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RAILWAY DECISIONS.

EMBRACING

ALL THE CASES FROM THE EARLIEST PERIOD OF RAILWAY LITIGATION TO THE PRESENT TIME

IN THE

UNITED STATES, ENGLAND AND CANADA.

BY

STEWART RAPALJE

AND

WILLIAM MACK.

VOLUME VIII.

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DIGEST

OF

RAILWAY DECISIONS.

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TRIAL.

Admissibility of testimony of witness in former, see DEATH BY WRONGFUL ACT, **251, 252**; EVIDENCE, **263.**

By jury in injunction suits, see ELEVATED RAILWAYS, **170-173.**

— — of assessment of land damages, see EMINENT DOMAIN, **516-642.**

— — to assess land damages, conduct of, see EMINENT DOMAIN, **546-594.**

Computing damages to time of, see ELEVATED RAILWAYS, **136.**

De novo in appellate court, see JUSTICE OF THE PEACE, **17.**

Errors on, when ground for new trial, see NEW TRIAL, **1-9.**

Estimating land damages from time of, see EMINENT DOMAIN, **461.**

Granting amendments at, see PLEADING, **157.**

Of issues in condemnation proceedings, see EMINENT DOMAIN, **360.**

— stock-killing cases, see ANIMALS, INJURIES TO, **524-578.**

Review of objections not made at, see ELEVATED RAILWAYS, **193.**

I. **MODE OF TRIAL: COURT OR JURY.** 1
II. **PLACE OF TRIAL**..... 3
1. *Proper County*..... 3
2. *Change of Venue*..... 6
III. **CONTINUANCE; POSTPONEMENT**.. 9
IV. **THE JURY, AND HOW EMPANELED.** 11
V. **CONDUCT OF THE TRIAL**..... 14
1. *In General*..... 14
2. *Reception of Evidence. View by Jury*..... 15
3. *Objections and Exceptions. Demurrer to Evidence*.. 19
4. *Nonsuit. Dismissal*..... 23
5. *Counsel's Address to the Jury*..... 37
VI. **INSTRUCTIONS TO THE JURY**..... 42
1. *Questions of Law and Fact.* 42
a. Questions of Law for the Court.... 42
b. Questions of Fact for the Jury..... 44
c. Mixed Questions of Law and Fact. 49
2. *What Instructions are Proper*..... 50
3. *What Instructions are Improper*..... 61
4. *Prayers for Instructions*.... 73
5. *Further Instructions*..... 84
6. *Directing Verdict*..... 85
VII. **VERDICT. FINDINGS**..... 89
1. *Generally*..... 89
2. *Special Verdicts*..... 95

I. MODE OF TRIAL: COURT OR JURY.

1. The right of trial by jury, generally.—Unpaid calls for railroad stock are not "instruments of writing ascertaining the plaintiff's demand," within the meaning of Ala. statute (Code, § 2366) authorizing the rendition of a final judgment by default without the intervention of a jury. *Connoly* v. *Alabama & T. R. R. Co.*, 29 *Ala.* 373.

The assessment of damages by a jury upon a default is a matter of practice and not of right; and where the proceeding is in a federal court the assessment should be made according to the uniform practice of the state courts. *Raymond* v. *Danbury & N. R. Co.*, 43 *Conn.* 596.

Mich. Const. art. 6, § 27, which provides that "the right of trial by jury shall remain," means that right as it existed at common law, namely, a trial by a jury of twelve good men and true, whose determination must be unanimous upon the rights of the parties. *McRae* v. *Grand Rapids, L. & D. R. Co.*, 93 *Mich.* 399, 53 *N. W. Rep.* 561.

A law was held unconstitutional because it deprived railroad companies of the right to a trial by jury in damage suits for cattle killed by them. *Graves* v. *Northern Pac. R. Co.*, 19 *Am. & Eng. R. Cas.* 436, 5 *Mont.* 556, 6 *Pac. Rep.* 16, 51 *Am. Rep.* 81.

Order made to send a case for trial by a jury under 36 Vict. c. 8, § 18, in an action against a company for negligence in killing horses by a train at a road crossing. *McGunnighal* v. *Grand Trunk R. Co.*, 6 *Ont. Pr.* 209.

2. —— in equity suits.—The trial by a court of equity, according to its own course and practice, of issues of fact growing out of the administration of railroad property in its possession, and operated by a receiver, does not impair the constitutional right of trial by jury. *Barton* v. *Barbour*, 4 *Am. & Eng. R. Cas.* 1, 104 *U. S.* 126.

The right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction; and the question of the liability of a receiver of an insolvent street railway properly belongs to the court appointing the receiver. *Pacific R. Co.* v. *Wade*, 50 *Am. & Eng. R. Cas.* 362, 91 *Cal.* 449, 27 *Pac. Rep.* 768.

In an equitable action by an abutting owner to restrain the improper use of a street, a trial by the court is proper. The court itself may properly hear the testimony, or may direct it to be taken by a referee, and reported to the court, or may order issues framed, or may take the opinion of a jury. *American P. M. Church* v. *Brooklyn El. R. Co.*, 12 *N. Y. S. R.* 500.

3. —— in suits for both legal and equitable relief.—Where a party elects to bring an action for both legal and equitable relief in respect to the same cause of action, the case is not one of right triable by jury; but by such election he submits to have the issues tried by the court, alone or with the aid of a jury, as the court in its discretion may determine, according to the practice in equity cases. *Cogswell* v. *New York, N. H. & H. R. Co.*, 105 *N. Y.* 319, 11 *N. E. Rep.* 518, 7 *N. Y. S. R.* 203, 12 *Civ. Pro.* 222; *reversing* 22 *J. & S.* 92.—REFERRING TO Davison *v.* Associates of Jersey Co., 71 N. Y. 333; New York & N. H. R. Co. *v.* Schuyler, 34 N. Y. 30; Baird *v.* Mayor, etc., of N. Y., 74 N. Y. 382.—APPLIED IN Lynch *v.* Metropolitan El. R. Co., 129 N. Y. 274.

Where a complaint in an action asks judgment for damages and for an abatement of an alleged nuisance, and also for an injunction restraining a continuance of the nuisance, plaintiff is not of right entitled to a jury trial. *Cogswell* v. *New York, N. H. & H. R. Co.*, 105 *N. Y.* 319, 11 *N. E. Rep.* 518, 7 *N. Y. S. R.* 203, 12 *Civ. Pro.* 222; *reversing* 22 *J. & S.* 92.—REVIEWED IN Johnston *v.* Manhattan R. Co., 41 N. Y. S. R. 682, 61 Hun 627, 16 N. Y. Supp. 434. —*Bergman* v. *Manhattan R. Co.*, 39 *N. Y. S. R.* 150, 27 *J. & S.* 566, *mem.*, 14 *N. Y. Supp.* 384; *affirmed in* 129 *N. Y.* 637, *mem.*, 41 *N. Y. S. R.* 947, *mem.*, 29 *N. E. Rep.* 1031, *mem.*—QUOTING Sears *v.* Metropolitan El. R. Co., 129 N. Y. 647.

4. Waiver of the right.—Where the petitioner, in a proceeding to condemn land for railroad purposes, makes no objection below to the action of the court in hearing evidence in reference to the title and rights of the defendant in the premises sought to be taken, and finding those rights without a jury, but participates in such hearing and offers evidence, it will be estopped from objecting in the supreme court that the preliminary facts were not found by a jury. In a civil case it is always competent for the parties to waive a jury and submit their case, or any part of it, to the court for decision. *Chicago, S. F. & C. R. Co.* v. *Ward*, 128 *Ill.* 349, 18 *N. E. Rep.* 828, 21 *N. E. Rep.* 562.

Plaintiffs' complaint set forth a cause of action in the nature of a *quo warranto* against two sets of claimants of the offices of directors of a company, with other causes of action of an equitable nature. Upon the trial, after reading the pleadings, plaintiffs rested. A portion of defendants who had, by their answer, admitted that they were acting as the officers whose titles were in dispute, thereupon requested a trial by jury, which was denied. *Held*, error; that the right to such trial was not waived by delay in making the application until plaintiffs rested; that, as it was not until then that said defendants had means of knowing that plaintiffs intended

to rely upon the legal claim, and as upon the issue made thereon plaintiffs had the right to require said defendants to prove their title and authority to act, it was then the proper time to raise the question and to object to a trial by the court. *People* v. *Albany & S. R. Co.*, 57 *N. Y.* 161, 6 *Am. Ry. Rep.* 73; *reversing* 55 *Barb.* 344, 2 *Lans.* 459, 7 *Abb. Pr. N. S.* 265, 5 *Lans.* 25, 1 *Lans.* 308, 38 *How. Pr.* 228, 57 *Barb.* 204, 8 *Abb. Pr. N. S.* 122, 39 *How. Pr.* 49.

Ohio Rev. St. § 5204, which provides that in an action arising upon contract trial by jury may be waived by the consent of the party appearing, when the opposite party fails to appear by himself or attorney, does not impair the right of trial by jury and is therefore valid. *Springfield, J. & P. R. Co.* v. *Western R. Constr. Co.*, 49 *Ohio St.* 681, 32 *N. E. Rep.* 961.

II. PLACE OF TRIAL.

1. *Proper County.*

5. In general.*—An action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant or either of several defendants resides, or in which the contract is made, or in which the carrier agrees to deliver the property. *Adams Exp. Co.* v. *Crenshaw*, 78 *Ky.* 136.

The venue in an action against a company can be laid only in some county wherein the track of its road, or some part thereof, is situated; actions brought otherwise are to be dismissed. *Graham* v. *Charlotte & S. C. R. Co.*, 64 *N. Car.* 631.—APPROVED IN Kingsbury *v.* Chatham R. Co., 66 N. Car. 284.

Tex. Act. of March 21, 1874, § 1, to fix the venue in certain cases, which authorizes suit against a railway company in any county where it has an agency, was not repealed by the first section of a subsequent act of the same legislature (Session Acts, p. 107). The first act was intended to extend the right to institute suits more particularly against railway companies in counties other than that of the domicil of the company, while the second act was designed to extend a like remedy to any association or joint-stock or insurance company. *Houston & T. C. R. Co.* v. *Ford*, 2 *Am. & Eng. R. Cas.* 514, 53 *Tex.* 364.—FOLLOWING Houston & T. C. R. Co. *v.* Willie, 53 Tex. 325.

The statute which determines the venue of suits against railway companies makes no distinction as to the character of actions as it does where a natural person is defendant, and a suit against a railway company for an injury by fire done to one's land and grass may be maintained not only in the county in which the cause of action arose, but in any county through or into which the company operates its road, or in which it has an agency, or in which its principal office is situated. *Galveston, H. & S. A. R. Co.* v. *Horne*, 35 *Am. & Eng. R. Cas.* 238, 69 *Tex.* 643, 9 *S. W. Rep.* 440.

Tex. Rev. St. art. 1198, subd. 21, providing that suits against any private corporation may be commenced in any county where the cause of action arose, or in which such corporation or company has an agency or representative, applies to suits against railway companies. *St. Louis & S. F. R. Co.* v. *Traweek*, 84 *Tex.* 65, 19 *S. W. Rep.* 370.—REVIEWING Houston & T. C. R. Co. *v.* Hill, 63 Tex. 383.

6. Where cause of action arose.—A company may be sued for a breach of duty either where the breach occurs, or in the county where the company has its principal place of business; and where the action is for a failure to carry lumber, and there is nothing in the complaint to show where the breach occurred, the presumption is that the action was brought in the proper county, and it rests upon the company to show otherwise in order to entitle it to a change of venue. *Chase* v. *South Pac. Coast R. Co.*, 42 *Am. & Eng. R. Cas.* 424, 83 *Cal.* 468, 23 *Pac. Rep.* 532.

Under Ga. Code, § 3320, railroad companies are liable to be sued for injuries to persons or property in the county where such cause of action originated. *Thomas* v. *Georgia R. & B. Co.*, 38 *Ga.* 222. *Georgia R. & B. Co.* v. *Monroe*, 49 *Ga.* 373.

When goods which have been transported by railroad are destroyed by fire in the depot at the place of destination, suit may be brought in the county where such cause of action arose. *Central R. & B. Co.* v. *Smith*, 54 *Ga.* 499.

Under the Massachusetts statutes a local action, as an action by a company for injuring its culvert and track by water from a reservoir, must be brought in the county

* Where venue may be laid in suits against corporations in state courts, see note, 57 AM. & ENG. R. CAS. 96

where the injury occurs. *Vermont & M. R. Co.* v. *Orcutt*, 16 *Gray* (*Mass.*) 116.

Tex. Act of March 21, 1874, ch. 31, prescribes the rule as to venue that "hereafter any public or private corporation, including railroad companies, * * * may be sued in any court in this state having jurisdiction of the subject-matter, and in any county where the cause of action, or any part thereof, accrued," and is the law. *Houston & T. C. R. Co.* v. *Graves*, 50 *Tex.* 181.

The above act applies to an action pending when it was enacted, plaintiff, by amendment subsequent to its enactment, having set up facts coming within its provisions. *Houston & T. C. R. Co.* v. *Graves*, 50 *Tex.* 181.

7. County where contract sued on was made.—An action against a company to recover the excess of a payment for freight beyond what is allowed to be charged by the charter of the company may be brought, under Ga. Act of March 4, 1869, in the county from which the articles were shipped, that being the place where the contract for shipment was made, although the payment was made in another county. *Arnold* v. *Georgia R. & B. Co.*, 50 *Ga.* 304.

Since a cause of action consists as well of the right of plaintiff as of the injury to that right, where plaintiff's right accrued by reason of a contract made with defendant in a certain county, and injury arose from a breach of that contract, which contract was to be partly performed in said county, and was wholly broken, a cause of action arose there, and the suit was properly instituted in said county. *Houston & T. C. R. Co.* v. *Hill*, 21 *Am. & Eng. R. Cas.* 263, 63 *Tex.* 381.—REVIEWED IN St. Louis & S. F. R. Co. *v.* Traweek, 84 Tex. 65.

8. County where subject of action is situated.—The principal place of business of a corporation is not necessarily its residence, within the meaning of Cal. Code Civ. Pro. § 395, relating to the place of trial; and in the absence of a statute defining such residence, a local action, such as one to condemn lands, is properly triable in the county where the lands are situated. *California Southern R. Co.* v. *Southern Pac. R. Co.*, 17 *Am. & Eng. R. Cas.* 172, 65 *Cal.* 394, 409, 4 *Pac. Rep.* 344.

An action against a company to recover for an injury to fences and growing pasture, caused by fire from a locomotive, is an action for an injury to real estate within Ind. Rev. St. 1881, § 307, and is properly brought in the county where the real estate is situate, notwithstanding defendant has no agent or office for the transaction of business in such county, and the joining of a claim for damage to personal property will not oust the jurisdiction. *Indiana, B. & W. R. Co.* v. *Foster*, 107 *Ind.* 430, 8 *N. E. Rep.* 264.

The venue in an action for damages occasioned by negligence to property, both real and personal, was erroneously laid in a different county from that in which the real property was situate. No steps were taken to compel correction of the error, and the cause was carried down for trial to the county in which the venue was laid. No motion was made to nonsuit because of the erroneous venue. *Held*, that the trial judge was right in refusing to direct a verdict for defendant or to withdraw from the jury the damages to the real estate, and in submitting to the jury the whole matter covered by the issue. *Blackford* v. *Lehigh Valley R. Co.*, 53 *N. J. L.* 56, 20 *Atl. Rep.* 735.

An action on town bonds issued in aid of a railway is not within N. Y. Code, § 982, requiring certain actions to be brought in the county in which the subject of the action is situated; the subject of such action is not the establishment of a lien upon real property, as this was effectuated when the bonds were issued pursuant to the adjudication; but the bonds themselves are the subject of the action. *Becker* v. *Cherry Creek*, 53 *N. Y. S. R.* 555, 24 *N. Y. Supp.* 19, 70 *Hun* 6; *affirmed in* 139 *N. Y.* 658, *mem.*, 54 *N. Y. S. R.* 935, *mem.*

9. Place of defendant's residence or domicil.—Where an alien desires to institute suit against a railway corporation he must resort to the domicil of the company. *Galveston, H. & S. A. R. Co.* v. *Gonzales*, 151 *U. S.* 496, 14 *Sup. Ct. Rep.* 401.

Under Ga. Code, §§ 3313, 3317, an action against a railroad for trespass upon land must be brought in the county where the defendant resides. *Georgia R. & B. Co.* v. *Kirkpatrick*, 35 *Ga.* 144.

Ga. Act of Feb. 23, 1866, providing for service of process upon the president of an express company, does not render it necessary that suit shall be brought in the county in which his residence is. *Conner* v. *Southern Exp. Co.*, 37 *Ga.* 397.

Where a company is sued for refusing to issue a through bill of lading, the action

should be brought either in the county where the refusal occurred, or in the county where the company has its residence. *Coles* v. *Central R. & B. Co.*, 82 *Ga.* 149, 9 *S. E. Rep.* 127.

The legislature, in granting to defendant company immunity from suit elsewhere than at its domicil, for causes of action other than trespass, designed to restrict the character of suits, not brought at the place of domicil, to actions of tort for wrongs committed, and its unlawful entry upon the lands of citizens *vi et armis*. *St. Julien* v. *Morgan's L. & T. R. & S. Co.*, 33 *Am. & Eng. R. Cas.* 92, 39 *La. Ann.* 1063, 3 *So. Rep.* 280.—QUOTING Gossin *v.* Williams, 36 La. Ann. 187; Montgomery *v.* Louisiana Levee Co., 30 La. Ann. 609. REVIEWING State ex rel. *v.* District Court Judge, 33 La. Ann. 955.—APPROVED IN Caldwell *v.* Vicksburg, S. & P. R. Co., 39 Am. & Eng. R. Cas. 239, 40 La. Ann. 753.

Corporations must be sued at their domicil for damages arising from the passive breach of their obligations, such as negligence and nonfeasance. *Caldwell* v. *Vicksburg, S. & P. R. Co.*, 39 *Am. & Eng. R. Cas.* 239, 40 *La. Ann.* 753, 5 *So. Rep.* 17.—APPROVING Montgomery *v.* Louisiana Levee Co., 30 La. Ann. 607; St. Julien *v.* Morgan's L. & T. R. & S. Co., 39 La. Ann. 1063. QUOTING State ex rel. *v.* District Court Judge, 33 La. Ann. 954; Gossin *v.* Williams, 36 La. Ann. 186.

Where a corporation has its principal business in one city and yet has a place of business in another city, this fact constitutes it, for the purposes of venue, a resident of the latter place. *Pond* v. *Hudson River R. Co.*, 17 *How. Pr.* (*N. Y.*) 543.

N. Y. Code Civ. Pro. § 984, making the residence of the parties the controlling fact in fixing the place of trial, means actual residence, and not necessarily the domicil of one of the parties. *Cincinnati, H. & D. R. Co.* v. *Ives*, 21 *N. Y. S. R.* 67, 3 *N. Y. Supp.* 895.

Texas Rev. St. art. 1198, subd. 4, providing that "when there are two or more defendants residing in different counties, suit may be brought in any county where one of the defendants resides," means, simply, that if one who is a proper or necessary party defendant resides in the county in which suit is brought, then other defendants who reside in other counties may be joined with him. Under this provision, a defendant residing in another county is entitled, under plea in abatement, to an instruction presenting the question of the liability of defendant residing in the county where action is brought. *Texas & P. R. Co.* v. *Mangum*, 30 *Am. & Eng. R. Cas.* 181, 68 *Tex.* 342, 4 *S. W. Rep.* 617.

10. Place where principal business office is located.—The principal place of business of a corporation is its residence, within the meaning of Cal. Code Civ. Pro. § 395, fixing the place of trial of actions. *Cohn* v. *Central Pac. R. Co.*, 71 *Cal.* 488, 12 *Pac. Rep.* 498.—DISTINGUISHING California Southern R. Co. *v.* Southern Pac. R. Co., 65 Cal. 394. FOLLOWING Jenkins *v.* California Stage Co., 22 Cal. 538.

A corporation is included in Florida act, § 10, "regulating judicial proceedings," and must be sued in the county in which the office of such corporation is kept. *Edwards* v. *Union Bank*, 1 *Fla.* 158.

A suit against a railroad for breach of contract, under Ga. Act of 1856, must be brought in the county where the principal business office of the road is situated. *Speer* v. *Atlanta & W. P. R. Co.*, 30 *Ga.* 135.

Under Ga. Act of April 18, 1863, a suit against the Western and Atlantic railroad for loss of goods in carriage must be brought in the county where the principal business office of the road is situated. *Wallace* v. *Thomas*, 34 *Ga.* 543.

The legislature chartered a company and provided that its principal offices should be in the city of Atlanta, but a foreign company obtained possession and control of the railroad and was exercising the franchises granted in the charter, and had an office in the city of Atlanta. *Held*, that an action for personal injuries may be instituted against it in the city court of Atlanta, though the injury was done in another county of the state through which the road runs. *Williams* v. *East Tenn., V. & G. R. Co.*, 90 *Ga.* 519, 16 *S. E. Rep.* 303.—QUOTING United States *v.* Southern Pac. R. Co., 49 Fed. Rep. 302; Baltimore & O. R. Co. *v.* Koontz, 104 U. S. 10. REVIEWING Angier *v.* East Tenn., V. & G. R. Co., 74 Ga. 634; Alabama G. S. R. Co. *v.* Fulghum, 87 Ga. 263; Baltimore & O. R. Co. *v.* Wightman, 29 Gratt. (Va.) 431, 26 Am. Rep. 384; Baltimore & O. R. Co. *v.* Noell, 32 Gratt. 394.

Under the statute providing that a defendant may be sued in the county where he "resides or may be found," a railroad

company may be sued in the county where it has its principal business office, although no part of its road is in the county. The residence of a corporation is where it exercises its corporate functions. *Bristol* v. *Chicago & A. R. Co.*, 15 *Ill.* 436.—FOLLOWED IN Baldwin *v.* Mississippi & M. R. Co., 5 Iowa 518. QUOTED IN McCabe *v.* Illinois C. R. Co., 4 McCrary (U. S.) 492, 13 Fed. Rep. 827; Chicago, D. & V. R. Co. *v.* Bank of North America, 82 Ill. 493.

Under the statute (1 Wagn. Mo. St. § 28, p. 294) suits may be brought against railroad companies in any county where they have or usually keep an office or agent for the transaction of their usual or customary business. *Hicks* v. *Hannibal & St. J. R. Co.*, 68 *Mo.* 329.

In a suit against a corporation, the venue should be laid in the county where its principal office is located, that being considered its place of residence, and the rule applies to a railroad company where its road runs through, and its franchises are exercised in different counties. *Thorn* v. *Central R. Co.*, 26 *N. J. L.* 121.—QUOTED IN State ex rel. *v.* Milwaukee, L. S. & W. R. Co., 45 Wis. 579.

A corporation organized under the laws of the state must be sued in the county where the cause of action arose, or where it has its principal office or place of business. *Holgate* v. *Oregon Pac. R. Co.*, 16 *Oreg.* 123, 17 *Pac. Rep.* 859.

A railway which has a located line in the county, but no general office, but whose treasurer has his office in the county where suit is brought, may be sued in such county. *Red River, S. & W. R. Co.* v. *Blount*, 3 *Tex. Civ. App.* 282, 22 *S. W. Rep.* 930.

11. Proper venue in actions for personal injuries.*—Cal. Const. art. 12, § 16, provides that a corporation may be sued in the county where the contract is made, or is to be performed, or where the liability arises, or the breach occurs, or in the county where its principal place of business is. *Held*, that one who has sustained an injury may sue in the county where the injury occurred. *Lewis* v. *South Pac. Coast R. Co.*, 66 *Cal.* 209, 5 *Pac. Rep.* 79.

Ga. Code, § 3406, which provides that a railroad company may be sued in any county where the injury occurred, is permissive and cumulative, and not exclusive. *Williams* v. *East Tenn., V. & G. R. Co.*, 90 *Ga.* 519, 16 *S. E. Rep.* 303.

Where a foreign company regularly runs its trains into a county of Kansas, under an arrangement to run its cars over the track of another company, it may be sued in such county for an injury to a passenger. (Kan. Code, §§ 50, 68*a*.) *Hannibal & St. J. R. Co.* v. *Kanaley*, 39 *Kan.* 1, 17 *Pac. Rep.* 324.

An action to recover for a personal injury must be brought in the county in which defendant resides, or in the county in which plaintiff was injured, or in which he resides, if he resides in a county into which the carrier passes. And in case of a railroad corporation the residence of its president, if there be one in the state, or if not, its vice-president, if there be one in the state, must be treated as the residence of the corporation, in determining the jurisdiction. *Harper* v. *Newport News & M. V. Co.*, 90 *Ky.* 359, 14 *S. W. Rep.* 346.—DISTINGUISHING Chesapeake *v.* Heath, 87 Ky. 651.

An action against a common carrier for a personal injury cannot be brought in a county which is neither the residence of any of the parties nor the place where the injury was done. *Sherrill* v. *Chesapeake, O. & S. W. R. Co.*, 89 *Ky.* 302, 12 *S. W. Rep.* 465.

An action against a corporation for personal injuries may be brought in any county where the corporation has an office or agency. *Toppins* v. *East Tenn., V. & G. R. Co.*, 5 *Lea* (*Tenn.*) 600.

When an action is transitory and is based on personal injuries, recognized as such by universal law, the suit may be brought where the aggressor is found, irrespective of the provisions of the local law or whether there will be any law at all in force at the place where the wrong was inflicted. *Willis* v. *Missouri Pac. R. Co.*, 23 *Am. & Eng. R. Cas.* 379, 61 *Tex.* 432.

2. *Change of Venue.*

12. Grounds, generally.—Under Cal. Const. art. 12, § 16, a corporation sued for damages for a breach of contract is entitled to have the place of trial changed to the county in which its principal place of business is, where the action is not brought in the county where the contract was made and was to be performed, or in which the breach occurred. *Cohn* v. *Central Pac. R. Co.*, 71 *Cal.* 488, 12 *Pac. Rep.* 498.

* Venue of action for personal injuries. County where company has its principal office or where injury occurred, see 57 AM. & ENG. R. CAS. 97, *abstr.*

Where a company is sued for a breach of contract for refusing to receive wood according to contract, in a county where it operates its road, it is not entitled to have the trial changed to the county where it has its principal offices and place of business, where legal notice has been served upon the company in the latter county. *Richardson* v. *Burlington & M. R. Co.*, 8 *Iowa* 260. *Baldwin* v. *Mississippi & M. R. Co.*, 5 *Iowa* 518.

In an action for injuries to a railroad employé, a change of venue will not be granted to the county of defendant's residence, where the complaint avers that the railroad upon which plaintiff was employed was lying within a particular county, and at the time of the injury plaintiff was in the service of defendant upon said railroad, as such averments sufficiently state the county in which the contract of employment was to be performed under Mont. Code Civ. Pro. § 59, providing that "actions upon contracts may be tried in the county in which the contract was to be performed, and actions for torts in the county where the tort was committed, subject, however, to the power of the court to change the place of trial as provided in this act." *Oels* v. *Helena & L. S. & R. Co.*, 10 *Mont.* 524, 26 *Pac. Rep.* 1000.

13. Convenience of witnesses.—In an action against a company for personal injuries, it is proper to refuse a change of venue from the county where plaintiff resides to a large city where the accident occurred, where it appears that the number of witnesses on each side are about equal, but that plaintiff is financially unable to transport his witnesses and unable physically to bear the fatigue of the travel, and his physicians and witnesses, who know of his condition, all reside where the suit is brought. *Tuthill* v. *Long Island R. Co.*, 75 *Hun* 556, 26 *N. Y. Supp.* 1029.

In a bill relating to property in Toronto, there not being sufficient time to get the cause down for hearing at the next ensuing Toronto sitting the venue was laid at Whitby with a view to bring the case to a hearing at the ensuing sittings there. After answers defendant moved to change the venue to Toronto, and filed affidavits stating that some of its witnesses were out of the jurisdiction, and the evidence of such witnesses could not be procured in time; that others were residents in Toronto engaged on defendant's railway there, and their attendance at Whitby would interfere with the working of the railway at Toronto. The court granted the motion on defendant undertaking to abide by such order as the court might make as to any damages which the delay caused by change of venue would occasion. *McMurray* v. *Grand Trunk R. Co.*, 3 *Chan. Chamb.* (*U. C.*) 133.

14. Disqualification of trial judge.—How. Mich. St. § 6495 *et seq.* does not require that the application for the transfer of a suit on account of the disqualification of the circuit judge shall be verified, nor that it shall set forth that the judge of the circuit to which the suit is to be transferred is qualified to sit. *Grostick* v. *Detroit, L. & N. R. Co.*, 96 *Mich.* 495, 56 *N. W. Rep.* 24.

That "the presiding judge had heretofore, as counsel, given an opinion in regard to the validity of the title to the land in controversy" is not equivalent to "where he shall have been of counsel in the case," and is not a ground of disqualification, and an order for change of venue for such reason is not legal, and when objected to is a cause of reversal. *Houston & T. C. R. Co.* v. *Ryan*, 44 *Tex.* 426.

15. Hostility and prejudice—Public excitement.—An application for a change of venue in a civil action should be denied unless it is made to appear that a fair and impartial trial cannot be had in the county where the action is pending. The fact that there are numerous persons in the county that are biased and prejudiced against a party to a suit will not justify a court in granting a change of venue on the application of such party if it appears that a fair and impartial jury and a fair trial can be had therein. *Northeastern Neb. R. Co.* v. *Frazier*, 36 *Am. & Eng. R. Cas.* 606, 25 *Neb.* 42, 40 *N. W. Rep.* 604.

A subscriber sued for assessments upon shares of stock moved for a change of venue on the ground that a fair and impartial trial could not be had, and in support of his motion produced evidence showing that the road of plaintiff passed through four of the thirteen towns in the county; that in those four towns the subject-matter of the suit and of his liability had been very generally discussed and opinions expressed in regard to it; and that of the 548 stockholders residing in the county, all but 23 were residents of the four towns. But it did not appear that the subject-matter of

the suit had been generally discussed in the other nine towns, or that opinions had been formed or expressed in those towns. *Held*, that the motion should be denied. *Cochecho R. Co.* v. *Farrington*, 26 *N. H.* 428.

Where a company is sued for damages to land by fire, and it is made to appear that the fire has been quite extensive, and that the persons who have commenced suit are extensively known and have much influence in the county, and that a subscription has been circulated to raise money to pay the expenses of one or more suits, and that the opinion prevails generally that the company is liable to all who have been injured, and that a strong prejudice exists, the venue should be changed to another county. *Udall* v. *Long Island R. Co.*, 2 *How. Pr.* (*N. Y.*) 138.

But where it appears that such fires have existed somewhat in two counties and that the same feeling and interest exists in both, the venue will not be changed from one county to the other. *Udall* v. *Long Island R. Co.*, 2 *How. Pr.* (*N. Y.*) 138.

A company's affidavit for a change of venue showed that a passenger train rolled down an embankment near the court house and killed or injured twenty-seven passengers, many of them prominent citizens of the county. Intense excitement prevailed and the company was loudly condemned. *Held*, sufficient to show that it would probably be difficult, if not impossible, to get a fair trial in the county; and such facts are not overcome by the opinions of plaintiff's witnesses that there was no prejudice and that an impartial trial could be had. *Stoddard* v. *Delaware & H. Canal Co.*, 42 *N. Y. S. R.* 73, 62 *Hun* 619, *mem.*, 16 *N. Y. Supp.* 621.

In an action against a company to recover for injuries by fire, it appeared that the fire extended over a considerable area, and that two similar suits had already been tried and fourteen others were pending, and facts were stated in numerous affidavits showing that there was among the people of the county much hostility and general prejudice against the company, and one affidavit alleged a combination and conspiracy among the claimants and others wrongfully to charge the origin of the fire to the negligence of the company, and compel it to pay damages, irrespective of justice. *Held*, that, under Wis. Rev. St. § 2622, subd. 2, a change of venue ought to have been granted. *Cyra* v. *Stewart*, 79 *Wis.* 72, 48 *N. W. Rep.* 50.

16. Motion papers, generally.—Where an application for change of venue on the ground of local prejudice is made by a corporation, the affidavit in support of it may be made by its secretary. *St. Louis, O. H. & C. R. Co.* v. *Fowler*, 113 *Mo.* 458, 20 *S. W. Rep.* 1069.

Under Pa. Act for the removal of causes to another county, providing that the affidavit must be made by "the party," in case of corporations the affidavit may be by an agent. *Vankirk* v. *Pennsylvania R. Co.*, 76 *Pa. St.* 66.

A director of a company filed a petition stating that he believed that the company could not receive a fair and impartial trial in the county, "for the reason that the inhabitants are prejudiced in this case against the defendant," and that several other actions of a like character were pending, and that there was much talk and ill feeling among the people. The affidavits of two other persons were also filed, which stated that the prejudice existed to "their own knowledge." *Held*, that the affidavits were not sufficient, because not in terms or in substance expressing the opinion that a fair trial cannot be had in the county, or that an impartial jury could not be obtained. *Parks* v. *Wisconsin C. R. Co.*, 33 *Wis.* 413.

17. Counter-affidavits.—The discretion confided to a court in motions for a change of venue in criminal cases does not apply in civil cases; and when an applicant has brought himself within the terms of the statute, as a rule, it is error to refuse the change. An application by a company for a change of venue based on the affidavit of an agent who was charged with investigating the facts, and who is familiar therewith, is sufficient. *Jones* v. *Chicago & N. W. R. Co.*, 36 *Iowa* 68.—DISTINGUISHED IN Hedge *v.* Gibson, 7 Am. & Eng. R. Cas. 69, 58 Iowa 656.

An application for a change of venue in a civil case cannot be met by contrary affidavits. *Jones* v. *Chicago & N. W. R. Co.*, 36 *Iowa* 68.

An affidavit of the supporting witnesses required by the statute to the effect that they "verily believe" that the grounds stated exist, is equivalent to a positive assurance, and sufficient. *Jones* v. *Chicago & N. W. R. Co.*, 36 *Iowa* 68.

Upon a motion for a change of venue counter-affidavits may be read; and if the court is satisfied from all the affidavits or other evidence for and against the motion that the venue ought to be changed, it will in the exercise of its discretion remove the case, otherwise it will not. The exercise of this discretion is of course reviewable by the appellate court. *Pittsburgh, W. & K. R. Co.* v. *Applegate*, 16 *Am. & Eng. R. Cas.* 440, 21 *W. Va.* 172.

18. What will effect the change.—By Pa. Act of April 14, 1834, a company may remove an action pending against it, to another county, at any time before the jury is sworn. And upon the affidavit required by the act having been made by the president of the company, it is error in the court to proceed further. *Williamsport & E. R. Co.* v. *Cummins*, 8 *Watts (Pa.)* 450.

The filing of the affidavit prescribed by the above act, by a company, for the removal of a cause into the court of an adjacent county, operates as a *supersedeas;* and any further proceedings in the court in which the suit was originally brought are void. *Hughes* v. *Mine Hill & S. H. R. Co.*, 30 *Pa. St.* 517.

19. Granting change on payment of costs.—Making a change of venue conditional upon the payment of all costs accrued up to the time the order is made, including the costs accrued at a former term, and refusing to grant the change without the payment of costs, is error for which judgment must be reversed. A party is entitled to a change of venue as a legal right on the ground of prejudice of the inhabitants of the county. *Bannigan* v. *Central Iowa R. Co.*, 7 *Am. & Eng. R. Cas.* 491, 58 *Iowa* 671, 12 *N. W. Rep.* 716.

III. CONTINUANCE; POSTPONEMENT.

20. Grounds, generally. — There is no error in refusing a continuance to a company on the ground of the providential absence of its "law-agent," whose duties are to get up evidence in all cases in the court wherein the continuance is asked, to secure the attendance of witnesses, assist counsel in the trial of cases, prepare cases for trial so far as the evidence is concerned, and who also has charge of all papers and documentary evidence connected with the litigation, it not appearing how or why defendant's counsel could not safely go to trial in the absence of such "agent." *East Tenn., V. & G. R. Co.* v. *Fleetwood*, 90 *Ga.* 23, 15 *S. E. Rep.* 778.

The inability properly to calculate the damages to plaintiff from a personal injury, owing to a sufficient time not having elapsed from the receipt of the injury, is a sufficient ground for postponing the trial. *Speers* v. *Great Western R. Co.*, 6 *Ont. Pr.* 170.

21. Absence of witnesses.—The absence of a witness is no cause for continuance when no proper diligence has been used to procure his evidence by deposition. *Southern C. P. & M. Co.* v. *Bradley*, 52 *Tex.* 587.

A second continuance is properly refused to defendant company, upon its application, on account of the absence of an employé residing in another county, no effort having been made to take his deposition, his personal attendance being expected, but not secured on account of a leave of absence having been granted to him by one of the officers of defendant. *East Line & R. R. R. Co.* v. *Scott*, 71 *Tex.* 703, 10 *S. W. Rep.* 99, 298.

Due diligence to obtain the attendance of a witness residing in the county is not shown unless a tender of witness fees be shown upon service of a subpœna. The witness should be in contempt upon non-attendance, and a state of facts authorizing the issuance of an attachment should appear. *Texas & P. R. Co. v. Hall*, 83 *Tex.* 675, 19 *S. W. Rep.* 121.

An affidavit showed statutory diligence in having three witnesses, residents of the county seat, duly subpœnaed. Their testimony was alleged to be material, and they were absent. It appeared that all three resided but a short distance from the court house, and two were in the employ and under control of the applicant, a railway company. The one not in its employ appeared and testified. Plaintiff produced one of the others, but defendant declined to examine him. *Held*, that there was no error in refusing a continuance. *St. Louis & S. F. R. Co.* v. *Woolum*, 84 *Tex.* 570, 19 *S. W. Rep.* 782.

Suit was brought against a company to recover the statutory penalty of $500 for an overcharge on freight. At the trial plaintiff offered to prove by parol the contents of a notice of the overcharge and an indorsement made thereon by the company's agent when he returned the same to plaintiff, first

proving that the notice was lost. *Held*, that the company had no right to a continuance on account of the absence of such agent, where it did not appear that it had exercised any diligence to have him present, and where there was nothing to show what it expected to prove by the agent. *Missouri Pac. R. Co.* v. *Kuthman*, 2 *Tex. App.* (*Civ. Cas.*) 406.

Where a company is sued for damages to a farm, caused by the construction of its road, the company is entitled to a second continuance where the application shows that it is on account of an absent witness who had been duly served and promised to be present, and it appears that the company expects to prove by the absent witness, *inter alia*, that he is thoroughly acquainted with plaintiff's farm, and the construction of the road across the same, and that the only fence torn down by the construction was at the points of entrance and exit of the track, that as soon as the fence was removed cattle-guards were placed at the points, and that no cattle trespassed upon plaintiff's land and crops sufficiently materially to damage the same. *Gulf, C. & S. F. R. Co.* v. *Sebastian*, 3 *Tex. App.* (*Civ. Cas.*) 464.

22. Non-compliance with subpœna duces tecum.—A person, having sued a company for the loss of a diamond earring from a trunk committed to its care, was served with a *subpœna duces tecum*, one day only before the trial, commanding her to produce on the trial a diamond earring in her possession, being the match for the one alleged to be lost. She appeared as a witness in the case, and while on the stand was asked if she had brought the earring, and stated she had not, because it had been sent out of the county before the subpœna was served upon her, and thereupon defendant moved to continue the case to give time to get the ring. *Held*, that the motion was properly overruled, the diligence used to obtain the testimony being insufficient. *Texas Exp. Co.* v. *Scott*, 16 *Am. & Eng. R. Cas.* 111, 2 *Tex. App.* (*Civ. Cas.*) 59.

23. Amendment of pleadings—Surprise. — Where, on trial, plaintiff amends his declaration in matter of substance, to which defendant, alleging surprise, refuses to plead or demur, but moves for a continuance, it is the duty of the court to grant the motion. *Pittsburgh & S. R. Co.* v. *Clarke*, 2 *Pittsb.* (*Pa.*) 48.

A plaintiff was examined as a witness and testified to the death of ten horses within two weeks of the delivery of the stock to him by the carrier, and thereupon moved the court for leave to amend his declaration to make it conform to his evidence, which leave was given. *Held*, that it was error for the court to refuse to grant a continuance to defendant on the ground of surprise. *Vicksburg, S. & P. R. Co.* v. *Stocking*, (*Miss.*) 10 *So. Rep.* 480.

24. Recent change of counsel.—A carrier was sued for failing to carry goods safely, and when the case was called for trial the company moved for a continuance on the ground that its chief counsel had been furnished with certain papers, called "tracers," in his lifetime, but had departed this life some two months before, and that these papers could not be obtained by the present counsel. It was admitted that these papers if present could not be used as evidence, but only to guide the counsel. *Held*, that it was not error to refuse a continuance. *Williams* v. *Baltimore & O. R. Co.*, 9 *W. Va.* 33.

25. The moving papers—Diligence.—In an action against a company for building its road over a lot, where an affidavit is filed for a continuance, showing that the evidence of an absent witness is material under the issues, and that such witness is in the army, and has been moving from place to place in the discharge of his military duties so that there is no assurance that he will remain in one place long enough to have his deposition taken, a continuance should be granted. *Terre Haute, A. & St. L. R. Co.* v. *Norman*, 22 *Ind.* 63.

A statement that a party has made an effort to get the depositions of certain witnesses, by making out interrogatories, having them crossed by opposing counsel, who have agreed to waive commissions and consented that the depositions might be taken before any officer legally qualified, is not stating that due diligence contemplated by the law. *Texas & P. R. Co.* v. *Hardin*, 21 *Am. & Eng. R. Cas.* 460, 62 *Tex.* 367.

Such application should clearly and fully set out the grounds for a continuance, as to whom the interrogatories were sent, the substance of the material testimony not obtainable then, the efforts to ascertain the whereabouts of witnesses, that their evidence will be at hand at the next term of

the court, and other like facts explaining fully the various things done constituting diligence. *Texas & P. R. Co.* v. *Hardin*, 21 *Am. & Eng. R. Cas.* 460, 62 *Tex.* 367.

An affidavit, in an action to recover damages for the destruction of property by a railroad fire, setting forth that absent witnesses would prove the value of the property destroyed to have been much less than the plaintiff claimed is not sufficient to warrant the granting of a continuance if it does not specify how much less such witnesses would state the value of the property to have been. *Galveston, H. & S. A. R. Co.* v. *Horne*, 35 *Am. & Eng. R. Cas.* 238, 69 *Tex.* 643, 9 *S. W. Rep.* 440.

26. Review of motions for continuance.—When a second application for a continuance has been overruled, and the record shows that before defendant closed his testimony the witness for whose testimony the continuance was made appeared in court and was not examined, it will be presumed that the testimony was not material, and the action of the court on such application will not be revised. *Keyes* v. *Houston & G. N. R. Co.*, 50 *Tex.* 169.

An application for continuance, showing that the means given by law to procure testimony have not been used, is addressed to the discretion of the trial judge, and in the absence of any abuse of that discretion this court will not reverse a judgment because of a failure of the lower court to grant a continuance. *Texas & P. R. Co.* v. *Hardin*, 21 *Am. & Eng. R. Cas.* 460, 62 *Tex.* 367.

IV THE JURY, AND HOW EMPANELED.

27. Summoning jurors.—Tenn. Code, § 4029, providing that "on motion of either party in any civil action, a special jury may be ordered and summoned if, in the opinion of the court, it is proper," is not confined to a special jury in extraordinary cases where questions of skill, experience, or knowledge of some particular act or business are involved, but applies to an ordinary civil action against a company for killing stock; and the court may order such jury though no special reasons be shown for its action. As the statute lays down no rule by which the discretion of the court is to be governed, that discretion cannot be reviewed on appeal. *Clingan* v. *East Tenn., V. & G. R. Co.*, 2 *Lea* (*Tenn.*) 726.

And the above code, § 3993, providing that "if the county court fail to nominate, or the persons nominated fail to attend, the court shall designate other good and lawful men, and direct the sheriff to summons them as jurors," clearly gives to the circuit judge the power to designate the jurors. *Clingan* v. *East Tenn., V. & G. R. Co.*, 2 *Lea* (*Tenn.*) 726.

But a circuit court has not the power to order, arbitrarily and upon its own motion, the summoning of a special jury or panel to try a particular case, and compel the selection of a trial jury from that panel over the objection of a party, and while the entire regular panel are in attendance and free from duty and exception. *McDaniel* v. *Nashville & C. R. Co.*, 88 *Tenn.* 542, 13 *S. W. Rep.* 76.

In an action for calls on stock, the coroner who summoned in the jury was a stockholder, but before receiving the *venire* transferred his stock, which was not all paid up, to the president of the company. The act of incorporation declared that no shareholder should be entitled to transfer his stock unless all calls were paid. In summoning the jury, the coroner questioned them as to their views in regard to railways, and was guided in his selection by their answers. *Held*, that he had not divested himself of his interest, and was not an impartial officer, and there must be a *venire de novo*. *Woodstock R. Co.* v. *Tupper*, 12 *New Brun.* 457.

28. Trial by less than twelve jurors.—The power vested in the legislature by Mich. Const. art. 6, § 46, to "authorize a trial by a jury of a less number than twelve men" cannot be delegated to any court or other tribunal. *McRae* v. *Grand Rapids, L. & D. R. Co.*, 93 *Mich.* 399, 53 *N. W. Rep.* 561.

Mich. Act No. 142 of 1861 (How. St. § 7622), which authorizes the court to proceed with the trial of a case before a less number of jurors than were originally empaneled to try the same, when by reason of death, sickness, or other cause any of the jurors are unable to attend, is unconstitutional. *McRae* v. *Grand Rapids, L. & D. R. Co.*, 93 *Mich.* 399, 53 *N. W. Rep.* 561.

By mental distress of a juror, occasioned by sickness in his family or of others demanding his presence at home or elsewhere, he is not "disabled from sitting," within the meaning of the phrase as used in Tex.

Const. art 5, § 13, so as to empower the remainder of the jury to render the verdict over the objections of either party. *Houston & T. C. R. Co.* v. *Waller*, 8 *Am. & Eng. R. Cas.* 431, 56 *Tex.* 331.

29. Qualifications of jurors.*—The son of a stockholder is incompetent as a juror in a case to which the corporation is a party. The ground of his disqualification is near relationship to a person having an interest in the suit. The disqualification being unknown to the adverse party and his counsel until after the trial is cause for granting a new trial. *Georgia R. Co.* v. *Hart*, 60 *Ga.* 550.—FOLLOWED IN Georgia R. Co. *v.* Cole, 73 Ga. 713.

An employé of a company is not a competent juror to try a case to which the company is a party. *Central R. Co.* v. *Mitchell*, 1 *Am. & Eng. R. Cas.* 145, 63 *Ga.* 173.

On the trial of a suit against a company, a brother of one stockholder and a son-in-law of another are incompetent jurors, and a verdict rendered by a jury on which they sat is illegal, unless their incompetency was waived. Nor are the jurors rendered competent by the fact that defendant had entered into a contract by which it leased its road and other property, and that the lessee had made a deposit of bonds as security for the performance of his contract, and had agreed, as a part thereof, to pay all damages incurred in the operation of the road. *Georgia R. Co.* v. *Cole*, 73 *Ga.* 713.—DISTINGUISHING Johnson *v.* Mayor, etc., of Americus, 46 Ga. 80. FOLLOWING Georgia R. Co. *v.* Hart, 60 Ga. 550.

When a juror was accepted, it did not appear that he was in any manner prejudiced against defendant company. During the trial, however, he assumed to cross-examine some witnesses, but there was nothing in the nature of the questions to show that he had become incompetent to discharge the duty of a juror. Defendant's counsel moved the court to exclude the juror from the panel, which the court refused. *Held*, no error. *Chicago, M. & St. P. R. Co.* v. *Harper*, 128 *Ill.* 384, 21 *N. E. Rep.* 561; *affirming* 26 *Ill. App.* 621.

An employé of a defendant corporation is incompetent as a juror. *Louisville, N. O. & T. R. Co.* v. *Mask*, 64 *Miss.* 738, 2 *So. Rep.* 360. *Burnett* v. *Burlington & M. R. Co.*, 19 *Am. & Eng. R. Cas.* 25, 16 *Neb.* 332, 20 *N. W. Rep.* 280.

To qualify a person to act as a juror, he should not only be unbiased and unprejudiced against all parties to the suit, but he should stand indifferent as to the success of either party thereto; and a person called as a juror who testifies that his acquaintance with one of the parties will interfere with his judgment and finding in the case should be excused. *Omaha St. R. Co.* v. *Craig*, 58 *Am. & Eng. R. Cas.* 208, 39 *Neb.* 601, 58 *N. W. Rep.* 209.

A stockholder is disqualified to sit as juror in a cause wherein his company is pecuniarily interested; and a verdict in the cause will be set aside if the fact of the juror's owning stock is not known until after verdict. *Page* v. *Contoocook Valley R. Co.*, 21 *N. H.* 438.

In an action against a company to recover for personal injuries, it appeared that the wife of one of the jurors was a sister of the wife of plaintiff. Under the statute the damages recovered would be community property of the plaintiff and his wife, which made her an interested party in the result of the suit. *Held*, that the juror might be challenged for cause. *Houston & T. C. R. Co.* v. *Terrell*, 69 *Tex.* 650, 7 *S. W. Rep.* 670.

30. Challenge to the panel.—Where the county commissioners select sixty names of persons proportionately from the several precincts of the county, from which the petit jurors are to be drawn by the clerk of the court and the sheriff, etc., a motion to quash the panel, on the ground that one of the commissioners had an action pending in court to be determined by a jury, should be overruled in the absence of a showing of partiality or unfairness, or that any of the persons thus selected were favorable to such commissioner. *Northeastern Neb. R. Co.* v. *Frazier*, 36 *Am. & Eng. R. Cas.* 606, 25 *Neb.* 42, 40 *N. W. Rep.* 604.

31. Challenge for cause.—Where one called as a juror had heard of the accident at the time deceased was killed, and had heard people talk about the matter, but had no opinion in the case, a challenge was properly overruled. *Chicago, B. & Q. R. Co.* v. *Perkins*, 125 *Ill.* 127, 14 *West. Rep.* 400, 17 *N. E. Rep.* 1; *affirming* 26 *Ill. App.* 67; *former appeal*, 110 *Ill.* 523.

Jurors were asked: "If the evidence were evenly balanced between plaintiff, an individual, and defendant, a corporation,

*Stockholders and servants of railroad as jurors, see note, 19 AM. & ENG. R. CAS. 28.

which way would you incline to find?" They answered that they would incline to find for plaintiff. They were then challenged for cause. The court then asked them if they thought they could try the case fairly, and without prejudice or bias, to which they replied affirmatively. *Held*, that, taking both answers together, the jurors were not incompetent; that jurors are not to be expected to know the rules of law about the weight of evidence, until instructed thereupon by the court. *Hudson* v. *St. Louis, K. C. & N. R. Co.*, 53 *Mo.* 525.—DISTINGUISHING Chicago & A. R. Co. *v.* Adler, 56 Ill. 344.—FOLLOWED IN Keegan *v.* Kavanaugh, 62 Mo. 230. REVIEWED IN Montgomery *v.* Wabash, St. L. & P. R. Co., 90 Mo. 446.

In a personal-damage case against a railroad a juror stated in his examination on his *voir dire* that he had an elevator on the railroad, and was engaged in buying and shipping grain over the road; that he had received favors from the company, and desired to retain its favorable consideration; that he had no personal feeling in the matter, and could render a fair and impartial verdict. *Held*, that a challenge for cause was properly sustained; that a fair trial can only be had where the jurors are absolutely free, impartial, and independent. *Omaha & R. V. R. Co.* v. *Cook*, 37 *Neb.* 435, 55 *N. W. Rep.* 943.

32. —— opinion of juror. — A juror who has made up his mind against a corporation defendant, and whose opinion against it is so strong that it would require evidence to remove it, does not stand indifferent and is incompetent. *Halsted* v. *Manhattan R. Co.*, 26 *J. & S.* 270, 32 *N. Y. S. R.* 109, 11 *N. Y. Supp.* 44.—DISTINGUISHING McKinney *v.* Long Island R. Co., 6 N. Y. Supp. 168.

33. Challenge for bias.—A juryman, in a suit against a railroad, was asked, on his *voir dire*, if the evidence were evenly balanced which way he would be inclined to find, and answered that in such case he would "lean against defendant." *Held*, that such juryman was incompetent, and it was error to refuse his challenge by defendant. *Chicago & A. R. Co.* v. *Adler*, 56 *Ill.* 344, 3 *Am. Ry. Rep.* 278.—DISTINGUISHED IN Hudson *v.* St. Louis, K. C. & N. R. Co., 53 Mo. 525. FOLLOWED IN Chicago & A. R. Co. *v.* Buttolf, 66 Ill. 347. OVERRULED IN Chicago & A. R. Co. *v.* Fisher, 141 Ill. 614.

A juror, called in an action by a servant against a company to recover damages for the loss of a leg from alleged negligence, stated that if he had any sympathy it was with plaintiff, and that he would have none for defendant, but that he knew of no reason why he could not try the case fairly and impartially, that he would not violate his oath under any circumstances, and that he would endeavor to do justice between the parties. *Held*, that the juror was clearly competent. *Chicago & W. I. R. Co.* v. *Bingenheimer*, 116 *Ill.* 226, 4 *N. E. Rep.* 840.

A juror who, in an action for damages against a company, states that he would find against defendant, if the evidence should be evenly balanced, but upon further inquiry says he has formed or expressed no opinion as to the rights of the parties, and has no prejudice against defendant, but would find according to the evidence and the instructions of the court, is not, for that reason, disqualified from sitting as a juror. *Montgomery* v. *Wabash, St. L. & P. R. Co.*, 90 *Mo.* 446, 2 *S. W. Rep.* 409. — REVIEWING Hudson *v.* St. Louis, K. C. & N. R. Co., 53 Mo. 536; Keegan *v.* Kavanaugh, 62 Mo. 230.

In an action against a corporation, a juror who testifies, upon a challenge for favor, that he has had some business difficulty with the president of the company, who is one of its principal stockholders, but thinks he can render an impartial verdict in the case, is a competent juror; but even if it was error not to exclude him on that challenge, the judgment should not be reversed for that reason, where it appears that the case was tried by an unobjectionable jury, and it does not appear that defendant was prejudiced by being obliged to use one of his peremptory challenges to exclude the juror. *Heucke* v. *Milwaukee City R. Co.*, 69 *Wis.* 401, 34 *N. W. Rep.* 243.

34. Peremptory challenges.—Plaintiff having announced that she had no challenges to make, and defendant then having challenged two jurors, plaintiff could not afterwards demand a right of challenge; therefore, the denial of such right by the circuit judge was not error of law. *Ward* v. *Charleston City R. Co.*, 16 *Am. & Eng. R. Cas.* 356, 19 *So. Car.* 521, 45 *Am. Rep.* 794.

35. Examination on the voir dire. —In an action against a company for personal injuries a juror was sworn upon his *voir dire* and answered to the effect that if empaneled as a juror he would give the benefit of a doubt to the company, if the evidence should be evenly balanced, not

because the burden of proof would be upon plaintiff, but on account of favors received from the company in business transactions. *Held*, that plaintiff's challenge for cause was properly sustained. *Denver, S. P. & P. R. Co.* v. *Driscoll*, 38 *Am. & Eng. R. Cas.* 105, 12 *Colo.* 520, 21 *Pac. Rep.* 708.

In empaneling a jury to try a civil action against a railroad it is competent for defendant's counsel to ask the jurors if, upon hearing the testimony, they should find it evenly balanced, which way they would be inclined to decide the case. *Chicago & A. R. Co.* v. *Buttolf*, 66 *Ill.* 347. — FOLLOWING Chicago & A. R. Co. *v.* Alder, 56 Ill. 344.— OVERRULED IN Chicago & A. R. Co. *v.* Fisher, 141 Ill. 614.—*Galena & S. W. R. Co.* v. *Haslam*, 73 *Ill.* 494.—OVERRULED IN Chicago & A. R. Co. *v.* Fisher, 141 Ill. 614.

In an action against a company defendant asked three several jurors: "If taken upon this jury, and the evidence were equally balanced upon both sides, just as much one way as the other, which way would you decide?" which the court refused, on objection of plaintiff. *Held*, that there was no error in the ruling. *Chicago & A. R. Co.* v. *Fisher*, 141 *Ill.* 614, 31 *N. E. Rep.* 406; *affirming* 38 *Ill. App.* 33.—OVERRULING Chicago & A. R. Co. *v.* Adler, 56 Ill. 344; Chicago & A. R. Co. *v.* Buttolf, 66 Ill. 347; Galena & S. W. R. Co. *v.* Haslam, 73 Ill. 494.

In an action against a company it is not admissible for defendant's counsel to ask jurors whether they did not, in a suit against the same company just tried, reluctantly return a verdict for defendant under the instruction of the court, and whether in the absence of such instruction they would have been willing to have found a verdict for defendant. *Natchez, J. & C. R. Co.* v. *Bolls*, 62 *Miss.* 50.

And where the judge, in such case, after excluding the inquiries of defendant's counsel, himself asks the jurors whether they feel as free to do justice between the parties as if the litigation were between private parties, and they answer in the affirmative, that is a sufficient test of their freedom from prejudice against defendant as a corporation. *Natchez, J. & C. R. Co.* v. *Bolls*, 62 *Miss.* 50.

When the court refused to allow counsel to ask the jury on their *voir dire* as to their prejudice against corporations, and then stated to the jury that if any of them had a prejudice against corporations which would bias them, counsel desired them to leave the box, and, no reply being made, they were sworn in without objection, the point is waived. *Loeffler* v. *Keokuk N. L. Packet Co.*, 7 *Mo. App.* 185.

One of the jurors testified on his *voir dire* that he was a consulting engineer of defendant company, but he was not shown to have been a regular employé or salaried officer of defendant; and he and another juror admitted a general prejudice against actions for damages, of which this was one. *Held*, that the evidence was not sufficient to warrant the appellate court in holding erroneous the rulings of the trial court in favor of the competency of both jurors. *Coppersmith* v. *Mound City R. Co.*, 51 *Mo. App.* 357.

In examining a juror on his *voir dire*, it is not improper to ask him if he knows anything about the facts of the case, or if he has made up his mind about the case. The examination need not be confined to the literal language of the statute, but may extend to any inquiry as to the bias or prejudice relating to the litigation, as well as to that which may be felt toward the parties personally. A refusal to allow such examination is cause for reversal. *Houston & T. C. R. Co.* v. *Terrell*, 69 *Tex.* 650, 7 *S. W. Rep.* 670. — APPROVING State *v.* Mann, 83 Mo. 589. DISTINGUISHING Burrell *v.* State, 18 Tex. 713; Johnson *v.* State, 27 Tex. 758.

V. CONDUCT OF THE TRIAL.

1. *In General.*

36. Separate trials. — Where two actions are brought against a company, growing out of the same collision, and one is put on trial just after the other, it is not error to permit the jury in the first case tried to return a verdict against the company, and read it in open court in the presence of the jury empaneled to try the other case. *Kansas City, Ft. S. & M. R. Co.* v. *McDonald*, 51 *Fed. Rep.* 178, 4 *U. S. App.* 563, 2 *C. C. A.* 153.

In an action to recover damages occasioned by negligently setting a fire, in which action a partnership or an association of persons who were engaged in operating a railroad in connection with a company were made defendants jointly with the company, it is not prejudicial error, nor an abuse of discretion, for the trial court to refuse a separate trial, under Kan. Code, § 268, to the persons composing the partnership or

association, for the reason that a different rule of evidence applies to them than to the railroad company. When the evidence establishing the origin of the fire and the culpable negligence of the parties in starting it is clear, convincing, and undisputed, and when the defendants below make no effort to explain or dispute it, there being no conflict in the evidence, there is no room for the play of different rules as to the burden of proof. *Latham* v. *Brown*, 48 *Kan.* 190, 29 *Pac. Rep.* 400.

Mo. Rev. St. § 3603 provides that where there are several causes of action united in a petition, or where there are several issues, and the court shall be of opinion that all or any of them shall be tried separately by the court or jury, it may, on the application of either party, direct separate trials. *Held*, that this leaves the question to the sound discretion of the trial court, whose action cannot be properly reviewed on appeal, unless it plainly appears that there has been an abuse of the discretion. *Hunt* v. *Missouri R. Co.*, 14 *Mo. App.* 160; *reversed on other grounds in* 89 *Mo.* 607.

Under the above statute where a passenger on a street-car sues both the company and the owner of a derrick placed near the track against which the car ran, causing the injury sued for, the defendants cannot demand a separate trial. *Hunt* v. *Missouri R. Co.*, 14 *Mo. App.* 160; *reversed on other grounds in* 89 *Mo.* 607.

An action to enforce performance by defendant company of a certain by-law passed by plaintiff village, and also the performance of a duty imposed by the Railway Act, came on for trial without a jury, and the trial judge decided to try the first branch of the case separately; and after hearing evidence upon it, held that the by-law was not binding upon defendant, and dismissed the action without hearing evidence on the second branch. *Held*, that rule 655 must be read in conjunction with the Judicature Act, § 52, subsec. 12 (R. S. O. c. 44); and this case was not one calling for an application of the rule by directing separate trials. *Ft. Erie* v. *Ft. Erie Ferry R. Co.*, 13 *Ont. Pr.* 444.

37. Preference on the calendar.—An action against a corporation to recover the amount of interest coupons upon bonds issued by another similar corporation, based upon an agreement between the two companies, by which defendant has become liable for their payment, is not an action "founded upon a note or other evidence of debt, for the absolute payment of money," within the meaning of N. Y. Code Civ. Pro. § 791, subsec. 8, giving to such an action against a corporation a preference upon the calendar. *Polhemus* v. *Fitchburgh R. Co.*, 113 *N. Y.* 617, *mem.*, 2 *Silv. App.* 150, 20 *N. E. Rep.* 601, 21 *N. Y. S. R.* 933.

Nor do the facts upon which such an action is based furnish a reason for giving to it a preference by the court in the exercise of its discretion; plaintiff stands in no better position than ordinary litigants. *Polhemus* v. *Fitchburgh R. Co.*, 113 *N. Y.* 617, *mem.*, 2 *Silv. App.* 150, 20 *N. E. Rep.* 601, 21 *N. Y. S. R.* 933.

38. Allowing access to papers in hands of adverse party.—In an action against a company for damages for personal injuries, it is proper for the court to compel defendant's counsel to deliver to plaintiff's counsel a bundle of papers or package containing certain written statements of employés of defendant in relation to the facts surrounding the occurrence which caused plaintiff's injury, where it appears that the bundle was in the court room, in the possession of defendant's counsel, and that plaintiff's counsel had been allowed to examine it and desired to use it as a foundation to impeach the testimony of one of defendant's employés, who was a witness for defendant, and who had made a statement which was at variance with his testimony. *Freel* v. *Market St. Cable R. Co.*, 97 *Cal.* 40, 31 *Pac. Rep.* 730.

2. *Reception of Evidence. View by Jury.*

39. General rules as to admissibility of evidence. — In an action for damages on account of a personal injury, it is doubtful whether it was admissible to prove statements of plaintiff, made some months after the accident, to show that he threatened that, if he did not get better, he would take his life, and that he contemplated suicide. But where the admissibility of evidence is doubtful, the rule in Georgia is to admit it, under proper instructions to the jury to consider its doubtful competency as a circumstance bearing upon its credibility in estimating the effect to be given to it. *Central R. Co.* v. *Smith*, 76 *Ga.* 209, 2 *Am. St. Rep.* 31.

The court admitted what a witness at the time said to defendant's flagman, and then

excluded the flagman's reply. *Held*, error. *Chicago, R. I. & P. R. Co.* v. *Eininger*, 114 *Ill.* 79, 29 *N. E. Rep.* 196.

Evidence which is competent and admissible for any purpose cannot be rejected because it is liable to be considered by the jury for an improper purpose. To avoid this, however, the party objecting to its introduction should ask an instruction limiting its effect to the legitimate purpose. *Allison* v. *Chicago & N. W. R. Co.*, 42 *Iowa* 274.

After permitting a witness for plaintiff to answer a question of doubtful competency, as calling for opinion evidence, the court should not exclude the answer of a witness for defendant to practically the same question. *Kelley* v. *Detroit, L. & N. R. Co.*, 80 *Mich.* 237, 45 *N. W. Rep.* 90.

Where a company is charged with negligence in not providing a sufficient culvert for the escape of water, it is not reversible error to exclude evidence that the engineer who had charge of the construction of the road was competent and skilful, where other witnesses had already testified that the road was in all respects properly constructed. *McPherson* v. *St. Louis, I. M. & S. R. Co.*, 97 *Mo.* 253, 10 *S. W. Rep.* 846.

Where the opposite party consents to the reading of the testimony of witnesses taken at a former trial, the party is not restricted to the direct examination, nor need he read the whole of the examination; but the whole of the testimony, so far as relevant, is open to both parties, and they can read that which they see fit. *Ainley* v. *Manhattan R. Co.*, 47 *Hun* 206, 13 *N. Y. S. R.* 557.

Where the action is against a company for negligently causing death, evidence taken at the inquest is incompetent; and it is not made competent because it was introduced without objection at a former trial. A new trial should be conducted as if there had been no previous trial. *Petrie* v. *Columbia & G. R. Co.*, 35 *Am. & Eng. R. Cas.* 430, 29 *So. Car.* 303, 7 *S. E. Rep.* 515.

In a suit for damages against a company defendant pleaded a release which was produced upon the trial. Plaintiff replied that it had been obtained from him when he was too drunk to know what he was doing, and without his having opportunity of knowing its contents. On the trial it was shown that the release was signed after deliberation and when plaintiff was apparently sober, he not denying his signature, but testifying that he did not remember signing it. *Held*, error to submit to the jury the replication of drunkenness or of plaintiff's signing the release without an opportunity to understand its terms. *Houston & T. C. R. Co.* v. *Tierney*, 72 *Tex.* 312, 12 *S. W. Rep.* 586.

It is error for the court to exclude plaintiff's material and relevant evidence, though it considers no case of negligence made out, unless defendant admits the truth of the propositions sought to be established by that evidence. *Roberts* v. *Alexandria & F. R. Co.*, 83 *Va.* 312, 2 *S. E. Rep.* 518.

40. Offers of proof. — An error assigned that the court refused to permit a conductor to prove that he would not have put appellant off the train if he had known he could not walk cannot be considered, because appellant failed to make any avowal that the witness would so testify. For the same reason the error assigned that the court refused to permit appellant to prove that he was a dissipated man will not be considered. *Louisville, C. & L. R. Co.* v. *Sullivan*, 16 *Am. & Eng. R. Cas.* 390, 81 *Ky.* 624.

Plaintiff in a suit for personal injury was allowed to show that after the injury he was refused work by defendant, plaintiff claiming at the time that he would follow it up by testimony showing that it was on account of his injury that he was refused work, but he failed so to follow up the testimony. *Held*, that the admission of the testimony, or the failure afterwards to exclude it, was error. *Harrison* v. *Denver & R. G. W. R. Co.*, 7 *Utah* 523, 27 *Pac. Rep.* 728.

41. Part of a transaction or document having been introduced, the adverse party may show the whole of it.—Where a special written contract is set up in defense, the execution of which is claimed to have been fraudulently obtained, and defendant proves by his agent what was said and done at the time it was signed, it is error to refuse to allow plaintiff, in rebuttal, to give his version of the same matters. *Black* v. *Wabash, St. L. & P. R. Co.*, 25 *Am. & Eng. R. Cas.* 388, 111 *Ill.* 351.

A party reading part of a statement or correspondence cannot be compelled by his adversary to read it all. The opposite party may, if he desires so to do, himself read so much of the remainder as tends to qualify or

explain what his adversary has read. *Parmenter* v. *Boston, H. T. & W. R. Co.*, 37 *Hun* (*N. Y.*) 354.

42. Evidence that appeals to the senses.—Where plaintiff sues for injuries to his eye, caused by being struck with a piece of hot coal or clinker from defendant's engine, an objection to the use of a skull to explain to the jury the nature of the plaintiff's injuries is not well taken. It rested in the discretion of the trial judge. *McNaier* v. *Manhattan R. Co.*, 22 *N. Y. S. R.* 840, 51 *Hun* 644, *mem.*, 4 *N. Y. Supp.* 310; *affirmed in* 123 *N. Y.* 664, *mem.*, 34 *N. Y. S. R.* 1010, *mem.*, 26 *N. E. Rep.* 750, *mem.*

Nor is an objection to the exhibition of the surgical instruments by which the operation was performed valid. *McNaier* v. *Manhattan R. Co.*, 22 *N. Y. S. R.* 840, 51 *Hun* 644, *mem.*, 4 *N. Y. Supp.* 310; *affirmed in* 123 *N. Y.* 664, *mem.*, 34 *N. Y. S. R.* 1010, *mem.*, 26 *N. E. Rep.* 750, *mem.*

43. Experiments in presence of the jury.—In an action against a company for damages for the burning of a lumber yard, alleged to have been set on fire by sparks from defendant's engine, it was pleaded that the engine was fed with coal, and emitted sparks only when steam was used, and that for some distance from the yard the grade was such that steam was not used; during the trial, the jury, by consent of the parties, inspected the ground, and the possibility of running a train as alleged was practically demonstrated. *Held*, that the experiment was without prejudice to plaintiff. *Stockwell* v. *Chicago, C. & D. R. Co.*, 43 *Iowa* 470.

It is not error for the trial court to refuse an application to allow the jury to witness experiments with cars upon a railway track outside the court room, as bearing on the question of the practicability of an alleged collision. *Smith* v. *St. Paul City R. Co.*, 16 *Am. & Eng. R. Cas.* 310, 32 *Minn.* 1, 50 *Am. Rep.* 550, 18 *N. W. Rep.* 827.

44. Exhibition of wound or performance of physical act by plaintiff.*—It is not a material error to permit plaintiff in the course of his testimony to exhibit his injured hand to the jury. *Indiana Car Co.* v. *Parker*, 100 *Ind.* 181.

In an action for personal injuries the court has the power, in a proper case, and under proper circumstances, to require plaintiff to perform a physical act in presence of the jury, such as walking across the court room, that will show the nature and extent of his injuries. But the propriety of doing so in a given case rests largely in the discretion of the trial court. *Hatfield* v. *St. Paul & D. R. Co.*, 18 *Am. & Eng. R. Cas.* 292, 33 *Minn.* 130, 53 *Am. Rep.* 14, 22 *N. W. Rep.* 176.

In an action against a company for a personal injury, based upon negligence, the trial judge may permit plaintiff to exhibit the injured limb to the jury. *Looram* v. *Second Ave. R. Co.*, 11 *N. Y. S. R.* 652.—QUOTING Mulhado *v.* Brooklyn City R. Co., 30 N. Y. 370.

45. View of locus in quo by jury—Discretion of court.—Plaintiff was run over or against by defendant's locomotive hauling a freight train, and his arm broken at the elbow. Plaintiff said that he was endeavoring to step off the track when struck by the engine. Defendant contended that plaintiff was drunk, lying with his head on the rail, and his arm near or on the rail, his limbs extending outwardly from the roadbed. Against defendant's objection, the judge allowed the jury to go from the court room to examine a railway engine. *Held*, that there was no error that would vitiate a verdict for plaintiff. *Owens* v. *Missouri Pac. R. Co.*, 38 *Fed. Rep.* 571.

Where the action is for flooding lands and damaging growing crops, it is a matter of discretion to be determined by the trial court whether the jury shall be allowed to view the premises, in charge of an officer; and a refusal is not error where the discretion is not abused. *St. Louis, A. & T. H. R. Co.* v. *Claunch*, 41 *Ill. App.* 592.

The granting of a motion in a negligence case that the jury view the premises where the accident occurred is within the discretion of the court, which is not abused by the denial of such motion where the trial is had two years after the accident, and the testimony shows that the condition of the premises is changed. *Stewart* v. *Cincinnati, W. & M. R. Co.*, 49 *Am. & Eng. R. Cas.* 456, 89 *Mich.* 315, 50 *N. W. Rep.* 852; *former appeal* 80 *Mich.* 166, 44 *N. W. Rep.* 1116.

The granting or refusing an application for the jury to view the premises which are the subject of injury or accident lies within the sound discretion of the judge. *Jenkins* v. *Wilmington & W. R. Co.*, 110 *N. Car.* 438, 15 *S. E. Rep.* 193.

* Action for injury to passenger. Exhibiting injured parts at trial, see 33 AM. & ENG. R. CAS. 532, *abstr.*

Plaintiff sued for damages for overflowing his land by reason of obstructing a creek by a bridge, and obtained a verdict which was set aside by the trial court as against the weight of evidence. It appeared that the jury were allowed to view the place, but this was long after the injury, and was not for the purpose of enabling them to determine the amount of damages, but only that they might understand the situation. Plaintiff insisted that as the jury saw the premises they had evidence before them not before the court, and therefore the verdict should be final. *Held*, that such objection was not well taken, where the verdict was not set aside for excessive damages. *Peck* v. *Fonda, J. & G. R. Co.*, 25 *N. Y. S. R.* 95, 53 *Hun* 634, *mem.*, 3 *Silv. Sup. Ct.* 10, 6 *N. Y. Supp.* 379.

In an action for work and labor, brought by a railroad contractor against a company plaintiff offered evidence tending to show that a certain excavation which was a part of the work was of solid rock. Defendant, having offered evidence tending to show the contrary, moved the court to have the jury view the premises, they being about thirty miles off, on the line of the road, and offered to send the jury on a train of the company and to defray the expenses. The court having overruled the motion, the appellate court cannot say that the court below erred unless it appears from the record that a view was necessary to a just decision; and that does not so appear. *Baltimore & O. R. Co.* v. *Polly*, 14 *Gratt.* (*Va.*) 447.

46. Time of the view.—In an action against a company for injuring a boy at a street crossing, the court refused to allow the jury to examine the premises in person until after the evidence closed, a request having been made to allow them to do so before the evidence closed. The evidence in the case fully described the premises and was sufficient clearly to establish negligence on the part of the company. *Held*, no grounds for reversal. *Kentucky C. R. Co.* v. *Smith*, 93 *Ky.* 449, 20 *S. W. Rep.* 392.

Under Ky. Civ. Code, § 318, empowering the courts to allow the jury to view premises in person, the court may, in an action for killing a person at a street crossing, permit the jury to go upon the premises after they have retired to their room to consider their verdict, section 321 permitting juries to return into court upon a disagreement as to any part of the testimony, so as to be further instructed and be satisfied thereon. *Louisville, N. A. & C. R. Co.* v. *Schick*, 94 *Ky.* 191, 21 *S. W. Rep.* 1036.

47. Conduct of the view.—A view of the premises was ordered and taken. At the time the jury were upon the ground, cars had been placed upon the track with a view of representing the situation as it was when the accident occurred. Plaintiff sought to prove by the officer in charge of the jury that the cars were not the same, and that their situation was different from what it was at the time of the accident. *Held*, that plaintiff might competently do so. *Close* v. *Lake Shore & M. S. R. Co.*, 37 *Am. & Eng. R. Cas.* 522, 73 *Mich.* 647, 41 *N. W. Rep.* 828.

In an action against an elevated railroad to recover damages to abutting property, the court instructed the jury that they might take a short recess and view the premises, but that they must all go together. They did not return promptly, and it appeared that the court's instruction had not been understood, and that only five of the jurors went upon the premises, and that they entered a building thereon and each drank a glass of beer. After being reprimanded by the court the trial proceeded and a verdict was returned for defendant. *Held*, that the parties must be deemed to have waived the objections to the misconduct of the jurors. *Moore* v. *New York El. R. Co.*, 15 *Daly* 506, 8 *N. Y. Supp.* 329, 29 *N. Y. S. R.* 146, 18 *Civ. Pro.* 146, 24 *Abb. N. Cas.* 77.—QUOTING Paulitsch *v.* New York C. & H. R. R. Co., 18 J. & S. (N. Y.) 241.

48. Reference to the view in charge of court.—The purpose for which a jury may be permitted to view an object which is the subject of testimony in a cause is to enable them better to understand the testimony of witnesses respecting such object, and thereby assist them more intelligently to apply the same; and an instruction which permits them to give weight to their own observations of such object, as evidence upon which to determine, in connection with the testimony, the issues in the cause, is erroneous. *Morrison* v. *Burlington, C. R. & N. R. Co.*, 84 *Iowa* 663, 51 *N. W. Rep.* 75.

Where a jury have viewed the scene of an accident it is not improper for the court to say in the charge that the jury have the aid of their own observations "to supplement

the testimony of the witnesses." *Ham* v. *Delaware & H. Canal Co.*, 58 *Am. & Eng. R. Cas.* 520, 155 *Pa. St.* 548, 26 *Atl. Rep.* 757.

When the jury have been properly permitted to view the premises in dispute, it is not improper to refuse a request which requires the court to instruct the jury that "they are not to take into consideration anything they saw or any impression they received at the view of the premises, in determining the rights of the parties to this suit." *Fox* v. *Baltimore & O. R. Co.*, 34 *W. Va.* 466, 12 *S. E. Rep.* 757.

49. Evidence in rebuttal.—Where defendant produced a witness who gave expert evidence upon the result of an examination of the heel of the boot worn by the deceased at the time of the accident, it was proper for the court to permit plaintiff to introduce a shoemaker as a witness in rebuttal on this question. *Lake Erie & W. R. Co.* v *Mugg*, 132 *Ind.* 168, 31 *N. E. Rep.* 564.—DISTINGUISHING Doyle *v.* St. Paul, M. & M. R. Co., 42 Minn. 79.

50. —— or reply. — A company was sued for negligence in the construction of a bridge which, being undermined by a flood fell under the train in which plaintiff's intestate was being carried. Plaintiff, in opening, gave direct evidence of faults and negligence in the construction of the bridge; that the injury occurred by reason of the washing away of an embankment forming the eastern approach to the bridge; that this embankment had been carried out from the eastern bank into the deepest part of the channel; that it was composed of light and unsubstantial material, liable to yield to the action of water; that at the time of the construction of the bridge there existed indications of a previous flow of water there, and that the attention of the engineers had been called to these circumstances. After defendant had closed his evidence, which was directed to show, among other things, that no such indications of a previous flow existed at the time of the construction of the bridge or afterwards, plaintiff was permitted to call a witness to show that at the time of the construction of the bridge there were saplings growing upon the low ground in the immediate vicinity of the bridge, and that these saplings bore water-marks to the distance of two or three feet from the ground. *Held*, to be within the discretion of the court. *Kansas Pac. R. Co.* v. *Miller*, 2 *Colo.* 442, 20 *Am. Ry. Rep.* 245.

Where the action is for negligently causing death, and defendant company pleads only the general issue, and plaintiff has made a *prima facie* case, and defendant has introduced evidence tending to show that it exercised due diligence, but does not attempt to show contributory negligence, the plaintiff is then entitled to reply to the defendant's theory of the case by additional evidence that the defense is not true. *Central R. & B. Co.* v. *Nash*, 81 *Ga.* 580, 7 *S. E. Rep.* 808.

Evidence offered by plaintiff in reply, relating to the degree of plaintiff's injury, and a part of his case, and not directly contradicting any of the testimony introduced by defendant, is admissible only in the discretion of the judge, and no exception can be sustained to its exclusion. *Wallace* v. *Taunton St. R. Co.*, 119 *Mass.* 91.

In an action for damages sustained in alighting from a train, defendant gave evidence that the train was in motion when plaintiff was alighting. Plaintiff, in reply, desired to contradict this evidence. There was a dispute as to whether plaintiff's witnesses had touched upon the point in making the case. *Held*, that the evidence was properly excluded, because the fact that the train had stopped was a necessary part of plaintiff's case, and if omitted could not be given in reply. *Harvey* v. *Canadian Pac. R. Co.*, 3 *Man.* 266

51. Striking out evidence.—Though evidence improperly admitted, which was calculated to arouse the feelings of the jury against the party opposing him who offered it, may afterwards be withdrawn and the jury told not to regard it, its impression is not easily effaced or its influence calculated, and its admission is ground for reversal. *Gulf, C. & S. F. R. Co.* v. *Levy*, 12 *Am. & Eng. R. Cas.* 90, 96, 59 *Tex.* 542, 46 *Am. Rep.* 269.

3. *Objections and Exceptions. Demurrer to Evidence.*

52. Necessity of objection. — Although a declaration may allege certain specifications of negligence by the servants of a company, yet if proof showing acts outside of those alleged be allowed to go to the jury without any objection, and without any motion to rule it out, *semble* that plaintiff should not be held strictly to the *allegata*

by the charge. *Savannah, F. & W. R. Co.* v. *Barber*, 71 *Ga.* 644.

An act of negligence not alleged in the complaint will be considered where testimony upon the point is introduced without objection. *Barber* v. *Richmond & D. R. Co.*, 34 *So. Car.* 444, 13 *S. E. Rep.* 630.—DISTINGUISHING Fell *v.* Richmond & D. R. Co., 33 So. Car. 198.

53. Time to object to evidence.—The objection that a letter-press copy of the report of a railroad accident and not the original was offered in evidence should have been made when the evidence was offered. *O'Hare* v. *Chicago & A. R. Co.*, 95 *Mo.* 662, 15 *West. Rep.* 427, 9 *S. W. Rep.* 23.

That the answer to a question, proper in itself, is shown to be an opinion of a witness not an expert as to the matter inquired about is no ground for ruling out the question before it is answered. The proper practice is to move the exclusion of the answer, if its objectionable character is not developed until cross-examination. *Ft. Worth & D. C. R. Co.* v. *Hogsett*, 67 *Tex.* 685, 4 *S. W. Rep.* 365.

Where a physician has testified, without objection by defendant, that plaintiff had assured him that he had never suffered with sore eyes or been injured in his eyes, a direction to the jury not to consider the evidence of symptoms of injury merely stated by plaintiff to his physician is properly refused, the objection having been taken too late. *Missouri Pac. R. Co.* v. *Mitchell*, 41 *Am. & Eng. R. Cas.* 224, 75 *Tex.* 77, 12 *S. W. Rep.* 810.

54. Definiteness and certainty of objections.—Where there is a variance between the allegations and the proof as to the place where an injury was inflicted, the attention of the court should be called to it, so as to afford an opportunity to obviate the objection by amendment of the declaration. It is not sufficient to state that the proof varies from the declaration. The party should point out in what the variance consists. *Lake Shore & M. S. R. Co.* v. *Ward*, 135 *Ill.* 511, 26 *N. E. Rep.* 520; *affirming* 35 *Ill. App.* 423.

Where the trial court does not know, from a question of a general character calling for the repetition of a conversation with an engineer at a station seven miles from the scene of the accident, whether the answer of the witness will or will not be competent evidence, it is not error to overrule an objection to the question based on the ground that the conversation "was irrelevant and immaterial and not connected with anything that occurred at the accident." If the answer is not competent, error may be predicated upon a refusal to strike it out. *Louisville, N. A. & C. R. Co.* v. *Jones*, 28 *Am. & Eng. R. Cas.* 170, 108 *Ind.* 551, 9 *N. E. Rep.* 476.

Where the testimony of a witness related to actions he had taken and statements he had made as attorney for defendants, and to the authority under which he acted, and it did not appear that he testified to any privileged communication, while some of his statements tended to show an admission that a certain crossing should be a bridge, and that the receiver had funds in his possession which he declined to use in making the crossing, on the ground that he thought the rights of the city were inferior to those of others, an objection to such testimony which did not specify the parts which it was claimed should be excluded, but was directed to all of it, some of the evidence being material and competent, was properly overruled. *Ft. Dodge* v. *Minneapolis & St. L. R. Co.*, 55 *Am. & Eng. R. Cas.* 58, 87 *Iowa* 389, 54 *N. W. Rep.* 243.

In an action by the assignee of a subscription for stock to recover the amount of the subscription, the declaration alleged the consolidation of the company in which the stock was taken, and plaintiff sought to introduce in evidence the articles of the original and the consolidated companies. *Held*, that the objection that they were "incompetent, irrelevant, and immaterial" was not sufficiently specific. *Rodgers* v. *Wells*, 44 *Mich.* 411, 6 *N. W. Rep.* 860.

An objection that a witness's answer to a question is irrelevant must be so expressed as to point to the particular answer, not to the whole of his testimony. *Wilson* v. *New York C. R. Co.*, 4 *Abb. App. Dec.* (*N. Y.*) 618, 3 *Keyes* 381.

55. General objections.—In an action for damages from fire caused by sparks from a locomotive, a witness for plaintiff testified that a former fire had occurred. He was then asked if he knew of any fire that occurred between the two. Defendant objected, as irrelevant and immaterial and too remote. *Held*, that the objection was too general and was properly overruled. *Steele* v. *Pacific Coast R. Co.*, 32 *Am. & Eng. R. Cas.* 333, 74 *Cal.* 323, 15 *Pac. Rep.* 851.

Where the testimony of an expert witness is deemed objectionable because it does not appear that he was sufficiently qualified to testify as an expert, an objection to such testimony because "incompetent and improper" is too general. *Schlereth* v. *Missouri Pac. R. Co.*, 115 *Mo.* 87, 21 *S. W. Rep.* 1110. — DISTINGUISHING Senn *v.* Southern R. Co., 108 Mo. 142; Alcorn *v.* Chicago & A. R. Co., 108 Mo. 81.

Where the evidence called for is relevant, a general objection to a question is not good as to the competency of the witness or the form of the question. *New Jersey Steamboat Co.* v. *Mayor, etc., of N. Y.*, 2 *Silv. App.* 23, 109 *N. Y.* 621, *mem.*, 15 *N. E. Rep.* 877, 14 *N. Y. S. R.* 57; *affirming* 39 *Hun* 657, *mem.*

A real-estate expert was allowed to testify that the physical effect of the railroad upon plaintiff's premises was to lessen the rental value. Defendant objected to the evidence as not within the cognizance of the witness as an expert. The court replied: "I will allow it and give you an exception," and counsel said: "We note an exception to it." *Held*, that as the evidence was illegal, its incompetence incapable of remedy, and the court assumed to apprehend the point of the objection, the general objection was sufficient to raise the question of error. *Blum* v. *Manhattan R. Co.*, 1 *Misc.* 119, 48 *N. Y. S. R.* 680, 20 *N. Y. Supp.* 722.

56. Waiver of objections.—Plaintiff, in an action for personal injury, proved that the profits of her business, which she was disabled from attending to, were $100 a month, including her charges for certain medical services, which charges were excluded on defendant's motion. *Held*, that if this left an uncertainty as to the profits exclusive of the medical charges, defendant could not be heard to complain on that ground when it might have obviated the objection by proof, but did not. *Chicago W. D. R. Co.* v. *Lambert*, 119 *Ill.* 255, 10 *N. E. Rep.* 219; *affirming* 20 *Ill. App.* 654.

In an action for injuries occasioned to a brakeman, an exception to the admission of evidence that the platform by the track was a proper place for plaintiff to run upon was waived by defendant's counsel stating in his closing argument that he would not contend that the boxing or planking was not a place where brakemen were likely to run in the performance of their duties, or that it was not convenient for them to run there, or that defendant had not reason to contemplate that the brakemen would so use it. *Sweat* v. *Boston & A. R. Co.*, 156 *Mass.* 284, 31 *N. E. Rep.* 296.

Defendant waives objection to the court's overruling an instruction in the nature of a demurrer to plaintiff's evidence by afterwards introducing evidence in its own behalf. *Hils* v. *Missouri Pac. R. Co.*, 101 *Mo.* 36, 13 *S. W. Rep.* 946.

In an action by a principal against his agent, charging violations of a parol contract, plaintiff, without objection from defendant, introduced in evidence a bond executed by such agent prior to the alleged breaches, conditioned for the faithful performance of his duties as such agent. *Held*, that defendant had waived the right afterwards to make the objection that there was a variance between the pleadings and the facts proven. (McIver, A. J., dissenting.) *South Carolina R. Co.* v. *Barrett*, 12 *So. Car.* 173.

To an objection to the relevancy of certain evidence introduced by plaintiff the court stated that it would entertain a motion to exclude it later on. No exception was taken to the court's action, nor was its attention again called to the matter before the rendition of judgment. *Held*, that the objection was waived. *Norfolk & W. R. Co.* v. *Anderson*, 58 *Am. & Eng. R. Cas.* 53, 90 *Va.* 1, 17 *S. E. Rep.* 757.

57. The right to take exceptions.—In an action for negligently causing death, the liability of defendant depended on whether or not the connecting rod of a brake broke before the car reached the top of a hill or at the top thereof. Counsel for defendant requested the court to charge that if the jury believed that the rod broke at the top of the hill, defendant was entitled to a verdict. The court answered, "I have charged your request in that respect." The counsel said, "I ask your honor to charge it in that language." The court replied, "I will not accept any request now, the counsel already having presented his requests to charge." Counsel excepted, but the court refused to allow any exceptions, upon the ground that counsel had already presented their requests. *Held*, error. *Pfeffele* v. *Second Ave. R. Co.*, 34 *Hun* (*N. Y.*) 497.

58. Demurrer to evidence, generally.—A demurrer to evidence admits all that it proves and all that it tends to prove.

Fent v. *Toledo, P. & W. R. Co.*, 59 *Ill.* 349. *Morris* v. *Indianapolis & St. L. R. Co.*, 10 *Ill. App.* 389.

Where the fact that the employer had notice of a defect in an engine is proved in an action for injury to an employé occasioned by such defect, the presumption fairly arises, on a demurrer to evidence, that the injured employé was induced to believe that the defect would speedily be obviated, and continued in the employment for that reason. *Morris* v. *Indianapolis & St. L. R. Co.*, 10 *Ill. App.* 389.

On a demurrer to evidence, its fair weight and all reasonable inferences deducible therefrom fall against the party demurring. *Indianapolis, P. & C. R. Co.* v. *Goar*, 62 *Ind.* 411.

Where the court sustains a demurrer to the evidence, the court must be able to say that, admitting every fact that is proved which is favorable to the plaintiff, and admitting every fact that the jury might fairly and legally infer from the evidence favorable to the plaintiff, still the plaintiff has utterly failed to make out some one or more of the material facts of his case. *Brown* v. *Atchison, T. & S. F. R. Co.*, 15 *Am. & Eng. R. Cas.* 271, 31 *Kan.* 1, 1 *Pac. Rep.* 605.

Where the defendant files a demurrer to the plaintiff's evidence on the ground that the evidence does not prove any cause of action, unless plaintiff has utterly failed by all his evidence to prove his case, or some material fact in issue of the case, the demurrer should be overruled. *Brown* v. *Atchison, T. & S. F. R. Co.*, 15 *Am. & Eng. R. Cas.* 271, 31 *Kan.* 1, *Pac. Rep.* 605.—QUOTED IN Kansas City, Ft. S. & G. R. Co. *v.* Foster, 39 Kan. 329.

59. Its effect as an admission.—A demurrer to evidence admits the facts the evidence tends to prove, and in passing upon it the court is required to make every inference of fact from the evidence in favor of the party offering it which the jury might, with any degree of propriety, have inferred in his favor, and if when viewed in that light it is insufficient to support a verdict in his favor, the demurrer should be sustained. *Donohue* v. *St. Louis, I. M. & S. R. Co.*, 28 *Am. & Eng. R. Cas.* 673, 91 *Mo.* 357, 2 *S. W. Rep.* 424, 3 *S. W. Rep.* 848.—APPLYING Buesching *v.* St. Louis Gaslight Co., 73 Mo. 219.—*Field* v. *Missouri Pac. R. Co.*, 46 *Mo. App.* 449. *Fowler* v. *Baltimore & O. R. Co.*, 8 *Am. & Eng. R. Cas.* 480, 18 *W. Va.* 579.

60. When the demurrer should be sustained.—Where an action is brought by a company in possession of a right of way through a tract of land, and using it for its track and telegraph line, to restrain the owner of said land from interfering with its possession and use of the right of way, and, upon the trial, plaintiff offers no testimony tending to show that defendant ever has interfered, or threatened, or is likely to interfere therewith, a demurrer to the evidence is properly sustained. *St. Joseph & D. C. R. Co.* v. *Dryden*, 17 *Kan.* 278.—QUOTED IN Dryden *v.* St. Joseph & D. C. R. Co., 23 Kan. 525.

It is not error to sustain a demurrer to the evidence, in a case to recover damages for injuries inflicted by a train, resulting in the death of the persons injured, when the evidence fails to show any negligence on the part of the company which contributed to the injury. *Hendryx* v. *Kansas City, Ft. S. & G. R. Co.*, 45 *Kan.* 377, 25 *Pac. Rep.* 893. *Williams* v. *Atchison, T. & S. F. R. Co.*, 22 *Kan.* 117. *Smith* v. *Missouri Pac. R. Co.*, 113 *Mo.* 70, 20 *S. W. Rep.* 896.

Where an action is brought to recover for personal injury, and plaintiff's testimony shows that his own negligence contributed directly to the injury, he has failed to make out a *prima facie* right of recovery, and a demurrer to his evidence should be sustained. *Union Pac. R. Co.* v. *Adams*, 19 *Am. & Eng. R. Cas.* 376, 33 *Kan.* 427, 6 *Pac. Rep.* 529.

Where a fire started inside defendant's right of way, and burned along its fence into and destroyed plaintiff's pasture, and there is no evidence showing how the fire originated, or that any engine or train of defendant had passed on the day of the fire, a demurrer to the evidence should be sustained. *Alexander* v. *Missouri Pac. R. Co.*, 37 *Mo. App.* 609.

61. When it should be overruled.—In an action against a carrier for delivering property to a person other than the consignee, a demurrer to the evidence should have been overruled when the evidence tended to show that plaintiff was the owner of the property; that it was, without any authority from plaintiff, turned over to one who was not the designated consignee and converted by him to his own use, and that he was insolvent; and that the prop-

erty was of a certain value. A demurrer to evidence concedes the truth of all the facts which the evidence demurred to tends to prove and all such inferences as can reasonably be drawn therefrom, and if there is evidence favorable to the party demurring, the court cannot consider it when it is in conflict with that against him. *Hartman* v. *Cincinnati, I., St. L. & C. R. Co.*, 4 *Ind. App.* 370, 30 *N. E. Rep.* 930.

Where the jury might reasonably decide from plaintiff's evidence that the damage complained of was caused by the negligent running of defendant's cars, it is error for the court to sustain a demurrer to the evidence. *Leavitt* v. *Terre Haute & I. R. Co.*, 5 *Ind. App.* 513, 31 *N. E. Rep.* 860, 32 *N. E. Rep.* 866.

As sustaining a demurrer to evidence works a final disposition of the case, the court does not err in overruling such demurrer whenever there is testimony which, although weak and inconclusive, yet fairly tends to prove every essential fact, and is sufficient to justify a court in overruling a motion to set aside a verdict based thereon. *Kansas Pac. R. Co.* v. *Couse*, 17 *Kan.* 571.

Where a plaintiff introduces evidence sufficient to prove all the material facts of his case *prima facie*, some of which, however, are proved only by circumstantial evidence, and also introduces the direct testimony of one witness contradicting some of the facts proved by this circumstantial evidence, and no other evidence is introduced, the court may rightfully overrule a demurrer to the evidence, and may sustain a verdict found by the jury in favor of plaintiff upon the evidence. *Kansas City, Ft. S. & G. R. Co.* v. *Foster*, 39 *Kan.* 329, 18 *Pac. Rep.* 285. —QUOTING Brown *v.* Atchison T. & S. F. R. Co., 31 Kan. 1; Kansas Pac. R. Co. *v.* Brady, 17 Kan. 380.

The trial court did not err in overruling a demurrer to plaintiff's evidence interposed by defendant on the grounds that the evidence showed that plaintiff was guilty of contributory negligence, and that such evidence as to the manner in which the accident occurred was irreconcilable with the physical facts attending it. *Coudy* v. *St. Louis, I. M. & S. R. Co.*, 27 *Am. & Eng. R. Cas.* 282, 85 *Mo.* 79.

In an action for personal injuries, if the evidence upon the questions whether the bell was rung while approaching a crossing, or a man was stationed on the car furthest from the engine to give danger signals while the train was being backed, is conflicting, an instruction in the nature of a demurrer to the evidence interposed by the defendant is properly overruled. *Kelly* v. *Union R. & T. Co.*, 35 *Am. & Eng. R. Cas.* 396, 95 *Mo.* 279, 14 *West. Rep.* 721, 8 *S. W. Rep.* 420.

Plaintiff was in the employ of defendant company as a section foreman. He sent a hammer to the repair shops, and he and three other witnesses, who were blacksmiths, testified that it looked well when it was returned; but when they commenced to use it a piece flew off and hit plaintiff in the eye, causing the injury sued for. The evidence tended to show that the repairing had not been done in a skilful manner, as the metal showed cracks or checks beneath the surface. *Held*, that a demurrer to the evidence should have been overruled. *Johnson* v. *Missouri Pac. R. Co.*, 96 *Mo.* 340, 9 *S. W. Rep.* 790.

4. *Nonsuit. Dismissal.*

62. Power of court to order a nonsuit.— Under the New York statutes a county court has no power to grant a nonsuit and then to order exceptions to be heard at the general term of the supreme court, and in the meantime to stay all further proceedings. *Johnson* v. *New York, O. & W. R. Co.*, 30 *Hun* (*N. Y.*) 166; *affirmed in* 97 *N. Y.* 624, *mem.*

A nonsuit is not a judgment nor the final determination of a cause, and under Wyom. Civ. Code, § 379, a district court has no authority to order a peremptory nonsuit against the will of plaintiff. *Mulhern* v. *Union Pac. R. Co.*, 2 *Wyom.* 465.

63. When a nonsuit should be ordered, generally.*— Evidence that live stock was received for carriage under a special contract that the company would not be liable for its delay or for its delivery within any certain or definite time warrants a nonsuit in an action for failure to deliver the stock within a reasonable time. *Hughes* v. *Great Western R. Co.*, 14 *C. B.* 637, 2 *C. L. R.* 1360, 18 *Jur.* 1001, 23 *L. J. C. P.* 153.

After the supreme court, upon a review of both law and facts, has held that there can be no recovery because of the gross negligence of plaintiff in exposing himself

* Where case may be withdrawn from jury, see note, 1 AM. & ENG. R. CAS. 137.

to danger and in failing to avoid the consequences, it is not error for the trial court, on a second trial, to award a nonsuit, the evidence for plaintiff being precisely the same as that submitted by him on the former trial. *Smith* v. *Central R. & B. Co.*, 41 *Am. & Eng. R. Cas.* 490, 82 *Ga.* 801, 10 *S. E. Rep.* 111.

In an action under Ga. Code, § 2084, against a railroad company for the value of shoes lost in shipment, a nonsuit was granted on the grounds that the shipment by steamship took the case out of the code, and that no receipt by defendant of the goods in good order was shown. *Joseph* v. *Georgia R. & B. Co.*, 88 *Ga.* 426, 14 *S. E. Rep.* 591. —FOLLOWING Evans *v.* Atlanta & W. P. R. Co., 56 Ga. 498.

Where there is conflicting testimony, and a plaintiff's case is made out unless disbelieved, it is proper to let the jury decide the controversy; but they should not be allowed to give to a plaintiff a verdict against his own admissions and his own case as he makes it out, with no other reliance. *Karrer* v. *Detroit, G. H. & M. R. Co.*, 41 *Am. & Eng. R. Cas.* 265, 76 *Mich.* 400, 43 *N. W. Rep.* 370.

Plaintiff, while walking at night on a track in defendant's yards, was hit by a freight car, moved without signals. *Held*, that plaintiff was properly forced to a nonsuit, because the facts disclose no negligence on defendant's part. *Hyde* v. *Missouri Pac. R. Co.*, 54 *Am. & Eng. R. Cas.* 157, 110 *Mo.* 272, 19 *S. W. Rep.* 483.

A nonsuit should always be granted where the proof is so clear as to warrant the assumption, in good faith, that if the question was submitted to the jury they would find that the negligence of plaintiff contributed to the injury. *Ernst* v. *Hudson River R. Co.*, 35 *N. Y.* 9.

Where a train hand sues for a personal injury, and there is no evidence of negligence on the part of the defendant, except that its train did not have a headlight, and this did not contribute to the injury, a nonsuit is properly ordered. *Glenn* v. *Columbia & G. R. Co.*, 21 *So. Car.* 466. — DISTINGUISHED IN Wallingford *v.* Columbia & G. R. Co., 30 Am. & Eng. R. Cas. 40, 26 So. Car. 258, 2 S. E. Rep. 19. REVIEWED IN Adkins *v.* Atlanta & C. A. L. R. Co., 31 Am. & Eng. R. Cas. 281, 27 So. Car. 71, 2 S. E. Rep. 849; Barber *v.* Richmond & D. R. Co., 34 So. Car. 444.—*Fell* v. *Charleston, C. & C. R. Co.*, 33 *So. Car.* 198, 11 *S. E. Rep.* 691. —DISTINGUISHED IN Barber *v.* Richmond & D. R. Co., 34 So. Car. 444.—*Hale* v. *Columbia & G. R. Co.*, 34 *So. Car.* 292, 13 *S. E. Rep.* 537.

A company was sued for the death of a fireman, caused by a misplaced switch. The evidence showed that a brakeman had properly placed the switch and a train had passed a short time before; but plaintiff's evidence was to the effect that the brakeman was careless and incompetent generally, but not on the occasion in question, and there was no evidence of carelessness on the part of any one else, nor that the switch could have been misplaced by the passing train. *Held*, that the court should have directed a verdict for defendant. *Galveston, H. & S. A. R. Co.* v. *Faber*, 77 *Tex.* 153, 8 *S. W. Rep.* 64.

It is unnecessary to submit a question of fact to the jury when the fact itself is established by undisputed evidence. *Berg* v. *Chicago, M. & St. P. R. Co.*, 2 *Am. & Eng. R. Cas.* 70, 50 *Wis.* 419, 7 *N. W. Rep.* 347.

Plaintiff's intestate and others were running a hand-car, when a train approached around a curve only a short distance away. The section foreman in charge gave the order to "push the car back and save her if you can; if you can't, save yourselves." The intestate and another got on the car to work the pumps, and four others assisted at the sides in pushing it, but as the car neared a trestle, and the train was nearly on it, all of the other men left it in time to avoid injury, but the intestate remained until on the trestle, and in trying to jump was run over and killed. As soon as the car was seen the engine was reversed and every effort made to stop it. *Held*, that a nonsuit was properly allowed. *Gumz* v. *Chicago, St. P. & M. R. Co.*, 5 *Am. & Eng. R. Cas.* 583, 52 *Wis.* 672, 10 *N. W. Rep.* 11.

64. —— for insufficiency of evidence.— Although the question may be one of negligence, yet if plaintiff fails to make out a *prima facie* case, a nonsuit may be awarded. *Bell* v. *Western & A. R. Co.*, 70 *Ga.* 566.

Where there is no evidence on behalf of a party having the burden of proof as to the issues, or where essential or integral elements of his cause of action or defense are wholly without proof, or when the facts are established without conflict, which as a matter of law will defeat the right to recover, the court should, upon motion, take

the case from the jury. *So held*, in an action by a brakeman for personal injury. *Magee* v. *Chicago & N. W. R. Co.*, 82 *Iowa* 249, 48 *N. W. Rep.* 92.

When for want of evidence of gross negligence there can be no recovery, the jury should be so told, if requested, or a nonsuit ordered. *Burlington & M. R. Co.* v. *Wendt*, 12 *Neb.* 76, 10 *N. W. Rep.* 456.

Where the action is to recover for a permanent injury caused by spasms claimed to be brought on by a wound received through defendant's negligence, and the medical testimony leaves it very doubtful whether the wound contributed to the spasms, it would be unsafe to allow the jury to speculate upon such remote consequences, and a nonsuit should be allowed. *Thrings* v. *Central Park R. Co.*, 7 *Robt.* (*N. Y.*) 616.

Where a passenger on a street-car sues for an injury, though he may offer evidence enough to make a *prima facie* case, still a nonsuit should be directed where his own evidence also shows that he himself was not without fault. *Taylor* v. *Dry Dock, E. B. & B. R. Co.*, 9 *N. Y. S. R.* 498.

A person whose duty it was to carry mails to and from trains drove to a station which was situated between tracks. Upon leaving, his horse became unmanageable, and when about crossing one of the tracks the driver was hit by an express train running at high speed and was killed. As he approached the station some one called to him that the train was coming, but there was no evidence that he heard the warning or the whistle of the approaching train. *Held*, that the evidence did not show negligence on the part of the company, nor that the deceased was free from contributory negligence, and a nonsuit was properly granted. *Percey* v. *Fitchburg R. Co.*, 27 *N. Y. Supp.* 1040, 57 *N. Y. S. R.* 467.

A nonsuit for want of evidence should not be granted where there is any evidence to go to the jury; but every question involving a fact need not go to the jury, where there is not evidence enough to support it. If there is no conflicting evidence, and all is on one side, the court may direct a nonsuit, as it would be a nugatory thing to send such a case unsupported by evidence to the jury. *Hooper* v. *Columbia & G R. Co.*, 21 *So. Car.* 549.

On the question of negligence, it is the right of the trial judge to determine whether there is any evidence to make a *prima facie* case, and, if not, he may grant a nonsuit. *Couch* v. *Charlotte, C. & A. R. Co.*, 28 *Am. & Eng. R. Cas.* 331, 22 *So. Car.* 557. —QUOTING Davis *v.* Columbia & G. R. Co., 21 So. Car. 93.

A nonsuit should always be awarded if, assuming the evidence of the plaintiff to be true, it will still not authorize a verdict in his favor. *Simms* v. *South Carolina R. Co.*, 31 *Am. & Eng. R. Cas.* 199, 26 *So. Car.* 490, 2 *S. E. Rep.* 486.—QUOTING Hooper *v.* Columbia & G. R. Co., 21 So. Car. 549.

Where there is an absence of all testimony as to any material contested fact in a case, a nonsuit will ordinarily be granted. *Martin* v. *Columbia & G. R. Co.*, 32 *So. Car.* 592, 10 *S. E. Rep.* 960. *Waldrop* v. *Greenwood, L. & S. R. Co.*, 34 *Am. & Eng. R. Cas.* 204, 28 *So. Car.* 157, 5 *S. E. Rep.* 471.

In an action to recover damages for the killing of plaintiff's intestate by defendant's train, negligence in the killing is a necessary and material allegation, and unless some evidence is offered to support it a nonsuit is proper. *Hale* v. *Columbia & G. R. Co.*, 34 *So. Car.* 292, 13 *S. E. Rep.* 537.

65. — because of contributory negligence.*—Where it affirmatively appears from plaintiff's evidence that the want of prudence upon his part was the proximate cause of the injury complained of, it becomes the duty of the court, upon motion made for nonsuit, to decide as a question of law that the action cannot be maintained. *Behrens* v. *Kansas Pac. R. Co.*, 8 *Am. & Eng. R. Cas.* 184, 5 *Colo.* 400. —CRITICISING Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 122. DISTINGUISHING Kansas Pac. R. Co. *v.* Brady, 17 Kan. 380; Pennsylvania R. Co. *v.* Ogier, 35 Pa. St. 60; Ernst *v.* Hudson River R. Co., 35 N. Y. 9. QUOTING Barton *v.* St. Louis & I. M. R. Co., 52 Mo. 258; Michigan C. R. Co. *v.* Campau, 35 Mich. 468. REVIEWING Langhoff *v.* Milwaukee & P. du C. R. Co., 19 Wis. 497. — *Denver, S. P. & P. R. Co.* v. *Pickard*, 18 *Am. & Eng. R. Cas.* 284, 8 *Colo.* 163, 6 *Pac. Rep.* 149.

In an action for the death of a person at or near where a railroad crossed a public street, the only witness of the accident was the conductor of the train. He was absolutely uncontradicted, and his statement, if believed, made the case one of inexcusable

* Nonsuits on the ground of contributory negligence, see note, 19 AM. & ENG. R. CAS. 276; 2 *Id.* 17.

recklessness and gross contributory negligence on the part of the deceased. *Held*, that a nonsuit should have been ordered. *Baltimore & O. R. Co.* v. *State*, 75 *Md.* 526, 24 *Atl. Rep.* 14.

In an action for negligent injury, it is incumbent on the plaintiff to prove his non-negligence; and in the absence of evidence to the point, he should be nonsuited. *Geoghegan* v. *Atlas Steamship Co.*, 3 *Misc.* (*N. Y.*) 224.

If the facts and circumstances coupled with the occurrence of the accident do not indicate or tend to establish the existence of some cause or occasion therefor which is consistent with proper care and prudence, the inference of negligence is the only one to be drawn, and the defendant is entitled to a nonsuit. *McDermott* v. *Third Ave. R. Co.*, 44 *Hun* 107, 8 *N. Y. S. R.* 458; *affirmed in* 115 *N. Y.* 670, *mem.*, 26 *N. Y. S. R.* 977, *mem.* — FOLLOWING Tolman *v.* Syracuse, B. & N. Y. R. Co., 98 N. Y. 198.

The evidence offered by plaintiff was to the effect that he allowed a team to linger by the track until it became unmanageable and got upon the track, where it was struck by the engine, and there was no evidence of negligence on the part of defendant company. *Held*, that a judgment of nonsuit should be entered. *Coughtry* v. *Willamette St. R. Co.* 21 *Oreg.* 245, 27 *Pac. Rep.* 1031.

On hearing the approach of a train toward a flag station where it was expected to stop, a youth left the fireplace in a store at the station and ran out, intending to jump from the platform in front of the store, where the train generally stopped, across the track of three-feet gauge, and go to his mules, which were standing in an open space freely used by the public as an uninclosed wagon yard; but when he reached the platform, the engine was passing, and the youth, failing to check himself, fell against the tender and his foot was run over. The engine had not blown its whistle or rung its bell for 500 yards before reaching this point. *Held*, that this was not a "traveled place" within the meaning of So. Car. Gen. St. § 1483, which refers only to such places as the public use for crossing by legal right, and the failure to give the signals was not negligence; therefore a nonsuit was properly granted. *Barber* v. *Richmond & D. R. Co.*, 34 *So. Car.* 444, 13 *S. E. Rep.* 630.

A nonsuit was also proper on the further ground that plaintiff having heard the train approaching, the failure to give the warning signals in no way contributed to the accident. *Barber* v. *Richmond & D. R. Co.*, 34 *So. Car.* 444, 13 *S. E. Rep.* 630.—APPLYING Petrie *v.* Columbia & G. R. Co., 29 So. Car. 318. REVIEWING Glenn *v.* Columbia & G. R. Co., 21 So. Car. 470.

In an action against a company for injuries to plaintiff's property by a moving train it was admitted that defendant was a corporation, but it was not admitted or shown that defendant was a common carrier or that it was operating trains, or that the alleged negligent act was the act of defendant or any of its agents, servants, or lessees. *Held*, that a nonsuit was properly granted. *Pennington* v. *Atlanta & C. A. L. R. Co.*, 35 *So. Car.* 439, 14 *S. E. Rep.* 852.

Where plaintiff's own evidence conclusively shows contributory negligence on his part a nonsuit will be granted. And where the facts stated in the complaint clearly show that the plaintiff was guilty of contributory negligence, a demurrer thereto should be sustained. *Hoth* v. *Peters*, 55 *Wis.* 405, 13 *N. W. Rep.* 219.—QUOTED IN Heine *v.* Chicago & N. W. R. Co., 58 Wis. 525.

Plaintiff, a passenger, heard a lamp drop in the water closet or saloon at the front of a car, and going forward saw a light in the saloon and some one trying to put out the fire. The fire broke out, and he tried to pull the bell rope, but finding it would not work ran into the smoking car in front, to pull the rope. The conductor had run forward, and plaintiff supposing, as he said, that something had been done to stop the train, and thinking of his valise, and that there was danger of the car being burned, went back into the burning car and got it, and tried to return, but the fire broke out fiercely across the passage and prevented him. He was then driven to the rear end of the car, where the other passengers were crowding, and was seriously burned before the train stopped. The other passengers who went with him into the smoking car remained there, and it was not burned. Defendant gave evidence that the lamp was of the best construction and well secured, and the oil was of the best kind, such as would not explode or take fire from the lamp falling. The jury found for plaintiff. *Held*, that there was some evidence from

which the jury might infer that the lamp was not properly secured, and that the fire was occasioned by its fall; and that the omission to have a bell rope, as required by statute, was negligence on defendant's part, but that upon the evidence the damage to plaintiff was caused, not by defendant's negligence, but by his own voluntary act in returning to the car. A nonsuit was therefore ordered. *Hay* v. *Great Western R. Co.*, 37 *U. C. Q. B.* 456.—QUOTING Bridges *v.* North London R. Co., L. R. 6 Q. B. 394. —DISTINGUISHED IN Wilton *v.* Northern R. Co., 5 Ont. 490. LIMITED IN Carty *v.* London, 18 Ont. 122.

66. — cases of injury to passengers.—A nonsuit is properly directed where suit is brought by a passenger to recover damages for injury received in alighting from a train, where he admits that he was familiar with the depot and surroundings, and that when his station was announced he got off on the side opposite the depot, and several squares away, while the train was yet moving at the rate of eight miles an hour. *Hughlett* v. *Louisville & N. R. Co.*, (*Ky.*) 22 *S. W. Rep.* 551.

Plaintiff testified that the car was moving when he attempted to get on and was injured, and the persons who were inside the car, as passengers, at the time, swore that plaintiff was solely to blame. *Held*, that if this preponderance of proof satisfied the judge of the negligence of plaintiff, it was his duty to stop the litigation there, by directing a nonsuit. *Thrings* v. *Central Park R. Co.*, 7 *Robt.* (*N. Y.*) 616.

While a plaintiff cannot be nonsuited on the testimony of one witness (not himself), if there are other witnesses whose evidence makes out a case for the jury, the rule has no application to a case where there is no contradiction in the testimony, but rather a corroboration, leaving it beyond dispute that the passenger stepped off the moving train. *Brown* v. *Barnes*, 151 *Pa. St.* 562, 25 *Atl. Rep.* 144.—DISTINGUISHING Kohler *v.* Pennsylvania R. Co., 135 Pa. St. 346.

Plaintiff, while walking down the aisle of a car, carrying a satchel in her hand and looking for a seat, stumbled over two satchels in the aisle and fell and was injured. None of defendant's employés was in the car at the time. The car was lighted so that a person could, by looking, see any obstructions in the aisle. *Held*, that the evidence showed no negligence on the part of defendant, and that a nonsuit was properly granted. *Stimson* v. *Milwaukee, L. S. & W. R. Co.*, 44 *Am. & Eng. R. Cas.* 381, 75 *Wis.* 381, 44 *N. W. Rep.* 748.

67. — to employes.—Where the suit is by an employé against a railroad to recover for an injury to him by a co-employé, and the evidence fails to show either that he was without negligence or that there was negligence on the part of his fellow-servants, a nonsuit is properly awarded. *Jones* v. *Georgia Southern R. Co.*, 66 *Ga.* 558.

Plaintiff's evidence showed that he put himself under the conductor to work his way, instead of paying his fare as a passenger, and that, without the conductor's instructions, he took orders from a brakeman to couple a car, and was injured while so doing, the injury being due to the temporary effects of cold weather on the coupling, and not to any fault or negligence of the employés of the company. *Held*, that a judgment of nonsuit was proper. *Sparks* v. *East Tenn., V. & G. R. Co.*, 82 *Ga.* 156, 8 *S. E. Rep.* 424.

Where a train hand sues for a personal injury alleged to have been caused by the negligence of his conductor in ordering the train to start before he could perform a certain duty on top of it and get down again, but where the evidence fails to show that the conductor gave the order prematurely or improperly, a nonsuit should be granted. *Central R. & B. Co.* v. *Smith*, 82 *Ga.* 236, 8 *S. E. Rep.* 311.

Where the evidence shows clearly that one of plaintiffs, an employé, was not free from fault, and there is no evidence that the structure which caused the injury was located so as to be dangerous to employés when engaged in the line of their duties, a nonsuit as to him is properly granted. *Wolf* v. *East Tenn., V. & G. R. Co.*, 88 *Ga.* 210, 14 *S. E. Rep.* 199.

For the same reasons the nonsuit was properly granted as to the action in favor of the employé's father, his implied consent to the employment of his minor son by the company being fairly deducible from the facts in evidence, and there being no proper foundation for an inference to the contrary. *Wolf* v. *East Tenn., V. & G. R. Co.*, 88 *Ga.* 210, 14 *S. E. Rep.* 199.

A nonsuit is properly granted where it appears that plaintiff could, by ordinary care, have avoided the consequences of defendant's negligence. *So held*, where a night

watchman sought to recover for being injured by defendant's train, while he was standing upon one of the three tracks in a street, he being familiar with the schedule and movement of trains and locomotives, and the proper signals having been given. *Jenkins* v. *Central R. & B. Co.*, 89 *Ga.* 756, 15 *S. E. Rep.* 655.

In a suit under the Damage Act (Wagn. Mo. St. 519, 520, § 2) it appeared that the employé was run over by an express train passing at the usual hour—about seven in the evening; that the night was moonlight, but at the site of the accident, owing to a cut and curve in the road, deceased could not have been seen on the track more than 250 yards; and there was no proof that the engineer saw him, or that he might with proper care have seen him; and on the other hand it was shown that deceased, for fourteen years, had lived in a house on the company's right of way, and presumably knew of the time of the passage of the train, and might have seen it coming in time to get off the track. *Held*, that plaintiff made out no case for a jury, and should have been nonsuited. *Maher* v. *Atlantic & P. R. Co.*, 64 *Mo.* 267, 17 *Am. Ry. Rep.* 231.—APPROVED IN Taylor *v.* Missouri Pac. R. Co., 86 Mo. 457. DISTINGUISHED IN Hicks *v.* Pacific R. Co., 65 Mo. 34. QUOTED IN Gourley *v.* St. Louis & S. F. R. Co., 35 Mo. App. 87.

Plaintiff, a conductor, stepped from a train in a yard where he was well acquainted and walked on or near a parallel track and stood there until he was struck by a backing engine. His only explanation as to why he did so was that he was watching a brakeman while making a switch. *Held*, sufficient to show gross and inexcusable negligence, and a nonsuit was properly allowed. *Redmond* v. *Chicago, W. & O. R. Co.*, 31 *N. Y. St. R.* 55, 10 *N. Y. Supp.* 330, 56 *Hun* 645.

68. —— when verdict for plaintiff would be set aside.—A nonsuit is proper when plaintiff's evidence so conclusively establishes contributory negligence that the court would grant a new trial in case of a verdict in his favor upon the same evidence; and the fact that the burden of proof may be upon defendant to establish contributory negligence will not preclude such nonsuit. *Nagle* v. *California Southern R. Co.*, 88 *Cal.* 86, 25 *Pac. Rep.* 1106. *Deyo* v. *New York C. R. Co.*, 34 *N. Y.* 9.—REVIEWING Toomey *v.* London, B. & S. C. R. Co., 3 C. B. N. S. 146; Cotton *v.* Wood, 8 C. B. N. S. 568.—*Davis* v. *Third Ave. R. Co.*, 9 *J. & S.* (*N. Y.*) 31.—APPLYING Toomey *v.* London, B. & S. C. R. Co., 3 C. B. N. S. 146.—*Northern Pac. R. Co.* v. *Holmes*, 3 *Wash. T.* 202, 14 *Pac. Rep.* 688.—APPROVED IN Seefeld *v.* Chicago, M. & St. P. R. Co., 32 Am. & Eng. R. Cas. 109, 70 Wis. 216, 35 N. W. Rep. 278.

It is the duty of the court to nonsuit where a verdict for plaintiff would be clearly against the weight of evidence; and this rule applies to cases based upon negligence. *Wilds* v. *Hudson River R. Co.*, 24 *N. Y.* 430, 23 *How. Pr.* 492; *reversing* 33 *Barb.* 503.—FOLLOWING Johnson *v.* Hudson River R. Co., 20 N. Y. 73; Cotton *v.* Wood, 8 C. B. N. S. 568.—FOLLOWED IN Deyo *v.* New York C. R. Co., 34 N. Y. 9. QUOTED IN Powell *v.* Missouri Pac. R. Co., 8 Am. & Eng. R. Cas. 467, 76 Mo. 80.

69. —— cases of misnomer and variance.—Suit was brought against the Central railroad, the declaration alleging that, by obstructing the flow of the waters of a creek, it had caused backwater, which worked injury to plaintiff, and on the trial the evidence showed that it was the embankment and culvert of the Southwestern railroad which were located at the point where the damage was alleged to be. *Held*, that a nonsuit should have been awarded. *Central R. Co.* v. *Flournoy*, 69 *Ga.* 763.

An action for a tort was brought against the Nashville, Chattanooga and St. Louis railway company, and the proof showed that the injury complained of was on the Western and Atlantic railroad, leased and operated by the former. *Held*, that the court, on motion, should have granted a nonsuit. *Nashville, C. & St. L. R. Co.* v. *Edwards*, 52 *Am. & Eng. R. Cas.* 62, 91 *Ga.* 24, 16 *S. E. Rep.* 347.

70. When a nonsuit should be refused, generally.—Where the law raises a presumption of negligence against the defendant by reason of the mere fact that the physical injury was inflicted by means of running its locomotive; and where, owing to special circumstances touching the conduct of the engineer towards the plaintiff, a child of only ten years of age, it is not altogether certain that the presumption is rebutted; and where, on account of plaintiff's tender years and his consequent immaturity of understanding, he is not amenable to so high a standard of diligence in regard to his own

safety as that which adults are obliged to observe, the case made by the plaintiff's evidence is more properly one for the jury than for the court, and a motion for a nonsuit should be denied. *Vickers* v. *Atlanta & W. P. R. Co.*, 8 *Am. & Eng. R. Cas.* 337, 64 *Ga.* 306.

The proof tended to show that plaintiff, a child, was injured by defendant's turntable, which was negligently left unfastened. It was in an exposed public place, and the father of the child was defendant's night watchman, whose duties kept him awake all night, but he had promised to take such care of defendant's property, including the turntable, as he could during the day. At the time of the accident he had gone to his breakfast, and had left his son to act for him, and plaintiff had gone to take breakfast to the son. *Held*, that the case was for the jury, and it was error to order a nonsuit. *Ferguson* v. *Columbus & R. R. Co.*, 75 *Ga.* 637.— DISTINGUISHED IN Daniels *v.* New York & N. E. R. Co., 154 Mass. 349.

In an action against a railroad for a personal injury, if there is any evidence, however slight, to support the plaintiff's case, the court should leave the matter to the jury. *Nichols* v. *Chesapeake, O. & S. W. R. Co.*, (*Ky.*) 2 *S. W. Rep.* 181.

Although a railroad corporation must be taken to have known at the time of a disaster the facts which subsequently pointed out the cause thereof, yet it is entitled to go to the jury on the question whether or not those facts would, before the accident, have indicated to a competent person, considering them with the care which is necessary when human life is involved, that the road was unsafe. *Littlejohn* v. *Fitchburg R. Co.*, 37 *Am. & Eng. R. Cas.* 54, 148 *Mass.* 478, 20 *N. E. Rep.* 103, 2 *L. R. A.* 502.

Evidence on the part of defendant that a train was derailed by the breaking of a sound, well-spiked rail; that the ties were good, sound oak ties, and the roadbed straight and well ballasted; that the train was at proper speed; that the break was a fresh break and disclosed neither flaw nor defect in the broken rail, but was the result of frost; that sound iron and steel rails would break from frost, and there was no way to prevent it, is not sufficient to justify a nonsuit. *Hipsley* v. *Kansas City, St. J. & C. B. R. Co.*, 27 *Am. & Eng. R. Cas.* 287, 88 *Mo.* 348.

Where the facts or inferences to be drawn from them are in some degree doubtful, the only proper rule is to submit the whole matter to the jury, with proper instructions. *Nichols* v. *Sixth Ave. R. Co.*, 38 *N. Y.* 131; *affirming* 10 *Bosw.* 260.

Where there is evidence from which the jury might infer negligence on the part of defendant, and freedom from contributory negligence, a denial of a motion for nonsuit is proper. *Leopold* v. *Delaware & H. Canal Co.*, 49 *N. Y. S. R.* 459, 66 *Hun* 628, *mem.*, 21 *N. Y. Supp.* 100.

Where there is some evidence on the part of plaintiff, however slight, to sustain a verdict, it is not error in the court below to deny the motion of defendant for a nonsuit. *Ryberg* v. *Portland Cable R. Co.*, 22 *Oreg.* 224, 29 *Pac. Rep.* 614.

In an action to recover damages for personal injuries, if the plaintiff has made out a case for himself by his own testimony he cannot be nonsuited, although another of his own witnesses shows his negligence. And when plaintiff's testimony is contradictory, so that on part of it he is entitled to go to the jury, and on the other part he is not, the case must go to the jury. *Ely* v. *Pittsburgh, C., C. & St. L. R. Co.*, 158 *Pa. St.* 233, 27 *Atl. Rep.* 970.

In an action to recover damages for killing stock by a passing train, the plaintiff proved the fact of the killing and the value of the stock. *Held*, that defendant could not claim a nonsuit. *Walker* v. *Columbia & G. R. Co.*, 25 *So. Car.* 141. — APPROVING Danner *v.* South Carolina R. Co., 4 Rich. (So. Car.) 330.

A defendant is not entitled to a nonsuit because of testimony which he succeeds in eliciting upon cross-examination of plaintiff's witnesses. *Wallingford* v. *Columbia & G. R. Co.*, 30 *Am. & Eng. R. Cas.* 40, 26 *So. Car.* 258, 2 *S. E. Rep.* 19.

Where the circumstances leave the inference of negligence in doubt, and the court is unable to say that upon the most favorable construction which can be given to plaintiff's evidence there is nothing to submit to the jury, a nonsuit is improper. *Ewen* v. *Chicago & N. W. R. Co.*, 38 *Wis.* 613.

71. —— where the ground is insufficiency of evidence.—In an action against a company to recover for wood destroyed by fire, plaintiff and another witness testified that the wood belonged to plaintiff individually. It appeared that on a former trial by a firm of which plaintiff was a member, the witness testified that the

wood belonged to the firm. *Held*, that this did not constitute ground for a nonsuit, but was matter for the consideration of the jury. *Holcombe* v. *Richmond & D. R. Co.*, 78 *Ga.* 776, 3 *S. E. Rep.* 755.

Where the suit is for damages for the killing of two mules, and a *prima facie* cause of action is established by plaintiff's evidence as to one of them, the court is not obliged to grant a nonsuit as to the other, though the evidence as to it be insufficient. *Central R. & B. Co.* v. *Bryant*, 89 *Ga.* 457, 15 *S. E. Rep.* 537.

Though the plaintiff's evidence was not direct, but only circumstantial, as to the fact that the mules were killed by the engine or cars of the company, yet the jury could have inferred that such was the fact; and there was no error in denying a nonsuit. *Central R. & B. Co.* v. *Bryant*, 89 *Ga.* 457, 15 *S. E. Rep.* 537.

Plaintiff claimed in his petition that his shoulder blade or joint was broken, and there was evidence of injury to the shoulder, and that a bone or bones were broken. *Held*, that the court was justified in submitting to the jury the claims of plaintiff as made. *Winter* v. *Central Iowa R. Co.*, 80 *Iowa* 443, 45 *N. W. Rep.* 737.

If the evidence tends to prove all the facts which it is incumbent on plaintiff to establish in order to maintain his action against a railroad for personal injuries, he has a right to have the weight and sufficiency of the evidence passed upon by the jury, and it is error for the court to grant a nonsuit, and render judgment against him. *Stockstill* v. *Dayton & M. R. Co.*, 24 *Ohio St.* 83.

Defendant is entitled to a nonsuit where there is a total failure of evidence to sustain plaintiff's case; but if there is any testimony the force and effect of which must be determined, the case should go to the jury. *Carter* v. *Columbia & G. R. Co.*, 15 *Am. & Eng. R. Cas.* 414, 19 *So. Car.* 20, 45 *Am. Rep.* 754.

In the absence of all testimony in support of the material allegations in the complaint, a nonsuit is proper; but where, in support of such allegations, there is any testimony the weight, truth, and sufficiency of which are to be determined, the case must go to the jury. *Davis* v. *Columbia & G. R. Co.*, 28 *Am. & Eng. R. Cas.* 440, 21 *So. Car.* 93.—QUOTED IN Couch *v.* Charlotte, C. & A. R. Co., 28 Am. & Eng. R. Cas. 331, 22 So. Car. 557.

In an action against a company to recover damages for refusing to carry goods for plaintiff, if there is some evidence that defendant refused to ship for plaintiff while shipping for others, a nonsuit is properly refused. *Avinger* v. *South Carolina R. Co.*, 35 *Am. & Eng. R. Cas.* 519, 29 *So. Car.* 265, 7 *S. E. Rep.* 493.

Whether facts are sufficient to prove negligence is for the jury. A nonsuit is proper only where there are no facts tending to prove the charge. *Carter* v. *Oliver Oil Co.*, 34 *So. Car.* 211, 13 *S. E. Rep.* 419.

There being some evidence that a railroad had once crossed a stream in such a manner as not to obstruct the flow of water, but had afterwards, by driving piles and dumping in rocks, so affected the flow as to render plaintiff's lands unfit for cultivation, a nonsuit moved for in an action to recover damages for such injury to these lands was properly refused. *Wallace* v. *Columbia & G. R. Co.*, 37 *So. Car.* 335.

A compulsory nonsuit should not be ordered upon plaintiff's evidence, where, on the most favorable construction in his favor which it can possibly bear, it tends to prove all the facts necessary to his recovery. And in this action, for an injury to the person from negligence in running a railway train, plaintiff's evidence tending to show negligence on defendant's part and not conclusively showing any contributory negligence on his own part, the court erred in directing a nonsuit. *Gower* v. *Chicago, M. & St. P. R. Co.*, 45 *Wis.* 182. — DISTINGUISHING Achtenhagen *v.* Watertown, 18 Wis. 331; Rothe *v.* Milwaukee & St. P. R. Co., 21 Wis. 256.—*Fitts* v. *Cream City R. Co.*, 15 *Am. & Eng. R. Cas.* 462, 59 *Wis.* 323, 18 *N. W. Rep.* 186.

Where a company is sued for killing a small child, through negligence in failing to fence its track, and the evidence shows a failure to fence, but not how the child got on the track, it is not error to refuse a nonsuit. *Schrier* v. *Milwaukee, L. S. & W. R. Co.*, 65 *Wis.* 457, 27 *N. W. Rep.* 167.

72. —— contributory negligence.— Where there are facts that tend to show negligence, which are controverted, the case is one for the jury, unless the act is negligent *per se*, or the weight of evidence is so preponderating that the court should set aside a verdict founded upon it. To justify a nonsuit all the disputed facts are to be decided in favor of the plaintiff, and

all presumptions and inferences which the plaintiff had a right to ask from the jury are to be conceded to him. *Phillips* v. *Rensselaer & S. R. Co.*, 57 *Barb.* (*N. Y.*) 644; *reversed on the facts in* 49 *N. Y.* 177.

While a court can nonsuit a party where it is palpable or patent that he is negligent, yet it has no right to draw inferences of fact to be derived from the facts and circumstances proven, unfavorable to the plaintiff, and upon such inferences to decide the case. It is the province of the jury to determine what are the inferences of fact to be deduced from the testimony, to the same extent that it is to decide the facts when the evidence is conflicting. *Gonzales* v. *New York & H. R. Co.*, 39 *How. Pr.* (*N. Y.*) 407; *reversing* 1 *Sweeny* 506; *former appeal* 38 *N. Y.* 440.—QUOTING Ireland *v.* Oswego, H. & S. Plank Road, 13 N. Y. 526; Keller *v.* New York C. R. Co., 24 How. Pr. (N. Y.) 177.

Plaintiff's intestate, a female, undertook to cross where defendant had six tracks, and where the view of approaching trains was somewhat obstructed, and where there was no flagman or gate, and where there was much noise and confusion by running machinery near by, and otherwise, and was struck by a train running at the rate of thirty miles an hour, and which approached without a signal from either bell or whistle. From the evidence the jury might well have found that she exercised such diligence as a prudent person would under the circumstances, and it could not be said as a matter of law what a prudent and reasonable person would have done in similar circumstances. *Held*, that it would be error to grant a nonsuit. *Sherry* v. *New York C. & H. R. R. Co.*, 1 *Silv. App.* 319, 10 *N. E. Rep.* 128, 5 *N. Y. S. R.* 574, 104 *N. Y.* 652, *mem.*; *reversing* 40 *Hun* 634, *mem.*

Where the action is based on negligence, and the evidence is not such as to require the jury to find that plaintiff was guilty of contributory negligence, it is not error to refuse a nonsuit. *Simpson* v. *Rome, W. & O. R. Co.*, 15 *N. Y. S. R.* 539, 48 *Hun* 113.

Where the evidence does not show gross and inexcusable contributory negligence a motion to nonsuit is properly denied. *Popp* v. *New York C. & H. R. R. Co.*, 26 *N. Y. S. R.* 639, 54 *Hun* 635, *mem.*, 4 *Silv. Sup. Ct.* 243, 7 *N. Y. Supp.* 249.

In an action for damages for the negligent killing of a man, a motion for nonsuit upon the ground that the evidence adduced showed contributory negligence by the deceased cannot be granted. *Carter* v. *Columbia & G. R. Co.*, 15 *Am. & Eng. R. Cas.* 414, 19 *So. Car.* 20, 45 *Am. Rep.* 754.

Contributory negligence is a matter of defense which must be proved to the satisfaction of the jury, and therefore cannot constitute a ground for a nonsuit. *Petrie* v. *Columbia & G. R. Co.*, 35 *Am. & Eng. R. Cas.* 430, 29 *So. Car.* 303, 7 *S. E. Rep.* 515.—APPLYING Carter *v.* Columbia & G. R. Co. 19 So. Car. 20; Darwin *v.* Charlotte, C. & A. R. Co., 23 So. Car. 531.

73. — cases of conflicting evidence.—When a trial judge is requested to nonsuit or direct a verdict in the trial of an action to enforce a liability for negligence, his duty is to determine whether facts have been established by evidence from which negligence may be reasonably inferred. If the real facts are in substantial dispute, the case cannot be taken from the jury. *Newark Pass. R. Co.* v. *Block*, 56 *Am. & Eng. R. Cas.* 590, 55 *N. J. L.* 605, 27 *Atl. Rep.* 1067.

Where there is a conflict of evidence as to the negligence that causes an injury to a passenger on a horse-car, and as to his contributory negligence in riding on the front platform, the case should be left to the jury. *Vail* v. *Broadway R. Co.*, 6 *Misc.* 20, 26 *N. Y. Supp.* 59, 58 *N. Y. S. R.* 124.

Where the action is for an injury caused by negligence, and the evidence is conflicting, the right of plaintiff to have the issue of negligence submitted to the jury is not affected by the fact that she was the only witness in her behalf and defendant examined four witnesses to contradict her. The jury were the sole judges of the facts, and they might believe the one against the four. *Scholl* v. *Broadway R. Co.*, 43 *N. Y. S. R.* 770, 63 *Hun* 629, *mem.*, 28 *Abb. N. Cas.* 205, 17 *N. Y. Supp.* 755.

If there is a conflict of evidence as to any material question of fact, or if, in respect to any such question, the fair and legitimate inference from the evidence is favorable to plaintiff's cause of action, it is error to take the case from the jury. *Fairfax* v. *New York C. & H. R. R. Co.*, 8 *J. & S.* (*N. Y.*) 128; *see also* 67 *N. Y.* 11; *reversing* 5 *J. & S.* 516, 73 *N. Y.* 167; *affirming* 11 *J. & S.* 18.

In an action to recover for personal injuries, where the evidence as to defendant's negligence and plaintiff's contributory negligence is conflicting, and is of such a char-

acter that inferences of fact must be drawn therefrom, the case is for the jury. *Smith* v. *Baltimore & O. R. Co.*, 158 *Pa. St.* 82, 27 *Atl. Rep.* 847.

74. — where different inferences may be drawn. — When the negligence of neither party can be conclusively established by a state of facts from which different inferences may be fairly drawn, or upon which fair-minded men may reasonably arrive at different conclusions, the case, under proper instructions, should be submitted to the jury. *Campbell* v. *Eveleth*, 83 *Me.* 50, 21 *Atl. Rep.* 784.

Whether the facts be disputed or undisputed, if different minds may honestly draw different conclusions from them, as to whether a company was guilty of negligence in leaving a turntable exposed, the case is properly left to the jury. *Atchison & N. R. Co.* v. *Bailey*, 10 *Am. & Eng. R. Cas.* 742, 11 *Neb.* 332, 9 *N. W. Rep.* 50. — QUOTING Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99.—DISTINGUISHED IN Daniels *v.* New York & N. E. R. Co., 154 Mass. 349. FOLLOWED IN Huff *v.* Ames, 16 Neb. 139; Omaha, N. & B. H. R. Co. *v.* O'Donnell, 35 Am. & Eng. R. Cas. 346, 22 Neb. 475.—*Alger* v. *New York El. R. Co.*, 28 *J. & S.* 1, 40 *N. Y. S. R.* 229, 15 *N. Y. Supp.* 960. *Craven* v. *Philadelphia & R. R. Co.*, 19 *Phila.* (*Pa.*) 409.

75. — where verdict for plaintiff would not, of necessity, be set aside. —If there is any evidence which would justify a verdict for plaintiff, the court should not order a nonsuit. *Fraser* v. *Charleston & S. R. Co.*, 75 *Ga.* 222.—DISTINGUISHED IN Smith *v.* Central R. & B. Co., 41 Am. & Eng. R. Cas. 490, 82 Ga. 801, 10 S. E. Rep. 111. FOLLOWED IN Woodruff *v.* Alabama G. S. R. Co., 75 Ga. 47.

A nonsuit will not be ordered unless a verdict for plaintiff would necessarily have to be set aside. *Bowers* v. *Union Pac. R. Co.*, 4 *Utah* 215, 7 *Pac. Rep.* 251.

76. — cases of injury to passengers.—Whether a passenger who was injured while passing from one coach to another by their sudden separation, throwing him to the ground, was in the exercise of ordinary care, should have been submitted to the jury; the grant of a nonsuit was erroneous. *Cotchett* v. *Savannah & T. R. Co.*, 84 *Ga.* 687, 11 *S. E. Rep.* 553.

A person about to take a train at a station where the platform was on one side of the track and the ticket office on the other side, in crossing from the ticket office to the platform, after buying the ticket, was killed by an engine moving at high speed. The declaration in the cause charged that the killing was caused by the company's wilful negligence. *Held*, that there was sufficient evidence of wilful negligence to require the submission of the case to the jury. *Nichols* v. *Chesapeake, O. & S. W. R. Co.*, (*Ky.*) 2 *S. W. Rep.* 181.

A train in which plaintiff's intestate was riding as a passenger was detached at night. An officer of the company ordered the intestate to pass forward to another car, and in attempting to do so she fell between the cars and was killed. *Held:* (1) that there was not such clear proof of contributory negligence as to warrant taking the case from the jury; (2) that there was sufficient evidence to warrant submitting the case to the jury on the question of the company's negligence; (3) there being some proof that the services of the intestate might have been of some value to the next of kin, a nonsuit was error. Nominal damages at least should be given. *McIntyre* v. *New York C. R. Co.*, 43 *Barb.* (*N. Y.*) 532.— QUOTING Oldfield *v.* New York & H. R. R. Co., 14 N. Y. 310.

In such case the rule that a plaintiff who in no event can recover more than nominal damages is not entitled to a new trial does not apply. The jury would not be limited to merely nominal damages, as it was a question for them what the services of the intestate would have been worth to the next of kin. *McIntyre* v. *New York C. R. Co.*, 43 *Barb.* (*N. Y.*) 532.

Plaintiff's evidence was to the effect that he boarded defendant's street-car, which was entirely filled inside, so that he was compelled to stand upon the platform in the rear; that the car stopped at frequent intervals to receive other passengers, so that plaintiff was crowded to one side of the platform and then to the step, from which he was thrown by the movement of the car while being driven very rapidly. All this was denied by the defendant. *Held*, that the case was properly one for the jury. *Slatzman* v. *Brooklyn City R. Co.*, 73 *Hun* 567, 26 *N. Y. Supp.* 311, 56 *N. Y. S. R.* 220.

There being testimony to show that plaintiff was injured while alighting at his station from a slowly moving train on which

he was a passenger, under the statement from a train hand that the conductor so directed, as the train would not stop, there was some testimony responsive to the issues, and a nonsuit was improperly granted. *Thomas* v. *Charlotte, C. & A. R. Co.*, 38 *So. Car.* 485, 17 *S. E. Rep.* 226.—DISTINGUISHING Spellman *v.* Richmond & D. R. Co., 35 So. Car. 475; Samuels *v.* Richmond & D. R. Co., 35 So. Car. 493; Cobb *v.* Columbia & G. R. Co., 37 So. Car. 194.

77. —— injuries to employes.—An employé of a foreign railroad company brought suit in Georgia on account of an injury received in the state where the railroad was chartered. The evidence made a very weak case, yet there was possibly enough evidence, if uncontradicted, to enable the jury to say that the injury was occasioned by the defective machinery of the company. The law which would determine plaintiff's right was somewhat uncertain, and it was doubtful whether, under the common law, which was in force in the state where the casualty occurred, he sustained the relation of co-employé to a company's agent, whose negligence caused the damage. *Held*, that the case should have been allowed to go to the jury, and a nonsuit was error. *Woodruff* v. *Alabama G. S. R. Co.*, 75 *Ga.* 47.—FOLLOWING Fraser *v.* Charleston & S. R. Co., 75 Ga. 222.

There being some evidence for the plaintiff as to the negligence of defendant company, and as to which of two companies using the same yard was his employer, a nonsuit should not be granted. *Barnett* v. *Northeastern R. Co.*, 87 *Ga.* 199, 13 *S. E. Rep.* 646.

Where a servant of a company informs another that the superintendent wants two hands to put up wires for the company, whereupon the first-mentioned employé directs plaintiff (a laborer employed by him) to assist in putting up the wires, and plaintiff is injured while doing so by reason of the carelessness of another servant of the company in allowing a ladder to fall, the questions whether the injury was occasioned by the negligence of a fellow-servant of plaintiff, and whether plaintiff was negligent, and could, by the exercise of ordinary care, have prevented the injury, are for the jury, and a nonsuit is error. *Reedy* v. *East Tenn., V. & G. R. Co.*, 87 *Ga.* 323, 13 *S. E. Rep.* 555.

In action by a car coupler for injuries received while coupling cars, there being some testimony as to the failure of defendant to furnish proper couplers, and that the conductor of the train had ordered the coupling to be done with improper couplers, a nonsuit should not be granted. *Boatwright* v. *Northeastern R. Co.*, 25 *So. Car.* 128. *Hornsby* v. *South Carolina R. Co.*, 26 *So. Car.* 187, 1 *S. E. Rep.* 594.

78. —— injuries to persons crossing track.—Plaintiff and his companions were strangers and ignorant of the existence of defendant's railroad. At the close of plaintiff's case there was no evidence to show that plaintiff could have seen the train, as it approached the crossing, in time to avoid the accident, except that other people in different localities, near where the collision occurred, heard and saw the approaching train in time to have avoided the accident. *Held*, that a nonsuit was properly refused. *Cohen* v. *Eureka & P. R. Co.*, 14 *Nev.* 376.—DISTINGUISHING Allyn *v.* Boston & A. R. Co., 105 Mass. 77. QUOTING Richardson *v.* New York C. R. Co., 45 N. Y. 850.

Plaintiff started to cross a street in front of an approaching car, and in ample time to have escaped it, but he slipped and caught his foot in a hole in the pavement, and was run over. *Held*, that a nonsuit, on the ground of contributory negligence, was properly denied. *Aaron* v. *Second Ave. R. Co.*, 2 *Daly* (*N. Y.*) 127.

It appeared that plaintiff was familiar with the dangerous character of a crossing at which he was injured; that he stopped about thirty feet from the track, looked down it, and listened, but did not look up the track because at the place at which he had stopped he could not see along it; that he looked at his watch to see if any train was due, and that, finding none, he drove upon the track. He was struck by an irregular train which approached at a high rate of speed and without any warning. *Held*, that it was error to direct a compulsory nonsuit, and that the question of defendant's liability ought to have been left to the jury. *McWilliams* v. *Philadelphia & R. R. Co.*, (*Pa.*) 35 *Am. & Eng. R. Cas.* 401, 15 *Atl. Rep.* 654.

Plaintiff's intestate was killed at a crossing on a day on which there was a high wind blowing. She had her head wrapped up, probably to protect her from the cold

wind. The wind came from a direction opposite to that from which the train approached. On approaching the crossing the whistle was blown, but not continuously, until the train reached the crossing, as required by statute. *Held*, that a motion for a nonsuit, on the ground that there was no evidence to show that the intestate's death was the result of defendant's failure to give the statutory signals, was properly refused, as the deceased might not have heard the signal actually given, but possibly might have heard the signal which ought to have been given. *Petrie* v. *Columbia & G. R. Co.*, 35 *Am. & Eng. R. Cas.* 430, 29 *So. Car.* 303, 7 *S. E. Rep.* 515.—APPLIED IN Barber *v.* Richmond & D. R. Co., 34 So. Car. 444. FOLLOWED IN Ward *v.* Richmond & D. R. Co., 43 Fed. Rep. 422.

In an action for injuries received at a crossing from a collision between plaintiff's wagon and a freight train, plaintiff should not be nonsuited on the ground that he is guilty of contributory negligence by reason of a failure to stop, look, and listen, when the evidence tends to show that he could not have seen or heard the train if he had stopped. *Ladouceur* v. *Northern Pac. R. Co.*, 4 *Wash.* 38, 29 *Pac. Rep.* 942.—REVIEWING Northern Pac. R. Co. *v.* Holmes, 3 Wash. T. 202, 14 Pac. Rep. 688, 3 Wash. T. 543, 18 Pac. Rep. 76.

79. Evidence must be conclusive and free from doubt.—In a suit against a company to recover for an injury sustained by plaintiff from being struck by a locomotive, the court should not nonsuit plaintiff and take the matter from the jury, except in cases where the facts are clear and undisputed, and show a want of ordinary care on the part of plaintiff. *New Jersey R. & T. Co.* v. *West*, 33 *N. J. L.* 430.—FOLLOWING Central R. Co. *v.* Moore, 24 N. J. L. 824.—FOLLOWED IN Delaware, L. & W. R. Co. *v.* Toffey, 38 N. J. L. 525.

Where the action is based on negligence, to justify a nonsuit either the question of negligence or that of contributory negligence must be answered, by the evidence, against plaintiff, so clearly that there is no room for doubt. All disputed facts must be conceded to plaintiff. A nonsuit cannot be sustained on the ground that evidence in favor of plaintiff, which would have justified a verdict, was outweighed by conflicting evidence. *Cook* v. *New York C. R. Co.*, 1 *Abb. App. Dec.* (*N. Y.*) 432, 3 *Keyes* 476.

It is not enough to justify a nonsuit that a court might in the exercise of its discretion grant a new trial. It is only where there is no evidence in law which, if believed, will sustain a verdict, that the court is called upon to nonsuit; and the evidence may be sufficient in law to sustain a verdict, although so greatly against the apparent weight of evidence as to justify the granting of a new trial. *Colt* v. *Sixth Ave. R. Co.*, 49 *N. Y.* 671, *mem.*; *affirming* 1 *J. & S.* 189.—REVIEWED IN Mulligan *v.* New York C. & H. R. R. Co., 33 N. Y. S. R. 534.

It is error to grant a nonsuit where, by any allowable deduction from the facts proved, a cause of action may be sustained by plaintiff; and it cannot be granted because of the contributory negligence, unless such negligence is conclusively established by evidence which leaves nothing of inference or fact for the jury. *Greany* v. *Long Island R. Co.*, 24 *Am. & Eng. R. Cas.* 473, 101 *N. Y.* 419, 5 *N. E. Rep.* 425; *affirming* 31 *Hun* 173, *mem.*—REVIEWING Kellogg *v.* New York C. & H. R. R. Co., 79 N. Y. 72; Shaw *v.* Jewett, 86 N. Y. 616.—DISTINGUISHED IN Bomboy *v.* New York C. & H. R. R. Co., 47 Hun 425. QUOTED IN Wall *v.* Delaware, L. & W. R. Co., 54 Hun 454; Knox *v.* Hall Steam Power Co., 69 Hun 231.

To justify a nonsuit in an action based on negligence, on the ground of contributory negligence, it must clearly appear that no construction of the evidence, and no inference from the facts, will warrant a contrary conclusion. *Kelly* v. *Pelham Hod El. Co.*, 51 *N. Y. S. R.* 549, 21 *N. Y. Supp.* 1107, 67 *Hun* 650, *mem.* *Towns* v. *Rome, W. & O. R. Co.*, 28 *N. Y. S. R.* 124, 54 *Hun* 638, *mem.*, 4 *Silv. Sup. Ct.* 332, 8 *N. Y. Supp.* 137; *affirmed in* 124 *N. Y.* 642, *mem.*, 36 *N. Y. S. R.* 1015, *mem.*—QUOTING Massoth *v.* Delaware & H. Canal Co., 64 N. Y. 529; Parsons *v.* New York C. & H. R. R. Co., 113 N. Y. 355, 22 N. Y. S. R. 697.

Where the action is based upon negligence, it is only where there is an entire absence of evidence of such negligence, or where the contributory negligence of the complaining party affirmatively and clearly appears from plaintiff's evidence, that a nonsuit may be ordered. *Langhoff* v. *Milwaukee & P. du C. R. Co.*, 19 *Wis.* 489.—QUOTED IN Townley *v.* Chicago, M. & St. P. R. Co., 4 Am. & Eng. R. Cas. 562, 53 Wis. 626. REVIEWED IN Behrens *v.* Kan-

sas Pac. R. Co., 8 Am. & Eng. R. Cas. 184, 5 Colo. 400.

Where plaintiff's evidence, supposing it to remain undisputed, and giving to it the most favorable construction that it will legitimately bear, including all reasonable inferences from it, would sustain a verdict in his favor, a peremptory nonsuit should not be granted. *Johnson* v. *Chicago & N. W. R. Co.*, 8 *Am. & Eng. R. Cas.* 471, 56 *Wis.* 274, 14 *N. W. Rep.* 181.

In an action for personal injuries caused by negligence, unless it is conclusively proved either that defendant was not guilty of any negligence which caused the injuries, or that plaintiff was guilty of negligence which contributed thereto, a nonsuit should not be ordered. *Bohan* v. *Milwaukee, L. S. & W. R. Co.*, 15 *Am. & Eng. R. Cas.* 374, 58 *Wis.* 30, 15 *N. W. Rep.* 801.

80. Effect of moving for nonsuit. —Where the action is against a company for negligently causing the death of a brakeman, a motion for a nonsuit on the ground that there is no evidence of negligence on the part of the company is sufficient when made in general terms, without specifying the particular negligence attempted to be shown by the proof. *Byrnes* v. *New York, L. E. & W. R. Co.*, 113 *N. Y.* 251, 21 *N. E. Rep.* 50, 22 *N. Y. S. R.* 936, 4 *L. R. A.* 151; *reversing* 14 *N. Y. S. R.* 554.—FOLLOWED IN Ford *v.* Lake Shore & M. S. R. Co., 2 Silv. App. 460.

The almost universal practice in the trial of such actions is to move for a nonsuit on the ground that no negligence of the defendant has been shown; and it is rare that the defendant goes into details for the purpose of showing why he claims that no negligence has been shown, or in what particular respect the plaintiff has failed in his proof. The motion is predicated also upon all the evidence of the case, and it is assumed for the purpose of the motion that the evidence upon the part of the plaintiff is true, and the claim is then made that upon such assumption no negligence has been shown, or no question is in the case proper for a jury to pass upon. *Byrnes* v. *New York, L. E. & W. R. Co.*, 113 *N. Y.* 251, 21 *N. E. Rep.* 50, 22 *N. Y. S. R.* 936, 4 *L. R. A.* 151; *reversing* 14 *N. Y. S. R.* 554.

And in arguing such motion the counsel for the defendant may enlarge upon it and present the case as he regards it, in detail as to each separate piece of evidence, and to all combined, that no question has been made for the jury, but such argument does not become a part of the record, and the question is sufficiently raised under a general motion that no negligence has been shown. *Byrnes* v. *New York, L. E. & W. R. Co.*, 113 *N. Y.* 251, 21 *N. E. Rep.* 50, 22 *N. Y. S. R.* 936, 4 *L. R. A.* 151; *reversing* 14 *N. Y. S. R.* 554.

81. Effect of a nonsuit.—The granting of a nonsuit, after hearing the testimony for both parties, is a complete determination of the action so far as the court is concerned, and brings it within the spirit if not the letter of Wis. Laws of 1882, ch. 202, and if the defendant fails to have his costs taxed within the time thereby required he waives them. *McDonough* v. *Milwaukee & N. R. Co.*, 69 *Wis.* 358, 34 *N. W. Rep.* 120.

82. Voluntary nonsuit.—In an action for personal injuries the plaintiff asked leave to amend his complaint, and upon its being refused, declined to proceed with the case and suffered a voluntary nonsuit. Subsequently defendant moved to dismiss, alleging that the claim was barred by the statute of limitations. N. Y. Code Civ. Pro., § 405, provides that if any action is terminated otherwise than by voluntary discontinuance, dismissal for neglect to prosecute, or final judgment, plaintiff may bring another action within one year. *Held*, that this was not a dismissal for neglect to prosecute within the meaning of the code, and the motion should be overruled. *Marx* v. *Manhattan R. Co.*, 10 *N. Y. Supp.* 222.

83. Review of judgments of nonsuit.—If the trial court erroneously refuses to nonsuit plaintiff for want of evidence of defendant's responsibility, and exception is thereupon sealed, and the defect in proof is not subsequently remedied, error may be assigned upon the exception and the judgment may be reversed. *May* v. *North Hudson County R. Co.*, 30 *Am. & Eng. R. Cas.* 644, 49 *N. J. L.* 445, 9 *Atl. Rep.* 688, 8 *Cent. Rep.* 345; *reversing* 48 *N. J. L.* 401, 5 *Atl. Rep.* 276.

And if the court refuses to grant a nonsuit when it should do so the defendant is entitled to his bill of exceptions, and the judgment will be reversed. But when the court wrongfully orders plaintiff nonsuit, and he submits, it is doubtful whether he can have his bill of exceptions, or bring a writ of error. *Central R. Co.* v. *Moore*, 24 *N. J. L.* 824.—FOLLOWED IN New Jersey

R. & T. Co. *v.* West, 33 N. J. L. 430; Delaware, L. & W. R. Co. *v.* Toffey, 38 N. J. L. 525.—*New Jersey Exp. Co.* v. *Nichols*, 33 *N. J. L.* 434; *affirming* 32 *N. J. L.* 166.—FOLLOWED IN Delaware, L. & W. R. Co. *v.* Toffey, 38 N. J. L. 525.

Under N. Y. Code Pro., § 265, as construed by the court of appeals, where an action is tried at the circuit before a court and jury exceptions taken to a nonsuit may be ordered to be heard in the first instance at general term; but this rule is changed by the Code Civ. Pro., § 1000, which provides that "upon the application of a party who has taken one or more exceptions the judge presiding at a trial by a jury may, in his discretion, at any time during the same, direct an order to be entered that the exceptions so taken be heard in the first instance at the general term, and that judgment upon the verdict be suspended in the meantime." *Seely* v. *New York C. & H. R. R. Co.*, 25 *Hun* (*N. Y.*) 280.

The operation of a railway over and along public highways in a village or city being necessarily attended with great peril to human life and property, railroad companies are held to the utmost care on the part of their servants to avoid inflicting injury under such circumstances. And in this action against a company for the killing of a child of six years by a train while crossing a city street, a judgment of nonsuit is reversed on the ground that the questions of negligence on defendant's part and contributory negligence of the child or its parents should have been submitted to the jury on the evidence. *Johnson* v. *Chicago & N. W. R. Co.*, 1 *Am. & Eng. R. Cas.* 155, 49 *Wis.* 529, 5 *N. W. Rep.* 886.

84. Power to dismiss.—When a motion for a nonsuit is made, or a demurrer to the declaration filed, it is the duty of the trial judge to pass upon it. If, however, the case is submitted to the jury without a motion to nonsuit, or a demurrer to the declaration, then the court must leave the question of negligence to the jury, and it is forbidden by law for the court to express any opinion upon the subject, when it is solely a question of fact. *Jarrett* v. *Atlanta & W. P. R. Co.*, 83 *Ga.* 347, 9 *S. E. Rep.* 681.

85. When a dismissal is proper.—Where the evidence shows that there could be no recovery for the killing of plaintiff's intestate on account of his contributory negligence, the cause will be dismissed, under Ark. Act of April 14, 1891, ch. 159, § 2. *St. Louis, I. M. & S. R. Co.* v. *Ross*, 56 *Ark.* 271, 19 *S. W. Rep.* 837.

Plaintiff subscribed certain real estate as stock in a corporation, through false and fraudulent representations. In an action to recover the real estate the complaint averred that plaintiff was ready and willing, and offered to bring the stock into court, to be disposed of as the court might direct. On motion of the defendant the court ordered plaintiff to furnish defendant with the certificates of stock for inspection, the motion being founded on the pleadings alone, and there being no evidence of notice to plaintiff to produce. For the failure of plaintiff to comply with this order the cause was dismissed without prejudice. *Held:* (1) that Ind. Code, §§ 305, 306, relates to papers which the adverse party desires to produce in evidence, and not to papers of which a mere inspection is demanded, and which are set forth or referred to in the pleadings; (2) that the statute does not change the common-law rule that where the form of action, or the pleadings, gives to the party notice to be prepared to produce a written instrument, no other notice to produce is necessary. *Silvers* v. *Junction R. Co.*, 17 *Ind.* 142.

Where the plaintiff in a civil action fails to appear on the trial, and there is no counterclaim or set-off filed or presented by the defendant, the district court should dismiss the case at the costs of the plaintiff without prejudice to a future action. *Kansas City, W. & N. W. R. Co.* v. *Walker*, 50 *Kan.* 739, 32 *Pac. Rep.* 365.

A complaint which fails to state facts sufficient to constitute a cause of action will be dismissed. *Myers* v. *Chicago, M. & St P. R. Co.*, 50 *Minn.* 371, 52 *N. W. Rep.* 962.

Action was brought against appellants and a railroad company. Pending the trial plaintiff asked and obtained leave to dismiss as to the railroad company, with costs. *Held*, no error, and that the trial was properly allowed to proceed as against the remaining defendants, without re-empaneling or re-swearing the jury, although the answer of defendants contained a paragraph in the nature of a plea in abatement for the misjoinder of the railroad company as a defendant. *Morrissey* v. *Schindler*, 18 *Neb.* 672, 26 *N. W. Rep.* 476.

Where the action is for wrongfully causing death, and plaintiff fails to establish

by competent evidence that the death was the legitimate result of any wrongful act, neglect, or default, the complaint is properly dismissed. *Schoen* v. *Dry Dock, E. B. & B. R. Co.*, 26 *J. & S.* 149, 31 *N. Y. S. R.* 400, 9 *N. Y. Supp.* 709.

Where the action is based on negligence, and plaintiff presents no evidence tending to prove that the injuries resulted solely from the negligence of defendant, or where it affirmatively appears that, though defendant may have been guilty of negligence, still plaintiff's negligence contributed to the injuries, it becomes proper for the court to dismiss the complaint, because of failure of proof sufficient to justify a recovery. *Winterfield* v. *Second Ave. R. Co.*, 49 *N. Y. S. R.* 435, 66 *Hun* 627, *mem.*, 20 *N. Y. Supp.* 801. — QUOTING Block *v.* Harlem Bridge, M. & F. R. Co., 28 N. Y. S. R. 495.

When the contributory negligence of the plaintiff is an inevitable inference from the evidence it is error not to dismiss the complaint. *Hamilton* v. *Third Ave. R. Co.*, 6 *Misc.* 382, 26 *N. Y. Supp.* 754, 56 *N. Y. S. R.* 397.

86. When a dismissal is improper. —In an action for work in grading a railway, where there is a conflict of evidence the court properly refuses a motion by defendant to dismiss the action. *Farrell* v. *St. Paul & N. P. R. Co.*, 38 *Minn.* 394, 38 *N. W. Rep.* 100.

Plaintiff's complaint alleged that her intestate was in his lifetime seized and possessed of certain premises which were described by metes and bounds, subject to a public easement in a part thereof used as a public street; that defendant at times specified, prior to the death of the intestate, and while he was so possessed, unlawfully entered upon that portion so used as a highway and committed acts of trespass by running its steam engines and cars thereon, etc. The complaint was dismissed on the ground that it did not set forth a cause of action, as the description by its terms only ran to the side line of the street and did not include any portion thereof. *Held*, error; that plaintiff was not concluded by the description, but, having alleged title in and possession of the *locus in quo*, subject only to the public easement for highway purposes, was entitled to an opportunity to establish these allegations. *Hussner* v. *Brooklyn City R. Co.*, 20 *Am. & Eng. R. Cas.* 265, 96 *N. Y.* 18; *affirming* 30 *Hun* 409.

Plaintiff sued for injuries to his wife by slipping on ice at one of defendant's stations as she was leaving a train. There was sufficient evidence to justify the jury in finding that ordinary care had not been used to make the steps reasonably safe, the evidence tending to show that snow which had fallen the night before had thawed in the middle of the day, and the drippings had frozen on the steps, no effort having been made to remove it or prevent its being slippery. *Held*, that a motion to dismiss because no negligence was shown was properly denied. *Ainley* v. *Manhattan R. Co.*, 47 *Hun* 206, 13 *N. Y. S. R.* 557.

Where different men of reasonable minds might have reached different conclusions from the facts disclosed by the evidence, the case is one for the jury, and a dismissal of the complaint is error. *Alger* v. *New York El. R. Co.*, 28 *J. & S.* (*N. Y.*) 1.—FOLLOWING Jones *v.* Metropolitan El. R. Co., 14 N. Y. Supp. 632.

It is not error in the court below to refuse to dismiss an action against a railroad company, on the ground that the court had not jurisdiction thereof, because the charter of the defendant's company provides the manner, in which a party injured by the construction of its road shall proceed to recover damages, where the complaint does not allege that the cause of action arose from the construction of said road. *Cole* v. *Carolina C. R. Co.*, 74 *N. Car.* 587.

87. The motion to dismiss. — In a suit for damages caused by constructing and maintaining a railroad in front of plaintiff's premises, the company moved to dismiss upon the ground that plaintiff had not made out a case. *Held*, that the ground of the motion was too general to raise the point that, even if plaintiff had the legal title and had received rents, yet not being in the actual occupancy of the premises he cannot maintain the action. *Dean* v. *Metropolitan El. R. Co.*, 119 *N. Y.* 540, 23 *N. E. Rep.* 1054, 30 *N. Y. S. R.* 81.—REVIEWED IN Bruen *v.* Manhattan R. Co., 39 N. Y. S. R. 86, 20 Civ. Pro. 127, 14 N. Y. Supp. 285.

5. *Counsel's Address to the Jury.*

88. Discretionary powers of the court.—An attorney, in his argument to the jury, should confine his discussion to the issues and the evidence in the case, and it is the duty of the trial court to see that

he does so. *Missouri Pac. R. Co.* v. *Metzger*, 35 *Am. & Eng. R. Cas.* 148, 24 *Neb.* 90, 38 *N. W. Rep.* 27.

A verdict will be set aside for unwarranted remarks of counsel to the jury in closing, unless the presiding justice finds, as matter of fact, that the jury were not influenced thereby, or that the effect upon their minds was wholly removed by a retraction of counsel, the charge of the court, or in some other way. *Bullard* v. *Boston & M. R. Co.*, 27 *Am. & Eng. R. Cas.* 117, 64 *N. H.* 27, 5 *Atl. Rep.* 838.—DISTINGUISHING Forsyth *v.* Boston & A. R. Co., 103 Mass. 510; Frost *v.* Grand Trunk R. Co., 10 Allen (Mass.) 387. REVIEWING Jacques *v.* Bridgeport Horse R. Co., 41 Conn. 61.

89. What arguments are proper.—It was proper for plaintiff's counsel to say, in his argument to the jury, that the burden of proof was on defendant to acquit itself of negligence; that the law was reasonable, because if it were otherwise plaintiff would be compelled to put defendant's employés on the stand, and prove by them their own negligence. It was also proper for such counsel to say: "Don't you know, gentlemen of the jury, that fast running was the cause of the killing of plaintiff's mules?" *Birmingham Mineral R. Co.* v. *Harris*, 98 *Ala.* 326, 13 *So. Rep.* 377.

The natural bias of relatives, or servants, or employés, is matter for legitimate comment by counsel before the jury, whether such witnesses be introduced by one side or the other. *Central R. Co.* v. *Mitchell*, 1 *Am. & Eng. R. Cas.* 145, 63 *Ga.* 173.

Where the record of proceedings appropriating the right of way for a railroad is offered in evidence, opposite counsel have a right in their argument to comment on any portion of such record. *Kostendader* v. *Pierce*, 37 *Iowa* 645.

An advocate, however unrestricted he may and ought to be in the use of all the forms of rhetoric, such as invective, satire, ridicule, or humor, and every variety of illustration drawn from the facts in evidence or from facts hypothetically assumed, ought not to be allowed to make himself a witness, and state facts within his own knowledge touching the case under discussion. *Loyd* v. *Hannibal & St. J. R. Co.*, 53 *Mo.* 509, 12 *Am. Ry. Rep.* 474.

It is no doubt the duty of the trial judge to prevent such departures from the proper and legitimate sphere of the counsel; but the line of discrimination between legitimate illustration and comment, and the introduction of facts not in evidence, and having no bearing on the question at issue, is not always clear, since it is always in the power of rhetorical ingenuity and fancy to put facts not in evidence hypothetically to the jury and by comments on such supposed facts do as much harm to the adverse party through the medium of innuendoes or insinuation as by plain and unequivocal assertions of their truth. These difficulties, however, were remediable under the old system of charging juries at the close of the case. That power is not now given to the courts, for reasons doubtless satisfactory to the legislature. *Loyd* v. *Hannibal & St. J. R. Co.*, 53 *Mo.* 509, 12 *Am. Ry. Rep.* 474.

The court cannot sum up the evidence, or comment on it, or draw the attention of the jury to the real points in issue, in any other way than by written instructions prepared and given to the jury before the arguments of counsel. To interfere with the latter without infringing on the province assigned by the legislature to the courts is therefore a delicate matter. *Loyd* v. *Hannibal & St. J. R. Co.*, 53 *Mo.* 509, 12 *Am. Ry. Rep.* 474.

It is not error to permit counsel, in the closing argument, to reply to an argument made by the adversary on a question of law applicable to the case, and to comment upon authorities applicable to the question. *Texas & P. R. Co.* v. *Garcia*, 21 *Am. & Eng. R. Cas.* 384, 62 *Tex.* 285.

It is not error, in an action for personal injuries, for counsel to allude in his argument to the jury to the fact that plaintiff had a wife and four children. *San Antonio & A. P. R. Co.* v. *Robinson*, 73 *Tex.* 277 11 *S. W. Rep.* 327.

90. What are improper, generally.—Where a company is sued for an injury at a crossing, and the negligence charged is a failure to ring a bell or blow a whistle on approaching the crossing, it is not ground for exception that the court refused to allow counsel for plaintiff to comment on the fact, which was made known to the jury by viewing the ground, that the company had stationed a flagman at the crossing since the accident. *Menard* v. *Boston & M. R. Co.*, 150 *Mass.* 386, 23 *N. E. Rep.* 214. — REVIEWED IN Shinners *v.* Prop'rs of Locks, etc., 154 Mass. 168.

Where a company is sued for injuries to a minor which it had employed, it is not

proper for counsel for plaintiff to say in his argument to the jury that it is against public policy to allow minors to be employed at such work, where they have no outside support, as it is calculated to increase pauperism. *Gulf, C. & S. F. R. Co.* v. *Jones*, 73 *Tex.* 232, 11 *S. W. Rep.* 185.

Remarks by plaintiff's attorney, in an action against a company for personal injuries, that, "if it should so be that the sum you fix as just and reasonable should be regarded by the court as excessive, it is our privilege to throw off as we see fit to" and "Money may minister somewhat to his comfort, and shall not he have it from a company that is able to pay?" are improper and prejudicial to defendant's rights. *Waterman* v. *Chicago & A. R. Co.*, 52 *Am. & Eng. R. Cas.* 592, 82 *Wis.* 613, 52 *N. W. Rep.* 247, 1136.

91. Statements unsupported by the evidence. — In an action against a company to recover for injuries to stock, counsel for plaintiff, appellee in this court, speaking, in his concluding argument before the jury, of an engineer who was in charge of defendant's train at the time of the injury, and who had been examined as a witness on behalf of defendant, said: "Engineers on railroads, like this engineer, have to emigrate if they don't conform to the wishes of their employers, and testify as their employers' interests require; they testify with a halter around their necks." *Held*, that if this had been stated as an inference or opinion, based on the witness's connection with the railroad, and with the act complained of as negligent, counsel would have kept within legitimate bounds. But having been stated as a fact, not as an inference or opinion, and the bill of exceptions, which purports to set out all the evidence, not showing any fact or circumstance in evidence which justified such a line of argument, it should have been ruled out by the court, and the jury cautioned against allowing it to have any influence with them; and the failure of the court so to rule is reversible error. *East Tenn., V. & G. R. Co.* v. *Bayliss*, 22 *Am. & Eng. R. Cas.* 596, 75 *Ala.* 466.

An attorney in his argument to the jury has no right to declare that if the employés of a railway company had testified otherwise than they did they would be discharged, when such statement is not supported by any evidence. *Moody* v. *Alabama G. S. R. Co.*, (*Ala.*) 10 *So. Rep.* 905.

An attorney will not be permitted, in the argument of a case to the jury, to make assertions or insinuations of the existence of facts not in evidence. If he does so the verdict may be set aside; but to authorize the setting aside of the verdict the statements must have been of such a character as may reasonably be supposed to have influenced the jury. *Festner* v. *Omaha & S. W. R. Co.*, 20 *Am. & Eng. R. Cas.* 238, 17 *Neb.* 280, 22 *N. W. Rep.* 557.

Where the evidence, in an action for injuries resulting from negligence in the operation of an electric car, shows that the motorman was discharged about three weeks after the accident, but does not show the reason of his discharge, it is not improper for counsel for plaintiff to draw the inference from such fact, and argue it to the jury, that the discharge of the motorman was on account of his carelessness at the time of the accident. *Sears* v. *Seattle Con. St. R. Co.*, 6 *Wash.* 227, 33 *Pac. Rep.* 389, 1081.

Where an engineer testifies that an engine was only run from four to six miles an hour, and that he did not recollect having stated that he was obliged to run faster to do the work, evidence that he did so state some time after the accident is only admissible for the purpose of discrediting his testimony, and it is error to permit counsel to treat it, in the argument to the jury, as original evidence upon the question of the speed of the train. *Heddles* v. *Chicago & N. W. R. Co.*, 39 *Am. & Eng. R. Cas.* 645, 74 *Wis.* 239, 42 *N. W. Rep.* 237.

92. Expressions calculated to inflame the minds of the jurors.* — On the trial of an action to recover for the death of plaintiff's intestate, plaintiff's counsel, in his closing address to the jury, said: "How can you go out and explain to your neighbors and friends if you find a verdict for this railroad company?" Defendant objected, and the court said: "It is a matter of argument. If counsel desire to make such remarks, I will overrule the objection and let them take chances." Nothing objectionable was thereafter said. *Held*, that the court could not say that the remark was ground of error, as it was not advised as to what preceded and followed the words complained of, and what

* Attempts to excite prejudice against railways and corporations, see 46 AM. & ENG. R. CAS. 153, *abstr.*

caused the same, and that it is improper for counsel to make appeals to the approval or disapproval of the public as a consideration to weigh with the jury. *Lake Erie & W. R. Co.* v. *Middleton*, 142 *Ill.* 550, 32 *N. E. Rep.* 453.

Where the action is to recover for the death of an employé, it is error to allow plaintiff's counsel to read to the jury in his closing argument a newspaper article, intended to cast a stigma upon all railroads on account of a fancied recklessness in caring for the lives of their employés. *Chicago & A. R. Co.* v. *Bragonier*, 13 *Ill. App.* 467.

Counsel for plaintiff in the course of his argument used this language: "The conduct of the conductor and the railroad employés shows that they have become like the corporation for whom they work; they have become so hard-hearted and unfeeling that they have no charity for their fellowman." The statement was objected to at the time by counsel for defendant, but the court overruled the objection, with the observation that the language was fairly justified by the evidence. *Held*, that there was not such an abuse of the discretion vested in the court concerning the argument of counsel as to justify a reversal of the judgment. *Lake Erie & W. R. Co.* v. *Close*, 5 *Ind. App.* 444, 32 *N. E. Rep.* 588.

In an action against a company to recover for personal injuries, the court will not set aside the verdict because counsel for plaintiff stated, in his argument to the jury, that the fireman in charge of the train was susceptible to the attractions of women and had been allured from his duty; that on a former trial of the case the jury found that there was no negligence on the part of plaintiff's parents; that there was the same state of facts at the former as in the existing trial; that there was a conspiracy between two of defendant's witnesses to defeat the plaintiff's recovery, although there was no testimony on the subject; that the attorneys for defendant, the Wabash system and Vanderbilt system, get $15,000 a year, and appealed to the prejudices of the jury with regard to Vanderbilt and Gould. *Battishill* v. *Humphreys*, 29 *Am. & Eng. R. Cas.* 411, 34 *Am. & Eng. R. Cas.* 69, 64 *Mich.* 514, 38 *N. W. Rep.* 581, 14 *West. Rep.* 863.

It is not proper for counsel upon either side to attempt to play either upon the pride or prejudices of the jury; but where the attorney for the losing party is the aggressor in matters of this kind, thereby challenging a reply from his opponent, the court is not called upon to punish the latter's client for an indiscretion of his counsel thus called out in the heated trial of an important cause, unless it appears quite plainly that the verdict was influenced thereby. *Sweet* v. *Michigan C. R. Co.*, 48 *Am. & Eng. R. Cas.* 395, 87 *Mich.* 559, 49 *N. W. Rep.* 882.

Counsel for plaintiff, on the refusal of the court to permit certain cross-examination of one of defendant's witnesses, remarked that the attorneys on the other side were afraid that the witness would tell. *Held*, that the natural tendency of the language used was to increase in the minds of the jurors a prejudice which common experience shows is very apt to exist, and that trial courts should set aside verdicts where such means have been resorted to. *Thompson* v. *Toledo, A. A. & N. M. R. Co.*, 91 *Mich.* 255, 51 *N. W. Rep.* 995.

Plaintiff's counsel, in summing up a case, after referring to the "utter disregard of the rights of the private citizen by corporations," was permitted to read, under objection and exception, an article from a newspaper which purported to be an account of the killing of a boy by coming in contact with an electric wire, negligently left swinging for months from a pole in a city street, and which commented on the neglect and incompetency of the city officials. *Held*, error; that it was the duty of the court to interpose and prevent the reading. *Williams* v. *Brooklyn El. R. Co.*, 46 *Am. & Eng. R. Cas.* 149, 126 *N. Y.* 96, 26 *N. E. Rep.* 1048, 36 *N. Y. S. R.* 504; *reversing* 57 *Hun* 591, *mem.*, 32 *N. Y. S. R.* 702, 10 *N. Y. Supp.* 929.

While it is the privilege of counsel, in addressing a jury, to comment upon every pertinent matter of fact bearing upon the questions the jury have to decide, this privilege does not justify the introduction of matters wholly immaterial and irrelevant, and which the jury have no right to consider; and where such comments are permitted after proper objection, and they tend to prejudice the minds of the jury, this is legal error. *Williams* v. *Brooklyn El. R. Co.*, 46 *Am. & Eng. R. Cas.* 149, 126 *N. Y.* 96, 26 *N. E. Rep.* 1048, 36 *N. Y. S. R.* 504; *reversing* 57 *Hun* 591, *mem.*, 32 *N. Y. S. R.* 702, 10 *N. Y. Supp.* 929.

References by counsel, in addressing a jury, to the wealth or poverty of the parties, to the strength of municipal or private corporations, and to the comparative helplessness of an individual citizen, are proper when made in a spirit of fairness, and for the purpose of stimulating the jury to a careful and conscientious discharge of their duty. *Henry* v. *Huff*, 143 *Pa. St.* 548, 22 *Atl. Rep.* 1046.

But when such references are made, and the changes are rung upon them, for the evident purpose of inflaming the passions and prejudices of jurors, and leading them to disregard their duty, the actual facts, and the legal rights of the parties in the particular case, it is the duty of the judge, upon request, to interfere. *Henry* v. *Huff*, 143 *Pa. St.* 548, 22 *Atl. Rep.* 1046.

In an action against a railroad to recover for injuries to a minor employé, where it was alleged that he was employed as a coal heaver, and without experience and against his will was directed to perform the duties of a switchman, it was reversible error to allow plaintiff's counsel, in his closing address to the jury, to make an improper appeal to their prejudices by telling them that it was against public policy to allow minors to be employed in such dangerous positions, and "calculated to increase the pauperism of the country, and means that you and I and the country have them to support." Especially should a verdict for plaintiff be set aside in such case where the weight of evidence shows that plaintiff was not without experience as a switchman and did not object to the work. *Gulf, C. & S. F. R. Co.* v. *Jones*, 73 *Tex.* 232, 11 *S. W. Rep.* 185.

93. Reading from law books to the jury. — In an action for a personal injury, counsel for plaintiff, as part of his argument addressed to the court upon the law of the case, cited as authority a certain reported case, and read a portion of it. Counsel for defendant objected to the reading in the hearing of the jury, and asserted that it was done for the purpose of affecting the minds of the jurors rather than to enlighten the court, but the objection was overruled. *Held*, that the practice of reading decisions in damage cases is not to be commended, but it is not error to permit it in the argument addressed to the court where the law read is pertinent. *Hastings* v. *Northern Pac. R. Co.*, 53 *Fed. Rep.* 224.

The reading by counsel for plaintiff of the former opinion in a case, accompanied by a statement that the court had then passed upon favorably to plaintiff the question of contributory negligence, is highly improper. *Laughlin* v. *Grand Rapids St. R. Co.*, 80 *Mich.* 154, 44 *N. W. Rep.* 1049.

The practice of counsel of reading from law books when arguing a case to a jury is an exceedingly dangerous one, and should not be indulged in. It is not apparent, in the case at bar, however, that defendant was prejudiced by an act of plaintiff's counsel of the character referred to. *Steffenson* v. *Chicago, M. & St. P. R. Co.*, 48 *Minn.* 285, 51 *N. W. Rep.* 610.

Where it appears that the injury was caused in another state, it is improper, after the introduction of a statute of that state, adopting the common law "as modified by constitutional and statutory law, judicial decision, etc.," to allow counsel to read to the jury decisions of the courts of such state as to the liability of railroad companies in certain cases, when it appears that the law of the case does not differ from the law of the state where the action was brought. *Slaughter* v. *Metropolitan St. R. Co.*, 58 *Am. & Eng. R. Cas.* 604, 116 *Mo.* 269, 23 *S. W. Rep.* 760.

It seems, it is the function of the trial court to instruct the jury upon the law, and where counsel, in summing up, undertake to read the law to the jury, the court may properly interpose to prevent it; but if it permits this to be done, and the law is correctly laid down in the extract read, such reading does not constitute legal error nor furnish a ground of exception. *Williams* v. *Brooklyn El. R. Co.*, 46 *Am. & Eng. R. Cas.* 149, 126 *N. Y.* 96, 26 *N. E. Rep.* 1048, 36 *N. Y. S. R.* 504; *reversing* 57 *Hun* 591, *mem.*, 32 *N. Y. S. R.* 702, 10 *N. Y. Supp.* 929.

It seems, also, that the reading by counsel from a decision in another case, for the purpose of bringing before the jury the facts of that case, or the amount of the verdict, or the comments of the judge on the facts, in order to influence the jury in deciding upon the facts in the case on trial or in fixing the amount of damages, may not be permitted. *Williams* v. *Brooklyn El. R. Co.*, 46 *Am. & Eng. R. Cas.* 149, 126 *N. Y.* 96, 26 *N. E. Rep.* 1048, 36 *N. Y. S. R.* 504; *reversing* 57 *Hun* 591, *mem.*, 32 *N. Y. S. R.* 702, 10 *N. Y. Supp.* 929.

Where a company is sued for wrongfully causing death, to allow the attorney for the plaintiff to read adjudicated cases, one where a verdict for $15,000 was rendered, and another for $10,000, is not such an abuse of the discretion of the trial court as will warrant a reversal, especially where the jury returns a verdict for only $6000. *Missouri Pac. R. Co.* v. *Lamothe*, 76 *Tex.* 219, 13 *S. W. Rep.* 194.

In an action against a company for ejecting a passenger, plaintiff's counsel read from law books on the subject of carriers of passengers, and in his concluding argument stated that conductors would often take up passengers' tickets, and afterwards demand payment of fare. *Held*, that the control of such things rested largely in the discretion of the trial judge. *Texas & P. R. Co.* v. *Wills*, 2 *Tex. App.* (*Civ. Cas.*) 700.

While it is the court's province to give the law to the jury, and the jury's to deal with the facts, it is an unwarrantable restriction upon the legitimate scope of argument, if not a flagrant usurpation, for a trial court to prohibit counsel, in Virginia, at least, from referring to and reading from recognized authorities, and especially from decisions in similar cases by courts of last resort. *Norfolk & W. R. Co.* v. *Harman*, 83 *Va.* 553, 8 *S. E. Rep.* 251.

Upon the trial of an action for damages, it is error for the court to permit counsel for plaintiff, over the objection of defendant, in argument, to read to the jury, upon the question of the measure of damages, extracts from reported cases, showing large damages held not excessive. *Ricketts* v. *Chesapeake & O. R. Co.*, 41 *Am. & Eng. R. Cas.* 42, 33 *W. Va.* 433, 7 *L. R. A.* 354, 10 *S. E. Rep.* 801.

Whether counsel, in argument before a jury, shall read law from law books and reported cases, and comment thereon, is within the discretion of the court, subject to review in case of abuse of discretion. If the law read be good law, and relevant to the case, it is clearly not a ground of error. If bad law, or irrelevant to the case and calculated to mislead the jury, yet, if the court has given instructions correctly stating the law on the subject, it would not be reversible error; but in the absence of such instructions to counteract the danger, it would be reversible error. *Gregory* v. *Ohio River R. Co.*, 37 *W. Va.* 606, 16 *S. E. Rep.* 819.

94. Right to open and close the argument. — A plea which admits that plaintiff was injured by the train of defendant, but denies that defendant was guilty of negligence, and asserts that it used ordinary care and reasonable diligence, and that the negligence of plaintiff caused the injury, is not a plea of justification which entitles defendant to open and conclude the argument. *Georgia R. Co.* v. *Williams*, 74 *Ga.* 723.

In trespass to the person, where no general issue or traverse of the declaration is filed, but only pleas of confession and avoidance, defendant has the right to open and close, both in the trial and in the argument to the jury. *Chicago, B. & Q. R. Co.* v. *Bryan*, 90 *Ill.* 126.—FOLLOWING Harvey *v.* Ellithorpe, 26 Ill. 418; Kells *v.* Davis, 57 Ill. 261.

VI. INSTRUCTIONS TO THE JURY.

1. *Questions of Law and Fact.*

a. Questions of Law for the Court.

95. In general.*—The reasonableness or unreasonableness of a city ordinance regulating the speed of trains is a question of law for the court and not for the jury, unless it depends, in the opinion of the court, on the existence of particular facts which are disputed. *Metropolitan St. R. Co.* v. *Johnson*, 90 *Ga.* 500, 16 *S. E. Rep.* 49. — CRITICISING Western & A. R. Co. *v.* Young, 81 Ga. 418.

What degree of care a common carrier must observe for the safety of a passenger in order to exonerate it from liability for personal injury to the passenger is a question of law. *Chicago & A. R. Co.* v. *Pillsbury*, 31 *Am. & Eng. R. Cas.* 24, 123 *Ill.* 9, 14 *N. E. Rep.* 22, 11 *West. Rep.* 757.

It is not for a jury to determine whether the work done by a plaintiff, under the orders of a station agent who had no authority to contract for a railroad company, was beneficial to the company, which, acting through its proper officers, had the right to determine whether or not it wanted the services of a porter at the station. *Willis* v. *Toledo, A. A. & N. M. R. Co.*, 72 *Mich.* 160, 40 *N. W. Rep.* 205.

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* Functions of court and of jury in negligence cases, see note, 15 L. R. A. 332.

When contributory negligence is for court and when for jury, see note, 8 AM. ST. REP. 849.

Functions of court and jury in determination of proximate and remote cause, see note, 36 AM. ST. REP. 851.

Plaintiff brought an action for personal injuries occurring in the state of Kansas, and the company pleaded that, by the laws of Kansas, the acts charged against it did not constitute negligence, and also that by the laws of Kansas plaintiff was guilty of contributory negligence. Plaintiff introduced evidence that the common law obtained in Kansas, and that the law governing the case was the same as if the cause of action had originated in the state where the action was brought. *Held*, that it was the right of the trial court, upon proper requests, to declare the law applicable to the case. *Slaughter* v. *Metropolitan St. R. Co.*, 58 *Am. & Eng. R. Cas.* 604, 116 *Mo.* 269, 23 *S. W. Rep.* 760.

Where evidence is adduced showing a tender of freight at a place other than the proper destination, the question of tender is one of law, and the court is not required to submit that issue to the jury. *Gulf, C. & S. F. R. Co.* v. *Clark*, (*Tex.*) 18 *Am. & Eng. R. Cas.* 628.

In a mandamus proceeding to compel a company to maintain a depot and to provide other facilities for the transaction of business at a certain place, where the facts are conceded or found, the question of what are proper facilities is one of law. *Northern Pac. R. Co.* v. *Territory ex rel.*, 29 *Am. & Eng. R. Cas.* 82, 3 *Wash. T.* 303, 13 *Pac. Rep.* 604.

96. Where the facts are undisputed.—If upon the facts presented there is any question as to what was the proximate cause of the injury, then the case should go to the jury; but if the undisputed facts show, under well-established rules of law, what the proximate cause is, then the court should declare it. *Pike* v. *Grand Trunk R. Co.*, 38 *Am. & Eng. R. Cas.* 336, 39 *Fed. Rep.* 255.

The rule that undisputed facts present a question of law rather than of fact is more adapted to questions of contract than to questions of tort. In negligence cases the rule applies only when the facts are undisputed, and the conclusion to be drawn from the facts is so far indisputable that men could not reasonably differ in the interpretation of them. *Lasky* v. *Canadian Pac. R. Co.*, 83 *Me.* 461, 22 *Atl. Rep.* 367.

Where all the facts appear in the writings set forth in plaintiff's statement, and none of the papers which are merely referred to but not set out are essential to the cause of action, and the affidavit denies no part of the statement except the inferences from the face of the papers, the case is one for the court to decide upon the statement and affidavit. *People's St. R. Co.* v. *Spencer*, 156 *Pa. St.* 85, 27 *Atl. Rep.* 113.

Where there is no controversy in regard to the facts or inferences that may fairly be drawn therefrom, the question of negligence is one of law for the court to determine. In this case the facts proven did not tend in any clearly appreciable degree to sustain plaintiff's claim, and the evidence was properly excluded from the jury by the court. *Woolwine* v. *Chesapeake & O. R. Co.*, 50 *Am. & Eng. R. Cas.* 37, 36 *W. Va.* 329, 15 *S. E. Rep.* 81.

97. Construction of writings.—Where a company is sued for killing an animal within an incorporated place, and the company defends on the ground that the animal was running at large in violation of an ordinance which was put in evidence, the construction of the ordinance is for the court and not for the jury. *Denver & R. G. R. Co.* v. *Olsen*, 4 *Colo.* 239.

Where a contract of subscription to stock is ambiguous, it is the duty of the court to determine its meaning from the evidence and to instruct the jury as to such meaning. *Ogden* v. *Kirby*, 79 *Ill.* 555.

98. Reasonableness of rules of company.—The reasonableness of a rule prescribed by a company for the government of its business is purely a question of law to be decided by the court, and not a question of fact to be passed upon by juries. *South Fla. R. Co.* v. *Rhodes*, 37 *Am. & Eng. R. Cas.* 100, 25 *Fla.* 40, 5 *So. Rep.* 633, 3 *L. R. A.* 733.

A company has a rule requiring passengers traveling between certain points on its road to surrender their tickets before leaving the last station before the place of destination, without receiving any check or other evidence that fare has been paid. *Held*, that the reasonableness of such regulation is a question of law, and it is error to leave it to the jury. *Vedder* v. *Fellows*, 20 *N. Y.* 126.

99. Measure of damages.—What circumstances will mitigate or aggravate a wrong done is a question of law. Hence, in cases arising under Mo. Damage Act, § 3 (Rev. St. 1879, § 2123), if any such circumstances exist they should be pointed out by proper instructions, and the jury

should be restricted to a consideration of those so designated. *Rains* v. *St. Louis, I. M. & S. R. Co.*, 5 *Am. & Eng. R. Cas.* 610, 71 *Mo.* 164. — DISTINGUISHED IN Smith *v.* Wabash, St. L. & P. R. Co., 31 Am. & Eng. R. Cas. 331, 92 Mo. 359.

The measure or rule of damages is always a question of law, and is never to be submitted to the jury as a question of fact. *Wilburn* v. *St. Louis, I. M. & S. R. Co.*, 36 *Mo. App.* 203.

b. Questions of Fact for the Jury.

100. In general.—Where it is sought to charge a railroad with damages resulting from the incompetency of its agent, it is for the jury to say whether the company used reasonable precautions to ascertain the agent's competency, but was deceived by his fraudulent practices. *Taylor* v. *Western Pac. R. Co.*, 45 *Cal.* 323.

Whether or not an encroachment upon a public or private right is a nuisance is a question for the jury, or the court sitting as such. *People* v. *Park & O. R. Co.*, 76 *Cal.* 156, 18 *Pac. Rep.* 141.

Whether a person's capacity to earn money and to labor successfully would be diminished from old age, and how much such diminution would be, depends considerably upon the character of the labor and the expectation of life of the person, and this question should be submitted to the jury. *Georgia R. Co.* v. *Pittman*, 26 *Am. & Eng. R. Cas.* 474, 73 *Ga.* 325. — DISTINGUISHED IN Smith *v.* Central R. & B. Co., 41 Am. & Eng. R. Cas. 490, 82 Ga. 801, 10 S. E. Rep. 111.

The wisdom of the policy of a company in filling all vacancies by promotion from lower positions is a question of fact for the jury. *Evansville & T. H. R. Co.* v. *Guyton*, 33 *Am. & Eng. R. Cas.* 311, 115 *Ind.* 450, 14 *West. Rep.* 301, 17 *N. E. Rep.* 101.

Whether cars which were being placed in procession on a street, between the hours of 5 and 9 P. M., with the purpose of being drawn away to their regular place of destination, were "in actual service" within the meaning of an ordinance of the city, and therefore not required to be fastened, as said ordinance required them to be when left standing on the street for a longer period than an hour, could only be determined by observation as matter of fact, and was therefore a question for the jury and not for the court. *Baltimore & O. R. Co.* v. *Fitzpatrick*, 35 *Md.* 32.

Whether a corporation has finished its road and put it into full operation is a question for the jury. *Toledo & A. A. R. Co.* v. *Johnson*, 49 *Mich.* 148, 13 *N. W. Rep.* 492.

Whether a subscription made by a county to railroad stock was made under the company's charter, or under the general railroad law which vested the stock in taxpayers to the extent of special taxes paid in satisfaction of the subscription, is a question of fact for the jury, to be determined from all the facts in the case. *Mastin* v. *Pacific R. Co.*, 83 *Mo.* 634.

Whether a regulation of a company is reasonable, and therefore valid, is a question for the jury and not for the court. *Compton* v. *Van Volkenburgh*, 34 *N. J. L.* 134.—FOLLOWING Morris & E. R. Co. *v.* Ayres, 29 N. J. L. 393.

Where the evidence shows that a general manager of a company has entire control and direction of its business, and is charged with the duty of preparing litigation in which the company is interested for trial, it is a question for the jury whether it is within the legitimate scope of his power to institute a prosecution for perjury against a witness who had appeared in an action against the company. *Gulf, C. & S. F. R. Co.* v. *James*, 73 *Tex.* 12, 10 *S. W. Rep.* 744.—QUOTING Ricord *v.* Central Pac. R. Co., 15 Nev. 176.

101. Questions of negligence, generally.—Particular means or measures of diligence appropriate for use by each party should be left to the jury. *Smith* v. *Savannah, F. & W. R. Co.*, 42 *Am. & Eng. R. Cas.* 105, 84 *Ga.* 698, 11 *S. E. Rep.* 455.

Where the action is to recover for injuries received at a crossing by being struck by a locomotive, the question of the company's negligence in backing the locomotive at night without a light on it is for the jury. *Chicago & N. W. R. Co.* v. *Stube*, 15 *Ill. App.* 39.

The question whether a plan adopted by a company for the movement of its trains is consistent with due care is for the jury. *Illinois C. R. Co.* v. *Neer*, 31 *Ill. App.* 126.

Negligence having been denied, whether there was any, and the degree thereof, were questions of fact for the jury, to be determined by them under the direction of the court. *Paducah & E. R. Co.* v. *Letcher*, (*Ky.*) 12 *Am. & Eng. R. Cas.* 61.—QUOTING Louisville & N. R. Co. *v.* Collins, 2 Duv.

(Ky.) 115; Louisville, C. & L. R. Co. *v.* Mahony, 7 Bush (Ky.) 237.

An accident happened a little after sunset, and there was evidence that the atmosphere was misty. Both plaintiff and a passenger on the car testified that they did not notice any lights on the barrier. *Held*, that the questions whether it was dark, and whether the barrier was lighted, were properly left to the jury. *Powers* v. *Boston*, 154 *Mass.* 60, 27 *N. E. Rep.* 995.

Plaintiff, in leaving a train, passed over a sidewalk which it was the duty of the company to keep in repair, and stepped in a narrow depression worn by vehicles passing over it, breaking her ankle. *Held*, that the question of the company's negligence in failing to repair the sidewalk was properly left to the jury. *Bateman* v. *New York C. & H. R. R. Co.*, 47 *Hun* 429, 14 *N. Y. S. R.* 454.

It is the province of the jury, in the exercise of reason and common sense, either by the aid of or without expert testimony, to determine within what distance a train might have been stopped under given circumstances. *Clark* v. *Wilmington & W. R. Co.*, 48 *Am. & Eng. R. Cas.* 546, 109 *N. Car.* 430, 14 *S. E. Rep.* 43.

Whether the spot where an injury occurred was not so commonly infested with cattle as to require a fence or cattle-guard is a question for the jury. *Wright* v. *Pennsylvania R. Co.*, 3 *Pittsb.* (*Pa.*) 116.—APPLYING Sullivan *v.* Philadelphia & R. R. Co., 30 Pa. St. 234.

102. —— of tortious or wilful acts. — In trespass against an employer for an injury caused by his servant, it is for the jury to decide whether the act was wilful or careless; if wilful, the employer would not be answerable. *Wood* v. *Detroit City St. R. Co.*, 19 *Am. & Eng. R. Cas.* 129, 52 *Mich.* 402, 18 *N. W. Rep.* 124.

Whenever the justification of an act alleged to be wrongful and injurious is founded on the exercise of authority, whether that authority be incident to the official character and duty of the party exercising it, or arise from the misconduct of the opposite party and the necessities of the case, the question of the excess of such authority is to be determined by the jury upon the evidence submitted for their consideration, and not by the court. *Hilliard* v. *Gould*, 34 *N. H.* 230.

A corporation may be held liable for torts, such as slander, libel, and malicious prosecution, however foreign they may be to the objects of its creation or beyond its granted powers. And this liability extends to the tortious acts of its servants done in its service. *Hussey* v. *Norfolk Southern R. Co.*, 98 *N. Car.* 34, 2 *Am. St. Rep.* 312, 3 *S. E. Rep.* 923.—FOLLOWING Gruber *v.* Washington & J. R. Co., 92 N. Car. 1; Philadelphia, W. & B. R. Co. *v.* Quigley, 21 How. (U. S). 202. NOT FOLLOWING Orr *v.* Bank of U. S., 1 Ohio 36; Gillett *v.* Missouri Valley R. Co., 55 Mo. 315. QUOTING Denver & R. G. R. Co. *v.* Harris, 122 U. S. 597.

The corporation and its servant by whose act the injury was done may be joined in the same action. Whether the act was committed by the servant in the service of the corporation, or for his own purpose, or whether the corporation authorized or participated in it, are questions of fact for the jury. *Hussey* v. *Norfolk Southern R. Co.*, 98 *N. Car.* 34, 2 *Am. St. Rep.* 312, 3 *S. E. Rep.* 923.

Where a master claims exemption from liability for the tortious act of his servant while apparently engaged in executing his orders, upon the ground that the servant was in fact pursuing his own purpose without regard to his master's business, and was acting wilfully and maliciously, it is ordinarily a question to be determined by the jury. *Rounds* v. *Delaware, L. & W. R. Co.*, 64 *N. Y.* 129, 21 *Am. Rep.* 597; *affirming* 3 *Hun* 329, 5 *T. & C.* 475.—FOLLOWED IN Hoffman *v.* New York C. & H. R. R. Co., 12 J. & S. (N. Y.) 1.

In an action against a company sued for an injury resulting from the tortious act of one of its employés, while apparently engaged in executing its orders, the company set up the defense that the employé was about his own business at the time, without any reference to the business of the company, and further was acting wilfully and maliciously. *Held*, that it was proper to leave the case to the jury. *Hoffman* v. *New York C. & H. R. R. Co.*, 12 *J. & S.* (*N. Y.*) 1. —FOLLOWING Jackson *v.* Second Ave. R. Co., 47 N. Y. 274; Rounds *v.* Delaware, L. & W. R. Co., 64 N. Y. 129.

Whether a servant was acting in the course of his employment when he committed a tortious act is a question of fact. *Redding* v. *South Carolina R. Co.*, 3 *So. Car.* 1.

103. Questions of contributory negligence. — Whether in a given case due diligence requires that a train should

leave on schedule time, or whether persons upon it not as passengers should alight from it before the time of departure fixed by the schedule, or whether when a train is starting, or about to start, the persons passing in front of it should see to it that the train is not moving, or about to move, and if so, what degree of diligence they should employ to ascertain whether it is starting, or about to start, are all questions of fact for the jury to determine. *Harris* v. *Central R. & B. Co.*, 30 *Am. & Eng. R. Cas.* 581, 78 *Ga.* 525, 3 *S. E. Rep.* 355.

Whether or not the continuation or permanency of disabilities or injuries caused to plaintiff by defendant's negligence were the result of plaintiff's own negligence is solely a question for the jury. *Rayburn* v. *Central Iowa R. Co.*, 74 *Iowa* 637, 35 *N. W. Rep.* 606, 38 *N. W. Rep.* 520.

Where the evidence presents a conflict as to the powers and duties of a brakeman it is proper to submit the question to the jury. *Galloway* v. *Chicago, R. I. & P. R. Co.*, 58 *Am. & Eng. R. Cas.* 245, 87 *Iowa* 458, 54 *N. W. Rep.* 447.

Where such a question has been submitted to the jury it is not erroneous to instruct them further that if the brakeman told a falsehood to the person injured as to the location of the train, and thus deceived him as to the rate of speed, it might excuse the rashness of the act of the latter. *Galloway* v. *Chicago, R. I. & P. R. Co.*, 58 *Am. & Eng. R. Cas.* 245, 87 *Iowa* 458, 54 *N. W. Rep.* 447.

Whether there was in fact apparent danger is a question for the jury, and the belief of the injured person that the act was attended with danger will not be conclusive. *Davis* v. *Louisville, N. O. & T. R. Co.*, 69 *Miss.* 136, 10 *So. Rep.* 450.

It is the province of the trial court to determine, in the first instance, whether a *prima facie* case of negligence has been made out, before submitting the question to the jury; and until a *prima facie* case is made out there can be no question of contributory negligence on the part of the plaintiff. *Simms* v. *South Carolina R. Co.*, 31 *Am. & Eng. R. Cas.* 199, 26 *So. Car.* 490, 2 *S. E. Rep.* 486.

104. Proximate cause. — The question as to what is the direct or proximate cause of an injury is ordinarily not one of science or of legal knowledge, but of fact, for a jury to determine, in view of the accompanying circumstances. *Schumaker* v. *St. Paul & D. R. Co.*, 46 *Minn.* 39, 48 *N. W. Rep.* 559.

It appeared that a train, at the speed allowed by ordinance, could be stopped within forty feet, but that it required 100 feet to stop while at the speed it had when it struck plaintiff's child. *Held*, a question of fact whether the excessive speed was the proximate cause of the injury. *Tobin* v. *Missouri Pac. R. Co.*, (*Mo.*) 18 *S. W. Rep.* 996.

105. Weight and credibility of conflicting evidence.—Where two witnesses testified that the bell was rung, and two witnesses, who were at the scene of the accident, testified that they did not hear it, there was a conflict of evidence, and the question was properly submitted to the jury. *McMarshall* v. *Chicago, R. I. & P. R. Co.*, 80 *Iowa* 757, 45 *N. W. Rep.* 1065.

The weight of the evidence, and the truth of testimony disputed or contradicted on the part of the defense, are to be determined by the jury. *Peterson* v. *Chicago & W. M. R. Co.*, 64 *Mich.* 621, 31 *N. W. Rep.* 548.

Plaintiff sued a street-car company for an assault committed by a car driver. There was a conflict of testimony between the driver and plaintiff, as to the circumstances which resulted in the difficulty; but plaintiff was considerably supported by the evidence of a third party who was upon the platform and saw the altercation, and who was called as a witness for the defendant. *Held*, that the case presented a question of fact to be submitted to the jury, as, if the assault was committed in the manner described by plaintiff, the company was liable. *Scott* v. *Central Park, N. & E. R. R. Co.*, 13 *N. Y. S. R.* 551, 47 *Hun* 634, *mem.*

106. Actions founded on contracts —Waiver.—If a company issues and sells bonds bearing upon their face a certificate signed by persons describing themselves as trustees, that the same are secured by a first mortgage to them in trust for the bondholders, there is no absolute presumption that a purchaser thereof relies upon such certificate; and, in an action upon a note given by him as a part of the consideration of the purchase, the question should be submitted to the jury whether he accepted the bond relying to any extent upon such certificate. *Edwards* v. *Marcy*, 2 *Allen* (*Mass.*) 486.

Plaintiff was employed as superintendent of a railroad, at a fixed salary, the em-

ployment to terminate upon three months' notice in writing. The company leased its road, of which plaintiff had notice, and upon his making complaint that he had accepted the position supposing it to be permanent, his company voted him extra compensation whenever the lessee company should take possession. Plaintiff was paid his regular compensation down to the time the lessee took possession, and also the extra compensation voted. He sued for three months' salary from the date when the lessee took possession, and the case was tried by the judge without a jury. *Held*, that it was error to rule, as a matter of law, that he was entitled to recover, without passing upon the question whether he had waived his right to three months' notice by receiving the extra compensation. *Nashua & L. R. Corp.* v. *Paige*, 15 *Am. & Eng. R. Cas.* 120, 135 *Mass.* 145.

The intent with which a company with knowledge that a lease had been made to a partnership for its benefit, and that covenants in the lease had been assumed for it by the partnership, received an assignment of the lease and occupied the leased premises, is a question for the jury. *Van Schaick* v. *Third Ave. R. Co.*, 38 *N. Y.* 346; *affirming* 49 *Barb.* 409.

Where a company is sued for breach of an oral contract to make an embankment, but where the evidence is conflicting as to the contract, it is for the jury to determine whether there was such a contract. *Morrell* v. *Long Island R. Co.*, 1 *N. Y. Supp.* 65; *reversed on the merits in* 15 *Daly* 127, 22 *N. Y. S. R.* 30, 3 *N. Y. Supp.* 928.

Whether an agent has authority to rescind a contract made for his principal is a question of fact for the jury. *Allegheny Valley R. Co.* v. *Steele*, 1 *Pennyp.* (*Pa.*) 312.

Where defendant's name is signed to a stock subscription list, but he denies having signed it or authorized the signing or that he subsequently ratified it, the questions raised in his defense are the issues in the cause to be submitted to the jury. *Williams* v. *Benet*, 34 *So. Car.* 112, 13 *S. E. Rep.* 97.

107. Actions against carriers of merchandise.—It is a question of fact whether the liability of a common carrier has been undertaken in a particular case. *Tamvaco* v. *Timothy*, 1 *C. & E.* 1.

Defendant company built a short branch road to certain phosphate mines, over lands of the phosphate company, and erected a depot on such lands. The phosphate company objected to the company carrying freights generally, as it caused the public to travel over its lands, whereupon the company refused to carry for plaintiff and he brought suit. *Held*, that the question whether the company was a common carrier over the branch was for the jury. *Avinger* v. *South Carolina R. Co.*, 35 *Am. & Eng. R. Cas.* 519, 29 *So. Car.* 265, 7 *S. E. Rep.* 493.

Where the evidence is conflicting as to whether or not it was the duty of a conductor of defendant's train in which was a car containing potatoes to have put such car on a "Y" from which it could be taken by a train on a connecting road, that question should have been submitted to the jury. *Blodgett* v. *Abbot*, 72 *Wis.* 516, 7 *Am. St. Rep.* 873, 40 *N. W. Rep.* 491.

108. Actions for injuries to passengers.—It is not negligence, as a matter of law, that a passenger should be or remain on the platform of a car for a time, though there be seats inside, in the absence of a law or regulation against it. But it is proper, in such a case, for the court to submit to the jury whether, under all the circumstances, plaintiff was in the exercise of due care when he met with the accident. *Gerstle* v. *Union Pac. R. Co.*, 23 *Mo. App.* 361.

Whether one was on a car as a passenger when pushed off, or was a trespasser and dropped off, is a question of fact for the jury, and not one of law for the court. *Meyer* v. *Second Ave. R. Co.*, 8 *Bosw.* (*N. Y.*) 305.

Plaintiff was riding on a freight train in charge of stock. He went to a hotel at a station for supper, and on returning passed around the engine near the engineer, but was injured by a sudden movement of the train as he was in the act of boarding it. *Held*, that it was for the jury to say whether the engineer saw plaintiff when he passed by to board the train. *Pitcher* v. *Lake Shore & M. S. R. Co.*, 40 *N. Y. S. R.* 896, 61 *Hun* 623, 16 *N. Y. Supp.* 62; *affirmed in* 137 *N. Y.* 568, *mem.*, 50 *N. Y. S. R.* 934, *mem.*, 33 *N. E. Rep.* 339, *mem.*

When there is doubt whether the speed of the train was so rapid as to render it clearly dangerous to get off, the fact is for the jury. *Delaware & H. Canal Co.* v. *Webster*, (*Pa.*) 27 *Am. & Eng. R. Cas.* 160, 6 *Atl. Rep.* 841.

In an action for personal injuries against a street railway, it is proper to submit the

case to the jury where plaintiff testifies that while riding on the back platform of a cable car he told the conductor to stop and let him off at a certain street; that the conductor rang the bell and the car slowed up; that plaintiff stepped down on the lower step, holding his dinner bucket in his right hand, and taking hold of the car handle with his left; that the car did not stop, and just as plaintiff was about to step to the ground the car started at full speed; that plaintiff held on a little bit, and then swung around and fell alongside of the car, and dislocated his shoulder. *Linch* v. *Pittsburgh Traction Co.*, 153 *Pa. St.* 102, 25 *Atl. Rep.* 621.

109. —— to employes. — Where it is controverted whether a pin used in the operation of a derrick was of sufficient size and proper material for the use intended, such question is properly submitted to the jury. *Richmond & D. R. Co.* v. *Weems*, 97 *Ala.* 270, 12 *So. Rep.* 186.

A company failed to fence its track, and a train was thrown from the track by running over an animal, injuring the brakeman. The company defended on the ground that the brakeman knew that the track was not fenced. *Held*, that the question whether he had such knowledge of the danger to which he was exposed as would charge him with contributory negligence is one of fact for the jury, and it is error to grant a nonsuit on the ground that the brakeman knew that the track was not fenced. *Magee* v. *North Pac. Coast R. Co.*, 78 *Cal.* 430, 20 *Pac. Rep.* 709, 21 *Pac. Rep.* 114.—NOT FOLLOWING Sweeney *v.* Central Pac. R. Co., 57 Cal. 15.

Where an employé, while running a handcar, is put in sudden apprehension of a dangerous collision with a locomotive approaching from an opposite direction, and the threatened collision is due alone to the negligence of the company, whether it is rash or reckless to leap from the car, or whether he should have remained upon it, or left it by means less hazardous than jumping, are questions for the jury. *Smith* v. *Wrightsville & T. R. Co.*, 41 *Am. & Eng. R. Cas.* 320, 83 *Ga.* 671, 10 *S. E. Rep.* 361.

Whether an employé giving a signal to a co-employé had a right to have it observed, or to assume that it would be observed, is a question of fact for the jury. *Parker* v. *Georgia Pac. R. Co.*, 83 *Ga.* 539, 10 *S. E. Rep.* 233. — FOLLOWED IN Metropolitan St. R. Co. *v.* Johnson, 90 Ga. 500.

Questions as to the condition of a brake, the length of time it had been out of repair, and whether it had been inspected with due care, were properly submitted to the jury. *Moon* v. *Northern Pac. R. Co.*, 48 *Am. & Eng. R. Cas.* 195, 46 *Minn.* 106, 48 *N. W. Rep.* 679.

In an action for personal injuries to an employé the court instructed the jury that if they found from the evidence that the labor in which plaintiff was engaged was of a dangerous character, of which plaintiff had knowledge, then he could not recover; but the evidence was contradictory as to whether the employment was dangerous or not. *Held*, that a verdict in favor of plaintiff was sustained by sufficient evidence, and would not be set aside. The question of danger was for the jury. *Union Pac. R. Co.* v. *O'Horn*, 24 *Neb.* 775, 40 *N. W. Rep.* 293.

In an action for personal injury received by reason of the reverse lever of a locomotive becoming detached and changing the motion of the engine, and by which it was sent violently against a car upon which the plaintiff was standing, a question was presented as to whether the lever became detached by reason of a defective construction of the "reverse lever," "quadrant," and "dog," or by the want of care of the engineer. *Held*, that the question was a proper one for the jury, there being some evidence of a defect in the operation of the machinery. *Burlington & M. R. Co.* v. *Wallace*, 28 *Neb.* 179, 44 *N. W. Rep.* 223.

Plaintiff, an engineer, was running his train over a single-track road when he discovered another engine approaching him, and being in imminent danger, he reversed his engine and jumped and received the injury sued for. The approaching engine was going to another station for water, the engineer thereof having made application for and received permission to do so. *Held*, that it was proper for the court to submit the question to the jury whether it was within the scope of authority of such engineer to make such application. *Gross* v. *Pennsylvania, P. & B. R. Co.*, 42 *N. Y. S. R.* 808, 62 *Hun* 619, *mem.*, 16 *N. Y. Supp.* 616.

The question as to whether an employé attempted to uncouple cars while they were in motion is a matter to be submitted to the jury, where there is no positive testimony either way. *Meek* v. *New York C. & H. R. R. Co.*, 52 *N. Y. S. R.* 932, *mem.*, 23 *N. Y. Supp.* 420, 69 *Hun* 488.

A special train was sent out, but owing to some oversight in the despatches it collided with a shifting engine, from which the engineer jumped on seeing the special train approaching. The shifting engine went forward with increased speed against the engine of another train and killed the fireman of the latter. The engineer of the special train testified that he was running six to nine miles an hour, and was giving regular signals of his approach. *Held*, that whether the engineer of the shifting engine should have heard these signals, or was too hasty in leaving his engine, were questions for the jury. *Nary* v. *New York, O. & W. R. Co.*, 9 *N. Y. Supp.* 53, 29 *N. Y. S. R.* 630, 55 *Hun* 612, *mem.*; *affirmed in* 125 *N. Y.* 759, *mem.*, 27 *N. E. Rep.* 408, *mem.*

The question of the competency of a telegraph operator seventeen years of age, who is shown to have performed his duty for three or four months satisfactorily and to have been of good intelligence, is for the jury. *Sutherland* v. *Troy & B. R. Co.*, 28 *N. Y. S. R.* 201, 8 *N. Y. Supp.* 83, 54 *Hun* 639, *mem.*; *reversed on another point in* 125 *N. Y.* 737, *mem.*, 35 *N. Y. S. R.* 853, 26 *N. E. Rep.* 609.

Whether the cars upon which a brakeman was working were provided with safe and sufficient brakes is a question of fact. He was not bound to look for hidden defects. *Carpenter* v. *Mexican Nat. R. Co.*, 39 *Fed. Rep.* 315, 17 *Wash. L. Rep.* 630.

110. —— to persons crossing the track.—An ordinance limiting passenger trains to twelve miles an hour, and freight trains to eight miles, was introduced in evidence; but the train which struck plaintiff's team was composed of an engine and caboose. *Held*, that it was for the jury to determine whether it was a passenger or freight train, and for the court to instruct them as to the rate of speed which it might lawfully maintain. *Lake Shore & M. S. R. Co.* v. *Pauly*, 37 *Ill. App.* 203.

The court will not undertake to say to the jury just how many feet from a track a person approaching a crossing should look for approaching trains before attempting to cross such track, but will leave that question to the jury. *Cleveland, C., C. & I. R. Co.* v. *Harrington*, 49 *Am. & Eng. R. Cas.* 358, 131 *Ind.* 426, 30 *N. E. Rep.* 37.

The question of the weight of testimony as to the blowing of the whistle and ringing of the bell is for the jury. *Battishill* v. *Humphreys*, 28 *Am. & Eng. R. Cas.* 597, 64 *Mich.* 494, 31 *N. W. Rep.* 894.

Whether or not a bell was being rung at the time of an accident is, where the evidence is conflicting, a question for the jury. *Hanlon* v. *Missouri Pac. R. Co.*, 104 *Mo.* 381, 16 *S. W. Rep.* 233.

Whether the injury might have been prevented had the bell been rung is also a question for the jury. *Hanlon* v. *Missouri Pac. R. Co.*, 104 *Mo.* 381, 16 *S. W. Rep.* 233.

111. —— to children.—On the trial of an action against a company for causing the death of a child, it is not error to refuse to instruct the jury as to what evidence would evince a willingness on the part of the defendant to inflict the injury. What evidence would show such willingness is a question for the jury. *Evansville & C. R. Co.* v. *Wolf*, 59 *Ind.* 89.

112. —— to property.—The questions to be submitted to the jury were, whether the property of the complaining parties had been injured by the company's use of a street, whether this injury was permanent, and if so, to what damages they were entitled. *Held*, that there was no error in restricting the inquiry to these points. *Guess* v. *Stone Mountain G. & R. Co.*, 28 *Am. & Eng. R. Cas.* 236, 72 *Ga.* 320.

The value of premises for dwelling purposes is a question of fact, in an action for injury to the owner from the unauthorized use of an adjacent highway by a company. *Grand Rapids & I. R. Co.* v. *Heisel*, 10 *Am. & Eng. R. Cas.* 260, 47 *Mich.* 393, 11 *N. W. Rep.* 212.

Whether the construction of a railroad benefits a certain property more than it injures it is a question for the jury. *Jenks* v. *Philadelphia, G. & C. H. R. Co.*, 17 *Phila. (Pa.)* 65.

Whether land was injured by the overflow of water, and the extent thereof, are questions for the jury. *Trinity & S. R. Co.* v. *Schofield*, 72 *Tex.* 496, 10 *S. W. Rep.* 575.

c. Mixed Questions of Law and Fact.

113. What are, generally.—Where the evidence is conflicting, or of such a character that different conclusions may be reasonably drawn therefrom, the case presents a question of fact for the jury under proper instructions. *Wadsworth* v. *Union*

Pac. R. Co., 56 *Am. & Eng. R. Cas.* 145, 18 *Colo.* 600, 33 *Pac. Rep.* 515.

Where it is shown that plaintiff, an employé, was injured by a train running against a boiler which he was repairing, the question whether the company is legally liable is a mixed question of law and fact. *Totten* v. *Pennsylvania R. Co.*, 11 *Fed. Rep.* 564.

What is an extraordinary flood is a question of fact to be determined by the jury, from the evidence, under proper instructions from the court. *Ohio & M. R. Co.* v. *Thillman*, 143 *Ill.* 127, 32 *N. E. Rep.* 529.—APPROVING Houston & G. N. R. Co. *v.* Parker, 50 Tex. 330.

114. Negligence.—Whether the negligence of the superintendent of a repair shop, resulting in injury to a co-employé, was the negligence of the company is a mixed question of law and fact, to be determined by the jury under proper instructions by the court. *Potter* v. *Chicago, R. I. & P. R. Co.*, 46 *Iowa* 399, 16 *Am. Ry. Rep.* 57.—FOLLOWED IN Lane *v.* Burlington & S. W. R. Co., 52 Iowa 18.

When the circumstances surrounding the act complained of are in dispute, the question whether or not there is negligence is a mixed one of law and fact, and the jury in such cases pass on what facts amount to negligence, and assess reasonable damages therefor. *Dawson* v. *Louisville & N. R. Co.*, (*Ky.*) 11 *Am. & Eng. R. Cas.* 134.—QUOTING AND DISTINGUISHING New Orleans, J. & G. N. R. Co. *v.* Statham, 42 Miss. 612.

Negligence being a mixed question of law and fact, it is proper to leave it to the jury to find whether defendant had done or omitted any act which, in the exercise of ordinary care, it was its duty to perform. *Norfolk & W. R. Co.* v. *Burge*, 32 *Am. & Eng. R. Cas.* 101, 84 *Va.* 63, 4 *S. E. Rep.* 21.

115. Other illustrations.—In a proceeding to compel a company to resume the use of an abandoned station, where the question is whether the place is a station within the meaning of the statute, it is a question of mixed law and fact, and a decision by the trial court that upon certain facts found the place was a station may be reviewed on appeal. *State* v. *New Haven & N. Co.*, 41 *Conn.* 134, 6 *Am. Ry. Rep.* 84.

The question whether a contract or agreement entered into between a railroad company and a line of steamers plying between certain points was entered into in good faith, and was legal and binding, or whether such contract constituted an oppressive monopoly, and hence was not legal and binding, is a mixed question of law and fact, and is properly left to the jury. *South Fla. R. Co.* v. *Rhodes*, 37 *Am. & Eng. R. Cas.* 100, 25 *Fla.* 40, 5 *So. Rep.* 633, 3 *L. R. A.* 733.

Where the superintendent of a railroad has made an order as to the management of a particular train, which order will be reasonable or unreasonable according to the circumstances under which it is to be enforced, the question whether in any particular case such order is to be deemed reasonable or unreasonable is a question of mixed law and fact, to be determined by the jury under proper instructions. *Pittsburgh, C. & St. L. R. Co.* v. *Henderson*, 5 *Am. & Eng. R. Cas.* 529, 37 *Ohio St.* 549.

Where, on the trial of an issue respecting the law of another state, the decisions of the courts of that state are given in evidence, it is the province of the jury to determine whether or not such decisions have been made, but it is the duty of the court to construe them and deduce from them the rules of law which they establish. *Alexander* v. *Pennsylvania Co.*, 48 *Ohio St.* 623, 30 *N. E. Rep.* 69.

2. *What Instructions are Proper.*

116. Duty of the court in respect to instructions. — Instructions in an action for personal injuries should be clear and definite as to facts the existence of which would create a liability. *Denver & B. P. Rapid Transit Co.* v. *Dwyer*, 3 *Colo. App.* 408.

Instructions should restrict the jury to the issues on which the case has been tried. *Benton* v. *Chicago, R. I. & P. R. Co.*, 55 *Iowa* 496, 8 *N. W. Rep.* 330.

It is the duty of the court, when there is no evidence of negligence on the part of the company, or there is uncontradicted evidence of negligence on the part of the persons killed or injured contributing directly to the result, so to instruct the jury. *Maher* v. *Atlantic & P. R. Co.*, 64 *Mo.* 267, 17 *Am. Ry. Rep.* 231.

General observations by the judge, on the trial of an action for injuries caused by a defective bridge, as to the high privileges granted to railroad companies by the delegation of the power of eminent domain are not "in respect to matters of fact" within

the meaning of a constitutional provision relative to the duties of judges. *Rembert* v. *South Carolina R. Co.*, 39 *Am. & Eng. R. Cas.* 252, 31 *So. Car.* 309, 9 *S. E. Rep.* 968.

Paschal's Tex. Dig. art. 1464 is mandatory and peremptory. It leaves no discretion to the judge as to whether or not he shall "charge or comment on the weight of evidence," or as to whether or not he shall "submit questions of fact solely to the jury"; but in his charge, questions of law must be separated from questions of fact, and the latter be decided by the jury alone. The statute presumes that the jury is as competent to decide questions of fact as the judge is to determine questions of law. *Texas & P. R. Co.* v. *Murphy*, 46 *Tex.* 356, 13 *Am. Ry. Rep.* 319.

117. What instructions are proper, generally.—Plaintiff sued for injuries received while coupling cars. The court charged that if plaintiff was directed by the yard conductor to go in and make the coupling, and signaled the engineer to stop, which he did, and plaintiff, in the exercise of ordinary care and diligence, was proceeding to shift a coupling pin in order to make the coupling, and the engineer negligently and without notice came back, and plaintiff's hand was caught and injured, then he was entitled to recover. *Held*, that this was not an expression of opinion as to what acts would constitute negligence, and did not exclude from the jury the consideration of whether or not plaintiff, after the engineer started to back, might not, by the exercise of ordinary diligence, have avoided the injury. *Central R. & B. Co.* v. *Neighbors*, 83 *Ga.* 444, 10 *S. E. Rep.* 115.—DISTINGUISHING West End & A. St. R. Co. *v.* Mozely, 79 Ga. 463; Georgia R. Co. *v.* Cole, 77 Ga. 77.

It not appearing that the witness who would ordinarily know the fact in question, and who was one of the employés of the company at the time the cause of the action arose, was inaccessible, or that defendant was ready to produce him, there was no error in calling attention to his absence or non-production, in charging the jury, as a fact to be considered by them in connection with the case. *Atlanta & W. P. R. Co.* v. *Holcombe*, 88 *Ga.* 9, 13 *S. E. Rep.* 751.

In an action for personal injury to an employé, an instruction to the jury that in judging of the credibility of witnesses they should take into consideration, among other things, their "hopes and fears" is not erroneous as intimating that railway employés dare not tell the truth from fear of being discharged. *Hatfield* v. *Chicago, R. I. & P. R. Co.*, 11 *Am. & Eng. R. Cas.* 153, 61 *Iowa* 434, 16 *N. W. Rep.* 336.—DISTINGUISHING Marquette, H. & O. R. Co. *v.* Kirkwood, 45 Mich. 51.

There is no error in the stating by the court to the jury of the defense relied upon by the defendant. *Jebb* v. *Chicago & G. T. R. Co.*, 31 *Am. & Eng. R. Cas.* 532, 67 *Mich.* 160, 10 *West. Rep.* 905, 34 *N. W. Rep.* 538.

Whether the reasonableness and validity of an ordinance, where it depends upon the existence of extrinsic facts as to which the evidence is conflicting, is a question for the court or for the jury, it is not error for the court to instruct the jury that it is unreasonable and void, when the evidence is conclusive. *Evison* v. *Chicago, St. P., M. & O. R. Co.*, 45 *Minn.* 370, 48 *N. W. Rep.* 6.

An instruction declaring the duties of a section foreman to be what he has testified they are is not objectionable in the absence of any other evidence on the subject. *Hall* v. *Missouri Pac. R. Co.*, 8 *Am. & Eng. R. Cas.* 106, 74 *Mo.* 298.

Where the action is for personal injury, it is error for the court to instruct the jury that the defendant had it in its power to examine the actual condition of the plaintiff, and if he refused to permit an examination, the defendant may prove it on the trial, in the absence of any evidence of a request and refusal. *Beckwith* v. *New York C. R. Co.*, 64 *Barb.* (*N. Y.*) 299.

An instruction, in an action for personal injuries, is not erroneous which tells the jury that the mere fact that the plaintiff has instituted an action gives no ground for recovery. *Rose* v. *West Phila. R. Co.*, (*Pa.*) 12 *Atl. Rep.* 78.

A judge may charge the jury as to what is proximate cause, but he may not say what facts would constitute it. *Price* v. *Richmond & D. R. Co.*, 38 *So. Car.* 199, 17 *S. E. Rep.* 732.

A charge which, as far as it goes, gives the law is not objectionable upon the ground of not setting forth with sufficient fullness the conditions under which the verdict should be for defendant, or upon the ground of not entering sufficiently into the particulars which distinguish remote from proximate causes, if special charges are not asked for upon these matters. *Interna-*

tional & G. N. R. Co. v. *Smith*, (*Tex.*) 27 *Am. & Eng. R. Cas.* 148, 1 *S. W. Rep.* 565.

The charge of the court should always be so framed as to present to the jury the issues made by the pleadings, if there be evidence under them, unless an issue be abandoned, concerning which abandonment the jury should be instructed. *International & G. N. R. Co.* v. *Underwood*, 27 *Am. & Eng. R. Cas.* 240, 64 *Tex.* 463.

An accident to a train was caused by the breaking of the side rods of the engine. The speed at which the train was running was not unlawful or unusual, and it was not shown that it would tend to contribute to such breakage. *Held*, that it was not error to instruct the jury that the speed of the train had no connection with the accident and could not be considered on the question of negligence. *Beery* v. *Chicago & N. W. R. Co.*, 73 *Wis.* 197, 40 *N. W. Rep.* 687.

An instruction that the jury should feel "reasonably certain" as to what they should find to be the cause of an accident is held not erroneous. *Beery* v. *Chicago & N. W. R. Co.*, 73 *Wis.* 197, 40 *N. W. Rep.* 687.

118. Illustrations.—Defendant company sent one of its employés to transfer coal from a vessel to its trains at so much per ton, by means of a hoisting engine. He employed plaintiff's intestate to assist, and he was killed by a train backing down on him. The company contended that he was its employé, and therefore it was not liable for an injury resulting from the negligence of a co-employé; but the wages of the intestate were not paid by the company, and his name was not on its pay roll. The court charged the jury that if the company had control of the intestate and could have discharged him without breaking its contract with the one in charge, or if the latter was but an employé of the company in hiring the intestate, then he was an employé of the company, but if the one in charge was an independent contractor, and the company could not control his discharge, then he was not. *Held*, that there was no error in the charge; and it was proper for the jury to find that the intestate was not a servant of the company. *Burke* v. *Norwich & W. R. Co.*, 34 *Conn.* 474.

When one, in the interest of a party to the cause, has maneuvered to entrap or corrupt an adverse witness, and the evidence suggests that he was sent on some mission to the witness by an attorney of the party whose interest he sought to promote, the court may charge the jury on the question whether his authority, if any he had, was pure or impure; whether it was limited to the use of proper means for the attainment of right ends, or was extended to such means as were actually used, and to ends apparently improper and illegal. Both the fact and the nature of the agency are open to the jury, and the evidence warranted the consideration of both. *Savannah, F. & W. R. Co.* v. *Holland*, 41 *Am. & Eng. R. Cas.* 196, 82 *Ga.* 257, 10 *S. E. Rep.* 200.

An instruction approved, as not being more comprehensive than the petition, and against the objection that it used the words "remotely" and "prudence and care" without explanation of their meaning. *Muehlhausen* v. *St. Louis R. Co.*, 28 *Am. & Eng. R. Cas.* 157, 91 *Mo.* 332, 2 *S. W. Rep.* 315.—FOLLOWED IN Chicago, S. F. & C. R. Co. *v.* Vivian, 33 Mo. App. 583.

Plaintiff was riding on a crowded elevated train, and at a station the guard in closing the gate pushed plaintiff off the car platform, and injured him. There was proof from which a jury could find that the guard intended to push plaintiff. *Held*, that a statement by the trial judge that it was not justifiable to do so was proper. *Miller* v. *Manhattan R. Co.*, 73 *Hun* 512, 26 *N. Y. Supp.* 162, 56 *N. Y. S. R.* 189.

A charge: "If you believe from the testimony that defendants charged and collected from plaintiff a greater rate of toll or compensation for a shipment of freight over their roads from Houston to Wharton than they charged Allen McCoy for a like quantity of freight of the same class from the same point to the same point and in the same direction, and that such charge was unjust and wilfully made, then such charge would be unlawful," was objected to. As to the objection that the petition did not allege that a like quantity of freight was carried for plaintiff and McCoy, it was pleaded and proved that the freight shipped for each was "one car load of lumber." *Held*, that this was a like quantity. No injury could result to defendant by the failure to define the word "unjust." It might have been omitted. Its use was rather to confuse the jury to the injury of plaintiff. *New York, T. & M. R. Co.* v. *Gallaher*, 79 *Tex.* 685, 15 *S. W. Rep* 694.

In the charge of the court one alleged cause of action by plaintiff was in effect

withdrawn from the jury; they were instructed to find only upon another count. *Held*, that such withdrawal from the jury eliminated the count and the defense set up against it, and complaint cannot be made that the defense to it was not presented in the charge. *Gulf, C. & S. F. R. Co.* v. *McCarty*, 82 *Tex.* 608, 18 *S. W. Rep.* 716.

119. Instructions assuming facts as proved.—Where a petition states as a cause of action that defendant had failed to construct and keep in repair sufficient and suitable drains, it is not error for the court to instruct the jury on the theory that a ditch had been constructed. *Drake* v. *Chicago, R. I. & P. R. Co.*, 29 *Am. & Eng. R. Cas.* 514, 70 *Iowa* 59, 29 *N. W. Rep.* 804.

In an action for personal injuries, the trial court instructed the jury that if they should find for plaintiff, they should allow "First, the expenses incurred by plaintiff in attempting to cure himself of his injuries; second, his loss of time; third, his bodily pain and suffering and mental anguish." *Held*, that this instruction, while not as definite and precise as it might have been, was not open to the objection that it assumed that plaintiff had incurred expense, lost time, and endured bodily pain, etc., and that judgment should not be reversed for the mere want of precision, especially as plaintiff's evidence as to these matters was not contradicted. *Klutts* v. *St. Louis, I. M. & S. R. Co.*, 11 *Am. & Eng. R. Cas.* 639, 75 *Mo.* 642.

An instruction is not objectionable, as being on the weight of evidence, because it assumes as true matters proven by both parties, or about which there is no controversy. *Alabama & V. R. Co.* v. *Phillips*, 70 *Miss.* 14, 11 *So. Rep.* 602.

When evidence of title is necessary to a recovery of damages sued for, and it is clearly proved, its existence may be assumed in the phraseology of a charge which instructs the jury as to the law of damages in the particular case. When a fact is clearly established by evidence, a charge which is based on its existence is not a charge, in contemplation of the statute on the weight of evidence. *Ft. Worth & N. O. R. Co.* v. *Pearce*, 75 *Tex.* 281, 12 *S. W. Rep.* 864.

Plaintiff sued for damages for personal injuries, and the court charged that "if the jury believe from the evidence that plaintiff was engaged at the time of the alleged injury in loading a car on the track of defendant company, and if they further believe from the evidence that while so engaged agents or servants of defendant propelled another car against the one plaintiff was so engaged in loading, and in so doing were guilty of negligence, etc., they should find for plaintiff." *Held*, that this charge assumed a material fact, viz., that plaintiff was rightfully on the railway track at the time of the injury; but as the evidence was undisputed on this point, the court might so assume, although the practice is of doubtful propriety. *Texas & P. R. Co.* v. *Pennell*, 2 *Tex. Civ. App.* 127, 21 *S. W. Rep.* 273.

120. Comments upon the evidence and the witnesses.—The court instructed: "It does not follow, merely because a witness makes an untrue statement, that his entire testimony is to be disregarded. This must depend upon the motive of the witness. If he intentionally swears falsely as to one matter, the jury may properly reject his whole testimony as unworthy of credit. But if he makes a false statement through mistake or misapprehension, they ought not to disregard his testimony altogether, and they should not consider the circumstance further than as showing inaccuracy of memory or judgment on the part of the witness." *Held*, that, taken as a whole, the instruction was not open to the objection that the accepting or rejecting of the testimony was made to depend wholly upon the motive of the witness. *Winter* v. *Central Iowa R. Co.*, 80 *Iowa* 443, 45 *N. W. Rep.* 737.

The presiding justice at a jury trial has full discretionary power to suggest to the jury possible solutions of seeming difficulties and possible harmonies of seeming discrepancies in the evidence, even though counsel do not do so. *York* v. *Maine C. R. Co.*, 84 *Me.* 117, 24 *Atl. Rep.* 790.

It is not error for a trial judge, after stating the facts upon which plaintiff bases her right of recovery, and which, if true, warrant him in directing a verdict in her favor, to instruct the jury that if they find from a fair preponderance of evidence that such facts are established, plaintiff is entitled to recover. *Sherwood* v. *Chicago & W. M. R. Co.*, 88 *Mich.* 108, 50 *N. W. Rep.* 101.

A statement by the judge in his charge that plaintiff is "a very intelligent and, I think, truthful, youth—I mean so far as a desire to tell the truth is concerned" is not erroneous. He does not thereby take the

question of plaintiff's credibility from the jury. *Hoffman* v. *New York C. & H. R. R. Co.*, 4 *Am. & Eng. R. Cas.* 537, 87 *N. Y.* 25, 41 *Am. Rep.* 337; *affirming* 14 *J. & S.* 526.

In an action against a company for negligence in the management of a train, it is proper, in the charge, to call attention to the fact that the engineer and fireman of the train, in testifying for defendant, were interested witnesses in one sense; at least, if attention is likewise called to the interest of plaintiff and his witnesses. *Ellis* v. *Lake Shore & M. S. R. Co.*, 138 *Pa. St.* 506, 21 *Atl. Rep.* 140.

121. Expressions of opinion.—In a suit by the United States to collect a tax from a railroad, where there has been a settlement twelve years before on an assessment made by a government officer, it is not error for the court to express an opinion to the jury that, under the circumstances, they should find for the defendant, where they are also told that the court does not desire to control their finding. *United States* v. *Philadelphia & R. R. Co.*, 123 *U. S.* 113, 8 *Sup. Ct. Rep.* 77.

It is not reversible error in a judge of a federal court to express his own opinion of the facts, if the rules of law are correctly laid down, and if the jurors are given to understand that they are not bound by such expressions of opinion. *Doyle* v. *Union Pac. R. Co.*, 147 *U. S.* 413, 13 *Sup. Ct. Rep.* 333.

On the trial evidence was given, without objection, as to whether a bell was or was not rung as an engine approached a crossing. At the close of the charge defendant's counsel asked the court to charge that that question had no bearing upon the issue. The court, in reply, said to the jury, "I do not think it has, but if you think otherwise you are not bound by my opinion." *Held*, no error. *Schwier* v. *New York C. & H. R. R. Co.*, 14 *Am. & Eng. R. Cas.* 656, 90 *N. Y.* 558; *affirming* 24 *Hun* 139.

The court has a right to express its opinion upon the facts, provided they are still submitted to the jury. Where, therefore, the court submitted the facts to the jury, but said they "would probably be considered by a jury as being careless"—*held*, not to be error. *Pennsylvania Co.* v. *Allen*, 3 *Pennyp.* (*Pa.*) 170.

122. Instructions that do not mislead the jury.—In an action to recover for a personal injury by a collision at a street crossing, the court, on its own motion, instructed the jury that the gist of the action was negligence, which plaintiff must prove by a preponderance of evidence, substantially as alleged in the declaration, and that it could not be presumed from the fact of plaintiff's injury; that the question of negligence was one of fact for the jury, but that the court instructed that it is the duty of all persons approaching a highway crossing where there is a railroad to exercise care and caution to learn if trains are approaching, and to take such measures as any prudent and cautious man would under like circumstances, and that if they believed, from the evidence, that plaintiff failed to exercise such care, and was injured in consequence thereof, he could not recover. *Held*, that while the instruction contained some inaccurate expressions, yet it could not have misled the jury to the prejudice of defendant. *Chicago, St. L. & P. R. Co.* v. *Hutchinson*, 32 *Am. & Eng. R. Cas.* 82, 120 *Ill.* 587, 11 *N. E. Rep.* 855.

In an action for an injury to a passenger, resulting from the negligence of defendant, an instruction that public policy demands that the law should be applied as rigidly to railroad companies as to any other species of common carriers is not calculated to mislead the jury. *Indianapolis, B. & W. R. Co.* v. *Beaver*, 41 *Ind.* 493.

An instruction, in an action for personal injuries, that if the injury was "the remote" cause of the injured person's last sickness and death a recovery might be had for the pain suffered in that sickness is not error, where it appears from the context that "remote" was not used in its legal sense, and that the jury could not have been misled by it. *Baker* v. *Pennsylvania Co.*, 142 *Pa. St.* 503, 21 *Atl. Rep.* 979.

123. Instructions on questions of negligence and due care, generally.—On the trial of an action for damages, it is not error for the court to state to the jury that he uses the word "negligence" in the sense of "carelessness" in his charge to them, especially when the charge contains full and accurate explanations of all the legal degrees of diligence and negligence. *Western & A. R. Co.* v. *Meigs*, 74 *Ga.* 857.

To charge the jury that the injury would be accidental if neither party was negligent is not error. *Chattanooga, R. & C. R. Co.* v. *Huggins*, 52 *Am. & Eng. R. Cas.* 473, 89 *Ga.* 494, 15 *S. E. Rep.* 848.

An instruction that it was the duty of defendant to use reasonable care and diligence to prevent injury to plaintiff, and that if the jury believed, from the evidence, that defendant failed to perform such duty, by reason whereof plaintiff, while exercising reasonable care on his part, received the injury complained of, then defendant was liable, is not open to the objection that it authorized the jury to find defendant guilty upon proof of any actionable negligence causing the injury, whether charged in the declaration or not. *Chicago & A. R. Co.* v. *Dillon*, 32 *Am. & Eng. R. Cas.* 1, 123 *Ill.* 570, 15 *N. E. Rep.* 181, 13 *West. Rep.* 286; *affirming* 24 *Ill. App.* 203.

Where the evidence shows that the negligence complained of may be attributed to either of two causes, the instructions should be framed so as to meet the case in either of its aspects. *Lake Erie & W. R. Co.* v. *Zoffinger*, 10 *Ill. App.* 252.

Where the action is for killing live stock, and the company is charged with negligence in failing to stop its train, an instruction that under certain circumstances therein stated a failure to stop a train would be negligence is not erroneous as an invasion of the province of the jury. *Ohio, I. & W. R. Co.* v. *Kleinsmith*, 38 *Ill. App.* 45.

Where the allegations of negligence are numerous, it is not necessary for the court in its charge to analyze them, and to direct the attention of the jury to the evidence which should be considered in support of the respective averments. *Pence* v. *Chicago, R. I. & P. R. Co.*, 42 *Am. & Eng. R. Cas.* 126, 79 *Iowa* 389, 44 *N. W. Rep.* 686.

An instruction to the jury that "direct and positive evidence of negligence as a fact is not required," and that "any circumstance from which negligence may be reasonably inferred may be sufficient," is not misleading or erroneous. *Atchison, T. & S. F. R. Co.* v. *Brassfield*, 51 *Kan.* 167, 32 *Pac. Rep.* 814.

An instruction that "if defendant committed any act of negligence by its agents, etc., in operating and managing its trains of cars at said junction at the time of the alleged injury" the jury should find for the plaintiff is not too broad as authorizing a verdict on account of an act of negligence not alleged in the petition. *Burbridge* v. *Kansas City Cable R. Co.*, 36 *Mo. App.* 669.

Four horses were attached to a car. The leading horses went off the track, struck plaintiff, and knocked him down. The judge charged that there was no evidence that one driver was insufficient to control the car, but that it was a question for the jury whether it was negligence. *Held*, that the judge meant, and must have been so understood, that there was no specific testimony that one driver was insufficient, but that there was circumstantial evidence on that point upon which the jury should pass; and there being, in fact, such circumstantial evidence, the charge was correct. *Whittaker* v. *New York & H. R. R. Co.*, 19 *J. & S.* (*N. Y.*) 287.

There is no error in charging a jury that "the allegation of the complaint being negligence of a particular character, the injury, to entitle the plaintiff to recover, must be from negligence of that kind. That is contended for by the defendant and is sound law." *White* v. *Augusta & K. R. Co.*, 30 *So. Car.* 218, 9 *S. E. Rep.* 96.

124. —— in actions for injuries to passengers.—In an action by a passenger for a personal injury, the court, after instructing the jury that the presumption of negligence was against the company, and showing how it might be rebutted, added, "All actions of this sort necessarily imply fault somewhere," but followed this up by saying that the company could not be held responsible if it was without fault, and that plaintiff must be shown to have used ordinary care to avoid the accident. *Held*, that the sentence quoted might be objectionable in itself, as excluding the idea of a mere accident, but not when taken in connection with the whole charge, the evidence tending strongly to show negligence. *City & S. R. Co.* v. *Findley*, 76 *Ga.* 311.

Where the court charged the jury as to whether an injury resulted to a passenger from defective cross-ties or rails, and also explained what character of defects would impose liability on the company, an instruction to the effect that if the jury should find that such defects did in fact exist, which were known or might have been known to the company, they should find for plaintiff, if his injuries resulted therefrom, is not error, and is not a charge upon the weight of evidence. *Texas & P. R. Co.* v. *Hardin*, 21 *Am. & Eng. R. Cas.* 460, 62 *Tex.* 367.

An instruction that if, by ordinary care by any of defendant's servants then in charge of defendant's train, the collision could have been avoided the jury should find

for plaintiff is not to the injury of defendant where there is no conflict in the evidence that the collision resulted from the negligence of the engineer of defendant's train. *Texas & P. R. Co.* v. *Easton*, 2 *Tex. Civ. App.* 378, 21 *S. W. Rep.* 575.

An instruction is not erroneous which charges a jury that a defendant is bound to exercise the highest degree of care, prudence, and caution in running and operating cars so as to prevent injury to passengers, as such instruction means simply the highest degree of practicable care and prudence in conducting that particular business. *Sears* v. *Seattle Con. St. R. Co.*, 6 *Wash.* 227, 33 *Pac. Rep.* 389, 1081.

Although it was held on a former appeal that there was no negligence in running a train past a platform without stopping, it is not error for the trial court, in charging the jury, to allude to the failure to stop, for the purpose of showing that, in view of such failure, it might be the duty of the company to instruct a boy passenger how to act. *Hemmingway* v. *Chicago, M. & St. P. R. Co.*, 33 *Am. & Eng. R. Cas.* 511, 72 *Wis.* 42, 7 *Am. St. Rep.* 823, 37 *N. W. Rep.* 804.

125. — in actions for injuries to persons crossing the track. — A city ordinance forbade the blowing of engine whistles within the city limits, except in case of imminent or immediate danger to life or property. One of defendant company's engines, which was standing a short distance from a crossing, blew its whistle while a funeral procession was crossing the track, frightening plaintiff's horse and causing him to run away, whereby plaintiff was injured. After instructing the jury to inquire whether there was negligence in blowing the whistle under the circumstances, the court added that if they found that the engineer blew "a loud blast of the locomotive whistle, and that at the time there was no imminent or immediate danger to life or property, and the whistle was not sounded as a warning of such danger, then the blowing of the whistle was a negligent act." *Held*, that the part of the charge quoted would be justified by the common law, and the instruction as a whole was not open to the objection that a non-observance of the ordinance raised a conclusive presumption of negligence. *Northern Pac. R. Co.* v. *Sullivan*, 53 *Fed. Rep.* 219, 10 *U. S. App.* 473, 3 *C. C. A.* 506. — QUOTING AND FOLLOWING Delaware, L. & W. R. Co. *v.* Converse, 139 U. S. 469, 11 Sup. Ct. Rep. 569. REFERRING TO Hayes *v.* Michigan C. R. Co., 111 U. S. 228, 4 Sup. Ct. Rep. 369; Grand Trunk R. Co. *v.* Ives, 144 U. S. 408, 12 Sup. Ct. Rep. 679.

The court instructed a jury that if plaintiff, while exercising ordinary care to avoid the injury, was injured by the negligence of defendant, as charged in the declaration, they should find for plaintiff. One count of the declaration charged defendant with negligence in failing to have a flagman at the place of the accident, in violation of an ordinance. *Held*, that the words "as charged in the declaration" did not leave the jury to determine the applicability of the ordinance to the circumstances of the case, and that the instruction was proper. *Pennsylvania Co.* v. *Frana*, 112 *Ill.* 398.

A petition in an action for killing a person at a street crossing stated that "defendant, without giving any proper warning or signal of the approach of its train, and without keeping any flagman at said crossing to give warning * * * as it was required by an ordinance duly passed," etc. *Held*, that this plea was broad enough to sustain an instruction submitting to the jury whether, under the circumstances, ordinary care and prudence did not require the company to keep a flagman at the crossing, independent of any ordinance. *Schmidt* v. *Burlington, C. R. & N. R. Co.*, 75 *Iowa* 606, 39 *N. W. Rep.* 916.

Where evidence has been introduced as to the existence of trees, fences, and other objects upon defendant's right of way, and also as to the condition of the highway at different points near the crossing, defendant has no reason to complain of an instruction that the condition of the highway and the existence of objects upon the track did not constitute negligence on its part, but might be considered as showing the degree of care to be exercised by defendant and also by plaintiff in approaching the crossing, although the evidence might not be sufficient to prove that the objects were upon the right of way. *Pence* v. *Chicago, R. I. & P. R. Co.*, 42 *Am. & Eng. R. Cas.* 126, 79 *Iowa* 389, 44 *N. W. Rep.* 686.

126. — in actions for injuries to employes.—An instruction to the jury, as to notice on the part of defendant of a defective engine, that they might find such notice to be proved if it might be rightfully and reasonably inferred from the evidence,

although there might be no direct testimony as to such notice, is proper, in view of the averment in the complaint that defendant had long known of the dangerous and defective condition of the engine. *Wabash & W. R. Co.* v. *Morgan*, 132 *Ind.* 430, 31 *N. E. Rep.* 661, 32 *N. E. Rep.* 85.

An instruction was given that "it is the law of Iowa that every railroad company shall be liable for all damages sustained by any person, including employés, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employés of the corporation * * * provided the plaintiff does not contribute to the injury complained of by his own want of proper care or by his own negligence." It was urged by defendant that the use of the terms "any neglect" and "any mismanagement" implied that defendant was liable for want of extraordinary care. *Held*, otherwise, and that the instruction was not erroneous. *Hamilton* v. *Des Moines Valley R. Co.*, 36 *Iowa* 31.

An instruction to the jury that they should "determine whether or not the switch was properly constructed, that is to say, whether it was in perfect order or repair," and that "defendant was bound to exercise ordinary care in keeping the switch in a reasonably safe condition, having regard to the safety of its employés," is not objectionable as fixing, as a matter of law, the degree of order or repair in which such switch should be kept to be reasonably safe for the use intended. *Brooke* v. *Chicago, R. I. & P. R. Co.*, 81 *Iowa* 504, 47 *N. W. Rep.* 74.

The issues submitted to a jury should never be broader than the evidence. So where a brakeman alleged that he was injured by the joint negligence of the engineer and a fellow-brakeman, but there was no evidence whatever tending to show negligence on the part of the engineer, it was not error to submit the case, making the right to recover dependent upon the negligence of the fellow-brakeman without referring to the engineer. *Osborne* v. *Pennsylvania R. Co.*, (*Ky.*) 11 *S. W. Rep.* 207.

Where the action is for killing a track repairer by running a switch engine over him, and the plaintiff claims that there was negligence in using the engine, it being a road engine with a square tank which would prevent the engineer from seeing a person on the track, and that there was negligence on the part of the engineer, an instruction that if the jury believed from the evidence that the injury was caused both by the construction or unfitness of the engine and the negligence of the engineer the company would be liable is not open to the objection that it assumed as a fact that the engine was defective or unsuitable. *Missouri Pac. R. Co.* v. *Lehmberg*, 75 *Tex.* 61, 12 *S. W. Rep.* 838.

127. —— in actions for injuries to trespassers.—In an action for injury to a trespasser, where no employé from the train is called as a witness, nor is such absence explained, it is not error for the court to instruct the jury that they may consider those facts in determining whether the act of some one of defendant's employés which caused the injury was purposely or accidentally done. *Clark* v. *New York, L. E. & W. R. Co.*, 2 *N. Y. S. R.* 249.

An instruction is proper which says that a company must use greater care in running trains through towns than in less populous districts; that the fact that pedestrians were accustomed to travel on the track at a particular place, in the knowledge of the company or its agent, made it its duty to use greater care in operating its road at that place; and that if the tracks where plaintiff's intestate was killed had long been used by the public with defendant's knowledge and acquiescence, then deceased was not on the track as a trespasser, but as a licensee. *Norfolk & W. R. Co.* v. *Carper*, 88 *Va.* 556, 14 *S. E. Rep.* 328.—APPLYING Virginia Midland R. Co. *v.* White, 84 Va. 498. DISTINGUISHING Baltimore & O. R. Co. *v.* Sherman, 30 Gratt. (Va.) 628; Richmond & D. R. Co. *v.* Anderson, 31 Gratt. 812.

128. —— in actions for injuries to animals.—An instruction that it was the "duty of the engineer to keep a lookout for obstructions on the track, and to use all appliances at his command to avoid accident; that if he failed to see an animal when he should see it, and thereby injures it, or if, seeing it, he does not use the appliances at his command to avoid injuring it, then the company is liable" is not objectionable as being too general, where the evidence was conflicting as to whether the weather was clear or foggy at the place of accident, and the engineer had neither made any effort to stop the train nor to frighten the animals from the track. *McMaster* v. *Montana Union R. Co.*, 49 *Am. & Eng. R. Cas.* 564, 12 *Mont.* 163, 30 *Pac. Rep.* 268.

129. Instructions relative to contributory negligence.—If there is evidence tending to prove that a party, at the time of receiving an injury, observed ordinary care, that will be sufficient to warrant the giving of an instruction based upon that hypothesis. *Missouri Furnace Co.* v. *Abend*, 107 *Ill.* 44; *affirming* 9 *Ill. App.* 319.

In an action to recover for an injury to an engineer, received by reason of a switch being left open while he was in charge of a train, the court instructed the jury that in determining whether the engineer, at the time of the accident, made use of all the care, etc., to avoid the accident which could reasonably be expected of a locomotive engineer of ordinary prudence, they might consider, etc. *Held*, that the words used could not be construed as limiting the question of care to the instant of the accident. The care to avoid an accident must necessarily precede the time of the happening of the same. *Lake Shore & M. S. R. Co.* v. *Parker*, 41 *Am. & Eng. R. Cas.* 339, 131 *Ill.* 557, 23 *N. E. Rep.* 237; *affirming* 33 *Ill. App.* 405.

Where the action is to recover for negligently running an engine against plaintiff's team, an instruction should not omit the question of the exercise of ordinary care on the part of plaintiff or his driver at the time of the injury. *Lake Shore & M. S. R. Co.* v. *Pauly*, 37 *Ill. App.* 203.

In an action for damages to a team and omnibus injured at a public street crossing in a city, where the company was liable for ordinary negligence and the injury was caused by its negligence, the court instructed the jury that if they found that plaintiff was not guilty of contributory negligence, or, if negligent, that his negligence was slight and did not directly contribute to the injury, they should find for the plaintiff. *Held*, not error. *Union Pac. R. Co.* v. *Henry*, 36 *Kan.* 565, 14 *Pac. Rep.* 1.

An instruction is not objectionable because of the use of the term "contributory negligence" without explaining to the jury the meaning of that term, when such instruction refers to other instructions given, in which the meaning of the term is explained. *Muehlhausen* v. *St. Louis R. Co.*, 28 *Am. & Eng. R. Cas.* 157, 91 *Mo.* 332, 2 *S. W. Rep.* 315.

In an action for an injury caused by negligence, where the defense is contributory negligence, it is sometimes proper to submit two issues, one as to the negligence of defendant and the other as to the contributory negligence of plaintiff, yet when the action of both has contributed to the injury, it is allowable to submit an issue as to defendant's negligence only, with instructions to find that in the negative if the jury believe that plaintiff's conduct contributed to the injury. *Scott* v. *Wilmington & W. R. Co.*, 96 *N. Car.* 428, 2 *S. E. Rep.* 151.

It is not error to charge the jury that if plaintiff, without signaling, attempted to board an electric car while it was in motion and was injured, he could not recover. *Woo Dan* v. *Seattle Elec. R. & P. Co.*, 5 *Wash.* 466, 32 *Pac. Rep.* 103.

130. Instructions in regard to damages, generally.—The court should explain to the jury the technical phrase "exemplary damages" used in an instruction. *Hayes* v. *St. Louis R. Co.*, 15 *Mo. App.* 583.

Plaintiff sued for personal injuries, and the evidence showed that he had been prevented from pursuing his ordinary occupation for several weeks, but there was no evidence of the value of his earnings. *Held*, that it was not error to instruct the jury that they might take into consideration his loss of earnings, there being no specific request for an instruction that the recovery therefor should be limited to nominal damages. *Seitz* v. *Dry Dock, E. B. & B. R. Co.*, 16 *Daly* 264, 10 *N. Y. Supp.* 1, 32 *N. Y. S. R.* 56.

In an action for personal injuries plaintiff testified that she was still under treatment, and had done nothing in the way of work since the accident, some time before. Her physician testified that in his estimation the injuries received by the plaintiff were incurable, which was not contradicted in any way, though the defendant had two physicians examine plaintiff, neither of whom was called as a witness. *Held*, that it was not error for the court to instruct the jury that in considering the damages they should consider that she might suffer in the future, if they should find that there was reasonable certainty of such suffering. *Koetter* v. *Manhattan El. R. Co.*, 36 *N. Y. S. R.* 611, 59 *Hun* 623, 13 *N. Y. Supp.* 458; *affirmed in* 129 *N. Y.* 668, *mem.*, 42 *N. Y. S. R.* 946, *mem.*, 30 *N. E. Rep.* 65, *mem.*,—QUOTING Feeney *v.* Long Island R. Co., 116 N. Y. 382, 26 N. Y. S. R. 729; Murray *v.* Hudson River R. Co., 47

Barb. (N. Y.) 196; Walker *v.* Erie R. Co., 63 Barb. 267.

Where plaintiff alleges several injuries and claims separate damages therefor the court should instruct the jury that they may find for one of the injuries without also finding for the others; but construing the whole charge together, the omission so to do—*held*, not error in this case. *Texas C. R. Co.* v. *Stuart*, 1 *Tex. Civ. App.* 642, 20 *S. W. Rep.* 962.

It was not error in the court to charge that defendant company was responsible to plaintiff for the "actual and direct results of the injury," instead of charging that defendant was liable for injuries sustained which were the direct and natural result of the negligence complained of by plaintiff, since there is no material distinction between an injury and the results thereof. *Texas & P. R. Co.* v. *Davidson*, 3 *Tex. Civ. App.* 542, 21 *S. W. Rep.* 68.

131. Instructions as to the elements and measure of damages.—Defendant company claimed that the injury sued for was originally slight, and was aggravated by plaintiff's neglect to take care of himself and to follow the advice of his physician, and prayed the court to instruct the jury that if plaintiff did not regard the advice of his physician, they had a right to infer that the injury was thereby aggravated, and that plaintiff could recover for nothing after his own imprudence. The court instructed that if they should find a verdict for plaintiff, he was entitled to recover full compensation for all the mental and physical injury which they should find on the evidence that he had sustained by reason of defendant's negligence. *Held*, no error. *Lawrence* v. *Housatonic R. Co.*, 29 *Conn.* 390.

It is not error to describe as pain and suffering a loss of capacity to labor occasioned by a physical injury, nor is it error to call attention to it separately after instructing the jury touching other pain and suffering. *Atlanta St. R. Co.* v. *Jacobs*, 88 *Ga.* 647, 15 *S. E. Rep.* 825.

An instruction, in an action to recover for a personal injury, that the jury may take into consideration the injury sustained, the pain and suffering undergone, and any permanent injury sustained, if shown by the evidence, "and such damages, if any, present or future," which the jury may believe, from the evidence, to have resulted, is not erroneous as directing the jury to assess double damages. *Lake Shore & M. S. R. Co.* v. *Hundt*, 140 *Ill.* 525, 30 *N. E. Rep.* 458; *affirming* 41 *Ill. App.* 220.

On the trial of an action for a personal injury the court instructed the jury that if they found defendant guilty, then, in assessing plaintiff's damages, they might take into consideration not only the bodily disability occasioned by the accident, if any was proved, but "also an impairment of plaintiff's general health which is shown by the evidence, and which the jury believe, from the evidence, will affect or impair his future ability to attend to his ordinary business, the same as if the injury complained of had not occurred." By another instruction for plaintiff the jury were told that in estimating his damages, present and prospective, they should give only such damages as were shown by the evidence, and in many of defendant's instructions the jury were told that plaintiff's right of recovery must be shown by a preponderance of evidence. *Held*, that the instruction first mentioned, taken in connection with the others, was not such as to mislead the jury, as assuming that plaintiff's general health was impaired by the injury. *Lake Erie & W. R. Co.* v. *Wills*, 140 *Ill.* 614, 31 *N. E. Rep.* 122; *affirming* 39 *Ill. App.* 649.

An instruction in an action for personal injuries is not erroneous which states, among other things, that the jury should "take into account the peril, if there was any, to plaintiff's life," and which concludes with the statement that only such damages shall be assessed "as will reasonably and justly compensate plaintiff for his injuries." *Terre Haute & I. R. Co.* v. *Brunker*, 128 *Ind.* 542, 26 *N. E. Rep.* 178.

As to the measure of damages, an instruction should not contain comments on evidence or mere discussion, but should state the rules of law applicable under the evidence, and what the jury should take into consideration in estimating the damages. Nor should an instruction ignore any issue, or present the real issue otherwise than impartially. *McGinnis* v. *Missouri Pac. R. Co.*, 21 *Mo. App.* 399.

The court is bound to instruct the jury as to the elements which they are to take into consideration in determining the question of negligence. The jurors are not judges of both the law and the facts, and they can only come to a conclusion by taking into con-

sideration the instructions given for the purpose of guiding them in considering the evidence. *Mayer* v. *New York C. & H. R. R. Co.*, 29 *N. Y. S. R.* 183, 8 *N. Y. Supp.* 461, 55 *Hun* 608, *mem.*; *affirmed in* 132 *N. Y.* 579, *mem.*, 43 *N. Y. S. R.* 965, *mem.*, 30 *N. E. Rep.* 867, *mem.*

132. Instructions giving rules for ascertaining amount of damages. — In an action by a wife for the wrongful death of her husband there is no error in charging the jury that "if you find it your duty to find for the plaintiff, you will look to the evidence and determine from that how much you will find. You will, in arriving at a conclusion, look to the evidence as to the age of the plaintiff's husband, the probable length of his life, the amount that he earned or would probably earn during his life, and the state of his health." *Georgia R. Co.* v. *Pittman*, 26 *Am. & Eng. R. Cas.* 474, 73 *Ga.* 325.

Neither is there error in such case, after telling the jury that a book had been introduced to aid in calculations, in charging them, "You can use the rules in that book, or can take any other rules or information that you possess that refers to making calculations." In making a calculation a jury may apply their own knowledge or information of arithmetic, without its being formally introduced in evidence. *Georgia R. Co.* v. *Pittman*, 26 *Am. & Eng. R. Cas.* 474, 73 *Ga.* 325.

Decisions of the supreme court touching particular amounts awarded by other juries in other cases as damages, and touching the question whether such awards were excessive or not excessive, should not be considered by the jury in fixing the damages to be allowed by them in the case on trial, and a charge to this effect is not erroneous. *East Tenn., V. & G. R. Co.* v. *King*, 88 *Ga.* 443, 14 *S. E. Rep.* 708.

An instruction, in an action for injuries to the person, which directs the jury that, in fixing the damages plaintiff ought to recover, if they believe from the evidence that he is entitled to recover they should consider all the circumstances surrounding the case, and then specifically points out the circumstances, is not open to the objection that instructions should be based upon the evidence. *Chicago, R. I. & P. R. Co.* v. *Otto*, 52 *Ill.* 416.

Under the Texas statute surviving children may recover damages for the death of their mother independent of those that may go to the father; and where the children are not made parties to a suit by the father, but themselves sue, it is proper to instruct the jury that they are not bound by a judgment in favor of the defendant in the action by the father. *Galveston, H. & S. A. R. Co.* v. *Kutac*, 72 *Tex.* 643, 11 *S. W. Rep.* 127.

133. Instructions cured by other parts of the charge. — The court instructed a jury that plaintiff was not bound to prove more than enough to raise a presumption of negligence on the part of defendant and resulting injury to himself; and that it was incumbent on plaintiff to show, to the satisfaction of the jury, by a preponderance of evidence, some carelessness or neglect on the part of the company which resulted in the injury; that if the injury was the result of an accident which ordinary prudence could not have prevented, defendant was not liable. *Held*, that if there was any error in these instructions, it was fully corrected by one given at the instance of defendant, that the company was only bound to exercise ordinary prudence to prevent the injury; that if the jury believed from the evidence that defendant was not guilty of negligence, plaintiff could not recover; and that negligence consisted in not doing those things which a reasonable man in managing his own property would have done, under the circumstances, or in doing those things which a reasonable man in managing his own property would not have done, under the circumstances. *Indianapolis, B. & W. R. Co.* v. *Beaver*, 41 *Ind.* 493.

The court instructed the jury that they should determine which of the theories of the case was best supported by the evidence. *Held*, not objectionable as a direction to find for the party whose theory had the most support, the jury having been, in other instructions, directed as to the grounds on which their verdict should be based. *Worden* v. *Humeston & S. R. Co.*, 76 *Iowa* 310, 41 *N. W. Rep.* 26.

Although the court charged the jury that the engine which collided with the plaintiff was run and operated substantially as alleged in the petition, this could not be construed to mean that the engine was run negligently, where, in another instruction, the jury were directed that they must find negligence to authorize a recovery. *Clampit* v. *Chicago, St. P. & K. C. R. Co.*, 49 *Am. & Eng. R. Cas.* 468, 84 *Iowa* 71, 50 *N. W. Rep.* 673.

An instruction which refers the jury to the proceedings for the purpose of ascertaining the issues in a cause is not erroneous in view of its being preceded by a full statement of the allegations of the petition and the denials of the defendant. *Morrison* v. *Burlington, C. R. & N. R. Co.*, 84 *Iowa* 663, 51 *N. W. Rep.* 75.

The failure to embrace all the issues of the cause in one instruction is not error if they are included in the series of instructions given, and the latter, as a whole, are correct, not contradictory nor calculated to mislead. *Muehlhausen* v. *St. Louis R. Co.*, 28 *Am. & Eng. R. Cas.* 157, 91 *Mo.* 332, 2 *S. W. Rep.* 315.

Although the instructions given for one party may be subject to criticism, yet if all the instructions, taken together, present the case to the jury in an intelligible manner, and are not misleading in character, the judgment should not be disturbed. *Missouri Pac. R. Co.* v. *Schoennen*, 37 *Mo. App.* 612.

134. Requirement that instructions be written. — Tex. Rev. St. art. 1317, requiring the charge of the court to be in writing, is merely directory, and a violation of it, unless material injury has resulted in consequence thereof, is not good ground for a reversal. *Gulf, C. & S. F. R. Co.* v. *Holt*, (*Tex.*) 11 *Am. & Eng. R. Cas.* 72.

135. Interpreting instructions. — Being instructed that it was the duty of defendant to keep the crossing in question in repair, the jury must have understood that that included all things necessary to maintain it as a good crossing. *Hunter* v. *Burlington, C. R. & N. R. Co.*, 84 *Iowa* 605, 51 *N. W. Rep.* 64.

Where a freight train breaks in two on a down grade and the two sections are running some distance apart, an instruction, in an action against the company for killing a person while attempting to pass between the sections, which defines the duty of those in charge of the train will be held to include those in charge of both sections of the train. *John* v. *Louisville & N. R. Co.*, (*Ky.*) 10 *S. W. Rep.* 417.

A charge must be considered as a whole, and with reference to the case named. *Wallace* v. *Columbia & G. R. Co.*, 37 *So. Car.* 335, 16 *S. E. Rep.* 35.

A charge that "the plaintiff sues defendant company for alleged injuries inflicted upon him by the derailment of a train on which he was traveling as a passenger, occasioned by the negligence of defendant," should be construed so that the word "alleged" qualifies the latter part of the sentence as well as that immediately following it. *International & G. N. R. Co.* v. *Simcock*, 81 *Tex.* 503, 17 *S. W. Rep.* 47.

3. *What Instructions are Improper.*

136. In general. — An instruction which professes to comprehend a statement, hypothetically, of all the facts necessary to a recovery, but ignores material facts testified to by the plaintiff, is erroneous. *Lake Shore & M. S. R. Co.* v. *Beam*, 11 *Ill. App.* 215.

Where the petition alleges, and the evidence shows, several acts of negligence as grounds of recovery, plaintiff's right to recover should not be confined by instruction to one ground alone. *McDermott* v. *Hannibal & St. J. R. Co.*, 28 *Am. & Eng. R. Cas.* 528, 87 *Mo.* 285.

An instruction that a plaintiff in a civil cause must satisfy the minds of the jury by "clear and convincing proof" is erroneous, as it, in effect, requires him to make out his case beyond a reasonable doubt. *Gage* v. *Louisville, N. O. & T. R. Co.*, 88 *Tenn.* 724, 14 *S. W. Rep.* 73.

Where the pleadings allege, and evidence is introduced to the effect, that the company had agreed to stop its train at a section house, and then refused to do so, in an action for damages against the company it is error in the court to charge that "under the allegations and proof it is immaterial to the plaintiff's right to recover whether the train was stopped at the section house or not, and in making up your verdict you will not consider that question." *Ormond* v. *Hayes*, 60 *Tex.* 180.

It is improper in a charge to refer repeatedly to a fact or facts in evidence and thus give prominence to such testimony. *Gulf, C. & S. F. R. Co.* v. *Harriett*, 80 *Tex.* 73, 15 *S. W. Rep.* 556.

137. Illustrations. — When it is a material question whether defendant's cars, at the time of the injury to plaintiff, stopped on the east or on the west side of a street, a charge to the jury that they "may indulge the presumption, in the absence of proof to the contrary, that the train stopped on the west side, where by law it was required

to stop," is erroneous. *North Birmingham St. R. Co.* v. *Calderwood*, 89 *Ala.* 247, 7 *So. Rep.* 360.

The uncontradicted evidence being that some efforts were made by the carrier to save plaintiff's goods, it is error to charge the jury upon any hypothesis grounded on the assumption or contingency that no efforts whatever were made. *Richmond & D. R. Co.* v. *White*, 88 *Ga.* 805, 15 *S. E. Rep.* 802.

In an action against a company for damages for injury to private property by the construction of its road upon a public street, it is error to instruct the jury to determine whether the company had constructed more tracks or upon different lines than were authorized by the city ordinances. The number thus authorized was a question of law, respecting which the court should have determined the legal rights of the parties. *Ingram* v. *Chicago, D. & M. R. Co.*, 38 *Iowa* 669.

Plaintiff alleged several specified injuries. The court instructed the jury that if they found that one specified injury was not caused or aggravated by the accident, then they should find for the defendant. *Held*, erroneous, although in other instructions the jury were told that if they found for plaintiff they should award damages sufficient to compensate him for all the injuries received. *Moore* v. *Des Moines & Ft. D. R. Co.*, 27 *Am. & Eng. R. Cas.* 315, 69 *Iowa* 491, 30 *N. W. Rep.* 51.

The court instructed that defendant was not responsible for the conduct of a person not in its employment in giving a signal to move the train; but in another instruction the jury were told that they might consider such fact in explaining in what manner the train was moved. *Held*, that the latter instruction was erroneous: (1) because such fact had no tendency to show in what manner the train was moved; (2) because it had no bearing on the material question, which was whether it was moved in a proper manner and at a proper time. And since it appears from answers to special interrogatories that the general verdict was, to some extent at least, affected by the consideration of this fact, the error was prejudicial, and ground for reversal. *Gadbois* v. *Chicago, M. & St. P. R. Co.*, 75 *Iowa* 530, 39 *N. W. Rep.* 871.

The court instructed the jury that "where an act of incorporation fixes the amount of capital stock of an enterprise, and the number of shares into which it shall be divided, the corporation can make no assessment nor call upon the individual stockholders until all the stock has been subscribed, unless either expressly or by implication a different intent appears either in the charter or in the subscription." They were further told that if they should believe that the act incorporating plaintiff company required the sum of $300,000 to be paid in before any call could be made upon the subscribers, and that plaintiff had failed to show that this had been done, they must find for defendant. *Held*, faulty, in submitting to the jury the legal construction of plaintiff's charter, the legal effect of written instruments being a question for the court, and not for the jury, and in raising the question whether the company was duly organized, which could only be done by a plea under oath denying the character assumed. *Selma, M. & M. R. Co.* v. *Anderson*, 51 *Miss.* 829.

The grant to a company, by a city, of license to occupy certain streets prescribed that "said company may construct said railway so as to be operated by electricity, or such other power as will not necessarily obstruct the use of the streets by the public." Touching the right of the company to use steam, the city offered to prove that the use of steam upon certain of the streets would interfere with the use thereof, and would be a public nuisance. This testimony was excluded. The court instructed the jury that "in this state railways generally use steam as a motive power. Under the ordinance plaintiff is not precluded from using steam, but might, if it desired, use electricity or other motive power known. It had the right to use steam if it desired." *Held*, that whether the use of steam would necessarily obstruct the use of the streets by the public was a fact to be found by the jury. It was error to exclude the testimony and to give the charge. *Mayor, etc., of Houston* v. *Houston B. & M. P. R. Co.*, 84 *Tex.* 581, 19 *S. W. Rep.* 786.

In an action by a passenger for being ejected from a train, the defense was urged that the passenger was occupying more than one seat, against a rule of the company, and had resisted the enforcement of the rule on the part of the conductors. The court in its general charge had submitted the issue whether the acts of the passenger were justified by a real or apparent invasion

of his rights as a passenger by the removal of his baggage from a seat other than the one occupied by him. *Held*, error to repeat such charge, thus emphasizing the theory of plaintiff. *Gulf, C. & S. F. R. Co.* v. *Moody*, 3 *Tex. Civ. App.* 622, 22 *S. W. Rep.* 1009.

138. Instructions not confined to issues. — Where there is no plea that a promise by a wrongdoer was made and accepted in satisfaction of the tort, any charge of the court as to rescission for nonperformance of the promise is irrelevant, the tort being the subject-matter of the action. A mere accord, though partly performed or executed, does not extinguish the original right; the part execution may be pleaded as satisfaction *pro tanto*. A promise of future performance will amount to satisfaction if expressly accepted as such, but generally not otherwise. For such a promise to be available in bar, it must be pleaded, and its acceptance averred. *Brunswick & W. R. Co.* v. *Clem*, 80 *Ga.* 534, 7 *S. E. Rep.* 84.

Where plaintiff avered that defendant carelessly "ran, conducted, and directed" its train, it was error to instruct the jury that they might consider the condition of brakes employed. The action was for carelessness, and not for a failure properly to equip the road. *Chicago, B. & Q. R. Co.* v. *Magee*, 60 *Ill.* 529.

In charging the jury in an action for fatal negligence, it is improper for the judge to abandon the grounds relied on in the declaration and direct their attention to other considerations as tending to support the action. *Marquette, H. & O. R. Co.* v. *Marcott*, 41 *Mich.* 433. — DISTINGUISHED IN McDonald *v.* Chicago & N. W. R. Co., 13 Am. & Eng. R. Cas. 585, 51 Mich. 628. EXPLAINED IN Marcott *v.* Marquette, H. & O. R. Co., 47 Mich. 1.

In an action for personal injuries, where the petition charges that the place of injury was "near" a regular crossing, and plaintiff's evidence shows that it was 100 feet distant, at a temporary opening in a train standing on the track, and there is no evidence that the public was accustomed to cross there, an instruction as to the injury occurring at a place where the public was accustomed to cross is erroneous in not confining the jury to the place alleged in the petition. *Dahlstrom* v. *St. Louis, I. M. & S. R. Co.*, 35 *Am. & Eng. R. Cas.* 387, 96 *Mo.* 99, 15 *West. Rep.* 85, 8 *S. W. Rep.* 777.

Instructions should tell the jury what the issues are, and should limit the issues to those made by the pleadings. So in a personal injury suit against a railroad it is error to instruct the jury that if they believe from the evidence that the company negligently inflicted "the injuries mentioned in the petition" they may find for plaintiff, without confining the negligence to that mentioned in the petition. *Gessley* v. *Missouri Pac. R. Co.*, 26 *Mo. App.* 156.

Where a petition only asks damages for making an embankment in the street in front of plaintiff's property, thereby raising the grade, and the instructions of the court include a further cause of action and direct the jury to assess damages sustained by reason of the change in the street or the construction of the cable railway, or both, it is error, as the instructions must be confined to the pleading. *Taylor* v. *Kansas City Cable R. Co.*, 28 *Mo. App.* 552.

Plaintiff, a boy some ten or twelve years old, testified that he got on defendant's up-town street-car and offered to pay his fare, but the conductor refused it and pushed him off, and he fell and was injured by a down-town car on the adjoining track; and his evidence was supported to some extent by several other witnesses. The defendant claimed that plaintiff was never on the car, but ran in front of the horses of the down-town car and was knocked down by them, which claim was supported to some extent by the evidence of the two conductors and some other witnesses. The court instructed the jury that if plaintiff was a trespasser, and got off as best he could on being notified, he could not recover; but even if he were a trespasser, if he was in a dangerous position, and the conductor threw him off, then defendant was liable. *Held*, that the instruction did not present the issues involved, as neither plaintiff nor defendant gave evidence tending to show that plaintiff was a trespasser. *Spitalera* v. *Second Ave. R. Co.*, 25 *N. Y. Supp.* 919, 73 *Hun* 37.

The company asked the court to charge that if the boy was not on either car, but was running across the street, and ran into the horses of the down-town car, or into the car, he could not recover; but the court replied "I refuse so to charge. There is no evidence before the jury that would show that he was not on one car or the other." *Held*, error. *Spitalera* v. *Second Ave. R. Co.*, 25 *N. Y. Supp.* 919, 73 *Hun* 37.

Plaintiff sued in New York for an injury occurring at a grade crossing in the state of Connecticut, where a statute exists requiring a bell to be sounded or a whistle to be blown on trains approaching highway crossings at grade. *Held*, that it was error to charge the jury that a failure to comply with the statute was conclusive evidence of negligence. The jury had a right to consider the statute in determining the question of negligence, but the mere fact that it was not complied with could not in itself make the company liable. *Van Raden* v. *New York, N. H. & H. R. Co.*, 56 *Hun* 96, 30 *N. Y. S. R.* 300, 8 *N. Y. Supp.* 914.

139. Instructions unsupported by evidence.—Where a declaration in a personal-injury case contains three counts, each charging negligence in a different way, but the evidence is applicable only to the first count, it is error to submit to the jury to find a species of negligence variant from that charged in the first count. *Illinois C. R. Co.* v. *Frelka*, 9 *Ill. App.* 605.

An instruction given on a theory which there is no evidence to support cannot be sustained. *Dimmick* v. *Council Bluffs & St. L. R. Co.*, 14 *Am. & Eng. R. Cas.* 226, 62 *Iowa* 409, 17 *N. W. Rep.* 595.

In an action for personal injury it is error for the court to instruct the jury that plaintiff is entitled to recover for reasonable expense incurred in nursing, where there is no evidence that any such expense was incurred. *Nichols* v. *Dubuque & D. R. Co.*, 27 *Am. & Eng. R. Cas.* 183, 68 *Iowa* 732, 28 *N. W. Rep.* 44.

It is error to give instructions based on facts not pleaded, and of which there is no evidence. *Fisk* v. *Chicago, M. & St. P. R. Co.*, 74 *Iowa* 424, 38 *N. W. Rep.* 132.—FOLLOWING Manuel *v.* Chicago, R. I. & P. R. Co., 56 Iowa 636; Gilbert *v.* Flint & P. M. R. Co., 51 Mich. 488, 16 N. W. Rep. 868; O'Donnell *v.* Chicago, M. & St. P. R. Co., 69 Iowa 102.

Where the court in its charge to the jury submits the case on the theory that two distinct and separate railway companies are simply one and the same corporation, designated by two names, and that the contract of one is the contract of both, and the evidence wholly fails to prove any such theory, the instruction is misleading and erroneous. *St. Louis, W. & W. R. Co.* v. *Kitz*, 11 *Am. & Eng. R. Cas.* 35, 30 *Kan.* 30, 1 *Pac. Rep.* 27.

It is error to instruct the jury in a negligence case that plaintiff is entitled to recover the money she may have expended in an attempt to be cured of her injuries, in the absence of any testimony tending to show such expenditure. *Cousins* v. *Lake Shore & M. S. R. Co.*, 96 *Mich.* 386, 56 *N. W. Rep.* 14.

Instructions held erroneous because they made plaintiff's right to recover depend on the finding of certain facts when the evidence tended to prove other facts which, if found, might entitle plaintiff to a recovery. *Graham* v. *Burlington, C. R. & N. R. Co.*, 39 *Minn.* 81, 38 *N. W. Rep.* 812.

An instruction is improper which submits an issue to the jury when there is no evidence to support it. *Harty* v. *St. Louis, I. M. & S. R. Co.*, 95 *Mo.* 368, 14 *West. Rep.* 760, 8 *S. W. Rep.* 562.

An instruction should not be given submitting to the jury the question of fraud in obtaining a release where there is no evidence to support an allegation of fraud. *Mateer* v. *Missouri Pac. R. Co.*, 105 *Mo.* 320, 16 *S. W. Rep.* 835.

An instruction in an action for injuries is improper which permits the jury to disregard the release if the company's claim agent obtained it "by any trick or artifice." It should confine the jury to the fraud shown by the evidence. *Mateer* v. *Missouri Pac. R. Co.*, 105 *Mo.* 320, 16 *S. W. Rep.* 839.

A trial court should not give instructions on a matter of negligence where there is no evidence to support them. *Evans* v. *Interstate R. T. R. Co.*, 106 *Mo.* 594, 17 *S. W. Rep.* 489.

A charge of the court as to the duty of a company in the selection and retention of its employés is, in a suit for damages caused by alleged negligence of the company, erroneous and prejudicial when there is no evidence or issue as to that subject before the court. *Houston & T. C. R. Co.* v. *Gilmore*, 62 *Tex.* 391.

In a suit for damages, which could only be recovered by showing that defendant company was liable on account of the negligence of one of its employés, a charge which directs the jury to inquire whether such negligence existed, when there is no evidence tending to show its existence, is error, and calculated to mislead. *Galveston, H. & S. A. R. Co.* v. *Faber*, 63 *Tex.* 344.

A charge which instructs the jury that they may find damages for the use of the

occupation of land from the time defendant entered thereon until the right of way was legally acquired, when there is not a particle of evidence to prove the value of such use and occupation, is erroneous; and it is error to instruct the jury that plaintiffs may recover damages to crops on the land from overflow, when there is no allegation in the pleadings to authorize such instruction. *Texas & St. L. R. Co.* v. *Reid*, 1 *Tex. App.* (*Civ. Cas.*) 120.

In an action against a company for the value of property destroyed by fire, it appeared that the train was running within a village at an unlawful rate of speed, that it consisted of only two cars, and was running on a straight line, and the grade was not shown. There was no other evidence that the undue speed increased the danger of fire. *Held*, that it was error, as against defendant, to submit that question to the jury. *Brusberg* v. *Milwaukee, L. S. & W. R. Co.*, 2 *Am. & Eng. R. Cas.* 264, 50 *Wis.* 231, 6 *N. W. Rep.* 821.

140. Comments upon the evidence.—An instruction containing a long recital of many facts which the evidence tends to prove is faulty. *Chicago, M. & St. P. R. Co.* v. *Krueger*, 124 *Ill.* 457, 17 *N. E. Rep.* 52; *affirming in part* 23 *Ill. App.* 639.

An instruction which comments on the evidence, giving certain facts undue prominence, is erroneous. *Benjamin* v. *Metropolitan St. R. Co.*, 50 *Mo. App.* 602.

141. —— or the witnesses.—When a witness, in addition to testifying to acts of intemperance of a railroad employé, has testified as to other facts in relation thereto, an instruction that unless the jury believe the witness told the truth, they should find that the employé was not drunk, or drinking, at the time of the collision in question is erroneous as argumentative, and as denying the right of the jury to believe the witness in respect to the drinking. *Kansas City, M. & B. R. Co.* v. *Sanders*, 58 *Am. & Eng. R. Cas.* 140, 98 *Ala.* 293, 13 *So. Rep.* 57.

The evidence of employés should be weighed and tested as that of other witnesses, and, in the absence of all proof of bias or prejudice resulting from their employment, an instruction is erroneous that if the jury believed from the evidence that the employés had testified under fear of losing their employment, and from a desire to please their employer, they could take it into consideration in weighing the evidence. *St. Louis, A. & T. H. R. Co.* v. *Huggins*, 20 *Ill. App.* 639.

In an action by an employé to recover for a personal injury due to defendant company's negligence, the court charged the jury, "You have a right to believe or disbelieve the plaintiff entirely, unless he is corroborated; if he is corroborated, you have a right to disbelieve him." *Held*, error; that the credibility of a witness is a question for the jury, and the charge took from them the right to determine whether his conduct brought him within the rule that the jury were at liberty to accept or reject the testimony of an interested witness. *Duggan* v. *Third Ave. R. Co.*, 55 *N. Y. S. R.* 777, 26 *N. Y. Supp.* 79.

It is error for a trial judge to state to the jury his estimate of a witness, or how the witness appears to him. Therefore, where a witness is introduced for the purpose of impeaching a former witness, it is error for the judge to state to the jury that the former is "a man of high character in his profession, and appears to be a man of culture," and to say nothing concerning the impeaching witness. *Crutchfield* v. *Richmond & D. R. Co.*, 76 *N. Car.* 320, 14 *Am. Ry. Rep.* 292.

142. Instructions assuming facts as proved.—An instruction is objectionable which assumes the existence of any disputed fact. *Harmon* v. *Washington & G. R. Co.*, 30 *Am. & Eng. R. Cas.* 627, 6 *Mackey* (*D. C.*) 57, 8 *Cent. Rep.* 738.

In an action against a company to recover for personal injuries at a street crossing, the court was asked to instruct the jury that it was the duty of plaintiff to observe any warning given of the approach of any train, and if he had any notice that a train was near, and about to pass in front of him, it was his duty to stop; and, also that if they believed from the evidence that by reason of negligence or inattention on his part he did not observe any signals of the approach of the train, he could not recover. The court refused to give the instructions. *Held*, that they were properly refused, as they assumed that "warning" or "signals" of the approach of the train were given, which was one of the controverted facts in the case. *Chicago, St. L. & P. R. Co.* v. *Hutchinson*, 32 *Am. & Eng. R. Cas.* 82, 120 *Ill.* 587, 11 *N. E. Rep.* 855.

An instruction which assumes that there was evidence tending to prove that defendant's servants negligently gave an alarm

signal by blowing an engine whistle, when in fact there was no such evidence, is erroneous. *Chicago, R. I. & P. R. Co.* v. *Felton*, 33 *Am. & Eng. R. Cas.* 533, 125 *Ill.* 458, 15 *West. Rep.* 41, 17 *N. E. Rep.* 765; *reversing* 24 *Ill. App.* 376.

Where a freight-train conductor sues for personal injuries alleged to be due to the failure of defendant's employés to observe the signal of a semaphore, and there is a conflict of evidence as to such neglect, it is error to instruct the jury that if they believe that the injury occurred by reason of the neglect of the employés to obey the signal, then they may find for plaintiff. *Illinois C. R. Co.* v. *Zang*, 10 *Ill. App.* 594.

An instruction given for defendant assumed that a car of wheat was "delivered" on the side track. The fact of delivery was in issue, and the instruction was therefore erroneous. *Pindell* v. *St. Louis & H. R. Co.*, 34 *Mo. App.* 675.

It is error for the trial judge to suppose evidence to be given which, though treated by counsel as given, was not really offered. *Bodine* v. *Camden & A. R. Co.*, 1 *Phila.* (*Pa.*) 28.

Where a number of witnesses testified directly and positively that a locomotive whistle was blown on approaching a crossing, and two witnesses merely stated that they did not hear the whistle, an instruction assuming that no signals were given is erroneous. *Galveston, H. & S. A. R. Co.* v. *Kutac*, 37 *Am. & Eng. R. Cas.* 470, 76 *Tex.* 473, 13 *S. W. Rep.* 327.

143. Instructions on the weight and sufficiency of evidence. — Where the direct issue between the parties is as to whether, on the approach of a train to a station, the company's agent exhibited only a white light, indicating that the road was clear and that the train might proceed without encountering collision or obstruction, or whether the agent also exhibited a green light under the white one, indicating that the train should proceed with caution and that there was another train on the road between the approaching train and the next station, and both sets of witnesses testify with equal positiveness, the question of positive and negative testimony is not involved, and a charge on such question is therefore not required. *Georgia Pac. R. Co.* v. *Bowers*, 86 *Ga.* 22, 12 *S. E. Rep.* 182.

It is ordinarily error to instruct a jury that "in all cases" expert testimony "should be received and weighed with caution." The evidence of competent medical experts is entitled to great respect and consideration. *Atchison, T. & S. F. R. Co.* v. *Thul*, 32 *Kan.* 255, 49 *Am. Rep.* 484, 4 *Pac. Rep.* 352.

Whether there is evidence of incompetency, or whether there are circumstances which might be considered, in connection with such evidence, sufficient to show incompetency, are questions exclusively for the jury; and a charge which assumes the existence of such evidence and of such circumstances violates the rule which forbids a judge to charge upon the weight of evidence. *Missouri Pac. R. Co.* v. *Christman*, 65 *Tex.* 369.

It is for the court to determine the admissibility of evidence. It also has the power, on a motion for a new trial, to declare whether sufficient evidence has been offered, and this power should be judiciously exercised; but a charge which, in effect, may induce the jury to believe that in the opinion of the judge there is evidence sufficient to prove, or strongly tending to prove, a controverted fact, is objectionable. *Missouri Pac. R. Co.* v. *Christman*, 65 *Tex.* 369.

In an action for injuries inflicted in a collision, the court instructed the jury: "When it is shown by the proof that an injury was received by reason of and as the direct result of an unusual occurrence, then the law presumes the occurrence so causing the injury to have happened by reason of negligence, unless it further appears by the proof that such an unusual occurrence was not the result of negligence, but was caused by some circumstance or cause which the exercise of the greatest care and prudence could not have prevented." The statute declares that a judge "shall not charge or comment on the weight of evidence." *Held*, that the charge in question clearly violated the statute. *Texas C. R. Co.* v. *Burnett*, 80 *Tex.* 536, 16 *S. W. Rep.* 320.—FOLLOWED IN Texas & P. R. Co. *v.* Davidson, 3 Tex. Civ. App. 542.

144. Instructions invading the province of the jury. — In an action against a carrier for failure to deliver goods, the testimony being conflicting as to whether the goods had ever been received, and whether freight had been paid on them, a charge *ex mero motu* that if the jury believed, from the evidence, that the carrier received freight on the goods in question,

that was sufficient evidence that the defendant had the goods in possession at that time is an invasion of the province of the jury, and necessarily erroneous. *Mobile & G. R. Co.* v. *Williams*, 52 *Ala.* 278.

145. Instructions calculated to mislead the jury.—In an action against a railroad for personal injuries it is error to instruct the jury that it is necessary for plaintiff to prove a material fact, or that it should be made to appear from the evidence "to the satisfaction of the jury." The law does not demand that every material allegation shall be established to the satisfaction of the jury. The jury are to decide facts upon the weight or preponderance of evidence, even though the proof does not show such facts to their satisfaction. *Stratton* v. *Central City Horse R. Co.*, 1 *Am. & Eng. R. Cas.* 115, 95 *Ill.* 25.

An instruction is calculated to mislead, and is erroneous, which sums up all or a number of the facts which the evidence tends to prove on one side, and omits all on the other, thus impressing on the jury the idea that the facts recited are the only ones that are important in the case. *Pennsylvania Co.* v. *Stoelke*, 8 *Am. & Eng. R. Cas.* 523, 104 *Ill.* 201.

The presumption obtains, in the absence of evidence to the contrary, that every one exercises ordinary care. But in an action against a company for damages for personal injuries, where there is abundant evidence from which plaintiff's negligence might have been found, an instruction that the presumption of ordinary care exists in his favor is calculated to mislead the jury and should not have been given. *Moberly* v. *Kansas City, St. J. & C. B. R. Co.*, 98 *Mo.* 183, 11 *S. W. Rep.* 569.—FOLLOWED IN Rapp *v.* St. Joseph & I. R. Co., 106 Mo. 423.

An instruction declaring it to be the duty of a company to erect and maintain gates on both sides of its "track" at a street crossing is misleading, where there are many tracks at such crossing and the city ordinance only requires "gates on both sides of its tracks" at the crossing. *Jennings* v. *St. Louis, I. M. & S. R. Co.*, 99 *Mo.* 394, 11 *S. W. Rep.* 999.

In an action to recover for personal injuries it is error for the court in its instructions to the jury to read to them the opinion of the supreme court delivered at the hearing of a former appeal, wherein certain material facts were recited tending to show negligence, of which no proof was offered on the second trial, without calling the attention of the jury to that point. *Wallace* v. *Western N. C. R. Co.*, 37 *Am. & Eng. R. Cas.* 159, 101 *N. Car.* 454, 8 *S. E. Rep.* 166.

In an action for refusal to receive and check a trunk, an instruction is erroneous which leaves it doubtful whether the occasion alluded to therein as that when plaintiff had not endeavored to deceive defendant was the occasion mentioned in the declaration, or some other. *Norfolk & W. R. Co.* v. *Irvine*, 37 *Am. & Eng. R. Cas.* 227, 85 *Va.* 217, 7 *S. E. Rep.* 233.

146. Expressions of opinion. — In an action for personal injuries the court instructed the jury, "I charge you again that these injuries are permanent, and that she [plaintiff] will have to suffer the remainder of her life." This was objected to as expressing the opinion of the court to the jury that the injuries were permanent. *Held*, that the objection was well founded, though it appeared from the whole charge that it was a *lapsus linguæ*, the court intending to say, "I charge you again that if these injuries are permanent," etc. *Chattanooga, R. & C. R. Co.* v. *Liddell*, 85 *Ga.* 482, 11 *S. E. Rep.* 853.

It is essential not only that the rules of law shall be given to the jury with substantial accuracy, but also that the jury be left perfectly free to form and declare from the evidence their opinion upon the questions of fact. It is not admissible for the court to express any opinion to the jury on questions of fact, even though in conformity to the previously expressed opinion of the same court upon reviewing a question of fact. *Chicago & N. W. R. Co.* v. *Moranda*, 17 *Am. & Eng. R. Cas.* 564, 108 *Ill.* 576.

147. Urging the jury to agree.—After being informed that a jury could not agree, and that the trouble was over the amount of damages, the court said: "Gentlemen, I cannot aid you in that, as I know of, in any way further than to say that upon that matter the jury ought to make a very earnest effort to agree—to reconcile conflicting opinions as to amounts. I merely give you that as advice of the court. You must make an effort to agree upon the amount. Of course, a juror ought not to give up his convictions, if they are so strong, but there ought to be an effort to come to an agreement. You can retire and see if you cannot agree upon the amount." *Held*, that this

was reversible error, since the jury might have understood the court as favoring a verdict for plaintiff; or jurors might have been induced to give up opinions that they may have entertained in favor of the defendant. *Georgia R. Co.* v. *Cole*, 77 *Ga.* 77. — DISTINGUISHED IN Central R. & B. Co. *v.* Neighbors, 83 Ga. 444, 10 S. E. Rep. 115.

Upon the trial of an action to recover damages for alleged negligence, after the jury had retired they came back into court, and one of them stated that there was no probability of their agreeing. The court refused to take the statement, saying to the jury: "You must get together. No juror ought to remain entirely firm in his own conviction one way or the other until he has made up his mind beyond all question that he is necessarily right and the others necessarily wrong." *Held*, error; that jurors who were not satisfied by the evidence of the truth of plaintiff's allegations were justified in refusing for that reason to find a verdict in her favor, although they had not made up their minds beyond all question that they were necessarily right and the others necessarily wrong. *Cranston* v. *New York C. & H. R. R. Co.*, 103 *N. Y.* 614, 9 *N. E. Rep.* 500, 4 *N. Y. S. R.* 300; *reversing* 39 *Hun* 308.

In an action for wrongfully causing death, after the jury had been out for some time they returned into court and reported that they could not agree; whereupon the judge said: "I do not like to work all the week without accomplishing anything. Of course I do not want you to agree upon a verdict simply to please me, or to agree upon a verdict at all unless you can conscientiously do so. Any verdict which you reach must be by the concurrence of the judgment of the jury. Of course I cannot ask you to agree unless you can conscientiously do so." *Held*, that this was not error when taken as a whole; but the court refused to say that the first sentence, taken alone, would not constitute reversible error. *East Tenn. & W. N. C. R. Co.* v. *Winters*, 85 *Tenn.* 240, 1 *S. W. Rep.* 790.

148. Instructions on questions of negligence and due care, generally. — An instruction that those engaged in operating trains are required to exercise the same degree of care as should be "suggested or exercised by men of extraordinary care, skill, diligence, or prudence" is erroneous as requiring too high a qualification. *Gadsden & A. U. R. Co.* v. *Causler*, 58 *Am. & Eng. R. Cas.* 258, 97 *Ala.* 235, 12 *So. Rep.* 439.

A company is liable for any damage done to persons, stock, or other property by the running of its trains, unless it appears that its agents exercised all ordinary and reasonable care and diligence to prevent such damage; but where, in an action for killing a horse, the court, after charging this principle, added, "that is, might say, a full measure of care and diligence — all that could be expected," such charge was error, the effect of it being to require extraordinary diligence from the company. *Western & A. R. Co.* v. *King*, 19 *Am. & Eng. R. Cas.* 255, 70 *Ga.* 261.

A company is only bound to exercise reasonable and ordinary care as toward employés. Therefore an instruction that a company is bound to "do all that human care, vigilance, and foresight could reasonably do, consistent with the modes of conveyance and the practical operation of its road, to keep its road and engines in a safe and good condition" imposes too strict a rule. *Chicago, M. & St. P. R. Co.* v. *Standart*, 16 *Ill. App.* 145.

In personal injury cases, based on negligence, instructions are wrong which tell the jury what particular acts were or were not consistent with the exercise of due care. That is always for the jury to determine. *Chicago & N. W. R. Co.* v. *Mueller*, 44 *Ill. App.* 461.

An instruction, "If you are satisfied from the evidence that soon after the happening of the injury complained of the track of defendant's road was moved back some distance from the coal chute, this you may consider as a circumstance tending to show negligence on the part of the defendant," is improper. *Atchison, T. & S. F. R. Co.* v. *Retford*, 18 *Kan.* 245, 15 *Am. Ry. Rep.* 278.

In an action to recover for injuries caused by negligence, it is error to give an instruction to the jury which makes the conduct of plaintiff the only condition upon which his right of recovery depends, and which virtually says that if plaintiff was careful and prudent, he may recover, whether defendant was negligent or not. *Atchison, T. & S. F. R. Co.* v. *Combs*, 25 *Kan.* 729. — FOLLOWED IN Kansas City, L. & S. W. R. Co. *v.* Richolson, 31 Kan. 28.

In an action for personal injuries where excessive speed is alleged, an instruction

that it was negligence on the part of those in charge of the train to run it at full speed over any part of the track known by them to be frequented by cattle, unless that part of the track was guarded, is error. *Chicago, B. & Q. R. Co.* v. *Clark*, 38 *Am. & Eng. R. Cas.* 192, 26 *Neb.* 645, 42 *N. W. Rep.* 703.

A charge, "If you believe the defendant did and had done all that could be required to render said bridge secure and safe for the passage of trains, and that the destruction of said bridge and the death of said —— was the result of an unprecedented rainfall, and of such a character that no human foresight or skill could provide against, you will find for the defendant," is erroneous: (1) in requiring a greater degree of care on the part of defendant than reasonable care for the safety of its employés; (2) in adding conjunctively the finding that the death was caused by unprecedented rainfall. The charge touching the rainfall was not in terms correct; it imposed upon defendant the burden of proof, while it devolved upon plaintiff to show want of care. *Galveston, H. & S. A. R. Co.* v. *Daniel.*, 1 *Tex. Civ. App.* 695, 20 *S. W. Rep.* 955.

149. —— in actions for injuries to passengers. — A charge that defendant would be liable if the bell rope did not reach through the passenger car, at the end of a train, is erroneous; the neglect must appear to have caused or contributed to the injury. *Mobile & M. R. Co.* v. *Ashcraft*, 48 *Ala.* 15.

On trial of an action for injuries to a passenger in a car of defendant's train, which was thrown from the track by a broken rail, or the breaking of a rail, an instruction undertaking to define a safe rate of speed by its comparison with the velocity "practiced before, with the tacit consent of the community, and without accident" assumes a false criterion, and is erroneous. *Cleveland, C., C. & I. R. Co.* v. *Newell*, 8 *Am. & Eng. R. Cas.* 377, 75 *Ind.* 542.—CRITICISING Wilds *v.* Hudson River R. Co., 29 N. Y. 315.

An instruction which declares that "railroad companies are bound to exercise very great vigilance and care in maintaining order and guarding passengers against violence from whatever source arising," etc., is erroneous. Reasonable care and diligence, under all the circumstances, is all that is required. *Illinois C. R. Co.* v. *Minor*, 52 *Am. & Eng. R. Cas.* 441, 69 *Miss.* 710, 16 *L. R. A.* 627, 11 *So. Rep.* 101.

150. —— in actions for injuries to persons crossing the track. — Where the action is to recover for injuries at a crossing, an instruction which assumes that defendant company was guilty of negligence which proximately caused the injury, by failing to check the speed of the train as it approached the crossing, or to station a flagman at the place, without reference as to whether plaintiff was negligent, is erroneous. *Carraher* v. *San Francisco Bridge Co.*, 81 *Cal.* 98, 22 *Pac. Rep.* 480.

151. —— in actions for injuries to employes. — Where a fireman is injured by the explosion of an engine boiler, and the railway company introduces evidence tending to show that the explosion was due to the negligence of the engineer and not to any defect in the boiler, the engineer testifying in rebuttal that the explosion was due, not to his negligence, but to the defective condition of the boiler, the trial court has no right to undertake to weigh the evidence and instruct the jury that the plaintiff was guilty of contributory negligence, or that the explosion was the result of the negligence of the engineer or of defects in the condition of engine or boiler. *Richmond & D. R. Co.* v. *Black*, (*Ala.*) 9 *So. Rep.* 568.

In an action for personal injuries by an engineer, after admitting evidence tending to show that such engineer was experienced and reliable, it is error to charge that, as throwing light on the question whether or not he was to blame, the jury may consider his character as an experienced and reliable engineer if such character has been shown by the testimony, the evidence mentioned not being relevant upon this particular issue. *Central R. & B. Co.* v. *Kent*, 87 *Ga.* 402, 13 *S. E. Rep.* 502.— FOLLOWING Atlanta & W. P. R. Co. *v.* Newton, 85 Ga. 517.

An instruction to the effect that if a railroad employé is injured solely on account of his negligence in disregarding the rules of the company, he cannot recover, is erroneous, because it is calculated to mislead the jury into the error of finding in his favor in case his negligence only contributed to the injury. *Deeds* v. *Chicago, R. I. & P. R. Co.*, 69 *Iowa* 164, 28 *N. W. Rep.* 488.

In an action by an employé, for personal injuries, evidence was introduced tending to show that a duty was imposed by the

company upon such employé, and afterwards another duty was assigned to him by his employer, without expressly relieving him from the performance of the first duty, and he could not act in the performance of both duties at the same time; and evidence was also introduced tending to show that he might have performed both duties by attending to one, and then to the other, alternately; and that he failed in the performance of one of such duties; and that, by reason of such failure, the injury for which he sued resulted. *Held*, that an instruction that if, at the time of the injury, plaintiff was in the discharge of the duty which he in fact performed, he might recover, notwithstanding the fact that he failed to perform the other duty, is misleading and erroneous. *Union Pac. R. Co.* v. *Fray*, 29 *Am. & Eng. R. Cas.* 309, 35 *Kan.* 700, 12 *Pac. Rep.* 98.

A charge which in effect assumes as matter of law that the placing of a car on a side track, or marking on it "Out of order," was sufficient to charge an ordinary man engaged in coupling it with notice of its damaged condition and the consequent extra risk of coupling it—*held*, error. *Watson* v. *Houston & T. C. R. Co.*, 11 *Am. & Eng. R. Cas.* 213, 58 *Tex.* 434.

In suits involving issues of care and negligence of master and servant, where all the facts bringing about or attending an accident on the part of both parties are in evidence before a jury, the propriety of giving any charge upon the burden of proof may be questioned. *Texas & P. R. Co.* v. *Geiger*, 79 *Tex.* 13, 15 *S. W. Rep.* 214.

152. —— in actions for injuries to trespassers.—An instruction founded on an engineer's duty after discovering a person walking on the track, but ignoring his duty to exercise ordinary care to discover that person's dangerous position, is improper. *Virginia Midland R. Co.* v. *White*, 34 *Am. & Eng. R. Cas.* 22, 84 *Va.* 498, 5 *S. E. Rep.* 573.

And so likewise is an instruction founded upon the idea that a person is a trespasser who is walking on a part of the track which is within city limits, and which has been for a long time, with the company's acquiescence, the common pathway of the public. *Virginia Midland R. Co.* v. *White*, 34 *Am. & Eng. R. Cas.* 22, 84 *Va.* 498, 5 *S. E. Rep.* 573. —QUOTING Townley *v.* Chicago, M. & St. P. R. Co., 53 Wis. 626.—APPLIED IN Norfolk & W. R. Co. *v.* Carper, 88 Va. 556.

153. —— in actions for injuries to animals.—In an action to recover the value of stock which plaintiff alleged were killed at a public crossing by the negligence of the company, the bill of particulars alleged that "the whistle of the engine was not sounded as prescribed by law; and that in consequence thereof the stock were not warned of the approach of the train until it was too late to prevent them from being killed; and that if the whistle of the engine had been sounded, as prescribed by law, the person in charge of the stock could have prevented any injury; that the railroad company permitted a very high and dense growth of hedge to extend out on its right of way, and nearly to the track"; and further stated that said hedge "prevented persons traveling upon the public road from observing the approach of trains." *Held*, that under the allegations of the bill of particulars it was misleading and erroneous to instruct the jury that "if the railroad company permitted and suffered a hedge to stand upon its right of way, so as to obstruct the view of the track, and but for such obstruction the injury to the stock would not have happened, the company is liable for the injury to the stock." *Atchison, T. & S. F. R. Co.* v. *Hawkins*, 40 *Am. & Eng. R. Cas.* 201, 42 *Kan.* 355, 22 *Pac. Rep.* 322.

Where it appears from the instructions and findings of the jury, under the allegations of such a bill of particulars, that the liability for the injury to the stock was fixed by the jury for the negligence of the company in permitting the hedge to grow upon the right of way as alleged, the verdict and judgment must be set aside. *Atchison, T. & S. F. R. Co.* v. *Hawkins*, 40 *Am. & Eng. R. Cas.* 201, 42 *Kan.* 355, 22 *Pac. Rep.* 322.

154. Instructions relative to contributory negligence.—An instruction is erroneous which tends to mislead the jury by putting in issue before them only the degree of negligence of deceased in trespassing upon the railroad track, when all the circumstances connected with her presence there, which might tend to show gross negligence on her part, should be laid before the jury for their consideration. (Walker, J., dissenting.) *Illinois C. R. Co.* v. *Hetherington*, 83 *Ill.* 510.

To instruct the jury, in an action for personal injuries, that if plaintiff failed to exercise ordinary care, he was guilty of gross negligence, and that "if he was injured for

the want of ordinary care, no action will lie unless defendant wilfully inflicted the injury, is error. *Stratton* v. *Central City Horse R. Co.*, 1 *Am. & Eng. R. Cas.* 115, 95 *Ill.* 25.

In an action to recover for an injury caused by negligence of defendant, an instruction that plaintiff cannot recover unless the proof shows that by the exercise of proper care he could have averted the injury is erroneous, as it submits a question of law to the jury as to what is proper care, and does not confine them to the question of fact whether plaintiff used ordinary care. *Stratton* v. *Central City Horse R. Co.*, 1 *Am. & Eng. R. Cas.* 115, 95 *Ill.* 25.—RECONCILED IN Chicago, B. & Q. R. Co. *v.* Johnson, 8 Am. & Eng. R. Cas. 225, 103 Ill. 512.

Where the evidence on the part of plaintiff shows that he was without fault or negligence, and that defendant was guilty of gross negligence, while the evidence on the other side shows defendant to be without fault, and plaintiff grossly negligent, a clause in an instruction that the sole question for determination is as to how the collision and injury occurred, and who is to blame for it (the injury being conceded), is not erroneous, in taking from the jury the question of plaintiff's contributory negligence. In such case there is no middle ground, either one or the other party being wholly at fault. *Chicago, St. L. & P. R. Co.* v. *Hutchinson*, 32 *Am. & Eng. R. Cas.* 82, 120 *Ill.* 587, 11 *N. E. Rep.* 855.

An instruction as to the duty of a person to take the safest place possible to avoid an injury by accident or through negligence is bad if it wholly ignores evidence to the effect that he took his position by the direction of the servants of defendant, and their negligence in that respect. *Lake Shore & M. S. R. Co.* v. *Brown*, 31 *Am. & Eng. R. Cas.* 61, 123 *Ill.* 162, 14 *N. E. Rep.* 197.

Where a plaintiff jumped from a hand-car on a bridge to the ground to avoid being run over by a train, an instruction that does not hold him to the exercise of reasonable care in selecting his means of escape, but is calculated to lead the jury to believe that the court intended to limit their inquiry to the care exercised by him in making the jump from the hand-car, would be clearly erroneous. *Peoria, D. & E. R. Co.* v. *Rice*, 144 *Ill.* 227, 33 *N. E. Rep.* 951.

When the circumstances and facts of a case are proven by direct testimony, it is error to instruct the jury that they should consider and give proper weight to the instincts and presumptions which naturally lead men to avoid injury and preserve their own lives, in determining whether at the time plaintiff was injured he was in the exercise of ordinary care. *Whitsett* v. *Chicago, R. I. & P. R. Co.*, 22 *Am. & Eng. R. Cas.* 336, 67 *Iowa* 150, 25 *N. W. Rep.* 104.—DISTINGUISHING Way *v.* Illinois C. R. Co., 40 Iowa 341. — FOLLOWED IN Reynolds *v.* Keokuk, 72 Iowa 371.

It is error for the court to instruct the jury that they may, in considering the whole case, "infer the absence of fault on the part of the plaintiff from the known disposition of persons to avoid injuries to themselves," in the presence of testimony that tends strongly to show the existence of fault. *Maryland C. R. Co.* v. *Neubeur*, 19 *Am. & Eng. R. Cas.* 261, 62 *Md.* 391.

Where, upon an issue as to whether an injury complained of was caused by the negligence of defendant, plaintiff made a *prima facie* case, the judge ought to have instructed the jury to find the issue in her favor if they believed her testimony, and it was error to blend his instructions on that issue with those on an issue relating to contributory negligence. *Jordan* v. *Asheville*, 112 *N. Car.* 743, 16 *S. E. Rep.* 760.

Plaintiff sued a company for a personal injury and had his deposition taken in the case. On cross-examination the company put the interrogatory: "Describe minutely how the accident occurred. Was it not your own fault and negligence?" *Held*, that the question was improper, and did not justify an instruction that the jury must treat the failure to answer it as a confession that he was in fault. *Houston & T. C. R. Co.* v. *Reason*, 61 *Tex.* 613. — REVIEWING Teall *v.* Barton, 40 Barb. (N. Y.) 143; Bryant *v.* Glidden, 39 Me. 460; Otis *v.* Thom, 23 Ala. 469; Livingston *v.* Cox, 8 Watts & S. (Pa.) 62; Weaver *v.* Alabama Coal Min. Co., 35 Ala. 183. — DISTINGUISHED IN Gulf, C. & S. F. R. Co. *v.* Locker, 78 Tex. 279.

In submitting to the jury the question of contributory negligence, the court said: "If plaintiff was negligent in the manner mentioned, would the loss have occurred if he had not been so negligent? * * * If defendant was negligent as charged, and such negligence was the proximate cause of the damage, the plaintiff is entitled to recover, even though you may think from the evi-

dence the plaintiff ought to have exercised greater care." *Held*, that such charge was misleading. *Gibbons* v. *Wisconsin Valley R. Co.*, 62 *Wis.* 546, 22 *N. W. Rep.* 533.

155. Instructions ignoring doctrine of contributory negligence.—An instruction is vicious which ignores an important fact intimately connected with and affecting plaintiff's right, or the extent of defendant's liability, which the evidence tends to prove. Thus, in an action to recover for a permanent personal injury, including one to plaintiff's spine, claimed to have resulted from an unjustifiable assault upon him by the conductor as he was attempting to board a car while in motion, the proof tending strongly to show that the principal injury, the one to plaintiff's spine, was caused by a severe strain or wrenching of his body in attempting to get on the train, an instruction which ignores the fact that such injury might have resulted from his own imprudent act should not be given. It should exclude from the jury all idea that there could be any recovery for injuries sustained by the imprudent attempt to board the car while in motion. *Wabash, St. L. & P. R. Co.* v. *Rector*, 9 *Am. & Eng. R. Cas.* 264, 104 *Ill.* 296.

156. Instructions in regard to damages, generally.—Where it is shown that the injury complained of resulted in a broken leg, pain, and inability to perform labor, it is improper to charge the jury that there is no proof of pecuniary loss to plaintiff. *Richmond & D. R. Co.* v. *Weems*, 97 *Ala.* 270, 12 *So. Rep.* 186.

It is very rarely that a servant is held personally liable to his master for injuries resulting to third persons from his failure to exercise perfect diligence and care. Therefore, where a company is sued for an injury to a person on the street it is proper to refuse an instruction which asserts that the engineer and fireman of the train were personally liable to the company "for any negligence" which was committed by them at the time of the accident. *Pennsylvania Co.* v. *Keane*, 41 *Ill. App.* 317; *affirmed in* 143 *Ill.* 172, 32 *N. E. Rep.* 260.

In an action of tort, it is error to instruct that if plaintiff has failed to prove any "damages either actual or possible, the verdict should be for defendant." The law implies damages for every wrong. *Rose* v. *Louisville, N. O. & T. R. Co.*, 70 *Miss.* 725, 12 *So. Rep.* 825.

157. Instructions as to the elements and measure of damages.—On the trial of an action under the statute to recover damages for the killing of a person through negligence, the court instructed the jury that if they believed, from the evidence, that the plaintiff was entitled to recover, they should render a verdict for no more than $5000. *Held*, that the instruction, in a doubtful case, was calculated improperly to influence the jury to render a verdict for a large amount. *Chicago, R. I. & P. R. Co.* v. *Austin*, 69 *Ill.* 426. *Lake Shore & M. S. R. Co.* v. *May*, 33 *Ill. App.* 366. *Benson* v. *Chicago & N. W. R. Co.*, 41 *Ill. App.* 227.

Where a company is sued for entering adjoining land and taking and carrying away grass and soil, the measure of damages is the value of the soil and grass removed, and the jury should be so instructed; and it is error to direct them to assess the damages at whatever sum they believe plaintiff entitled to. *Flynt* v. *Chicago, B. & Q. R. Co.*, 38 *Mo. App.* 94. — DISTINGUISHED IN Wallace *v.* Kansas City & S. R. Co., 47 Mo. App. 491.

In an action for personal injuries, the court charged the jury that plaintiff was entitled to be fully compensated for all loss he had sustained, and for the pain he had endured, and was likely to endure in the future. There was no evidence that the injury was permanent, or that plaintiff was likely to suffer in the future. *Held*, error so to charge. *Mosher* v. *Russell*, 44 *Hun* (*N. Y.*) 12. — QUOTING Strohm *v.* New York, L. E. & W. R. Co., 96 N. Y. 306. REVIEWING Curtis *v.* Rochester & S. R. Co., 18 N. Y. 534.

The court charged: "It is of course difficult to give a money value to pain and suffering. No person would voluntarily endure such pain and suffering as it is proven Mrs. Baker endured, for any amount of money. But it is the duty of the jury, if they find for the plaintiff, to fix some sum which would be a compensation for this pain and suffering." *Held*, error; its effect was to suggest the price in money sufficient to induce a person to undergo voluntarily the pain and suffering complained of, as a measure of the compensation for having been subjected to it. Such a standard is inapplicable in actions for a personal injury not wantonly inflicted. *Baker* v. *Pennsylvania Co.*, 142 *Pa. St.* 503, 21 *Atl. Rep.* 979.

The record did not show the loss of time caused, nor its value. In such case it was

error to submit loss of time as one of the elements of damages to be considered by the jury. *International & G. N. R. Co.* v. *Simcock*, 81 *Tex.* 503, 17 *S. W. Rep.* 47.

158. Instructions giving rules for estimating damages.—In a personal injury case, it is error to instruct the jury that in estimating the damages they may take into consideration the "age and situation" of plaintiff, when there is no evidence of his age. *Gressley* v. *Missouri Pac. R. Co.*, 26 *Mo. App.* 156.—RECONCILED IN Bigelow *v.* Metropolitan St. R. Co., 48 Mo. App. 367.

A charge that "in inquiring into the amount of damage, you will take into consideration the age, health, strength of the deceased, his usual earnings and length of time he would probably live, and give such damages as you see proper, not exceeding $20,000," is too broad. *International & G. N. R. Co.* v. *Ormond*, 62 *Tex.* 274.—FOLLOWING Ryan *v.* Hays, 62 Tex. 42.

Where a street is sixty-six feet wide and a single track is laid on one side of it, it is error to instruct the jury that they may estimate the damages to an abutting owner, who claims to own the fee to one half of the street, on the theory that the whole of his side of the street has been appropriated. *Farran* v. *Chicago & N. W. R. Co.*, 21 *Wis.* 435.

4. *Prayers for Instructions.*

159. Necessity of a request to charge.—In the absence of a request, there is no duty on the court to charge the jury that defendant was not bound to produce all of the agents and employés who were connected with the running of the train. *Chattanooga, R. & C. R. Co.* v. *Huggins*, 52 *Am. & Eng. R. Cas.* 473, 89 *Ga.* 494, 15 *S. E. Rep.* 848.

If defendant fears that evidence may be improperly considered by the jury as laying the foundation for the assessment of special damages, it should ask an instruction placing proper limits upon the effect to be given to it. *Lake Shore & M. S. R. Co.* v. *Ward*, 135 *Ill.* 511, 26 *N. E. Rep.* 520; *affirming* 35 *Ill. App.* 423.

Unless asked to do so, the court is not bound to define "reasonable care and diligence," as used in an instruction. *Johnson* v. *Missouri Pac. R. Co.*, 96 *Mo.* 340, 9 *S. W. Rep.* 790.

The provision of the statute that charges of the court are considered as excepted to does not relieve a party of the duty of asking additional instructions if he considers the charge given out not full enough. *Missouri Pac. R. Co.* v. *Marten*, (*Tex.*) 22 *Am. & Eng. R. Cas.* 409.

It was not error to fail to charge the jury as to the duty of defendant's servants, or as to the question of negligence in running a train at a rapid rate of speed, where no request for such instructions was made. *McDonald* v. *International & G. N. R. Co.*, 55 *Am. & Eng. R. Cas.* 280, 86 *Tex.* 1, 20 *S. W. Rep.* 847.

Where a company is sued for the death of an employé claimed to be caused by a defective brake, and the court makes a finding for plaintiff depend upon the fact that the brake was defective, and that the death was caused thereby, the necessity of the further finding that the company knew or ought to have known of the defect will be considered waived where the company does not object or suggest any further instruction. *Foy* v. *Central Vt. R. Co.*, 65 *Vt.* 242, 26 *Atl. Rep.* 954.

160. Form and sufficiency of the prayer.—Where the action is to recover for the death of an employé, an instruction asked for which is open to the objection that it confuses or unites two distinct propositions, to wit, one relating to the risks assumed by an employé in entering a given service, and the other relating to the amount of vigilance that should be exercised under given circumstances, is properly refused, as liable to mislead the court and to confuse the jury. *Union Pac. R. Co.* v. *O'Brien*, 49 *Fed. Rep.* 538, 4 *U. S. App.* 221, 1 *C. C. A.* 354.

Where a defendant requests an instruction in a form submitting the question of negligence of deceased as an issue of law, it cannot complain that the submission of such issue was inconsistent with plaintiff's instruction, in which that question was properly submitted as a question of fact. *Wilkins* v. *St. Louis, I. M. & S. R. Co.*, 101 *Mo.* 93, 13 *S. W. Rep.* 893.

In an action against a street railway for a personal injury, an instruction that the burden of proof is upon plaintiff to establish defendant's liability by a preponderance of testimony is properly refused, when couched in the unexplained legal terms "burden of proof" and "preponderance of

evidence." *Mackin* v. *People's St., R. & E. L. & P. Co.*, 45 *Mo. App.* 82.

A passenger in a street-car sued both the street car company and a truck owner for a personal injury, charging joint negligence. Before the court charged the jury, requests to charge were made by counsel for the respective parties, which it charged or refused. Counsel for the truck owner then made further requests, which were charged. Counsel for the railway company made a further request, which was acceded to. Counsel for the truck owner then made a further request, which the court declined to hear or receive. *Held*, no error. *O'Neil* v. *Dry Dock, E. B. & B. R. Co.*, 52 *Am. & Eng. R. Cas.* 573, 129 *N. Y.* 125, 29 *N. E. Rep.* 84, 41 *N. Y. S. R.* 107; *affirming* 27 *J. & S.* 123, 36 *N. Y. S. R.* 934, 15 *N. Y. Supp.* 84. — DISTINGUISHING Chapman *v.* McCormick, 86 N. Y. 479.

It seems that counsel may not unreasonably prolong a trial by the examination of witnesses, or by debates to the court or the jury, or by innumerable and interminable requests to charge. *O'Neil* v. *Dry Dock, E. B. & B. R. Co.*, 52 *Am. & Eng. R. Cas.* 573, 129 *N. Y.* 125, 29 *N. E. Rep.* 84, 41 *N. Y. S. R.* 107; *affirming* 27 *J. & S.* 123, 36 *N. Y. S. R.* 934, 15 *N. Y. Supp.* 84.

A trial court is not required to select one of several charges asked as an entirety and give it, when others are not applicable or called for by the facts of the case, or when the jury has already been fully instructed on the question under consideration. *Sabine & E. T. R. Co.* v. *Ewing*, 1 *Tex. Civ. App.* 531, 21 *S. W. Rep.* 700.

Where a request to charge is couched too much upon the weight of the testimony, and confines the jury to the particular circumstances narrated, without notice of others that may be of importance, and selects one prominent fact or circumstance as controlling the case to the exclusion of all others, it should be refused. *Leak* v. *Rio Grande Western R. Co.*, 9 *Utah* 246, 33 *Pac. Rep.* 1045.

161. What prayers should be granted. — Plaintiff purchased land after a railroad was built, and sued the company for flooding said land by reason of an insufficient culvert. The evidence tended to show that the works were permanent, and that the injury thereby occasioned was a loss to the vendor, for which he had a cause of action which did not pass to plaintiff by his deed. *Held*, that it was error to refuse to instruct the jury upon this view of the law. *Chicago & A. R. Co.* v. *Calkins*, 17 *Ill. App.* 55.

The giving of an instruction upon the subject of negligence, general in its terms, will not justify the refusal of one, correct in itself, which announces that certain facts established by the evidence constitute negligence as a matter of law, notwithstanding the latter instruction is comprehended in the former. *Haines* v. *Illinois C. R. Co.*, 41 *Iowa* 227.

It is error to refuse an instruction that there is no evidence that plaintiff was injured by an engineer's negligence "in failing to stop, manage, or control the train" properly, where the engineer testifies that he started with no unusual jerk and there is no evidence that he did not do so, or that the slipping of a tank which caused the injury would not have happened if the train had been properly started. *Graham* v. *Boston & A. R. Co.*, 156 *Mass.* 4, 30 *N. E. Rep.* 359.

A plaintiff in an action for injury resulting from negligence is entitled to have his charges of negligence affirmatively presented to the jury, and the failure of the court so to instruct, when requested, will constitute reversible error, and this is true, although instructions given for defendant indirectly presented the same issues. *Humbird* v. *Union St. R. Co.*, 110 *Mo.* 76, 19 *S. W. Rep.* 69.

In an action for personal injuries, plaintiff testified that he had been in the wholesale wine business for a number of years; but there was no evidence as to the value of the business, or of his time, or of the amount of profits that he had made in the business. The court charged that there was no evidence from which the jury could find any loss, and refused to charge that no damages could be allowed from the mere fact that plaintiff had been unable to carry on his business since the accident. The jury found for the plaintiff. *Held*, that the instruction was error. As there was no evidence showing the existence or extent of any damage, the jury should not be left to guess or speculate as to the amount of damages. *Klien* v. *Second Ave. R. Co.*, 22 *J. & S.* (*N. Y.*) 164. — FOLLOWING Leeds *v.* Metropolitan Gas Light Co., 90 N. Y. 29.

In a suit for personal injury, defendant relied on a release, which plaintiff sought

to avoid on the ground of mental incapacity alone. The charge of the court recited that plaintiff alleged that the release was executed over the protest of plaintiff's wife and on the importunities of appellant's agent. To avoid misconception as to whether these facts could be considered by the jury, defendant asked the court to charge in terms that the release could only be avoided by reason of plaintiff's insanity, and that it could not be held invalid by reason of any supposed fraud in its procurement. *Held*, that the charge should have been given. *Missouri Pac. R. Co.* v. *Brazzil*, 72 *Tex.* 233, 10 *S. W. Rep.* 403.

In an action to recover for personal injuries, it being a disputed question whether the injuries were the proximate result of the negligence complained of or of some independent and intervening cause for which the defendant was not responsible, it was error to refuse to submit that question to the jury for a special finding. *Kreuziger* v. *Chicago & N. W. R. Co.*, 73 *Wis.* 158, 40 *N. W. Rep.* 657.

162. What requests should be refused, generally.— An instruction was properly refused which stated, as a matter of law, what were the duties of a yardmaster, in which capacity plaintiff was acting at the time of an accident, and that his position was more favorable than that of the master to know the fitness of the engine and engineer. *Wabash & W. R. Co.* v. *Morgan*, 132 *Ind.* 430, 31 *N. E. Rep.* 661, 32 *N. E. Rep.* 85.—FOLLOWING Louisville, N. A. & C. R. Co. *v.* Buck, 116 Ind. 566.

An instruction that it is the duty of a conductor and gripman of a train to report all accidents, and, if they did not report the one in controversy, then, in the absence of evidence to the contrary, the presumption would be that they knew nothing of the accident, is properly refused, as it calls for a presumption resting on the basis of another presumption. *Bigelow* v. *Metropolitan St. R. Co.*, 48 *Mo. App.* 367.

Requests to charge as to matters upon which the court has already charged, or which embody abstract or immaterial propositions, or relate to questions of evidence and the credibility of witnesses, may be properly denied. *Williams* v. *Brooklyn El. R. Co.*, 46 *Am. & Eng. R. Cas.* 149, 126 *N. Y.* 96, 26 *N. E. Rep.* 1048, 36 *N. Y. S. R.* 504; *reversing* 57 *Hun* 591, *mem.*, 32 *N. Y. S. R.* 702, 10 *N. Y. Supp.* 929.

Requests to charge based on erroneous assumptions, and requests as to matters upon the doing or not doing of which defendant's liability is not made to rest, are properly refused. *Collins* v. *New York, N. H. & H. R. Co.*, 23 *J. & S.* 31, 8 *N. Y. S. R.* 164; *affirmed in* 112 *N. Y.* 665, *mem.*, 20 *N. E. Rep.* 413, *mem.*, 20 *N. Y. S. R.* 977, *mem.*

Under the practice now prevailing in North Carolina, the jury, in civil actions, do not find a general verdict, as that plaintiff does or does not recover, but they respond to specific issues submitted to them. Hence it is not erroneous to deny a prayer for an instruction that upon evidence a party is not entitled to recover. *Bottoms* v. *Seaboard & R. R. Co.*, 109 *N. Car.* 72, 13 *S. E. Rep.* 738.

A judge may refuse to charge upon the effect of a given state of facts, when the facts themselves are in dispute; hence it is not error, in an action for injuries received from a collision with a train, to refuse to instruct the jury that there was no evidence that the accident was caused by the sole negligence or want of care of the servants of defendants, and that therefore the verdict must be in their favor. *Philadelphia & T. R. Co.* v. *Hagan*, 47 *Pa. St.* 244.

It is not error to refuse to charge the jury, in a civil suit for damages, that it would require the same character of proof to recover as it would to convict an engineer of a felony under section 4643 of the Tenn. Code, which makes it a felony for any one connected with a train to fail to observe the statutory precautions, if such failure results in death. *East Tenn., V. & G. R. Co.* v. *Humphreys*, 15 *Am. & Eng. R. Cas.* 472, 12 *Lea (Tenn.)* 200.

163. — because sufficiently covered in the general charge.— Where instructions, so far as correct, have been given in substance by the court in its general charge, there is no error in refusing to give them in the language requested. In fact, it is much the better practice to refuse to give instructions the substance of which has already been given in the general charge, than to repeat the same charge in different language, although the charge requested may be technically correct as an abstract proposition of law; for a multitude of instructions, all stated in different language, and meaning the same thing, tend rather to confuse than to enlighten the minds of the jury. *New York, L. E. & W.*

R. Co. v. *Winter*, 52 *Am. & Eng. R. Cas.* 328, 143 *U. S.* 60, 12 *Sup. Ct. Rep.* 356.

In an action for a personal injury, defendant is not injured by the refusal of an instruction that the negligence of defendant was not of itself sufficient to justify a recovery, when other instructions given require the jury to find not only such negligence of defendant but also the exercise of ordinary care by plaintiff. When all that is material in refused instructions is embraced in others which are given, there will be no error in refusing them. *North Chicago St. R. Co.* v. *Williams*, 52 *Am. & Eng. R. Cas.* 522, 140 *Ill.* 275, 29 *N. E. Rep.* 672; *affirming* 40 *Ill. App.* 590.

The rule that a trial court need not charge the jury in the language of a request, if the propositions contained in it are fully and clearly stated in the general charge, followed. *Kolsti* v. *Minneapolis & St. L. R. Co.*, 19 *Am. & Eng. R. Cas.* 140, 32 *Minn.* 133, 19 *N. W. Rep.* 655.

Where a company is not liable for the destruction of cotton by fire, after it had been deposited alongside the track awaiting shipment, by reason of its failure to construct a depot at such place, and the court so instructs the jury, no instructions should be given for plaintiff, in an action for the destruction of such cotton by fire, touching defendant's responsibility for failing to erect a depot. *Kansas City, M. & B. R. Co.* v. *Lilly*, (*Miss.*) 45 *Am. & Eng. R. Cas.* 379, 8 *So. Rep.* 644.

Plaintiff tried to get on a moving car, but was thrown down and injured by a car going in the opposite direction. The court charged: "If you find it was negligence on his part to attempt to board the car under these circumstances, then there is an end of the case." *Held*, that there was no error in refusing to charge a request which went no further, except to specify the probable dangers from an approaching car on the other track. *Pallez* v. *Brooklyn City R. Co.*, 22 *N. Y. S. R.* 657, 51 *Hun* 644, *mem.*, 4 *N. Y. Supp.* 384; *affirmed in* 123 *N. Y.* 652, *mem.*, 25 *N. E. Rep.* 954, *mem.*

Where a court instructs the jury that the burden of proof is on plaintiff to show negligence in the employment of a fireman, running an engine, or negligence in his retention, by the failure to use reasonable care in his employment or in his retention, and such negligence could not be found solely from the facts and circumstances at the time of the accident, it is not error to refuse an instruction that if the jury find that the fireman was competent to perform his duties, including the incidental duty of temporarily handling the engine, then they should find for defendant. *Brown* v. *Southern Pac. R. Co.*, 7 *Utah* 288, 26 *Pac. Rep.* 579.

164. —— because not within the issue or conformable to the pleadings.—When a brakeman claims damages on account of personal injuries sustained in attempting to couple cars, and there is evidence tending to show that, at the time the injury was received, a train of ten loaded cars was allowed to move down rapidly to the place of coupling, with only one brakeman in charge, and that the cars came together with great force, a general charge denying his right to recover, under a count which alleges that the injuries were caused "by reason of defendant's negligence, carelessness, and failure to have on said train a sufficient number of competent and skilful brakemen," is properly refused. *Georgia Pac. R. Co.* v. *Propst*, 44 *Am. & Eng. R. Cas.* 548, 90 *Ala.* 1, 7 *So. Rep.* 635.

On the trial of an action for a personal injury defendant asked an instruction to the effect that if the jury believed that the evidence on the part of defendant was equally balanced with the evidence of plaintiff, or preponderated in favor of defendant, they should find for defendant. *Held*, properly refused, for the reason that it was not restricted to matters essential to the right to recover. *Chicago W. D. R. Co.* v. *Lambert*, 119 *Ill.* 255, 10 *N. E. Rep.* 219; *affirming* 20 *Ill. App.* 654.

Where a plaintiff in his declaration bases his right to recover upon a breach of statutory duty, and makes no general averments of any neglect of duty, he will not be entitled to an instruction placing his right of recovery upon a common-law neglect of duty. He must recover upon the grounds shown by his pleadings. *Toledo, St. L. & K. C. R. Co.* v. *Cline*, 45 *Am. & Eng. R. Cas.* 150, 135 *Ill.* 41, 25 *N. E. Rep.* 846; *reversing* 31 *Ill. App.* 563.

Where the action is for injury resulting from the negligent manner in which a railroad was operated, an instruction that payment for right of way included compensation for any loss resulting from the proper and careful operation of the road through plaintiff's premises is properly refused. *Slossen* v. *Burlington, C. R. & N.*

R. Co., (*Iowa*) 7 *Am. & Eng. R. Cas.* 509, 10 *N. W. Rep.* 860; *reversed in* 11 *Am. & Eng. R. Cas.* 67, 60 *Iowa* 215, 14 *N. W. Rep.* 244.

When the petition charges negligence as the plaintiff's ground of action, and there is no question of unskilfulness on the part of defendant raised by either the petition or plaintiff's evidence, plaintiff is not entitled to an instruction as to the effect of unskilfulness on the part of defendant. *Bell* v. *Hannibal & St. J. R. Co.*, 4 *Am. & Eng. R. Cas.* 580, 72 *Mo.* 50.

An instruction that the jury must believe from a preponderance of the testimony that plaintiff's injuries were caused by the wrongful acts of defendant's servants which were within the scope of their authority is properly refused, where no issue as to acts complained of being in the scope of the servants' authority is presented by either the pleadings or the evidence. *Mackin* v. *People's St. R., E. L. & P. Co.*, 45 *Mo. App.* 82.

Plaintiff did not claim on the trial any liability on defendant's part because of a failure to ring the bell or blow the whistle on an approaching train, but the ground of liability was the alleged mismanagement of gates. Before the trial the provision of N. Y. Act of 1854, ch. 282, § 7, requiring the bell to be rung or whistle sounded upon a locomotive approaching a highway crossing, had been repealed. (Ch. 593, Laws of 1886.) Defendant's counsel requested the court to charge that it was not bound as matter of law to ring the bell or blow the whistle. This request was refused. *Held*, no error, as it had no bearing upon the issue. *Kane* v. *New York, N. H. & H. R. Co.*, 132 *N. Y.* 160, 30 *N. E. Rep.* 256, 43 *N. Y. S. R.* 494; *affirming* 56 *Hun* 648, *mem.*, 31 *N. Y. S. R.* 741, 9 *N. Y. Supp.* 879.—DISTINGUISHED IN Petrie *v.* New York C. & H. R. R. Co., 49 N. Y. S. R. 279, 66 Hun 282, 21 N. Y. Supp. 159.

165. — because unduly limiting the issue or inquiry. — There being some proof tending to sustain the allegations of a complaint that there were defects in a switch, causing the injury, as well as in another part of a track, charges confining the inquiry of the jury to the unsafe condition of the switch alone are properly refused. *Kansas City, M. & B. R. Co.* v. *Webb*, 97 *Ala.* 157, 11 *So. Rep.* 888.

In such case charges which separately assert that defendant is not liable for the negligence of its roadmaster, nor that of its section foreman, are properly refused, when the evidence tends to show that these officials were charged by defendant with performance of duties in keeping its track in good condition. *Kansas City, M. & B. R. Co.* v. *Webb*, 97 *Ala.* 157, 11 *So. Rep.* 888.

In an action for a personal injury, caused by various alleged acts of negligence, an instruction which practically withdraws from the jury the grounds of recovery alleged in several of the counts of the declaration is erroneous, and properly refused. *Elgin, J. & E. R. Co.* v. *Raymond*, 148 *Ill.* 241, 35 *N. E. Rep.* 729.

Defendant, in its answer and upon the trial, having justified the action of its employé, in seizing plaintiff in order to prevent him from boarding a train, exclusively upon the ground that such action was taken for the safety of plaintiff, in view of the facts that he was intoxicated and that the train was already in motion, the court properly refused to instruct the jury that defendant had a right to exclude plaintiff from the train on the ground that he was an unfit passenger because of his intoxication, as not being applicable to the issues tendered by the answer. *Harrold* v. *Winona & St. P. R. Co.*, 47 *Minn.* 17, 49 *N. W. Rep.* 389.

A charge that would tend to limit a recovery for all injuries received to a recovery for only a part of the injuries made the basis of the claim is properly refused, as it makes the capacity for labor at the time of the injury the standard by which a life's labor is to be estimated. *Houston & T. C. R. Co.* v. *Boehm*, 9 *Am. & Eng. R. Cas.* 366, 57 *Tex.* 152.

It is not error to refuse a charge which, though abstractly correct, would tend to eliminate from the consideration of the jury matters necessarily connected with its subject-matter, and proper to be considered in determining the right to recover, when in the general charge already given the jury has been properly instructed. *Missouri Pac. R. Co.* v. *Cornwall*, 70 *Tex.* 611, 8 *S. W. Rep.* 312.

When an employé sues to recover for personal injuries caused by the explosion of a boiler, an instruction asked for by the defendant to the effect that the incompetency of the engineer in charge of the boiler could not be proved by one single act of negligence is properly refused, as not applicable to the facts of the case, where there was

evidence tending to show his entire want of experience as an engineer, and that his avocation was that of a bridge carpenter. *East Line & R. R. R. Co.* v. *Scott*, 71 *Tex.* 703, 10 *S. W. Rep.* 99, 298.

166. — because emphasizing a particular phase of the case. — It is proper for the court to refuse instructions which cull from the body of conflicting evidence special features that may be favorable to the one litigant or the other, and the weight of which would be emphasized by such instructions. *Gulf, C. & S. F. R. Co.* v. *Shearer*, 1 *Tex. Civ. App.* 343, 21 *S. W. Rep.* 133.

The jury should be instructed upon all questions fairly in the case, but it is not error to refuse to emphasize any particular phase of the case in favor of either party. *Watson* v. *Milwaukee & M. R. Co.*, 10 *Am. & Eng. R. Cas.* 68, 57 *Wis.* 332, 15 *N. W. Rep.* 468.

167. — because not supported by evidence.—When the evidence does not show that a train was running faster over a curve than its usual rate of speed over curves, or indicate that the train ran over the curve with the same speed as over a straight road, the court will refuse to instruct the jury that it was the duty of the conductor to slacken its speed at the curve. *Wright* v. *Georgia R. & B. Co.*, 34 *Ga.* 330. —APPROVED IN Woolfolk *v.* Macon & A. R. Co., 56 Ga. 457.

An instruction that a company has omitted a duty in maintaining crossings and approaches to its road is properly refused, when there is no evidence tending to show that the defect by which it is claimed the injury was occasioned was on the right of way. *Schmidt* v. *Chicago & N. W. R. Co.*, 83 *Ill.* 405.

It is not error to refuse to instruct the jury that plaintiff cannot recover by reason of the fact that he was trying to make a coupling without the use of a safety coupler, which he was required to use by the rules of the company, where there is no evidence that the injury was caused or contributed to on account of a failure to use a safety coupler. *Wabash & W. R. Co.* v. *Morgan*, 132 *Ind.* 430, 31 *N. E. Rep.* 661, 32 *N. E. Rep.* 85.

In an action of trespass, where the defense is a public right of way by prescription over a railroad, a request for an instruction that the proved or admitted acts of the company in putting up fences on either side of the railroad would prevent the use of the way being continuous is properly refused, no such acts being admitted, and it being a question for the jury as to what acts were proved. *Weld* v. *Brooks*, 152 *Mass.* 297, 25 *N. E. Rep.* 719.

Plaintiff was driving on a street-car track in front of a car, and was injured by a collision as he was attempting to leave the track on the left-hand side. He testified that another car was passing on the left-hand side, and he waited for it to pass before leaving the track, as there was not room enough for him to turn out on the right-hand side. *Held*, that a request for an instruction that the presumption was that the condition of the road on the right-hand side was sufficient to enable him to turn to the right was properly refused. *Quinn* v. *Atlantic Ave. R. Co.*, 12 *N. Y. Supp.* 223, 34 *N. Y. S. R.* 801; *affirmed in* 134 *N. Y.* 611, *mem.*, 45 *N. Y. S. R.* 935, *mem.*, 31 *N. E. Rep.* 629, *mem.*

168. — or contrary to evidence. —It is not error to refuse a charge asserting that a track was properly constructed, when there is evidence tending to show that it was not properly constructed. *Kansas City, M. & B. R. Co.* v. *Webb*, 97 *Ala.* 157, 11 *So. Rep.* 888.

The evidence showed that just before the casualty plaintiff had either put on or let off a brake, but did not show which was done; instructions requested to the effect that the proof did not show that plaintiff was in the discharge of his duties at the time, as was averred in the complaint, were properly refused. *Kansas City, M. & B. R. Co.* v. *Burton*, 97 *Ala.* 240, 12 *So. Rep.* 88.

There being evidence from which the jury might infer that a car was left dangerously near the adjacent track by the negligence of a yardmaster, he having control of the cars and being charged with the duty of seeing that the tracks were clear, a request for instructions that there was no evidence of negligence on the part of the yardmaster was properly refused. *Kansas City, M. & B. R. Co.* v. *Burton*, 97 *Ala.* 240, 12 *So. Rep.* 88.

Where the evidence shows that a boy was under fourteen years of age, a charge which assumes him to be of the age of fourteen is properly refused. *Georgia Midland & G. R. Co.* v. *Evans*, 87 *Ga.* 673, 13 *S. E. Rep.* 580.

Where there is proof, in an action against two railway companies, that an agent, guilty of negligence, was employed and paid by both companies, and operated a semaphore or signal in the interest or service of both companies, it is proper to refuse an instruction that such agent was not the agent of one of the companies, but was agent of the other company. *Chicago & N. W. R. Co.* v. *Snyder*, 38 *Am. & Eng. R. Cas.* 188, 128 *Ill.* 655, 21 *N. E. Rep.* 520.

In an action in which the injuries complained of were caused by plaintiff being thrown from his seat, and against the stove in the car, hurting his nose and, as he claimed, causing catarrh, an instruction that there is not sufficient evidence to warrant the jury in finding that plaintiff's catarrh was caused by the injury complained of is properly refused, when plaintiff has testified that the injury was followed by catarrh and that he had no catarrh before, and the medical testimony tends to show that the injury might produce catarrh. *Quackenbush* v. *Chicago & N. W. R. Co.*, 34 *Am. & Eng. R. Cas.* 545, 73 *Iowa* 458, 35 *N. W. Rep.* 523.

The evidence showed that an engineer had been in defendant's service five or six years, and that plaintiff had but a slight acquaintance with him, having made but one trip as brakeman with him before the accident. The court refused to instruct the jury that "if plaintiff had equal means of knowledge with defendant in ascertaining the alleged incompetence of the engineer, then plaintiff was not entitled to recover." *Held*, that the instruction was rightly refused. *Williams* v. *Missouri Pac. R. Co.*, 109 *Mo.* 475, 18 *S. W. Rep.* 1098.

Plaintiff's intestate became entangled in a guy rope of an engine and he was hoisted several feet high, and a boy about sixteen years of age, who had been left in charge of the engine during the engineer's temporary absence, let him down so that he fell and was injured. *Held*, that it was not error in the court to refuse to charge at defendant's request that "if no notice was given to, or received by, an officer of defendant responsible for its general conduct, that the boy was running the engine, plaintiff could not recover," inasmuch as there was some proof tending to establish the fact of such notice. *Sweeney* v. *New York Steam Co.*, 25 *N. Y. S. R.* 598, 6 *N. Y. Supp.* 528; *affirmed in* 117 *N. Y.* 642, *mem.*, 22 *N. E. Rep.* 1131, *mem.*, 27 *N. Y. S. R.* 977, *mem.*

A passenger afflicted with rheumatism was thrown from his seat by a collision of trains, and his thigh bone broken. In action for damages the company's counsel asked that the jury be instructed that, though they believed plaintiff was injured as complained of, yet he could not recover if they believed that he was in such an infirm state as would have prevented a prudent man from taking the risk of travel, and but for which state he would not have received the injury. *Held*, that the instruction was properly refused, because inconsistent with both the evidence and the law. *Shenandoah Valley R. Co.* v. *Moose*, 83 *Va.* 827, 3 *S. E. Rep.* 796.—APPLYING Reading City Pass. R. Co. *v.* Eckert, 2 Cent. Rep. 791. QUOTING Thirteenth & F. St. Pass. R. Co. *v.* Boudron, 92 Pa. St. 475. REVIEWING Sawyer *v.* Dulany, 30 Tex. 479.

In a suit for personal injury, a charge that "defendant had the right to use its own track, and its servants managing its train would have the right to presume, if its track was clear, that it would remain so; and if its servants saw plaintiff driving his team towards the crossing over its track they had the right to act on the presumption that he would not drive his team on to its track or in contact with its train, or in dangerous proximity to it; and if you believe from the evidence that plaintiff was not on the track that defendant's engine occupied, and that his injury, if any, was occasioned by his driving his team up to or against defendant's train, by reason of which his horses, or one of them, took fright and ran off, and occasioned such injury, then your verdict should be for the defendant," was correctly refused, the evidence showing that the engineer running the train was guilty of negligence. *Texas & P. R. Co.* v. *Lowry*, 61 *Tex.* 149.

169. —— because invading the province of the jury.— An instruction telling the jury, as a matter of law, that an ordinary switchman's lantern, giving forth a white light, is a sufficient compliance with a city ordinance requiring "a brilliant and conspicuous light on the forward end of each locomotive," etc., is properly refused, as taking from the jury an important fact which it is their province to find from the evidence. *Pennsylvania Co.* v. *Conlan*, 6 *Am. & Eng. R. Cas.* 243, 101 *Ill.* 93.

Defendant asked the court to instruct that if the jury "believe, from the evidence,

that the plaintiff, at the time he sustained the injury, was so attracted in a different direction that the noise of the bell or the whistle would not have attracted him, or that the wind was so strong that he would not likely have heard it in his then state of mind, then the failure to ring or whistle would not be such negligence as would enable plaintiff to recover for such failure." *Held*, properly refused, as argumentative, and invading the province of the jury, and wrong in substance. *Toledo, St. L. & K. C. R. Co.* v. *Cline*, 45 *Am. & Eng. R. Cas.* 150, 135 *Ill.* 41, 25 *N. E. Rep.* 846; *reversing* 31 *Ill. App.* 563.

It is not error to refuse an instruction that a railroad corporation is entitled to the same protection under the law as individual litigants, where it does not appear that there was any reason to distrust the integrity of the jury, or to impute partiality or prejudice to them. *Central Branch U. P. R. Co.* v. *Andrews*, 41 *Kan.* 370, 21 *Pac. Rep.* 276.

In an action for personal injuries, a refusal to rule that upon the whole evidence plaintiff is entitled to recover is correct, where it is a question for the jury whether plaintiff was in the exercise of due care, and there is evidence of negligence competent to be submitted to them. *Sweat* v. *Boston & A. R. Co.*, 156 *Mass.* 284, 31 *N. E. Rep.* 296.

A refusal to give special charges, specifying certain acts of a person suing for damages for personal injuries as constituting negligence on his part, or charging him with special duties in approaching a railway crossing, is not error. Such a charge encroaches on the province of the jury. *Texas & P. R. Co.* v. *Wright*, 23 *Am. & Eng. R. Cas.* 304, 62 *Tex.* 515.

170. —— because laying down improper rules as to damages.—Where the court properly charges on the measure of damages and the character of the elements going to make up the damages, there is no error in refusing a long request to charge, containing an elaborate enumeration of the elements which do or do not make up the sum of damages, or to enumerate a multitude of such elements of damage as may be considered or rejected by the jury. *Mayor, etc., of Macon* v. *Harris*, 75 *Ga.* 761.

Where a suit is to recover only compensatory damages, the court having instructed the jury that they would find such actual damages as the evidence showed plaintiff to have sustained, and set out the several reasons, or grounds, for which damages might be found, none of these grounds being punitory in character, an instruction that "You will allow only damages by way of compensation, and nothing for punishing the defendant," is properly refused. *Houston & T. C. R. Co.* v. *Boehm*, 9 *Am. & Eng. R. Cas.* 366, 57 *Tex.* 152.

Where there is no evidence as to the value of the use of goods lost by a carrier, and a requested charge also embodies a rule restricting and limiting the right of plaintiff to recover the value of the goods, without explaining how such value is to be ascertained, the charge is correctly refused. *Gulf, C. & S. F. R. Co.* v. *Clark*, (*Tex.*) 18 *Am. & Eng. R. Cas.* 628.

171. Requests to charge as to proximate cause.—It appearing that an injury occurred because a company violated the law in running its train to and over a crossing in an illegal manner, it is not error for the court to refuse to charge the jury that, to make the company liable, the failure to comply with the law must operate as a cause of the injury, and if the injury would not have occurred but for such violation of law, then the company would be liable, otherwise it would not. *East Tenn., V. & G. R. Co.* v. *Warmack*, 86 *Ga.* 351, 12 *S. E. Rep.* 813.

Rule as to proximate cause where a horse becomes frightened on crossing a track, but becomes unmanageable by reason of a rein breaking, see *Putman* v. *New York C. & H. R. R. Co.*, 47 *Hun* 439, 14 *N. Y. S. R.* 329.

Where the court has already given to the jury, in general language, the correct rule as to negligence, it is not error to refuse to give an instruction which is more specific as to the "proximate and efficient cause" of the injury. *Murray* v. *Gulf, C. & S. F. R. Co.*, 38 *Am. & Eng. R. Cas.* 177, 73 *Tex.* 2, 11 *S. W. Rep.* 125.—QUOTING International & G. N. R. Co. *v.* Ormond, 64 Tex. 489.

172. Prayers relative to respective weight of positive and negative testimony.—A charge to the jury as to the weight of positive as compared with negative testimony, not predicating equal credibility and means of knowledge on the part of the witnesses, is properly refused. *Ensley R. Co.* v. *Chewning*, 50 *Am. & Eng. R. Cas.* 46, 93 *Ala.* 24, 9 *So. Rep.* 458.

Where the testimony as to whether a whistle was sounded by an engineer is con-

flicting, it is not error for the court to refuse to instruct that the positive testimony of a witness who says he heard the whistle blow is entitled to more weight than the negative testimony of a witness who says he did not hear it. *Sibley* v. *Ratliffe*, 37 *Am. & Eng. R. Cas.* 295, 50 *Ark.* 477, 8 *S. W. Rep.* 686.

An instruction that the affirmative testimony of witnesses that the bell of a locomotive engine was rung at a given time and place is of greater force and entitled to more weight than the testimony of witnesses of no greater credibility, and who had no better opportunity of hearing, that the bell was not rung, or that they did not hear it ring, and that under such circumstances the jury should give greater weight to such affirmative testimony than to the negative, is properly refused. *Louisville, N. A. & C. R. Co.* v. *Shires*, 19 *Am. & Eng. R. Cas.* 387, 108 *Ill.* 617.

A refusal to charge the jury that the evidence of plaintiff in regard to sounding the whistle and ringing the bell of a locomotive was of a negative character, while that of defendant was positive, and that the law esteems the latter class of evidence more highly and of more value than the former, was not error because it ignored all modifying circumstances and assumed that there was no positive evidence of the alleged signal given in behalf of plaintiff, whereas it appears that positive testimony with reference thereto had been offered by him. *Kansas City, Ft. S. & G. R. Co.* v. *Lane*, 23 *Am. & Eng. R. Cas.* 237, 33 *Kan.* 702, 7 *Pac. Rep.* 587.

173. Requests to charge on questions of negligence or due care.—An instruction, in an action for personal injuries, that there is no evidence that defendant was guilty of "corporate negligence" is properly refused, since when the injured person is a third party, and not an employé of the company, the negligence of any agent is the negligence of the company. *Kansas City, M. & B. R. Co.* v. *Phillips*, 98 *Ala.* 159, 13 *So. Rep.* 65.

There is no error in refusing to charge that "if to do the freight business it was necessary to use a pair of short 'skids' for the hauling of freight, and it was necessary for the proper handling of freight to keep the 'skids' between the main and side tracks, and the 'skids' were kept for such purpose in a usual and customary place, plaintiff cannot recover." If the injury resulted from the carelessness and negligence of defendant's agents in leaving these "skids" on the roadway, it could make no difference whether such negligence had become usual or customary. *Central R. Co.* v. *DeBray*, 71 *Ga.* 406.

In an action to recover for injuries sustained by plaintiff in attempting to pass between the cars of defendant while a train was being made up on the street, a prayer that plaintiff could not recover if the jury believed that defendant left open spaces between the cars at all the regular crossings of the street, and that the accident did not happen at a regular crossing, is objectionable in that it ignores all the circumstances tending to prove negligence on the part of defendant, and would have precluded plaintiff's right of recovery, though his injuries had been occasioned by the grossest negligence of defendant, provided they were inflicted at a place other than a regular crossing. *Baltimore & O. R. Co.* v. *Fitzpatrick*, 35 *Md.* 32.

Where the evidence of a witness for the defense in an action for negligence is not so specific and certain as necessarily to establish, as matter of law, either that defendant was not, or that plaintiff was, guilty of negligence, a refusal of the court to charge that if they believe the testimony of the witness they must find for defendant is not error. *Dolan* v. *Delaware & H. Canal Co.*, 71 *N. Y.* 285.

In an action against a common carrier, a request by defendant to charge "that the facts disprove negligence on the part of the defendant" is properly denied: (1) because it undertook to decide a question of fact; (2) because if defendant was liable as at common law no question of negligence was involved. *Bamberg* v. *South Carolina R. Co.*, 9 *So. Car.* 61.

As the statute does not require the whistle to be blown or the bell to be rung when a locomotive approaches a place where two railroads cross each other, an instruction, in an action to recover damages for injuries received through the alleged negligence of a railroad engineer, as to the effect of a failure to do so is properly refused. *Gulf, C. & S. F. R. Co.* v. *York*, 74 *Tex.* 364, 12 *S. W. Rep.* 68.

It is not error to refuse a charge that "a higher degree of care is required of trainmen at a passenger depot than at a stopping

place for water only." *Galveston, H. & S. A. R. Co.* v. *Cooper*, 2 *Tex. Civ. App.* 42, 20 *S. W. Rep.* 990

In an action by a passenger against a carrier and a third person, the court instructed the jury that if the injury was caused by the negligence of both defendants, the jury should find against both, but if that of one, they should find against him, and refused to instruct that extraordinary care was required of the carrier, and only ordinary care of the third person. *Held*, no error as against the third person. *New York, P. & N. R. Co.* v. *Cooper*, 37 *Am. & Eng. R. Cas.* 33, 85 *Va.* 939, 9 *S. E. Rep.* 321. — DISTINGUISHING Norfolk & W. R. Co. *v.* Burge, 84 Va. 63.

174. Requests to charge as to contributory negligence. — Where plaintiff, who testifies in his own behalf, does not testify that he acted under any excitement when he jumped from a train, and there is no allegation in his declaration on the subject, it is not error to refuse to give a charge to the jury based upon the legal effect of such excitement, as tending to excuse what might otherwise be considered a rash act. *Covington* v. *Western & A. R. Co.*, 34 *Am. & Eng. R. Cas.* 469, 81 *Ga.* 273, 6 *S. E. Rep.* 593.

Under peculiar circumstances going to excuse plaintiff from taking the precautions usually necessary to avoid danger, an instruction, in a suit to recover for a personal injury from a passing train, that if plaintiff knew of the existence of the track at the place of the injury, and that trains frequently passed, and could have looked for and seen, or have listened and heard, the approaching train before going upon the track, and did not thus look and listen, and if by reason of such neglect he failed to avoid the injury, then verdict should be for defendant, may be properly refused, although ordinarily such an instruction should be given. *Pennsylvania Co.* v. *Rudel*, 6 *Am. & Eng. R. Cas.* 30, 100 *Ill.* 603.

Defendant asked the court to instruct the jury that if a certain witness attempted to prevent plaintiff from crossing in time to avoid the injury, then there could be no recovery. *Held*, properly refused, as ignoring the question whether plaintiff had notice or knowledge of such attempt. *Chicago, R. I. & P. R. Co.* v. *Clough*, 134 *Ill.* 586, 25 *N. E. Rep.* 664, 29 *N. E. Rep.* 184; *affirming* 33 *Ill. App.* 129.

Defendant asked this instruction: "The jury are instructed, as a matter of law, that under the evidence in this case the plaintiff is not entitled to recover, even if the jury believe, from the evidence, that the flagman signaled him to come across the track, and if the jury also believe, from the evidence, that no bell was rung or whistle sounded, provided the jury believe, from the evidence, that the plaintiff could, by looking and listening, have discovered the approach of the train in season to avoid the accident complained of." *Held*, properly refused, as it deprived plaintiff, as matter of law, and wholly regardless of the surrounding circumstances, of the right to place any reliance upon the signals given by the flagman. *Chicago, R. I. & P. R. Co.* v. *Clough*, 134 *Ill.* 586, 25 *N. E. Rep.* 664, 29 *N. E. Rep.* 184; *affirming* 33 *Ill. App.* 129.

A request for an instruction that if the jury believed it to be the duty of the operators of the train to slow up as it approached the point at which an accident happened, then, in considering the question of contributory negligence, they should understand that the decedent had a right to believe that the train would be slowed up, and to act upon such belief, unless it was apparent from the conduct of the employés that the speed would not be slackened, was properly refused, such instruction being well calculated to mislead the jury. *McDonald* v. *International & G. N. R. Co.*, 55 *Am. & Eng. R. Cas.* 280, 86 *Tex.* 1, 20 *S. W. Rep.* 847.

175. How the request should be given in charge.—When a hypothetical point prays for instructions upon the legal effect of certain facts therein stated, which are supported by evidence in the case, it is error to answer the point by simply submitting the facts to the determination of the jury without giving them any instructions as to their duty in case they should find the facts to be as stated. *Ham* v. *Delaware & H. Canal Co.*, 142 *Pa. St.* 617, 21 *Atl. Rep.* 1012.

176. Modifying the prayer, when proper.—In an action against a company for the death of an engineer, caused by a projecting rock falling on the track, the company asked the court to instruct the jury that if the engineer could, by ordinary care, have known of the rock, and continued in the service without objection or notice to the company to remove the rock, he assumed all risk and there could be no re-

covery for his death, after he knew of its condition. *Held*, not error for the court to modify the latter part of the instruction so as to read, "after he knew, or ought to have known, of its condition." *Little Rock & Ft. S. R. Co.* v. *Voss*, (*Ark.*) 18 *S. W. Rep.* 172.

In such case the company further asked the court to instruct the jury that if the fall of the rock was caused by rain washing and saturating the earth around it, then the risk was one of the hazards assumed by the engineer, and the company would not be liable. *Held*, not error for the court to add to this instruction "unless defendant was guilty of negligence or carelessness in regard to the rock." *Little Rock & Ft. S. R. Co.* v. *Voss*, (*Ark.*) 18 *S. W. Rep.* 172.

In such case a further instruction was asked by the company to the effect that if the track was straight for a certain distance before reaching the obstruction, and the obstruction could have been seen at that distance and the train checked in time to avoid the accident, and the deceased either failed to discover the obstruction or to resort to the necessary precautions to stop the train, the company could not be held liable. *Held*, not error for the court to modify this instruction by making the latter part read "and deceased, from negligence, failed to discover the obstruction, or, having discovered it, failed to resort to the necessary precaution to stop the train," there could be no recovery. *Little Rock & Ft. S. R. Co.* v. *Voss*, (*Ark.*) 18 *S. W. Rep.* 172.

In such case plaintiff claimed that the train was thrown from the track by reason of a rock having fallen from the mountain-side on the track, but there was some evidence tending to show that it was thrown from the track by loose earth cast on the track by a landslide. The company asked the court to instruct the jury that if the rock did not fall on the track—that if the engine was thrown therefrom by such loose earth, caused by recent rains, and not from any fault of defendant—there could be no recovery. *Held*, not error for the court to modify the instruction so as to exonerate the company if the jury believed that the train was thrown from the track by means of the loose earth "irrespective of the rock." *Little Rock & Ft. S. R. Co.* v. *Voss*, (*Ark.*) 18 *S. W. Rep.* 172.

In an action growing out of negligence of a company in using a freight car with a defective coupling apparatus, the court was asked to instruct the jury that although they believed, from the evidence, that plaintiff (an employé whose business it was to couple cars) had no actual knowledge of the defect in the apparatus, still he was not thereby excused and exempted from ordinary care and diligence; and that if they believed that plaintiff so far contributed by his own negligence or want of care and caution that, but for such negligence, the injury would not have happened, they should find for defendant. *Held*, that the instruction was faulty in seeming to import that any negligence, even if slight, on the part of plaintiff, contributing to the injury, might defeat a recovery, and ought to have been qualified by the word "ordinary," so as to read that plaintiff "so far contributed to the injury by his own negligence or want of ordinary care and caution." *Chicago, B. & Q. R. Co.* v. *Avery*, 17 *Am. & Eng. R. Cas.* 649, 109 *Ill.* 314; *affirming* 10 *Ill. App.* 210.

An instruction that a master is not responsible for an injury to an employé for defects in cars, caused by wear and tear, until notified of such defects, or has had time and opportunity to learn of such defects, and to have the same repaired, was modified by adding the words "or such defects shall have existed for such a length of time as to give the proper authorities opportunity to learn of such defect in the due discharge of their duties." *Held*, that there was no error in the modification, it being but the expression of the idea in the instruction, as drawn, in a more wordy form. *Chicago, B. & Q. R. Co.* v. *Avery*, 17 *Am. & Eng. R. Cas.* 649, 109 *Ill.* 314; *affirming* 10 *Ill. App.* 210.

Defendant asked an instruction that "if the jury believe, from the evidence, that the flagman on the crossing did not flag plaintiff to cross the tracks at all, and if the jury further believe, from the evidence, that he signaled plaintiff not to cross, then the jury are instructed, as a matter of law, that plaintiff is not entitled to recover in this case, even if the jury should also find, from the evidence, that the gates were not lowered on the crossing, that no bell was rung or whistle sounded, and that the train was moving at a rate of speed in excess of that prescribed by the ordinances of the town." The court modified the same by inserting after the words "not to cross" the words

"in time for plaintiff, by the exercise of reasonable care, to have avoided the injury." *Held*, proper. *Chicago, R. I. & P. R. Co.* v. *Clough*, 134 *Ill.* 586, 25 *N. E. Rep.* 664, 29 *N. E. Rep.* 184; *affirming* 33 *Ill. App.* 129.

On the trial of an action for a personal injury while crossing a track in a street, defendant asked the court to instruct the jury that if the evidence was evenly balanced, or if it preponderated, as to a material point, in favor of the defendant, the finding should be not guilty, which the court modified by striking out the words "as to a material point," and then gave it. *Held*, that under the facts the instruction was properly refused, as requiring too much proof on the part of plaintiff. *Chicago, R. I. & P. R. Co.* v. *Clough*, 134 *Ill.* 586, 25 *N. E. Rep.* 664, 29 *N. E. Rep.* 184; *affirming* 33 *Ill. App.* 129.

Defendant requested the court to instruct the jury that it was plaintiff's duty upon approaching the track to use his eyes and ears constantly. *Held*, proper for the court to amend by striking out the word "constantly." *Kenney* v. *Hannibal & St. J. R. Co.*, 105 *Mo.* 270, 15 *S. W. Rep.* 983, 16 *S. W. Rep.* 837.

In an action to recover for personal injuries caused by negligence, it is not error to refuse defendant's request to charge that "there is no evidence in this case which shows to a reasonable certainty that the condition of the plaintiff's body," as testified to by a certain doctor, "was caused by the accident," and charging instead, "it is for you to determine from the evidence whether they [the injuries] were or were not caused by this accident." *Heath* v. *Broadway & S. A. R. Co.*, 39 *N. Y. S. R.* 378, 27 *J. & S.* 592, *mem.*, 15 *N. Y. Supp.* 142; *affirmed in* 133 *N. Y.* 526, *mem.*, 30 *N. E. Rep.* 1148, *mem.*, 44 *N. Y. S. R.* 929, *mem.*

177. When the request should be given verbatim.—Where the chief pressure of the case was upon the question whether defendant, in consenting to and authorizing a given contract made with the consignee by plaintiff in behalf of both carriers, for the transportation of certain freights, at a special reduced rate, over their respective railways, as a connected and continuous line, acted upon information derived from plaintiff that the contract was or was to be limited in its performance to a certain portion of the year, a written request by defendant to the court to charge the jury in appropriate terms (the same being set out in the request) upon that specific question should have been complied with. The instructions should have been given in the language requested, or in language substantially equivalent thereto. *Georgia R. & B. Co.* v. *Smith*, 40 *Am. & Eng. R. Cas.* 123, 83 *Ga.* 626, 10 *S. E. Rep.* 235.

Defendant's counsel requested the court to charge that it was negligence on the part of the deceased if he approached the crossing at such speed as to be unable to stop or turn his horses aside before actually going on the track. The court so charged, with the qualification that if he so approached without making an effort to apprehend the approach of the train he was guilty of negligence. *Held*, error; that under the circumstances as disclosed by the evidence defendant was entitled to the charge as requested without any qualification. *Salter* v. *Utica & B. R. R. Co.*, 75 *N. Y.* 273; *reversing* 13 *Hun* 187.

178. Excepting to refusals to charge.—At the close of the evidence, defendant's counsel presented to the court fifteen separate requests to charge; as to most of these the court charged substantially as requested, and at the conclusion of the charge declined to charge except as already charged, to which refusal as to each of the requests said counsel excepted. *Held*, untenable; that if the court erred in refusing to charge one or more of the propositions presented, there was no sufficient exception. The exception should have been more specific, pointing out the particular request to which it was intended to apply. *Smedis* v. *Brooklyn & R. B. R. Co.*, 8 *Am. & Eng. R. Cas.* 445, 88 *N. Y.* 13; *affirming* 23 *Hun* 279.

5. *Further Instructions.*

179. Necessity of request for.—When a charge of the court, though correctly stating the law, may, by reason of its general terms, be defective as applicable to the case made by the evidence, it is the right of the party complaining to supply its defects by asking further instructions; failing in this, he cannot complain. *Texas & P. R. Co.* v. *Beard*, 68 *Tex.* 265, 4 *S. W. Rep.* 483.

180. Court not bound to give.—Where the court has fully and fairly submitted in his charge to the jury the law applicable to the whole case, he is not bound to give any further charge, however

proper or legal. *Georgia R. Co.* v. *Thomas*, 73 *Ga.* 350.

181. Propriety of, when given.—In an action against a company to recover for killing stock, where the court has properly charged the jury that, if they believe the evidence, they must find for plaintiff, it is not error to instruct them further that if, under the facts and circumstances shown in evidence, they do not believe the evidence offered by defendant, tending to acquit itself of negligence, then a verdict may be found for plaintiff. This is but the legal and logical result in every case, where the party upon whom rests the burden of proof attempts to sustain it by evidence that is not believed. *Alabama G. S. R. Co.* v. *McAlpine*, 80 *Ala.* 73.—ADHERING TO East Tenn., V. & G. R. Co. *v.* Bayliss, 75 Ala. 466, 77 Ala. 429.

In an action for damages for the death of a passenger killed by a passing train while crossing an adjoining track, after the instructions to the jury were concluded a juror asked whether the fact that the passenger had previously got off safely on the same side of the train would give him the right to get off there again, and the court replied that this was left to the jury. *Held*, that the answer was not misleading in view of the fact that the jury had been instructed to take the whole situation into consideration in determining whether there was any want of due care on the part of the deceased. *Robostelli* v. *New York, N. H. & H. R. Co.*, 34 *Am. & Eng. R. Cas.* 515, 33 *Fed. Rep.* 796.

When, at the request of a party, the instructions to the jury have been reduced to writing, and so given to the jury, and, after the retirement of the jury to consider their verdict, they are again brought into court, and the instructions are again read, it is error to give any verbal explanations with them. *Ohio & M. R. Co.* v. *Rowland*, 51 *Ind.* 285.

6. *Directing Verdict.*

182. Power of the court.*—A constitutional provision that "judges shall not charge juries with regard to matters of fact" does not prohibit a judge from directing a verdict for either party where the evidence is not sufficient to sustain a verdict for the other party. *Catlett* v. *St. Louis, I. M. & S. R. Co.*, 54 *Am. & Eng. R. Cas.* 113, 57 *Ark.* 461, 21 *S. W. Rep.* 1062.—QUOTING Little Rock & Ft. S. R. Co. *v.* Perry, 9 Am. & Eng. R. Cas. 610, 37 Ark. 164; Richardson *v.* State, 47 Ark. 567.

In an action for being ejected from a train, where, after plaintiff has submitted his case, the court directs a verdict for defendant, plaintiff is entitled to have everything on which his right to recover depends, and which the evidence tended to prove, regarded as established by the testimony. *Stone* v. *Chicago & N. W. R. Co.*, 47 *Iowa* 82, 17 *Am. Ry. Rep.* 461.—FOLLOWED IN Youll *v.* Sioux City & P. R. Co., 21 Am. & Eng. R. Cas. 589, 66 Iowa 346.

In no case is it the duty of the judge to submit a case to the jury, unless the evidence is so doubtful or conflicting that a verdict for plaintiff or defendant could be sustained, and ought not to be disturbed, upon the principles governing the review by the courts of the verdicts of juries. *Ernst* v. *Hudson River R. Co.*, 24 *How. Pr.* (*N. Y.*) 97; *reversing general term*, 19 *How. Pr.* 205.

183. When a verdict should be directed.—(1) *General rules.*—Questions of negligence and contributory negligence are ordinarily questions of fact to be passed upon by a jury; yet when the undisputed evidence is so conclusive that the court will be compelled to set aside a verdict returned in opposition thereto, it may withdraw the case from the jury and direct a verdict. *Elliott* v. *Chicago, M. & St. P. R. Co.*, 150 *U. S.* 245, 14 *Sup. Ct. Rep.* 85.

When all the evidence offered to show negligence is assumed to be true, and no inference which tends to show a failure of duty could clearly be drawn therefrom, the court must instruct the jury that no negligence has been shown, and that they must find their verdict accordingly. *Hathaway* v. *East Tenn., V. & G. R. Co.*, 29 *Fed. Rep.* 489.—NOT FOLLOWED IN Kansas City, Ft. S. & G. R. Co. *v.* Kier, 38 Am. & Eng. R. Cas. 119, 41 Kan. 661, 671, 21 Pac. Rep. 770.

Where a case depends upon the effect or weight of evidence, it is error for a court to withdraw it from the jury unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict in opposition to it. If the evidence, with all the inferences that the jury could

* Right of court to direct a verdict in actions based upon negligence, see note, 4 L. R. A. 778.

justifiably draw from it, is insufficient to support a verdict for plaintiff, so that such verdict, if returned, must be set aside, the court may direct a verdict for defendant. *Dwyer* v. *St. Louis & S. F. R. Co.*, 52 *Fed. Rep.* 87. *Simmons* v. *Chicago & T. R. Co.*, 18 *Am. & Eng. R. Cas.* 50, 110 *Ill.* 340. *Dechert* v. *Indiana, B. & W. R. Co.*, 17 *Ill. App.* 74. *Giermann* v. *St. Paul, M. & M. R. Co.*, 42 *Minn.* 5, 43 *N. W. Rep.* 483.—FOLLOWING Abbett *v.* Chicago, M. & St. P. R. Co., 30 Minn. 482, 16 N. W. Rep. 266; Thompson *v.* Pioneer Press Co., 37 Minn. 285, 33 N. W. Rep. 856.—*Longenecker* v. *Pennsylvania R. Co.*, 105 *Pa. St.* 328.

Under the practice in Iowa, if there is no evidence tending to establish plaintiff's case, or if there are essential ultimate facts to be found in order to entitle him to recover and there is no evidence tending in that direction, the court may direct the jury as to their verdict. But where there is evidence in any degree tending to establish the cause of action, the case may be left to the jury. *Way* v. *Illinois C. R. Co.*, 35 *Iowa* 585, 5 *Am. Ry. Rep.* 399.—FOLLOWED IN Green *v.* Milwaukee & St. P. R. Co., 38 Iowa 100.

Where there is no evidence proving the negligent acts claimed to have caused the injury complained of, the court may properly direct a verdict for defendant. *Skellenger* v. *Chicago & N. W. R. Co.*, 12 *Am. & Eng. R. Cas.* 206, 61 *Iowa* 714, 17 *N. W. Rep.* 151.—APPLIED IN St. Louis, I. M. & S. R. Co. *v.* Gaines, 46 Ark. 555.

In an action for personal injuries, if the facts are undisputed, and fail to show that plaintiff was in the exercise of due and reasonable care at the time of receiving the injuries, it is the duty of the court to instruct the jury that he cannot recover. *Gavett* v. *Manchester & L. R. Co.*, 16 *Gray* (*Mass.*) 501.—DISTINGUISHED IN Snow *v.* Housatonic R. Co., 8 Allen (Mass.) 441; Brooks *v.* Boston & M. R. Co., 16 Am. & Eng. R. Cas. 345, 135 Mass. 21. REVIEWED IN Worthington *v.* Central Vt. R. Co., 64 Vt. 107.

Where a plaintiff in an action for damages shows, under Miss. Code 1880, § 1059, which makes proof of injury *prima facie* evidence of negligence, that certain of his animals were struck and killed by a running train of defendant company, and defendant then shows, by undisputed evidence, that its servants did everything possible to prevent the killing, it is proper for the court to direct a verdict in favor of defendant. *Bedford* v. *Louisville, N. O. & T. R. Co.*, 65 *Miss.* 385, 4 *So. Rep.* 121.

Where, at the close of plaintiff's case, there is no evidence proving the defendant's liability, defendant has a right to ask the court to instruct the jury to find for defendant. *Smith* v. *Hannibal & St. J. R. Co.*, 37 *Mo.* 287.—FOLLOWING Clark *v.* Hannibal & St. J. R. Co., 36 Mo. 202.

Where an agreed statement of facts makes out a *prima facie* case for plaintiff, and the facts recited are unrebutted and undisputed, it is the duty of the court to direct the jury to find a verdict for plaintiff. *Magoffin* v. *Missouri Pac. R. Co.*, 47 *Am. & Eng. R. Cas.* 489, 102 *Mo.* 540, 15 *S. W. Rep.* 76.

Courts cannot shut their eyes to the fact that in certain controversies between the weak and the strong—between a humble individual and a gigantic corporation—the sympathies of the human mind naturally, honestly, and generously run to the assistance and support of the feeble and apparently oppressed; and that compassion will sometimes exercise over the deliberations of a jury an influence which, however honorable to them as philanthropists, is wholly inconsistent with the principles of law and the ends of justice. There is, therefore, a manifest propriety in withdrawing from the jury those cases in which the plaintiff fails to show a right of recovery. *Haring* v. *New York & E. R. Co.*, 13 *Barb.* (*N. Y.*) 9. *Suydam* v. *Grand St. & N. R. Co.*, 17 *Abb. Pr.* (*N. Y.*) 304, 41 *Barb.* 375.

Where there is conflicting testimony, but the clear weight of evidence is with one side, the court is justified in taking the case from the jury. *Guley* v. *Northwestern C. & T. Co.*, 7 *Wash.* 491, 35 *Pac. Rep.* 372.

When there is no evidence tending in any fairly appreciable degree to make out plaintiff's case, the court on motion should instruct the jury to find for defendant, first giving to plaintiff an opportunity to suffer a nonsuit if he desires to do so. *Knight* v. *Cooper*, 36 *W. Va.* 232, 14 *S. E. Rep.* 999.

(2) *Illustrations.*—When the evidence given at the trial of a suit by an employé against a railroad for personal injuries, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for plaintiff, so that such a verdict, if returned, must be set aside, the court may direct a verdict for defendant. *Randall* v. *Baltimore & O. R. Co.*, 15 *Am. &*

Eng. R. Cas. 243, 109 *U. S.* 478, 3 *Sup. Ct. Rep.* 322.

In actions against carriers of live stock for failing to carry safely, the court may direct a verdict for plaintiff where it is clear that he is entitled to recover, and nothing affecting his claim is in doubt. *North Pa. R. Co.* v. *Commercial Bank*, 123 *U. S.* 727, 8 *Sup. Ct. Rep.* 266.—QUOTED IN Delaware, L. & W. R. Co. *v.* Converse, 139 U. S. 469.

In a suit against a company for negligently injuring plaintiff, where the facts are undisputed, the question of liability is one of law, and where the undisputed facts show negligence on the part of the company, which was the primary cause of the injury, and no contributory negligence on the part of plaintiff, it is proper for the court to withdraw the case from the jury. *Union Pac. R. Co.* v. *McDonald*, 152 *U. S.* 262, 14 *Sup. Ct. Rep.* 619.

In an action for injury to real estate, caused by the building of a railroad, at the close of plaintiff's evidence defendant has a right to ask of the court instructions upon the case as made by plaintiff, and to have the case submitted to the jury. *Clark* v. *Hannibal & St. J. R. Co.*, 36 *Mo.* 203.—FOLLOWED IN Smith *v.* Hannibal & St. J. R. Co., 37 Mo. 287.

In an action to recover damages for injuries received by a trespasser on a track, the court should direct a verdict for defendant, where the facts are practically undisputed, and it is satisfied that it would be its duty to set aside a verdict for plaintiff, if the question was submitted to the jury. *Candelaria* v. *Atchison, T. & S. F. R. Co.*, 48 *Am. & Eng. R. Cas.* 565, 6 *N. Mex.* 266, 27 *Pac. Rep.* 497.

In an action for the death of a passenger killed at a station by a train, plaintiff's *narr.* averring, in effect, that the deceased received the injuries from which he died while walking upon the station platform for the purpose of getting on the cars of the moving train, the testimony on both sides tending to establish this averment, a verdict for the defendant was properly directed. *Bacon* v. *Delaware, L. & W. R. Co.*, 143 *Pa. St.* 14, 21 *Atl. Rep.* 1002.

In an action for damages to plaintiff's business by the laying of tracks across his property, a verdict is properly directed for defendant, in the absence of any evidence as to the value of such interference. *Baird* v. *Schuylkill River E. S. R. Co.*, 154 *Pa. St.* 463, 25 *Atl. Rep.* 834.

An employé of a company who had been injured set out, in a suit against the company, a contract with the company by which it agreed to pay to him $1.75 a day so long as he was disabled by reason of the injury, and thereafter to employ him at the same wages, but the complaint only alleged a breach of the contract in failing to give employment. At the trial plaintiff abandoned his claim for a failure to give employment and so announced in open court. *Held*, that it was error not to direct the jury to find for defendant. *Texas Pac. R. Co.* v. *Grimes*, (*Tex. Civ. App.*) 21 *S. W. Rep.* 402.

184. When direction of verdict should be refused.—(1) *General rules.*—When there is a conflict in the evidence, or when contrary inferences may be drawn from the evidence supporting the allegation of negligence on the part of defendant or the plea of contributory negligence, the general affirmative charge should not be given. *Helton* v. *Alabama Midland R. Co.*, 97 *Ala.* 275, 12 *So. Rep.* 276.

Where, in an action on the case, the opening statement of counsel presents to the jury but an outline of his case, leaving the details to be supplied by the testimony, it is error to direct a verdict for defendant because from that statement no case appears to have been made out against defendant. The court should first permit the case to be manifested by the proof. *Jones* v. *Baltimore & P. R. Co.*, 5 *Mackey* (*D. C.*) 8.

Where there is evidence tending to show a right of recovery in plaintiff, the court should not instruct the jury, on all the evidence, to find for defendant. *Pennsylvania Co.* v. *Stoelke*, 8 *Am. & Eng. R. Cas.* 523, 104 *Ill.* 201.

The court should not direct a verdict for defendant in an action based on negligence if the evidence is such that a fair inference may be drawn from it that defendant was guilty of negligence producing the injury, and that plaintiff was not guilty of negligence which contributed to such injury. *Rush* v. *Coal Bluff Min. Co.*, 131 *Ind.* 135, 30 *N. E. Rep.* 904.

It is not proper to withdraw a case from the jury on the prayer of defendant, though, assuming the truth of all the evidence on the part of defendant, there would be no ground for recovery by plaintiff, if the evidence on his part, if believed by the jury,

might afford ground for the conclusion that there was such negligence on the part of defendant as to entitle plaintiff to recover. *Philadelphia, W. & B. R. Co.* v. *Stebbing*, 19 *Am. & Eng. R. Cas.* 36, 62 *Md.* 504.

Where the evidence is sufficient to warrant a verdict for plaintiff in any view of it which may be legally taken, it is proper to refuse a peremptory instruction to find for defendant, and a verdict for plaintiff will be sustained. *Illinois C. R. Co.* v. *Boehms*, 70 *Miss.* 11, 12 *So. Rep.* 23.

Where the evidence on the part of plaintiff makes out a *prima facie* case, which is rebutted by the evidence on the part of defendant, it is error to take the case from the jury by instruction, and they should be allowed to pass upon the credibility of the witnesses and the weight of their testimony. *Hipsley* v. *Kansas City, St. J. & C. B. R. Co.*, 27 *Am. & Eng. R. Cas.* 287, 88 *Mo.* 348. *Boone* v. *Wabash, St. L. & P. R. Co.*, 20 *Mo. App.* 232.

In actions for injuries resulting from negligence, if it appears from the evidence that plaintiff, or the deceased, where death results, was guilty of negligence which contributed to the injury, there can be no recovery; and as a rule questions of negligence belong exclusively to the jury. Cases may arise in which the proof of negligence is so clear and irresistible that a court may be justified in assuming that the negligence is established, without submitting the question to the jury; but from the nature of the question such instances must be rare. *Bernhard* v. *Rensselaer & S. R. Co.*, 1 *Abb. App. Dec.* (*N. Y.*) 131, 23 *How. Pr.* 166; *affirming* 32 *Barb.* 165, 19 *How. Pr.* 199.

But if there is any conflict in the evidence going to establish any of the circumstances upon which the question depends, it must be left to the jury. If there are inferences to be drawn from the evidence which are not certain and incontrovertible, they are for the jury. If it is necessary to determine, as in most cases it is, what a man of ordinary care and prudence would be likely to do under the circumstances proved, involving generally more or less of conjecture, the case must be left to the jury. *Bernhard* v. *Rensselaer & S. R. Co.*, 1 *Abb. App. Dec.* (*N. Y.*) 131, 23 *How. Pr.* 166; *affirming* 32 *Barb.* 165, 19 *How. Pr.* 199.

A direction of a verdict for defendant in an action for personal injuries is properly refused where there is evidence tending to show that defendant's negligence caused the injury, and there are no admitted or undisputed facts showing as a matter of law that plaintiff was guilty of contributory negligence. *Groner* v. *Delaware & H. Canal Co.*, 153 *Pa. St.* 390, 26 *Atl. Rep.* 7.— DISTINGUISHING Carroll *v.* Pennsylvania R. Co., 2 Pennyp. (Pa.) 159.

(2) *Illustrations.*—The court cannot take a case from the jury where there is any evidence involving issues of fact. Thus in an action by an employé for injuries received by reason of defective and dangerous machinery which he has been employed to work, the questions of the sufficiency of the machinery for the purpose for which it was employed, the employé's ignorance of the dangers connected with its use, and the failure of the employer to inform him thereof, are all matters peculiarly within the province of the jury. *McDade* v. *Washington & G. R. Co.*, 26 *Am. & Eng. R. Cas.* 325, 5 *Mackey* (*D. C.*) 144.

In a suit for damages for injuries sustained by the alleged negligence of a company, the court directed a verdict for defendant on the ground of contributory negligence. *Held*, that plaintiff had a right to have his own side of the controversy assumed to be true, unaffected by counter proofs. *Strand* v. *Chicago & W. M. R. Co.*, 28 *Am. & Eng. R. Cas.* 213, 64 *Mich.* 216, 31 *N. W. Rep.* 184.

Where the action is to recover for an injury at a crossing, and there is positive evidence that a whistle was blown before the train reached the crossing, the court cannot direct a verdict for defendant where some of the witnesses testify that the whistle was blown more than 2000 feet from the crossing, instead of within 80 or 100 rods of it, as required by the Ohio statute (Rev. St. Ohio 1890, § 3336). *Griffith* v. *Baltimore & O. R. Co.*, 44 *Fed. Rep.* 574.

185. Waiver of erroneous refusal to direct.—In an action to recover for personal injuries, a motion asking the court to direct a verdict for defendant on the ground of plaintiff's contributory negligence was overruled, and a verdict for plaintiff was subsequently set aside upon motion of defendant upon the same ground. *Held*, that defendant by filing the latter motion waived the error, if any, committed by the court in overruling the former. *Laverenz* v. *Chicago, R. I. & P. R. Co.*, 53 *Iowa* 321, 5 *N. W. Rep.* 156.

VII. VERDICT. FINDINGS.

1. *Generally.*

186. Deliberations of the jury, generally.—In determining whether or not an injury was wilful, the jury may consider the other circumstances of the case, the manner of the conductor, the force, if any, used by him, and the effects of his acts, together with the presumption that every person intends the probable and natural consequences of his acts; and the unlawful intent may be inferred from conduct which shows a reckless disregard of consequences and a willingness to inflict injury by purposely and voluntarily doing the act, with knowledge that some one is in a situation to be unavoidably injured thereby. *Citizens' St. R. Co.* v. *Willoeby*, 58 *Am. & Eng. R. Cas.* 485, 134 *Ind.* 563, 33 *N. E. Rep.* 627.

Jurors are always to use the knowledge and experience they are supposed to possess in common with mankind generally, in making up a verdict. *Missouri River R. Co.* v. *Richards*, 8 *Kan.* 101.

But jurors cannot of their own knowledge, independently of evidence, find in how short a distance a train can be stopped. This is not a subject on which jurymen may use their own knowledge. *Union Pac. R. Co.* v. *Shannon*, 19 *Am. & Eng. R. Cas.* 500, 33 *Kan.* 446, 6 *Pac. Rep.* 564.

Having signed their verdict and delivered it to a messenger to be deposited with the proper custodian thereof, the jury have no further control over it, and cannot afterward act judicially in reference to it. *West* v. *West & E. R. Co.*, 20 *Am. & Eng. R. Cas.* 402, 61 *Miss.* 536.

The long delay of a plaintiff in bringing suit may be taken into consideration by the jury in determining whether the injury complained of resulted from the cause alleged. *Lehigh & W. B. Coal Co.* v. *Lear*, (*Pa.*) 32 *Am. & Eng. R. Cas.* 74, 9 *Atl. Rep.* 267.

187. Taking out papers, etc. — Allowing a jury to take to their room and read a deposition that has not been read at the trial, and that is favorable to the party in whose favor the verdict is rendered, is reversible error. *Stewart* v. *Burlington & M. R. R. Co.*, 11 *Iowa* 62.—FOLLOWED IN Cowles *v.* Chicago, R. I. & P. R. Co., 32 Iowa 515. REVIEWED IN Wright *v.* Illinois & M. Tel. Co., 20 Iowa 195.

A phonographic report of the testimony should not be sent to the jury without the consent of the parties. *Louisville, C. & L. R. Co.* v. *Caven*, 9 *Bush.* (*Ky.*) 559.

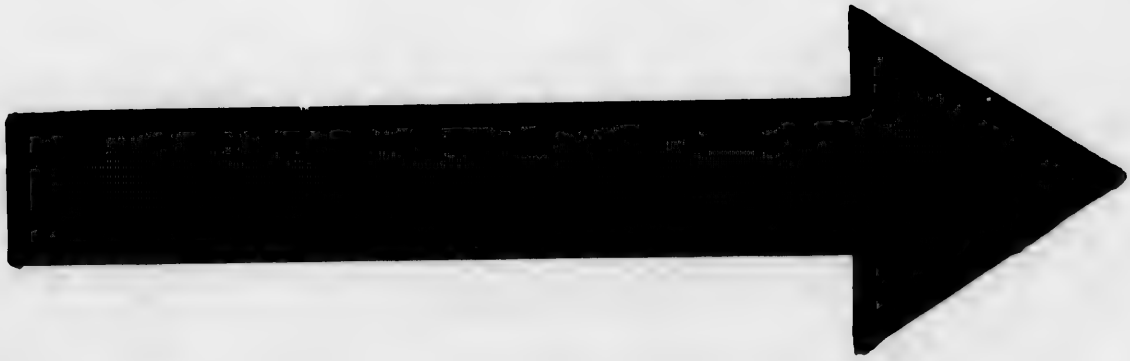
A tenant's calculation of damages, which was allowed to go out with the jury, contained an item of "damages for being deprived of lease for two years." The company had filed a bond about six months after entering the premises, and the court had ruled that any damage accruing after the filing of said bond must be recovered under it, and not in the action of trespass. *Held*, that it was error to send out said item with the jury. *Pennsylvania R. Co.* v. *Eby*, 107 *Pa. St.* 166.

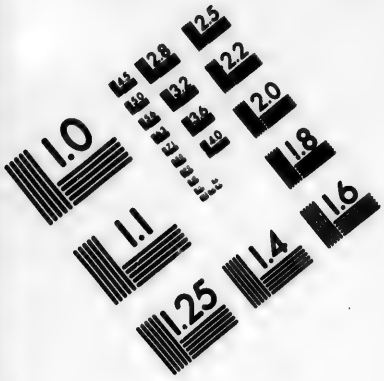
188. Mode of assessing damages—Quotient verdict. — In an action by a passenger for expulsion from a train and for ill treatment, a verdict was arrived at by having each juror write the amount which he was willing to fix as the damages, adding the several amounts, and dividing the total by the number of jurors; but there was no agreement made to abide by the result, and the amount of damages actually awarded was much less than the quotient obtained by the above process, the verdict being freely assented to by all the jurors. *Held*, that this was not sufficient reason for setting it aside. *Johnson* v. *Northern Pac. R. Co.*, 46 *Fed. Rep.* 347. *Parshall* v. *Minneapolis & St. L. R. Co.*, 35 *Fed. Rep.* 649.

A refusal to charge as requested that the jury should not return a verdict by averaging the individual estimate of the damages is not error. *Western & A. R. Co.* v. *Young*, 42 *Am. & Eng. R. Cas.* 135, 83 *Ga.* 512, 10 *S. E. Rep.* 197.

Where a jury agree in advance to be bound by a verdict arrived at by each marking down a separate amount and dividing the aggregate thereof by twelve, the verdict will be held invalid, and set aside. *Fuller* v. *Chicago & N. W. R. Co.*, 31 *Iowa* 211, 1 *Am. Ry. Rep.* 377. *Illinois C. R. Co.* v. *Able*, 59 *Ill.* 131, 11 *Am. Ry. Rep.* 154. *Chicago & I. Coal R. Co.* v. *McDaniels*, 134 *Ind.* 166, 32 *N. E. Rep.* 728, 33 *N. E. Rep.* 769. *Moses* v. *Central Park, N. & E. R. R. Co.*, 52 *N. Y. S. R.* 213, 3 *Misc.* 322, 23 *N. Y. Supp.* 23.

To render invalid a verdict arrived at by adding the several amounts which the different jurors are in favor of and dividing the same by the number of jurors, there must have been an agreement on their part in advance to be bound by the result. If the verdict was arrived at in this way with-





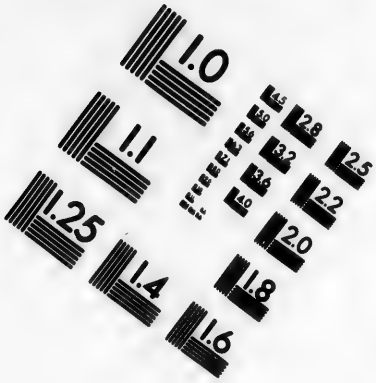
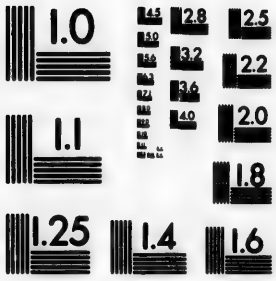
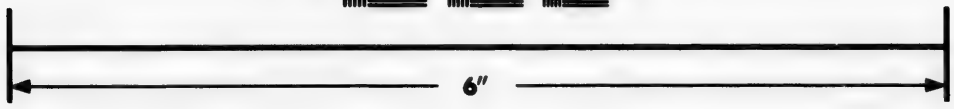


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out any such agreement, and was afterwards discussed and assented to as their verdict, it is valid. *Hamilton* v. *Des Moines Valley R. Co.*, 36 *Iowa* 31. *Sullens* v. *Chicago, R. I. & P. R. Co.*, 74 *Iowa* 659, 7 *Am. St. Rep.* 501, 38 *N. W. Rep.* 545. *Deppe* v. *Chicago, R. I. & P. R. Co.*, 38 *Iowa* 592.

But though the jurors divide the aggregate of their several estimates by twelve, and return the sum as their verdict, it is not invalid if they assent to the amount of their verdict. *Moses* v. *Central Park, N. & E. R. R. Co.*, 52 *N. Y. S. R.* 213, 3 *Misc.* 322, 23 *N. Y. Supp.* 23.

In an action for personal injuries the jury agreed that three of their number should settle the controverted point as to the amount of damages, and agreed in advance that they would abide by their determination. *Held*, that the verdict was invalid and should be set aside. *Memphis & C. R. Co.* v. *Pillow*, 9 *Heisk.* (*Tenn.*) 248.

A verdict in a damage suit, arrived at by an agreement that one juror should add $400 to the amount he was for, and then each one of the entire jury should reduce the amount he was for $400, and that the sums thus ascertained should be added together and the result divided by twelve, and the latter result adopted as the verdict of the jury, is a gambling verdict, and cannot stand. *East Tenn. & W. N. C. R. Co.* v. *Winters*, 85 *Tenn.* 240, 1 *S. W. Rep.* 790.

Where the action is to recover unliquidated damages, and there is a conflict of evidence as to the cause and extent of the injury, the fact that the verdict is a compromise between the two extremes of conflicting views is no ground for setting it aside. *Owens* v. *Missouri Pac. R. Co.*, 30 *Am. & Eng. R. Cas.* 205, 67 *Tex.* 679, 4 *S. W. Rep.* 593.

189. Form and sufficiency of the verdict, generally.—Where two companies are sued to recover for an injury alleged to have been caused by their joint negligence, and each company answers separately, denying the negligence, a verdict finding one guilty, but silent as to the other, is not responsive to the issue and will be set aside on motion of plaintiff; and his failure to make the motion at the time the verdict was returned will not raise a presumption that the issue had been abandoned at the trial. *Rankin* v. *Central Pac. R. Co.*, 73 *Cal.* 93, 15 *Pac. Rep.* 57.

In an action against a company by the widow of an engineer who was killed by reason of a collision occasioned by a misplaced switch, the declaration contained two counts, one count based upon the ground that the switch was dangerous for want of a target, and the other upon the incompetency of the switch tender negligently retained by the company. The jury found the issues joined on both counts in favor of plaintiff. *Held*, that even if there was no testimony to sustain the first count, the verdict on the second count would be good. *East Tenn., V. & G. R. Co.* v. *Gurley*, 17 *Am. & Eng. R. Cas.* 568, 12 *Lea* (*Tenn.*) 46.—APPROVING East Tenn., V. & G. R. Co. *v.* White, 5 Lea 540.

A verdict, "We, the jury, find for the plaintiff against the G., C. & S. F. Rwy. Co., find for Southern Pacific Company, damages to the amount of ($4000) four thousand dollars," is not sufficiently certain to support a judgment for plaintiff against the Gulf, Colorado, and Santa Fé railroad company. *Gulf, C. & S. F. R. Co.* v. *Hathaway*, 41 *Am. & Eng. R. Cas.* 219, 75 *Tex.* 557, 12 *S. W. Rep.* 999.

190. Sufficiency as respects the damages awarded.—Judgment will not be arrested for uncertainty in the verdict as to amount where the finding of the jury is for a specific sum "less amount of freight," and there is no freight involved in the controversy. The superadded words are meaningless and may be treated as surplusage. *North & S. St. R. Co.* v. *Crayton*, 86 *Ga.* 499, 12 *S. E. Rep.* 877.

In an action for personal injuries the *ad damnum* stated in the declaration was $2000, and there was issue on a plea of not guilty. The verdict was, "We, the jury, find for the plaintiff." *Held*, that, there being no assessment of damages, there was no verdict sufficient to form the basis of a judgment, and the court should have awarded a *venire de novo*. It was error to render judgment for plaintiff for costs. *Broeck* v. *Wabash, St. L. & P. R. Co.*, 13 *Ill. App.* 556.

In an action for the death of a minor, caused by the wrongful act or omission of another, it is not material error to refuse to require the jury to itemize the value of the probable future services of the intestate to his next of kin, as by showing how much a year he would have contributed to their support had he lived. *Union Pac. R. Co.* v. *Dunden*, 34 *Am. & Eng. R. Cas.* 88, 37 *Kan.* 1, 14 *Pac. Rep.* 501.

Plaintiff sued for personal injuries and filed a complaint in three counts, each for the same cause of action, and each claiming $10,000 as damages; but in the general prayer for relief the damages were fixed at $20,000. The jury returned a verdict for $15,000. *Held*, that the general prayer controlled and authorized the verdict; but if it was otherwise plaintiff could amend under the code at any time. *Schultz* v. *Third Ave. R. Co.*, 9 *Am. & Eng. R. Cas.* 412, 89 *N. Y.* 242; *reversing* 14 *J. & S.* 211.—APPLIED IN Rown *v.* Christopher & T. St. R. Co., 34 Hun (N. Y.) 471.

In a suit for damages in which both actual and exemplary damages were claimed, the verdict was for $150 actual damages, and for $237.50 "for insult." *Held*, that the verdict by its terms excluded the idea that a larger sum than $150 for actual damages was intended. *Galveston, H. & S. A. R. Co.* v. *Dunlavy*, 11 *Am. & Eng. R. Cas.* 673, 56 *Tex.* 256.

In an action to recover damages for personal injuries, the jury assessed damages for "peril and fright," $833; "mental anguish," $1666; "pain and suffering," $6667. *Held*, that the sum awarded for pain and suffering consequent upon the personal injuries included the two items for "mental anguish" and "fright," and that the verdict therefore gave a double recovery therefor. *Galveston, H. & S. A. R. Co.* v. *Porfert*, 37 *Am. & Eng. R. Cas.* 540, 72 *Tex.* 344, 10 *S. W. Rep.* 207.

191. When a general verdict is sufficient.—A defendant, having failed to ask of the jury special findings upon the several items of damage alleged in plaintiff's petition, has no ground to complain that only a general verdict was rendered. *Clampit* v. *Chicago, St. P. & K. C. R. Co.*, 84 *Iowa* 71, 50 *N. W. Rep.* 673.

When the petition sets up separate causes of action, stated in separate counts, a general verdict for a general sum is improper, and is good cause for arrest of judgment. This rule does not apply where there is but one cause of action, stated in different forms, in different counts. In such a case a finding upon any one of the counts would bar further recovery on any count in the petition, and a general verdict for plaintiff would be sufficient. *Owens* v. *Hannibal & St. J. R. Co.*, 58 *Mo.* 386, 9 *Am. Ry. Rep.* 19.

Where a special verdict is found, a general verdict is unnecessary; but its rendition is not error, especially where it is merely a correct conclusion of law from the special findings. *Hoppe* v. *Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 74, 61 *Wis.* 357, 21 *N. W. Rep.* 227.

192. Effect of general verdict—Presumptions.—Where the jury return a special verdict, a failure to find as to any facts in issue is not ground for a *venire de novo*. Courts will assume a failure of proof as to the facts not found, on such motion, though such omission might be ground for a new trial. *Louisville, N. A. & C. R. Co.* v. *Buck*, 38 *Am. & Eng. R. Cas.* 152, 116 *Ind.* 566, 19 *N. E. Rep.* 453, 2 *L. R. A.* 520, 28 *Am. Law Reg.* 148.

In an action for injuries from negligence, where proper instructions have been given, and there is a general verdict for plaintiff, the jury must be presumed to have passed upon both the question of defendant's negligence and that of plaintiff's contributory negligence. *Hartwig* v. *Chicago & N. W. R. Co.*, 1 *Am. & Eng. R. Cas.* 65, 49 *Wis.* 358, 5 *N. W. Rep.* 865.

193. Interpreting the verdict.—Plaintiff sued for an injury to his property caused by the negligent and unauthorized construction of a side track, and also prayed for a mandamus to compel its removal. The jury returned a verdict for plaintiff. Under the evidence and instructions of the court they were authorized to find for plaintiff, not for damages caused by the existence of the side track, but for damages arising from defective waterways connected therewith. *Held*, that the verdict did not amount to a finding that the side track was a continuing nuisance at the time of the trial, and a motion by plaintiff for judgment for the mandamus also was properly overruled. *Fuller* v. *Chicago, R. I. & P. R. Co.*, 14 *Am. & Eng. R. Cas.* 149, 61 *Iowa* 125, 15 *N. W. Rep.* 861.

A jury found that defendant was guilty of gross negligence, immediately causing the injury. They also found that plaintiff was guilty of negligence contributing to the injury, without specifying what degree of negligence, or whether proximately or remotely contributory. *Held*, that it was apparent from the other findings, and the instructions of the court, that they intended only such slight negligence as was consistent with a right to recover compensation. *Kansas Pac. R. Co.* v. *Pointer*, 14 *Kan.* 37.

Where the action is based on negligence, and the evidence as to the negligence is conflicting, and the jury find a verdict for the plaintiff, this must be regarded as settling the question of negligence in his favor. *Sheffield* v. *Rochester & S. R. Co.*, 21 *Barb.* (*N. Y.*) 339.

Plaintiff alleged in his complaint that he was returning from his place of business to his home, along defendant's track, as he had been in the habit of doing for several years without objection from defendant, and was within the corporate limits of a town, when, owing to the gross negligence of defendant's servants, he was struck from behind by a locomotive engine belonging to defendant and thrown from the track, and was thereby much injured. The jury, in response to the first issue, found that plaintiff was "injured by the negligence of the defendant, as alleged." *Held*, that the verdict meant only that defendant, by failure to exercise ordinary care, injured plaintiff. *McAdoo* v. *Richmond & D. R. Co.*, 41 *Am. & Eng. R. Cas.* 524, 105 *N. Car.* 140, 11 *S. E. Rep.* 316.—QUOTING Manly *v.* Wilmington & W. R. Co., 74 N. Car. 655.

194. Reconsidering the verdict.—Where the jury, in a special verdict, find that defendant company "took and converted the property in controversy to its own use," but do not set out the facts upon which such conclusion is based, the court should send them to their room to perfect their verdict, or if this be not done a *venire de novo* should be granted. *Louisville, N. A. & C. R. Co.* v. *Balch*, 105 *Ind.* 93, 4 *N. E. Rep.* 288.

Where any one of the findings in a special verdict is not specific and certain, either party may require that it may be made so before the jury is discharged. If no objection to such finding is made by either party, it will thereafter be construed most strongly against the party in whose favor it is made. *Kansas Pac. R. Co.* v. *Pointer*, 14 *Kan.* 37.

A verdict for plaintiff was for $500 actual, and $4500 exemplary, damages. There was no issue as to exemplary damages, and plaintiff had received severe injuries. The judge refused to receive the verdict, instructing the jury that they could not find exemplary damages. They then, after short consultation, returned a verdict for plaintiff for $5000. This was received and judgment was rendered thereon. *Held*, that this was proper practice. The statute is conclusive: "If the verdict is not responsive to the issues submitted to the jury, the court shall call their attention thereto and send them back for further deliberation." *Ft. Worth & D. C. R. Co.* v. *Mackney*, 83 *Tex.* 410, 18 *S. W. Rep.* 949.

195. Amending and correcting the verdict—Surplusage. — Where a complaint does not claim damages payable in coin, the words "payable in United States gold coin," in a verdict, should be rejected as surplusage. *Watson* v. *San Francisco & H. B. R. Co.*, 50 *Cal.* 523. *Patochi* v. *Central Pac. R. Co.*, 52 *Cal.* 90.

..finding that "the Grand Rapids and Indiana railroad" is located on certain land, and that "grading was commenced on said railroad in the month of June, 1868; that the said Grand Rapids and Indiana railroad company has never built, or caused to be built, any fences," etc., considered in view of the universal custom of calling railroads by the name of the company laying out and building them, cannot be misunderstood; and the defect will not be held a fatal omission upon the objection that the finding fails to declare specifically that the Grand Rapids and Indiana railroad company is a corporation owning and occupying the road in question, or coming within the railroad laws, where the sense is clear and the bill of exceptions furnishes conclusive proof by which it can be amended. *Continental Imp. Co.* v. *Ives*, 30 *Mich.* 448.

Where a verdict contains matter of fact which is immaterial and not responsive to the issue, such matter may be rejected as surplusage; and the verdict should stand if the remaining portion is responsive to the issue and not open to any further objection. *Martin* v. *Ohio River R. Co.*, 37 *W. Va.* 349, 16 *S. E. Rep.* 589.

196. Grounds for setting aside verdict, generally.—In personal-injury cases it is the duty of the trial judge to set aside a verdict when, in his sound judgment, justice will be served thereby, and an appellate court will not disturb his action unless clearly satisfied that the court below exceeded the bounds of its judicial discretion. *Woods* v. *Richmond & D. R. Co.*, 1 *App. Cas.* (*D. C.*) 165.

A verdict will not be set aside for erroneous instructions where justice has been done. *Garland* v. *Chicago & N. W. R. Co.*, 8 *Ill. App.* 571.—FOLLOWED IN O'Malley *v.*

Chicago City R. Co., 33 Ill. App. 354; O'Malley *v.* Chicago City R. Co., 30 Ill. App. 309.

A plaintiff not entitled to recover at all has no right to have a verdict for the defendant set aside, nor one in his own behalf, because the damages are less than the pecuniary injury. *O'Malley* v. *Chicago City R. Co.*, 33 *Ill. App.* 354.—FOLLOWING Garland *v.* Chicago & N. W. R. Co., 8 Ill. App. 571.

A verdict for a personal injury alleged to have been occasioned by an employer's negligence in failing to provide proper machinery and appliances cannot stand where it does not appear upon what ground the verdict was based. *United States Rolling Stock Co.* v. *Chadwick*, 35 *Ill. App.* 474.

Plaintiff brought a suit in the nature of ejectment for the possession of 120 acres of land, without any claim for damages or compensation, except so far as damages were an incident to the right of possession; but the other pleadings and proceedings showed that only a narrow strip, or right of way across the land, was in controversy. The jury returned a verdict that "We, the jury, find for the plaintiff and assess his damages at forty-two dollars." *Held*, not sufficient to enable the court to render the proper judgment, and a *venire de novo* should be granted. *Cincinnati, H. & I. R. Co.* v. *Clifford*, 33 *Am. & Eng. R. Cas.* 81, 113 *Ind.* 460, 15 *N. E. Rep.* 524, 13 *West. Rep.* 384.

Facts which are essential to a right of recovery must be proved by testimony having at least a preponderating influence. A verdict evidently founded upon mere conjecture of possibilities or probabilities, however reasonable, will not be permitted to stand. *Moore* v. *Missouri Pac. R. Co.*, 28 *Mo. App.* 622.—REVIEWING Philadelphia & R. R. Co. *v.* Shertle, 97 Pa. St. 450.

In an action by an employé to recover for a personal injury, alleged to have been caused by negligence, four questions were submitted to the jury for special findings, one of which was whether plaintiff was guilty of contributory negligence. The jury returned a general verdict for plaintiff for $6000, but stated that they could not agree as to the special findings. There was nothing to show that the question of contributory negligence had been settled. *Held*, that the verdict should be set aside. *Ebersole* v. *Northern C. R. Co.*, 23 *Hun* (*N. Y.*) 114.

Plaintiff granted to a company the right to construct its track across certain mill property, but provided that the track was not to be nearer than seven rods from the mill. He sued for damages for constructing the track within that distance. By the pleadings plaintiff's title to the grounds was put in issue. The jury returned a verdict that the track was constructed as alleged in the complaint, and that it damaged the property to a certain amount, but they did not expressly find that plaintiff owned the property. *Held*, that the failure so to find was not ground for reversing the judgment at the instance of defendant. *Hutchinson* v. *Chicago & N. W. R. Co.*, 41 *Wis.* 541.

197. Verdict against evidence.—The presumption arising against a railroad, where damage is done to stock or other property by the running of its locomotives or cars, was rebutted in this case by the evidence for the plaintiff. A nonsuit might have been awarded; but this not having been done, and evidence for the defendant not having been introduced, a finding for the plaintiff was unsupported by the evidence, and was properly set aside. *Morgan* v. *Central R. Co.*, 77 *Ga.* 788.

A company was sued for killing mules near a crossing. The evidence showed that the engineer saw them when on the crossing, and at once whistled "on brakes," gave the "stock alarm," reversed the engine, sanded the track, and would have stopped the train before reaching the mules, but that they ran some eighty yards on the track toward the engine. *Held*, not sufficient to show negligence, and a verdict against the company should be set aside. *Crawley* v. *Georgia R. & B. Co.*, 82 *Ga.* 190, 8 *S. E. Rep.* 417; *further appeal*, 87 *Ga.* 191.

Where the verdict is so manifestly contrary to the evidence as to show that it must have been the result of passion, prejudice, or undue sympathy, it should be reversed. *Lake Shore & M. S. R. Co.* v. *Kuhlman*, 18 *Ill. App.* 222.

A verdict which, upon the issues submitted to the jury, is against the weight of evidence cannot be sustained by the opinion of the court upon a distinct ground of liability, which has not been alleged or tried, and which can only be put in issue by an amendment of the declaration, and by evidence which the jury have not been permitted to consider. *So held*, where the action was to recover for injuries received

at a highway crossing by running a train of cars against plaintiff's wagon, the negligence charged being a failure to ring a bell before the crossing was reached, but where the trial court was of opinion that there was not sufficient evidence of negligence as to the bell, but there was as to a failure to erect a signboard, if the matter had been pleaded. *Elkins* v. *Boston & A. R. Co.*, 115 *Mass.* 190, 7 *Am. Ry. Rep.* 456.

In an action for personal injuries to a section boss caused by the derailment of an engine and tender, there was evidence tending to show that the derailment was caused by a brake shoe falling in advance of a car wheel, and that if the shoe had been properly fastened it would not have fallen. It was claimed that the engine and tender were both inspected a short time before the accident, but it was shown that on that inspection machinery constantly in sight of the engineer who made the inspection was not observed to be out of order, though a material part of it was missing. *Held*, that a verdict for plaintiff which involved the finding that the machinery was defective was sufficiently supported by the evidence. *Missouri Pac. R. Co.* v. *McElyea*, 38 *Am. & Eng. R. Cas.* 200, 71 *Tex.* 386, 9 *S. W. Rep.* 313, 1 *L. R. A.* 411.

198. Excessive damages.—The fact that a verdict may be so excessive as to suggest to the trial court a *remittitur* does not necessarily suggest that the verdict should be set aside *in toto*. *Holmes* v. *Atchison, T. & S. F. R. Co.*, 48 *Mo. App.* 79. —CRITICISING Gurley *v.* Missouri Pac. R. Co., 104 Mo. 211.

Where evidence of greater damage, loss, or value than the amount specified in the bill of particulars is given without objection, and the amount recovered is no more than the party is justly entitled to, the court will not set aside the verdict because it is more than the amount of damage specified in the bill of particulars. *Chadbourne* v. *Delaware, L. & W. R. Co.*, 6 *Daly* (*N. Y.*) 215.

A verdict will not be set aside because excessive when there is no satisfactory mode of computing the damages and the case was fairly submitted to the jury. *Dillingham* v. *Scales*, 78 *Tex.* 205, 14 *S. W. Rep.* 566.

199. Misconduct of jurors.*—In an action for personal injuries the jury returned a verdict for the defendant corporation, but at the same time the foreman handed to the clerk a paper signed by him stating that the jury recommended to the company that plaintiff be reimbursed for his expenses and loss of time. Plaintiff moved to set aside the verdict on the ground of misconduct of the jury. *Held:* (1) that it was not in itself sufficient evidence of misconduct to warrant interfering with the verdict; (2) that the affidavits of the jurors were not admissible to show misconduct on their part. *Kelley* v. *Pennsylvania R. Co.*, 33 *Fed. Rep.* 856.

In an action for unliquidated damages, the jury may, to arrive at a verdict, resort to means that are not allowed in criminal actions, or in civil actions where the damages are liquidated. *St. Louis & S. R. Co.* v. *Myrtle*, 51 *Ind.* 566.—DISTINGUISHING Ellsworth *v.* Central R. Co., 34 N. J. L. 93. QUOTING Guard *v.* Risk, 11 Ind. 156.

200. Sealed verdicts.—A jury, having been authorized so to do, brought in a sealed verdict for plaintiff for $6000, which was entered upon the clerk's minutes. Upon polling the jury they did not agree, and were directed by the court to return to their room. They retired, but returned for instructions as to whether they could increase their verdict. The court instructed them that they might render such verdict as they thought proper, whereupon they brought in a verdict for $7000. *Held*, no error. *Warner* v. *New York C. R. Co.*, 52 *N. Y.* 437, 4 *Am. Ry. Rep.* 516.—DISTINGUISHING Fordham *v.* Smith, 46 N. Y. 683.

Plaintiff claimed that defendant was guilty of negligence in three particulars, and the court submitted these three claims to the jury with instructions to find a general verdict. The jury agreed upon a verdict for plaintiff, sealed it up, and separated. When the verdict was delivered in open court, the presiding judge required the jury to state the particular ground upon which they had found for plaintiff, and they did so. *Held*, no error, for no further deliberation was thereby required. *Germond* v. *Central Vt. R. Co.*, 65 *Vt.* 126, 26 *Atl. Rep.* 401.

Such a finding is an authoritative statement from the jury of the ground upon which they base their verdict, and renders immaterial any error in the submission of the other claims of plaintiff. *Germond* v. *Central Vt. R. Co.*, 65 *Vt.* 126, 26 *Atl. Rep.* 401.

201. Findings by the court.—There is no rule of law requiring the appellate court to reverse a judgment because of in-

*See also *ante*, **189.**

consistent conclusions of law, when the judgment directed to be entered is in accordance with the correct conclusions of law under the facts found. *Welsh* v. *Manhattan El. R. Co.*, 29 *N. Y. S. R.* 511, 8 *N. Y. Supp.* 492.

In an action of trespass against an elevated railway company, for injuries to abutting property, the court found as a fact that the trespass had diminished the rental value of the property, and that the plaintiff was damaged in the sum of $5198. This finding was sustained by the evidence, and justified the conclusion of law that plaintiff was entitled to judgment for that amount; but the court further found, at the request of the company, that the evidence did not establish any definite amount of damages for which judgment could be rendered. *Held*, that the first finding as to the amount of damages controlled, and if the second finding had any effect at all, it was as a conclusion of law, and was clearly erroneous. Under New York Code, § 1022, the decision of the court on a trial without a jury must state the facts found and the conclusions of law separately. *Welsh* v. *Manhattan El. R. Co.*, 29 *N. Y. S. R.* 511, 8 *N. Y. Supp.* 492.

2. Special Verdicts.

202. Right to have special questions submitted to the jury.—A state law requiring juries to answer special interrogatories in addition to the general verdict does not apply to United States courts. *Indianapolis & St. L. R. Co.* v. *Horst*, 93 *U. S.* 291.—FOLLOWED IN St. Louis, I. M. & S. R. Co. *v.* Vickers, 122 U. S. 360.

Ill. statute only makes it the duty of the court to require the jury to find specially "upon material questions of fact." If the finding of such special matters cannot affect the general verdict in favor of the other party, such special questions will be properly refused. *Jacksonville S. E. R. Co.* v. *Southworth*, 135 *Ill.* 250, 25 *N. E. Rep.* 1093; *affirming* 32 *Ill. App.* 307.

It is the right of the parties to have important questions of fact that are based on competent testimony, and that are within the issues of the case, submitted to the jury, and answered upon request; and under the facts and circumstances of this case, the refusal of the right was material error. *Wichita & W. R. Co.* v. *Fechheimer*, 36 *Kan.* 45.—FOLLOWED IN Chicago, I. & K. R. Co. *v.* Townsdin, 38 Kan. 78.

Where the proximate cause of an injury was either the negligence of a superior servant of the company in ordering plaintiff to continue his work upon a detached car while an engine was approaching, or the failure of the engineer or fireman (plaintiff's fellow-servants) to ring the engine bell, and thus give plaintiff sufficient warning to enable him to save himself from being thrown from the car by the shock of the collision, it is error to refuse to submit special questions to the jury calling for findings whether such warning would have been given, and whether the accident would have happened, if the bell had been so rung. *Harrison* v. *Detroit, L. & N. R. Co.*, 41 *Am. & Eng. R. Cas.* 398, 79 *Mich.* 409, 44 *N. W. Rep.* 1034.

In such case the jury should be instructed that if at the time said order was given plaintiff was aware of the near approach of the engine, of which fact the superior servant was ignorant, and failed to notify him, or to save himself, he was guilty of contributory negligence. *Harrison* v. *Detroit, L. & N. R. Co.*, 41 *Am. & Eng. R. Cas.* 398, 79 *Mich.* 409, 44 *N. W. Rep.* 1034.

Special findings, as distinguished from special verdicts, are contemplated by the statute requiring the court, upon the request of either party, to submit special issues to the jury. *Benton* v. *St. Louis & S. F. R. Co.*, 25 *Mo. App.* 155.—FOLLOWED IN Gourley *v.* St. Louis & S. F. R. Co., 25 Mo. App. 144.

In an action to recover damages for an injury caused by the negligence of defendant company, which pleads contributory negligence, defendant is entitled to an issue on this question, unless the court includes it, by proper instructions to the jury, under the issue as to negligence. *Kirk* v. *Atlanta & C. A. L. R. Co.*, 97 *N. Car.* 82, 2 *S. E. Rep.* 536.

Instructions with regard to negligence and contributory negligence should be given to the jury in connection with questions submitted on those points and not as general instructions in the case. *Kelly* v. *Chicago & N. W. R. Co.*, 60 *Wis.* 480, 19 *N. W. Rep.* 521.

203. What questions or interrogatories should be submitted. — The question whether defendant was first guilty of negligence should be submitted to the jury before allowing them to consider whether plaintiff was guilty of contributory negligence, since the submission of the lat-

ter question involves an assumption that there was already negligence on the other side. *Harmon* v. *Washington & G. R. Co.*, 30 *Am. & Eng. R. Cas.* 627, 6 *Mackey* (*D. C.*) 57, 8 *Cent. Rep.* 738.

The question "Was the deceased exercising reasonable care for his own safety at the time he was killed?" submits a material and controlling fact, and one that can properly be made the subject of a special finding. *Chicago & N. W. R. Co.* v. *Dunleavy*, 39 *Am. & Eng. R. Cas.* 381, 129 *Ill.* 132, 22 *N. E. Rep.* 15; *affirming* 27 *Ill. App.* 438.

It is proper for plaintiff to submit an interrogatory to the jury, asking if the foreman of the shop of defendant, at the place where the accident occurred, was not notified before an accident by an engineer of the defective engine that it was in an unsafe and unfit condition, and liable to be wrecked unless it was taken into the shops and repaired. *Wabash & W. R. Co.* v. *Morgan*, 132 *Ind.* 430, 31 *N. E. Rep.* 661, 32 *N. E. Rep.* 85.

The statute (Wis. Rev. St. § 1809) having provided that at street crossings no locomotive should go faster than six miles an hour, a question submitted for special verdict as to whether the engine was "being run at a greater rate of speed than six miles an hour" is not objectionable in form. *Heddles* v. *Chicago & N. W. R. Co.*, 39 *Am. & Eng. R. Cas.* 645, 74 *Wis.* 239, 42 *N. W. Rep.* 237.

In an action against the owner of a private logging railroad for injuries sustained by an employé in the wreck of a train loaded with logs, the complaint charged that defendant was negligent in respect to (1) the condition of the railroad; (2) the selection of chains for binding loads of logs on the cars; (3) the sufficiency of such chains; (4) allowing a large log to remain beside the track in dangerous proximity thereto; (5) the loading of the logs on the cars. There was evidence tending to show that the loading was done by an independent contractor, for whose negligence in that respect defendant would not be liable. The jury found, in a special verdict, that defendant was negligent in the first four particulars mentioned; but the court refused to submit to them a question, proposed by defendant, as to whether the accident was caused in whole or in part by negligent loading. *Held*, that this was error, although the jury found that the wrecking of the train was caused by the log lying in the ditch near the track. If the court had not practically taken the question of negligent loading from the jury, they might have found that such loading was the proximate cause of the accident and the log lying near the track a remote cause only. *Haley* v. *Jump River Lumber Co.*, 81 *Wis.* 412, 51 *N. W. Rep.* 321, 956.

Although the inquiry as to whether the accident was caused in part by the negligence of the loader was immaterial, since in that case defendant would still be liable, yet the proposed question should not have been rejected merely because that immaterial inquiry was joined with it. *Haley* v. *Jump River Lumber Co.*, 81 *Wis.* 412, 51 *N. W. Rep.* 321, 956.

The jury found that plaintiff did not know that the log was lying in the ditch near the track; but the court refused to submit a question as to whether he could, by the exercise of ordinary care, have discovered such log and its precise relation to the track, and also refused to instruct the jury to the effect that if the danger caused by the presence of the log might, by the use of reasonable or ordinary care, have been known to him, he is presumed to have known it and assumed the risk. *Held*, error. *Haley* v. *Jump River Lumber Co.*, 81 *Wis.* 412, 51 *N. W. Rep.* 321, 956.

204. What should be refused. — In an action for not delivering cattle at a certain time according to agreement, the question properly left to the jury was "whether such an agreement had been entered into." It was unnecessary to direct the jury to say "whether the cattle had been carried under the bargain," that point not having been made at the trial. *Brown* v. *Bristol & E. R. Co.*, 9 *W. R.* 872, 4 *L. T.* 830.

In an action to recover for the death of a person through negligence, this special question: "What precaution did the deceased take to inform himself of the approach of the train which caused the injury?" was properly refused. *Chicago & N. W. R. Co.* v. *Dunleavy*, 39 *Am. & Eng. R. Cas.* 381, 129 *Ill.* 132, 22 *N. E. Rep.* 15; *affirming* 27 *Ill. App.* 438.

At the request of plaintiff the court, in an action against a company for running over plaintiff's horses and wagon, submitted to the jury the interrogatories: (1) "Was not the defendant guilty of negligence in placing

the freight car on the side track on the street, thereby obstructing the same?" (2) "Was not the defendant guilty of negligence in not placing some visible signal to indicate the approach of the backing train?" To each of which the jury answered "Yes." *Held*, that the interrogatories were not within the statute, and should not have been submitted to the jury, because they did not ask a finding on any particular matters of fact, but, assuming certain facts, asked the jury to pronounce upon the question of negligence, as a conclusion of law from the facts assumed. *Toledo & W. R. Co.* v. *Goddard*, 25 *Ind.* 185.—CRITICISED IN Ft. Wayne, J. & S. R. Co. *v.* Husselman, 65 Ind. 73. QUOTED IN Pittsburgh, C. & St. L. R. Co. *v.* Spencer, 98 Ind. 186. REVIEWED IN Cronk *v.* Chicago, M. & St. P. R. Co., 54 Am. & Eng. R. Cas. 525, 3 S. Dak. 93, 52 N. W. Rep. 420.

An interrogatory which asks the jury to decide a question of law is improper. An interrogatory reading "Could the defendant have lawfully fenced its track at the point" where animals entered upon it? is a question of law. *Louisville, N. A. & C. R. Co.* v. *Worley*, 107 *Ind.* 320, 7 *N. E. Rep.* 215.

In an action for injury to premises by fire from an engine it is not error to strike out certain interrogatories proposed by defendant for the jury to answer which required the name of any witness who testified that the fire complained of was set by a locomotive engine operated by defendant. The origin of such a fire is often proved by circumstances. It is not necessary to prove it by direct or positive evidence. If the interrogatories were submitted, and the most favorable answers to defendant secured, the result would not be affected, and it is not error to reject an interrogatory which could not have affected the general verdict, however answered. *Ohio & M. R. Co.* v. *Trapp*, 4 *Ind. App.* 69, 30 *N. E. Rep.* 812.

Defendant requested the court to submit to the jury the following question for special finding: "Could the plaintiff have avoided the accident for which he sues by the use of such ordinary care and prudence as is usually required of brakemen on railroads?" *Held*, that the question was properly refused for the reasons (1) that it presented a hypothetical case, and required the jury to find the possible effects or consequences of the case supposed; (2) it did not require the jury to find from the evidence an ultimate fact in issue. (Cole, J., dissenting.) *Hamilton* v. *Des Moines Valley R. Co.*, 36 *Iowa* 31.

In an action by a brakeman for personal injuries, the defendant asked that a number of special interrogatories be submitted to the jury, among which was this: "Do you find from the evidence that the accident to the plaintiff was in whole or in part caused by any act of his own, either of commission or omission?" *Held*, that it was properly refused, as being too general. *Whalen* v. *Chicago, R. I. & P. R. Co.*, 38 *Am. & Eng. R. Cas.* 141, 75 *Iowa* 563, 39 *N. W. Rep.* 894.

In an action for the death of a brakeman defendant asked the court to submit to the jury the following special finding: "What negligent act was done or what duty omitted by any employé of the defendant which caused the accident to the decedent?" *Held*, that it was proper to refuse the request, as the effect of the investigation called for by the question was to leave the jury to canvass the whole field of negligence, rather than the alleged acts. *Gorman* v. *Minneapolis & St. L. R. Co.*, 78 *Iowa* 509, 43 *N. W. Rep.* 303.

Under the Texas statute a special verdict must find the facts established by the evidence, and not the evidence by which they are established, and the finding must be such that nothing remains for the court but to draw therefrom the conclusions of law. A special issue whether defendant before crossing a track could have seen the train approaching is properly refused, as the question still remains for the jury whether his failure to do so was negligence. *Gulf, C. & S. F. R. Co.* v. *Anderson*, 42 *Am. & Eng. R. Cas.* 160, 76 *Tex.* 244, 13 *S. W. Rep.* 196.

A refusal to submit specific questions for a special verdict in the form proposed by the appellant is not error where such questions are substantially submitted to the jury. *Berg* v. *Chicago, M. & St. P. R. Co.*, 2 *Am. & Eng. R. Cas.* 70, 50 *Wis.* 419, 7 *N. W. Rep.* 347.

Where the questions submitted to the jury for a special verdict are such that the answers thereto will dispose of the whole case, it is not error to refuse to submit other questions which have a bearing only upon the amount of the damages. *Watson* v. *Milwaukee & M. R. Co.*, 10 *Am. & Eng. R. Cas.* 168, 57 *Wis.* 332, 15 *N. W. Rep.* 468.

205. Time of submission—Limiting number of interrogatories.—While the statute under which interrogatories are authorized does not in terms impose a definite limit as to the number and character of the special findings to be called for, yet it must be implied that there shall be a reasonable limit in every case, and unless it appears that the limit imposed by the trial court probably affected the party complaining in some material degree, such ruling ought not to be ground for reversing a judgment. *Toledo, St. L. & K. C. R. Co.* v. *Kid*, 29 *Ill. App.* 353.

The questions to be submitted to a jury for a special verdict should be settled upon before the argument, and the refusal to submit a question presented by a party after the argument is not error, especially where the same question has been submitted in a more general form. *Pool* v. *Chicago, M. & St. P. R. Co.*, 8 *Am. & Eng. R. Cas.* 360, 56 *Wis.* 227, 14 *N. W. Rep.* 46.

206. What answers to interrogatories constitute a sufficient finding.—In an action for a personal injury to plaintiff while traveling west on a street and while crossing a track, a special question submitted to the jury, whether there was a flagman at the crossing, was answered, "None visible from the east." *Held*, that the answer was sufficient, it amounting in substance to an answer that there was none. *Lake Shore & M. S. R. Co.* v. *Johnsen*, 135 *Ill.* 641, 26 *N. E. Rep.* 510; *affirming* 35 *Ill. App.* 430.

In an action for causing the death of an engineer, it appeared that a rule of defendant company required its engineers, during heavy rainstorms, or immediately thereafter, to run trains "very cautiously," and one of the questions submitted to the jury for their special finding was whether the deceased was running the engine "very cautiously" at the time it came in contact with ice, causing the accident. *Held*, that, it appearing from the evidence that the rain had ceased several hours before the deceased reached the place of the accident, the interrogatory related to an immaterial fact; but that, conceding that the rule was applicable to the case, it called only for the exercise of reasonable care under the circumstances referred to, and the answer of the jury that the deceased was running "reasonably precautious" was sufficiently definite as to its meaning, and was not irresponsive to the question as referring to a different degree of care from that called for by the above rule. *Scagel* v. *Chicago, M. & St. P. R. Co.*, 83 *Iowa* 380, 49 *N. W. Rep.* 990.

In an action against a company for killing sheep, the court instructed the jury to find specially at what point the sheep got on the track. The jury returned that "we believe" that they got on the track at a certain point. *Held*, that this was not objectionable as being the mere opinion of the jury. *McGuire* v. *Missouri Pac. R. Co.*, 23 *Mo. App.* 325.—FOLLOWING Evans & H. Fire Brick Co. *v.* St. Louis & S. F. R. Co., 21 Mo. App. 648.

A simple affirmative answer in the special verdict to the alternative question "Did the plaintiff show her ticket to the brakeman or conductor of defendant's train?" is sufficient, the act of either being equally the act of the company. *Patry* v. *Chicago, St. P., M. & O. R. Co.*, 82 *Wis.* 408, 52 *N. W. Rep.* 312.

An affirmative answer to the question "Was negligence on the part of defendant's servants the proximate cause?" etc., is equivalent to a finding of want of ordinary care, the jury having been instructed that the negligence spoken of in the question meant a want of ordinary care. *Patry* v. *Chicago, St. P., M. & O. R. Co.*, 82 *Wis.* 408, 52 *N. W. Rep.* 312.

207. —— and what are insufficient.—In an action against a railroad to recover for animals killed, an answer by the jury to an interrogatory, that the animals entered upon the defendant's ground at a place where the road could have been fenced, but was not, is a mere conclusion, and not a special finding upon a particular question of fact within the meaning of the statute. *Bechdolt* v. *Grand Rapids & I. R. Co.*, 35 *Am. & Eng. R. Cas.* 168, 113 *Ind.* 343, 15 *N. E. Rep.* 686, 13 *West. Rep.* 53.

208 Sufficiency of answer "Don't know."—The questions "Did the deceased look to ascertain if the train in question was approaching?" and "Did the deceased listen to ascertain if said train was approaching?" were submitted to a jury, and both were answered "Don't know." *Held*, questionable if objection to the form of the answer was not waived by failure to interpose the same before the jury was discharged; also, that the questions called for a finding of merely evidentiary facts, and

therefore a negative answer could not have affected the general verdict. *Chicago & N. W. R. Co.* v. *Dunleavy*, 39 *Am. & Eng. R. Cas.* 381, 129 *Ill.* 132, 22 *N. E. Rep.* 15; *affirming* 27 *Ill. App.* 438.—REVIEWED IN Treffert *v.* Ohio & M. R. Co., 36 Ill.App. 93.

It is a general rule that, whenever, in addition to a general verdict, a question of fact is submitted to the court which is proper and pertinent, and an answer can be deduced from the testimony, it is the duty of the court to compel an answer, and to refuse to receive a verdict until one is made; yet, where the question is not as to one of the issuable, essential, and principal facts, but runs to one of the minor and subdivided facts into which every principal fact may be resolved and re-resolved almost indefinitely, and the entire testimony leaves in uncertainty the existence of several of such minor facts (including the one inquired about), either of which would be sufficient to sustain the general conclusion reached, the court may sometimes properly receive and sustain a verdict where the only answer to the question is that the jury do not know. But it should never do so when it is evident that a determination of the fact is essential to the conclusion reached in the general verdict, nor where it is apparent that the jury by improperly professing ignorance have sought to leave the facts in such uncertainty as unduly to hinder any subsequent inquiry into the correctness of their verdict. *Atchison, T. & S. F. R. Co.* v. *Campbell*, 16 *Kan.* 200.

An employé sued a company for the alleged negligence of his co-employé, and special questions with reference to facts tending to show the negligence of such co-employé were submitted to the jury. The court instructed the jury that if there was not sufficient evidence to warrant a finding upon any of these special questions, the jury might answer "Don't know," and the jury answered some of the special questions in that manner. *Held*, that, as the burden of proving the negligence of such co-employé rests upon plaintiff, the answers "Don't know" to such questions are favorable to the company, and not to plaintiff, although the jury may have intended them otherwise. *Kansas Pac. R. Co.* v. *Peavey*, 34 *Kan.* 472, 8 *Pac. Rep.* 780.

The court erred in instructing the jury that they might, under any circumstances, answer special questions of fact by merely saying "Don't know." *Kansas Pac. R. Co.* v. *Peavey*, 34 *Kan.* 472, 8 *Pac. Rep.* 780.

A case was tried before a court and a jury, and it was doubtful upon the evidence whether any verdict should be rendered in favor of plaintiff. The court submitted special questions to the jury, but at the same time told them that where the evidence was not sufficient they might answer the questions by saying "Don't know," or "Cannot answer on the evidence." The jury answered a large proportion of the questions by simply saying "Don't know," when in fact ample evidence was introduced upon which many of such questions might have been properly answered. The questions were material. The jury answered other questions against the evidence, and found a general verdict against defendant for vastly excessive damages, and the court discharged the jury, after refusing to require them to answer the questions properly. *Held*, error, and that a new trial ought to have been granted upon the application of defendant. *Atchison, T. & S. F. R. Co.* v. *Cone*, 37 *Kan.* 567, 15 *Pac. Rep.* 499. *Leavenworth, T. & S. W. R. Co.* v. *Jacobs*, 39 *Kan.* 204, 17 *Pac. Rep.* 791.—FOLLOWING Atchison, T. & S. F. R. Co. *v.* Cone, 37 Kan. 567.—FOLLOWED IN Leavenworth, T. & S. W. R. Co. *v.* Jacobs, 39 Kan. 204.

In an action against a company for killing stock, the special question was put to the jury: "As plaintiff and his cattle were situated when the train was eighty rods west of the crossing, could a whistle blown upon the locomotive have prevented the injury?" to which the jury answered "We do not know." *Held*, that such answer was equivalent to a simple denial. *Union Pac. R. Co.* v. *Shannon*, 38 *Kan.* 476, 16 *Pac. Rep.* 836.

209. Sending jury back to frame proper answers. — Where defendant seeks to show contributory negligence on the part of plaintiff, the jury having entered evasive and improper answers to interrogatories pertinent to the issue, it is error for the court to overrule a motion to require the jury to retire and make the answers to the interrogatories definite and certain. *Cleveland, C., C. & I. R. Co.* v. *Asbury*, 120 *Ind.* 289, 22 *N. E. Rep.* 140.

Plaintiff sued for injuries alleged to have been received while attempting to couple cars, and alleged to have resulted from the negligence of a co-employé in moving the

car to be coupled at too great a velocity. The evidence tended to show that plaintiff might have taken a position, prior to his attempt to make the coupling, from which he could have determined with a great degree of accuracy the rate of speed at which the car was moving; but that he did not do so, taking, instead, a place from which he could not estimate the rate of speed with any degree of accuracy, and from which place he attempted to make the coupling in ignorance of such rate of speed, and was injured. The company claimed that plaintiff was guilty of contributory negligence in this respect; the court submitted the following special questions to the jury, and they returned the following answers, to wit: "Q. 27. Did not the plaintiff of his own will occupy a position which prevented him from ascertaining the speed of the car which injured him? A. We think he occupied the usual place for making the coupling. Q. 28. Could he not have taken such a position as would have enabled him to determine the speed of the car before he attempted to couple? A. To make the coupling, he could not." *Held*, that the answers were evasive and unsatisfactory, and the court erred in refusing, upon the request of defendant, to require the jury to answer them properly. *Kansas Pac. R. Co.* v. *Peavey*, 34 *Kan.* 472, 8 *Pac. Rep.* 780.

210. Effect of failure to answer.—Defendant, for the purpose of obtaining a finding from the jury showing contributory negligence on the part of plaintiff, requested the court to instruct, and the court did instruct, the jury to answer the special question whether a certain train was in motion at a particular time and place. An affirmative answer to this question would have tended to show such contributory negligence, but the jury answered this question "Evidence conflicts, and we cannot answer," and the jury also rendered a general verdict in favor of plaintiff. *Held*, that the failure of the jury to answer the special question was equivalent to a finding, against defendant, that the train was not in motion. *Atchison, T. & S. F. R. Co.* v. *McCandliss*, 22 *Am. & Eng. R. Cas.* 295, 33 *Kan.* 366, 6 *Pac. Rep.* 587.

In an action for a personal injury at a crossing, to the questions "Could the plaintiff have heard the whistle?" and "If he had stopped his team, etc., could he have heard it?" the jury answered, "He might or might not." *Held*, that such answer was not evasive, as no direct and positive answer could be given. *Urbanek* v. *Chicago, M. & St. P. R. Co.*, 47 *Wis.* 59, 1 *N. W. Rep.* 464, 21 *Am. Ry. Rep.* 58.—DISTINGUISHED IN Seefeld *v.* Chicago, M. & St. P. R. Co., 32 Am. & Eng. R. Cas. 109, 70 Wis. 216, 35 N. W. Rep. 278.

211. When a special verdict is proper.*—Several cattle were killed and injured by separate trains of defendant. In an action for the entire damage, defendant asked for special findings as to the amount of damage done by each train. The court submitted the questions, with an instruction that if the jury found that damage was done by both trains, and that one train was operated with reasonable care, then they should answer the questions. No special findings were returned with the general verdict, whereupon defendant moved to require the jury to return answers to the questions, which motion was overruled. *Held*, that the instruction was correct, and the motion properly overruled; that under the general verdict the questions asked became material; and that the statute (Iowa Code, § 2808) does not require special findings of facts that are immaterial. *Lawson* v. *Chicago, R. I. & P. R. Co.*, 57 *Iowa* 672, 11 *N. W. Rep.* 633.

Where either party requires it, the court should direct the jury to return a special verdict only, and if it fails to do so, and both a general and special verdict are returned, on appeal the court will only look to see whether the judgment is supported by the special verdict. *Paducah & E. R. Co.* v. *Letcher*, (*Ky.*) 12 *Am. & Eng. R. Cas.* 61.

A special verdict being asked, the court was bound to direct it, but it was in the court's discretion also to order the jury to find a general verdict. *Louisville & N. R. Co.* v. *Brice*, 28 *Am. & Eng. R. Cas.* 542, 84 *Ky.* 298, 1 *S. W. Rep.* 483.

212. What special verdict is sufficient.—A special verdict, in a case involving accident at a crossing, which fails to find that the horses were docile, and that the traveler could have heard the signals if sounded, and would have stopped and could have controlled his horses at that

*The law of special verdicts, see note, 26 AM. & ENG. R. CAS. 213.

Special findings of juries, see note, 28 AM. & ENG. R. CAS. 296.

distance, is not defective. *Terre Haute & I. R. Co.* v. *Brunker*, 128 *Ind.* 542, 26 *N. E. Rep.* 178.

Where the special findings of a jury are not contested, and where such findings show conclusively that the alleged errors as to evidence and instructions could not and did not prejudice the defendant, no cause is presented for a reversal of the judgment rendered upon the special findings which sustain the verdict. *Atchison, T. & S. F. R. Co.* v. *Sly*, 41 *Kan.* 729, 21 *Pac. Rep.* 790.—DISTINGUISHING Atchison, T. & S. F. R. Co. *v.* Wagner, 33 Kan. 660; Atchison, T. & S. F. R. Co. *v.* Ledbetter, 34 Kan. 326.

The testimony of a brakeman on a train that the bell on the engine was rung when the train started from a switch about 500 feet distant from the crossing at which an accident occurred, but that he could not say whether it was ringing all the time from the switch down to the place of the accident, together with the testimony of other witnesses that they did not hear the bell at or near the crossing, though listening for it—*held*, to have warranted a special finding by the jury that the bell was not rung as a signal at the crossing. *Burns* v. *North Chicago Rolling Mill Co.*, 65 *Wis.* 312, 27 *N. W. Rep.* 43. DISTINGUISHED IN Heddles *v.* Chicago & N. W. R. Co., 39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237.

213. What is insufficient—Conclusions.—Where the action is by a passenger for personal injuries, a special finding that the injury resulted from defendant backing a car against the one occupied by plaintiff, whereby he was injured "by the carelessness, negligence, and fault of the defendant," without finding any facts from which the court can deduce negligence as a conclusion of law, is bad, and a *venire de novo* will be awarded. *Pittsburgh, C. & St. L. R. Co.* v. *Spencer*, 21 *Am. & Eng. R. Cas.* 478, 98 *Ind.* 186.—QUOTING Toledo & W. R. Co. *v.* Goddard, 25 Ind. 185.

In an action for damages growing out of the alleged negligent conduct of defendant, a paragraph of the special verdict which recites "that the conduct of the plaintiff on the occasion of the injury was ordinarily prudent and cautious under the circumstances, and that he did not wholly contribute to said injury by any fault or negligence on his part, but that said injury was caused mostly by the agent of the defendant, driver of said car," contains nothing more than inferences or conclusions, and will not be regarded as a finding of facts. *Conner* v. *Citizens' St. R. Co.*, 26 *Am. & Eng. R. Cas.* 210, 105 *Ind.* 62, 55 *Am. Rep.* 177, 4 *N. E. Rep.* 441.

A special verdict should state facts, not conclusions. A finding that one of the parties has been guilty of negligence is a mere statement of a conclusion, and will not support a judgment. *Chicago, St. L. & P. R. Co.* v. *Burger*, 124 *Ind.* 275, 24 *N. E. Rep.* 981.

In an action for wilful neglect under Ky. Gen. St., ch. 57, § 3, a special verdict having been demanded, the court should have instructed the jury as to what "wilful neglect" is, and then left it to them, by questions properly framed, to decide whether it existed; and the jury not having passed on the question of wilful neglect, their special verdict is not sufficient to support a judgment for plaintiff. *Paducah & E. R. Co.* v. *Letcher*, (*Ky.*) 12 *Am. & Eng. R. Cas.* 61.

In an action for injuries from negligence, the jury, by special verdict, found that negligence of the person injured contributed materially to the injury, and also found specially that, "in the exercise of ordinary care and prudence," he might have done a certain act which, if done, would or might have saved him from the injury; and there was neither finding nor proof of any other facts tending to show contributory negligence. The special fact so found was not such that it could be said, as matter of law, to establish contributory negligence. *Held*, that the court below should have granted a new trial on plaintiff's motion, instead of rendering judgment on the verdict. *Cottrill* v. *Chicago, M. & St. P. R. Co.*, 47 *Wis.* 634, 3 *N. W. Rep.* 376, 21 *Am. Ry. Rep.* 66.—REVIEWING Rood *v.* American Exp. Co., 46 Wis. 639.—FOLLOWED IN Burns *v.* North Chicago Rolling Mill Co., 19 Am. & Eng. R. Cas. 412, 60 Wis. 541.

214. Construing the special verdict—Presumptions.— Where a special verdict contains no findings as to certain facts alleged in the complaint, such facts will be regarded as found against the plaintiff, and the refusal of the court to give instructions relating to such facts at the request of the defendant is at most harmless error. *Louisville, N. A. & C. R. Co.* v. *Hart*, 119 *Ind.* 273, 21 *N. E. Rep.* 753.

If a special verdict is silent upon a material point, such point will be deemed as found against the party having the burden; so, where the verdict, while finding that the

whistle was sounded, is silent with reference to the ringing of the bell, it will be deemed that the latter signal was given, the presumption being, in the absence of a showing to the contrary, that the engineer did his duty. *Louisville, N. A. & C. R. Co.* v. *Green*, 120 *Ind.* 367, 22 *N. E. Rep.* 327.

After answering all the questions propounded for a special verdict, the jury added that they found "for the plaintiff to the amount of $2,000." *Held*, that, in the absence of any proof in the record that the court directed a general verdict, this must be construed as simply a finding of plaintiff's damages in case he were entitled to recover upon the facts of the special verdict. *Kelley* v. *Chicago, M. & St. P. R. Co.*, 5 *Am. & Eng. R. Cas.* 469, 53 *Wis.* 74, 9 *N. W. Rep.* 816.

215. Rule that general verdict cannot stand if inconsistent with special findings.—Special findings in a verdict control general findings, and judgment should be entered in conformity with the facts thus established. *Rio Grande Southern R. Co.* v. *Deasey*, 3 *Colo. App.* 196, 32 *Pac. Rep.* 725. *Atchison, T. & S. F. R. Co.* v. *Morgan*, 42 *Am. & Eng. R. Cas.* 184, 43 *Kan.* 1, 22 *Pac. Rep.* 995.—DISTINGUISHING Union Pac. R. Co. *v.* Dunden, 37 Kan. 1.—*Kelley* v. *Chicago, M. & St. P. R. Co.*, 5 *Am. & Eng. R. Cas.* 469, 53 *Wis.* 74, 9 *N. W. Rep.* 816.

Where the action is based on defendant's negligence, and there is a special verdict showing contributory negligence, the court will decline to interfere with a judgment for the defendant, notwithstanding a general verdict. *Quick* v. *Indianapolis & St. L. R. Co.*, 29 *Ill. App.* 143; *reversed on other grounds in* 130 *Ill.* 334, 22 *N. E. Rep.* 709.

In an action for personal injuries, where the special findings of a jury and their verdict for plaintiff are irreconcilable, a judgment should be rendered for the defendant. *Grand Rapids & I. R. Co.* v. *Ellison*, (*Ind.*) 18 *N. E. Rep.* 507.

Where important and material special findings of the jury are without any support in the evidence, and where other findings are contrary to the evidence, and still other findings evasive and inconsistent, and it appears from such findings that the jury either misconceived the import of portions of the testimony, or else did not make fair and impartial answers to the questions of fact submitted, the general verdict cannot stand, although it has been approved by the trial court. *Atchison, T. & S. F. R. Co.* v. *Brown*, 33 *Kan.* 757, 7 *Pac. Rep.* 571.

216. What special findings are inconsistent with the general verdict.—Where a general verdict is rendered for plaintiff, who seeks to recover for personal injuries sustained by her while a passenger by reason of the failure of defendant to stop the train a sufficient length of time to enable her to alight, a judgment rendered thereon should not be allowed to stand, where the jury also find by special verdict that the train did stop a reasonable length of time. *Chicago & A. R. Co.* v. *Means*, 48 *Ill. App.* 396.

On the trial of an action for injuries alleged to have been inflicted upon plaintiff by the wrongful and negligent act of defendant, the jury, with their general verdict in favor of plaintiff, returned special findings in answer to interrogatories propounded to them, showing that there was negligence on the part of plaintiff which contributed to, if not altogether causing, the injuries complained of. *Held*, that judgment was properly rendered, notwithstanding such general verdict in favor of defendant on such special findings. *Thompson* v. *Cincinnati, L. & C. R. Co.*, 54 *Ind.* 197.

In an action to recover for injuries received by the breaking of an axle under a locomotive tender, the jury found generally for plaintiff, and also specially that the defect in the axle was discoverable by a practical test, and that the same broke at a point in the road where the rails were short and the ties bad. There was also a special finding by the jury, in answer to interrogatories by defendant, that three months before the accident the axle had been tested by the best approved methods in use; that the tender had been inspected before the train started on the trip, and any flaw in the axle might not have been detected by such inspection at that time; that it was made by a reputable manufacturer, and received no unusual strain before it broke; that the train was running at a safe rate of speed; that the road was in ordinary good condition; and that the employés of the road had been guilty of no particular negligence. *Held*, that defendant was entitled to judgment, notwithstanding the general verdict. *Grand Rapids & I. R. Co.* v. *Boyd*, 65 *Ind.* 526.

In an action by an administratrix for the death of her intestate, it was pleaded that

as one of defendant's trains approached a town, the servants in charge of it carelessly and negligently detached the engine from the cars; that the engine was run with accelerated speed to a water tank about fifty yards west of the depot, leaving the cars to follow of their own momentum on a descending grade to the depot. The jury returned a general verdict in favor of plaintiff, and found the following facts: The decedent had been familiar with the crossing for ten years, and for two or three months before his death his business had taken him to the depot on each week day at about the same hour at which he was killed. He was on foot on his way to the depot at the time he was struck by the train, which arrived on schedule time. It had been the habit of those in charge of the train, for two or three months before the injury, to detach the engine and run it to the water tank as was done on the day of the injury. The deceased, if he had looked in the direction of the approaching train, could have seen it in time to avoid the injury. The conductor stood on the depot platform and shouted a warning to the deceased. A brakeman on the train also warned him. The brakes were set at the time of the accident, and the train was moving about four miles an hour. *Held*, that defendant's motion for judgment on the special findings of the jury, notwithstanding the general verdict, ought to have been granted. *Chicago & E. I. R. Co.* v. *Hedges*, 37 *Am. & Eng. R. Cas.* 516, 118 *Ind.* 5, 20 *N. E. Rep.* 530. —LIMITED IN Toledo, St. L. & K. C. R. Co. *v.* Adams, 131 Ind. 38.

Where the facts stated in an answer to an interrogatory are such as to preclude a recovery, the court must so adjudge, although answers upon other points may be favorable to the party who relies upon the general verdict. The statement that a person saw an approaching engine forty or fifty feet from him before he attempted to cross a railroad is the statement of a fact, and so is the statement that he attempted to cross and was struck by the locomotive. *Korrady* v. *Lake Shore & M. S. R. Co.*, 131 *Ind.* 261, 29 *N. E. Rep.* 1069.

Where the jury in their special findings returned that the actual damage done to a passenger by a sudden starting of the train while she was alighting amounted to $300, a general verdict for $700 will be set aside, where the circumstances are not such as to entitle the plaintiff to exemplary damages. *Atchison, T. & S. F. R. Co.* v. *Harvey*, 16 *Am. & Eng. R. Cas.* 352, 31 *Kan.* 750, 3 *Pac. Rep.* 568.—FOLLOWING Union Pac. R. Co. *v.* Fray, 31 Kan. 739.

Where the action is for destroying property by fire from an engine and the complaint charges the company's employés with negligence "in operating and running its engine," but at the trial there is no claim made that any one was negligent except the engineer, and the jury finds specially that they are not warranted in saying that the engineer was negligent, it is error to render judgment for the plaintiff on such finding. *St. Louis & S. F. R. Co.* v. *Fudge*, 35 *Am. & Eng. R. Cas.* 246, 39 *Kan.* 543, 18 *Pac. Rep.* 720. — DISTINGUISHED IN Ft. Scott, W. & W. R. Co. *v.* Tubbs, 47 Kan. 630.

In an action for negligence against a railroad, while the special findings of the jury showed that defendant had not used ordinary care, they also showed that plaintiff had failed to use such care. *Held*, that the court properly entered a verdict for the road, although the jury had found for plaintiff. *Adams* v. *Louisville & N. R. Co.*, 21 *Am. & Eng. R. Cas.* 380, 82 *Ky.* 603.

If the special findings by the jury and the averments of the complaint conclusively show that the defendant was free from any negligence causing the injury complained of, a finding in the verdict that defendant was guilty of such negligence will be treated merely as an erroneous conclusion of law, and will have no weight in determining what judgment should be entered. *Hogan* v. *Chicago, M. & St. P. R. Co.*, 15 *Am. & Eng. R. Cas.* 439, 59 *Wis.* 139, 17 *N. W. Rep.* 632. — REVIEWED IN Fick *v.* Chicago & N. W. R. Co., 34 Am. & Eng. R. Cas. 378, 68 Wis. 469, 32 N. W. Rep. 527.

In a case where the special findings of the jury show the existence of such circumstances, the question of negligence is a question of law, and a finding of negligence as well as a general verdict for the plaintiff for damages for an injury so caused must yield to the special findings of fact, and can have no weight in determining the judgment to be entered by the court. *Hogan* v. *Chicago, M. & St. P. R. Co.*, 15 *Am. & Eng. R. Cas.* 439, 59 *Wis.* 139, 17 *N. W. Rep.* 632.

217. What special findings are not sufficiently inconsistent with general verdict to override it. — A special finding of a jury that the employés

of one of defendant railways, in charge of its train when it crossed the track of another road, were not guilty of negligence that materially contributed to the injury is not inconsistent with a general verdict finding both defendants guilty of negligence contributing to the injury, where the negligence charged and proved was that the agent of both companies failed properly to manage the semaphore and so to signal as to prevent a collision, such agent not being an employé in charge of the train. *Chicago & N. W. R. Co.* v. *Snyder*, 38 *Am. & Eng. R. Cas.* 188, 128 *Ill.* 655, 21 *N. E. Rep.* 520.

A special finding that plaintiff, in attempting to cross a street filled with tracks, looked both before and after he stopped to see whether any cars were approaching on the track upon which he stopped, and that there was nothing to prevent him from seeing the approach of the cars which ran over him, if he had looked, is not necessarily inconsistent with a general verdict for plaintiff, when the cars that struck him were on a different track from the one where he stood when he looked, and they were suddenly switched onto that track. *Lake Shore & M. S. R. Co.* v. *Johnsen* 135 *Ill.* 641, 26 *N. E. Rep.* 510; *affirming* 35 *Ill. App.* 430.

Where the action is by a landowner to recover damages for the construction of a railroad across his land, the fact that the jury returns specially that the company employed competent engineers, and had done no wilful or unnecessary damage, will not prevent plaintiff from recovering on a general verdict. Admitting that the road had been properly located, and constructed with the utmost care, would not prevent plaintiff from recovering, if he was damaged. *New Albany & S. R. Co.* v. *Huff*, 19 *Ind.* 315.

Where the special findings of a jury, in answer to interrogatories, do not embrace and cover all the issues, and are not inconsistent with a general verdict rendered for plaintiff, as to issues not covered by them, defendant will not be entitled to judgment thereon, though they be inconsistent with the general verdict as to the issues covered by them. *Toledo, W. & W. R. Co.* v. *Milligan*, 52 *Ind.* 505.

In a suit against an express company for money intrusted to it by plaintiff and alleged to have been lost, the jury returned a general verdict for plaintiff, and, in answer to interrogatories, found specially that the money had been received from plaintiff by an agent of the company for delivery to the consignee, and that the package containing it had been delivered unbroken by another agent to a party other than the consignee. *Held*, that these answers were not inconsistent with the general verdict. *Monroe* v. *Adams Exp. Co.*, 65 *Ind.* 60.

In an action to recover damages against a company for killing a cow, a negative answer to the question "Do you find the plaintiff was without fault, and guilty of no contributory negligence?" is equivalent to no finding at all upon that question, and is not inconsistent with a general verdict for plaintiff. *Louisville, N. A. & C. R. Co.* v. *Whitesell*, 68 *Ind.* 297.

Where the general verdict is perfect and complete in every particular, a *venire de novo* ought not to be granted merely because the answers of the jury to interrogatories submitted to them are "irregular, indefinite, improper, and uncertain." *Pittsburgh, C. & St. L. R. Co.* v. *Hixon*, 32 *Am. & Eng. R. Cas.* 374, 110 *Ind.* 225, 11 *N. E. Rep.* 285. — QUOTING Bedford, S. O. & B. R. Co. *v.* Rainbolt, 99 Ind. 551.

The special findings in an action for injuries sustained while leaving a train showed that plaintiff got on the lower step of the platform for the purpose of alighting when the train was moving at the rate of four and a half miles an hour. The jury also found specially that neither the conductor nor the engineer in charge of the train knew that plaintiff was on the steps of the car or that he proposed leaving it, or that he was in the act of alighting at the time when he attempted to leave it. *Held*, that as the special findings showed that the conductor knew plaintiff was on the train but did not know he was in the act of alighting when he made the attempt to leave it, there was no such conflict between the special findings and a general verdict for plaintiff as required the latter to be set aside. *Louisville & N. R. Co.* v. *Crunk*, 41 *Am. & Eng. R. Cas.* 158, 119 *Ind.* 542, 21 *N. E. Rep.* 31.

In an action for damages, the jury returned answers to interrogatories in addition to a general verdict for plaintiff, and defendant moved for judgment on the answers to the interrogatories, notwithstanding the general verdict. *Held*, that as the answers only tended to show contributory negligence, and were not conclusive, they were not sufficient to override the general

verdict. *Cincinnati, I., St. L. & C. R. Co.* v. *Smock*, 133 *Ind.* 411, 33 *N. E. Rep.* 108.

In an action for injuries at a highway crossing, resulting from plaintiff's horse having been frightened, a general verdict was returned in favor of plaintiff, on the complaint that the immediate cause of the injury was the noise made by the escape of steam from a safety valve on defendant's locomotive. Answers to special interrogatories were to the effect that steam escaped only from an automatic safety valve; that the valve was a safe and necessary device; that it was properly constructed and in good repair; that the discharge of steam therefrom was necessarily incident to the use and safety of the engine; and, further, that the escape of steam was caused by an affirmative act of the engineer, and that by regulating his fire and injecting cold water he could have controlled it. *Held*, that the special findings were not inconsistent with the general verdict. *Louisville, N. A. & C. R. Co.* v. *Schmidt*, 55 *Am. & Eng. R. Cas.* 128, 134 *Ind.* 16, 33 *N. E. Rep.* 774.

In an action for personal injuries the question was submitted to the jury: "Was the plaintiff at the time of the accident guilty of ordinary negligence which directly contributed to his injuries?" to which the jury replied, "Very slight." *Held*, that this was not sufficient to overturn the general verdict or prevent plaintiff from recovering. *Salina* v. *Trosper*, 27 *Kan.* 544.

Answers by the jury to specific questions which are not conclusive of plaintiff's contributory negligence will not entitle defendant to a verdict thereon, in opposition to the general verdict in plaintiff's favor. *Clay* v. *Chicago & A. R. Co.*, 24 *Mo. App.* 39.

Special findings control the general verdict only when they are so inconsistent that both cannot stand. *Gates* v. *Chicago, M. & St. P. R. Co.*, 53 *Am. & Eng. R. Cas.* 245, 2 *S. Dak.* 422, 50 *N. W. Rep.* 907.

218. General verdict conclusive unless special findings are utterly irreconcilable with it. — All fair intendments will be made in favor of the general verdict, and answers to interrogatories cannot prevail against it unless they are in irreconcilable conflict with it. *Toledo, St. L. & K. C. R. Co.* v. *Adams*, 131 *Ind.* 38, 30 *N. E. Rep.* 794. — FOLLOWING Terre Haute & I. R. Co. *v.* Clark, 73 Ind. 168. LIMITING Chicago & E. I. R. Co. *v.* Hedges, 118 Ind. 5.

A brakeman instituted an action against a company to recover for injuries alleged to have been occasioned by a defective brake. The complaint alleged that the defect was unknown to plaintiff, but that it was known to defendant. Defendant claimed that under the rules of the company it was plaintiff's duty to inspect the brake; that the company had no knowledge of the defect, nor means of knowledge, and that plaintiff both had the means of knowledge and was bound to know of the defective brake. A general verdict was returned for plaintiff. The jury also returned answers to a number of interrogatories submitted to them. *Held*, that the general verdict was in effect a finding that there was negligence on the part of defendant, that the defect in the brake was not a risk assumed by plaintiff as an incident of his employment, and that plaintiff had no knowledge of the defective brake. *Matchett* v. *Cincinnati, W. & M. R. Co.*, 53 *Am. & Eng. R. Cas.* 266, 132 *Ind.* 334, 31 *N. E. Rep.* 792.—DISTINGUISHING Chicago, St. L. & P. R. Co. *v.* Fry, 131 Ind. 319.

The general verdict on these questions was conclusive, as the answers to interrogatories were not utterly irreconcilable therewith. *Matchett* v. *Cincinnati, W. & M. R. Co.*, 53 *Am. & Eng. R. Cas.* 266, 132 *Ind.* 334, 31 *N. E. Rep.* 792.

Where the answer to one of the interrogatories stated that the defect in the brake could have been readily discovered by plaintiff, and the answer to another interrogatory stated that it was not shown whether the defect could have been discovered had an examination been made, the answers neutralized each other, leaving the general verdict decisive that plaintiff was free from contributory negligence. *Matchett* v. *Cincinnati, W. & M. R. Co.*, 53 *Am. & Eng. R. Cas.* 266, 132 *Ind.* 334, 31 *N. E. Rep.* 792.

A general verdict will not be disturbed unless there is an irreconcilable conflict between the facts found specially and the general verdict. *Chicago, St. L. & P. R. Co.* v. *Spilker*, 55 *Am. & Eng. R. Cas.* 200, 134 *Ind.* 380, 33 *N. E. Rep.* 280.

If the answers to interrogatories can, by any hypothesis, be reconciled with the general verdict, the latter will control, and the court should not render judgment against the party who has the general verdict in his favor. *Chicago & E. R. Co.* v. *Brannegan*, 5 *Ind. App.* 540, 32 *N. E. Rep.* 790.

Where the answers to interrogatories show that a train stopped for two minutes at a station where plaintiff desired to alight, and certain articles were unloaded from the train, such facts are not necessarily inconsistent with a general verdict for plaintiff. Notwithstanding the facts shown in answer to the interrogatories, there might have been such negligence on the part of defendant, and such diligence and care on the part of plaintiff, as to sustain the general verdict. *Ohio & M. R. Co.* v. *Smith*, 5 *Ind. App.* 560, 32 *N. E. Rep.* 809.

219. Effect of inconsistency between the special findings.—The general rule is that when the special findings, taken and construed together, are inconsistent with the general verdict, the former shall control, and the court shall give judgment accordingly; but where the special findings when so taken and construed are inconsistent with each other, contradictory and uncertain in their meaning, they will not control the general verdict. *Grand Rapids & I. R. Co.* v. *McAnnally*, 98 *Ind.* 412.

Where the action is for negligently causing the death of an employé, the supreme court cannot say that the trial court committed material error by submitting to the jury such general questions as the following: "10. Was the death of said P. caused by the wrongful act or omission of the defendant? 11. Could the defendant, by the exercise of reasonable and ordinary care on its part, have prevented the injury complained of? 12. Was the death of P. caused by the gross negligence of the defendant? 13. At the time of the injury complained of, was P. in the exercise of reasonable and ordinary care? 14. At the time of the injury complained of, was P. guilty of any negligence that proximately contributed thereto?" Where such general questions are submitted to the jury along with numerous specific questions, and the jury make findings in answer to both the general and the specific questions, then, if it can be seen that the general findings are mere conclusions drawn by the jury from the facts found and stated in the answers to the specific questions, the general findings may be wholly ignored and disregarded, whether they agree with or contradict the specific findings. *Atchison, T. & S. F. R. Co.* v. *Plunkett*, 2 *Am. & Eng. R. Cas.* 127, 25 *Kan.* 188.—NOT FOLLOWED IN Hatfield *v.* Chicago, R. I. & P. R. Co., 11 Am. & Eng. R. Cas. 153, 61 Iowa 434. QUOTED IN Atchison, T. & S. F. R. Co. *v.* Lindley, 41 Am. & Eng. R. Cas. 72, 42 Kan. 714, 6 L. R. A. 646, 41 Alb. L. J. 92, 22 Pac. Rep. 703.

The jury in an action for damages for personal injury was asked to return answers to the following questions: "4. Was the wreck which occasioned the injury caused by a defective or unsafe roadbed? 5. Or was the wreck caused by a defective locomotive?" The jury answered "yes" to both questions. *Held*, that when the verdict seems excessive, though such conflicting findings would not ordinarily authorize a reversal, yet such finding may be looked to in determining whether the jury has given due consideration to the evidence. *Gulf, C. & S. F. R. Co.* v. *Gordon*, 70 *Tex.* 80, 7 *S. W. Rep.* 695.—QUOTED IN Gulf, C. & S. F. R. Co. *v.* James, 73 Tex. 12, 10 S. W. Rep. 744.

Where the facts found in a special verdict conclusively show that wrongful acts by an employé were done in the course of his employment, a finding that such acts were not done in the course of his employment is to be treated as a mere erroneous conclusion of law. *Fick* v. *Chicago & N. W. R. Co.*, 34 *Am. & Eng. R. Cas.* 378, 68 *Wis.* 469, 32 *N. W. Rep.* 527.

While plaintiff was attempting to alight from a train it suddenly started, and she was injured in jumping to the platform. The jury found specially that she was not compelled to jump because of the starting of the train, but could, by the use of ordinary care and reasonable effort, have turned back or retained her place on the steps with safety; also that in leaving the train she was not guilty of any want of ordinary care which contributed to the injury. *Held*, that such findings, if not inconsistent, acquitted plaintiff of negligence, and defendant was not prejudiced by an order setting aside the special verdict as inconsistent. *Kelly* v. *Chicago & N. W. R. Co.*, 70 *Wis.* 335, 35 *N. W. Rep.* 538.—QUOTING Schultz *v.* Chicago & N. W. R. Co., 44 Wis. 638.

The jury found that, in consequence of an order given by the "boss," J. did not assist in removing the last timber from under the engine, and that in consequence of his failure so to assist the accident occurred, and to that extent the "boss" and J. were found negligent. They also found that three men were generally employed to do the work referred to, though two, one being in the

pit, could do the work. *Held*, that the findings were inconsistent. *McBride* v. *Union Pac. R. Co.*, 3 *Wyom.* 247, 21 *Pac. Rep.* 687.

The finding that two men were sufficient, and that two were furnished, does not warrant a judgment for defendant, it being inconsistent with the finding that the accident occurred in consequence of the third man being ordered away; and to strike out the latter and give effect to the former would be making a new verdict. *McBride* v. *Union Pac. R. Co.*, 3 *Wyom.* 247, 21 *Pac. Rep.* 687.

220. Ordering a new trial in such cases. — Where a jury renders a general verdict and makes numerous special findings, and the special findings are inconsistent with each other, and some of them with the general verdict, and where the general verdict and some of the special findings are in favor of plaintiff, and several of the special findings are in favor of defendant, and where it appears from the findings of the jury that they found both ways, it is error for the trial court to render judgment upon the special findings in favor of defendant; and as, in such condition of things, neither party is entitled to judgment upon the verdict or findings, it is the duty of the trial court to grant a new trial. *Shoemaker* v. *St. Louis & S. F. R. Co.*, 14 *Am. & Eng. R. Cas.* 266, 30 *Kan.* 359, 2 *Pac. Rep.* 517.—FOLLOWED IN St. Louis & S. F. R. Co. *v.* Shoemaker, 38 Kan. 723.—*St. Louis & S. F. R. Co.* v. *Shoemaker*, 38 *Kan.* 723, 17 *Pac. Rep.* 584.—FOLLOWING Shoemaker *v.* St. Louis & S. F. R. Co., 30 Kan. 359.

Where the special findings of a jury are in conflict with the general verdict and inconsistent with each other, and are so uncertain and incomplete that the appellate court cannot render judgment on them, the judgment rendered by the trial court must be reversed, and the cause remanded for further proceedings. *Atchison, T. & S. F. R. Co.* v. *Woodcock*, 42 *Kan.* 344, 22 *Pac. Rep.* 421.

In an action to recover for an injury at a crossing, the jury, in response to special questions, replied that plaintiff on approaching the crossing did not look up or down the track, that it was very dark, that plaintiff was driving slowly, and that the train which occasioned the injury was moving slowly. They found also that plaintiff was notified of the danger before he reached the track, but paid no attention to the notice, and that the notice was not given to him in time to enable him to avoid the danger. They also answered in response to one question that plaintiff could have seen the lights of the engine in time to avoid danger had he been looking out for them, while in answer to another they replied that plaintiff could not, under the circumstances, have seen the train approaching in time to avoid a collision. The general verdict was for plaintiff. *Held*, that the special findings were so clearly inconsistent as to indicate a disposition on the part of the jury to distort the evidence in order to make a case favorable for plaintiff, and that a new trial would be ordered accordingly. *Burns* v. *North Chicago Rolling Mill Co.*, 19 *Am. & Eng. R. Cas.* 412, 60 *Wis.* 541, 19 *N. W. Rep.* 380.—FOLLOWING Haas *v.* Chicago & N. W. R. Co., 41 Wis. 44; Kearney *v.* Chicago, M. & St. P. R. Co., 47 Wis. 144; Lawton *v.* Royal Canadian Ins. Co., 50 Wis. 163; Cottrill *v.* Chicago, M. & St. P. R. Co., 47 Wis. 634.

TRIBUNAL.

For assessment of land damages, selection of, see EMINENT DOMAIN, **448.**

TRICYCLES.

Negligence of employé in the operation of, see EMPLOYÉS, INJURIES TO, **394.**

TROLLEY LINES.

See ELECTRIC RAILWAYS.

TROOPS.

Carriage of, on land-grant roads, see LAND-GRANT RAILROADS, **7.**

TROVER; CONVERSION.

When lies against carrier of merchandise, see CARRIAGE OF MERCHANDISE, **306.**

— maintainable by holder of bill of lading, see BILLS OF LADING, **119.**

I. WHEN TROVER WILL LIE..... 107
II. PROCEDURE..... 112

I. WHEN TROVER WILL LIE.

1. In general.*—Trover will lie against a carrier who, by mistake, delivers goods to a wrong person. *Illinois C. R. Co.* v. *Parks*, 54 *Ill.* 294.

* Action for conversion of goods by carrier. Improper delivery, see 55 AM. & ENG. R. CAS. 674, *abstr.*

Either case or trover may be brought against a carrier for the non-delivery of goods, but trover cannot be sustained without proof of conversion. *Packard* v. *Getman*, 6 *Cow.* (*N. Y.*) 757.—DISTINGUISHED IN Merriam *v.* Hartford & N. H. R. Co., 20 Conn. 354. FOLLOWED IN Grosvenor *v.* New York C. R. Co., 39 N. Y. 34, 5 Abb. Pr. N. S. 345.

A carrier delivered goods to defendants, by mistake, and upon discovering the mistake demanded a return of the goods or payment of their value, which was refused. The carrier then paid the value of the goods to the true owner, taking an assignment of his interest therein, and again demanded the goods or their value, which was refused. *Held:* (1) that the carrier became the absolute owner of the goods, and might maintain an action for their value; (2) that the action might be regarded as one in tort for the conversion of the goods or one on an implied contract for their value. *Hudson River R. Co.* v. *Lounsberry*, 25 *Barb.* (*N. Y.*) 597.

Trover lies against a person who illegally makes use of a thing found or delivered to him; or against a bailee employed merely to keep or carry the goods, who, having no beneficial interest, misuses the chattel intrusted to him; or against one who draws out a part of the contents of a vessel and replaces it with water; or against one who improperly breaks open a box of goods or sells them. *Trowell* v. *Youmans*, 5 *Strobh.* (*So. Car.*) 67.

2. When the action will not lie.—If cross-ties appropriated by a railroad were the property of the plaintiff and wrongfully taken, trover is the proper action, but not if taken by plaintiff's permission or license under an agreement to sell by which title passed. *Kinney* v. *South & N. Ala. R. Co.*, 82 *Ala.* 368, 3 *So. Rep.* 113.

Trover will not lie against a carrier for goods lost by nonfeasance merely. *Bowlin* v. *Nye*, 10 *Cush.* (*Mass.*) 416.—DISTINGUISHING Devereux *v.* Barclay, 2 B. & Ald. 702; Hawkins *v.* Hoffman, 6 Hill (N. Y.) 586.

Trover may be maintained against a common carrier where the goods intrusted to him are lost by his act, though without any wrongful intent; as where he delivers them to the wrong person by mistake, or under a forged order. But if the goods are lost through the mere omission of the carrier, trover will not lie even after demand and refusal, but the owner should bring either assumpsit or a special action on the case. *Hawkins* v. *Hoffman*, 6 *Hill* (*N. Y.*) 586.—DISTINGUISHED IN Bowlin *v.* Nye, 10 Cush. (Mass.) 416.

3. Who may maintain it.—If a carrier, through mistake or the fraudulent representations of a third person, wrongfully delivers goods to a person who has no right to them, the true owner may maintain detinue or trover for them against the person receiving them, or against any other person to whom he may deliver them. *Young* v. *East Ala. R. Co.*, 80 *Ala.* 100.

If the goods are delivered by the person so wrongfully receiving them to another carrier, on whom he afterwards gives plaintiff an order for them, and this carrier, accepting the order, and receiving the charges for freight, agrees to deliver them to plaintiff on demand, this creates between them the relation of bailor and bailee. *Young* v. *East Ala. R. Co.*, 80 *Ala.* 100.

Though a landlord cannot maintain trespass for cutting timber upon land in possession of his tenant, for a conversion of it after it is cut he may maintain trover; for the tenant's interest in the timber ceases upon its severance from the freehold, and the right of property in the landlord draws after it a constructive possession. *Lexington & O. R. Co.* v. *Kidd*, 7 *Dana* (*Ky.*) 245.

The transfer of a bill of lading, whether absolute or by way of pledge, conveys to the transferee either a general or special property in the goods for which the bill is given, of such a character that he is entitled to maintain an action of trover in case of the conversion of such goods. *Forbes* v. *Boston & L. R. Co.*, 9 *Am. & Eng. R. Cas.* 76, 80, 133 *Mass.* 154.

A. in Chicago shipped goods to B. in Boston, receiving a bill of lading by which the company undertook to deliver the goods to B. or order. B., having received the bill of lading, indorsed it to C. as a security for an advance, and it was held by C. when the goods arrived. As between B. and C. it was agreed that B. should pay the freight. The goods arrived in Boston on Oct. 30, and remained in the cars until Dec. 12. On that day B. demanded them without producing the bill of lading, and the company, finding by their way bill that he was the consignee, delivered said goods to him. The goods were afterwards sent abroad and C. subsequently brought trover against the

company for them. *Held*, that there had been no laches on plaintiff's part and that under the principles above laid down he was entitled to recover. *Forbes* v. *Boston & L. R. Co.*, 9 *Am. & Eng. R. Cas.* 76, 80, 133 *Mass.* 154.

A wrongful conversion of property does not deprive the owner of his title: he may transfer the title to another, who, upon demand and refusal of the person in possession of the property to surrender the same, may maintain an action against him for a conversion. *Serat* v. *Utica, I. & E. R. Co.*, 102 *N. Y.* 681, 6 *N. E. Rep.* 795, 2 *N. Y. S. R.* 15, 1 *Silv. App.* 70; *affirming* 32 *Hun* 642, *mem.*

A firm of which plaintiff was a member erected a trestlework for handling coal, on defendant's ground, on condition that it should remain the personal property of the firm, but the company took possession of it and converted it to its own use. The firm conveyed its interest in the trestlework to plaintiff, who made a demand for it upon the company. *Held*, that he might maintain an action to recover its value. The company's wrongful act in taking possession of the property did not transfer the title, or excuse it from surrendering the property on demand; neither was it a partnership asset after such transfer. *Serat* v. *Utica, I. & E. R. Co.*, 1 *Silv. App.* 70, 102 *N. Y.* 681, *mem.*, 6 *N. E. Rep.* 795, 2 *N. Y. S. R.* 15; *affirming* 32 *Hun* 642, *mem.*

The acceptance of an offer made by a debtor to pay his debt with wood already deposited on land which is owned and possessed by the creditor constitutes an executed contract and a complete transfer of title to the property. If the contract is that the creditor shall return the wood provided the debtor will afterwards pay the debt in money, the creditor, while the wood remains in his possession, and before a compliance with the permission to pay in money, may maintain an action against a trespasser for the conversion of the property. *Texas & P. R. Co.* v. *Beard*, 68 *Tex.* 265, 4 *S. W. Rep.* 483.

4. Who may not maintain it.—It will not lie by the owner of a slave, for a conversion of him by a third person, while such slave is in the hands of a bailee for hire and the term is unexpired. *Lexington & O. R. Co.* v. *Kidd*, 7 *Dana* (*Ky.*) 245.

A carrier who is in lawful possession of goods may retain the possession until he can deliver them to the owner or consignee and until his charges for the carriage are paid; or he may make a warehouseman his bailee, with the right to terminate the bailment at pleasure and assuming a liability to pay for the storage; or he may make the warehouseman the agent and bailee of the owner, and thereby complete the delivery of the goods and discharge himself from all further responsibility concerning them. *Hamilton* v. *Nickerson*, 11 *Allen* (*Mass.*) 308.

If the warehouseman, in such case, pays to the carrier his freight, he takes the goods upon the credit of the owner and the value of the goods themselves; the agency, although created by the carrier, may be for the owner directly; and the payment of the carrier's charges discharges the carrier's lien and terminates his interest in the property. He would have no claim against the carrier in case of loss. So where a carrier delivers goods to a warehouseman and receives his charges, and the warehouseman remains in possession of the goods for four years, the warehouseman represents the owner and not the carrier, and the latter cannot maintain an action against him for converting the goods to his own use. *Hamilton* v. *Nickerson*, 11 *Allen* (*Mass.*) 308. See also *Fisk* v. *Newton*, 1 *Den.* (*N. Y.*) 45.

Where ties are taken and used by a subcontractor for building a railroad, and the road was in use before it was delivered to the company, the owner of the ties, after waiting until they have become realty, cannot bring trover against the company as for their conversion. *Detroit & B. C. R. Co.* v. *Busch*, 9 *Am. & Eng. R. Cas.* 151, 43 *Mich.* 571, 6 *N. W. Rep.* 90.

Where goods are received by a common carrier for transportation, and their possession is then demanded by the agent of the shipper's mortgagee, after conditions broken, but the carrier declines to surrender the possession and after retaining them until the next day ships them to their destination, the carrier is not liable to the mortgagee for a conversion. *Kohn* v. *Richmond & D. R. Co.*, 37 *So. Car.* 1.—QUOTING Pingree *v.* Detroit, L. & N. R. Co., 66 Mich. 143, 11 Am. St. Rep. 479.

5. Necessary title or possession in plaintiff.—Plaintiff bought a quantity of old railroad iron out of a much larger mass. Before he had separated the iron the road was sold, and the purchasers converted the whole of the iron. *Held*, that plaintiff had

not perfected his title by separation and delivery, therefore trover would not lie; and this, though the purchasers of the road bought with notice of plaintiff's claim. *Pennsylvania R. Co.* v. *Hughes*, 39 *Pa. St.* 521.

6. For what property trover lies.* —Trover lies for the conversion of shares in an incorporated company; and the pledgee, when sued for such conversion, may recoup his debt from the pledger. *Nabring* v. *Bank of Mobile*, 58 *Ala.* 204.

Trover lies for the conversion of corporate stock. *Ayers* v. *French*, 41 *Conn.* 142.

Shares of stock in a corporation are personal property, and trover will lie for their misappropriation. In Oregon the common-law rule that trover lies only for the conversion of tangible property has been changed, extending the action to every species of personal property. *Budd* v. *Multnomah St. R. Co.*, 22 *Am. & Eng. R. Cas.* 27, 12 *Oreg.* 271, 7 *Pac. Rep.* 99. *Payne* v. *Elliot*, 54 *Cal.* 339.

Trover will lie for the conversion of certificates of stock, but not for "shares of stock." *Neiler* v. *Kelley*, 69 *Pa. St.* 403.

7. Who is liable. — A person received railroad bonds of another with which he was to purchase lands of the company "at or near the average price of $5.00 per acre." Instead, he sold them for six cents on the dollar, and invested the proceeds at $5.00 per acre. The purchaser of the bonds in turn sold them at an advance of 150 per cent. Both purchasers knew of the terms on which the bonds were to be disposed of. *Held*, that the owner could recover the bonds in trover. *Kitchen* v. *Bedford*, 13 *Wall.* (*U. S.*) 413.

A carrier who receives goods from one not authorized to deliver them is a trespasser, and may be sued in trover. *Southern Exp. Co.* v. *Palmer*, 48 *Ga.* 85.

In trover against a railroad for iron, the road will be liable, where it had knowledge that the seizure of the iron from another railroad by the Confederate government was illegal. *Central R. & B. Co.* v. *Atlantic & G. R. Co.*, 50 *Ga.* 444.

A railroad company is liable in trover for the value of posts taken by the company's contractors, without the owner's consent, and used in fencing the road. *St. Louis, V. & T. H. R. Co.* v. *Kaulbrumer*, 59 *Ill.* 152, 11 *Am. Ry. Rep.* 186.

A carrier is liable in trover for the conversion of goods, where he puts them into the hands of a third person without orders, even if done by mistake or upon a forged order. *Trowell* v. *Youmans*, 5 *Strobh.* (*So. Car.*) 67.

The president of a company gratuitously loaned to his brother bonds of the state issued to the company under the internal improvement laws of the state, the borrower simply obligating himself to return them upon request, meaning that he would return similar bonds or their equivalent. *Held*, a conversion, and that both brothers were liable to the company for the value of the bonds at the time, with interest, the borrower under the circumstances being primarily liable. *Branner* v. *Branner*, 1 *Lea* (*Tenn.*) 101.

If a company carries plants as merchandise for a contractor planting hedges for it at its stations, and its general superintendent allows such contractor to place the plants in a piece of ground close to the station, belonging to the company, and when the contractor demands the plants, such superintendent refuses to give them up, the company is liable in an action of trover. *Giles* v. *Taff Vale R. Co.*, 2 *El. & Bl.* 822, 18 *Jur.* 510, 23 *L. J. Q. B.* 43.

8. Who is not liable — Attachments.* —A railroad company is not liable for the conversion of rails by a reasonable use of them while it had no notice that the ownership of them had changed; nor by a mere compliance with a written demand served upon its president at a place other than where the rails were, the corporation making no objection or resistance to plaintiff's taking possession of them. *Fifield* v. *Maine C. R. Co.*, 62 *Me.* 77.

Where a carrier safely transports goods to their destination, and is ready to deliver the same, it is not liable to the shipper for surrendering possession of the goods to an officer who takes them under an attachment against the consignee; and the shipper cannot impose upon the carrier, without its consent, the duty of notifying the officer or of taking other steps to stop the goods *in transitu*. *French* v. *Star Union Transp. Co.*, 134 *Mass.* 288.

A carrier who removes goods from the owner's place of deposit under the direction of a person in apparent control and able

* Trover for shares of stock, see note, 22 AM. & ENG. R. CAS. 31.

* See also CARRIAGE OF MERCHANDISE, **27. 100, 161, 295, 302.**

immediately to assume the actual custody of them, and delivers them to such person, is not liable to the owner for their conversion. *Gurley* v. *Armstead*, 148 *Mass.* 267, 19 *N. E. Rep.* 389.

9. What amounts to a conversion, generally.—A certificate of stock is not the stock itself; but it is documentary evidence of title to the stock, and may be used for the purposes of symbolical delivery, as the stock is incapable of actual delivery. A wrongful use of an indorsed certificate of stock may operate as conversion of it. *McAllister* v. *Kuhn*, 96 *U. S.* 87.

A misdelivery of property by a carrier or warehouseman, to a person unauthorized by the owner or person to whom the carrier or warehouseman is bound by his contract to deliver it, is of itself a conversion which renders the bailee liable in an action of trover, without regard to the question of his due care or negligence. *Forbes* v. *Boston & L. R. Co.*, 9 *Am. & Eng. R. Cas.* 76, 80, 133 *Mass.* 154.

Defendant sent out its agents with its tie train to take up ties it had purchased, and in doing so they took up and carried away plaintiff's ties, against his consent, and did not return them. *Held*, that this constituted an unlawful conversion and rendered defendant liable. *Baker* v. *Kansas City, C. & S. R. Co.*, 52 *Mo. App.* 602.

An association that owned grounds for a summer resort maintained a dock on a lake. A boat delivered goods at the dock for plaintiff, but the association claimed that the dock was private, and its agent required the vessel to take the goods away again. It appeared that plaintiff had a license to have goods landed at the dock. *Held*, that the act of the agent requiring the goods to be reshipped amounted to a conversion. *Davis* v. *Chautauqua Lake S. S. Assembly*, 2 *N. Y. S. R.* 365, 41 *Hun* 638, *mem.*

The conversion of property is abundantly established by the fact that defendant, as a common carrier, received it in good order at its place of destination, properly consigned to plaintiff, and, on demand of the delivery of the same, refused to deliver it. *Clement* v. *New York C. & H. R. R. Co.*, 30 *N. Y. S. R.* 713, 9 *N. Y. Supp.* 601, 56 *Hun* 643, *mem.*

The gist of the action of trover is a wrongful conversion, although the taking may have been lawful. *Waring* v. *Pennsylvania R. Co.*, 76 *Pa. St.* 491.

If a common carrier negligently delivers freight to a person other than the consignee, and thereafter contracts with that person to sell the goods and hold the proceeds for its account, it is guilty of conversion. *Erie Dispatch* v. *Johnson*, 40 *Am. & Eng. R. Cas.* 113, 87 *Tenn.* 490, 11 *S. W. Rep.* 441.

A company received fourteen packages of nursery trees from a connecting carrier, to be delivered at a station on its line. The trees were addressed to the order of the shippers, and they directed the company to deliver one half of them to an individual, but it delivered them all. *Held*, that it was liable for a conversion. *Leslie* v. *Canada C. R. Co.*, 44 *U. C. Q. B.* 21.—DISTINGUISHING Heugh *v.* London & N. W. R. Co., L. R. 5 Ex. 51. QUOTING Martin *v.* Great Indian Peninsular R. Co., L. R. 3 Ex. 14.

10. What does not.—Proof that a common carrier failed seasonably to deliver goods amounts to negligence and nonfeasance, but does not constitute a conversion. *Robinson* v. *Austin*, 2 *Gray* (*Mass.*) 564.

A mere bailee, whether a common carrier or otherwise, is not guilty of a conversion, although he receive property from one not rightfully entitled to possession, and, acting as a mere conduit, deliver it in pursuance of the bailment, if this be done before notice of the rights of the real owner. *Nanson* v. *Jacob*, 32 *Am. & Eng. R. Cas.* 553, 93 *Mo.* 331, 12 *West. Rep.* 358, 6 *S. W. Rep.* 246.

The rule that a common carrier cannot be held responsible for conversion before having notice of the rights of the real owner is not affected or changed by Mo. Rev. St., § 1018. *Nanson* v. *Jacob*, 32 *Am. & Eng. R. Cas.* 553, 93 *Mo.* 331, 12 *West. Rep.* 358, 6 *S. W. Rep.* 246.

A mere failure of a common carrier to transport and deliver goods to a consignee within a reasonable time may render it liable for damages; but the owner cannot, merely on account of the delay, refuse the goods and sue the carrier as for a conversion. *Scovill* v. *Griffith*, 12 *N. Y.* 509.—DISTINGUISHED IN Louisville & N. R. Co. *v.* Lawson, 88 Ky. 496.

A mere delay on the part of a common carrier in delivery of goods is not a conversion of the property so as to entitle the owner to recover their value. *Briggs* v. *New York C. R. Co.*, 28 *Barb.* (*N. Y.*) 515.

Plaintiff had an arrangement to sell goods through an agent or salesman. He shipped certain goods, but before their arrival tele-

graphed the carrier that the goods belonged to him and to deliver them only on his order. The agent produced the bill of lading, paid the freight, and received the goods from the carrier, and went on and sold them, remitting to plaintiff his share of the proceeds. The agreement for the sale of the goods might be terminated at pleasure. *Held*, that the facts showed that plaintiff still considered the contract in force after giving the notice, and therefore could not treat the delivery by the carrier as a conversion. *Lester* v. *Delaware, L. & W. R. Co.*, 55 *N. Y. S. R.* 923, 73 *Hun* 398, 26 *N. Y. Supp.* 206.

11. Necessity of demand before suit.—A demand is necessary before trover will lie against a common carrier for the conversion of goods. *Rome R. Co.* v. *Sullivan*, 14 *Ga.* 277.

An action for the conversion of goods will not lie against a carrier for omitting seasonably to deliver the goods, without a previous demand. *Robinson* v. *Austin*, 2 *Gray* (*Mass.*) 564.

12. Necessity of tender of charges claimed by defendant.*—Trover lies for the value of goods illegally withheld under a claim of a lien for freight. *Marsh* v. *Union Pac. R. Co.*, 6 *Am. & Eng. R. Cas.* 359, 3 *McCrary* (*U. S.*) 236, 9 *Fed. Rep.* 873.

A consignee who is ready to pay freight for goods may maintain trover for them on a refusal to deliver them, there being no other legal claim upon them, and he is not bound first to make legal tender of the freight. *East Tenn., V. & G. R. Co.* v. *Hunt*, 15 *Lea* (*Tenn.*) 261.

13. When a refusal is a conversion.—A consignee demanded of a company, at its depot, a box of goods, of the arrival of which its agent had notified him. He was informed that they were not there, and received the same information in answer to subsequent demands. After several months the goods were found in the depot, where they were at the time of the first demand, and had been ever since. The company then offered to deliver them, but the consignee refused to receive them, and brought trover to recover their value in damages. *Held*, that plaintiff had the right to treat defendant's refusal to deliver as a conversion and to recover the value of the goods. *Louisville & N. R. Co.* v. *Lawson*, 88 *Ky.* 496, 11 *S. W. Rep.* 511.—DISTINGUISHING Scovill *v.* Griffith, 12 N. Y. 509.

A railroad carried plaintiff's grain, and delivered it to an elevator, which was burned while part of plaintiff's grain was yet in it. At the time of the fire the elevator contained a large amount of grain besides plaintiff's. Part of the grain was lost, but a part settled down on the wharf. Plaintiff claimed that he could identify his grain from its position in the building, and asked to be allowed to remove it, but the railroad, being bailee of the greater part, assumed control and sold the grain for the common benefit. *Held*, that trover would lie against the company, but only the actual value of the grain converted could be recovered. The railroad, not being in the possession of the grain, should have allowed plaintiff to recover his if he could identify it. *Moffatt* v. *Grand Trunk R. Co.*, 15 *U. C. C. P.* 392.

II. PROCEDURE.

14. Pleading.—A complaint against a company, alleging that defendant unlawfully and wrongfully took, converted, and appropriated the property in controversy to its own use by hauling it away and using it on its road, sufficiently charges a conversion. *Louisville, N. A. & C. R. Co.* v. *Balch*, 105 *Ind.* 93, 4 *N. E. Rep.* 288.

Where, by reason of the loss of his memorandum, plaintiff alleges that he is unable to locate the property any more definitely than that it was along the line of defendant's road in certain counties, it is not reversible error to overrule a motion to make the complaint more specific. *Louisville, N. A. & C. R. Co.* v. *Balch*, 105 *Ind.* 93, 4 *N. E. Rep.* 288.

In an action in trover for the loss of a steer shipped by plaintiff, the material facts were set out in the petition, so as to justify the developing, in proof, of all the facts and circumstances leading to and connected with the closing act of conversion, being merely the facts constituting the cause of action. *Held*, that this was setting forth but one cause of action, contained in a single count. The use in the petition, in such case, of the words "negligently suffered" will be regarded as mere surplusage. *Johnson* v. *Wabash, St. L. & P. R. Co.*, 22 *Mo. App.* 597.

* Payment of freight charges as condition precedent to right to maintain trover for failure to deliver goods, see note, 21 L. R. A. 117.

A petition by a guardian alleged that his wards were owners in fee simple of certain woodland, that the timber thereon was cut down and removed by a person unknown and without any authority whatever, and that the same was taken, used, and possessed for its own use and without any authority whatever by a certain railroad company, which company was afterwards consolidated with other railroad companies, under and by the name of defendant, and that by reason of the conversion by said first-named company his wards were greatly damaged, etc., praying judgment against the consolidated company. *Held*, on demurrer, that the petition stated sufficient facts to constitute a cause of action for the conversion of personal property. *Lake Shore & M. S. R. Co.* v. *Hutchins*, 4 *Am. & Eng. R. Cas.* 219, 37 *Ohio St.* 282.

A petition in an action for conversion which, with proper allegations of plaintiff's ownership of the property and of its value, avers that defendant converted it to his own use states a cause of action. It is not necessary to allege a demand of the property by plaintiff and a refusal to deliver it to him by defendant. *Baltimore & O. R. Co.* v. *O'Donnell*, 49 *Ohio St.* 489, 32 *N. E. Rep.* 476.

A complaint alleged plaintiff's ownership and possession of a stated number of crossties, at or near defendant's right of way, and their value; that defendant was a corporation, and unlawfully took possession of these cross-ties and converted them to its own use, to plaintiff's damage, etc. *Held*, that the complaint alleged a legal right of plaintiff and its invasion by defendant, and therefore stated facts sufficient to constitute a cause of action. *Nance* v. *Georgia, C. & N. R. Co.*, 35 *So. Car.* 307, 14 *S. E. Rep.* 629.—FOLLOWED IN Bryson *v.* Georgia, C. & N. R. Co., 35 So. Car. 608; Wharton *v.* Georgia, C. & N. R. Co., 35 So. Car. 608.

15. Matters of defense.—In trover against a railroad for iron illegally taken by the Confederate government from another road, the fact that the iron laid in the road was subsequently injured by the Federal army cannot be considered by the jury. *Central R. & B. Co.* v. *Atlantic & G. R. Co.*, 50 *Ga.* 444.

A company was sued for the conversion of staves, and offered evidence to prove that they were cut upon the lands of the president of the company. *Held*, that this was not sufficient to make out a defense, without showing that permission had not been given to plaintiff to cut the staves, or that they did not belong to him. *Allen* v. *St. Louis, I. M. & S. R. Co.*, 72 *Mo.* 386.—DISTINGUISHING Pearson *v.* Inlow, 20 Mo. 322.

Where a company wrongfully delivers goods carried by it, the fact that a recovery therefor could be had against it is no defense to an action for the conversion of the goods against the person to whom they were delivered. *Dickson* v. *Merchants' Elevator Co.*, 44 *Mo. App.* 498.

Defendant's possession of ties at the time of conversion would in this case defeat plaintiff's action, but their being on a railroad right of way, though for future shipment, did not put defendant in possession so as to defeat the action. *Baker* v. *Kansas City, C. & S. R. Co.*, 52 *Mo. App.* 602.

Where a carrier is sued for the conversion of a lot of wool, it may, under a general denial in its answer, introduce proof controverting any fact that plaintiff is required to prove to establish his cause of action. And when proof has been introduced showing a demand on the carrier and a failure to deliver, the carrier has a right to explain this by showing an excuse for its failure to deliver, thereby repelling any inference of a conversion deducible from plaintiff's evidence, as by showing a previous delivery to a third party under circumstances constituting a good delivery to plaintiff. *Ontario Bank* v. *New Jersey Steamboat Co.*, 59 *N. Y.* 510; *affirming* 5 *Daly* 117.

Where one has lawful possession of the goods of another, and has not converted them, trover will not lie until there has been a refusal to deliver them upon demand. Where goods have been converted by a bailee the conversion is presumed to be wrongful, and trover may be maintained without a previous demand; but such presumption may be rebutted by showing the plaintiff's permission to convert the property. *Waring* v. *Pennsylvania R. Co.*, 76 *Pa. St.* 491.

Plaintiff, a railroad company, delivered to defendant by mistake three cars of oil, which defendant converted to his own use. *Held*, that the defendant might prove that he received the oil unwittingly, and that he received no more than he was entitled to, and that if there was any mistake it was on the part of plaintiff; but if defendant knowingly took advantage of plaintiff's mistake and appropriated the oil, it was a wrongful

conversion. *Waring* v. *Pennsylvania R. Co.*, 76 *Pa. St.* 491.

16. Evidence.* — In trover for goods withheld by a carrier, the plaintiff is a competent witness to testify as to the value of the goods, though he may not know the market value of such goods at the place of delivery. Perhaps the best way to arrive at the value of such goods would be to show the price in the market of new goods of the same character, and then show, as nearly as possible, the extent of depreciation from use. But such course is not open to a plaintiff when the defendant retains possession of the goods. In the matter of values, as in other matters, the law will give relief according to the injury, on the best testimony that can be obtained. *Marsh* v. *Union Pac. R. Co.*, 6 *Am. & Eng. R. Cas.* 359, 3 *McCrary* (*U. S.*) 236, 9 *Fed. Rep.* 873.

Where the evidence shows plaintiff's title, under a *bona fide* order therefor from the owner, to certain goods in the possession of a railroad, and a demand therefor and refusal to deliver, a verdict for plaintiff for the value of the goods is right and the court will not disturb it for a technical error which should not have affected the result. *Georgia R. & B. Co.* v. *Scott*, 37 *Ga.* 94.

In trover for the conversion of railroad stock it is competent for plaintiff to give evidence tending to show that the company was about to, and did, increase the stock, and that owners of stock were, by its regulations, to have a certain *pro rata* of the new stock at reduced rates—not to enable plaintiff to recover the value of the new stock as special damages, but as being a circumstance which would bear upon the question of the value of the stock converted. *Sturges* v. *Keith*, 57 *Ill.* 451.

If the delivery of goods has been such as to vest the title in the defendant, plaintiff cannot recover in trover; but where a plaintiff sues a company for the conversion of cross-ties, and testifies that he delivered them along the line of the road, to be paid for before taken away, but that the company took them away without his consent, and without paying for them, it is sufficient to show that he did not regard placing them along the line of the road as a delivery, and to enable him to recover their value. *Ohio & M. R. Co.* v. *Burton*, 21 *Ind.* 217.

A company stored goods with its agent, who was sued for conversion based upon a failure to deliver them to plaintiff on demand. *Held*, that it was competent for defendant to show that the property was unclaimed baggage, and that it had been sold by the company before any demand for it had been made. *McClellan* v. *Wyatt*, 26 *Abb. N. Cas.* 144, 34 *N. Y. S. R.* 55, 11 *N. Y. Supp.* 686.

And proof of such sale by the company does not show that defendant was guilty of any conversion or breach of duty to the owner of the property. *McClellan* v. *Wyatt*, 26 *Abb. N. Cas.* 144, 34 *N. Y. S. R.* 55, 11 *N. Y. Supp.* 686.

17. Instructions. — In an action of trover for goods of plaintiff which the evidence showed were in a car in the possession of the road and which plaintiff had demanded of the road, an instruction that it is incumbent upon plaintiff to identify the goods contained in the car at the time of demand made, so as to enable defendant to know what goods he must deliver, and to enable him to plead such delivery in any future suit for the same goods, should have been given. *Georgia R. & B. Co.* v. *Scott*, 37 *Ga.* 94.

Defendant company was the last of connecting carriers, and denied that it had ever received the goods, and the evidence was far from establishing beyond doubt that they came to its hands. *Held*, that it was error on the part of the court to ignore such fact in instructing the jury, and instruct as though the company was liable if it failed to deliver the goods on demand. *Chicago, B. & Q. R. Co.* v. *Goldman*, 46 *Ill. App.* 625.

18. Damages, generally. — For the conversion or loss of goods, or total failure to deliver them to the consignee, a common carrier is liable only for their value and interest at six per cent. per annum. *St. Louis, I. M. & S. R. Co.* v. *Mudford*, 21 *Am. & Eng. R. Cas.* 139, 44 *Ark.* 439. *Leslie* v. *Canada C. R. Co.*, 44 *U. C. Q. B.* 21.

The rule in Illinois is that the proper measure of damages in an action of trover is the current market value of the property at the time of the conversion, with interest from that time until the trial, and no exception is recognized where the property converted happens to be stocks. *Sturges* v.

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* Admissibility of evidence of conversation at the time of shipment as to how long it would take for goods to reach destination, see 35 AM. & ENG. R. CAS. 656, *abstr.*

Keith, 57 *Ill.* 451.—DISAPPROVING Shepherd *v.* Johnson, 2 East 211; M'Arthur *v.* Seaforth, 2 Taunt. 258; Downes *v.* Back, 1 Stark. 318; Harrison *v.* Harrison, 1 C. & P. 412; Mercer *v.* Jones, 3 Camp. 477.

As a general rule the measure of damages in trover is the market value of the goods converted, with interest from the date of conversion. This rule, however, is subject to modification when the plaintiff has only a special interest or property in the goods, and is not answerable over to any person for the balance of the value; and where the goods are wrongfully delivered to a third person who pays the freight, the measure of damages is their market value with interest, less the freight. *Forbes* v. *Boston & L. R. Co.*, 9 *Am. & Eng. R. Cas.* 76, 80, 133 *Mass.* 154.—QUOTED IN Massachusetts L. & T. Co. *v.* Fitchburg R. Co., 143 Mass. 318.

In an action for the conversion of timber against a railroad which was an innocent purchaser from a person who had previously converted it to his own use, and had afterwards added to its value by his own labor by cutting it into railroad ties and firewood, the measure of damages is the value of the chattels when first taken from the owner, whether the first taker was a wilful or an involuntary trespasser. *Lake Shore & M. S. R. Co.* v. *Hutchins*, 4 *Am. & Eng. R. Cas.* 219, 37 *Ohio St.* 282.—FOLLOWING Lake Shore & M. S. R. Co. *v.* Hutchins, 32 Ohio St. 571.

In case of the conversion of stock, the ordinary rule as to the measure of damages is the value of the stock at the time of the conversion, or a reasonable time thereafter; but an exception is that when a party has suffered only a technical conversion, without any pecuniary loss, he can recover only nominal damages. *Budd* v. *Multnomah St. R. Co.*, 15 *Oreg.* 413, 15 *Pac. Rep.* 659.

In trover for the conversion of certificates of stock pledged for a debt, if the debt remains unpaid, and there are no circumstances of outrage in the case, the measure of damages is the value of the stock at the time of conversion with interest to the time of trial, less the debt; but if the debt be paid, then the measure of damages is the highest market value of the stock at any time after payment, with interest. *Neiler* v. *Kelley*, 69 *Pa. St.* 403.

The measure of damages for the conversion of a lot of railroad ties is the highest market price thereof at any time between the conversion and judgment. *Hilliard F. & L. Co.* v. *Woods*, 1 *Wyom.* 396.

19. Illustrations.—Plaintiff contracted to sell to W. a car-load of corn, to be paid for in cash before delivery, and which defendant, a common carrier, received "for account" of plaintiff, and subject to his order. W. had previously paid part of the purchase price only, and had not acquired title or right to the possession. Defendant delivered the corn to W., without plaintiff's consent, and before payment of the balance due. *Held*, a conversion of the corn, and that the measure of the plaintiff's damages was the full value of the property, with interest; but that defendant was entitled to prove, in mitigation of damages, that, subsequent to the conversion, plaintiff had received from W. the full amount of the purchase price of the corn. *Jellett* v. *St. Paul, M. & M. R. Co.*, 16 *Am. & Eng. R. Cas.* 246, 30 *Minn.* 265, 15 *N. W. Rep.* 237.

Plaintiff ordered certain machinery shipped by rail, and made numerous inquiries of the freight agent if it had arrived, and was notified that it had not. Accidentally learning from another source that it had arrived, he again called on the agent and was told that the machinery was not there, but got permission to search for it personally, and found it covered by other things, whereupon he offered to pay the freight charges as evidenced by the bill of lading, but the agent refused to deliver it without the payment of an additional sum of $2.80. After the institution of suit plaintiff was informed that he could have the machinery upon payment of the freight charges, and again called for it, but the agent refused to deliver it because a bill of lading was not presented, though he knew plaintiff and knew him to be the owner and consignee of the machinery. The machinery was never taken up, suit being for conversion. At the trial the court instructed the jury that the measure of damage was the value of the property, together with the value of the use of the same and the time lost in going to and from defendant's office and endeavoring to recover it. *Held*, that under the facts of the case this charge was not erroneous. Where the conversion is accompanied by fraud, malice, gross negligence, or oppression, as in this case, the measure of damage is enlarged so as to embrace actual damages and enough in addition thereto to compensate the owner

for other damages. *Texas & P. R. Co.* v. *Curry*, 2 *Tex. App.* (*Civ. Cas.*) 397.

Plaintiff, a railroad company, deposited with defendants certain of the former's mortgage bonds, payable to bearer, to be held by defendants, upon performance of a certain condition, for a specified purpose. This condition was not performed, but defendants, in good faith, claimed to hold the bonds for another purpose, and refused to surrender them on demand. These bonds were never worth above par, but after their conversion by defendants they greatly depreciated in market value. Plaintiff brought trover for the bonds, alleging in the declaration, in addition to general damages, that it had, by the conversion, been deprived of the means of negotiating them, and had been put to expense in raising funds to relieve its property from attachment. Before trial defendants offered in court to deliver the bonds to plaintiff and to pay the costs already accrued. The court made an order allowing them to bring the bonds and costs into court for plaintiff, and that if the latter refused to receive them it must proceed at its peril as to subsequent costs, unless it succeeded in recovering more than nominal damages above the face of the bonds. *Held:* (1) that the case was one proper for the exercise of the power of the court to make such an order in its discretion; (2) that defendants having complied with this order, and plaintiff having refused to accept such compliance as a satisfaction of the suit, but having proceeded to trial, and proved no facts materially different from those appearing when the order was granted, it was entitled to recover only nominal damages. *Rutland & W. R. Co.* v. *Bank of Middlebury*, 32 *Vt.* 639.—QUOTING Yale *v.* Saunders, 16 Vt. 243; Henschel *v.* Mahler, 3 Hill (N. Y.) 132; Rogers *v.* Crombie, 4 Me. 274. REVIEWING Fisher *v.* Prince, 3 Bur. 1363.

The proper measure of damages is the value of the property at the time and place of the conversion, with such increase as it may have received from fluctuations of the market, or other causes independent of the acts of the defendant. *Weymouth* v. *Chicago & N. W. R. Co.*, 17 *Wis.* 550.—DISTINGUISHING Stanton *v.* Kirsch, 6 Wis. 338; Horneffer *v.* Duress, 13 Wis. 603. QUOTING Jeffries *v.* Great Western R. Co., 34 Eng. L. & Eq. 122.

20. Effect of judgment or settlement to pass title to defendant.—A railroad company filed an interpleader in a suit in replevin between individuals to recover live stock, setting up that it had injured the stock in the operation of its road, and that plaintiff had brought suit and recovered a judgment as for a total loss, and that the property thereby belonged to the company. *Held*, that the interpleader was bad, whether the original action against the company was for the conversion of the stock or for damages for injuring it. In the former case it should have alleged a satisfaction of the judgment, and in the latter event the company had no claim to the property at all. *Dow* v. *King*, 40 *Am. & Eng. R. Cas.* 233, 52 *Ark.* 282, 12 *S. W. Rep.* 577.

The owner of goods stolen from a carrier may either demand the value of the goods or wait until they are recovered and then demand them; but where he accepts without suit an amount offered in payment of the goods, this passes title to the carrier. *Scammon* v. *Wells*, 42 *Am. & Eng. R. Cas.* 400, 84 *Cal.* 311, 24 *Pac. Rep.* 284.

TRUCKS.

Patents for, see PATENTS FOR INVENTIONS, **32.**

TRUSTS AND TRUSTEES.

As parties to condemnation proceedings, see EMINENT DOMAIN, **273.**
Compensation of attorneys out of trust fund, see ATTORNEYS, **15.**
Enforcement of, see EQUITY, **19.**
Exception of, under statute of limitations, see LIMITATIONS OF ACTIONS, **68.**
In deeds of trust, subrogation of, see SUBROGATION, **3.**
— foreign attachment, fixing liability of, see ATTACHMENT, ETC., **52–62.**
Liability of, for injuries caused by fire, see FIRES, **163.**
— — in case of insolvency, see INSOLVENCY, **2.**
Of an express trust, right of, to sue, see PARTIES TO ACTIONS, **3.**
— mortgage, liability of, for killing stock, see ANIMALS, INJURIES TO, **651.**
Pledge of stock by, see STOCK, **46.**
Right of, to foreclose, see MORTGAGES, **175.**
Substitution of, see DEEDS OF TRUST, **13.**
Taking land by consent of, see EMINENT DOMAIN, **195.**
Under deed of trust, powers and duties of, see DEEDS OF TRUST, **12.**
— mortgage, authority of, to lease, see LEASES, ETC., **94.**

Under mortgage, insurable interest of, see FIRE INSURANCE, **3.**
— — when liable as garnishee, see ATTACHMENT, ETC., **19.**
— railway mortgages, see MORTGAGES, **130-150.**
Validity of subscriptions by, see SUBSCRIPTIONS TO STOCK, **31.**
When limitation begins to run in actions by or against, see LIMITATIONS OF ACTIONS, **35.**
— proper plaintiffs in actions against elevated railways, see ELEVATED RAILWAYS, **83.**
Who may be made in attachment suit, see ATTACHMENT, ETC., **11-19.**

1. Creation of trusts, generally.— A valid trust may be created, by and in favor of the makers of a promissory note executed in aid of a railroad company, by their deposit of bonds of the company with one of their number, under a verbal agreement that the bonds shall be held by him for the protection and security of the makers against liability on the note, their respective interests in the bonds being proportionate with their agreed liability on the note as between themselves. *Reid* v. *Bank of Mobile*, 14 *Am. & Eng. R. Cas.* 554, 70 *Ala.* 199.

A business relation between several persons associated for the purpose of organizing, controlling, and operating railroad and other corporations, and who repose great confidence in each other in respect to the business, if it does not constitute a partnership, is nevertheless a fiduciary relation between the associates, subject to the ordinary rules governing trust relations. *Colton* v. *Stanford*, 82 *Cal.* 351, 23 *Pac. Rep.* 16.

Money was recovered by the administratrix of a person killed by a railway accident, and the shares allotted to her children were deposited with her brother, who was fully cognizant where the money came from and to whom it belonged. *Held*, that he was liable to account to the children as their trustee. *Secord* v. *Costello*, 17 *Grant's Ch.* (*U. C.*) 328.

2. —— by contract or deed. — A company issued a circular, inviting people to settle upon and improve its lands, promising that they should be preferred as purchasers when the lands should be offered for sale. Defendant settled upon the land in controversy, and filed his application to purchase the same in the office of the company, as directed by the circular, and made valuable improvements thereon. The company, without notifying defendant that the price of the lands had been fixed, and without giving him the option to purchase, sold the land to plaintiff, who took with notice of defendant's equities. *Held*, in an action of ejectment, wherein defendant filed a cross-complaint, setting up the above facts and praying that plaintiff be compelled to convey to him, that the offer of the company and the acceptance by defendant created a valid contract, and that plaintiff took the legal title impressed with a trust in favor of defendant, and should be compelled to convey the same to him. *Boyd* v. *Brinckin*, 55 *Cal.* 427.

Where an assignee of a contract to construct a railway, for the payment of which certain securities of the railway are pledged, in order to pay the purchase money, borrows from another, and pledges him as consideration therefor part of the profits to arise under the contract, the lender becomes entitled to an equitable lien on the contract and securities pledged to secure payment; and one subsequently purchasing said contract and securities takes them subject to such lien; and the moneys and assets arising under the transfer constitute a trust as to the lender, enforceable in a court of equity. Especially is this so where the allegations of the bill present a strong case of fraud. *Langdon* v. *Branch*, 37 *Fed. Rep.* 449, 2 *L. R. A.* 120.

A trustee appointed under decree to sell land who conveys the title for the nominal consideration of one dollar violates the trust, and the deed executed by him amounts only to a deed of gift. The donee in such case becomes a trustee for the beneficiaries in the trust, and this whether the donee had notice of the trust or not, since he had not paid value for the land. *Everett* v. *Texas Mexican R. Co.*, 67 *Tex.* 430, 3 *S. W. Rep.* 678.

3. Declaration of trust. — An individual subscribed to the capital stock of a proposed railroad company a large sum on his own account and $60,000 as trustee. Afterwards the *cestui que trust* asked him to acknowledge that he held it in trust for S., who had purchased it; thereupon he wrote, "I hereby acknowledge to hold in the Southern Railroad Association as trustee for S. under an arrangement with B. [the *cestui que trust*], an original subscription of $60,000,

on which seventy per cent. has been paid." *Held*, that this amounted to an absolute and unqualified declaration of trust for the amount of the subscription so far as paid. *McComb* v. *Frink*, 149 *U. S.* 629, 13 *Sup. Ct. Rep.* 993.

4. Resulting trusts.—In order to establish an equitable lien or resulting trust on rolling stock, on the ground that it was purchased with money advanced for that purpose, if it is enforced at all in respect to personal property, the so-called trust funds must be traced into the identical cars and locomotives on which the equity or lien is asserted. *Central Trust Co.* v. *Ohio C. R. Co.*, 36 *Am. & Eng. R. Cas.* 299, 36 *Fed. Rep.* 520.

5. Validity.—A trust, valid in itself, is never permitted to fail for lack of a trustee. *Farmers' L. & T. Co.* v. *Chicago & A. R. Co.*, 24 *Am. & Eng. R. Cas.* 166, 27 *Fed. Rep.* 146.

Ind. Rev. St. § 2988, which denies to residents of other states the right to take and hold in trust, or otherwise than by last will and testament, real and personal property in the state, or that a trust will cease upon the removal of the trustee from the state, does not apply to a conveyance in trust to a foreign corporation of property within the state. *Farmers' L. & T. Co.* v. *Chicago & A. R. Co.*, 24 *Am. & Eng. R. Cas.* 166, 27 *Fed. Rep.* 146.

6. Powers of trustees.—Land was conveyed to a trustee for the use of a wife and her husband, with remainder to their children, with a provision that the husband might remain in possession without accounting for the rents and profits, if he did not commit waste or destruction thereof. While so in possession he granted to a railroad company the privilege of building its road over the land. *Held*, that the trustee could not recover the land from the company until the husband's right of possession should be adjudged forfeited, which could only be done in a suit to which he was a party. *Tutt* v. *Port Royal & A. R. Co.*, 20 *Am. & Eng. R. Cas.* 367, 20 *So. Car.* 110.

The trustee can only do with the trust property what the deed, either in express terms or by necessary implication, authorizes him to do. *Crumlish* v. *Shenandoah Valley R. Co.*, 38 *Am. & Eng. R. Cas.* 577, 32 *W. Va.* 244, 9 *S. E. Rep.* 180.

Power to invest money "upon security by way of mortgage of any freehold, copyhold, or leasehold hereditaments" does not authorize an investment upon the security of railway mortgages made in conformity to 8 & 9 Vict. c. 16, § 41, or in Great Northern railway stock. *Mortimore* v. *Mortimore*, 28 *L. J. Ch.* 558, 4 *De G. & J.* 472.

7. Right to deal with trust property.—A trustee who holds the legal title for the benefit of another cannot speculate with the trust property. He cannot purchase an outstanding title and hold it for his own use, and it matters not that such title was acquired by purchase at a judicial sale or that it is superior to the one conveyed to him in trust; and this rule is as applicable to a trustee holding the legal title to a railroad for the use of its bondholders as to other trustees. *Baker* v. *Springfield & W. M. R. Co.*, 86 *Mo.* 75.

Nor can a trustee who has acquired such outstanding title require, in an action of ejectment for the railroad, the latter to refund to him the amount paid by him for such title. *Baker* v. *Springfield & W. M. R. Co.*, 86 *Mo.* 75.

There is no rule of law or of equity that incapacitates a trustee from purchasing the obligations of his *cestui que trust* which have become legally vested in a third person. If they are valid obligations they may be sold and transferred to any one, and such transfer will pass a good title to them. *Clark* v. *Flint & P. M. R. Co.*, 5 *Hun* (*N. Y.*) 556.

Quære, whether in such case the trustee will be permitted to enforce them for any greater sum than he paid for them. *Clark* v. *Flint & P. M. R. Co.*, 5 *Hun* (*N. Y.*) 556.

A trustee in a deed to secure debts, who is an attorney in fact and at law of the creditor, cannot make a valid sale to himself at auction of the property. *Washington, A. & G. R. Co.* v. *Alexandria & W. R. Co.*, 19 *Gratt.* (*Va.*) 592.

8. Sales of land by trustee.—Where trustees under a will profess to convey land of the testator under the provisions of the Lands Clauses Act, the validity of the sale must be determined without reference to the power of sale under the will. *Peters* v. *Lewes & E. G. R. Co.*, *L. R.* 18 *Ch. D.* 429, 50 *L. J. Ch. D.* 839, 45 *L. T.* 234, 29 *W. R.* 875; *affirming* *L. R.* 16 *Ch. D.* 703, 50 *L. J. Ch. D.* 172, 44 *L. T.* 372, 29 *W. R.* 422.

Trustees under a will of land for *femes coverts* who are absolutely entitled for their separate use are not persons competent to contract with a railway company for the

sale of the land under the Lands Clauses Act, 1845, § 7. *Peters* v. *Lewes & E. G. R. Co., L. R.* 18 *Ch. D.* 429, 50 *L. J. Ch. D.* 839, 45 *L. T.* 234, 29 *W. R.* 875; *affirming L. R.* 16 *Ch. D.* 703, 50 *L. J. Ch. D.* 172, 44 *L. T.* 372, 29 *W. R.* 422.

Where trustees under a will profess to convey land of the testator under the provisions of the Lands Clauses Act, 1845, the sale is invalid if the trustees appoint one of themselves as surveyor to value the land under section 9 of the act. *Peters* v. *Lewes & E. G. R. Co., L. R.* 18 *Ch. D.* 429, 50 *L. J. Ch. D.* 839, 45 *L. T.* 234, 29 *W. R.* 875; *affirming L. R.* 16 *Ch. D.* 703, 50 *L. J. Ch. D.* 172, 44 *L. T.* 372, 29 *W. R.* 422.

9. Compensation of trustees—Commissions.—A railroad company executed a trust or mortgage deed to secure $2,600,000, naming three trustees who were to receive a reasonable compensation for executing the trust. They successfully defended a suit brought by the company to set aside the mortgage. *Held*, that it was reasonable compensation to allow them $17,000 as counsel fees, and an additional sum for disbursements, and $26,000 for personal compensation. *Dow* v. *Memphis & L. R. R. Co.*, 23 *Blatchf.* (*U. S.*) 84, 32 *Fed. Rep.* 185.

Commissions may be allowed to a conventional trustee of a railroad, although not expressly provided for in the instrument creating the trust; but, except in the event of a sale of the trust property, in the absence of such provision, and where the labor performed by the trustees demands very little of their time, and in discharging the trust, which is in its nature somewhat of a public character, they are engaged in subserving great and important public interests, commissions will not be allowed. *Northern C. R. Co.* v. *Keighler*, 29 *Md.* 572.

A trustee can receive pay out of the trust fund for such services and expenditures only as are within the line of duties imposed upon him by the instrument creating the trust. *Tracy* v. *Gravios L. Co.*, 13 *Mo. App.* 295; *affirmed in* 84 *Mo.* 210. —REVIEWED IN Investment Co. of Phila. *v.* Ohio & N. W. R. Co., 46 Fed. Rep. 696.

A company executed a mortgage or trust deed to secure bonds to the amount of $10,000,000, naming three trustees who were to receive $5000 each, one being resident and the other two residing in New York. The resident trustee was informed of the terms and consented to act. Afterwards the company determined to increase the mortgage to $15,000,000, to have a fourth trustee, and to pay to the four $15,000, the resident trustee having been informed of the reduction of the compensation. The company made still another deed to two of the trustees, omitting the resident, and under this deed the company proceeded to effect the loan. *Held*, that the resident trustee having been appointed upon a specific compensation, and having been discharged without his knowledge, was entitled to the compensation agreed upon. *Maury* v. *Chesapeake & O. R. Co.*, 27 *Gratt.* (*Va.*) 698.

Where a trustee executes the deed with knowledge that the compensation is to be reduced by paying to four trustees what was at first agreed to be paid to three, and having acted under the deed, he is only entitled to receive one fourth of the compensation fixed for the four. *Maury* v. *Chesapeake & O. R. Co.*, 27 *Gratt.* (*Va.*) 698.

10. Liabilities of trustees, generally.—Where certain lands are granted to a company in aid of its railroad, and upon foreclosure of a mortgage upon such railroad the lands are transferred, under an arrangement, to another company, which issues certificates therefor entitling the holders to proportionate shares of the land after a certain time, such company is a naked trustee for the purpose named, and not liable for not preventing trespass and waste upon the lands while so held by it. *Beecher* v. *Chicago & N. W. R. Co.*, 11 *Biss.* (*U. S.*) 246, 14 *Fed. Rep.* 211.

But if the company participates in committing, or receives the proceeds of, the waste, it will be compelled to account therefor to the equitable owners. *Beecher* v. *Chicago & N. W. R. Co.*, 11 *Biss.* (*U. S.*) 246, 14 *Fed. Rep.* 211.

A testator provided by will that his trustees should "at any time when they should deem it proper to do so, sell, lease, mortgage, or convey all or any portion of said property, execute any assignment, and invest and reinvest the same in such manner and such securities as to them shall seem advisable." The trustees invested in railroad bonds. *Held*, that they exceeded their authority, the railroad bonds not being securities for permanent investment, and that the parties interested might hold them for any loss resulting from depreciation of the investment. *In re Keteltas*, 6 *N. Y. Supp.* 668, 24 *N. Y. S. R.* 329.

11. Conversion or misappropriation of funds by trustee.—If a trustee, holding bonds deposited to secure the makers of a note from liability thereon, appropriates them to the payment of his individual debts, or the debts of a partnership of which he is a member, or pledges them as collateral security for such debts, this is a violation of the trust and a wrongful conversion which renders him chargeable, at the suit of the beneficiaries, with the value of the bonds at the time of the conversion; and the beneficiaries may also pursue and recover the bonds, or their proceeds if changed, in the hands of all persons except a purchaser for valuable consideration without notice; and they may recover even in the hands of such a purchaser, if the bonds are not negotiable paper. *Reid* v. *Bank of Mobile*, 14 *Am. & Eng. R. Cas.* 554, 70 *Ala.* 199.

Trust funds were fraudulently used by a trustee to purchase railway stock in a company which, under legislative authority, was afterwards consolidated with another company. *Held*, that the *cestui que trust* having knowledge of the misappropriation, and suffering the trustee to retain possession of the stock in the consolidated company, must enforce his equities against the consolidated company. *North Carolina R. Co.* v. *Drew*, 3 *Woods* (*U. S.*) 691.

Where such beneficial owner promoted and acquiesced in the issue and sale of bonds by the new consolidated company, it could not except to the *bona fides* of the issue and sale, and the holders of the bonds so issued had a better equity as against the property of the railroad company than such beneficial holder. *North Carolina R. Co.* v. *Drew*, 3 *Woods* (*U. S.*) 691.

12. Actions against trustees, generally.—Suit for a breach of duty by defendants as trustees, in surrendering and allowing to be canceled certain bonds executed by a railroad company and held by defendants in trust to secure the repayment of certain sums advanced to the company by a town, plaintiff's assignor. *Held:* (1) that the company was not a necessary defendant; (2) the contract by the town with the company not being prohibited by any statute, that the mere lack of power in the town to loan money could not be taken advantage of by the borrower or by the defendants; (3) that an acceptance of the trust in writing by the trustees was not necessary to fix their liability. *Ridenour* v. *Wherritt*, 30 *Ind.* 485.

Where a judgment is rendered against a trustee for costs, and it appears that he has received and voluntarily paid out money belonging to the estate during the pendency of the action, the court may allow the plaintiff to take personal judgment for the amount of his costs, if the trustee has no other trust funds. *Butler* v. *Boston & A. R. Co.*, 24 *Hun* (*N. Y.*) 99.

The trustees of a railroad, three in number, two of them residing without the state, in March, 1856, duly appointed an agent for the service of process against them, in conformity with Vt. Act of 1854, p. 32, but though they recognized him as their agent for that purpose until after February, 1857, they did not renew the certificate of his appointment in January, 1857, as the statute required. In February, 1857, they were summoned as trustees of O. in a suit against him, and the only service made upon them was by an attested copy of the writ left by the officer with the agent. *Held:* (1) that this amounted to the same as personal service upon the non-resident trustees, and that upon their non-appearance they were properly defaulted; (2) that though no personal service was made upon the resident trustee, and no judgment was taken against him, yet that constituted no ground for sustaining *audita querela* to set aside the judgment against the others. *Hamilton* v. *Wilder*, 31 *Vt.* 695.

13. —— in what name suable.—If trustees in a railroad mortgage take possession after default, and continue to do business in the name of the company, they are liable to be sued in that name, and their property is responsible for liabilities incurred while so doing business. *Willkinson* v. *Fleming*, 30 *Ill.* 353.

Where the trustees of a company incur a liability while operating the road in the name of the corporation, while they may be sued in their names as trustees, no reason is seen why an action cannot be maintained against them in the name they use. *Wisconsin C. R. Co.* v. *Ross*, 53 *Am. & Eng. R. Cas.* 73, 142 *Ill.* 9, 31 *N. E. Rep.* 412; *affirming* 43 *Ill. App.* 454.

14. Death of trustee. — Where a mortgage of railroad property is made to one, his heirs and assigns, as trustee for bondholders, the court may, upon his death, appoint a successor, at the instance of the

parties in interest, and in case of such an appointment the heir at law of the former trustee is not entitled to be made a party to a suit for the foreclosure of the mortgage. *Gibbes* v. *Greenville & C. R. Co.*, 4 *Am. & Eng. R. Cas.* 459, 13 *So. Car.* 228.

15. Removal of trustee.—A railroad company in Alabama executed a mortgage or deed of trust in 1853, naming plaintiff, a citizen of New York, as trustee therein. He was a mere naked trustee. During the civil war the company filed a bill against him seeking his removal, but no service was had on him, except by publication, and he in fact did not know of the proceeding until the close of the war. The court granted the relief sought, and appointed other trustees. *Held*, that the court had the power to make the removal, and to appoint other trustees. The very existence of the war would furnish good reason for such course, to preserve the trust estate. *Ketchum* v. *Mobile & O. R. Co.*, 2 *Woods* (*U. S.*) 532.

In such case the removed trustee learned in 1865 of his removal and the appointment of another in his stead, but for ten years thereafter made no claim to his trusteeship, and did no act as trustee. *Held*, that he must be held to have abandoned his title to the office, and to have acquiesced in the appointment of his successor. *Ketchum* v. *Mobile & O. R. Co.*, 2 *Woods* (*U. S.*) 532.

Defendant was appointed by plaintiff company trustee of a sinking fund to pay the debts of the corporation, and it was provided in the trust deed that the moneys of said fund might be invested, in the discretion of the trustee, in such securities as the president of the company or its board of directors might recommend. The trustee, without any previous direction, loaned a portion of said moneys to a banking firm of which he was the senior member, and which soon thereafter became insolvent. *Held*: (1) that such action constituted a breach of trust, which it was not in the power of the board of directors to condone, their relation to the company being that of an agent to his principal; (2) that the misconduct was not relieved by taking collaterals to secure such loan which the trustee thought to be good at the time of taking them; (3) that the creditors to be paid out of said sinking fund are not necessary parties to a proceeding to remove the trustee; (4) that taking a bond from the trustee is but a subsidiary security for his fidelity, but is not a substitute for his personal fitness for the place; (5) that the foregoing facts constitute sufficient grounds for the removal of the trustee and the appointment of a receiver to take charge of the fund until the acts and dealings of the former trustee can be thoroughly investigated. *North Carolina R. Co.* v. *Wilson*, 81 *N. Car.* 223.

TUNNELS.

Damages to abutting owners when constructed under city streets, see STREETS AND HIGHWAYS, **252.**

Duty to employés as to safety of, see EMPLOYÉS, INJURIES TO, **62.**

In streets or highways, see STREETS AND HIGHWAYS, **81.**

Under railway, right of landowner to dig, see MINES, ETC., **7, 8.**

When subject to taxation, see TAXATION, **87.**

1. Right to construct—Position of tunnel. — Authority to tunnel under the streets of a city by a railway company may be implied from the grant and the necessities of its execution. *Baltimore & P. R. Co.* v. *Reaney*, 42 *Md.* 117, 14 *Am. Ry. Rep.* 330.

A railway tunnel must be made in the exact position indicated on the deposited plans, and no deviation is permitted without the consent required by the Railways Clauses Consolidation Act 1845, § 13, or special powers in the special act. *Little* v. *Newport, A. & H. R. Co.*, 7 *Railw. Cas.* 280, 12 *C. B.* 752, 17 *Jur.* 209, 22 *L. J. C. P.* 39.

2. Consent of public authorities.—N. J. Act of March 21, 1874, extending the time for the completion by the Hudson Tunnel railroad company of its proposed tunnel, did not confer upon that company, organized under the General Railroad Law, the right to construct the tunnel in the land of the state under the waters of the Hudson river, without first obtaining consent of the board of riparian commissioners. *Attorney-General ex rel.* v. *Hudson Tunnel R. Co.*, 27 *N. J. Eq.* 176; *reversed in* 27 *N. J. Eq.* 573.

The above company was permitted to proceed to condemnation as against the lessees of lands lying under the waters of the Hudson river, leased to the Morris and Essex railroad by the board of riparian commissioners, but enjoined from taking possession of those lands, or the land between the exterior line of piers and the

state line, until the consent of the state should have been obtained. *Attorney-General ex rel.* v. *Hudson Tunnel R. Co.*, 27 *N. J. Eq.* 176; *reversed in* 27 *N. J. Eq.* 573.

3. Description of terminus.—The westerly terminus of a tunnel was defined in a certificate filed under New Jersey General Railroad Law to be on the "western shore of the Hudson river, and within or near Jersey City or Hoboken." *Held*, that the word "shore" was not used in its strictest sense, but in the more extended and popular sense, as that Jersey City is built upon the western shore of the Hudson river. *State* (*Morris & E. R. Co., Pros.*) v. *Hudson Tunnel R. Co.*, 38 *N. J. L.* 548, 13 *Am. Ry. Rep.* 82; *affirming* 38 *N. J. L.* 17.

4. Damages to abutting owners.—Damage done to a house by reason of excavating the street in making a railroad tunnel is not *damnum absque injuria*, because the work is lawfully authorized; and the owner of the building may recover damages without showing that the power delegated to the company has been illegally or negligently exercised. *Baltimore & P. R. Co.* v. *Reaney*, 42 *Md.* 117, 14 *Am. Ry. Rep.* 330.

As against the company the owner of the house is entitled to the natural support to the foundation of his house which the bed of the street affords; and if injury accrues to the house in the exercise of the power which has been conferred upon the company in making the excavation, the company is liable; and such liability arises even though the injury is the natural or inevitable result or consequence of the act authorized to be done. *Baltimore & P. R. Co.* v. *Reaney*, 42 *Md.* 117, 14 *Am. Ry. Rep.* 330.

The owner of a corner house binding on a street where such excavation is made being entitled to such support to the foundation of his house as the bed of the street affords, where the adjoining house is bound to his, and is dependent upon it for stability, the disturbance of the natural support of the corner house by the company, whereby injury results to the adjoining house, furnishes the owner of the latter a cause of action against the company. *Baltimore & P. R. Co.* v. *Reaney*, 42 *Md.* 117, 14 *Am. Ry. Rep.* 330.

The measure of damages in such case is a sum that will compensate the owner of the house for the injuries done to his particular interest in the premises. *Baltimore & P. R. Co.* v. *Reaney*, 42 *Md.* 117, 14 *Am. Ry. Rep.* 330.

TURNOUTS.

Location of, in city streets, see STREETS AND HIGHWAYS, **152.**

Right of street railway to construct, see STREET RAILWAYS, **122.**

Taking land for, when for a public use, see EMINENT DOMAIN, **184.**

TURNPIKES; PLANK ROADS.

Liability of, for defects in crossings, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, **42.**

1. Rights as against parallel railroad.—An incorporated turnpike company that has the right to carry persons and property and charge therefor cannot recover damages against a railroad company that is subsequently chartered and builds its road parallel to the turnpike road, so as to divert trade and travel therefrom. *Washington & B. Turnpike Road* v. *Baltimore & O. R. Co.*, 10 *Gill & J.* (*Md.*) 392.

2. Appropriation of road by railway company—Consent of highway commissioners.—Although a turnpike corporation has acquired a right to the use and control of a town highway for its purposes, there still remains in the highway commissioners a general control over it as a highway, and they have a duty to perform towards the public in connection with its proper maintenance as such. Where, therefore, a turnpike company has acquired from adjoining landowners the right to a strip of land on each side of the highway for a bridle path, and has given consent to the use by a company organized under N. Y. Act of 1884 of a portion of said bridle path for its railroad, this is not the consent required by the act. It has no effect except as to the rights and interests of the turnpike company; the highway has not ceased to be such because used as a turnpike, and the administrative duty of the highway commissioners of the town remains unimpaired, so far as its exercise is required for the preservation of the rights and interests of the public; and their consent is requisite. *In re Rochester El. R. Co.*, 46 *Am. & Eng. R. Cas.* 157, 123 *N. Y.* 351, 25 *N. E. Rep.* 381, 33 *N. Y. S. R.*

695; *affirming* 57 *Hun* 56, 32 *N. Y. S. R.* 1, 10 *N. Y. Supp.* 379.

In such proceedings to acquire title to lands outside of the bridle path for the purposes of its road, the consent of the highway commissioners to the construction of the road is an essential prerequisite, as the right of the petitioner to exercise the franchise of constructing and operating its road upon the highway does not become a vested right until the consent is obtained; and this not having been obtained, the petitioner cannot maintain the proceedings. *In re Rochester El. R. Co.*, 46 *Am. & Eng. R. Cas.* 157, 123 *N. Y.* 351, 25 *N. E. Rep.* 381, 33 *N. Y. S. R.* 695; *affirming* 57 *Hun* 56, 32 *N. Y. S. R.* 1, 10 *N. Y. Supp.* 379.—DISTINGUISHING In re New York C. & H. R. R. Co., 77 N. Y. 248. REVIEWING In re Thirty-fourth St. R. Co., 102 N. Y. 343; In re Kings County El. R. Co., 105 N. Y. 97.

Pennsylvania Act of February 19, 1849, § 13 (P. L. 84), providing that any company finding it necessary to change the site of any portion of any turnpike shall cause the same to be reconstructed, etc., does not require such company first to appropriate the road longitudinally, nor forbid a change of site where the appropriation consists of a grade crossing at an angle of forty-five degrees. *Appeal of North Manheim Tp.*, (*Pa.*) 36 *Am. & Eng. R. Cas.* 194, 14 *Atl. Rep.* 137.

3. —— acceptance of substituted road.—A railroad company took a portion of an old road and made a substitute, as its charter provided. *Held*, that this was sufficient to justify the turnpike company in using it as a portion of its road, and that its continuing to use it as a portion of its road, keeping the gates closed, taking toll, and actually repairing this portion of the road, was sufficient to establish it as a portion of the turnpike company's road which it was bound to keep in a state of ordinary safety for the use of travelers, day and night, so far as this could be done by ordinary diligence. *Mathews* v. *Winooski Turnpike Co.*, 24 *Vt.* 480.—FOLLOWING Batty *v.* Duxbury, 24 Vt. 155.

4. Notices at railway crossings.—A turnpike company is not the overseer of a public road within the meaning of Tenn. Code, § 1223, requiring every overseer of a public road to put up notices marked "Look out for the cars," etc., at every crossing of the road by a railroad. *Louisville & N. Turnpike Co.* v. *State*, 3 *Heisk.* (*Tenn.*) 129. —DOUBTING State *v.* Mayor, etc., of Laudon, 3 Head (Tenn.) 263.

The statute relates to overseers of common roads for which overseers are appointed annually by the county courts, and does not embrace a turnpike chartered by the legislature as private property, and upon which no overseers are appointed. *Louisville & N. Turnpike Co.* v. *State*, 3 *Heisk.* (*Tenn.*) 129.

5. Tolls.—The legislature has the power to authorize the construction of a railway on the bed of a turnpike road, with the consent of the turnpike company; and the construction of such railway does not affect the right of the turnpike company to collect tolls under its charter. *Hooper* v. *Baltimore & Y. Turnpike Road*, 34 *Md.* 521.

The fact that an act of assembly which authorized the construction of a railway on the bed of a turnpike road did not provide for the condemnation of the rights of abutting landowners in the fee of said turnpike road, and no condemnation thereof was made, cannot be urged as a defense in a suit by the turnpike company for the recovery of tolls. *Hooper* v. *Baltimore & Y. Turnpike Road*, 34 *Md.* 521.

6. Trespass for unlawful entry on.—An injunction constraining a street-railway company from entering upon a street occupied by a plank-road company for the purpose of constructing an electric-railway track or incumbrance of any kind upon said street, or in any way preparing to lay such track, cannot be said to cover the operation or repair of a track theretofore built and used, although repairs in paving the street had required the temporary removal of a portion of the track. *Detroit & B. P. Road Co.* v. *Detroit Citizens' St. R. Co.*, 97 *Mich.* 583, 56 *N. W. Rep.* 940.

Proof that a plank-road has been duly established under the statute and constructed, with toll gates thereon, and that the company is in actual use and enjoyment of the same, is sufficient to enable the company to maintain an action of trespass against a railroad company that enters upon the road without showing a better title than the plaintiff company has. *Ellicottville & G. V. Plank Road Co.* v. *Buffalo & P. R. Co.*, 20 *Barb.* (*N. Y.*) 644.

The provision of N. Y. Act of 1850, § 28, that a railroad company organized thereunder shall have the right to construct its road "across, along, and upon any stream of

water, watercourse, street, highway, plank road, turnpike, or canal," cannot be construed so as to authorize the company to enter upon and permanently occupy, or seriously injure, a turnpike or plank-road company, without paying the damages therefor as provided by law. *Ellicottville & G. V. Plank Road Co.* v. *Buffalo & P. R. Co.*, 20 *Barb.* (*N. Y.*) 644.

TURNTABLES.

At station, liability for injuries caused by, see STATIONS AND DEPOTS, **96.**

Contributory negligence of child riding on or playing with, see CHILDREN, INJURIES TO, **91.**

Duty to employés as to safety of, see EMPLOYÉS, INJURIES TO, **53.**

Injuries occasioned by negligence in operating, see STREETS AND HIGHWAYS, **380.**

— to children at, see CHILDREN, INJURIES TO, **24.**

Knowledge of absence of, assumption of risk after, see EMPLOYÉS, INJURIES TO, **246.**

Negligence as to safety of, a question for the jury, see EMPLOYÉS, INJURIES TO, **686.**

U

ULTRA VIRES.

Grants of exclusive privileges in streets are, see STREETS AND HIGHWAYS, **98.**

Leasing of railway, when deemed to be, see LEASES, ETC., **26.**

Restraining action of directors as, at instance of stockholders, see STOCKHOLDERS, **102.**

Subscriptions in aid of railways, see MUNICIPAL AND LOCAL AID, **185.**

— to stock in other corporations, when deemed to be, see SUBSCRIPTIONS TO STOCK, **230–232.**

I. GENERAL PRINCIPLES 124
II. WHAT ACTS OR CONTRACTS ARE ULTRA VIRES 126
III. WHAT ACTS OR CONTRACTS ARE INTRA VIRES 129
IV. RULE AS RESPECTS EXECUTED CONTRACTS 131
V. APPLICATION OF THE DOCTRINE TO TORTS 132

I. GENERAL PRINCIPLES.*

1. Application of the doctrine, generally.†—In recent times courts have been extremely liberal in the construction of the powers of railroad corporations to accomplish the general scope and objects of their creation, and the question of *ultra vires* of late years has not been construed with the strictness that formerly existed. *Dimpfel* v. *Ohio & M. R. Co.*, 9 *Biss.* (*U. S.*) 127.

The doctrine of *ultra vires* ought to be reasonable and not unreasonably understood and applied, and whatever may be fairly regarded as incidental to and consequential upon those things which are authorized by the charter of the company ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*. *Ellerman* v. *Chicago J. R. & U. S. Co.*, 49 *N. J. Eq.* 217, 23 *Atl. Rep.* 287.—QUOTING Shrewsbury & B. R. Co. *v.* Northwestern R. Co., 6 H. L. Cas. 113; Scottish Northeastern R. Co. *v.* Stewart, 3 Macq. H. L. Cas. 382; Elkins *v.* Camden & A. R. Co., 36 N. J. Eq. 241; Chicago, R. I. & P. R. Co. *v.* Union Pac. R. Co., 47 Fed. Rep. 15.—*Attorney-General* v. *Great Eastern R. Co.*, *L. R.* 5 *App. Cas.* 473, 49 *L. J. Ch. D.* 545, 42 *L. T.* 810, 28 *W. R.* 769; *affirmed in L. R.* 11 *Ch. D.* 449, 48 *L. J. Ch. D.* 428, 40 *L. T.* 265, 27 *W. R.* 759.—CONSIDERED IN Attorney-General *v.* Shrewsbury Bridge Co., L. R. 21 Ch. D. 752, 51 L. J. Ch. D. 746, 46 L. T. 687, 30 W. R. 916.

Acts of a corporation which are *ultra vires* are illegal. *Stewart* v. *Erie & W. Transp. Co.*, 17 *Minn.* 372 (*Gil.* 348), 8 *Am. Ry. Rep.* 149.—FOLLOWING Bissell *v.* Michigan S. & N. R. Co., 22 N. Y. 258.

Where a want of power is pleaded in favor of a corporation to defeat the payment of the consideration for benefits which it has received and enjoyed, the courts will go as far as is consistent with law to uphold the contract, for the purpose of maintaining justice, equity, and good conscience; but where the want of power is pleaded against the corporation to prevent wrong, the corporation will be held to the strictest rules of law. *Tippecanoe County Com'rs* v. *Lafay-*

* Action *ultra vires* by corporations, see note, 3 AM. & ENG. R. CAS. 564.

Acts of municipal officers done *colore officii* but *ultra vires* the corporation impose no liability, see note, 20 AM. & ENG. R. CAS. 66.

† In England and Canada the term *ultra vires* is sometimes used where the word "unconstitutional" would be used in the United States.

ette, M. & B. R. Co., 50 *Ind.* 85, 8 *Am. Ry. Rep.* 324.—DISTINGUISHING Smead *v.* Indianapolis, P. & C. R. Co., 11 Ind. 104; State Board of Agriculture *v.* Citizens' St. R. Co., 47 Ind. 407.

2. How pleaded.—Where the defense of *ultra vires* is not pleaded or in any way raised at the trial, it cannot be raised on writ of error. *Pullman Palace Car Co.* v. *Central Transp. Co.*, 139 *U. S.* 62, 11 *Sup. Ct. Rep.* 489.

A company sued upon an *ultra vires* contract may avail itself of the defense of *ultra vires* without alleging the contract to be such in its plea, if it appears on the face of the declaration or any other pleading that it is so. *Taylor* v. *Chichester & M. R. Co.*, 4 *H. & C.* 409, 14 *L. T.* 437; *reversed in L. R.* 2 *Ex.* 356, 36 *L. J. Ex.* 201, 16 *L. T.* 703, 16 *W. R.* 147; *affirmed in L. R.* 4 *H. L. Cas.* 628, 39 *L. J. Ex.* 217.

3. When the state must raise the question.*—Where a corporation is seeking to obtain title to lands which are not required for corporate purposes and the acquisition of which is *ultra vires*, the rule that the power of the corporation to hold lands is one which concerns the state alone, and the title thereto can only be defeated by proceedings in the nature of *quo warranto* on behalf of the state, does not apply, and the court will not enforce a contract or trust in favor of the corporation. *Case* v. *Kelly*, 43 *Am. & Eng. R. Cas.* 1, 133 *U. S.* 21, 10 *Sup. Ct. Rep.* 216; *affirming* 13 *Am. & Eng. R. Cas.* 70.

As a rule, no private citizen has the power to question, by legal proceedings, the action of a corporation as being *ultra vires*, where he has no other interest therein than any other citizen. The people, through their attorney-general, are the proper parties. *Starin* v. *Edson*, 112 *N. Y.* 206, 20 *N. Y. S. R.* 898; *reversing* 42 *Hun* 549, 4 *N. Y. S. R.* 588.

4. Ratification by legislative act.†—Original stockholders in a corporation created by the states of Illinois and Iowa claimed that a certain subsequent issue of stock was illegal and void, and prayed for an injunction against the proceeds of that issue. It appeared that the legislature of Iowa had ratified the act of the directors in issuing the stock, but that state did not have exclusive jurisdiction over the corporation. *Held*, that the *ultra vires* act of the directors was not thereby made valid. *Fisk* v. *Chicago, R. I. & P. R. Co.*, 4 *Abb. Pr. N. S.* (*N. Y.*) 378, 53 *Barb.* 513, 36 *How. Pr.* 20.

By an agreement between plaintiff company and a railway company it was agreed that there should be certain joint rates chargeable to passengers and freight by the steamship company and the railway company, to be divided into certain proportions; and if it should be found that the proportion payable to the steamship company did not, at the end of the season, amount to the sum therein stipulated, then that the deficiency should be made good by a rebate from the share of the railway company; and, on the other hand, if the steamship company received more than the sums mentioned in the agreement, the railway company was entitled to a share of the surplus. Subsequently the railway company leased its line to a third company, the latter agreeing to assume the contract with plaintiff. Afterwards the lessee company leased its line to still another company, both leases being confirmed by act of parliament, by which act the latter company was to assume all contracts of the first company, including the one with plaintiff. *Held*, that, even if the agreement between plaintiff and the company was *ultra vires* the latter company, it was made valid by the subsequent legislation; but apart therefrom it was in no sense objectionable. *Owen Sound Steamship Co.* v. *Canadian Pac. R. Co.*, 40 *Am. & Eng. R. Cas.* 593, 17 *Ont.* 691.

5. Ratification by assent of stockholders.*—When a corporation does an act not expressly prohibited by law, though there is a want of power to do it, and it affects only the interests of the stockholders, such act may be made good by the assent of the stockholders, so as to protect strangers dealing with the corporation in good faith. *Hollins* v. *St. Paul, M. & M. R. Co.*, 29 *N. Y. S. R.* 208, 9 *N. Y. Supp.* 909.

6. Acquiescence—Laches—Estoppel.—A stockholder sued for himself and

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* Injunction to restrain *ultra vires* acts, see note, 16 AM. & ENG. R. CAS. 460.

Power of individuals to restrain *ultra vires* appropriation of property, see note, 20 AM. & ENG. R. CAS. 25.

† Ratification by legislature of unauthorized act of municipal corporation, see note, 15 AM. & ENG. R. CAS. 575.

* Ratification of unauthorized act by corporation, see note, 12 AM. & ENG. R. CAS. 651.

such others as might join in the bill, asking the court to declare a contract made by the company, by which it acquired a new division of its road, and the bonds that were issued under a mortgage given by the company upon that division, null and void, on the ground that they were *ultra vires*. It appeared that the bonds had been sold to *bona fide* purchasers several years before. *Held*, that both the company and the stockholders were estopped to set up the *ultra vires* of the proceeding. *Dimpfel* v. *Ohio & M. R. Co.*, 9 *Biss.* (*U. S.*) 127.

Where the local agents of a company represent the company as a common carrier beyond its own line, and such agents are empowered to contract for carrying goods beyond its line, either by the express act of the directors or by an implied power arising from the mutual consent of the different roads making up the through line, then the company cannot plead its lack of corporate authority to carry beyond its own line, or the want of authority in the agents so to contract, though the company in fact, under its charter, has not the power to make such contracts. *Perkins* v. *Portland, S. & P. R. Co.*, 47 *Me.* 573.

The liability of a company does not rest upon the doctrine of ratification, which, in ordinary legal acceptation, applies to such contracts as a party has authority to make, but upon acquiescence, on which the other party has acted, so that he cannot be restored to his former status, and thereby the company is precluded from interposing its own infirmity as a defense. *Camden & A. R. Co.* v. *May's Landing & E. H. C. R. Co.*, 48 *N. J. L.* 530, 7 *Atl. Rep.* 523.

When an act of directors is in excess of their authority, but done with a *bona fide* intent of benefiting the corporation, and a shareholder, knowing of it, does not dissent within a reasonable time, his assent will be presumed, and he cannot gainsay it. Six years' omission to proceed would be a bar. *Watt's Appeal*, 78 *Pa. St.* 370.

Even if expenditures were *ultra vires*, stockholders knowing of them and not objecting until long after their completion could not compel the directors to account for the moneys expended. *Watt's Appeal*, 78 *Pa. St.* 370.

7. When no defense.* — Where an action is on a lease to recover some consideration thereunder, defendant may attack it on the ground of *ultra vires*, but where the action is by the lessee against a third party for services rendered, the authority of the lease cannot be called in question. *Southern Pac. Co.* v. *United States*, 28 *Ct. of Cl.* 77.

Where parties, in consideration of the benefits which will accrue to them by the construction of a railroad through a certain county and town, bind themselves in a sum sufficient to pay for the right of way across the county, they cannot, after the road is so constructed, claim want or inadequacy of consideration to defeat the contract. One who has received from a corporation the full consideration of his agreement to pay money cannot avail himself of the objection that the contract is *ultra vires*. *Chicago & A. R. Co.* v. *Derkes*, 24 *Am. & Eng. R. Cas.* 251, 103 *Ind.* 520, 3 *N. E. Rep.* 239.

It seems that, in an action by a city to recover rent of a ferry, the fact that a railroad corporation, defendant, had no legal right to enter into the contract would be no defense. *Starin* v. *Edson*, 112 *N. Y.* 206, 19 *N. E. Rep.* 670, 20 *N. Y. S. R.* 898; *reversing* 42 *Hun* 549, 4 *N. Y. S. R.* 588, *and affirming* 1 *N. Y. S. R.* 544. — FOLLOWING Whitney Arms Co. *v.* Barlow, 63 N. Y. 62.

Plaintiff, a railroad corporation, purchased certain property for a purpose which was perhaps unauthorized by its act of incorporation, and beyond the limit of its corporate powers, but to which neither the stockholders nor the state had objected, and it afterwards sold the same property to defendants. *Held*, that if plaintiff had in the purchase exceeded its corporate powers, that did not, under the circumstances of the case, constitute any defense to an action brought against defendants to recover the price they had agreed to pay for the property, and for the repairs plaintiff had made upon it after its sale to defendants and at their request. *Rutland & B. R. Co.* v. *Proctor*, 29 *Vt.* 93.—FOLLOWED IN Sturges *v.* Knapp, 31 Vt. 1.

II. WHAT ACTS OR CONTRACTS ARE ULTRA VIRES.

8. In general.*—It is *ultra vires* for two railway companies to agree that they will work together, and that the profits shall be

* Estoppel of corporation to set up plea of *ultra vires*, see very full note, 20 L. R. A. 765.

* *Ultra vires* contracts, see note, 3 AM. & ENG. R. CAS. 564.

Ultra vires acts of corporations, see note, 13 L. R. A. 780.

shared, so as to give a certain percentage to each. *Charlton* v. *Newcastle & C. R. Co.*, 5 *Jur. N. S.* 1096.

At a meeting of the stockholders or proprietors of a company a resolution was passed authorizing the directors to subscribe a sum out of the company's funds towards the erection of the Imperial Institute. *Held*, that the proposed subscription was not prevented from being *ultra vires* by the fact that the establishment of the institute might benefit the company by causing an increase of passenger traffic over its line. *Tomkinson* v. *South Eastern R. Co.*, 30 *Am. & Eng. R. Cas.* 517, *L. R.* 35 *Ch. D.* 675. — DISTINGUISHING Hutton *v.* West Cork R. Co., L. R. 23 Ch. D. 654.

9. Contracts in excess of charter powers.—A railroad company was authorized by its charter to borrow money and to sell bonds therefor at a rate below par, and also to execute mortgages to secure its indebtedness. The company proposed to raise a large sum of money by issuing to the stockholders and bondholders irredeemable bonds of $50 each, at the price of $15 for each bond, to bear interest at the rate of six per cent. on their face value, payable annually out of the surplus earnings, after defraying current expenses and distributing a dividend of six per cent. on the common stock, with a right to share equally with the stockholders any balance that might remain after such six per cent. and their face value were paid. It proposed also to execute a blanket mortgage on the property of the road, partly to secure said bonds. *Held*, on the application of several stockholders and bondholders, that the scheme was not authorized by the company's charter; that the issuing of such bonds and the execution of such a mortgage would be *ultra vires*, and that therefore a court of equity would interpose by injunction to restrain the same. *Taylor* v. *Philadelphia & R. R. Co.*, 3 *Am. & Eng. R. Cas.* 163, 7 *Fed. Rep.* 386.

A lease made by a company for the purpose of extending its road beyond the terminus fixed by its charter is *ultra vires*, and void as against public policy, and should be set aside on the application of one of the parties, but no recovery will be permitted for the use of the property leased previous to its being declared invalid. *Union Bridge Co.* v. *Troy & L. R. Co.*, 7 *Lans.* (*N. Y.*) 240.—QUOTING Bissell *v.* Michigan S. & N. I. R. Co., 22 N. Y. 285.

An act incorporating a railway conferred upon it in respect of the disposition of lands powers of "letting, conveying, and otherwise departing therewith for the benefit and on account of the company from time to time as they should deem necessary." Nearly forty years before the commencement of this action defendants laid pipes for conveying water along the track, using them for such purpose almost continuously up to the present time, such privilege having been given to them by resolution of the directors of the company, who a few years subsequently passed another resolution, and in pursuance thereof executed a deed granting, releasing, and confirming such right and privilege, which at the time this action was brought had become vested in defendants. The company, desiring to alter the position of its track, gave notice of expropriation to defendants, and placed the track over the water pipes, and now sought to have the resolutions and deed mentioned declared *ultra vires*, and also claimed an injunction restraining the user of the water pipes, and if necessary an order for their removal. *Held*, that the resolutions and deed were *ultra vires* as not within the powers specified by the charter, or such as could fairly be regarded as incidental thereto, or reasonably derived by implication therefrom; that plaintiff was not estopped from asserting its own title and denying defendants', and that defendants, not having used and enjoyed their easement for forty years, had not acquired a title thereto by prescription under R. S. Ont. c. 111, § 35. *Canada Southern R. Co.* v. *Niagara Falls*, 22 *Ont.* 41. — DISTINGUISHING Norton *v.* London & N. W. R. Co., L. R. 13 Ch. D. 268; Bobbett *v.* South Eastern R. Co., L. R. 9 Q. B. D. 424; Erie & N. R. Co. *v.* Rosseau, 17 Ont. App. 483. REVIEWING Ashbury R., C. & I. Co. *v.* Riche, L. R. 7 H. L. 653; Attorney-General *v.* Great Eastern R. Co., L. R. 5 App. Cas. 473; Mulliner *v.* Midland R. Co., L. R. 11 Ch. D. 611.

10. Alienation of franchise or corporate property.—As a general rule, a corporation cannot dispose of its franchises, nor a railroad company its road, without legislative authority; but if the power both to sell and to buy exists in the original charters it may be exercised. *Branch* v. *Jesup*, 9 *Am. & Eng. R. Cas.* 558, 106 *U. S.* 468, 1 *Sup. Ct. Rep.* 495.

Certain contracts entered into by a railroad company, assigning a large part of its

franchise, and alienating property which was necessary to the performance of its obligations and duties to the government and to the public — *held, ultra vires. American Union Tel. Co.* v. *Union Pac. R. Co.*, 1 *McCrary* (*U. S.*) 188.

The respective legislatures of the state of New York and Canada incorporated certain parties for the purpose of constructing a suspension bridge across the Niagara river, for railroad and other purposes, with power to take lands, charge tolls, etc., and the two companies joined in conveying to one railway company the exclusive use of the railway portion of their structure, with power to make arrangements with other railway companies. *Held*, that such assignment was *ultra vires* and void. *Attorney-General* v. *Niagara Falls Int. Bridge Co.*, 20 *Grant's Ch.* (*U. C.*) 34.

11. Contracts made prior to incorporation. — The managing body of a company has no power to enter into a contract regulating the future traffic which may be carried upon a line which the company may thereafter be empowered to construct, so as to give to another railway an interest in such traffic. *Midland R. Co.* v. *London & N. W. R. Co.*, *L. R.* 2 *Eq.* 524, 35 *L. J. Ch.* 831.

A company being about to construct a railway through plaintiff's land, and having a bill before parliament for that purpose, covenanted with plaintiff "that in the event of the bill being passed in the present session of parliament, the company shall, before they shall enter upon any part of the land, pay £4900 purchase money for any portion of his land, not exceeding forty-three acres, which the company may require and take for the purposes of their undertaking; that in addition to the purchase money the company shall pay to the plaintiff, before they shall enter upon any part of the land, £7100, as the landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them." *Held*, that an absolute covenant to pay these sums within a reasonable time after the passing of the act would have been *ultra vires* and void. *Gage* v. *Newmarket R. Co.*, 7 *Railw. Cas.* 168, 16 *Jur.* 1136, 21 *L. J. Q. B.* 398, 18 *Q. B.* 457.

12. Contracts of guaranty or indemnity. — An instrument whereby the officers of a transfer corporation authorized by its act of incorporation "to engage in the general freight transfer business, and such other business as may not be inconsistent therewith," undertake to guarantee the credit of a third party is illegal, *ultra vires*, and not binding on the corporation. *Lucas* v. *White Line Transfer Co.* 70 *Iowa* 541, 30 *N. W. Rep.* 771.—DISTINGUISHING *Bissell v.* Michigan S. & N. I. R. Co., 22 N. Y. 258.

It is *ultra vires* and against public policy for a company to agree with the managing committee of a proposed company that, in consideration of its not abandoning its project and intention of applying to parliament for an act to authorize the making of the proposed line, the company will, in case of rejection of the scheme, insure them against loss which might be occasioned by such rejection and failure, and will pay all expenses incurred in endeavoring to obtain the act. *Macgregor* v. *Dover & D. R. Co.*, 7 *Railw. Cas.* 227, 18 *Q. B.* 618, 17 *Jur.* 21, 22 *L. J. Q. B.* 69.

The A company applied for the approval of an agreement with the B company providing that the B company should give to the A company the exclusive right to use the railway, from the time it was opened for traffic, as fully and freely as if it were its own property, and the exclusive right of fixing and receiving tolls, rates, and fares demanded and taken in respect of traffic on the railway, and the A company undertook in return to maintain the railway in good working order and condition, and to pay to the B company four per cent. per annum on all money raised at any time by shares, mortgages, or otherwise, and expended by the B company in or about the construction of the railway. *Held*, that the application could not be approved, because the B company's act of 1879 did not authorize the two companies to enter into an agreement with respect to the maintenance of the railway, but only with respect to the use of the railway, the Railway Clauses Act, 1863, part 3, treating use and maintenance as separate and distinct purposes; and also because the undertaking of the A company to pay over half yearly to the B company such a sum as might be necessary to pay interest at four per cent. per annum on its capital was *ultra vires*, such guaranty not being limited to the funds to be derived from the user of the B railway, but requir-

ing the A company to employ its own funds in case of need. *In re Taff Vale & T. V. R. Co.*, 4 *Ry. & C. T. Cas.* 54.

13. Doctrine as applied to Canadian statutes.—Ont. Rev. St. c. 124, § 9, entitled "An act respecting assignments and preferences by insolvent persons," is *ultra vires* the Ontario legislature. *In re Assignments and Preferences Act*, § 9, 20 *Ont. App.* 489.

The power of legislation as to the Windsor branch, i. e., the line of railway between Windsor and Windsor Junction, belongs exclusively to the legislature of Nova Scotia, under the British North America Act, § 92, subsection 10, that road being a local work, and not coming within any of the classes excepted by the section referred to; and therefore the act of the Dominion parliament, 1874, c. 16, is *ultra vires*. *Windsor & A. R. Co.* v. *Western Counties R. Co.*, 12 *Nov. Sc.* 376.

III. WHAT ACTS OR CONTRACTS ARE INTRA VIRES.

14. In general.—It is not *ultra vires* for a canal company, having the right to draw water from a public river for its chartered purpose, to agree to discharge its waste water at a certain point. *Armstrong* v. *Pennsylvania R. Co.*, 38 *N. J. L.* 1, 13 *Am. Ry. Rep.* 9.—REVIEWING Staffordshire & W. Canal Nav. *v.* Birmingham Canal Nav., L. R. 1 H. L. 254.—DISTINGUISHED IN Hoppock *v.* United N. J. R. & C. Co., 27 N. J. Eq. 286.

An agreement for a traffic arrangement by which two companies arrange for an interchange of business, and one agrees to promote the business of the other "so far as it can with proper regard for its own interests," is not *ultra vires*; and if it was, the objecting company could not raise the question after having availed itself of the contract and enjoyed its benefits. *Tonawanda Valley & C. R. Co.* v. *New York, L. E. & W. R. Co.*, 42 *Hun* 496, 4 *N. Y. S. R.* 744.

Defendant company agreed to load steamers chartered by plaintiff with cotton to be delivered by a certain day, but failed to deliver the cotton till some days later, when it was loaded. Under its charter party, plaintiff had to pay a certain sum per day for demurrage, whereof defendant was aware. *Held*, that the contract was not *ultra vires* on the part of defendant company, and it was liable to plaintiff for the amount paid by the latter for demurrage; nor was its liability waived by plaintiff accepting delivery after the agreed day. *Norfolk & W. R. Co.* v. *Shippers' Compress Co.*, 30 *Am. & Eng. R. Cas.* 57, 83 *Va.* 272, 2 *S. E. Rep.* 139.

15. Matters incidental to powers expressly conferred.—A corporation owning a very large body of lands had power, under its charter, "to aid in the development of minerals and other materials, and to promote the clearing and settlement of the country." *Held*, that the building of sawmills and a hotel for the accommodation of those having business in connection with carrying out the prime object of the corporation was within its powers. *Watt's Appeal*, 78 *Pa. St.* 370.

A company carried coal on its line for defendants, who were coal merchants, and delivered them at defendants' wharf, which adjoined a siding at one of the company's stations, and allowed defendants, in consideration of paying a specified reasonable charge, to weigh out the coal to customers by a machine belonging to the company and placed in the station yard. The company had no express statutory power to make charges for the use of its weighing machines. *Held*, that the charges were not *ultra vires*, and the company could maintain an action to recover them from defendants. *London & N. W. R. Co.* v. *Price*, 13 *Am. & Eng. R. Cas.* 128, *L. R.* 11 *Q. B. D.* 485, 52 *L. J. Q. B. D.* 754, 4 *Ry. & C. T. Cas.* xxi.

Whatever is fairly incidental to those things which the legislature has authorized by an act of parliament ought not (unless expressly prohibited) to be held *ultra vires*. *Attorney-General* v. *Great Eastern R. Co.*, *L. R.* 5 *App. Cas.* 473, 49 *L. J. Ch. D.* 545, 5 *Ry. & C. T. Cas.* xi.

16. Agreements with owners of land sought to be taken.—Where a company is about to apply to parliament for authority to alter one of its branch lines, it is not *ultra vires* for it to contract for the purchase of the lands required if it should obtain the act. *Scottish North-Eastern R. Co.* v. *Stewart*, 5 *Jur. N. S.* 607, 3 *Macq. H. L. Cas.* 382.

It is not *ultra vires* for a company about to apply to parliament for an extension act to agree with a landowner over whose

estate the proposed line is to pass, and who threatened to oppose the passage of the bill in parliament, to pay him £2000 for his land required, and £2000 within three months from the passing of the act, as personal compensation for any loss and disturbance which he might suffer. *Taylor* v. *Chichester & M. R. Co.*, 39 *L. J. Ex.* 217, *L. R.* 4 *H. L. Cas.* 628; *reversing L. R.* 2 *Ex.* 356, 36 *L. J. Ex.* 201, 16 *L. T.* 703, 16 *W. R.* 147; *which reversed* 4 *H. & C.* 409, 14 *L. T.* 437.

17. Purchase of land at tax sale.—The mere fact that a railroad corporation is a purchaser of certain tracts of land at a tax sale does not prove that such purchase is *ultra vires*, and that the tax-sale certificate in the hands of the corporation is null and void, so as to release the county from the obligation to refund the money in case the sale proves to be invalid. *School Dist. No.* 15 v. *Allen County Com'rs*, 22 *Kan.* 568.

A company which has received a land grant from the general government has the power to lay off and dedicate streets intersecting its right of way. Crossings may be made without crippling the railroad or impairing its usefulness. *Northern Pac. R. Co.* v. *Spokane*, 56 *Fed. Rep.* 915.

A railroad corporation may dedicate to public use a highway across lands owned by it and used for its railroad tracks. *State* (*Central R. Co., Pros.*) v. *Bayonne*, 43 *Am. & Eng. R. Cas.* 176, 52 *N. J. L.* 503, 20 *Atl. Rep.* 69.

18. Dedication of land for highway.—The act of a railroad corporation in dedicating a portion of its land as a highway for the public is not *ultra vires*. *People* v. *Eel River & E. R. Co.*, 98 *Cal.* 665, 33 *Pac. Rep.* 728.

19. Agreements for joint operation or use of road.—A contract for the joint operation of two railroads partly in another state cannot be declared *ultra vires* in Massachusetts, in the absence of statutory prohibition or evidence of the statutes of the other state or any objection thereto by the authorities of either state. *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.*, 157 *Mass.* 268, 31 *N. E. Rep.* 1060.

An agreement between two companies providing for the use by one company of the line of the other for carrying coal, the tolls to be paid to be in the form of dividends on the stock of the company owning the line, such dividends to be increased as the amount of coal carried increases, is not *ultra vires*, but is an agreement into which the companies are competent to enter, the payments to be made being tolls within the Railways Clauses Consolidation Act, 1845, § 87. *Great Northern R. Co.* v. *South Yorkshire R. & R. D. Co.*, 9 *Ex.* 642, 23 *L. J. Ex.* 186.

It is not *ultra vires* for two groups of railways, being owners of independent coterminous routes, to divide the profits of the whole traffic in certain portions calculated on the experience of the past course of traffic. *Hare* v. *London & N. W. R. Co.*, 2 *Johns. & H.* 80, 7 *Jur. N. S.* 1145, 30 *L. J. Ch.* 817.

20. Transportation of persons and property beyond terminus.—If a company is authorized by statute "to contract for the transportation and delivery of, and to transport and deliver, persons and property conveyed over their road, beyond its *termini*," the purchase by it of a steamboat, designed in good faith for the transportation of freight and passengers from the terminus of the road to the line of another, is not *ultra vires*, and a note given by the company in consideration of such a purchase will be binding upon it. *Shawmut Bank* v. *Plattsburgh & M. R. Co.*, 31 *Vt.* 491.

21. Contracts for future transportation.—The board of directors of a company which is authorized by the act of incorporation to construct, maintain, and operate a railroad, and for that purpose is empowered to make contracts and "to do all acts needful to carry into effect the objects for which it was created," including the right to demand and receive for the transportation of passengers and property a compensation not exceeding a maximum rate, may, within that limit, make contracts for transportation for a fixed future period. Such a contract, if otherwise valid, is not *ultra vires* and void for the reason that it binds the corporation for a fixed period of time. *Cleveland & M. R. Co.* v. *Himrod Furnace Co.*, 3 *Am. & Eng. R. Cas.* 471, 37 *Ohio St.* 321, 41 *Am. Rep.* 509.—DISTINGUISHING Thomas *v.* West Jersey R. Co., 101 U. S. 71; Middlesex R. Co. *v.* Boston & C. R. Co., 115 Mass. 347.

22. Doctrine applied to Canadian statutes.—The Provincial Act, 33 Vict. c. 47, authorized the issue of debentures to the Houlton Branch railway company, to aid in the construction of a railway from Houlton, in the state of Maine, to the New

Brunswick and Canada railway in this province. *Held*, to be beyond the powers of the local legislature, under the British North America Act, 1867, limiting the powers of provincial legislatures. *Queen* v. *Dow*, 14 *New Brun.* 300. — DISTINGUISHING European & N. A. R. Co. *v.* Thomas, 14 New Brun. 42.

Under the provision of the act of the legislature of Nova Scotia of 1874, ch. 104, "to facilitate arrangements between railway companies and their creditors," the Windsor and Annapolis railway company proposed an arrangement whereby the so-called B debenture stock of the company, then bearing interest at the rate of six per cent., was "abrogated and determined," and in lieu thereof the holders of said stock were to receive allotments of new stock thereby created, bearing lower rates of interest, and otherwise differing from the stock for which it was substituted. *Held*, that so much of the act as was necessary to the confirmation of the proposed scheme was within the authority of the legislature of Nova Scotia. *In re Windsor & A. R. Co.*, 16 *Nov. Sc.* 312.

IV. RULE AS RESPECTS EXECUTED CONTRACTS.*

23. Defense ordinarily inadmissible where contract has been executed.—If a contract with a corporation is *ultra vires*, neither party can enforce it against the other, and either of them may assert its invalidity; but when the contract has been fully executed by both, as by the execution of a deed and full payment of the purchase money, a court of equity will not rescind it nor grant relief against it. *Long* v. *Georgia Pac. R. Co.*, 91 *Ala.* 519, 8 *So. Rep.* 706.

The doctrine of *ultra vires* is not favored in law, and should not be applied when it will defeat the ends of justice. The defense of *ultra vires* is not admitted in the case of executed contracts not involving moral turpitude. The doctrine of estoppel is then applied to the defense. *Southern Pac. Co.* v. *United States*, 28 *Ct. of Cl.* 77.

Although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of its charter, or of any statute, and the corporation has by its promise induced a party, relying upon such promise and in execution of the contract, to expend money and perform his part of the contract, the corporation is liable on the contract. *State Board of Agriculture* v. *Citizens' St. R. Co.*, 47 *Ind.* 407.—DISTINGUISHED IN Tippecanoe County Com'rs *v.* Lafayette, M. & B. R. Co. 50 Ind. 85. REVIEWED IN Clarke *v.* Sarnia St. R. Co., 42 U. C. Q. B. 39.

Where a company enters into a contract with the owner of a controlling interest in the stock of another railroad company for the purchase of his stock, for the purpose of acquiring the roadbed, right of way, and franchises of the other company, and executes its note in payment therefor, it cannot, after the full execution of the contract by the stockholder and its utilization of the property purchased, deny, in a suit upon the note, its power to enter into the contract and execute the note. *Dewey* v. *Toledo, A. A. & N. M. R. Co.*, 50 *Am. & Eng. R. Cas.* 607, 91 *Mich.* 351, 51 *N. W. Rep.* 1063.

A corporation, when sued on a contract, cannot avail itself of the defense of *ultra vires* where the contract has been in good faith fully performed by the other party, and it has had the benefit of the performance. *Cunningham* v. *Massena Springs & Ft. C. R. Co.*, 44 *N. Y. S. R.* 723, 63 *Hun* 439, 18 *N. Y. Supp.* 600; *affirmed in* 138 *N. Y.* 614, *mem.*, 51 *N. Y. S. R.* 933, 33 *N. E. Rep.* 1082.

Where a corporation has entered into a contract which has been fully executed on one part, and nothing remains to be done but to pay the consideration money, it will not be allowed to set up that the contract was *ultra vires*. *Oil Creek & A. R. R. Co.* v. *Pennsylvania Transp. Co.*, 83 *Pa. St.* 160, 16 *Am. Ry. Rep.* 322.

24. Cannot retain benefits received and assert want of power to contract. — A corporation which has received the consideration and retained the benefits of a contract which has been fully executed by the other party thereto cannot assert that it had no power to make such contract. *Louisville, N. A. & C. R. Co.* v. *Flanagan*, 32 *Am. & Eng. R. Cas.* 532, 113 *Ind.* 488, 12 *West. Rep.* 190, 14 *N. E. Rep.* 370.

A contract for the transportation of freight after the completion of the line, entered into by a railroad corporation before the completion of its road, is not *ultra vires*, but is binding and enforceable. *Louisville, N. A. & C. R. Co.* v. *Flanagan*,

* *Ultra vires* contracts executed and unexecuted, see note, 20 AM. & ENG. R. CAS. 537.

32 *Am. & Eng. R. Cas.* 532, 113 *Ind.* 488, 12 *West. Rep.* 190, 14 *N. E. Rep.* 370.

Defendant, a street-railway company, before its road was in operation, entered into an agreement with a railway company to carry freight for said company between certain places, and afterwards, the road being still unfinished, in order to fulfil the contract agreed with plaintiff, a steamboat owner, for the transportation of merchandise by water between these points until the railway should be opened. Plaintiff performed the service and defendant received payment from the railway company therefor. It was objected that defendant had no power to make the contract with plaintiff, and that therefore he could not recover. *Held*, that to the extent to which defendant had so benefited by plaintiff's services it was liable to him, and should not be allowed to raise the objection of *ultra vires*. *Clarke* v. *Sarnia St. R. Co.*, 42 *U. C. Q. B.* 39. — REVIEWING State Board of Agriculture *v.* Citizens' St. R. Co., 47 Ind. 407, 17 Am. Rep. 702.

25. Accounting for benefits received. — Where a corporation takes advantage of an *ultra vires* contract, a court of equity will restrain it from taking possession of the property which has passed under the contract until a return of the consideration paid. *Atlantic & P. Tel. Co.* v. *Union Pac. R. Co.*, 1 *McCrary* (*U. S.*) 541, 1 *Fed. Rep.* 745.

It is a rule of equity that a corporation is accountable for benefits which it has received under an *ultra vires* transaction. So where a company procures a court to set aside a construction contract on the ground of *ultra vires*, it must account to the contractor for the benefits it has received so far as the contract has been carried out; and the contractor is not to be discharged with payment of his actual outlay, but, in the absence of express contract as to the price, is to receive what it is worth among railroad contractors. *New Castle Northern R. Co.* v. *Simpson*, 23 *Fed. Rep.* 214.

Although a contract may be *ultra vires*, if it has been executed in whole or in part neither party to it will be permitted to rescind it of his own motion, and to recover, without process of law, and by force, the consideration paid or property acquired under the contract; and in such case a corporation that has received a large consideration for a contract *ultra vires* for the sale of a telegraph franchise will be restrained from resuming possession of said franchise and the property connected therewith until an accounting and settlement can be had between the parties. *American Union Tel. Co.* v. *Union Pac. R. Co.*, 1 *McCrary* (*U. S.*) 188.

Under the equitable rule that neither party to a transaction simply *ultra vires* will be heard to allege its invalidity while retaining its fruits, defendant company, which has, under a contract, used the roadbed, rolling stock, and equipments of plaintiff company, cannot set up as a defense to plaintiff's bill for an accounting and a return of the property that the contract was *ultra vires*. *Manchester & L. R. Co.* v. *Concord R. Co.*, 47 *Am. & Eng. R. Cas.* 359, 66 *N. H.* 100, 20 *Atl. Rep.* 383.

26. Disaffirmance and suit on quantum meruit.—An *ultra vires* contract of a corporation does not become valid by being carried into execution, but the remedy for a party aggrieved is to disaffirm the contract and sue on a *quantum meruit*. *Pittsburgh, C. & St. L. R. Co.* v. *Keokuk & H. Bridge Co.*, 39 *Am. & Eng. R. Cas.* 213, 131 *U. S.* 371, 9 *Sup. Ct. Rep.* 770.—FOLLOWING Pennsylvania R. Co. *v.* St. Louis, A. & T. H. R. Co., 118 U. S. 290.

V. APPLICATION OF THE DOCTRINE TO TORTS.

27. No defense that tort resulted from ultra vires act.—Where a railroad company damages by fire lands belonging to a manufacturing corporation, it cannot escape responsibility by showing that the corporation was not permitted by its charter to acquire title to the property, or that it acquired the title for purposes unauthorized by law. *Farmers' L. & T. Co.* v. *Green Bay & M. R. Co.*, 11 *Biss.* (*U. S.*) 334, 12 *Fed. Rep.* 773.

A corporation may be liable for the wrongful acts of its agents where such agents were exceeding its corporate power, and were, by its authority, engaged in transactions wholly foreign to its nature. *South & N. Ala. R. Co.* v. *Chappell*, 61 *Ala.* 527.

A railroad corporation cannot defend an action for a tort done by it on the ground that the business in the prosecution of which the tort was done was *ultra vires*. *New York, L. E. & W. R. Co.* v. *Haring*, 21 *Am. & Eng. R. Cas.* 436, 47 *N. J. L.* 137.

28. Application of the rule to cases of personal injuries.*—Where a corporation is sued on a contract, it may defend on the ground that the contract was *ultra vires;* but this rule does not apply to actions *ex delicto*, founded on a tort committed by the officers or employés of the corporation while in the discharge of their duty. *Central R. & B. Co.* v. *Smith*, 25 *Am. & Eng. R. Cas.* 25, 76 *Ala.* 572, 52 *Am. Rep.* 353.—APPROVING Bissell *v.* Michigan S. & N. I. R. Co., 22 N. Y. 258. QUOTING Brokaw *v.* New Jersey R. & T. Co., 32 N. J. L. 328.

To render a corporation liable in an action *ex delicto* for damages caused by the negligence of its agents or employés in the performance of a contract which is *ultra vires*, it must be shown that the contract was its corporate act, and not the unauthorized act of its officers or agents. *Central R. & B. Co.* v. *Smith*, 25 *Am. & Eng. R. Cas.* 25, 76 *Ala.* 572, 52 *Am. Rep.* 353.

Plaintiff was injured owing to the mismanagement of a horse-car. Defendant contended that even if the jury found that it ran such horse-cars, as it had no franchise to do so it could not be liable to the action. *Held*, that such defense was untenable. *New York, L. E. & W. R. Co.* v. *Haring*, 21 *Am. & Eng. R. Cas.* 436, 47 *N. J. L.* 137.—FOLLOWING Hutchinson *v.* Western & A. R. Co., 6 Heisk. (Tenn.) 634.

It is no defense to an action of tort that the tort complained of resulted from an act which was *ultra vires*. So, where a corporation undertakes to carry passengers, and one of them is injured by its negligence, it is immaterial to inquire, in an action for damages, whether the corporation had or had not the power, under its charter, to carry passengers. *Gruber* v. *Washington & J. R. Co.*, 1 *Am. & Eng. R. Cas.* 438, 92 *N. Car.* 1.—FOLLOWED IN Hussey *v.* Norfolk Southern R. Co., 98 N. Car. 34.

UMPIRE.

Appointment of, and hearing before, see ARBITRATION AND AWARD, **10, 11.**
— — **in expropriation proceedings**, see EMINENT DOMAIN, **1256.**

UNAUTHORIZED USE.

Of street, injunction to restrain, see STREETS AND HIGHWAYS, **230.**
Of streets, liability for, see STREETS AND HIGHWAYS, **167-175.**

UNAVOIDABLE ACCIDENT.

As a defense, see NEGLIGENCE, **85.**
Burden of proof to show, see ANIMALS, INJURIES TO, **515.**
Evidence of, see ANIMALS, INJURIES TO, **493.**
— **to show**, see ANIMALS, INJURIES TO, **466.**
Generally, see NEGLIGENCE, **19, 40.**
Is a defense to action for injury in street or highway, see STREETS AND HIGHWAYS, **373.**
To children in the street, see CHILDREN, INJURIES TO, **61.**
— **trespassers**, see TRESPASSERS, INJURIES TO, **65, 66.**
When excuses carrier of passengers, see CARRIAGE OF PASSENGERS, **158.**
Whether accident was unavoidable a question of fact, see ANIMALS, INJURIES TO, **550.**

UNCERTAINTY.

In contract, effect of, see CONTRACTS, **49.**
— **description of premises conveyed for right of way**, see EMINENT DOMAIN, **201.**
— — — — **in deed, effect of**, see DEEDS, **16.**
— **subscriptions as a defense to action on subscription**, see SUBSCRIPTIONS TO STOCK, **171.**
— **verdict, effect of**, see NEW TRIAL, **25.**

UNCOUPLING.

Contributory negligence of employés in, see EMPLOYÉS, INJURIES TO, **396-422.**

UNDERGROUND RAILWAYS.

1. Statutory authorization.—New York Act of 1880, ch. 582, "providing for excavating and tunneling * * * for transportation purposes within the villages and cities of this state," authorizes and regulates underground street railways. *In re New York Dist. R. Co.*, 32 *Am. & Eng. R. Cas.* 202, 107 *N. Y.* 42, 14 *N. E. Rep.* 187, 11 *N. Y. S. R.* 753; *affirming* 42 *Hun* 621, 4 *N. Y. S. R.* 739.—DISTINGUISHED IN Re Washington St., A. & P. R. Co., 115 N. Y. 442, 22 N. E. Rep. 356, 26 N. Y. S. R. 504.

New York Act of 1886, amending the act of 1868, ch. 842, entitled "An act to provide for the transmission of letters, packages, and merchandise in the cities of New York and Brooklyn * * * by means of pneumatic tubes to be constructed beneath the surface," is in violation of the state Con-

* Liability of corporations for injuries occurring while engaged in enterprises in excess of charter powers, see note, 52 AM. REP. 358.

stitution, art 3, § 18, forbidding the passage of private or local bills granting to any corporation the right to lay down railroad tracks, except upon conditions specified, or granting to a private corporation any exclusive privilege, immunity, or franchise. *Astor* v. *Arcade R. Co.*, 113 *N. Y.* 93, 20 *N. E. Rep.* 594, 22 *N. Y. S. R.* 1, 2 *L. R. A.* 789; *affirming* 48 *Hun* 562, 1 *N. Y. Supp.* 174, 16 *N. Y. S. R.* 141.—QUOTING In re Gilbert El. R. Co., 70 N. Y. 361.—DISTINGUISHED IN Re Third Ave. R. Co., 43 Am. & Eng. R. Cas. 222, 121 N. Y. 536, 24 N. E. Rep. 951, 31 N. Y. S. R. 693. — *Bailey* v. *New York Arcade R. Co.*, 1 *N. Y. Supp.* 304, 48 *Hun* 621, *mem.*, 16 *N. Y. S. R.* 1007, *mem.*; *affirmed in* 22 *N. Y. S. R.* 1.

2. Consent of abutting owners and local authorities. — Under N. Y. Laws 1880, ch. 582, in order to authorize the general term to appoint commissioners to determine as to the construction of an underground railroad, the affidavit accompanying the petition must show affirmatively what application has been made and refused for the consent of the owners of the property bounded on the proposed line, and that they were the owners of at least one half in value thereof. An averment of belief that the consent cannot be obtained is not sufficient. *In re Broadway Underground R. Co.*, 23 *Hun* (*N. Y.*) 693.—RECONCILED IN Re People's R. Co., 112 N. Y. 578, 20 N. E. Rep. 367, 21 N. Y. S. R. 496.

A railroad confined within the limits of a city, and proposed to be built exclusively under the surface of a street, is a street railway within the meaning of N. Y. Const., art. 3, § 18, declaring that no law shall authorize the construction of a street railroad except upon the condition of the consent of the owners of one half in value of the property bounded on, and the consent also of the local authorities having control of the street, or in lieu of the consent of the property holders, in case it cannot be obtained, the determination of commissioners appointed by the court that the road ought to be constructed. *In re New York Dist. R. Co.*, 32 *Am. & Eng. R. Cas.* 202, 107 *N. Y.* 42, 14 *N. E. Rep.* 187, 11 *N. Y. S. R.* 753; *affirming* 42 *Hun* 621, 4 *N. Y. S. R.* 739.—QUOTED IN Re People's Rapid Transit Co., 34 N. Y. S. R. 595, 10 N. Y. Supp. 849.

As applicable to such a road, therefore, the provision of said act declaring that the determination of commissioners, confirmed by the court, "may be taken in lieu of the consent of said authorities" is unconstitutional and invalid. *In re New York Dist. R. Co.*, 32 *Am. & Eng. R. Cas.* 202, 107 *N. Y.* 42, 14 *N. E. Rep.* 187, 11 *N. Y. S. R.* 753; *affirming* 42 *Hun* 621, 4 *N. Y. S. R.* 739.

The General Surface Act of 1884, ch. 252, while permitting such an appointment of commissioners, is limited wholly to surface roads, and so cannot be applied in aid of an underground street railroad. *In re New York Dist. R. Co.*, 32 *Am. & Eng. R. Cas.* 202, 107 *N. Y.* 42, 14 *N. E. Rep.* 187, 11 *N. Y. S. R.* 753; *affirming* 42 *Hun* 621, 4 *N. Y. S. R.* 739.

An order was applied for, under the act of 1880, for the appointment of commissioners to determine whether an underground street railroad ought to be built without the consent of the municipal authorities or the owners, which application was denied. *Held*, that an order could not be granted to stand for the consent of the property owners alone; that the order must have the statute effect or none, and that, so limited, it would not be the order which the statute authorized. *In re New York Dist. R. Co.*, 32 *Am. & Eng. R. Cas.* 202, 107 *N. Y.* 42, 14 *N. E. Rep.* 187, 11 *N. Y. S. R.* 753; *affirming* 42 *Hun* 621, 4 *N. Y. S. R.* 739.

It seems that the act of 1880 may stand as an authority for the construction of an underground street railroad upon condition of the assent of the city authorities and the owners of half the abutting values, rejecting all the provisions for the appointment of commissioners whose order shall be a substitute. *In re New York Dist. R. Co.*, 32 *Am. & Eng. R. Cas.* 202, 107 *N. Y.* 42, 14 *N. E. Rep.* 187, 11 *N. Y. S. R.* 753; *affirming* 42 *Hun* 621, 4 *N. Y. S. R.* 739.

UNDERTAKING.

On appeal in condemnation proceedings, see EMINENT DOMAIN, **941–944.**

UNDISCLOSED PRINCIPAL.

Rights and liabilities of, see AGENCY, **44.**

UNDUE PREFERENCE.

In charges, under English acts, see CHARGES, **91–95.**

UNIFORMITY.

Of operation of statutes, see STATUTES, **8.**

UNILATERAL CONTRACTS.

How construed, see CONTRACTS, 27.

UNION.

Admission of states into, see STATES, 1.

UNION DEPOT COMPANIES.

Requirements as to lighting and warming, see STATIONS AND DEPOTS, 105.
Taxation of, see TAXATION, 73.

1. Nature of the company.—A company created for the purpose of locating, building, owning, and maintaining a union depot in a city, and for the purpose of building tracks so as to connect with different railroads at the boundaries of the city, is not an ordinary railroad corporation within the meaning of Colorado statutes, so that it may be charged with wrongfully usurping the privileges and franchises of such a corporation, though its corporate title be that of a union depot and railroad company. *People ex rel.* v. *Cheeseman*, 16 *Am. & Eng. R. Cas.* 400, 7 *Colo.* 376, 3 *Pac. Rep.* 716.

2. Construction and effect of statutes.*—Mich. Union Depot Act of 1881 (Act No. 244) is not unconstitutional in that it confers the power of eminent domain upon the corporations organized under it, and the title is sufficient to warrant the conferring of such power. *Fort St. Union Depot Co.* v. *Morton*, 47 *Am. & Eng. R. Cas.* 41, 83 *Mich.* 265, 47 *N. W. Rep.* 228.

The objection that section 30 of the above act embraces an object not stated in its title, namely, the establishment, maintenance, and operation of railroads, independent of depot purposes and having no connection therewith, is untenable. *Fort St. Union Depot Co.* v. *Morton*, 47 *Am. & Eng. R. Cas.* 41, 83 *Mich.* 265, 47 *N. W. Rep.* 228.

There is no force in the contention that the above act does not contemplate more than one union depot in each city or village. *Fort St. Union Depot Co.* v. *Morton*, 47 *Am. & Eng. R. Cas.* 41, 83 *Mich.* 265, 47 *N. W. Rep.* 228.

Wagn. Mo. St., § 67, provides that any union depot company, with the consent of "the proper authorities of the city" in which the depot is to be constructed, shall have the right to lay tracks and erect buildings on streets. *Held*, that the phrase "proper authorities of the city" refers only to those properly so called, and does not include a county court. *Union Depot Co.* v. *St. Louis*, 76 *Mo.* 393; *affirming* 8 *Mo. App.* 412.

By the proclamation of the policy of the state that all railroads entering a city should find a terminus at one common centre, in Missouri Act of March 18, 1871, entitled "An act authorizing the formation of union depots and stations for railroads in cities of this state," the state gave, by the strongest and most necessary implication, the means to the accomplishment of that end. *State ex rel.* v. *St. Louis, K. C. & N. R. Co.*, 3 *Mo. App.* 180.

3. Condemnation of land for.—Where a portion of a street in a city of the first class is vacated pursuant to Kan. Gen. St. 1889, p. 582, and a lot abutting thereon is condemned, and the perpetual use thereof is acquired by a union depot and railroad company for the maintenance of a union depot, the portion of the vacated street situated in front of the lot so condemned becomes, as it were, an accretion or appurtenance of the lot, and passes with it to the company. *Challiss* v. *Atchison U. D. & R. Co.*, 45 *Kan.* 398, 25 *Pac. Rep.* 894.—DISTINGUISHING Harris *v.* Elliott, 10 Pet. (U. S.) 25. FOLLOWING Atchison, T. & S. F. R. Co. *v.* Patch, 28 Kan. 470.

Under Mass. Act of 1871, ch. 343, providing for a union depot in the city of Worcester, the railroad commissioners, who are to decide matters where the different companies cannot agree, have no power to authorize one of the companies to take and use the lands of another, and it is their duty upon application to fix the compensation to be paid to the company whose land is used. *Worcester & N. R. Co.* v. *Railroad Com'rs*, 118 *Mass.* 561.—APPLIED IN Boston & M. R. Co. *v.* Lowell & L. R. Co., 124 Mass. 368.

But such commissioners have the power to order such changes in the location and arrangement of the tracks in the vicinity of the station as the safety and convenience of the public may require, and they are empowered to authorize one company to take a portion of the location of another, on condition that the latter shall have the right to use the track of the former, subject to rea-

* Formation of union depots, see note, 13 L. R. A. 415.

sonable regulations to be established by the commissioners. *Providence & W. R. Co.* v. *Norwich & W. R. Co.*, 22 *Am. & Eng. R. Cas.* 493, 138 *Mass.* 277.

The payment, by a union depot company organized under How. Mich. St. ch. 93, of the award of damages made by the jury in condemnation proceedings instituted by the company, upon the order of the court on confirming such award, cannot affect the right of the company to appeal from such award, and to have the question of damages retried by another jury. *Fort St. Union Depot Co.* v. *Backus*, 92 *Mich.* 33, 52 *N. W. Rep.* 790.

Where a statute gives to the circuit court or judge in vacation complete jurisdiction over the condemnation of property for a union depot, and this tribunal secures jurisdiction over a particular condemnation by the filing of the proper petition in court, and the proceedings show that defendant was notified and appeared, the court has complete jurisdiction of the subject-matter and the person, and the judgment, though irregular and erroneous, is not void, and therefore not subject to collateral attack. *Union Depot Co.* v. *Frederick*, 57 *Am. & Eng. R. Cas.* 656, 117 *Mo.* 138, 21 *S. W. Rep.* 1118.

Where defendant in such proceedings has twice appeared by an attorney before the court, the court has jurisdiction over him as much as if he had been correctly served with process. *Union Depot Co.* v. *Frederick*, 57 *Am. & Eng. R. Cas.* 656, 117 *Mo.* 138, 21 *S. W. Rep.* 1118.

4. Right of railroads to subscribe for stock in. — The object of plaintiff's incorporation is considered to be the combining in this corporate organization of all the railroad companies whose roads enter or may enter the city of St. Paul, for the purpose of providing and maintaining depot and other railroad facilities for the common benefit of all such railroad companies and of the public. In view of this purpose, and construing the provisions of its charter—*held*, that railroad companies entering the city since this corporate organization are entitled, for the purpose of becoming members of the corporation, and sharing in and contributing to the benefits of the organization, to subscribe for and purchase a proper proportion of its stock at its par value. *St. Paul Union Depot Co.* v. *Minnesota & N. W. R. Co.*, 50 *Am. & Eng. R. Cas.* 55, 47 *Minn.* 154, 49 *N. W. Rep.* 646.—REAFFIRMING State *v.* St. Paul Union Depot Co., 42 Minn. 142.

If necessary for this purpose, and for a proper apportionment of the stock, the existing members may be required to surrender or sell a part of the stock held by them. *St. Paul Union Depot Co.* v. *Minnesota & N. W. R. Co.*, 50 *Am. & Eng. R. Cas.* 55, 47 *Minn.* 154, 49 *N. W. Rep.* 646.

5. Contracts for joint use of. — Six railroad companies whose lines terminated at a city, and another company whose line ran through the city, made a contract with a union depot company whereby each of said companies agreed to use such depot, and to pay as rent therefor one seventh of the expenses of operating the depot and one seventh of the interest on the cost of the depot. The contract further provided that any rents received by the depot company from other roads should be credited upon the rent reserved in the contract. One of the parties to the contract, whose road terminated at the city, extended its line through the city by purchasing the line of another company not a party to the contract, and which had been paying rent to the depot company for the temporary use of the depot. *Held*, that said purchasing company was entitled to use the depot for its original and its purchased line upon payment only of the rental imposed on it by the contract. *Union Depot Co.* v. *Chicago, K. & N. R. Co.*, 56 *Am. & Eng. R. Cas.* 245, 113 *Mo.* 213, 20 *S. W. Rep.* 792.

Under the agreement between the company and the purchased line, the latter had only a temporary right to use the depot, and not a lease from year to year. *Union Depot Co.* v. *Chicago, K. & N. R. Co.*, 56 *Am. & Eng. R. Cas.* 245, 113 *Mo.* 213, 20 *S. W. Rep.* 792.

6. Conveyances for depot purposes — Reservations. — A railroad company conveyed to a depot company a site for a union passenger depot. The deed of conveyance contained a provision that the railroad company should have the perpetual and exclusive use and control of the three most northerly tracks in said depot for its own business and the business of such other railroad companies as it was then, or should at any time thereafter be, under obligation to furnish or provide with passenger depot accommodations. *Held:* (1) that the grantor railroad company was entitled to the use of

these three tracks, not merely for the business of those companies to whom it was at the time of the execution of the deed under obligations to furnish depot accommodations, but also for that of any other companies with which it might thereafter contract to furnish such accommodations; (2) that the reservation covered not only the right to run trains in and out of the depot upon the three tracks, but also the right to general depot accommodations; (3) that such a construction was neither repugnant to the grant, nor in conflict with public policy, nor prejudicial to the interest of the union depot company. *St. Paul Union Depot Co.* v. *St. Paul, M. & M. R. Co.*, 26 *Am. & Eng. R. Cas.* 567, 35 *Minn.* 320, 29 *N. W. Rep.* 140.

A deed of conveyance from a railway company to a union depot company, and a lease from the latter company to the former, considered and construed with reference to the rights of the first-named corporation to the exclusive use and occupation of certain specified railway tracks and adjoining platforms in the train house, or annex to a depot building. *St. Paul, M. & M. R. Co.* v. *St. Paul Union Depot Co.*, 44 *Minn.* 325, 46 *N. W. Rep.* 566.

7. Rules and their enforcement.—Defendant depot company had a rule requiring persons passing through its gates, for the purpose of taking trains, to exhibit their tickets to the gatekeeper, and have them punched by him; also one providing that no passenger should be allowed to board a train that was in motion. *Held*, that the rules were reasonable, and that all persons intending to take trains, and knowing of the rules, and having a reasonable opportunity to comply with them, were bound to do so. *Dickerman* v. *St. Paul Union Depot Co.*, 45 *Am. & Eng. R. Cas.* 596, 44 *Minn.* 433, 46 *N. W. Rep.* 907.

Defendant had a right to enforce its rules or prevent a violation of them, and to employ such force as might be necessary for that purpose, and might seize hold of and detain passengers so far as necessary to prevent their boarding trains in motion. *Dickerman* v. *St. Paul Union Depot Co.*, 45 *Am. & Eng. R. Cas.* 596, 44 *Minn.* 433, 46 *N. W. Rep.* 907.

8. Negligence of—Liability of railroad company.—Where a company receives and delivers its baggage in a city at a union depot that belongs to a separate company, the railroad company is liable for the loss of the baggage through the negligence of the depot company as its agent. *Jacobs* v. *Tutt*, 33 *Fed. Rep.* 412.

A company delivered baggage to a union depot company, and the evidence showed that it was usually two hours before baggage could be delivered by such company to the owner, and that during that time the baggage in question was lost. *Held*, that the railroad company was liable as a carrier, though the baggage was not called for until the next day. *Jacobs* v. *Tutt*, 33 *Fed. Rep.* 412.—FOLLOWING Lin *v.* Terre Haute & I. R. Co., 10 Mo. App. 132.

9. Liability of company for assaults by servant of tenant.—It appeared, by a complaint and a stipulation, that defendant corporation was organized for the express purpose of furnishing depot and station-house accommodations at a city for the use of such railway corporations as entered into contract with it. It leased a room in its depot building to a tenant who carried on the business of storing for hire the parcels and light baggage of travelers. Plaintiff arrived at said depot as a passenger, and proceeded to said room for the purpose of temporarily storing his valise, and was there wilfully and maliciously assaulted and beaten by an employé of defendant's tenant. It was further charged that this employé was a man of savage and vicious propensities, who had frequently, during the six years of his employment there, attacked and beaten persons who were lawfully upon the premises, which was well known to defendant corporation at the time of the attack upon plaintiff. *Held*, that the complaint, in connection with the stipulation, stated a good cause of action. *Dean* v. *St. Paul Union Depot Co.*, 39 *Am. & Eng. R. Cas.* 360, 41 *Minn.* 360, 5 *L. R. A.* 442, 43 *N. W. Rep.* 54.—APPROVING McCord *v.* Western Union Tel. Co., 39 Minn. 181, 39 N. W. Rep. 315. REVIEWING Ahlbeck *v.* St. Paul, M. & M. R. Co., 39 Minn. 424, 40 N. W. Rep. 364.—See also *Indianapolis Union R. Co.* v. *Cooper*, 6 *Ind. App.* 202.

UNION PACIFIC R. CO.

Federal grants to, see LAND GRANTS, **92-95. Transfer of franchise of, to Central Pacific R. Co.**, see CENTRAL PACIFIC R. CO., **5.**

1. Construction of incorporating act, generally.—The Act of Congress of July 1, 1862 (12 St. at L. 489), incorporat-

ing the above company and pledging the support of the government, embodies in itself both a charter and a compact. Those provisions which bind the government to do something, and cast distinct obligations upon it, and make it take a financial part in the enterprise, are something distinct from a charter, and are to be differently construed. *Union Pac. R. Co.* v. *United States*, 10 *Ct. of Cl.* 548.

The above statute provides that the defendants shall loan their bonds to aid in the construction of the road, upon condition that the "company shall pay said bonds at maturity" and transport the mails and military and other supplies of the defendants at ordinary rates, and that "all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid," and that "five *per centum* of the net earnings of said road shall also be annually applied to the payment thereof," and prescribes by its terms a specific mode of payment prior to the maturity of the bonds. If the means thus designated exceed the advances for interest on the bonds, the loss *ad interim* will be the company's; if they fall short, it will be the defendants'. And the defendants having the option of augmenting the supply from these sources by increasing the employment to be furnished by them to the company, the injury which they suffer is, in contemplation of law, of their own choosing. *Union Pac. R. Co.* v. *United States*, 10 *Ct. of Cl.* 548.

2. —— as to status of constituent companies.—The Act of Congress of July 1, 1862, chartering the company, incorporated into that company several state railway corporations, which were authorized to construct branches, and to receive aid from the United States. *Held*, that they were all subject to the terms and conditions imposed by the act of congress. *Western Union Tel. Co.* v. *Union Pac. R. Co.*, 1 *McCrary* (*U. S.*) 418, 3 *Fed. Rep.* 1.

By the above act and by its amendments large subsidies were bestowed upon the companies building the branches, as well as upon the company which was to build the main line. *Held*, that by accepting the terms of the acts of congress, and receiving its benefits, each one of the corporations became subject to all the terms and conditions imposed by the acts of congress, and that neither it nor its successors could enter into a contract unauthorized thereby, anything in the original state charter to the contrary notwithstanding. *Western Union Tel. Co.* v. *Union Pac. R. Co.*, 1 *McCrary* (*U. S.*) 418, 3 *Fed. Rep.* 1.

3. —— as respects the eastern terminus.—Under the Act of Congress of 1862, § 14, providing that the company "is hereby authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the state of Iowa" westward, the bridge of the company and its track thereon over the Missouri river between Council Bluffs, Ia., and Omaha, Neb., is a part of its line of road, and it is the duty of the road to operate its trains to and from Council Bluffs, which duty may be enforced by mandamus. *Union Pac. R. Co.* v. *Hall*, 91 *U. S.* 343.—APPROVED IN Illinois C. R. Co. *v.* People, 143 Ill. 434; McCann *v.* South Nashville St. R. Co., 2 Tenn. Ch. 773. QUOTED IN Re Bronson, 1 Ont. 415. REVIEWED IN People *v.* New York C. & H. R. R. Co., 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543; Hughes *v.* Northern Pac. R. Co., 9 Sawy. (U. S.) 313, 18 Fed. Rep. 106.

The charter of the company (12 St. at L. 489, § 12) required its Iowa branch to be constructed westward from a point on the western boundary of the state of Iowa to be fixed by the president of the United States. *Held*, on a consideration of various provisions of the charter, that the eastern terminus of said branch was on the Iowa shore of the Missouri river, and not on the Nebraska shore, nor at a point "on the middle of the main channel" of the river, although that was the legal western boundary of the state of Iowa. *United States ex rel.* v. *Union Pac. R. Co.*, 4 *Dill.* (*U. S.*) 479.

A peremptory mandamus was granted to compel the company to operate its road over the bridge in the same general manner that it operates the other portions of its road, and the device of a separate transfer over the bridge by local trains—*held*, to be in violation of the duty of the company to the public. *United States ex rel.* v. *Union Pac. R. Co.*, 4 *Dill.* (*U. S.*) 479.—APPROVED IN Illinois C. R. Co. *v.* People, 143 Ill. 434.

4. Sinking-fund act—Amendments of charter.—Act of Congress of May 7, 1878, amending the act of 1862 chartering the road, and the Act of July 2, 1864, is constitutional, in so far as it establishes

in the treasury of the United States a sinking fund, by retaining compensation due to the company for services rendered to the government, one half thereof to be applied to the interest on the bonds issued to the company, and the other half applied to a sinking fund to meet the principal. *Union Pac. R. Co.* v. *United States*, 99 *U. S.* 700.

Every possible presumption is in favor of the validity of the statute, and this continues until the contrary is shown beyond a reasonable doubt; and the supreme court will not declare an act of congress void, except in a very clear case. *Union Pac. R. Co.* v. *United States*, 99 *U. S.* 700.

The United States cannot, any more than a state, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional provision which prevents states from passing laws impairing the obligation of contracts, but, equally with the states, the United States are prohibited from depriving persons or corporations of property without due process of law. But under the power reserved in the act of 1864, "that congress may at any time alter, amend, and repeal this act," the establishment of said sinking fund does not violate any previous contract with the company or the state corporations composing it. *Union Pac. R. Co.* v. *United States*, 99 *U. S.* 700.

The establishment of the fund is a reasonable regulation of the administration of the affairs of the companies, promotive alike of the interests of the public and of the corporators, and is warranted, under the authority which congress has, by way of amendment, to change or modify the rights, privileges, and immunities granted by it. *Union Pac. R. Co.* v. *United States*, 99 *U. S.* 700.

Neither the debt of the company, nor that of the Central Pacific railroad company, to the United States, is paid by depositing and investing the sinking fund in the manner prescribed in the Act of Congress of May 7, 1878. Retaining in the fund one half of the earnings for services rendered to the government by those companies respectively, which by the Act of July 2, 1864, was to be paid to them, does not release the government from such payment. Although kept in the treasury, the fund is owned by them, and they will be entitled to the securities whereof it consists which remain undisposed of when the debt chargeable upon it shall be paid. Under the circumstances, such retaining is, in law, a payment to them. *Union Pac. R. Co.* v. *United States*, 99 *U. S.* 700.

The annual payment into the sinking fund prescribed by the Thurman Act, § 4, adds to the five per cent. of net earnings prescribed by the act of 1862 so much of $850,000 as will make five per cent., and with the compensation for services performed for the government an amount equal to twenty-five per cent. of the net earnings of the road, and no more. *Union Pac. R. Co.* v. *United States*, 20 *Ct. of Cl.* 70.

5. Construction of Act of March 3, 1873.—The Act of Congress of March 3, 1873 (17 St. at L. 509), requiring the attorney-general to bring a suit in equity against the company and others, was not intended to change the substantial rights of the parties to the suit, but was intended to provide a specific mode of procedure which, by removing restrictions on the jurisdiction, processes, and pleading in other cases, would give a larger scope to the action of the circuit court, and a more economical and efficient remedy than existed before, and is a valid and constitutional exercise of legislative power. *United States* v. *Union Pac. R. Co.*, 98 *U. S.* 569.

The authority to serve process without the territorial limits of the district in which the suit should be brought, and to mingle in one bill parties and subjects of controversy which would be multifarious in an ordinary suit, is a regulation of practice and procedure in regard to rules founded on convenience within legislative control. *United States* v. *Union Pac. R. Co.*, 98 *U. S.* 569.

The bill in this case was dismissed on demurrer in the court below, and its sufficiency must be determined in the supreme court by the provisions of the act under which it was brought; for it cannot be supposed that congress, in laying down in specific terms the subject-matter of the suit and granting enlarged and peculiar powers to the court, intended that any other matter should be tried in that case. This is confirmed by the fact that the same statute provided other remedies for other subjects of controversy with the railroad company, and an effectual means of investigating all its affairs. *United States* v. *Union Pac. R. Co.*, 98 *U. S.* 569.

The statute in this case authorizes a money decree in favor of the company for money

due for capital stock, for money or property received from it on fraudulent contracts, or for money or property which ought in equity to belong to the company; and it authorizes a decree in favor of the United States or the company for money, bonds, or lands wrongfully received from the United States, which ought in equity to be paid or accounted for. *United States* v. *Union Pac. R. Co.*, 98 *U. S.* 569.

There can, under this statute, therefore, be no recovery except in favor of the corporation or the United States, and none but such as was authorized by the principles of equity before the statute was enacted. *United States* v. *Union Pac. R. Co.*, 98 *U. S.* 569.

The company, which might by a cross-bill have availed itself of the act, refuses to do so and demurs to the bill, thereby resisting any relief in its favor in this suit, and it is conformable neither to the principles of equity nor of the common law to render judgment in favor of a competent party who asserts no claim, denies the right to relief, and refuses to proceed in the case. There can, therefore, be no recovery in this suit in favor of the company. *United States* v. *Union Pac. R. Co.*, 98 *U. S.* 569.

Though the bill sets up many fraudulent transactions on the part of the directors and some of the stockholders of the company, for which innocent stockholders would be entitled to relief, these latter are not parties to this suit, and neither the frame of the bill nor the provisions of the statute authorize any relief or recovery in their favor. *United States* v. *Union Pac. R. Co.*, 98 *U. S.* 569.

The United States has two distinct relations to the company; namely, the legislative and visitatorial power of a government creating the corporation, and the relation growing out of the contract found in the charter and its amendment. *United States* v. *Union Pac. R. Co.*, 98 *U. S.* 569.

This bill exhibits no right to relief on the part of the United States founded on the charter contract. The company has constructed its road to completion, keeping it in running order, and carries for the government all that is required of it. It owes to the government nothing that is due, and the government has the security which by law is provided. Nor does the bill show anything which authorizes the United States as the depositary of a trust, public or private, to sustain this suit. *United States* v. *Union Pac. R. Co.*, 98 *U. S.* 569.

This interference by the attorney-general with corporations on the ground of such a trust in the government is limited to two classes of cases: (1) religious, charitable, municipal, or other corporations whose functions are solely public and whose managers have destroyed the fund or are putting it to improper uses, or otherwise abusing their functions; (2) other corporations which are exercising powers beyond those to which they are limited by the law of their organization. The present case belongs to neither of these classes. *United States* v. *Union Pac. R. Co.*, 98 *U. S.* 569.

6. Effect of charter provisions upon state control. — The right of way of the company is not exempt from the operation of a state law respecting the crossing and connecting of railroads, and the condemnation of property for those purposes, because the company's charter was derived from the United States. *Union Pac. R. Co.* v. *Burlington & M. R. R. Co.*, 3 *Fed. Rep.* 106, 1 *McCrary* (*U. S.*) 452.—FOLLOWING Union Pac. R. Co. *v.* Peniston, 18 Wall. (U. S.) 5.

The provision in the Act of Congress of July 1, 1862, § 15, that "any other railroads now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for by this act, in such places and upon such just and equitable terms as the president of the United States may prescribe," does not deprive a state of the right of eminent domain over the company's right of way, or of the right to control the railway with respect to the crossing and connecting of railroads. *Union Pac. R. Co.* v. *Leavenworth, N. & S. R. Co.*, 29 *Fed. Rep.* 728.

7. State taxation of property. — The property of the railroad, a corporation created by congress, is taxable by the states, though always liable to be employed as an agency of the United States, and actually employed, to a limited extent, in the government service, both military and postal. *Union Pac. R. Co.* v. *Peniston*, 18 *Wall.* (*U. S.*) 5, 6 *Am. Ry. Rep.* 369.—APPLIED IN Pullman Palace Car Co. *v.* Twombly, 29 Fed. Rep. 658. DISTINGUISHED IN California *v.* Central Pac. R. Co., 33 Am. & Eng. R. Cas. 451, 127 U. S. 1; San Benito County *v.* Southern Pac. R. Co., 37 Am. & Eng. R. Cas. 374, 77 Cal. 518, 19 Pac. Rep. 827. FOLLOWED IN Union Pac. R. Co. *v.* Burlington & M. R. R. Co., 3 Fed. Rep. 106, 1 McCrary (U. S.) 452; State *v.* Central

Pac. R. Co., 10 Nev. 47.—QUOTED IN Wisconsin C. R. Co. *v.* Taylor County, 1 Am. & Eng. R. Cas. 532, 52 Wis. 37.

8. Regulation of telegraph lines.—Under its original charter, the company is without authority to alienate its telegraph franchise or any property necessary to the performance by it of the duties imposed by law. *Western Union Tel. Co.* v. *Union Pac. R. Co.*, 3 *Fed. Rep.* 1, 1 *McCrary* (*U. S.*) 418. *Western Union Tel. Co.* v. *Union Pac. R. Co.*, 3 *Fed. Rep.* 721, 1 *McCrary* 581. *Atlantic & P. Tel. Co.* v. *Union Pac. R. Co.*, 1 *Fed. Rep.* 745, 1 *McCrary* 541.

But under the Act of Congress of July 2, 1864, § 4, the company is authorized to transfer to the United States telegraph company the right to construct and operate the telegraph line required of the railroad company; and the same may be constructed and operated by the successor of said telegraph company. *Western Union Tel. Co.* v. *Union Pac. R. Co.*, 3 *Fed. Rep.* 1, 1 *McCrary* 418. *Western Union Tel. Co.* v. *Union Pac. R. Co.*, 3 *Fed. Rep.* 721, 1 *McCrary* 581.

Under the Act of Congress of 1862 the company was required to construct a telegraph line along its railroad, and to give to the government preference in its use "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service." Afterwards it was provided that the rate should be fixed by the postmaster-general, and the company was authorized to lease its line, the operators along the road to act for both the railway company and the telegraph company. *Held*, that government messages were to be paid for at rates fixed by the postmaster-general for the entire distance, though they might have been transmitted part of the way at commercial rates, if the sender had required it. *United States* v. *Union Pac. R. Co.*, 45 *Fed. Rep.* 221.

9. Right to sue and be sued.—Under the act of congress (12 St. at L. 490) creating the company, and providing that it "by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity," it is capable of suing and being sued in the federal courts which have jurisdiction of the same class of actions between other parties. *Smith* v. *Union Pac. R. Co.*, 2 *Dill.* (*U. S.*) 278. *Bauman* v. *Union Pac. R. Co.*, 3 *Dill.* (*U. S.*) 367.

The capacity of the eastern division of the company for suing and being sued was not enlarged by the act of congress incorporating the company. *Lathrop* v. *Union Pac. R. Co.*, 1 *MacArth.* (*D. C.*) 234.

The act of congress incorporating the company, and authorizing it to sue and be sued in any court of law or equity within the United States, and extending aid to it and to all other companies which might accept certain terms and conditions recited in the statute, does not also render such other companies as accept the benefit of the statute liable to be sued in the same manner. *Lathrop* v. *Union Pac. R. Co.*, 7 *D. C.* 111.

10. Application of earnings to payment of government bonds.—The government bonds issued to the company were declared to be a first lien on the road and property; the act of 1864 authorized the company to issue an equal amount of the first mortgage bonds, to have priority over the government bonds. *Held*, that this priority authorized the payment of the interest accruing on these first mortgage bonds out of the net earnings of the road, in preference to the five *per centum* payable to the government, which is only demandable out of the excess in each year. *Union Pac. R. Co.* v. *United States*, 99 *U. S.* 402.—FOLLOWED IN United States v. Sioux City & P. R. Co., 99 U. S. 491.

Under the Act of Congress of July 1, 1862 (12 St. at L. 489), the United States may recover in an action at law of the companies receiving its bonds, until such bonds and interest are paid, five per cent. of the net income earned after the completion of the roads. *United States* v. *Kansas Pac. R. Co.*, 4 *Dill.* (*U. S.*) 367.

For a valuable service rendered, a present debt accrues unless the parties have expressly provided that payment shall be deferred or appropriated to a particular purpose. Therefore, when the Act of July 2, 1864 (13 St. at L. 358), provides that only half of the earnings of the railroad shall be retained and applied to the payment of certain bonds, the company will have a good cause of action for the remainder of its earnings; and any demand of the government for interest advanced on the bonds must be asserted by a counterclaim in the nature of a cross-action. *Union Pac. R. Co.* v. *United States*, 10 *Ct. of Cl.* 548.

The Act of July 1, 1862 (12 St. at L. 489), which incorporates the company, and pro-

vides that the United States shall loan to it its bonds to aid in the construction of its road, upon condition that the "company shall pay said bonds at maturity" and transport the mails and military and other supplies of the defendant at ordinary rates, and that "all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid," and that "five *per centum* of the net earnings of said road shall also be annually applied to the payment thereof," prescribes by its terms a specific mode of payment prior to the maturity of the bonds. If the means thus designated exceed the advances for interest on the bonds, the loss *ad interim* will be the company's; if they fall short, it will be that of the United States. And the government having the option of augmenting the supply from these sources by increasing the employment to be furnished by it to the company, the injury which it suffers is, in contemplation of law, of its own choosing. *Union Pac. R. Co.* v. *United States*, 10 *Ct. of Cl.* 548.

It is not the purpose of the Pacific Railroad Act of 1864, § 10, to postpone the payment "of the five *per centum* of the net earnings" of the roads until the first mortgage debt of the company should be paid. *Union Pac. R. Co.* v. *United States*, 13 *Ct. of Cl.* 401.

The legal obligation of the companies to pay the five *per centum* of their net earnings was not suspended when the priority of the government's lien upon the roads was subordinated by the act of 1864, but remains in full effect as between the government and the companies, though it may be otherwise as between first mortgagees and the government. *Union Pac. R. Co.* v. *United States*, 13 *Ct. of Cl.* 401.

When the fact of completion of a twenty-mile section of the road was ascertained and declared in the way prescribed by law, the fact must be regarded as finally settled. It could not be changed by the executive, and cannot be re-examined by the judiciary. *Union Pac. R. Co.* v. *United States*, 13 *Ct. of Cl.* 401.

There was but one completion of the road within the contemplation of the statutes, and that was when the last section was completed by the company and accepted by the president in the manner prescribed by law. *Union Pac. R. Co.* v. *United States*, 13 *Ct. of Cl.* 401.

When the last section of the road was "completed and equipped" within the meaning of section 4 of the act of 1864, the entire road was "completed" within the meaning of section 6, so as to entitle the government to have the "five *per centum* of the net earnings" of the road annually applied from that time to the payment of the bonds loaned to the company. *Union Pac. R. Co.* v. *United States*, 13 *Ct. of Cl.* 401.

The claimants, having demanded and received government bonds and lands on the representation that each section of the road was "completed and equipped in all respects as required" by the statute, are estopped from denying the fact of the completion of the entire road. *Union Pac. R. Co.* v. *United States*, 13 *Ct. of Cl.* 401.

In determining what are the "net earnings" of the Pacific railroads, the interest paid on the first mortgage bonds issued for the construction of the road cannot be deducted from the gross earnings as a part of the expense of operating the road. *Union Pac. R. Co.* v. *United States*, 13 *Ct. of Cl.* 401.

The expenditures of the Pacific railroads in regard to lands received from the government but not connected with the business of the roads cannot be deducted from the gross earnings in the ascertainment of the net earnings. *Union Pac. R. Co.* v. *United States*, 13 *Ct. of Cl.* 401.

Interest cannot be recovered by the government on the "five *per centum* of the net earnings" of the Pacific railroads, which, by the terms of the statute, is to be "annually applied to the payment" of the bonds loaned to the companies. *Union Pac. R. Co.* v. *United States*, 13 *Ct. of Cl.* 401.

11. Interest on bonds. — The company is not required to pay the interest upon the bonds until the principal becomes due. *United States* v. *Union Pac. R. Co.*, 91 *U. S.* 72, 9 *Am. Ry. Rep.* 411.—QUOTED IN Tompkins *v.* Little Rock & Ft. S. R. Co., 21 Fed. Rep. 370, 120 U. S. 160, 7 Sup. Ct. Rep. 469, 5 McCrary 597, 18 Fed. Rep. 344.

12. Directors, pay of. — The Act of Congress of July 1, 1862, chartering the company, and the further act of July, 1864, amending the former act, provided, among other things, that certain directors to be appointed by the general government were "to be paid their actual traveling expenses, and to be allowed and paid such reasonable compensation for their time actually employed as the board of directors may

decid.. The acts contained a further provision that Congress may at any time alter, amend, or repeal the charter. The Act of July 27, 1866, provided that directors representing the interest of the government in land-grant railroads should receive ten dollars per day for each and every day actually and necessarily employed, and ten cents per mile for each and every mile actually and necessarily traveled in discharging the duties required of them. *Held*, that the act of 1866 applied to the Union Pacific railroad. *Brewer* v. *Union Pac. R. Co.*, 31 *Hun* (*N. Y.*) 545; *affirmed* (*?*) 101 *N. Y.* 647, *mem.*

It was further objected that congress had no constitutional authority to make the act of 18(licable to said road, because the form chartering it constituted a contract between the United States and the corporation, under which it was agreed that the company should pay only the actual and necessary traveling expenses of such directors, together with a *per diem* to be fixed by the company, and the right reserved to the government to alter or amend the charter did not authorize such change. *Held*, that the right to alter or amend the charter was within the limits of the power reserved to the government, and the objection was not well taken. *Brewer* v. *Union Pac. R. Co.*, 31 *Hun* (*N. Y.*) 545; *affirmed* (*?*) 101 *N. Y.* 647, *mem.*

The company was sued by a director for services rendered during certain years after the passage of the act of 1866, and exhibited in defense a receipt of the plaintiff "in full"; but it appeared that such receipt had been given under a mistake as to his full rights. *Held*, that the indebtedness was fixed by the statute, and the payments made being only for a portion of the sum due, the receipts given only operated to extinguish the indebtedness *pro tanto*. Plaintiff was entitled to the balance due, with interest from the time he presented his claim. *Brewer* v. *Union Pac. R. Co.*, 31 *Hun* (*N. Y.*) 545; *affirmed* (*?*) 101 *N. Y.* 647, *mem.*

UNITED STATES.

Government railroads in, see GOVERNMENT RAILROADS, **1–8.**
Power of, to condemn lands within state, see EMINENT DOMAIN, **71.**
Taxation of road chartered by, see TAXATION, **69.**

UNITED STATES SUPREME COURT.

Jurisdiction and powers of, generally, see FEDERAL COURTS, **17–29.**

UNIVERSITIES.

Condemnation of property of, see EMINENT DOMAIN, **124.**

UNLAWFUL TRANSPORTATION.

Of slaves, see CARRIAGE OF SLAVES, **5–13.**

UNLIQUIDATED DEMANDS.

Payment of, by receiver, see RECEIVERS, **90.**
Right to interest on, see INTEREST, **10.**
Set-off of, see SET-OFF, ETC., **3.**
When may be reached in attachment, see ATTACHMENT, ETC., **33.**

UNLOADING.

When terminates carrier's liability, see CARRIAGE OF MERCHANDISE, **620.**

UNSECURED DEBTS.

Payment of, by receiver, see RECEIVERS, **91.**
Provisions for payment of, in judgment of foreclosure, see MORTGAGES, **208.**

USAGE.

Effect of, on limitation of liability, see LIMITATION OF LIABILITY, **16.**
— — — right to stop over, see TICKETS AND FARES, **47.**
See also CUSTOM AND USAGE.

USE.

Change of, when constitutes an additional servitude, see EMINENT DOMAIN, **163, 164.**
Evidence of value of land for particular, see EMINENT DOMAIN, **600–605.**
Special value for particular, as the measure of damages, see EMINENT DOMAIN, **652.**
To which property is adaptable, consideration of, in estimating damages, see EMINENT DOMAIN, **466, 1242, 1243.**

USE AND OCCUPATION.

Opinion of witness as to value of, see WITNESSES, **111.**
See also ASSUMPSIT, **7.**

USURY.

Effect of, on validity of bonds, see BONDS, **24.**

In judgment against company as a defense to stockholders sued by creditors, see STOCKHOLDERS, **71.**

1. What constitutes. — The statutes of usury have no application to a mortgage executed by a corporation to secure a debt. *Stevens* v. *Buffalo, C. & N. Y. R. Co.*, 45 *How. Pr.* (*N. Y.*) 104.

If there is no statute limiting the rate of interest upon loans to corporations, illegality or taint of usury cannot be imputed to their contracts as borrowers. *Stevens* v. *Buffalo, C. & N. Y. R. Co.*, 45 *How. Pr.* (*N. Y.*) 104.

Bonds issued by a corporation to certain of its creditors at a discount, in settlement of a previous indebtedness, which bonds bear interest at the rate of eight per cent., are void for usury under Act of 1866, ch. 24. *Craven Com'rs* v. *Atlantic & N. C. R. Co.*, 77 *N. Car.* 289.

A sale by a corporation of its own obligations for the payment of money, such as railroad bonds, is a contract for the loan of money. It matters not what the form of the transaction may be, where one party advances money to another, to be repaid at a future day, it is a loan; and if the sum to be repaid be greater than the sum advanced, with lawful interest, the contract is usurious, and will not be enforced, either at law or in equity. *M'Gregor* v. *Covington & L. R. Co.*, 1 *Disney* (*Ohio*) 509.

2. Who may interpose the defense. —Under the Interest Law of 1853 a corporation cannot interpose the defense of usury in any action. *American C. R. Co.* v. *Miles*, 52 *Ill.* 174.

New York Act of April 6, 1850, entitled "An act to prohibit corporations from interposing the defense of usury," does not affect the contract in respect to other parties, but merely precludes the corporation and those in privity with it from avoiding it; and an accommodation indorser of usurious negotiable paper made by a corporation may interpose such defense. *Hungerford's Bank* v. *Potsdam & W. R. Co.*, 10 *Abb. Pr.* (*N. Y.*) 24, 30 *Barb.* 626, 19 *How. Pr.* 39; *reversing* 9 *Abb. Pr.* 124.

As a cloak for usury, worthless railroad stock was sold and transferred by the mortgagee to the mortgagor, to an amount equal to the sum loaned, and a mortgage was taken covering the whole price of the stock and the loan. *Held*, that it was not necessary for the mortgagor to return or tender the stock to the mortgagee before bringing suit; he had qualified himself for his action when he voluntarily paid the whole debt, and that was payment which the mortgagee had accepted as such. *Heath* v. *Page*, 48 *Pa. St.* 130.

3. Law of place.—An Indiana railroad issued bonds payable in New York which were negotiated in Ohio. When sued on, the defense was made that the negotiation was not a sale of the bonds, but by way of a loan at a usurious rate of interest. *Held*, that the law of New York relating to usury must govern; and under a law of that state that a corporation cannot plead usury, such defense could not be made to a suit in Indiana. *Junction R. Co.* v. *Bank of Ashland*, 12 *Wall.* (*U. S.*) 226.—DISTINGUISHED IN Craven Com'rs *v.* Atlantic & N. C. R. Co., 77 N. Car. 289.

The statute of New York forbidding corporations to plead usury as a defense cannot govern a corporation of North Carolina sued in that state, although the bonds in question were delivered in New York and made payable there. Where such bonds express a rate of interest illegal in North Carolina and also in New York, and were issued in payment of a precedent debt, and secured by a mortgage on the corporation property, they could legally bear no greater rate of interest than that allowed in North Carolina. *Craven Com'rs* v. *Atlantic & N. C. R. Co.*, 77 *N. Car.* 289.—DISTINGUISHING Junction R. Co. *v.* Bank of Ashland, 12 Wall. (U. S.) 226.

A Wisconsin corporation executed its bond for $1500, with interest at ten per cent., payable in New York city, and included an assignment of a note made in Wisconsin and of a mortgage upon land in the same state, securing the note. An agent negotiated the bond in Connecticut, and deposited the money in New York to the credit of the company. *Held:* (1) that if the contract is to be governed by the usury laws of Wisconsin, it is valid under Laws of 1851, ch. 64; (2) that if the law of New York, where the principal and interest were payable, is to govern, the contract is valid by the laws of New York, which prohibit a corporation from interposing the defense of usury. *Lyon* v. *Ewings*, 17 *Wis.* 61.

UTAH.

Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, **35.**

Statute of, regulating liability for injuries caused by fire, see FIRES, **15.**

UTILITY.

Of invention sought to be patented, see PATENTS FOR INVENTIONS, **1.**

V

VACANCIES.

Among directors, filling, see DIRECTORS, ETC., **16.**

In boards of commissioners, filling, see EMINENT DOMAIN, **503.**

— office of mortgage trustee, see MORTGAGES, **133, 134.**

VACATING.

Appointment of receiver, see RECEIVERS, **164.**

Assessments for local improvements, see MUNICIPAL CORPORATIONS, **9.**

Judgments, see JUDGMENT, **45.**

Of attachment, see ATTACHMENT, ETC., **51.**

Streets and highways, see STREETS AND HIGHWAYS, **31-36.**

VACATION.

Jurisdiction of condemnation proceedings during, see EMINENT DOMAIN, **242.**

Of appointment of arbitrators, see ARBITRATION AND AWARD, **14.**

— land patents, see PUBLIC LANDS, **37.**

— transfers in fraud of the bankrupt act, see BANKRUPTCY, **8.**

VALIDITY.

Of agreements between connecting companies, see CONNECTING LINES, **5.**

— — to change route, see LOCATION OF ROUTE, **23.**

— — — convey land, see VENDOR AND PURCHASER, **1.**

— — — issue free pass, see PASSES, **3.**

— Alabama statutes as to state aid, see STATE AID, **1.**

— assignments, see ASSIGNMENT, **13.**

— award of arbitrators, see ARBITRATION AND AWARD, **23, 24.**

— — — — in Canadian expropriation proceedings, see EMINENT DOMAIN, **1264, 1265.**

— — — — — condemnation proceedings, see EMINENT DOMAIN, **489.**

— bonds, proof of, in foreclosure, see MORTGAGES, **203.**

— by-laws, see BY-LAWS, **2.**

Of by-laws as to fares in England, see TICKETS AND FARES, **143-145.**

— car leases, see SLEEPING, ETC., COMPANIES, **3.**

— certificates of indebtedness, see CERTIFICATES OF INDEBTEDNESS, **2.**

— commercial paper, see BILLS, ETC., **8, 9.**

— compromises, see COMPROMISES, **2.**

— conditions in deeds, see DEEDS, **29.**

— — — subscription, see SUBSCRIPTIONS TO STOCK, **199-203.**

— — — — — as to portion of road to be built, see SUBSCRIPTIONS TO STOCK, **209.**

— contracts as affected by law of place, see CONTRACTS, **89.**

— — between parallel roads, see PARALLEL AND COMPETING LINES, **5.**

— — — railroad companies and telegraph lines, see TELEGRAPH, ETC., LINES, **3-6.**

— — effects of war upon, see WAR, **9.**

— — for carrying the mails, see CARRIAGE OF MAILS, **4.**

— — — railway construction, see CONSTRUCTION OF RAILWAYS, **16.**

— — — rebate and drawbacks, see DISCRIMINATION, **64-67.**

— — generally, see CONTRACTS, **47-67.**

— — limiting liability, see CARRIAGE OF PASSENGERS, **335.**

— — of car trust associations, see CAR TRUST ASSOCIATIONS, **1, 2.**

— — to locate stations, see STATIONS AND DEPOTS, **37-40.**

— — — procure or convey right of way, see RIGHT OF WAY, **8.**

— conventional limitation of time to sue, see LIMITATIONS OF ACTIONS, **3.**

— corporate bonds, see BONDS, **22-30.**

— coupons, see COUPONS, **3.**

— customs and usages, see CUSTOMS, **1.**

— — of carrier inconsistent with charter, see CARRIAGE OF MERCHANDISE, **426.**

— debentures, see DEBENTURES, **4.**

— dedication of street, see STREETS AND HIGHWAYS, **2.**

— deeds, see DEEDS, **49-51.**

— — of trust, see DEEDS OF TRUST, **3.**

— donations in aid of railways, see MUNICIPAL AND LOCAL AID, **244-267.**

Of double damage laws, see FENCES, 6.
— elections, see DIRECTORS, ETC., 11.
— employment of infants without consent of parents, see EMPLOYÉS, INJURIES TO, 459.
— engineers' estimates, see CONSTRUCTION OF RAILWAYS, 55.
— execution sales, see EXECUTION, 18.
— fence laws, see FENCES, 1-6.
— guardian's sale and deed, see GUARDIAN AND WARD, 2.
— licenses, see LICENSE, 1-10.
— limitations in contract of amount recoverable, see CARRIAGE OF LIVE STOCK, 86-90.
— — of amount recoverable for loss or injury to goods, see EXPRESS COMPANIES, 72, 73.
— — — liability for loss by fire, see BILLS OF LADING, 73.
— — — time for notice of claim or bringing suit, see CARRIAGE OF MERCHANDISE, 486, 487.
— majority verdict, see EMINENT DOMAIN, 818.
— mortgages, see MORTGAGES, 71.
— ordinances, see STREETS AND HIGHWAYS, 302.
— — and resolutions as to right of way through streets, see STREETS AND HIGHWAYS, 82-86.
— — regulating speed, see STREETS AND HIGHWAYS, 323.
— overissued stock, estoppel to deny, see STOCK, 17.
— parol appointment of agents, see AGENCY, 2.
— partnership contracts, see PARTNERSHIP, 2.
— pledges, see PLEDGE, ETC., 4.
— proceedings at directors' meetings, see DIRECTORS, ETC., 23-25.
— provisions for payment of interest on subscriptions, see SUBSCRIPTIONS TO STOCK, 42.
— — in contract making engineer arbitrator, see CONSTRUCTION OF RAILWAYS, 66.
— — — mortgage prohibiting foreclosure, see MORTGAGES, 162.
— railway aid bonds, see MUNICIPAL AND LOCAL AID 315-336.
— — leases, see LEASES, ETC., 17-19.
— receivers' sales, see RECEIVERS, 111.
— release, see RELEASE, 8-15.
— — by injured employé, see RELEASE, 22, 26.
— — — — passenger, see RELEASE, 17.
— rules for the conduct of the company's business, see EMPLOYÉS, INJURIES TO, 23.
— — requiring identification of passengers, stamping of tickets, etc., see TICKETS AND FARES, 78, 79.
Of sales, see SALES, 1.
— — of lands for non-payment of taxes, see TAXATION, 327.
— — — stock, see STOCK, 51.
— schemes for reorganization, see REORGANIZATION, 1.
— special contracts limiting liability, see CARRIAGE OF LIVE STOCK, 68-100.
— statutes, see STATUTES, 6-36.
— — authorizing mortgages of corporate property, see MORTGAGES, 5, 6.
— — or orders directing deposit of land damages, see EMINENT DOMAIN, 391.
— — relative to branch roads, see BRANCH AND LATERAL ROADS, 2.
— — — — process, see PROCESS, 1.
— stipulations against liability for negligence, see LIMITATION OF LIABILITY, 27-37.
— stock certificate, see STOCK, 7.
— submission to arbitrators in condemnation proceedings, see EMINENT DOMAIN, 487.
— subscriptions in aid of railways, see MUNICIPAL AND LOCAL AID, 173-203.
— — to new stock, see STOCK, 26.
— — — stock, see SUBSCRIPTIONS TO STOCK, 27-35.
— Sunday contracts, see SUNDAY, 1.
— surveys of public lands, see PUBLIC LANDS, 25.
— taxes and assessments for local improvements, see MUNICIPAL CORPORATIONS, 7-9.
— tender, see TENDER, 2.
— transfers of stock, see STOCK, 31-36.
— trusts, see TRUSTS AND TRUSTEES, 5.

VALUATION.

For taxation, evidence of, on question of damages, see FIRES, 355.
Of governmental right to use land-grant roads, see LAND-GRANT RAILROADS, 9.
— land for taxation, evidence of, on assessment of land damages, see EMINENT DOMAIN, 631.

VALUE.

At nearest available market, competency of evidence of, see EVIDENCE, 22.
— place of shipment, when measure of damages, see CARRIAGE OF MERCHANDISE, 760.
Before and after location of road, opinion of witness as to, see WITNESSES, 123.
Declaration of, by shipper, conclusiveness of, see CARRIAGE OF MERCHANDISE, 519.
Evidence on question of, under Canadian expropriation laws, see EMINENT DOMAIN, 1248.

Fixing, in bill of lading, see BILLS OF LADING, 81-87.
For particular uses, evidence of, on assessment of land damages, see EMINENT DOMAIN, 600-605.
Immediately before and after the taking, evidence of, see EMINENT DOMAIN, 629, 630.
Limiting liability for goods to less than, see CARRIAGE OF MERCHANDISE, 461.
Of animal killed as the measure of damages, see ANIMALS, INJURIES TO, 587.
— — — proof of, see ANIMALS, INJURIES TO, 423-430.
— baggage, disclosure or concealment of, by passenger, see BAGGAGE, 88-90.
— buildings on the right of way as an element of land damages, see EMINENT DOMAIN, 681.
— circumstantial evidence, see EVIDENCE, 287.
— crops as the measure of damages in actions for flowing lands, see FLOODING LANDS, 97-100.
— — opinions of farmers as to, see WITNESSES, 162.
— — when a question for experts, see WITNESSES, 135.
— deceased's services, proof of, on question of damages, see DEATH BY WRONGFUL ACT, 280.
— easement, opinions as to, see ELEVATED RAILWAYS, 122.
— goods at place of destination, when measure of damages, see CARRIAGE OF MERCHANDISE, 758.
— — concealment by shipper, effect of, see CARRIAGE OF MERCHANDISE, 444.
— — fraud of shipper in concealing, see CARRIAGE OF MERCHANDISE, 199-203.
— — lost, proof of, see CARRIAGE OF MERCHANDISE, 755.
— — shipped, bill of lading as evidence of, see BILLS OF LADING, 19.
— — — notice of, see EXPRESS COMPANIES, 28.
— husband's life, how ascertained in action by wife for his death, see DEATH BY WRONGFUL ACT, 395.
— land, actual sales as evidence of, see EVIDENCE, 271.
— — along the road, evidence of present or future increase in, see EMINENT DOMAIN, 640.
— — before and after construction, difference in, as the measure of damages, see STREETS AND HIGHWAYS, 276-278.
— — — — — taking, difference between, when measure of damages, see EMINENT DOMAIN, 452.
— — for a particular purpose, consideration of, in assessment of damages, see EMINENT DOMAIN, 1243.
Of land, opinions of farmers as to, see WITNESSES, 160.
— — taken as the measure of damages, see STREETS AND HIGHWAYS, 273.
— — — by old company, liability of new company for, see REORGANIZATION, 16.
— — — opinion evidence as to, see EMINENT DOMAIN, 633-636.
— — — with interest, when the measure of damages, see EMINENT DOMAIN, 644.
— — to be taken, allegation of, in petition, see EMINENT DOMAIN, 319.
— live stock, notice to carrier of, see CARRIAGE OF LIVE STOCK, 27.
— lost baggage, competency of plaintiff to prove, see BAGGAGE, 114.
— other land in vicinity of that taken, evidence of, see EMINENT DOMAIN, 599.
— premises, depreciation of, as the measure of damages, see NUISANCE, 38.
— property before and after building of the road as the measure of damages, see EMINENT DOMAIN, 1237.
— — — — — location of roads, opinions as to, see ELEVATED RAILWAYS, 118.
— — declarations of owner as to, see EVIDENCE, 216.
— — depreciation in, as the measure of damages, see STREETS AND HIGHWAYS, 274.
— — destroyed, proof of, on question of damages, see FIRES, 352-358.
— — for special purpose, opinions as to, see ELEVATED RAILWAYS, 120.
— railway passes, evidence of, see EVIDENCE, 7.
— residue of land, diminution of, when measure of damages, see EMINENT DOMAIN, 646.
— services, evidence as to, see EVIDENCE, 8.
— timber cut as an element of land damages, see EMINENT DOMAIN, 723.
— trees, crops, leasehold property, etc., evidence of, see EMINENT DOMAIN, 607, 608.
— whole tract before and after taking, difference in, when measure of damages, see EMINENT DOMAIN, 645.
Opinions of real-estate brokers as to, see ELEVATED RAILWAYS, 119.
— — witnesses on questions of, see WITNESSES, 109-118.
Sale as evidence of, see EVIDENCE, 2.
— of stock at less than face, see STOCK, 53.
Special, for particular use, when measure of damages, see EMINENT DOMAIN, 652.
Tax list as evidence of, see EVIDENCE, 248.
With or without the railroad, difference in, when measure of damages, see EMINENT DOMAIN, 647.

VARIANCE.

Amendments to pleadings to obviate, see PLEADING, **151.**
Between allegation and proof, see DEATH BY WRONGFUL ACT, **152.**
— indictment and proof in prosecution for causing death, see DEATH BY WRONGFUL ACT, **448.**
— pleading and proof, generally, see PLEADING, **125-142.**
— — — — in action against carrier of passengers, see CARRIAGE OF PASSENGERS, **553.**
— — — — — for damages caused by fire, see FIRES, **173, 174.**
— — — — — — injury by negligence of fellow servant, see FELLOW-SERVANTS, **457.**
— — — — — — lost baggage, see BAGGAGE, **118.**
— — — testimony, see WITNESSES, **75.**
How to be objected to on trial, see APPEAL AND ERROR, **96.**
In actions against carriers, see CARRIAGE OF MERCHANDISE, **735.**
— — — — of cattle, see CARRIAGE OF LIVE STOCK, **150.**
— — for assault, see ASSAULT, **14.**
— — — flowing land, see FLOODING LANDS, **71.**
— — — injuries to employés, see EMPLOYÉS, INJURIES TO, **515.**
— — — — — passengers, see STREET RAILWAYS, **440.**
— — on stock subscriptions, see SUBSCRIPTIONS TO STOCK, **113.**
Nonsuit in cases of, see TRIAL, **69.**
When material, see ANIMALS, INJURIES TO, **383, 384.**

VENDOR AND PURCHASER.

Enforcement of vendor's lien under Canadian expropriation proceedings, see EMINENT DOMAIN, **1280.**
— — — — — English compulsory purchase acts, see EMINENT DOMAIN, **1209.**
Of animals, right of, to sue, see ANIMALS, INJURIES TO, **317.**
Requirements of the statute of frauds, see CONTRACTS, **17.**
Rights of purchaser to sue for damages caused by fire, see FIRES, **149-151.**
— — vendor who reserves title until payment, see MORTGAGES, **56.**
Suit to enforce vendor's lien, see EMINENT DOMAIN, **863.**
When vendor entitled to land damages, see EMINENT DOMAIN, **434.**
Which may appeal in condemnation proceedings, see EMINENT DOMAIN, **879.**

1. Validity and construction of agreements to convey.—A public road over land conveyed constitutes an incumbrance; and the same rule applies to a railroad over the land. *Farrington* v. *Tourtelott*, 39 *Fed. Rep.* 738.

The owners agreed to sell certain lands to a company, for a money consideration and others, among which was one that the company should "restore all the switch connections now existing between said second party and said first party, or any of them, and continue to them the use of the same as heretofore." The switch connections referred to were certain tracks leading to coal yards. *Held*, that the agreement gave free switch privileges without any limit as to time. *Pittsburgh, Ft. W. & C. R. Co.* v. *Reno*, 123 *Ill.* 273, 14 *N. E. Rep.* 195, 11 *West. Rep.* 795; *affirming* 22 *Ill. App.* 470.

The effect of a certain instrument executed by plaintiff to the McGregor Western railway company, and of a certain instrument executed by that company to the Milwaukee and St. Paul railway company, and of an act of the legislature, approved March 7, 1867, considered and *held*, not to establish a sale of conveyance or contract to sell the land to which this proceeding relates, within Minn. Laws 1857, Ex. Sess. ch. 1, § 9, or Sp. Laws 1862, ch. 17, § 6. *Minnesota C. R. Co.* v. *Melvin*, 21 *Minn.* 339.—FOLLOWED IN Stevens County *v.* St. Paul, M. & M. R. Co., 29 Am. & Eng. R. Cas. 225, 36 Minn. 467, 31 N. W. Rep. 942. REVIEWED IN Minnesota C. R. Co. *v.* Donaldson, 38 Minn. 115, 35 N. W. Rep. 725.

One S. took an assignment of a contract of purchase of certain railroad lands and rented said lands to a tenant for a share of the crops. The contract of purchase contained a provision that in case the purchaser or her assignees should fail to make the payments thereon, "and each of them punctually and upon the strict terms of times above limited, and likewise perform and complete all and each of her agreements and stipulations aforesaid, strictly and literally without any failure or default, then this contract, so far as it may bind said first party, shall become strictly null and void," etc. *Held:* (1) that the rights of the assignee did not terminate until there was an actual forfeiture; (2) that where the assignee had been in default for a number of years, and had by his tenant sowed a crop before a forfeiture of his estate in the

land, such forfeiture before the crops were ripe did not deprive him of his interest in said crops. *Sornberger* v. *Berggren*, 20 *Neb.* 399, 30 *N. W. Rep.* 413.

2. Requirements of the statute of frauds.—Where the owner of land makes a verbal contract to convey a part thereof to a company for a section house, upon condition that the company will locate a station and erect depot buildings on the owner's other land, and a house on the parcel donated, and such condition has been performed by the company, and possession taken by the original owner's consent, such performance will take the case out of the statute of frauds, and a specific performance will be decreed. *Chicago, B. & Q. R. Co.* v. *Boyd*, 118 *Ill.* 73, 7 *N. E. Rep.* 487.

A parol agreement, reserving to the grantor the right to use the water of a stream which runs across the land granted for the purpose of a road, is not void under the statute of frauds; the right to the water remaining in the grantor, he is, by the agreement, but confirmed in his existing legal right. *Smith* v. *Holloway*, 46 *Am. & Eng. R. Cas.* 495, 124 *Ind.* 329, 24 *N. E. Rep.* 886.

Under an oral agreement that defendant would convey to plaintiff its interest in certain real estate if plaintiff would procure and pay in consideration therefor a certain specified amount in the warrants of a county, the warrants were tendered to defendant's agent, according to the terms of the agreement, whereupon defendant refused to convey. *Held*, that the contract was within the statute of frauds, and specific performance should not be decreed. *Wilson* v. *Chicago, R. I. & P. R. Co.*, 41 *Iowa* 443.

The making of substantial improvements, pursuant to an oral agreement to convey the real estate improved, by a vendee in possession prior to and at the time of the agreement is such a part performance as takes the agreement out of the statute of frauds. *Pfiffner* v. *Stillwater & St. P. R. Co.*, 23 *Minn.* 343.

3. English agreements.—Where a landowner agrees that he will accede to a bill in parliament for the making of a railway, and in consideration therefor the promoters agree that in the event of the bill passing the company shall pay him for the land required at a certain rate per acre and £3000 in full compensation for the general damage which the line may do, the promoters thereby bind themselves that the company shall pay the £3000 on the passing of the act, although the railway is not constructed nor any actual damage done. *Bland* v. *Crowley*, 6 *Railw. Cas.* 756, 6 *Ex.* 522.

Where a company which has a bill pending in parliament authorizing the construction of a branch line contracts with a landowner for the purchase of land, the money to be paid when the company shall have "begun to execute the branch," the company after it obtains the act is not bound to execute or begin to execute the branch; and if it does not do so, its obligation to pay the purchase money does not arise. *Edinburgh, P. & D. R. Co.* v. *Philip*, 2 *Macq. H. L. Cas.* 514, 3 *Jur. N. S.* 249.

Where a company purchasing land has agreed to procure a supply of water as good as that cut off by constructing the line, it is only bound to do that which may reasonably be expected to insure a sufficient supply, and need not do whatever may be necessary from time to time to secure that result. *In re Gray*, 44 *L. T.* 567.

The promoters of a railway may lawfully contract with landowners for the purchase at a fixed rate, in the event of the bill passing parliament, of such land as they may require; such an agreement is not void on the ground of the want of mutuality. *Bedford & C. R. Co.* v. *Stanley*, 32 *L. J. Ch.* 60, 2 *Johns. & H.* 746.

A company promoting a bill for the extension of its line, which extended line would pass through the lands of plaintiff, agreed that "in event of the bill being passed in the present session of parliament, the company shall, before they shall enter upon any part of the lands of Sir T. R. G., pay to him, his heirs, or assigns, £4900 purchase money for any portion of his lands, not exceeding forty-three acres, which the company may, under the powers of their act, require and take for the purposes of this undertaking. In addition to purchase money the company shall pay to him, his heirs, or assigns, before they shall enter upon any part of the land, £7100 as landlord's compensation for the damage arising to his estate by the severance thereof, in respect of the lands, not exceeding forty-three acres, to be taken by them." *Held*, that the company was not bound to pay either of these sums unless they entered upon some part of the lands. *Gage* v. *Newmarket R. Co.*, 18 *Q. B.* 457, 16 *Jur.* 1136, 21 *L. J. Q. B.* 398, 7 *Railw. Cas.* 168.

Under an agreement between a company and a landowner for the purchase at a certain price per acre of such land as the company may require, the court will accept as conclusive the evidence of the company's engineer as to the quantity of land required if his statement has a reasonable appearance of accuracy. *Kemp* v. *South Eastern R. Co.*, *L. R.* 7 *Ch.* 364, 41 *L. J. Ch.* 404, 20 *W. R.* 306, 26 *L. T.* 110.

Where the projectors of a company agree with a landowner that the company will pay to him a certain sum for his land and a certain sum for damage, such contract is conditional upon the making of the railway, and if the company, upon being incorporated, is not able to raise sufficient funds to construct the road, the landowner is not entitled to the moneys payable under such agreement. *Preston* v. *Liverpool, M. & N.-upon-T. J. R. Co.*, 5 *H. L. Cas.* 605, 2 *Jur. N. S.* 241, 25 *L. J. Ch.* 421.

4. Rights of purchasers—Notice.—The actual possession by a company of a tract of land, under a verbal contract for a conveyance to be made upon the performance of certain conditions, is notice to any subsequent purchaser from the party with whom the verbal contract was made of all such rights as the company may have in the premises. *Chicago, B. & Q. R. Co.* v. *Boyd*, 118 *Ill.* 73, 7 *N. E. Rep.* 487.

Where a company has performed its part of a contract for a right of way over a tract of land, and has entered into possession of the same with the owner's consent, the company will become the equitable owner of the right of way, and its continued possession and that of its successor will be notice of its equitable rights to all subsequent purchasers of the land from the original owner. *Chicago & E. I. R. Co.* v. *Hay*, 119 *Ill.* 493, 10 *N. E. Rep.* 29.

Where a company, in consideration of a license to change the course of a stream, agrees with the owner of a mill to which water power is furnished by said stream to dig a new channel and to construct certain levees, and, after a breach on the part of the company in failing to make the channel and the levees in the manner agreed upon, the mill is conveyed to another, the vendee cannot maintain an action against the company on the agreement. *Junction R. Co.* v. *Sayers*, 28 *Ind.* 318.—DISTINGUISHED IN Midland R. Co. *v.* Fisher, 43 Am. & Eng. R. Cas. 578, 125 Ind. 19; Louisville & N. R. Co. *v.* Filbern, 6 Bush (Ky.) 574.

Where a vendee knows that a railroad track has been graded over land at the time of a purchase, this is sufficient to put him upon inquiry. *Paul* v. *Connersville & N. J. R. Co.*, 51 *Ind.* 527. *Jeffersonville, M. & I. R. Co.* v. *Oyler*, 60 *Ind.* 383.

A prospective purchaser of land upon which a grade for a railroad is constructed is warned thereby that there is some claim of right, and if he fails to make proper inquiry he buys at his peril. *Indiana, B. & W. R. Co.* v. *McBroom*, 33 *Am. & Eng. R. Cas.* 90, 114 *Ind.* 198, 15 *N. E. Rep.* 831.

Premises adjacent to a railroad were conveyed to plaintiff "subject to any right of way said railroad may own over the same." The company had previously become entitled to thirty-five feet in width from the centre line of its track as right of way, but there was nothing of record showing the extent of such easement. The railroad was in operation at the time, and a fence had been constructed on one side near the track. *Held*, that plaintiff was advised by the presence of the railroad and the recitals in the conveyance that the company claimed a right of way over the premises, and by inquiry could have learned the extent of that right; and that she must be regarded as having notice of all the facts which due and timely inquiry would have elicited. *Slocumb* v. *Chicago, B. & Q. R. Co.*, 57 *Iowa* 675, 11 *N. W. Rep.* 641.

The purchaser of lots abutting upon a street is chargeable with notice of the rights of a company arising from the fact that it is in possession of that part of the street upon which its track is laid. *Merchants' Union Barb-Wire Co.* v. *Chicago, R. I. & P. R. Co.*, 43 *Am. & Eng. R. Cas.* 121, 79 *Iowa* 613, 44 *N. W. Rep.* 900.

When the grantee has knowledge that the grantor was a director in a corporation at the time he became the purchaser of a railroad belonging to the corporation, at a judicial sale thereof, such grantee is put upon inquiry as to the character of the title to the road thus acquired by such director. The grantee in such case is not an innocent purchaser. *Covington & L. R. Co.* v. *Bowler*, 9 *Bush* (*Ky.*) 468.

A purchaser is bound to inquire into the title of his vendor, and is affected with notice of any equities which appear upon the same. And, in equity, covenants relat-

ing to land or its mode of use or enjoyment are frequently enforced against grantees with notice, though there is no privity of estate, and they are not such as, in strict legal contemplation, run with the land. But they must be such as relate to or concern the land or its use. It is not enough that a covenant affects the use of the land or its mode of enjoyment in a collateral way. *Kettle River R. Co.* v. *Eastern R. Co.*, 40 *Am. & Eng. R. Cas.* 449, 41 *Minn.* 461, 6 *L. R. A.* 111, 43 *N. W. Rep.* 469.

One purchasing with knowledge or with the means of knowledge that a company claims an entire strip used as a right of way will purchase subject to such claim. *Hargis* v. *Kansas City, C. & S. R. Co.*, 43 *Am. & Eng. R. Cas.* 599, 100 *Mo.* 210, 13 *S. W. Rep.* 680.

A purchaser is bound to take notice of all liens and encumbrances shown to exist by his vendor's title deeds, though they are not recorded and he has never seen them, provided he claims under them and cannot make title without them. *Poage* v. *Wabash, St. L. & P. R. Co.*, 24 *Mo. App.* 199.

Where a subsequent purchaser has actual notice that the property in question is encumbered or affected, he is charged constructively with notice of all the facts and instruments to the knowledge of which he would have been led by an inquiry into the encumbrance or other circumstance affecting the property of which he had notice. *Crumlish* v. *Shenandoah Valley R. Co.*, 38 *Am. & Eng. R. Cas.* 577, 32 *W. Va.* 244, 9 *S. E. Rep.* 180.

5. Vendor's lien.* — An individual who has purchased land and paid for it and is entitled to a deed, and who sells it to a railroad company and causes the conveyance to be made directly to the company, has a vendor's lien on the land for the purchase money. *Loomis* v. *Davenport & St. P. R. Co.*, 3 *McCrary* (*U. S.*) 489, 17 *Fed. Rep.* 301.—DISTINGUISHING Pierce *v.* Milwaukee & St. P. R. Co., 24 Wis. 551.

A vendor of real estate has an equitable lien thereon for the unpaid purchase money, although he conveys it by an absolute deed; but he may waive the lien expressly, or by any act which manifests an intention to do so. The acceptance of personal security for the purchase money other than the note of the vendee is *prima facie* evidence of such intention. Where land is conveyed to a company upon the promise of third parties to pay the consideration if the company will locate a depot thereon, the vendor's lien as against the company is waived. *Springfield & M. R. Co.* v. *Stewart*, 51 *Ark.* 285, 10 *S. W. Rep.* 767.

The vendor's lien applies to lands the title to which has been transferred by operation of law, under railroad and other corporation charters, as well as to voluntary sales by the party himself. *Mims* v. *Macon & W. R. Co.*, 3 *Ga.* 333.

The lien of a vendor of real estate attaches for the purchase money against the vendee and all persons claiming as volunteers or with notice under him. *Mims* v. *Macon & W. R. Co.*, 3 *Ga.* 333.

There is no fixed rule as to what amounts to a waiver of such liens; each case must be determined by its own facts. The taking of security for the purchase money is not conclusive evidence that the lien is waived. The lien is not extinguished by the acceptance of the certificate of deposit of the cashier of a corporation for the valuation of land, where the money is not paid when called for, owing to the insolvency of the corporation. *Mims* v. *Macon & W. R. Co.*, 3 *Ga.* 333.

A written contract for the sale of land stipulated that the vendee should cut the timber growing upon it into ties, upon which the vendor should have a lien to the extent of the purchase price of the land. The vendee sold to a company whose agent received and paid for the ties with full notice of plaintiff's lien. *Held*, that the company was bound by its agent and bought the ties subject to the rights of the lien-holder. *Slater* v. *Irwin*, 38 *Iowa* 261.

A company being bound to convey $50,000 worth of real estate to one of its contractors, its president agreed to let the company have a lot of land belonging to him to be so conveyed with other tracts, in fulfilment of its said obligation, the company agreeing to pay to him a stipulated price therefor by the conveyance of other real estate at some future time. The president then executed to the contractor, in the name of the company, a contract for the conveyance, on demand and by clear title, of the lot and tract aforesaid, without any intimation that he retained any claim upon his lot so to be conveyed. *Held*, that the president was bound, as between him and the contractor, to convey the lot,

*See also MORTGAGES, **93, 129.**

and could not set up any lien for the purchase money, although the contractor knew of his ownership and his contract with the company. *Corwin* v. *Collett*, 16 *Ohio St.* 289.

It seems that a lien equivalent to a vendor's lien exists to secure the purchase money for a right of way when not paid. *Howe* v. *Harding*, 42 *Am. & Eng. R. Cas.* 1, 76 *Tex.* 17, 13 *S. W. Rep.* 41.—APPROVING McAulay *v.* Western Vt. R. Co., 33 Vt. 322. REVIEWING Provolt *v.* Chicago, R. I. & P. R. Co., 57 Mo. 263.

Where a company has agreed, in consideration of a grant of right of way, to erect and maintain a water tank upon the lands of the proprietor, to be supplied with water from an elevated spring thereon, which shall be used by the company and for which the owner shall be paid the compensation usually payable for such a privilege, a lien for the payment of such sum exists upon the right of way granted, and an action will lie against the receiver of the company, under Tex. Gen. Laws 1887, p. 121, § 15, that "all judgments, claims, or causes of action when determined, existing against any corporation at the time of the appointment of a receiver, shall be paid out of the earnings of such corporation while in the hands of the receiver * * * and the same shall be a lien upon such earnings." *Howe* v. *Harding*, 42 *Am. & Eng. R. Cas.* 1, 76 *Tex.* 17, 13 *S. W. Rep.* 41.

6. Remedies of the vendor. — (1) *American decisions.* — The existence of an easement in favor of a railroad which excludes the owner from the beneficial use and enjoyment of the land constitutes such an incumbrance as will support a counterclaim against a demand on a note given for the purchase money, even though the grantee knew of the existence of such easement when he took the conveyance. *Quick* v. *Taylor*, 113 *Ind.* 540, 16 *N. E. Rep.* 588.

In an action against the defendant town for the price of land sold to it for a street, the defense was that the purchase was unlawful, on the ground that it was in fact made for the benefit of a railroad company which desired the ground for a right of way, and that plaintiff and others combined to have the land procured for the company, but ostensibly for the town. *Held*, that evidence was properly admitted tending to show that the company was, at the time of the purchase, trying to get the right of way, and the record of condemnation proceedings was competent for that purpose, though the awards had not been paid. *Strahan* v. *Malvern*, 77 *Iowa* 454, 42 *N. W. Rep.* 369.

Where land is conveyed to a company on condition that it shall revert to the grantor on the abandonment of the road, and the road is sold under mortgages to the state, and is carried to completion by the state and by new companies chartered for the purpose, the grantor is not entitled to a reconveyance of the land. *Harrison* v. *Lexington & F. R. Co.*, 9 *B. Mon.* (*Ky.*) 470.

Where, in a contract for the sale of land on credit, payment is to be made in instalments on days definitely fixed, and the time is essential, with penalty of forfeiture for want of punctuality, the mere receipt of one or more payments overdue does not of itself operate as a waiver of the right to declare a forfeiture for non-payment of instalments subsequently falling due. The simple act of receiving a payment after the day when the payee was bound to accept it, without more, is no excuse for laches in making future payments. *Lent* v. *Burlington & M. R. R. Co.*, 11 *Neb.* 201, 8 *N. W. Rep.* 431. — FOLLOWING Reynolds *v.* Burlington & M. R. R. Co., 11 Neb. 186.

When the occupying claimant is a vendee of land under a contract providing for a forfeiture of all his improvements in case of non-performance on his part, he is not, in case of eviction at the suit of the vendor, entitled to the benefits of the act for the relief of occupying claimants. *Vance* v. *Burlington & M. R. R. Co.*, 10 *Am. & Eng. R. Cas.* 623, 12 *Neb.* 285, 11 *N. W. Rep.* 334.

Plaintiff's intestate conveyed a railway to defendant and agreed to accept as part of the purchase money bonds secured by a mortgage on the road. *Held*, that plaintiff was entitled (the bonds never having been given) to recover the full par value of the bonds, though they might be below par in the market. *Texas Western R. Co.* v. *Gentry*, 33 *Am. & Eng. R. Cas.* 46, 69 *Tex.* 625, 8 *S. W. Rep.* 98.

(2) *English decisions.* — A person who agrees to sell his land to a company purchasing under a statutory power to buy lands for extraordinary purposes is not bound to see that such land is strictly required for such purposes; if he acts *bona fide* in the matter, he may enforce payment of the contract, although the company has misapplied its funds. *Eastern Counties R. Co.* v. *Hawkes*, 5 *H. L. Cas.* 331, 24 *L. J. Ch.* 601.

Where a company has purchased land in consideration of a rent charge under an agreement authorizing the grantor to enter in default of payment, the grantor may enter as against a receiver of the undertaking appointed by the court. *Forster* v. *Manchester & M. R. Co.*, 49 *L. J. Ch. D.* 454.

Where a company, after getting its act through parliament, determines to abstain from constructing the line authorized, it cannot be compelled specifically to perform an agreement for the purchase of land which it had agreed to buy for the purposes of the line. *Scottish North-Eastern R. Co.* v. *Stewart*, 3 *Macq. H. L. Cas.* 382, 5 *Jur. N. S.* 607.

If a company exercises its compulsory powers of taking land, it cannot afterwards enforce an agreement between the landowner and the promoters of the company for the purchase of the land entered into before the company's bill was passed by parliament. *Bedford & C. R. Co.* v. *Stanley*, 32 *L. J. Ch.* 60, 2 *Johns. & H.* 746.

7. —— of the vendee.—If the owner of land sells it, giving a contract for a deed of general warranty to be made on final payment, and between the sale and the making of the deed a portion of the premises is condemned for a railway track, the incumbrance thus created is not one for which damages can be recovered in an action on the covenants in the deed. *Stevenson* v. *Loehr*, 57 *Ill.* 509.

A company purchased land to which another party claimed a right of redemption from a trustee's sale, under which the vendor held. He agreed that if the claimant should sustain his right to redeem, he would refund the purchase money with interest. *Held*, that the vendor was not entitled to be released from the agreement to pay interest, the property having been redeemed through a decree of court. *Union Mut. L. Ins. Co.* v. *Chicago & W. I. R. Co.*, 44 *Ill. App.* 88.

A purchaser of real estate holding it by contract and being in possession may recover damages for injury thereto. *Omaha & R. V. R. Co.* v. *Brown*, 44 *Am. & Eng. R. Cas.* 475, 29 *Neb.* 492, 46 *N. W. Rep.* 39. —FOLLOWING Hastings & G. I. R. Co. *v.* Ingalls, 15 Neb. 123, 16 N. W. Rep. 762.

Promoters of a railway may lawfully contract for land that will be necessary for the proposed line, and when the bill has passed parliament, the contract may be enforced. *Eastern Counties R. Co.* v. *Hawkes*, 5 *H. L. Cas.* 331, 24 *L. J. Ch.* 601.

8. Rescission.—A condition precedent in a subscription of land to a corporation is waived when a subscriber, before any act of the corporation indicative of an intention to comply with the condition, executes his deed absolute in form, and receives the stock of the corporation therefor. *Parks* v. *Evansville, I. & C. S. L. R. Co.*, 23 *Ind.* 567.

Where a corporation has, by false representations of its agent, induced a subscriber to convey his land and to receive his stock certificates before the condition of his subscription has been performed by the company, and the corporation has conveyed it to third parties who have full knowledge of the condition and its non-performance, no action for rescission can be maintained against the company or its assignees until a tender of the stock certificates has been made to it, conditioned upon its procuring a deed of reconveyance of the land to the subscriber. *Parks* v. *Evansville, I. & C. S. L. R. Co.*, 23 *Ind.* 567.

Where prompt action has been taken by a party asking rescission of a contract, he must not only aver ignorance of the fraud, or of the failure to comply with the terms of the agreement, but must show that such want of knowledge was not the result of his failure to use the means of information within his reach. *Parks* v. *Evansville, I. & C. S. L. R. Co.*, 23 *Ind.* 567.—DISTINGUISHING Thurston *v.* Blanchard, 22 Pick. (Mass.) 18; Armstrong *v.* Tuffts, 6 Barb. (N. Y.) 432.

VENTILATING APPARATUS.

Patents for, see PATENTS FOR INVENTIONS, **51.**

VENUE.

How laid in justice's court, see ANIMALS, INJURIES TO, **617.**

— — — **pleading**, see PLEADING, **8.**

— — — **stock-killing cases**, see ANIMALS, INJURIES TO, **329.**

In suits against foreign corporations, see FOREIGN CORPORATIONS, **22.**

Of actions for causing death, see DEATH BY WRONGFUL ACT, **105–107.**

— — — **conversion by carrier**, see CARRIAGE OF MERCHANDISE, **306.**

— — — **trespass**, see TRESPASS, **7, 22.**

— **condemnation proceedings**, see EMINENT DOMAIN, **240.**

— **jury trial in assessment of land damages**, see EMINENT DOMAIN, **546.**

— **local and transitory actions**, see ACTIONS, **6, 7.**

Proper place of trial, and how changed, see TRIAL, 5-19.

VERDICT.

Against some one of defendants, see CARRIAGE OF MERCHANDISE, 696.
Assessing land damages, requisites of, as respects fencing, see EMINENT DOMAIN, 697.
Assignability of, see ASSIGNMENT, 9.
Death of plaintiff after, as ground of abatement, see ABATEMENT, 5.
Defective allegations not cured by, see ANIMALS, INJURIES TO, 369.
Directing for contributory negligence, see CONTRIBUTORY NEGLIGENCE, 122.
— generally, see TRIAL, 182-185.
— in actions for injuries caused by negligence of fellow servants, see FELLOW-SERVANTS, 505.
Direction of, in actions for causing death, see DEATH BY WRONGFUL ACT, 330, 347.
— — — — — damages caused by fire, see FIRES, 307.
— — on assessment of land damages, see EMINENT DOMAIN, 594.
— — when proper, see ANIMALS, INJURIES TO, 577.
Duty of court to render judgment on, see EMINENT DOMAIN, 842.
Erroneous, when ground for reversal, see EMINENT DOMAIN, 900.
Errors cured by, see APPEAL AND ERROR, 87; PLEADING, 180.
For damages in condemnation proceedings, generally, see EMINENT DOMAIN, 817-841.
— land damages, interest on, see EMINENT DOMAIN, 763-767.
Granting amendments after, see PLEADING, 158.
In actions against carriers of cattle, see CARRIAGE OF LIVE STOCK, 155.
— — for assault, see ASSAULT, 16.
— — — causing death, see DEATH BY WRONGFUL ACT, 358-362.
— — — injuries caused by fire, see FIRES, 363, 364.
— — — killing stock, interpretation of, see ANIMALS, INJURIES TO, 555-557.
— — on construction contracts, see CONSTRUCTION OF RAILWAYS, 117.
— condemnation proceedings, objections to, how taken, see EMINENT DOMAIN, 916.
Informality in, not ground for reversal, see APPEAL AND ERROR, 88.
Irregularities and defects in, as ground for new trial, see NEW TRIAL, 16-27.
Irregular mode of arrival at, as ground for new trial, see NEW TRIAL, 15.
Of jury to assess damages in condemnation proceedings, see EMINENT DOMAIN, 817-841.
On foreclosure of mechanic's lien, see LIENS, 42.
— trial, generally, see TRIAL, 188-200.
Reversal for errors in, see APPEAL AND ERROR, 55.
Setting aside as excessive, see NEW TRIAL, 28-86.
— — for inadequacy, see APPEAL AND ERROR, 127.
Sufficiency of evidence to sustain, see EVIDENCE, 289.
When court may direct, see NEGLIGENCE, 59.
— excessive in actions for causing death, see DEATH BY WRONGFUL ACT, 427-436.
— interest should be included in, see EMINENT DOMAIN, 762.
— properly directed for plaintiff's contributory negligence, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 219.

VERIFICATION.

Of petition for railway aid, see MUNICIPAL AND LOCAL AID, 90.
— — — removal of cause, see REMOVAL OF CAUSES, 51.
— — in condemnation proceedings, see CROSSING OF RAILROADS, 31; EMINENT DOMAIN, 308.
— replication, see PLEADING, 75.

VERMONT.

Constitutionality of statutes of, as to municipal aid for railways, see MUNICIPAL AND LOCAL AID, 51.
— — tax laws of, see TAXATION, 48.
Laying out streets across railways under statutes of, see CROSSING OF STREETS AND HIGHWAYS, 49.
Liability of company to laborers employed by contractors in, see CONSTRUCTION OF RAILWAYS, 95.
Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, 36.
Statute of, regulating liability for injuries caused by fire, see FIRES, 16.
Statutes of, relative to intersection of railways, see CROSSING OF RAILROADS, 15.
Statutory regulation of grade crossings in, see CROSSING OF STREETS AND HIGHWAYS, 94.

VESSELS.

Rights of, in passing drawbridges, see BRIDGES, ETC., 75-81.

Statement of cause of action in actions for injuries to, see PLEADING, 28.

VESTED RIGHTS.

Statutes interfering with, see STATUTES, 11.

VESTIBULE CARS.

Patents for connection of, see PATENTS FOR INVENTIONS, 34.

VIADUCTS.

Authority to construct, ownership, etc., see BRIDGES, ETC., 43-45.
Compelling construction of, see MANDAMUS, 12.
Ordinances requiring construction of, see STREETS AND HIGHWAYS, 311.
Over railways at street crossings, see CROSSING OF STREETS AND HIGHWAYS, 63.
Taking land for, when for a public use, see EMINENT DOMAIN, 183.
See also BRIDGES, VIADUCTS.

VIBRATION.

As an element of damages, see STREETS AND HIGHWAYS, 287.
— — — — land damages, see EMINENT DOMAIN, 720.
Evidence of damage by, in eminent domain proceedings, see EMINENT DOMAIN, 612.
Measure of damages for, see EMINENT DOMAIN, 1197.
Of buildings, consequential damages for, see ELEVATED RAILWAYS, 162.

VICE-PRESIDENT.

Rights, powers, and duties of, see OFFICERS, 17.

VICE-PRINCIPAL.

Allegation of negligence of, see FELLOW-SERVANTS, 456.
Assumption of extra risk in obeying orders of, see EMPLOYÉS, INJURIES TO, 284.
Concurring negligence of, liability for, see FELLOW-SERVANTS, 72.
Declarations of, as proof of incompetency of servants, see FELLOW-SERVANTS, 480.
Distinction between fellow-servants and, see FELLOW-SERVANTS, 201.
Notice to, of incompetency of servants, see FELLOW-SERVANTS, 155.
Whether negligence of, was cause of injury a question of fact, see FELLOW-SERVANTS, 516.
Who are, whether question of law or fact, see FELLOW-SERVANTS, 514.
Who deemed to be, see FELLOW-SERVANTS, 210-221.

VIEW.

By jury in stock-killing cases, see ANIMALS, INJURIES TO, 530.
Duty to give signal in cases of obstruction of, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 97.
Effect of obstruction of, on duty to look and listen, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 286-307.
Knowledge gained by, instructions to jury as to use of, see EMINENT DOMAIN, 583.
Of locus in quo by jurors, see TRIAL, 45-48.
— — — — — — irregularities in, as ground for new trial, see NEW TRIAL, 14.
— — — — in criminal cases, see CRIMINAL LAW, 8.
— premises by commissioners to assess damages, see EMINENT DOMAIN, 511.
— — — jury on assessment of land damages, see EMINENT DOMAIN, 564-571.
— — irregularities in, as ground for setting aside verdict, see EMINENT DOMAIN, 833.
— track, effect of obstruction to, on defense of contributory negligence, see DEATH BY WRONGFUL ACT, 195.

VIEWERS.

Assessment of land damages by, see EMINENT DOMAIN, 473-485.
Of land damages, qualifications of, see EMINENT DOMAIN, 476.

VILLAGES.

Degree of care required in passing through, see TRESPASSERS, INJURIES TO, 27.
Duty to fence track in, see ANIMALS, INJURIES TO, 99.
— — give signals at crossings in, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 94.
— — keep lookout in running through, see TRESPASSERS, INJURIES TO, 49.
Injuries to animals in, see ANIMALS, INJURIES TO, 203-212.
Liability for excessive speed at crossings in, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 177.
Location of stations in, see STATIONS AND DEPOTS, 18, 20.
Power of legislature to authorize aid to railways by, see MUNICIPAL AND LOCAL AID, 9.

VINDICTIVE DAMAGES.

For ejection of passenger from train, see EJECTION OF PASSENGERS, 112-119.

For injuries caused by derailment, see DERAILMENT, 7.
In actions for false imprisonment, see FALSE IMPRISONMENT, 20.
— — — injuries to employés, see EMPLOYÉS, INJURIES TO, 754.
— condemnation proceedings, see EMINENT DOMAIN, 672.
— trespass to land, see TRESPASS, 18.
When recoverable against carrier of passengers, see CARRIAGE OF PASSENGERS, 634–639.

VIOLATION.

Of carrier's rules, as a defense to accident insurance policy, see ACCIDENT INSURANCE, 11.
— injunctions, see INJUNCTION, 55–62.
— internal revenue laws, penalties for, see REVENUE, 9.

VIRGINIA.

Aid to railroads by the state, see STATE AID, 37.
Assessment and levy of taxes in, see TAXATION, 284.
Constitutionality of statutes of, as to municipal aid for railways, see MUNICIPAL AND LOCAL AID, 52.
— — tax laws of, see TAXATION, 49.
Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, 755.
Occupation of streets by steam roads under legislative grants of, see STREETS AND HIGHWAYS, 57.
Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, 37.
Plaintiff's pleadings need not negative contributory negligence in, see CONTRIBUTORY NEGLIGENCE, 67.
Rule as to imputed negligence in, see IMPUTED NEGLIGENCE, 23.

VISITORS.

To premises, when deemed licensees, see LICENSEES, INJURIES TO, 4.

VIS MAJOR.

As a defense to carrier of merchandise, see CARRIAGE OF MERCHANDISE, 19.
When excuses carrier of passengers, see CARRIAGE OF PASSENGERS, 158.

VOIR DIRE.

Examination of jurors on, see TRIAL, 35.

VOLUNTARY BANKRUPTCY.

See BANKRUPTCY, 3.

VOLUNTARY DELIVERY.

Extinguishes lien for charges, see CARRIAGE OF MERCHANDISE, 389.

VOLUNTARY EXPOSURE.

As a defense to action on insurance policy, see ACCIDENT INSURANCE, 10.

VOLUNTARY NONSUIT.

Effect of, see TRIAL, 82.

VOLUNTARY PAYMENTS.

What are, and right to recover back, see PAYMENT, 5.
— is, see TAXATION, 338, 339.

VOLUNTEERS.

Contributory negligence of, see EMPLOYÉS, INJURIES TO, 340.
Fellow-servant rule as applied to, see FELLOW-SERVANTS, 10.
Liability for injuries to, see EMPLOYÉS, INJURIES TO, 492.
Risks assumed by, see EMPLOYÉS, INJURIES TO, 203.
When deemed fellow-servants with other employés, see FELLOW-SERVANTS, 209.

VOTERS.

Bribery of, see MUNICIPAL AND LOCAL AID, 149.
Registration of, on election on question of aid to railway, see MUNICIPAL AND LOCAL AID, 120.

VOTING.

For directors, see DIRECTORS, ETC., 5–7.
Right to vote at stockholders' meeting, see STOCKHOLDERS, 14–20.

VULGAR LANGUAGE.

Expulsion of passenger for, see STREET RAILWAYS, 523, 524.

W

WAGERS.

Illegality of, see CONTRACTS, 54.

WAGES.

Advances to pay, protection of, see MORTGAGES, 89.
Claims for, when prior to mortgage, see MORTGAGES, 100.
Deduction from, as contribution to sick fund, see RELIEF ASSOCIATIONS, 8.
Employé on car to receive, when deemed passenger, see CARRIAGE OF PASSENGERS, 58.
Excessive damages for loss of, see EMPLOYÉS, INJURIES TO, 779.
Loss of, as an element of damages, see CARRIAGE OF PASSENGERS, 629.
Of employés, see EMPLOYÉS, 10-21.
— — liability of receiver for, see RECEIVERS, 66.
— — payment of, by receiver, see RECEIVERS, 92.
— — what may be set off against, see SET-OFF, ETC., 6.
Priority of mortgage over claims for, see MORTGAGES, 117.
When exempt from attachment, see ATTACHMENT, ETC., 36-39.
— may be reached in attachment, see ATTACHMENT, ETC., 34.

WAGON.

Collision between trolley car and, see ELECTRIC RAILWAYS, 28.
Contributory negligence of driver of, see ELECTRIC RAILWAYS, 36.
Duty of driver of, to turn off track, see ELECTRIC RAILWAYS, 35.

WAITING ROOM.

At station, what is, see STATIONS AND DEPOTS, 2.

WAIVER.

By city of irregularities in issue of bonds, see MUNICIPAL AND LOCAL AID, 341.
— consignee of irregular delivery, see EXPRESS COMPANIES, 51.
— employé of duty of company as respects safety of machinery, see EMPLOYÉS, INJURIES TO, 101.
— owner of prepayment of damages, see EMINENT DOMAIN, 1022.
Of breach of special contract, see CARRIAGE OF MERCHANDISE, 410.
— carrier's rules, see CARRIAGE OF PASSENGERS, 69.
— company's liability as condition precedent to receiving freight, see LIMITATION OF LIABILITY, 17.
— conditions as to prepayment of land damages, see EMINENT DOMAIN, 419-423.
— — in subscription, see SUBSCRIPTIONS TO STOCK, 198.
— — — subscriptions in aid of railway, see MUNICIPAL AND LOCAL AID, 229.
— — requiring identification of passenger, see TICKETS AND FARES, 81.
— — that stock must be all subscribed before assessment, see SUBSCRIPTIONS TO STOCK, 52.
— defective marking by receipt of goods, see CARRIAGE OF MERCHANDISE, 191, 192.
— — service of process by appearance or otherwise, see PROCESS, 48.
— defects in car, see CARRIAGE OF LIVE STOCK, 9.
— — — pleadings, see PLEADING, 175-178.
— defenses in actions on subscription to stock, see SUBSCRIPTIONS TO STOCK, 174-177.
— erroneous refusal to direct verdict, see TRIAL, 185.
— errors by appealing from justice, see JUSTICE OF THE PEACE, 20.
— forfeiture by public agent, see AGENCY, 118.
— — — statute, see DISSOLUTION, ETC., 10.
— — for breach of condition in deed, see DEEDS, 37.
— — — failure to complete railway within time limited, see STREET RAILWAYS, 119.
— — of construction contracts, see CONSTRUCTION OF RAILWAYS, 34.
— grounds of challenge of jurors, see EMINENT DOMAIN, 544.
— — — forfeiture of franchise, see CHARTERS, 90.
— irregularities, effect of appearance as a, see EMINENT DOMAIN, 956.
— — in assessment of damages by jury, see EMINENT DOMAIN, 1189.
— — on view of premises by jury, see EMINENT DOMAIN, 571.
— lien for charges, see CARRIAGE OF MERCHANDISE, 391.
— — on stock by creditor, see STOCKHOLDERS, 69.

Of limitation as to amount of loss by payment of larger sum, see BILLS OF LADING, **87.**
— — **in ticket by checking baggage**, see TICKETS AND FARES, **86.**
— **mechanic's lien**, see LIENS, **29, 30.**
— **notice of arrival of goods**, see BILLS OF LADING, **101.**
— — — **assessment of stock**, see SUBSCRIPTIONS TO STOCK, **72.**
— — — **claim for damages**, see CARRIAGE OF MERCHANDISE, **423.**
— — — — — **loss**, see CARRIAGE OF MERCHANDISE, **490.**
— — — **condemnation proceedings**, see EMINENT DOMAIN, **299, 300.**
— **objections**, see TRIAL, **56.**
— — **by going on with hearing of condemnation proceedings**, see EMINENT DOMAIN, **361.**
— — **on the trial**, see APPEAL AND ERROR, **104**; EMINENT DOMAIN, **919.**
— — **to evidence**, see APPEAL AND ERROR, **67.**
— **original trespass by reception of award**, see EMINENT DOMAIN, **1076.**
— **performance of condition in subscription**, see SUBSCRIPTIONS TO STOCK, **208.**
— **privileged communications**, see WITNESSES, **93.**
— **proof of loss**, see FIRE INSURANCE, **8.**
— **right of action against carrier of passengers**, see CARRIAGE OF PASSENGERS, **529.**
— — — — **for damages caused by delay**, see CARRIAGE OF MERCHANDISE, **144.**
— — — — — **wrong delivery**, see CARRIAGE OF MERCHANDISE, **280.**
— — — **appeal in condemnation proceedings**, see EMINENT DOMAIN, **880.**
— — — **trial by jury**, see TRIAL, **4.**
— — **to appeal in foreclosure suits**, see MORTGAGES, **298.**
— — — **assessment of damages for land taken**, see EMINENT DOMAIN, **1230.**
— — — **full compensation for carrying the mail**, see CARRIAGE OF MAILS, **11.**
— — — **jury trial**, see EMINENT DOMAIN, **524, 525.**
— — — **move to vacate foreclosure sale**, see MORTGAGES, **292.**
— — — **remove cause by applying too late**, see REMOVAL OF CAUSES, **45.**
— **rule for government of employés**, see EMPLOYÉS, INJURIES TO, **430.**
— — **of company by conductor**, see EMPLOYÉS, INJURIES TO, **26.**
— — **requiring production of ticket**, see TICKETS AND FARES, **34.**
— **statutory requirements as to sufficiency of fences**, see ANIMALS, INJURIES TO, **113.**
Of statutory requirements to fence, by landowner, see FENCES, **39.**
— **strict performance of contracts**, see CONTRACTS, **75.**
— — — — — **for railway construction**, see CONSTRUCTION OF RAILWAYS, **29.**

WAR.

Claims for goods seized during, see CLAIMS AGAINST UNITED STATES, **9.**
— — **rebuilding bridges destroyed during**, see CLAIMS AGAINST UNITED STATES, **11.**
Effect of, on compensation for carrying the mail, see CARRIAGE OF MAILS, **13.**
Liability of carriers of merchandise as affected by, see CARRIAGE OF MERCHANDISE, **12, 16, 17, 19, 41, 104, 289.**
— — — — **passengers as affected by**, see CARRIAGE OF PASSENGERS, **158, 177.**
— — **express companies as affected by**, see EXPRESS COMPANIES, **24, 31.**

1. Status of the Confederate government.—As to the relation of a Confederate state to the United States, and whether it remained a "state" within the meaning of the United States Constitution and laws, See *Texas* v. *White*, 7 *Wall.* (*U. S.*) 700.

The term *de facto* as descriptive of a government has no fixed and definite sense. It is, perhaps, most correctly used as signifying a government completely, though only temporarily, established in the place of the lawful or regular government, occupying its capital and exercising its power. In this sense the Confederate government was never a *de facto* government; but the term is often used in a sense less precise, as signifying any organized government established for the time over a considerable territory, in exclusion of the regular government. *Keppel* v. *Petersburg R. Co.*, *Chase Dec.* (*U. S.*) 167.

A *de facto* government of the latter kind is not distinguishable in principle from any other unlawful combination, and is only distinguishable in fact in its power, territorial control, and by the policy usually adopted in relation to it by the general government. The Confederate government was something of the latter class, but not such as to entitle its acts to judicial recognition. *So held*, where stock owned by a citizen of Pennsylvania in a railroad within Confederate lines was condemned and sold, and the proceeds, with the earned dividends thereon, paid into the Confederate treasury; and it was held that the confiscation was null

and void. *Keppel* v. *Petersburg R. Co.*, *Chase Dec.* (*U. S.*) 167.

Where two or more parties are engaged in the same illegal transaction, in violation of the supreme law of the land, and one of them is injured by the negligence of the other, the court will not lend its assistance in favor of the injured party. The widow of a railroad employé brought suit to recover for the killing of her husband through the negligence of another employé of the road. The evidence showed that at the time of the killing the husband was voluntarily engaged in transporting Confederate soldiers and munitions of war over the road. *Held*, that there could be no recovery. *Wallace* v. *Cannon*, 38 *Ga.* 199.

The husband of plaintiff was captain of a company of Confederate soldiers, and was carrying his company by rail, under the orders of his superior officer, to move in an attack on the Federal troops. While the employés of the road and the captain were thus engaged a collision occurred upon the road, and the captain was killed. *Held*, that there could be no recovery against the road. *Martin* v. *Wallace*, 40 *Ga.* 52.

2. Taking property for military use.—The title of private property may be acquired by the government by capture from a public enemy, by purchase from the true owner, or by taking under eminent domain. *Taylor* v. *Nashville & C. R. Co.*, 6 *Coldw.* (*Tenn.*) 646.

The right of the state to impress and take private property for the use of the army in the field and upon the actual theatre of military operations depends upon the police power of the nation, and arises from its obligation to protect the national existence, and the lives and property of its citizens. *Taylor* v. *Nashville & C. R. Co.*, 6 *Coldw.* (*Tenn.*) 646.

The right of the citizen to compensation for private property taken by the state for the use of its armies does not preclude the exercise of the police power of the state over private property, which is necessary for the orderly existence of all governments; compensation is not a condition precedent to the right to take property, or to the vesting the title thereto in the government. *Taylor* v. *Nashville & C. R. Co.*, 6 *Coldw.* (*Tenn.*) 646.

If movable property is taken in good faith, by the agent of the government, for the public use, with intent to appropriate it absolutely and permanently to such use, the title vests in the government upon such taking, and will not revest in the original owner upon the government ceasing to use the property. *Taylor* v. *Nashville & C. R. Co.*, 6 *Coldw.* (*Tenn.*) 646.

The military forces of the government have the right, while in occupation of friendly territory, in time of war, and upon pressure of military necessity, to take for the public use or to destroy private property without first making compensation. *Taylor* v. *Nashville & C. R. Co.*, 6 *Coldw.* (*Tenn.*) 646.

Wood was cut for a railroad operated by the United States as a military railroad, under a military order, upon the land of complainant, and sold to the military authorities, who sold it to the company owning the road, when it was turned over by the military authorities to the company. *Held*, that complainant had no title to the wood. The title vested in the company. *Taylor* v. *Nashville & C. R. Co.*, 6 *Coldw.* (*Tenn.*) 646.

3. Payments in Confederate money.—Mississippi Act of Dec. 7, 1863, "to enable the railroad companies of this state to pay the moneys borrowed by them," was in aid of the rebellion, and void. *Mississippi C. R. Co.* v. *State*, 46 *Miss.* 157.

The state treasurer had no authority to receive either Confederate or state treasury notes from the railroads in payment of money loaned to them by the state before the war began. *Mississippi C. R. Co.* v. *State*, 46 *Miss.* 157.

Payments made by a company prior to the passage of the above act stand upon a different footing from payments made subsequent to, and in pursuance of, such act. It is impossible for the court to say that payments made prior to the passage of the act were made for unlawful purposes, or applied to an illegal use. While illegal measures were being supported by state appropriations, yet expenditures were being made for legitimate purposes. *New Orleans, St. L. & C. R. Co.* v. *State*, 52 *Miss.* 877.

4. Control of railroads by government.*—Where officers of the government require a railroad to transport the freight of government contractors, without otherwise interfering with its management, and the road thereby becomes blocked, and a shipper brings an action against the road

* See also CARRIAGE OF MERCHANDISE, 41.

as a common carrier and obtains judgment because of the road's delay in transporting his freight, the judgment cannot be regarded as the natural and proximate consequence of the acts of the officers, but must be deemed remote damages. *Illinois C. R. Co.* v. *United States*, 16 *Ct. of Cl.* 312.

Where a railroad is under such military control that it cannot ship grain without the consent of the government, a mere delivery of grain in cars and warehouses, by consent of the agent, where no receipt is given, will not create the relation of shipper and common carrier, so as to make the company liable for failing to carry the grain. Such liability can be created only by contract. *Illinois C. R. Co.* v. *Ashmead*, 58 *Ill.* 487, 11 *Am. Ry. Rep.* 59.—DISTINGUISHING Illinois C. R. Co. *v.* McClellan, 54 Ill. 58.—REVIEWED IN Nashville & C. R. Co. *v.* Estes, 10 Lea (Tenn.) 749.

A company was under the military control of the government and was operated in the transportation of troops, munitions of war, and supplies, in the suppression of the rebellion, so that it was not in the free and unrestrained exercise of its franchise. *Held*, not liable as a common carrier for refusing to receive freight for transportation, but not so where it accepted the freight with knowledge that it could not properly transport it on account of such interference. *Phelps* v. *Illinois C. R. Co.*, 9[illegible] *Ill.* 548.

An agreement by an agent of a company to furnish cars, at a future day, to transport grain, and to receive and ship the same, will not estop the company, when sued in tort upon its common-law obligation, from showing its right to refuse to receive the grain, owing to the military control of the United States. *Phelps* v. *Illinois C. R. Co.*, 94 *Ill.* 548.

If the government monopolizes a railroad, to relieve itself from liability the company should abdicate its functions as a common carrier for the public at large. *Pruitt* v. *Hannibal & St. J. R. Co.*, 62 *Mo.* 527.

5. Confiscation of stock.—Acts done under the authority of an insurgent body, actually organized as a government within a large extent of territory, not merely in hostility to the regular and lawful government but in complete exclusion of it from the whole territory subject to insurgent control, cannot be recognized as lawful; but acts of individual subjects of such *de facto* government may be lawful. *Keppel* v. *Petersburg R. Co.*, *Chase Dec.* (*U. S.*) 167.

Stock held by a citizen of Pennsylvania in a railroad within Confederate territory was confiscated, and the proceeds, with certain earned dividends, paid into the Confederate treasury. *Held:* (1) that the confiscation was a nullity; (2) that the company was liable for the dividends declared during the war, but only in an amount equal to the value of Confederate currency, with interest thereon from the time of bringing suit, no previous demand having been made therefor. *Keppel* v. *Petersburg R. Co.*, *Chase Dec.* (*U. S.*) 167.

Where complainants claim title to shares of railroad stock under a judgment of a court of the Confederate States of America, confiscating such stock as the property of alien enemies, they do not thereby acquire a valid title thereto as against the original owners of the stock, and the railroad cannot be required to issue to them certificates of ownership. (Harris, J., dissenting.) *Central R. & B. Co.* v. *Ward*, 37 *Ga.* 515.

6. Acts justified by command of military officer.—The late rebellion had matured into a civil war on May 10, 1862. The admitted laws of all civilized warfare entitle each party in a civil war to the same right of capture or destruction of enemies' property, and show that when either the capture or destruction of property by one of such belligerents is lawful, it is equally lawful by the other, and if unlawful by one, it would be equally so by the other. One who, acting under the orders of a Confederate general, burned the cars of a railroad, in May, 1862, is not liable to a civil action for damages. The act of Kentucky legislature, approved Feb. 22, 1862, "to provide a remedy for injuries done by disloyal persons," does not apply to such cases, nor to the exercise by citizens of Kentucky of belligerent rights in the Confederate army within the state. The rights of belligerents were regulated, as to all alike, by the national law and the national will, which Kentucky could neither modify, control, nor frustrate as to any belligerent, citizen or no citizen. *Bell* v. *Louisville & N. R. Co.*, 1 *Bush* (*Ky.*) 404.

An order issued by a regularly constituted military authority during the civil war is sufficient to protect citizens or a carrier obeying it. *Western & A. R. Co.* v. *Hurst*, 11 *Heisk.* (*Tenn.*) 625.—REVIEWED IN

Nashville & C. R. Co. *v.* Estes, 10 Lea (Tenn.) 749.

In 1862 plaintiff stored certain cotton with a warehouseman in Tennessee, with instructions to retain it until he gave him further instructions. Soon afterwards the Federal army approached the place, when the commander of the Confederate forces, in preparing to evacuate the place, issued an order directing the warehouseman to ship the cotton further south, which was done, where it was placed with a reliable warehouseman, but in the subsequent conflicts and casualties of war it was destroyed. *Held*, that there could be no recovery. *Western & A. R. Co.* v. *Hurst*, 11 *Heisk.* (*Tenn.*) 625.

7. Liability for bridges destroyed. —A railroad company is not liable to the United States for the cost of rebuilding bridges, as a military necessity, that were destroyed by the armies in time of war. *United States* v. *Pacific R. Co.*, 120 *U. S.* 227, 7 *Sup. Ct. Rep.* 490.

The right of the government in time of war to destroy bridges for the public defense, or to rebuild them as a military necessity, does not carry with it a right to force an implied contract upon the owner of the realty for the cost of the structures erected. Such a contract must rest upon the owner's license, express or implied, and be subject to its limitations. *Pacific R. Co.* v. *United States*, 20 *Ct. of Cl.* 200.

8. Construction of military railways.—The United States military authorities had the right during the civil war to construct a line of railroad along a public street of a city, connecting the railroad of one company with the depot of another company, and no one using such road for military purposes under the orders of the military authorities could be deemed a trespasser. But the charter of neither of said companies authorizing the construction of such road, they could, as against the public, the state, or municipal authorities, derive no right through a license from the military authorities to use the same for their private benefit. A company, by using such road for its own purposes, became a trespasser and liable for any damage occurring in consequence of the passage of its train. *Mississippi & T. R. Co.* v. *Wilson*, 10 *Heisk.* (*Tenn.*) 496.

9. Effect of war on validity of contracts.—The validity or invalidity of acts or contracts, while the rebellion existed, may be tested by the following grounds: If in aid of the war, they were invalid; if for a legitimate purpose, though by an insurgent or an insurgent body, they are generally valid. *New Orleans, St. L. & C. R. Co.* v. *State*, 52 *Miss.* 877.

10. Liability of carriers as affected by. — Confederate troops who, during the civil war, made a raid into one of the states adhering to the Union were public enemies; and a carrier is not liable for goods taken from it by such forces. *Bland* v. *Adams Exp. Co.*, 1 *Duv.* (*Ky.*) 233.

A carrier will not be liable for the loss of property occasioned by the military forces of the Confederate states, but the burden is upon it to establish such occasion by sufficient evidence. *Wallace* v. *Sanders*, 50 *Ga.* 134; *former appeal* 42 *Ga.* 486. *Lewis* v. *Ludwick*, 6 *Coldw.* (*Tenn.*) 368.

Where property was delivered to a carrier in one of the Confederate states during the civil war, and within the Confederate military lines, the carrier was not liable for a loss where the property was seized and destroyed by the Confederate forces acting under military orders; and the fact that the carrier gave no notice of the loss to the consignor would not affect its liability. *Nashville & C. R. Co.* v. *Estes*, 3 *Am. & Eng. R. Cas.* 492, 10 *Lea* (*Tenn.*) 749.

During the civil war, goods being transported within the Confederate lines by common carriers were captured and destroyed by the United States forces. *Held*, that the loss was occasioned by the "public enemy," and the carriers were not liable. *Southern Exp. Co.* v. *Womack*, 1 *Heisk.* (*Tenn.*) 256.

A railroad company ceased to be a common carrier while its road was in the hands of the Confederate authorities, appropriated to military uses. *Nashville & C. R. Co.* v. *Estis*, 7 *Heisk.* (*Tenn.*) 622.

Whether spirits delivered to a railroad company for transportation were destroyed by the order of the Confederate authorities as a military measure to prevent their falling into the hands of the approaching Federal army, or as a matter of public necessity for the safety of the people in the neighborhood, in either case such a destruction would be a good defense for the company whose road was at the time in the hands of said authorities. *Nashville & C. R. Co.* v. *Estis*, 7 *Heisk.* (*Tenn.*) 622.

The destruction of property by the Confederate army cannot be set up by a common

carrier as the act of the "public enemy." *Nashville &c. R. Co.* v. *Estis*, 7 *Heisk.* (*Tenn.*) 622. *Patterson* v. *North Carolina R. Co.*, 64 *N. Car.* 147.

WAREHOUSEMEN.

Agreements of agents to store goods, see AGENCY, **57.**
Charging liability as both carrier and, see CARRIAGE OF MERCHANDISE, **361.**
Discrimination in warehouse facilities, see DISCRIMINATION, **51.**
Duty to furnish warehouse facilities, see CARRIAGE OF MERCHANDISE, **54.**
Effect of notice of arrival to reduce carrier's liability to that of, see CARRIAGE OF MERCHANDISE, **224.**
Express company when liable as, see EXPRESS COMPANIES, **56-59.**
Insurable interest of, see FIRE INSURANCE, **2.**
Liability of carrier as, see CARRIAGE OF MERCHANDISE, **316-374.**
— — initial carrier as, see CARRIAGE OF MERCHANDISE, **621.**
Power to act as, see BALTIMORE & OHIO R. Co., **3.**
When carrier's liability attaches on delivery to, see CARRIAGE OF MERCHANDISE, **74.**
— company liable as, for baggage, see BAGGAGE, **68-74.**
— liability as, attaches, see CARRIAGE OF MERCHANDISE, **333-361.**
— — — terminates, see CARRIAGE OF MERCHANDISE, **362-365.**

1. Nature of the contract with.— A warehouseman cannot have the possession of another man's property, with its accompanying duties and responsibilities, forced upon him against his will. *Delaware, L. & W. R. Co.* v. *Central S. Y. & T. Co.*, 37 *Am. & Eng. R. Cas.* 607, 45 *N. J. Eq.* 50, 17 *Atl. Rep.* 146; *affirmed in* 46 *N. J. Eq.* 280, 19 *Atl. Rep.* 185.

2. Warehouse receipts.* — Warehouse receipts made payable to bearer are not negotiable. They are made negotiable only by written indorsement and delivery. *Erie & P. Dispatch* v. *St. Louis Cotton Compress Co.*, 6 *Mo. App.* 172.

A company not doing a warehouse business cannot issue warehouse receipts which will be binding and valid. *Great Western R. Co.* v. *Hodgson*, 44 *U. C. Q. B.* 187.

A company cannot issue a valid warehouse receipt in favor of one who has no goods on storage with it. *Great Western R. Co.* v. *Hodgson*, 44 *U. C. Q. B.* 187.

When a warehouse receipt is issued and delivered under a special agreement which remains unfulfilled on the part of him to whom it is delivered, the latter takes no property in the receipt itself, nor in the property described therein. *Great Western R. Co.* v. *Hodgson*, 44 *U. C. Q. B.* 187.

A company holding property under a special bailment for another cannot issue a warehouse receipt therefor for the purpose of having it discounted in the company's favor by a third party. *Great Western R. Co.* v. *Hodgson*, 44 *U. C. Q. B.* 187.

3. —— and rights of assignees.— A carrier held freight consigned to a firm, and issued what were called arrival notices. The next day a messenger of the firm presented these notices with an indorsement thereon to deliver to a certain warehouse. The indorsement was in the firm name, by one of the members. The warehousemen, without having actual control or possession of the goods, issued receipts to the individual member of the firm, who sold the goods, and delivered the receipts indorsed. The firm subsequently sold to other parties. The warehousemen then purchased the receipts issued to the individual member, and procured an assignment of the same. *Held*, that in the absence of proof of authority on the part of the consignees of the warehousemen to issue a receipt to the individual partner the receipt was void, and that the warehousemen, coming into possession of the receipt thereafter as indorsers for value, were chargeable with notice of its invalidity, and had no title to the goods as against the assignees of the firm. *Delaware, L. & W. R. Co.* v. *Corwith*, 37 *N. Y. S. R.* 728, 60 *Hun* 576, 14 *N. Y. Supp.* 245.

Defendant company gave warehouse receipts to one B. for 7500 barrels of flour as in store for him, on the faith of which plaintiffs accepted and paid bills drawn upon them by B.; and there being a deficiency of 192 barrels, they sued defendant. The evidence showed that defendant knew that such receipts were commonly used to obtain advances of money, and that they sometimes gave receipts to B. for flour in advance, on being told that it was on the way; but how the mistake in question occurred was not shown. *Held*, that there

*Transfer and negotiability of warehouse receipts, see notes, 84 AM. DEC. 752; 89 *Id.* 361.
How far warehouseman's receipt is conclusive as to quality of goods, see note, 100 AM. DEC. 243.

was a case to go to the jury in support of the declaration, and that a verdict for plaintiffs must be allowed to stand, although the jury might well have found otherwise. *McLean* v. *Buffalo & L. H. R. Co.*, 24 *U. C. Q. B.* 270.—REVIEWED IN Erb *v.* Great Western R. Co., 3 Ont. App. 446.

4. Diligence or care required.*—A warehouseman must exercise reasonable care, but he is not an insurer against all losses except those arising from the "act of God" and the public enemy; he is only liable for losses which might have been guarded against by the exercise, on his part, of ordinary care and diligence. *St. Louis, A. & T. H. R. Co.* v. *Montgomery*, 39 *Ill.* 335.

The custodian of another's property who uses the means which, at the time of danger, appear to him best for its preservation is not to be held responsible for failing to adopt measures which subsequent events show would have produced better results. An honest and reasonable effort made in the exercise of an honest judgment is all the law requires of him. *Turrentine* v. *Wilmington & W. R. Co.*, 100 *N. Car.* 375, 6 *S. E. Rep.* 116.

5. Duty to insure.—A warehouseman agreed to carry insurance for the benefit of the owners and a carrier, covering cotton deposited with him for compression for shipment. He received cotton valued at $698,300, but carried only $301,750 insurance. There was a total loss by fire without his or the carrier's fault. The owners sued the warehouseman for breach of his contract to carry insurance, making the carrier a co-defendant. *Held*, that complainants were entitled to recover of the warehouseman such damages as resulted from a breach of his contract to carry insurance, but not entitled to hold him as an insurer. But the owners, having taken out for themselves the very insurance which the warehouseman had contracted to procure for them, and having received payment of loss in full from their own insurer, were entitled to recover nothing, having sustained no damage by reason of the warehouseman's default. *Lancaster Mills* v. *Merchants' Cotton-Press Co.*, 45 *Am. & Eng. R. Cas.* 423, 89 *Tenn.* 1, 14 *S. W. Rep.* 317.

A carrier contracted with a warehouseman to receive for it from customers, and compress, all cotton designed for shipment over its line from a named depot, and that the warehouseman should insure the cotton in solvent companies for the benefit of the carrier while it remained in the warehouse. The course of business pursued under this contract was as follows: The carrier gave to its customers permits authorizing the warehouseman to receive cotton as its agent. Upon deposit of the cotton under these permits the warehouseman gave to each customer a "dray ticket" therefor. Upon the face of some of these tickets it was stated that the cotton was "fully covered by the policies of insurance" held by the warehouseman, and in others that it was "covered by" the warehouseman "with insurance for the owners as interest may appear." The warehouseman uniformly made verbal representations to customers that their cotton was "fully insured" for benefit of carrier and owners. Upon presentation of this "dray ticket," the customer received a bill of lading from carrier in lieu thereof. Under that bill of lading the carrier was exempted from liability for loss of the cotton by fire while it was in the warehouse for compression. Loss of the cotton by fire occurred, without negligence of carrier or warehouseman, while it remained in the warehouse for compression. The warehouseman had not covered it with insurance as stipulated with carrier or as represented to customers. *Held:* (1) that the carrier was not liable; and that the warehouseman was liable, but not as an insurer against loss by fire; (2) that the contract and true relations between the warehouseman and depositors of cotton should be ascertained from a view of the entire series of transactions considered as one whole, and not alone from the face of the "dray tickets"; (3) that therefore the surrender of the "dray tickets" to the carrier, and acceptance of bills of lading in lieu thereof, did not end the warehouseman's obligations to depositors with reference to carrying insurance for their benefit. *Lancaster Mills* v. *Merchants' Cotton-Press Co.*, 45 *Am. & Eng. R. Cas.* 423, 89 *Tenn.* 1, 14 *S. W. Rep.* 317.

The warehouseman's contract with depositors was to carry insurance in solvent companies to cover their cotton, not to stand, himself, as insurer against loss by fire; and therefore his liability was not direct and absolute, as that of an insurer, but only for loss or damage resulting to depositors from

* Care required of warehousemen. Evidence of general custom. Opinion evidence, see 45 AM. & ENG. R. CAS. 423, *abstr.*

his failure to comply with his contract or representations as to the carrying of insurance for their benefit. *Lancaster Mills* v. *Merchants' Cotton-Press Co.*, 45 *Am. & Eng. R. Cas.* 423, 89 *Tenn.* 1, 14 *S. W. Rep.* 317.

The warehouseman's obligation is to take out insurance upon the entire value, and not upon the liability or interest of the carrier only, where he agrees to receive and compress cotton for shipment by the carrier, "as well as to insure the same while in his keeping for the benefit of the" carrier. But the carrier is not liable to the owner for the warehouseman's default in failing to procure such insurance where he is under no obligation to have the owner's interest insured. And the warehouseman's representations to depositors that such insurance has been procured, or his promise to them that it shall be taken out, are not binding upon the carrier. He is not, in that matter, the carrier's agent. *Lancaster Mills* v. *Merchants' Cotton-Press Co.*, 45 *Am. & Eng. R. Cas.* 423, 89 *Tenn.* 1, 14 *S. W. Rep.* 317.

6. Charges for storage.—The legislature has power to declare what service warehousemen shall render to the public, and to fix the compensation that may be demanded for such service, but until such power is exercised warehousemen are at liberty to use their warehouses as they please. *Delaware, L. & W. R. Co.* v. *Central S. Y. & T. Co.*, 37 *Am. & Eng. R. Cas.* 607, 45 *N. J. Eq.* 50, 17 *Atl. Rep.* 146; *affirmed in* 46 *N. J. Eq.* 280, 19 *Atl. Rep.* 185.

7. —— and lien therefor.* — After goods had been bargained for, the seller shipped them by rail, consigned to himself, and sent to plaintiff, the purchaser, a bill and an order on the carrier for the goods on payment of the freight. The freight was paid, but the goods not being of the quality ordered, plaintiff refused to receive them. The carrier notified plaintiff that the goods would be stored, if not taken away, and they were stored, but no notice of the actual storage was given either to plaintiff or to the seller, though plaintiff learned of it some ten days afterwards. Five months afterwards plaintiff made an arrangement with the seller by which he was to take up the goods, and the carrier delivered a portion of them without claiming any lien, but refused to deliver the rest until the charges were paid, whereupon plaintiff replevied the remainder from the warehouseman. *Held*, that the warehouseman had a lien on the goods replevied for his charges on the whole, and the action could not be maintained. *Barker* v. *Brown*, 138 *Mass.* 340.

A warehouseman, in the absence of a contract for a lien, acquires no lien on goods for freight charges which he pays at the request of the owner, unless there be a custom of the place giving such lien. *Bass* v. *Upton*, 1 *Minn.* 408 (*Gil.* 292).

8. Liabilities of warehouseman, generally.*—A railroad company which owns a warehouse or place of deposit for goods and freight which are to be delivered to consignees stands upon the same footing as to liability for injuries to persons and property, by reason of not having safe and secure roads and ways for ingress and egress to and from such freight, as any other person. Its liability is the same as that of others in like circumstances; no greater and no less. *Central R. Co.* v. *Gleason*, 72 *Ga.* 742.

Where various parties deliver grain for storage to the keeper of an elevator, who, without any agreement to that effect, and without the knowledge of the owners, but according to the custom in such cases, mixes in a common mass all the grain of the same kind and quality, the several owners become tenants in common of the entire amount in store of like quality; and where in such case the elevator and its contents are burned through the negligence of a railway company, each owner may recover of the company the value of his grain so destroyed *Arthur* v. *Chicago, R. I. & P. R. Co.*, 16 *Am. & Eng. R. Cas.* 283, 61 *Iowa* 648, 17 *N. W. Rep.* 24.

In such case the warehouseman would not be liable to the owners of the grain, as his act of mixing it was not a conversion; and the fact that one of the owners of the grain brought an action against the warehouseman to recover the value of his grain, on the ground that the act of mingling was a conversion of it, in which action he failed to recover, would not defeat him in his action against the railway company. *Arthur*

* Definition of warehouseman's lien; when it does and when it does not exist, see note, 42 Am. Dec. 257.

* Liability of railroads as warehousemen, see note, 7 Am. & Eng. R. Cas. 404.

Liability of carrier for goods in transit and as warehouseman, see note, 13 L. R. A. 33.

v. *Chicago, R. I. & P. R. Co.*, 16 *Am. & Eng. R. Cas.* 283, 61 *Iowa* 648, 17 *N. W. Rep.* 24.

Small packages of whiskey were shipped into the state by rail to defendant, who was selling it in violation of the law. The carrier was in the habit of holding the different packages and allowing defendant to take up one at a time, paying the charges thereon as he might need it in his business. Certain packages were seized while in the carrier's warehouse, in a proceeding to condemn the same. *Held:* (1) That the company ceased to be a carrier in thus holding the whiskey, and became a warehouseman, and could not claim protection on the ground that it was an interstate shipment, as decided in 125 U. S. 465. The protection given by that decision relates only to interstate carriers, and not to warehousemen. (2) That the company could not make any valid claim to the liquors on the ground that it had a lien thereon for the unpaid freight. *State* v. *Creeden*, 40 *Am. & Eng. R. Cas.* 31, 78 *Iowa* 556, 7 *L. R. A.* 295, 43 *N. W. Rep.* 673.

A warehouseman who uses due diligence is not liable to the consignor as for a conversion, in case of misdelivery, where the misdelivery is superinduced by the laches of the consignor; and the question of diligence is one for the jury. *Bush* v. *St. Louis, K. C. & N. R. Co.*, 3 *Mo. App.* 62.

The effect of Texas Rev. St., art. 281, is to make railroad companies and other common carriers having depots or other warehouses for storing goods *ipso facto* warehousemen, regardless of whether or not they charge for storage of goods. Being warehousemen, their liability is ascertained by applying the rules of the common law. *Texas & P. R. Co.* v. *Morse*, 1 *Tex. App.* (*Civ. Cas.*) 179.

9. —— for losses or failure to deliver.* — Plaintiff proved that defendant company received at its warehouse eighteen bales of cotton belonging to him and failed to deliver more than sixteen of the bales. The company did not show that the missing bales had been lost, or give any explanation as to what became of them, nor that it exercised reasonable care to prevent the loss. *Held*, that the trial court was right in holding that the burden was not on plaintiff to show the manner and particulars of the company's negligence by which the loss occurred. The authorities are not uniform as to the burden of proof in such cases; but inasmuch as the bales were bulky and could not have been removed without difficulty, and consequently not without the knowledge of the company, the very fact that they were missing was strong evidence of negligence. *Boies* v. *Hartford & N. H. R. Co.*, 37 *Conn.* 272.

In an action of contract against warehousemen to recover for a failure to deliver goods intrusted to them, which are admitted or proved to have been received by them, and not delivered upon demand, the burden of proof is on them to show that the goods have been lost without their fault. (Bigelow, C.J., dissenting.) *Cass* v. *Boston & L. R. Co.*, 14 *Allen* (*Mass.*) 448.—RECONCILING Lamb *v.* Western R. Corp., 7 Allen 98.

A warehouseman is only answerable for loss occasioned by the want of ordinary care and skill; but he may restrict his liability by contract, except as to loss occurring through his fraud or want of good faith. *Gashweiler* v. *Wabash, St. L. & P. R. Co.*, 25 *Am. & Eng. R. Cas.* 403, 83 *Mo.* 112, 53 *Am. Rep.* 558.

Where the plaintiff proves a refusal or omission on the part of a warehouseman to deliver stored property after the same has been duly demanded, the burden of proof is shifted, and the defendant is bound to account for the property and excuse his omission to deliver it. *Golden* v. *Romer*, 20 *Hun* (*N. Y.*) 438.

10. —— for losses by fire.* — A railroad company does not become liable for an injury to another's property caused by the negligence in the handling of cotton of a compress company exercising an independent employment, by reason merely of the fact that the railroad company had taken up the compress company's receipts for cotton received for compression and issued bills of lading therefor to the owners of the cotton, and had agreed to pay the compress company's charges for compression. *Martin* v. *St. Louis, I. M. & S. R. Co.*, 55 *Ark.* 510, 19 *S. W. Rep.* 314.

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*Carrier's liability for goods deposited in warehouse, see note, 31 AM. & ENG. R. CAS. 101.

*Liability of company for goods destroyed by fire from engine. Goods in warehouse. Massachusetts statute construed, see 32 AM. & ENG. R. CAS. 530, *abstr.*

Demand on a warehouseman and a refusal to deliver the goods make out a *prima facie* case of negligence and conversion against him. If, however, it appears that the property has been destroyed by fire, the bailor must prove the fire to have resulted from the negligence of the warehouseman. *Wilson* v. *Southern Pac. R. Co.*, 62 *Cal.* 164. —ADOPTED IN Benson *v.* Central Pac. R. Co., 98 Cal. 45.

If goods are destroyed by a fire set by a railway engine, this is *prima facie* evidence of negligence, and, unless the company in whose custody the goods were shows that the fire was not in fact caused by its negligence or want of care, the owner may recover for the goods destroyed. This rule applies although such goods were in the company's custody as a warehouseman and not as a common carrier. *Leland* v. *Chicago, M. & St. P. R. Co.*, (*Iowa*) 21 *Am. & Eng. R. Cas.* 108, 23 *N. W. Rep.* 390.

The assent of a shipper to a delay by a warehouseman in forwarding cotton to the place of its consignment, it being by reason of its surroundings subjected to unusual danger from fire, does not preclude the shipper from a recovery for its loss by fire while thus delayed, unless he knew of the danger to which it would be subjected by the delay. *Merchants' Wharfboat Assoc.* v. *Heidingsfelder*, 64 *Miss.* 678, 2 *So. Rep.* 242.

But if such shipper knew of the peculiar danger to which the cotton would be subjected by the delay, and then failed to dissent, he cannot avoid the effect of his acquiescence by showing that his failure to dissent to the delay was due to the fact that on previous occasions he had dissented without avail, it not being shown that on such former occasions the cotton was surrounded by the same peculiar danger from fire. *Merchants' Wharfboat Assoc.* v. *Heidingsfelder*, 64 *Miss.* 678, 2 *So. Rep.* 242.

The law does not presume negligence. When a bailee in an action for non-return of an article borrowed shows that it was destroyed by fire, under circumstances fully disclosed, and not suggestive of any want of proper care, it devolves on the bailor to turn the scale by some evidence inculpatory of the defendant. *Meridian F. & E. Assoc.* v. *North Birmingham St. R. Co.*, 70 *Miss.* 808, 12 *So. Rep.* 555.

Where, during a fierce and large fire, the employés of a warehouseman were busily engaged trying to save other property, the fact that a car containing goods was not hauled away from the burning warehouse is not sufficient proof of negligence to require the submission to the jury of an action for the loss of the goods therein. *Draper* v. *Delaware & H. Canal Co.*, 42 *Am. & Eng. R. Cas.* 411, 118 *N. Y.* 118, 23 *N. E. Rep.* 131, 27 *N. Y. S. R.* 931; *affirming* 42 *Hun* 654, *mem.*

Where the evidence in an action against a warehouseman for goods destroyed by fire while in his possession shows that the fire began in a neighboring building, but does not show that such building was owned by the defendant, negligence on the part of the warehouseman in the origin of the fire is not established. *Draper* v. *Delaware & H. Canal Co.*, 42 *Am. & Eng. R. Cas.* 411, 118 *N. Y.* 118, 23 *N. E. Rep.* 131, 27 *N. Y. S. R.* 931; *affirming* 42 *Hun* 654, *mem.*

The burden of proof is upon the bailor of goods to show neglect on the part of a warehouseman in an action for the value of goods destroyed by fire. *Texas & P. R. Co.* v. *Capps*, (*Texas*) 16 *Am. & Eng. R. Cas.* 118.

Where a company is sued for the loss of wool by fire while in its depot, it is competent to prove that certain "wool waste," which was liable to spontaneous combustion, was stored in the depot with plaintiff's wool, and that such waste is easily distinguished from ordinary wool, and that it is the custom of warehousemen to take certain precautions in storing it. *Whitney* v. *Chicago & N. W. R. Co.*, 27 *Wis.* 327, 5 *Am. Ry. Rep.* 291.

In an action for the value of plaintiff's goods, destroyed by fire in defendant's warehouse, there was evidence that a kerosene lamp was left burning in defendant's office in the warehouse, at night, after all agents had left the building; but the evidence was conflicting as to whether the fire originated in the office or in some other part of the building. The jury were instructed that if they should find "that if the lamp was left burning, and that the act of leaving it burning was a negligent act, and from that should infer that the burning actually took place from the lamp," they should find for plaintiff. Again, after an instruction that the burden was on plaintiff to show how the fire occurred, and that it could have been prevented by the exercise of ordinary care, the court added: "If the plaintiff shows an act of negligence liable to lead to the accident, it may afford ground for

inferring that negligence was the cause." *Held*, that the instructions were erroneous, as leaving the jury to find from the mere fact that the lamp was negligently left burning that the building took fire therefrom, and as leaving them free to ignore the evidence tending to show that the fire originated in another part of the building. *Kronshage* v. *Chicago, M. & St. P. R. Co.*, 45 *Wis.* 500.

A kerosene lamp was left burning in defendant's telegraph office after midnight and after all persons had left the building. The lamp was mounted upon a bracket attached to the frame of a window in the partition between the telegraph office and defendant's warehouse; and before morning the warehouse and plaintiff's goods therein were destroyed by fire. Assuming that the fire was caused in some way by the burning lamp, the question was, whether defendant was guilty of a want of ordinary care in leaving the lamp thus burning; and there was no proper evidence upon that question, apart from the above facts. *Held*, that it must be presumed that defendant used due care in respect to the lamp, its material, construction, and location, the oil used therein, etc.; and that there was nothing to support a verdict against defendant. *Wood* v. *Chicago, M. & St. P. R. Co.*, 51 *Wis.* 196, 8 *N. W. Rep.* 214.

11. Transfers of goods stored.— A worthless check is not a payment for goods sold. When grain is received by car in Peoria, it is the custom of the board of trade at that place to inspect it and to make two inspection tickets, one of which is put on the car and the other delivered to the owner. Plaintiff received and had inspected a car-load of oats, and subsequently ordered them delivered by the railway company to its elevator, which was done. Plaintiff then sold the oats to P., and delivered to him the inspection ticket with the price of sale marked on it and the letter "A" to indicate the elevator where the grain was stored. P. gave to plaintiff a check to pay for the oats, and, presenting the inspection ticket at the elevator, directed them to be shipped, which was done, the elevator (railway) company inferring from P.'s possession of the inspection ticket that P. was owner of the grain. *Held*, that possession of the inspection ticket was no evidence of ownership or authority to receive the grain, and, P.'s check proving worthless, that the railway company was liable for the oats. *Peoria & P. U. R. Co.* v. *Buckley*, 21 *Am. & Eng. R. Cas.* 94, 114 *Ill.* 337, 2 *N. E. Rep.* 179.

12. Bonded warehouses. — Though the bond given by the owner of a warehouse does not in all respects comply with the requirements of the statute concerning bonded warehouses (Rev. St. § 2961), yet if there be a substantial compliance and the building is constructed, secured, and used as a bonded warehouse, and is entered as such on the treasury "Registry of Warehouses, Customs," it must be deemed a bonded warehouse in the settlement of the collector's accounts and the ascertainment of the compensation due to him. *Ellsworth* v. *United States*, 14 *Ct. of Cl.* 382.

WAREHOUSES.

Delivery of grain in, sufficiency of, see CARRIAGE OF MERCHANDISE, **255.**
Liability for explosion of nitroglycerine in, see EXPLOSIONS, **6.**
When deemed fixtures, see FIXTURES, **6.**
— subject to taxation, see TAXATION, **85.**

WARNING.

Alleging negligence in failure to give, see EMPLOYÉS, INJURIES TO, **534.**
Duty to give, to infant employés, see EMPLOYÉS, INJURIES TO, **461-463.**
— — — — unskilled employés, see EMPLOYÉS, INJURIES TO, **27-37.**
Failure of vice-principal to give, liability of company, see FELLOW-SERVANTS, **88.**
— to heed, in getting off train, see CARRIAGE OF PASSENGERS, **432.**
— — — when contributory negligence, see EMPLOYÉS, INJURIES TO, **309**; STATIONS AND DEPOTS, **116.**
Getting on moving train after being warned not to, see CARRIAGE OF PASSENGERS, **382.**
Non-liability for negligence of fellow-servants in giving, or failing to give, see FELLOW-SERVANTS, **43, 44.**
Of employés, failure to heed, when getting off cars, see CARRIAGE OF PASSENGERS, **394.**
To employé, negligence in failing to give, see EMPLOYÉS, INJURIES TO, **665.**
— leave platform and go inside of car, disregard of, see CARRIAGE OF PASSENGERS, **473.**
— passenger, duty to give, see CARRIAGE OF PASSENGERS, **223, 241.**

To passenger of danger, duty of carrier to give, see CARRIAGE OF PASSENGERS, **134.**
When train is approaching or leaving station, see STATIONS AND DEPOTS, **62, 63.**

WARRANT.

Form and sufficiency, generally, see PROCESS, **11, 12.**
For taxes, demand before issuing of, see TAXATION, **297.**
In condemnation proceedings, see EMINENT DOMAIN, **303.**
To summon jurors to assess land damages, see EMINENT DOMAIN, **530, 531.**

WARRANTY.

Buyer's action for breach of, see SALES, **14.**
Covenants of, see COVENANTS, **12.**
Measure of damages for breach of, see DAMAGES, **53.**
On sales of chattels, see SALES, **10.**
— — — stock, see STOCK, **56.**

WASHINGTON.

Conditions exempting carrier from liability to person riding on free pass in, see PASSES, **27.**
Constitutionality of tax laws of, see TAXATION, **50.**
Construction of stock laws of, see ANIMALS, INJURIES TO, **26.**
Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, **756.**
Mechanic's lien law of, see LIENS, **15.**
Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, **38.**
Plaintiff's pleadings need not negative contributory negligence in, see CONTRIBUTORY NEGLIGENCE, **67.**
Taking land for streets and laying out roads in, see STREETS AND HIGHWAYS, **30.**

WASHINGTON TERRITORY.

Injuries to animals running at large in, see ANIMALS, INJURIES TO, **259.**

WASTE.

As ground for receiver, see RECEIVERS, **17.**
Liability of lessee to lessor for, see LEASES, ETC., **67.**
Of corporate property by directors, action by stockholders to restrain, see STOCKHOLDERS, **101.**

WATCHES.

When may be carried as baggage, see BAGGAGE, **44.**

WATCHMEN.

As fellow-servants with master mechanics, see FELLOW-SERVANTS, **405.**
— — — other employés, see FELLOW-SERVANTS, **444.**
At intersection of railroads, see CROSSING OF RAILROADS, **77.**
Duty to keep, to prevent fire, see FIRES, **75.**
— — look and listen as affected by failure to provide, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, **266.**
— — provide, see SLEEPING, ETC., COMPANIES, **27.**
Employment of, at stations, see STATIONS AND DEPOTS, **64.**
Instructions as to negligence of, or absence of, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, **355.**
Liability for injuries at crossings as dependent upon employment of, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, **85-90.**
Ordinances requiring, at crossings, see STREETS AND HIGHWAYS, **313.**

WATER RATES.

In Canada, see TAXATION, **391.**

WATERS AND WATERCOURSES.

Action for damages for diversion of water, see EMINENT DOMAIN, **992.**
— — — — obstruction of access to, see EMINENT DOMAIN, **994.**
Condemnation of land under water, see EMINENT DOMAIN, **96.**
Duty to fence road along or over watercourses, see FENCES, **64.**
— — provide for natural flow of water, see CULVERTS, **4, 5.**
Flooding lands, see FLOODING LANDS.
Injury to water power as an element of land damages, see EMINENT DOMAIN, **712.**
Land under water, when subject to taxation, see TAXATION, **82.**
Liability for obstructing flow of watercourses, see FLOODING LANDS, **1-23.**
Overflow of water, as an element of damages to abutting owner, see STREETS AND HIGHWAYS, **289.**
Turning surface water into watercourses, see FLOODING LANDS, **44.**
What constitutes a taking of water, see EMINENT DOMAIN, **168-171.**
When limitation begins to run in cities for obstruction to, see LIMITATIONS OF ACTIONS, **30.**

I. NAVIGABLE WATERS..... 169
II. WATERCOURSES..... 171
III. SURFACE WATER..... 180
IV. WELLS AND SPRINGS..... 183

I. NAVIGABLE WATERS.

1. What waters are navigable.—The true criterion of a navigable stream is its usefulness to the population on its banks as a means of carrying off the products of their fields and forests, or of bringing to them articles of merchandise. If, in its natural state, without artificial improvements, it may be prudently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then, in the American sense, it is navigable. *Little Rock, M. R. & T. R. Co.* v. *Brooks*, 17 *Am. & Eng. R. Cas.* 152, 39 *Ark.* 403.

It is not necessary that a stream, to be navigable, be so declared by any statute of the state or United States. Usefulness for purposes of navigation for rafts, boats, or barges gives navigable character to a stream, reference being had to its natural state rather than to its average depth the year round; and this character may be proved by parol. *Little Rock, M. R. & T. R. Co.* v. *Brooks*, 17 *Am. & Eng. R. Cas.* 152, 39 *Ark.* 403.

By the law of Pennsylvania the Delaware river is a public, navigable river, held by its joint sovereigns in trust for the public. Riparian owners, in that state, have no title to the river nor any right to divert its waters except by license from the state. Such license is revocable and in subjection to the superior right of the state to divert the water for public improvements, such diversion being either by the state directly or by a corporation created for that purpose. *Rundle* v. *Delaware & R. Canal Co.*, 14 *How.* (*U. S.*) 80.—APPROVED IN Marshall *v.* Baltimore & O. R. Co., 16 How. (U. S.) 314. FOLLOWED IN New York & E. R. Co. *v.* Young, 33 Pa. St. 175. QUOTED IN Attorney-General *v.* Delaware & B. B. R. Co., 27 N. J. Eq. 631.

At common law waters were called navigable only when affected by the ebb and flow of the tide; but in Wisconsin they are such as are navigable in fact, though not affected by the ebb and flow of the tide. *Diedrich* v. *Northwestern Union R. Co.*, 42 *Wis.* 248, 15 *Am. Ry. Rep.* 9.

2. Powers of the states—Improvements.—A company which has built its road along a harbor below high-water mark, claiming the right to do so under its charter, cannot maintain a bill to restrain commissioners from establishing a system of harbor lines. *Prosser* v. *Northern Pac. R. Co.*, 152 *U. S.* 59, 14 *Sup. Ct. Rep.* 528.

The state has the same power to improve its navigable streams as to improve its highways, and when improvement is necessary in order to develop the resources of the commonwealth and to facilitate commerce, contracts may be made with individuals or corporations, and, as a consideration for such improvements, the tolls arising from the use of the rivers may be transferred by the state. *Sinking Fund Com'rs* v. *Green & B. R. Nav. Co.*, 79 *Ky.* 73.

An exclusive privilege to navigate a stream in the state cannot be granted, but it is competent for the state to authorize a corporation improving it, under a contract with the state, to charge tolls prescribed by the general assembly, reserving to all citizens a right to navigate the stream upon the payment of tolls. *Sinking Fund Com'rs* v. *Green & B. R. Nav. Co.*, 79 *Ky.* 73.—REVIEWING McReynolds *v.* Smallhouse, 8 Bush (Ky.) 447; Kentucky River Nav. Co. *v.* Com., 13 Bush 435.

3. Bridges over.*—The Constitution delegates to congress the power to prescribe the conditions upon which commerce in all its forms shall be conducted between the citizens of the several states, and to adopt means to promote its development and prosperity. Bridges over navigable waters are necessary to facilitate transportation and commercial intercourse. They are well-recognized instrumentalities of commerce, and the power to build them, or to authorize them to be built, is an incident of the general power to regulate interstate commerce. *Decker* v. *Baltimore & N. Y. R. Co.*, 30 *Fed. Rep.* 723.—QUOTING People *v.* Rensselaer & S. R. Co., 15 Wend. (N. Y.) 113.

* Broken railroad bridge in a navigable river. Duty of company to remove *débris*, see 25 AM. & ENG. R. CAS. 285, *abstr.*

Power of congress over navigable streams which are boundary lines between states. Bridging such streams, see 37 AM. & ENG. R. CAS. 244, *abstr.*

Right to bridge over navigable waters; duty to construct drawbridge, see 48 AM. & ENG. R. CAS. 76, *abstr.*

Obstruction of stream while building a bridge. How far allowable, see 52 AM. & ENG. R. CAS. 667, *abstr.*

The Railways Clauses Consolidation Act, 1845, § 16, clause 1, empowers a company to execute its works in navigable rivers, and is not by the second clause of that section restricted to works in non-navigable rivers. *Abraham* v. *Great Northern R. Co.*, 16 *Q. B.* 586, 15 *Jur.* 855, 20 *L. J. Q. B.* 322.

4. Obstructions, and suits therefor.*—The question whether a bridge over a navigable river obstructs navigation raises a federal question, and gives jurisdiction to the federal courts, irrespective of the citizenship of the parties. *Sunflower River Packet Co.* v. *Georgia Pac. R. Co.*, 39 *Fed. Rep.* 229.

Where a brick company sues a railroad for unlawfully obstructing a river and thereby shutting it off from the natural market for its wares it is not necessary, under the New Jersey law, to aver the place where the obstruction is placed. *Mehrhof Bros. Brick Mfg. Co.* v. *Delaware, L. & W. R. Co.*, 51 *N. J. L.* 56, 16 *Atl. Rep.* 12.

5. Enjoining obstruction. — The power of the state ends where that of the national government begins, but until congress has asserted its power to regulate commerce, and by legislation has assumed to restrict the jurisdiction of a state over its navigable waters, no conflict can arise, and the authority of the state is comprehensive. *Ormerod* v. *New York, W. S. & B. R. Co.*, 21 *Blatchf.* (*U. S.*) 106.

Where a company is constructing its road along a navigable river, under authority from the state, one who navigates the river in a schooner is not entitled to an injunction to restrain the building of the road so that it will prevent the schooner from landing at a certain dock to take away freights that the owner of the vessel has contracted for. *Ormerod* v. *New York, W. S. & B. R. Co.*, 21 *Blatchf.* (*U. S.*) 106.

A private person owning a tannery, flour-mill, sawmill, stores, warehouses, a wharf and water lots, and stock in a plank road leading from the town where they are situated, which town is upon a navigable river, and from which trade, in which he participates, is carried on by water, may enjoin a railroad company from obstructing the navigation of the bay into which the river empties, when the obstruction will materially injure the trade of the town. *Works* v. *Junction R. Co.*, 5 *McLean* (*U. S.*) 425.

From the nature of such an injury, its extent cannot be ascertained with precision. It is permanent; consequently suits at law must be endless. To establish the wrong, it need not be measured by dollars and cents. It must be shown to exist, and to be material; but the particular amount of damage cannot and need not be shown. *Works* v. *Junction R. Co.*, 5 *McLean* (*U. S.*) 425.

Ordinarily courts of equity will not interfere where the parties have a perfect remedy at law; but where obstructions to public navigation are about to be erected, and after erection can be removed only at great expense, an injunction may be obtained. *Attorney-General* v. *Paterson & H. R. R. Co.*, 9 *N. J. Eq.* 526.

A company having begun to fill up part of a state canal and to erect an arch over it, thus obstructing its use, an injunction was granted at the instance of the commonwealth, although it appeared that that part of the canal had scarcely ever been used, and had for many years lain in a state of abandonment. *Com.* v. *Pittsburgh & C. R. Co.*, 24 *Pa. St.* 159.

6. —— or diversion.—A company will be restrained from taking a large quantity of water from a river where the conservators of the river testify that the taking of such water will impede navigation. *Attorney-General* v. *Great Eastern R. Co.*, *L. R.* 6 *Ch.* 572, 19 *W. R.* 788.

7. Construction of locks and dams —Charging tolls.—A company to which the legislature has given the right to construct locks and dams upon a navigable stream, and to charge tolls for boats, rafts, etc., passing through the locks, has no right to charge tolls for rafts which do not pass through the locks. During high water, when navigation is unobstructed, such streams are free for all the purposes of navigation. *Green & B. R. Nav. Co.* v. *Palmer*, 83 *Ky.* 646.—FOLLOWED IN Green & B. R. Nav. Co. *v.* Chesapeake, O. & S. W. R. Co., 88 Ky. 1.

8. Rights of fishery.—The grant of a several fishery, in a public navigable river, cannot be presumed from the mere uninterrupted use and enjoyment of the right of fishing for more than twenty years. If such presumption can be made at all, from the fact of such use and enjoyment, it must be

* Obstruction of navigable streams; remedies of parties specially injured, see note, 17 AM. & ENG. R. CAS. 157.

Obstruction of navigation of vessels in rivers, see note, 29 AM. & ENG. R. CAS. 494.

shown to have been in exclusion of the right of others, and the absence of an averment to that effect, in a bill praying for an injunction to protect such right from a railroad about to erect wharves interfering with it, was held to be fatal to the complainant's case. *Delaware & M. R. Co.* v. *Stump*, 8 *Gill & J.* (*Md.*) 479.

Though the grant to a railroad of a right to erect wharves and employ steamboats, if destructive of the paramount right of general navigation and fishing, may be void, the remedy is not by injunction, which is only applicable to special injuries in violation of private rights. Public grievances are not to be redressed by individuals at their own suit. *Delaware & M. R. Co.* v. *Stump*, 8 *Gill & J.* (*Md.*) 479.

II. WATERCOURSES.

9. What is a watercourse.*—For a watercourse there must be a channel, a bed to the stream, and not merely low land or a slough over which water flows. *Chicago, K. & W. R. Co.* v. *Morrow*, 42 *Kan.* 339, 22 *Pac. Rep.* 413.

In order to constitute a watercourse there must be a stream usually flowing in a particular direction, though it need not flow continually. It must flow in a definite channel, have a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in hollows or ravines which is the mere surface water from rain or melting snow, and is discharged through such channels from a higher to a lower level, the ravines at other times being destitute of water. *Benson* v. *Chicago & A. R. Co.*, 20 *Am. & Eng. R. Cas.* 96, 78 *Mo.* 504. *Jones* v. *Wabash, St. L. & P. R. Co.*, 18 *Mo. App.* 251.—QUOTING McCormick *v.* Kansas City, St. J. & C. B. R. Co., 57 Mo. 433.—QUOTED IN St. Louis, I. M. & S. R. Co. *v.* Schneider, 30 Mo. App. 620.

Mere sloughs or swales are not regarded as watercourses, as to the water flowing over the country which has escaped from the banks or natural channel of a running stream. *Jones* v. *Wabash, St. L. & P. R. Co.*, 18 *Mo. App.* 251.—QUOTING Benson *v.* Chicago & A. R. Co., 78 Mo. 504.

A slough, or bayou, extending at right angles from a natural watercourse, being without a current, having no flow except when, at times, a freshet causes its waters to spread, with no defined outline, over the adjoining lands, and not being fed by any living springs, is not a natural watercourse; and an injunction will not lie to restrain persons having proprietary rights from erecting an embankment across its junction with the natural watercourse, because of an apprehended increase in the volume of the watercourse, to plaintiff's possible injury. *St. Louis, I. M. & S. R. Co.* v. *Schneider*, 30 *Mo. App.* 620.—QUOTING Jones *v.* Wabash, St. L. & P. R. Co., 18 Mo. App. 251.

A watercourse must be a stream in fact, as distinguished from mere surface drainage rendered necessary by freshets or other extraordinary causes, though the flow of water need not be constant. *Morrissey* v. *Chicago, B. & Q. R. Co.*, 58 *Am. & Eng. R. Cas.* 622, 38 *Neb.* 406, 56 *N. W. Rep.* 946.

To maintain the right to a watercourse or brook, it must be made to appear that the water usually flows in a certain direction and by a regular channel, with banks or sides. It need not flow continually, and the channel may at times be dry, but it must have a well-defined and substantial existence. *Wagner* v. *Long Island R. Co.*, 5 *T. & C.* (*N. Y.*) 163, 2 *Hun* 633; *appeal dismissed in* 70 *N. Y.* 614, *mem.*

A watercourse is a stream of water consisting of a bed, banks, and water, though the water need not flow continually, and there are many watercourses which are sometimes dry. There is, however, a distinction in law between a regular flowing stream which at certain seasons is dried up, and those occasional bursts of water which, in times of freshets, or melting of snow and ice, descend from the hills and inundate the country. To maintain the character of a watercourse it must appear that the water usually flows in a certain direction, and by a regular channel, with banks or sides. It need not be shown that the water flows continually, but the stream must have a well-defined and substantial existence. *Eulrich* v. *Richter*, 37 *Wis.* 226.

10. Right to the natural flow of the stream.—A company, authorized to construct its railroad across a pond of a mill corporation, through which a natural stream

*What is a watercourse, see note, 14 AM. & ENG. R. CAS. 271.

flows, is bound to build its road in such a way as will allow not only the water of the stream to pass through, but also the water which has been accumulated by the dam of the mill corporation. *Bryant* v. *Bigelow Carpet Co.*, 7 *Am. & Eng. R. Cas.* 72, 131 *Mass.* 491.

The right of the owner of lands to the continued flow of water, in its natural channel, can only be extinguished by operation of law, the act of God, or the act of the party himself. If the abandonment or extinguishment of the right is predicated upon the act of the party, something must have been done absolutely destructive of the right, or which is incompatible with its exercise. *Mississippi C. R. Co.* v. *Mason*, 51 *Miss.* 234.

Where a railroad crossing a stream obstructs the natural course of the water, and the owner of the land diverts the stream to a new channel, in order to work an extinguishment of the right to the natural channel there must also be an intention permanently to abandon the old channel; and whether such intention existed is a question for the jury. *Mississippi C. R. Co.* v. *Mason*, 51 *Miss.* 234.

11. Constructing road over watercourse.*—A company, in constructing its road over watercourses, must make suitable bridges, culverts, or other provisions for effectually carrying off the water. The duty imposed upon such a company to restore the stream to its former state, or so to restore it as not to impair its usefulness, exists without any statutory requirement. *Ohio & M. R. Co.* v. *Thillman*, 143 *Ill.* 127, 32 *N. E. Rep.* 529.—QUOTING Jacksonville, N. W. & S. E. R. Co. *v.* Cox, 91 Ill. 500.

If injury necessarily results to an adjoining landowner from the construction in a skilful and proper manner of a railroad crossing over a natural watercourse, he will be entitled to compensation therefor. *Ohio & M. R. Co.* v. *Thillman*, 143 *Ill.* 127, 32 *N. E. Rep.* 529.

The common-law duty of a company is to construct its road, where it crosses a watercourse, so as not to impair the usefulness thereof; and such duty is a continuing one. Where the road is not properly constructed, each overflow creates a new cause of action for damages suffered; and this is so although the party injured acquired his interest after the creation of the obstruction. *Ohio & M. R. Co.* v. *Thillman*, 43 *Ill. App.* 78.

The power granted by the legislature to a company to build a railroad between designated points carries the authority to cross intervening navigable waters, and to build necessary drawbridges, which authority implies the right and imposes the duty to maintain and repair or rebuild such bridges. The company, having authority to build or rebuild a bridge across a navigable stream, is not responsible for damages for temporary obstructions of the stream by scaffolding, or by a temporary stationary bridge, and for unavoidable delay in the completion of the bridge. *Hamilton* v. *Vicksburg, S. & P. R. Co.*, 34 *La. Ann.* 970, 44 *Am. Rep.* 451.

Where a company constructs its road over a watercourse on private lands, it is the duty of the owners of such lands, after a stream has been properly turned, to watch the future action of the water upon their lands, and to protect the banks, and the company is not required to protect them at all times from the effects of the water. *Mississippi C. R. Co.* v. *Mason*, 51 *Miss.* 234.

It is well settled as a general principle of law that a company has no right to construct embankments, in building its road across a stream, so as to injure the adjoining landowners; but this is expressly prohibited by a provision in defendant company's charter that "when it shall become necessary for the company to construct its road across any stream or watercourse, it shall restore the stream or watercourse to its former state, so as not to impair its usefulness to the owner or the public." *Young* v. *Chicago & N. W. R. Co.*, 28 *Wis.* 171, 5 *Am. Ry. Rep.* 159.

12. Right to erect dams and embankments.*—A party agreed to sell a part of an island in a river, to be used as a pleasure ground for picnics and excursions, and to maintain two dams on the river, so as to keep a pond above for boating purposes by the purchaser. He reserved the right to keep and maintain the dams as they then existed, and the right to the free and uninterrupted use and enjoyment of the water power and other privileges for manufacturing and other purposes, subject to conditions in a certain lease to an ice

* Construction of railroad over watercourse, see note, 11 AM. & ENG. R. CAS. 573.

* Obstruction of watercourse by extension of embankment. Contributory negligence, see 52 AM. & ENG. R. CAS. 714, *abstr.*

company. *Held*, that the right to maintain the dams or to use the water power was in no respect inconsistent with the duty to keep them up for the benefit of the grantee; and that a clause making the deed subject to a lease to an ice company was inserted for the protection of that company, and did not authorize the vendor to remove the dams. *Shelby* v. *Chicago & E. I. R. Co.*, 143 *Ill.* 385, 32 *N. E. Rep.* 438; *affirming* 42 *Ill. App.* 339.

The above conveyance provided that the dams should never be so lowered as to interfere with the free use of the millpond for boating, but the deed did not name appurtenances. *Held*, that the use of the pond for boating purposes was in the contemplation of the parties, and was actually so far necessary to the proper enjoyment of the land conveyed as to constitute an easement appurtenant to the land. *Shelby* v. *Chicago & E. I. R. Co.*, 143 *Ill.* 385, 32 *N. E. Rep.* 438; *affirming* 42 *Ill. App.* 339.

In such case the vendor submitted to the purchaser a copy of the lease to which the grant was to be subject, and a draft of certain clauses that he desired to have inserted in the deed. When the question was raised by the purchaser whether under the deed the dams could be maintained, he replied that they should never be so lowered as to interfere with the free use of the pond for boating, and upon this assurance the sale was concluded, and the grounds were fitted up, at great expense, as a pleasure resort. *Held*, that it would be grossly inequitable to allow the vendor or his heirs to recede from the construction he himself thus placed upon the deed. *Shelby* v. *Chicago & E. I. R. Co.*, 143 *Ill.* 385, 32 *N. E. Rep.* 438; *affirming* 42 *Ill. App.* 339.

It is for the jury to determine whether or not an embankment made by the construction of a street railway obstructs the natural flow of water. *Damour* v. *Lyons City*, 44 *Iowa* 276.

If one obstructs the flow of water in a watercourse by erecting a dam or reservoir and collecting water therein for use on his own land, he is liable to any riparian owner along the course of the stream who is injured by such interruption of the water, even though he may have leased out the land after building the dam. *Anderson* v. *Cincinnati Southern R. Co.*, 14 *Am. & Eng. R. Cas.* 275, 30 *Am & Eng. R. Cas.* 193, 86 *Ky.* 44, 5 *S. W. Rep.* 49, 9 *Am. St. Rep.* 263.

The right to construct and maintain a railroad, conferred by charter on a company, does not include the right to build dams across watercourses or otherwise obstruct the flow of any running stream. *Anderson* v. *Cincinnati Southern R. Co.*, 14 *Am. & Eng. R. Cas.* 275, 30 *Am. & Eng. R. Cas.* 193, 86 *Ky.* 44, 5 *S. W. Rep.* 49, 9 *Am. St. Rep.* 263.

No one can lawfully erect dams or obstructions on a watercourse which flows by the land of others, except to operate a mill, and after leave obtained of the county court as provided by statute. *Anderson* v. *Cincinnati Southern R. Co.*, 14 *Am. & Eng. R. Cas.* 275, 30 *Am. & Eng. R. Cas.* 193, 86 *Ky.* 44, 5 *S. W. Rep.* 49, 9 *Am. St. Rep.* 263.

A company has no right to stop the natural flow of surface water by erecting an embankment, nor to divert its course so as to throw it upon the land of an adjoining proprietor. Overflow water from a river in time of flood is surface water within the meaning of this rule. *Shane* v. *Kansas City, St. J. & C. B. R. Co.*, 5 *Am. & Eng. R. Cas.* 64, 71 *Mo.* 237, 36 *Am. Rep.* 480.—FOLLOWING McCormick *v.* Kansas City, St. J. & C. B. R. Co., 70 Mo. 359. NOT FOLLOWING Gannon *v.* Hargadon, 10 Allen (Mass.) 106; Goodale *v.* Tuttle, 29 N. Y. 459.—OVERRULED IN Abbott *v.* Kansas City, St. J. & C. B. R. Co., 20 Am. & Eng. R. Cas. 103, 83 Mo. 271, 53 Am. Rep. 581; O'Connell *v.* East Tenn., V. & G. R. Co., 87 Ga. 246.

A landowner conveyed to a company land for a depot and water tanks, and the right to draw water from any streams or springs on the premises, by means of pipes, for supplying the depot and water station. The company, with the assent of the grantor, constructed a dam across a stream, and took water by a wooden conduit from the reservoir so formed. Afterwards the dam was carried away and not rebuilt, but the water was drawn directly from the stream. *Held*, that the company was under no duty to maintain the dam for the benefit of the grantor, not being required in the deed to do so; and that it was not confined to the use of so much water as was required at the time of the grant, or to the particular method of exercising its right as first adopted. *Read* v. *Erie R. Co.*, 20 *Am. & Eng. R. Cas.* 121, 97 *N. Y.* 341; *modifying* 25 *Hun* 563, *mem.*

A company which has acquired title to land under water some distance from the shore for the purpose of constructing its roadbed, and has built thereon an embank-

ment supporting its tracks, leaving a bay between the embankment and the original shore line, into which the tide ebbs and flows, is not a "proprietor of adjacent lands" within the meaning of 1 N. Y. Rev. St. 208, § 67, and the owner of the upland adjoining the original shore, not the railroad corporation, is entitled to the grant. *Rumsey* v. *New York & N. E. R. Co.*, 125 *N. Y.* 681, *mem.*, 3 *Silv. App.* 203, 34 *N. Y. S. R.* 454; *reversing* 22 *N. Y. S. R.* 820, 51 *Hun* 644, *mem.*, 4 *N. Y. Supp.* 293; *adhering to former appeal in* 114 *N. Y.* 423, 21 *N. E. Rep.* 1066, 23 *N. Y. S. R.* 928.

A riparian proprietor whose land has been gradually washed away by a change in the course of the current of the stream, occasioned by necessary erections made above him in the stream by a railway company, has no claim for damages against the company, whether such erections have been made in a careless and unskilful manner or not. *Henry* v. *Vermont C. R. Co.*, 30 *Vt.* 638.—DISTINGUISHED IN Eaton *v.* Boston, C. & M. R. Co., 51 N. H. 504.

13. Liability for obstructions.—A company is liable for damages caused by obstructing a stream by the improper construction of a culvert, regardless of the length of time it may have been maintained. The limitation begins to run from the time of the injury, and not from the time the road was constructed. *Ohio & M. R. Co.* v. *Elliott*, 34 *Ill. App.* 589.—QUOTING Ohio & M. R. Co. *v.* Wachter, 123 Ill. 440.—FOLLOWED AND QUOTED IN Ohio & M. R. Co. *v.* Nuetzel, 43 Ill. App. 108.

If a company obstructs a stream, it cannot avoid liability by showing that others have also obstructed it lower down. *Culver* v. *Chicago, R. I. & P. R. Co.*, 38 *Mo. App.* 13[illegible].

If a company unlawfully, that is, without legislative authority, interferes with a stream, it is liable without regard to its actual negligence; but if it has legislative authority, then it is liable only for such injury as results from its negligence in constructing its works. *Bellinger* v. *New York C. R. Co.*, 23 *N. Y.* 42.—APPLYING Rochester White Lead Co. *v.* Rochester, 3 N. Y. 463. DISAPPROVING Fletcher *v.* Auburn & S. R. Co., 25 Wend. 462; Brown *v.* Cayuga & S. R. Co., 12 N. Y. 486. EXPLAINING Lawrence *v.* Great Northern R. Co., 16 Q. B. 643.—APPLIED IN Colorado C. R. Co. *v.* Mollandin, 4 Colo. 154; Barnes *v.* South Side R. Co., 2 Abb. Pr. N. S. (N. Y.) 415. DISAPPROVED IN Eaton *v.* Boston, C. & M. R. Co., 51 N. H. 504. DISTINGUISHED IN Cott *v.* Lewiston R. Co., 36 N. Y. 214, 34 How. Pr. 222. EXPLAINED IN Booth *v.* Rome, W. & O. T. R. Co., 44 N. Y. S. R. 9, 63 Hun 624, 17 N. Y. Supp. 336. FOLLOWED IN Moyer *v.* New York C. & H. R. R. Co., 8 Am. & Eng. R. Cas. 531, 88 N. Y. 351; Conhocton Stone Road Co. *v.* Buffalo, N. Y. & E. R. Co., 3 Hun (N. Y.) 523, 5 T. & C. 651. REVIEWED IN Losee *v.* Buchanan, 51 N. Y. 476; Cogswell *v.* New York, N. H. & H. R. Co., 103 N. Y. 10, 8 N. E. Rep. 537, 4 Cent. Rep. 225, 3 N. Y. S. R. 56.

14. Liability for flowage.* — Two watercourses with well-defined channels from twenty to thirty feet wide and six to ten feet deep ran through plaintiff's land. In one of these, in order to protect its roadbed from inundation, defendant erected a bulkhead whereby the waters were diverted from their channel and thrown on the lands of plaintiff. By way of further protection, defendant cut a ditch with its open face next to the roadbed and threw up a levee ranging from one and one half to four feet in height across the entire western boundary of plaintiff's land, whereby the diverted waters from the one stream, and the overflowed waters from the other, were thrown back upon and damaged plaintiff's lands. At each of three trestles built by defendant in its roadbed for the outflow of the creeks there had been three replacements, and each time the old piles were not removed, but were cut off above the surface, with the result that but a small opening was left for the escape of the water. *Held*, that the injuries to plaintiff's lands must be deemed to have been caused by the obstruction of the streams, and that the defendant was liable although the accumulations of sand, etc., therein had been increased by the removal of timber from the side hills and by other natural causes. *Mississippi & T. R. Co.* v. *Archibald*, 41 *Am. & Eng. R. Cas.* 4, 67 *Miss.* 38, 7 *So. Rep.* 212.

If a company negligently obstructs the natural flow of a creek, so that there is an overflow, it is liable for the resulting injury. *Brink* v. *Kansas City, St. J. & C. B. R. Co.*,

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* See also FLOODING LANDS.

Overflow of streams, see note, 41 AM. & ENG. R. CAS. 9.

Right of landowners to damages from overflowing lands, diverting streams, etc., see note, 4 AM. ST. REP. 403.

17 *Mo. App.* 177.— DISTINGUISHING Abbott *v.* Kansas City, St. J. & C. B. R. Co., 83 Mo. 271.

A company can only be held liable for such unlawful obstructions as it places in a stream itself, or authorizes; and it is not liable for injury or loss caused by others by raising levees which increase the flow of water in a certain direction. *Coleman* v. *Kansas City, St. J. & C. B. R. Co.*, 36 *Mo. App.* 476.

If a watercourse is wrongfully obstructed by the building of a permanent railroad embankment, a tenant of adjacent land, though he rents the land after the erection of the embankment and with knowledge thereof, can recover from the company the damage to his crops from overflows caused by such obstruction. *McKee* v. *St. Louis, K. & N. W. R. Co.*, 49 *Mo. App.* 174.

A railroad owning land abutting on a river, through which land a creek flows and empties into the river, may, as against proprietors on the opposite side of the river, change the channel and mouth of the creek upon its own land and for its own protection or convenience, if, in so doing, it exercises reasonable care and caution not to injure others. If, however, the opposite bank of the river be subject to inundation and overflow in case of unusual but not unprecedented floods in the river, such change in the channel and mouth of the creek cannot be rightfully made, if thereby, in the exercise of ordinary prudence and foresight, increased danger of inundation and overflow on the opposite side of the river may be anticipated. When such change is made without fault or carelessness, and a levee on the opposite bank is broken and washed away by an unusual but not unprecedented flood, whereby the crops growing on adjacent lands are destroyed, it is *damnum sine injuria*, notwithstanding a sandbar in the river at the new mouth of the creek, caused by the change in the creek, may have contributed, in some degree, to the damage. *Cincinnati, H. & D. R. Co.* v. *Carr*, 11 *Am. & Eng. R. Cas.* 533, 38 *Ohio St.* 448.

Where a company, by making necessary erections, such as bridges, whether such bridges have been made in a careless manner or not, gradually washes away the lands of a riparian owner below and changes the course of the stream, it is not responsible therefor; yet it may be responsible to one who has been injured by the setting back of waters above the erection. *Henry* v. *Vermont C. R. Co.*, 30 *Vt.* 638.

Where for many years a canal company has diverted a considerable part of a stream, a railway company which, under authority of parliament, purchases and discontinues the canal is not liable for injuries caused by a flood when it restores to the stream the water which had been diverted from it. *Mason* v. *Shrewsbury & H. R. Co., L. R.* 6 *Q. B.* 578, 40 *L. J. Q. B.* 293, 20 *W. R.* 14, 25 *L. T.* 239.

15. When liable for diverting the flow of the stream.*—A grant of a right of way to a company, with the right "to change watercourses," does not authorize it to divert streams from other lands upon the land of the grantor, to his injury. *St. Louis, I. M. & S. R. Co.* v. *Harris*, 26 *Am. & Eng. R. Cas.* 608, 47 *Ark.* 340, 1 *S. W. Rep.* 609.

Where a company diverts the flow of a watercourse from its natural channel, and conducts it through a ditch to a point where it overflows the land of another, the company will be liable for such damages as result therefrom. *East St. Louis & C. R. Co.* v. *Eisentraut*, 134 *Ill.* 96, 24 *N. E. Rep.* 760. *East St. Louis & C. R. Co.* v. *Eisentraut*, 34 *Ill. App.* 563.

A compromise and dismissal of a suit for damages to land, caused by the diversion of water from its natural channel, is no bar to another suit for damages subsequently accruing from the same cause. *Wright* v. *Syracuse, B. & N. Y. R. Co.*, 3 *N. Y. Supp.* 480, 49 *Hun* 445, 23 *N. Y. S. R.* 78; *affirmed in* 124 *N. Y.* 668, *mem.*, 27 *N. E. Rep.* 854, *mem.*

The owner of land over which a stream of water flows, suitable for a mill site, cannot recover from a company for the loss of water power which he was not using or attempting to use, but he may recover for any injury that he otherwise suffers by reason of the diversion of the water. *Clark* v. *Pennsylvania R. Co.*, 145 *Pa. St.* 438, 22 *Atl. Rep.* 989.—QUOTING Pennsylvania R. Co. *v.* Miller, 112 Pa. St. 41, 3 Atl. Rep. 780.

A company cannot justify the taking of water from a running stream on the lands of another, on the ground that such water

* Right of railroad to divert watercourse by constructing embankments, see notes, 20 AM. & ENG. R. CAS. 120; 17 *Id.* 77; 14 *Id.* 280; 26 *Id.* 607.

is essential to the operation of the road. The water can only be taken as other property which is essential to the construction and operation of the road, upon making due compensation therefor. *Clark* v. *Pennsylvania R. Co.*, 145 *Pa. St.* 438, 22 *Atl. Rep.* 989.

A company as a riparian proprietor has no right to take water from a stream for supplying its locomotives. *Attorney-General* v. *Great Eastern R. Co.*, 18 *W. R.* 1187, 23 *L. T.* 344.

16. When not liable.—The diversion of a watercourse was expressly authorized by a deed from the grantor of a right of way to a company. *Held*, that the company was not liable for the consequential damages resulting therefrom. *St. Louis, I. M. & S. R. Co.* v. *Walbrink*, 26 *Am. & Eng. R. Cas.* 604, 47 *Ark.* 330, 1 *S. W. Rep.* 545.

Under a charter conferring on a company the power to acquire by condemnation land for the construction of its road, it has the right to divert, if it sees fit to do so, a stream flowing across the road. *Baltimore & P. R. Co.* v. *Magruder*, 34 *Md.* 79.

The right of a company to divert a stream of water does not depend upon an express grant to be made and specified in the inquisition itself, but may be acquired by condemnation of the land, duly confirmed, and payment or tender of the damages awarded; and proof *dehors* the inquisition is admissible to show that at the time of taking, and before they signed the same, the attention of the jury of inquest was directed to the intended diversion. *Baltimore & P. R. Co.* v. *Magruder*, 34 *Md.* 79.

Where the attention of the jury is directed to a diversion of a stream, and the same is within the lines of the land condemned for the construction of the road, the owner of the land through which the road passes has no remedy, either at law or in equity, for any injury that may result therefrom. *Baltimore & P. R. Co.* v. *Magruder*, 34 *Md.* 79. — DISTINGUISHED IN Eaton *v.* Boston, C. & M. R. Co., 51 N. H. 504. REVIEWED IN Denver City I. & W. Co. *v.* Middaugh, 12 Colo. 434, 21 Pac. Rep. 565.

An owner of land on the east side of a river is not entitled to an injunction to restrain a company from building a retaining wall on the west side, where the proofs neither define plaintiff's riparian rights nor show that the wall will impede or deflect the flow of the water. *Patterson's Appeal*, 40 *Am. & Eng. R. Cas.* 507, 129 *Pa. St.* 109, 18 *Atl. Rep.* 563.

Under the Railways Clauses Consolidation Act, 1845, § 16, a company can divert a stream only when such diversion is strictly necessary to enable it to carry out its undertaking, and it will be enjoined from making a diversion which is merely convenient or economical, as to avoid the expense of making two bridges within a very short distance of each other. *Pugh* v. *Golden Valley R. Co.*, *L. R.* 15 *Ch. D.* 330, 49 *L. J. Ch. D.* 721, 42 *L. T.* 863, 28 *W. R.* 863; *affirming L. R.* 12 *Ch. D.* 27, 48 *L. J. Ch. D.* 666, 41 *L. T.* 30.

The above section gives to companies the power to divert the course of a river or road "in order the more conveniently to carry the same over or under, or by the side of the railway, as they may think proper"; but this power must be taken as qualified by the proviso that the act be necessary for making, maintaining, or repairing the railway. *Pugh* v. *Golden Valley R. Co.*, *L. R.* 15 *Ch. D.* 330, 49 *L. J. Ch. D.* 721, 42 *L. T.* 863, 28 *W. R.* 863; *affirming L. R.* 12 *Ch. D.* 27, 48 *L. J. Ch. D.* 666, 41 *L. T.* 30.

17. Pleading and defenses in suits for diversion. — Where a company by digging a ditch along its track diverts the flow of a natural watercourse wholly or in part, to the injury of an adjoining landowner, it is no defense to an action to recover for such damages that the digging of the ditch was necessary for the protection of the track, or that the ditch was wholly on land owned by the company in fee. *Union Pac. R. Co.* v. *Dyche*, 14 *Am. & Eng. R. Cas.* 272, 31 *Kan.* 120, 1 *Pac. Rep.* 243.

A bill by a manufacturing company states that complainant owns the water power and canal included in its premises, and that the present flow of water is no more than sufficient to carry its various mills and machinery now dependent on said flow for propelling power; that defendant without authority threatens, and has already commenced, to place two stone piers, to support an iron bridge to be used by it for railroad purposes, extending out on either side into and diagonally across the canal; and has taken forcible and violent possession of the property and deprived complainant of its water power and mills, and threatens to continue such possession, to the irreparable damage of complainant. Such bill states facts which entitle complainant to

that preventive remedy which a court of equity alone can grant. *Newaygo Mfg. Co.* v. *Chicago & W. M. R. Co.*, 29 *Am. & Eng. R. Cas.* 505, 64 *Mich.* 114, 30 *N. W. Rep.* 910.

Under a complaint that defendant, by the improper construction of a ditch, diverted a flowing stream from its channel, thus flooding plaintiff's land, defendant cannot complain of instructions which make his liability depend solely upon the improper and negligent construction of the ditch. *Mangold* v. *St. Louis, I. M. & S. R. Co.*, 24 *Mo. App.* 52.

18. Rights of upper and lower proprietors, generally.—It is the legal right of any one along the line of a natural stream of water to drain into it the waters which naturally shed into it, and no one owning land along the stream will have a right of action for damages to his inheritance by means of the increased flow caused by draining water into the stream above him. *Kankakee & S. R. Co.* v. *Horan*, 41 *Am. & Eng. R. Cas.* 13, 131 *Ill.* 288, 23 *N. E. Rep.* 621; *affirming* 30 *Ill. App.* 552.

Where a company builds a road across a natural watercourse, it is its duty to provide for a discharge of all water that may flow through such watercourse, although the amount is subsequently increased by the construction of drainage ditches. *Kankakee & S. R. Co.* v. *Horan*, 41 *Am. & Eng. R. Cas.* 13, 131 *Ill.* 288, 23 *N. E. Rep.* 621; *affirming* 30 *Ill. App.* 552.

One riparian proprietor cannot maintain an action against an upper proprietor for a diversion of part of the water of a natural watercourse flowing through their lands, unless such diversion causes plaintiff actual perceptible damage. *Elliot* v. *Fitchburg R. Co.*, 10 *Cush.* (*Mass.*) 191.—DISTINGUISHED IN Garwood *v.* New York C. & H. R. R. Co., 2 Am. & Eng. R. Cas. 490, 83 N. Y. 400, 38 Am. Rep. 452.

A company has a right, if it does not interfere with the natural outlet, to protect its own property against an extraordinary flood arising from natural causes, although the damage inflicted upon its neighbor be thereby increased. *Nield* v. *London & N. W. R. Co.*, 44 *L. J. Ex.* 15.

19. Rights of mill owners, generally.*—After leave has been given under the statute to establish a grist mill on a watercourse, the owner has a vested right which cannot be taken away without just compensation, but this does not impair the right of any riparian owners along the stream to use the water. *Anderson* v. *Cincinnati Southern R. Co.*, 14 *Am. & Eng. R. Cas.* 275, 30 *Am. & Eng. R. Cas.* 193, 86 *Ky.* 44, 5 *S. W. Rep.* 49, 9 *Am. St. Rep.* 263.

Where the complaint is that defendant company has constructed an embankment in the mouth of a creek, so that the water is prevented from flowing in its accustomed channel, and plaintiff, who has a right of storing, landing, and rafting lumber in the mouth of said creek, for the use of his sawmill, is thereby deprived of the full enjoyment of his privilege, the injury to the right is the direct and immediate consequence of the act of defendant, and the damages sustained cannot be denominated remote or consequent, and it is no defense to an action for such injury that the water flowing in the mouth of the creek is the water of a public navigable river under servitude to the public interest, the regulation of which is vested in the sovereign power. *Tinsman* v. *Belvidere Del. R. Co.*, 26 *N. J. L.* 148.

A company has the right to drain the surface water from its lands into a stream which is the natural outlet, although the quantity of water in the stream is thereby increased in time of high water and diminished at other times, to the damage of a mill owner below. *Waffle* v. *New York C. R. Co.*, 53 *N. Y.* 11, 5 *Am. Ry. Rep.* 163; *affirming* 58 *Barb.* 413. — RECONCILING Clinton *v.* Myers, 46 N. Y. 511.—QUOTED IN Jenkins *v.* Wilmington & W. R. Co., 110 N. Car. 438.

In an action for penning back the water of a stream supplying plaintiffs' mills by placing a hatch or gate across the stream, a plea that defendant was incorporated for the purpose of constructing a railroad, and empowered to intersect or cross any stream on the route of the railroad, and to construct the railroad across or upon the same; that the stream was on the route of the railroad, and it was necessary that the railroad should be constructed across the same; whereupon defendant, in accordance with the powers and provisions of the act, placed the hatch or gate in and across the stream, and continued the same there, the said portion of the road not being completed at the commencement of the suit, so as to enable defendant to restore the stream

*Injury to mill by obstructing the natural flow of stream, see notes, 29 AM. & ENG. R. CAS. 514, 521; 48 *Id.* 75, *abstr.*

to its natural state, is bad on demurrer, as not confessing and avoiding, or traversing the injury complained of, and for not showing a sufficient justification. *Anderson* v. *Great Western R. Co.*, 11 *U. C. Q. B.* 126.

20. —— of lower mill owners. — A company erected a dam across a stream in order to form a reservoir, using the water for the purpose of operating its engines. A riparian mill owner brought suit for damages resulting from this alleged unlawful obstruction and use of the water of the stream. The company set up as a defense the fact that it had leased its road, including the dam. *Held:* (1) that the fact that the road had been leased was not available as a defense; (2) that the use made by the railroad of the water of the stream was not a use for natural or domestic purposes; and if by other use the flow of water to a mill is diminished, and the capacity of the water power below is lessened, the company must answer in damages to persons injured thereby, but not so in any other case. *Anderson* v. *Cincinnati Southern R. Co.*, 14 *Am. & Eng. R. Cas.* 275, 30 *Am. & Eng. R. Cas.* 193, 86 *Ky.* 44, 9 *Am. St. Rep.* 263, 5 *S. W. Rep.* 49.

The owner of a mill on a river let the mill to tenants from year to year. A canal company, by its permanent structures, so constantly abstracted the waters of the river above the mill as to impair the value of the property and to compel the landlord to reduce his rents. *Held*, that the landlord could recover for the injury to his property, and that the tenant could also recover damages for the diminution in the value of the use of the mill resulting from abstractions of the water during his term. *Halsey* v. *Lehigh Valley R. Co.*, 45 *N. J. L.* 26.

Plaintiff was the owner of a mill operated by water power furnished by a creek. Defendant, who was a riparian owner above, diverted the waters of the creek under a claim of right, conveying them by pipes to reservoirs whence its locomotives were supplied with water. It appeared that the water so "diverted from the creek was sufficient" to "perceptibly reduce the volume of water therein," and to "materially reduce or diminish the grinding power of plaintiff's mill," and that in consequence he had sustained damage to a substantial amount. *Held*, that an action was maintainable to recover the damages sustained and to restrain such diversion. *Garwood* v. *New York C. & H. R. R. Co.*, 2 *Am. & Eng. R. Cas.* 490, 83 *N. Y.* 400, 38 *Am. Rep.* 452; *affirming* 17 *Hun* 356. — DISTINGUISHING Elliott *v.* Fitchburg R. Co., 10 Cush. (Mass.) 191; Sandwich *v.* Great Northern R. Co., L. R. 10 Ch. D. 707. — APPLIED IN Garwood *v.* New York C. & H. R. R. Co., 45 Hun 128, 9 N. Y. S. R. 448.

Defendant company built its road across a stream nearly two miles above plaintiff's sawmill. The land was low and marshy, and the company raised its roadbed above the natural surface of the land, leaving ditches, by means of which the surface water was drawn off and passed into the stream. Such ditches were wholly upon the company's land. The testimony tended to prove that, by means of the ditches, the water was led into the stream too rapidly at times of high water, and that in dry seasons the supply of water was, by the same means, earlier exhausted, and the mill compelled to lie idle. *Held*, that these facts constituted no cause of action, and that plaintiff was properly nonsuited. The company had a right to drain the land near the stream. *Waffle* v. *New York C. R. Co.*, 58 *Barb.* (*N. Y.*) 413.—DISTINGUISHED IN Gould *v.* Booth, 66 N. Y. 65; Eaton *v.* Boston, C. & M. R. Co., 51 N. H. 504. QUOTED IN McCormick *v.* Kansas City, St. J. & C. B. R. Co., 70 Mo. 359.

Where a company withdraws water from a stream upon which a grist mill is situated, thereby decreasing the grinding capacity of the mill, the owner is entitled to compensatory damages. *Garwood* v. *New York C. & H. R. R. Co.*, 2 *N. Y. S. R.* 701, 41 *Hun* 637, *mem.*; *affirmed in* 116 *N. Y.* 649, *mem.*, 2 *Silv. App.* 409, 26 *N. Y. S. R.* 620.

In such case it is error to exclude evidence offered by the mill owner that before the company first took water from the stream the period of low water, during which mills situated on the stream could not run, was but a few days in the year, and that since it began to take the water there had been a constant increase in the period during which the mills could not be run. *Garwood* v. *New York C. & H. R. R. Co.*, 2 *N. Y. S. R.* 701, 41 *Hun* 637, *mem.*; *affirmed in* 116 *N. Y.* 649, *mem.*, 2 *Silv. App.* 409, 26 *N. Y. S. R.* 620.

Defendant company dammed a stream about two miles above plaintiff's mill and inserted a pipe with a capacity of 86,000 gallons a day. Plaintiff's evidence tended

to show that since the erection of the dam there had never been sufficient water to enable the mill to do a regular business, although prior thereto he ran it for ten months in the year, and that the loss in rental value was $500 a year, and had continued about four years. Defendant's evidence tended to show that the dam and pipe did not diminish the flow so as to affect the mill injuriously, and that the reduced supply was caused by the gradual drying up of the stream. *Held:* (1) that it was proper to submit the question to the jury; (2) that a verdict for $600 was not excessive. *Marsh* v. *Delaware, L. & W. R. Co.*, 35 *N. Y. S. R.* 719, 59 *Hun* 615, *mem.*, 12 *N. Y. Supp.* 376.

A company, in the repair of its roadbed at a point several miles above plaintiff's mill, caused large quantities of mud to be washed down into a creek, thereby lessening the volume of water used in operating plaintiff's mill and causing the damage complained of. *Held*, that whether the company was liable for consequential damages growing out of the exercise of a right conferred in its charter, *quære;* but if the power was exercised recklessly, and without a due regard to the interests of others, the company would be liable. *Salisbury* v. *Western N. C. R. Co.*, 29 *Am. & Eng. R. Cas.* 518, 91 *N. Car.* 490. — REVIEWING Meares *v.* Wilmington Com'rs, 9 Ired. (N. Car.) 73.

Plaintiff conveyed a water mill, with the lands connected therewith, in trust for the benefit of his wife with the remainder to their son, but was in possession of the mill and was operating it. Defendant company threw mud and dirt into the stream above the mill, which interfered with its operation. *Held*, that plaintiff had such a personal interest as to entitle him to recover such damages as he himself sustained, and the trustee might sue for such damages as the inheritance had sustained. *Salisbury* v. *Western N. C. R. Co.*, 29 *Am. & Eng. R. Cas.* 518, 91 *N. Car.* 490.

A company inserted a pipe in the backwater of a dam, and upon its own property, and pumped water therefrom to supply its tanks in such quantities as seriously to diminish the supply required by a lower riparian proprietor for the running of his paper mill. *Held*, that the right of the company was only to use the water so as not sensibly to diminish the stream to the riparian owner below. If the company required more it must resort to the right of eminent domain. *Pennsylvania R. Co.* v. *Miller*, 25 *Am. & Eng. R. Cas.* 282, 112 *Pa. St.* 34, 3 *Atl. Rep.* 780.

A company as a riparian owner is entitled to take from the stream a reasonable quantity of water for supplying its engines and for the purposes of its station, and the amount taken will be held reasonable if a mill owner lower down the stream is not damaged in wet weather, and the working of his mill is never shortened for more than a few minutes a day. *Sandwich* v. *Great Northern R. Co., L. R.* 10 *Ch. D.* 707, 49 *L. J. Ch. D.* 225, 27 *W. R.* 616, 3 *Ry. & C. T. Cas.* xv.

21. Enjoining diversion or obstruction.—A bill charged that a company was threatening to enter plaintiff's lands to obtain sand, without permission or condemnation proceedings, and that such removal of sand would probably change the course of a river, thus doing irreparable damage to the land. *Held*, that the bill showed good grounds for an injunction. *Cobb* v. *Illinois & St. L. R. & C. Co.*, 68 *Fed.* 233.

The obstruction of the flow of a stream, whereby lands are inundated, is a nuisance, and a court of equity may enjoin such obstruction without an averment or proof of the insolvency of the defendant. *Moore* v. *Chicago, B. & Q. R. Co.*, 75 *Iowa* 263, 39 *N. W. Rep.* 390. *Galveston, H. & S. A. R. Co.* v. *Tait*, 63 *Tex.* 223.

Where it is doubtful whether the acts of a company in obstructing a stream are authorized by its charter, the question must be determined against it in an action at law before it will be restrained in equity. *Sheboygan* v. *Sheboygan & F. du L. R. Co.*, 21 *Wis.* 667.—QUOTING Mohawk Bridge Co. *v.* Utica & S. R. Co., 6 Paige (N. Y.) 554. REVIEWING Milwaukee *v.* Milwaukee & B. R. Co., 7 Wis. 85. — DISTINGUISHED IN Jamestown *v.* Chicago, B. & N. R. Co., 32 Am. & Eng. R. Cas. 263, 69 Wis. 648, 34 N. W. Rep. 728.

Where a company had constructed tanks for the use of its locomotives, said tanks being filled from a stream running through plaintiff's land, but not abstracting, in the filling, more than one eightieth or one one-hundredth part of the water in the stream, the court refused to restrain the company from using the water of the stream, and dismissed with costs a bill filed for the purpose of such restriction, notwithstanding that plaintiff had previously recovered a verdict

at law, for such use of the water, with one shilling damages. *Graham* v. *Northern R. Co.*, 10 *Grant's Ch.* (*U. C.*) 259.

22. Damages for diversion. — The erection of an embankment for a track closed the natural channel of a stream and diverted the water from a tract of land. *Held*, that the injury caused to such land thereby was a permanent one, for which damages might at once be fully recovered. *Stodghill* v. *Chicago, B. & Q. R. Co.*, 53 *Iowa* 341, 5 *N. W. Rep.* 495.—QUOTING Troy *v.* Cheshire R. Co., 23 N. H. 83. — NOT FOLLOWED IN Dickson *v.* Chicago, R. I. & P. R. Co., 2 Am. & Eng. R. Cas. 538, 71 Mo. 575.

In an action for diverting water, by means of a dam, from its natural course over plaintiff's land, he can only recover the damage sustained prior to the date of the writ, and such an action cannot be maintained when the dam is erected under the authority of a statute which provides a remedy for one who sustains damage by reason of the dam. *Williams* v. *Camden & R. Water Co.*, 79 *Me.* 543, 11 *Atl. Rep.* 600.

In an action for diverting a stream of water and thereby throwing mud and earth into plaintiff's millpond, it appeared that the property was held by a trustee. *Held*, that there could be a recovery only to the extent of plaintiff's possession. *Salisbury* v. *Western N. C. R. Co.*, 98 *N. Car.* 465, 4 *S. E. Rep.* 465.

23. Restoration of diverted stream. — A company which, in the construction of its road, necessarily diverts a stream of water from its natural channel is bound to restore and preserve the stream in its former state of usefulness as nearly as practicable, in respect to the owners of real property on such stream. *Cott* v. *Lewiston R. Co.*, 36 *N. Y.* 214, 34 *How. Pr.* 222.—DISTINGUISHING Bellinger *v.* New York C. R. Co., 23 N. Y. 42.—FOLLOWED IN Gale *v.* New York C. & H. R. R. Co., 76 N. Y. 594, 13 Hun 1.

To restore to a proprietor such stream burdened with the expense of preserving it would not be a compliance with the requirements of the statute in such respect. *Cott* v. *Lewiston R. Co.*, 36 *N. Y.* 214, 34 *How. Pr.* 222.

A company diverted a stream from its natural channel, and caused it to flow along its track about 300 feet, to a culvert through which the water was turned on plaintiff's land. At times of heavy freshets, stone and gravel were deposited on his land. *Held*, that plaintiff was entitled to a mandatory injunction to compel the company to restore the stream to its original channel. *Wright* v. *Syracuse, B. & N. Y. R. Co.*, 3 *N. Y. Supp.* 480, 23 *N. Y. S. R.* 78, 49 *Hun* 445; *affirmed in* 124 *N. Y.* 668, *mem.*, 27 *N. E. Rep.* 854, *mem.*

Defendant, without authority, diverted a watercourse on certain land and afterwards made compensation therefor to the then owner of the land, plaintiff's predecessor in title. *Held*, that the equitable easement thereby created in favor of defendant was not valid against the registered deed of plaintiff, a *bona fide* purchaser for value without actual notice, defendant having shown no prescriptive right to divert the watercourse and the diversion being wrongful as against plaintiff. *Tolton* v. *Canadian Pac. R. Co.*, 22 *Ont.* 204. — DISTINGUISHING Knapp *v.* Great Western R. Co., 6 U. C. C. P. 187; L'Esperance *v.* Great Western R. Co., 14 U. C. Q. B. 173; Wallace *v.* Grand Trunk R. Co., 16 U. C. Q. B. 551; Partridge *v.* Great Western R. Co., 8 U. C. C. P. 97.

Plaintiff, having failed to prove actual damage, was allowed nominal damages for the wrong; and instead of granting a mandatory injunction to compel the restoration of the watercourse, the court directed a reference to ascertain the compensation to which plaintiff would be entitled as upon an authorized diversion of the watercourse under 51 Vict. c. 29, § 90, subsec. h (D.). *Tolton* v. *Canadian Pac. R. Co.*, 22 *Ont.* 204.

III. SURFACE WATER.

24. What is surface water.*—Water which leaves a creek channel far above a culvert and flows over plaintiff's land, but on account of an embankment is turned back into the channel again above the culvert, must be regarded, in determining the sufficiency of the culvert, as no longer surface water, but as though it had flowed all the time in the channel. *Sullens* v. *Chicago, R. I. & P. R. Co.*, 74 *Iowa* 659, 7 *Am. St. Rep.* 501, 38 *N. W. Rep.* 545.

Water which at the time of a freshet leaves the channel of a stream and spreads over the bottom land, and is forced back

* The law of surface waters, see note, 20 AM. & ENG. R. CAS. 114.

into the channel again by a railroad embankment, is not surface water in considering the sufficiency of a culvert constructed in the embankment. *Moore* v. *Chicago, B. & Q. R. Co.*, 75 *Iowa* 263, 39 *N. W. Rep.* 390.—FOLLOWING Sullens *v.* Chicago, R. I. & P. R. Co., 74 Iowa 659.—FOLLOWED IN Noe *v.* Chicago, B. & Q. R. Co., 76 Iowa 360, 41 N. W. Rep. 42.

When waters gathered from hills along the bank of a stream, and caused by a rainfall, have once become part of the stream, they are governed by the rules applicable to watercourses and not by the rules applicable to surface waters, even though they are dammed back and caused to flow upon adjoining lands. *Mississippi & T. R. Co.* v. *Archibald*, 41 *Am. & Eng. R. Cas.* 4, 67 *Miss.* 38, 7 *So. Rep.* 212.

25. Duty of company as to surface water, generally.*—A company must so construct its road across a watercourse as not only to carry off the water within its banks, but also surface water which has usually found its outlet through them. *Kansas, Ft. S. & M. R. Co.* v. *Cook*, 58 *Am. & Eng. R. Cas.* 654, 57 *Ark.* 387, 21 *S. W. Rep.* 1066.

Where one is injured by water flowing upon his land through a ditch wrongfully dug thereon, it is immaterial that he did not own the land when the ditch was dug; it is enough that he owned it when the injury occurred. *Miller* v. *Keokuk & D. M. R. Co.*, 14 *Am. & Eng. R. Cas.* 293, 63 *Iowa* 680, 16 *N. W. Rep.* 567.

26. Right to drain surface water into natural outlet.—If a company in constructing its road makes a ditch along the side thereof, so as to carry off the water from the adjoining land to a natural channel, it is not bound to keep such ditch open if the flow of the water is not changed injuriously to the owner of the land by the building of the road. *Louisville, N. A. & C. R. Co.* v. *McAfee*, 30 *Ind.* 291.

It is not negligence for a company to dig and leave open across its track a ditch two feet wide and eight inches deep, to carry off the surface water. *Meyer* v. *Midland Pac. R. Co.*, 2 *Neb.* 319.

A company has the right to cut and maintain, on its right of way, such ditches as may be necessary to carry the surface water collected thereon to any natural outlet capable of receiving it, but has not the right to divert such surface water into a channel where it would not naturally flow, and which is not adequate to receive it, if, thereby, the lands of others are injured. *Staton* v. *Norfolk & C. R. Co.*, 109 *N. Car.* 337, 13 *S. E. Rep.* 933.

Respecting the drainage or diversion of surface water, a company enjoys the same privileges as, but no greater than, any other landowner—that is, a right to cause it to flow in its natural channel. *Jenkins* v. *Wilmington & W. R. Co.*, 110 *N. Car.* 438, 15 *S. E. Rep.* 193.—QUOTING Waffle *v.* New York C. R. Co., 53 N. Y. 11.—REVIEWED IN Staton *v.* Norfolk & C. R. Co., 111 N. Car. 278.

27. Liability for diverting surface water.*—If by the construction of a roadbed and ditches surface water is diverted from its usual and ordinary course, and by means of embankments or ditches is conveyed to any particular place, and thereby overflows land which did not overflow before, the company will be liable to the landowner for the injury. *Springfield & M. R. Co.* v. *Henry*, 44 *Ark.* 360.—QUOTING Gulf, C. & S. F. R. Co. *v.* Donahoo, 59 Tex. 128. —*Olson* v. *St. Paul, M. & M. R. Co.*, 34 *Am. & Eng. R. Cas.* 152, 38 *Minn.* 419, 37 *N. W. Rep.* 953.—FOLLOWING Hogenson *v.* St. Paul, M. & M. R. Co., 31 Minn. 224, 17 N. W. Rep. 374.—FOLLOWED IN Jordan *v.* St. Paul, M. & M. R. Co., 41 Am. & Eng. R. Cas. 1, 42 Minn. 172, 6 L. R. A. 573, 43 N. W. Rep. 849.

The term "surface water" includes such as is carried off by surface drainage; that is, drainage independently of a watercourse; and a railroad company is not liable in damages to the proprietor of neighboring lands incidentally overflowed and injured by the construction of an embankment proper for railroad purposes, which deflects such surface water from its normal course. *Morrissey* v. *Chicago, B. & Q. R. Co.*, 58 *Am. & Eng. R. Cas.* 622, 38 *Neb.* 406, 56 *N. W. Rep.* 946.

28. Liability for obstructing flow of surface water.—The owner of a servient heritage has no right to stop, by embankments or other artificial means, the natural flow of the surface water from the

* Rights and liabilities of railroads as to surface water, see notes, 5 AM. & ENG. R. CAS. 86; 14 *Id.* 288.

* Diversion of surface water by ditches, see note, 29 AM. & ENG. R. CAS. 530.

Diverted surface water. Liability for, see note, 24 AM. & ENG. R. CAS. 149.

dominant heritage, and thus throw it back upon the latter. *Gillham* v. *Madison County R. Co.*, 49 *Ill.* 484.—REVIEWING Kauffman *v.* Griesemer, 26 Pa. St. 407; Martin *v.* Riddle, 26 Pa. St. 415; Miller *v.* Laubach, 47 Pa. St. 154.—REVIEWED IN Little Rock & Ft. S. R. Co. *v.* Chapman, 39 Ark. 463.—*Wagner* v. *Long Island R. Co.*, 2 *Hun* (*N. Y.*) 633, 5 *T. & C.* 163; *appeal dismissed in* 70 *N. Y.* 614, *mem.*

But exceptional circumstances may require a modification of this rule, as in the case of ravines in which surface water is gathered into streams in well-defined channels. *Rowe* v. *St. Paul, M. & M. R. Co.*, 39 *Am. & Eng. R. Cas.* 255, 41 *Minn.* 384, 43 *N. W. Rep.* 76.

The owner of land may erect upon the boundaries thereof, not interfering with any natural or prescriptive watercourse, such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside, or heaping up of these waters to the injury of other lands he is not responsible; but such waters as fall in rain and snow upon his lands, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural watercourse. *Cairo & V. R. Co.* v. *Stevens*, 5 *Am. & Eng. R. Cas.* 58, 73 *Ind.* 278.—QUOTING Templeton *v.* Voshloe, 72 Ind. 134. REVIEWING Taylor *v.* Fickas, 64 Ind. 167.

An owner of land who builds an embankment thereon which obstructs the flow of surface water, causing it to fall and accumulate upon his neighbor's land, does not become liable for the injury arising therefrom, unless the passageway through which the water flows is such as to constitute a watercourse. *Chicago, K. & N. R. Co.* v. *Steck*, 51 *Kan.* 737, 33 *Pac. Rep.* 601.

Where a company has formed a ditch across plaintiff's land under a simple verbal license revocable at pleasure, and has no easement authorizing it to maintain the ditch, it is not obliged to continue to keep the ditch in use, and it is not liable to plaintiff for damages to his crops caused by the simple act of closing the ditch upon the company's own land, whereby, by reason of the contour of the ground, surface waters, the overflow of the parallel ditches, made their way across plaintiff's farm substantially as they would do in their natural course, if the ditches were not in existence. *Olson* v. *St. Paul, M. & M. R. Co.*, 34 *Am. & Eng. R. Cas.* 154, 38 *Minn.* 479, 38 *N. W. Rep.* 490.

The rule that a landowner may improve his own land for the purpose for which similar land is ordinarily used, and may do what is necessary for that purpose—as to build upon it, or raise or lower its surface, even though the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water that would otherwise remain there, or to shed surface water over land on which it would not otherwise go—applies to a company constructing its road across a prairie country. *Jordan* v. *St. Paul, M. & M. R. Co.*, 41 *Am. & Eng. R. Cas.* 1, 42 *Minn.* 172, 6 *L. R. A.* 573, 43 *N. W. Rep.* 849.—FOLLOWING Kobs *v.* Minneapolis, 22 Minn. 159; Hogenson *v.* St. Paul, M. & M. R. Co., 31 Minn. 224, 17 N. W. Rep. 374; Blakely Tp. *v.* Devine, 36 Minn. 53, 29 N. W. Rep. 342; Pye *v.* Mankato, 36 Minn. 373, 31 N. W. Rep. 863; Olson *v.* St. Paul, M. & M. R. Co., 38 Minn. 419, 37 N. W. Rep. 953.

The rule of the common law with reference to surface water is in force in Missouri. Under that rule, generally speaking, surface water is a common enemy, which the proprietor of land may repel without being responsible for damages caused by so doing. *Burke* v. *Missouri Pac. R. Co.*, 29 *Mo. App.* 370.—QUOTING Hoyt *v.* Hudson, 27 Wis. 656.—*Field* v. *Chicago, R. I. & P. R. Co.*, 21 *Mo. App.* 600.

Concerning surface water, under the civil law, there was a natural easement or servitude in favor of the owner of the superior or higher ground, by reason of which the proprietor of the inferior or lower ground was bound to receive on his ground all the surface water which naturally flowed down upon it from the higher ground. Under the common law there is no such easement. *Schneider* v. *Missouri Pac. R. Co.*, 29 *Mo. App.* 68.

Semble, that the proprietor of lower lands cannot obstruct the flow of surface waters across his lands from the lands of an adjoining higher proprietor, except when there is a necessity for the exercise of the right in the proper enjoyment of the ownership of the property for the protection of which it is exercised, and there is no

other reasonable way of preventing the injury. *Waldrop* v. *Greenwood, L. & S. R. Co.*, 34 *Am. & Eng. R. Cas.* 204, 28 *So. Car.* 157, 5 *S. E. Rep.* 471.

A railway company which by artificial erections on its own land causes water to pass on its neighbor's land is liable to an action if the water interferes with the reasonable enjoyment by the neighbor of his land. *Hurdman* v. *North Eastern R. Co.*, *L. R.* 3 *C. P. D.* 168, 38 *L. T.* 339, 26 *W. R.* 489.

29. Collecting water in excavations — Percolation.* — Where one, through some unlawful or unreasonable use or sufferance, allows water to collect upon his lot, and by percolation through the soil it reaches his neighbor's property and renders it less valuable, he becomes liable to the latter for the damages sustained by him on account thereof. *Quinn* v. *Chicago, B. & Q. R. Co.*, 17 *Am. & Eng. R. Cas.* 63, 63 *Iowa* 510, 19 *N. W. Rep.* 336.

An action was brought for making an excavation on defendant's land, in which water collected and afterwards broke out and injured plaintiff's house. *Held*, that in making the excavation defendant was bound to guard against unnecessarily injuring the property of others. *Rau* v. *Minnesota Valley R. Co.*, 13 *Minn.* 442 (*Gil.* 407).

If the excavation was likely to collect waters, and when so collected they were likely to break out, it was the duty of defendant, when the excavation was made, to take such reasonable precautions as it could to prevent the waters so collected breaking out and flowing against plaintiff's house. *Rau* v. *Minnesota Valley R. Co.*, 13 *Minn.* 442 (*Gil.* 407).

Defendant had no right to change unnecessarily the channels which the water had been accustomed to take, and if the excavation was likely to change such channels, it was the duty of defendant to take such reasonable precautions as it could to prevent damage being done to plaintiff's property. *Rau* v. *Minnesota Valley R. Co.*, 13 *Minn.* 442 (*Gil.* 407).

The attempt to collect a large body of water into a limited space surrounded with a porous and gravelly soil, without taking any adequate precaution to confine it to the receptacle prepared for it, is negligence, and the person chargeable with the negligent act is liable for damages resulting therefrom to adjoining owners. *Reed* v. *State*, 108 *N. Y.* 407, 15 *N. E. Rep.* 735, 13 *N. Y. S. R.* 815.—APPLYING Pixley *v.* Clark, 35 N. Y. 520; Jutte *v.* Hughes, 67 N. Y. 267; Mairs *v.* Manhattan Real Estate Assoc., 89 N. Y. 506.

Defendant company made excavations on its right of way for the purpose of erecting an embankment near by, and the surface water collected in the excavations, and sometimes overflowed and set back on plaintiff's land. Before the excavations were made, such water passed off without doing damage. *Held*, that plaintiff was entitled to a judgment commanding the company to fill up the excavations or to construct suitable drains to carry off the water. *Deigleman* v. *New York, L. & W. R. Co.*, 34 *N. Y. S. R.* 4, 12 *N. Y. Supp.* 83.

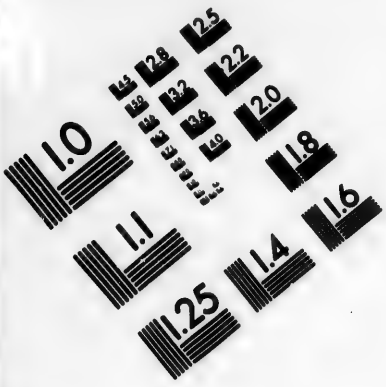
IV. WELLS AND SPRINGS.

30. Draining well or spring. — Plaintiff filed his bill against a company, and asked for an injunction, alleging that the company was proceeding to sequester a spring of water belonging to him, located a quarter of a mile from the line of the road, without his consent, and had laid pipes through his land to obtain it, and was using the water. The judge dismissed the bill for want of equity. *Held*, that the court erred, it not appearing that the water was indispensable and could not otherwise be obtained, and upon the view that there was *prima facie* a case made for equity jurisdiction entitling complainant to a hearing. *Strohecker* v. *Alabama & C. R. Co.*, 42 *Ga.* 509.

If the owner of land makes an excavation within his own premises, and thereby drains the well or subterranean spring of another, it is *damnum absque injuria*, and no action will lie. *New Albany & S. R. Co.* v. *Peterson*, 14 *Ind.* 112. — FOLLOWING Acton *v.* Blundell, 12 M. & W. 324.

If, in consequence of the excavation made for a railroad, the water of a well on an estate adjoining the railroad, but not crossed by it, is drawn off and the well is thereby rendered dry and useless, the owner of such estate will be entitled to recover damages therefor, in the same manner as for land taken for the railroad. *Parker* v. *Boston & M. R. Co.*, 3 *Cush.* (*Mass.*) 107.—DIS-

* Damage by surface water under peculiar circumstances, see note, 17 AM. & ENG. R. CAS. 71.



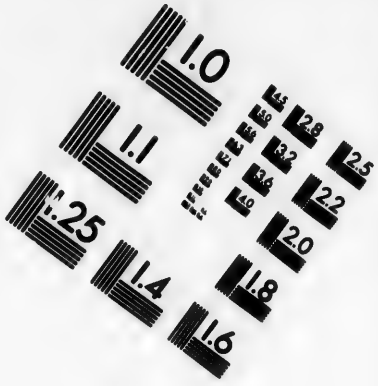
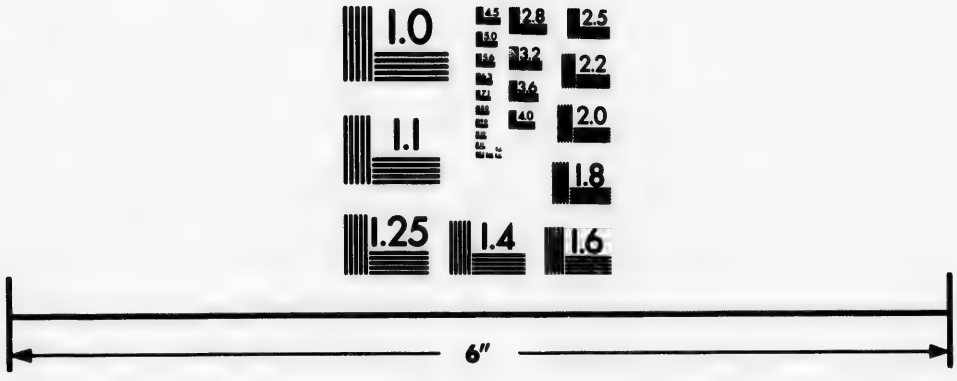
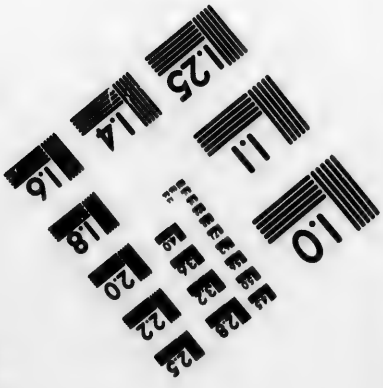


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TINGUISHING Currier *v.* Lowell, 16 Pick. (Mass.) 170.

31. Diverting water—Filling up spring.—For the liability for interfering with the water supply from springs generally, see *Robinson* v. *New York & E. R. Co.*, 27 *Barb.* (*N. Y.*) 512. *Strohecker* v. *Alabama & C. R. Co.*, 42 *Ga.* 509. *Garwood* v. *New York C. & H. R. R. Co.*, 83 *N. Y.* 400, 38 *Am. Rep.* 452; *affirming* 17 *Hun* 356.

When a company, in the construction of its road across a natural watercourse, covers up a spring from which a part of the supply of water issues, builds a large embankment, and by other means totally diverts the water from the land of a person through whose land the water naturally flowed before the construction of the road, such person is entitled to a mandatory injunction against the company. *Atchison, T. & S. F. R. Co.* v. *Long*, 46 *Kan.* 701, 27 *Pac. Rep.* 182.

Plaintiffs conveyed land to a company for a right of way, with the condition that the company should convey the water from a spring on the land to the south side of the road, so as to be accessible for watering plaintiffs' stock. *Held*, that it was not the spring basin as it actually existed when the right of way was granted that was to be preserved, but the water which issued from it. *Chamberlain* v. *Baltimore & O. R. Co.*, 29 *Am. & Eng. R. Cas.* 533, 66 *Md.* 518.

In such case the spring was destroyed by quarrying for the construction of the road, and the water collected elsewhere and was conducted to the south side. *Held*, that if it was so conducted in as ample quantity, and in equal purity, and was as accessible as in the spring reserved in the deed, the actual destruction of the old site of the spring gave no cause of action to plaintiffs. *Chamberlain* v. *Baltimore & O. R. Co.*, 29 *Am. & Eng. R. Cas.* 533, 66 *Md.* 518.

The measure of damages which plaintiffs are entitled to for the failure to carry the water across the track is not the difference in value of the farm with and without the spring, but the loss which plaintiffs suffered by failing to have the water for their stock. *Chamberlain* v. *Baltimore & O. R. Co.*, 29 *Am. & Eng. R. Cas.* 533, 66 *Md.* 518.

A company cannot be restrained from constructing on its own land an embankment which is necessary in constructing its road, because such embankment has already slipped on plaintiff's land, and is liable to slip further and ruin a spring, where it appears that the damages can easily be estimated, and the company is pecuniarily able to respond in damages. *Rider* v. *New York, W. S. & B. R. Co.*, 65 *How. Pr.* (*N. Y.*) 419.

WAY BILLS.

Admissibility and effect of, as evidence, see EVIDENCE, **253.**
Liability of carrier where wrong address is entered on, see CARRIAGE OF MERCHANDISE, **193.**
When contract of through shipment may be implied from, see CARRIAGE OF MERCHANDISE, **605, 606.**

WEATHER.

State of, when a question for experts, see WITNESSES, **137.**

WEIGHING MACHINES.

At stations, see STATIONS, **27.**

WEIGHT.

Of baggage, limit of, see BAGGAGE, **46.**
— circumstantial evidence, see EMPLOYÉS, INJURIES TO, **622.**
— conflicting evidence a question of fact, see TRIAL, **105.**
— evidence, erroneous instructions on, see APPEAL AND ERROR, **42.**
— — generally, see EVIDENCE, **264-299.**
— — in actions for causing death, see DEATH BY WRONGFUL ACT, **253-270.**
— — — — — damages caused by fire, see FIRES, **243-256.**
— — setting aside verdict against, see EMINENT DOMAIN, **836.**
— — verdict against, when ground for new trial, see NEW TRIAL, **20-24.**
— expert testimony, see WITNESSES, **195-198.**
— live stock, opinions of farmers as to, see WITNESSES, **163.**
— positive and negative testimony, see EVIDENCE, **291.**

WEIGHT OF EVIDENCE.

Harmless instructions on, see APPEAL AND ERROR, **76.**
How far reviewable on appeal, see APPEAL AND ERROR, **118, 119.**
When question for jury, see CONTRIBUTORY NEGLIGENCE, **95.**

WELLS.

Digging, on right of way, see RIGHT OF WAY, **17.**
Near track, injuries to animals caused by, see ANIMALS, INJURIES TO, **76.**
See also WATERS AND WATERCOURSES, **30, 31.**

WESTERN & ATLANTIC R. CO.*

1. Powers of superintendent — Settlement of claims. — Ga. Act of 1851–52 provides that the superintendent of the road shall have power, with the approval of the governor, to settle all claims against the road, and should any dispute arise which cannot be amicably adjusted, the claimant shall be authorized to bring suit in any of the superior courts of the several counties of the state through which the road passes, against the superintendent in his official character. *Held*, that the rejection of a claim by the late chief engineer did not, under this act, entitle the party to sue the superintendent. *Mason* v. *Cooper*, 19 *Ga.* 543.

While the road was operated by a superintendent, he had no power, under Ga. Code, § 971, to make contracts for machinery, cars, materials, etc., involving more than $3000, without the written approval of the governor. *Tappan* v. *Western & A. R. Co.*, 62 *Ga.* 198.

2. Suits against the road.—Ga. Act of March 5, 1856, entitled "An act to define the liabilities of the several railroad companies of this state, for injury to persons or property, to prescribe in what counties they may be sued, and how served with process," does not apply to the Western and Atlantic railroad. *Walker* v. *Spullock*, 23 *Ga.* 436.

By Ga. Act of April 18, 1863, all suits then pending, and brought after the adoption of the code, against the above road for damages caused by running of the cars stand upon the same footing as suits against other railroad companies for such damages, and this even though the damage for which the suits are brought was received before the adoption of the code. *Lewis* v. *Turner*, 40 *Ga.* 416.

Under Ga. Act. of 1870, the company is only liable to be sued, as a corporation, for damages sustained on the line of its road. *Galloway* v. *Western & A. R. Co.*, 57 *Ga.* 512. —EXPLAINED IN Brunswick & W. R. Co. *v.* Clem, 80 Ga. 534, 7 S. E. Rep. 84.

3. Auditing accounts of officers and agents—Powers of comptroller-general.—On the abolition of the officers of the railroad, the comptroller-general became the proper custodian of the books and records of the road, and the duty of causing the true amount due by defaulting officers of the road to be ascertained devolved upon him. *Scofield* v. *Perkerson*, 46 *Ga.* 325.

The legislature has authority to appoint, by resolution, a committee of its own body as ministerial agents to audit and state the accounts of the officers and agents of the railroad. Where such statement shows an officer or agent in default, and is transmitted by the committee to the comptroller-general, and he thereupon issues executions against the defaulting officer and his sureties, the court will presume that he satisfied himself of the correctness of the committee's report by inspection of the books and accounts of the railroad, and adopted it as his own. *Scofield* v. *Perkerson*, 46 *Ga.* 325.

4. Executions against defaulting officers.—The court will not enjoin an execution issued by the comptroller-general against a defaulting officer of the railroad on the ground that there is a suit pending, at the instance of the state, against such officer and his securities, or on the ground that the amount for which he is a defaulter was fraudulently used and embezzled by him. *Scofield* v. *Perkerson*, 46 *Ga.* 325.

The issuing of executions by the comptroller-general against defaulting agents of the railroad is a matter which is exclusively within the control of the executive department, and the courts will not interfere or prescribe the kind of evidence which shall be necessary to authorize it to issue such executions. *Scofield* v. *Perkerson*, 46 *Ga.* 350.

WESTERN PENNSYLVANIA R. CO.

1. Ejectment for lands of. — Land taken by the commonwealth for the main line of its canal became vested in fee simple in it. *Western Pa. R. Co.* v. *Childs*, 3 *Pittsb.* (*Pa.*) 168.

In ejectment, land covered originally by the slopes and embankments of the canal, as well as any portion beyond it necessarily occupied by the ordinary accretions, may be

* The road belongs to the state of Georgia, and has been operated by a superintendent or lessees.

recovered by the above company to the extent of its ownership, and it cannot be estopped from doing so by the unauthorized acts of its agents in allowing parties to take and hold possession of the land. *Western Pa. R. Co.* v. *Childs*, 3 *Pittsb.* (*Pa.*) 168.

WEST VIRGINIA.

Constitutionality of tax laws of, see TAXATION, **51.**

Contributory negligence need not be negatived in, see FIRES, **193.**

Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, **757.**

Liability of company to laborers employed by contractors in, see CONSTRUCTION OF RAILWAYS, **96.**

Local assessment upon steam railways in, for repairs, paving, etc., see STREETS AND HIGHWAYS, **356.**

Plaintiff's pleadings need not negative contributory negligence in, see CONTRIBUTORY NEGLIGENCE, **68.**

Statutory duty to fence in, see FENCES, **34.**

WHARVES AND PIERS.

Delivery of goods on, see CARRIAGE OF MERCHANDISE, **217.**

— — — — sufficiency of, see CARRIAGE OF MERCHANDISE, **93.**

For ferry purposes, see FERRIES, **13.**

License to erect, see LICENSE, **7.**

Reservation of right of access to, see DEEDS, **45.**

Right to condemn for railway purposes, see EMINENT DOMAIN, **125.**

Sufficiency of delivery at, see CARRIAGE OF MERCHANDISE, **253.**

Taking land for, when deemed a public use, see EMINENT DOMAIN, **189.**

When exempt from taxes, see TAXATION, **170.**

— subject to taxation, see TAXATION, **88.**

1. Right to erect wharves, generally.—A riparian owner may build a dock to navigable water, though it extends beyond the dock line as fixed by a city. *Yates* v. *Milwaukee*, 10 *Wall.* (*U. S.*) 497.—QUOTED IN Chicago, R. I. & P. R. Co. *v.* Joliet, 79 Ill. 25; Rumsey *v.* New York & N. E. R. Co., 133 N. Y. 79.

A pier erected in the navigable water of a river for the sole use of the riparian owner as part of a boom for saw-logs, and without license or authority of any kind for its erection except such as may arise from his ownership of the adjacent shore, is an unlawful structure, and the owner is liable for the sinking of a barge run against it in the night. *Atlee* v. *Northwestern Union Packet Co.*, 21 *Wall.* (*U. S.*) 389.

Such structures differ very materially from wharves, piers, and other structures of like character, made to facilitate and aid navigation, and generally regulated by city or town ordinances, or by statutes of the state, or other competent authority. They also have a very different standing in the courts from piers built for railroad bridges across navigable streams, which are authorized by acts of Congress or statutes of the states. *Atlee* v. *Northwestern Union Packet Co.*, 21 *Wall.* (*U. S.*) 389.

The public authorities have the right, in Iowa, to build wharves and levees on the banks of the Mississippi below high water, and to make other improvements thereon necessary to navigation or public passage by railways and otherwise, without the consent of the adjacent proprietor, and without making compensation to him. *Barney* v. *Keokuk*, 94 *U. S.* 324.

Under the charter of defendant company and the consent of the city of Chicago to enter its limits, the company had the right to erect piers and breakwaters, and to fill in the shallow waters of Lake Michigan within the city limits, and to use the ground thus made for its roadbed and other purposes, provided such piers and breakwaters did not interrupt the navigation of the lake. *Illinois* v. *Illinois C. R. Co.*, 33 *Fed. Rep.* 730; *modified and affirmed in* 146 *U. S.* 387, 13 *Sup. Ct. Rep.* 110.

The right of the legislature to grant to corporations or individuals the privilege of making and maintaining wharves is well settled, and it is permissible to grant the right to a riparian owner. Such grant is not a donation of public revenues to a private purpose, but is the control by the legislature of a public servitude. *New Orleans* v. *New Orleans, M. & C. R. Co.*, 27 *La. Ann.* 414.

The authority of the general assembly to grant to corporations the right to make and maintain wharves has long been settled, as well as the authority of the corporations and lessees from them to build wharves with inclines or aprons. *DeGruy* v. *Aiken*, 43 *La. Ann.* 798, 9 *So. Rep.* 747.

The proprietor of a wharf in a harbor was authorized by an act of the legislature to extend the same into the channel to the line of the harbor; but before any extension

thereof, in pursuance of such act, the legislature incorporated a company having authority to locate and construct a railroad across and over the flats between such wharf and the line of the harbor. *Held*, that the act authorizing such extension operated as a grant to the proprietor of the wharf, and was not a mere license, revocable at the pleasure of the legislature, and revoked by the act incorporating the company. *Fitchburg R. Co.* v. *Boston & M. R. Co.*, 3 *Cush.* (*Mass.*) 58.

A company, after locating its road over a wharf more than sixty feet, and filing the location with the county commissioners, agreed with the owners of the wharf to extend the road sixty feet on and over the same before a certain day, and the owners, in consideration thereof, agreed not to demand any damages for such extension. The road was made according to the location that was filed previous to such agreement. *Held*, that this was not an agreement of the corporation not to extend its road more than sixty feet over the wharf, and that the owners of the wharf were not thereby entitled to apply, after three years from the filing of the location, for an estimate of the damages caused by an extension of the road more than sixty feet over the wharf. *Charlestown Branch R. Co.* v. *Middlesex County Com'rs*, 7 *Metc.* (*Mass.*) 78.

Owners of land bordering on the waters of Lake Champlain have no title to the soil beyond low-water mark, nor right appurtenant, but only a statutory right to build wharves and storehouses into the lake in front of their land. Therefore, if land is made by a stranger by filling in earth in front of their land, from low-water mark into the lake, and wharves and docks are built thereon, they cannot maintain ejectment therefor. *Austin* v. *Rutland R. Co.*, 45 *Vt.* 215, 2 *Am. Ry. Rep.* 46.

A riparian owner upon navigable water, whether or not he own the soil *usque ad medium filum aquæ*, has a right, unless prohibited by local law, to construct in shoal water, in front of his land, proper wharves or piers in aid of navigation, and at his peril of obstructing navigation, through the water far enough to reach actually navigable water. *Diedrich* v. *Northwestern Union R. Co.*, 42 *Wis.* 248, 15 *Am. Ry. Rep.* 9.

2. Leases of wharf property. — Where the owner of a wharf makes a siding on his land, connecting a railway with a wharf part of which is in the occupation of tenants, and by reason of the company's wrongfully and permanently obstructing access to such wharf by means of its railway the tenants remove to another wharf, the owner is entitled as reversioner to maintain an action. *Bell* v. *Midland R. Co.*, 10 *C. B. N. S.* 287, 7 *Jur. N. S.* 1200, 30 *L. J. C. P.* 273, 9 *W. R.* 612, 4 *L. T.* 293.

Where the directors of a company lease land with the privilege of using docks, and agree to pay rent and royalties to the owner, and enter into other conditions which subsequently appear to be unreasonable and impolitic, such conditions cannot on that account be treated as *ultra vires* of the directors. *Taff Vale R. Co.* v. *Macnabb*, *L. R.* 6 *H. L. Cas.* 169, 42 *L. J. Q. B.* 153, 22 *W. R.* 65.

A condition entered into by a company leasing docks to pay shipping dues, not only for goods actually brought and shipped at such docks, but for goods carried by the railway to be shipped at other docks, is not in restraint of trade. *Taff Vale R. Co.* v. *Macnabb*, *L. R.* 6 *H. L. Cas.* 169, 42 *L. J. Q. B.* 153, 22 *W. R.* 65.

Where a wharf has been leased "with all the privileges thereto belonging," a vessel attached to the wharf by the usual fastenings cannot be distrained upon for rent. *Sanderson* v. *Kingston Marine R. Co.*, 3 *U. C. Q. B.* 168. *Sanderson* v. *Kingston Marine R. Co.*, 4 *U. C. Q. B.* 340.

3. Rights of wharfingers, generally.—The owner of wharves in front of which a railroad is located according to law cannot recover of the railroad company, as damages, under Mass. Rev. St. ch. 39, § 56, the anticipated depreciation of the wharf property because the access thereto is made dangerous and inconvenient. *Boston & W. R. Co.* v. *Old Colony R. Co.*, 12 *Cush.* (*Mass.*) 605.

Certiorari was brought to set aside a resolution of the common council of a city declaring the wharves constructed at the end of and over the streets of the city free to public use though in the possession of private parties, and authorizing the street commissioners to remove all obstructions therefrom. *Held*, that as it appeared by defendant's own showing that the city was not in the exclusive possession of the streets and of the docks, wharves, and piers from which obstruction was sought to be removed, and that plaintiff was in possession,

claiming right to the same as private property, and that the enforcement of the resolution might involve questions of right and title between the parties, and the nature and extent of easements and of alleged dedications made to the public, the party complained of was entitled to notice, and to have his rights determined by process of law. *State (Jersey Co., Pros.)* v. *Mayor, etc., of Jersey City*, 34 *N. J. L.* 31.

4. Liability as regards safety, repairs, etc.—An incline or apron of a wharf is not a safe place to walk upon on a dark night after a rain, and those who venture thereon without the least necessity, at such times, and when it is made slippery by rain, assume risks precluding them from recovering damages. *DeGruy* v. *Aiken*, 43 *La. Ann.* 798, 9 *So. Rep.* 747.

A company owning a wharf where foreign vessels land and discharge freight is liable to customs officers who are required to visit the wharf in the performance of their duties for personal injuries received because of the unsafe condition of the wharf. *Low* v. *Grand Trunk R. Co.*, 72 *Me.* 313, 39 *Am. Rep.* 331.

Appellant was the owner of a pier used for the accommodation of those engaged in traffic with it. The ground abutting upon the pier also belonged to appellant, and tracks were constructed thereon for the running of cars and engines, for the purpose of conveying articles of merchandise to and from the pier, and from other piers and wharves adjacent thereto. There was also a trestle, with tracks on it, and a gangway, on the side of which persons walked. At the end toward the pier the ascent to and descent from this trestle was by a stairway; in descending this stairway appellee, who was a steward upon a vessel lying at the pier by permission of appellant, was injured by a fall occasioned by the broken condition of the steps. *Held*, that a right of transit to and from the pier was implied in the arrangement between the two companies, and that, in the absence of proof that a particular way had been constructed and designated for the purpose of ingress and egress, persons could use any way not prohibited by defendant. *Baltimore & O. R. Co.* v. *Rose*, 27 *Am. & Eng. R. Cas.* 125, 65 *Md.* 485, 4 *Atl. Rep.* 899.—QUOTING Sweeny *v.* Old Colony & N. R. Co., 10 Allen (Mass.) 373; Corby *v.* Hill, 4 C. B. N. S. 556.

The owner of a wharf is not liable for injuries sustained by an employé of the lessee in consequence of the breaking of a rotten plank, unless it appear that such owner knew, or by reasonable care and diligence could have known, the unsafe condition of the wharf when he leased it. *State* v. *Boyce*, 73 *Md.* 469, 21 *Atl. Rep.* 322.

A city in possession of a public wharf, exercising exclusive supervision and control over it and receiving tolls for its use, is bound to keep it in proper condition for use. *Pittsburgh* v. *Grier*, 22 *Pa. St.* 54.

Where plaintiff's horse and cart fell from defendant's wharf by reason, as alleged, of defendant's negligence in not keeping a cap-log on the wharf, it is competent for defendant to show that a cap-log would interfere with its business in loading vessels. *Philadelphia & R. R. Co.* v. *Ervin*, 89 *Pa. St.* 71.

The non-compliance with a city ordinance requiring the owners of wharves to maintain cap-logs thereon does not render such wharf owners liable to one injured thereby. *Philadelphia & R. R. Co.* v. *Ervin*, 89 *Pa. St.* 71.

Plaintiffs obtained a license from a city to use a wharf upon the payment of wharfage. Subsequently the city authorized a railroad company to build tracks along the wharf, and afterwards to widen them, and in the widening certain posts used for mooring were removed from the wharf and a pile of *débris* deposited thereon. Plaintiffs notified the city to replace the posts and to remove the *débris*, which it neglected to do, and upon a sudden rise in the river certain rafts belonging to plaintiffs were carried away and lost, by reason of said *débris* and the absence of the posts. *Held:* (1) that, as between plaintiffs and the city, the latter was responsible for its negligence; whatever plaintiffs' remedy might be against the railroad company, it did not affect the city's liability; (2) that plaintiffs were not guilty of contributory negligence, although they may have had equal opportunity with the city of knowing the danger; (3) that plaintiffs' occupancy of the wharf under a license from the city did not relieve the city from its duty to keep the wharf in repair. *Allegheny* v. *Campbell*, 107 *Pa. St.* 530.—DISTINGUISHING Weir *v.* Allegheny County, 95 Pa. St. 415.

5. Rights of persons using wharves.—A railroad was authorized to build a wharf in the city of New Orleans, for the accommodation of vessels doing business with the road, but after it was built vessels not doing business with the road were permitted to use

it. *Held*, that a lessee of the public wharves owned by the city could not enjoin the use of the railroad wharf by vessels not doing business with the road. Whether the railroad exceeded its chartered powers could not be inquired into at the suit of an individual. *New Orleans, M. & T. R. Co.* v. *Ellerman*, 7 *Am. & Eng. R. Cas.* 144, 105 *U. S.* 166.

Where a company operates both a railroad and steamers, and maintains a wharf in public, navigable waters as a connection between its railroad and steamers, a steamboat company not a rival to the railroad business is entitled to use the wharf in receiving and discharging passengers and freight, upon paying a reasonable compensation. *Oregon S. L. & U. N. R. Co.* v. *Ilwaco R. & N. Co.*, 50 *Am. & Eng. R. Cas.* 554, 51 *Fed. Rep.* 611.

In such case it is no excuse that the wharf is too small to accommodate the steamers. The company being a common carrier must provide necessary facilities for the transaction of business with it. *Oregon S. L. & U. N. R. Co.* v. *Ilwaco R. & N. Co.*, 50 *Am. & Eng. R. Cas.* 554, 51 *Fed. Rep.* 611. —FOLLOWING Covington Stock-Yards Co. *v.* Keith, 139 U. S. 128, 11 Sup. Ct. Rep. 461. REFERRING TO Indian River Steamboat Co. *v.* East Coast Transp. Co., 28 Fla. 387, 10 So. Rep. 480.

Equity will not interfere by mandatory injunction in the allotment of wharves owned by a railroad, used in reshipping coal from its trains to vessels of others, to direct to whom they shall be allotted, or to continue certain shippers in their use on the ground that they have enjoyed the privilege for many years, and are large shippers. *Audenried* v. *Philadelphia & R. R. Co.*, 68 *Pa. St.* 370, 1 *Am. Ry. Rep.* 515. –QUOTED IN Messenger *v.* Pennsylvania R. Co., 37 N. J. L. 531; Scofield *v.* Lake Shore & M. S. R. Co., 23 Am. & Eng. R. Cas. 612, 43 Ohio St. 571, 54 Am. Rep. 846. REVIEWED IN Loughlin *v.* Atlantic & O. R. Co., 15 Phila. (Pa.) 241.

WHIPPING STRAPS.

Duty to employés as regards, see EMPLOYÉS, INJURIES TO, **58, 59.**

WHISTLE.

Duty to sound, where animals are discovered on track, see ANIMALS, INJURIES TO, **65.**

Use of, before reaching signal post, when negligence, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, **143.**

WIDOW.

Instructions as to damages to, for death of husband, see DEATH BY WRONGFUL ACT, **323, 345.**

Right of action of, for causing death of husband, see DEATH BY WRONGFUL ACT, **48, 90.**

— — — — — injury to homestead caused by fire, see FIRES, **152.**

WIDTH.

Of land grant, see LAND GRANTS, **76, 85.**

— right of way, evidence of, see FIRES, **216.**

— street crossing over railway, see CROSSING OF STREETS AND HIGHWAYS, **67.**

— — crossings, see CROSSING OF STREETS AND HIGHWAYS, **17.**

— strip conveyed for right of way, description of, see EMINENT DOMAIN, **202.**

— — taken, statutes regulating, see EMINENT DOMAIN, **51.**

WIFE.

Excessive damages for injuries to, see NEW TRIAL, **33.**

— — in actions for death of, see DEATH BY WRONGFUL ACT, **432.**

Injury to, by negligence of husband's fellow-servants, see FELLOW-SERVANTS, **55.**

Measure of damages to, for loss of husband, see DEATH BY WRONGFUL ACT, **393–398.**

— — — — husband, for death of, see DEATH BY WRONGFUL ACT, **399–402.**

Negligence of husband, when imputed to, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, **217**; IMPUTED NEGLIGENCE, **26.**

Of plaintiff, measure of damages for injuries to, see DAMAGES, **69.**

Services of deceased, proof of, on question of damages, see DEATH BY WRONGFUL ACT, **281.**

See also HUSBAND AND WIFE.

WILD TRAINS.

Duty to protect employés from, see EMPLOYÉS, INJURIES TO, **164.**

WILFUL.

Torts of agents, liability of principal for, see AGENCY, **79–82.**

WILFUL ACTS.

Allegation of, when excuses negativing of contributory negligence, see CONTRIBUTORY NEGLIGENCE, **70.**

Exemplary damages in cases of, see CARRIAGE OF PASSENGERS, **638.**
Inflicting injuries on children, liability of company for, see CHILDREN, INJURIES TO, **35.**
Limitation of liability for, see CARRIAGE OF LIVE STOCK, **67**; CARRIAGE OF PASSENGERS, **334.**
Of employés, protection of passengers against, see CARRIAGE OF PASSENGERS, **301-312.**
— servants, exemplary damages for, see DAMAGES, **31, 32.**
— — liability cannot be limited as against, see BAGGAGE, **102.**
— — — for, see ANIMALS, INJURIES TO, **37.**
Showing wilful or malicious killing, see DEATH BY WRONGFUL ACT, **268.**
Wanton and malicious assaults, see ASSAULT, **4.**

WILFUL MISCONDUCT.

Evidence to show, see CARRIAGE OF PASSENGERS, **562, 573.**
Liability to trespassers for, see TRESPASSERS INJURIES TO, **29.**
Of carriers, passenger's contributory negligence will not excuse, see CARRIAGE OF PASSENGERS, **347.**
— defendant, when excuses plaintiff's negligence, see CONTRIBUTORY NEGLIGENCE, **50.**

WILFUL NEGLIGENCE.

Averment of, see DEATH BY WRONGFUL ACT, **148.**
Burden of proof as to, see ANIMALS, INJURIES TO, **496.**
Company liable for, notwithstanding plaintiff's contributory negligence, see DEATH BY WRONGFUL ACT, **180.**
Competency of evidence as to, see EVIDENCE, **72.**
Exemplary damages for, see DAMAGES, **28.**
Limitation of liability for, see LIMITATION OF LIABILITY, **29.**
— — — to cases of, see CARRIAGE OF LIVE STOCK, **78.**
Of company, sufficiency of evidence of, see EMPLOYÉS, INJURIES TO, **615.**
— — when question for jury, see EMPLOYÉS, INJURIES TO, **702.**
— employe bars action for damages, see EMPLOYÉS, INJURIES TO, **335.**
— fellow-servant, liability for, see FELLOW-SERVANTS, **53.**
— vice-principal, liability of company for, see FELLOW-SERVANTS, **82.**
Punitive damages not recoverable except in cases of, see DEATH BY WRONGFUL ACT, **420.**
When question of fact, see ANIMALS, INJURIES TO, **546.**

WILLS.

1. What will pass in a bequest of "stock."—It is a general rule that a will speaks from the time of the death of the testator. This rule is not excepted from the case of a general bequest of a particular description of property, as of a certain number of shares of a particular stock. *Brundage* v. *Brundage*, 60 *N. Y.* 544; *affirming* 1 *T. & C.* 82.

Where a testator simply bequeaths "stock," without specifying the shares by definitely describing them by number or otherwise, and dies without holding any stock in a certain company, the legacy may be made good by a purchase and transfer to the legatee of any shares to be had in the market, to the number mentioned. *Brundage* v. *Brundage*, 60 *N. Y.* 544; *affirming* 1 *T. & C.* 82.

Where a testator bequeaths shares of capital stock, as such, no dividends thereon declared and received by him in his lifetime pass to the legatee, as attached or as accessory thereto. *Brundage* v. *Brundage*, 60 *N. Y.* 544; *affirming* 1 *T. & C.* 82.—DISTINGUISHING Clive *v.* Clive, Kay 600; Burroughs *v.* North Carolina R. Co., 67 N. Car. 376. REFERRING TO Currie *v.* White, 45 N. Y. 822.

WINDING UP.

Liability of directors on, see DIRECTORS, ETC., **43.**
Of tramway, see TRAMWAYS, **8.**
See also DISSOLUTION, ETC.

WINDOW.

Of car, riding with part of person projecting from, see CARRIAGE OF PASSENGERS, **484-493.**

WINONA & ST. PETER R. CO.

1. Power of state to regulate charges.—The company is a common carrier, and bound to carry when called upon for that purpose, and to charge only a reasonable compensation for the carriage. There is nothing in its charter limiting the

power of the state to regulate its rates of charge. *Winona & St. P. R. Co.* v. *Blake*, 94 *U. S.* 180.—FOLLOWING Munn *v.* Illinois, 94 U. S. 113; Chicago, B. & Q. R. Co. *v.* Iowa, 94 U. S. 155; Chicago, M. & St. P. R. Co. *v.* Ackley, 94 U. S. 179; Peik *v.* Chicago & N. W. R. Co., 94 U. S. 164.—FOLLOWED IN Stone *v.* Farmers' L. & T. Co., 23 Am. & Eng. R. Cas. 577, 116 U. S. 307.

The provisions in the Act of Feb. 28, 1866, that the "company shall be bound to carry freight and passengers upon reasonable terms," and in Minn. Const. art. 10, § 4, that "all corporations being common carriers * * * shall be bound to carry the mineral, agricultural, and other productions or manufactures on equal and reasonable terms," add nothing to, and take nothing from, the grant as contained in the original charter. *Winona & St. P. R. Co.* v. *Blake*, 94 *U. S.* 180.

2. Not liable for debts of Transit R. Co.—Under Minn. Act of March 10, 1862, entitled "An act to facilitate the construction of a railroad from Winona westerly, by the way of St. Peter," and transferring to certain persons, to be known as the Winona and St. Peter railroad company, all the rights, privileges, franchises, etc., of the Transit railroad company acquired by the state, the former is not the same corporation as the latter, nor liable for its debts. *Huff* v. *Winona & St. P. R. Co.*, 11 *Minn.* 180 (*Gil.* 114).—FOLLOWED IN Southern Pac. R. Co. *v.* Burr, 86 Cal. 279; Hilbert *v.* Winona & St. P. R. Co., 11 Minn. 246 (Gil. 163).

WIRE FENCES.

Sufficiency of, see FENCES, **77.**

WIRES.

Right to stretch, in street, see ELECTRIC RAILWAYS, **9–15.**

WISCONSIN.

Constitutionality of statutes of, as to municipal aid for railways, see MUNICIPAL AND LOCAL AID, **53.**
— — — — relative to condemnation of land, see EMINENT DOMAIN, **45.**
— — tax laws of, see TAXATION, **52.**
Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, **758.**
Examination of parties before trial in, see DISCOVERY, ETC., **9.**
Federal grants to, see LAND GRANTS, **45, 46.**
Grants by, to railroads, see LAND GRANTS, **127.**
Jurisdiction of circuit court of, see JURISDICTION, **13.**
Liability of company to laborers employed by contractors in, see CONSTRUCTION OF RAILWAYS, **97.**
License taxes in, see TAXATION, **399.**
Local assessment upon steam railways in, for repairs, paving, etc., see STREETS AND HIGHWAYS, **357.**
Occupation of streets by steam roads under legislative grants of, see STREETS AND HIGHWAYS, **58.**
Penalties for overcharges in, see CHARGES, **58.**
Plaintiff's pleadings need not negative contributory negligence in, see CONTRIBUTORY NEGLIGENCE, **69.**
Review of town bonding proceedings by mandamus in, see MUNICIPAL AND LOCAL AID, **455.**
Statute of, regulating liability to servant for injuries caused by negligence of fellow-servants, see FELLOW-SERVANTS, **194.**
Taxation in aid of railways in, see MUNICIPAL AND LOCAL AID, **428.**
— of land grants in, see TAXATION, **124.**

WITHDRAWAL.

From stockholders' meeting, see STOCKHOLDERS, **13.**
Of appeal in condemnation proceedings, see EMINENT DOMAIN, **952.**
— consent by city to use of streets, see STREETS AND HIGHWAYS, **102–105.**
— counts, see PLEADING, **37.**
— flagmen from crossing, liability for, see CROSSINGS, INJURIES TO PERSONS, ETC., AT, **38.**
— names of taxpayers from petition in aid of railway, see MUNICIPAL AND LOCAL AID, **89.**

WITNESSES.

Absence of, as ground for continuance, see TRIAL, **21.**
Admissibility in evidence of experiments by, see ANIMALS, INJURIES TO, **422.**
— of testimony of, at former trials, see DEATH BY WRONGFUL ACT, **251, 252.**
As to value of land condemned, examination of, see EMINENT DOMAIN, **635.**
At former trial, admissibility of testimony of, see EVIDENCE, **263.**

Attempts to bribe, as evidence, see EVIDENCE, **222.**
Change of venue for convenience of, see TRIAL, **13.**
Comments upon, in instructions, see TRIAL, **141.**
Commissioners to assess damages, how far bound by testimony of, see EMINENT DOMAIN, **510.**
Competency of negligent fellow-servants as, see FELLOW-SERVANTS, **472.**
— — to testify as to value of animal killed, see ANIMALS, INJURIES TO, **430.**
Credibility of, a question of fact, see ANIMALS, INJURIES TO, **554.**
— — how far reviewable on appeal, see APPEAL AND ERROR, **120.**
Discretion of court to limit number of, see APPEAL AND ERROR, **22.**
Evidence to impeach not ground for new trial, see NEW TRIAL, **95.**
Examination of, by arbitrators in condemnation proceedings, see EMINENT DOMAIN, **488.**
— — — commissioners to assess land damages, see EMINENT DOMAIN, **509.**
Fees of, see EMINENT DOMAIN, **785.**
Knowledge of, to qualify them to give opinion, see ELEVATED RAILWAYS, **124.**
Not bound to criminate themselves, see INTERSTATE COMMERCE, **173.**
Opinions of, in elevated railway cases, see ELEVATED RAILWAYS, **115-126.**
Positive and negative testimony of, see EVIDENCE, **290-299.**
Presumption arising from failure to call, see ANIMALS, INJURIES TO, **472.**
— from failure to produce employés as, see EVIDENCE, **120.**

I. ATTENDANCE AND COMPENSATION. 192
II. COMPETENCY 194
1. *In General* 194
2. *Parties* 195
3. *Persons Interested in Event* 196
4. *Husband and Wife* 199
III. CREDIBILITY 201
1. *In General* 201
2. *Contradiction—Impeachment* 203
3. *Corroboration — Confirmation* 209
IV EXAMINATION 210
1. *In General* 210
2. *Examination in Chief* 212
3. *Cross-examination* 217
4. *Re-examination—Recalling Witnesses* 224
5. *Refreshing the Memory* 225
6. *Privilege of Refusing to Answer* 227
7. *Privileged Communications* 228
V. OPINIONS. EXPERT TESTIMONY ... 230
1. *Opinions of Ordinary Witnesses* 230
a. In General 230
b. Value 245
c. Amount of Damages 252
d. Speed 259
2. *What Questions Call for Expert Testimony* 260
3. *Qualifications and Competency of Experts* 269
4. *Examination of Experts* .. 274
5. *Farmers* 277
6. *Physicians and Surgeons* .. 278
7. *Surveyors and Civil Engineers* 288
8. *Mechanics—Machinists* ... 288
9. *Railway Employés* 289
10. *Experts in Handwriting* .. 294
11. *Hypothetical Questions* 294
12. *Weight of Expert Testimony* 297

I. ATTENDANCE AND COMPENSATION.

1. Subpœna.—To compel the attendance of a witness or a party whom it is sought to examine, he must be duly subpœnaed or served with an appointment eight days previous to an examination. *McMurray* v. *Grand Trunk R. Co.*, 3 *Chan. Chamb.* (*U. C.*) 130.

A subpœna should not be dated prior to the time at which the party taking out such subpœna is entitled to examine the party or witness served with subpœna. *McMurray* v. *Grand Trunk R. Co.*, 3 *Chan. Chamb.* (*U. C.*) 130.

Where a party plaintiff in a cause had been served with a subpœna dated before he was regularly liable to examination, a motion to commit him or dismiss his bill was refused, but without costs. *McMurray* v. *Grand Trunk R. Co.*, 3 *Chan. Chamb.* (*U. C.*) 130.

2. Subpœna duces tecum.—That part of section 12 of the Interstate Commerce Act authorizing the federal courts to use their process to enforce subpœnas issued by the commission is not unconstitutional as imposing on judicial tribunals duties not judicial. *Interstate Commerce Commission* v. *Brimson*, 154 *U. S.* 447, 14

Sup. Ct. Rep. 1125; *reversing* 53 *Am. & Eng. R. Cas.* 1, 53 *Fed. Rep.* 476, 4 *Int. Com. Rep.* 315.

N. Y. Code Civ. Pro. § 868, providing for the issue of a *subpœna duces tecum* to the president or other head of a corporation, or the officer thereof in whose custody is a book or paper required, only requires the party to whom the subpœna is directed to produce the books and papers in his custody, and does not require him to obtain the custody of books and papers not actually in his custody, but which he is able to get into his custody in order to produce them in court. *In re Sykes*, 10 *Ben.* (*U. S.*) 162.

An officer of a corporation can be compelled, by *subpœna duces tecum*, to bring its books from its office, and produce them before a master. *Erie R. Co.* v. *Heath*, 8 *Blatchf.* (*U. S.*) 413.

The president and secretary of a construction company, a corporation, can be compelled by *subpœna duces tecum* to produce books and papers of the corporation, in a suit in equity in which the corporation is not a party, upon the application of one of the parties. *Wertheim* v. *Continental R. & T. Co.*, 21 *Blatchf.* (*U. S.*) 246, 15 *Fed. Rep.* 716.

A mere clerk who does not have the books of the corporation in his possession or under his control cannot be compelled to produce the books. *Bank of Utica* v. *Hillard*, 5 *Cow.* (*N. Y.*) 153.

And the president cannot be compelled to produce the books of the corporation, where it is a party to the action, because a party cannot be required to produce evidence against himself. *Bank of Utica* v. *Hillard*, 5 *Cow.* (*N. Y.*) 419.

Under New York Code of Procedure, and the rules of court heretofore existing, the practice has been to deny applications for an order to compel an inspection of books and papers, where their production could be procured by a *subpœna duces tecum* and the examination as a witness of the party having their custody, either before or on the trial. *Central Crosstown R. Co.* v. *Twenty-third St. R. Co.*, 53 *How. Pr.* (*N. Y.*) 45.

N. Y. Code, § 868, provides that "the production upon a trial of a book or paper belonging to, or under the control of, a corporation may be compelled in like manner as if it were in the hands or under the control of a natural person." *Held*, that this gives to a person ample means of obtaining the proofs, without resorting to an order to compel an examination of the books and papers. *Central Crosstown R. Co.* v. *Twenty-third St. R. Co.*, 53 *How. Pr.* (*N. Y.*) 45.

3. Taxation of fees.* — (1) *In general.*—Ill. General Cost Act applies to proceedings to condemn land under the Eminent Domain Act, and under it the court may, after the conclusion of the evidence, limit the number of witnesses whose fees are to be taxed against any party not less than two, as may appear to have been necessary. *Chicago, B. & N. R. Co.* v. *Bowman*, 122 *Ill.* 595, 13 *N. E. Rep.* 814, 11 *West. Rep.* 598.

Two actions were commenced against a company to recover for injuries to a wife, one by the husband alone and the other by the husband and wife jointly, but by order of court they were tried together and resulted in verdicts for plaintiffs. *Held*, that it was proper to direct that the travel and attendance of witnesses who attended in both cases should be taxed in each case as if the cases had been tried separately. *Taylor* v. *Vermont & M. R. Co.*, 1 *Gray* (*Mass.*) 422, *n.*

The mileage to be allowed to witnesses is according to the distance by the usual and ordinary route of traveling by the common modes of conveyance. Because a railroad has been built which is longer by several miles than the common road is no reason why mileage on the longer (railroad) route should be allowed. *Johnson* v. *Atlantic & N. P. R. Co.*, 18 *Phila.* (*Pa.*) 656.

The officers and directors of a corporation defendant are not entitled to costs as witnesses unless duly subpœnaed as witnesses simply. *McFarland* v. *Ligonier Valley R. Co.*, 18 *Phila.* (*Pa.*) 661.

The amount due to each witness for attendance in a suit should be separately taxed and thus carried into the bill of costs accompanying the execution, so as to give to the defendant each item of costs that he is required to pay. *Houston & G. N. R. Co.* v. *Jones*, 46 *Tex.* 133, 13 *Am. Ry. Rep.* 294.

(2) *Affidavit of witness.*—Where the officers of a corporation, living without the state, attend a trial of a suit against the company, an affidavit stating that they attended for the purpose of being witnesses

† See also RECEIVERS, 150.

and also stating the number of miles traveled within the state is sufficient to authorize a taxation of fees and mileage, though there is no statement that they attended only as witnesses and not as officers, nor that they were deemed absolutely material and necessary, and no statement as to what was expected to be proven by them, where they were not called as witnesses because a verdict was directed upon the plaintiff's evidence. *Cheever* v. *Pittsburg, S. & L. E. R. Co.*, 26 *N. Y. Supp.* 829, 57 *N. Y. S. R.* 188, 74 *Hun* 539.

Where it appears that the witnesses for whom fees and mileage are charged are officers of a corporation, the affidavit upon which the taxation is claimed should distinctly show not only that the witnesses have attended, but that the fees have been or will be paid. *Cheever* v. *Pittsburg, S. & L. E. R. Co.*, 26 *N. Y. Supp.* 829, 57 *N. Y. S. R.* 188, 74 *Hun* 539.

Whenever the court, by a refusal of a continuance in a case set for trial, compels a party to keep his witnesses in court, such party is entitled to witness fees therefor as part of his costs, notwithstanding he has a rule pending to amend his statement. *Ludy* v. *Philadelphia Traction Co.*, 2 *Pa. Dist.* 848.

Utah Comp. Laws 1888, § 5447, providing that witness fees shall not be taxed unless the witness appears before the clerk within two days after the trial and claims his fees, gives to any witness who has appeared without his fees and mileage being paid in advance a personal right to have his fees and mileage taxed in his favor as a part of the costs in the case, provided he appears and claims them within two days; and if he does not so appear they will be deemed to have been waived. *Grant* v. *Union Pac. R. Co.*, 6 *Utah* 270, 21 *Pac. Rep.* 996.

Under section 3965, the party who has paid the fees and mileage of his witnesses is entitled to have the same taxed and included in the judgment, and it is not necessary that the witnesses who have already been paid should appear before the clerk within two days, and claim their fees and mileage. *Grant* v. *Union Pac. R. Co.*, 6 *Utah* 270, 21 *Pac. Rep.* 996.

II. COMPETENCY.

1. *In General.*

4. Means of knowledge.—A person driving a team across a track and in front of a standing locomotive may be a competent witness as to what frightened the team while crossing. *Geveke* v. *Grand Rapids & I. R. Co.*, 22 *Am. & Eng. R. Cas.* 551, 57 *Mich.* 589, 24 *N. W. Rep.* 675.

The owner of land taken for a right of way who swears that he knows what it is worth, having resided upon and improved it for several years, is a competent witness on the question of its value. *Sioux City & P. R. Co.* v. *Weimer*, 20 *Am. & Eng. R. Cas.* 184, 16 *Neb.* 272, 20 *N. W. Rep.* 349.—FOLLOWING Burlington & M. R. R. Co. *v.* Schluntz, 14 Neb. 421.

In an action for damages to a mill by the construction of a railroad, it was not a valid objection to a witness that he had been a viewer, especially where he was instructed by the court that he must speak from his own knowledge and not give any opinion founded on evidence heard as a viewer; nor that the road was not completed when his examination was made, the location not having been changed from that which was then pointed out in the presence of the parties; nor that, in continuation of his evidence in chief, he was permitted to testify as to what was pointed out to him about where the line was to run and the road to be constructed, and how the premises were damaged, before he had been cross-examined as to the mode in which his opinion was formed, for the cross-examination was out of time. *Dorlan* v. *East Brandywine & W. R. Co.*, 46 *Pa. St.* 520.

An engineer under whose direction a trestle was built is a competent witness to show by whom it was built and for what purpose. *Johns* v. *Charlotte, C. & A. R. Co.*, 58 *Am. & Eng. R. Cas.* 175, 39 *So. Car.* 162, 17 *S. E. Rep.* 698.

5. To give testimony of deceased witnesses.—A witness who can give the substance of what was testified to by a former witness, since deceased, is competent. It is not necessary to give the precise language of the deceased witness. *Ruch* v. *Rock Island*, 97 *U. S.* 693.

Written memoranda of what was testified to by a witness, since deceased, in a suit between the same parties is competent evidence. *Mineral Point R. Co.* v. *Keep*, 22 *Ill.* 9.

So are the notes of a stenographer taken at the time, where he can swear positively that they are correct. *Chicago, R. I. & P. R. Co.* v. *Harmon*, 17 *Ill. App.* 640.

A witness who, at a former trial, heard the testimony of another witness, since deceased, and who can give the substance of such testimony but not the exact language, is a competent witness to state what the testimony of such deceased witness was. *Chicago, R. I. & P. R. Co.* v. *Harmon*, 17 *Ill. App.* 640.—QUOTING Illinois C. R. Co. *v.* Jonte, 13 Ill. App. 425.

6. Infamy. — The offense of wantonly or maliciously injuring a railroad, or of placing any obstruction or impediment thereon, not being a common-law felony under Ala. Code of 1876, § 4239, and not having the element of the *crimen falsi*, a witness's complicity with and conviction of the same offense does not render him incompetent to testify at the trial of a defendant indicted therefor, but merely affects his credibility. *Clifton* v. *State*, 73 *Ala.* 473.

A conviction of the offense of maliciously obstructing the passing of cars does not render the convict an incompetent witness. *Com.* v. *Dame*, 8 *Cush.* (*Mass.*) 384.—FOLLOWING United States *v.* Brockius, 3 Wash. (U. S.) 99.

The rejection, on the ground of infamy, of a witness who was afterwards admitted on production of a pardon is no error. *Com.* v. *Pennsylvania & O. R. Co.*, 2 *Phila.* (*Pa.*) 250.

It was shown during the progress of a cause that plaintiff, who offered himself as a witness, had been convicted of a felony and was afterwards pardoned by the governor. The jury was instructed that "the proclamation of the governor renders the plaintiff a competent witness, leaving his credibility to be determined by you from all the facts and circumstances in evidence." *Held*, that the charge was not a charge on the weight of evidence. *Costley* v. *Galveston City R. Co.*, 70 *Tex.* 112, 8 *S. W. Rep.* 114.

7. Officers and stockholders of corporations. — In a suit by a bank against a common carrier, to recover for a package of bank bills intrusted to the carrier and lost by it, the teller of the bank, who delivered the package to the carrier, is a competent witness for plaintiff. *Farmers' & M. Bank* v. *Champlain Transp. Co.*, 18 *Vt.* 131.

And the cashier of the bank, who was, at the time of the delivery of the bills to defendant, a stockholder in the bank, is a competent witness for the bank, it appearing that the bank has executed and delivered to the cashier a release of all liability to it on account of the loss of the bills in question, and that the cashier has transferred to the bank, upon sufficient consideration, the shares owned by him in the stock of the bank. *Farmers' & M. Bank* v. *Champlain Transp. Co.*, 18 *Vt.* 131.

8. Judicial officers.—A county judge may testify as to whether a highway by dedication has been recognized as a public road by the commissioners' court over which he presides. *Albert* v. *Gulf, C. & S. F. R. Co.*, 2 *Tex. Civ. App.* 664, 21 *S. W. Rep.* 779.

2. *Parties.*

9. Competency of plaintiff in action against corporation.—(1) *In general.*—In appeal cases from a justice's court, where the amount in controversy exceeds twenty dollars, the statute authorizing either party to be a witness in his own behalf (Ala. Code, § 2779) has no application to suits by or against corporations aggregate. *Alabama & T. R. R. Co.* v. *Oaks*, 37 *Ala.* 694.—FOLLOWING Yonge *v.* Mobile & O. R. Co., 31 Ala. 422.

Under Alabama Act of Feb. 14, 1867, a plaintiff is competent to testify for himself in an action against a corporation, although the action was commenced before the passage of the act. *Montgomery & W. P. R. Co.* v. *Edmonds*, 41 *Ala.* 667.

In an action for personal injuries, a plaintiff is not excluded by his interest from testifying to the value of his services before and after the injury. *Winter* v. *Central Iowa R. Co.*, 80 *Iowa* 443, 45 *N. W. Rep.* 737.

The mother is a competent witness in an action by parents to recover damages for the killing of their minor child. *Reilly* v. *Hannibal & St. J. R. Co.*, 34 *Am. & Eng. R. Cas.* 81, 94 *Mo.* 600, 13 *West. Rep.* 658, 7 *S. W. Rep.* 407.

N. H. Rev. St. ch. 118, § 12, provides that members of public corporations shall be competent witnesses in cases affecting the interests of such corporations. N. H. Act of Dec. 25, 1844, § 3, provides that all railroad corporations which shall be unable to purchase the lands needed for their roads shall be public corporations. *Held*, that this does not make railroad companies public corporations so as to allow stockholders to be witnesses for them. *Dearborn* v. *Boston, C. & M. R. Co.*, 24 *N. H.* 179.

In a proceeding to appropriate land for the use of a railroad, the owner of the land

is a competent witness to testify in his own behalf, provided the proceedings have been instituted since the code took effect. *Atlantic & G. W. R. Co.* v. *Campbell*, 4 *Ohio St.* 583.

In an action for personal injuries, it is proper to permit plaintiff to testify as to the internal injuries he has received. *Spurrier* v. *Front St. Cable R. Co.*, 3 *Wash.* 659, 29 *Pac. Rep.* 346.

(2) *When officer or agent of corporation is dead.* — A locomotive engineer by whose negligent act the injury complained of was sustained is an agent of the corporation within the meaning of Ga. Act of Oct. 29, 1889, and he being dead, the person injured is an incompetent witness to testify in his own behalf to such negligent act, it not appearing that any surviving officer or agent of the corporation was present. *Mayfield* v. *Savannah, G. & N. A. R. Co.*, 87 *Ga.* 374, 13 *S. E. Rep.* 459.

How. Mich. St. § 7545, which excludes the testimony of a party to a suit which is prosecuted or defended by a corporation, said testimony relating to matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation and not within that of any surviving officer or agent, is held not to apply to the testimony of a plaintiff in a negligence case against a railroad company to an interview with the yardmaster, since deceased, in the presence of the master of the roundhouse, who survives him. *Lyttle* v. *Chicago & W. M. R. Co.*, 84 *Mich.* 289, 47 *N. W. Rep.* 571.

Plaintiff is a competent witness to testify as to a contract, made with a deceased agent of a company, in regard to furnishing cars for the transportation of plaintiff's cattle. *Roberts* v. *Richmond & D. R. Co.*, 109 *N. Car.* 670, 14 *S. E. Rep.* 106.

In an action against an express company for unlawfully selling a trunk containing valuable contents, the owner may testify to the contents and their value, and may prove that she is a lady of wealth and "of fine social position," making the contents necessary to her station in life. *Adams Exp. Co.* v. *Schlessinger*, 75 *Pa. St.* 246.

10. Competency of members of corporation or partnership. — A corporation, being a collection of individuals, acting through its officers and agents who are admitted to testify in cases where the corporation is a party, cannot be said to be under legal disability, and the opposing party can be examined as a witness. *North Hudson County R. Co.* v. *May*, 27 *Am. & Eng. R. Cas.* 151, 48 *N. J. L.* 401, 5 *Atl. Rep.* 276; *reversed on other grounds in* 49 *N. J. L.* 445, 9 *Atl. Rep.* 688.

Plaintiff sued as administrator to recover the value of certain bonds sent by express to his intestate, but lost. The action was against the express company by name, but it did business as a partnership, and not as a corporation, and the names of the individual partners were set out. *Held*, that one of the partners was not a competent witness; and where the allegation of partnership was not properly denied in the answer, he could not be a witness to deny it. *Martin* v. *American Exp. Co.*, 19 *Wis.* 336.

3. *Persons Interested in Event.*

11. In general.—B. contracted with a company to construct a section of its road, and afterwards underlet the section to C., D., and E., jointly, and C. underlet it to D. and E., who proceeded in the work for a short time, and then stopped; the corporation then assumed the work and finished it, and was sued by S. for articles furnished under a contract with C. and D. for the completion of the work, said articles being used by the corporation. S. released B. and C. from all liability for the articles, and introduced the testimony of D. in support of the claim. *Held*, that D. was a competent witness. *Stiles* v. *Western R. Corp.*, 11 *Metc.* (*Mass.*) 376.

When coal is delivered to a common carrier for transportation to the consignee, who is to pay the freight, in replevin by the vendee of the latter against the carrier, who claims a lien on the coal for his freight, the vendor and consignor and the consignee are competent witnesses for plaintiff. *Gillespie* v. *Goddard*, 1 *Pittsb.* (*Pa.*) 306.

12. Creditors.—It is no objection to a witness, offered by an insolvent company in support of a money claim, that he is a creditor of the company, and that a recovery would increase the fund out of which he is to be paid. *Delaware & A. R. Co.* v. *Irick*, 23 *N. J. L.* 321.

13. Stockholders.*—A stockholder in a railroad corporation is not a competent

* The old rule that excluded stockholders or others on account of interest has been quite generally abolished.—ED.

witness for the corporation. *Alabama &c. M. R. R. Co.* v. *Sanford*, 36 *Ala.* 703. *Philadelphia &c. W. C. R. Co.* v. *Hickman*, 28 *Pa. St.* 318.

A statute which provides that stockholders in a particular corporation shall be competent witnesses for or against the corporation, when the general law of the state would exclude them on account of interest, is not unconstitutional as special legislation. *Pittsfield &c. F. P. R. Co.* v. *Harrison*, 16 *Ill.* 81.

A stockholder is not competent to testify generally for the corporation; but the secretary of a company, although a stockholder, is a competent witness to identify the books of organization and records of the company. *Peake* v. *Wabash R. Co.*, 18 *Ill.* 88.

Stockholders are competent witnesses for the corporation, and it is error to exclude their evidence on the ground that they are interested and virtually parties to the suit. Under 2 Ind. Rev. St. 80, § 238, such interest only goes to the credibility of the witness. *Newcastle &c. R. R. Co.* v. *Brumback*, 5 *Ind.* 543. *Unthank* v. *Henry County Turnpike Co.*, 6 *Ind.* 125. *New Albany &c. R. Co.* v. *Gillespy*, 7 *Ind.* 245.

And the same rule applies under the Maine statute of 1855 which provides that no person offered as a witness, except a party to the action, shall be excluded by reason of his interest in the event of the action, but his interest may be proved to affect his credibility. *Penobscot &c. R. R. Co.* v. *Dunn*, 39 *Me.* 587. *York &c. R. Co.* v. *Pratt*, 40 *Me.* 447.

A stockholder is made a competent witness in an action for instalments due on subscriptions on capital stock, if at the trial he transfers his shares by an instrument in writing, although the regulations of the company require that before the transfer is complete it shall be entered on the books of the company. *Delaware &c. A. R. Co.* v. *Irick*, 23 *N. J. L.* 321.

A stockholder is a competent witness for the corporation. *New York &c. E. R. Co.* v. *Cook*, 2 *Sandf.* (*N. Y.*) 732.

14. Officers and agents. — Where a company is charged with a failure to sound a whistle or ring a bell as required by law, the engine driver is not competent to testify on behalf of the company as to whether the whistle was sounded or the bell rung, on account of his liability over to the company if it is found guilty. *Chicago &c. R. I. R. Co.* v. *Hutchins*, 34 *Ill.* 108.

And the same rule applies in an action against a company for injury from the washing away of a part of its road. The engineer who built the alleged defective portion is not a competent witness for the company, without a release. *Galena &c. U. R. Co.* v. *Welch*, 24 *Ill.* 31.

In an action against a railroad for the death of a person caused by the negligence of an employé, such employé is a competent witness in behalf of the company, under Ill. Act of 1867, notwithstanding his interest by reason of his liability over to the company. *Illinois C. R. Co.* v. *Weldon*, 52 *Ill.* 290.

An agent is, in general, a competent witness to prove his own acts within the scope of his authority; but not where the principal is sued for a tort done by the agent while in his service, but without his authority; because, as a judgment against the principal fixes the agent's liability to him, and the record will be conclusive as to the amount of damages, the agent is directly interested. *Lexington &c. O. R. Co.* v. *Kidd*, 7 *Dana* (*Ky.*) 245.

A pilot is a competent witness to testify in behalf of the managers of a steamboat sued for loss by jettison alleged to be unjustifiable. *Bentley* v. *Bustard*, 16 *B. Mon.* (*Ky.*) 643.

The president and chief engineer of a defendant company are competent to testify on its behalf, the former that whatever representations he had made to plaintiffs were made in good faith and from the best information he had, and the latter that he had made up the estimates in good faith and with no intention to defraud plaintiffs; and it is for the jury to determine what credit is to be given to their testimony. *Phelps* v. *George's Creek &c. C. R. Co.*, 16 *Am. &c. Eng. R. Cas.* 600, 60 *Md.* 536.

In an action against a railroad to recover damages for the non-delivery of goods intrusted to it for transportation, and in an action of trover to recover the value of such goods, an agent of the road, employed by it to load and unload cars and deliver freight at the depot where the goods arrived, is a competent witness for defendant, to prove that all the goods were delivered, at such depot, to plaintiff or his agents. *Draper* v. *Worcester &c. N. R. Co.*, 11 *Metc.* (*Mass.*) 505. —DISTINGUISHING Fuller *v.* Wheelock, 10 Pick. (Mass.) 135.

A cartman employed by the owner of goods to deliver them for carriage to a company is a competent witness for the owner, without a release, to prove the delivery. *Moses* v. *Boston & M. R. Co.*, 24 *N. H.* 71.

The engineer in charge of a train causing an injury is not a competent witness for the company, without a release, in an action to recover damages therefor. *Catawissa R. Co.* v. *Armstrong*, 49 *Pa. St.* 186.

Tenn. Code, § 1169, which enacts that where a company is sued for killing or injuring stock the engineer, agent, or employé shall in no case be a witness for it, does not exclude any witness other than the particular engineer, agent, or employé whose tortious act or negligence is drawn in question. *Horne* v. *Memphis & O. R. Co.*, 1 *Coldw.* (*Tenn.*) 72.—FOLLOWED IN Memphis & O. R. Co. *v.* Tugwell, 1 Coldw. 91; Nashville & C. R. Co. *v.* Fugett, 3 Coldw. 402. QUOTED IN Maxwell *v.* Louisville & N. R. Co., 1 Tenn. Ch. 8. REVIEWED IN Grable *v.* Louisville & N. R. Co., 2 Lea (Tenn.) 246.—*Nashville & C. R. Co.* v. *Fugett*, 3 *Coldw.* (*Tenn.*) 402.—FOLLOWING Horne *v.* Memphis & O. R. Co., 1 Coldw. 72.—REVIEWED IN Grable *v.* Louisville & N. R. Co., 2 Lea 246.

The railroad company, by executing a proper release to such agent, employé, or engineer, restores his competency, and it may examine him as a witness. *Nashville & C. R. Co.* v. *Fugett*, 3 *Coldw.* (*Tenn.*) 402.

Under the statute, an engineer cannot be a witness for the company unless he be released from all liability to the company if the judgment be against it. *Memphis & O. R. Co.* v. *Tugwell*, 1 *Coldw.* (*Tenn.*) 91.

The above statute was repealed by Tenn. Act of 1869-70, removing all objections to the competency of witnesses by reason of their being parties or being interested in the issues to be tried. *Grable* v. *Louisville & N. R. Co.*, 2 *Lea* (*Tenn.*) 246.—REVIEWING Horne *v.* Memphis & O. R. Co., 1 Coldw. (Tenn.) 72; Nashville & C. R. Co. *v.* Fugett, 3 Coldw. 402.

15. Stranger through whose negligence the cause of action arose.—The owner of a flat-boat, who had charge of her at the time of a collision, is not a competent witness for the owner of damaged goods in an action for damages against a steamboat; nor is he made competent by Ala. Code, § 2302. *Steamboat Farmer* v. *McCraw*, 26 *Ala.* 189.

In an action by a carrier to recover freight, the defense being set up that the cargo was damaged by his negligence and that defendant is entitled to recoup for such damages, the pilot who had charge of the flat-boat at the time of the accident is a competent witness for plaintiff, unless it is affirmatively shown that the same act of negligence on the part of the pilot which caused the damage to the goods also made him liable to an action at the suit of plaintiff. *Johnson* v. *Lightsey*, 34 *Ala.* 169.

16. Opposing party deceased — Competency of officers, agents, and stockholders.—The president of a company is not a competent witness to prove certain negotiations and agreements concerning stock between himself and a member of a firm since deceased, although he testified that his railroad had been previously leased by another company, to which he applied as friend of the deceased partner, and not officially, for an issuing of the stock. *Central R. & B. Co.* v. *Papot*, 59 *Ga.* 342. *Southwestern R. Co.* v. *Papot*, 67 *Ga.* 675.

Neither is it competent to prove by a director in a company representations made by the deceased partner in the course of such negotiations, although the witness stated that he acted in such negotiations as attorney for the two companies, and not as a director of the one leased. *Central R. & B. Co.* v. *Papot*, 59 *Ga.* 342.

In a suit by a company against an executor, to recover the amount of a subscription made by his testator to the stock of the company, stockholders in the company are not parties to the contract or to the suit, within the letter or spirit of Md. Act of 1868, ch. 116, § 2, and are competent witnesses for the plaintiff. *Downes* v. *Maryland & D. R. Co.*, 37 *Md.* 100.—DISTINGUISHING King *v.* Woburn, 10 East 395; King *v.* Hardwick, 11 East 578. REVIEWING City Bank of Baltimore *v.* Bateman, 7 Har. & J. (Md.) 104; Fletcher *v.* Greenwell, 1 Cromp., M. & R. 754.

How. Mich. St. § 7545, as amended by Act No. 139, Laws of 1885, which excludes the testimony of any person who is or has been an officer or agent of a corporation, in a suit prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person against the corporation, includes only those who are authorized to act for the corporation in the matter with reference to which testimony is given.

Brennan v. *Michigan C. R. Co.*, 93 *Mich.* 156, 53 *N. W. Rep.* 358.

17. Beneficiaries in actions for causing death.—A widow is a competent witness for the plaintiff in an action by the administrator of her husband against a company for negligently causing his death. Ind. Rev. St. 1881, §§ 498, 499, do not apply to such actions. *Louisville, N. A. & C. R. Co.* v. *Thompson*, 27 *Am. & Eng. R. Cas.* 88, 107 *Ind.* 442, 57 *Am. Rep.* 120, 8 *N. E. Rep.* 18, 9 *N. E. Rep.* 357.

18. Release. — A release "from all claim" which a company "may have" against the parties to whom it is given, "growing in any manner out of an accident whereby the negro slave of" plaintiff "was killed," and about which a suit is pending, is in proper form and renders the parties released competent witnesses. *Scaggs* v. *Baltimore & W. R. Co.*, 10 *Md.* 268.

In an action against a carrier for damage to cotton, an individual was examined by commission, as a witness for plaintiff. By agreement, he was to share with plaintiff the profits and losses of the shipment, but had assigned and released his interest to plaintiff. When the assignment was produced, the objection to his competency was waived and his testimony was read. When the evidence was closed, the judge declined to rule out his testimony as incompetent. *Held*, that the ruling was proper. *Burnside* v. *Union Steam Boat Co.*, 10 *Rich.* (*So. Car.*) 113.

Tenn. Code, § 1169, providing that in actions against railroad companies for killing stock, the engineer, agent, or employé shall in no case be a witness for the company, does not change the common-law rule that such engineer, agent, or employé may be made a competent witness by a release. *Horne* v. *Memphis & O. R. Co.*, 1 *Coldw.* (*Tenn.*) 72.

Before an engineer of a company whose conduct is called in question can be a witness for it, he must be released by the company from all liability for damages to it in the event of a verdict and judgment against it. *Memphis & O. R. Co.* v. *Tugwell*, 1 *Coldw.* (*Tenn.*) 91.—FOLLOWING Horne *v.* Memphis & O. R. Co., 1 Coldw. (Tenn.) 72.

The owner of a life estate is capable of taking by release from a remainderman, so as to qualify the latter as a witness in the owner's behalf in a suit for injury to the property. *Clark* v. *Southern Pac. R. Co.*, 27 *Tex.* 100.

4. Husband and Wife.

19. In general.—Where husband and wife jointly sue a company for an injury to the wife, the latter is a competent witness. *Little Rock & Ft. S. R. Co.* v. *Harkey*, (*Ark.*) 15 *S. W. Rep.* 456.

A married woman sued a company for hay destroyed by fire, and called her husband as a witness. The company pleaded that plaintiff was not the owner of the hay, and was not the real party in interest. *Held* that it was competent for the company to establish such fact if it could do so by evidence in its own behalf, but that it could not establish it by cross-examination of the husband. *Bulliss* v. *Chicago, M. & St. P. R. Co.*, 76 *Iowa* 680, 39 *N. W. Rep.* 245.—FOLLOWING Murphy *v.* Sioux City & P. R. Co., 55 Iowa 473.

The wife of plaintiff is not a competent witness in an action under Mass. St. of 1846, ch. 271, § 3, by the husband against a railroad for causing the death of a cow by insufficient fencing, although the wife was the only witness to the circumstances of the cow's escape from the pasture. *Baxter* v. *Boston & W. R. Corp.*, 102 *Mass.* 383.

The marriage of a female plaintiff, pending her suit, will not render her incompetent as a witness. *Charles* v. *St. Louis & I. M. R. Co.*, 58 *Mo.* 458.

By New York Code of Pro. § 399, as amended in 1860, husband and wife are competent witnesses for or against each other in all cases where they are parties to the action. *Matteson* v. *New York C. R. Co.*, 62 *Barb.* (*N. Y.*) 364.

Where a married woman sues for a personal injury, and it appears that she was living separate and apart from her husband, and was carrying on business in her own name the profits of which she used for the support of herself and children, in the absence of a specific objection it is proper to ask her as to the amount of her income from her business at the time of the accident. *Griffith* v. *Utica & M. R. Co.*, 17 *N. Y. Supp.* 692, 63 *Hun* 626, *mem.*, 43 *N. Y. S. R.* 835; *affirmed in* 137 *N. Y.* 566, *mem.*, 50 *N. Y. S. R.* 933, *mem.*, 33 *N. E. Rep.* 339.

Husband and wife were caused to alight from a sleeper before daylight, at a water stand some distance from a depot. Injury to the wife's health was alleged as one ground of damages. *Held*, that it was com-

petent for the wife to testify: "I know of nothing else that could have caused my illness except the exposure to which I was subjected on the morning when I got off the train." *Pullman Palace Car Co.* v. *Smith*, 79 *Tex.* 468, 14 *S. W. Rep.* 993.

It is well settled that where a wife is a party to a suit, and is interested in the subject-matter thereof, the husband is incompetent to testify. *Shenandoah Valley R. Co.* v. *Lewis*, 12 *Am. & Eng. R. Cas.* 305, 76 *Va.* 833.

20. Confidential communications. —In no case can either a husband or wife testify concerning any communication made by one to the other during the marriage. Kan. Civil Code, § 323, subd. 3. *Chicago, K. & N. R. Co.* v. *Ellis*, 57 *Am. & Eng. R. Cas.* 480, 52 *Kan.* 41, 33 *Pac. Rep.* 478.

21. Husband a nominal party — Competency of wife. — The Arkansas statute disqualifying a wife as a witness for or against her husband does not affect her competency as a witness in an action brought by her husband as next friend of their minor child, notwithstanding his personal liability for costs. *St. Louis, I. M. & S. R. Co.* v. *Rexroad*, 58 *Am. & Eng. R. Cas.* 615, 59 *Ark.* 180, 26 *S. W. Rep.* 1037.

And the case is not affected by the provision of law giving to fathers and mothers the enjoyment of the estate of their minor children. *Lapleine* v. *Morgan's L. & T. R. & S. Co.*, 37 *Am. & Eng. R. Cas.* 348, 40 *La. Ann.* 661, 1 *L. R. A.* 378, 4 *So. Rep.* 875.

Where a minor dies after entry of her suit by next friend, and her administrator is admitted to prosecute, the wife of the next friend is a competent witness for the plaintiff, the next friend being no longer liable for costs. *Taylor* v. *Grand Trunk R. Co.*, 48 *N. H.* 304.

22. When jointly interested. — In an action by a husband and wife to recover damages for personal injuries to each of them, although neither is a competent witness for or against the other, under Mansf. Ark. Dig. § 2859, either is competent to testify in his or her own behalf. *St. Louis, I. M. & S. R. Co.* v. *Amos*, 54 *Ark.* 159, 15 *S. W. Rep.* 362.

The rule that permits husband and wife, when joined, to testify in their own behalf, cannot be extended to authorize or permit one to testify against the other, except in cases provided by statute. *Sanders* v. *Reister*, 1 *Dak.* 151, 46 *N. W. Rep.* 680.—DISTINGUISHING Hasbrouch *v.* Vandervoort, 9 N. Y. 153. QUOTING Mousler *v.* Harding, 33 Ind. 176; Maverick *v.* Eighth Ave. R. Co., 36 N. Y. 378. QUOTING AND DISTINGUISHING Stein *v.* Bowman, 13 Pet. (U. S.) 217. REVIEWING Russ *v.* Steamboat War Eagle, 14 Iowa 363.

A husband who is a co-plaintiff with his wife in an action under Mo. Rev. St. § 2121 for the death of their son is a competent witness. *Bell* v. *Hannibal & St. J. R. Co.*, 86 *Mo.* 599.

In an action by husband and wife where the husband has a direct pecuniary interest he may testify on his own behalf. *Maverick* v. *Eighth Ave. R. Co.*, 36 *N. Y.* 378.—QUOTED IN Sanders *v.* Reister, 1 Dak. 151.

23. Suits affecting wife's separate property.—A wife is, under the statutes of Florida, a competent witness as to her own interests in an action brought in her own right by herself and her husband. *Williams* v. *Jacksonville, T. & K. W. R. Co.*, 26 *Fla.* 533, 8 *So. Rep.* 446.

Where a suit is brought by the husband to recover for the loss of the wearing apparel and ornaments of the wife, as she was, at common law, virtually the owner, and could only be divested of such ownership by their sale or gift by the husband, she is interested in the property in suit so as to render her a competent witness under the exception to section 5 of the act relating to the competency of witnesses, which declares that where the suit relates to the separate property of the wife either may be a witness. *Northern Line Packet Co.* v. *Shearer*, 61 *Ill.* 263.

A claim for damages for an injury done to a married woman living under the rule of the community is an asset of the community, on which suit must be brought in the husband's name, and the wife is not a competent witness. *White* v. *Vicksburg, S. & P. R. Co.*, 42 *La. Ann.* 990, 8 *So. Rep.* 475.

In a suit by husband and wife for the loss of merchandise belonging to the wife before marriage, she is not a competent witness for plaintiffs, nor is her competency affected by the statute which removes the objection of interest. *Smith* v. *Boston & M. R. Co.*, 44 *N. H.* 325. — FOLLOWING Kelley *v.* Proctor, 41 N. H. 139; Breed *v.* Gove, 41 N. H. 452.

Virginia Act of April 4, 1877, § 2, providing that "all real and personal estate here-

after acquired by any married woman, whether by gift, grant, purchase, inheritance, devise, or bequest, shall be and continue her sole and separate estate," does not include the damages recovered in an action for a tort on the wife's person; and hence in a joint action by a husband and wife against a common carrier for injuries inflicted upon the wife by the negligence of defendant, the husband has a legal interest in the suit and the wife's common-law disability as a witness attaches, and she is not a competent witness. *Norfolk & W. R. Co.* v. *Prindle*, 27 *Am. & Eng. R. Cas.* 332, 82 *Va.* 122. — DISTINGUISHING Hayes *v.* Mutual Protection Assoc., 76 Va. 228; Farley *v.* Tillar, 81 Va. 275.

24. Wife as husband's agent.—The right of a wife to testify for her husband on the score of agency must be confined to a suit which is based upon, grows out of, or is in some way connected with, the business conducted by her as agent. *Held*, also, that the fact that a wife purchased household furniture as agent for her husband did not, under this rule, render her a competent witness for him to prove the value of the property in an action by him for damages for the destruction of the property by fire through the negligence of a railroad. *Flannery* v. *St. Louis, I. M. & S. R. Co.*, 44 *Mo. App.* 396.

25. Assignment of interest pendente lite. — Pending suit by husband and wife against a common carrier for injury to her goods while in course of transportation, plaintiffs, by deed and for value, assigned the right of action without recourse to the wife's father, for whose benefit and at whose costs the suit continued to be prosecuted. *Held*, that the husband was a competent witness in behalf of the assignee. *Norfolk & W. R. Co.* v. *Read*, 87 *Va.* 185, 12 *S. E. Rep.* 395.

III. CREDIBILITY.

1. *In General.*

26. Of a party in his own behalf. —In estimating the weight to be given to a plaintiff's testimony, the jury may take into consideration the interest of plaintiff in the result of the suit. So in an action by a passenger against a street-car company, to recover for personal injuries, it was held not error for the trial court to instruct the jury that they should receive plaintiff's evidence "with great caution, as not entitled to the same weight and degree of credibility as the testimony of disinterested witnesses whose veracity had not been impeached." *Metropolitan R. Co.* v. *Jones*, 1 *App. Cas.* (*D. C.*) 200.

An instruction that what plaintiff testified against her interest, if anything, is to be taken as true, is properly refused where the jury might conclude that what seemed to be against her interest was the result of mistaken judgment. *Culberson* v. *Chicago, M. & St. P. R. Co.*, 50 *Mo. App.* 556.

If, in an action for personal injuries, plaintiff's case depends almost entirely upon his own testimony, and a large amount of evidence is offered tending to impeach his character for veracity, it is error for the court to omit in its charge all mention of such evidence. *Hersteine* v. *Lehigh Valley R. Co.*, 151 *Pa. St.* 244, 25 *Atl. Rep.* 104.

27. As affected by means of knowledge.—Plaintiff sued for personal injuries, and the evidence tended to show some internal injuries, manifesting themselves in symptoms of hysteria. Medical witnesses were called on each side, but their evidence was conflicting. The jury were instructed that the testimony of defendant's witnesses, on account of their experience in similar cases, was entitled to greater weight; but plaintiff produced evidence tending to show serious injuries. *Held*, that a verdict for plaintiff did not necessarily disregard the instruction. *Southern Pac. R. Co.* v. *Rauh*, 49 *Fed. Rep.* 696, 7 *U. S. App.* 84, 1 *C. C. A.* 416.

Witnesses, mere casual observers, not engaged in business on a railroad, not connected with it, nor engaged with those operating it, but pursuing other occupations, testified to facts tending to show that, at a point in question, a fence would not interfere with its free use. Other witnesses, assisting in the business of the road, so that they could not be mistaken, and having peculiar qualifications for knowing and judging of the matter, testified positively to a contrary state of facts, showing that a fence there would be a serious interference with the business of the road, and endanger its employés. *Held*, that this was not really a conflict of evidence, but that the class of witnesses first referred to should be understood as testifying only that, so far as they had observed, the facts were as stated by them. *Cincinnati, R. & F. W. R. Co.* v. *Wood*, 82 *Ind.* 593.

28. Question of credibility is for the jury.—Where the testimony to rebut the presumption of negligence proceeds from persons who would be guilty of a criminal fault unless they vindicated themselves from such presumption, a question of credibility is presented for the jury, and they may disregard such testimony. *Robinson* v. *New York C. & H. R. R. Co.*, 20 *Blatchf.* (*U. S.*) 338, 9 *Fed. Rep.* 877.

It is the province of the jury to reconcile differences in testimony, and to decide as to the credibility of the witnesses, taking into consideration the relation they sustain to the case, their probable motives, their demeanor, their opportunities of knowing and seeing the facts about which they testify, and the reasonableness or unreasonableness of their testimony, in view of the jury's knowledge of human nature, and the established and undoubted facts in the case. *Gallena* v. *Hot Springs R. Co.*, 4 *McCrary* (*U. S.*) 371, 13 *Fed. Rep.* 116.

In an action for personal injuries plaintiff's evidence, if believed, was sufficient to sustain a verdict; but it was objected that his witnesses were unworthy of credit, and that their evidence was disproved by the witnesses for defendant. *Held*, that it was for the jury to say whether, and how far, the evidence was to be believed. If, by giving credit to plaintiff's evidence, and discrediting the counter evidence, plaintiff's case was made out, it would be error to withdraw it from the jury. *Northern Pac. R. Co.* v. *Conger*, 56 *Fed. Rep.* 20.

In an action for personal injuries the controversy turned mainly on whether a frog was blocked at the time of the accident, and whether, as charged in the complaint, the want of blocking caused the injury. Plaintiff produced several witnesses who testified that they examined the frog the morning after the accident, and found that it was not blocked or filled. On the other hand, defendant produced a greater number of witnesses who testified that they examined the frog, either on the morning succeeding the accident, or a day or two thereafter, and found it properly blocked and filled. *Held*, that the mere fact of a larger number of witnesses testifying for defendant would not justify the court in withdrawing the case from the jury. *Union Pac. R. Co.* v. *James*, 56 *Fed. Rep.* 1001.

The jury cannot act upon their private and personal knowledge of the character of the witnesses who testify. *So held*, in an action against a railroad for negligence in causing an injury to a fireman. *Chattanooga, R. & C. R. Co.* v. *Owen*, 90 *Ga.* 265, 15 *S. E. Rep.* 853.

In an action for personal injuries to an employé, the fact that plaintiff's testimony on a material point differs from his testimony given on a former trial goes only to his credibility, and it is for the jury to say, after hearing his explanation, as that he was at the time of the former trial suffering from the effects of the injury, whether his last testimony is worthy of belief. *Henry* v. *Sioux City & P. R. Co.*, 75 *Iowa* 84, 39 *N. W. Rep.* 193.

An instruction that "where a considerable number of witnesses, apparently intelligent and reliable, substantially agree in estimating the value of, or injury to, a particular thing, that is a circumstance proper for the consideration of the jury" is not erroneous as an abstract proposition; and when coupled with the further instruction that the jury were not bound by the testimony of any one witness or any number of witnesses, but must come to their own conclusions from all the evidence in the case, cannot be presumed to have worked any injury to the rights of either party. *Leavenworth, T. & S. W. R. Co.* v. *Paul*, 10 *Am. & Eng. R. Cas.* 490, 28 *Kan.* 816.—QUOTED IN St. Louis, K. & A. R. Co. *v.* Chapman, 38 Kan. 307. REAFFIRMED IN Kansas City & T. R. Co. *v.* Vickroy, 46 Kan. 248. REVIEWED IN Leroy & W. R. Co. *v.* Ross, 40 Kan. 598; Ottawa, O. C. & C. G. R. Co. *v.* Fisher, 42 Kan. 675, 22 Pac. Rep. 713.

Circumstances may justify a jury in disbelieving witnesses whose testimony is not directly contradicted. *Cantlon* v. *Eastern R. Co.*, 45 *Minn.* 481, 48 *N. W. Rep.* 22.

Where the witnesses on one side make out a case of culpable negligence, and the witnesses on the other side show that the act complained of was the result of inevitable accident, after all the usual precautions had proved vain, it is not error to leave the case to the jury to decide according to the weight of evidence. *Montgomery* v. *Wilmington & W. R. Co.*, 6 *Jones* (*N. Car.*) 464.

29. Credibility of employes.—Railroad employés are as worthy of belief as other agents. All agents and employés are presumed to be friendly to their employer, and on that account are usually subjected

to a rigid cross-examination; but when this is done, their evidence must be weighed as other testimony, and its value estimated in connection with all the facts proven. *Tucker* v. *Duncan*, 6 *Am. & Eng. R. Cas.* 268, 4 *Woods* (*U. S.*) 652, 9 *Fed. Rep.* 867.

In so far as the evidence of the employé of one of the parties conflicts with that of other witnesses, the jury may look to his employment as a fact which may affect his credibility. *Central R. & B. Co.* v. *Maltsby*, 90 *Ga.* 630, 16 *S. E. Rep.* 953.

In an action against a company, the jury, in determining what weight to give to the testimony of a witness for defendant, may take into consideration the fact that the relation of employer and employé exists, and from this, and his manner of testifying, judge whether he is apparently influenced by such relation, and to what extent. *Illinois C. R. Co.* v. *Haskins*, 22 *Am. & Eng. R. Cas.* 343, 115 *Ill.* 300, 2 *N. E. Rep.* 654.

The mere relation of employé to one of the parties to a suit, be it a company or an individual, is not of itself, apart from any other consideration, any impeachment of a witness. *Chicago, R. I. & P. R. Co.* v. *Givens*, 18 *Ill. App.* 404.

The fact that all the witnesses for defendant company were in its employ, and some of them engaged in running the train causing the injury sued for, should not discredit their testimony, unless it is substantially contradicted. *Good* v. *New York, L. E. & W. R. Co.*, 18 *N. Y. S. R.* 773, 50 *Hun* 601, *mem.*, 2 *N. Y. Supp.* 419.

30. Instructions as to credibility of employes.—A charge that the jury should weigh the testimony of railroad witnesses as they would that of witnesses in other employments introduces a subject of investigation foreign to the issue, and is properly refused. *Kansas City, M. & B. R. Co.* v. *Webb*, 97 *Ala.* 157, 11 *So. Rep.* 888.

Where a corporation is sued, and calls an employé as a witness, in the absence of evidence that he stands in fear of being discharged unless he testifies favorably to the corporation, it is error to give an instruction based upon such assumption. *St. Louis, A. & T. H. R. Co.* v. *Walker*, 39 *Ill. App.* 388.

A court has no right to instruct a jury or suggest to them that servants or agents of a party, who are called as witnesses, have any such interest as affects their testimony. *Marquette, H. & O. R. Co.* v. *Kirkwood*, 9 *Am. & Eng. R. Cas.* 85, 45 *Mich.* 51, 7 *N. W. Rep.* 209.—DISTINGUISHED IN Hatfield *v.* Chicago, R. I. & P. R. Co., 11 Am. & Eng. R. Cas. 153, 61 Iowa 434; Funston *v.* Chicago, R. I. & P. R. Co., 14 Am. & Eng. R. Cas. 640, 61 Iowa 452.—*Solomon R. Co.* v. *Jones*, 34 *Kan.* 443, 8 *Pac. Rep.* 730.

Where the action is for personal injuries, it is error to charge that defendant's employés are not disinterested witnesses, and their evidence should be subjected to as severe criticism as plaintiff's own evidence. *Uransky* v. *Dry Dock, E. B. & B. R. Co.*, 37 *N. Y. S. R.* 543, 59 *Hun* 626, *mem.*, 13 *N. Y. Supp.* 670.

2. *Contradiction—Impeachment.*

31. In general.—In a suit for killing stock it was not error to permit plaintiff, in rebuttal, to ask his own witness, over defendant's objection, "whether there was curve enough to prevent seeing along the track through there," since that was an inquiry as to a visible and certain physical fact. *Birmingham Mineral R. Co.* v. *Harris*, 98 *Ala.* 326, 13 *So. Rep.* 377.

Evidence that plaintiff had brought another suit to recover for a less number of trees than that claimed to have been destroyed in this action is incompetent for the purpose of impeachment. *Leiber* v. *Chicago, M. & St. P. R. Co.*, 84 *Iowa* 97, 50 *N. W. Rep.* 547.

It is a suspicious circumstance for a witness to recollect a crucial fact on a second trial which was not adverted to at the former trial; but it is not conclusive evidence of his dishonesty. His demeanor upon the stand might entirely overcome the suspicion which might otherwise arise that the recollection of the testimony was an afterthought. *Cowan* v. *Third Ave. R. Co.*, 9 *N. Y. Supp.* 610, 56 *Hun* 644, *mem.*, 31 *N. Y. S. R.* 145; *affirmed in* 132 *N. Y.* 598, *mem.*, 30 *N. E. Rep.* 1152, *mem.*

Where a company is sued for personal injuries, an offer by the defendant to prove that plaintiff had made claims for damages against other companies is properly excluded, unless connected with the injury sued for. The mere fact that plaintiff had been a witness before, and had made other claims for damages against other companies, of itself would prove nothing, and would not tend to show that his present claim was manufactured. *Hansee* v. *Brooklyn El. R.*

Co., 66 *Hun* 384, 50 *N. Y. S. R.* 255, 21 *N. Y. Supp.* 230.

It is competent to test the knowledge and judgment or the bias of a witness, testifying in proceedings to assess damages for a right of way, by asking him, upon cross-examination, whether it is not an advantage to farming lands in that neighborhood to have a railroad constructed near them, and whether they are not worth more in consequence. *Pittsburgh, V. & C. R. Co.* v. *Vance*, 115 *Pa. St.* 325, 8 *Atl. Rep.* 764.

In an action against a company for the assessment of land damages, certain witnesses for plaintiffs in fixing the damages took into consideration the value of limestone beneath the railroad. A judgment for plaintiffs was reversed, the court holding that the value of the limestone should not be considered. At a second trial the witnesses estimated plaintiffs' damages at the same amount. *Held*, that it was error to prevent the company from inquiring on cross-examination whether the witnesses had not made a new arrangement of the elements of damage so as to enable them to fix the damages at the same total as before, but by a different process. *Reading & P. R. Co.* v. *Balthaser*, 126 *Pa. St.* 1, 17 *Atl. Rep.* 518.

32. Proof of conviction of crime.—Evidence of the arrest for a crime and the conviction of a witness is admissible as affecting his credibility; but it is not competent to show what the witness testified to on the trial in regard to the charge made against him. *Cole* v. *Lake Shore & M. S. R. Co.*, 95 *Mich.* 77, 54 *N. W. Rep.* 638.

It is not competent to cross-examine a witness in regard to his conviction of a crime and then impeach his credit by showing that he has made statements contradictory to those made on such cross-examination. *Cole* v. *Lake Shore & M. S. R. Co.*, 95 *Mich.* 77, 54 *N. W. Rep.* 638.

33. Contradicting testimony of opponent's witnesses.—In a suit against an express company to recover for the loss of three bales of furs, defendant's receipt therefor had on it a memorandum in a corner, showing the weight of each bale, and that two were mink and one skunk furs. Plaintiffs' clerk testified that this was put upon the receipt before it went to the express office for signature, and, on cross-examination, that the weights of such packages were kept in the receipt book, and that such weights were "most always" put in the receipt books. The agent of the company who signed the receipt testified that to the best of his knowledge the memorandum was not on the receipt when he signed it. He was then asked whether or not it was customary for plaintiffs, according to his observation, to put the weights on their receipts. On objection the court disallowed the question. The witness had been in the service of defendant many years. *Held*, that the question should have been allowed, as competent to contradict the testimony of plaintiffs' clerk. *Adams Exp. Co.* v. *Boskowitz*, 16 *Am. & Eng. R. Cas.* 102, 107 *Ill.* 660.

In a suit to recover for an injury to plaintiff's intestate, received from a passing train while he was engaged in repairing the track, defendant company called a roadmaster who testified that he had given instructions to the intestate a number of times about getting out of the way of trains, etc. Plaintiff, in rebuttal, called several other men who worked with the deceased, and proved by them severally that the roadmaster gave them no such instructions. *Held*, that the latter evidence was improper, as not tending to contradict the roadmaster, he having testified only as to instructions given to the person who was injured. *Chicago & N. W. R. Co.* v. *Moranda*, 17 *Am. & Eng. R. Cas.* 564, 108 *Ill.* 576.

On the issue whether an engine bell was rung upon approaching a highway crossing at grade, a witness to the ringing, whose cross-examination showed that he relied to some degree upon his recollection but mostly upon the fact that the bell was generally rung there, cannot be contradicted by evidence that the bell was not always rung at the crossing. *Tuttle* v. *Fitchburg R. Co.*, 45 *Am. & Eng. R. Cas.* 148, 152 *Mass.* 42, 25 *N. E. Rep.* 19.

In an action by a brakeman to recover for personal injuries, the company called a physician who testified that he inspected plaintiff's person about sixteen months before the alleged accident, and that he was able to fix the day with certainty by means of a record of the examination which he had made on the day it occurred. On cross-examination he claimed to have made the record in a book regularly kept for such purposes, in which he entered the facts of such examinations in chronological order, each on the day of its occurrence. *Held*,

that it was proper to allow an expert in handwriting to testify that all the entries in the book, consisting of about thirty-four pages, were made on the same occasion, and not at the respective dates on which they purported to have been made. *Van Tassel* v. *New York, L. E. & W. R. Co.*, 1 *Misc.* 299, 48 *N. Y. S. R.* 767, 20 *N. Y. Supp.* 708; *reargument denied in* 2 *Misc.* 592, *mem.*; *affirmed in* 142 *N. Y.* 634, *mem.*, 37 *N. E. Rep.* 566, *mem.*

34. Previous contradictory statements of witness.—Where the proper foundation has been laid, that is, where a witness has been asked if he did not make certain admissions or statements at a certain time and place inconsistent with those testified to at the trial, and denies making such statements, then, for the purpose of impeaching him, it is competent to prove that he did make such statements, if they relate to a material matter in issue. *Little Rock & Ft. S. R. Co.* v. *Voss*, (*Ark.*) 18 *S. W. Rep.* 172. *Chicago & A. R. Co.* v. *Pennell*, 110 *Ill.* 435. *Central R. Co.* v. *Allmon*, 45 *Ill. App.* 389; *affirmed in* 147 *Ill.* 471, 35 *N. E. Rep.* 726. *Artz* v. *Chicago, R. I. & P. R. Co.*, 44 *Iowa* 284. *Jamison* v. *Illinois C. R. Co.*, 63 *Miss.* 33. *Spohn* v. *Missouri Pac. R. Co.*, 101 *Mo.* 417, 14 *S. W. Rep.* 880. *Sloan* v. *New York C. R. Co.*, 45 *N. Y.* 125. *Lennon* v. *New York C. & H. R. R. Co.*, 48 *N. Y. S. R.* 806, 65 *Hun* 578, 20 *N. Y. Supp.* 557. *Bonner* v. *Mayfield*, 82 *Tex.* 234, 18 *S. W. Rep.* 305. *Texas & P. R. Co.* v. *Woodall*, 2 *Tex. App.* (*Civ. Cas.*) 413. *Heddles* v. *Chicago & N. W. R. Co.*, 39 *Am. & Eng. R. Cas.* 645, 74 *Wis.* 239, 42 *N. W. Rep.* 237. *Heddles* v. *Chicago & N. W. R. Co.*, 77 *Wis.* 228, 46 *N. W. Rep.* 115.

Shortly after an accident, the claim agent of a company obtained from some of its employés statements relating thereto, and had them sign papers containing a synopsis of such statements. On the trial of an action for personal injury received in such accident, defendant offered to introduce such papers for the purpose of impeaching a witness. The evidence was excluded. *Held*, error, on account of which a new trial should be granted. *Chicago, M. & St. P. R. Co.* v. *Artery*, 44 *Am. & Eng. R. Cas.* 573, 137 *U. S.* 507, 11 *Sup. Ct. Rep.* 129.—DISTINGUISHING Vicksburg&M. R.Co.*v.*O'Brien, 119 U. S. 99.

It is error to admit in evidence, for the purpose of impeaching a witness, a written statement made by him to his employer, a railroad company, shortly after an accident, containing the opinion of the witness as to the causes of the accident and not contradictory of any fact testified to by him on the trial. *Helton* v. *Alabama Midland R. Co.*, 97 *Ala.* 275, 12 *So. Rep.* 276.

That an engine was defective is not established by the testimony of plaintiff that the engineer told him, some days after the injury, that it had certain defects, although the engineer had testified that he did not so tell him. Impeaching the evidence of the engineer by contradicting him as to what he had said would not prove that what he had said was true. Such impeaching evidence being the only evidence touching any defect in the engine, there was nothing on which to base instructions to the jury to "look to the evidence and determine whether the engine was defective, * * * whether there was a leak in the steam, which escaped into the cylinders and caused the accident." *Central R. & B. Co.* v. *Maltsby*, 90 *Ga.* 630, 16 *S. E. Rep.* 953.

In an action for personal injuries, an extract from a paper signed by plaintiff's attending physician, containing a statement tending to contradict his testimony at the trial, may be read to the jury, the paper itself having been excluded; and the fact that the paper is also signed by a physician in the employ of defendant is immaterial. *Smith* v. *Metropolitan R. Co.*, 19 *Am. & Eng. R. Cas.* 171, 137 *Mass.* 61.

Plaintiff was injured in alighting from a car, and as he was being conveyed to a hospital made certain statements to a police officer, who made a report thereof at the police station, which was entered in what was called the "police blotter." It was claimed that such statements were inconsistent with what he testified to at the trial. *Held*, that the blotter was not admissible in evidence, as it was not the best evidence. The evidence of the police officer would have been better. *Weymouth* v. *Broadway & S. A. R. Co.*, 51 *N. Y. S. R.* 612, 22 *N. Y. Supp.* 1047, 2 *Misc.* 506; *affirmed in* 142 *N. Y.* 681, 37 *N. E. Rep.* 825, *mem.*

Such blotter was not admissible to contradict the officer, his attention not having been called to the statements therein, or to corroborate him, as for this it was but hearsay. *Weymouth* v. *Broadway & S. A. R. Co.*, 51 *N. Y. S. R.* 612, 22 *N. Y. Supp.* 1047, 2 *Misc.* 506; *affirmed in* 142 *N. Y.* 681, 37 *N. E. Rep.* 825, *mem.*

On the day after a fire, an agent of a company drew up a statement in the form of a certificate, giving the amount of plaintiff's goods destroyed while in the possession of the company, etc. The company introduced the deposition of the agent as to the same facts. *Held*, that the statement was admissible to contradict the deposition in case it disagreed with the statement, and the attention of the witness was called to such disagreement. *East Line & R. R. R. Co.* v. *Hall*, 64 *Tex.* 615.

35. Previous contradictory testimony by the witness. — In an action against a railroad for killing a man on the track, the issue being whether the killing might have been avoided, the engineer testified that he saw the man when 462 feet away, and that he did not recollect saying in his evidence at the coroner's inquest that he saw him when 1287 feet away. *Held*, that it was competent for plaintiff to prove that the engineer had so testified. *Wren* v. *Louisville, St. L. & T. R. Co.*, (*Ky.*) 20 *S. W. Rep.* 215.

It is not error to permit a witness to be asked on cross-examination if he did not make a contrary statement as a witness in another cause which had been tried that day, and then to permit such contrary statement to be proved by the court stenographer. *Sherard* v. *Richmond & D. R. Co.*, 35 *So. Car.* 467, 14 *S. E. Rep.* 952.

In an action for an injury at a crossing, plaintiff's testimony upon a second trial was materially different from that which he gave at the former trial as to the distance the train was from the crossing when he noticed its approach. On cross-examination he was asked: "Have you not made a different statement in your testimony on this trial as to the distance the train was from you when you first saw it from the statements you made in your testimony on the former trial of this case, by reason of the supreme court having reversed the case and you having seen the grounds upon which the case was reversed?" The witness had admitted having read the opinion of the supreme court holding him guilty of contributory negligence. *Held*, that it was reversible error to refuse the question. *Galveston, H. & S. A. R. Co.* v. *Porfert*, 1 *Tex. Civ. App.* 716, 20 *S. W. Rep.* 870.

Depositions of witnesses at a coroner's inquest are admissible to impeach them, when introduced by defendant on their denying that they made certain declarations at the inquest. *New York, P. & N. R. Co.* v. *Kellam*, 32 *Am. & Eng. R. Cas.* 114, 83 *Va.* 851, 3 *S. E. Rep.* 703.

36. Former statements as to collateral matters. — In a suit against a street railway for alleged negligence in allowing a drunken driver to run a car drawn by mules, the evidence was conflicting as to whether the driver was drunk at the time of the accident, and he testified, denying that he was intoxicated. On cross-examination he was asked if he did not, after the first trial of the case (there having been several trials), at a named place, tell two persons named that he did not deny being drunk at the time of the accident, and he denied having said so at that or any other place. The court allowed plaintiff to prove, by such persons, that the driver, shortly before the first trial, did make such statements. *Held*, that the admission of such impeaching evidence was erroneous. *Quincy Horse R. & C. Co.* v. *Gnuse*, 137 *Ill.* 264, 27 *N. E. Rep.* 190; *reversing* 38 *Ill. App.* 212.

The rule is well settled that if a party examines his adversary's witness on new and immaterial matter he is bound by his answer, and cannot call witnesses to contradict him. *McCallan* v. *Brooklyn City R. Co.*, 15 *N. Y. S. R.* 843, 48 *Hun* 340, 1 *N. Y. Supp.* 289. *Union Pac. R. Co.* v. *Reese*, 56 *Fed. Rep.* 288.

And the same rule applies where the evidence is inadmissible. *Sherman* v. *Delaware, L. & W. R. Co.*, 106 *N. Y.* 542, 13 *N. E. Rep.* 616, 11 *N. Y. S. R.* 318.

37. Laying foundation for impeachment. — When, on cross-examination, a witness is interrogated as to a conversation, with a view to laying the foundation for impeaching him, he has a right to give the whole conversation so far as it is pertinent; and this, without reference to whether the other interlocutor was an agent of the cross-examining party or not. *Savannah, F. & W. R. Co.* v. *Holland*, 41 *Am. & Eng. R. Cas.* 196, 82 *Ga.* 257, 10 *S. E. Rep.* 200.

It is competent to inquire of a witness the exact date, after a fire, when a locomotive was taken to the shop to be repaired, in order to ascertain the correctness of a previous statement by him as to such date. *Louisville, N. A. & C. R. Co.* v. *Richardson*, 66 *Ind.* 43.

A witness having testified that he saw the fire which caused the injury start from another source, it is proper, for the purpose

of impeachment, to ask him if he had not stated at a certain time and place that it started from the locomotive. *Hoye* v. *Chicago, M. & St. P. R. Co.*, 46 *Minn.* 269, 48 *N. W. Rep.* 1117.

A witness was asked as to a declaration by another witness who had already been examined) made in the presence of the deceased a short time after the accident causing his death. *Held*, inadmissible, because the other witness had not been asked as to it, so as to lay a predicate to impeach him; nor was it shown to have been participated in by deceased, or sufficiently connected with the accident to render it *res gestæ*. *Galveston, H. & S. A. R. Co.* v. *Le Gierse*, 51 *Tex.* 189.

What a witness thought and said in regard to a material fact at a time prior to the trial cannot be detailed by him on the trial in response to a leading question, unless his answer be sought for the purpose of impeaching his testimony; if that be the object, his attention must first be called to the time, place, and circumstances under which the declarations were made. If such testimony be admitted for a purpose other than that of impeachment, and be of a character likely to have influenced the verdict, it will constitute cause for reversal. *Ft. Worth & D. C. R. Co.* v. *Thompson*, 75 *Tex.* 501, 12 *S. W. Rep.* 742.

38. Impeaching one's own witness.—The general rule is that when a party produces a witness in proof of his cause he thereby represents him as worthy of belief, and the law will not permit the party calling him afterwards to impeach his general reputation for truth, nor impugn his credibility by general evidence tending to show him unworthy of belief; but this rule does not preclude the party from proving the truth of any particular fact by other competent testimony, though in direct contradiction of what such witness may have testified, and though the evidence may collaterally have the effect of showing that he was generally unworthy of belief. *Tobin* v. *Chicago City R. Co.*, 17 *Ill. App.* 82.

It is not competent for a party to impeach his own witness by the introduction in evidence of an affidavit previously signed by the witness, and setting forth a contrary state of facts from that testified to upon the trial, nor by proof of declarations made by the witness inconsistent with his testimony upon the trial; and error in the admission of such impeaching evidence will not be cured by an instruction of the court to the jury that the evidence could be considered by them simply for the purpose of explaining how the witness came to be put upon the stand. *Hall* v. *Chicago, R. I. & P. R. Co.*, 84 *Iowa* 311, 51 *N. W. Rep.* 150. —FOLLOWING Thorn *v.* Moore, 21 Iowa 289; Clapp *v.* Peck, 55 Iowa 272.

Generally a party cannot impeach the credibility of his own witness; but he may, for this purpose, prove contradictory statements of an unfriendly witness, whom he is entrapped into calling, and by whose testimony he is surprised. *Moore* v. *Chicago, St. L. & N. O. R. Co.*, 9 *Am. & Eng. R. Cas.* 401, 59 *Miss.* 243.

If the circumstances raise a presumption that the party, when he introduces the witness, knows that he will not testify as he represents, evidence of surprise is requisite before the contradictory statements will be admitted. *Moore* v. *Chicago, St. L. & N. O. R. Co.*, 9 *Am. & Eng. R. Cas.* 401, 59 *Miss.* 243.

A plaintiff who, in a suit for damages against a company, calls witnesses who testify that they were not present when he was injured, cannot, in order to impeach their credibility, ask them whether they have stated otherwise to designated persons. *Moore* v. *Chicago, St. L. & N. O. R. Co.*, 9 *Am. & Eng. R. Cas.* 401, 59 *Miss.* 243.

Whether the court can, at plaintiff's suggestion, examine persons in defendant's service without affecting his right to impeach them, *quære;* but the power, if it exists, is discretionary, and refusal to use it is not error, whatever its unwarranted exercise may be. *Moore* v. *Chicago, St. L. & N. O. R. Co.*, 9 *Am. & Eng. R. Cas.* 401, 59 *Miss.* 243.

Showing that a witness has made statements out of court varying from and conflicting with what he testifies to in court, on a point material to the issue, is admissible when the witness has been interrogated upon the point and denies making the statements; but this rule is applicable only to the witnesses of the opposing party. A party may not impeach, either by general evidence, or by proof of contradictory statements out of court, the witness whom he has presented as worthy of credit. He may contradict him as to a fact material in the cause, although the effect of the proof may be to discredit him, but he cannot contradict him when it is only material as it bears

on his credibility. *Coulter* v. *American Merchants' Union Exp. Co.*, 56 *N. Y.* 585.

39. Hostility of witness.—It is competent for a party against whom a witness has been called to prove acts or declarations showing feelings of hostility or malice, if the witness denies them; but the evidence to show hostile feelings of a witness should be direct and positive, and not very remote. *Schultz* v. *Third Ave. R. Co.*, 89 *N. Y.* 242; *reversing* 14 *J. & S.* 211. *Gale* v. *New York C. & H. R. R. Co.*, 76 *N. Y.* 594, *mem.; affirming* 13 *Hun* 1.

Hostility or favor towards either party may be proved by the declarations of the witness, and if he denies making the declarations he may be contradicted; but there is a wide distinction between showing the relations of the witness to either party and proving his statements made *in pais* inconsistent with his testimony upon the stand. *McCallan* v. *Brooklyn City R. Co.*, 15 *N. Y. S. R.* 843, 48 *Hun* 340, 1 *N. Y. Supp.* 289.

40. Attack upon the reputation of the witness.—When a female has testified to certain indecent conduct toward herself, evidence relating to her general character for truth, veracity, and chastity is admissible, to impeach her. *Indianapolis, P. & C. R. Co.* v. *Anthony*, 43 *Ind.* 183.

Where an attempt is made to impeach the credibility of a witness by proof of bad reputation, the party making such attempt may—having produced slight evidence of bad reputation at the time of the trial—extend back his evidence on that point for a reasonable period. *Memphis & O. R. Packet Co.* v. *McCool*, 8 *Am. & Eng. R. Cas.* 390, 83 *Ind.* 392.—QUOTING People *v.* Abbott, 19 Wend. (N. Y.) 192.

In an action by a boy ten years old for a personal injury, a physician called as a witness for plaintiff testified to the extent of the injury. Defendant offered to show that the physician and plaintiff's mother, three years before the injury, drove together to an apothecary's shop and there remained until one o'clock at night, under circumstances showing great intimacy. *Held*, that this evidence might properly be rejected by the presiding judge as immaterial. *Elkins* v. *Boston & A. R. Co.*, 115 *Mass.* 190, 7 *Am. Ry. Rep.* 456.

A witness was asked on cross-examination whether he had been expelled from a fire department. *Held*, that the question was improper because the fact sought to be proved was not pertinent, neither did it relate to any specific fact which tended to discredit the witness or impeach his moral character. *Nolan* v. *Brooklyn City & N. R. Co.*, 87 *N. Y.* 63.

A witness called by defendant contradicted plaintiff as to certain material matters. *Held*, that it was competent for plaintiff to break down his credibility by proving by the witness himself that he had been guilty of acts tending to prove his bad moral character, as that he had embezzled money from a former employer. *Allen* v. *Dry Dock, E. B. & B. R. Co.*, 19 *N. Y. S. R.* 114, 2 *N. Y. Supp.* 738.

41. Discharge or refusal of employment.—Defendant offered to show that one of plaintiff's witnesses had, prior to the accident as to which he testified, applied for a position upon its road and had been refused. *Held*, that the rejection of such testimony was not error. *Gale* v. *New York C. & H. R. R. Co.*, 76 *N. Y.* 594, *mem.; affirming* 53 *How. Pr.* 385, 13 *Hun* 1.

The evidence was conflicting as to the circumstances of an accident, plaintiff and two witnesses testifying that he was pushed or thrown from the car by the conductor, the latter and another witness for defendant, that this was not so, but that plaintiff jumped from the car. R., one of plaintiff's witnesses, a car driver who had been discharged by defendant, was asked on cross-examination if he did not have a conversation with P., another car driver, in which he sought to induce P. to testify falsely that his brakes were out of order, so as to fix the company with liability in another case; this R. denied. P. was called as a witness for defendant, and the offer was made to prove such conversation by him; this was objected to and excluded. *Held*, error. *Schultz* v. *Third Ave. R. Co.*, 9 *Am. & Eng. R. Cas.* 412, 89 *N. Y.* 242; *reversing* 14 *J. & S.* 211.

Where a company is sued for a personal injury and calls one of its employés as a witness, it is proper to ask such employé on cross-examination whether he had stated that the company would blacklist him if he gave his testimony according to the facts, as such statement would tend to show his bias and affect his credibility. *Pyne* v. *Broadway & S. A. R. Co.*, 46 *N. Y. S. R.* 662, 19 *N. Y. Supp.* 217; *affirmed in* 138 *N. Y.* 627, *mem.*, 51 *N. Y. S. R.* 934, *mem.*, 33 *N. E. Rep.* 1083, *mem.*

In such case, evidence of other witnesses that the employé had stated that if he was independent by having a house and lot in the country he could give his evidence without regard to being blacklisted is competent for the same purpose. *Pyne* v. *Broadway & S. A. R. Co.*, 46 *N. Y. S. R.* 662, 19 *N. Y. Supp.* 217; *affirmed in* 138 *N. Y.* 627, *mem.*, 51 *N. Y. S. R.* 934, *mem.*, 33 *N. E. Rep.* 1083, *mem.*

3. *Corroboration—Confirmation.*

42. In general.—Plaintiff sued for personal injuries, and at the trial testified in his own behalf that his character for truth and veracity had never been attacked, and that he boarded with a certain individual who could testify to his good character. *Held*, that the admission of such evidence was reversible error. *Savannah, F. & W. R. Co.* v. *Harrigan*, 80 *Ga.* 602, 7 *S. E. Rep.* 280.

The testimony of a woman who nursed plaintiff while he was confined to his bed, to the effect that he called her at a time and exhibited to her a piece of bone, which he said he had just taken from the wound, was competent to corroborate plaintiff's testimony as to taking the bone from the wound. And so also the testimony of other witnesses that after the injury plaintiff limped, while engaged in labor, was competent to show the extent of the injury. *Pringle* v. *Chicago, R. I. & P. R. Co.*, 18 *Am. & Eng. R. Cas.* 91, 64 *Iowa* 613, 21 *N. W. Rep.* 108.

Where the action is for personal injuries, and plaintiff is a witness for himself and testifies as to his feelings, he cannot reinforce his evidence by proof that he made statements of like character to his physician. *Barrelle* v. *Pennsylvania R. Co.*, 21 *N. Y. S. R.* 109, 4 *N. Y. Supp.* 127; *affirmed in* 121 *N. Y.* 697, *mem.*, 24 *N. E. Rep.* 1099, *mem.*

In an action for the amount of a subscription to stock, defendant alleged that it was expressly stipulated by the agent of the company, in the presence of S., that the subscription was not to be paid until a certain amount had been subscribed. The agent, on cross-examination, denied having made such representations. Defendant then called S. to prove that the agent had made such representations, although they were made at a time previous to the subscription. The court excluded the offer. *Held*, that the testimony should have been admitted as tending to corroborate defendant, and as part of the *res gestæ*. *Rinesmith* v. *People's Freight R. Co.*, 1 *Am. & Eng. R. Cas.* 374, 90 *Pa. St.* 262.

A plaintiff who sues a company for personal injuries may, on direct examination, testify as to the business and standing of his witnesses, though their character or knowledge of the matters about which they testify has not been assailed by the company. *Galveston, H. & S. A. R. Co.* v. *Thornsberry*, (*Tex.*) 17 *S. W. Rep.* 521.—APPROVING Philadelphia & R. R. Co. *v.* Derby, 14 How. (U. S.) 486; Pennsylvania Co. *v.* Roy, 102 U. S. 455; Houston & T. C. R. Co. *v.* Gorbett, 49 Tex. 581.

A witness testified that a horse was worth $150, and on cross-examination stated that he founded his opinion on an offer made to him for the horse. The testimony of value was not stricken out, and the evidence was corroborated by another witness, and was not contradicted. *Held*, that a verdict for the value of the horse as stated was justified by the evidence. *Johnson* v. *Rio Grande Western R. Co.*, 7 *Utah* 346, 26 *Pac. Rep.* 926.

Plaintiff granted a right of way over certain property to defendant company, but afterwards sued for damages for building the track closer to his mill than the conveyance specified. He called two witnesses who were permitted to testify that on one occasion plaintiff's mill had caught fire from sparks from the locomotive, but they made no estimate of plaintiff's damages. *Held*, that their evidence was admissible to verify that of other witnesses who did estimate the depreciation of plaintiff's property by reason of the construction of the railroad, and who specified the danger of fire as an element of such depreciation. *Hutchinson* v. *Chicago & N. W. R. Co.*, 41 *Wis.* 541.

43. Necessity for corroboration.—There are very few cases in which a jury should find a verdict for plaintiff upon his unsupported testimony alone, when it is positively contradicted by defendant. Plaintiff sued for personal injuries and gave his own evidence only in support of his claim. He was contradicted positively by a conductor, and a brakeman testified to such facts as would absolutely bar a recovery if believed by the jury. Plaintiff recovered. *Held*, that a new trial should be awarded. *Illinois C. R. Co.* v. *Alexander*, 46 *Ill. App.* 505.—FOLLOWING Peaslee *v.* Glass, 61 Ill. 94.

IV. EXAMINATION.

1. *In General.*

44. Materiality of answer called for.—In an action for stock killed, the question by defendant, "What were the mules appraised at?" when the evidence shows that they were not appraised on the demand of plaintiff, nor in writing, calls for illegal and *ex parte* evidence. *Birmingham Mineral R. Co.* v. *Harris*, 98 *Ala.* 326, 13 *So. Rep.* 377.

On the examination of an engineer as to his written report to the company of killing stock, an objection to his examination as to its contents without first showing the time and place when and where the report was made is properly overruled. *Birmingham Mineral R. Co.* v. *Harris*, 98 *Ala.* 326, 13 *So. Rep.* 377.

Where a witness is not asked as to the fact of the use of brakes during a railroad accident, but what he had said about their use, his answer is inadmissible. *Marsh* v. *South Carolina R. Co.*, 56 *Ga.* 274.

On the trial of an action to recover for a personal injury, a physician who had treated plaintiff was called to testify on the question of the extent of the injury. During his examination he was asked if he was "the same gentleman who treated the bomb-struck policeman." *Held*, that the answer to the question would not have added any force to the witness's testimony, nor was it at all material. *Pennsylvania R. Co.* v. *Connell*, 127 *Ill.* 419, 20 *N. E. Rep.* 89; *affirming* 26 *Ill. App.* 594.

It is not necessary that every question put to a witness shall be so broad and comprehensive that the answer shall be evidence of some issue in the case. If all the answers to a series of questions upon the same general subject, taken together, are competent, each is competent, and a question tending to elicit such an answer should be allowed. *Atchison, T. & S. F. R. Co.* v. *Stanford*, 12 *Kan.* 354, 8 *Am. Ry. Rep.* 230.

In an action against a company for causing death, one of defendant's witnesses was asked on cross-examination if he had not said to a certain person that "money would be no object to the railroad company if it could find some person to state that Ritter [plaintiff's intestate] was fishing and wading in the creek, in bad weather, before his death," which he denied. The party to whom he was reported to have said it was examined as a witness, but made no reference to this matter; but another witness was called who testified that he did say it. *Held*, that the evidence was incompetent, except for the purpose of contradicting the witness. *Louisville & N. R. Co.* v. *Ritter*, 28 *Am. & Eng. R. Cas.* 167, 85 *Ky.* 368, 3 *S. W. Rep.* 591.

Where an employé claims to have been injured by a sudden movement of the train while he was uncoupling cars, it is error to permit him to state what he would have done had he known that the sudden movement would occur. *Rutledge* v. *Missouri Pac. R. Co.*, 110 *Mo.* 312, 19 *S. W. Rep.* 38.

In an action for personal injuries to a passenger on a street-car, after being asked whether the car on which plaintiff was riding was striving with another car as to which should reach a crossing first, witness was then asked whether he had ever seen a race of that kind. *Held*, that an objection to the question was properly sustained. *Whitbeck* v. *Atlantic Ave. R. Co.*, 4 *N. Y. Supp.* 100.

In an action for damages for injuries alleged to have been caused by negligence in the management of a train, it is not error to allow the engineer, in the course of his narrative of how the accident happened, to state that the engine boiler leaked steam. *Lakin* v. *Oregon Pac. R. Co.*, 34 *Am. & Eng. R. Cas.* 500, 15 *Oreg.* 220, 15 *Pac. Rep.* 641.

In an action to recover for the construction and operation of a siding in front of plaintiff's property, it is not competent for the company to ask plaintiff if he would take a certain sum for the property, nor for defendant to ask its own witness if he would give a certain sum therefor. *Auman* v. *Philadelphia & R. R. Co.*, 133 *Pa. St.* 93, 20 *Atl. Rep.* 1059.

45. Relevancy of answer called for.—Plaintiff's injuries having been received while in defendant's employment as a brakeman on a freight train of loaded cars which was drawn by an engine without a cowcatcher, and which was derailed by running over a cow, a railroad engineer who has testified that an engine is liable to be thrown off with or without a cowcatcher, and that he knew of one case, cannot be allowed to testify, against objection, as to the particulars of that case. *Tennessee C., I. & R. Co.* v. *Kyle*, 93 *Ala.* 1, 8 *So. Rep.* 764.

Where the injuries complained of are alleged to have been caused by the negligence

of the foreman of a car on which plaintiff was working, he having checked it suddenly while it was moving at a rapid speed, whereby plaintiff was thrown off and injured, the speed of the car being relevant and material to the issue and the plaintiff having testified that it was moving eight or ten miles an hour, he may be asked "About how fast, compared to a man running?" and may answer "It was running faster than a man could run." *Kansas City, M. & B. R. Co.* v. *Crocker*, 95 *Ala.* 412, 11 *So. Rep.* 262.

A witness having described the place of an accident, the testimony of another witness as to measurements taken by him of the place pointed out by the first witness is competent, it appearing that the place pointed out and the place of the accident were the same. *Keim* v. *Union R. & T. Co.*, 15 *Mo. App.* 593.

To establish the weight of nineteen bales of cotton burned on defendant's railroad, it is competent for a witness to state the average weight of a lot of thirty-three bales, of which the burned bales were a portion, and thus to fix the weight of the nineteen bales by approximation. *Smith* v. *North Carolina R. Co.*, 68 *N. Car.* 107.

A company sued for damages for constructing its road over land rested its defense on the acquiescence, consent, and permission of plaintiffs. After evidence had been offered of certain facts and circumstances tending to show such permission, it was competent for the company to ask one of its witnesses whether there "was any act of the owner indicating a dissent." *Tompkins* v. *Augusta & K. R. Co.*, 21 *So. Car.* 420.

Where the question is whether plaintiff's intestate, by jumping from a car drawn by horses which were running away, was not guilty of contributory negligence, and it appeared that there was an embankment near the place of the accident over which the car might have been thrown, it is proper to ask a witness "How steep is that embankment?" *Dimmey* v. *Wheeling & E. G. R. Co.*, 27 *W. Va.* 32.

A witness for plaintiff was permitted to testify as to how many people he had seen walking on the tracks at the point where the accident occurred, in a given time a year or more after the accident. The plaintiff had previously testified that the number of people walking on the track at the time mentioned was about equal to the number walking there when he was injured. *Held*, that the evidence was competent to show the amount of travel there at the time of the accident. *Whalen* v. *Chicago & N. W. R. Co.*, 41 *Am. & Eng. R. Cas.* 558, 75 *Wis.* 654, 44 *N. W. Rep.* 849.

46. Answer responsive to question. — In an action against an express company for failure to deliver certain jewelry, the consignee was examined on interrogatories, and required to append the invoice to his answer, and to state the value of the part of the jewelry received and of the part not received. He answered, appending the invoice, enumerating the articles not received and the value of each, and then stated, "The values attached to each article are the invoice prices, and the total value of the missing articles is $163.25." *Held*, that an objection to this portion of the answer on the ground that the witness was not testifying of his own knowledge of the value of the missing articles, but only as to the invoice of value, even if well taken, went only to the weight and not to the competency of the evidence, and was no reason for excluding it. *Southern Exp. Co.* v. *Hess*, 53 *Ala.* 19.

The chief engineer of defendant company was asked, "What was the condition of the ties?" *Held*, that his answer that "the ties are in the condition that we find them generally in all parts of the track previous to renewals" was properly stricken out as argumentative and irresponsive. *Louisville, N. A. & C. R. Co.* v. *Miller*, (*Ind.*) 58 *Am. & Eng. R. Cas.* 304, 37 *N. E. Rep.* 343.

A witness, in answer to a question as to the general custom of a company in keeping engines and spark arresters in good order, can, without objection, instead of testifying to the custom, state what the company did. *Patterson* v. *Chicago, M. & St. P. R. Co.*, 70 *Iowa* 593, 33 *N. W. Rep.* 228.

In an action for damages to abutting property by an elevated railroad, a witness who owned and occupied a building in the same street was asked what effect the railroad had upon his property, and answered, "It destroyed my business entirely." *Held*, responsive to the question. *Johnston* v. *Manhattan R. Co.*, 39 *N. Y. S. R.* 227, 60 *Hun* 583, *mem.*, 14 *N. Y. Supp.* 897.

47. Indefinite question. — Plaintiff sued for a personal injury in falling while attempting to get on a street-car. The company claimed that plaintiff was intoxi-

cated at the time, which contributed to the injury, upon which point there was a conflict of evidence. His employer was called and was asked whether during the time of plaintiff's employment he had had occasion at any time to lay him off for drinking beer. It appeared that plaintiff had been in the employment of the witness for two years, but there was nothing else to indicate the time. *Held*, that the question was not sufficiently definite, as to time or circumstance, to make the refusal of the court to permit it to be answered error. *Morris* v. *Eighth Ave. R. Co.*, 52 *N. Y. S. R.* 61, 22 *N. Y. Supp.* 666, 68 *Hun* 39.

48. Rule of exclusion from court room.—Witnesses in a civil case to recover damages for an assault on a passenger by a conductor may be put under the rule and examined separately. *Texas & P. R. Co.* v. *Pearl*, 3 *Tex. App.* (*Civ. Cas.*) 19.

49. Harmless error.—A witness, after testifying as to the custom of "clinkermen" of helping "yard hostlers," stated several times the same facts disclosed in the answer to which the company objected. *Held*, that under such circumstances, even if the answer was objectionable it could not prejudice defendant company. *Butler* v. *Chicago, B. & Q. R. Co.*, 87 *Iowa* 206, 54 *N. W. Rep.* 208.

Testimony of witnesses that they were engaged in cleaning out a ditch which caused the overflow sued for at the time they heard of the commencement of the suit, that they did not finish work, but were ordered to quit, and that they had worked part of two days, cannot prejudice the defendant when it is probable that the work was being done on the day the suit was brought and the day following. *Willitts* v. *Chicago, B. & K. C. R. Co.*, 88 *Iowa* 281, 55 *N. W. Rep.* 313.

2. *Examination in Chief.*

50. In general.—Where the action is for killing live stock, it is proper for plaintiff to ask the engineer when his train left O., when it arrived at B., the distance and number of stops between the two places, and the average duration of such stops, for the purpose of showing a negligent rate of speed. *Birmingham Mineral R. Co.* v. *Harris*, 98 *Ala.* 326, 13 *So. Rep.* 377.

In an action against an express company to recover money lost from a package, an agent of the company was asked: "State what occurred, fully and in detail, at the time plaintiff called for the package." *Held*, that so much of the answer as stated a conversation between the witness and another agent, not in the presence of plaintiff, and expressing a theory as to the loss which was unfavorable to plaintiff, was improper. *American Merchants' Union Exp. Co.* v. *Gilbert*, 57 *Ill.* 468.

In a suit to recover a promised rebate on a shipment under a special contract, the making of which was not disputed, but where the authority of the agent and question of a ratification were in dispute, plaintiff called his agent who made the contract and asked him: "With whom were the contracts for the shipment of this corn made?" The court allowed the question over defendant's objection. *Held*, no error. *Erie & P. Despatch* v. *Cecil*, 112 *Ill.* 180.

Suit was brought against a company for the loss of baggage, and a check of a certain style was put in evidence as being the one given when the baggage was delivered to the carrier. A certain baggage-master testified that such checks were never used over that portion of the road on which plaintiff's baggage was sent, and was then asked whether his position was such as to enable him to know if such checks ever had been so used. *Held*, that the question was proper, as it was competent to show whether he had the means of knowing whether such checks had ever been used. *Lake Shore & M. S. R. Co.* v. *Lassen*, 12 *Ill. App.* 659.

A company was seeking to show, in an action against it for lost baggage, that the baggage had never been received, and called a baggage-master who testified that the check that plaintiff held was never used between the stations that plaintiff claimed that her baggage was shipped from and to. He was asked by the defendant whether it was possible for the check held by plaintiff to have been used in the usual course of business. *Held*, that the question was proper, leaving plaintiff on cross-examination to test the grounds upon which the witness might state that it could not have been so used. *Lake Shore & M. S. R. Co.* v. *Lassen*, 12 *Ill. App.* 659.

Witnesses cannot testify, for the purpose of showing that a company was negligent in employing careless engineers, that the engineer through whose supposed fault the

accident occurred was known by the nicknames of "Crazy Pete" and "Wild Irishman." *St. Louis, A. & T. H. R. Co.* v. *Corgan*, 49 *Ill. App.* 229.

Where plaintiff testifies that since his injury he has worked every day, but that he is not able to accomplish as much work in a day as he did before receiving the injury, he may properly answer a question asking his *per diem* compensation before the accident, such evidence enabling the jury to estimate approximately the aggregate loss of time due to the injury. *Baxter* v. *Chicago, R. I. & P. R. Co.*, 87 *Iowa* 488, 54 *N. W. Rep.* 350.

In an action against a company for killing stock, a witness was introduced to show the absence of a cattle-guard, and to prove that the road was not lawfully fenced at the place where the killing was done. He answered that he did not know what a cattle-guard was. The counsel was then permitted to describe a cattle-guard, and then to ask the witness if the thing described existed at the place, which was claimed as error. *Held*, that the proceeding was proper. *Powell* v. *Hannibal & St. J. R. Co.*, 35 *Mo.* 457.

Plaintiff claimed damages against an elevated road for loss of rent. On his direct examination he testified as to the rents of the property, without objection. On cross-examination it was made to appear that there were written leases. *Held*, that a refusal to strike out his evidence was not error. *Ottinger* v. *New York El. R. Co.*, 43 *N. Y. S. R.* 817, 63 *Hun* 631, *mem.*, 17 *N. Y. Supp.* 912.

Plaintiff sued for personal injuries and testified that for several weeks after the accident she could only attend to her business about half of the time, and was then obliged to stop. *Held*, that it was admissible then to ask her why she had to stop. *Griffith* v. *Utica & M. R. Co.*, 17 *N. Y. Supp.* 692, 63 *Hun* 626, *mem.*, 43 *N. Y. S. R.* 835; *affirmed in* 137 *N. Y.* 566, *mem.*, 33 *N. E. Rep.* 339, *mem.*

51. Leading questions.—A question asked of a plaintiff who seeks to recover for injuries sustained by leaving a car at the rear platform, as to whether he was directed by defendant or any of its employés or agents to get off at the other end, is not objectionable as leading. *McDonald* v. *Illinois C. R. Co.*, 58 *Am. & Eng. R. Cas.* 263, 88 *Iowa* 345, 55 *N. W. Rep.* 102.

In an action for personal injuries, there was proof as to the paralysis of the left side of plaintiff, and that one side was useless. A direct question was then put by plaintiff to a physician whether plaintiff could walk without a cane, which he answered by saying that the paralysis made a perceptible lameness. *Held*, that leading questions are always discretionary, but this one could do no harm. *Johnson* v. *Broadway & S. A R. Co.*, 6 *N. Y. Supp.* 113, 53 *Hun* 633, *mem.*, 25 *N. Y. S. R.* 162; *affirmed in* 125 *N. Y.* 702, *mem.*, 26 *N. E. Rep.* 752, *mem.*

52. Limiting number of witnesses examined.—Where there is no dispute as to the amount of land taken by a company, and the only question is as to its value, it is within the discretion of the court to limit the number of witnesses to five on each side, who may testify as to the value of the property. (Beck and Adams, JJ., dissenting.) *Everett* v. *Union Pac. R. Co.*, 10 *Am. & Eng. R. Cas.* 203, 59 *Iowa* 243, 13 *N. W. Rep.* 109.—FOLLOWING Kesee *v.* Chicago & N. W. R. Co., 30 Iowa 78; Bayes *v.* Herring, 51 Iowa 286.

The court has a right to limit the number of witnesses which may be called upon the question of the value of property taken. *Sheldon* v. *Minneapolis & St. L. R. Co.*, 29 *Minn.* 318, 13 *N. W. Rep.* 134.

The judge, on the trial of a cause, should exercise a sound discretion in determining how many concurrent witnesses a party may examine upon one point. *Jatho* v. *Green & C. St. Pass. R. Co.*, 4 *Phila.* (*Pa.*) 24.

53. Asking questions which are for the jury.—On a controversy as to the soundness of the ties on a railroad, there is no error in refusing to allow a witness to answer whether or not there is a railroad standard as to the number of ties required to make a first-class roadbed, especially where the witness in substance states everything called for by the question. *Chicago, P. & St. L. R. Co.* v. *Lewis*, 145 *Ill.* 67, 33 *N. E. Rep.* 960.

A question which asks a witness how much less a farm would be worth by reason of the construction of a railroad across it is objectionable as an indirect mode of obtaining the opinion of the witness as to the amount of damages resulting from the construction of the road. *Baltimore, P. & C. R. Co.* v. *Johnson*, 59 *Ind.* 247.

A question is objectionable and properly ruled out when it submits a matter in issue

to the judgment of the witness. A question whether a train stopped sufficiently long at a station to enable plaintiff to alight, if she exercised due diligence, is rightly excluded under this rule. *Madden* v. *Missouri Pac. R. Co.*, 50 *Mo. App.* 666. *Illinois C. R. Co.* v. *Blye*, 43 *Ill. App.* 612.

54. General statements as to value or damages. — In the trial of an appeal from the assessment by a sheriff's jury, in a right-of-way case, it is proper to permit the witnesses called by the respective parties, on their examination in chief, to speak as to their opinion of the value of the premises before and after the taking of the right of way, leaving the opposite party to learn by cross-examination of the ability of the witness to judge in the premises, and what he takes into consideration in making up his judgment. *Henry* v. *Dubuque & P. R. Co.*, 2 *Iowa* 288.

The question "Taking into consideration the advantages and disadvantages of the location and operation of this railroad, were the owners of this land damaged or benefited, and in what way?" is competent and relevant in an issue to determine the injury caused by the taking of land by a railroad for its roadway. *Pittsburgh Southern R. Co.* v. *Reed*, (*Pa.*) 28 *Am. & Eng. R. Cas.* 233, 6 *Atl. Rep.* 838.

On a trial in condemnation proceedings, a landowner, against the objection of the company, was permitted to ask a witness how much less valuable his land would be in consequence of the appropriation, and the witness named a definite sum; and the same question, when asked another witness by the company, was, at the instance of the landowner, not permitted to be answered. *Held*, that it was not error for the court to withdraw from the jury the answer to the question asked by the landowner. *Powers* v. *Hazelton & L. R. Co.*, 33 *Ohio St.* 429.

When reimbursement of the amount expended in medicines and for medical attendance is claimed by way of damages, a general statement of the amount by a witness may be made, and it is no ground of objection to his testimony that each item, such as the number of visits made by the medical attendant or the articles of medicine purchased, was not proved. Defendant could examine the witness about this if he desired. *International & G. N. R. Co.* v. *Brett*, 61 *Tex.* 483.

But where a plaintiff knows the items of expense, he should give them when called for. *Galveston, H. & S. A. R. Co.* v. *Wesch*, 85 *Tex.* 593, 22 *S. W. Rep.* 957.—REVIEWING Gulf, C. & S. F. R. Co. *v.* Trawick, 80 Tex. 275.

55. Questions calling for conclusions. — In an action to recover damages by fire to grass land and a grove, plaintiff, after stating that he had examined them since the fire, was permitted to testify how he found them, and what effect the fire had upon them. *Held*, not open to the objection that the witness did not state facts, but only his opinion. *Brooks* v. *Chicago, M. & St. P. R. Co.*, 32 *Am. & Eng. R. Cas.* 383, 73 *Iowa* 179, 34 *N. W. Rep.* 805.

In an action for a personal injury, it is competent to ask a witness who had known plaintiff both before and after the injury: "What, if anything, did you see in his [plaintiff's] appearance since the accident—that he was able to work as before, or otherwise?" *Winter* v. *Central Iowa R. Co.*, 74 *Iowa* 448, 38 *N. W. Rep.* 154.

In an action to recover for the death of an engineer, caused by the derailment of a train, it appeared that the ice in a stream crossed by defendant's road had so lodged against a bridge that when struck by the engine the rails on the approach on one side were loosened for some distance, and the engine and cars were derailed. *Held*, that the question, to a witness who visited the place four or five hours after the accident, whether any ice that was there appeared to have been struck by the engine was not objectionable as calling for an opinion. *Scagel* v. *Chicago, M. & St. P. R. Co.*, 83 *Iowa* 380, 49 *N. W. Rep.* 990.

On the trial of an issue whether wood delivered by plaintiff to defendant was accepted by it, the company called as a witness its agent to whom the delivery was made, and asked him whether he ever accepted the wood. The judge excluded the question, but ruled that the company might show what was or was not done by it in reference to the wood. *Held*, that the company had no ground of exception. *Brewer* v. *Housatonic R. Co.*, 107 *Mass.* 277.

Where the action is against a carrier for a delay in carrying live stock, and it is claimed that the engine used was not sufficient to haul the train, it is not competent to prove by a witness, who is not shown to be in any way an expert, that the engine was not of sufficient capacity, judging by its appearance. *Sisson* v. *Cleveland & T. R.*

Co., 14 *Mich.* 489.—DISTINGUISHED IN Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99. FOLLOWED IN Cleveland & T. R. Co. *v.* Perkins, 17 Mich. 296.

In an action against a carrier for delay in transporting hogs and cattle, it appeared that they were loaded at three different places along the line of the road, all to be carried to the same place. A witness who was called to testify as to the damages in consequence of detention on the road was asked what, in his opinion, was the extra shrinkage of the stock at the three places where they were loaded, and at the place of destination, above what it would have been if they had gone through properly. *Held*, that inasmuch as the stock was on the train for different lengths of time, and, therefore, must have been affected differently, the question was improper. *Michigan S. & N. I. R. Co.* v. *McDonough*, 21 *Mich.* 165.

Questions as to whether defendant's gripman could see plaintiff's team on the track are proper, and a variation of the questions does not render them improper so long as they call for a fact and not a mere guess or conclusion; and if their admission is error it is harmless, since the gripman testifies that he saw the team approach and enter upon the track. *Hoffman* v. *Metropolitan St. R. Co.*, 51 *Mo. App.* 273.

After bondholders of a road had purchased it, they brought suit to recover certain moneys, due for carrying the mails, which defendant had received as the agent of the road. One of plaintiff's witnesses testified that he was employed for a time as superintendent of the road, and was then asked: "For whom and on whose behalf did Mr. B. [one of the plaintiffs] make that employment, if you understood?" *Held*, that the question was not objectionable as calling for the mere conclusion of the witness. *Murray* v. *Deyo*, 10 *Hun* (*N. Y.*) 3.

It may be relevant to ask a competent witness: "Within what distance could such a train as that in question be stopped with ordinary brakes, on an ascending grade, running at such a rate that a man could run faster than the train was going?" *Mott* v. *Hudson River R. Co.*, 8 *Bosw.* (*N. Y.*) 345.

The question "How much, in your opinion, were these beef cattle damaged per head by reason of the fact that they remained in the muddy pens of the railway company thirteen hours on a cold, damp day and night, without food from early Friday morning until about nine o'clock Saturday night?" is improper as calling for the opinion of the witness. *Gulf, C. & S. F. R. Co.* v. *Wright*, 1 *Tex. Civ. App.* 402, 21 *S. W. Rep.* 80.—FOLLOWED IN Ft. Worth & D. C. R. Co. *v.* Ward, 2 Tex. Civ. App. 598.

56. Non-expert opinions.—In a suit against a common carrier for the value of household goods lost, it is competent for plaintiff to ask a witness whose opinion is based upon a knowledge of the articles lost, and not on his skill as an expert, his opinion as to their value in bulk. Plaintiff is not obliged to restrict the examination to the value of each article, and in that way to arrive at their total value, nor is it incumbent on him to show the process by which the conclusion of the witness is reached. *Seyfarth* v. *St. Louis & I. M. R. Co.*, 52 *Mo.* 449.

57. Assuming a controverted fact.—It is improper for defendant to ask an engineer if he saw the mules as soon as the light of the engine permitted him to see them, since such question ignores the maintenance of a proper lookout by the engineer at the time. *Birmingham Mineral R. Co.* v. *Harris*, 98 *Ala.* 326, 13 *So. Rep.* 377.

Plaintiff sued for personal injuries, and claimed damages, among others, for injuries to her arm. A physician who had attended plaintiff testified in her behalf that when he last examined her arm she had persistent pain on moving it. *Held*, that defendant's request to strike out this testimony on the ground that it involved the assumption that there was pain "now" was properly denied. A fair interpretation of the answer of the witness shows that it did not involve the assumption claimed. *Rosevelt* v. *Manhattan R. Co.*, 27 *J. & S.* 197, 37 *N. Y. S. R.* 894, 13 *N. Y. Supp.* 598; *affirmed in* 133 *N. Y.* 537, *mem.*, 30 *N. E. Rep.* 1148, *mem.*, 44 *N. Y. S. R.* 929, *mem.*

The same physician was asked: "You examined her [plaintiff] a few days ago, and she told you, while you were examining her, that she was suffering from pain in that arm?" This question was objected to upon the ground that the witness could not testify as to plaintiff's having pain, and upon the ground that it involved the assumption that there was pain at the present time. *Held*, that the question was not objectionable upon the grounds stated. *Rosevelt* v. *Man-*

hattan R. Co., 27 *J. & S.* 197, 37 *N. Y. S. R.* 894, 13 *N. Y. Supp.* 598; *affirmed in* 133 *N. Y.* 537, *mem.*, 30 *N. E. Rep.* 1148, *mem.*, 44 *N. Y. S. R.* 929, *mem.*

58. Showing means of knowledge. —A person who was present when plaintiff was injured by an approaching train, and who has testified that he did not hear any whistle or bell sounded, may further state that "there was nothing to prevent his hearing it." *Ensley R. Co.* v. *Chewning*, 50 *Am. & Eng. R. Cas.* 46, 93 *Ala.* 24, 9 *So. Rep.* 458.

A witness having testified as to the relative height of defendant's track at the place of an accident and on the main bridge, for the purpose of showing what the grade was at the time of the accident and the judgment and recollection of the witness concerning it, is properly permitted to testify that since the accident the grade of the road at that point has been raised about one foot. *Scagel* v. *Chicago, M. & St. P. R. Co.*, 83 *Iowa* 380, 49 *N. W. Rep.* 990.

Although a witness may not be able to identify an engine by its number, but does know something of the engine that makes the usual daily runs between given points with a given train, it is not error to permit him to identify it in any way he can, and give evidence tending to show the defective construction of what he had good reason to suppose to be the engine in controversy. *McCoy* v. *Kansas City, St. J. & C. B. R. Co.*, 36 *Mo. App.* 445.

59. Questions calling for negative testimony.—For the purpose of showing that an engine was run without sufficient watchfulness, plaintiff was properly permitted to testify that at the time of the injury he saw no one upon the rear end of the engine, negativing any excuse for [illegible] negligence of the engineer and fireman. *Crumpet* v. *Chicago, St. P. & K. C. R. Co.*, [illegible], 50 *N. W. Rep.* 673.

In a personal-injury case six medical witnesses testified, after an examination, as to the physical condition of plaintiff, three being called by each side. One of such witnesses called by the plaintiff testified that he discovered nothing in her physical condition which would indicate that she was still suffering from the alleged injury. He was then asked, "Might there not have been a fracture of the neck of the femur and you not be able to discover it?" to which he replied, "That may be in the range of possibilities, but not probable." *Held*, that inasmuch as the witness had not testified favorably to the plaintiff, it was in the discretion of the court whether such question should be put, though it was in the nature of cross-examination. *Quaife* v. *Chicago & N. W. R. Co.*, 48 *Wis.* 513, 4 *N. W. Rep.* 658, 33 *Am. Rep.* 821.—FOLLOWED IN Louisville, N. A. & C. R. Co. *v.* Wood, 113 Ind. 544.

60. Examination as to the existence of a custom. — In an action to recover for an injury inflicted while attempting to couple cars, plaintiff was asked: "What was the usual custom about going in to make couplings, or going in to get links or pins, after giving the signal, as to waiting or delaying till trains stop or not?" to which, over defendant's objection, he was permitted to answer: "They don't wait." *Held*, error, because the case was an exceptional one, and the facts as shown by the evidence did not bring it within the custom. *Bucklew* v. *Central Iowa R. Co.*, 64 *Iowa* 603, 21 *N. W. Rep.* 103. — DISTINGUISHED IN Beeson *v.* Busenbark, 44 Kan. 669.

An express company was sued for failing to deliver a package, and made defense that the plaintiff did business on an upper floor of a building, and that the package was left on the first floor and plaintiff informed. The driver of an express wagon was called as a witness and questioned as to the usual custom of express companies in delivering packages in the city. *Held*, that the question was inadmissible, there having been no previous proof of a custom to leave packages on the first floor when the owner did business on some upper floor. *Haslam* v. *Adams Exp. Co.*, 6 *Bosw.* (*N. Y.*) 235.

61. Irrelevant testimony—Motion to strike out.—Plaintiff sued defendant company for running steam motors upon the street in front of a house and lot owned by him, and offered evidence tending to show that dust and ashes were cast in the house, which, together with the noise, made the place unfit for either business or residence. The company called a witness who kept a small store on the opposite side of the street, and who was asked whether the running of the cars affected her business, her answer being that her business was not injured thereby. *Held*, that the answer was properly stricken out, as the very circumstances which might tend to injure plain-

tiff's business might increase the business of the witness. *Murphy* v. *Brooklyn City R. Co.*, 6 *N. Y. S. R.* 47, 42 *Hun* 657.—DISTINGUISHING Baird *v.* Daly, 68 N. Y. 547.

In an action for personal injuries received in attempting to get on a car, it appeared that plaintiff was working at the time in a factory. Her attorney asked her at the trial, "Did the foreman excuse you from work by reason of your injury?" to which she answered, "My boss was sorry for me; he knew I had to work and make my living, and he gave me a girl help, if they were not very busy." The boss was not called as a witness to say what he did, or to give a reason for his conduct. *Held*, that she had no right to testify further than as to the extent of her injuries and her ability to work, and the question and answer were improper. *Ryan* v. *Manhattan R. Co.*, 10 *N. Y. S. R.* 376, 45 *Hun* 592, *mem.*

An elevated railroad company was sued for damages to abutting property. For the purpose of showing that the property was damaged plaintiff called a real-estate expert, who testified that the property prior to the construction of the road was valued as high as $30,000, and that he had offered the owner that sum for it. The defendant objected to the portion of the evidence as to the offer for the property. *Held*, that the testimony was incompetent to prove the value of the property, but the evidence as to its value was competent, and the statement as to the offer was a simple remark of the witness as a basis for forming his judgment, and, if not strictly proper, was harmless. *Ross* v. *Manhattan El. R. Co.*, 29 *N. Y. S. R.* 517, 8 *N. Y. Supp.* 495.

62. Hearsay.—A witness may testify to his age, without being first required to show from what source he derived his information, and when and where he was born. The correctness of his statement may be tested on cross-examination by asking whence he derived his information, and likewise the time and place of his birth; but on such subjects hearsay evidence is admissible, from the necessity of the case. *Central R. Co.* v. *Coggin*, 73 *Ga.* 689.

A witness for plaintiff was asked by plaintiff's counsel if he had ever seen an accident from a "flying switch." The witness said he had never seen one, but had heard of one. He was then asked if he had ever heard of an accident from "roping in." Objection being made, the question was not pressed, and then plaintiff's counsel moved to strike out so much of what the witness had stated as was hearsay. *Held*, that there was no error in granting this motion. *Price* v. *Richmond & D. R. Co.*, 38 *So. Car.* 199, 17 *S. E. Rep.* 732.

63. Questions answered without objection.—Where evidence is introduced in chief, and no objection is made at the time it is introduced, nor motion afterwards made to strike it out, and no instruction is asked with regard to it, it is not error for the court to allow it to be considered by the jury, notwithstanding it may have appeared on the cross-examination of the witness that he was not competent to testify upon the particular subject on which he did testify. *Atchison, T. & S. F. R. Co.* v. *Stanford*, 12 *Kan.* 354, 8 *Am. Ry. Rep.* 230.—FOLLOWED IN Missouri Pac. R. Co. *v.* Kincaid, 29 Kan. 654.

3. *Cross-examination.*

64. In general.—In an action by an administrator to recover for the death of his intestate, a witness for defendant testified that it was the custom in defendant's yard for the men to clear the track on the approach of a locomotive, and that a sectionman was expected to look out for his own safety. On cross-examination he was asked if it was not a custom of the company, or of all companies, to have a foreman with the sectionmen, to warn them of approaching trains. He answered that the foreman could not always be with his men. He should be with them unless some necessary work called him away. That when present it was customary for him to look out for passing engines, and to warn the laborers. *Held*, that as answered there was no error in allowing the question, and that it seemed to have been proper and pertinent cross-examination. *Pittsburgh, C. & St. L. R. Co.* v. *McGrath*, 115 *Ill.* 172, 3 *N. E. Rep.* 439; *affirming* 15 *Ill. App.* 85.

In an action for personal injuries, a witness for plaintiff, on cross-examination, testified that he had made a written statement about the accident. He was then asked, "Would you recognize a copy of the statement, if it was read over to you?" *Held*, that the question was properly rejected. *Detroit & M. R. Co.* v. *Van Steinburg*, 17 *Mich.* 99.

On cross-examination of a witness in condemnation proceedings as to the deprecia-

tion in value of a building, it is irrelevant to ask if the depreciation sworn to was caused by an omission to locate a depot near the building. *St. Paul & S. C. R. Co.* v. *Murphy*, 19 *Minn.* 500 (*Gil.* 433).

In an action to recover damages for injuries to growing crops by reason of an insufficient culvert, it is competent for the defendant company to ask the plaintiff how much of the damaged crop was planted on its right of way. *Waldrop* v. *Greenwood, L. & S. R. Co.*, 34 *Am. & Eng. R. Cas.* 204, 28 *So. Car.* 157, 5 *S. E. Rep.* 471.

Plaintiff sued for personal injuries, alleged to have been caused by a defect in the track, and called witnesses who testified as to its condition both before and after the accident. The company then introduced one witness who testified only to the condition of the track after the accident. *Held*, that it was competent for plaintiff to show, upon cross-examination of one of defendant's witnesses, that there was another witness within the knowledge and reach of the defendant who might contradict plaintiff's witnesses, if their evidence was not true, and to argue therefrom that the failure of the defendant to call such witness was proof that plaintiff's evidence was true. *Beattie* v. *Grand Trunk R. Co.*, 41 *Vt.* 275.

65. Confined to matters in direct examination. — While very liberal rules prevail as to the legitimate scope of cross-examination, boundaries must be assigned to it, and it should never be allowed to lead to an unnecessary multiplication of issues, whose only effect will be to draw away the minds of the jury from the main question involved; as, where the failure of defendant company to use certain warning signals is charged to be negligence, and defendant has examined the officers of many other roads as to the use and usefulness of such precautionary signals, plaintiff cannot, on cross-examination, inquire into the particulars of similar accidents on those roads—whether they had not been mulcted in damages and afterwards adopted such signals. *Louisville & N. R. Co.* v. *Hall*, 48 *Am. & Eng. R. Cas.* 170, 91 *Ala.* 112, 8 *So. Rep.* 371.

A witness who has testified that he is "a special agent" of a company whose track had been obstructed, and has been directed to "investigate and work up the case," having answered, on cross-examination, that he did not know whether he was "a special agent or a detective" cannot be further asked: "You have been in court frequently before, and examined as a witness frequently, have you not?" *Mitchell* v. *State*, 94 *Ala.* 68, 10 *So. Rep.* 518.

In an action to recover for a personal injury, the plaintiff was called but no question was asked him as to his health prior to the time of his injury. Defendant proposed, on cross-examination, to ask him questions as to whether, at any previous time, he had been afflicted with any disease, which the court, on objection, refused to permit. *Held*, that such questions were not within the scope of a proper cross-examination, and the exclusion was justified, though the record failed to show that the objection was on that ground. *North Chicago St. R. Co.* v. *Cotton*, 52 *Am. & Eng. R. Cas.* 238, 140 *Ill.* 486, 29 *N. E. Rep.* 899; *affirming* 41 *Ill. App.* 311.

In an action for personal injury, it is not objectionable to inquire of plaintiff whether he has followed the requirements made by his physician, where it has not been shown what these requirements were. Defendant, on cross-examination, can inquire what they were, and what plaintiff does in following them. *Hatfield* v. *Chicago, R. I. & P. R. Co.*, 11 *Am. & Eng. R. Cas.* 153, 61 *Iowa* 434, 16 *N. W. Rep.* 336.

It is improper to ask a witness, who has testified that plaintiff in a negligence case had been discharged by another employer than defendant for drunkenness, if he (the witness) is a total abstainer. *Fox* v. *Peninsular W. L. & C. Works*, 92 *Mich.* 243, 52 *N. W. Rep.* 623.

In an action by a brakeman to recover for a personal injury, after he had testified that the injury had unfitted him, to some extent, from performing the duties of a brakeman, the company introduced witnesses to show that he had worked for some months after the injury and was then discharged, not on account of the disability. *Held*, that after this a further cross-examination for the purpose of showing that he had been discharged for negligence was inadmissible. *Southern Pac. R. Co.* v. *Markey*, (*Tex.*) 19 *S. W. Rep.* 392.

Where a husband, as administrator of his wife, brings an action to recover damages of a street-railroad company for causing her death, and he is examined as a witness on his own behalf, it is improper on cross-examination to ask him: "Are you engaged to be married again?" *Dimmey* v. *Wheeling & E. G. R. Co.*, 27 *W. Va.* 32.

In an action for injuries at a farm crossing, a witness for plaintiffs, after testifying as to the condition of the crossing, stated, on cross-examination, that he had also a farm crossing on his land, and that it was in the same condition as the one at which plaintiffs were injured. He was then asked by defendant's counsel whether he carried his crops over his crossing that year. *Held*, that an objection to the question was properly sustained: (1) because it was not proper cross-examination; (2) because it tended to raise a side issue. *Grasse* v. *Milwaukee, L. S. & W. R. Co.*, 36 *Wis.* 582.

66. Previous contradictory statements.—On the trial of an action against a street-railway company charged with negligence in failing to stop a car before a collision occurred, the conductor testified that he applied the brake as soon as he could, and did all that he could to stop the car. *Held*, that it was proper cross-examination to ask him if he had not, on a previous occasion, stated that he forgot to put on the brake, and that he could have stopped the car if he had not lost his presence of mind. *Central R. Co.* v. *Allmon*, 147 *Ill.* 471, 35 *N. E. Rep.* 725.

In an action for injuries sustained on account of a switch stand and the target thereof being too close to the track, plaintiff testified that prior to his injuries he had no actual knowledge how close the target was to the track. Upon cross-examination he was asked: "After you were injured, didn't you say to persons that you had repeatedly called the attention of parties to that target?" This question was objected to, and the objection sustained. *Held*, error. *Southern Kan. R. Co.* v. *Michaels*, 49 *Kan.* 388, 30 *Pac. Rep.* 408.

In an action for personal injuries sustained while driving across defendant's railroad, the negligence charged consisted in so leaving cars standing upon a street eighty feet wide that a space of only twenty-four or twenty-five feet was left for crossing. A witness for defendant, who was in defendant's employ at the time of the accident, was asked on cross-examination if he gave his opinion at the time that the company was careless in leaving the cars where it did. *Held*, that the question was irrelevant and incompetent. *Close* v. *Lake Shore & M. S. R. Co.*, 37 *Am. & Eng. R. Cas.* 522, 73 *Mich.* 647, 41 *N. W. Rep.* 828.

In an action by a passenger for injuries caused by falling over a board placed across the aisle of the car by a brakeman, for his use in lighting lamps, it is not proper on cross-examination of the brakeman for plaintiff to ask him to state a conversation he had with plaintiff subsequent to the accident, in which the brakeman stated that he had forgotten to remove the board, and that the accident was his fault; and upon the brakeman denying having so stated, plaintiff cannot testify to such conversation. *Sherman* v. *Delaware, L. & W. R. Co.*, 31 *Am. & Eng. R. Cas.* 15, 106 *N. Y.* 542, 11 *N. Y. S. R.* 318.—DISTINGUISHED IN Butler *v.* Manhattan R. Co., 4 Misc. (N. Y.) 401.

The evidence being in its nature inadmissible, plaintiff could not obtain the benefit of it by cross-examining the brakeman in regard to it, and, upon his denying it, seeking to prove it under the guise of contradicting the brakeman, where there was nothing in the alleged conversation which impeached or contradicted him. *Sherman* v. *Delaware, L. & W. R. Co.*, 31 *Am. & Eng. R. Cas.* 15, 106 *N. Y.* 542, 11 *N. Y. S. R.* 318.

The question being admitted under defendant's objection, and the witness denying that he ever said it, plaintiff was bound by his answer, and had no right to contradict him by other evidence. It was unnecessary to repeat the objection when the court asked plaintiff to repeat the conversation. *Sherman* v. *Delaware, L. & W. R. Co.*, 31 *Am. & Eng. R. Cas.* 15, 106 *N. Y.* 542, 11 *N. Y. S. R.* 318.

Upon a second trial of an action against an express company for the loss of a trunk and its contents, plaintiff testified that he called at the office and requested permission to take out a few things and leave the trunk until the following day. The company's agent then testified that the arrangement about leaving the trunk was made after the charges were paid and a receipt was signed. *Held*, that it was proper to ask him if he did not testify on the former trial that the arrangement was made before the charges were paid and the receipt signed. *Oderkirk* v. *Fargo*, 41 *N. Y. S. R.* 9, 61 *Hun* 418, 16 *N. Y. Supp.* 220.

In an action against a company for causing a fire, a witness for plaintiff, who testified that the wind was east or north of east the entire day, may be asked on cross-examination if he had not stated that had the wind not changed from the southeast the most of the town would have been

burned, where there was some evidence that the origin of the fire was from a clearing in a southeasterly direction. *Stacy* v. *Milwaukee, L. S. & W. R. Co.*, 72 *Wis.* 331, 39 *N. W. Rep.* 532.

67. Calling out whole transaction.—Where a company proves, by its agent, the declaration of the latter made at the time of signing a contract, the validity of which is being questioned, it is clearly the right of the other party, on cross-examination, to call out all that was said at the same time on the same subject. *Black* v. *Wabash, St. L. & P. R. Co.*, 25 *Am. & Eng. R. Cas.* 388, 111 *Ill.* 351.

68. Testing means of information and accuracy of memory.—In a suit for the value of a horse killed, where plaintiff testifies as to the market value of the animal, he may be required on cross-examination to disclose how much he paid for it. *St. Louis & S. F. R. Co.* v. *Sageley*, 56 *Ark.* 549, 20 *S. W. Rep.* 413.

In an action for killing a horse, defendant introduced the fireman of the engine by which the horse was killed, who testified in chief that the horse was standing in a highway crossing when it was struck. On cross-examination he was asked at what speed he was running at the time he saw the animal. The question was objected to as not cross-examination, and as immaterial. *Held*, that it was the right of plaintiff to cross-examine to test the accuracy of the observation of the witness as to the location of the accident, by showing the speed of the train, as affecting the witness's ability to determine the location of the animal. *Keyser* v. *Kansas City, St. J. & C. B. R. Co.*, 56 *Iowa* 440, 9 *N. W. Rep.* 338.

Where an abutting lot owner sues for damages for building a railroad in the street, and calls a witness who testifies generally as to the damage to the property, it is competent for him to show the facts upon which he bases his opinion, as that the tops of the rails were laid several inches above the surface of the street. *Eslich* v. *Madison City & Ft. D. R. Co.*, 75 *Iowa* 443, 39 *N. W. Rep.* 700.

Where a witness on examination in chief has given his opinion with regard to the value of certain land, he may afterwards be cross-examined with regard to his reasons for such opinion. Great latitude should generally be allowed on cross-examination. *Missouri, K. & T. R. Co.* v. *Haines*, 10 *Kan.* 439.

Upon cross-examination a question is proper which enables the jury to see upon what basis the witness has made his estimates of value, or which connects the general estimates of value and damages with the particular premises and injury. So, also, a question which seeks to ascertain if there be anything of a personal nature which may bias or influence the testimony of the witness. *Atchison, T. & S. F. R. Co.* v. *Blackshire*, 10 *Kan.* 477.

Where the action is to recover damages for building a railroad on or near lots, where the evidence as to the damages consists purely of the opinions of the witnesses, the greatest latitude in cross-examination should be allowed. *Central Branch U. P. R. Co.* v. *Andrews*, 14 *Am. & Eng. R. Cas.* 248, 30 *Kan.* 590, 2 *Pac. Rep.* 677; *former appeal* 26 *Kan.* 702.

Where the issue is whether a train dispatcher was negligent in giving an order to a conductor to meet another train composed of two sections, and to establish the negligence of the train dispatcher the conductor testifies in his direct examination that until he saw the second section of the train he had orders to meet, he had no knowledge that the section was on the road, on cross-examination it is competent to ask him if he understood the signals carried by the first section; if, with the information conveyed by those signals, he knew there was a second section following, which had a right to the road, regardless of him; if, with the signals carried, he had the right to leave the station in face of the signals, and also similar questions. *Hannibal & St. J. R. Co.* v. *Kanaley*, 39 *Kan.* 1, 17 *Pac. Rep.* 324.

A witness who testifies as to the amount of damage that results from the destruction of a certain thing may be questioned in detail as to whether or not all conditions and circumstances which might affect the amount of such damage have been considered by him in stating his estimate. *Carron* v. *Wood*, 10 *Mont.* 500, 26 *Pac. Rep.* 388.

In an action for personal injuries, a physician testified that the condition of plaintiff's limb at the time of the trial might have been caused by the injury, but he did not say that it was so caused. *Held*, that it was not error to exclude questions, on cross-examination, tending to show that his opinion as to the cause of the present condition of the limb had no certain foundation.

Shoemaker v. *New York C. & H. R. R. Co.*, 4 *N. Y. Supp.* 931, 50 *Hun* 602, *mem.*, 21 *N. Y. S. R.* 541; *affirmed in* 121 *N. Y.* 670, *mem.*, 24 *N. E. Rep.* 1094, *mem.*

In an action by an abutting owner against an elevated railroad for damages to his property, the defense called a witness who lived on the property, who testified that the road didn't bother him much; that he had not found it any serious inconvenience to live there. It appeared that the witness owned a stable in the same street and near the premises in question, and that he had brought suit against the same company for damages. *Held*, that it was proper on cross-examination to ask him, "How much do you think the elevated road has damaged your stable?" *Malcolm* v. *Metropolitan El. R. Co.*, 36 *N. Y. S. R.* 741, 13 *N. Y. Supp.* 283.

An answer to such question that the road had damaged his "business" a certain sum is irresponsive; but in the absence of a motion to strike it out, or to direct the jury to disregard it, an exception to its admission as incompetent is not available. *Malcolm* v. *Metropolitan El. R. Co.*, 36 *N. Y. S. R.* 741, 13 *N. Y. Supp.* 283.

In an action by a passenger to recover for personal injuries received in a wreck, one of his witnesses, on cross-examination, in referring to the time immediately before the wreck, stated that "all were nervous and apprehensive, and the effect and sensations were those of very fast speed, and what seemed very reckless speed." In his direct examination the witness had stated that the train was run at an unusual rate of speed. Before making this answer, defendant's attorney had asked him to state how he knew the speed of the train, and what attention he paid to it, and what experience he had had in estimating the speed of trains. *Held*, that the answer was sufficiently responsive to the request of the attorney. *Galveston, H & S. A. R. Co.* v. *Wesch*, (*Tex. Civ. App.*) 21 *S. W. Rep.* 62.

An expert witness having given his opinion as to the value of land sought to be condemned may, for the purpose of testing his competency as an expert, be cross-examined as to the value of other real estate in the vicinity, without proof that the same was similar in character and value to the land in question, and may also be asked if he did not know that several lots—part of such real estate—had been sold at sums greatly differing from his estimate of their value. *Unfacke* v. *Chicago, M. & St. P. R. Co.*, 67 *Wis.* 108, 29 *N. W. Rep.* 899.

Where a railroad employé states on cross-examination that he understands certain signals, it is proper to show by him that at a former trial he was not positive of them. *Waterman* v. *Chicago & A. R. Co.*, 52 *Am. & Eng. R. Cas.* 592, 82 *Wis.* 613, 52 *N. W. Rep.* 247, 1136.

69. Upon questions for the jury.— A witness in an action for an injury to an engineer was asked on cross-examination whether the injury arose from ignorance or want of knowledge on the part of the engineer, or from some other cause. In answer the witness gave all the facts attending the injury. *Held*, that the answer was sufficiently responsive to the question, as it was the province of the jury to draw conclusions from the facts in evidence as to the ignorance of the person injured. *Houston & T. C. R. Co.* v. *Patton*, (*Tex.*) 9 *S. W. Rep.* 175.

70. Matters of opinion. — Plaintiff having testified that he was near the place at the time of the accident but did not hear any whistle sounded by the passing train, he cannot be asked on cross-examination whether a whistle might not have sounded without his hearing it, this being mere matter of opinion, and not the statement of a fact. *East Tenn., V. & G. R. Co.* v. *Watson*, 90 *Ala.* 41, 7 *So. Rep.* 813.

Where a witness has already testified to facts it is error to allow him to testify to mere inferences deducible therefrom. So where a company is sued for the death of an engineer caused by the alleged faulty construction of the road, and another engineer is called as a witness and has testified in regard to its defective condition, it is not allowable for him to state that all engineers on the road were aware of such condition. *Union Pac. R. Co.* v. *O'Brien*, 49 *Fed. Rep.* 538, 4 *U. S. App.* 221, 1 *C. C. A.* 354.

Plaintiff sued for the value of a horse shipped from New York to San Francisco, *via* the Isthmus of Panama. Plaintiff claimed that the horse died of injuries received on the railroad in crossing the isthmus, while the defendant claimed that it died of a disease, and was sick before reaching the railroad. The mate of the vessel, who was not an expert, testified that the horse was sick on the voyage. *Held*, that

he might be asked on cross-examination if he saw any alteration in its condition during the voyage. The question does not ask for an opinion requiring skill. *Harris* v. *Panama R. Co.*, 4 *J. & S.* (*N. Y.*) 373, 5 *Bosw.* 312; *affirmed in* 58 *N. Y.* 660, *mem.*

71. Showing bias and hostility.—The cross-examination of a party or of an expert should be allowed a liberal range touching all matters testified to in chief, or tending to test the temper, bias, motives, intelligence, accuracy, credibility, or means of knowledge of the witness. *McFadden* v. *Santa Ana, O. & T. St. R. Co.*, 87 *Cal.* 464, 25 *Pac Rep.* 681.

An engineer had testified for the company, and on cross-examination was asked: "What would be the consequences if you should kill stock carelessly and negligently, and should report it to your company?" The question was objected to on the ground that it was new matter, and was irrelevant and incompetent, but the court overruled the objection. *Held*, that the question was proper as a means of furnishing to the jury a test of the value of his evidence through his relation to the company, and his interest and inclination towards the parties. *Jacksonville, T. & K. W. R. Co.* v. *Wellman*, 26 *Fla.* 344, 7 *So. Rep.* 845.

Where two persons bring separate suits for personal injuries alleged to have been sustained on the same occasion, and one of them prepares the other's case for trial, is to receive a share of the recovery therein, and is a witness therein, the company, whose defense is based upon the theory of a conspiracy between the two plaintiffs to extort money, should be allowed great latitude in the cross-examination of the witness who is the plaintiff in the case not on trial. *Cole* v. *Lake Shore & M. S. R. Co.*, 81 *Mich.* 156, 45 *N. W. Rep.* 983.

It is proper, on cross-examination, to ask a witness any question that may be pertinent to the matter to be decided by the jury; and any fact tending to show a bias in the evidence of the opposite party is admissible, whether it be offered in the examination in chief or in cross-examination. *Evansich* v. *Gulf, C. & S. F. R. Co.*, 61 *Tex.* 24.—QUOTING Wentworth *v.* Crawford, 11 Tex. 133.

This rule is not confined to such questions as will show bias of the witness—for the purpose of showing this, or falsity in his main statement, a witness may be examined upon collateral matters—but it extends to an examination into all matters connected with the *res gestæ*. *Evansich* v. *Gulf, C. & S. F. R. Co.*, 61 *Tex.* 24.

72. Circumstances tending to discredit the witness.—Where plaintiff has testified on direct examination as to the injury suffered by her and the pain immediately resulting therefrom, she may be asked on cross-examination whether she called a doctor that night. *McFadden* v. *Santa Ana, O. & T. St. R. Co.*, 87 *Cal.* 464, 25 *Pac. Rep.* 681.

A company was charged with negligence in not having sufficient rules for the conduct of its business. The superintendent of the road testified for the company that its rules as to trains and employés were sufficient and the best that could be framed. *Held*, that it was proper to ask him on cross-examination if a new rule had not been given by him since the accident, the better to secure the protection of track repairers. *Quinn* v. *New York, N. H. & H. R. Co.*, 56 *Conn.* 44, 5 *N. Eng. Rep.* 685, 12 *Atl. Rep.* 97.—RECONCILING Nalley *v.* Hartford Carpet Co., 51 Conn. 524.

In a suit against a carrier to recover for a loss from negligence and delay in the transportation of freight, a special contract of shipment was set up in bar which defendant claimed was executed in consideration of reduced rates, but which plaintiff claimed was signed by him, under the fraudulent assurance that it was only a pass, just as the train was starting to leave, and when he had no time to read it. Defendant's station agent was permitted to testify that $33.50 was the schedule rate per car for the shipment of stock. On cross-examination plaintiff asked him if the company had ever received that amount for a car of freight between the same points, and also this question: "Did you tell him [plaintiff] when he came for them [the cars] at $25 he would have to sign any contract releasing the company from liability?"—to which the court sustained objections. *Held*, that under the latitude of cross-examination both questions were clearly proper, and that the court erred in ruling otherwise. *Black* v. *Wabash, St. L. & P. R. Co.*, 25 *Am. & Eng. R. Cas.* 388, 111 *Ill.* 351.

A company was sued for injuries to a car repairer who charged that there was negligence in moving a train in response to an unauthorized signal. The conductor testified that he was standing on the platform

and heard the bell ring, and that it caused him to turn and face the engine. On cross-examination he was asked "You thought that a very strange occurrence—the bell being rung—did you not?" and "Rather surprised you, didn't it?" The questions were objected to as incompetent, immaterial, and not cross-examination. *Held*, that it was error to overrule the objection. *Gadbois* v. *Chicago, M. & St. P. R. Co.*, 75 *Iowa* 530, 39 *N. W. Rep.* 871.

A petitioner for damages to land, a part of which has been taken for a railroad, may be asked, on cross-examination, for what price he sold the residue of the lot seventeen years thereafter. *Whitman* v. *Boston & M. R. Co.*, 7 *Allen* (*Mass.*) 313.

Plaintiff sued for being ejected from a train and testified that he had not sold or given away his ticket, and that it was in his possession after he left the train, but it was not produced or accounted for on the trial. *Held*, that it was proper, on cross-examination, to ask him what had become of it. *Louisville & N. R. Co.* v. *Maybin*, 66 *Miss.* 83, 5 *So. Rep.* 401.

On cross-examination of a witness offered by a railroad who had charge of the section where the alleged injury happened from a defective rail, it is proper to ask him if he was short of iron at the time. *Taylor* v. *Grand Trunk R. Co.*, 48 *N. H.* 304.

It is competent to ask a party who offers himself as a witness in a damage suit against a railroad whether he has made any agreement to share with any one what he may recover in the suit. *Delaware, L. & W. R. Co.* v. *Dailey*, 37 *N. J. L.* 526.

A question on cross-examination of a witness for defendant in a negligence case as to his relationship with an officer of defendant is admissible in the discretion of the judge. *Hoffman* v. *New York C. & H. R. R. Co.*, 4 *Am. & Eng. R. Cas.* 537, 87 *N. Y.* 25, 41 *Am. Rep.* 337; *affirming* 14 *J. & S.* 526.

A witness having testified for plaintiff that immediately after the overflow plaintiff's land was worthless, it is error to exclude an inquiry of the witness at what price he had sold adjoining lands, also overflowed, after the overflow. This is admissible to test the weight and credibility of his testimony. *Gulf, C. & S. F. R. Co.* v. *Hepner*, 52 *Am. & Eng. R. Cas.* 670, 83 *Tex.* 136, 18 *S. W. Rep.* 441.

73. Testing competency of experts.—Where a physician, as an expert, has testified in chief that he visited plaintiff about two weeks after the injury and held a consultation with an attending physician, and that he examined the patient as to her condition and the probable causes of her ailments, it is proper cross-examination to ask what they determined was the serious thing to attend to, and what was the treatment advised. *McFadden* v. *Santa Ana, O. & T. St. R. Co.*, 87 *Cal.* 464, 25 *Pac. Rep.* 681.

The reading of extracts from medical works, and asking an expert medical witness if he agrees with the author, is not permissible on cross-examination where the extracts do not contradict the evidence of the witness, and are evidently intended as evidence for the cross-examining party, to sustain his theory of the case. Questions as to extracts from such works, on cross-examination, should be strictly limited to the one purpose of testing either the competency of the witness as an expert or the value of his opinions. *Fisher* v. *Southern Pac. R. Co.*, 89 *Cal.* 399, 26 *Pac. Rep.* 894.

It is competent to ask a medical witness, either on direct or cross examination, to give his opinion as to the probable results of an injury to the person. *Louisville, N. A. & C. R. Co.* v. *Lucas*, 119 *Ind.* 583, 21 *N. E. Rep.* 968.

74. Answer responsive to question.—A witness was asked, upon cross-examination, a question as to his knowledge of values, and volunteered the statement: "A neighbor of mine right north of me has 120 acres and was offered $6000." The court refused the request of defendant to withdraw such statement from the jury. *Held*, error. *Chicago, K. & W. R. Co.* v. *Muller*, 47 *Am. & Eng. R. Cas.* 188, 45 *Kan.* 85, 25 *Pac. Rep.* 210.

A witness on cross-examination (testimony by depositions) was asked: "If in answer to any of the direct interrogatories you have stated anything as to the rate of speed the train was running at the time of the wreck or accident, state how you know, and state particularly what attention, if any, you paid to the speed of the train." On motion to suppress the answer of the witness that "all were nervous and apprehensive, and the effects and sensations were those of very fast speed and what seemed to me reckless speed"—*held*, responsive to the interrogatory, and proper. The witness had stated in answer to direct interrogatories that "the train was running at forty or fifty

miles an hour." *Galveston, H. & S. A. R. Co.* v. *Wesch*, 85 *Tex.* 593, 22 *S. W. Rep.* 957.

75. Variance between pleadings and testimony. — Plaintiff, having testified as to the manner in which he was injured in jumping from a hand-car, was asked on cross-examination to explain why he alleged in his petition that he was thrown from the car. The court sustained objections to the question. *Held*, that the ruling was correct. The variance, if any, between his allegations and testimony showing for itself, his explanations would not make it more apparent. *Gulf, C. & S. F. R. Co.* v. *Johnson*, 83 *Tex.* 628, 19 *S. W. Rep.* 151.

76. Explanation of testimony on direct examination.—Where a witness has testified that plaintiff used a piece of board in an unsuccessful attempt to couple cars, he may be asked on cross-examination what kind of sticks defendant furnished for coupling, with a view of showing that the one used was equal to that required to be used. *Richmond & D. R. Co.* v. *Hissong*, 97 *Ala.* 187, 13 *So. Rep.* 209.

Where, on the trial of appeal in condemnation proceedings, a witness for the landowner has been examined in chief generally as to the land sought to be appropriated, the material it contains, value, etc., it is error to sustain an objection to a question on cross-examination of such witness requiring him to state the value of the land, including all the materials in it as it lies, and how much it is worth per acre in the market, though such witness may have answered such question on his examination in chief. *Pittsburgh, Ft. W. & C. R. Co.* v. *Swinney*, 59 *Ind.* 100.

There was evidence tending to show that a car was moving rapidly on a down grade when the brake was suddenly applied and the speed so checked as to throw plaintiff from the platform where he was riding. The driver testified that he was taking the car down as he usually did. *Held*, that it was proper on cross-examination to ask if he usually walked his horses across the street where the accident happened. *Murray* v. *Brooklyn City R. Co.*, 27 *N. Y. S. R.* 280, 7 *N. Y. Supp.* 900.

Where the action is by a passenger to recover for injuries caused by a car leaving the track, it is proper to allow the driver of the car, on cross-examination, to state that if the rear platform had not been overloaded it would not have left the track, where such statement is in explanation of his direct testimony. *Griffith* v. *Utica & M. R. Co.*, 43 *N. Y. S. R.* 835, 63 *Hun* 626, *mem.*, 17 *N. Y. Supp.* 692; *affirmed in* 137 *N. Y.* 566, *mem.*, 50 *N. Y. S. R.* 933, 33 *N. E. Rep.* 339.

Plaintiff, a child four years old, was knocked down by defendant's street-car and his foot crushed so that amputation became necessary. In an action to recover for the injury, a physician called by plaintiff testified that he advised amputation at once, but the parents objected. *Held*, that on cross-examination it was proper to ask him to give the reasons of his advice, as the evidence, if not tending to establish a defense, was relevant on the question of damages. *Barry* v. *Second Ave. R. Co.*, 1 *Misc.* 502, 49 *N. Y. S. R.* 705, 20 *N. Y. Supp.* 871.

4. *Re-examination—Recalling Witnesses.*

77. In general.—In an action for damages to private property from the construction of a railroad near it, defendant answered that plaintiff had been paid for all damages sustained by reason of the construction of the railroad, and during the taking of the testimony of defendant's right-of-way agent, defendant offered in evidence a voucher and receipt for money paid for the right of way through other property, the witness testifying that at the time of the execution of the receipt no claim had been made for the damages involved in the suit then on trial, and therefore the damages were not included in the voucher and receipt. Plaintiff in rebuttal testified to substantially the same thing, and defendant, after plaintiff's evidence was closed, recalled its witness for the purpose of proving that when plaintiff signed the receipt he knew the purport thereof, which, upon objection, was excluded. *Held*, no error. *Chicago, K. & N. R. Co.* v. *Hazels*, 26 *Neb.* 364, 42 *N. W. Rep.* 93.

78. Explanatory of cross-examination.—In an action for causing the death of an employé by being caught in a rapidly revolving shaft in car works, a witness for plaintiff was asked on cross-examination if it occurred to him at the time that there was danger about the place, which he answered in the affirmative. *Held*, that it was then proper to ask him on redirect examination wherein the danger consisted. *Pullman Palace Car Co.* v. *Harkins*, 55 *Fed.*

Rep. 932, 5 *C. C. A.* 326, 17 *U. S. App.* 22; *affirming* 52 *Fed. Rep.* 724.

On the trial of an action for personal injury at a railroad crossing, where defendant, on cross-examination, elicits testimony that no injury has occurred there before or since the one in question, it is competent on redirect examination of the witness to show that the crossing has been repaired since the accident. *Tetherow* v. *St. Joseph & D. M. R. Co.*, 98 *Mo.* 74, 11 *S. W. Rep.* 310.

When, upon the cross-examination of a witness, the opposite party has introduced a subject germane to the issue on trial, and has elicited some facts respecting it, the party calling the witness may, upon redirect examination, follow it up by inquiring for further facts explanatory of those so elicited, even though it might not have been competent to prove them upon the examination in chief. *McElheny* v. *Pittsburgh, V. & C. R. Co.*, 147 *Pa. St.* 1, 23 *Atl. Rep.* 392.

79. Matters not pertinent to the issue.—In an action against a company for negligently burning plaintiff's warehouse by the escape of fire from an engine, defendant introduced a witness who testified that he was a master mechanic in the employ of the company in its machine shop; that the spark arrester used on the engine in question was the best known and in use; that he knew it was in good repair at the time the fire occurred. On cross-examination he said that it was his business to know the condition of every engine at the time it left the shop on each trip; that he knew the condition of the engine from the uniform course of business of the shop, but was unable to state that he had made a personal examination of that engine. On re-examination defendant asked the witness what was the uniform course of business in the shop. *Held*, that it was immaterial that he should explain in detail the course of business in the shop. *Great Western R. Co.* v. *Haworth*, 39 *Ill.* 346.

Evidence on re-examination of a physician who had once attended plaintiff that he had at one time thereafter visited her with certain physicians sent by defendant is irrelevant. *Michigan C. R. Co.* v. *Coleman*, 28 *Mich.* 440, 12 *Am. Ry. Rep.* 59.

In an action for driving a street-car over a child, the driver testified that he had turned his face toward the car to make change for a passenger, and on turning around again he saw the child falling immediately in front of the car. On redirect examination he was asked which he looked out for mostly, passengers or people on the street, and which he regarded as his first duty to watch out for, passengers or those whom he might run over. *Held*, that the questions were properly ruled out. The question was what the driver did, and not what he was accustomed to do, or what he regarded as his first duty. *Hyland* v. *Yonkers R. Co.*, 4 *N. Y. Supp.* 305, 51 *Hun* 643, *mem.*, 22 *N. Y. S. R.* 100; *affirmed in* 119 *N. Y.* 612, *mem.*, 23 *N. E. Rep.* 1143, *mem.*

80. Party's statements out of court.—It is not competent in corroboration of a witness, or confirmation of his evidence, to prove that on other occasions he has made statements consistent with his testimony. Plaintiff sued for personal injuries and claimed that he was disabled from performing labor. The defendant then proved that plaintiff had performed labor several months after the injury. Plaintiff was then recalled and testified that at the time he had declared to a person that he felt ill. *Held*, that such statement was inadmissible either to controvert defendant's proof or to corroborate his own. *Reed* v. *New York C. R. Co.*, 45 *N. Y.* 574; *reversing* 56 *Barb.* 493.—DISTINGUISHED IN Roche *v.* Brooklyn City & N. R. Co., 105 N. Y. 294, 11 N. E. Rep. 630, 7 N. Y. S. R. 361. QUOTED IN Sanders *v.* Reister, 1 Dak. 151; Olp *v.* Gardner, 48 Hun 169, 15 N. Y. S. R. 544. REVIEWED IN DeLong *v.* Delaware, L. & W. R. Co., 37 Hun (N. Y.) 282.

5. *Refreshing the Memory.*

81. By memorandum.—A written statement made by a physician while treating an injured person, for the purpose of giving information to others, is not admissible in evidence against the defendant. *Vicksburg & M. R. Co.* v. *O'Brien*, 119 *U. S.* 99, 7 *Sup. Ct. Rep.* 118.

Where plaintiff, a fireman injured in a railroad accident, was allowed, in testifying about the time trains were due, to refresh his memory from a time card which was his own and was not put in evidence, it is no error to refuse to require him, on cross-examination, to read parts thereof. *Chattanooga, R. & C. R. Co.* v. *Owen*, 90 *Ga.* 265, 15 *S. E. Rep.* 853.

In an action against a railroad to recover for property destroyed by fire, it is proper

to permit plaintiff, in giving his testimony, to refresh his recollection from a memorandum he had made of the articles destroyed by the fire. And witnesses may testify to the loss of articles not included in the declaration as part of the *res gestæ*. *Chicago & N. W. R. Co.* v. *McCahill*, 56 *Ill.* 28, 4 *Am. Ry. Rep.* 561.

A written memorandum made by a witness at or about the time of the occurrence is only admissible in evidence as an auxiliary to the witness's oral evidence; and it must appear that it is necessary to introduce it on account of the inability of the witness to recollect the facts after refreshing his memory by looking at the memorandum. *Russell* v. *Hudson River R. Co.*, 17 *N. Y.* 134; *reversing* 5 *Duer* 39.—REVIEWING Halsey *v.* Sinsebaugh, 15 N.Y. 485.

Plaintiff sued for injuries caused by depressions in a sidewalk. Two witnesses examined the depressions, one making the measurements and the other seeing that they were correct. The former entered them in a memorandum which the latter signed. The latter testified that he knew the memorandum to be true when he signed it, but without recourse to it he could not state the size of the depressions. *Held*, that it was proper to allow him to look at the memorandum and state the figures as there entered. *Bateman* v. *New York C. & H. R. R. Co.*, 47 *Hun* 429, 14 *N. Y. S. R.* 454. —FOLLOWING McCormick *v.* Pennsylvania C. R. Co., 49 N. Y. 303.

A witness who has a memorandum of the facts he desires to testify to, and cannot recall them without a reference thereto, may use it to refresh his memory, if not, indeed, introduce it in evidence as a paper correctly recording a fact which has since escaped his recollection. *Flynn* v. *Manhattan R. Co.*, 1 *Misc.* 188, 48 *N. Y. S. R.* 670, 20 *N. Y. Supp.* 652.

A witness may refresh his recollection as to the value of specific articles by referring to a bill of particulars, known to him to be a copy of a correct memorandum of their value, made by himself. *Houston & T. C. R. Co.* v. *Burke*, 9 *Am. & Eng. R. Cas.* 59, 55 *Tex.* 323, 40 *Am. Rep.* 808.

82. By books of entry.—The refusal by the trial court to let a witness refresh his memory and testify from certain entries in a book, he being unable to testify from memory, is not error, or if error, is not prejudicial error, when the entries from which it is sought to have the witness refresh his memory have already been read to the jury and are before them as evidence. *Burlington & M. R. Co.* v. *Wallace*, 28 *Neb.* 179, 44 *N. W. Rep.* 223.

Where an abutting owner sues for loss of rents caused by the building of an elevated road in the street, and plaintiff testifies from memory as to the rents received, an objection that he refreshed his memory by looking at the books in which the rents were entered is not well taken. *Steubing* v. *New York El. R. Co.*, 64 *Hun* 639, *mem.*, 19 *N. Y. Supp.* 313, 46 *N. Y. S. R.* 799; *affirmed in* 138 *N. Y.* 658, *mem.*, 34 *N. E. Rep.* 369, 53 *N. Y. S. R.* 186, 30 *Abb. N. Cas.* 319.

In such case where plaintiff testifies that he has examined the books from time to time, and knows that the entries therein are correct, it is immaterial where the one who made such entries is at the time of the trial. *Steubing* v. *New York El. R. Co.*, 64 *Hun* 639, *mem.*, 19 *N. Y. Supp.* 313, 46 *N. Y. S. R.* 799; *affirmed in* 138 *N. Y.* 658, *mem.*, 34 *N. E. Rep.* 369, 53 *N. Y. S. R.* 186, 30 *Abb. N. Cas.* 319.

Where a witness truly made the entries, including an entry of the particular shipment in question, in a freight book of a company, on the day the entries purport to have been made in the regular course of business, the freight book is admissible in evidence, with the oath of the witness showing these facts, although at the time of testifying he has no recollection of the particular shipment or of other shipments on the date of its entry, and although his memory is not refreshed by the book, and he knows nothing of the matter except as he sees it in the book. *Moots* v. *State*, 21 *Ohio St.* 653.

Consignees of cotton required the facts connected with the condition in which the cotton was received, and as to the extent of its damage, and other details connected with its receipt, to be reduced to writing by their yard clerk and returned into their office. *Held*, in a suit against a carrier: (1) that it was not necessary to call the clerk who recorded the items in the book to prove that he had correctly recorded them as they were transmitted to him by the yard clerk; (2) that if a witness knew generally, of his own knowledge, the facts entered in the book, he could, after inspecting it, testify to their correctness. *International & G. N. R. Co.* v. *Blanton*, 22 *Am. & Eng. R. Cas.* 428, 63 *Tex.* 109.

83. Stenographer's notes.—Experience has demonstrated the fact that an expert stenographer can take the evidence of a witness in shorthand with very great if not perfect, accuracy, and this is now the mode most universally adopted to preserve oral proceedings in courts; and where such proceedings are so taken and the stenographer testifies that they were fully and correctly written at the time, he may testify to the contents of the writing though he has no independent recollection of the facts therein contained. *Chicago & A. R. Co.* v. *Robinson*, 16 *Ill. App.* 229.

In such cases, however, the writing itself must be produced in court to enable the opposite party to cross-examine in reference to it, and it may be read to the jury, not as independent evidence, but to be considered by them in connection with the oral evidence of the witness. *Chicago & A. R. Co.* v. *Robinson*, 16 *Ill. App.* 229.

84. Bill of lading. — In an action against a carrier for damages to fruit by a delay in shipment, a bill of lading was shown to a witness called in rebuttal to refresh his memory as to the date and place of shipment. The company then claimed the right to introduce the bill of lading, or to prove its contents for the purpose of showing that plaintiff had assumed the risks of injury arising from decay during transportation. *Held*, that the bill of lading was not made admissible by being merely shown to the witness to refresh his memory. *Erie & P. Dispatch* v. *Stanley*, 22 *Ill. App.* 459.

85. Surveyor's plat. — When the accuracy of a plat is verified by a witness as correctly representing the relative situation and location of certain lots with reference to other property, it is not error to allow such witness, on his examination, to use the plat in pointing out to the jury such lots, their situation and location. *Rippe* v. *Chicago, D. & M. R. Co.*, 23 *Minn.* 18, 17 *Am. Ry. Rep.* 19.

6. *Privilege of Refusing to Answer.*

86. When witness may assert his privilege.—A proceeding to forfeit a person's goods for an offense against the laws, though civil in form, is a criminal case within the fifth amendment to the U. S. Const. providing that no one shall be compelled, in any criminal case, to be a witness against himself. *Boyd* v. *United States*, 116 *U. S.* 616, 6 *Sup. Ct. Rep.* 524. — DISTINGUISHED IN re Counselman, 44 Fed. Rep. 268.

A person under examination before a grand jury, in an investigation into certain alleged violations of the Interstate Commerce Act, is not obliged to answer questions where he states that his answers might tend to criminate him; the witness in such case may invoke the protection of the fifth amendment to the Constitution of the United States, which declares that "no person * * * shall be compelled in any criminal case to be a witness against himself," although U. S. Rev. St., § 860, provides that no evidence given by him shall in any manner be used against him in any court of the United States in any criminal proceeding. The object of such constitutional provision is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime; the protection of the provision is not limited to a criminal prosecution against the witness himself. *Counselman* v. *Hitchcock*, 48 *Am. & Eng. R. Cas.* 448, 142 *U. S.* 547, 12 *Sup. Ct. Rep.* 195; *reversing* 44 *Fed. Rep.* 268.

Where the testimony of a witness before a grand jury which is investigating alleged violations of the interstate commerce law by the agent of a railroad company shows that such witness is not himself guilty of the offense, he cannot refuse to produce certain documents demanded by the grand jury on the ground that their production will tend to criminate him. *In re Peasley*, 44 *Fed. Rep.* 271.—FOLLOWING In re Counselman, 44 Fed. Rep. 268.

A defendant is not excused from stating what may bear upon or support his defense unless it will disclose his witnesses, or the manner of proving his case, and therefore in a suit against a conductor charging him with receiving money for fares which he has not accounted for, he may be required to state the condition of his property at the commencement and close of his service, to be weighed with other evidence in the cause, even if it be alleged that this is part of his defense. *State ex rel.* v. *Farmer*, 46 *N. H.* 200.—FOLLOWING Boston & W. R. Corp. *v.* Dana, 1 Gray (Mass.) 83.

87. When witness may not assert his privilege. — A grand jury was engaged in the investigation of alleged violations of the interstate commerce law, and

defendant refused to produce certain books and papers or to answer certain questions on the ground that so doing would tend to criminate himself. His own evidence showed that he was not guilty of the offense which the grand jury was investigating. *Held*, that his refusal was unauthorized. *In re Peasley*, 44 *Fed. Rep.* 271.

Corporations acting as interstate carriers are not liable criminally for violations of the Interstate Commerce Act, nor are they exposed to its penalties and forfeitures. Only the officers of such corporations and shippers are punishable for violations of the statute. Therefore such witness could not refuse to produce books and papers before the grand jury on the ground that their production would tend to subject the corporation to penalties and forfeitures. *In re Peasley*, 44 *Fed. Rep.* 271.

7. *Privileged Communications.*

88. To physicians.* — A physician may not testify, in the absence of plaintiff, regarding statements made to him by the latter's attending physician, concerning the character of the injury suffered by plaintiff. *Goshen* v. *England*, 119 *Ind.* 368, 21 *N. E. Rep.* 977.

A physician who has assisted in dressing plaintiff's injuries, and, in conversation with plaintiff while so engaged, has asked how the accident occurred is incompetent to testify as to the information obtained. *Pennsylvania Co.* v. *Marion*, 123 *Ind.* 415, 7 *L. R. A.* 687, 23 *N. E. Rep.* 973.—FOLLOWING Heuston *v.* Simpson, 115 Ind. 62.

An attending physician cannot testify, against his patient's objection, touching the latter's condition, regardless of whether he derived the information from his patient's statement or from his own observation. *Corbett* v. *St. Louis, I. M. & S. R. Co.*, 26 *Mo. App.* 621.

N. Y. Code Civ. Pro., § 834, forbids a physician to disclose any information acquired by him "in a professional capacity and which was necessary to enable him to act in that capacity." A physician who was called in by plaintiff after she had been injured was asked if he conversed with plaintiff about her injuries, and if he made an examination of her. *Held*, that the question was improper. *Feeney* v. *Long Island R. Co.*, 39 *Am. & Eng. R. Cas.* 639, 116 *N. Y.* 375, 22 *N. E. Rep.* 402, 26 *N. Y. S. R.* 729, 5 *L. R. A.* 544; *affirming* 42 *Hun* 657, *mem.*, 5 *N. Y. S. R.* 63.—FOLLOWING Edington *v.* Mutual Life Ins. Co., 67 N. Y. 185. QUOTING Grattan *v.* Metropolitan Life Ins. Co., 80 N. Y. 281.—QUOTED IN Koetter *v.* Manhattan El. R. Co., 36 N. Y. S. R. 611, 59 Hun 623, *mem.*, 13 N. Y. Supp. 458.—*Butler* v. *Manhattan R. Co.*, 3 *Misc.* 453, 52 *N. Y. S. R.* 498, 30 *Abb. N. Cas.* 78, 23 *N. Y. Supp.* 163; *affirmed in* 143 *N. Y.* 630, *mem.*, 37 *N. E. Rep.* 826, *mem.*, 60 *N. Y. S. R.* 873, *mem.* —APPLYING Sloan *v.* New York C. R. Co., 45 N. Y. 125. DISTINGUISHING Treanor *v.* Manhattan R. Co., 28 Abb. N. Cas. (N. Y.) 47; Marx *v.* Manhattan R. Co., 56 Hun (N. Y.) 575. FOLLOWING Hope *v.* Troy & L. R. Co., 40 Hun 438.—*Butler* v. *Manhattan R. Co.*, 4 *Misc.* 401, 53 *N. Y. S. R.* 664; *reversed in* 143 *N. Y.* 417, 38 *N. E. Rep.* 454. *Jones* v. *Brooklyn, B. & W. E. R. Co.*, 21 *N. Y. S. R.* 169, 3 *N. Y. Supp.* 253; *affirmed in* 121 *N. Y.* 683, *mem.*, 24 *N. E. Rep.* 1098.

89. To physician called in consultation.—Under N. Y. Code, § 834, a physician is only forbidden to disclose "information which he acquires in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." Therefore a second physician who examines an injured person at the request of the attending physician, merely to see what was the matter without being expected or requested to treat or prescribe for the injured person, nor to advise as to such treatment, is not excluded as a witness. *Henry* v. *New York, L. E. & W. R. Co.*, 32 *N. Y. S. R.* 16, 10 *N. Y. Supp.* 508, 57 *Hun* 76, 19 *Civ. Pro.* 188.

Where physicians are called in consultation, what is said in the presence of the patient is inadmissible in evidence. The fact that they do not agree as to the disease does not permit the confidential statements between physician and patient to be disclosed. *Morris* v. *New York, O. & W. R. Co.*, 73 *Hun* 560, 26 *N. Y. Supp.* 342, 56 *N. Y. S. R.* 231.

90. To surgeon sent by opposing party. — It is proper for a physician to testify, in an action against a street railway for personal injuries, as to information acquired by him of the physical condition of the party injured, if he has visited such injured party upon the suggestion of defendant and has stated to her that he came

*Confidential communications of physicians, see note, 13 AM. & ENG. R. CAS. 9.

solely and entirely at the request of defendant, to ascertain the nature and character of her injuries for the purpose of reporting them to defendant, and if he confines his conduct to such examination and report; yet where it appears that he continued to visit and prescribe for her, and that the information acquired by him was obtained while visiting her at her request and prescribing for her, such evidence, if objected to by her, is properly excluded. *Freel* v. *Market St. Cable R. Co.*, 97 *Cal.* 40, 31 *Pac. Rep.* 730.

Where one injured upon a railroad is attended by the company's surgeon, a communication made by him to the surgeon in response to a question asked for the purpose of ascertaining the facts in order properly to treat him is a privileged communication, within the meaning of Iowa Code, § 3643. *Raymond* v. *Burlington, C. R. & N. R. Co.*, 18 *Am. & Eng. R. Cas.* 217, 13 *Am. & Eng. R. Cas.* 6, 65 *Iowa* 152, 17 *N. W. Rep.* 923, 21 *N. W. Rep.* 495.

Plaintiff was thrown down and injured as she was leaving defendant's car. Soon after a physician called on her in the interest of the company, for the purpose of learning the extent of her injuries and to obtain admissions in regard to the injury. He stated that he came for the company, and there was no evidence that he prescribed for her, consulted with her doctor, who was present, or gave any professional advice or suggestions, or gave any reason to believe that he intended to render any professional service. *Held*, that any statements which plaintiff made to him were not privileged under N. Y. Code Civ. Pro., § 834. *Heath* v. *Broadway & S. A. R. Co.*, 25 *J. & S.* 496, 29 *N. Y. S. R.* 267, 8 *N. Y. Supp.* 863.

91. Extent of the privilege.—Before information to a physician can be excluded under N. Y. Code Civ. Pro., § 834, it must appear that it was such as the physician acquired in some way while professionally attending a patient, and it must also be such as was necessary to enable him to prescribe as a physician, or to do some act as a surgeon. It is not sufficient to authorize the exclusion that the physician acquired the information while attending his patient, but it must be the necessary information mentioned. *Brown* v. *Rome, W. & O. R. Co.*, 45 *Hun* 439, 12 *N. Y. S. R.* 446.

If the physician has acquired any information which was not necessary to enable him to prescribe or to act as a surgeon, such information may be disclosed by him although he acquired it while attending the patient. So where a physician is called to treat one who was injured at a crossing, statements made to him by the injured person that when approaching the crossing he heard persons calling and saw a man swinging his hat are not privileged. *Brown* v. *Rome, W. & O. R. Co.*, 45 *Hun* 439, 12 *N. Y. S. R.* 446.

92. Where physician testified at former trial.—Upon the trial of an action to recover damages for injuries to plaintiff, a physician who, as such, attended plaintiff after the injury was called as a witness in her behalf, and testified as to all the facts bearing upon her physical condition learned by him while so attending upon her. *Held*, that upon a subsequent trial defendant was entitled to call and examine him as a witness in regard to such facts. *McKinney* v. *Grand St., P. P. & F. R. Co.*, 104 *N. Y.* 352, 10 *N. E. Rep.* 544, 4 *N. Y. S. R.* 349.—REVIEWED IN Marx *v.* Manhattan R. Co., 56 Hun 575, 18 Civ. Pro. 384, 31 N. Y. S. R. 914, 10 N. Y. Supp. 159; Treanor *v.* Manhattan R. Co., 28 Abb. N. Cas. (N. Y.) 47.

93. Waiver of the privilege.—In an action by a husband for injuries to his wife while she was a passenger, it is competent for the husband and wife to waive the protection of the statute (Mo. Rev. St. § 4017) and allow the wife's attending physician to testify as to statements made to him by her in reference to the sickness resulting from her injuries. *Blair* v. *Chicago & A. R. Co.*, 89 *Mo.* 334, 1 *S. W. Rep.* 367. *Blair* v. *Chicago & A. R. Co.*, 89 *Mo.* 383, 1 *S. W. Rep.* 350.

A patient who calls his physician to testify does not thereby waive his right to object to other physicians who have treated him testifying on the same subject. *Mellor* v. *Missouri Pac. R. Co.*, 47 *Am. & Eng. R. Cas.* 450, 105 *Mo.* 455, 16 *S. W. Rep* 849.—APPLYING Hope *v.* Troy & L. R. Co., 40 Hun (N. Y.) 438. DISTINGUISHING Edington *v.* Ætna Ins. Co., 77 N. Y. 564.

A plaintiff who sues for a personal injury, by bringing an action and putting her physical condition on trial does not thereby waive the privilege of the statute, so that the testimony of a physician attending her may be admissible; and the fact that plaintiff's prior condition was brought out on cross-examination is not a waiver. *Butler*

v. *Manhattan R. Co.*, 23 *N. Y. Supp.* 163, 52 *N. Y. S. R.* 498, 3 *Misc.* 453; *affirmed in* 143 *N. Y.* 630, *mem.*, 37 *N. E. Rep.* 826, *mem.*, 60 *N. Y. S. R.* 873, *mem.*—REVIEWING Hope *v.* Troy & L. R. Co., 40 Hun 438; Sloan *v.* New York C. R. Co., 45 N. Y. 125.

Under New York Code of Civil Procedure, §§ 834, 836, providing that a physician or surgeon shall not disclose any information acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity, unless the privilege is "expressly waived by" the patient, the privilege is waived when the patient's attorney calls the physician as a witness and states that, as patient's attorney, he waives it. *Alberti* v. *New York, L. E. & W. R. Co.*, 4 *Am. & Eng. R. Cas.* 201, 118 *N. Y.* 77, 23 *N. E. Rep.* 35, 27 *N. Y. S. R.* 865, 6 *L. R. A.* 765; *affirming* 43 *Hun* 421.—FOLLOWING Mark *v.* Buffalo, 87 N. Y. 184.

It appeared in an action for personal injuries that three physicians treated plaintiff, but each at a different time. At the trial she called one of the three, who gave testimony as to her injuries. *Held*, that this was not a waiver of the protection of the statute as to the other two so that the defendant might call them. *Hope* v. *Troy & L. R. Co.*, 40 *Hun* (*N. Y.*) 438; *affirmed in* 110 *N. Y.* 643, *mem.*, 17 *N. E. Rep.* 873.—APPLIED IN Mellor *v.* Missouri Pac. R. Co., 105 Mo. 455. FOLLOWED AND REVIEWED IN Butler *v.* Manhattan R. Co., 23 N. Y. Supp. 163, 52 N. Y. S. R. 498.

A mere bringing of an action by an injured person and his testimony that his leg was broken does not waive his right to silence his physician in reference to secrets acquired in treating him, and where it was not disputed that the leg was broken it must be presumed that some other information acquired by the physician was sought to be elicited. *Jones* v. *Brooklyn, B. & W. E. R. Co.*, 21 *N. Y. S. R.* 169, 3 *N. Y. Supp.* 253; *affirmed in* 121 *N. Y.* 683, 24 *N. E. Rep.* 1098.

In such case the defendant had, after the accident, sent its doctor to plaintiff to look after its interest, and he was called and examined fully in relation to the injuries of plaintiff. *Held*, that this was not a waiver by plaintiff of his privilege to silence the other physicians who attended him. No act of the defendant can be construed as a waiver by the plaintiff. *Jones* v. *Brooklyn, B. & W. E. R. Co.*, 21 *N. Y. S. R.* 169, 3 *N. Y. Supp.* 253; *affirmed in* 121 *N. Y.* 683, 24 *N. E. Rep.* 1098.

Where the patient testifies as to what took place between himself and his physician he thereby waives the protection of the statute, and the physician is then competent to testify to conversations with his patient. *Marx* v. *Manhattan R. Co.*, 56 *Hun* 575, 18 *Civ. Pro.* 384, 31 *N. Y. S. R.* 914, 10 *N. Y. Supp.* 159.—REVIEWING McKinney *v.* Grand St., P. P. & F. R. Co., 104 N. Y. 352.—APPLIED IN Treanor *v.* Manhattan R. Co., 28 Abb. N. Cas. (N. Y.) 47. DISTINGUISHED IN Butler *v.* Manhattan R. Co., 52 N. Y. S. R. 498, 23 N. Y. Supp. 163.—*Treanor* v. *Manhattan R. Co.*, 28 *Abb. N. Cas.* 47, 16 *N. Y. Supp.* 536, 41 *N. Y. S. R.* 614, 21 *Civ. Pro.* 364; *reversing* 39 *N. Y. S. R.* 186, 14 *N. Y. Supp.* 270.—APPLYING Marx *v.* Manhattan R. Co., 56 Hun 575. REVIEWING McKinney *v.* Grand St., P. P. & F. R. Co., 104 N. Y. 352. DISTINGUISHED IN Butler *v.* Manhattan R. Co., 52 N. Y. S. R. 498.

V. OPINIONS. EXPERT TESTIMONY.

1. *Opinions of Ordinary Witnesses.*

a. In General.

94. Witness must ordinarily state facts and not conclusions. — (1) *Conclusions.*—A witness who is a director of a bank cannot be asked whether the other directors and himself knew with what intention a railroad company issued certain bills or notes. *Whetstone* v. *Montgomery Bank*, 9 *Ala.* 875.

A witness who was present when plaintiff was compelled to leave a car though he claimed that he had paid his fare cannot be allowed to testify that the conductor "seemed to be anxious to get the matter settled," that "his actions showed that he was doing his utmost to get the matter settled without further trouble," and that in his opinion the conductor behaved "as well as a man could do in such a case." These statements were the mere opinion and conclusion of the witness, and not shorthand renderings of facts. *Alabama G. S. R. Co.* v. *Tapia*, 94 *Ala.* 226, 10 *So. Rep.* 236.

A witness cannot be allowed to state that he was in a better position to see an occurrence than another witness on the same train, since the facts showing the relative position occupied by each should have been submitted to the jury. *Helton* v. *Alabama Midland R. Co.*, 97 *Ala.* 275, 12 *So. Rep.* 276.

The reply of a witness to the question "Who did the chief engineer say would pay for the work?" stating that "I judged the company would pay for it" is a conclusion, and not admissible as testimony. *Huntsville B. L. & M. S. R. Co.* v. *Corpening*, 97 *Ala.* 681, 12 *So. Rep.* 295.

The opinion of defendant's agent that plaintiffs' claim was just and ought to be paid is not admissible as testimony for plaintiffs. *East Tenn., V. & G. R. Co.* v. *Johnson*, 85 *Ga.* 497, 11 *S. E. Rep.* 809.

The court did right, on motion of defendant's counsel, in ruling out the testimony of a witness that "the engineer had time to blow the whistle before the deceased was struck," and in refusing to allow plaintiff's attorney to ask the witness if "the engineer didn't have time to signal the approach of the engine, and had he done so, would the deceased not have had time to have gotten off the track?" the court ruling: "You can show all the facts, and it is for the jury to draw conclusions from the facts." *Dowdy* v. *Georgia R. & B. Co.*, 88 *Ga.* 726, 16 *S. E. Rep.* 62.

A question to a witness in this form: "If the engineer had paid any attention to the signals that were given, and stopped the train, would this man have been killed?" is objectionable as calling for his opinion, when the facts on which his opinion was based were the proper objects of inquiry, the conclusions from such facts being questions for the jury and not for the witness. *Kendrick* v. *Central R. & B. Co.*, 89 *Ga.* 782, 15 *S. E. Rep.* 685.

Where the action is based upon the alleged wrongful expulsion of plaintiff from defendant's train, the testimony of the conductor that he thought he allowed plaintiff time enough to get the money to pay his fare is mere matter of opinion and is properly excluded. *Curl* v. *Chicago, R. I. & P. R. Co.*, 11 *Am. & Eng. R. Cas.* 85, 63 *Iowa* 417, 16 *N. W. Rep.* 69, 19 *N. W. Rep.* 308.

In an action by a company against a county to recover for cars burned by a mob, a conductor was asked whether there had not been talk of a strike prior to the burning of the cars. *Held*, that he could not testify as to what was generally understood, but might testify as to what the rumor was. *Lake Shore & M. S. R. Co.* v. *Erie County Sup'rs*, 2 *N. Y. S. R.* 317, 41 *Hun* 637.

As a general rule, the correct practice is for a witness who does not testify as an expert to state facts, and leave deductions therefrom to be drawn by the jury. *Houston & T. C. R. Co.* v. *Smith*, 52 *Tex.* 178. *Taylor* v. *Baltimore & O. R. Co.*, 39 *Am. & Eng. R. Cas.* 259, 33 *W. Va.* 39, 10 *S. E. Rep.* 29.

A witness who testified to the manner in which plaintiff was injured, on cross-examination admitted that he did not see plaintiff when injured, and that he had testified to his opinion as to the matter. *Held*, that his testimony should have been excluded. *Trinity & S. R. Co.* v. *Lane*, 79 *Tex.* 643, 15 *S. W. Rep.* 477.

Suit was brought against a company for damages to a team run into by a train. At the trial plaintiff was permitted to prove by the driver that "there was no way to save the team." *Held*, that the statement was a violation of the rule that witnesses shall state facts and not give mere opinions. *Missouri Pac. R. Co.* v. *Burnett*, 3 *Tex. App.* (*Civ. Cas.*) 287.

As bearing upon the question whether a given person is a competent helper to a car repairer, it is not proper to ask a witness whether he is bright and intelligent. *Latremouille* v. *Bennington & R. R. Co.*, 48 *Am. & Eng. R. Cas.* 265, 63 *Vt.* 336, 22 *Atl. Rep.* 656.

(2) *Shorthand rendering of facts.*—That the cars of a freight train were started with "an unusual hard jerk" is not a conclusion, but a shorthand rendering of facts properly admitted as testimony. *Birmingham Mineral R. Co.* v. *Wilmer*, 97 *Ala.* 165, 11 *So. Rep.* 886.

The deceased and three other track repairers were on a hand-car, from which they jumped on the sudden appearance of a train. *Held*, that a question to one who jumped and escaped injury as to whether the deceased had time to jump is not objectionable as calling for an opinion. *Quinn* v. *New York, N. H. & H. R. Co.*, 56 *Conn.* 44, 5 *N. Eng. Rep.* 685, 12 *Atl. Rep.* 97.—QUOTED IN Kansas Pac. R. Co. *v.* Whipple, 37 Am. & Eng. R. Cas. 320, 39 Kan. 531, 18 Pac. Rep. 730.

A witness familiar with the track at a place where cattle were killed was asked how far cattle on the track could be seen by the engineer or other person on the track from the point where they were killed. *Held*, that the question related to a fact about which any one acquainted with the track, and possessed of ordinary intelligence and eyesight, might give his opinion or judg-

ment; and an objection to the question that it called for the opinion of the witness was rightly overruled. *Gulf, C. & S. F. R. Co.* v. *Washington*, 49 *Fed. Rep.* 347, 4 *U. S. App.* 121, 1 *C. C. A.* 286.

It is proper, in a proceeding to appropriate a railroad right of way, to ask a witness to "state how embankments affect communication with different sides of the railroad." The question asks for a fact rather than an opinion. *Smalley* v. *Iowa Pac. R. Co.*, 36 *Iowa* 571.

In an action against a company for negligently killing a child upon the track, it is proper for the engineer, when asked why he did not see the child, to testify that the child could not possibly be on the track without his seeing it unless it got on from the ditch on the left-hand side of the engine. This was a matter of knowledge and not of opinion. *Marcott* v. *Marquette, H. & O. R. Co.*, 8 *Am. & Eng. R. Cas.* 306, 49 *Mich.* 99, 13 *N. W. Rep.* 374.

It is a rule of law that witnesses must state facts and not opinions, still a mere shorthand rendering of the facts is not always objectionable, as where plaintiff, having sued for personal injuries caused by running a car against the one in which he was seated as a passenger, was asked whether or not "the force of the returning train to couple to your car was of unusual force," and he answered: "The force of the concussion of the train and the caboose when coupling was very unusual and unnecessary"; and especially is such answer unobjectionable where the witness states that he has traveled a great deal and is familiar with such movement of trains. *Missouri Pac. R. Co.* v. *Martin*, 2 *Tex. App.* (*Civ. Cas.*) 571.

95. Upon questions proper for expert testimony.—In an action for negligently killing plaintiff's intestate, the opinion of a witness who was not present at the time of the injury but who, some time afterwards, came to the place where the body was lying and where the injury occurred, as to whether "said wounds could have been made if the deceased had been lying down" is not competent evidence, it not being shown that the witness is an expert in regard to the matter upon which his opinion is called for. *Nave* v. *Alabama G. S. R. Co.*, 54 *Am. & Eng. R. Cas.* 151, 96 *Ala.* 264, 11 *So. Rep.* 391.

Where a carrier of hogs is charged with negligence in overloading the car, it is competent for a witness, after showing that he has had a number of years' experience in shipping hogs, to state that the number and weight of the hogs in controversy could not be safely shipped in one car in hot weather, and such statement cannot be regarded as expert evidence. *Wabash, St. L. & P. R. Co.* v. *Pratt*, 15 *Ill. App.* 177.

In an action against a carrier for loss of hogs delivered to it for transportation, it is error to allow a witness for defendant to state, as a matter of opinion, that he believed at one time that the claim as to the number of hogs shipped was correct, but subsequently changed such opinion. *Aiken* v. *Chicago, B. & Q. R. Co.*, 25 *Am. & Eng. R. Cas.* 377, 68 *Iowa* 363, 27 *N. W. Rep.* 281.

A question which asks an opinion of a witness not an expert is properly excluded. *Mascheck* v. *St. Louis R. Co.*, 3 *Mo. App.* 600.

In an action by a female passenger against a street-railway company, a witness who was not a medical expert, and who attended plaintiff for several days after the accident, after describing her condition and symptoms on the first day stated that on the second and third days after the accident she was still worse. *Held*, that this statement was not objectionable as only giving an opinion, and not being by a medical expert. *King* v. *Second Ave. R. Co.*, 75 *Hun* 17, 26 *N. Y. Supp.* 973.

The opinion of a witness that a wound which he saw inflicted upon a horse was sufficient to cause its death is not competent evidence when such witness is not shown to have any peculiar skill or knowledge in such cases. *Harris* v. *Panama R. Co.*, 3 *Bosw.* (*N. Y.*) 7.

A witness not qualified to testify as an expert should not be allowed to give his opinion based upon a hypothetical state of facts. *Grant* v. *Raleigh & G. R. Co.*, 108 *N. Car.* 462, 13 *S. E. Rep.* 209.

Non-experts were permitted to give their opinions as to the cause of the overflowing of plaintiff's land, testifying that it was caused by an embankment made by defendant. The witnesses were not shown to be familiar with the river, the rainfalls, and previous overflows, and were possessed of very little information with respect to the width and fall of the river, and the facts with respect to the embankment that would make it the cause of the overflow. *Held*, that the opinions should have been ex-

cluded. *Gulf, C. & S. F. R. Co.* v. *Hepner*, 52 *Am. & Eng. R. Cas.* 670, 83 *Tex.* 136, 18 *S. W. Rep.* 441.

A witness not shown to be an expert cannot give his opinion in evidence that persons operating the train "could have stopped and not have hit the wagon had they driven slower." *International & G. N. R. Co.* v. *Kuehn*, 2 *Tex. Civ. App.* 210, 21 *S. W. Rep.* 58.

96. Admissible opinion evidence.—A witness who had ridden during a portion of two days in a train with a party composed of adults and children was permitted to express the opinion, formed from the observation of their demeanor and conduct, their dress, conversation, and general appearance, that they were of one family, and of German nationality. *Kansas Pac. R. Co.* v. *Miller*, 2 *Colo.* 442, 20 *Am. Ry. Rep.* 245.

In an action for personal injuries at a crossing, the court allowed several witnesses to testify that they were near the crossing at the time and did not hear any bell or whistle, and that, in their opinion, they would have heard it if the bell had rung or the whistle sounded. *Held*, that the evidence was properly admitted. *Chicago & A. R. Co.* v. *Dillon*, 32 *Am. & Eng. R. Cas.* 1, 123 *Ill.* 570, 15 *N. E. Rep.* 181, 13 *West. Rep.* 286; *affirming* 24 *Ill. App.* 203.—DISTINGUISHING Hopkins *v.* Indianapolis & St. L. R. Co., 78 Ill. 32; Pennsylvania Co. *v.* Conlan, 101 Ill. 93; Chicago & N. W. R. Co. *v.* Moranda, 108 Ill. 576. FOLLOWING Peoria, P. & J. R. Co. *v.* Siltman, 88 Ill. 531.—FOLLOWED IN Illinois C. R. Co. *v.* Slater, 139 Ill. 190.

Whether a two-horse team could be turned in a certain road is a question of fact which a witness might testify to without qualifying himself as an expert. *Funston* v. *Chicago, R. I. & P. R. Co.*, 14 *Am. & Eng. R. Cas.* 640, 61 *Iowa* 452, 16 *N. W. Rep.* 518.

In an action for damages to plaintiff's land caused by the increase of the overflow of a river on account of its obstruction by defendant's embankment, the estimates made by farmers and others residing in the vicinity as to the quantity of water which flowed through the side channels and the main channel in times of freshet, and why the water was higher above the embankment than below it after the acts complained of were done, were not incompetent as evidence on the ground that they were in the nature of opinions and speculations. *Noe* v. *Chicago, B. & Q. R. Co.*, 76 *Iowa* 360, 41 *N. W. Rep.* 42.

In order to show negligence on the part of a gateman, a witness for plaintiff was asked whether or not the gatekeeper had time to close the gate between the time of leaving the gatehouse and the arrival of the train, to which he replied: "In my best judgment he had rather a short time, though he might have closed it before the train passed." *Held*, that the purpose of the question and answer was to obtain the opinion of the witness as to the time which elapsed between the starting of the gatekeeper to close the gate and the arrival of the train, and evidence on this point was pertinent, and the answer not objectionable because it stated the opinion of the witness. *Bayley* v. *Eastern R. Co.*, 125 *Mass.* 62.

In a suit against a street railway company involving the safety of a street crossing which it was the duty of the company to prevent being made dangerous to travel, it is competent to allow persons familiar with driving to give their opinions, as eye-witnesses, concerning the safety of such crossing. *Laughlin* v. *Grand Rapids St. R. Co.*, 26 *Am. & Eng. R. Cas.* 377, 62 *Mich.* 220, 28 *N. W. Rep.* 873.

In questions relative to distances and the dimensions and quantities of things, a witness cannot testify without an implied expression of opinion, and no objection can be sustained on that account. *Hackett* v. *Boston, C. & M. R. Co.*, 35 *N. H.* 390.—EXPLAINED IN Low *v.* Connecticut & P. R. R. Co., 45 N. H. 370. QUOTED IN Ward *v.* Charleston City R. Co., 16 Am. & Eng. R. Cas. 356, 19 So. Car. 521, 45 Am. Rep. 794.

Witnesses who saw a woman thrown down by the starting of a street car as she was alighting from it may give their opinion as to whether she had time to get clear of it. *Ward* v. *Charleston City R. Co.*, 16 *Am. & Eng. R. Cas.* 356, 19 *So. Car.* 521, 45 *Am. Rep.* 794.—QUOTING Hackett *v.* Boston, C. & M. R. Co., 35 N. H. 390.

Suit for personal damages received by passenger through the negligence of the servants of the railroad in using unusual force in coupling cars. Plaintiff, as a witness, was asked whether or not the force of the returning train to couple to the car in which he was seated was unusual. *Held*, that the answer necessarily involved the fact of negligence on the part of those

operating the train, and did not violate the rule that a witness is not permitted to state his opinion or conclusion, and was admissible. *Missouri Pac. R. Co.* v. *Marten*, (*Tex.*) 22 *Am. & Eng. R. Cas.* 409.

As a rule witnesses are not allowed to give their opinions except upon questions of science, trade, and some others of the same nature, and then they must be experts; but upon matters of common experience, such as the state of the weather, and the effects likely to be produced by it upon fruit or vegetables in the hands of a carrier or in a warehouse, the evidence savors more of facts than of conjecture, and more of knowledge than of mere opinion, and is admissible. *Curtis* v. *Chicago & N. W. R. Co.*, 18 *Wis.* 312.

97. Inadmissible opinion evidence. — Negligence of a company in allowing the surface of its track to be uneven, so as to endanger walking thereon by employés in the discharge of their duties, being in question, the opinion of a witness as to the comparison of that track with others in the state generally is not admissible. *Louisville & N. R. Co.* v. *Chaffin*, 84 *Ga.* 519, 11 *S. E. Rep.* 891.

A company, when sued for damages for constructing its road over land, set up in defense a release of damages. The plaintiff replied, alleging that the release was obtained by fraud in regard to the location of the road over his land. *Held*, that the oral testimony of witnesses in regard to their opinion in reference to the permanent location of the road prior to the execution of the release was only matter of opinion, and not sufficient to establish fraud. *Ohio & M. R. Co.* v. *Bath*, 11 *Ind.* 538.

In an action for killing a person by a train, a witness who saw the decedent on the track testified that the train was going twenty-five to thirty miles an hour, and that the decedent got about four feet off the track before the train came along, but the suction or force of the train drew him back and he fell under the engine and was killed. *Held*, that the statement as to the suction or force of the train drawing him back was properly stricken out as not expressing a fact but merely an opinion. *Sherfey* v. *Evansville & T. H. R. Co.*, 121 *Ind.* 427, 23 *N. E. Rep.* 273.

It is not competent for a witness to give an opinion as to the propriety of a given method of operating trains. *Jeffrey* v. *Keokuk & D. M. R. Co.*, 5 *Am. & Eng. R. Cas.* 568, 56 *Iowa* 546, 9 *N. W. Rep.* 884.

Questions asked of a witness as to the time usually required to fill a cattle-guard with snow are properly excluded as calling for an opinion rather than for facts. *Grahlman* v. *Chicago, St. P. & K. C. R. Co.*, 42 *Am. & Eng. R. Cas.* 588, 78 *Iowa* 564, 5 *L. R. A.* 813, 43 *N. W. Rep.* 529.

In an action against a company for running an engine against a man delivering wood from a wagon by the side of the track, a witness cannot be asked his opinion whether the only mode of approach by a wagon to the place of delivery was by way of the track. *Robinson* v. *Fitchburg & W. R. Co.*, 7 *Gray* (*Mass.*) 92.

The opinion of witnesses on the substance of an issue should never be resorted to, except when the subject is beyond the knowledge or experience of ordinary men. So where hogs are found piled up in a car, and many of them dead, it is error to allow a witness to give it as his opinion that the condition was brought about by a jerk of the car. Whether it was so produced was for the jury to determine from the facts. *Walton* v. *Kansas City, Ft. S. & M. R. Co.*, 40 *Mo. App.* 544.

Where a father sues for injuries received by his child while it was playing on a turntable, he will not be permitted to testify whether or not he thinks it possible that the child could have visited the place of the accident without his knowledge, as it is merely a matter of opinion or inference. *Bridger* v. *Asheville & S. R. Co.*, 27 *So. Car.* 456, 13 *Am. St. Rep.* 653, 3 *S. E. Rep.* 860.

A carrier was sued for injuries to and loss of horses shipped. *Held*, that it was not permissible for one of the plaintiffs to prove a custom of the company in delivering stock at stations, for the purpose of showing that plaintiffs were relieved from looking after the horses themselves, where there is nothing to show that the custom was uniform, reasonable, and notorious. *Missouri Pac. R. Co.* v. *Fagan*, 72 *Tex.* 127, 2 *L. R. A.* 75, 9 *S. W. Rep.* 749.

The mere opinion of a witness upon the question whether a certain bank of earth between defendant's track and land occupied by plaintiff was "as good a protection against cattle as a fence four and a half feet high" is inadmissible. *Veerhusen* v. *Chicago & N. W. R. Co.*, 53 *Wis.* 689, 11 *N. W. Rep.* 433. — QUOTED IN Baltimore &

O. R. Co. *v.* Schultz, 22 Am. & Eng. R. Cas. 579, 43 Ohio St. 270, 54 Am. Rep. 805.

Where land is so situated that, in order to plat it into village lots with a proper street it would be necessary to open the street through the lands of other parties, the probable expense of opening such street is not a proper subject for the opinion of a witness. *Watson* v. *Milwaukee & M. R. Co.*, 10 *Am. & Eng. R. Cas.* 168, 57 *Wis.* 332, 15 *N. W. Rep.* 468.

The opinions of witnesses as to whether a stock-car was a dangerous place for one to ride are not admissible. *Lawson* v. *Chicago, St. P., M. & O. R. Co.*, 21 *Am. & Eng. R. Cas.* 249, 64 *Wis.* 447, 24 *N. W. Rep.* 618, 54 *Am. Rep.* 634.

98. Upon questions for the jury. —(1) *In general.*—Whether or not plaintiff was an expert, his opinion as to the propriety of his own conduct on the occasion of an injury is not admissible testimony. *Hudson* v. *Georgia Pac. R. Co.*, 85 *Ga.* 203, 11 *S. E. Rep.* 605.

In an action to recover for an injury received from the falling or throwing of a piece of coal or slate from a passing locomotive, it is error to allow a witness to be asked and to testify what he considers a safe distance to retire from the track when the train is passing. Whether the line of danger from a passing train is at one distance rather than another depends upon facts and not upon opinions. This does not fall within the rule as to expert testimony, and to allow such opinions to be given is to usurp the functions of the jury. *Chicago & N. W. R. Co.* v. *Moranda*, 17 *Am. & Eng. R. Cas.* 564, 108 *Ill.* 576. — DISTINGUISHED IN Chicago & A. R. Co. *v.* Dillon, 32 Am. & Eng. R. Cas. 1, 123 Ill. 570, 15 N. E. Rep. 181, 13 West. Rep. 286.

Whether a certain fast mail train is a regular passenger train, within the meaning of the statute requiring such trains to stop at all stations which are in county seats, cannot be shown by the opinions of witnesses as to the fact, as this would allow them to decide the very point in dispute. *Illinois C. R. Co.* v. *People*, 143 *Ill* 434, 33 *N. E. Rep.* 173.—APPLYING Chicago & A. R. Co. *v.* Springfield & N. W. R. Co., 67 Ill. 142.

Where it is in question whether a railroad could properly be fenced at a certain place, it is not competent to take the opinion of witnesses upon the question; the jury must be left to decide that question upon the facts proved. *Indiana, B. & W. R. Co.* v. *Hale*, 19 *Am. & Eng. R. Cas.* 562, 93 *Ind.* 79. — QUOTING Com. *v.* Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

Where it is attempted to prove that an express company held itself out as a common carrier and collecting agent, it is not competent to prove such fact by the mere opinion of witnesses. They must state the facts upon which that opinion is founded and leave it to the jury whether the company held itself out as a common carrier. *United States Exp. Co.* v. *Anthony*, 5 *Kan.* 490.

It is never proper to leave to witnesses the determination of matters which can be determined by the jury. *So held*, where plaintiff's witness testified to experiments made by him regarding the probability of being able to reach and cross a railway crossing in advance of an approaching train, plaintiff having been run over in attempting to do so. *Klanowski* v. *Grand Trunk R. Co.*, 64 *Mich.* 279, 31 *N. W. Rep.* 275.— DISTINGUISHED IN Nosler *v.* Chicago, B. & Q. R. Co., 73 Iowa 268, 34 N. W. Rep. 850.

The testimony of the same witness as to the speed at which the train was running at the time of his experiments was objectionable, he professing to fix the period of the experiment at fifty-five seconds but giving no certain data as to the distance traversed by the train during that time. *Klanowski* v. *Grand Trunk R. Co.*, 64 *Mich.* 279, 31 *N. W. Rep.* 275.

It is not for a witness, but for the jury, to draw inferences from facts. *So held*, where a witness testified that "I know there must have been wood in the engine, by the sparks." *Ireland* v. *Cincinnati, W. & M. R. Co.*, 79 *Mich.* 163, 44 *N. W. Rep.* 426.

The general rule is that a witness must state facts and not give his opinion; a witness should not be allowed to state whether or not a railroad crossing is dangerous for a stranger, but should state the facts disclosing the location and surroundings, and leave the jury to determine the question of danger. *King* v. *Missouri Pac. R. Co.*, 98 *Mo.* 235, 11 *S. W. Rep.* 563.

Where the action is for killing a man on the track, a statement by a witness that there was no difficulty in getting off the track at that place is properly rejected, as that question is to be determined by the

jury upon the facts proved. *Remer* v. *Long Island R. Co.*, 1 *N. Y. Supp.* 124, 48 *Hun* 352, 15 *N. Y. S. R.* 884; *affirmed in* 113 *N. Y.* 669, 23 *N. Y. S. R.* 994, 21 *N. E. Rep.* 1116.

It is not competent for a witness, examined to prove that a railroad company failed to deliver to another company four bales of cotton according to its undertaking, to state the conclusion which he reached by a comparison of the receipts given by the latter company for a week's shipment and the books kept by plaintiff in the action. *McCombs* v. *North Carolina R. Co.*, 67 *N. Car.* 193.

(2) *As to prudence, diligence, and skill.*—An engineer in charge of a train at the time of an accident cannot be allowed to testify that he used "every means" he had "to stop the train," but should state what means he did use. So he cannot be asked whether "the ground and the bearings of the roadbed [were] such as would have allowed or permitted him [the deceased] to escape injury or hurt by the locomotive and cars, but for his own conduct." *Tanner* v. *Louisville & N. R. Co.*, 60 *Ala.* 621.

The opinion of a witness that the backing of a train was very carefully done, and that nothing was done carelessly or negligently, is not admissible. *Central R. & B. Co.* v. *Ryles*, 84 *Ga.* 420, 11 *S. E. Rep.* 499.

That the plaintiff acted cautiously is a conclusion, not a fact, and he is not competent to testify in general terms that he so acted. *Mayfield* v. *Savannah, G. & N. A. R. Co.*, 87 *Ga.* 374, 13 *S. E. Rep.* 459.

It is not proper to ask an engineer: "If the engine and engineer worked so as to be satisfactory to the yardmaster, is there any occasion for complaint?" nor to ask a witness a question which necessitates a comparison of engines. *Wabash & W. R. Co.* v. *Morgan*, 132 *Ind.* 430, 31 *N. E. Rep.* 661, 32 *N. E. Rep.* 85.

Where a complaint alleges that deceased's death was due to an engineer's lack of skill, a witness will not be allowed to testify to his skill, that being an ultimate question of fact for the jury. *Butler* v. *Chicago, B. & Q. R. Co.*, 87 *Iowa* 206, 54 *N. W. Rep.* 208.

While witnesses ought not to be permitted to express an opinion that a fireman upon an engine performed a certain service in the manner required of him in the proper discharge of his duty, yet it is competent for any witness having personal knowledge of the facts to state what the duty is, or what services were generally performed by firemen in that yard. *Missouri Pac. R. Co.* v. *Mackey*, 22 *Am. & Eng. R. Cas.* 306, 33 *Kan.* 298, 6 *Pac. Rep.* 291.

A question calling for the opinion of a witness whether an accident happened by reason of defendant's negligence or of plaintiff's inattention calls for incompetent testimony. *So held*, where, after a witness for plaintiff had testified that he saw plaintiff step from the car steps onto a box placed there for that purpose and fall, he was asked, on cross-examination, whether it occurred to him at the time that the accident happened by reason of the darkness, or of the inattention of plaintiff to a step being there. *Kelley* v. *Detroit, L. & N. R. Co.*, 80 *Mich.* 237, 45 *N. W. Rep.* 90.

A question which proposes to substitute the opinion of a witness for the opinion of the jury, on the question of prudence and care, is inadmissible. *Murtaugh* v. *New York C. & H. R. R. Co.*, 49 *Hun* (*N. Y.*) 456.

A witness cannot give his opinion as to whether it was proper for a switchman to ride on a freight-car ladder. He may give the facts connected with such riding, and it is for the jury to draw the conclusion as to whether it was proper or improper. *Johnston* v. *Oregon S. L. & U. N. R. Co.*, 23 *Oreg.* 94, 31 *Pac. Rep.* 283.

A question whether or not defendant was ordinarily careful in building up low joints and keeping its track in good condition is objectionable as calling only for the opinion of the witness as to the exercise of ordinary care. *Ft. Worth & D. C. R. Co.* v. *Thompson*, 2 *Tex. Civ. App.* 170, 21 *S. W. Rep.* 137.

There is no error in sustaining an objection to questions to witnesses as to whether an engineer could have done anything else to avoid an accident, after they have stated what he did. *Johnson* v. *Rio Grande Western R. Co.*, 7 *Utah* 346, 26 *Pac. Rep.* 926.

99. As to safety of appliances.*—(1) *Admissible.*—A witness may testify as to the condition of ties which he found, shortly after a catastrophe, lying near the track at the place where the derailment in question occurred, where it appears that at the time of such examination the old ties

* Injuries to employés. Opinion evidence as to safety of appliances. Competency of witness, see 48 AM. & ENG. R. CAS. 219, *abstr.*

. been removed and new ties put in the roadbed by the company. *Chicago, P. & St. L. R. Co.* v. *Lewis*, 58 *Am. & Eng. R. Cas.* 126, 145 *Ill.* 67, 33 *N. E. Rep.* 960.

In an action against a company for burning property by sparks from its engine, it appeared that another road which ran parallel with defendant's used a different spark arrester. Defendant's engineer, after testifying that he was acquainted with the kind of spark arrester used on the other road, was asked which of the two he had observed emitted the largest and most sparks. *Held*, that the question was proper. *Collins* v. *New York C. & H. R. R. Co.*, 32 *Am. & Eng. R. Cas.* 366, 109 *N. Y.* 243, 16 *N. E. Rep.* 50, 14 *N. Y. S. R.* 783, 12 *Cent. Rep.* 36; *reversing* 39 *Hun* 651, *mem.*

A witness personally acquainted with the character and location of a turntable may testify that it was dangerous for children to ride thereon. *Bridger* v. *Asheville & S. R. Co.*, 25 *So. Car.* 24.

It is competent, where a building is burned twenty or thirty feet from defendant's track, for plaintiff to ask a witness whether he would not consider a spark arrester out of order which threw live sparks thirty or forty feet. *Nashville & C. R. Co.* v. *Tyne*, (*Tenn.*) 7 *Am. & Eng. R. Cas.* 515. —FOLLOWING Burke *v.* Louisville & N. R. Co., 7 Heisk (Tenn.) 464.

Where the issue is whether a railroad bridge across a stream has been so unskilfully constructed as to cause the waters of the stream to overflow, unskilled witnesses familiar with the bridge structure and the facts connected with the overflow are properly permitted to give their opinion as to whether the bridge, on account of being improperly constructed, caused the damage, and to state in that connection the facts within their knowledge. *International & G. N. R. Co.* v. *Klaus*, 29 *Am. & Eng. R. Cas.* 500, 64 *Tex.* 293.—QUOTING Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249.—FOLLOWED IN Ft. Worth & D. C. R. Co. *v.* Wilson, 3 Tex. Civ. App. 583. NOT FOLLOWED IN St. Louis, I. M. & S. R. Co. *v.* Yarborough, 56 Ark. 612. REVIEWED IN Gulf, C. & S. F. R. Co. *v.* Hepner, 52 Am. & Eng. R. Cas. 670, 83 Tex. 136; Gulf, C. & S. F. R. Co. *v.* Locker, 78 Tex. 279.

It is not error, in a suit by a passenger against a railway company for damages because of personal injuries received in an accident on its road, to permit witnesses, though not possessing special knowledge as railroad experts, to state their opinions as to the unsafe condition of the company's track at the point of accident, after having testified to actual knowledge of the road and to the fact upon which their opinions are founded. *Missouri Pac. R. Co.* v. *Jarrard*, 65 *Tex.* 560.—FOLLOWED IN Ft. Worth & D. C. R. Co. *v.* Wilson, 3 Tex. Civ. App. 583.

It is not reversible error to allow a non-expert witness to testify that, in his opinion, a train left the track, thus causing the injury sued for, by reason of the cross-ties being burned away which left the rails without support, where there is other evidence tending to prove the same fact. *Gulf, C. & S. F. R. Co.* v. *Smith*, 74 *Tex.* 276, 11 *S. W. Rep.* 1104.

(2) *Not admissible.*—In an action against a company for damages caused by its substitution of a solid embankment for a trestle, thereby obstructing a flow of water and causing it to back up on plaintiff's land, a non-expert witness who knows the trend of the country and the quantity of water discharged by a waterway is not competent to testify as to whether or not the openings in the embankment were sufficient to carry off the water in times of ordinary floods. *Kansas City, Ft. S. & M. R. Co.* v. *Cook*, 58 *Am. & Eng. R. Cas.* 654, 57 *Ark.* 387, 21 *S. W. Rep.* 1066.

In an action against a company for the death of an engineer, caused by the derailment of his locomotive, it appeared that the accident was on a mountain side, and the company was charged with negligence in not providing a suitable culvert to carry off the water from a depression or gully. A locomotive engineer, after testifying to facts tending to show the need of a culvert, and that in his judgment a culvert would have added to the safety of the road, was asked: "Is not that cut constructed there and the water run out of it exactly as others are ordinarily constructed on roads running through such places?" and the court sustained an objection to the witness answering. *Held*, that it was the duty of the company to use ordinary care in the construction of its road, which care could not be proven by the opinion of the witness. The necessity of a culvert depends upon the surroundings, in which no two are exactly alike, and how culverts are ordinarily constructed was immaterial. *Union Pac. R. Co.* v. *O'Brien*, 49 *Fed. Rep.* 538, 4 *U. S. App.* 221, 1 *C. C. A.* 354.

In an action for the death of an engineer on account of a defective track, evidence of what the section foreman at the place where the accident occurred said, at a time other than that of the accident, as to the dangerous condition of the track at that point is not admissible, either as part of the *res gestæ* or as an expression of an opinion. *Worden* v. *Humeston & S. R. Co.*, 72 *Iowa* 201, 33 *N. W. Rep.* 629.

In an action for the loss of a colt killed in consequence of the insufficiency of a cattle-guard, it is improper to ask plaintiff and his witnesses whether, in their opinion, the cattle-guard was sufficient to prevent animals from getting on the right of way under circumstances ordinarily arising at those places. *Smead* v. *Lake Shore & M. S. R. Co.*, 23 *Am. & Eng. R. Cas.* 241, 58 *Mich.* 200, 24 *N. W. Rep.* 761.

Where a witness has testified to the dangers incident to operating a machine, which dangers are obvious and apparent, the jury are as competent as the witness to judge of the danger to which an inexperienced man would be subjected if set to perform such work, and it is not error to reject the opinion of the witness on that subject. *Melzer* v. *Peninsular Car Co.*, 76 *Mich.* 94, 42 *N. W. Rep.* 1078.—APPROVED IN Bennett *v.* Northern Pac. R. Co., 2 N. Dak. 112.

The opinions of witnesses who are not experts as to whether a turntable is or is not a dangerous machine, and as to whether it is or is not gross carelessness to leave it unfastened or uncovered, are not competent evidence. *Koons* v. *St. Louis & I. M. R. Co.*, 65 *Mo.* 592.—QUOTED IN Muff *v.* Wabash, St. L. & P. R. Co., 22 Mo. App. 584.

In an action for injuries received by a servant while loading coal from a bin, and caused by the giving way of the partition, where it is shown that the timber (hemlock) of which it was constructed was commonly used for that purpose, it is error to permit a question calling for the opinion of a witness as to whether hemlock was a proper material for that purpose. *Gerbig* v. *New York, L. E. & W. R. Co.*, 51 *N. Y. S. R.* 534, 67 *Hun* 649, *mem.*, 69 *Hun* 177, *n.*, 22 *N. Y. Supp.* 21.

So, also, as to whether the braces or anchors were sufficient to hold the crib-work. *Gerbig* v. *New York, L. E. & W. R. Co.*, 51 *N. Y. S. R.* 534, 67 *Hun* 649, *mem.*, 69 *Hun*, 177, *n.*, 22 *N. Y. Supp.* 21.

In an action to enjoin a switch on plaintiff's lands in a highway, opinions of witnesses as to the effect of the construction of the switch upon plaintiff's property are inadmissible, as that is the precise question which the court is to decide. *Burditt* v. *New York C. & H. R. R. Co.*, 55 *N. Y. S. R.* 18, 71 *Hun* 361, 24 *N. Y. Supp.* 1137.

An action was brought for an injury received by falling into a trench which had been dug in a public street for the purpose of laying or repairing the track of a street railroad. *Held*, that the opinion of a witness for the plaintiff that the condition of the trench and track was dangerous was not competent. But after the defendant, on cross-examination, had called out the opinion of the witness that the condition, as he claimed it to be, of the trench and track was not dangerous, it was not error to permit the witness on re-examination to state his opinion that the condition, as claimed by the plaintiff, of the trench and track was dangerous. *Street R. Co.* v. *Nolthenius*, 19 *Am. & Eng. R. Cas.* 191, 40 *Ohio St.* 376.

Where plaintiff, alighting from a train upon a narrow platform, walked obliquely towards its edge, fell over an offset upon a broader platform, and was injured, it is error to permit witnesses, in describing the construction of the platforms and their surroundings, to testify whether in their opinions the construction was dangerous or not. *Graham* v. *Pennsylvania Co.*, 47 *Am. & Eng. R. Cas.* 522, 139 *Pa. St.* 149, 21 *Atl. Rep.* 151.

In such case it was also error to refuse to charge that "if the jury believe the platform on which the plaintiff fell was reasonably safe, and one which could be used, without danger, by a passenger using ordinary care, their verdict should be for the defendant." On a finding of the facts suggested, the company was not chargeable with negligence. *Graham* v. *Pennsylvania Co.*, 47 *Am. & Eng. R. Cas.* 522, 139 *Pa. St.* 149, 21 *Atl. Rep.* 151.

Where a railroad employé is injured by a loose plank falling on him from a pile-driver, the opinion of a witness that it was not proper to have loose boards on the pile-driver is not admissible. *St. Louis, A. & T. R. Co.* v. *Jones*, (*Tex.*) 14 *S. W. Rep.* 309.

The question was, whether a hoisting apparatus was negligently constructed by the defendant railroad, or negligently operated

by the plaintiff in attempting, with the assistance of one man, to raise a stone weighing 3600 pounds. *Held*, that the opinion of a witness, in effect, that it was not prudent "to use it with less than three men on a stone of two tons heft" was not admissible. *Bemis* v. *Central Vt. R. Co.*, 25 *Am. & Eng. R. Cas.* 138, 58 *Vt.* 636, 3 *Atl. Rep.* 531.

The statement of a witness that he would have considered it dangerous to leave a lamp burning in a station building is not admissible as evidence in a suit to recover the value of goods destroyed by fire. *Wood* v. *Chicago, M. & St. P. R. Co.*, 51 *Wis.* 196, 8 *N. W. Rep.* 214.

100. As to physical condition of injured persons.—(1) *In general.*—The following expressions, used by a witness testifying as to personal injuries received by plaintiff, though awkwardly expressed sometimes, are, at most, conclusions of fact and are not improperly allowed: Plaintiff seemed to be suffering the day after the injury; she was not able to return home on that day; was not able to use her arm a large part of the time for several months; when she returned home, on the second day after the injury, she looked bad, and her left wrist looked like the bone had slipped off the joint; she was disabled by the fall. *South & N. Ala. R. Co.* v. *McLendon*, 63 *Ala.* 266.

In an action for personal injuries, a person not a physician may testify that it was necessary to have a physician, and as to how often it was necessary for the physician to visit the injured person as long as he did in fact attend him. *Chicago, B. & Q. R. Co.* v. *George*, 19 *Ill.* 510.

Where a non-professional witness is testifying to the condition and appearance of the injured party before and after the injury, an expression of opinion by the witness that the party had grown worse is competent. *Louisville, N. A. & C. R. Co.* v. *Wood*, 113 *Ind.* 544, 12 *West. Rep.* 303, 14 *N. E. Rep.* 572, 16 *N. E. Rep.* 197.—DISAPPROVING Reid *v.* Piedmont & A. Life Ins. Co., 58 Mo. 425.

Persons who are not experts may testify as to plaintiff's condition and appearance prior to the accident, as to having recovered from former injuries. *Winter* v. *Central Iowa R. Co.*, 80 *Iowa* 443, 45 *N. W. Rep.* 737.

The mother of the child, who had personally cared for it, was permitted to show the appearance of sickness, the fact that he was ill, and the symptoms of the disorders which appeared after the accident. *Held*, no error. *Keyser* v. *Chicago & G. T. R. Co.*, 31 *Am. & Eng. R. Cas.* 399, 66 *Mich.* 390, 10 *West. Rep.* 646, 33 *N. W. Rep.* 867.

A witness who is not an expert may testify to facts within his knowledge and observation in reference to the health and physical condition of an injured person. *Tierney* v. *Minneapolis & St. L. R. Co.*, 21 *Am. & Eng. R. Cas.* 545, 33 *Minn.* 311, 53 *Am. Rep.* 35, 23 *N. W. Rep.* 229.

The statement that a person was lamer in the morning than on the day before is not a matter of opinion but a statement of a fact, and therefore admissible in evidence. *Taylor* v. *Grand Trunk R. Co.*, 48 *N. H.* 304.

Where there is evidence that plaintiff had her hip bone fractured and probably would never recover, a witness who saw her four months after the injury may testify that she seemed to be suffering great pain. *McSweyny* v. *Broadway & S. A. R. Co.*, 27 *N. Y. S. R.* 363, 54 *Hun* 637, *mem.*, 4 *Silv. Sup. Ct.* 495, 7 *N. Y. Supp.* 456.

A lay witness may testify to a physical fact, such as that an injured person had a certain cross or cast in his eye after the injury that did not exist before, with equal certainty as an expert, and the fact that there was no evidence connecting this condition of the eye with the accident is no reason for excluding it. It is a question for the jury whether the condition was connected with the accident. *Doyle* v. *Manhattan R. Co.*, 37 *N. Y. S. R.* 604, 59 *Hun* 625, *mem.*, 13 *N. Y. Supp.* 536.

A witness who was in attendance upon plaintiff for three or four weeks after he was injured is competent, though not an expert, to state whether he suffered greatly or not. *Heddles* v. *Chicago & N. W. R. Co.*, 77 *Wis.* 228, 46 *N. W. Rep.* 115.

(2) *Ability to pursue occupation.*—After stating facts within the knowledge of the witness tending to show that plaintiff was seriously disabled by an injury, the witness may express his opinion that plaintiff "has been unable to perform any duties which required the slightest physical exertion, and during his severe attacks he was unable to do anything, and at his best cannot do anything other than jobs of very light nature." *Chattanooga, R. & C. R. Co.* v. *Huggins*, 52 *Am. & Eng. R. Cas.* 473, 89 *Ga.* 494, 15 *S.*

E. Rep. 848.—APPLYING Atlanta & W. P. R. Co. *v.* Johnson, 66 Ga. 259.

In an action for injuries received by a female passenger on a freight train by being thrown down by a sudden jerk, different witnesses who were not medical experts were permitted to testify that they took that train because there was no other train at the time, how the jerking of that particular train compared with what was usual on freight trains, and whether in their opinion plaintiff had been in physical condition to do her usual work since the accident. *Held*, no error. *Chicago & A. R. Co.* v. *Arnol*, 46 *Ill. App.* 157.

Non-expert witnesses may answer concerning their judgment as to whether plaintiff has had the full use of her arm since the injury, and has been able to work. *Harris* v. *Detroit City R. Co.*, 76 *Mich.* 227, 42 *N. W. Rep.* 1111.—FOLLOWING Elliott *v.* Van Buren, 33 Mich. 53.

In an action for injuries to a female passenger, a question put to her attendant as to how far plaintiff was able to help herself and at what point she required assistance to do what was necessary to be done is admissible, as calling for facts and not for a mere opinion. *Sloan* v. *New York C. R. Co.*, 45 *N. Y.* 125.—DISTINGUISHED IN Haggerty *v.* Brooklyn City & N. R. Co., 6 Abb. N. Cas. (N. Y.) 129, 61 N. Y. 624. REVIEWED IN Butler *v.* Manhattan R. Co., 52 N. Y. S. R. 498 23 N. Y. Supp. 163.

(3) *As to sight and hearing.*—Relatives, neighbors, and acquaintances are competent to testify to a person's state of health, hearing, and eye-sight, and his ability to work and walk and to use his arms and legs naturally and without trouble during a given past period of time, even though they are not scientific experts in matters relating to the human anatomy. *Chicago City R. Co.* v. *Van Vleck*, 143 *Ill.* 480, 32 *N. E. Rep.* 262.

In a personal injury case, a witness testified that she had never heard any complaint in regard to plaintiff resting at night, nor that he had any difficulty with his hearing, and never observed any with his sight. *Held*, that it was clearly incompetent to then ask her to compare plaintiff's sight and hearing with that of ordinary people. *Barrelle* v. *Pennsylvania R. Co.*, 21 *N. Y. S. R.* 109, 4 *N. Y. Supp.* 127; *affirmed in* 121 *N. Y.* 697, *mem.*, 24 *N. E. Rep.* 1099.

(4) *Description of injuries.*—The injury suffered by plaintiff being a double fracture of the lower jaw-bone, and the trial being had nearly two years after the injury was received, he may testify, though not an expert, that his jaw was permanently injured, and may state how it is affected at the time of the trial. *Alabama G. S. R. Co.* v. *Frazier*, 93 *Ala.* 45, 9 *So. Rep.* 303.

Though not an expert, a plaintiff may properly state the effect on particular organs of a blow. *Bland* v. *Southern Pac. R. Co.*, 65 *Cal.* 626, 4 *Pac. Rep.* 672.

In an action for personal injuries, the description by plaintiff of the injuries which she received is not in the nature of expert evidence, and in describing them she may testify that the nerves of her head, side, and left limb are paralyzed. *Owens* v. *Kansas City, St. J. & C. B. R. Co.*, 33 *Am. & Eng. R. Cas.* 524, 95 *Mo.* 169, 15 *West. Rep.* 88, 8 *S. W. Rep.* 350.

101. As to mental condition of injured persons.—After proving that before the accident plaintiff was a bright child, an intelligent witness, not an expert, who knew him well after the accident was allowed to answer the question: "Is he, in your opinion, an ordinarily bright child?" Also the question: "From what you have seen of him, and talked with him, what is your opinion as to whether he is a bright boy or foolish?" *Held*, no error. *Keyser* v. *Chicago & G. T. R. Co.*, 31 *Am. & Eng. R. Cas.* 399, 66 *Mich.* 390, 10 *West. Rep.* 646, 33 *N. W. Rep.* 867.

In order that an opinion of a non-expert witness on the question of sanity may go to the jury, it should be accompanied by some of the facts on which such opinion is based. Before a witness should be received to testify as to the condition of mind, it should appear that he had an adequate opportunity of observing and judging of capacity. *Turner* v. *Kansas City, St. J. & C. B. R. Co.*, 23 *Mo. App.* 12.

102. Construction of company's rules.—A question calling upon a witness to state whether, under a certain rule of a company, there would be any objection to doing a thing a certain way is not proper. It is calling upon the witness to construe the rule, which is not within the domain of verbal evidence. *Pennsylvania Co.* v. *Stoelke*, 8 *Am. & Eng. R. Cas.* 523, 104 *Ill.* 201.

In an action by a brakeman for injuries received in coupling cars, it is improper to ask a witness whether it was "in the line of his duty" for a brakeman to get off the

cars while in motion, as the answer must involve a mere statement of opinion. *Allen* v. *Burlington, C. R. & N. R. Co.*, 5 *Am. & Eng. R. Cas.* 620, 57 *Iowa* 623, 11 *N. W. Rep.* 614.

It is incompetent to show by a carrier the interpretation placed by it on the words "to be forwarded" in its written contract of carriage. *Fischer* v. *Merchants' Dispatch Transp. Co.*, 13 *Mo. App.* 133.

103. Upon questions of law.—In an action against a common carrier for an injury to living freight, a witness should not be allowed to answer a question whether the freight had been in fact delivered to defendant, where the delivery is disputed, and other witnesses have stated the facts and circumstances relating to the delivery. *Bowie* v. *Baltimore & O. R. Co.*, 1 *MacArth.* (*D. C.*) 609.

In ejectment against a railroad, testimony of a witness that the land in question was legally condemned for a right of way is inadmissible, this being a conclusion of law depending upon the facts in regard to the proceedings previously had. *Mobley* v. *Breed*, 48 *Ga.* 44.

The opinion of a witness given in a deposition as to the liability of a carrier under a bill of lading is not competent testimony, but objection should be made on the trial. *Merchants' Despatch Transp. Co.* v. *Leysor*, 89 *Ill.* 43.

104. Opinions accompanied by facts.—(1) *When admissible.*—Any witness may give an opinion as to what caused a train to run off the track, provided he states the reasons upon which the opinion is predicated. One who is an expert may give an opinion without stating his reasons. *Central R. Co.* v. *Senn*, 27 *Am. & Eng. R. Cas.* 304, 73 *Ga.* 705.—APPROVED IN Georgia R. Co. *v.* Bryans, 77 Ga. 429.

It is a general rule that, wherever an expert can give an opinion without the reasons upon which it is based, any other witness, who knows facts upon which he can form an opinion, may state his opinion, by giving the facts upon which he bases it. *Central R. Co.* v. *Senn*, 27 *Am. & Eng. R. Cas.* 304, 73 *Ga.* 705. *Killian* v. *Augusta & K. R. Co.*, 78 *Ga.* 749, 3 *S. E. Rep.* 621. *Straus* v. *Kansas City, St. J. & C. B. R. Co.*, 27 *Am. & Eng. R. Cas.* 170, 86 *Mo.* 421. *McDermott* v. *Third Ave. R. Co.*, 44 *Hun* 107, 8 *N. Y. S. R.* 458; *affirmed in* 115 *N. Y.* 670, *mem.*, 26 *N. Y. S. R.* 977, 22 *N. E. Rep.* 1126.—FOLLOWING Hallahan *v.* New York, L. E. & W. R. Co., 102 N. Y. 199.—*Gulf, C. & S. F. R. Co.* v. *Richards*, 83 *Tex.* 203, 18 *S. W. Rep.* 611.

But in order to render such evidence competent the facts must appear to be such as would enable the witness to arrive at an intelligent opinion with respect to the subject. *Gulf, C. & S. F. R. Co.* v. *Hepner*, 52 *Am. & Eng. R. Cas.* 670, 83 *Tex.* 136, 18 *S. W. Rep.* 441.—REVIEWING International & G. N. R. Co. *v.* Klaus, 64 Tex. 293.

Such witness should not be allowed to indulge in argument upon the subject on which his opinion is given unless called upon in cross-examination. *Galveston, H. & S. A. R. Co.* v. *Daniels*, 1 *Tex. Civ. App.* 695, 20 *S. W. Rep.* 955.

Taken in connection with other facts to which he deposed, it is not error to permit plaintiff to testify that "as the engineer slacked up for the switchman to get on the train, he seemed to shut off his engine and the car ran up on the engine, and he opened his engine right suddenly, I suppose." The supposition relates only to the sudden opening of the engine, and amounts to nothing more than an opinion that such was the case. And where the subject under investigation is a proper one to be illustrated by the opinions of experts, unskilled persons may give their opinions, provided they accompany them with the facts from which such opinions are deduced. *Central R. Co.* v. *Coggin*, 73 *Ga.* 689.

In an action against a company for killing a person on the track, it appeared that strangers were in the cab of the engine with the engineer. *Held*, that when the place has been described to the jury, and the situation of the several persons, it cannot be said that the engineer might not be permitted to testify that their presence did not interfere with the performance of his duties; the jury could not judge of this fact as well as the witness. *Marcott* v. *Marquette, H. & O. R. Co.*, 8 *Am. & Eng. R. Cas.* 306, 49 *Mich.* 99, 13 *N. W. Rep.* 374.

On the question whether a storm which caused the roadbed of a railroad to give way was an unusual or extraordinary one, a non-expert witness who has lived in the vicinity all his life may testify whether the traces found the next morning showed anything greater than storms he had seen before. *McPherson* v. *St. Louis, I. M. & S. R. Co.*, 97 *Mo.* 253, 10 *S. W. Rep.* 846.

A witness, when asked to describe the position of plaintiff's elbow with reference to the car window at the time of the accident, answered that "his elbow was resting on the sill, and I should judge that it could not project out of the window by the position that he held it in the car." Defendant's counsel moved to strike out the last part of the answer as a conclusion. The motion was denied. *Held*, no error. *Hallahan* v. *New York, L. E. & W. R. Co.*, 26 *Am. & Eng. R. Cas.* 169, 102 *N. Y.* 194, 6 *N. E. Rep.* 287, 1 *N. Y. S. R.* 367.—FOLLOWED AND QUOTED IN McDermott *v.* Third Ave. R. Co., 44 Hun 107, 8 N. Y. S. R. 458. REVIEWED IN Francis *v.* New York Steam Co., 114 N. Y. 380, 21 N. E. Rep. 988, 23 N. Y. S. R. 543.

Where a witness has testified to all the facts it is not reversible error to allow him to state his conclusions, as that a pile of ashes caused a wagon to tip over. *Chamberlain* v. *Wheatland*, 4 *Silv. Sup. Ct.* 165, 7 *N. Y. Supp.* 190.

A witness was asked, "Why was it the water of the Bosque did not flow in 1887 as it did formerly?" to which he replied, "The railway obstructed it." He was not an expert, but he testified to actual knowledge of the facts—of the waterflow before and after the railway had been built; was present at the flood causing the damage in controversy. *Held*, that having given the attendant circumstances, his opinion was admissible. *Gulf, C. & S. F. R. Co.* v. *Locker*, 78 *Tex.* 279, 14 *S. W. Rep.* 611.—DISTINGUISHING Houston & T. C. R. Co. *v.* Reason, 61 Tex. 613. REVIEWING International & G. N. R. Co. *v.* Klaus, 64 Tex. 294; Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249.—NOT FOLLOWED IN St. Louis, I. M. & S. R. Co. *v.* Yarborough, 56 Ark. 612.

(2) *When not admissible.*—Plaintiff's evidence tended to show that his injuries were caused by the overturning of a car in which he was riding. A witness who had testified that, after the car turned over, he went to it to assist passengers in getting out, and found no one in it but one lady, and that a man could not have got out without assistance, cannot further state, "I think they were all out of the car before it turned over," this being the mere statement of his opinion, or conclusion from the facts. *Montgomery & E. R. Co.* v. *Mallette*, 92 *Ala.* 209, 9 *So. Rep.* 363.

The opinion of a non-expert witness that an overflow was caused by a railway embankment is inadmissible where it does not appear that the facts upon which his opinion is based cannot be sufficiently described to the jury. *St. Louis, I. M. & S. R. Co.* v. *Yarborough*, 52 *Am. & Eng. R. Cas.* 682, 56 *Ark.* 612, 20 *S. W. Rep.* 515.—NOT FOLLOWING Gulf, C. & S. F. R. Co. *v.* Locker, 78 Tex. 279, 14 S. W. Rep. 611; International & G. N. R. Co. *v.* Klaus, 64 Tex. 294; Porter *v.* Pequonnoc Mfg. Co., 17 Conn. 249.

In an action for causing death, one of plaintiff's witnesses testified that when the deceased came out of a switch shanty near the track, defendant's engine which did the injury was standing on the track forty or fifty feet east of the switch shanty with her cylinder cocks open and blowing off steam. The witness was then asked whether the deceased could have heard the blowing off of steam, which question was, on objection, refused. It did not appear that the witness was either in or near the shanty. *Held*, that there was no error in the ruling of the court, as the jury were as capable as the witness of drawing a conclusion whether or not the deceased heard the steam escaping. *Chicago, M. & St. P. R. Co.* v. *O'Sullivan*, 143 *Ill.* 48, 32 *N. E. Rep.* 398.

A witness who swore to having been in the garden of her house, which was by the side of a track, for several minutes before a train passed, and that she did not hear any whistle blown, was asked whether the whistle could have blown anywhere near the neighboring station without her hearing it. *Held*, that this question was properly ruled out; it related to a matter of opinion and common observation and experience, upon which the jury could have judged as well as the witness, when she had stated the facts as to distance and the existence of any obstacle. *Marcott* v. *Marquette, H. & O. R. Co.*, 8 *Am. & Eng. R. Cas.* 306, 49 *Mich.* 99, 13 *N. W. Rep.* 374.

Where a witness testified that, before the trial, plaintiff told him that if he would tell the truth about the matter he would not lose anything, such witness should not be permitted to state that he understood this to be a hint to testify in plaintiff's favor, such evidence being merely an opinion, and the proper meaning of the expression being for the jury. *Gulf, C. & S. F. R. Co.* v. *Fox*, (*Tex.*) 33 *Am. & Eng. R. Cas.* 543, 6 *S. W. Rep.* 569.

Non-expert witnesses, after testifying to the facts, were asked as to what the facts

indicated as having caused the injury. The witnesses had not qualified as experts. *Held*, that the opinion of these witnesses as to how the injury was caused was incompetent. They had done all they could be permitted to do in describing what they saw. It was the province of the jury to draw conclusions and form opinions from all the circumstances. *Houston City St. R. Co.* v. *Sciacca*, 80 *Tex.* 350, 16 *S. W. Rep.* 31.

When the facts upon which an opinion is based can be detailed by the witness to the jury, and there is no reason why the jury cannot form an opinion, after hearing such facts for themselves, it is error to admit the opinion of the witness as evidence. *Kansas & G. S. L. R. Co.* v. *Scott*, 1 *Tex. Civ. App.* 1, 20 *S. W. Rep.* 725.

105. Where facts and circumstances cannot be specifically described. — How far an animal as large as a horse can be seen under ordinary circumstances is a matter of common knowledge, and not a matter on which a witness can express an opinion; but when applied to the circumstances of a particular case, and dependent upon the features of a particular locality, the details of which cannot be fully and accurately described, a witness may state his opinion. *East Tenn., V. & G. R. Co.* v. *Watson*, 90 *Ala.* 41, 7 *So. Rep.* 813.

Non-expert witnesses may state their opinions as to matters with which they are especially acquainted, but which cannot be specifically described. *Louisville, E. & St. L. R. Co.* v. *Donnegan*, 34 *Am. & Eng. R. Cas.* 116, 111 *Ind.* 179, 9 *West. Rep.* 641, 12 *N. E. Rep.* 153.

Witnesses not shown to be experts may, nevertheless, testify to facts, although such facts appear to be opinions or conclusions of facts, if the subject-matter to which their testimony relates cannot be reproduced or described to the jury as it appeared to the witnesses at the time of its occurrence, and such opinions are founded upon facts such as men in general are capable of comprehending and understanding. *Atchison, T. & S. F. R. Co.* v. *Miller*, 35 *Am. & Eng. R. Cas.* 190, 39 *Kan.* 419, 18 *Pac. Rep.* 486.

No amount of description can enable a jury to see a place as witnesses saw it, and while they must describe the place as well as they can, it is always competent for those who are familiar with highways and their use to give the impressions received at the time concerning the safety or convenience of passage, and other conditions of an analogous nature. *Laughlin* v. *Grand Rapids St. R. Co.*, 26 *Am. & Eng. R. Cas.* 377, 62 *Mich.* 220, 28 *N. W. Rep.* 873.

A witness who says that he cannot recollect just what was said in a conversation about land damages cannot be allowed to state his "impression" as to what was said. *In re New York, W. S. & B. R. Co.*, 33 *Hun* (*N. Y.*) 231.

The admissibility of the opinions of witnesses, expert and others, must always rest in clear necessity. In those matters where mere descriptive language is inadequate to convey to the jury the precise facts or their bearing on the issue, a witness may be allowed to supplement his description by his opinion in order to put the jury in position to determine the facts in issue. *Graham* v. *Pennsylvania Co.*, 47 *Am. & Eng. R. Cas.* 522, 139 *Pa. St.* 149, 21 *Atl. Rep.* 151. — QUOTING Clifford *v.* Richardson, 18 Vt. 620. — *Madden* v. *Missouri Pac. R. Co.*, 50 *Mo. App.* 666.

But when the circumstances are such that they can be fully and accurately described to the jury and their bearing on the issue estimated by persons without special knowledge or training, opinions of witnesses, expert or other, are inadmissible. *Graham* v. *Pennsylvania Co.*, 47 *Am. & Eng. R. Cas.* 522, 139 *Pa. St.* 149, 21 *Atl. Rep.* 151. — FOLLOWING Beatty *v.* Gilmore, 16 Pa. St. 463; Minnequa Springs Imp. Co. *v.* Coon, 10 W. N. C. 502. QUOTING New England Glass Co. *v.* Lovell, 7 Cush. (Mass.) 321.

The opinion of a witness as to questions of time, quantity, number, distance, and the like, when it is shown that he was in position to form and had the means of forming an intelligent estimate, is sometimes admissible as the best evidence that can be obtained. *Sabine & E. T. R. Co.* v. *Brousard*, 34 *Am. & Eng. R. Cas.* 199, 69 *Tex.* 617, 7 *S. W. Rep.* 374.

The general rule of evidence that witnesses may not give opinions as to matters of fact does not preclude the evidence of common observers, who may state the results of their observations in regard to ordinary appearances and conditions of things which cannot be produced to a jury exactly as they were observed by the witnesses at the time. *Sears* v. *Seattle Con. St. R. Co.*, 6 *Wash.* 227, 33 *Pac. Rep.* 389, 1081.

106. As to knowledge of witness who gives opinion.—A witness who is conversant with, and has had peculiar opportunities of observing, cotton, its nature and quality, and its liability to catch fire and burn, may express his opinion that if a blazing missile or a burning coal is applied to cotton, the cotton would thereby be fired immediately, and would burn with such rapidity that its extinguishment would be improbable if not impossible. *Seals* v. *Edmondson*, 71 *Ala.* 509.

Plaintiff was injured while standing on a freight car that was then being loaded with slag by means of a steam shovel. It was shown that he was struck by the bucket suspended to a revolving lever, having just changed his position. *Held*, that the person who was operating the steam shovel, testifying as a witness for the defense, might state that "after it had started, and plaintiff had placed himself under it, no human effort could have prevented the lever or bucket from swinging to its accustomed place." *Alabama G. S. R. Co.* v. *Yarbrough*, 83 *Ala.* 238, 3 *So. Rep.* 447, 3 *Am. St. Rep.* 715.

A witness who has been engaged in handling guano for several years, and who has stated the weight of sacks filled with it, may be asked to state also the dimensions (the length, breadth, and thickness) of such sacks, as relevant to the question of overloading a car. *Kansas City, M. & B. R. Co.* v. *Smith*, 90 *Ala.* 25, 8 *So. Rep.* 43.

A brakeman may state that the engineer "backed the engine against the car with more force than was necessary." *Louisville & N. R. Co.* v. *Watson*, 90 *Ala.* 68, 8 *So. Rep.* 249.

A witness may testify as to who are or were officers of a railroad without producing evidence of their appointment. *East Tenn., V. & G. R. Co.* v. *Davis*, 91 *Ala.* 615, 8 *So. Rep.* 349.

On the question whether a shipper made a contract with a carrier to ship goods by a certain route, his testimony wherein he states what experience he had in shipping such goods, and that the route indicated was a better way of shipping them, is admissible. *Central R. & B. Co.* v. *Skellie*, 86 *Ga.* 686, 12 *S. E. Rep.* 1017.

In an action to recover damages to property by the construction and operation of a railway in the street in front of it, a witness who had seen the premises a[illegible] location of the railroad but had not been present when any trains had passed was called by plaintiff and was asked: "From the proximity of the railroad track, can you tell whether the smoke and cinders and gases from passing locomotives would enter these premises—enter the house?" and he answered, "Yes, sir, very likely." *Held*, that if the witness had at any time seen trains pass the premises it would have been proper for him to state any facts which had come to his knowledge, but that he could not assume the position of an expert and give his opinion to the jury as evidence. *Chicago & G. W. R. Co.* v. *Wedel*, 144 *Ill.* 9, 32 *N. E. Rep.* 547.

A witness cannot testify to the value of services unless it appears that he knows the usual rate of compensation paid for like services at the time when, and place where, they were rendered. His mere naked opinion is incompetent. *Louisville, N. A. & C. R. Co.* v. *Cox*, 30 *Ill. App.* 380.

A woman who is accustomed to drive every day over a track where a flagman is stationed, and sometimes five or six times a day, is competent to testify that she knows the flagman's signals to stop and to go on, and that he gave the signal to go on at the time in question. *Buchanan* v. *Chicago, M. & St. P. R. Co.*, 35 *Am. & Eng. R. Cas.* 378, 75 *Iowa* 393, 39 *N. W. Rep.* 663.

Plaintiff sued a company for damages to his growing crops by trespassing cattle, and claimed that the company maintained a defective cattle-guard over which they entered. The company called a witness who testified that he had put in a great many cattle-guards, but there was nothing to show that he knew anything about cattle or their habits, and he was asked whether it was not "a fact that cattle get breachy with reference to these cattle-guards, the same as they do as to fences, and then is it not almost impossible for a cattle-guard to stop them?" *Held*, that it was not error to refuse to allow the witness to answer. *St. Louis & S. F. R. Co.* v. *Edwards*, 7 *Am. & Eng. R. Cas.* 547, 26 *Kan.* 72.

Where a person has lived several months on a farm near where a railroad crosses a public highway, and his business requires him to cross the track frequently, and he is able to tell the time the regular trains pass, he is competent to testify whether a particular train is an irregular or extra one. *Missouri Pac. R. Co.* v. *Stevens*, 35 *Kan.* 622, 12 *Pac. Rep.* 25.

Plaintiff having attempted to prove that a flagman employed by the company was a careless and intemperate person, defendant had a right to show that he was careful, attentive, and temperate; and these facts may be proved by persons who have seen his conduct, and need not be proved by experts. *Gahagan* v. *Boston & L. R. Co.*, 1 *Allen* (*Mass.*) 187.

A witness accustomed to packing marble slabs for transportation may be asked whether in his opinion a certain mode of packing was proper. *Shriver* v. *Sioux City & St. P. R. Co.*, 24 *Minn.* 506.

While it may be error for a witness with no more knowledge than the jurymen to give his opinion as to the possibility of stopping a train, yet it will be no ground for reversal unless it appears that the opposing party was prejudiced by such testimony. *Robertson* v. *Wabash, St. L. & P. R. Co.*, 84 *Mo.* 119.—QUOTED IN Gourley *v.* St. Louis & S. F. R. Co., 35 Mo. App. 87.

The opinion of a witness on the question of negligence in setting fire to brush in a time of high wind, founded upon his knowledge of the situation of the land and brush and his observation of the wind, and upon the same question in the management of the fire, founded upon the acts and omissions of defendant at the time, is competent evidence. *Wells* v. *Eastman*, 61 *N. H.* 507.

A question which limits the opinion of a witness to information derived from his personal knowledge of the accident itself, without reference to his means of knowledge derived from other sources, is objectionable unless preliminary questions have shown his personal knowledge to be sufficient. *Haggerty* v. *Brooklyn City & N. R. Co.*, 6 *Abb. N. Cas.* (*N. Y.*) 129, 61 *N. Y.* 624, *mem.*—DISTINGUISHING Sloan *v.* New York C. R. Co., 45 N. Y. 125.

In an action for killing cattle, the company introduced an expert witness who testified as to the distance within which a train could be stopped. *Held*, that it was competent for the plaintiff then to prove by non-experts the distance within which they had seen trains stopped. *Harmon* v. *Columbia & G. R. Co.*, 32 *So. Car.* 127, 10 *S. E. Rep.* 877.

In an action for personal injuries caused by plaintiff's horses being frightened by a locomotive and running away, a witness who owned the horses about a year before the accident was properly allowed to testify as to whether they were gentle or wild when he owned them. *Kalbus* v. *Abbot*, 77 *Wis.* 621, 46 *N. W. Rep.* 810.

107. Opinions without requisite knowledge of facts.—In a suit against a railroad for failing to deliver grain in proper time, a witness disclaimed all personal knowledge of the time the grain was shipped, and did not pretend to possess any peculiar knowledge as to the management of defendant's road or the running of trains. *Held*, that it was not proper to permit the witness to give his opinion whether it would have been possible or probable, in the ordinary course of business, for the grain to have been placed under the control of the consignee by a given day. *Chicago & N. W. R. Co.* v. *Ingersoll*, 65 *Ill.* 399.

108. Testing accuracy of witness's judgment.—A witness had testified as to his opinion in regard to a person's age; the other side on cross-examination asked his opinion of the age of a bystander. Witness said "fifty-five." The bystander was then called by cross-examining counsel and asked his age, to which he replied "forty-six." *Held*, that the evidence of the bystander was competent to show that the witness's opinions as to age were entitled to no credit. *Louisville, N. A. & C. R. Co.* v. *Falvey*, 23 *Am. & Eng. R. Cas.* 522, 104 *Ind.* 409, 3 *N. E. Rep.* 389, 4 *N. E. Rep.* 908.

b. Value.

109. Of land.*—The opinions of witnesses familiar with land taken for a right of way as to its value before and after the taking are admissible. *St. Louis, A. & T. R. Co.* v. *Anderson*, 17 *Am. & Eng. R. Cas.* 97, 39 *Ark.* 167. *Fayetteville & L. R. R. Co.* v. *Combs*, 39 *Am. & Eng. R. Cas.* 140, 51 *Ark.* 324, 11 *S. W. Rep.* 418. *Santa Ana* v. *Harlin*, 99 *Cal.* 538, 34 *Pac. Rep.* 224. *Springfield, E. & S. E. R. Co.* v. *Peters*, 8 *Ill. App.* 300. *Frankfort & K. R. Co.* v. *Windsor*, 51 *Ind.* 238.—DISTINGUISHING Evansville, I. & C. S. L. R. Co. *v.* Fitzpatrick, 10 Ind. 120.—*Union R. T. & S. Y. Co.* v. *Moore*, 5 *Am. & Eng. R. Cas.* 346, 80 *Ind.* 458. *Indianapolis, D. & S. R. Co.* v. *Pugh*, 10 *Am. & Eng. R. Cas.* 196, 85 *Ind.* 279. *Central Branch U. P. R. Co.* v. *Andrews*, 30 *Am. & Eng. R. Cas.* 352, 37 *Kan.* 162, 14

* Competency of witnesses to give opinion evidence as to value of land, see notes, 44 AM. & ENG. R. CAS. 136, 51 *Id.* 600, *abstr.*

Pac. Rep. 509. *Blagen* v. *Thompson*, 56 *Am. & Eng. R. Cas.* 530, 23 *Oreg.* 239, 31 *Pac. Rep.* 647, 18 *L. R. A.* 315. *Watson* v. *Pittsburgh & C. R. Co.*, 37 *Pa. St.* 469. *Jones* v. *Erie & W. V. R. Co.*, 56 *Am. & Eng. R. Cas.* 664, 151 *Pa. St.* 30, 25 *Atl. Rep.* 134. *Houston & T. C. R. Co.* v. *Knapp*, 51 *Tex.* 592. CONTRA, *Fremont, E. & M. V. R. Co.* v. *Whalen*, 5 *Am. & Eng. R. Cas.* 364, 11 *Neb.* 585, 10 *N. W. Rep.* 491. —MODIFIED IN Burlington & M. R. Co. *v.* White, 28 Neb. 166. OVERRULED IN Republican Valley R. Co. *v.* Arnold, 10 Am. & Eng. R. Cas. 219, 13 Neb. 485. QUOTED IN Burlington & M. R. R. Co. *v.* Beebe, 14 Neb. 463.

Real estate brokers who testify that they are acquainted with the value of real estate in the neighborhood of property sought to be condemned for a right of way are competent witnesses to give their opinions as to the value of the same, even though their knowledge of values in the locality is not satisfactorily shown to be based on actual sales. Such objection goes to the value of their testimony rather than to its competency. *Chicago & E. R. Co.* v. *Blake*, 23 *Am. & Eng. R. Cas.* 97, 116 *Ill.* 163, 4 *N. E. Rep.* 488.—REVIEWED IN Peoria G. L. & C. Co. *v.* Peoria Terminal R. Co., 146 Ill. 372.—*Sherlock* v. *Chicago, B. & Q. R. Co.*, 130 *Ill.* 403, 22 *N. E. Rep.* 844.—QUOTING Davis *v.* Charles River Branch R. Co., 11 Cush. (Mass.) 506. RECONCILING Chicago & W. I. R. Co. *v.* Maroney, 95 Ill. 179.—*Ragan* v. *Kansas City & S. E. R. Co.*, 111 *Mo.* 456, 20 *S. W. Rep.* 234.

In a proceeding to condemn land for a right of way, it is not essential to the competency of witnesses as to value that they should have bought or sold such land, or similar land, or that their opinion should be based on values realized from sales. *Montana R. Co.* v. *Warren*, 6 *Mont.* 275, 12 *Pac. Rep.* 641.

Witnesses having testified as to the value of an entire block or square, both with and without the railroad upon it, and it appearing, on cross-examination, that they made their estimates of value upon the basis of dividing the property into lots and fixing a value upon each lot, *held*, not to be an error on the part of the court to refuse to strike out their evidence, it also appearing that property in the city in which the square was situated was generally divided into lots, and that the square in question was capable of being so divided. *Blue Earth County* v. *St. Paul & S. C. R. Co.*, 10 *Am. & Eng. R. Cas.* 209, 28 *Minn.* 503, 11 *N. W. Rep.* 73.

110. Of animals.—A witness may give his opinion of the value of an animal killed —a graded cow, part Jersey—although he states that his opinion is based "on the Jersey craze which existed about that time." *Western R. Co.* v. *Lazarus*, 88 *Ala.* 453, 6 *So. Rep.* 877.

Plaintiff, testifying in his own behalf and stating that he is familiar with the value of stock, may give his opinion as to the value of his horse which was killed, although he is not shown to have any peculiar skill as an expert. *East Tenn., V. & G. R. Co.* v. *Watson*, 90 *Ala.* 41, 7 *So. Rep.* 813.

Plaintiff may testify, also, that the animal killed was a "very fine colt," or "fine stock," or "trotting stock," or "was sired by a trotting horse," or that "its mother was a fine-blooded animal"; these and similar expressions being merely the statement of a collective fact, and not requiring any expert skill or knowledge. *East Tenn., V. & G. R. Co.* v. *Watson*, 90 *Ala.* 41, 7 *So. Rep.* 813.

Every one is supposed to have some idea of the value of such property as is in general use; and it is not necessary to have a drover or butcher to prove the value of a cow killed on a railroad. *Ohio & M. R. Co.* v. *Irvin*, 27 *Ill.* 178. — FOLLOWED IN Ohio & M. R. Co. *v.* Taylor, 27 Ill. 207.—*Chicago, M. & St. P. R. Co.* v. *Kendall*, 49 *Ill. App.* 398. *Low* v. *Connecticut & P. R. R. Co.*, 45 *N. H.* 370.—EXPLAINING Hackett *v.* Boston, C. & M. R. Co., 35 N. H. 398.—*Missouri Pac. R. Co.* v. *Fagan*, 35 *Am. & Eng. R. Cas.* 666, 72 *Tex.* 127, 2 *L. R. A.* 75, 9 *S. W. Rep.* 749.

Where the action is for killing workhorses, and the evidence shows that they were adapted to, and suitable for, draying and hauling, it is proper to ask a witness what they were worth for draying and hauling heavy loads. *Nosler* v. *Chicago, B. & Q. R. Co.*, 73 *Iowa* 268, 34 *N. W. Rep.* 850.

Witnesses who have dealt in sheep, and are acquainted with their varieties and with their market value, may testify to the value of sheep such as those injured. *Holsapple* v. *Rome, W. & O. R. Co.*, 3 *Am. & Eng. R. Cas.* 487, 86 *N. Y.* 275.—FOLLOWING Teerpenning *v.* Corn Exchange Ins. Co., 43 N. Y. 279.

In an action against a carrier for an injury to a trotting mare, opinions of wit-

nesses as to her value both before and after her injury, and as to her speed, and her value, assuming that she possessed the speed proved, are admissible. *Reed* v. *Rome, W. & O. R. Co.*, 48 *Hun* 231, 16 *N. Y. S. R.* 58; *affirmed in* 125 *N. Y.* 708, *mem.*, 26 *N. E. Rep.* 753, 34 *N. Y. S. R.* 1013.

111. Of use and occupation.—It is competent to allow a witness to give his opinion as to the value of the use and occupation of a tract of land, the witness being familiar with the facts, although there was no market value known to said witness for like property. *Gulf, C. & S. F. R. Co.* v. *Dunman*, 85 *Tex.* 176, 19 *S. W. Rep.* 1073.

112. Of timber and growing crops.—Where a landowner sustains injury to his crops, land, etc., caused by the negligence of a company, a witness who possesses the requisite knowledge may testify to the value of the crops, property, etc., and to facts and circumstances calculated to inform the jury on those questions, but will not be permitted to state the amount of damages sustained by a party for loss of crops or other injuries, that being a matter for the jury to determine. *Fremont, E. & M. V. R. Co.* v. *Marley*, 25 *Neb.* 138, 40 *N. W. Rep.* 948.

On the trial of a question of damages for an injury to growing crops, neither science nor unusual skill being involved, the witnesses should be confined in their testimony to a statement of the facts showing the injury, and should not be permitted to express their opinions as to the amount of the damages or loss which have been occasioned thereby. (Maxwell, J., dissenting.) *Burlington & M. R. Co.* v. *Schlunts*, 14 *Am. & Eng. R. Cas.* 182, 14 *Neb.* 421, 16 *N. W. Rep.* 439.—QUOTED IN Belch *v.* Missouri Pac. R. Co., 18 Mo. App. 80.

The question being as to the damage done to land by a fire, properly qualified witnesses may state in what, in their opinion, the value of the land consisted, and may give their opinion as to the value of standing timber thereon, as one ground of their estimates. *Stertz* v. *Stewart*, 74 *Wis.* 160, 42 *N. W. Rep.* 214.

113. Of services rendered.—A person who has personal knowledge of services rendered, and of their value, and what is usually paid for them in the eastern part of the country, is competent to testify what the services were worth, although he may not have known of any established price for such services in the vicinity where they were rendered. *Missouri River R. Co.* v. *Richards*, 8 *Kan.* 101.

On a trial of an action under Kan. Stock Law of 1874, the opinion of a witness as to the value of the services rendered by plaintiff's attorney in prosecuting the case is competent, if such opinion is founded upon the character of the case set out in the bill of particulars, or upon a hypothetical case put to the witness, corresponding with the real case; and it is not error for the witness to give his opinion of the value of such services when a particular company is singled out, if he shows himself acquainted with the value. *Central Branch U. P. R. Co.* v. *Nichols*, 24 *Kan.* 242.

Plaintiff having been a farmer for many years, and engaged in farming, is competent to testify as to the value of his own labor. It is a proper subject for the opinion of witnesses. *Loucks* v. *Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 305, 31 *Minn.* 526, 18 *N. W. Rep.* 651.

114. Rental value. — One not acquainted with the value of a farm nor with values in its locality, having been permitted to testify as to the effect upon the rental value of said farm of a railroad crossing thereon being closed, it appearing that the witness was a farmer of large experience and that he based his answers upon a plat of the farm before him at the time, the testimony was competent. *Hunter* v. *Burlington, C. R. & N. R. Co.*, 84 *Iowa* 605, 51 *N. W. Rep.* 64.

Plaintiff sued defendant company for breach of covenant in failing to maintain an opening through certain premises between a station and his hotel. He was permitted to testify, under objection, as to what the rental value of his property would have been, between the time defendant's gate was made and the commencement of the action, if there had been a sufficient opening kept opposite the hotel for the convenient access of passengers and their baggage. *Held*, error. He should have stated the facts and left it to the jury to determine his damages. *Avery* v. *New York C. & H. R. R. Co.*, 121 *N. Y.* 31, 24 *N. E. Rep.* 20, 30 *N. Y. S. R.* 471; *reversing* 2 *N. Y. Supp.* 101, 17 *N. Y. S. R.* 417.—APPLIED IN Suydam *v.* New York El. R. Co., 46 N. Y. S. R. 360; Sillcocks *v.* New York El. R. Co., 46 N. Y. S. R. 671. DISTINGUISHED IN Bohlen *v.* Metropolitan El. R. Co., 39 N. Y. S. R. 151. QUOTED IN McGay *v.* Man-

hattan El. R. Co., 40 N. Y. S. R. 668. REVIEWED IN Roberts *v.* New York El. R. Co., 128 N. Y. 455.

115. Market value.—The opinions of those who have a knowledge of the circumstances and surroundings may be taken upon the question of what is the market value of property, although they are not experts. *San Diego L. & T. Co.* v. *Neale*, 78 *Cal.* 63, 20 *Pac. Rep.* 372, 3 *L. R. A.* 83.

Witnesses should not be allowed to give their opinions as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. *Santa Ana* v. *Harlin*, 99 *Cal.* 538, 34 *Pac. Rep.* 224. *St. Louis, K. & N. W. R. Co.* v. *St. Louis Union Stock Yard Co.*, 57 *Am. & Eng. R. Cas.* 677, 120 *Mo.* 541, 25 *S. W. Rep.* 399.

Witnesses may testify as to their knowledge of the market price of cattle derived from the newspapers. The newspapers themselves need not be put in evidence. *Cleveland & T. R. Co.* v. *Perkins*, 17 *Mich.* 296.—FOLLOWING Sisson *v.* Cleveland & T. R. Co., 14 Mich. 497.

Market value of land is not a question of science or skill, upon which only an expert can give an opinion. Persons of the neighborhood are presumed to have sufficient knowledge of the market value of the land. *Pennsylvania & N. Y. R. & C. Co.* v. *Bunnell*, 81 *Pa. St.* 414, 16 *Am. Ry. Rep.* 1.

Knowledge of the selling price of various pieces of land in the vicinity renders a witness competent to testify as to the value of land taken. The value of such opinion is for the jury. *Pittsburgh & L. E. R. Co.* v. *Robinson*, 1 *Am. & Eng. R. Cas.* 468, 95 *Pa. St.* 426.

Where a witness has testified for the plaintiff as to the manner in which the construction of a railroad has affected the market value of property injured, it is incompetent to inquire on cross-examination what the company paid in settlement of injuries to other properties near to that of plaintiff. *Pennsylvania S. V. R. Co.* v. *Ziemer*, 124 *Pa. St.* 560, 17 *Atl. Rep.* 187.

Evidence of the market value of an article is not objectionable because it is in some measure the opinion of a witness. *Ft. Worth & D. C. R. Co.* v. *Hogsett*, 67 *Tex.* 685, 4 *S. W. Rep.* 365.

Where a witness states that he does not know the market value of land in the vicinity of lands sought to be appropriated, he is not competent to give an opinion of the value of the lands affected by the condemnation proceedings. *Seattle & M. R. Co.* v. *Gilchrist*, 4 *Wash.* 509, 30 *Pac. Rep.* 738.—APPROVING March *v.* Portsmouth & C. R. Co., 19 N. H. 372; Concord R. Co. *v.* Greely, 23 N. H. 237; Washburn *v.* Milwaukee & L. W. R. Co., 59 Wis. 364.

116. For special purposes.—Where witnesses testify as to the value of ear corn for seed purposes, it is not error to permit them to testify as to why shelled corn is of less value, even if in so testifying they state the reasons farmers give for refusing to purchase shelled corn for such purposes. *Missouri Pac. R. Co.* v. *Nevin*, 16 *Am. & Eng. R. Cas.* 252, 31 *Kan.* 385, 2 *Pac. Rep.* 795.

In a condemnation proceeding, witnesses shown from their knowledge of the property to be competent, and who have observed the situation and condition of the premises as affected by the construction of the road, may express their opinions as to the value of the land in controversy and the amount of damages suffered by the owner; and any purpose for which the land is adapted, and which enters into and affects its market value, may properly be considered upon the question of its value. *Sherman* v. *St. Paul, M. & M. R. Co.*, 10 *Am. & Eng. R. Cas.* 193, 30 *Minn.* 227, 15 *N. W. Rep.* 239.—QUOTED IN Chicago, K. & N. R. Co. *v.* Davidson, 49 Kan. 589.

117. Where property has no standard or market value.—In an action to recover compensation for land taken for railroad purposes, consisting of an undeveloped "prospect" in mineral lands, the opinion of a competent witness, familiar with the country and its surroundings, as to the value of the land taken may be received in evidence. *Montana R. Co.* v. *Warren*, 47 *Am. & Eng. R. Cas.* 194, 137 *U. S.* 348, 11 *Sup. Ct. Rep.* 96.—APPLIED IN St. Louis & S. F. R. Co. *v.* Bradley, 54 Fed. Rep. 630, 2 U. S. App. 637, 4 C. C. A. 528.

Land, and especially lots, in the city of Chicago have no fixed or market value; therefore, where a company is proceeding to condemn a lot in said city, it is right to take the opinions of witnesses as to the value after hearing the facts upon which such opinions are founded. *Illinois & W. R. Co.* v. *Von Horn*, 18 *Ill.* 257.

Where a railroad seeks to condemn city lots with buildings thereon, as lands and

city lots have no standard value it is proper to take the opinions of witnesses, and to hear the facts upon which such opinions are founded, to enable the jury to fix the compensation to be awarded to the owners. *Lafayette, B. & M. R. Co.* v. *Winslow*, 66 *Ill.* 219.—DISTINGUISHED IN Peoria G. L. & C. Co. *v.* Peoria Terminal R. Co., 146 Ill. 372. QUOTED IN Johnson *v.* Freeport & M. R. R. Co., 25 Am. & Eng. R. Cas. 192, 111 Ill. 413.

Where land sought to be condemned is shown to have no market value, it is proper to allow a witness who has platted the land and fixed the price of the lots, and who testifies that he is acquainted with the value of property in that vicinity, to testify as to the value of the lots taken. *St. Louis, K. & A. R. Co.* v. *Chapman*, 38 *Kan.* 307, 16 *Pac. Rep.* 695.—DISTINGUISHED IN Kansas City & T. R. Co. *v.* Vickroy, 46 Kan. 248. REVIEWED IN Kansas City & S. W. R. Co. *v.* Ehret, 41 Kan. 22, 20 Pac. Rep. 538.

The opinion of a witness as to the value of property in suit, in an action for conversion, is properly received where there is no near market by prices in which the value could be ascertained. *Burger* v. *Northern Pac. R. Co.*, 22 *Minn.* 343.

Where property is without a market value the law allows the next best evidence, and the opinions of persons shown to be judges, or to have knowledge of the value of lands in the vicinity, may be received; and an instruction telling the jury to disregard as evidence the opinions of any and all witnesses as to value where the jury deem such opinions based upon "arbitrary prices" asked for land in the vicinity, without defining the phrase "arbitrary prices" further than that it does not mean "market value," is misleading in such case. *Kansas City, N. & F. S. R. Co.* v. *Dawley*, 50 *Mo. App.* 480.

118. Means of knowledge.—(1) *In general.*—A witness who knew the animal killed (a thoroughbred bull), his breed, and peculiar merits, may testify to its value, although he may not be an expert and although his opinion is not based upon actual sales at or near the place. *Alabama G. S. R. Co.* v. *Moody*, 92 *Ala.* 279, 9 *So. Rep.* 238.

Preliminary proof of personal knowledge of the witness as to the value of the land in question, based on actual sales, is not indispensable. The lack of such acquaintance, or absence of proof thereof, would go to the weight rather than to the admissibility of the evidence. *Chicago & E. R. Co.* v. *Blake*, 23 *Am. & Eng. R. Cas.* 97, 116 *Ill.* 163, 4 *N. E. Rep.* 488.

One who is conversant with current prices of property generally, but who never saw the property in controversy, may give an opinion as to its value upon a hypothetical description of it embodied in questions to him. *Smith* v. *Indianapolis & St. L. R. Co.*, 7 *Am. & Eng. R. Cas.* 582, 80 *Ind.* 233.—QUOTING Bowen *v.* Bowen, 74 Ind. 470; Johnson *v.* Thompson, 72 Ind. 167; Marion County Com'rs *v.* Chambers, 75 Ind. 409; Holten *v.* Lake County Com'rs, 55 Ind. 194.—*Atchison, T. & S. F. R. Co.* v. *Gabbert*, 22 *Am. & Eng. R. Cas.* 621, 34 *Kan.* 132, 8 *Pac. Rep.* 218. *Moore* v. *Chicago, M. & St. P. R. Co.*, 78 *Wis.* 120, 47 *N. W. Rep.* 273.

In a proceeding to condemn land, it is not essential to the competency of witnesses as to its value that they should have bought or sold the land or similar property, or that their opinion should be based upon values realized on actual sales. *Montana R. Co.* v. *Warren*, 6 *Mont.* 275, 12 *Pac. Rep.* 641.

The value of a horse at the time of its death is the measure of damages. But it is competent for defendant to show the condition of the horse by witnesses who had seen it at any reasonable time ranging within three months before the killing, and then, after proving by other witnesses that its condition was unchanged, the former witnesses may testify to the value of the horse at the time of the killing, on the hypothesis that its condition was the same as when they saw it. *Toledo & W. R. Co.* v. *Smith*, 25 *Ind.* 288.

To show a witness's knowledge of the value of land in a neighborhood, he may be asked if a certain farm therein has been sold, and for what amount it sold. *Winklemans* v. *Des Moines N. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 186, 62 *Iowa* 11, 17 *N. W. Rep.* 82.

That a witness, examined as to the value of land, bases his estimate upon what he has heard others say in relation thereto will not render him incompetent, but his means of knowledge may be fully tested on cross-examination, and his testimony should go to the jury for what it is worth. *Winklemans* v. *Des Moines N. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 186, 62 *Iowa* 11, 17 *N. W. Rep.* 82.

Where a party seeking to recover damages to a farm consisting of 160 acres puts a witness on the stand to prove his damages, and the witness says he cannot set a value on eighty acres of the land, and does not know the market value of the other eighty, but says it is, in his judgment, worth twenty dollars per acre, it is error to permit him, over objection, to state how much less the whole farm was worth immediately after the appropriation of the right of way across it by the railroad company than it was immediately before such right of way was appropriated. *Chicago, K. & W. R. Co.* v. *Easley*, 46 *Kan.* 337, 26 *Pac. Rep.* 731.

In an action against a common carrier for the loss of a pearl ring, plaintiff, who was not an expert, was allowed to point out a pearl corresponding in size, color, and general appearance to the one lost, and an expert was then allowed to testify as to the value of the pearl pointed out. *Held*, that defendant had no ground of exception. *Berney* v. *Dinsmore*, 141 *Mass.* 42, 5 *N. E. Rep.* 273.

In an action for wrongfully causing death, evidence of what the deceased was worth at the time of his death is admissible for the purpose of showing the reasonable expectation of pecuniary benefit to his family from the continuance of his life; and any one who has knowledge of his pecuniary affairs, as an attorney who managed the settlement of his estate, may testify. The fact that such witness's knowledge was derived in part from proceedings had in the probate court in the settlement of the estate does not render his evidence secondary. *Phelps* v. *Winona & St. P. R. Co.*, 32 *Am. & Eng. R. Cas.* 56, 37 *Minn.* 485, 35 *N. W. Rep.* 273, 5 *Am. St. Rep.* 867.

The owner of land taken for right of way who swears that he knows what it is worth, having resided upon and improved it for several years, is a competent witness on the question of its value. So, too, are other persons who have resided for several years in the immediate neighborhood of the land, and who seem, upon examination, to be well informed of its situation, condition, and value. *Burlington & M. R. R. Co.* v. *Schluntz*, 14 *Am. & Eng. R. Cas.* 182, 14 *Neb.* 421, 16 *N. W. Rep.* 439.—FOLLOWED IN Sioux City & P. R. Co. *v.* Weimer, 20 Am. & Eng. R. Cas. 184, 16 Neb. 272.

Without a showing, there is no presumption that a witness is competent to give a reliable estimate of the market value of land in condemnation proceedings, and when one's competency is challenged, before he should be permitted to express an opinion it should be made to appear that he has in some way become qualified to do so. *Missouri Pac. R. Co.* v. *Coon*, 14 *Am. & Eng. R. Cas.* 202, 15 *Neb.* 232, 18 *N. W. Rep.* 62.

Where there is a stone quarry upon a right of way which will be destroyed by grading a roadbed, witnesses familiar with the value of such quarry may be interrogated in regard to the same, as its value is a proper element of damages. So where a dwelling house is situated on the right of way and will become the property of the company condemning the land. *Burlington & M. R. Co.* v. *White*, 28 *Neb.* 166, 44 *N. W. Rep.* 95.

Opinions of witnesses as to the value of chattels may be received, and a witness who has been in this country five years may be allowed to testify, from knowledge acquired since he came to this country, as to the value of the contents of a trunk, and to prove that he has made inquiries here as to the value of articles of that kind. *Merrill* v. *Grinnell*, 30 *N. Y.* 594.

The opinion of a witness as to the value of an article (as, for instance, a horse), when admissible, is admitted partly on the ground that he is shown to have a special knowledge on that subject, and partly on the ground that no amount of descriptive testimony would be as safe a guide to a jury, in estimating its value, as the testimony of such a witness. *Harris* v. *Panama R. Co.*, 3 *Bosw.* (*N. Y.*) 7.

One who is shown to have twenty years' experience as a real-estate dealer in the vicinity of plaintiff's property is competent to give his opinion as to the depreciation in its rental value caused by defendant's road. *Johnston* v. *Manhattan R. Co.*, 39 *N. Y. S. R.* 227, 60 *Hun* 583, 14 *N. Y. Supp.* 897.

It is competent for a witness to state the price of cotton from information received through commercial circulars, prices current, and correspondence with and telegrams from his factor. *Smith* v. *North Carolina R. Co.*, 68 *N. Car.* 107.

In order that a witness may be competent to testify intelligently as to the market value of land he should have some special opportunity for observation; he should, in

a general way and to a reasonable extent, have in his mind the data from which a proper estimate of value ought to be made; if interrogated, he should be able to disclose sufficient actual knowledge of the subject to indicate that he is in condition to know what he proposes to state, and to enable the jury to judge of the probable proximate accuracy of his conclusion. *Pittsburgh, V. & C. R. Co.* v. *Vance*, 115 *Pa. St.* 325, 8 *Atl. Rep.* 764.—REVIEWED IN Ehret *v.* Schuylkill River E. S. R. Co., 151 Pa. St. 158.

An attorney, not an expert in the use, value, or manufacture of locomotives, but who had made some investigation as to the value of the engine in controversy, was allowed to testify as to its value. *Held*, not error as matter of law. *Lamoille Valley R. Co.* v. *Bixby*, 57 *Vt.* 548.

(2) *No rule of law as to amount of knowledge required.*—No exact rule can be laid down as to the amount of knowledge which a witness as to the value of land condemned for railroad purposes must possess; the determination of that matter must rest largely in the discretion of the trial court. *Montana R. Co.* v. *Warren*, 47 *Am. & Eng. R. Cas.* 194, 137 *U. S.* 348, 11 *Sup. Ct. Rep.* 96. —FOLLOWED IN St. Louis & S. F. R. Co. *v.* Bradley, 54 Fed. Rep. 630, 2 U. S. App. 637, 4 C. C. A. 528.—*Papooshek* v. *Winona & St. P. R. Co.*, 44 *Minn.* 195, 46 *N. W. Rep.* 329. *Dodd* v. *Long Island R. Co.*, 44 *N. Y.* 367.

(3) *Those residing in the vicinity.*—Witnesses who reside near the land in question and are familiar with its value, as well as with the value of other lands in the neighborhood, can testify as to the value of the land taken for right of way. Such knowledge is sufficient to authorize them to give their estimates as to the value of the land taken. *Orange Belt R. Co.* v. *Craver*, 32 *Fla.* 28, 13 *So. Rep.* 444.—QUOTING St. Louis & St. J. R. Co. *v.* Richardson, 45 Mo. 466; Kansas City, St. J. & C. B. R. Co. *v.* Campbell, 62 Mo. 585.—*Kansas City & S. W. R. Co.* v. *Ehret*, 41 *Kan.* 22, 20 *Pac. Rep.* 538.—QUOTING Leroy & W. R. Co. *v.* Hawk, 39 Kan. 640. REVIEWING St. Louis, K. & A. R. Co. *v.* Chapman, 38 Kan. 307.—DISTINGUISHED IN Kansas City & T. R. Co. *v.* Vickroy, 46 Kan. 248. FOLLOWED IN Kansas City & S. W. R. Co. *v.* Baird, 41 Kan. 69, 21 Pac. Rep. 227; Kansas City & S. W. R. Co. *v.* Orr, 41 Kan. 70; Kansas City & S. W. R. Co. *v.* Headrick, 41 Kan. 71. QUOTED IN Ottawa, O. C. & C. G. R. Co. *v.* Fisher, 42 Kan. 675, 22 Pac. Rep. 713; Chicago, K. & N. R. Co. *v.* Davidson, 49 Kan. 589.—*Russell* v. *Horn Pond Branch R. Corp.*, 4 *Gray* (*Mass.*) 607. *Lehmicke* v. *St. Paul, S. & T. F. R. Co.*, 19 *Minn.* 464 (*Gil.* 406), 10 *Am. Ry. Rep.* 296. —FOLLOWED IN Curtis *v.* St. Paul, S. & T. F. R. Co., 20 Minn. 28 (Gil. 19).—*Sioux City & P. R. Co.* v. *Weimer*, 20 *Am. & Eng. R. Cas.* 184, 16 *Neb.* 272, 20 *N. W. Rep.* 349.

In ascertaining the damages to land taken for railroad purposes, the opinion as to the value of the land of a witness who does not reside in the vicinity, but who has tried, as agent, to sell a neighboring property, though he does not possess other knowledge of land values in the vicinity, is inadmissible. *Schuylkill River E. S. R. Co.* v. *Stocker*, 44 *Am. & Eng. R. Cas.* 137, 128 *Pa. St.* 233, 18 *Atl. Rep.* 399.

(4) *Those familiar with the locality.*—Any person knowing property and its value may be examined to prove its value, though he may not be engaged in the buying and selling of that character of property, the weight to be given to his testimony being left to the jury. *Chicago, P. & St. L. R. Co.* v. *Nix*, 137 *Ill.* 141, 27 *N. E. Rep.* 81. —FOLLOWING Keithsburg & E. R. Co. *v.* Henry, 79 Ill. 290.—*Central Pac. R. Co.* v. *Pearson*, 35 *Cal.* 247.—OVERRULED IN San Diego L. & T. Co. *v.* Neale, 78 Cal. 63, 20 Pac. Rep. 372, 3 L. R. A. 83.—*Little Rock Junction R. Co.* v. *Woodruff*, 33 *Am. & Eng. R. Cas.* 169, 49 *Ark.* 381, 4 *Am. St. Rep.* 51, 5 *S. W. Rep.* 792. *Johnson* v. *Freeport & M. R. R. Co.*, 25 *Am. & Eng. R. Cas.* 192, 111 *Ill.* 413. *Lafayette* v. *Nagle*, 113 *Ind.* 425, 15 *N. E. Rep.* 1, 12 *West. Rep.* 637. *Central Branch U. P. R. Co.* v. *Andrews*, 30 *Am. & Eng. R. Cas.* 352, 37 *Kan.* 162, 14 *Pac. Rep.* 509. *Snow* v. *Boston & M. R. Co.*, 65 *Me.* 230.—DISTINGUISHING Clark *v.* Rockland Water Power Co., 52 Me. 68.—*Whitman* v. *Boston & M. R. Co.*, 7 *Allen* (*Mass.*) 313. *Colvill* v. *St. Paul & C. R. Co.*, 19 *Minn.* 283 (*Gil.* 240).—FOLLOWED IN Lehmicke *v.* St. Paul, S. & T. F. R. Co., 19 Minn. 464 (Gil. 406); Curtis *v.* St. Paul, S. & T. F. R. Co., 20 Minn. 28 (Gil. 19).—*Tate* v. *Missouri, K. & T. R. Co.*, 64 *Mo.* 149, 17 *Am. Ry. Rep.* 191. *Jones* v. *Erie & W. V. R. Co.*, 151 *Pa. St.* 30, 25 *Atl. Rep.* 134. *San Antonio & A. P. R. Co.* v. *Ruby*, 80 *Tex.* 172, 15 *S. W. Rep.* 1040.

But such witness must state the facts upon which he bases his opinion. *Holten* v. *Lake County Com'rs*, 55 *Ind.* 194.—QUOTED IN Smith *v.* Indianapolis & St. L. R. Co., 7 Am. & Eng. R. Cas. 582, 80 Ind. 233.

One who has acted as a viewer in the case and has a general knowledge of the market value of the land may testify to his opinion from his own observation while so acting. *Gorgas* v. *Philadelphia, H. & P. R. Co.*, 51 *Am. & Eng. R. Cas.* 593, 144 *Pa. St.* 1, 22 *Atl. Rep.* 715.

A witness unfamiliar with the land in question or that in the vicinity would not be rendered competent by viewing the land after its appropriation as a railroad right of way, and this without regard to his station or occupation. *Kansas City, N. & F. S. R. Co.* v. *Dawley*, 50 *Mo. App.* 480.

Where witnesses have stated their belief that plaintiff's farm will depreciate in value by reason of a railroad running through it, it is proper to allow them to give the reasons for such belief, as by showing the danger to plaintiff, his horses and cattle incident to crossing the track, the danger of fires, and the liability of teams to be frightened by the running of trains. *Parks* v. *Wisconsin C. R. Co.*, 33 *Wis.* 413.

c. Amount of Damages.

119. In general.—In an action to recover damages for the negligent killing of plaintiff's intestate, who was a youth over fifteen years of age, a question as to "what would the services of the deceased have been worth when he reached twenty-one years of age, if he had lived?" is properly excluded, as calling for an opinion based upon contingencies too remote and uncertain to furnish a basis for the admeasurement of damages. *Nave* v. *Alabama G. S. R. Co.*, 54 *Am. & Eng. R. Cas.* 151, 96 *Ala.* 264, 11 *So. Rep.* 391.

The opinions of witnesses as to the benefit which would probably result to land by the location of a depot within a certain distance of it are admissible. *Hayes* v. *Ottawa, O. & F. R. V. R. Co.*, 54 *Ill.* 373.

On the trial of an action for a personal injury, plaintiff was asked what his services were reasonably worth, in his estimation, per day, for the time he lost on account of such injury. He answered, "Well, I would say this: for just my services alone, a dollar and a half a day. Maybe that is high, and maybe it is not." *Held*, that the answer was but the expression of an opinion of the fair and reasonable pecuniary value of his services by the day during the time mentioned, and the evidence was clearly competent. *Chicago & E. I. R. Co.* v. *Bivans*, 142 *Ill.* 401, 32 *N. E. Rep.* 456; *affirming* 42 *Ill. App.* 450.

The opinion of a non-expert witness as to the cost or value of work in making a fill is competent evidence. *Terre Haute & L. R. Co.* v. *Crawford*, 27 *Am. & Eng. R. Cas.* 369, 100 *Ind.* 550.

Non-expert witnesses may give their opinions as to the habits, ability, or experience, before the injury, of a person injured by the derailment of a train, if they state, so far as possible, the facts and observations upon which such opinions are based. *Louisville, N. A. & C. R. Co.* v. *Miller*, (*Ind.*) 58 *Am. & Eng. R. Cas.* 304, 37 *N. E. Rep.* 343.

At the trial of a case for damages for the taking of a right of way through farming land, a farmer living in the neighborhood who has had knowledge of the farm for years, and knows its location, advantages, character of soil, and its market value compared to other lands surrounding it, is a competent witness, and qualified to testify to the value of the land taken and to the damages to the whole tract. *Chicago, K. & W. R. Co.* v. *Cosper*, 42 *Kan.* 561, 22 *Pac. Rep.* 634.—FOLLOWING Leroy & W. R. Co. *v.* Hawk, 39 Kan. 638. QUOTING Reisner *v.* Atchison U. D. & R. Co., 27 Kan. 382. DISTINGUISHED IN Kansas City & T. R. Co. *v.* Vickroy, 46 Kan. 248.

Witnesses who have competent judgment and understand the question may give their opinion of the damages sustained by a company in having a highway located over its track. *Portland & R. R. Co.* v. *Deering*, 23 *Am. & Eng. R. Cas.* 51, 78 *Me.* 61, 57 *Am. Rep.* 784, 2 *Atl. Rep.* 670.

The opinions or estimates of witnesses as to the amount of damage done to the land not taken by taking part of a tract for railroad purposes are not conclusive on the jury. *Johnson* v. *Chicago, B. & N. R. Co.*, 37 *Minn.* 519, 35 *N. W. Rep.* 438.—FOLLOWING Patterson *v.* Boston, 20 Pick. (Mass.) 159; Murdock *v.* Sumner, 22 Pick. 156; Head *v.* Hargrave, 105 U. S. 45; Anthony *v.* Stinson, 4 Kan. 211; Ward *v.* Lawrence, 79 Ill. 295; McReynolds *v.* Burlington & O. R. R. Co., 106 Ill. 152.

It is no objection to the testimony of a witness as to the damages resulting from a

particular act that he may not have considered the benefits which might also result therefrom. *Gallatin Canal Co. v. Lay*, 10 *Mont.* 528, 26 *Pac. Rep.* 1001.—FOLLOWING Carron *v.* Wood, 10 Mont. 500.

A witness may state that the taking of a right of way in a diagonal direction across plaintiff's farm is a damage to the remaining and severed pieces of land, and may state in what such damage consists. *Republican Valley R. Co.* v. *Linn*, 14 *Am. & Eng. R. Cas.* 198, 15 *Neb.* 234, 18 *N. W. Rep.* 35.

In an action for personal injuries, it is competent for plaintiff to prove the extent, nature, and permanency of the injury; and any question fairly calling for facts bearing on that point is competent. Hence, it is proper to allow plaintiff to answer the question: "Did the state of your health cause you to give up your business?" *Beckwith* v. *New York C. R. Co.*, 64 *Barb.* (*N. Y.*) 299.

A witness called to testify as to the amount of damage caused by taking a right of way for a railroad over land cannot express opinions as to the separate items of damage to the land not taken. *In re New York, W. S. & B. R. Co.*, 29 *Hun* (*N. Y.*) 609, *mem.*—APPLIED IN Re New York, W. S. & B. R. Co., 37 Hun 317.

Where the action is for damages to abutting property by building an elevated road in the street, and experts have given evidence as to the value of the property, it is then competent to introduce the testimony of owners of adjoining real estate, although not experts, as to the value placed by them on their respective parcels. *Carter* v. *New York El. R. Co.*, 25 *J. & S.* 279, 28 *N. Y. S. R.* 581, 7 *N. Y. Supp.* 678; *affirmed in* 134 *N. Y.* 168, 45 *N. Y. S. R.* 848, 31 *N. E. Rep.* 514.

The opinion of witnesses who have, by their opportunities, qualified themselves to testify is competent as to the fact and *quantum* of damages. *Durham & N. R. Co.* v. *Bullock Church*, 44 *Am. & Eng. R. Cas.* 151, 104 *N. Car.* 525, 10 *S. E. Rep.* 761.

In a suit for unnecessary damage, brought against a company by the owner of land who has deeded to the company a right of way over it, "with right to use such additional land as may be necessary for the construction and maintenance of its road, and to take and use water and stone therefrom," a witness who is familiar with the land and the manner of the construction of the road, though not an expert in railway construction, can testify that, in his opinion, plaintiff's land would not have been damaged by standing water had the road been constructed in a different manner. *Gulf, C. & S. F. R. Co.* v. *Richards*, 83 *Tex.* 203, 18 *S. W. Rep.* 611. — FOLLOWED IN Ft. Worth & D. C. R. Co. *v.* Wilson, 3 Tex. Civ. App. 583.

A witness familiar with the facts, though not an expert, may give his opinion that the company could have constructed its embankment across plaintiff's land without taking up as much land as it did. *Gulf, C. & S. F. R. Co.* v. *Richards*, 83 *Tex.* 203, 18 *S. W. Rep.* 611.

The rule that mere opinions cannot be received as evidence except when given by experts must not be so construed as to exclude the results of reason, judgment, and observation on the part of witnesses. So it is competent to show, in a condemnation proceeding, that the land not taken would require more fencing on account of the road; that a crooked fence made of rails would cover part of it; that in places the fence would be liable to wash away at times of floods, and the cost of the fence. *Milwaukee & M. R. Co.* v. *Eble*, 3 *Pinn.* (*Wis.*) 334, 4 *Chand.* 72.

The rule by which damages to land adjoining a railway are to be determined is the depression of the market value of the land caused by the construction and operation of the road, less any special benefits which may accrue to the landowner; and witnesses may, after stating the amount of depression, testify as to the elements or items which make up that amount, and may state their grounds or reasons for fixing the damages at the sum named by them. *Neilson* v. *Chicago, M. & N. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 239, 58 *Wis.* 516, 17 *N. W. Rep.* 310.

The trial court may in its discretion limit or control the extent to which such testimony may be received, and nothing short of an abuse of such discretion will work a reversal of the judgment. *Neilson* v. *Chicago, M. & N. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 239, 58 *Wis.* 516, 17 *N. W. Rep.* 310.

120. Should state facts.—The opinions of witnesses as to the amount of damages sustained by a party in the appropriation of land for railroad purposes are not competent evidence. The witnesses must testify to facts, and the court or jury must determine the amount of damages. *Balti-*

more, P. & C. R. Co. v. *Johnson*, 59 *Ind.* 247. *Belch* v. *Missouri Pac. R. Co.*, 18 *Mo. App.* 80.—QUOTING Burlington & M. R. R. Co. *v.* Beebe, 14 Neb. 463; Parsons *v.* Lindsay, 26 Kan. 430; Burlington & M. R. R. Co. *v.* Schluntz, 14 Neb. 421. APPROVED IN Hurt *v.* St. Louis, I. M. & S. R. Co., 34 Am. & Eng. R. Cas. 422, 94 Mo. 255, 13 West. Rep. 233, 7 S. W. Rep. 1.—*Avery* v. *New York C. & H. R. R. Co.*, 121 *N. Y.* 31, 24 *N. E. Rep.* 20, 30 *N. Y. S. R.* 471; *reversing* 2 *N. Y. Supp.* 101, 17 *N. Y. S. R.* 417. —FOLLOWING Teerpenning *v.* Corn Exchange Ins. Co., 43 N. Y. 279.—*Burton* v. *Serverance*, 22 *Oreg.* 91, 29 *Pac. Rep.* 200.

It is improper for a witness merely to state in round numbers his conclusion as to the amount of the damages, since by so doing he assumes the office of the jury. *Watkins* v. *St. Louis, I. M. & S. R. Co.*, 44 *Mo. App.* 245.

A witness who accompanied cattle during transportation and has testified to the injuries they have received, and as to their condition at the time of shipment and at the time of their arrival, and as to their market value, cannot further testify that in his opinion they were damaged five dollars per head, though he is shown to have had an experience of several years in shipping and handling cattle. *Ft. Worth & D. C. R. Co.* v. *Ward*, 2 *Tex. Civ. App.* 598, 21 *S. W. Rep.* 607.—FOLLOWING Gulf, C. & S. F. R. Co. *v.* Wright, 1 Tex. Civ. App. 402.

121. Not amount of damages.*—In condemnation proceedings, a witness, without testifying either as to specific values or as to specific facts, may not estimate damages by "taking into consideration all incidental loss, inconvenience, and damages, present and prospective, which may reasonably be expected or shown to exist from the maintenance of said railroad track to be continued permanently." *Wichita & W. R. Co.* v. *Kuhn*, 33 *Am. & Eng. R. Cas.* 159, 38 *Kan.* 675, 17 *Pac. Rep.* 322.—OVERRULING in part Wichita & W. R. Co. *v.* Kuhn, 38 Kan. 104.—FOLLOWED IN Chicago, K. & W. R. Co. *v.* Muller, 45 Kan. 85; Chicago, K. & N. R. Co. *v.* Neiman, 45 Kan. 533.

In assessing the damages occasioned by the construction of a railroad to a person through whose lands the road passes, a witness cannot state his opinion as to the amount of damage sustained. *Montgomery & W. P. R. Co.* v. *Varner*, 19 *Ala.* 185. *Alabama & F. R. Co.* v. *Burkett*, 42 *Ala.* 83. *Evansville, I. & C. S. L. R. Co.* v. *Fitzpatrick*, 10 *Ind.* 120. — DISTINGUISHED IN Frankfort & K. R. Co. *v.* Windsor, 51 Ind. 238.—*Baltimore, P. & C. R. Co.* v. *Stoner*, 59 *Ind.* 579.—FOLLOWED IN Baltimore, P. & C. R. Co. *v.* Johnson, 59 Ind. 480.—*Baltimore, P. & C. R. Co.* v. *Johnson*, 59 *Ind.* 480. — FOLLOWING Baltimore, P. & C. R. Co. *v.* Stoner, 59 Ind. 579.—*Pittsburgh, C. & St. L. R. Co.* v. *Hixon*, 8 *Am. & Eng. R. Cas.* 717, 79 *Ind.* 111. *Hartley* v. *Keokuk & N. W. R. Co.*, 85 *Iowa* 455, 52 *N. W. Rep.* 352.—QUOTING Renwick *v.* Davenport & N. W. R. Co., 49 Iowa 674.—*Chicago, K. & N. R. Co.* v. *Neiman*, 47 *Am. & Eng. R. Cas.* 186, 45 *Kan.* 533, 26 *Pac. Rep.* 22.—FOLLOWING Wichita & W. R. Co. *v.* Kuhn, 38 Kan. 675.—*Atlantic & G. W. R. Co.* v. *Campbell*, 4 *Ohio St.* 583.—FOLLOWED IN Cleveland & P. R. Co. *v.* Ball, 5 Ohio St. 568; Columbus, H. V. & T. R. Co. *v.* Gardner, 32 Am. & Eng. R. Cas. 243, 45 Ohio St. 309.—*Brown* v. *Providence & S. R. Co.*, 12 *R. I.* 238.

But a witness may be allowed to give his opinion as to the value of the land affected. *Cleveland & P. R. Co.* v. *Ball*, 5 *Ohio St.* 568.—FOLLOWING Atlantic & G. W. R. Co. *v.* Campbell, 4 Ohio St. 583.—FOLLOWED IN Columbus, H. V. & T. R. Co. *v.* Gardner, 32 Am. & Eng. R. Cas. 243, 45 Ohio St. 309.

And the above rule applies in personal injury cases. *Central R. & B. Co.* v. *Kelly*, 58 *Ga.* 107, 16 *Am. Ry. Rep.* 114. *Central R. Co.* v. *Senn*, 27 *Am. & Eng. R. Cas.* 304, 73 *Ga.* 705. *Hurt* v. *St. Louis, I. M. & S. R. Co.*, 34 *Am. & Eng. R. Cas.* 422, 94 *Mo.* 255, 13 *West. Rep.* 233, 7 *S. W. Rep.* 1. —APPROVING Lincoln *v.* Saratoga & S. R. Co., 23 Wend. (N. Y.) 425; Belch *v.* Missouri Pac. R. Co., 18 Mo. App. 80. REVIEWING Ramadge *v.* Ryan, 9 Bing. 335; Blair *v.* Milwaukee & P. du C. R. Co., 20 Wis. 262.—*Lincoln* v. *Saratoga & S. R. Co.*, 23 *Wend.* (*N. Y.*) 425. *Andreson* v. *Ogden U. R. & D. Co.*, 8 *Utah* 128, 30 *Pac. Rep.* 305. *Blair* v. *Milwaukee & P. du C. R. Co.*, 20 *Wis.* 262.—APPROVING Lincoln *v.* Saratoga & S. R. Co., 23 Wend. 425. REVIEWING Rochester & S. R. Co. *v.* Budlong, 10 How. Pr. (N. Y.) 289.—REVIEWED IN Hurt *v.* St. Louis, I. M. & S. R. Co., 34 Am. & Eng. R. Cas. 422, 94 Mo. 255.

* Opinion evidence as to the value of land, amount of damages, etc., see notes, 47 AM. & ENG. R. CAS. 183, 187; 50 *Id.* 348; 45 *Id.* 573, *abstr.*

And in an action against a carrier for delay in transporting cattle. *Fleming* v. *Delaware & H. Canal Co.*, 8 *Hun* (*N. Y.*) 358.

And in an action for damages to timber land by fire. *Burlington & M. R. R. Co.* v. *Beebe*, 14 *Neb.* 463, 16 *N. W. Rep.* 747.—CRITICISING Shattuck *v.* Stoneham Branch R. Co., 6 Allen (Mass.) 115. QUOTING Fremont, E. & M. V. R. Co. *v.* Whalen, 11 Neb. 587.—QUOTED IN Belch *v.* Missouri Pac. R. Co., 18 Mo. App. 80.

What the effect of a given kind of treatment is upon an animal, either in reducing or increasing its weight or in injuring or benefiting its appearance, is a proper matter of opinion to be stated by a witness to the jury; but as to whether these several items constitute the legal damage in a given case, and the amount of such damage, the jury must decide under proper instructions from the court. *Gulf, C. & S. F. R. Co.* v. *Wright*, 1 *Tex. Civ. App.* 402, 21 *S. W. Rep.* 80.

122. Opinion accompanied by basis of estimate. — Where one injured by an accident on a railroad has shown the nature and character of the injury, and the reduction of his wages growing out of infirmities consequent thereon, he may testify as to the extent to which his capacity to labor is diminished thereby. *Central R. Co.* v. *Coggin*, 73 *Ga.* 689.

On an assessment of damages under a proceeding to condemn a right of way through a farm, it is competent for witnesses who are acquainted with the farm, and familiar with the use and production of such property and its value, to give their opinion as to the extent of damage which the construction of the road over the farm will occasion. *Keithsburg & E. R. Co.* v. *Henry*, 79 *Ill.* 290.—FOLLOWED IN Chicago, P. & St. L. R. Co. *v.* Nix, 137 Ill. 141.—*Cairo & St. L. R. Co.* v. *Woosley*, 85 *Ill.* 370.

A person whose land has been taken for a railroad may, on a trial before a sheriff's jury for the assessment of damages, testify to his opinion of the amount of damage which he has sustained, and may prove actual recent sales, before or since the date of the warrant for the jury, of other lands in the vicinity whose situation is similar to that of his own; but he cannot be allowed to introduce in evidence the opinions of others as to the value of other lands in the vicinity. *Shattuck* v. *Stoneham Branch R. Co.*, 6 *Allen* (*Mass.*) 115.—CRITICISED IN Burlington & M. R. R. Co. *v.* Beebe, 14 Neb. 463.

Witnesses shown to be qualified to testify on the subject may, in the discretion of the court, be permitted to give their estimate of the damages to a particular tract from the construction of a railway through it, or the court may require them, in the first instance, to state the basis of their estimate. *Minnesota Belt Line R. & T. Co.* v. *Gluek*, 45 *Minn* 463, 48 *N. W. Rep.* 194. *Nevada & M. R. Co.* v. *De Lissa*, 103 *Mo.* 125, 15 *S. W. Rep.* 366.—QUOTING AND FOLLOWING Springfield & S. R. Co. *v.* Calkins, 90 Mo. 538.—*St. Louis, K. & N. W. R. Co.* v. *St. Louis Union Stock Yard Co.*, 57 *Am. & Eng. R. Cas.* 677, 120 *Mo.* 541, 25 *S. W. Rep.* 399. *State Line R. Co.* v. *Playford*, (*Pa.*) 14 *Atl. Rep.* 355. *Texas & St. L. R. Co.* v. *Young*, 13 *Am. & Eng. R. Cas.* 544, 60 *Tex.* 201. *Grafton & G. R. Co.* v. *Foreman*, 20 *Am. & Eng. R. Cas.* 215, 24 *W. Va.* 662.

In a suit against a railroad for flooding lands, a witness who lives a short distance from the land and frequently passes it may testify as to the amount of damage, though he has not been on the land since the injury complained of. *Gulf, C. & S. F. R. Co.* v. *Harmonson*, (*Tex. Civ. App.*) 22 *S. W. Rep.* 764.

Where a lady sues to recover damages for a delay in receiving her baggage, including wearing apparel, it is competent to allow her to testify as to the amount it was worth to her during the time of the delay. Such evidence is but an opinion and is not binding on the jury as to the amount fixed, but may aid them in assessing her damages. *Gulf, C. & S. F. R. Co.* v. *Vancil*, 2 *Tex. Civ. App.* 427, 21 *S. W. Rep.* 303.

123. Value before and after location of road. — On an appeal from an assessment of damages done to a farm by reason of the appropriation of a right of way through it for a railroad, it is competent for a witness who is a farmer, and well acquainted with the market value of land in the vicinity, to testify to the value of the farm before and after the location of the railroad. *Kansas C. R. Co.* v. *Allen*, 5 *Am. & Eng. R. Cas.* 362, 24 *Kan.* 33; *former appeal* 22 *Kan.* 285. *Evansville, I. & C. S. L. R. Co.* v. *Cochran*, 10 *Ind.* 560. —OVERRULED IN Jeffersonville, M. & I. R. Co. *v.* Bowen, 40 Ind. 545. REVIEWED IN Simmons *v.* St. Paul & C. R. Co., 18 Minn. 184 (Gil. 168).—*Ohio Valley R. & T.*

Co. v. *Kerth*, 130 *Ind.* 314, 30 *N. E. Rep.* 298. *Curtis* v. *St. Paul, S. & T. F. R. Co.*, 20 *Minn.* 28 (*Gil.* 19).—FOLLOWING Simmons *v.* St. Paul & C. R. Co., 18 Minn. 184 (Gil. 168); Colvill *v.* St. Paul & C. R. Co., 19 Minn. 283 (Gil. 240); Lehmicke *v.* St. Paul, S. & T. F. R. Co., 19 Minn. 464 (Gil. 406).—FOLLOWED IN Sherwood *v.* St. Paul & C. R. Co., 21 Minn. 127.—*Sigafoos* v. *Minneapolis, L. & M. R. Co.*, 36 *Am. & Eng. R. Cas.* 675, 39 *Minn.* 8, 38 *N. W. Rep.* 627. *Republican Valley R. Co.* v. *Arnold*, 10 *Am. & Eng. R. Cas.* 219, 13 *Neb.* 485, 14 *N. W. Rep.* 478.—OVERRULING Fremont, E. & M. V. R. Co. *v.* Whalen, 11 Neb. 587.—APPLIED IN Omaha *v.* Kramer, 25 Neb. 489, 41 N. W. Rep. 295.—*Blakeley* v. *Chicago, K. & N. R. Co.*, 25 *Neb.* 207, 40 *N. W. Rep.* 956. *Omaha* v. *Kramer*, 25 *Neb.* 489, 41 *N. W. Rep.* 295.—APPLYING Republican Valley R. Co. *v.* Arnold, 13 Neb. 485.—*Burlington & M. R. Co.* v. *White*, 28 *Neb.* 166, 44 *N. W. Rep.* 95. *San Antonio & A. P. R. Co.* v. *MacGregor*, 2 *Tex. Civ. App.* 586, 22 *S. W. Rep.* 269.

Or the witnesses may give their opinion directly of the amount of damages accruing from taking the land. *Texas & St. L. R. Co.* v. *Kirby*, 44 *Ark.* 103.

Where a pasture and cattle corrals are injured but not destroyed by the right of way, it is improper for a witness to give his estimate of the amount of damages thereto; he should describe how they were injured, and their value immediately before they were injured and immediately after. *Ottawa, O. C. & C. G. R. Co.* v. *Adolph*, 41 *Kan.* 600, 21 *Pac. Rep.* 643.

When the company's witnesses have stated their opinion of such difference in values, it is proper, on cross-examination, in order to test the value of their opinions, to ask them if in their judgments it would make any difference that the owner had no right to cross the right of way taken. *Sigafoos* v. *Minneapolis, L. & M. R. Co.*, 36 *Am. & Eng. R. Cas.* 675, 39 *Minn.* 8, 38 *N. W. Rep.* 627.

Compensation includes not only the value of the portion of land taken for a right of way, but also the diminution of the value of that from which it is severed, and this may always be proved by the opinions of competent witnesses; but on the other hand, the opinions of witnesses, though well informed as to how much a party will be injured in other respects, independently of the diminution of the value, are improper, as such opinions are merely matters of speculation. *Rochester & S. R. Co.* v. *Budlong*, 6 *How. Pr. (N. Y.)* 467.

The true rule of damages to an abutting owner for constructing and operating a railroad in the street is the difference in value of the property before and the value after the location of the road, but this is to be determined by the jury from all the facts in evidence, and not by the mere opinion of witnesses, except so far as opinions may be received on questions of value. So it is improper to ask a witness: "What difference is there in the value of this property with the track there and with it somewhere else?" *Columbus, H. V. & T. R. Co.* v. *Gardner*, 32 *Am. & Eng. R. Cas.* 243, 30 *Am. & Eng. R. Cas.* 409, 45 *Ohio St.* 309, 11 *West. Rep.* 264, 13 *N. E. Rep.* 69.—FOLLOWING Atlantic & G. W. R. Co. *v.* Campbell, 4 Ohio St. 583; Cleveland & P. R. Co. *v.* Ball, 5 Ohio St. 573. QUOTING Lake Shore & M. S. R. Co. *v.* Cincinnati, S. & C. R. Co., 30 Ohio St. 604. REVIEWING Powers *v.* Hazelton & L. R. Co., 33 Ohio St. 429.

In proceedings to assess damages for a right of way, a witness was called to testify as to the difference in the market value of the land through which the railroad passed, before and after its construction. He testified that he was not much acquainted with the land; that he had been on the lower part of it, but knew nothing at all about the upper part; that he had seen the lower part seven or eight years before, but had not seen it for four or five years before the railroad was built; that he knew nothing whatever of the quality of the upper part, which was the greater part of the tract; and that his estimate was made with reference solely to the lower part, which he knew. *Held*, that he had not sufficient knowledge of the facts upon which to base an opinion on the subject to be testified to, and was, therefore, incompetent. *Pittsburgh, V. & C. R. Co.* v. *Vance*, 115 *Pa. St.* 325, 8 *Atl. Rep.* 764.

124. How far opinions may be given.*—It is competent for witnesses to give their opinion as to the amount of damage to owners of land by the construction of a railroad. *Galena & S. W. R. Co.* v. *Haslam*, 73 *Ill.* 494.—DISTINGUISHED IN

* Eminent domain. Owner of land a competent witness to testify as to depreciation of land not taken, see note, 51 AM. & ENG. R. CAS. 602.

Peoria G. L. & C. Co. *v.* Peoria Terminal R. Co., 146 Ill. 372.

So a witness may be allowed, without showing his experience in such matters, to give his opinion as to what damage the construction and operation of a railroad will be to the parts of the land not taken for right of way. *Chicago, P. & St. L. R. Co.* v. *Nix*, 137 *Ill.* 141, 27 *N. E. Rep.* 81.

Where a spring is destroyed by a railway, it is not error, in the trial of the question of damages to the land, to allow one of the company's witnesses, who has testified to the damage, to be asked on cross-examination how much damage the destruction of a spring of a certain capacity would be to the land. *Winklemans* v. *Des Moines N. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 186, 62 *Iowa* 11, 17 *N. W. Rep.* 82.

Upon the question of the value of property, real or personal, and the amount of damage done to it, parties shown to be acquainted with the value or damage may, in connection with the facts, state their opinions as to the same. *Springfield & S. R. Co.* v. *Calkins*, 90 *Mo.* 538, 3 *S. W. Rep.* 82. —QUOTED AND FOLLOWED IN Nevada & M. R. Co. *v.* De Lissa, 103 Mo. 125.—*Simmons* v. *St. Paul & C. R. Co.*, 18 *Minn.* 184 (*Gil.* 168).—FOLLOWED IN Colvill *v.* St. Paul & C. R. Co., 19 Minn. 283 (Gil. 240); Lehmicke *v.* St. Paul, S. & T. F. R. Co., 19 Minn. 464 (Gil. 406); Curtis *v.* St. Paul, S. & T. F. R. Co., 20 Minn. 28 (Gil. 19).—*Brainard* v. *Boston & N. Y. C. R. Co.*, 12 *Gray* (*Mass.*) 407. *McKeynolds* v. *Kansas City, C. & S. R. Co.*, 110 *Mo.* 484, 19 *S. W. Rep.* 824. *Rochester & S. R. Co.* v. *Budlong*, 10 *How. Pr.* (*N. Y.*) 289.—DISAPPROVED IN Roberts *v.* New York El. R. Co., 128 N. Y. 455. REVIEWED IN Blair *v.* Milwaukee & P. du C. R. Co., 20 Wis. 262.—*Beck* v. *Pennsylvania, P. & B. R. Co.*, 148 *Pa. St.* 271, 23 *Atl. Rep.* 900. *Seattle & M. R. Co.* v. *Gilchrist*, 4 *Wash.* 509, 30 *Pac. Rep.* 738. *Snyder* v. *Western Union R. Co.*, 25 *Wis.* 60.—FOLLOWING Robbins *v.* Milwaukee & H. R. Co., 6 Wis. 636.—EXPLAINED IN Neilson *v.* Chicago, M. & N. W. R. Co., 14 Am. & Eng. R. Cas. 239, 58 Wis. 516. FOLLOWED IN Esch *v.* Chicago, M. & St. P. R. Co., 36 Am. & Eng. R. Cas. 620, 72 Wis. 229, 39 N. W. Rep. 129; Parks *v.* Wisconsin C. R. Co., 33 Wis. 413; Hutchinson *v.* Chicago & N. W. R. Co., 37 Wis. 582. QUOTED IN Washburn *v.* Milwaukee & L. W. R. Co., 20 Am. & Eng. R. Cas. 225, 59 Wis. 364. REVIEWED IN Small *v.* Chicago, R. I. & P. R. Co., 50 Iowa 338. REVIEWED AND APPLIED IN Driver *v.* Western Union R. Co., 32 Wis. 569.—*Wooster* v. *Sugar River Valley R. Co.*, 10 *Am. & Eng. R. Cas.* 499, 57 *Wis.* 311, 15 *N. W. Rep.* 401.

In the trial of an appeal from an award of damages the court permitted plaintiff, as a witness, to answer the question: "How much less was the farm worth immediately after the railroad went through, per acre, than it was before?" *Held*, error, as it involved substantially the subject-matter the jury were called upon to determine. *Chicago, K. & W. R. Co.* v. *Muller*, 47 *Am. & Eng. R. Cas.* 188, 45 *Kan.* 85, 25 *Pac. Rep.* 210.—FOLLOWING Wichita & W. R. Co. *v.* Kuhn, 38 Kan. 675.

In an action of trespass against a company for entering upon land and making a cut before a report in condemnation proceedings, it is proper for plaintiff to ask a witness acquainted with the property and the cut: "Considering the property as you saw it when you were there, with the cut through it, what, in your opinion, would the market value of the property be lessened at that time by reason of the cut, as it was then, supposing the defendant had gone off and abandoned it afterwards?" *Leber* v. *Minneapolis & N. W. R. Co.*, 29 *Minn.* 256, 13 *N. W. Rep.* 31.

A witness testifying as to injury inflicted on a tract of land by a railroad running through it may give his opinion as to the extent to which the land next to the road would be injured, and may illustrate such opinion by reference to a map in evidence. *St. Louis, O. H. & C. R. Co.* v. *Fowler*, 113 *Mo.* 458, 20 *S. W. Rep.* 1069.

It is improper to inquire of such witness on cross-examination whether the residue of the tract was worth as much per acre after the right of way was taken out as it was before, since such question permits the witness to set off against the damages any benefit the land might, in common with other lands in the vicinity, receive from the construction of the railroad. *St. Louis, O. H. & C. R. Co.* v. *Fowler*, 113 *Mo.* 458, 20 *S. W. Rep.* 1069.

Where a car is run against a horse, frightening him and causing him to run away, it is error to allow witnesses to testify that the occurrence will reduce the market value of the horse fifty per cent. though he may not run away again for years. *Van Wag-*

oner v. *New York Cement Co.*, 36 *Hun* (*N. Y.*) 552.—DISTINGUISHING Filer *v.* New York C. R. Co., 49 N. Y. 42.

The question "To what amount, if any, is your property depreciated in market value by reason of the construction and operation of the defendant's railroad, taking into consideration the physical disturbances to said property only, if any, such as noise, smoke, noxious vapors, and vibrations, and excluding from your consideration all damages and inconveniences sustained in common with the community at large" is objectionable upon the ground that it calls for the opinion of the witness upon a matter involving a mixed question of law and fact. *Gainesville, H. & W. R. Co.* v. *Hall*, 44 *Am. & Eng. R. Cas.* 51, 78 *Tex.* 169, 14 *S. W. Rep.* 259.

In a proceeding to condemn land, it is competent for a witness to testify as to how much, in his opinion, land lying on one side of the railroad will be diminished in value by reason of the drainage being obstructed, when the character of the land and the direction of the drainage has been shown and it appears from the evidence that the road is to be constructed upon a grade which will naturally obstruct the drainage. *Seattle & M. R. Co.* v. *Gilchrist*, 4 *Wash.* 509, 30 *Pac. Rep.* 738.

It is proper to permit a witness for a railroad company who has given his opinion of the effect of the railroad on the market value of plaintiff's land to be cross-examined as to the effect upon such value of the probability or possibility that horses may be frightened or fire communicated by passing locomotives and trains. *Wooster* v. *Sugar River Valley R. Co.*, 10 *Am. & Eng. R. Cas.* 499, 57 *Wis.* 311, 15 *N. W. Rep.* 401.

125. As to measure of damages.—It is error to permit a witness to give his opinion as to the measure of damages, that being matter of law. *Houston & T. C. R. Co.* v. *Burke*, 9 *Am. & Eng. R. Cas.* 59, 55 *Tex.* 323, 40 *Am. Rep.* 808.—FOLLOWED IN Gregory *v.* New York, L. E. & W. R. Co., 55 Hun 303, 28 N. Y. S. R. 726, 8 N. Y. Supp. 525.

126. Means of knowledge.—Where witnesses are shown to possess the knowledge that will enable them to form a proper judgment as to the value of land over which a company is proceeding to condemn a right of way, their opinion as to how the land will be affected by taking a portion of it is competent evidence. *Rochester & S. R. Co.* v. *Budlong*, 6 *How. Pr.* (*N. Y.*) 467.

When witnesses are called to give their opinion as to the extent to which a tract of land is injured by the construction and operation of a railway through it, they may, as bearing on the weight to be given to such opinion, state that a railway runs through their own land. *Dallas, P. & S. E. R. Co.* v. *Day*, 3 *Tex. Civ. App.* 353, 22 *S. W. Rep.* 538.

127. Ignorance of value of property.—Opinions of farmers who reside in the vicinity of a particular farm and who are acquainted therewith, but who cannot testify to its market value or its usable or productive value, are inadmissible for the purpose of showing how much the farm is depreciated in value by the appropriation of a right of way for a railroad across it. *Ottawa, O. C. & C. G. R. Co.* v. *Fisher*, 42 *Kan.* 675, 22 *Pac. Rep.* 713.—QUOTING Leroy & W. R. Co. *v.* Ross, 40 Kan. 598; Chicago, K. & W. R. Co. *v.* Dill, 41 Kan. 736, 21 Pac. Rep. 778; Kansas City & S. W. R. Co. *v.* Ehret, 41 Kan. 22. REVIEWING Leavenworth, T. & S. W. R. Co. *v.* Paul, 28 Kan. 816.

Opinions of witnesses, based upon a mere knowledge of the results generally following the construction and operation of railways, are not competent evidence in a condemnation proceeding. *Elizabethtown & P. R. Co.* v. *Helm*, 8 *Bush.* (*Ky.*) 681.

In an action for damages for the appropriation of a right of way through farming land, it is error to permit a witness who said he did not know the market value of the land to testify that the land was damaged ten dollars per acre by reason of the construction of the road. *Chicago, K. & W. R. Co.* v. *Stewart*, 50 *Kan.* 33, 31 *Pac. Rep.* 668.—REVIEWING Chicago, K. & W. R. Co. *v.* Dill, 41 Kan. 736.

A witness who has no knowledge of the market value of lands in the neighborhood is incompetent to testify that a railroad is a "disadvantage to the market value" of the land. *Gorgas* v. *Philadelphia, H. & P. R. Co.*, 51 *Am. & Eng. R. Cas.* 593, 144 *Pa. St.* 1, 22 *Atl. Rep.* 715.

A witness called to testify as to damages to lands who was but thirteen years of age when the injuries complained of were committed, and was then without definite knowledge of the lands, is incompetent to testify as to the extent to which the market value

thereof was affected. *Gallagher* v. *Kemmerer*, 144 *Pa. St.* 509, 22 *Atl. Rep.* 970.

d. Speed.

128. In general.—The rules or customs which regulate the speed of railroad trains, not being a matter of common knowledge, are a legitimate subject of proof; hence a witness may be allowed to testify what was the usual speed of running trains on a spur-track nearly two miles long. *Kansas City, M. & B. R. Co.* v. *Webb*, 97 *Ala.* 157, 11 *So. Rep.* 888.

Where the question of the speed of a train is involved, opinions of witnesses may be received as to that fact. *Chicago, B. & Q. R. Co.* v. *Johnson*, 8 *Am. & Eng. R. Cas.* 225, 103 *Ill.* 512. *Pennsylvania Co.* v. *Conlan*, 6 *Am. & Eng. R. Cas.* 243, 101 *Ill.* 93. —DISTINGUISHED IN Chicago & A. R. Co. *v.* Dillon, 32 Am. & Eng. R. Cas. 1, 123 Ill. 570. —*Evansville & T. H. R. Co.* v. *Crist*, 116 *Ind.* 446, 19 *N. E. Rep.* 310, 2 *L. R. A.* 450. *Van Horn* v. *Burlington, C. R. & N. R. Co.*, 7 *Am. & Eng. R. Cas.* 591, 59 *Iowa* 33, 12 *N. W. Rep.* 752. — DISTINGUISHED IN Bostwick *v.* Minneapolis & P. R. Co., 2 N. Dak. 440.—*Pence* v. *Chicago, R. I. & P. R. Co.*, 42 *Am. & Eng. R. Cas.* 126, 79 *Iowa* 389, 44 *N. W. Rep.* 686. *Thomas* v. *Chicago & G. T. R. Co.*, 86 *Mich.* 496, 49 *N. W. Rep.* 547.—FOLLOWING Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 104.—*Walsh* v. *Missouri Pac. R. Co.*, 102 *Mo.* 582, 14 *S. W. Rep.* 873, 15 *S. W. Rep.* 757. *Nutter* v. *Boston & M. R. Co.*, 60 *N. H.* 483. *Northrup* v. *New York, O. & W. R. Co.*, 37 *Hun* (*N. Y.*) 295.—APPLYING Salter *v.* Utica & B. R. R. Co., 59 N. Y. 631.— *Ward* v. *Chicago, St. P., M. & O. R. Co.*, 85 *Wis.* 601, 55 *N. W. Rep.* 771.

A non-expert witness may give an opinion as to the speed at which a train was moving. *Louisville, N. A. & C. R. Co.* v. *Hendricks*, 128 *Ind.* 462, 28 *N. E. Rep.* 58. *Louisville, N. A. & C. R. Co.* v. *Jones*, 28 *Am. & Eng. R. Cas.* 170, 108 *Ind.* 551, 9 *N. E. Rep.* 476. *Detroit & M. R. Co.* v. *Van Steinburg*, 17 *Mich.* 99.—FOLLOWED IN Thomas *v.* Chicago & G. T. R. Co., 86 Mich. 496.—*Chicago, B. & Q. R. Co.* v. *Clark*, 38 *Am. & Eng. R. Cas.* 192, 26 *Neb.* 645, 42 *N. W. Rep.* 703. *Hoppe* v. *Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 7.., 61 *Wis.* 357, 21 *N. W. Rep.* 227.—DISTI" GUISHING Muster *v.* Chicago, M. & St. P. R. Co., 61 Wis. 325.

Evidence as to the space within which witnesses had observed certain trains stopped is not admissible where the witnesses are unable to state the speed of the trains at the time they were stopped. *Louisville & N. R. Co.* v. *Marriott*, (*Ky.*) 19 *Am. & Eng. R. Cas.* 509.

In order to show negligence on the part of a company in running a train at too great a speed, a witness was called who had been traveling on trains as a mail agent regularly for two years, and he was asked: "At what rate of speed should the train have been running to stop at the usual stopping-place?" *Held*, that the question was proper. To constitute an expert it is not necessary that one should be connected with the management of the train. If he is in a position to witness the result of the management, and to observe the effect when the means of checking the train are applied, he may be as competent to express an opinion as a conductor or other person in charge of the train. *Detroit & M. R. Co.* v. *Van Steinburg*, 17 *Mich.* 99.

It is not error to allow witnesses to compare the speed of a train at the time of an accident with the speed of the same train on other days. Such evidence may be worth but little, but it is competent as far as it goes. *Guggenheim* v. *Lake Shore & M. S. R. Co.*, 32 *Am. & Eng. R. Cas.* 89, 66 *Mich.* 150, 9 *West Rep.* 903, 33 *N. W. Rep.* 161.

But opinions on relative speed, without some standard of rapidity, are of no value by themselves. *Grand Rapids & I. R. Co.* v. *Huntley*, 38 *Mich.* 537.

129. Opinions of passengers.—The speed of trains is not a matter for scientific testimony, but it cannot be shown from the opinions of passengers, observing only from the inside, unless their experience and observation is such as to make their judgment reliable. *Grand Rapids & I. R. Co.* v. *Huntley*, 38 *Mich.* 537.

Though it is likely true that the opinion of a person on a train should not ordinarily be received in evidence as to its speed, yet no harm can arise when there is other unexceptionable evidence to the same effect. *Hoffman* v. *Metropolitan St. R. Co.*, 51 *Mo. App.* 273.

130. As to safety of a given rate.—In an action by a brakeman for injury received while coupling cars, the question whether the rate of speed of the cars was

dangerous is in the nature of a conclusion to be drawn from the facts proven and such others as are in the common knowledge of all men, and it is the duty of the jury to draw that conclusion; and while the opinions of witnesses who are qualified by their experience to express an opinion on the subject are competent evidence, they are not conclusive upon the jury, and a finding by the jury not in harmony with such opinions cannot be set aside by the supreme court as being without warrant in the evidence. *Henry* v. *Sioux City & P. R. Co.*, 75 *Iowa* 84, 39 *N. W. Rep.* 193.—DISTINGUISHING Nichols *v.* Chicago, R. I. & P. R. Co., 69 Iowa 156.

Where a passenger is injured in a wreck which is claimed to have been caused by running at an unusual rate of speed, and a witness for the passenger, speaking of the rate of speed, states that all were nervous and apprehensive, and the effect and sensations were those of very fast, and what seemed to him a very reckless, speed, the testimony is not objectionable as stating the conclusion of the witness instead of facts. *Galveston, H. & S. A. R. Co.* v. *Wesch*, (*Tex. Civ. App.*) 21 *S. W. Rep.* 62.

2. *What Questions Call for Expert Testimony.*

131. In general.*—Plaintiff's husband was employed in car works and was caught in a rapidly revolving shaft and killed. There was evidence tending to show that the danger of the shaft was latent, and that the deceased did not see it. *Held*, that it was proper to admit the evidence of experts that such a shaft was dangerous. *Pullman Palace Car Co.* v. *Harkins*, 55 *Fed. Rep.* 932, 5 *C. C. A.* 326, 17 *U. S. App.* 22; *affirming* 52 *Fed. Rep.* 724.

Whether a railroad was finished at a certain date is a question of fact involving science; it is not a mixed question of law and fact, and the opinion of experts is admissible concerning it. *Hilton* v. *Mason*, 92 *Ind.* 157.

The opinion of an expert is incompetent as to the value of the reversion of land over which a railroad has been located. *Boston & W. R. Corp.* v. *Old Colony & F. R. R. Corp.*, 3 *Allen* (*Mass.*) 142.

In a suit to recover damages for the negligent killing of a child five years of age, the testimony of witnesses who are shown by their knowledge or experience to be qualified to express an opinion upon the pecuniary value to its parents of the services and assistance of such a child from the age named until it arrived at the age of twenty-one years, over and above the cost of its care, education, maintenance, and support, is admissible, not for the purpose of controlling, but of aiding, the jury in arriving at a just conclusion. *Rajnowski* v. *Detroit, B. C. & A. R. Co.*, 74 *Mich.* 20, 41 *N. W. Rep.* 847.

Opinions of witnesses possessing peculiar skill are admissible whenever the subject of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. *Goins* v. *Chicago, R. I. & P. R. Co.*, 47 *Mo. App.* 173; *see* 37 *Mo. App.* 676. —QUOTING Davidson *v.* St. Paul, M. & M. R. Co., 34 Minn. 51.—*Hamilton* v. *Des Moines Valley R. Co.*, 36 *Iowa* 31. *Benjamin* v. *Metropolitan St. R. Co.*, 50 *Mo. App.* 602.

Plaintiff was injured by a collision between a street car of one of the defendants in which she was a passenger, and the truck of the other defendant, the collision occurring while the car was crossing, and the truck was passing along, a street. A witness who had driven trucks for years was asked, and permitted to answer under objection and exception, a question as to within what time and space a loaded truck could be stopped. *Held*, no error; the court, however, stating that the question was barely competent, and that this class of testimony was not to be encouraged. *O'Neil* v. *Dry Dock, E. B. & B. R. Co.*, 52 *Am. & Eng. R. Cas.* 573, 129 *N. Y.* 125, 29 *N. E. Rep.* 84, 41 *N. Y. S. R.* 107; *affirming* 27 *J. & S.* 123, 36 *N. Y. S. R.* 934, 15 *N. Y. Supp.* 84.

The opinions of witnesses as to the value of land taken by a company, or as to the damage done to it by the location and construction of the road, cannot be admitted merely because such witnesses reside near the land, and are acquainted with it and the manner in which it is crossed by the railroad; but to render the opinions of witnesses admissible upon such subjects, as well as upon every other, the witnesses must be shown to be experts and therefore

* Expert testimony, see note, 8 AM. & ENG. R. CAS. 76.

Eminent domain. Expert evidence as to sales of adjoining lands, see note, 51 AM. & ENG. R. CAS. 602.

to possess peculiar qualifications for judging of the matters concerning which they swear. *Buffum* v. *New York & B. R. Co.*, 4 *R. I.* 221.

The same rule applies also to the exclusion, as testimony, of the opinions of witnesses who are not experts as to the benefits derived to the land of the claimant, not taken, by the location and construction of the railroad, when such benefits are attempted to be set off against the damages claimed by him. *Buffum* v. *New York & B. R. Co.*, 4 *R. I.* 221.

Witnesses who know the position and character of an open waterway across a track are not for that reason competent to state their opinion as to the danger of the place, and of the need of a notice to one pushing a handcar over it. *Couch* v. *Charlotte, C. & A. R. Co.*, 28 *Am. & Eng. R. Cas.* 331, 22 *So. Car.* 557.

A track was constructed at a public crossing so that sand from time to time was washed upon the track, making it unsafe. *Held*, that it was competent to allow expert witnesses to testify that the road-crossing was not properly constructed, or to the readiness with which the sand washed upon the track could be seen, and the chances of stopping the engine after it had been seen. *St. Louis, A. & T. R. Co.* v. *Johnston*, 78 *Tex.* 536, 15 *S. W. Rep.* 104. —FOLLOWED IN Ft. Worth & D. C. R. Co. *v.* Wilson, 3 Tex. Civ. App. 583.

The presumption that a company was able to furnish cars for transporting live stock, as promised, at a certain time and place, can be overcome only by the evidence of some person who had knowledge of the general resources of the company in that respect at the time in question. The testimony of a station agent and of a train despatcher who are not shown to have any such knowledge is properly rejected. *Ayres* v. *Chicago & N. W. R. Co.*, 40 *Am. & Eng. R. Cas.* 108, 75 *Wis.* 215, 43 *N. W. Rep.* 1122.

132. Expectancy of life.*—In an action for a personal injury, it is competent to prove by a life-insurance agent the life expectancy of a man of plaintiff's age, under the American Tables of Mortality. *Greer* v. *Louisville & N. R. Co.*, (*Ky.*) 21 *S. W. Rep.* 649. *Galveston, H. & S. A. R. Co.* v. *Cooper*, 2 *Tex. Civ. App.* 42, 20 *S. W. Rep.* 990.—NOT FOLLOWING Texas Mexican R. Co. *v.* Douglass, 69 Tex. 694.

Such evidence is admissible, but not necessary. The law contemplates that the jury shall judge of this upon proof being made of the party's age and physical condition. *Gulf, C. & S. F. R. Co.* v. *Compton*, 44 *Am. & Eng. R. Cas.* 637, 75 *Tex.* 667, 13 *S. W. Rep.* 667.

133. Safety of appliances. — The superintendent of a railroad, who has been employed on railroads for twenty years in various capacities, may give his opinion as an expert as to the value and usefulness of "whipping straps," or pendent ropes, as cautionary signals to brakemen when a train is approaching a low bridge or tunnel; but he cannot give his opinion as to the prudent management of the road. *Louisville & N. R. Co.* v. *Hall*, 39 *Am. & Eng. R. Cas.* 298, 87 *Ala.* 708, 4 *L. R. A.* 710, 6 *So. Rep.* 277.

Witnesses who are shown to have sufficient knowledge on the subject may testify, as experts, as to whether the drawheads used on defendant's cars at the time of the injury received by plaintiff were such as were generally used on well regulated railroads. *Richmond & D. R. Co.* v. *Jones*, 92 *Ala.* 218, 9 *So. Rep.* 276.

The opinion of an expert is not admissible to show how brakes should be applied to prevent a train from breaking in two, as that is a question for the jury to determine from all the facts of the case. *Burns* v. *Chicago, M. & St. P. R. Co.*, 28 *Am. & Eng. R. Cas.* 409, 69 *Iowa* 450, 30 *N. W. Rep.* 25.—DISTINGUISHING Baldwin *v.* Chicago, R. I. & P. R. Co., 50 Iowa 680; Cincinnati & Z. R. Co. *v.* Smith, 22 Ohio St. 246; Bellefontaine & I. R. Co. *v.* Bailey, 11 Ohio St. 333.

Where a witness is shown to be an expert and competent to express an opinion, he may give his opinion as to the character and safety of a switch as it was shown to be at the time a broken rail caused the derailment of an engine. *Clapp* v. *Minneapolis & St. L. R. Co.*, 36 *Minn.* 6, 29 *N. W. Rep.* 340.

The questions being whether plaintiff's foot was caught by a splinter on the inside of a track or rail, and as to whether defendant is chargeable with negligence therefor, danger from such cause not being self-evident, it is competent for defendant to show by experienced witnesses that such accidents have been unknown. *Doyle* v. *St. Paul, M.*

* See also *post*, **148.**

& M. R. Co., 41 *Am. & Eng. R. Cas.* 376, 42 *Minn.* 79, 43 *N. W. Rep.* 787. — DISTINGUISHED IN Lake Erie & W. R. Co. *v.* Mugg, 132 Ind. 168.

A witness having special knowledge on the subject, derived from experience in the business, may give his opinion whether a particular stable was a proper and suitable one in which to house horses. *Armstrong* v. *Chicago, M. & St. P. R. Co.*, 45 *Minn.* 85, 47 *N. W. Rep.* 459.

The opinion of experts as to whether a certain arrangement of machinery was dangerous cannot be received in evidence, where the facts are such that, when placed before a jury and explained to them, they are as competent as the witnesses to form an opinion as to whether or not it was safe. *Freeberg* v. *St. Paul Plow-Works*, 48 *Minn.* 99, 50 *N. W. Rep.* 1026.

Where prior witnesses have described very minutely the condition in which they found rails and the road immediately after the accident, an expert who has had years of experience in building roads and in superintending them may give his opinion as to whether the rails had been properly laid. *Carpenter* v. *Central Park, N. & E. R. R. Co.*, 11 *Abb. Pr. N. S.* (*N. Y.*) 416, 4 *Daly* 550, *mem.*

Plaintiff's intestate was killed by the giving way of a partition in a coal bin in which he was employed. *Held*, that it was error to admit the testimony of experts as to the safety of the bin. *Davis* v. *New York, L. E. & W. R. Co.*, 23 *N. Y. Supp.* 358, 69 *Hun* 174, 52 *N. Y. S. R.* 740. — QUOTING Van Wycklen *v.* Brooklyn, 118 N. Y. 424, 24 N. E. Rep. 179.

Plaintiff was injured while operating a crane or hoisting apparatus of unusual and peculiar structure. *Held*, that expert evidence was admissible to prove that it was of sufficient capacity and repair for the use intended. *Bemis* v. *Central Vt. R. Co.*, 25 *Am. & Eng. R. Cas.* 138, 58 *Vt.* 636, 3 *Atl. Rep.* 531.

In an action for injuries caused by a turntable used on a street railway, a witness shown to be an expert may testify as to the kind of turntables in general use, as to whether the turntable in question was one of the most approved turntables in use, and as to defects therein and how they could be remedied. *Fitts* v. *Cream City R. Co.*, 15 *Am. & Eng. R. Cas.* 462, 59 *Wis.* 323, 18 *N. W. Rep.* 186.

134. Cattle-guards.—Where a witness is shown to have no greater knowledge about railroads and cattle-guards than other ordinarily intelligent farmers who live near the track, he is not competent to testify as an expert as to the sufficiency of a cattle-guard. He might properly be permitted to state any instances he had observed of cattle crossing, or attempting to cross, the guard in question or others like it. *Lake Erie & W. R. Co.* v. *Helmericks*, 38 *Ill. App.* 141.

In an action to recover for horses killed, the opinion of an expert that the construction of a cattle-guard under the track at the place where the horses entered upon it would render the use of the tracks dangerous is inadmissible. *Chicago & E. I. R. Co.* v. *Modesitt*, 124 *Ind.* 212, 24 *N. E. Rep.* 986. *Pennsylvania Co.* v. *Mitchell*, 124 *Ind.* 473, 24 *N. E. Rep.* 1065. *Toledo, St. L. & K. C. R. Co.* v. *Jackson*, 5 *Ind. App.* 547, 32 *N. E. Rep.* 793.

Upon the question of whether the cattle-guards were proper and sufficient to complete the inclosure and prevent domestic animals crossing it, the opinions of witnesses are not admissible; but when the facts relating to the construction and condition of the guards are shown, the jury are capable of forming a correct judgment regarding their sufficiency. *St. Louis & S. F. R. Co.* v. *Ritz*, 19 *Am. & Eng. R. Cas.* 611, 33 *Kan.* 404, 6 *Pac. Rep.* 533.

The question whether a cattle-guard was properly constructed is not one calling for the opinion of an expert. When the manner of its construction is shown, the jury can judge of its fitness for use. *Swartout* v. *New York C. & H. R. R. Co.*, 7 *Hun* (*N. Y.*) 571.

135. Value of crops at different stages of development.—If a witness qualifies himself as an expert, his opinion as to the value of a crop at a particular stage of development should be received. *Gulf, C. & S. F. R. Co.* v. *Simonton*, 2 *Tex. Civ. App.* 558, 22 *S. W. Rep.* 285.

136. Culverts, sluices, and embankments.—A non-expert witness cannot be asked whether an outlet of 100 feet in a railway's roadbed is sufficient to carry off the water of a certain stream in time of ordinary flood, since the question calls for an answer requiring the special knowledge and skill of an expert. *Kansas City, Ft. S. & M. R. Co.* v. *Cook*, 58

Am. & Eng. R. Cas. 654, 57 *Ark.* 387, 21 *S. W. Rep.* 1066.

It is error to reject the testimony of an expert offered by defendant to show that it was not possible for defendant's embankment to back water over plaintiff's land, situated at the distance it was from such embankment. *St. Louis, I. M. & S. R. Co.* v. *Lyman*, 57 *Ark.* 512, 22 *S. W. Rep.* 170.

Testimony that there was no reason why a culvert should have been suspected by the company's servants, and that there was no indication of danger requiring men to watch it, is not admissible, it not appearing that the witnesses were experts or knew anything of railroad embankments or culverts, although they lived in the neighborhood, and had stated the facts and circumstances of the rainfall as touching the culvert in question. *Central R. & B. Co.* v. *Kent*, 84 *Ga.* 351, 10 *S. E. Rep.* 965.

A company was sued for constructing a bridge and embankments so as to divert the water of a creek from its course. Defendant offered to prove by an expert that the abutments of the bridge were properly and skilfully placed, and sufficient to discharge the water in time of flood, but the testimony was excluded. *Held*, error. *Conhocton Stone Road Co.* v. *Buffalo, N. Y. & E. R. Co.*, 3 *Hun* (*N. Y.*) 523, 5 *T. & C.* 651.

A strong wind blew the waters of a gulf out of their usual bounds and they washed away plaintiff's building. It appeared that the land for a considerable distance was level, and he claimed that if it had not been for an embankment erected by defendant company the waves would have passed on without injuring the building. A witness for defendant, after testifying that the wind blew at the rate of sixty miles an hour, was asked: "With a wind like that, what would have been the size of the waves in that immediate vicinity?" It appeared that the witness was acquainted with the locality and had been a seagoing man for many years. *Held*, that his opinion called for was admissible. *Ilfrey* v. *Sabine & E. T. R. Co.*, 76 *Tex.* 63, 13 *S. W. Rep.* 165.—REVIEWED IN Sowles *v.* Moore, 65 Vt. 322.

It is error to admit the testimony of non-experts as to the necessity for the erection of more culverts and sluices, and as to the character and location of the same. Questions of science and skill should be elucidated by witnesses who, by their education and experience, are shown to be competent to judge of the matter. *International & G. N. R. Co.* v. *Malone*, 1 *Tex. App.* (*Civ. Cas.*) 92.

137. Concerning state of the weather.—Plaintiff was a passenger on defendant's car during an unprecedented snowstorm, and was injured by a collision. Defendant claimed that the collision was unavoidable on account of the state of the weather, and that of the tracks caused by such conditions. The employé of the United States signal station was called as a witness by defendant, and testified as to the temperature, snowfall, velocity of the wind, and other circumstances connected with the storm, and that he had been at the station for sixteen years. He was then asked, "In that whole sixteen years did you ever know of a storm involving such a combination of snow, wind, and cold together as the blizzard?" and further, whether during that time there had been such a disturbance of the elements, with such a combination of wind and snow. The severity of the storm seemed to be conceded at the trial. *Held*, that expert testimony was not needed to convice the jury of the severity of the storm, and the questions were properly refused. *Dlabola* v. *Manhattan R. Co.*, 29 *N. Y. S. R.* 149, 8 *N. Y. Supp.* 334, 15 *Daly* 470; *affirmed in* 134 *N. Y.* 585, *mem.*, 45 *N. Y. S. R.* 934, 31 *N. E. Rep.* 628, *mem.*

138. Danger in approaching crossing.—A competent expert may give an opinion as to the distance at which it is safe to stop before going upon a crossing. *New York, C. & St. L. R. Co.* v. *Grand Rapids & I. R. Co.*, 35 *Am. & Eng. R. Cas.* 283, 116 *Ind.* 60, 18 *N. E. Rep.* 182, 15 *West. Rep.* 548.

The evidence of experts as to the custom of railroads in maintaining flagmen at crossings is not admissible where a company is charged with negligence in not maintaining a flagman at a particular place. The point at issue was whether the company exercised due care, which would depend upon the circumstances at the particular place and not upon custom. *Bailey* v. *New Haven & N. Co.*, 107 *Mass.* 496.—QUOTING Shaw *v.* Boston & W. R. Co., 8 Gray (Mass.) 45. REFERRING TO Bradley *v.* Boston & M. R. Co., 2 Cush. (Mass.) 539.

139. Questions requiring medical skill.—Plaintiff offered a surgeon as an expert. The witness had examined plain-

tiff's injury, but had been consulted by plaintiff for the purpose of qualifying him as a witness and not for treatment, and in stating the result he testified, against defendant's objection, to actions and words of plaintiff, while being examined, indicating pain. *Held*, that the evidence was inadmissible. But defendant afterwards called a surgeon who had examined plaintiff, and his testimony as to the character and extent of the injuries agreed essentially with that of plaintiff's surgeon. *Held*, that the error in admitting the former testimony had become immaterial as not injuriously affecting defendant. *Darrigan* v. *New York & N. E. R. Co.*, 23 *Am. & Eng. R. Cas.* 438, 52 *Conn.* 285, 52 *Am. Rep.* 590. *Grand Rapids & I. R. Co.* v. *Huntley*, 38 *Mich.* 537.

In an action for personal injuries to a passenger, it is proper to receive the opinions of medical experts as to the permanence and probable future effect of the injuries. *Cunningham* v. *New York C. & H. R. R. Co.*, 49 *Fed. Rep.* 439.—FOLLOWED IN Reed *v.* Pennsylvania R. Co., 56 Fed. Rep. 184. *Reed* v. *Pennsylvania R. Co.*, 56 *Fed Rep.* 184. — FOLLOWING Cunningham *v.* New York C. & H. R. R. Co., 49 Fed. Rep. 439. —*Johnson* v. *Broadway & S. A. R. Co.*, 2 *Silv. Sup. Ct.* 532, 6 *N. Y. Supp.* 113, 25 *N. Y. S. R.* 162; *affirmed in* 125 *N. Y.* 702, *mem.*, 26 *N. E. Rep.* 752, *mem.*

Medical testimony as to the possible effect of provoking language or vexatious circumstances on plaintiff's health is inadmissible in an action for a tort to which these are merely incidental. *Hufford* v. *Grand Rapids & I. R. Co.*, 18 *Am. & Eng. R. Cas.* 336, 53 *Mich.* 118, 18 *N. W. Rep.* 580.— DISTINGUISHED IN Fell *v.* Northern Pac. R. Co., 44 Fed. Rep. 248; Philadelphia, W. & B. R. Co. *v.* Rice, 26 Am. & Eng. R. Cas. 264, 64 Md. 63.

In an action to recover damages for personal injuries, the probability that the injury will cause permanent ill-health may be proved by experts. *Louisville, N. A. & C. R. Co.* v. *Falvey*, 23 *Am. & Eng. R. Cas.* 522, 104 *Ind.* 409, 3 *N. E. Rep.* 389, 4 *N. E. Rep.* 908.

Where the action is for personal injuries, and it is in issue whether plaintiff had fully recovered, it is competent to ask medical experts whether plaintiff would be likely to recover; what the result would be if he did not fully recover, and whether a certain disease of his spine was curable. *Beckwith* v. *New York C. R. Co.*, 64 *Barb.* (*N. Y.*) 299.

It appeared that several years elapsed between the time of an injury and the time of a trial to recover damages therefor. The evidence tended to show that the injuries continued to the time of trial. *Held*, that the testimony of a physician as to plaintiff's condition four months after the injury was admissible. *Dale* v. *Brooklyn City, H. P. & P. P. R. Co.*, 1 *Hun* (*N. Y.*) 146, 3 *T. & C.* 686; *affirmed in* 60 *N. Y.* 638, *mem.*

Where a female passenger sues for being thrown down and severely injured as she is leaving a car, and testifies as to the injuries received, it is then proper to ask a medical expert whether the precise injury could have been occasioned by the fall. *Montgomery* v. *Long Island R. Co.*, 29 *N. Y. S. R.* 822, 8 *N. Y. Supp.* 811, 55 *Hun.* 611, *mem.*— DISTINGUISHING Strohm *v.* New York, L. E. & W. R. Co., 96 N. Y. 305.

In an action for personal injuries, a physician was called for plaintiff and testified that he had not examined plaintiff for some eleven months before the trial, but at that time he found the injured leg one inch shorter than the other. *Held*, that it was not competent for him to state from that examination and his professional knowledge whether the limb would continue to shorten to the time of the trial. As no reason was given why a re-examination could not be made, evidence should have been given as to the actual state of the limb at the time of the trial. *Kummer* v. *Christopher & T. St. R. Co.*, 46 *N. Y. S. R.* 386, 20 *N. Y. Supp.* 116.

In an action against a street-car company for a personal injury to a passenger, a daughter who is not an expert is not competent to testify that her mother suffered in her head and in her stomach. *Lombard & S. St. Pass. R. Co.* v. *Christian*, 124 *Pa. St.* 114, 23 *W. N. C.* 273, 16 *Atl. Rep.* 628, 46 *Phila. Leg. Int.* 210, 19 *Pittsb. L. J.* (*N. S.*) 404.

140. Questions for civil engineers. —In an action against a railroad for not receiving stone for a bridge, as contracted, the evidence of experts may be introduced to show what constitutes a bridge and its approaches, and whether a dyke is a necessary part thereof. *Union Pac. R. Co.* v. *Clopper*, 131 *U. S.* 192, *App'x.*

The question whether a railroad has or has not been properly constructed at a cer-

tain place for the purposes for which it is being used may be proper for the opinion of an expert witness. *Colorado Midland R. Co.* v. *O'Brien*, 48 *Am. & Eng. R. Cas.* 235, 16 *Colo.* 219, 27 *Pac. Rep.* 701.

In an action against a company to recover damage to crops by flooding plaintiff's upper lands by means of an embankment across a watercourse, defendant called an expert witness and sought to show by him that the overflow was the result of natural causes, and not of the construction of the embankment, which testimony the court refused to admit. *Held*, error. *Ohio & M. R. Co.* v. *Webb*, 142 *Ill.* 404, 32 *N. E. Rep.* 527.—QUOTING Folkes *v.* Chadd, 3 Dougl. 157; Grigsby *v.* Clear Lake Water Works Co., 40 Cal. 396.—FOLLOWED IN Ohio & M. R. Co. *v.* Schmidt, 47 Ill. App. 383.

Whether the structure of a railroad is such as to warrant fast travel is not usually a question for ordinary witnesses. *Grand Rapids & I. R. Co.* v. *Huntley*, 38 *Mich.* 537.

The effect of a bridge as an obstruction of a river may be a subject for the testimony of experts; and their opinions are not excluded by the question being the issue to be decided. *Gault* v. *Concord R. Co.*, 63 *N. H.* 356.

The proper place, as to form and materials, for the construction of a railroad bridge is a question of art, upon which the opinions of experts may be received. *Brown* v. *Mohawk & H. R. Co.*, 1 *How. App. Cas.* (*N. Y.*) 52.

The probable cost of completing a contract for the construction of a railroad may be satisfactorily established by proof of value of the material, labor, and skill required. To effect such proof, resort can be had to the opinion and judgment of men who are shown to have information and experience which qualify them to testify as to such matters. *Waco Tap R. Co.* v. *Shirley*, 45 *Tex.* 355, 13 *Am. Ry. Rep.* 233.

141. Questions for the jury.—(1) *In general.*—When the question to be determined is the result of common experience, or is to be inferred from particular facts, the inference is to be drawn by the jury and not by the witness. If the circumstances out of which negligence is said to arise have been or can be established by proof, the ultimate fact of negligence is to be inferred by the jury and cannot be established by the opinions of witnesses. *Sappenfield* v. *Main St. & A. P. R. Co.*, 91 *Cal.* 48, 27 *Pac. Rep.* 590.

Whether the straight pin which fastened the singletree to the drawhead of a horse-car was safe, or whether, if it should come out, it would be unsafe, are questions for the jury to determine; and the opinion evidence of a street-car driver that from his experience it was not safe, and that in case it should come out the chances are that the horse would get away, is incompetent. *Sappenfield* v. *Main St. & A. P. R. Co.*, 91 *Cal.* 48, 27 *Pac. Rep.* 590.

A pine knot caught in a pilot, causing the engine to leave the track and kill the fireman. In an action against the company it appeared that the place of the accident was one where the road passed through the mountains, and that forest fires were raging at the time, causing rocks, logs, and pieces of timber to roll down on the track. *Held*, that it was not competent for a railroad engineer who was acquainted with the track to testify that it was necessary to have track-walkers at the place. It was the duty of the jury to determine that question. *Denver, S. P. & P. R. Co.* v. *Wilson*, 12 *Colo.* 20, 20 *Pac. Rep.* 340.

Whether it be practicable for a person of ordinary activity, if he is careful, to descend without injury from the upper deck of a car while it is passing over a bridge is a question to be determined by the jury, and not to be referred to the opinion of a witness. *Baltimore & Y. Turnpike Road* v. *Leonhardt*, 27 *Am & Eng. R. Cas.* 194, 66 *Md.* 70, 5 *Atl. Rep.* 346.

The testimony of a physician who has known plaintiff for some years that, in his opinion, she is "shamming before the jury" is incompetent, the jury being as well qualified as the witness to give an opinion on that subject. *Cole* v. *Lake Shore & M. S. R. Co.*, 95 *Mich.* 77, 54 *N. W. Rep.* 638.

Where the action is for causing the death of a female passenger as she was leaving a train, it is not competent to ask a witness whether the train stopped an ample time for all passengers, including ladies, to get off, nor whether it was safer to discharge the passengers at a station or before reaching it. These are questions to be decided by the jury. *Keller* v. *New York C. R. Co.*, 2 *Abb. App. Dec.* (*N. Y.*) 480, 24 *How. Pr.* 172; *affirming* 17 *How. Pr.* 102.

In an action to recover damages for the construction of a road on an embankment in the street opposite plaintiff's premises, it is not competent to ask a witness what has

been the effect upon plaintiff's premises of the construction of the embankment. The jury are the sole judges of whether it damaged plaintiff. *Ranch* v. *New York, L. & W. R. Co.*, 17 *N. Y. S. R.* 401, 2 *N. Y. Supp.* 108.

(2) *The question of negligence.*—The opinion of witnesses offered as experts that damage to freight was occasioned by the negligence of the carrier is not admissible. *East Tenn., V. & G. R. Co.* v. *Wright*, 76 *Ga.* 532.

In an action to recover for a personal injury received by plaintiff while coupling cars, the opinions of witnesses engaged in the same business are inadmissible upon the question whether plaintiff used due care or acted imprudently, as no question of science, skill, or trade is involved. The facts only should be proved, leaving the jury to determine whether due care was used. *Hopkins* v. *Indianapolis & St. L. R. Co.*, 78 *Ill.* 32.—DISTINGUISHED IN Chicago & A. R. Co. *v.* Dillon, 32 Am. & Eng. R. Cas. 1, 123 Ill. 570.

Whether an engineer was acting in the line of his duty at a given time is a question to be determined by the jury from the facts, and opinions of witnesses upon a supposable state of facts are not admissible. *Grand Rapids & I. R. Co.* v. *Ellison*, 39 *Am. & Eng. R. Cas.* 480, 117 *Ind.* 234, 20 *N. E. Rep.* 135.

Where one of the issues is whether the person injured was in the exercise of ordinary care, and there were eye-witnesses as to his conduct at the time of the injury, the opinions of experts as to whether he was generally a careful and skilful man are not competent evidence. *Southern Kan. R. Co.* v. *Robbins*, 41 *Am. & Eng. R. Cas.* 316, 43 *Kan.* 145, 23 *Pac. Rep.* 113.

Ordinary care and prudence in common emergencies is not a question for experts; and unless there is a conflict of testimony the matter may often be taken from the jury as one of universal judgment. *Clinton* v. *Root*, 58 *Mich.* 182, 24 *N. W. Rep.* 667.

In an ordinary case, whether certain acts were negligence, and whether due care required certain things to be done, are not matters for the opinions of experts. *Mantel* v. *Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 362, 33 *Minn.* 62, 21 *N. W. Rep.* 853.

The question whether the appearance of machinery would suggest to a prudent man the necessity of an examination is not one for an expert witness, but is for the jury to determine. *Goodsell* v. *Taylor*, 41 *Minn.* 207, 42 *N. W. Rep.* 873.

142. Handling live stock. — Where an action is brought against a company for breach of contract in failing to furnish cars for the shipment of cattle, whereby the owner is compelled to drive them a considerable distance to another road, a person who is an expert in handling cattle may testify as to how much they were damaged by being so driven. *Missouri Pac. R. Co.* v. *Harmonson*, 4 *Tex. App.* (*Civ. Cas.*) 133, 16 *S. W. Rep.* 539.

Where a witness is shown to be an expert, it is competent for him to give his opinion as to the loss of weight that cattle would suffer from injury received in a wreck, and also as to the amount of shrinkage caused by delay; and such opinions may be given upon a hypothetical case, embracing the circumstances and conditions in evidence. *Ft. Worth & D. C. R. Co.* v. *Greathouse*, 49 *Am. & Eng. R. Cas.* 157, 82 *Tex.* 104, 17 *S. W. Rep.* 834.

143. Construction of rules—Duty of employes.—It is not matter for expert testimony to show that no railroad employé is required to get on or off a train while it is in motion; that neither the conductor nor any other officer can require an employé to get on or off a moving train, and that if such order is given, the employé is not required to obey it. *Central R. Co.* v. *DeBray*, 71 *Ga.* 406.

A copy of the rules of a company was admitted in evidence, showing what was required of switchmen, and what work the deceased switchman was required to do, as well as the means at his hand with which it could be accomplished. The main and side tracks and their distance from each other, and the street crossings and yards, were fully described, and other material facts given in evidence. *Held*, no error to refuse the testimony of other switchmen that in their opinion it was not necessary for the deceased to have been where he was when he received the injury, or to have passed along the track, and that there was space enough to perform his duties properly without going upon such track. *Pennsylvania Co.* v. *Conlan*, 6 *Am. & Eng. R. Cas.* 243, 101 *Ill.* 93.

The inquiry of what are the general duties of a fireman on a switch engine, in a

certain track yard, at a stated time, does not relate to a matter which is the subject of expert testimony and upon which an opinion may be given, but is a question of fact which may be testified to by any witness having personal knowledge thereof. *Missouri Pac. R. Co.* v. *Mackey*, 22 *Am. & Eng. R. Cas.* 306, 33 *Kan.* 298, 6 *Pac. Rep.* 291.

In an action against a company to recover for injuries caused by the negligence of a co-employé, in which action it is alleged in the petition that it was the duty of the engineer in charge of a switch engine to stop it, and plaintiff, the injured party, swears on the trial that the engineer did stop the engine, it is not error for the trial court to exclude the evidence of experts that it was the duty of the engineer to stop the engine under such circumstances. *Weld* v. *Missouri Pac. R. Co.*, 39 *Kan.* 63, 17 *Pac. Rep.* 306.

Whether a rule of a company for the guidance of its employés in the operation of trains was "safe, proper, and sufficient" does not present a question for expert testimony. *Nary* v. *New York, O. & W. R. Co.*, 29 *N. Y. S. R.* 630, 9 *N. Y. Supp.* 153, 55 *Hun* 612, *mem.*; *affirmed in* 125 *N. Y.* 759, *mem.*, 36 *N. Y. S. R.* 1010, *mem.*, 27 *N. E. Rep.* 408, *mem.*

144. Matters of common knowledge.—When the facts from which negligence is sought to be inferred are within the experience of all men of common education, the jury must determine the question of negligence without the aid of experts. *Shafter* v. *Evans*, 53 *Cal.* 32.—QUOTING New England Glass Co. *v.* Lovell, 7 Cush. (Mass.) 321.—*De Berry* v. *Carolina C. R. Co.*, 100 *N. Car.* 310, 6 *S. E. Rep.* 723.

The testimony of experts may be received on questions of science, trade, or skill, and others of a like kind, but not upon subjects of general knowledge which are understood by men in general, and with which a jury are presumed to be familiar. *Concord R. Co.* v. *Greely*, 23 *N. H.* 237.—APPROVED IN Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509.

On the trial of an action to recover for a personal injury, plaintiff was asked how long he was confined to his bed on account of the injury, to which he answered: "From the 15th of May to about the first of August." He was also asked: "Have you suffered any pain in consequence of the injury?" which was answered in the affirmative. Plaintiff and others testified that his arm was broken, that he was otherwise injured, and that following the accident he had been confined to his bed. *Held*, no error. *North Chicago St. R. Co.* v. *Cook*, 145 *Ill.* 551, 33 *N. E. Rep.* 958.

In such case, whether plaintiff suffered pain from a broken arm was a fact that required no expert skill to ascertain, nor would it require expert knowledge or skill to determine the fact that plaintiff required help to put on his coat, or that in consequence of his broken arm his food had to be cut for him. It was competent for him to testify to his condition resulting from the injury and the effect produced by it, even though he was aged and infirm and to some extent a paralytic at the time of the injury. *North Chicago St. R. Co.* v. *Cook*, 145 *Ill.* 551, 33 *N. E. Rep.* 958.

Whether, in a given case, a shaded object would be rendered visible by a certain artificial light is not a question of technical knowledge, but rather a matter of judgment based upon common observation, and is not a proper subject for expert testimony. *Weane* v. *Keokuk & D. M. R. Co.*, 45 *Iowa* 246.

Cutaneous diseases affecting the exposed parts of the body, and paralysis, are not latent, and it does not require either a description of symptoms or the skill of a physician to discover their existence. *Fox* v. *Peninsular W. L. & C. Works*, 92 *Mich.* 243, 52 *N. W. Rep.* 623.

145. Matters not calling for scientific knowledge.—When the injury relates to a subject which does not require peculiar habits of study in order to enable a man to understand it, the opinion of skilled witnesses is not admissible. *Overby* v. *Chesapeake & O. R. Co.*, 53 *Am. & Eng. R. Cas.* 417, 37 *W. Va.* 524, 16 *S. E. Rep.* 813. *Belair* v. *Chicago & N. W. R. Co.*, 43 *Iowa* 662, 14 *Am. Ry. Rep.* 575. *Kline* v. *Kansas City, St. J. & C. B. R. Co.*, 50 *Iowa* 656. *Fisher* v. *Oregon S. L. & U. N. R. Co.*, 53 *Am. & Eng. R. Cas.* 539, 22 *Oreg.* 533, 30 *Pac. Rep.* 425, 16 *L. R. A.* 519.

In an action for killing stock, evidence of experts as to the sufficiency of a barway and bars is inadmissible. This question is not one of science nor of peculiar or educated skill, and is for the jury to determine. *Enright* v. *San Francisco & S. J. R. Co.*, 33 *Cal.* 230.—QUOTED IN Baltimore & O. R. Co. *v.* Schultz, 22 Am. & Eng. R. Cas. 579, 43 Ohio St. 270.

A yardmaster cannot testify as an expert as to the manner in which a brakeman attempted to make a coupling, the brakeman having been injured in doing so, on the ground that expert evidence is not competent upon subjects upon which a jury are as well able to judge for themselves as is the witness. *Seese* v. *Northern Pac. R. Co.*, 39 *Fed. Rep.* 487.—DISTINGUISHING Propst *v.* Georgia Pac. R. Co., 83 Ala. 518, 3 So. Rep. 764; Louisville, N. A. & C. R. Co. *v.* Frawley, 110 Ind. 18, 9 N. E. Rep. 594.

Expert evidence of blacksmiths or other workers in metal is not indispensable in order to show that the "spring rail" of a switch, the breaking of which caused an accident, was or appeared to be sound and made of fit material. The jury may regard other evidence as sufficient to vindicate the company's diligence. *Crawford* v. *Georgia Pac. R. Co.*, 86 *Ga.* 5, 12 *S. E. Rep.* 176.

Whether a thoroughfare is used, and how used, and whether worked upon by public authorities or abandoned, depends upon certain facts only and not on the opinions of witnesses. So, also, the use made of a street by a railroad company is an existing fact, while the use that ought to be made of it is a mere matter of opinion. Witnesses not experts should be allowed to testify only to facts, not to give their opinions, and should leave the jury to draw conclusions from the facts. *Pittsburg, Ft. W. & C. R. Co.* v. *Reich*, 101 *Ill.* 157.

To determine whether a train is a regular passenger train is not a subject which so far partakes of the nature of science as to require a course of previous habit or study in order to the attainment of a knowledge of it. *Illinois C. R. Co.* v. *People*, 143 *Ill.* 434, 33 *N. E. Rep.* 173.

Where an employé is injured, it is a question for the jury whether he was able to perform the duties of baggageman and express messenger, and the opinions of witnesses who were familiar with such duties and with plaintiff are not admissible. *Moore* v. *Chicago, B. & Q. R. Co.*, 22 *Am. & Eng. R. Cas.* 396, 65 *Iowa* 505, 54 *Am. Rep.* 26, 22 *N. W. Rep.* 650.

The work of piling lumber does not in any proper sense involve the exercise of technical knowledge or skill; and to allow one experienced in such work to testify how he would have piled it in a certain case, or how, in his opinion, it ought to have been piled, is error where the material question is whether or not it was so negligently piled that it fell upon and injured plaintiff. *Baldwin* v. *St. Louis, K. & N. R. Co.*, 68 *Iowa* 37, 25 *N. W. Rep.* 918.

The amount of the professional income of a deceased dentist is to be ascertained by the testimony of witnesses who knew his character and professional reputation, as well as the extent of his practice in the place where he lived and its neighborhood, and not by the testimony of experts. *State* v. *Cecil County Com'rs*, 54 *Md.* 426.

In an action for the death of a brakeman who was, by the breaking of a hand-hold, thrown under the cars and killed while descending a ladder on a moving car, the testimony of a carpenter that, in his opinion, it would have been disclosed by reasonable inspection that the hand-hold was not tightly fastened to the top of the car was inadmissible, it not being a case calling for the introduction of expert evidence. *Gutridge* v. *Missouri Pac. R. Co.*, 94 *Mo.* 468, 13 *West. Rep.* 644, 7 *S. W. Rep.* 476.

In an action for the destruction of grass through fire communicated by an engine, expert evidence is not admissible to prove that such a fire would not destroy the roots of grass, since the effect of the fire on the roots of the grass sued for is susceptible of direct proof, and witnesses may testify in regard thereto directly and explicitly and from personal examination. *Gates* v. *Chicago & A. R. Co.*, 44 *Mo. App.* 488.

What hardpan is, and whether any was found in excavating, are not questions relating to a matter of science, art, or skill; and it is not necessary that a witness should be shown to be qualified as an expert before he can be interrogated as to such matter. *Currier* v. *Boston & M. R. Co.*, 34 *N. H.* 498.

The opinions of witnesses as to the difference between the value of property, either to sell or rent, estimated with the railroad in the street and as operated by the company, and the value of the same property without the railroad, are inadmissible in an action for damages to the property, the matter not calling for the opinions of experts. *Thompson* v. *Pennsylvania R. Co.*, 51 *N. J. L.* 42, 15 *Atl. Rep.* 833.

A witness who does not claim to be an expert, but who testifies that he has noticed the manner of constructing railroads, may testify as to the usual manner of laying tracks. This is a matter open to the

observation and knowledge of any one who is about where tracks are being laid, and a witness may speak to the extent of his knowledge without violating any rule of evidence. *Carpenter* v. *Central Park, N. & E. R. R. Co.*, 11 *Abb. Pr. N. S.* (*N. Y.*) 416, 4 *Daly* 550, *mem.*

In an action for injuries to a brakeman, caused by appliances connected with a brake-rod giving way, it is error to receive the testimony of witnesses as to the capacity of a brakeman to displace the brake-rod in case a certain pin had remained in it, or whether or not a pin or ring could be lost out on the road between certain places in the absence of the use of the brake and in the absence of any accident. *Bailey* v. *Rome, W. & O. R. Co.*, 55 *Hun* 509, 29 *N. Y. S. R.* 755, 8 *N. Y. Supp.* 780.—DISTINGUISHING Vosburgh *v.* Lake Shore & M. S. R. Co., 14 Wkly. Dig. 514. QUOTING Hart *v.* Hudson River Bridge Co., 84 N. Y. 60.

Where the combustible nature of land through which a right of way passes has been shown in evidence, it is error to allow a witness to testify that in his opinion there would be danger of the land igniting in dry weather, from sparks from the locomotive. (Scott and Dunbar, JJ., dissenting.) *Seattle & M. R. Co.* v. *Gilchrist*, 4 *Wash.* 509, 30 *Pac. Rep.* 738.

Where a company is authorized to take the lands delineated on the deposited plans, evidence may be admitted to prove boundaries of plots beyond those shown on the deposited plans, for the purpose of determining the extent of the "lands delineated"; but the testimony of engineers as experts on the construction of the plans and of the act will not be admitted. *Dowling* v. *Pontypool, C. & N. R. Co., L. R.* 18 *Eq.* 714, 43 *L. J. Ch.* 761.

3. *Qualifications and Competency of Experts.*

146. In general.—A witness shown to be a resident of the neighborhood, and acquainted with the technical terms used in the construction of railroads, may testify that the term "waste ground" means earth or other material excavated from the bed of the road and deposited on the ground adjoining. *Prather* v. *Ross*, 17 *Ind.* 495.

In an action against a coal company for injuries caused by the alleged negligence of its engineer, the superintendent of the company was properly allowed to state whether in his opinion the engineer was competent, without previously showing himself to be an expert. *Couch* v. *Watson Coal Co.*, 46 *Iowa* 17.—FOLLOWING Frazier *v.* Pennsylvania R. Co., 38 Pa. St. 104.

Though the court may, in its discretion, allow the opposing party to cross-examine an expert witness as to his qualifications before permitting him to give his opinion, such preliminary cross-examination is not a matter of right. *Finch* v. *Chicago, M. & St. P. R. Co.*, 46 *Minn.* 250, 48 *N. W. Rep.* 915.—FOLLOWING Sarle *v.* Arnold, 7 R. I. 582; Ft. Wayne *v.* Coombs, 107 Ind. 75.

A person is not competent to testify as to the length of time in which a train, running at a given rate of speed, can be stopped, merely from the fact that he is employed with a squad of section hands in repairing the track, and has seen trains stop at the depot of the company. *Igo* v. *Chicago & A. R. Co.*, 38 *Mo. App.* 377.—FOLLOWING Gourley *v.* St. Louis & S. F. R. Co., 35 Mo. App. 87.

The qualifications of an expert, and whether the subject is such as to render the opinions of experts admissible, are preliminary questions for the trial court, the decision of which is conclusive unless it appears from the evidence to have been erroneous or founded on error of law. *Benjamin* v. *Metropolitan St. R. Co.*, 50 *Mo. App.* 602.

A witness shown not to have any knowledge in the matter of the construction or operation of railroads is not competent to give an opinion as to the needs of a company in respect to its depot or other grounds. *Deitrichs* v. *Lincoln & N. W. R. Co.*, 13 *Neb.* 361, 13 *N. W. Rep.* 624.

In an action to recover damage for real estate condemned for a right of way, a witness who testifies that he resides near the land condemned, and is acquainted with the value of real estate in that vicinity at the time of the condemnation, is, *prima facie*, a competent witness to prove the amount of damages sustained by the landowner. *Northeastern Neb. R. Co.* v. *Frazier*, 36 *Am. & Eng. R. Cas.* 673, 25 *Neb.* 53, 40 *N. W. Rep.* 609.

An ordinary real estate agent is not competent to give his opinion as evidence upon the value of the private title in a strip of land lying in a public highway and separated by the street from private property.

Laing v. *United N. J. R. & C. Co.*, 54 *N. J. L.* 576, 25 *Atl. Rep.* 409.—QUOTING Pennsylvania & P. R. Co. *v.* Root, 53 N. J. L. 253.

Nor upon the damages which should be paid to the owner of the abutting property on the condemnation of such a strip for railroad purposes. *Laing* v. *United N. J. R. & C. Co.*, 54 *N. J. L.* 576, 25 *Atl. Rep.* 409.

A car upon defendant's road, in which plaintiff's testator was a passenger, was thrown from the track in consequence of a broken rail, and he was injured. In an action to recover damages, the question was whether the rail was defective or had been maliciously cut by some unknown person. A witness called by defendant, who testified that during a period of twenty years he had visited "dozens of railroad accidents," and had examined, for the purpose of reporting for a newspaper, the probable cause, was asked whether he had arrived at any conclusion as to the cause of the breaking of the rail in question. *Held*, that it did not appear that the witness was qualified to give his opinion as an expert, and that the evidence was properly excluded. *Hoyt* v. *Long Island R. Co.*, 57 *N. Y.* 678.

The competency of an expert is usually proved by himself, and the opinion of another witness that he does not know anything about kindred subjects is incompetent. *Carley* v. *New York, O. & W. R. Co.*, 16 *N. Y. S. R.* 307, 1 *N. Y. Supp.* 63, 48 *Hun* 619, *mem.*

147. Knowledge gained from scientific books.—A scientific expert may testify in respect to the character of cuts, embankments, slopes, etc., though his information is mostly derived from books. *Central R. Co.* v. *Mitchell*, 1 *Am. & Eng. R. Cas.* 145, 63 *Ga.* 173.

Where a person has been educated in a particular profession—as a physician, surgeon, or veterinarian—he is presumed to understand thoroughly the questions pertaining to his profession; but a person not a member of those professions, who has read extensively from books and heard the testimony of experts in court in regard to the diseases of men or cattle, is not considered an expert concerning the same. *Missouri Pac. R. Co.* v. *Finley*, 38 *Kan.* 550, 16 *Pac. Rep.* 951.

Evidence as to the statements of medical books or authors is inadmissible; but its admission may not work a reversal where both parties introduced and had the benefit of it, and the question of its competency was not raised in the trial court by proper and specific objections. *Kreuziger* v. *Chicago & N. W. R. Co.*, 73 *Wis.* 158, 40 *N. W. Rep.* 657.

148. As to expectancy of life.*—One who is acquainted with the business of life insurance is competent to give evidence as to the probable duration of lives and the present value of annuities. *Rowley* v. *London & N. W. R. Co.*, 42 *L. J. Ex.* 153, *L. R.* 8 *Ex.* 221, 21 *W. R.* 869, 29 *L. T.* 180.—FOLLOWED AND EXPLAINED IN Phillips *v.* London & S. W. R. Co., 27 W. R. 797, L. R. 4 Q. B. D. 406, 40 L. T. 813.

But an experience of six months as agent of a life insurance company will not qualify a witness to testify as an expert as to an expectation of life at a certain age. *Donaldson* v. *Mississippi & M. R. Co.*, 18 *Iowa* 280.

149. Knowledge from experience in business.—In an action against a company for erecting and maintaining a bridge and embankment so as to cause the overflow of land, a witness was called who was not an expert, but who had had special opportunities for observation in such cases. *Held*, that whether he showed himself sufficiently well informed by such special observation, and knowledge to be permitted to express his opinion was a question for the trial court, and its decision will not be reversed unless unquestionably erroneous. *St. Louis & S. F. R. Co.* v. *Bradley*, 54 *Fed. Rep.* 630, 2 *U. S. App.* 637, 4 *C. C. A.* 528.—FOLLOWING Montana R. Co. *v.* Warren, 137 U. S. 348, 11 Sup. Ct. Rep. 96.

In such case there is no error in holding the witness qualified as a practical expert as to the effect of a bridge and embankment in causing overflows when he has long resided on the land in question, and has experienced and observed several overflows before and after their erection. *St. Louis & S. F. R. Co.* v. *Bradley*, 54 *Fed. Rep.* 630, 2 *U. S. App.* 637, 4 *C. C. A.* 528.—APPLYING Montana R. Co. *v.* Warren, 137 U. S. 348, 11 Sup. Ct. Rep. 96. QUOTING Connecticut Mut. L. Ins. Co. *v.* Lathrop, 111 U. S. 612, 4 Sup. Ct. Rep. 533.

A witness who has shipped fruit to New York for fifteen or twenty years, and has received from dealers in that city daily quotations by telegrams and circulars, as well

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* See also *ante*, **132.**

as accounts of sales of fruit which he shipped, may testify, from returns of sales of fruit shipped by himself at a certain time, as to the market value of such fruit in New York at that time. *Central R. & B. Co.* v. *Skellie*, 86 *Ga.* 686, 12 *S. E. Rep.* 1017.

So the testimony of one who was a resident of New York and a dealer in fruit, and who sold the fruit in question, is admissible. *Central R. & B. Co.* v. *Skellie*, 86 *Ga.* 686, 12 *S. E. Rep.* 1017.

Persons experienced as contractors in railroad building are experts, and may testify that, but for delays caused by the company and its engineers, the work contracted for could have been completed within the time fixed in the contract. *Louisville, E. & St. L. R. Co.* v. *Donnegan*, 34 *Am. & Eng. R. Cas.* 116, 111 *Ind.* 179, 9 *West. Rep.* 641, 12 *N. E. Rep.* 153.

A person not connected with the management of a train, nor having such experience in running trains and in checking their speed as entitles him to speak as an expert, is not a competent witness to answer the question "How long does it take to stop a train?" *Manhattan, A. & B. R. Co.* v. *Stewart*, 13 *Am. & Eng. R. Cas.* 503, 30 *Kan.* 226, 2 *Pac. Rep.* 151.

A person who has testified that he is fifty years of age, that he has followed farming all his life, that he has had experience in growing fruit trees, that he has put out in his lifetime three or four different orchards, that he knew at the time of the construction of a railroad through certain premises that there was "quite a nice little orchard there," that he had been over the premises very frequently, that he lived only two miles from them, and that while he could not say he knew the particular trees taken, he knew what fruit trees planted in such an orchard were reasonably worth at the time of the construction of the road, is competent to give his opinion of the value of fruit trees two, three, and five years old which were growing in an orchard on the premises, but were taken or destroyed by a company in constructing its road. *Chicago, K. & W. R. Co.* v. *Mouriquand*, 45 *Kan.* 170, 25 *Pac Rep.* 567. *Latham* v. *Brown*, 48 *Kan.* 190, 29 *Pac. Rep.* 400.

In a condemnation proceeding it was claimed that the construction of the road interfered with the natural drainage of the land not taken; that the ditches would not carry off the water, and a portion of the land would be overflowed and injured. A witness who was acquainted with the land and had seen the road and ditches since they were made, but who had not measured the capacity of the ditches and had not seen an overflow of the land, and where, in fact, there had been none since the construction of the road, was asked, and allowed to answer, what proportion of the plaintiff's land was subject to overflow from the ditches. *Held*, that as the witness was not a surveyor or civil engineer, and had no special skill that would enable him to take levels or make calculations as to the quantity of water which would accumulate and could be discharged through the ditches, or to make measurements and calculations as to the extent of land that would be affected if there was an overflow of the ditches, he was not competent to give an opinion upon the subject, and his testimony should have been excluded. *Chicago, K. & W. R. Co.* v. *Donelson*, 45 *Kan.* 189, 25 *Pac. Rep.* 584.

A farmer engaged for years in raising, buying, and selling cattle, during which time he has handled blooded and other stock, is qualified to testify as an expert to the value of such stock. *Missouri Pac. R. Co.* v. *Shumaker*, 46 *Kan.* 769, 27 *Pac. Rep.* 126.

A witness who has been for ten years secretary of an insurance company, and, as such, has been in the practice of examining buildings with reference to the insurance thereof, and who has also, as county commissioner, frequently estimated damages caused to estates by the laying out of highways and railroads, may, on a hearing before a jury empanelled to appraise damages sustained by a party by the laying out of a railroad over his land and near to his buildings, give his opinion that the passage of locomotive engines within 100 feet of a building would diminish the rent and increase the rate of insurance thereof against fires. *Webber* v. *Eastern R. Co.*, 2 *Metc.* (*Mass.*) 147.—QUOTED IN Hughes *v.* Providence & W. R. Co., 2 R. I. 508. REVIEWED IN Small *v.* Chicago, R. I. & P. R. Co., 50 Iowa 338.

A station agent who receives and ships all goods at his station is competent to give his opinion as to whether it would interfere with shipping at that point to maintain a fence along the tracks on ground contiguous to the depot. *Robinson* v. *St. Louis, I. M. & S. R. Co.*, 21 *Mo. App.* 141.

A carrier was sued for the loss of certain cloth intended to be manufactured into clothing. A witness was called who was in the clothing business and engaged in the manufacture of clothing, and who knew what the cloth and other materials cost, and what it would cost to make them up, and what the clothes would have sold for. *Held*, that this was sufficient to enable him to give testimony as to the value of the articles lost. *Browning* v. *Long Island R. Co.*, 2 *Daly* (*N. Y.*) 117.

Persons who have acquired a knowledge of the breeds of horses from raising and dealing in them are competent to testify on the subject. *Harris* v. *Panama R. Co.*, 4 *J. & S.* (*N. Y.*) 373, 5 *Bosw.* 312; *affirmed in* 58 *N. Y.* 660, *mem.*

A witness who has been several years in the business of raising and selling horses, who has on hand over 200 horses and as many colts, and who has dealt in horses of a particular variety, may testify to the breed of a horse of that variety. *Harris* v. *Panama R. Co.*, 4 *J. & S.* (*N. Y.*) 373, 5 *Bosw.* 312; *affirmed in* 58 *N. Y.* 660, *mem.*

The groom of a horse, who has had experience while in the service of men engaged in the business of buying and selling horses and while living with professional farmers, may testify as to the breed of a horse. *Harris* v. *Panama R. Co.*, 4 *J. & S.* (*N. Y.*) 373, 5 *Bosw.* 312; *affirmed in* 58 *N. Y.* 660, *mem.*

Persons who own similar property in the vicinity of plaintiff's property, and experts who have dealt in the same kind of property, are competent witnesses. *Myers* v. *Schuylkill River E. S. R. Co.*, 19 *Phila.* (*Pa.*) 468.

A farmer may, as an expert, give his estimate of the value as farm land of realty which has been condemned to a public use, but his opinion generally of the value of such realty is inadmissible, since the market value of a farm may be much greater than its agricultural value. *Brown* v. *Providence & S. R. Co.*, 12 *R. I.* 238.

In a suit to recover the value of second-hand clothing, it is not error to exclude the testimony of a witness as to the relative value of new and second-hand goods when the witness states that he is a dealer in new goods only, and has no knowledge as an expert as to the value of second-hand clothing. *International & G. N. R. Co.* v. *Nicholson*, 21 *Am. & Eng. R. Cas.* 122, 61 *Tex.* 550.

In such a suit a question asked a witness as to "what per cent. was lost on goods by being used, or the value of second-hand goods," is properly excluded as too general. *International & G. N. R. Co.* v. *Nicholson*, 21 *Am. & Eng. R. Cas.* 122, 61 *Tex.* 550.

In an action to recover damages for injuries to an animal, witnesses who have had much experience in the business for which such animals are used are competent to testify as to its value. *Texas & P. R. Co.* v. *Virginia R. L. & C. Co.*, (*Tex.*) 35 *Am. & Eng. R. Cas.* 201, 7 *S. W. Rep.* 341.

A witness who has had twenty years' experience in the construction of railways is properly permitted, after stating the manner in which a culvert was constructed, to state that the construction was not proper. *Bonner* v. *Mayfield*, 82 *Tex.* 234, 18 *S. W. Rep.* 305.

In order to testify as an expert, a witness must have special knowledge and skill in the particular calling to which the inquiry relates. One who is a lawyer by profession is not qualified as an expert to testify as to the rate of speed at which a particular train could be run with safety by reason of the fact that while employed as a claim agent by a company he has casually acquired some knowledge of engines and of their operation. *Ft. Worth & D. C. R. Co.* v. *Thompson*, 2 *Tex. Civ. App.* 170, 21 *S. W. Rep.* 137.

Persons having practical knowledge and experience in regard to a subject may testify as to it; thus manufacturers and others engaged in the wool trade may testify as to the liability of wool-waste to spontaneous combustion. *Whitney* v. *Chicago & N. W. R. Co.*, 27 *Wis.* 327, 5 *Am. Ry. Rep.* 291.

In an action for damages for the taking of part of plaintiff's block in a city for a railway, a witness for plaintiff who has acted for several years as his agent in looking after the block, has paid taxes, given leases, and collected rents thereon, received offers to purchase, and was personally acquainted with the block both before and after the taking, is competent to testify not only to the value of the strip taken, but also to the depreciation in value of the remainder of the block by reason of the taking for railway purposes. *Diedrich* v. *Northwestern Union R. Co.*, 47 *Wis.* 662, 3 *N. W. Rep.* 749.

150. Experience in handling machinery. — A person who has acted continuously for more than seven years as a conductor can be examined as an expert rel-

ative to the means of stopping trains. *Mobile & M. R. Co.* v. *Blakely*, 59 *Ala.* 471.

The opinion of an experienced railroad superintendent, in a matter within the scope of his employment, stands upon the footing of the opinion of an expert. *Macon & W. R. Co.* v. *Johnson*, 38 *Ga.* 409.

A witness testifying as to the possibility of stopping a cable car within a certain distance can answer as to the source and basis of his knowledge. If such witness has been in the service of street-car companies, a reference by him to previous experience and observation will not be improper, because it may tend to show that he is qualified to give evidence as to the distance within which it is possible to stop such a car. *Chicago City R. Co.* v. *McLaughlin*, 146 *Ill.* 353, 34 *N. E. Rep.* 796.

On the trial of an action for the price of cross-ties furnished to a company, the defense being that the ties were not of a good quality, one witness called by plaintiff to prove the quality of the ties stated that he had been roadmaster of another railroad, and as such it had been his duty to inspect and receive ties; and another witness, called for the same purpose, stated that he had made cross-ties and sold them to defendant. *Held*, that the witnesses were shown to possess sufficient knowledge of the subject to make them competent witnesses as to the quality of the ties. *Jeffersonville R. Co.* v. *Lanham*, 27 *Ind.* 171.

A witness who has been employed in railroad work twenty-five years, part of the time in charge of a turntable, is competent to answer the question "Would it be practicable to lock or fence turntables?" *Kolsti* v. *Minneapolis & St. L. R. Co.*, 19 *Am. & Eng. R. Cas.* 140, 32 *Minn.* 133, 19 *N. W. Rep.* 655.

A witness who testifies that he is somewhat familiar with railroad brakes and with the operation of them, and has used them on a railroad and knows which are the best brakes, is competent to testify as to the distance within which any given train can be stopped with a designated class of brakes and a given number of brakemen. *Mott* v. *Hudson River R. Co.*, 8 *Bosw.* (*N. Y.*) 345.

A locomotive engineer, without any experience or skill in the construction or repair of boilers, is not an expert as to the effect of broken stay-bolts in the boiler or of mud packed therein. His opinion is not admissible. *McKelvey* v. *Chesapeake & O. R. Co.*, 53 *Am. & Eng. R. Cas.* 230, 35 *W. Va.* 500, 14 *S. E. Rep.* 261.—DISTINGUISHING Bird *v.* Com., 21 Gratt. (Va.) 800; Chicago & A. R. Co. *v.* Shannon, 43 Ill. 339; Sheldon *v.* Booth, 50 Iowa 209.

In an action for injuries to a brakeman through alleged defects in a locomotive engine, plaintiff called a witness who stated that he did not claim to be a practical engineer, and was not a first class locomotive engineer, but that he had fired and handled a locomotive, and understood an engine, and was at the time in control of the engine of a manufacturing company. *Held*, that he was competent to testify as to the effect of a leaky throttle-valve. *Brabbits* v. *Chicago & N. W. R. Co.*, 38 *Wis.* 289.—REVIEWING Craker *v.* Chicago & N. W. R. Co., 36 Wis. 657.

151. Insufficient knowledge.—The opinion of a witness upon the reasonableness of freight charges is inadmissible where he is not shown to have had any special knowledge or skill in their adjustment. *Little Rock & Ft. S. R. Co.* v. *Bruce*, 55 *Ark.* 65, 17 *S. W. Rep.* 363.

When the subject so far partakes of the nature of a science or trade as to require a previous course of study or habit in order to the attainment of a knowledge of it, opinions of experts are admissible. On the other hand, if the relation of facts and their probable result can be determined without especial skill or study, the facts themselves must be given and the jury left to draw conclusions or inferences. *Muldowney* v. *Illinois C. R. Co.*, 36 *Iowa* 462.

In a petition for the assessment of damages caused by the location of a railroad upon a wharf used for the wood and lumber business and the land connected therewith, one who has been engaged in the lumber business for several years on a wharf in the vicinity, and who has also been connected for many years with railroads, but who has not had any peculiar means of knowledge as to the effect of constructing railroads over wharves similar to that of the petitioners, is not thereby qualified to give an opinion as an expert as to the effect of the location on the value for that business of the petitioners' wharf; nor is one qualified to give an opinion as an expert as to the value of the reversion of land over which a railroad has been located who has given time and attention to the consideration of the value of land subject to easements of

different kinds, including that of land taken for streets and similar purposes, but not for railroads. *Boston & W. R. Corp.* v. *Old Colony & F. R. R. Corp.*, 3 *Allen* (*Mass.*) 142.—QUOTED IN Gourley *v.* St. Louis & S. F. R. Co., 35 Mo. App. 87.

Upon the assessment of damages for taking farm land on the bank of a river, a farmer who had lived many years in the vicinity, and had known of sales of land in the neighborhood, was allowed without objection to testify to the value of the land taken and of the inconvenience resulting to a farmer from being deprived of access to the river, but being asked what, in his opinion, was the damage to the remainder of the farm by reason of the loss of the river bank, the question was excluded. The petitioner also claimed damages by reason of being excluded from the river bank for purposes of fishing and from a fishing ground, but it did not appear that the witness had any special or superior knowledge on the subject of fishing or of fishing grounds; and other witnesses for the petitioner testified to the value of the river bank as affording facilities for fishing. *Held*, no error to exclude the farmer's testimony. *Boston & M. R. Co.* v. *Montgomery*, 119 *Mass.* 114.

A physican and surgeon, showing himself otherwise qualified, is not disqualified from giving an opinion as an expert by the fact that, at the time of the occurrence in reference to which he is called upon to testify, he was not in full practice. It is simply a matter for the jury in determining what weight should be given to his opinion. *Roberts* v. *Johnson*, 58 *N. Y.* 613; *affirming* 5 *J. & S.* 157.

Plaintiff was working in repair shops and was injured by the bursting of an emery wheel used in polishing. There was evidence tending to show that the wheel was untrue or unbalanced, which caused it to burst, and defendant claimed that plaintiff had knowledge of the fact and assumed the risk. A witness was asked whether he would consent to run such a wheel a thousand revolutions to the minute. *Held*, that the question and answer were properly excluded. And it was likewise proper to exclude a question as to what the witness would say regarding the prudence of an operator who would take one hand off a bar while polishing it. *Murtaugh* v. *New York C. & H. R. R. Co.*, 23 *N. Y. S. R.* 636, 3 *N. Y. Supp.* 483.

The opinion of a witness who neither knows nor can know more about the subject-matter than the jury, and who must draw his deductions from facts already in the possession of the jury, is not admissible. *Overby* v. *Chesapeake & O. R. Co.*, 53 *Am. & Eng. R. Cas.* 417, 37 *W. Va.* 524, 16 *S. E. Rep.* 813.

A carpenter and joiner who, for four years, has made turntables for a street-railway company is competent to testify as an expert whether a certain turntable is safe, and the one most approved in general use. *Fitts* v. *Cream City R. Co.*, 15 *Am. & Eng. R. Cas.* 462, 59 *Wis.* 323, 18 *N. W. Rep.* 186.

4. *Examination of Experts.*

152. In general.—A car-repairer, while engaged, in pursuance of his duties, in removing old brasses from the boxing of car wheels, was seriously poisoned by a certain poisonous grease that had formed thereon. In a suit brought by him against the company the negligence averred was the failure upon the part of the defendant to have the brasses removed before the grease formed. *Held*, that it was not competent to ask a witness as an expert when the work should be done. The witness should state the results accruing from delay in having the work done, and the jury should determine whether or not the delay shown in the case on trial constituted negligence. *Kitteringham* v. *Sioux City & P. R. Co.*, 18 *Am. & Eng. R. Cas.* 14, 62 *Iowa* 285, 17 *N. W. Rep.* 585.

Plaintiff was injured while unloading coal from a car which was constructed so as to tip, the injury being caused by its flying back and striking him. At a trial for the injuries, the issue was made as to whether the car was properly constructed. The company called an expert who stated that a car so constructed, although in good order, might fly back by reason of the fault of those using it, and added that he had seen it done. *Held*, no error. *Donahoe* v. *New York & N. E. R. Co.*, 159 *Mass.* 125, 34 *N. E. Rep.* 87.

The issue being how much the rental value of an abutting farm is diminished by reason of a railway not being fenced, an expert witness may be asked either what would be the difference between the rental value with the road fenced and with the road unfenced, or, first, what the rental value would be with the road fenced, and

then what it would be with it unfenced. Either mode of examination is permissible in the discretion of the trial court. *Emmons* v. *Minneapolis & St. L. R. Co.*, 40 *Am. & Eng. R. Cas.* 236, 41 *Minn.* 133, 42 *N. W. Rep.* 789. — FOLLOWING Emmons *v.* Minneapolis & St. L. R. Co., 35 Minn. 503, 29 N. W. Rep. 202; Emmons *v.* Minneapolis & St. L. R. Co., 38 Minn. 215, 36 N. W. Rep. 340; Nelson *v.* Minneapolis & St. L. R. Co., 41 Minn. 131.

Where the action is for negligently running a cable car against a team, the question "How soon at this point could a gripman in the proper discharge of his duty stop a car" is error; but where the answer is harmless it is not reversible error. *Hoffman* v. *Metropolitan St. R. Co.*, 51 *Mo. App.* 273.

A witness called to estimate the value of property fixed it at $3000. On his cross-examination it was offered to prove by him that, as an insurance agent, he had offered and written a policy of insurance upon the same property at a valuation of $4000, but the offer was rejected. *Held*, error. *Markel* v. *Moudy*, 13 *Neb.* 322, 14 *N. W. Rep.* 409.

In an action for damages to real estate, a stipulation limiting the number of real-estate experts to three on each side is not violated by calling in addition an owner of real estate who does not claim to be an expert, but simply testifies to facts within his knowledge. *Taber* v. *New York El. R. Co.*, 26 *J. & S.* 579, 33 *N. Y. S. R.* 706, 11 *N. Y. Supp.* 584; *affirmed in* 134 *N. Y.* 615, *mem.*, 47 *N. Y. S. R.* 929, *mem.*, 32 *N. E. Rep.* 649, *mem.*

Evidence of an expert is not rendered incompetent because based upon an *ex parte* examination. The objection to such may go to the weight but not to the competency. The examination may be made pending the suit, or it may be an old examination; in either case the testimony of the expert is equally competent. *Mississippi & T. R. Co.* v. *Ayres*, 16 *Lea* (*Tenn.*) 725.

Plaintiff sued a company for failing to receive and ship lumber, and at the trial was permitted to prove the amount of lumber by an expert in the lumber business, without his having ascertained the exact amount by measurement. *Held*, not error. *Texas & P. R. Co.* v. *Hays*, 2 *Tex. App.* (*Civ. Cas.*) 341.

Where the plaintiff in a suit for damages for personal injuries, after testifying to the manner in which he was injured, is asked the question: "State whether or not, in your opinion as an expert railroad man, if the car from which you fell had been thoroughly examined at certain places by the defendant through its proper employés, the defect of the round which gave way would have been discovered," and is permitted to answer, such ruling is error, as permitting the expert to make his own facts upon which to base his opinion. *Allen* v. *Union Pac. R. Co.*, 7 *Utah* 239, 26 *Pac. Rep.* 297. — QUOTED IN Gutridge *v.* Missouri Pac. R. Co., 105 Mo. 520.

In an action for taking part of a block in a city for railway purposes, a witness who had testified fully as to the actual value of the block both before and after the taking was asked what a particular front of the block was worth before the road was constructed. *Held*, that there was no error in excluding the question. *Diedrich* v. *Northwestern Union R. Co.*, 47 *Wis.* 662, 3 *N. W. Rep.* 749.

It is proper on rebuttal to examine plaintiff's expert witnesses generally on a theory on which they were not examined in chief, but which was testified to by defendant's witnesses. *Waterman* v. *Chicago & A. R. Co.*, 52 *Am. & Eng. R. Cas.* 592, 82 *Wis.* 613, 52 *N. W. Rep.* 247, 1136.

153. As to opinion concerning admitted facts. — In a proceeding to condemn a right of way over a farm, the land-owner asked a witness what, in his judgment, would be the injury or damage to the remaining portion of the farm outside of the right of way. It was objected that the question did not confine the witness to the effect of the construction and operation of the railway upon the market value of the abutting property. *Held*, that the opinion called for was entirely proper, and that it was incumbent upon the petitioner, if it was apprehended that such opinion embraced improper elements of damage, or rested upon an improper basis, to bring such fact to light by cross-examination. *Chicago, P. & St. L. R. Co.* v. *Nix*, 137 *Ill.* 141, 27 *N. E. Rep.* 81.

In such case, an instruction that "the jury, in assessing the damages to the owner, may take into consideration not only the value of the land taken, but all the facts which contribute to produce the damages to that not taken, or that the farm is put in a worse shape for cultivation or pasturage; that some portions of it are more dangerous

for use; that there is danger of fire from passing engines, and all other actual inconveniences and damages the property may sustain in its use, not only for the present, but for the future" is good in substance, subject only to the criticism of failing to refer specifically to the evidence. *Chicago, P. & St. L. R. Co.* v. *Nix*, 137 *Ill.* 141, 27 *N. E. Rep.* 81.

Where it appears that a carload of stock was suffering greatly, probably from heat, it is proper to ask an expert witness what course the carrier might properly have pursued for its relief. *Lindsley* v. *Chicago, M. & St. P. R. Co.*, 31 *Am. & Eng. R. Cas.* 86, 36 *Minn.* 539, 33 *N. W. Rep.* 7.

A person conversant with the growth of grass, and accustomed to compare its appearance in different stages of growth with its ultimate yield per acre, has such knowledge of the subject as to make him competent to testify as to how much, in his opinion, a given piece examined by him will yield per acre. *Phillips* v. *Terry*, 3 *Abb. App. Dec.* (*N. Y.*) 607.

An expert may be asked his opinion regarding facts affecting a matter peculiar to his art or employment when the facts are undisputed, but he cannot be asked his opinion as to the evidence in the case as rendered. Such a practice would usurp the province of the jury, who must weigh the credibility of the evidence. *Ft. Worth & D. C. R. Co.* v. *Thompson*, 75 *Tex.* 501, 12 *S. W. Rep.* 742.

154. Opinions based on testimony of other witnesses. — A question to a medical expert as to his general opinion as to the testimony he had heard in regard to a rupture of certain ligaments of plaintiff's leg is properly excluded. *Loveless* v. *Manhattan R. Co.*, 25 *J. & S.* 3, 5 *N. Y. Supp.* 185, 24 *N. Y. S. R.* 177.

An expert cannot be asked to weigh the evidence that he has heard before answering a question; this is the province of the jury. *Loveless* v. *Manhattan R. Co.*, 25 *J. & S.* 3, 5 *N. Y. Supp.* 185, 24 *N. Y. S. R.* 177.

Questions put to expert witnesses which require them to determine in their own minds what the evidence was which has been given, and then to form and express their judgment upon their own conclusions as to the nature and effect of that evidence, are improper. *Uransky* v. *Dry Dock, E. B. & B. R. Co.*, 37 *N. Y. S. R.* 543, 59 *Hun* 626, *mem.*, 13 *N. Y. Supp.* 670.

In an action for personal injuries, a physician testified that he first saw plaintiff about two weeks after the accident and that plaintiff was then suffering from meningitis. After stating that he had heard plaintiff's testimony as to the manner of the accident, he was allowed to testify that the injuries received in the manner described were quite sufficient to produce meningitis. *Held*, that the testimony was improper. *Connelly* v. *Manhattan R. Co.*, 60 *Hun* 495, 39 *N. Y. S. R.* 561, 15 *N. Y. Supp.* 176.

It seems to be a common practice in examining a medical witness to ask him whether he has heard the testimony of a witness who has testified as to the circumstances under which the injuries were received, and if he answers in the affirmative, to inquire as to his opinion upon the testimony so given; but this practice can only be justified for the purpose of facilitating the trial where no objection is made. The party against whom the evidence is offered is entitled to have an explicit statement made to or by the expert as to the precise state of facts upon which his opinion is based. *Connelly* v. *Manhattan R. Co.*, 60 *Hun* 495, 39 *N. Y. S. R.* 561, 15 *N. Y. Supp.* 176.

An expert may give his opinion based upon the testimony of another witness whom he heard testify, if such testimony was brief, plain, and uncontradicted, or where the jury is informed of the exact fact upon which the opinion is based. *Abbot* v. *Dwinnell*, 74 *Wis.* 514, 43 *N. W. Rep.* 496.

155. Opinions supported by facts upon which given.—One question in a case being whether an engine could be stopped under certain circumstances, an expert who testifies on that subject can give his reasons for what he states, and for that purpose, by way of illustration, state what he has known to be done under even more difficult circumstances. *Augusta & S. R. Co.* v. *Dorsey*, 68 *Ga.* 228.

An expert who has testified to the state of the weather at a certain time and place, and to his opinion of the effect of such weather upon a certain substance, as deduced from many experiments, cannot be asked in his examination in chief as to the details of each experiment. *Ingledew* v. *Northern R. Co.*, 7 *Gray* (*Mass.*) 86.

Expert witnesses may be allowed to give their opinions as to the market value of dogs, such opinions being based on actual

sales or on their general observations and experience. *Canfling* v. *Hannibal & St. J. R. Co.*, 54 *Mo.* 385, 12 *Am. Ry. Rep.* 387.

In an action for diverting water from a mill, a millwright acquainted with the mill and with its wheels and efficiency having stated what quantity of water two pumps of a railroad company, continuously occupied, would take from a creek is properly allowed to state the grinding capacity of that quantity of water at the mill, against the objection that there was no foundation laid for the evidence, although it did not appear that the two pumps were constantly in operation. *Garwood* v. *New York C. & H. R. R. Co.*, 45 *Hun* 128, 9 *N. Y. S. R.* 448.—APPLYING Garwood *v.* New York C. & H. R. R. Co., 17 Hun 356.

156. Upon hypothetical statement of facts.—A train was running backward at the time of an accident, and there was evidence that the track was in the same condition at that time as when it was seen by an expert witness. *Held*, that it was proper for the expert to state whether, if the track was in the same condition, it would be more dangerous to run the train backward than forward. *Kuhns* v. *Wisconsin, I. & N. R. Co.*, 70 *Iowa* 561, 31 *N. W. Rep.* 868.

Where it is sought to recover for professional services rendered to a company, evidence showing what the services were worth at the place is incompetent. The witness should be informed what services were rendered and allowed to predicate his opinion thereon. *Southgate* v. *Atlantic & P. R. Co.*, 61 *Mo.* 89.

An expert may give an opinion based on a state of facts which he himself has witnessed, or which are detailed to him by other witnesses, or which are put to him in the form of a hypothetical case, and may state his reasons therefor by which the jury may judge of the weight and value of the opinion. *Benjamin* v. *Metropolitan St. R. Co.*, 50 *Mo. App.* 602.

An expert witness speaking upon a question of science may be asked, in presence of a given effect, of what cause it either was, or might be, the resultant. *Moyer* v. *New York C. & H. R. R. Co.*, 98 *N. Y.* 645, *mem.*; *affirming* (*P*) 32 *Hun* 644, *mem.*

157. Assuming facts not proved.—A witness, a grazier, was asked: "What is the difference between the value of the cattle depastured" on a certain tract of land, "compared with what it would have been had they been pastured quietly, and if they had not been disturbed by the making of the railroad?" *Held*, that the question was inadmissible, because it assumed that there was a deterioration sustained by the cattle, and that it was owing to the construction of the railroad, which were facts to be proven, and therefore for the jury to find, even conceding the witness to be an expert. *Baltimore & O. R. Co.* v. *Thompson*, 10 *Md.* 76.

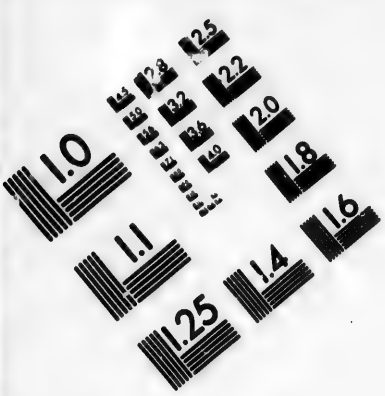
158. Cross-examination.—A witness, having testified to the damages to a particular tract of land touched by a track, cannot, on cross-examination, be required to testify as to the effect upon other tracts owned by the same party. *Peoria, P. & J. R. Co.* v. *Laurie*, 63 *Ill.* 264, 7 *Am. Ry. Rep.* 214.

In an action for personal injuries, plaintiff exhibited a running sore on his ankle which he claimed was caused by the injury. A physician testified that in his opinion the condition of the limb was caused by the injury. *Held*, that it was competent to show, on cross-examination, that his opinion had no certain foundation and was of little or no value. *Shoemaker* v. *New York C. & H. R. R. Co.*, 21 *N. Y. S. R.* 541, 4 *N. Y. Supp.* 931, 50 *Hun* 602, *mem.*; *affirmed in* 121 *N. Y.* 670, *mem.*, 24 *N. E. Rep.* 1094, *mem.*

A medical witness may properly be cross-examined, in an action to recover for personal injuries, as to statements made and opinions given in his testimony at a former trial, relative to plaintiff's condition, the trouble from which he was suffering, and the causes, said testimony being inconsistent with his present testimony. *Waterman* v. *Chicago & A. R. Co.*, 52 *Am. & Eng. R. Cas.* 592, 82 *Wis.* 613, 52 *N. W. Rep.* 247, 1136.

5. *Farmers.*

159. In general.—Where farmers or others give their opinions, as experts, as to the market value of land with which they are acquainted, it is not improper, upon cross-examination, for the purpose of testing their knowledge and competency, to inquire of them concerning the sales of adjoining land. *Chicago, K. & N. R. Co.* v. *Stewart*, 47 *Kan.* 704, 28 *Pac. Rep.* 1017.—DISTINGUISHING East Pa. R. Co. *v.* Hiester, 40 Pa. St. 53.



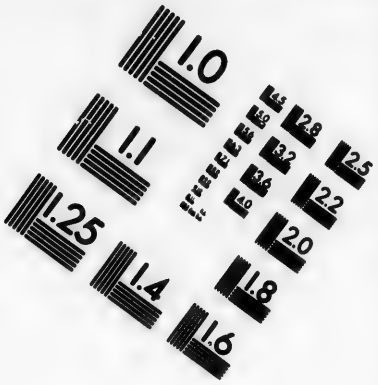
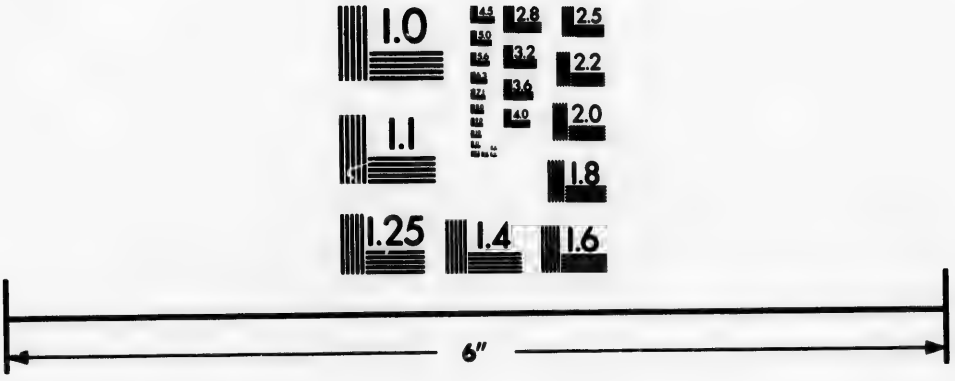
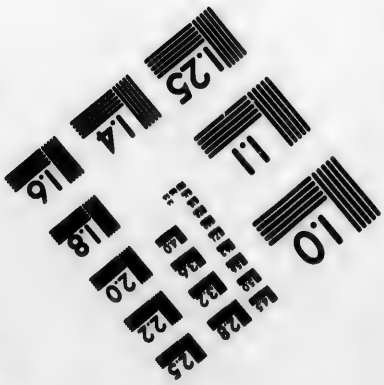


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Witnesses estimated the damages for a right of way across a farm from nothing up to $1200. Those fixing it at the highest estimate were farmers, and those fixing it at the lowest amount were persons engaged in other pursuits. None of the farmers estimated the damages as low as the sum fixed by the jury. *Held*, that from their occupation they had a better opportunity of estimating the damages than the other witnesses, and the jury were justified in giving the preference to their testimony. *Jacksonville, A. & St. L. R. Co.* v. *Caldwell*, 21 *Ill.* 75.

A witness in an action for damages for firing a field may testify that the meadow burned would produce more profitable crops of corn than of hay. *Toledo, St. L. & K. C. R. Co.* v. *Kingman*, 49 *Ill. App.* 43.

160. Value of land.—The testimony of farmers who live in the neighborhood of the property in question, and who state that they know the value of lands there, is competent on the question of damages. *Ball* v. *Keokuk & N. W. R. Co.*, 74 *Iowa* 132, 37 *N. W. Rep.* 110. *Leroy & W. R. Co.* v. *Hawk*, 36 *Am. & Eng. R. Cas.* 665, 39 *Kan.* 638, 18 *Pac. Rep.* 943.—FOLLOWED IN Chicago, K. & W. R. Co. *v.* Cosper, 42 Kan. 561, 22 Pac. Rep. 634. QUOTED IN Kansas City & S. W. R. Co. *v.* Ehret, 41 Kan. 22, 20 Pac. Rep. 538.—*Kansas City & S. W. R. Co.* v. *Baird*, 41 *Kan.* 69, 21 *Pac. Rep.* 227.—FOLLOWING Kansas City & S. W. R. Co. *v.* Ehret, 41 Kan. 22, 20 Pac. Rep. 538.—FOLLOWED IN Kansas City & S. W. R. Co. *v.* Orr, 41 Kan. 70; Kansas City & S. W. R. Co. *v.* Headrick, 41 Kan. 71.—*Pennsylvania, P. & B. R. Co.* v. *Root*, 47 *Am. & Eng. R. Cas.* 181, 53 *N. J. L.* 253, 21 *Atl. Rep.* 285.—QUOTED IN Laing *v.* United N. J. R. & C. Co., 54 N. J. L. 576.

The value and effect of such testimony are for the jury. *Curtin* v. *Nittany Valley R. Co.*, 44 *Am. & Eng. R. Cas.* 130, 135 *Pa. St.* 20, 19 *Atl. Rep.* 740.

A witness who was a farmer had visited and examined the land through which a railroad ran, within a year of the trial, with a view of buying it. He had, besides, a general knowledge of the value of land in the county. *Held*, that he was competent to express an opinion in regard to the value of the land and the injury inflicted upon it by the railroad. *Pittsburgh Southern R. Co.* v. *Reed*, (*Pa.*) 28 *Am. & Eng. R. Cas.* 233, 6 *Atl. Rep.* 838.

A farmer not engaged in buying and selling real estate, not knowing the market value of real estate, not living in the neighborhood of the land inquired about, and who does not know its situation and fertility, its advantages and disadvantages, cannot, as a witness, give his evidence as to the value of the land before and after the appropriation of the right of way by a railroad company. A farmer conversant with the land as to its situation, soil, advantages, etc., is competent as a witness to the value, as having particular knowledge of the facts in issue. *Leroy & W. R. Co.* v. *Ross*, 36 *Am. & Eng. R. Cas.* 653, 40 *Kan.* 598, 2 *L.* [illegible] 217, 20 *Pac. Rep.* 197.—REVIEWING Leavenworth, T. & S. W. R. Co. *v.* Paul, 28 Kan. 816.

161. Rental value.—Practical farmers are qualified to give an opinion as to what extent leaving a farm unfenced will affect its rental value. *Finch* v. *Chicago, M. & St. P. R. Co.*, 46 *Minn.* 250, 48 *N. W. Rep.* 915.

162. Value of crops.—A farmer suing for the destruction of his crop by overflow may give his opinion as to the value of the crop at the time of its destruction, and state as the basis of his valuation the usual yield of the land in crop seasons similar to that in question. *St. Louis, I. M. & S. R. Co.* v. *Lyman*, 57 *Ark.* 512, 22 *S. W. Rep.* 170.

163. Weight of live stock.—In an action against a company to recover for damages to hogs shipped, a witness who states that he is forty-five years old and has been raising hogs all his life, has weighed a good many, set down their weights since he was a boy, and is engaged in shipping cattle and hogs, and says that he thinks he is qualified to estimate with reasonable certainty the weight of hogs though not claiming to be an expert, is competent to give his opinion as to the weight of hogs. The admission of such evidence rests largely in the discretion of the trial judge. *Southern Pac. R. Co.* v. *Duncan*, 3 *Tex. App.* (*Civ. Cas.*) 285.

6. *Physicians and Surgeons.*

164. In general.—(1) *General rules.*—Plaintiff's attending physician having made an examination of her person, and testified as to the nature and extent of her injuries, stated that he found the coccyx bone somewhat disjointed, causing great

pain, but that this might be cured by the removal of the bone by a surgical operation. *Held*, that he could not be asked why he did not "call in some surgeon and remove it." *Alabama G. S. R. Co.* v. *Hill*, 93 *Ala.* 514, 9 *So. Rep.* 722.

There is no objection to a plaintiff closing his case with medical expert testimony based upon the facts as then presented, and no rule requires the exclusion of such testimony because other facts are developed by defendant's witnesses and plaintiff's medical witnesses are not recalled for further examination. *Sorenson* v. *Northern Pac. R. Co.*, 36 *Fed. Rep.* 166.

In an action for a personal injury, plaintiff called his attending physician, who testified to having examined plaintiff, who stated the symptoms, and that he had suffered pain. The witness was then asked whether plaintiff was feigning or "making believe," to which he answered, "No, sir; I know he did not, from examination and tests." *Held*, that, with the explanation as to his means of knowledge, there was no error in the admission of the evidence. The answer could only be understood as a deduction or conclusion from the examination and tests made. *Chicago, B. & Q. R. Co.* v. *Martin*, 112 *Ill.* 16.

In such case, the attending physician, having every means of observing the symptoms, may be asked if the patient suffered pain and his answer in the affirmative can be considered only as an opinion based upon actual facts and tests. It does not even require an expert to know the existence of pain from the nature of the injury and the patient's outward manifestations. *Chicago, B. & Q. R. Co.* v. *Martin*, 112 *Ill.* 16.

In an action for a personal injury in which it was claimed that the left side of plaintiff was paralyzed, he called a physician who testified that he himself was paralyzed on the left side, in his arm and leg, and had no practical use of them. *Held*, that the testimony was relevant as tending to show that the witness had given special study to the subject, thus giving greater value to his opinions as an expert. *Chicago W. D. R. Co.* v. *Lambert*, 119 *Ill.* 255, 10 *N. E. Rep.* 219; *affirming* 20 *Ill. App.* 654.

The fact that a physician examined plaintiff to gain information before testifying may affect the credibility of his testimony, but does not make it incompetent; and the fact that he did not, at the time of the examination, have in mind a given disease does not make it improper for him to state certain facts and symptoms which he knows may indicate the disease in question. It is for the jury to weigh the evidence so given. *Chicago, St. L. & P. R. Co.* v. *Spilker*, 55 *Am. & Eng. R. Cas.* 200, 134 *Ind.* 380, 33 *N. E. Rep.* 280.

On the trial of an action for personal injuries, five physicians testified that they had made a personal examination, and expressed a uniform opinion as to the character and probable permanence of the injuries. A sixth physician was called, who testified, without objection, that he had heard none of the testimony; that he had made a personal examination, and from such examination, as well as from statements of the party as to the past history of the case and statements made by her husband in her presence, he had formed a certain opinion, which opinion was in harmony with that expressed by the other physicians, and upon cross-examination he reiterated the same testimony. A motion was made to strike out all of his testimony, and no inquiry was made as to what the statements to him of the party or her husband were. The amount awarded by the jury was not grossly excessive. *Held*, that the court will not reverse the judgment on the ground that the trial court erred in overruling the motion to strike out the testimony. *Atchison, T. & S. F. R. Co.* v. *Frazier*, 8 *Am. & Eng. R. Cas.* 72, 27 *Kan.* 463.—COMMENTED ON IN Cleveland, C., C. & I. R. Co. *v.* Newell, 23 Am. & Eng. R. Cas. 492, 104 Ind. 264, 54 Am. Rep. 312. FOLLOWED IN St. Louis & S. F. R. Co. *v.* Farr, 56 Fed. Rep. 994.

The testimony of a physician as to his diagnosis of a case, the diagnosis not being based upon any history of the case, and his opinion as to the cause of the paralysis with which the patient is afflicted being based upon the conclusions of another physician, is incompetent testimony. *Fox* v. *Peninsular W. L. & C. Works*, 92 *Mich.* 243, 52 *N. W. Rep.* 623.

The testimony of a physician that injuries resulting from railroad accidents are more severe than from other causes, though bearing the same external appearance, is admissible although his knowledge is derived from study alone. *Taylor v. Grand Trunk R. Co.*, 48 *N. H.* 304.

In an action for personal injuries, the proof tended to show that the left side of

plaintiff was partially paralyzed. The direct question was then asked of a physician by plaintiff's counsel whether plaintiff could walk without a cane. *Held*, that leading questions are always discretionary, and this one could do no harm where the witness did not answer it further than to say that the paralysis made a perceptible lameness. *Johnson* v. *Broadway & S. A. R. Co.*, 25 *N. Y. S. R.* 162, 53 *Hun* 633, *mem.*, 2 *Silv. Sup. Ct.* 532, 6 *N. Y. Supp.* 113; *affirmed in* 125 *N. Y.* 702, *mem.*, 34 *N. Y. S. R.* 1012, 26 *N. E. Rep.* 752.

The evidence of a physician who testifies as an expert is not rendered incompetent because it is based upon an *ex parte* examination. Such objection only goes to the weight of the evidence, and not to its competency. *Mississippi & T. R. Co.* v. *Ayres*, 16 *Lea* (*Tenn.*) 725.

The qualifications of a physician to testify in a professional capacity (under § 1436, S. & B. Wis. Ann. St.) may be proved by his own oral testimony, without producing his diploma or proving by record evidence the incorporation of the institution or society which granted it, or that he is a member of one of the medical societies designated. *McDonald* v. *Ashland*, 78 *Wis.* 251, 47 *N. W. Rep.* 434.

(2) *Opinions not permissible.*—In an action to recover for personal injuries to a passenger which caused a permanent stiffening of one of his arms, a physician and surgeon who has testified, as an expert, that the injury might probably be cured by a painful and somewhat dangerous surgical operation cannot be asked whether, if it was his arm, he would submit to such operation. *Montgomery & E. R. Co.* v. *Mallette*, 92 *Ala.* 209, 9 *So. Rep.* 363.

A physician cannot testify to his opinion as to what ails a patient where such opinion is not the result of his own examination nor based on facts in proof nor given in answer to hypothetical questions based on facts. *Grand Rapids & I. R. Co.* v. *Huntley*, 38 *Mich.* 537.

In an action for personal injuries, a physician testified that he had never seen plaintiff before she was injured, and that he had no personal knowledge of her medical history prior to the accident except what he learned by questioning her, and no evidence was given as to what plaintiff had told the physician. He was then asked for what he had treated her, what symptoms he had treated her for during the time from the injury to the trial, "due entirely to the injuries she received at the time of the accident." *Held*, that an objection to the question should have been sustained. It allowed the witness completely to usurp the functions of the jury. *Atkins* v. *Manhattan R. Co.*, 32 *N. Y. S. R.* 214, 10 *N. Y. Supp.* 432, 57 *Hun* 102.

In a suit for a personal injury, the physician attending plaintiff cannot be asked his opinion as to the result if the treatment adopted by him had been continued by the physician succeeding him after he had abandoned the case, when such evidence does not go to show that the subsequent treatment rendered permanent the injury to plaintiff. *International & G. N. R. Co.* v. *Irvine*, (*Tex.*) 18 *Am. & Eng. R. Cas.* 294.

(3) *As to value of services.*—In an action for personal injuries resulting in the loss of both legs below the knees, a physician testified, without objection, that he had recommended plaintiff to go South or West for the recovery of his health; that it was necessary that a person should go with him; that he was in the incipient stages of consumption; and that, while his injuries would not directly produce this disease, they would produce a condition of body favorable to its development. He was then allowed, against objection, to testify as to the price for the services of such a trained nurse as would be competent to take care of plaintiff. *Held*, that defendant had no ground of exception. *Turner* v. *Boston & M. R. Co.*, 158 *Mass.* 261, 33 *N. E. Rep.* 520

In an action for injuries to plaintiff's eye, it appearing that he was put to expense for surgical treatment, it is proper to allow the surgeon to testify to the value of the services. It is not necessary that the amount shall have been actually paid. *McNeier* v. *Manhattan R. Co.*, 4 *N. Y. Supp.* 310, 51 *Hun* 644, 22 *N. Y. S. R.* 840; *affirmed in* 123 *N. Y.* 664, *mem.*, 26 *N. E. Rep.* 750.

165. Cause of personal injury.—(1) *Rule stated.*—Where a medical witness who has seen and examined the injured party has testified to his condition, it is proper to permit such witness to state what, in his opinion, produced the symptoms he had described. *Louisville, N. A. & C. R. Co.* v. *Wood*, 113 *Ind.* 544, 12 *West. Rep.* 303, 14 *N. E. Rep.* 572, 16 *N. E. Rep.* 197. *Pennsylvania Co.* v. *Frund*, 4 *Ind. App.* 469, 30 *N. E. Rep.* 1116. *Lacas* v. *Detroit City*

R. Co., 92 *Mich.* 412, 52 *N. W. Rep.* 745.—DISTINGUISHING Jones *v.* Portland, 88 Mich. 598. FOLLOWING Fay *v.* Swan, 44 Mich. 544.—*Stouter* v. *Manhattan R. Co.* 127 *N. Y.* 661, 3 *Silv. App.* 472, 38 *N. Y. S. R.* 162, 27 *N. E. Rep.* 805; *affirming* 25 *N. Y. S. R.* 683, 6 *N. Y. Supp.* 163, 3 *Silv. Sup. Ct.* 413. *Texas C. R. Co.* v. *Burnett*, 80 *Tex.* 536, 16 *S. W. Rep.* 320.

But he must state the facts upon which his opinion is founded. *Matteson* v. *New York C. R. Co.*, 62 *Barb.* (*N. Y.*) 364.—APPLIED IN Jones *v.* Utica & B. R. R. Co., 40 Hun (N. Y.) 349.

And he cannot be asked his opinion as to the cause of an injury judging merely from the condition in which he found the patient, and without any knowledge as to how the injury took place. *Hitchcock* v. *Burgett*, 38 *Mich.* 501.

(2) *Illustrations.*—A physician, testifying as an expert as to the nature and extent of plaintiff's injuries, after a personal examination may state his opinion that they were caused by a fall, but not that they were caused by a fall from a horse at a particular railroad crossing described in the complaint, when he knows nothing of the facts. *Patterson* v. *South & N. Ala. R. Co.*, 89 *Ala.* 318, 7 *So. Rep.* 437.

In an action for a personal injury, plaintiff called a practising physician and surgeon who was well acquainted with plaintiff, having met him almost daily for many years, but who had been called upon to treat him for the first time when the injury was received, and asked him this question: "What, in your opinion and knowledge of Mr. O.'s previous health and condition, has caused his present illness or disorder, as described by you?" and he answered: "My opinion is, it results from the injury in November last." *Held*, no error, it appearing that the witness had sufficient knowledge upon which to base an intelligent opinion. *Louisville, N. A. & C. R. Co.* v. *Shires*, 19 *Am. & Eng. R. Cas.* 387, 108 *Ill.* 617.

In such case, a witness for the defense, a practising physician, was asked the question: "Please state what, in your judgment as a physician, is the present malady of plaintiff, according to the symptoms as given by Dr. Tillottson?" The witness had stated that he had heard Dr. T.'s testimony, and also that the doctor had made a statement of the case to him on the day before. *Held*, that an objection to the question was properly sustained, as it did not call for an opinion on the testimony of Dr. T. as given on the trial, but according to the symptoms given by Dr. T., which also included statements made by him on the preceding day. *Louisville, N. A. & C. R. Co.* v. *Shires*, 19 *Am. & Eng. R. Cas.* 387, 108 *Ill.* 617.

A physician may give his opinion as to whether fright would produce heart trouble. *Illinois C. R. Co.* v. *Latimer*, 128 *Ill.* 163, 21 *N. E. Rep.* 7; *affirming* 28 *Ill. App.* 552.

While a surgeon may testify whether external violence having a specified effect upon the person may produce a given result, it is not competent for him to say that a described movement of a car and of the person of the patient will or will not produce that specified effect upon his person. *Wabash Western R. Co.* v. *Friedman*, 41 *Ill. App.* 270.

A physician who attended one injured in a railway accident in December and testified as to his condition the following April can be asked whether the condition of the patient in April was the natural result of the injuries received in December. *McDonald* v. *Illinois C. R. Co.*, 88 *Iowa* 345, 55 *N. W. Rep.* 102.

The injury inflicted was rupture and varicocele, and a competent physician and surgeon who had examined the injury was called as an expert, and testified that such injuries were generally the result of more or less violence. He had heard the injured plaintiff testify how the injury was caused, and he was asked to state whether, in his opinion, plaintiff's injury could have been produced in the manner stated. Over objection he answered that it could, and must have been done by violence. *Held*, not prejudicial error. *Atchison, T. & S. F. R. Co.* v. *Brassfield*, 51 *Kan.* 167, 32 *Pac. Rep.* 814.

The principal injury complained of being a fracture and dislocation of the shoulder which had impaired plaintiff's power to use his arm, and the defense having claimed that these injuries were feigned, it is not prejudicial error to permit an expert witness, who has testified to a shrunken condition of the arm which could not have been caused by mere disuse, to give his opinion that plaintiff was not simulating. *Harrold* v. *Winona & St. P. R. Co.*, 47 *Minn.* 17, 49 *N. W. Rep.* 389.

In an action for personal injuries to a passenger by the cars leaving the track, plain-

tiff testified that he was thrown on some rubbish with his body bent forward over his limbs and certain rubbish piled on his back, which caused certain injuries. It was clearly proven that his spine was injured. *Held*, that it was competent to ask a physician whether the doubling up of plaintiff in the manner described "would be a competent cause for this condition." *Beckwith* v. *New York C. R. Co.*, 64 *Barb.* (*N. Y.*) 299.

In an action for personal injuries a physician testified that he first saw plaintiff about two weeks after the accident, when she was suffering from meningitis, and that he had heard plaintiff describe the accident. He was then asked whether the injuries received as described by plaintiff were sufficient to produce meningitis. *Held*, that the question was improper. The witness must base his answer upon what he believes to be the facts, and not upon what plaintiff has testified to. *Connelly* v. *Manhattan R. Co.*, 39 *N. Y. S. R.* 561, 15 *N. Y. Supp.* 176, 60 *Hun* 495.

In an action for personal injuries occurring in the upper part of New York city, a medical witness was asked, assuming that plaintiff was in good health the day before the accident and that she was thrown from her seat in defendant's car, carried in an ambulance to a house near by and afterwards removed to Brooklyn, and was then examined and found to be suffering from rapid pulse, bruises, and ruptured veins, what would witness say was the cause of her injuries. *Held*, not objectionable as calling for the mere conclusion of the witness. *Haviland* v. *Manhattan R. Co.*, 15 *N. Y. Supp.* 898, 61 *Hun* 626, *mem.*, 40 *N. Y. S. R.* 773, *affirmed in* 131 *N. Y.* 630, *mem.*, 30 *N. E. Rep.* 864, *mem.*

No objection having been made to the question as ill-framed and improperly asking for the cause of the injuries, defendant cannot, on appeal, avail itself of such objections. *Haviland* v. *Manhattan R. Co.*, 15 *N. Y. Supp.* 898, 61 *Hun* 626, *mem.*, 40 *N. Y. S. R.* 773; *affirmed in* 131 *N. Y.* 630, *mem.*, 30 *N. E. Rep.* 864, *mem.*

Plaintiff was standing in a crowded horse car when it jumped the track and stopped suddenly against a bridge, which threw plaintiff forward and injured her. A physician who had attended plaintiff was asked if the falling of the other passengers on plaintiff as described by her would be sufficient to cause the shock or injury. He replied that, in his opinion, it would not; that the injury was caused by the jar or fall. *Held*, that the admission of the evidence was not error. *Griffith* v. *Utica & M. R. Co.*, 43 *N. Y. S. R.* 835, 63 *Hun* 626, *mem.*, 17 *N. Y. Supp.* 692; *affirmed in* 137 *N. Y.* 566, *mem.*, 50 *N. Y. S. R.* 933, *mem.*, 33 *N. E. Rep.* 339, *mem.*—DISTINGUISHING Ryan *v.* Porter Mfg. Co., 57 Hun 256, 32 N. Y. S. R. 621. QUOTING Hagenlocher *v.* Coney Island & B. R. Co., 99 N. Y. 137.

166. Nature and extent of personal injury.* — A surgeon who has examined an injury may testify as to the character of the fracture and as to what bones were broken. *Goshen* v. *England*, 119 *Ind.* 368, 21 *N. E. Rep.* 977. — DISAPPROVED IN Terre Haute & I. R. Co. *v.* Clem, 123 Ind. 15.

The testimony of the physicians who examined plaintiff's limb and broken bone as to the details of such examination is competent. *Sherwood* v. *Chicago & W. M. R. Co.*, 88 *Mich.* 108, 50 *N. W. Rep.* 101.

A practising physician may testify in respect to the nature of a disease which is alleged to be the result of an injury received by being thrown from a car, and the fact that he is not a specialist only affects the value of his testimony. *Cooper* v. *St. Paul City R. Co.*, 58 *Am. & Eng. R. Cas.* 598, 54 *Minn.* 379, 56 *N. W. Rep.* 42.

Practising physicians may likewise give their opinions as to the nature of the injuries, such opinions being based in part on the statements of the injured person in relation to his condition, sufferings, or symptoms in the course of their professional examination into the case. *Cooper* v. *St. Paul City R. Co.*, 58 *Am. & Eng. R. Cas.* 598, 54 *Minn.* 379, 56 *N. W. Rep.* 42.

In an action for personal injuries, where a physician has testified that an uncertainty of movement in plaintiff was a symptom of paralysis, he may further testify as to the degree of physical and mental power plaintiff possessed in his partially paralyzed condition. *Beckwith* v. *New York C. R. Co.*, 64 *Barb.* (*N. Y.*) 299.

In an action for personal injuries, a physician who attended plaintiff for the first six weeks after the injury, treated him twelve

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* Expert testimony as to personal injury, see note, 19 AM. & ENG. R. CAS. 395.

As to when attending physician may give opinion as to extent of personal injuries, see note, 10 AM. ST. REP. 63.

to fifteen times thereafter, and examined him seven months before the trial, is qualified to speak as to the nature and extent of the injury. *Germann* v. *Suburban Rapid Transit Co.*, 13 *N. Y. Supp.* 897, 37 *N. Y. S. R.* 360; *affirmed in* 128 *N. Y.* 681, *mem.*, 29 *N. E. Rep.* 149, *mem.*

In an action for personal injuries, a physician who had examined plaintiff on three different occasions was asked: "From what you have known of his case heretofore, and what you have learned of his condition here to-day, what do you say about his being able to do heavy work, and hard work?" Witness answered: "I don't think it would be prudent for him to do hard work"; and again, to the question, "What is your opinion about his arm having been broken?" answered, "My opinion is that it was broken." *Held*, admissible. *Johnson* v. *Central Vt. R. Co.*, 19 *Am. & Eng. R. Cas.* 169, 56 *Vt.* 707.

167. Permanency of injuries.*—(1) *General rule.*—In an action for personal injuries, the declaration alleges that all of plaintiff's injuries will continue for a long time and prevent her from having free use of her person; that the injuries to her side and arm are permanent; that she will not be able for a very long time, by reason of said injuries, to discharge her domestic duties, and that her capacity to earn money has been destroyed for a long period of time and permanently decreased one half. *Held*, not error to permit a witness to testify that the condition of plaintiff ten years hence, if it continues going on as it is, will be that of a confirmed invalid, the court instructing the jury that they cannot consider any permanent injuries damage except to the arm and side, and that evidence as to duration of other injuries can be considered only as showing that the injuries will extend for some time in the future. *Metropolitan St. R. Co.* v. *Johnson*, 90 *Ga.* 500, 16 *S. E. Rep.* 49.

Plaintiff was injured in July, 1880, and in June, 1885, a doctor was called to see him. On the trial the doctor was asked: "When you got there what condition did you find the child in?" Defendant objected that the visit was too remote from the accident to be material. *Held*, that as there was testimony that the injuries received continued to time of trial, and some evidence that they were permanent, the question was not immaterial upon this ground. *Keyser* v. *Chicago & G. T. R. Co.*, 31 *Am. & Eng. R. Cas.* 399, 66 *Mich.* 390, 10 *West. Rep.* 646, 33 *N. W. Rep.* 867.

In an action for personal injuries, plaintiff, after proving the injury which he has suffered, may offer in evidence the opinion of a medical witness having knowledge of the case as to the probability of his recovery. *Griswold* v. *New York C. & H. R. R. Co.*, 42 *Am. & Eng. R. Cas.* 221, 115 *N. Y.* 61, 21 *N. E. Rep.* 726, 23 *N. Y. S. R.* 729; *affirming* 44 *Hun* 236, 7 *N. Y. S. R.* 804.—DISTINGUISHING Strohm *v.* New York, L. E. & W. R. Co., 96 N. Y. 305; Tozer *v.* New York C. & H. R. R. Co., 105 N. Y. 617. QUOTING Turner *v.* Newburgh, 109 N. Y. 309.—DISTINGUISHED IN Miley *v.* Broadway & S. A. R. Co., 29 N. Y. S. R. 107; O'Brien *v.* New York, N. H. & H. R. Co., 36 N. Y. S. R. 801, 59 Hun 623, 13 N. Y. Supp. 305. FOLLOWED IN Alberti *v.* New York, L. E. & W. R. Co., 118 N. Y. 77; Atkins *v.* Manhattan R. Co., 32 N. Y. S. R. 214, 10 N. Y. Supp. 432, 57 Hun 102.—*Buel* v. *New York C. R. Co.*, 31 *N. Y.* 314. *Reichman* v. *Second Ave. R. Co.*, 15 *N. Y. S. R.* 928, 48 *Hun* 620, *mem.*, 1 *N. Y. Supp.* 836. *Campbell* v. *New York C. & H. R. R. Co.*, 3 *N. Y. Supp.* 694, 49 *Hun* 611, *mem.*, 19 *N. Y. S. R.* 659; *affirmed in* 121 *N. Y.* 669, *mem.*, 24 *N. E. Rep.* 1094. *Goll* v. *Manhattan R. Co.*, 25 *J. & S.* 74, 24 *N. Y. S. R.* 24, 5 *N. Y. Supp.* 185; *affirmed in* 125 *N. Y.* 714, 26 *N. E. Rep.* 756. *Coyne* v. *Manhattan R. Co.*, 42 *N. Y. S. R.* 617, 62 *Hun* 620, 16 *N. Y. Supp.* 686. *Macer* v. *Third Ave. R. Co.*, 15 *J. & S.* (*N. Y.*) 461.—DISTINGUISHING Curtis *v.* Rochester & S. R. Co., 18 N. Y. 534.—*Bailey* v. *Wescott*, 14 *Daly* (*N. Y.*) 506.

And questions put to the physician need not necessarily be hypothetical in form. *Coyne* v. *Manhattan R. Co.*, 42 *N. Y. S. R.* 617, 62 *Hun* 620, 16 *N. Y. Supp.* 686.

And the physician may give his opinion whether pain will continue. *Popp* v. *New York C. & H. R. R. Co.*, 26 *N. Y. S. R.* 639, 54 *Hun* 635, 4 *Silv. Sup. Ct.* 243, 7 *N. Y. Supp.* 249.—DISTINGUISHING Strohm *v.* New York, L. E. & W. R. Co., 96 N. Y. 305; Tozer *v.* New York C. & H. R. R. Co., 105 N. Y. 617, 6 N. Y. S. R. 447. FOLLOWING Griswold *v.* New York C. & H. R. R. Co., 23 N. Y. S. R. 729.

* Expert testimony as to the permanence and future effects of personal injuries, see note, 42 AM. & ENG. R. CAS. 223.

(2) *Illustrations.*—In an action for personal injuries, a doctor, one of plaintiff's witnesses, was asked as to whether the complications from which plaintiff was suffering were likely to be permanent. The answer was: "They certainly are likely to be permanent, by all means." *Held*, that this was competent. *Reichman* v. *Second Ave. R. Co.*, 15 *N. Y. S. R.* 928, 48 *Hun* 620, *mem.*, 1 *N. Y. Supp.* 836.

In an action for personal injuries, where the evidence shows that the effects of the injuries remained until the time of trial, a physician who saw plaintiff in the meantime, some four months after the injury, may properly testify as to plaintiff's condition at that time. *Dale* v. *Brooklyn City, H. P. & P. P. R. Co.*, 3 *T. & C.* (*N. Y.*) 686; *affirmed in* 60 *N. Y.* 638.

It appeared that the witness had been in practice for eighteen years. *Held*, that it was proper to ask him whether, in his opinion, plaintiff would recover. *Johnson* v. *Broadway & S. A. R. Co.*, 25 *N. Y. S. R.* 162, 53 *Hun* 633, *mem.*, 2 *Silv. Sup. Ct.* 532, 6 *N. Y. Supp.* 113; *affirmed in* 125 *N. Y.* 702, *mem.*, 34 *N. Y. S. R.* 1012, 26 *N. E. Rep.* 752, *mem.*

Plaintiff endeavored to board an elevated railroad car after the gate was closed, and was carried some distance before the train could be stopped and her rescue effected. In an action for the injuries sustained thereby the evidence was conflicting as to whether the guard told her to get on. The court excluded questions put to a physician as follows: "From your experience as a physician, what are the principal effects that will be apt to attend a patient who has suffered the injuries you have described?" and "Can you state, from your experience as a physician, any of the effects which usually attend such injuries as you have testified to, and which are or may become permanent?" *Held*, no error; that such questions were vague and speculative. *Lewis* v. *Brooklyn El. R. Co.*, 27 *N. Y. Supp.* 889, 7 *Misc.* 286.

A physician and surgeon who attended plaintiff having testified that the injuries received were of a permanent character, it is not error to permit him also to testify as to the expectation of life, as shown by the mortality tables, of a healthy man of plaintiff's age. *McCue* v. *Knoxville*, 146 *Pa. St.* 580, 23 *Atl. Rep.* 439.—FOLLOWING Steinbrunner *v.* Pittsburgh & W. R. Co., 146 Pa. St. 504.

In an action for personal injuries, the opinion of a witness who attended plaintiff, that his injuries are permanent, is admissible although two years have elapsed since the time of the accident. *Missouri Pac. R. Co.* v. *Callaghan*, (*Tex.*) 41 *Am. & Eng. R. Cas.* 85, 12 *S. W. Rep.* 833.

168. Probable future effect of injury.*—(1) *In general.*—Medical witnesses may testify as to the probable results that will follow from an injury described by other witnesses who have testified on the trial. *Louisville, N. A. & C. R. Co.* v. *Wood*, 113 *Ind.* 544, 12 *West. Rep.* 303, 14 *N. E. Rep.* 572, 16 *N. E. Rep.* 197.—DISTINGUISHING Van Deusen *v.* Newcomer, 40 Mich. 90; Haggerty *v.* Brooklyn City & N. R. Co., 61 N. Y. 624.

In an action for personal injuries, the evidence of experts as to future consequences which are expected to follow the injury is competent. *Strohm* v. *New York, L. E. & W. R. Co.*, 19 *Am. & Eng. R. Cas.* 167, 96 *N. Y.* 305; *reversing* 32 *Hun* 20. —APPLIED IN Jones *v.* Utica & B. R. R. Co., 40 Hun 349; Harold *v.* New York C. & H. R. R. Co., 13 Daly (N. Y.) 378; DeSoucey *v.* Manhattan R. Co., 39 N. Y. S. R. 79, 15 N. Y. Supp. 108. DISTINGUISHED IN Griswold *v.* New York C. & H. R. R. Co., 115 N. Y. 61, 21 N. E. Rep. 726, 23 N. Y. S. R. 729; McClain *v.* Brooklyn City R. Co., 40 Am. & Eng. R. Cas. 254, 116 N. Y. 459, 22 N. E. Rep. 1062, 27 N. Y. S. R. 549; Alberti *v.* New York, L. E. & W. R. Co., 118 N. Y. 77, 23 N. E. Rep. 35; Wallace *v.* Vacuum Oil Co., 128 N. Y. 579, 27 N. E. Rep. 956; Ganiard *v.* Rochester City & B. R. Co., 50 Hun 22, 18 N. Y. S. R. 692, 2 N. Y. Supp. 470; Popp *v.* New York C. & H. R. R. Co., 26 N. Y. S. R. 639, 7 N. Y. Supp. 249; Montgomery *v.* Long Island R. Co., 29 N. Y. S. R. 822, 8 N. Y. Supp. 811. EXPLAINED IN Peterson *v.* Chicago, M. & St. P. R. Co., 38 Minn. 511, 39 N. W. Rep. 485. FOLLOWED IN Tozer *v.* New York C. & H. R. R. Co., 105 N. Y. 617, 6 N. Y. S. R. 447, 1 Silv. App. 371; Miley *v.* Broadway & S. A. R. Co., 29 N. Y. S. R. 107, 8 N. Y. Supp. 455; Atkins *v.* Manhattan R. Co., 32 N. Y. S. R. 214, 10 N. Y. Supp. 432, 57 Hun 102. QUOTED IN Mosher *v.* Russell, 44 Hun 12. REVIEWED IN Cook *v.* New York

* Examination of medical witnesses. Opinion as to future effect of injury, see 52 AM. & ENG. R. CAS. 610, *abstr.*

C. & H. R. R. Co., 17 N. Y. S. R. 353.—*McClain* v. *Brooklyn City R. Co.*, 40 *Am. & Eng. R. Cas.* 254, 116 *N. Y.* 459, 22 *N. E. Rep.* 1062, 27 *N. Y. S. R.* 549; *affirming* 42 *Hun* 657, *mem.*, 6 *N. Y. S. R.* 49.—DISTINGUISHING Strohm *v.* New York, L. E. & W. R. Co., 96 N. Y. 305. FOLLOWING Lincoln *v.* Saratoga & S. R. Co., 23 Wend. 425; Filer *v.* New York C. R. Co., 49 N. Y. 42.—FOLLOWED IN Alberti *v.* New York, L. E. & W. R. Co., 118 N. Y. 77.—*Wallace* v. *Vacuum Oil Co.*, 128 *N. Y.* 579, *mem.*, 27 *N. E. Rep.* 956.—DISTINGUISHING Strohm *v.* New York, L. E. & W. R. Co., 96 N. Y. 305.—*Jones* v. *Utica & B. R. R. Co.*, 40 *Hun* (*N. Y.*) 349, *mem.*—APPLYING Matteson *v.* New York C. R. Co., 35 N. Y. 487; Matteson *v.* New York C. R. Co., 62 Barb. 364; Strohm *v.* New York, L. E. & W. R. Co., 96 N. Y. 305; Tozer *v.* New York C. & H. R. R. Co., 38 Hun 100.—*Maclennan* v. *Long Island R. Co.*, 20 *J. & S.* (*N. Y.*) 22; *affirmed* (*?*) *in* 107 *N. Y.* 623, *mem.*, 13 *N. E. Rep.* 939, *mem.*, 11 *N. Y. S. R.* 882, *mem. Evansville & T. H. R. Co.* v. *Crist*, 116 *Ind.* 446, 19 *N. E. Rep.* 310, 2 *L. R. A.* 450. *Kansas Pac. R. Co.* v. *Pointer*, 9 *Kan.* 620. *Abbot* v. *Dwinnell*, 74 *Wis.* 514, 43 *N. W. Rep.* 496.

To authorize such evidence, however, the apprehended consequences must be such as in the ordinary course of nature are reasonably certain to ensue; consequences which are contingent, speculative, or merely possible are not proper to be considered in estimating the damages and may not be proved. (Ruger, Ch. J., and Danforth, J., dissenting.) *Strohm* v. *New York, L. E. & W. R. Co.*, 19 *Am. & Eng. R. Cas.* 167, 96 *N. Y.* 305; *reversing* 32 *Hun* 20. *Tozer* v. *New York C. & H. R. R. Co.*, 105 *N. Y.* 617, *mem.*, 11 *N. E. Rep.* 846, 8 *N. Y. S. R.* 56, 6 *N. Y. S. R.* 447, 1 *Silv. App.* 371; *reversing* 38 *Hun* 100.—APPLIED IN DeSoucey *v.* Manhattan R. Co., 39 N. Y. S. R. 79, 15 N. Y. Supp. 108. DISTINGUISHED IN Griswold *v.* New York C. & H. R. R. Co., 115 N. Y. 61, 21 N. E. Rep. 726, 23 N. Y. S. R. 729; Popp *v.* New York C. & H. R. R. Co., 26 N. Y. S. R. 639.—*O'Brien* v. *New York, N. H. & H. R. Co.*, 36 *N. Y. S. R.* 801, 59 *Hun* 623, 13 *N. Y. Supp.* 305.—DISTINGUISHING Griswold *v.* New York C. & H. R. R. Co., 115 N. Y. 61, 23 N. Y. S. R. 729. FOLLOWING Atkins *v.* Manhattan R. Co., 32 N. Y. S. R. 214.—*DeSoucey* v. *Manhattan R. Co.*, 39 *N. Y. S. R.* 79, 15 *N. Y. Supp.* 108.—APPLYING Strohm *v.* New York, L. E. & W. R. Co., 96 N. Y. 305; Tozer *v.* New York C. & H. R. R. Co., 105 N. Y. 617, 6 N. Y. S. R. 447; Johnson *v.* Manhattan R. Co., 52 Hun 113, 23 N. Y. S. R. 388; Gregory *v.* New York, L. E. & W. R. Co., 55 Hun (N. Y.) 303, 28 N. Y. S. R. 726; Atkins *v.* Manhattan R. Co., 57 Hun (N. Y.) 102, 32 N. Y. S. R. 214.—*Butler* v. *Manhattan R. Co.*, 3 *Misc.* 453, 30 *Abb. N. Cas.* 78, 52 *N. Y. S. R.* 498, 23 *N. Y. Supp.* 163; *affirmed in* 143 *N. Y.* 630, *mem.*, 60 *N. Y. S. R.* 873, 37 *N. E. Rep.* 826, *mem.*—FOLLOWING Filer *v.* New York C. R. Co., 49 N. Y. 42; Brown *v.* New York C. R. Co., 32 N. Y. 598; Keane *v.* Waterford, 130 N. Y. 188.

But it is not competent to ask a medical expert what results are likely to flow from the injuries received by plaintiff. *Atkins* v. *Manhattan R. Co.*, 32 *N. Y. S. R.* 214, 10 *N. Y. Supp.* 432, 57 *Hun* 102.—FOLLOWING Johnson *v.* Manhattan R. Co., 52 Hun 111, 23 N. Y. S. R. 388; Strohm *v.* New York, L. E. & W. R. Co., 96 N. Y. 306; Griswold *v.* New York C. & H. R. R. Co., 115 N. Y. 61, 23 N. Y. S. R. 729.—FOLLOWED IN O'Brien *v.* New York, N. H. & H. R. Co., 36 N. Y. S. R. 801, 59 Hun 623, 13 N. Y. Supp. 305.

(2) *Illustrations.*—It is competent for an attending physician, after stating the character and condition of the injuries sued for, to give his opinion as to the probable results of such injuries, although he did not continuously attend the injured person to the time of the trial, and it is also competent to embody the facts stated by him in a hypothetical question put to another physician. *Louisville, N. A. & C. R. Co.* v. *Wright*, 38 *Am. & Eng. R. Cas.* 41, 115 *Ind.* 378, 13 *West. Rep.* 798, 16 *N. E. Rep.* 145, 17 *N. E. Rep.* 584.

A medical witness called by plaintiff was permitted to testify to his opinion as to the result of a disease in the natural and ordinary course, to wit, that plaintiff would never be any better and never be able to straighten his limbs. *Held*, no error. *Alberti* v. *New York, L. E. & W. R. Co.*, 41 *Am. & Eng. R. Cas.* 201, 118 *N. Y.* 77, 23 *N. E. Rep.* 35, 27 *N. Y. S. R.* 865, 6 *L. R. A.* 765; *affirming* 43 *Hun* 421.—DISTINGUISHING Strohm *v.* New York, L. E. & W. R. Co., 96 N. Y. 305. FOLLOWING Griswold *v.* New York C. & H. R. R. Co., 44 Hun 236, 115 N. Y. 61; McClain *v.* Brooklyn City R. Co., 116 N. Y. 459.

In such case the witness was asked to state the length of time plaintiff might live in the natural and ordinary course of events. Upon objection the court decided that the witness might answer if he could speak with reasonable certainty. He replied that he could only give the probability from the history of similar cases, and this he was permitted to do. *Held*, no error. *Alberti* v. *New York, L. E. & W. R. Co.*, 41 *Am. & Eng. R. Cas.* 201, 118 *N. Y.* 77, 23 *N. E. Rep.* 35, 27 *N. Y. S. R.* 865, 6 *L. R. A.* 765; *affirming* 43 *Hun* 421.

The testimony of a physician that on any unusual exertion or exposure of the injured person some pain may be suffered, or that a change of weather might make the injury painful at times, is inadmissible as being too conjectural and speculative. *Elsas* v. *Second Ave. R. Co.*, 30 *N. Y. S. R.* 414, 56 *Hun* 161, 9 *N. Y. Supp.* 210.

It is proper to permit a surgeon to testify that, in his opinion, a personal injury is liable to grow worse. *Saltzman* v. *Brooklyn City R. Co.*, 73 *Hun* 567, 26 *N. Y. Supp.* 311, 56 *N. Y. S. R.* 220.—FOLLOWING Alberti *v.* New York, L. E. & W. R. Co., 118 N. Y. 77.

Where a female passenger sues to recover for damages which she received while on a street-car, the statement of her attending physician that she will never be able to bear children and that her condition will never improve is not open to the objection that it is but an opinion, where he gives facts and reasons for such opinion based upon his medical knowledge. *King* v. *Second Ave. R. Co.*, 75 *Hun* 17, 26 *N. Y. Supp.* 973.

169. As to mental condition of patient.—A physician who has made an examination may give opinion evidence as to mental condition. *Louisville, N. A. & C. R. Co.* v. *Falvey*, 23 *Am. & Eng. R. Cas.* 522, 104 *Ind.* 409, 3 *N. E. Rep.* 389, 4 *N. E. Rep.* 908.

170. Usual effect of similar injuries. — Where, in a negligence case, plaintiff's physician testifies fully in regard to her condition and the disease from which she is suffering, resulting, as claimed, from the injuries received, it is competent for him to state from his experience, practice, and observation what percentage of persons in plaintiff's condition recover their health, the question having a direct bearing upon the permanency of the disease. *Cole* v. *Lake Shore & M. S. R. Co.*, 95 *Mich.* 77, 54 *N. W. Rep.* 638.

It is permissible to ask a physician who testifies as an expert what is the usual effect of a certain internal injury, and whether it usually affects permanently the health and strength of the patient. *Harold* v. *New York C. & H. R. R. Co.*, 13 *Daly* (*N. Y.*) 378; *affirmed in* 108 *N. Y.* 664, *mem.*, 15 *N. E. Rep.* 445, *mem.*, 13 *N. Y. S. R.* 903, *mem.* —APPLYING Strohm *v.* New York, L. E. & W. R. Co., 96 N. Y. 305.

It is proper to ask a physician as to the probability of plaintiff recovering from a certain injury; but when he has answered that it is likely to be troublesome for many years, it is error to allow him to go on and state that he had known a similar injury to trouble a man and to be tender for about thirty years. *Miley* v. *Broadway & S. A. R. Co.*, 29 *N. Y. S. R.* 107, 8 *N. Y. Supp.* 455, 55 *Hun* 608.—DISTINGUISHING Griswold *v.* New York C. & H. R. R. Co., 115 N. Y. 61, 23 N. Y. S. R. 729. FOLLOWING Strohm *v.* New York, L. E. & W. R. Co., 96 N. Y. 305.

171. Manner of receiving injury. —Medical experts may give their opinion as to the permanent or incurable nature of an injury, based upon the assumption that the injured person was in good health before the injury and upon testimony as to the manner in which the injury was received, the kind of injury inflicted, and his present bodily condition. *Cooper* v. *St. Paul City R. Co.*, 58 *Am. & Eng. R. Cas.* 598, 54 *Minn.* 379, 56 *N. W. Rep.* 42.

A surgeon who examined plaintiff soon after he had his leg broken is competent to testify as an expert that, judging from the relative position and the condition of the broken bones, plaintiff's foot struck upon a sloping object; that the heel struck before the ball of the foot, and that his body was in an upright position when he fell. *Johnson* v. *Steam-Gauge & L. Co.*, 25 *N. Y. Supp.* 689, 55 *N. Y. S. R.* 133, 72 *Hun* 535.

172. Cause of death. — In an action for negligently causing death, the evidence showed that the immediate cause of the death was peritonitis. Medical witnesses called by plaintiff testified that peritonitis might be caused in seven different ways. *Held*, that it was no objection to a verdict for plaintiff that there was no proof that several causes which could not be attributed to defendant's negligence did not exist

in the case. *Looram* v. *Third Ave. R. Co.*, 6 *N. Y. Supp.* 504, 25 *J. & S.* 165, 25 *N. Y. S. R.* 926; *affirmed in* 117 *N. Y.* 657, *mem.*, 22 *N. E. Rep.* 1133.

In such case the physician who attended the intestate from the time of the injury to his death testified that the immediate cause of death was peritonitis. *Held*, that it was then proper to ask him by what the peritonitis was caused. *Looram* v. *Third Ave. R. Co.*, 6 *N. Y. Supp.* 504, 25 *J. & S.* 165, 25 *N. Y. S. R.* 926; *affirmed in* 117 *N. Y.*, 657, *mem.*, 22 *N. E. Rep.* 1133.

In an action against a company for causing the death of a child by leaving a turntable unfastened, where the attending physician has testified that the child, who was frail and weak, died from injuries received at the turntable, it is not error for the court to exclude a question to such witness as to "whether or not, if the child had been a healthy child, it would have survived the injury." *Ilwaco R. & N. Co.* v. *Hedrick*, 1 *Wash.* 446, 25 *Pac. Rep.* 335.

173. Basis of opinion. — (1) *Statements by patient to physician.*—The opinion of a medical expert witness may rest in part on statements made by his patient. *Louisville, N. A. & C. R. Co.* v. *Falvey*, 23 *Am. & Eng. R. Cas.* 522, 104 *Ind.* 409, 3 *N. E. Rep.* 389, 4 *N. E. Rep.* 908. *Cleveland, C., C. & I. R. Co.* v. *Newell*, 23 *Am. & Eng. R. Cas.* 492, 104 *Ind.* 264, 54 *Am. Rep.* 312, 3 *N. E. Rep.* 836.—COMMENTING ON Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 537, 31 Am. Rep. 321.—*Louisville, N. A. & C. R. Co.* v. *Wood*, 113 *Ind.* 544, 12 *West. Rep.* 311, 14 *N. E. Rep.* 572, 16 *N. E. Rep.* 197. *Louisville, N. A. & C. R. Co.* v. *Snyder*, 37 *Am. & Eng. R. Cas.* 137, 117 *Ind.* 435, 20 *N. E. Rep.* 284, 3 *L. R. A.* 434. *Atchison, T. & S. F. R. Co.* v. *Frazier*, 8 *Am. & Eng. R. Cas.* 72, 27 *Kan.* 463. *Ashton* v. *Detroit City R. Co.*, 41 *Am. & Eng. R. Cas.* 235, 78 *Mich.* 587, 44 *N. W. Rep.* 141.—FOLLOWED IN Johnson *v.* McKee, 27 Mich. 471; Elliott *v.* Van Buren, 33 Mich. 49; Mayo *v.* Wright, 63 Mich. 44.—*Jones* v. *Chicago, St. P., M. & O. R. Co.*, 44 *Am. & Eng. R. Cas.* 357, 43 *Minn.* 279, 45 *N. W. Rep.* 444. *Johnson* v. *Northern Pac. R. Co.*, 47 *Minn.* 430, 50 *N. W. Rep.* 473. *Pullman Palace Car Co.* v. *Smith*, 79 *Tex.* 468, 14 *S. W. Rep.* 993.

But the physician may not testify as to what the party said in respect to the past history of the case and the cause or duration of the injury; neither can he give an opinion based partially upon his personal examination and partially upon what the party told him in reference to the past history of the case, and also upon statements in reference thereto made by a third person in the presence of the party. *Atchison, T. & S. F. R. Co.* v. *Frazier*, 8 *Am. & Eng. R. Cas.* 72, 27 *Kan.* 463.

In an action for personal injuries claimed to be incurable, a physician may be asked by plaintiff whether he had noticed an uncertainty of movement, indicating paralysis, when plaintiff was not aware that the witness saw him. *Held*, that the evidence was proper, as tending to show that paralysis was not feigned. *Beckwith* v. *New York C. R. Co.*, 64 *Barb.* (*N. Y.*) 299.

In an action for personal injuries, including an injury to plaintiff's arm, a medical witness called by plaintiff was asked: "You examined her [plaintiff] a few days ago, and she told you while you were examining her that she was suffering from pain in that arm?" This was objected to on the ground that the witness could not testify as to plaintiff's pain, and upon the ground that it involved the assumption that there was pain at the present time. *Held*, that the question was not open to either objection. *Rosevelt* v. *Manhattan R. Co.*, 27 *J. & S.* 197, 13 *N. Y. Supp.* 598, 37 *N. Y. S. R.* 894; *affirmed in* 133 *N. Y.* 537, *mem.*, 30 *N. E. Rep.* 1148.

Where, at the commencement of an action for personal injuries, a medical expert is consulted by plaintiff solely that he might be called as a witness, such expert should not be allowed to testify on behalf of the plaintiff to the statements made by the latter as to his symptoms, feelings, and conditions from the time of the accident to the time of such consultation. *Stewart* v. *Everts*, 44 *Am. & Eng. R. Cas.* 313, 76 *Wis.* 35, 44 *N. W. Rep.* 1092.

(2) *Expressions of pain.* — A physician, testifying to his attendance on plaintiff and his examination of her person after she received the injuries for which she sues, may state that when he first saw her "she was complaining of pain from an injury she said she had received." *Birmingham Union R. Co.* v. *Hale*, 90 *Ala.* 8, 8 *So. Rep.* 142.

A physician may testify as to statements or expressions of pain, etc., made to him by plaintiff in the course of an examination. *Cleveland, C., C. & I. R. Co.* v. *Newell*, 23

Am. & Eng. R. Cas. 492, 104 *Ind.* 264, 54 *Am. Rep.* 312, 3 *N. E. Rep.* 836.

(3) *Statements of third parties.*— The opinions of physicians as to the nature of the affliction complained of, its cause, and the probability of its curability, are admissible upon facts as proved by other witnesses. *Matteson* v. *New York C. R. Co.*, 35 *N. Y.* 487.—APPLIED IN Jones *v.* Utica & B. R. R. Co., 40 Hun (N. Y.) 349. FOLLOWED IN Stouter *v.* Manhattan R. Co., 3 Silv. App. 472.

Where a question put to a medical expert calls for his opinion, based upon the knowledge of the witness himself and what he may have derived from outside sources and not predicated solely upon the facts in evidence, or where, among other things, it calls for the witness's opinion as to possible consequences, such as are speculative and not reasonably certain, a specific objection is necessary to present the point on appeal. *Wallace* v. *Vacuum Oil Co.*, 128 *N. Y.* 579, *mem.*, 27 *N. E. Rep.* 956.

A medical expert should not be permitted to give an opinion based upon contradictory testimony of other witnesses; and he should not be permitted to testify as to his opinion of a certain malady where he has made no personal examination other than obtaining statements from the injured person and her mother a year and a half after the injury. *Kreuziger* v. *Chicago & N. W. R. Co.*, 73 *Wis.* 158, 40 *N. W. Rep.* 657.

7. Surveyors and Civil Engineers.

174. Surveyors.—A surveyor is competent as a witness in condemnation proceedings to test and apply the data on the map as sufficient guides for location. *Grand Rapids, L. & D. R. Co.* v. *Chesebro*, 39 *Am. & Eng. R. Cas.* 159, 74 *Mich.* 466; 42 *N. W. Rep.* 66.

In an action for obstructing a creek and thereby causing water to overflow plaintiff's land, a surveyor was called as a witness who had made a survey of the creek and a map, and had taken levels at various points upon the land of plaintiff which was then overflowed and liable to be overflowed at certain stages of the water, and had estimated the distances of these points from each other. His levels were from the surface of the water at a time when the creek was not at its highest. He was then asked by plaintiff's counsel: "On these estimated distances and the levels you took, how much more land would be overflowed with water if the water was one foot higher?" *Held*, that the evidence called for was competent. *Phillips* v. *Terry*, 3 *Abb. App. Dec.* (*N. Y.*) 607.

175. Civil engineers.—The chief engineer of a company, testifying as to work done by plaintiff on railroad trestles, whether as original contractor or as a sub-contractor under one P. being the question at issue, may use these expressions: "This contract was given to him by P. at my special instance, and because of my previous negotiations with him; the amount of work done by him for P. on the trestles is the identical amount of work he would have done for the company if the company had contracted directly with him instead of P., as he did all the framing that was done on the trestles." Also, "At all events, the entire claim is erroneous, * * * and, from an engineering standpoint, is preposterous." *Mobile & B. R. Co.* v. *Worthington*, 95 *Ala.* 598, 10 *So. Rep.* 839.

A civil engineer is properly permitted to testify to measurements of work performed under a sub-contract, notwithstanding such measurements were not made until eight months after a draft was drawn paying for the work. *Delaware County Bank* v. *Duncombe*, 48 *Iowa* 488.

Upon an issue of negligence in the construction of a work, it is not competent for an engineer in charge to testify that in the opinion of other engineers his work was sufficient and suited to its purpose. *Cornish* v. *Chicago, B. & Q. R. Co.*, 49 *Iowa* 378.

In an action for flowing lands, a civil engineer can testify that a couple of culverts through an embankment would help materially in draining the land. *Willitts* v. *Chicago, B. & K. C. R. Co.*, 88 *Iowa* 281, 55 *N. W. Rep.* 313.

In an action for personal injuries caused by falling in a hole upon station grounds, the testimony of a civil engineer that a hole near a traveled way is a dangerous place and needs protection is competent. *Cross* v. *Lake Shore & M. S. R. Co.*, 35 *Am. & Eng. R. Cas.* 476, 69 *Mich.* 363, 14 *West. Rep.* 181, 37 *N. W. Rep.* 361.—FOLLOWING Laughlin *v.* Street R. Co., 62 Mich. 220, 28 N. W. Rep. 873.

8. Mechanics. Machinists.

176. Mechanics.—On the question of the negligence imputed to defendant, the

testimony of a witness familiar with the management, use, and construction of steam locomotive engines, that he "never heard of any accident to persons from sparks emitted from the smoke-stack, either before or since" the one then under investigation, was pertinent and material. *Higgins* v. *Cherokee R. Co.*, 27 *Am. & Eng. R. Cas.* 218, 73 *Ga.* 149.

In an action for the death of a brakeman caused by a hand-hold giving way as he was descending the ladder at the side of a moving car, the testimony of a carpenter that, in his opinion, the defect would have been disclosed by a reasonable inspection is not admissible, it not being a case calling for expert evidence. *Gutridge* v. *Missouri Pac. R. Co.*, 94 *Mo.* 468, 7 *S. W. Rep.* 476.

A complaint averred that plaintiff's injury was due to the imperfect and brittle condition of and flaws in a hammer which had been repaired in defendant's shop and then furnished to plaintiff for use. *Held*, that under this averment the evidence of blacksmiths as to the hammer not having been repaired with reasonable skill was admissible. *Johnston* v. *Missouri Pac. R. Co.*, 96 *Mo.* 340, 9 *S. W. Rep.* 790.

An expert builder of stairs may give his opinion as to the proper slant of a step. *O'Mellia* v. *Kansas City, St. J. & C. B. R. Co.*, 115 *Mo.* 205, 21 *S. W. Rep.* 503.

A master mechanic who never drove a car is not competent to testify as to the distance within which a car may be stopped. *Barry* v. *Second Ave. R. Co.*, 1 *Misc.* 502, 49 *N. Y. S. R.* 705, 20 *N. Y. Supp.* 871.

177. Machinists. — Where the question is whether or not a defective weld of an iron staff, which caused it to break, could be discovered by inspection before it broke, a competent expert who saw one of the broken pieces may testify to the appearance of the broken end and give his opinion upon the question. *St. Louis & S. F. R. Co.* v. *Farr*, 56 *Fed. Rep.* 994, 6 *C. C. A.* 211, 12 *U. S. App.* 520.—FOLLOWING Davidson *v.* St. Paul, M. & M. R. Co., 34 Minn. 51; Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 537.

In an action by a passenger for a personal injury, after several experts called by plaintiff had testified upon a statement of the facts and circumstances of the accident which, in their opinion, threw the cars from the track, defendant was permitted to ask a machinist who had been connected for many years with railroads and with the running of cars and engines, and who was in the cars at the time of the accident and saw all the facts and circumstances, "What, in your judgment, threw off the car at the time of the accident?" *Held*, that plaintiff had no ground of exception. *Seaver* v. *Boston & M. R. Co.*, 14 *Gray* (*Mass.*) 466.

A person practised in building locomotives and in running them on trial trips is competent as an expert to testify as to the distance within which a train may be stopped by a steam brake. *Eckert* v. *St. Louis, I. M. & S. R. Co.*, 13 *Mo. App.* 352; *affirmed on another point sub-nom. in Bergman* v. *St. Louis, I. M. & S. R. Co.*, 88 *Mo.* 678.—QUOTED IN Gourley *v.* St. Louis & S. F. R. Co., 35 Mo. App. 87.

178. Person in charge of stationary engine.—A brakeman sued for personal injuries alleged to have been caused by defects in a locomotive. He called a witness who testified that he then had control of a steam engine of a factory company; that he did not claim to be a practical engineer and was not a first-class locomotive engineer, but had fired and handled a locomotive and understood an engine. *Held*, that he was competent to testify to so plain and simple a matter as the effect of a leaky throttle-valve. *Brabbits* v. *Chicago & N. W. R. Co.*, 38 *Wis.* 289.

9. *Railway Employes.*

179. In general. — (1) *Opinions admissible.* — A witness having necessary knowledge may testify to the general rules and practice of railroads in coupling cars, and may give his opinion as to the comparative safety or danger of the different methods; but he cannot, even when competent to testify as an expert, state that the particular method or machinery of another railroad is better or safer than defendant's. *Georgia Pac. R. Co.* v. *Propst*, 83 *Ala.* 518, 3 *So. Rep.* 764.—DISTINGUISHED IN Seese *v.* Northern Pac. R. Co., 39 Fed. Rep. 487.

A witness who has been operating trains for eight years may be allowed to give his opinion as to the effect of a car, either heavily loaded or empty, running over a switch improperly set. *Louisville & N. R. Co.* v. *Mothershed*, 97 *Ala.* 261, 12 *So. Rep.* 714.

The owner of a hotel sued for damages caused by laying an additional track and

erecting a signal station in front of his hotel. *Held*, that expert railroad operators might give their opinion as to the effect produced upon the amount of switching by laying the additional track, and as to the stopping of trains thereon. *McCarty* v. *Chicago, B. & Q. R. Co.*, 34 *Ill. App.* 273.—QUOTING Chicago *v.* Union Bldg. Assoc., 102 Ill. 379.

In an action by a brakeman against his employer for injuries received while engaged in more dangerous work than that for which he had been hired, but which he had been required to do, it is proper to allow a competent witness to show what the actual duties of a brakeman were in practice in order to find how the additional duties differed therefrom. But where the witness himself was hired as train baggageman, and, like plaintiff, had been ordered to take part in the extra work, a question as to whether, in his opinion, the order called him out of the line of his duty was immaterial. *Jones* v. *Lake Shore & M. S. R. Co.*, 8 *Am. & Eng. R. Cas.* 221, 49 *Mich.* 573, 14 *N. W. Rep.* 551.

A witness who has been employed in railroad work twenty-five years, part of the time in charge of a turntable, is competent to answer the question: "Would it be practicable to lock or fence turntables?" *Kolsti* v. *Minneapolis & St. L. R. Co.*, 32 *Minn.* 133, 19 *N. W. Rep.* 655.

Persons who have been employed on and about locomotives, and have had to do with them in varying circumstances for lengths of time running from ten to twenty-five years as engineers, conductors, or master mechanics in railroad shops, as also a brakeman and yardmaster of three years' service who seems to have had special advantages and means for observing the nature, operation, and effect of sparks issuing from coal-burning engines, are competent to testify as to the size and effect of sparks from such an engine, the time during which they will remain alive, and the distance to which fire may be communicated by them. *Davidson* v. *St. Paul, M. & M. R. Co.*, 23 *Am. & Eng. R. Cas.* 352, 34 *Minn.* 51, 24 *N. W. Rep.* 324.

Where a train is running under a special order, the conductor and engineer, who have been in the service of the company for a considerable time, are qualified to give a construction to the order and testify to its effect as a direction to them, and they may state that it was not necessary for them to stop the train at a certain station. *Albert* v. *Sweet*, 42 *Am. & Eng. R. Cas.* 216, 116 *N. Y.* 363, 22 *N. E. Rep.* 762, 26 *N. Y. S. R.* 738; *affirming* 3 *N. Y. S. R.* 738.

A person skilled in running trains may be asked as an expert, upon an assumed state of facts which the evidence tends to prove, whether or not, in the case assumed, the brakemen were in their proper places. *Cincinnati & Z. R. Co.* v. *Smith*, 22 *Ohio St.* 227.—DISTINGUISHED IN Burns *v.* Chicago, M. & St. P. R. Co., 69 Iowa 450.

The testimony of practical railroad men, called as experts to testify as to the proper methods of passing trains on a single-track road, is admissible. *Lewis* v. *Seifert*, 116 *Pa. St.* 628, 9 *Cent. Rep.* 751, 11 *Atl. Rep.* 514, 20 *W. N. C.* 145.—FOLLOWING Laros *v.* Com., 84 Pa. St. 200; Yardley *v.* Cuthbertson, 108 Pa. St. 461.

A witness who has had experience in railroading, though no longer so employed, may testify as an expert as to the usual mode of making up freight trains, the respective duties of the yard force and trainmen, and as to the manner of switching off cars into a one-end siding. *Price* v. *Richmond & D. R. Co.*, 38 *So. Car.* 199, 17 *S. E. Rep.* 732.

Where it is claimed that property was destroyed by the negligence of those in charge of a train, by running it at too great a speed, railroad employés, such as engineers, firemen, switchmen, and foremen of yard engines, are *prima facie* competent as experts to testify as to the speed of the train. *Texas & P. R. Co.* v. *Rosedale St. R. Co.*, 4 *Tex. App.* (*Civ. Cas.*) 266, 15 *S. W. Rep.* 120.

(2) *Opinions not admissible.*—Testimony of an experienced railroad man that a notice, "Passengers must not stand on the platform," is generally intended to mean when the car is in motion is inadmissible. *Macon & W. R. Co.* v. *Johnson*, 38 *Ga.* 409.

Brakemen, baggagemasters, and conductors are not competent to give opinions as experts respecting the coupling of cars, and as to the danger a brakeman would incur by attempting to make a coupling under certain circumstances. *Muldowney* v. *Illinois C. R. Co.*, 36 *Iowa* 462.—DISTINGUISHED IN Baldwin *v.* Chicago, R. I. & P. R. Co., 50 Iowa 680.

An inquiry put to a laborer on a railroad, as to the number of persons ordinarily re-

quired on a completed road to keep in repair a specified distance of the line, is properly overruled where the witness is not shown to be competent to express an opinion; moreover, the inquiry is not susceptible of a direct answer, as there is and can be no general rule on the subject. *Tower* v. *Detroit, L. & L. M. R. Co.*, 34 *Mich.* 328.

It is not competent to prove the duties of a brakeman by the testimony of one who has only been around trains a few times when the brakemen were attending to their duties, and who testifies that he has no other knowledge of their duties than what he has observed and what he has been told by railroad men said duties are supposed to be. *Farber* v. *Missouri Pac. R. Co.*, 116 *Mo.* 81, 22 *S. W. Rep.* 631.

180. Brakemen.—There is no error in allowing a witness who has been a brakeman for several years to state his opinion as to the speed at which a train was running at the time of an accident. *Louisville, N. A. & C. R. Co.* v. *Shires*, 19 *Am. & Eng. R. Cas.* 387, 108 *Ill.* 617.

To render admissible the opinion of one as an expert, the pursuit in which the witness claims to be expert must be one of science, skill, trade, or the like. A brakeman is not an expert of such a character as to qualify him to give his opinion upon matters pertaining to his occupation. *Hamilton* v. *Des Moines Valley R. Co.*, 36 *Iowa* 31. *Coates* v. *Burlington, C. R. & N. R. Co.*, 15 *Am. & Eng. R. Cas.* 265, 62 *Iowa* 486, 17 *N. W. Rep.* 760.

One shown to have experience as a brakeman is competent to testify as to the effects produced upon a train of cars by the sudden turning on of steam after the speed of the train has been checked by the brakes. *Whitsett* v. *Chicago, R. I. & P. R. Co.*, 22 *Am. & Eng. R. Cas.* 336, 67 *Iowa* 150, 25 *N. W. Rep.* 104.

Where the decedent was killed while attempting to couple a flat car to a caboose and the accident was attributed to defects in the cars, an experienced brakeman who was standing upon the platform of the caboose at the time, and saw the accident, and noticed the condition of the cars, was permitted to testify that the platform of the caboose was in bad condition and insufficient. His conclusions were based on differences in the construction of cars which he had noticed, and which he explained. *Held*, that while his conclusions were of doubtful competency, they were not, in view of his explanations and the special findings of the jury, prejudicial. *Van Gent* v. *Chicago, M. & St. P. R. Co.*, 80 *Iowa* 526, 45 *N. W. Rep.* 913.

A brakeman was injured while coupling cars. *Held*, that he could not be asked whether, judging from his experience, he would have been injured if the car had approached him at a proper rate of speed. *Kansas Pac. R. Co.* v. *Peavey*, 11 *Am. & Eng. R. Cas.* 260, 29 *Kan.* 169, 44 *Am. Rep.* 630.—QUOTED IN Howard *v.* Kansas City, Ft. S. & G. R. Co., 37 Am. & Eng. R. Cas. 552, 41 Kan. 403.

In an action involving the killing of a man by a freight train, the conductor of the train, who had previously been a brakeman and who was a witness for plaintiff, testified that the train ought to have been stopped quicker than it was, and in from three to five minutes; that he could not tell how far it would go after all the appliances were used for stopping it, but that his idea was, forty or fifty rods. *Held*, no error. *Freeman* v. *Travelers Ins. Co.*, 144 *Mass.* 572, 4 *N. Eng. Rep.* 621, 12 *N. E. Rep.* 372.

In an action to recover for injuries suffered by a brakeman while attempting to make a coupling because of an alleged defective link and pin, old and experienced brakemen are competent to give their opinions as to the safety of coupling one car to another where the pin is so bent that it cannot be taken out, and the coupling would have to be made with the link fast in the drawhead of the standing car. *Goins* v. *Chicago, R. I. & P. R. Co.*, 47 *Mo. App.* 173; *see* 37 *Mo. App.* 676.

A brakeman who for several years has observed the make-up of freight trains in a yard is a competent witness as to the respective duties of the conductor and other servants of the company in making up the train and moving it off. *Price* v. *Richmond & D. R. Co.*, 38 *So. Car.* 199, 17 *S. E. Rep.* 732.

A brakeman who has helped to operate a train fc two weeks is a competent witness to testify as to the carefulness and competency of an engineer on the same train, except as to matters involving a scientific or technical knowledge of the machinery of the engine. *Houston & T. C. R. Co.* v. *Patton*, (*Tex.*) 9 *S. W. Rep.* 175.

One who has had long experience as a brakeman, and who has in person investi-

gated the physical facts connected with the derailment of a car, may give his opinion as to its cause. *Ft. Worth & D. C. R. Co.* v. *Thompson*, 75 *Tex.* 501, 12 *S. W. Rep.* 742.

The question at issue in a suit for damages resulting from the derailment of a car being negligence *vel non*, a witness who helped to construct the road, and who was engaged as brakeman when the accident happened, may state facts within his knowledge showing the defective construction of the road where the derailment occurred, though the pleadings may not have charged specifically that the road was wanting in permanence of construction when built. *Ft. Worth & D. C. R. Co.* v. *Thompson*, 75 *Tex.* 501, 12 *S. W. Rep.* 742.—FOLLOWED IN Ft. Worth & D. C. R. Co. *v.* Wilson, 3 Tex. Civ. App. 583.

181. Conductors. — Where an engineer sues for an injury received while running his engine, the conductor of the train may testify as to the duties of the engineer. *Augusta & S. R. Co.* v. *Dorsey*, 68 *Ga.* 228.

A brakeman was injured by striking an overhead bridge, but before the trial went to work again for the company in the same capacity. Members of his family testified that he was seriously injured both bodily and mentally. Defendant inquired of eight witnesses, including plaintiff's family physician, whether they had ever heard of plaintiff having been seriously injured. *Held*, that it was not error after this to exclude a question by defendant to the conductor of the train whether or not he had any reason to suspect that plaintiff was feeble in mind or body. (Scott, J., dissenting.) *Chicago & A. R. Co.* v. *Johnson*, 116 *Ill.* 206, 4 *N. E. Rep.* 381.

The conductor of a train, who was looking at a car when it turned over, was introduced as a witness, and asked if it was his opinion that if there had been chains on the car the accident would have happened, and he replied that if the chains had been properly attached, and strong enough to hold the trucks to the car, they would have done so. He was then asked if it was his opinion that if such chains had been on the car as were subsequently put on when the car was repaired they would have held the truck on the car, and he answered that they would not. *Held*, that the testimony was not admissible as that of an expert, but that as it was not to the prejudice of defendant, there was no error in its admission upon which defendant could sustain exceptions. *Bixby* v. *Montpelier & St. J. R. Co.*, 49 *Vt.* 123, 17 *Am. Ry. Rep.* 140.

182. Engineers.—In a suit for killing stock, it is error to refuse to allow defendant to ask the engineer whether sounding the cattle-alarm and applying the air-brakes was a more effective means of saving the stock than reversing the engine, since the engineer was an expert. *Birmingham Mineral R. Co.* v. *Harris*, 98 *Ala.* 326, 13 *So. Rep.* 377.

Where an engineer sues for an injury and it is made a question whether he was negligent at the time of the injury, it is competent to prove by himself, as an expert, what were his duties; and he may testify that he had complied with all the instructions given to him. *Augusta & S. R. Co.* v. *Dorsey*, 68 *Ga.* 228.

In such case, where it is made a question whether an engine could be stopped under certain circumstances, another engineer may testify on that subject and give reasons for what he states, and for that purpose, by way of illustration, may state what he has known to be done under even more difficult circumstances. *Augusta & S. R. Co.* v. *Dorsey*, 68 *Ga.* 228.

An injury was received while a locomotive was running backward. *Held*, that the testimony of an experienced engineer respecting the rate of speed of a locomotive running in that manner which was usually considered safe, and respecting the effect of striking an animal upon the track by a locomotive running backward, was competent. *Cooper* v. *Central R. Co.*, 44 *Iowa* 134.

In an action for the value of a team killed by a train at a street crossing, the engineer was asked as a witness whether he did everything he could from the time he saw the team was likely to be struck till it was struck. *Held*, that the question called for an opinion only, and that it was properly excluded. *Nosler* v. *Chicago, B. & Q. R. Co.*, 73 *Iowa* 268, 34 *N. W. Rep.* 850.

A locomotive engineer's opinion that if he had obeyed the order of the yardmaster to place his engine on the main track when a coming train was past due he would have gotten into trouble is not admissible to show that the railroad company was negligent in keeping the yardmaster in its employment, unless the case had been brought to the knowledge of the company's officers.

Michigan C. R. Co. v. *Gilbert*, 2 *Am. & Eng. R. Cas.* 230, 46 *Mich.* 176, 9 *N. W. Rep.* 243.

Plaintiff sued for injuries received by a train leaving the track at a curve, but on the inside thereof. Plaintiff claimed that the accident was caused either by the rottenness of the ties or by the improper elevation of the outer rail. He called an expert who had been an architect and builder for twenty years, and who, all through his life, had had more or less to do with timber, studying it and its causes of decay, and who professed to be an expert in all things relating to mechanics or natural philosophy. *Held*, that it was proper to ask him how he accounted for the cars running off on the inside of the curve instead of the outside. In such cases railroad engineers or persons who have actually constructed tracks are not the only persons who are competent to testify. *Murphy* v. *New York C. R. Co.*, 66 *Barb.* (*N. Y.*) 125.

In an action for negligently killing plaintiff's intestate, who was on the track, the conduct of the engineer being in issue, an expert engineer may testify as to the effect of shutting off steam when deceased was first discovered. *Remer* v. *Long Island R. Co.*, 48 *Hun* 352, 1 *N. Y. Supp.* 124, 15 *N. Y. S. R.* 884; *affirmed in* 113 *N. Y.* 669, 23 *N. Y. S. R.* 994, 21 *N. E. Rep.* 1116.

Where the action is for destroying property by fire from a locomotive, a witness who has worked upon an engine for twelve years as fireman and engineer may give his opinion as an expert that if the engine had been properly equipped with a spark arrester it could not have emitted sparks of the size it did. *Frace* v. *New York, L. E. & W. R. Co.*, 52 *N. Y. S. R.* 102, 22 *N. Y. Supp.* 958.

183. Firemen.—A locomotive fireman of four years' experience may state his opinion as an expert as to the time or distance within which a given train, under a given set of circumstances, can be stopped. *Grimmell* v. *Chicago & N. W. R. Co.*, 31 *Am. & Eng. R. Cas.* 537, 73 *Iowa* 93, 34 *N. W. Rep.* 758.

Where the action is for injuring a boy who was on the track, defendant may ask the fireman on the engine whether the boy had ample time to get off the track after the danger whistle was blown. *Kansas Pac. R. Co.* v. *Whipple*, 37 *Am. & Eng. R. Cas.* 320, 39 *Kan.* 531, 18 *Pac. Rep.* 730.—QUOTING Quinn *v.* New York, N. H. & H. R. Co., 56 Conn. 44, 12 Atl. Rep. 97.

In an action to recover for the death of an engineer, a fireman is not a competent witness to testify, as an expert, to the necessity of a safety-switch at the place of the injury. *Ballard* v. *New York, L. E. & W. R. Co.*, 126 *Pa. St.* 141, 19 *Atl. Rep.* 35.

184. Freight agents. — In an action by a company against an officer for storage of freight cars attached by him and left for some days on its premises, freight agents of other railroads are competent witnesses to the proper charge for such storage, although they have never known a case of storing cars except when the freight in a car has been attached. *Fitchburg R. Co.* v. *Freeman*, 12 *Gray* (*Mass.*) 401.

185. Roadmasters and section foremen. — While two employés were working the handles of a hand-car which had been damaged by a collision with another hand-car, the handles at both ends broke at the same time, and one of the employés was injured. The breaks were within the iron rings or clasps circling the handles. It was claimed by the employé that after the collision there was no proper examination or inspection of the handles by the servants or agents of the company. The company, to establish that there was no necessity for putting the car through a rigid inspection, offered to prove by the foreman in charge of the car at the time of the collision that he had no reason to apprehend that the handles had sustained any injury, and that he did not suspect that the handles had been injured by the collision. The evidence was rejected. *Held*, no error, as the witness was permitted to testify as to all the facts relating to the handles, and to his own acts and the acts of the other parties on the car at and after the collision. *Solomon R. Co.* v. *Jones*, 34 *Kan.* 443, 8 *Pac. Rep.* 730.

In an action against a company, its section foreman and roadmaster were properly permitted, over its objections, to testify that in their opinion its roadbed was not properly constructed at the point where the derailment and injury occurred, they testifying to having eighteen years' experience in railroading, and stating the facts on which their opinion was based. *Ft. Worth & D. C. R. Co.* v. *Wilson*, 3 *Tex. Civ. App.* 583, 24 *S. W. Rep.* 686.—FOLLOWING Ft. Worth & D. C. R. Co. *v.* Thompson, 75 Tex. 501;

Missouri Pac. R. Co. *v.* Jarrard, 65 Tex. 560; Gulf, C. & S. F. R. Co. *v.* Richards, 83 Tex. 203; International & G. N. R. Co. *v.* Klaus, 64 Tex. 293; St. Louis, A. & T. R. Co. *v.* Johnston, 78 Tex. 536.

186. Switchmen.—A witness who has been in the service of a company "as switchman and about the yard" for twenty years may testify as an expert to the difference in danger between using a road engine with or without a flat car attached, when coupling or uncoupling cars, especially when he states the facts on which his opinion is based; and an expert may also testify, though a non-expert cannot, that railroad men consider a road engine dangerous for that service. *Mobile & O. R. Co.* v. *George*, 94 *Ala.* 199, 10 *So. Rep.* 145.

10. *Experts in Handwriting.*

187. Comparison of handwriting.—The genuineness of handwriting cannot be established by the opinions of a witness whose belief is founded upon a mere naked comparison of papers submitted for his examination. *Tome* v. *Parkersburg Branch R. Co.*, 39 *Md.* 36, 11 *Am. Ry. Rep.* 285.

In an action against a company by the holder of fraudulent stock issued and negotiated by its treasurer, a witness is not competent to testify to the genuineness of the signature of "V. W.," the president, which purported to be affixed to the certificate, if his opinion is derived solely from comparisons of handwriting. *Tome* v. *Parkersburg Branch R. Co.*, 39 *Md.* 36, 11 *Am. Ry. Rep.* 285.

188. Familiarity with handwriting.—The proof of the execution of a receipt was that it was signed by the clerk of an express company employed to receive and deliver property at its office. He had acted in that capacity for several years. The witness had never seen him write, but he knew the man, and had seen a large number of receipts signed by him for property delivered to other express companies, and from the knowledge thus acquired believed the signature to be that of the agent. *Held*, that this was sufficient proof of the due execution of the receipt. *Armstrong* v. *Fargo*, 8 *Hun* (*N. Y.*) 175.

To require each person who delivers property to such an agent to prove the signature to receipts by some person who saw them executed would be practically impossible after a few days or weeks. *Armstrong* v. *Fargo*, 8 *Hun* (*N. Y.*) 175.

11. *Hypothetical Questions.*

189. In general.—Where some of the facts assumed in a hypothetical question have been eliminated by a subsequent ruling of the court, but there still remain in evidence facts upon which an opinion may properly be based, it is not error to refuse to strike out the entire opinion, though such elimination may weaken its value. *Louisville, N. A. & C. R. Co.* v. *Falvey*, 23 *Am. & Eng. R. Cas.* 522, 104 *Ind.* 409, 3 *N. E. Rep.* 389, 4 *N. E. Rep.* 908.

A question was put to an expert as follows: "Suppose the fact to be that it [the track] was so badly out of line that it was plainly visible to the eye; * * * what do you say then as to whether the danger would be increased by running the engine backward over the track at a high rate of speed?" The question should have been excluded, (1) where there was no issue as to an improper rate of speed; (2) because the hypothesis was too indefinite, since slight as well as serious defects may be plainly visible. *Kuhns* v. *Wisconsin, I. & N. R. Co.*, 70 *Iowa* 561, 31 *N. W. Rep.* 868.

The answer of an expert witness to a hypothetical question must be given upon the basis of the facts therein stated, and without recourse to other facts within his own knowledge. *Fuller* v. *Mayor, etc., of Jackson*, 92 *Mich.* 197, 52 *N. W. Rep.* 1075.

In a hypothetical question embodying plaintiff's assumed symptoms and condition, a medical expert may be asked what, in his judgment, was the probability of recovery. *Peterson* v. *Chicago, M. & St. P. R. Co.*, 38 *Minn.* 511, 39 *N. W. Rep.* 485.—EXPLAINING Strohm *v.* New York, L. E. & W. R. Co., 96 N. Y. 305.

A physician may, in answer to a hypothetical question, state that in his judgment the tremor and impairment of the nervous system with which plaintiff is afflicted are due to the injury for which the action is brought. *McClain* v. *Brooklyn City R. Co.*, 40 *Am. & Eng. R. Cas.* 254, 116 *N. Y.* 459, 22 *N. E. Rep.* 1062, 27 *N. Y. S. R.* 549; *affirming* 42 *Hun* 657, *mem.*, 6 *N. Y. S. R.* 49.

A medical expert may give his opinion upon a supposititious statement made to him as illustrative of the case on trial. *Perkins* v. *Concord R. Co.*, 44 *N. H.* 223.—

FOLLOWING Spear *v.* Richardson, 37 N. H. 23.

In an action for personal injuries, a question put to a physician assumed that the injured person had good health prior to the injury, and then recounted the facts connected with the injury and the care taken of her for the next three days, before the witness visited her professionally, and after reciting the injuries and symptoms then existing, concluded, "What would you say was the cause of these injuries?" *Held*, that the form of the question might not be commendable, but it called for nothing that was improper. *Haviland* v. *Manhattan R. Co.*, 40 *N. Y. S. R.* 773, 61 *Hun* 626, *mem.*, 15 *N. Y. Supp.* 898; *affirmed in* 131 *N. Y.* 630, *mem.*, 43 *N. Y. S. R.* 962, *mem.*, 30 *N. E. Rep.* 864, *mem.*

A question to an expert as to the probability of the permanency of injuries may be based either on the acquaintance of the expert with plaintiff, on a medical examination which he has made, or upon a hypothetical case submitted, based on testimony already in the case. *Butler* v. *Manhattan R. Co.*, 52 *N. Y. S. R.* 498, 3 *Misc.* 453, 23 *N. Y. Supp.* 163; *affirmed in* 143 *N. Y.* 630, 60 *N. Y. S. R.* 873, *mem.*, 37 *N. E. Rep.* 826.—APPLYING Filer *v.* New York C. R. Co., 49 N. Y. 42; Brown *v.* New York C. R. Co., 32 N. Y. 598.

Where the conclusions called for by a hypothetical question, put to a medical man who is being examined as an expert, depend upon facts the evidential weight of which can only be determined by those familiar with that specialty, then those conclusions may be given by an expert in such specialty. *Bowen* v. *Huntington*, 35 *W. Va.* 682, 14 *S. E. Rep.* 217.

190. Must state accurately facts in evidence.—Where there is evidence that a certain thing has been done three or four times a day for a month, and a witness is asked what would be the effect if it was done a hundred times, the court cannot affirm that there is no evidence on which to base such hypothetical question. *Kansas City, M. & B. R. Co.* v. *Webb*, 97 *Ala.* 157, 11 *So. Rep.* 888.

Hypothetical questions to an expert are properly excluded when they do not fully and accurately state the facts in evidence, and where the matter inquired of is not, under the circumstances of the case, a subject for expert testimony. *Briggs* v. *Minneapolis St. R. Co.*, 52 *Minn.* 36, 53 *N. W. Rep.* 1019.

A hypothetical question as to the cause of plaintiff's illness after her expulsion from a train stated her age as thirty-three years, when in fact she was but twenty-nine. *Held*, that the difference was not material. *Patry* v. *Chicago, St. P., M. & O. R. Co.*, 82 *Wis.* 408, 52 *N. W. Rep.* 312.

191. Any state of facts in evidence may be assumed.—A party who propounds a hypothetical question may assume such facts within the range of the evidence as he believes the evidence tends to establish. *Louisville, N. A. & C. R. Co.* v. *Wood*, 113 *Ind.* 544, 12 *West. Rep.* 303, 14 *N. E. Rep.* 572, 16 *N. E. Rep.* 197.

In propounding hypothetical questions to medical experts, it is the privilege of counsel to assume any state of facts which there is evidence tending to prove, and to have the expert's opinion based upon the facts assumed. Such facts are assumed only for the purposes of the question. *Peterson* v. *Chicago, M. & St. P. R. Co.*, 38 *Minn.* 511, 39 *N. W. Rep.* 485. *Benjamin* v. *Metropolitan St. R. Co.*, 50 *Mo. App.* 602. *Filer* v. *New York C. R. Co.*, 49 *N. Y.* 42, 3 *Am. Ry. Rep.* 460.—APPLIED IN Butler *v.* Manhattan R. Co., 52 N. Y. S. R. 498.

It is not the province of an expert to draw inferences from the testimony of other witnesses, unless the facts testified to are clear and uncontroverted, nor to take into consideration such facts as he can recollect that have been testified to, and thus form an opinion, but he should have full information of the ascertained or supposed state of facts upon which his opinion is based. Where the facts are controverted, or are not quite clear, a hypothetical question may be put, based upon the facts claimed to have been proved. *Guiterman* v. *Liverpool, N. Y. & P. Steam Ship Co.*, 83 *N. Y.* 358; *reversing* 9 *Daly* 119.

When a medical witness is introduced and examined as an expert, it is proper to propound to him a hypothetical question, reciting certain facts which the evidence in the cause tends to prove, and such recital need not contain all of the facts which the evidence has a tendency to prove, but counsel may embody in the question such facts as tend to support his theory of the case, in order to elicit the opinion of the witness based upon the testimony of other witnesses in the cause, or based upon scientific prin-

ciples applied to the facts so testified to. *Bowen* v. *Huntington*, 35 *W. Va.* 682, 14 *S. E. Rep.* 217.

Upon a trial in which expert testimony is competent and proper, the physician or the expert may give his opinion on any hypothetical state of facts which the evidence tends to prove, but his opinion must be based upon the state of facts as testified to by himself or other witnesses, though not upon his knowledge of other facts not testified to by himself or others. In such case the question put and the answers given should be so put and so given as not to elicit or cause the expression of an opinion by the physician or other expert on the credit of the witnesses, or on the truth of the facts testified to. *Bowen* v. *Huntington*, 35 *W. Va.* 682, 14 *S. E. Rep.* 217.

192. Must not include facts not in evidence.—A medical expert will not be allowed to testify to an opinion formed upon information derived from private conversations with witnesses in a case. He may examine the patient, and from this give his opinion to the jury. If he has not made a personal examination, then the proper practice is to put a question to the witness reciting hypothetically the supposed facts upon which the opinion of the expert is wanted. *Louisville, N. A. & C. R. Co.* v. *Shires*, 19 *Am. & Eng. R. Cas.* 387, 108 *Ill.* 617.

An expert cannot be permitted to answer a question based upon a hypothesis which is not based upon the evidence. *Hurst* v. *Chicago, R. I. & P. R. Co.*, 49 *Iowa* 76.—FOLLOWING State *v.* Geddis, 42 Iowa 264; State *v.* Stickley, 41 Iowa 232. QUOTING Muldowney *v.* Illinois C. R. Co., 39 Iowa 615.—*Muldowney* v. *Illinois C. R. Co.*, 39 *Iowa* 615, 8 *Am. Ry. Rep.* 487.—QUOTED IN Hurst *v.* Chicago, R. I. & P. R. Co. 49 Iowa 76.—*Russ* v. *Wabash Western R. Co.*, 112 *Mo.* 45, 20 *S. W. Rep.* 472. *Gregory* v. *New York, L. E. & W. R. Co.*, 28 *N. Y. S. R.* 726, 55 *Hun* 303, 8 *N. Y. Supp.* 525.—APPLIED IN DeSoucey *v.* Manhattan R. Co., 39 N. Y. S. R. 79, 15 N. Y. Supp. 108.—*New York, L. E. & W. R. Co.* v. *Daugherty*, (*Pa.*) 6 *Am. & Eng. R. Cas.* 139.

But it is not necessary that a hypothetical case embrace every fact proved, or which there is evidence tending to prove. *Gulf, C. & S. F. R. Co.* v. *Compton*, 44 *Am. & Eng. R. Cas.* 637, 75 *Tex.* 667, 13 *S. W. Rep.* 667.

The court instructed the jury to disregard the opinions of expert witnesses based upon hypothetical statements of facts if the jury should find the hypothesis to be not in accordance with the facts. *Held*, no error. *Loucks* v. *Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 305, 31 *Minn.* 526, 18 *N. W. Rep.* 651.—FOLLOWED IN Mykleby *v.* Chicago, St. P., M. & O. R. Co., 49 Minn. 457.

Whether the facts assumed in a hypothetical question for the opinion of an expert witness are within the evidence is a preliminary question for the trial court, the decision of which is conclusive unless it appears from the evidence to have been erroneous. *Goss* v. *Missouri Pac. R. Co.*, 50 *Mo. App.* 614.

193. Opinions based on testimony of other witnesses.—The question to an expert must be hypothetically put; if the facts are doubtful, and remain to be found by the jury, an expert who has heard the evidence cannot give his opinion upon the case on trial, but may be asked his opinion upon a similar case hypothetically stated. *Baltimore & O. R. Co.* v. *Thompson*, 10 *Md.* 76.

The trial court may permit a question to an expert witness, calling for his opinion, to refer him to the testimony in the case, if he has heard it, instead of stating the facts it tends to prove; but in such case the question must require the witness to assume the testimony to be true. *Jones* v. *Chicago, St. P., M. & O. R. Co.*, 44 *Am. & Eng. R. Cas.* 357, 43 *Minn.* 279, 45 *N. W. Rep.* 444.

In an action for personal injuries caused by a collision of trains, a physician, after stating that he heard most of plaintiff's testimony, was asked: "Take such a fall as he describes here, resulting from a collision of two cars, and of the symptoms following that fall, he having theretofore been a sound and healthy man, can you state with reasonable certainty that the consequences that have flowed are natural and usual?" *Held*, that the question was improper in form and immaterial. *Page v. Mayor, etc., of N. Y.*, 32 *N. Y. S. R.* 563, 10 *N. Y. Supp.* 826, 57 *Hun* 123.

In order to obtain the opinion of a witness on matters not depending upon general knowledge, but on facts not testified to by himself, either the witness must be present and hear all the testimony, or the testimony must be summed up in the question put to

him, and in either case the question must be put to him hypothetically. *Sebrell* v. *Barrows*, 36 *W. Va.* 212, 14 *S. E. Rep.* 996. FOLLOWING Hall *v.* Lyons, 29 W. Va. 510.

194. Including opinions of other experts.—Counsel may get the opinion of an expert, where expert evidence is admissible, on a hypothetical case. Counsel on each side may frame the hypothetical question on their own theory of the case, but the facts assumed must be such as have some evidence in their support. The hypothetical question cannot include the opinion of another expert, and must not require witness to pass on disputed facts. *Louisville, N. A. & C. R. Co.* v. *Falvey*, 23 *Am. & Eng. R. Cas.* 522, 104 *Ind.* 409, 3 *N. E. Rep.* 389, 4 *N. E. Rep.* 908.—QUOTING Quinn *v.* Higgins, 63 Wis. 664.

In framing a hypothetical question for an expert, facts testified to by an expert may be included. *Louisville, N. A. & C. R. Co.* v. *Falvey*, 23 *Am. & Eng. R. Cas.* 522, 104 *Ind.* 409, 3 *N. E. Rep.* 389, 4 *N. E. Rep.* 908.

12. *Weight of Expert Testimony.*

195. In general. — Answers to hypothetical questions as to how an engine would act if steam escaped into the cylinders, etc., would not establish the fact that there was a defect in the engine without evidence that that particular engine acted in that manner. *Central R. & B. Co.* v. *Maltsby*, 90 *Ga.* 630, 16 *S. E. Rep.* 953.

Expert testimony based upon testimony which is rejected by the jury is of no value. *Stone* v. *Chicago & W. M. R. Co.*, 30 *Am. & Eng. R. Cas.* 600, 66 *Mich.* 76, 9 *West. Rep.* 596, 33 *N. W. Rep.* 24.

Where one expert is examined on each side, and the evidence of one is loose, conflicting, and plainly inaccurate, the court is justified in disregarding it and preferring the testimony of the other. *Sherwood* v. *Metropolitan El. R. Co.*, 36 *N. Y. S. R.* 195, 58 *Hun* 611, *mem.*, 12 *N. Y. Supp.* 852; *affirmed in* 128 *N. Y.* 624, *mem.*, 40 *N. Y. S. R.* 157, 28 *N. E. Rep.* 485.

196. Not conclusive.—The opinions of witnesses upon the question of damages in a proceeding to condemn land for a right of way are not to be passively received and blindly followed, but they are to be weighed by the jury and judged of in view of all the testimony in the case and the jury's own knowledge of affairs, and have only such consideration given to them as the jury may believe them entitled to receive. *McReynolds* v. *Burlington & O. R. R. Co.*, 14 *Am. & Eng. R. Cas.* 172, 106 *Ill.* 152.—REVIEWING Chicago & I. R. Co. *v.* Hopkins, 90 Ill. 323.—FOLLOWED IN Johnson *v.* Chicago, B. & N. R. Co., 37 Minn. 519, 35 N. W. Rep. 438.

On the question whether an elevator is necessary to the successful operation of a railway, the opinions of witnesses that it is are not conclusive nor entitled to a controlling influence; the court will determine the true relations of the elevator to the road and its operation from the facts proved, rather than from the opinions of witnesses. *In re Swigert*, 24 *Am. & Eng. R. Cas.* 494, 119 *Ill.* 83, 6 *N. E. Rep.* 469.

In an action to determine the value of certain town lots condemned for a right of way, the opinions of witnesses as to the value of the lots at the time they were condemned will not be deemed conclusive, but the jury may consider such opinions in connection with all the other testimony in the case, and then, for itself, determine from all the testimony the value of such lots. *Chicago, K. & W. R. Co.* v. *Drake*, 47 *Am. & Eng. R. Cas.* 178, 46 *Kan.* 568. 26 *Pac. Rep.* 1039.—APPROVING Head *v.* Hargrave, 105 U. S. 45. QUOTING Murdock *v.* Sumner, 22 Pick. (Mass.) 158.—QUOTED IN Kansas City, W. & N. W. R. Co. *v.* Ryan, 49 Kan. 1.

Great respect should be paid to the opinions of scientific witnesses, yet they are no more controlling than are those of any other class or body of men when speaking upon subjects which lie within the range of common observation and experience. *Brehm* v. *Great Western R. Co.*, 34 *Barb.* (*N. Y.*) 256.

There is no rule of law that requires jurors to surrender their judgment implicitly to, or to give a controlling influence to the opinions of, scientific witnesses, however learned or accomplished such witnesses may be, and however they may speak with conceded intelligence and authority, aided by the accumulated results of a long experience. *Brehm* v. *Great Western R. Co.*, 34 *Barb.* (*N. Y.*) 256.

The jury are not bound to accept as true the testimony of any expert witness, even if he testifies that an alleged result has followed with reasonable certainty from the accident. *Klein* v. *Second Ave. R. Co.*, 22 *J. & S.* (*N. Y.*) 164.

197. For the jury.—In determining the weight of evidence of experts as to the value of land taken for a railroad, the jurors may apply their own general knowledge. *Laflin* v. *Chicago, W. & N. R. Co.*, 33 *Fed. Rep.* 415.

In the assessment of damages for a right of way, the jury will be warranted in giving but slight, if any, weight to the evidence of experts when it is based simply on theory and conjecture. *Peoria & P. U. R. Co.* v. *Peoria & F. R. Co.*, 10 *Am. & Eng. R. Cas.* 129, 105 *Ill.* 110.

The jury are to decide what weight, if any, shall be given to the opinion or evidence of an expert. Therefore it is misleading for a trial court to instruct the jury that the testimony of experts is supposed to be the best that can be furnished. *Kansas City, W. & N. W. R. Co.* v. *Ryan*, 49 *Kan.* 1, 30 *Pac. Rep.* 108.—QUOTING Ball *v.* Hardesty, 38 Kan. 540; Chicago, K. & W. R. Co. *v.* Drake, 46 Kan. 568.

198. When in conflict with established facts.—Expert opinions are of no force against direct testimony for showing the speed of a locomotive, especially if many of the facts necessary for forming a correct opinion were not placed before the witness. *Viets* v. *Toledo, A. A. & G. T. R. Co.*, 18 *Am. & Eng. R. Cas.* 11, 55 *Mich.* 120, 20 *N. W. Rep.* 818.

The opinions of experts are admissible concerning the scientific probability of certain consequences from particular facts, and the scientific probability of their concurrence. But neither science nor witnesses can be held infallible; and when facts are shown to the satisfaction of a jury to exist, the jury must act upon them. *Laughlin* v. *Grand Rapids St. R. Co.*, 26 *Am. & Eng. R. Cas.* 377, 62 *Mich.* 220, 28 *N. W. Rep.* 873.—FOLLOWED IN Cross *v.* Lake Shore & M. S. R. Co., 69 Mich. 363.

Scientific opinions are worthless when pitted against facts. The theories of medical men are not always reasonable, and are never to be regarded when they manifestly conflict with established facts. *Stone* v. *Chicago & W. M. R. Co.*, 30 *Am. & Eng. R. Cas.* 600, 66 *Mich.* 76, 9 *West. Rep.* 596, 33 *N. W. Rep.* 24.

The testimony of scientific railway engineers that they have constructed a roadbed skilfully, and in accordance with scientific rules, should not—in a suit for damages claimed on account of injury to crops caused by water being backed up by the roadbed after a rainfall, not extraordinary in its character—prevail over the testimony of others, if such other testimony, to the effect that the roadbed did in fact cause the injury, is believed by the jury. *Sabine & E. T. R. Co.* v. *Hadnot*, 30 *Am. & Eng. R. Cas.* 197, 67 *Tex.* 503, 4 *S. W. Rep.* 138.

WORDS AND PHRASES.

"**Adjacent flats**," see RIPARIAN RIGHTS, **7.**
"**All risks**," see PRIVATE CARS, **2.**
"**Any future extensions**," see CONTRACTS, **31.**
"**Arising under a law of the United States**," see REMOVAL OF CAUSES, **9.**
"**As much as shipper may desire**," see CARRIAGE OF MERCHANDISE, **409.**
"**At company's convenience**," see BILLS OF LADING, **103.**
— **owner's risk**," see BILLS OF LADING, **104.**
"**Bill, order, note**," see CARRIAGE OF MERCHANDISE, **527.**
"**Bills of lading**," see BILLS OF LADING, **1.**
"**Branch roads**," see BRANCH AND LATERAL ROADS, **1.**
"**Break ground**," see CONTRACTS, **32.**
"**Breaking**," see BILLS OF LADING, **107.**
"**Carriage**," see STREET RAILWAYS, **315.**
Carriers of merchandise, see CARRIAGE OF MERCHANDISE, **1, 2.**
— — "**passengers**," see CARRIAGE OF PASSENGERS, **10.**
"**Chafing**," see BILLS OF LADING, **107.**
"**Citizens**," see CITIZENSHIP, ETC., **1.**
"**Commerce**," see COMMERCE, **1.**
"**Competitive stations**," see CONTRACTS, **33.**
Construction of, in stock laws, see ANIMALS, INJURIES TO, **17.**
— — **particular, in statutes**, see STATUTES, **64.**
"**Contents and value unknown**," see CARRIAGE OF MERCHANDISE, **417.**
"**Control**," see CONTRACTS, **34.**
— **of streets**," see STREETS AND HIGHWAYS, **71.**
"**Counted—Inspected**," see CONTRACTS, **35.**
"**Damaged**," **in eminent domain statutes**, see EMINENT DOMAIN, **174.**
"**Depot grounds**," see STATIONS AND DEPOTS, **8.**
— **or station**," see STATIONS AND DEPOTS, **3.**
"**Dividends**," see DIVIDENDS, **1.**
"**Farm crossings**," see FARM CROSSINGS, **1.**
"**Forwarders**," see CARRIAGE OF MERCHANDISE, **31.**
"**Found**," see PROCESS, **18.**
"**Franchises**," see FRANCHISES, **1.**
"**Good cause**" **for setting aside report of**

commissioners, see EMINENT DOMAIN, 802.
"Good for this trip only," see TICKETS AND FARES, 94.
"Gross negligence," see COMPARATIVE NEGLIGENCE, 4, 17; NEGLIGENCE, 3.
"Heirs," see CONTRACTS, 36.
"Highways," see PUBLIC LANDS, 39.
"In and about the rails," see STREET RAILWAYS, 135.
— a parcel or package," see CARRIAGE OF MERCHANDISE, 523.
— apparent good order," see BILLS OF LADING, 21.
"Independent contractors," see INDEPENDENT CONTRACTORS, 1.
"In good order and well-conditioned," see BILLS OF LADING, 22.
Inhabitants, see CITIZENSHIP, ETC., 2.
"Injuring," see STREETS AND HIGHWAYS, 122.
"Injuriously affected," under English compulsory purchase laws, see EMINENT DOMAIN, 1100.
— affecting," see STREETS AND HIGHWAYS, 122.
In tax laws, construction of, see TAXATION, 60.
Interpretation of, in pleadings, see ANIMALS, INJURIES TO, 328.
— — particular, see CONSTRUCTION OF RAILWAYS, 23.
— — — in condemnation statutes, see EMINENT DOMAIN, 56.
— — — — deeds, see DEEDS, 13.
"Just and reasonable," in limitation of liability, see CARRIAGE OF LIVE STOCK, 92.
— compensation," see EMINENT DOMAIN, 372.
"Laborer," see LIENS, 44, 45.
"Land grants," see LAND GRANTS, 1.
"Legal negligence," see CARRIAGE OF PASSENGERS, 127.
"Local and through traffic," see LEASES, ETC., 139.
"Locality," see DISCRIMINATION, 49.
"Market value," see EMINENT DOMAIN, 649.
"Negligence," see NEGLIGENCE, 1.
"Negotiation," see DEBENTURES, 3.
"Net earnings," see LAND GRANT RAILROADS, 11.
"New lines," see CONTRACTS, 37.
"Non-negotiable," see BILLS OF LADING, 114.
"Not to exceed 200 tons," see CONTRACTS, 38.
"Operating expenses," see LAND GRANT RAILROADS, 11.
"Ordinary care," see NEGLIGENCE, 6.
"Other portions of the drawbridge," see CONTRACTS, 39.
"Owners, occupants," in eminent domain law, see EMINENT DOMAIN, 288.
"Owner's risk," see CARRIAGE OF MERCHANDISE, 459.
"Perils of the sea," see BILLS OF LADING, 102.
"Permanent," see CONTRACTS, 40.
"Private carriers," see CARRIAGE OF MERCHANDISE, 4.
"Privilege of reshipping," see BILLS OF LADING, 105.
"Property," see STREET RAILWAYS, 59.
"Public crossing," see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 6.
"Railroad connection," see CONNECTING LINES, 1.
"Railway station," see STATIONS AND DEPOTS, 6.
"Reasonable facilities," see CARRIAGE OF MERCHANDISE, 533-538.
"Regular depot or station," see STATIONS AND DEPOTS, 4.
"Revenue bond scrip," see STATE AID, 34.
"Rights, powers, and privileges," see TAXATION, 148.
"Servant," see LIENS, 44, 45.
"Shall be disposed of," see CONTRACTS, 41.
"Slight negligence," see COMPARATIVE NEGLIGENCE, 4, 17.
"Solid rock," see CONTRACTS, 42.
"Station," see STATIONS AND DEPOTS, 5.
— agents," see STATION AGENTS, 1.
"Stock," see CROSSINGS, INJURIES TO PERSONS, ETC., AT, 25.
— in a will, see WILLS, 1.
"Taking," see STREETS AND HIGHWAYS, 120, 121.
— under eminent domain law, see EMINENT DOMAIN, 160, 161.
— — English compulsory purchase laws, see EMINENT DOMAIN, 1097.
"To be forwarded," see CONTRACTS, 43.
— — left until called for," see CARRIAGE OF MERCHANDISE, 352.
— intersect, join, and unite," see LEASES, ETC., 32.
"Toll-bridge," see BRIDGES, ETC., 89.
"Tolls," see CHARGES, 127.
"Total inability to labor," see RELIEF ASSOCIATIONS, 2.
"To the satisfaction of board of trade," see BRIDGES, ETC., 30.
"Unavoidable accidents," see BILLS OF LADING, 106.
"Undue preference," see DISCRIMINATION, 16.
"Unjust" or "unreasonable," in limitation of liability, see CARRIAGE OF LIVE STOCK, 93.
"Until sold and conveyed," see TAXATION, 80.
"Usual stopping-places," see STATIONS AND DEPOTS, 7.

"**Watercourses,**" see WATERS AND WATERCOURSES, **9.**
"**Wilful negligence,**" see NEGLIGENCE, **4.**
"**Workman,**" see LIENS, **44, 45.**
See also BAGGAGE, **20**; BRIDGES, ETC., **9.**

1. "Abstract," as applied to records, ordinarily means a mere brief, and not a copy of that from which it is taken. *Dickinson* v. *Chesapeake & O. R. Co.*, 7 *W. Va.* 390.

2. "Abuse and misuse," as used in an act of incorporation, means any positive act in violation of the charter and in derogation of public right wilfully done or caused to be done by those appointed to manage the general concerns of the corporation. *Baltimore* v. *Pittsburgh & C. R. Co.*, 3 *Pittsb.* (*Pa.*) 20.

3. "Abutting lot" means one bounded on the side of a public street, in the bed or soil of which the owner of the lot has no title, interest, or private rights, except such as are incident to a lot so situated. *Hughes* v. *Metropolitan El. R. Co.*, 130 *N. Y.* 14, 28 *N. E. Rep.* 765, 40 *N. Y. S. R.* 587; *affirming* 25 *J. & S.* 379, 29 *N. Y. S. R.* 516, 8 *N. Y. Supp.* 535.

4. Accident.*—An accident is an event from an unknown cause, or an unusual and unexpected event from a known cause; a chance or casualty. Thus if a railroad bed, engine, and cars, are in good order, and the engineer and other attendants are skilful and careful, and yet a rail breaks, the train is crushed, and the employés and passengers are killed, that is an unusual and unexpected event from a known cause, and an accident. But if the track is out of order, and the engine worn and unmanageable, and on account thereof there is the like result as above stated on the good road, that is not an unusual and unexpected event, but a usual and expected event from such a cause. It is not accident, but it is negligence. *Crutchfield* v. *Richmond & D. R. Co.*, 76 *N. Car.* 320, 14 *Am. Ry. Rep.* 293.

Accident is an unforeseen and unexpected event occurring externally to the person affected by it, and of which his own agency is not the proximate cause. *Kopper* v. *Dyer*, 59 *Vt.* 477, 4 *N. Eng. Rep.* 369, 9 *Atl. Rep.* 4.

Accident embraces not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force; but such unforeseen events, misfortunes, losses, acts, or omissions as are not wholly the result of negligence or misconduct in the party affected thereby. *Kopper* v. *Dyer*, 59 *Vt.* 477, 4 *N. Eng. Rep.* 368, 9 *Atl. Rep.* 4.

5. "Accidentally begun." — A fire negligently started by a passing locomotive is not within the meaning of a statute providing for exemption of liability for fires accidentally begun. *Webb* v. *Rome, W. & O. R. Co.*, 49 *N. Y.* 420, 4 *Am. Ry. Rep.* 547; *affirming* 3 *Lans.* 453.

6. "Accrue." — In some cases wages may properly be said to "accrue" on a customary monthly pay-day, rather than at the completion of the work contracted to be done. *Mundt* v. *Sheboygan & F. du L. R. Co.*, 31 *Wis.* 451.

7. Act of God.—(1) *What is.**—An unusual and extraordinary flood in a river is such an act of God as to excuse a common carrier from his undertaking to transport goods; but in such case the carrier is bound to exercise the care of a very prudent man to preserve the freight intrusted to him. *Wallace* v. *Clayton*, 42 *Ga.* 443.

"Act of God" means something superhuman, or something in opposition to the act of man. Loss by fire, as in the great Chicago fire of 1871, therefore, will not relieve a carrier from his undertaking. *Merchants' Despatch Co.* v. *Smith*, 76 *Ill.* 542. *Chicago & N. W. R. Co.* v. *Sawyer*, 69 *Ill.* 285.

"Unavoidable" is synonymous with "inevitable," and inevitable or unavoidable accidents are the same as the acts of God, which mean any accident produced by physical causes which are inevitable, such as lightnings, storms, perils of the sea, earthquakes, inundations, sudden death or illness. *Fish* v. *Chapman*, 2 *Ga.* 349. *Walpole* v. *Bridges*, 5 *Blackf.* (*Ind.*) 222.

The words "inevitable accident," when used in law to designate a mode by which loss has happened or may happen to goods while in the hands of a common carrier, are synonymous with the words "act of God." *Neal* v. *Saunderson*, 10 *Miss.* 572.

A loss occasioned by the act of God has reference to acts with which the agency of man has nothing to do. *Republican Valley R. Co.* v. *Fink*, 18 *Neb.* 89, 24 *N. W. Rep.* 691.

* What is injury caused by "accident" within the meaning of insurance laws, see notes, 8 AM. REP. 219; 54 *Id.* 302.

* What is act of God, see note, 2 AM. & ENG. R. CAS. 171.

The phrase "act of God," as applied to carriers, denotes natural accidents that could not have happened by the intervention of man, such as storms, lightning, and tempest, and excludes all human agency, and must be distinguished from what is called "inevitable accident." *Merritt* v. *Earle*, 29 *N. Y.* 115.

"The act of God" denotes such causes as are beyond the control of the carrier, and produce loss without the intervention of human agency. *Truax* v. *Philadelphia, W. & B. R. Co.*, 3 *Houst.* (*Del.*) 233.

The act of God which will excuse a common carrier must be a direct and violent act of nature. *Friend* v. *Woods*, 6 *Gratt.* (*Va.*) 189.

A loss is caused by the act of God if it is occasioned by the elementary forces of nature unconnected with the agency of man; and for such a loss a carrier is not liable, provided reasonable care would not have prevented it. *Nugent* v. *Smith*, *L. R.* 1 *C. P. D.* 423, 45 *L. J. C. P. D.* 697, 34 *L. T.* 827, 25 *W. R.* 117; *reversing L. R.* 1 *C. P. D.* 19, 45 *L. J. C. P. D.* 19, 33 *L. T.* 731, 24 *W. R.* 237.

It is not necessary that there should be a sudden and irresistible act of nature to constitute an act of God which will relieve a carrier from liability; nor is it necessary to show that the carrier could not, by any amount of ability, foresee or prevent its effect. *Nugent* v. *Smith*, *L. R.* 1 *C. P. D.* 423, 45 *L. J. C. P. D.* 697, 34 *L. T.* 827, 25 *W. R.* 117; *reversing L. R.* 1 *C. P. D.* 19, 45 *L. J. C. P. D.* 19, 33 *L. T.* 731, 24 *W. R.* 237.

(2) *As applied to carriers of passengers.* —Carriers of freight are liable for any damage not caused by the act of God or of the public enemy, and are insurers; but carriers of passengers are liable only for injuries resulting from their actual negligence or that of their employés. *Grand Rapids & I. R. Co.* v. *Huntley*, 38 *Mich.* 537.

Carriers of passengers are not liable for mere accident or misadventure, any more than for the act of God or the public enemy, or for any sudden convulsion of nature, or an unknown or unforeseen destruction, or an unknowable insufficiency of some part of the road. In addition to this there must be some actual negligence or want of strict care, diligence, and foresight. *Sawyer* v. *Hannibal & St. J. R. Co.*, 37 *Mo.* 240.

A carrier is not bound to the highest degree of foresight and circumspection as against an act of God, but only to such care as an ordinarily prudent person would use under all circumstances of the case. *Gillespie* v. *St. Louis, K. C. & N. R. Co.*, 6 *Mo. App.* 554.

Where an accident by which baggage is lost in the hands of a common carrier is not due to the failure of any of the appliances of transportation, but to flood, amounting to an act of God, there is no presumption of negligence which will shift the burden of proof upon the carrier to show that he was not negligent. *Long* v. *Pennsylvania R. Co.*, 147 *Pa. St.* 343, 23 *Atl. Rep.* 459.

(3) *As applied to carriers of live stock.* —A snowstorm so severe as to hinder and delay a railroad company in the performance of its duties is such an act of God as to relieve the company from liability for loss or injury resulting from a delay in shipping live stock within a reasonable time. *Ballentine* v. *North Mo. R. Co.*, 40 *Mo.* 491. *Black* v. *Chicago, B. & Q. R. Co.*, 30 *Neb.* 197, 46 *N. W. Rep.* 428.

Where the negligence of a carrier of live stock concurs in and contributes to the injury, he is not exempt from liability on the ground that the immediate damage was occasioned by the act of God or inevitable accident. *Pruitt* v. *Hannibal & St. J. R. Co.*, 62 *Mo.* 527.

A common carrier of live stock is not an insurer against injuries unavoidably resulting from the inherent nature or propensities of the animals, or against loss caused by the act of God. *Black* v. *Chicago, B. & Q. R. Co.*, 30 *Neb.* 197, 46 *N. W. Rep.* 428.

While a carrier, when overtaken by an occurrence known as the act of God, is not bound to exercise the highest degree of diligence to preserve the property from injury, yet in such an emergency he is required to bestow such care as an ordinarily prudent person or carrier would use under like circumstances, and if he fails to do so and loss results therefrom, he is liable. *Black* v. *Chicago, B. & Q. R. Co.*, 30 *Neb.* 197, 46 *N. W. Rep.* 428.

The common-law rule making common carriers of merchandise liable as insurers, except for injury or loss resulting from the act of God or the public enemy, is modified as to carriers of live stock to the extent of relieving them from liability for injuries or

loss resulting by reason of the vitality of the freight. *Cragin* v. *New York C. R. Co.*, 51 *N. Y.* 61, 4 *Am. Ry. Rep.* 418. *Dow* v. *Portland Steam Packet Co.*, 84 *Me.* 490, 24 *Atl. Rep.* 945. *Hayman* v. *Philadelphia & R. R. Co.*, 8 *N. Y. S. R.* 86.

In Texas, a railway company is bound, as a common carrier, to receive and transport live animals, when offered for transportation from one point to another within the state, as other property, and is liable, after receiving them, as an insurer against loss from any cause except the act of God or of the public enemy, the act of the owner of the stock, or the vicious propensities or inherent character of the animals. This liability a railroad company cannot limit by special contract, even in regard to matters concerning which it might legally contract at common law. *Gulf, C. & S. F. R. Co.* v. *Trawick*, 30 *Am. & Eng. R. Cas.* 49, 68 *Tex.* 314, 4 *S. W. Rep.* 567.

A carrier of live stock is not liable for injuries thereto caused by a delay where the delay is caused by atmospheric conditions beyond the carrier's control, making it impossible to get telegraphic shipping orders; but to excuse such delay the carrier must have exercised due care to protect the property from injury during the delay. *International & G. N. R. Co.* v. *Hynes*, 3 *Tex. Civ. App.* 20, 21 *S. W. Rep.* 622.

(4) *As applied to carriers of merchandise.*—A common carrier received goods on his boat and gave a bill of lading to deliver them at the point of destination, without excepting the dangers of the river. *Held*, that the contract was not absolute to deliver at all events, but was subject to the common-law qualifications of loss occurring by the act of God or the public enemy. *Neal* v. *Saunderson*, 10 *Miss.* 572.

The common law holds a common carrier liable for damage to and loss of goods committed to him for transportation, unless the damage or loss results from the act of God (which is limited to inevitable accident), or from the public enemy. *Mobile & O. R. Co.* v. *Weiner*, 49 *Miss.* 725. *Hooper* v. *Wells*, 27 *Cal.* 11. *Fish* v. *Chapman*, 2 *Ga.* 349. *Chicago & A. R. Co.* v. *Shea*, 66 *Ill.* 471. *Robertson* v. *Kennedy*, 2 *Dana* (*Ky.*) 430. *Hall* v. *Renfro*, 3 *Metc.* (*Ky.*) 51. *Fillebrown* v. *Grand Trunk R. Co.*, 55 *Me.* 462. *Davis* v. *Wabash, St. L. & P. R. Co.*, 26 *Am. & Eng. R. Cas.* 315, 89 *Mo.* 340, 1 *S. W. Rep.* 327; *reversing* 13 *Mo. App.* 449. *Merritt* v. *Earle*, 29 *N. Y.* 115. *Harrell* v. *Owens*, 1 *Dev. & B.* (*N. Car.*) 273. *Arnold* v. *Jones*, 26 *Tex.* 335. *Texas & P. R. Co.* v. *Morse*, 1 *Tex. App.* (*Civ. Cas.*) 179.

The law holds the carrier responsible as insurer for all loss and damage to goods intrusted to his care, whether it arise from his own negligence, or that of his servants, or of third persons, or whether it be caused by the tortious acts of himself or others who are not the public enemies, or whether it be by unavoidable accident not caused by the act of God. *Howe* v. *Oswego & S. R. Co.*, 56 *Barb.* (*N. Y.*) 121.

If a common carrier has reasonable grounds for not receiving goods offered to him for transportation, he may refuse them; but if he once receives them he becomes an insurer, and can only exonerate himself from liability by showing that the loss arose from the act of God or the public enemy. *Porcher* v. *Northeastern R. Co.*, 14 *Rich.* (*So. Car.*) 181.

The rule that persons engaged as common carriers of goods for hire are responsible for all damages done to the goods while in their charge, unless such injury be caused by the act of God or the public enemy, applies as well to common carriers by water as by land. *Houston & G. Nav. Co.* v. *Dwyer*, 29 *Tex.* 376.

While a railway company is transporting cars of another company, and has the complete and uninterrupted control of them, it will be liable as a carrier for any injury to the cars not caused by the act of God or the public enemy. *Peoria & P. U. R. Co.* v. *United States Rolling Stock Co.*, 136 *Ill.* 643, 27 *N. E. Rep.* 59; *reversing* 28 *Ill. App.* 79.

A common carrier cannot escape responsibility for a loss of freight not caused by the act of God or the public enemy by showing that it employed the means of transportation furnished to it by others. *Austin* v. *St. Louis & St. P. Packet Co.*, 15 *Mo. App.* 197.

A common carrier, when there is no special contract limiting his responsibility, is bound as an insurer of goods received by him for transportation as against loss occasioned by any cause other than the act of God, the public enemy, or the conduct of the shipper. *Southern Exp. Co.* v. *Moon*, 39 *Miss.* 822.

Except so far as limited by valid special contract, a common carrier is an insurer against all losses except those caused by

the act of God, the public enemy, or contributory negligence on the part of the consignor. *Alabama G. S. R. Co.* v. *Thomas*, 89 *Ala.* 294, 7 *So. Rep.* 762. *Louisville & N. R. Co.* v. *McGuire*, 79 *Ala.* 395. *Louisville, N. A. & C. R. Co.* v. *Nicholai*, 4 *Ind. App.* 119, 30 *N. E. Rep.* 424. *Bohannan* v. *Hammond*, 42 *Cal.* 227.

When a railroad company, by its agents, agrees to deliver goods within a prescribed time, it does not thereby become an absolute insurer of the goods, and required, at all events, to deliver or pay for them. If they are destroyed by the act of God or the public enemy before the time for delivering, the carrier is excused. *Strohn* v. *Detroit & M. R. Co.*, 23 *Wis.* 126.

Where there is no special contract, a common carrier is liable for all losses of or injuries to goods received by him for carriage not occasioned by the act of God or the public enemy. *Texas Exp. Co.* v. *Scott*, (*Tex.*) 16 *Am. & Eng. R. Cas.* 111. *Watson* v. *Memphis & C. R. Co.*, 9 *Heisk.* (*Tenn.*) 255.

(5) *Limits and qualifications.* — The old rule that a common carrier is answerable for all losses which are not occasioned by the act of God or the public enemy, being founded in justice and sound policy, ought never to be departed from; and the carrier will not be allowed to limit his common-law liability by contract, nor to excuse himself from liability for losses attributable to the negligence of his servants. *Heaton* v. *Morgan's L. & T. R. & S. Co.*, 1 *Tex. App.* (*Civ. Cas.*) 425. *Texas Exp. Co.* v. *Scott*, 2 *Tex. App.* (*Civ. Cas.*) 59.

Damage to goods while in the hands of a carrier, resulting from the explosion of a boiler, is not the act of God or of the public enemy, nor a *vis major*, so as to relieve the carrier from liability. *Houston & G. Nav. Co.* v. *Dwyer*, 29 *Tex.* 376.

When the act of God is relied upon to excuse a carrier, it must be shown to be the proximate cause of the loss, and without any concurrent negligence on the part of the carrier. *Missouri Pac. R. Co.* v. *Barnes*, 2 *Tex. App.* (*Civ. Cas.*) 507. *Adams Exp. Co.* v. *Jackson*, 92 *Tenn.* 326, 21 *S. W. Rep.* 666.

The mere failure of a common carrier to forward goods promptly will not render him liable for a loss occasioned proximately by the "act of God" if he is guilty of no wrongful detention of them at the place of shipment, or of no negligence or want of care and diligence in securing them from loss *in transitu*. *Lamont* v. *Nashville & C. R. Co.*, 9 *Heisk.* (*Tenn.*) 58, 19 *Am. Ry. Rep.* 284.

A carrier is not liable because its negligence may have contributed remotely to the loss if it appears that the proximate cause is some act of God, such as an unusual flood. *Memphis & C. R. Co.* v. *Reeves*, 10 *Wall.* (*U. S.*) 176.

Where, from the plaintiff's own evidence, it appears that the act of God caused the injury to the goods, the carrier is exonerated from liability unless plaintiff shows that the carrier was guilty of some specific negligence which actually co-operated to produce the loss. *Davis* v. *Wabash, St. L. & P. R. Co.*, 26 *Am. & Eng. R. Cas.* 315, 89 *Mo.* 340, 1 *S. W. Rep.* 327; *reversing* 13 *Mo. App.* 449.

If a loss is occasioned partly by the act of God and partly by some other cause which, if it had been the sole cause of the loss, would have furnished a defense, the carrier will be entitled to immunity in respect of such loss if he can show that it could not have been prevented by the exercise of reasonable care. *Nugent* v. *Smith*, *L. R.* 1 *C. P. D.* 423, 45 *L. J. C. P. D.* 697, 34 *L. T.* 827, 25 *W. R.* 117; *reversing L. R.* 1 *C. P. D.* 19, 45 *L. J. C. P. D.* 19, 33 *L. T.* 731, 24 *W. R.* 237.

The rule that a common carrier is an insurer of goods, and can only avoid liability for loss by showing that it happened by the act of God or the public enemy, does not apply where the damage results from delay in their delivery by accident or misfortune, although not inevitable or produced by the act of God. *Gulf, C. & S. F. R. Co.* v. *Levi*, 42 *Am. & Eng. R. Cas.* 439, 76 *Tex.* 337, 13 *S. W. Rep.* 191, 8 *L. R. A.* 323; *reversing* 40 *Am. & Eng. R. Cas.* 115, 12 *S. W. Rep.* 677.

Freezing weather causing a loss of goods cannot be deemed the act of God. *McGraw* v. *Baltimore & O. R. Co.*, 9 *Am. & Eng. R. Cas.* 188, 18 *W. Va.* 361, 41 *Am. Rep.* 696.

(6) *As applied to express companies.*—In the absence of special contract, express companies are subject to the same liability as are other common carriers. At common law they are regarded as absolute insurers of goods intrusted to them for transportation, when properly packed, except for loss by act of God or the public enemy. *Overland M. & E. Co.* v. *Carroll*, 7 *Colo.* 43, 1

Pac. Rep. 682. *American Merchants' Union Exp. Co.* v. *Schier*, 55 *Ill.* 140. *Klauber* v. *American Exp. Co.*, 21 *Wis.* 21.

An express company is a common carrier, and as such is liable for the loss of goods intrusted to it, except when the loss is caused by the act of God or the public enemy. *Southern Exp. Co.* v. *Newby*, 36 *Ga.* 635.

An express company is an insurer of the safe delivery of a money package intrusted to it for delivery to another person, and nothing can excuse it from its obligation to carry and deliver safely but the act of God or the public enemy. *United States Exp. Co.* v. *Hutchins*, 67 *Ill.* 348.

It is the duty of an express company, upon receiving a package of money to be forwarded, to carry and deliver the money safely to the consignee; and the only way it can relieve itself from responsibility as a common carrier is by showing performance, or prevention thereof by the act of God or a public enemy. It is not discharged by delivering the package to another on a forged order of the owner. *American Merchants' Union Exp. Co.* v. *Milk*, 73 *Ill.* 224.

Express companies are insurers of the safe delivery of goods, and nothing can relieve them of this obligation except the act of God or the public enemy. No fraud, imposition, or mistake will excuse a delivery to the wrong person. *Shearer* v. *Pacific Exp. Co.*, 43 *Ill. App.* 641.

The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better opinion is that it must be the sole cause. And where the loss is caused by the "act of God," if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible. *Wolf* v. *American Exp. Co.*, 43 *Mo.* 421.

The contract of an express company acting as a common carrier is that it will carry the goods intrusted to it, and deliver them to the consignee, at the proper time and place, without loss or failure except by the act of God or of the public enemy. *Marshall* v. *American Exp. Co.*, 7 *Wis.* 1.

An express company, as a common carrier of money and valuables, is not liable for losses resulting from such causes as the act of God, the public enemy, mobs, or riots, unless it expressly insures against such loss. Therefore the company is not entitled to any notice whatever of such a loss. *Southern Exp. Co.* v. *Glenn*, 16 *Lea* (*Tenn.*) 472, 1 *S. W. Rep.* 102.

8. "Adequate crossing," as used in the proviso of a deed of right of way to a railroad company, does not apply to a crossing with heavy slide gates between the grantor's house and the highway; it should be an open crossing. *Gray* v. *Burlington & M. R. Co.*, 37 *Iowa* 119.

9. All.—Arkansas Act of July 23, 1868, entitled "An act giving all laborers a lien upon the production of their labor until the same is paid for," should not be construed literally, and the word "all" does not give a lien to every laborer, regardless of the character of his labor. *Dano* v. *Mississippi, O. & R. R. R. Co.*, 27 *Ark.* 564.

10. All possible skill and care.—A street-railway company using cars, drawn by horses upon rails, carrying passengers for hire, is bound to exercise all possible skill, foresight, and care in the running of its cars, so that passengers may not be exposed to danger on account of the manner in which the cars are run. "All possible skill and care" implies that every reasonable precaution in the management and operation of street cars be used to prevent injuries to passengers. The phrase means good tracks, safe cars, experienced drivers, careful management, and judicious operation in every respect. "All possible foresight" means anticipation, if not knowledge, that the operation of street cars will result in danger to passengers, and that there must be some action with reference to the future; a provident care to guard against such occurrences; a wise forethought and prudent provision that will avert the threatened evil, if human thought or action can do so. *Topeka City R. Co.* v. *Higgs*, 34 *Am. & Eng. R. Cas.* 529, 38 *Kan.* 375, 16 *Pac. Rep.* 667.—QUOTING Tuller *v.* Talbot, 23 Ill. 357; Meier *v.* Pennsylvania R. Co., 64 Pa. St. 226; Philadelphia & R. R. Co. *v.* Derby, 14 How. (U. S.) 468.

11. All through grain.—A railroad company and an elevator company entered into a contract that the latter would erect suitable buildings for receiving, storing, delivering, and handling all grain that should be received from the railroad, and that the elevator company would receive and discharge for the railroad company "all through grain at one cent a bushel." *Held*, that the words "all through grain" did not mean grain shipped merely to the end of the

railroad, but all grain consigned through the city where the elevator company was located to some point beyond. *Richmond* v. *Dubuque & S. C. R. Co.*, 26 *Iowa* 191.

12. Along its route.—Maine statute of 1842 makes railroad companies liable for fires communicated by their locomotives, and gives to each company an insurable interest in the property for which it may be held responsible "along its route." *Held*, that the words "along its route" apply to buildings near and adjacent to the road so as to be exposed to danger of fire from passing engines. *Pratt* v. *Atlantic & St. L. R. Co.*, 42 *Me.* 579.

The same words in a similar statute of Vermont construed to mean in proximity to the rails upon which the locomotives run. *Grand Trunk R Co.* v. *Richardson*, 91 *U. S.* 454.

13. Always.—Tennessee statute that "every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead," should not be construed as requiring the company literally to keep some one always on the lookout. It is sufficient if the precaution was being observed when the accident happened. *Louisville & N. R. Co.* v. *Stone*, 7 *Heisk.* (*Tenn.*) 468.—FOLLOWING Memphis & C. R. Co. *v.* Dean, 5 Sneed (Tenn.) 291.

14. "Amalgamate."—For meaning of the term as applied to corporations, see *Meyer* v. *Johnston*, 8 *Am. & Eng. R. Cas.* 584, 64 *Ala.* 603.—QUOTING In re Empire Assurance Corp., L. R. 4 Eq. 341; In re Bank of Hindustan, 2 H. & M. 657.

15. Any of the public roads.—The provision of N. Y. Laws 1853, ch. 471, § 2, authorizing telegraph companies to erect fixtures upon "any of the public roads," does not apply to the roadway of a railroad company. *New York City & N. R. Co.* v. *Central Union Tel. Co.*, 21 *Hun* (*N. Y.*) 261.

16. Any person.—The phrase "any person," as used in the Missouri Damage Act, does not include fellow-servants. *Proctor* v. *Hannibal & St. J. R. Co.*, 64 *Mo.* 112, 9 *Am. Ry. Rep.* 440.—FOLLOWING Rohback *v.* Pacific R. Co., 43 Mo. 187.—FOLLOWED IN Elliott *v.* St. Louis & I. M. R. Co., 67 Mo. 272.

The words "any person" in Wis. Rev. St., § 4482, include any corporation. *Chippewa Valley & S. R. Co.* v. *Chicago, St. P., M. & O. R. Co.*, 40 *Am. & Eng. R. Cas.* 408, 75 *Wis.* 224, 6 *L. R. A.* 601, 44 *N. W. Rep.* 17.

17. Any regularly laid out public highway.—Kan. Laws of 1876, ch. 105, § 1 (Comp. Laws 1879, ch. 84, § 41), provide that it shall be the duty of every railway company or corporation owning, controlling, or operating any line of railroad within the state to construct and keep in repair at each crossing of "any regularly laid out public highway" a good and substantial crossing. *Held*, that the words "any regularly laid out public highway" do not apply to roads which have become such by use merely. *Missouri, K. & T. R. Co.* v. *Long*, 6 *Am. & Eng. R. Cas.* 254, 27 *Kan.* 684.—DISTINGUISHING Kelley *v.* Southern Minn. R. Co., 28 Minn. 98, 9 N. W. Rep. 588.

18. Appurtenance—Appurtenant.—An "appurtenance" is that which belongs to or is connected with something else to which it is subordinate or less worthy, and with which it passes as an incident; and in strict legal sense land can never be appurtenant to land. *New Orleans Pac. R. Co.* v. *Parker*, 143 *U. S.* 42, 12 *Sup. Ct. Rep.* 364.—REVIEWING Harris *v.* Elliott, 10 Pet. (U. S.) 25; Humphreys *v.* McKissock, 140 U. S. 304; Linthicum *v.* Ray, 9 Wall. 241; Smith *v.* McCullough, 104 U. S. 25; Bank of Commerce *v.* Tennessee, 104 U. S. 493.

The word "appurtenant" has no inflexible meaning, but must be construed in connection with the nature and subject of the principal thing granted. *Missouri Pac. R. Co.* v. *Maffitt*, 94 *Mo.* 56, 12 *West. Rep.* 412, 6 *S. W. Rep.* 600.

19. "Article," as used in a printed notice given by a carrier on taking charge of traveler's baggage, means not each separate trunk, valise, bag, etc., but each distinct thing, piece of clothing, ornament, book, etc., contained in a trunk, etc. *Hopkins* v. *Westcott*, 6 *Blatchf.* (*U. S.*) 64.

20. Assessment.—The word "assessment" has been employed in two different senses—sometimes as expressing the appraisement or valuation of the property, and entering it on the lists for the purposes of taxation; and sometimes as indicating the charge or special tax imposed on the land, as its portion of the expense of a benefit conferred by a local improvement. *First Div. St. P. & P. R. Co.* v. *St. Paul*, 21 *Minn.* 526, 18 *Am. Ry. Rep.* 435.

21. "At" often means "in" or "within." It cannot be denied that "at," when used in reference to place, frequently means in or within, but not always. It sometimes denotes nearness or proximity, which is its primary signification. It is less definite than "in" or "on." *Williams* v. *Ft. Worth & N. O. R. Co.*, 82 *Tex.* 553, 18 *S. W. Rep.* 206.

22. "At the termini" of a railroad means near the *termini*. *State* (*West Jersey R. Co., Pros.*) v. *Receiver of Taxes*, 38 *N. J. L.* 299.

23. Baggage.*—The term "baggage," for which passenger carriers are responsible, does not include articles of merchandise not intended for personal use, such as thirty-eight pairs of new shoes, sixty pairs of stock for boys' shoes, and two papers of shoe nails. *Collins* v. *Boston & M. R. Co.*, 10 *Cush.* (*Mass.*) 506.—FOLLOWING Jordan *v.* Fall River R. Co., 5 Cush. 69.

24. Believe and satisfied.—In instructions, the terms "believe" and "satisfied" are used interchangeably, and imply no more than that the jury shall be convinced by the preponderance of evidence of the truth of the basic facts constituting the plaintiff's alleged cause of action. *Braddy* v. *Kansas City, Ft. S. & M. R. Co.*, 47 *Mo. App.* 519.

25. Boss.—A person employed to perform any of the master's duties towards his servants is, while that relation continues, and in respect to such duties, not a fellow-servant of the latter; and it is not decisive by what name he is designated. *Dayharsh* v. *Hannibal & St. J. R. Co.*, 103 *Mo.* 570, 15 *S. W. Rep.* 554.

26. Branch.—A railroad whose line terminated near certain docks leased the same, and *inter alia* agreed, so far as possible, to procure all goods to be shipped or unshipped at the docks, and to pay certain dues and royalties on goods conveyed "along the railway or any part or branch thereof." *Held*, that this only applied to the railway or those parts or branches in connection with some place of shipment or unshipment. *Taff Vale R. Co.* v. *Macnabb*, 42 *L. J. Q. B.* 153, *L. R.* 6 *H. L. Cas.* 169, 22 *W. R.* 65, 1 *Ry. & C. T. Cas.* 21.

27. "Bridge."—A structure, usually of wood, stone, brick, or iron, erected over a river or other watercourse, or over a chasm, railroad, etc., to make a passageway from one bank to the other. Anything supported at the ends, which serves to keep some other thing from resting upon the object spanned, which forms a platform or staging over which something passes or is conveyed. *Duncan* v. *State*, 52 *Am. & Eng. R. Cas.* 646, 29 *Fla.* 439, 10 *So. Rep.* 815.

A "bridge," as known to the common law, was a structure over a river having a footpath for man and beast. *Propr's of Bridges* v. *Hoboken L. & I. Co.*, 13 *N. J. Eq.* 503; *affirming* 13 *N. J. Eq.* 81.

28. Building or other property.—Conn. Gen. St., § 3581, makes railroads liable "when any injury is done to a building or other property by a fire communicated by a locomotive engine." *Held*, that the term "building or other property" includes personalty as well as realty. *Martin* v. *New York & N. E. R. Co.*, 62 *Conn.* 331, 25 *Atl. Rep.* 239.—REVIEWING Regan *v.* New York & N. E. R. Co., 60 Conn. 124.

29. "Built," as used in an agreement under which a tax was voted in aid of a railroad, applies to a road so far progressed as to be in a condition to be operated, although not completed. *Muscatine Western R. Co.* v. *Horton*, 38 *Iowa* 33.

A proviso in a stock subscription that the "road shall be built" in a specified locality is, by the permanent location of the road there, sufficiently complied with to render the subscriber liable for calls, though the road is not completed. *Warner* v. *Callender*, 20 *Ohio St.* 190.—DISTINGUISHED IN Memphis, K. & C. R. Co. *v.* Thompson, 1 Am. & Eng. R. Cas. 331, 24 Kan. 170.

30. "Business corporation," as used in section 37 of the Bankrupt Act of Congress of 1867, is not merely synonymous with "trading corporation," but has a broader meaning. It includes a railroad corporation. *Adams* v. *Boston, H. & E. R. Co.*, 1 *Holmes* (*U. S.*) 30.

31. By any power other than locomotive.—The words "by any power other than locomotive," used in the charter of an electric railway, may be construed as including every present known power of locomotion except steam. *Gillette* v. *Chester & M. R. Co.*, 2 *Pa. Dist.* 450.

32. Calls.*—A "call" on the shareholders of a company means an application to them for money. *Newry & E. R. Co.* v.

* See also BAGGAGE, **29-46.**

* See also SUBSCRIPTIONS TO STOCK, **45-75.**

Edmonds, 2 *Ex.* 119, 5 *Railw. Cas.* 275, 17 *L. J. Ex.* 102.

33. Capital stock.—A statute exempting the capital stock of a company from taxation means the capital to be raised by subscriptions to the stock, and not lands granted by Congress to aid the road. *St. Louis, I. M. & S. R. Co.* v. *Loftin*, 30 *Ark.* 693.—QUOTING State ex rel. *v.* Hood, 15 Rich. (So. Car.) 185. REVIEWING St. Joseph *v.* Hannibal & St. J. R. Co., 39 Mo. 476; Hannibal & St. J. R. Co. *v.* Shacklett, 30 Mo. 550; Milwaukee & St. P. R. Co. *v.* Milwaukee, 34 Wis. 271; State (New Jersey R. & T. Co., Pros.) *v.* Collectors, 25 N. J. L. 315.

The term as used in Illinois revenue law, with respect to the assessment of corporations, means all the property belonging to a corporation, whether tangible or intangible, and of whatever nature or kind, and it must be valued under this designation for the purpose of taxation. *Pacific Hotel Co.* v. *Lieb*, 83 *Ill.* 602.—FOLLOWED IN Union Trust Co. *v.* Weber, 3 Am. & Eng. R. Cas. 583, 96 Ill. 346. REAFFIRMED IN Chicago, B. & Q. R. Co. *v.* Siders, 88 Ill. 320.—*Ohio & M. R. Co.* v. *Weber*, 5 *Am. & Eng. R. Cas.* 101, 96 *Ill.* 443.

The capital stock of a corporation is the money or property put into the corporate fund by the subscribers for said stock, which fund becomes the property of the corporation. *Burrall* v. *Bushwick R. Co.*, 75 *N. Y.* 211.

New York Act of 1853, ch. 502, § 2, authorizes a stockholder of any railroad or plank-road company which has been sold on foreclosure to acquire the same relative interest in the road as he had before, upon paying to the purchasers a sum equal to such proportion of the price paid on such sale, and the costs and expenses thereof, as such stockholder's stock in such company shall bear to the whole capital stock in said company. *Held*, that the term "the whole capital stock" means the capital stock actually subscribed for and issued, and not the amount named in the articles of association. *Pratt* v. *Munson*, 17 *Hun* (*N. Y.*) 475.

34. Car.—A car, or coach, or stage, or stagecoach, is the same. *Mayor, etc., of N. Y.* v. *Third Ave. R. Co.*, 40 *Am. & Eng. R. Cas.* 278, 117 *N. Y.* 404, 22 *N. E. Rep.* 755, 27 *N. Y. S. R.* 170; *affirming* 16 *N. Y. S. R.* 122, 1 *N. Y. Supp.* 397.

35. Care and negligence are relative terms, and the degree of caution required of carrier and passenger is to be estimated, in a measure, by the hazard to life and limb. It is always such care and vigilance as a prudent, rational person would exercise under like circumstances. *Daugherty* v. *Missouri R. Co.*, 21 *Am. & Eng. R. Cas.* 497, 81 *Mo.* 325, 51 *Am. Rep.* 239.

36. "Care, diligence, and foresight" imply a relation to future events, for no amount of care, diligence, or foresight can avoid an event which has already happened. *Wheaton* v. *North Beach & M. R. Co.* 36 *Cal.* 590.

37. "Care of the American Express Co.," appearing upon goods alone, and not being mentioned in the receipt given by the company, indicates merely that if the consignee cannot be found they may be delivered into the care of the express company. *Chicago & N. W. R. Co.* v. *Merrill*, 48 *Ill.* 425.

38. Carriage.*—To the ordinary mind, in the United States at least, the word "carriage" alone does not convey the idea of a railroad car, or of a street car, nor does it even convey the idea of a wheeled vehicle used for the transportation of merchandise or products used in ordinary business; but a vehicle used for the transportation of persons or property for pleasure, and drawn by horses or other animals. *Cream City R. Co.* v. *Chicago, M. & St. P. R. Co.*, 21 *Am. & Eng. R. Cas.* 70, 63 *Wis.* 93.

39. Cash value.—The actual cash value of real and personal property is the price for which it would sell for cash, in the ordinary course of business, free from all incumbrances, otherwise than at a forced sale. *Morgan's L. & T. R. & S. Co.* v. *Board of Receivers*, (*La.*) 33 *Am. & Eng. R. Cas.* 438, 3 *So. Rep.* 507.

40. Cattle.—This term includes horses and asses as well as domesticated horned animals. *Ohio & M. R. Co.* v. *Brubaker*, 47 *Ill.* 462. *Newark & S. O. H. C. R. Co.* v. *Hunt*, 50 *N. J. L.* 308, 11 *Cent. Rep.* 219, 12 *Atl. Rep.* 697. *McAlpine* v. *Grand Trunk R. Co.*, 38 *U. C. Q. B.* 446.

41. "Cattle-guard," as that term is used in the Kansas statute relating to the duties of railroad companies in connection therewith, means such an appliance as will

* Definitions of "carriage," see note, 21 AM. & ENG. R. CAS. 74.

be effectual to prevent the passage of domestic animals. *Missouri Pac. R. Co.* v. *Manson*, 13 *Am. & Eng. R. Cas.* 540, 31 *Kan.* 337, 2 *Pac. Rep.* 800.

42. Causa proxima, non remota, spectatur. — For applications of the maxim, see *Pielke* v. *Chicago, M. & St. P. R. Co.*, 38 *Am. & Eng. Cas.* 349, 5 *Dak.* 444, 41 *N. W. Rep.* 669. *Pennsylvania R. Co.* v. *Kerr*, 62 *Pa. St.* 353. *Pennsylvania R. Co.* v. *Hope*, 80 *Pa. St.* 373. *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 *U. S.* 469. *Annapolis & E. R. Co.* v. *Gantt*, 39 *Md.* 115. *Fent* v. *Toledo, P. & W. R. Co.*, 59 *Ill.* 349.

An intervening agency does not always shield a wrongdoer from liability, where the injury flows from his wrongful act. So where a company negligently causes a team to run away, and while so running and unmanageable it runs against and kills an individual, the above maxim does not apply. *Billman* v. *Indianapolis, C. & L. R. Co.*, 6 *Am. & Eng. R. Cas.* 41, 76 *Ind.* 166, 40 *Am. Rep.* 230.—REVIEWED IN Denver, T. & G. R. Co. *v.* Robbins, 2 Colo. App. 313; Pennsylvania Co. *v.* Whitlock, 22 Am. & Eng. R. Cas. 629, 99 Ind. 16.

The maxim *causa proxima, non remota, spectatur* is not controlled by time or distance, nor by the succession of events. An efficient, adequate cause being found must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. The maxim includes liability for all actual injuries which were the natural and probable result of the wrongful act or omission complained of or were likely to ensue from it under the ordinary circumstances. *Kellogg* v. *Chicago & N. W. R. Co.*, 26 *Wis.* 223, 2 *Am. Ry. Rep.* 483.—DISAPPROVING Ryan *v.* New York C. R. Co., 35 N. Y. 210; Pennsylvania R. Co. *v.* Kerr, 62 Pa. St. 353. FOLLOWING Perley *v.* Eastern R. Co., 98 Mass. 414.—APPROVED IN Gram *v.* Northern Pac. R. Co., 1 N. Dak. 252. DISTINGUISHED IN Lewis *v.* Flint & P. M. R. Co., 54 Mich. 55. QUOTED IN Jucker *v.* Chicago *v.* N. W. R. Co., 2 Am. & Eng. R. Cas. 41, 52 Wis. 150; Marvin *v.* Chicago, M. & St. P. R. Co., 79 Wis. 140.

43. Cessante ratione, cessat ipsa lex.—*Grosso* v. *Delaware, L. & W. R. Co.*, 50 *N. J. L.* 317, 11 *Cent. Rep.* 574, 13 *Atl. Rep.* 233.

44. Charges. — The term "charges" does not apply to a claim for damages, but refers only to such expenses as the master of the boat has paid, and for which he has a lien upon the cargo. *Huntley* v. *Dows*, 55 *Barb.* (*N. Y.*) 310.

45. Charity, as used in the Massachusetts Sunday law, includes whatever proceeds from a sense of moral duty or a feeling of kindness and humanity, and is intended wholly for the purpose of the relief or comfort of another, and not for one's own benefit or pleasure. *Doyle* v. *Lynn & B. R. Co.*, 118 *Mass.* 195, 9 *Am. Ry. Rep.* 277.

46. Commerce.*—"Commerce," in its general sense, means "an interchange or mutual change of goods, wares, productions, or property of any kind, between nations or individuals, either by barter or by purchase and sale; trade; traffic." It also means intercourse and navigation. *Fuller* v. *Chicago & N. W. R. Co.*, 31 *Iowa* 187, 1 *Am. Ry. Rep.* 383.

47. Commerce—Transportation.—Commerce is the interchange or mutual change of goods, productions, or property of any kind between nations or individuals. Transportation is the means by which commerce is carried on. *Council Bluffs* v. *Kansas City, St. J. & C. B. R. Co.*, 45 *Iowa* 338.

48. Commercial corporations.—This term, in the bankrupt law, includes railroad companies. *Sweatt* v. *Boston, H. & E. R. Co.*, 3 *Cliff.* (*U. S.*) 339.

49. Common carrier.† — A common carrier is one who carries passengers, or goods, wares, and merchandise, for compensation, and the true principle of his liability is in the reward he receives. *Lee* v. *Burgess*, 9 *Bush* (*Ky.*) 652.

A common carrier is one who offers to carry for any person, between certain *termini*, or on a certain route; and he is bound to carry for all who tender him goods and the price of carrying, and insures the goods against all losses but those arising from the act of God or of the public enemy, and has a lien on the goods for the carriage. *Varble* v. *Bigley*, 14 *Bush* (*Ky.*) 698.

Those who make a business of transporting goods, for pay, from place to place (by themselves or servants), including draymen, cartmen, porters, drivers of ox-sleds, etc.,

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* See also COMMERCE, **1.**
What "commerce" includes, see note, 13 L. R. A. 686.

† See also CARRIAGE OF MERCHANDISE, **1-30.**

are common carriers. *Robertson* v. *Kennedy*, 2 *Dana* (*Ky.*) 430.

A common carrier is "one who undertakes for hire to transport goods of such as choose to employ him, from place to place." *Christenson* v. *American Exp. Co.*, 15 *Minn.* 270 (*Gil.* 208).

Every person who undertakes to carry, for compensation, the goods of all persons, indifferently, is a common carrier. *Mershon* v. *Hobensack*, 22 *N. J. L.* 372.

50. "Commutation ticket," in railway language, designates a passenger ticket during a limited time between neighboring towns, or cities and suburban towns. *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 *U. S.* 263, 12 *Sup. Ct. Rep.* 844.

51. Compel.—In its ordinary signification the word "compel" implies force or violence and has in it the element of irresistibility. Employed in an instruction it may be used interchangeably with the word "force." *St. Clair* v. *Missouri Pac. R. Co.*, 29 *Mo. App.* 76.

52. Compensation.—The word "just," in Nev. Const., art. 1, § 9, being used to intensify the word "compensation," the phrase "compensation for land taken" in Nev. St. of 1864, 427, § 30, imports something more than the mere market value. *Virginia & T. R. Co.* v. *Henry*, 8 *Nev.* 165.

53. "Completed," when applied to a railroad, may mean fully constructed according to specifications of the contract, or advanced to a condition to be opened for regular passenger and freight traffic. *Tower* v. *Detroit, L. & L. M. R. Co.*, 34 *Mich.* 328.

54. Completing, in a grant of lands to a railroad, providing that upon "completing" its line the company shall be entitled to the lands, has substantially the same signification as "constructing." A railroad is completed or constructed when that is done which is necessary to make it a railroad—when it is fitted for use as a railroad; that is, when it is made ready and put in proper condition for the placing and running of regular trains upon it, or for operation, as it is usually termed. In this, its natural and ordinary sense, the word "completing" does not include the equipment of the road with rolling stock, or putting it into operation. *De Graff* v. *St. Paul & P. R. Co.*, 23 *Minn.* 144.

55. Condemn or appropriate.—The words "condemn or appropriate," used in Ark. Constitution, mean a taking of private property under the right of eminent domain, and not by contract. *St. Louis & S. F. R. Co.* v. *Foltz*, 52 *Fed. Rep.* 627.

56. "Consistent" means compatible, congruous, standing together or in agreement. So *held*, where a general statute provided that existing railroad companies should be subject "to all the duties, liabilities, and provisions not inconsistent with * * * their charters." *Visscher* v. *Hudson River R. Co.*, 15 *Barb.* (*N. Y.*) 37.

57. Consolidation.—For meaning of the word as applied to railroads, see *Meyer* v. *Johnston*, 8 *Am. & Eng. R. Cas.* 584, 64 *Ala.* 603.

58. Construction.—The word "construction," as used in Iowa Right of Way Act, implies not only the making of the roadbed, but also its preparation and readiness for use in a safe and convenient manner. *Preston* v. *Dubuque & P. R. Co.*, 11 *Iowa* 15.

59. Contractor.—Tay. Wis. St. 1051, § 57, provides that whenever any laborer upon any railroad * * * shall have a just claim or demand for labor performed on such railroad, against any person being contractor on such railroad with the railroad company, such railroad company shall be liable to pay such laborer, etc. *Held*, that the words "contractor * * * with the railroad company" do not necessarily restrict the remedy to claims against persons who have contracted directly and immediately with the company; but they may be understood as describing all persons who, by means of laborers in their employ, prosecute work upon the railroad, under the primary direction and authority of the company, by virtue of any contract which connects them with the company, though indirectly, immediately, or remotely. *Mundt* v. *Sheboygan & F. du L. R. Co.*, 31 *Wis.* 451.—RECONCILED IN Wells *v.* Mehl, 25 Kan. 205.

The term "contractor" in said act includes sub-contractors in the second degree, as well as those who contract directly with the company. *Redmond* v. *Galena & S. W. R. Co.*, 39 *Wis.* 426, 13 *Am. Ry. Rep.* 400.

60. Contributory negligence.*—Contributory negligence is such want of care as materially helps in producing the disaster. *Palys* v. *Erie R. Co.*, 30 *N. J. Eq.* 604; *reversed on another point in* 32 *N. J. Eq.* 303.

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* See also CONTRIBUTORY NEGLIGENCE, **1.**

Contributory negligence consists of such acts or omissions of plaintiff amounting to want of ordinary care as, co-operating with negligent acts of defendant, are the proximate cause of the injury. *Richmond & D. R. Co.* v. *Pickleseimer*, 85 *Va.* 798, 13 *Va. L. J.* 646, 10 *S. E. Rep.* 44.

61. Cord.—Usage has defined a cord of wood to mean 128 cubic feet, and a contract for sale of wood by the cord calls for this quantity. *Kennedy* v. *Oswego & S. R. Co.*, 67 *Barb.* (*N. Y.*) 169.

62. Corporation, as used in a revenue law declaring that every person or corporation owning a railroad shall be subject to a tax in respect thereof, does not include a state. A railroad wholly owned by a state, managed by state agents, and the profits of which form a part of the revenue for the support of the state government, is not liable to taxation under such a law. *Georgia* v. *Atkins*, 1 *Abb.* (*U. S.*) 22.

63. Corruption.—The word "corruption," in the Act of Regulations of 1695, should receive its ordinary construction, and it cannot be taken to include irregular conduct on the part of the arbitrator with no suggestion of any corrupt motive. *Adams* v. *Great North of Scotland R. Co.*, [1891] *A. C.* 31; *affirming* 16 *Court Sess. Cas. 4th Series*, (*Rettie*) 843.—DISAPPROVING Alexander *v.* Bridge of Allan Water County, 7 Court Sess. Cas. 3d Series, (Macph.) 498.

64. Costs and expenses.—To reach the issues and profits of a railroad in the hands of a receiver appointed by the governor, the claimant must be able to show that his claim falls within the "costs and expenses" incident to the receivership, and which are alone authorized to be deducted by Tenn. statute of [illegible] *Hopkins* v. *Connel*, 2 *Tenn. Ch.* 338.

65. County authorities, as used in 15 So. Car. St. 93, incorporating a railroad company and providing for county subscriptions thereto, means the county commissioners. *Glenn* v. *York County Com'rs*, 6 *So. Car.* 412.—FOLLOWED IN State ex rel. *v.* Chester & L. R. Co., 5 Am. & Eng. R. Cas. 220, 13 So. Car. 290.

66. County or corporation purpose.—The construction of a railroad through a county or municipal corporation is a county or corporation purpose within the meaning of Tenn. Const., art. 2, § 29. *Louisville & N. R. Co.* v. *Davidson County Court*, 1 *Sneed* (*Tenn.*) 637.

67. County purposes.—A subscription to the capital stock of a railroad company by the board of county commissioners of a county is within the meaning of the phrase "county purposes," as used in Fla. Constitution. *Cotten* v. *Leon County Com'rs*, 6 *Fla.* 610.—QUOTING Police Jury v. McDonogh, 8 La. Ann. 341.

68. Creditor.—A judgment creditor does not become the creditor of the garnishee by service of process upon him, or by the issue of a *fieri facias;* therefore a person obtaining a garnishee order on a railroad company is not "a creditor" of the company within the meaning of 27 Vict. c. 57 D, § 10, authorizing a company to issue to all creditors holding *bona fide* claims against it scrip in exchange therefor. *Wardrope* v. *Canadian Pac. R. Co.*, 7 *Ont.* 321.

69. "Criminal negligence," as used in Neb. Comp. St., ch. 72, art. 1, § 3, means "gross negligence," such as amounts to reckless disregard of one's own safety, and a wilful indifference to the consequences liable to follow. *Chicago, B. & Q. R. Co.* v. *Landauer*, 54 *Am. & Eng. R. Cas.* 640, 36 *Neb.* 642, 54 *N. W. Rep.* 976.

70. Curved line, as used in Mass. St. of 1871, ch. 343, § 11, providing for a railroad viaduct in the city of Worcester, means a line whose general course is a curve, although a short piece, taken by itself, is straight. *Mayor etc., of Worcester* v. *Railroad Com'rs*, 113 *Mass.* 161.

71. Damage—Compensation.—In an action on a bond, executed in an injunction suit in a circuit court of the United States, conditioned to pay all damages or costs that may be occasioned by the injunction, the word "damages" will be taken to include reasonable counsel fees actually paid. *Hannibal & St. J. R. Co.* v. *Shepley*, 1 *Mo. App.* 254.

The words "damage" and "compensation," as applied respectively to the lateral railroad and to the wharf or land in the Lateral Railroad Law, mean practically the same thing. The word "damage" in this connection is a relative term with reference to possible advantages to the party otherwise damaged. The word "compensation" is absolute, and implies *ex vi termini* that the owner must be paid in money for what is taken from him. *Hays* v. *Briggs*, 3 *Pittsb.* (*Pa.*) 504.

71a. "Day of trial," in So. Car. Code Pro. § 427, regulating notice, etc., means

the day fixed by law for the commencement of the term. *Green* v. *Charlotte, C. & A. R. Co.*, 6 *So. Car.* 342.

72. "Deadhead" is a term applied to persons other than the president, directors, officers, agents, or employés of a railroad company who are permitted by the company to travel on the road without paying any fare therefor. *Gardner* v. *Hall*, *Phill.* (*N. Car.*) 21.

73. Depot — Depot grounds. — A "depot" is a building for goods at a station or terminus of a railway. But in the United States and Canada the word "depot" is used as synonymous with "station." *Goyeau* v. *Great Western R. Co.*, 25 *Grant's Ch.* (*U. C.*) 62.

"Depot" does not necessarily mean a single building. The word may mean the entire grounds used by a company for its business with the public at a station. *Pittsburg, Ft. W. & C. R. Co.* v. *Rose*, 24 *Ohio St.* 219, 7 *Am. Ry. Rep.* 1.

A mere side track, used only for loading and shipping tanbark, there being no depot buildings or platform, no station or station agent, and no highway leading thereto, does not make a place "depot grounds" within the meaning of Wis. Rev. St. § 1810. *Jaeger* v. *Chicago, M. & St. P. R. Co.*, 40 *Am. & Eng. R. Cas.* 194, 75 *Wis.* 130, 43 *N. W. Rep.* 732.—DISTINGUISHING Dinwoodie *v.* Chicago, M. & St. P. R. Co., 70 Wis. 160. REVIEWING McDonough *v.* Milwaukee & N. R. Co., 73 Wis. 223.

74. Discrimination in freight tariffs by railroad companies means charging shippers of freight unequal sums for carrying the same quantity of freight equal distances; that is, more in proportion for a short than for a long distance. *Hines* v. *Wilmington & W. R. Co.*, 95 *N. Car.* 434.

75. District.—The "district" of a company includes the district adjacent to its line from which traffic is drawn to that line, and if two companies draw traffic from the same district, such district belongs to them both. *Caledonian R. Co.* v. *North British R. Co.*, 2 *Ry. & C. T. Cas.* 285.

76. "Donation" imports a transfer without a consideration—a gratuitous, unconditional gift. An act enabling city authorities to make a donation in aid of the construction of a railroad does not authorize them to engage to furnish certain funds upon condition that the company will maintain its machine shops in the city; and an engagement thus made is void altogether, for want of power, not void as to this condition merely. *Indiana N. & S. R. Co.* v. *Attica*, 56 *Ind.* 476.

77. "Due and reasonable care and caution" means that degree of care and caution which might reasonably be expected of a reasonably prudent person under the circumstances surrounding him or her at the time in question. *Spurrier* v. *Front St. Cable R. Co.*, 3 *Wash.* 659, 29 *Pac. Rep.* 346.

78. Due process of law.* — "Due process of law" imports the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law. *Zeigler* v. *South & N. Ala. R. Co.*, 58 *Ala.* 594, 20 *Am. Ry. Rep.* 463.

The constitutional provisions that no person shall be deprived of life, liberty, or property without due process of law mean more than a mere legislative enactment. They restrict the power of the legislature so that it cannot reach the life, liberty, or property of the individual, except when he is convicted of crime, or when the sacrifice of his property is demanded by a just regard of the public welfare. *Atchison & N. R. Co.* v. *Baty*, 6 *Neb.* 37, 15 *Am. Ry. Rep.* 63.

"Due process of law" means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights, including notice to a party whose property is to be taken by right of taxation. *South Platte Land Co.* v. *Buffalo County Com'rs*, 7 *Neb.* 253.

The phrase "due process of law" means a suit conducted according to the usual procedure, as distinguished from summary proceedings by petition. *In re Hatch*, 11 *J. & S.* (*N. Y.*) 89.

It means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual

* Protection of vested rights. "Due process of law" defined, see note, 2 L. R. A. 258.

rights as these maxims prescribe for the class of cases to which the one in question belongs. *Beyman* v. *Black*, 47 *Tex.* 558.

The words "without due process of law," as used in the Constitution, do not mean the want of process by which the property is taken, but the want of a judicial proceeding in which it is taken. *Squares* v. *Campbell*, 60 *Barb.* (*N. Y.*) 391.

79. Embankment.—An embankment is an artificial bank or mound of earth. It may be used either exclusively as a roadway or as a railroad bed, or exclusively as a protection from overflow, or as both. *State ex rel.* v. *New Orleans & N. E. R. Co.*, 43 *Am. & Eng. R. Cas.* 258, 42 *La. Ann.* 138, 7 *So. Rep.* 226.

Where a statute gives to abutting owners the right to compensation for damages sustained by reason of "any excavation or embankment" made in the construction of a railroad in any street or alley, the jury have a right to take into consideration the ties and the ballasting between them as part of the embankment, the height of which is thereby increased. *Pittsburg, V. & C. R. Co.* v. *Rose*, 74 *Pa. St.* 362, 3 *Am. Ry. Rep.* 56, 6 *Am. Ry. Rep.* 343.

The remote parts of a necessary embankment are as essentially a portion of the roadbed of a railroad as the portion under the rails or ties. *Buchner* v. *Chicago, M. & N. W. R. Co.*, 14 *Am. & Eng. R. Cas.* 447, 60 *Wis.* 264, 19 *N. W. Rep.* 56.

80. Employe.—The term "employé" in its ordinary and usual sense includes all whose services are rendered for another; it is not restricted to any kind of employment or service, but includes the professional man as well as the common laborer. *Gurney* v. *Atlantic & G. W. R. Co.*, 58 *N. Y.* 358, 9 *Am. Ry. Rep.* 520; *reversing* 2 *T. & C.* 446.—REVIEWED IN Lehigh C. & N. Co. *v.* Central R. Co., 29 N. J. Eq. 252.

81. Engineering purposes.—In Minn. Sp. Laws of 1864, ch. 1, relating to the Southern Minnesota railroad company, is the phrase "on the present located line thereof, except so far as it may be necessary to change the same for engineering purposes in coming up the valley of Root river." By the words "engineering purposes" is meant a purpose of constructing the road on that route, in coming up the valley of Root river from La Crescent, on which it can be built, operated, and kept in repair in the best, cheapest, and safest manner. *McRoberts* v. *Southern Minn. R. Co.*, 18 *Minn.* 108 (*Gil.* 91).

82. "Equal to," in a contract, means "not less than." *Stewart* v. *Lehigh Valley R. Co.*, 38 *N. J. L.* 505, 13 *Am. Ry. Rep.* 54; *affirming* 36 *N. J. L.* 259.

83. "Erect," in a contract to erect a station, means to "set up"; to "establish." *Port Huron & N. W. R. Co.* v. *Richards*, 90 *Mich.* 577, 579, 51 *N. W. Rep.* 680.

84. Establish.—Under an agreement respecting the establishment of railway stations and maintenance of the same for seven years after trains shall have commenced to run over a certain line of road, the word "establish" was held not in itself to mean "maintain and use forever," and that the company was not bound under the agreement to maintain stations or substituted stations after the expiration of the seven years. *Nottawasaga* v. *Hamilton & N. W. R. Co.*, 38 *Am. & Eng. R. Cas.* 698, 16 *Ont. App.* 52.—DISTINGUISHING Wallace *v.* Great Western R. Co., 3 Ont. App. 44; Jessup *v.* Grand Trunk R. Co., 7 Ont. App. 128; Geauyeau *v.* Great Western R. Co., 3 Ont. App. 412.

85. Etc.—The abbreviation "etc." is sometimes used in pleadings to avoid repetitions, and when so used usually relates to things unnecessary to be stated; but when used in a statute, it will be construed liberally where the statute is remedial, but strictly where the statute is summary in character. So where a statute, after providing for laborers' liens, and as to what shall be done "when any real estate is to be sold under a lien for labor, such as ditching, building levees, etc.," and the remedy is summary in character, the abbreviation "etc." will not be construed so as to include railroads. *Dano* v. *Mississippi, O. & R. R. R. Co.*, 27 *Ark.* 564.

86. Exemption.—The word "exemption" is not comprehended within the words "rights and privileges," as applied to a corporation claiming a right of exemption from taxation by virtue of a section of its charter which confers upon it the rights and privileges of a like corporation, which latter corporation was by express terms of the charter exempt from taxation. *Wilson* v. *Gaines*, 9 *Baxt.* (*Tenn.*) 546, 16 *Am. Ry. Rep.* 316.

87. "Expert" signifies nothing more than a man of experience in the particular business to which the inquiry relates—one

having peculiar knowledge or skill in reference to the subject-matter of inquiry. *Louisville, E. & St. L. R. Co.* v. *Donnegan*, 34 *Am. & Eng. R. Cas.* 116, 111 *Ind.* 179, 9 *West. Rep.* 641, 12 *N. E. Rep.* 153.

The following are definitions of an expert: First, "One who by practice or observation has become experienced in any science, art, or trade." Second, "One instructed by experience in a course of previous habit, practice, or study, so as to be familiar with the subject." *Goins* v. *Chicago, R. I. & P. R. Co.*, 47 *Mo. App.* 173; *see* 37 *Mo. App.* 676.

88. "Express facilities," as a term, is descriptive of the accommodation or service which a railway or other transportation company is expected, and may be required, to furnish to a person or corporation engaged in the express business. *Wells* v. *Oregon R. & N. Co.*, 8 *Sawy.* (*U. S.*) 600, 15 *Fed. Rep.* 561.

89. Express train.—A train on a local line, running in connection with trains between L. and C., cannot be said to lose its character of an express train by stopping at junctions connecting the line with other important lines, even though it stops at two such junctions within eight miles of each other. *Hood* v. *North Eastern R. Co.*, 19 *W. R.* 523, 1 *Ry. & C. T. Cas.* 19.

90. "Extend," as used in Mass. St. of 1874, ch. 29, § 11, authorizing a street-railway corporation to extend its tracks whenever it can be done without entering upon those of another corporation, includes the location of additional tracks not connected with its existing tracks except by the tracks of another corporation. *South Boston R. Co.* v. *Middlesex R. Co.*, 121 *Mass.* 485.

91. Ex turpi causa non oritur actio.—For application of the maxim, see *Farley* v. *St. Paul, M. & M. R. Co.*, 4 *McCrary* (*U. S.*) 138, 14 *Fed. Rep.* 114.

92. Falsa demonstratio non nocet, cum de corpore constat.—For application of the maxim, see *Adler* v. *Kansas City, S. & M. R. Co.*, 92 *Mo.* 242, 10 *West. Rep.* 331, 4 *S. W. Rep.* 917.

93. "Farm out," as used in a railroad charter, means to lease. *State* v. *Richmond & D. R. Co.*, 72 *N. Car.* 634.

94. "First-class funeral," or "very handsome funeral," when applied to a particular individual, generally has reference to the previous social status and pecuniary condition of the person to be interred, for what might be considered extravagant in one case would be seemingly moderate in another. *Mackovsky* v. *Manhattan R. Co.*, 11 *N. Y. S. R.* 649.

95. "Forthwith" means "in a reasonable time." So a company bound to erect a trestle "forthwith" may do so in a reasonable time. *Pennsylvania R. Co.* v. *Reichert*, 10 *Am. & Eng. R. Cas.* 429, 58 *Md.* 261.

96. Found. — A foreign corporation doing business within a state whose laws authorize it to be sued there by service of process upon an agent is, in case of service upon one of the officers mentioned, "found" in the state and in the judicial district of the federal court, within the United States statute restricting suit to the district in which defendant "is an inhabitant, or in which he is found at the time of serving the writ." *Merchants' Mfg. Co.* v. *Grand Trunk R. Co.*, 11 *Abb. N. Cas.* (*N. Y.*) 183.

97. Franchise.*—The term "franchise" has several significations, and there is some confusion in its use. The better opinion, deduced from the authorities, seems to be that it consists of the entire privileges embraced in and constituting the grant. It does not embrace the property acquired by the exercise of the franchise. *Bridgeport* v. *New York & N. H. R. Co.*, 36 *Conn.* 255.

98. General business manager.—The words "general business manager" do not carry any implication by which the authority of a general agent of a corporation to charge the company for medical services to a servant injured in its works can be determined as a matter of law. The power of a general agent is a question for the jury upon the facts in the particular case. *Swazey* v. *Union Mfg. Co.*, 42 *Conn.* 556.

99. Good and lawful.—As to what is implied by the expression "a good and lawful fence," in the proviso of Kan. railroad stock law of 1874, see *Atchison, T. & S. F. R. Co.* v. *Jones*, 20 *Kan.* 527, 20 *Am. Ry. Rep.* 308.

100. Good cause. — The California statute provides for setting aside the reports of commissioners in assessing damages for land taken, for "good cause" shown. If "good cause" exists for setting aside the report which does not appear on its face, such as fraud or misconduct on the part of the commissioners or others, such cause may be shown by affidavits or in any other

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* See also FRANCHISES, **1.**

legal mode which the court may prescribe. *Central Pac. R. Co.* v. *Pearson*, 35 *Cal.* 247.

Good cause for setting aside a report of commissioners imports some clear and indubitable ground of action. *Virginia & T. R. Co.* v. *Henry*, 8 *Nev.* 165.

101. Grant.—In Wis. Rev. St. ch. 95, § 3, which declares that a married woman "may receive by inheritance, or by gift, grant, devise, or bequest from any person other than her husband, and hold to her sole and separate use" real and personal property, the word "grant" includes deeds of bargain and sale of land. *McVey* v. *Green Bay & M. R. Co.*, 42 *Wis.* 532, 15 *Am. Ry. Rep.* 143.

102. "Gross earnings of the railway."—For the meaning of the words as applied to a contract between a railroad company and an individual to run a ferry across a river for "one-fifth of the actual gross earnings of the railway," see *Dardanelle & R. R. Co.* v. *Shinn*, 40 *Am. & Eng. R. Cas.* 570, 52 *Ark.* 93, 12 *S. W. Rep.* 183.

103. Gross negligence.*—The term "gross negligence," when referred to as authorizing a recovery for a negligent injury notwithstanding the contributory negligence of the plaintiff, means an intentional failure to perform a manifest duty, in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of consequences, without the exertion of any effort to avoid them. *Denman* v. *Johnston*, 85 *Mich.* 387, 48 *N. W. Rep.* 565.

The most learned and discriminating text writers concur in the opinion that in actions arising *ex delicto* there is no degree of negligence that can be described by the word "gross" alone. It is not proper to treat the word "gross" as synonymous with wilful, malicious, or fraudulent. *McAdoo* v. *Richmond & D. R. Co.*, 41 *Am. & Eng. R. Cas.* 524, 105 *N. Car.* 140, 11 *S. E. Rep.* 316.

In England it is now the course of adjudication and definitely decided that there is no difference between negligence and gross negligence, the latter being nothing more than the former with the addition of a vituperative epithet. *McPheeters* v. *Hannibal & St. J. R. Co.*, 45 *Mo.* 22.—QUOTED IN Lemon *v.* Chanslor, 68 Mo. 340.

And the same rule obtains in **Canada.** *Fitzgerald* v. *Grand Trunk R. Co.*, 4 *Ont. App.* 601; *affirming* 28 *U. C. C. P.* 586.

104. Hand-cars.—By the provisions of Ga. Code, § 3329, railroad companies are liable for injuries done to persons or property by the running of hand-cars upon their roads. The word "hand-car" is included in the words "cars and engines" as used in the statute. *Thomas* v. *Georgia R. & B. Co.*, 38 *Ga.* 222.

105. Highway.—In its ordinary sense the word "highway" does not include railroads. *Burlington, K. & S. W. R. Co.* v. *Johnson*, 33 *Am. & Eng. R. Cas.* 215, 38 *Kan.* 142, 16 *Pac. Rep.* 125.

"Highway," as used in R. I. Rev. St. ch. 176, § 16, making carriers liable for loss of life of a person crossing upon a highway, includes the crossing of navigable waters, the same being a public highway. *Chase* v. *American Steamboat Co.*, 10 *R. I.* 79.

A public highway may be defined as a public easement, by virtue whereof every one may pass and repass over a particular strip of land. From another point of view, a highway is a road or street maintained by the public for the general convenience. *Gulf, C. & S. F. R. Co.* v. *Montgomery*, 85 *Tex.* 64, 19 *S. W. Rep.* 1015. — REVIEWING Missouri Pac. R. Co. *v.* Bridges, 74 Tex. 520.

106. Hirer and charterer. — The words "hirer and charterer" apply to persons who in their own rights are entitled to possess, use, and have the benefits resulting from the use of the thing hired or chartered, and those rights must be acquired by contract with persons having such dominion over the thing hired or chartered as enables them to confer on the hirer or charterer the right to use the thing hired or chartered, and to have the benefits resulting therefrom. *Turner* v. *Cross*, 83 *Tex.* 218, 18 *S. W. Rep.* 578.

107. "Income and revenues" of a railroad are all the income and revenues of the company, and necessarily embrace the "earnings" of the road. *Tompkins* v. *Little Rock & Ft. S. R. Co.*, 15 *Fed. Rep.* 6.

108. "Incorporated company," as used in Ind. Const. art. 10, § 6, refers to associations which are created for public benefit, and to which the government delegates a portion of its sovereign power, to be exercised for public utility, such as turnpike, bridge, canal, and railroad companies.

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*See also NEGLIGENCE, **3.**

Lafayette, M. & B. R. Co. v. *Geiger*, 34 *Ind.* 185.

109. Inevitable accident.*—When a casualty occurs which might have been prevented by the use of known and proper precautions against the danger, it is not an "inevitable accident." *Ladd* v. *Foster*, 12 *Sawy.* (*U. S.*) 547, 31 *Fed. Rep.* 827.

The words "inevitable accident," when used in law to designate the mode by which loss has happened or may happen to a common carrier, are synonymous with the phrase "the act of God." *Neal* v. *Saunderson*, 10 *Miss.* 572.

110. "Inferior tribunals," as used in Iowa Laws 1868, ch. 86, § 5, and 1870, ch. 153, § 2, does not apply to the *quasi*-judicial bodies from which appeals in special proceedings for the assessment of damages upon the location of highways, railroads, and other improvements are authorized to be taken to the district court. *Davey* v. *Burlington, C. R. & M. R. Co.*, 31 *Iowa* 553.

111. In jure non remota causa, sed proxima, spectatur.—For applications of the maxim under the rule of proximate and remote cause, see *Washington* v. *Baltimore & O. R. Co.*, 17 *W. Va.* 190. *Fawcett* v. *Pittsburg, C. & St. L. R. Co.*, 19 *Am. & Eng. R. Cas.* 1, 24 *W. Va.* 755.

112. Involving.—A statute relating to appeals provided that an appeal might be allowed when a question was presented "involving the construction of the Constitution of the United States or of this state." *Held*, that the word "involving" implied that a constitutional question was raised in and submitted to the trial court, and that such court had the opportunity to pass upon it. *Bennett* v. *Missouri Pac. R. Co.*, 105 *Mo.* 642, 16 *S. W. Rep.* 947. *Wabash Western R. Co.* v. *Siefert*, 41 *Mo. App.* 35.

113. "Judicial trial" means a fair trial, and a verdict in an action rendered unfair by improper statements of counsel will be set aside. So *held* in an action against a company for ejecting a person from a car and causing his death, when counsel for plaintiff, while examining a witness, managed to inform the jury that a certain brakeman had made a written statement of the accident, and had been discharged. *Baldwin* v. *Grand Trunk R. Co.*, 37 *Am. & Eng. R. Cas.* 126, 64 *N. H.* 596, 7 *N. Eng. Rep.* 111, 15 *Atl. Rep.* 411.

114. Jurisdiction of the subject-matter is the power to hear and determine cases of the general class to which the proceeding in question belongs. *State ex rel.* v. *Neville*, 110 *Mo.* 345, 19 *S. W. Rep.* 491.

115. "Land" includes such real property only as has corporeal existence, and it therefore excludes incorporeal hereditaments. *In re Metropolitan El. R. Co.*, 18 *N. Y. S. R.* 134, 2 *N. Y. Supp.* 278.

116. Landing.—Under Pa. Act of 1871 providing for lateral railroads and landings, the word "landing" means a place for loading and unloading vessels, and not a harbor for them whether loaded or empty. *Hays* v. *Briggs*, 74 *Pa. St.* 373.

117. "Lands injuriously affected."—What are, within meaning of statute requiring compensation for "lands taken" and "lands injuriously affected." *Bowen* v. *Canada Southern R. Co.*, 14 *Ont. App.* 1.

118. "Lateral" means proceeding from the side; as, the lateral branches of a tree; lateral shoots; and this is the sense in which the word is to be understood when we speak of branch or lateral railroads. A lateral railroad is nothing more nor less than an offshoot from the main line or stem. *Blanton* v. *Richmond, F. & P. R. Co.*, 43 *Am. & Eng. R. Cas.* 617, 86 *Va.* 618, 14 *Va. L. J.* 120, 10 *S. E. Rep.* 925.

A statute authorizing a company to construct such lateral or branch lines as it "may deem necessary" gives it power to construct them either from its terminus or from any point on its main line. *Western Pa. R. Co.'s Appeal*, 99 *Pa. St.* 155.

The definition of such a structure does not depend either upon its length or direction. *McAboy's Appeal*, 107 *Pa. St.* 548.

119. "Legal fraud" means that degree of moral culpability in the statement of an untruth to induce another to alter his position to which the law attaches responsibility. *Peek* v. *Derry, L. R.* 37 *Ch. D.* 541.

120. Letting, as applied to a construction contract, simply means a putting out of the contract, or engaging the contractors to do the work. *Eppes* v. *Mississippi, G. & T. R. Co.*, 35 *Ala.* 33.

121. "Levee" means an artificial mound of earth intended exclusively as a protection from overflow; every levee is, therefore, an embankment, but every em-

* See also ANIMALS, INJURIES TO, **51, 52**; BAGGAGE, **12**; CARRIAGE OF MERCHANDISE, **15, 104**; CARRIAGE OF PASSENGERS, **151, 158**; EXPRESS COMPANIES, **24**; FIRES, **31**.

bankment is not a levee. *State ex rel.* v. *New Orleans & N. E. R. Co.*, 43 *Am. & Eng. R. Cas.* 258, 42 *La. Ann.* 138, 7 *So. Rep.* 226.

122. "Liability," as used in the Limitation Act, §§ 15, 17, fixing the time in which an action "founded upon a contract, obligation, or liability" may be brought, does not extend to tort. *Thomas* v. *Union Pac. R. Co.*, 1 *Utah* 235.

123. Load—Unload.—The legal meaning in the special acts of railway companies of the words "load" and "unload" is no other than the sense in which they are used in ordinary English, and the words are not applicable to things which have their proper words to describe them. *Kempson* v. *Great Western R. Co.*, 4 *Ry. & C. T. Cas.* 426.

Checking is a service not properly embraced in the term loading, and should not be reckoned a part of the expense of loading. *Kempson* v. *Great Western R. Co.*, 4 *Ry. & C. T. Cas.* 426.

124. Locomotive. — A locomotive which is sometimes let out by its owner to farmers for the purpose of carrying straw and manure for use in farming operations, and which is sometimes used by the owner himself for the purpose of carrying for hire straw and manure to be used exclusively on farms, and is not used for any other purpose, is within the exemption in the Highways and Locomotives (Amendment) Act, 1878, § 32, as being "a locomotive used solely for agricultural purposes," and may be so used without a license from the county authority. *Ellis* v. *Hulse, L. R.* 23 *Q. B. D.* 24.

125. "Locomotive engine," as used in the Employers' Liability Act, 1880, § 1, subsec. 5, does not include a steam crane fixed on a trolley and propelled by steam along a set of rails. *Murphy* v. *Wilson*, 52 *L. J. Q. B. D.* 524, 48 *L. T.* 788, 47 *J. P.* 565, 48 *J. P.* 24.

126. "Lower rates," in a contract to carry coal at lower rates under certain circumstances, means proportionately lower rates per ton per mile, and not a less sum per ton irrespective of the distance carried. *Glasgow & S. W. R. Co.* v. *Mackinnon, L. R.* 11 *App. Cas.* 386.

127. Machinery.*— A hammer operated by hand is not "machinery" within the meaning of a statute which declares that a company shall be liable for damage done to persons, etc., "by the running of the locomotives or cars or other machinery of such company," except it show that reasonable care and diligence have been employed in the use thereof. *Georgia R. & B. Co.* v. *Nelms*, 39 *Am. & Eng. R. Cas.* 355, 83 *Ga.* 70, 29 *Cent. L. J.* 352, 9 *S. E. Rep.* 1049.

128. "Many" denotes multitude, but not majority. *Louisville & N. R. Co.* v. *Hall*, 39 *Am. & Eng. R. Cas.* 298, 87 *Ala.* 708, 4 *L. R. A.* 710, 6 *So. Rep.* 277.

129. "Market."—A place designated by the municipal authorities of a city or an incorporated town for the sale of articles necessary or convenient for the subsistence of men and domestic animals. *Strickland* v. *Pennsylvania R. Co.*, 154 *Pa. St.* 348, 26 *Atl. Rep.* 431.

130. Market value.*— Property may have a value for which a plaintiff may recover, if it be destroyed, although it may have no actual market value. *Atchison, T. & S. F. R. Co.* v. *Stanford*, 12 *Kan.* 354, 8 *Am. Ry. Rep.* 230.

131. "Matters of damage to personal property," as used in Arkansas Constitution of 1874, art. 7, § 40, means all injuries which one may sustain in respect to his ownership of personal estate. *St. Louis, I. M. & S. R. Co.* v. *Heath*, 18 *Am. & Eng. R. Cas.* 557, 41 *Ark.* 476.

132. Maturity.—When used with reference to bonds and similar instruments, the word "maturity" means the time fixed for payment of the principal. A condition to pay bonds at maturity does not refer to payment of annual instalments of interest, though such are promised by the bonds, and is not broken by default in payment of interest until the time named for paying the principal arrives. *United States* v. *Union Pac. R. Co.*, 91 *U. S.* 72, 9 *Am. Ry. Rep.* 411.

133. May.—In a statute providing for public subscriptions to railroad stock, and that the authorities "may" cause an election to be held to take the sense of the taxpayers, the word "may" must be taken to mean "shall." *Leavenworth & D. R. Co.* v. *Platte County Court*, 42 *Mo.* 171. *State ex rel.* v. *Garroutte*, 67 *Mo.* 445.

The word "may," in a statute, is to be construed "must" or "shall," where the

* A spike hammer is not "machinery" under Ala. Code, 1886, § 2590. See 33 AM. & ENG. R. CAS. 354, *abstr.*

* "Market value" defined as applied to taking property for public use, see note, 12 L. R. A. 610.

interests or rights of the public are concerned, and the public or third persons have a claim *de jure* that the power should be exercised. *Blake* v. *Portsmouth & C. R. Co.*, 39 *N. H.* 435.

134. Minerals.*—Where a statute excepts from a grant of land to a company for its road any "mines of coal, ironstone, slate, or other minerals, 'except' such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works," it includes not only beds and seams of minerals got by underground working, but also such as can only be worked by open or surface operations. *Midland R. Co.* v. *Robinson*, 43 *Am. & Eng. R. Cas.* 557, *L. R.* 15 *App. Cas.* 19.

In estimating the damages that will be sustained by a landowner by the construction of a railroad, the jury may allow the market value of the land taken, and all actual damages arising from the manner of the construction of the road; but they cannot consider the value of unopened mines beneath the surface. *Searle* v. *Lackawanna & B. R. Co.*, 33 *Pa. St.* 57.

135. Month.—In Ind. General Railroad Law of May 11, 1852, § 8 (1 Rev. St. 412), the word "month" means thirty days. *Heaston* v. *Cincinnati & Ft. W. R. Co.*, 16 *Ind.* 275.

136. "Most approved."—In an action against a company for burning property, it is not error to instruct the jury that the company must use the "most approved fire arresters." Such charge is less exacting than one that requires proof of the "best engines and the best appliances." *Missouri Pac. R. Co.* v. *Bartlett*, 81 *Tex.* 42, 16 *S. W. Rep.* 638.

137. Necessary.—The word "necessary," occurring in clause 2 of article 8 of Fla. Constitution, and by implication transferred to clause 4 of the same article, when applied to the taxing power of county authorities is to be taken rather as an indication of a grant of discretion, to be exercised within the appropriate limits of their general power, than as a restraint upon that power. *Cotten* v. *Leon County Com'rs*, 6 *Fla.* 610.

"Necessary," as used in a charter authorizing a company to enter upon, take, and hold all real estate and materials "necessary for that purpose," not only authorizes it to hold enough land on which to lay its track, but in addition enough for desirable appendages, such as drains and ditches, fences, water-tanks, wood and coal yards, telegraph poles, side tracks and turntables, passenger stations, freight and stock yards, etc. *Prather* v. *Jeffersonville, M. & I. R. Co.*, 52 *Ind.* 16.

Mass. St. of 1876, ch. 236, § 13, defined the operating expenses of a certain railroad to include "necessary expenditures for construction, insurance, taxes, renewals, and repairs needful to maintain its road and equipment in good condition." *Held*, that the last ten words quoted related to and qualified only the three words immediately preceding, and did not qualify the words "necessary expenditures for construction." *Phillips* v. *Eastern R. Co.*, 22 *Am. & Eng. R. Cas.* 247, 138 *Mass.* 122.

The terms "necessary and useful for public or private purposes," in Pa. Lateral Railroad Act, are to receive a reasonable construction; the word "necessary" refers not to an absolute, but a reasonable, necessity, and the burden of establishing the usefulness and necessity of the road for public or private purposes is wholly and exclusively upon the petitioner. *Hays* v. *Briggs*, 3 *Pittsb.* (*Pa.*) 504.—REVIEWING Harvey *v.* Lloyd, 3 Pa. St. 331.

138. Negligence.*—The term "negligence," in its legal acceptation, includes acts of omission as well as of commission, while "diligence" implies action as well as forbearance to act; an act, therefore, which is the result of an accident may constitute a legal cause of action. *Grant* v. *Moseley*, 29 *Ala.* 302.

Various definitions of the term "negligence" collected. *Union Pac. R. Co.* v. *Rollins*, 5 *Kan.* 167.

Negligence consists in the failure to observe that degree of care which the law requires for the protection of the interests likely to be injuriously affected by the want of it. *Kendrick* v. *Towle*, 60 *Mich.* 363, 1 *Am. St. Rep.* 526, 27 *N. W. Rep.* 567.—APPROVING Flint & P. M. R. Co. *v.* Stark, 38 Mich. 717; Brown *v.* Congress & B. St. R. Co., 49 Mich. 153.

Negligence is want of that proper care which all the circumstances require. It may

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* See also MINES AND MINING.
"Minerals"; what are, see note, 43 AM. & ENG. R. CAS. 569.

* See also NEGLIGENCE, **1–4.**

result from acts of omission or from acts of commission, or from both combined. *Dunn* v. *Pennsylvania R. Co.*, 20 *Phila.* (*Pa.*) 258.

A court charged that "negligence is the lack of that care which an ordinarily prudent man would exercise in the management of his own affairs." Appellant contends that the definition should have been: "Negligence implies generally the want of that care and diligence which ordinarily prudent men would use to prevent injury under the circumstances of the particular case. *Held*, that the difference in these definitions is so slight that no injury could have resulted to appellant. *Texas & P. R. Co.* v. *Gorman*, 2 *Tex. Civ. App.* 144, 21 *S. W. Rep.* 158.—QUOTING Houston & T. R. Co. *v.* Oram, 49 Tex. 346; Southern C. P. & M. Co. *v.* Bradley, 52 Tex. 599.

The terms "negligence" and "ordinary care" are correlative terms. Ordinary care depends on the circumstances of the particular case, and is such care as a person of ordinary prudence would under the circumstances have exercised. *Fowler* v. *Baltimore & O. R. Co.*, 8 *Am. & Eng. R. Cas.* 480, 18 *W. Va.* 579.

Negligence, in one sense, is a quality attaching to acts dependent upon and arising out of the duties and relations of the parties concerned, and is as much a fact to be found by the jury as the alleged act to which it attaches by virtue of such duties and relations. *Townley* v. *Chicago, M. & St. P. R. Co.*, 4 *Am. & Eng. R. Cas.* 562, 53 *Wis.* 626, 11 *N. W. Rep.* 55.—QUOTING Texas & P. R. Co. *v.* Murphy, 46 Tex. 366; Langhoff *v.* Milwaukee & P. du C. R. Co., 19 Wis. 515.

139. Nemo debet esse judex in propria sua causa.—*Chicago & A. R. Co.* v. *Summers*, 113 *Ind.* 10, 14 *N. E. Rep.* 733, 12 *West. Rep.* 205.

140. Net earnings.*—The term, as used in a contract giving to preferred stockholders in a company priority in payment out of the net earnings of the road, means what remains of the earnings of the road after deducting expenses incurred by the company in conducting its operations in good faith, free from dictation by the preferred stockholders. *St. John* v. *Erie R. Co.*, 22 *Wall.* (*U. S.*) 136, 11 *Am. Ry. Rep.* 446.

As a general proposition the "net earnings" of a company are the excess of the gross earnings over the expenditures defrayed in producing them, aside from and exclusive of the expenditure of capital laid out in constructing and equipping the works themselves. *Barry* v. *Missouri, K. & T. R. Co.*, 29 *Am. & Eng. R. Cas.* 384, 27 *Fed. Rep.* 1.—FOLLOWING Union Pac. R. Co. *v.* United States, 99 U. S. 420.

Net earnings are, properly, the gross receipts less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains—that is, out of net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders, to go toward dividends, which in that way are paid out of the net earnings. *Hazeltine* v. *Belfast & M. L. R. Co.*, 30 *Am. & Eng. R. Cas.* 528, 79 *Me.* 411, 10 *Atl. Rep.* 328.—QUOTING St. John *v.* Erie R. Co., 10 Blatchf. (U. S.) 271.

141. "Night hostler."—A term applied to one who has general charge of engines at night. The word "hostler" comes from the habit of calling an engine an "iron horse." *Dayharsh* v. *Hannibal & St. J. R. Co.*, 103 *Mo.* 570, 15 *S. W. Rep.* 554.

142. Notice.—An act requiring that corporations shall have the same notice of proceedings to sell an equity of redemption now provided for natural persons does not apply to service of process. *Vicksburg & M. R. Co.* v. *McCutchen*, 52 *Miss.* 645.

143. Notice and warning of danger.—Plaintiff was injured while driving on a street. He stopped his wagon on or very near a railroad track, and was struck by a moving engine. From his position on the wagon he could have seen the approaching train by turning his head and using his eyes when it was a thousand feet distant; and he knew of the existence of the track. *Held*, that these were a "notice and warning of danger." *Hanlon* v. *Missouri Pac. R. Co.*, 104 *Mo.* 381, 16 *S. W. Rep.* 233.

144. "Obstruction" is not such a term of art as to require explanation by an expert, as, for instance, whether it includes a hand-car on a track. *Nashville & C. R. Co.* v. *Carroll*, 6 *Heisk.* (*Tenn.*) 347, 12 *Am. Ry. Rep.* 20.

145. Officer.—An engineer is an "officer" of a company within the meaning of Administration of Justice Act, 1873, § 24.

* "Net earnings" defined, see note, 23 AM. & ENG. R. CAS. 745.

Oakley v. *Toronto, G. & B. R. Co.*, 6 *Ont. Pr.* 253.

The tie inspector of a company is not an "officer" of the company within the above statute. *Dalziel* v. *Grand Trunk R. Co.*, 6 *Ont. Pr.* 307.

An engine driver and paymaster of a company are not officers within the meaning of the above statute. *McLean* v. *Great Western R. Co.*, 7 *Ont. Pr.* 358.

146. Omnibus.—Street cars are either omnibuses or vehicles in the nature of omnibuses. *Mayor of N. Y.* v. *Third Ave. R. Co.*, 3 *N. Y. S. R.* 181.—APPLYING Frankford & P. Pass. R. Co. *v.* Philadelphia, 58 Pa. St. 119; Hoyt *v.* Sixth Ave. R. Co., 1 Daly (N. Y.) 528.

147. On or about.—In an action for a personal injury, it was alleged in the complaint that the injury occurred "on or about" a certain day. *Held*, that this was not a statement of any distinct day or time, and therefore it did not appear from the complaint that the action was barred by lapse of time; and such defense, if made at all, must be made by answer. *Conroy* v. *Oregon Constr. Co.*, 10 *Sawy.* (*U. S.*) 630, 23 *Fed. Rep.* 71.

148. "Or" held to mean "on" in a provision in a railroad charter, relating to assessment of damages for land taken and appeals from the report of viewers, which enacted that upon the coming in of such report and the confirmation thereof, "or upon final judgment *or* appeal therefrom," the company should become seized of the estate. *Levering* v. *Philadelphia, G. & N. R. Co.*, 8 *Watts & S.* (*Pa.*) 459.

149. "Or damaged," as used in Neb. Const. art. 1, § 21, includes all damages arising from the exercise of the right of eminent domain which cause a diminution in the value of private property. *Omaha* v. *Kramer*, 25 *Neb.* 489, 41 *N. W. Rep.* 295.—DISTINGUISHING Pennsylvania R. Co. *v.* Marchant, 119 Pa. St. 541.

150. Ordinary care.*—The terms "ordinary care" and "diligence," when applied to the management of railroad engines and cars in motion, must be understood to import all the care and circumspection, prudence, and discretion which the peculiar circumstances of the case or the occasion reasonably require of such servants, and this will be increased or diminished according as the ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and operation of them. *Patterson* v. *Philadelphia, W. & B. R. Co.*, 4 *Houst.* (*Del.*) 103, 7 *Am. Ry. Rep.* 207.

Ordinary care is that amount of care which an ordinarily prudent person would exercise under the same circumstances, and which ought reasonably to be observed, taking into consideration all the exigencies of the particular service. *Lindvall* v. *Woods*, 44 *Fed. Rep.* 855.

Ordinary care is synonymous with, or about equivalent to, common prudence. *Richmond & D. R. Co.* v. *Howard*, 79 *Ga.* 44, 3 *S. E. Rep.* 426.

Ordinary care is that degree of care which is exercised by ordinarily prudent persons under similar circumstances. *Needham* v. *Louisville & N. R. Co.*, 85 *Ky.* 423, 3 *S. W. Rep.* 797, 11 *S. W. Rep.* 306.

Ordinary care is that degree of caution, attention, activity, and skill which are habitually employed by, or may reasonably be expected from, persons in the situation of the respective parties, under all the circumstances surrounding them at the time. *Central R. Co.* v. *Smith*, 74 *Md.* 212, 21 *Atl. Rep.* 706.

There is no substantial difference between "ordinary care" and "reasonable care." *Ridenhour* v. *Kansas City Cable R. Co.*, 102 *Mo.* 270, 13 *S. W. Rep.* 889, 14 *S. W. Rep.* 760.

What is "ordinary care" is of difficult definition, but is said to have relation to the situation of the parties and the business in which they are engaged, and varies according to the particular circumstances under which it is to be exercised. *Walsh* v. *Oregon R. & N. Co.*, 10 *Oreg.* 250.

Ordinary care is such as an ordinarily prudent man would use under the circumstances. *International & G. N. R. Co.* v. *Bell*, 75 *Tex.* 50, 12 *S. W. Rep.* 321.

Ordinary care is the care that a person of ordinary prudence would exercise under the same circumstances. So the charge "Ordinary care is that degree of care a person would use under similar circumstances" is erroneous as a definition. *St. Louis, A. & T. R. Co.* v. *Finley*, 79 *Tex.* 85, 15 *S. W. Rep.* 266.

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*See also NEGLIGENCE, 6.

"Ordinary care" defined as applied to duty of passenger to avoid injury, see note, 6 L. R. A. 242.

151. Ordinary skill. — The use of "ordinary skill and caution" in the construction of a work is not sufficient to protect from liability, if there was a failure to provide against a danger which might have been foreseen. *Staton* v. *Norfolk & C. R. Co.*, 52 *Am. & Eng. R. Cas.* 686, 111 *N. Car.* 278, 16 *S. E. Rep.* 181. — APPLYING Wright *v.* Wilmington, 92 N. Car. 156. CRITICISING Meares *v.* Wilmington Com'rs, 9 Ired. (N. Car.) 73.

152. Ordinary trains. — Accelerated trains forming part of fast through trains from London are not "ordinary trains," within the meaning of a branch railway act giving to a landowner the right to stop by signals all ordinary trains; and this is so although the fares charged on such train are at the ordinary rate. *Turner* v. *London & S. W. R. Co.*, *L. R.* 17 *Eq.* 561, 43 *L. J. Ch.* 430, 2 *Ry. & C. T. Cas.* 16.

153. "Original contractor," as used in Mo. Mechanics' Lien Law, includes a party furnishing material to a company under a contract with its president. *Hearne* v. *Chillicothe & B. R. Co.*, 53 *Mo.* 324, 12 *Am. Ry. Rep.* 349.

154. Outstanding title.— Under an agreement in partition of certain lands and water rights that if either grantee was put to any expense "in extinguishing any outstanding title or claim" the expense should be borne by each grantee proportionately to its share in the lands—*held*, that the state's title to land under water was an "outstanding title." *United N. J. R. & C. Co.* v. *Long Dock Co.*, 38 *N. J. Eq.* 142.

155. "Over," as used in Iowa Code, § 1262, authorizing railway companies to pass over a street without consent of the city authorities, means "upon." *State* v. *Davenport & St. P. R. Co.*, 47 *Iowa* 507.— QUOTING Chicago N. & S. W. R. Co. *v.* Mayor of Newton, 36 Iowa 299.

156. Owner.—A statute giving a right of action against the owner of any locomotive or car by the defects of which a person is injured means the owner at the time of the injury—the owner for the purposes of operating the road—and not, necessarily, the party in whom the absolute right of property is vested. If a corporation hires cars from a car builder, and runs them on its road, the corporation, not the lessor, is the party liable to the statutory action. *Proctor* v. *Hannibal & St. J. R. Co.*, 64 *Mo.* 112, 9 *Am. Ry. Rep.* 440.—FOLLOWED IN Elliott *v.* St. Louis & I. M. R. Co., 67 Mo. 272.

The word "owner," as used in the statute relating to rights of way, and providing "if the owner refuses to grant the right of way, it may be taken," applies to any person having an interest in the estate. *Dodge* v. *Omaha & S. W. R. Co.*, 28 *Am. & Eng. R. Cas.* 260, 20 *Neb.* 276, 29 *N. W. Rep.* 936.

The word "owner," as used in So. Car. Gen. St. of 1872, ch. 63, § 83, means the person who has control of the land; therefore, permission to enter upon the land, given by executors who had, under the will, a power of sale for purposes of division or of paying debts, is valid, as such executors were the owners within the meaning of this section. *Tompkins* v. *Augusta & K. R. Co.*, 21 *So. Car.* 420.

157. Packages.—Under a clause in a bill of lading restricting the carrier's liability for the loss of "packages"—*held*, that 70,000 pounds of corn in bulk was not a package. *Rosenstein* v. *Missouri Pac. R. Co.*, 16 *Mo. App.* 225.

The word "packages" used in a bill of lading was held to include bales of cotton. *Lamb* v. *Camden & A. R. & T. Co.*, 2 *Daly* (*N. Y.*) 454.

158. "Paintings," in the Carriers' Act (11 Geo. IV. & 1 Will. IV. c. 68), § 1, is used in its ordinary and popular sense to denote works of art. Models and working designs for carpets and rugs, painted by hand and skilfully designed, but of value in the carpet trade only, are not "paintings" within the statute. *Woodward* v. *London & N. W. R. Co.*, 3 *Ex. D.* 121, 47 *L. J. Ex. D.* 263, 3 *Ry. & C. T. Cas.* xii.

159. "Passenger."—In the legal sense of the word, a passenger is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier as to the payment of fare, or that which is accepted as an equivalent therefor. *Pennsylvania R. Co.* v. *Price*, 1 *Am. & Eng. R. Cas.* 234, 96 *Pa. St.* 256.

160. "Pecuniary injury"* and "necessary injury" are parallel and interchangeable as applied in actions for causing death. *Goss* v. *Missouri Pac. R. Co.*, 50 *Mo. App.* 614.

Under a statute allowing the widow or next of kin to recover damages measured by

* What the term "pecuniary loss" includes, see note, 13 L. R. A. 859.

the "pecuniary injuries," neither the pecuniary circumstances of the plaintiff nor the wealth of the defendant should be considered. *Chicago & N. W. R. Co.* v. *Bayfield*, 37 *Mich.* 205.

No nice or contracted interpretation should be put upon the term as used in a statute allowing damages for wrongfully causing death. The jury are to give such damages as they shall deem a fair and just compensation. They are not tied down to any precise rule. *Tilley* v. *Hudson River R. Co.*, 29 *N. Y.* 252.

Such damages may include loss of expected services of a small child. *Ihl* v. *Forty-second St. R. Co.*, 47 *N. Y.* 317.

161. Perils of the sea.* — Where goods are shipped by vessel to be safely carried, the "perils of the sea excepted," it is incumbent upon the owners of the vessel to show that a loss occurred through the perils of the sea; and if they fail to do so they are liable. *Hooper* v. *Rathbone*, 1 *Taney* (*U. S.*) 519.

An exception in a bill of lading of "dangers of lake navigation" includes all the ordinary perils which attend navigation on the lakes, and among others that which arises from shallowness of the waters at the entrance of harbors formed from them. *Western Transp. Co.* v. *Downer*, 11 *Wall.* (*U. S.*) 129.

Where a carrier agrees to forward goods, "perils of navigation and transportation excepted," the exception embraces more than the term "act of God," but it goes no further than to exempt the carrier from liability for such perils as could not be foreseen or avoided by the exercise of care and prudence. It does not include a loss caused by negligently running a vessel on a snag. *Christenson* v. *American Exp. Co.*, 15 *Minn.* 270 (*Gil.* 2[illegible]).

162. "Perpetrator," as used in Iowa Revision, § 4111, making the perpetrator of an act resulting in death liable for the injury, includes a railroad company. *Philo* v. *Illinois C. R. Co.*, 33 *Iowa* 47. — FOLLOWING Donaldson *v.* Mississippi & M. R. Co., 18 Iowa 280.

163. Person — Persons. — Railroads are "persons" within the meaning of the fourteenth amendment to the Constitution of the United States, guaranteeing the equal protection of the law to all persons. *Minneapolis & St. L. R. Co.* v. *Beckwith*, 38 *Am. & Eng. R. Cas.* 267, 129 *U. S.* 26, 9 *Sup. Ct. Rep.* 207.—FOLLOWING Santa Clara County *v.* Southern Pac. R. Co., 118 U. S. 394; Pembina C. S. M. & M. Co. *v.* Pennsylvania, 125 U. S. 181. FOLLOWED IN Charlotte, C. & A. R. Co. *v.* Gibbes, 142 U. S. 386.—*San Mateo County* v. *Southern Pac. R. Co.*, 8 *Sawy.* (*U. S.*) 238, 13 *Fed. Rep.* 722; *writ of error dismissed in* 116 *U. S.* 138, 6 *Sup. Ct. Rep.* 317. *Pittsburgh, C., C. & St. L. R. Co.* v. *Backus*, 54 *Am. & Eng. R. Cas.* 227, 133 *Ind.* 625, 33 *N. E. Rep.* 432.

In the absence of any statutory definition to that effect, the word "person" should be construed to include a corporation, unless it appears to have been used in a more limited sense. *In re Oregon B. P. & P. Co.*, 13 *Nat. Bank. Reg.* 199.

Under Ill. attachment law (Scates's Comp. 722), § 9, the word "person" includes corporations, both foreign and domestic. *Mineral Point R. Co.* v. *Keep*, 22 *Ill.* 9.

The provision of Kansas Comp. Laws 837, extending the word "person" to bodies politic and corporate, applies to the Civil Code; hence, section 59 thereof authorizes actions to be brought against foreign corporations. *North M. R. Co.* v. *Akers*, 4 *Kan.* 453.

Servants and employés of a railroad corporation are not to be included in the designation "any person," according to the true meaning of the act concerning railroad companies (Mo. Gen. St. 1865, p. 342, ch. 63, § 38). *Rohback* v. *Pacific R. Co.*, 43 *Mo.* 187.—FOLLOWED IN Proctor *v.* Hannibal & St. J. R. Co., 64 Mo. 112.

As to whether the word "person" includes employés, as used in the Missouri Damage Act, § 2, providing for damages "whenever the death of a person shall be caused by the wrongful act, neglect, or default of another," see *Connor* v. *Chicago, R. I. & P. R. Co.*, 59 *Mo.* 285, 8 *Am. Ry. Rep.* 417.—REVIEWED IN Miller *v.* Missouri Pac. R. Co., 109 Mo. 350.

The word "person," as used in N. Y. Penal Code, § 154, making a wilful omission to perform any duty enjoined by law upon any public officer or upon any person holding a public trust or employment, where no special provision shall have been made for punishment of such delinquency, punishable as a misdemeanor, includes a corporation as well as a natural person. *People* v.

* "Perils of the sea," meaning of, generally, see note, 41 AM. DEC. 281.

Long Island R. Co., 134 *N. Y.* 506, 31 *N. E. Rep.* 873, 47 *N. Y. S. R.* 648; *affirming* 58 *Hun* 412, 34 *N. Y. S. R.* 715, 12 *N. Y. Supp.* 41.

The word "person," as used in R. I. Rev. St. ch. 176, § 21, making liable in damages a person inflicting an injury causing death, includes corporations as well as natural persons. *Chase* v. *American Steamboat Co.*, 10 *R. I.* 79.

As used in a statute providing that persons may be sued for a trespass in the county where the trespass is committed, the word "persons" includes a railroad company. *Bartee* v. *Houston & T. C. R. Co.*, 36 *Tex.* 648.

In a statute, the word "person" generally includes corporations. *Miller* v. *Com.*, 27 *Gratt.* (*Va.*) 110.

The word "persons" in Wis. Rev. St., § 1810 (Laws of 1881, ch. 193), includes railroad employés. *Quackenbush* v. *Wisconsin & M. R. Co.*, 62 *Wis.* 411, 22 *N. W. Rep.* 519.

164. "Personal property other than rolling stock" embraces tools, materials for repairs, and all other property which, in its ordinary use, is not taken from one part of the line to another. This, with lands not being part of the "railroad track," constitutes local property. *Ohio & M. R. Co.* v. *Weber*, 5 *Am. & Eng. R. Cas.* 101, 96 *Ill.* 443.

165. "Personal representative," as used in a statute giving an action to the personal representative of one whose death is caused by wrongful act, means the executor or administrator, and does not give to the widow a right to sue in her own name. *Hagen* v. *Kean*, 3 *Dill.* (*U. S.*) 124.

166. Persons interested. — The charter of a company distinguished between the owner and person interested in proceedings to condemn lands. By owner is meant the person having some legal estate which the company proposes by the condemnation to acquire. Under the expression "persons interested" are included not only the owner whose estate it is intended to acquire, but also other persons having some independent right or interest therein, or lien or encumbrance thereon. *State* (*National R. Co., Pros.*) v. *Easton & A. R. Co.*, 36 *N. J. L.* 181, 12 *Am. Ry. Rep.* 417.

"Person interested" as used in Regulation of Railways Act, 1873, § 14 (36 and 37 Vict. c. 45), is not limited to persons paying the rates which are the subject of the application. *Pelsall C. & I. Co.* v. *London & N. W. R. Co., L. R.* 23 *Q. B. D.* 536.

The expression "person interested" in the above section includes any person who makes out by proper evidence that the rates which he seeks to have distinguished are really and substantially competitive rates with his own, and it includes "all persons who have a *bona fide* interest in knowing how the particular rates which are the subject of their application are made up." *Pelsall C. & I. Co.* v. *London & N. W. R. Co., L. R.* 23 *Q. B. D.* 536.

167. "Police power of a state, properly exercised, aims to regulate the intercourse of citizen with citizen, to prescribe the manner of using one's property and pursuing one's occupation, so as not to trespass on the property or rights of others. Police is, in general, a system of precaution, either for the prevention of crimes or of calamities. *Kansas Pac. R. Co.* v. *Mower* 16 *Kan.* 573, 9 *Am. Ry. Rep.* 400.

168. Posts, stations, or depots.— A contract was made to transport government supplies to certain Western states and territories, "and at any points or places at which posts, stations, or depots shall be established * * * on the west bank of the Missouri river." *Held*, that the words "posts, stations, or depots" meant military posts, and not railway stations; that "on the west bank of the Missouri river" could not be held to embrace points more than ninety miles west of the river. *Caldwell's Case*, 19 *Wall.* (*U. S.*) 264.

169. "Precinct," "township," and "school district," as used in Wyom. Act of December 13, 1879, relating to the assessment of railways and telegraph lines, do not refer to or include municipal corporations. *Union Pac. R. Co.* v. *Ryan*, 2 *Wyom.* 408.

170. Preferred stock.—An act of the legislature authorized the issue of bonds by a county "in subscription for preferred stock" of a company, and the act provided that the county "shall receive from the company preferred stock to the amount of the said bonds, which preferred stock shall bear interest at the rate of seven per cent. per annum." *Held*, that "preferred stock" meant capital stock, different from other capital stock only in the preference given to it in the matter of dividends. *State ex rel.* v. *Cheraw & C. R. Co.*, 9 *Am. & Eng. R. Cas.* 631, 16 *So. Car.* 524.

171. "Property," as used in Md. Bill of Rights, relating to taxation, does not include the franchise of a corporation. *State* v. *Philadelphia, W. & B. R. Co.*, 45 *Md.* 361.

172. Proximate cause.—In speaking of the contributory negligence of a plaintiff as a cause of damages which will relieve a defendant from liability, the words "immediate cause" and "proximate cause" are indiscriminately used to express the same meaning. *Longabaugh* v. *Virginia City & T. R. Co.*, 9 *Nev.* 271.

The term "proximate cause" was substantially the same, originally, as the *causa causans*, or the cause necessarily producing the result. But the practical construction of the term by the courts has now come to be the cause which naturally led to and which might have been expected to produce the result. *State* v. *Manchester & L. R. Co.*, 52 *N. H.* 528.

The proper legal meaning of the term "proximate cause" discussed. *Jucker* v. *Chicago & N. W. R. Co.*, 2 *Am. & Eng. R. Cas.* 41, 52 *Wis.* 150, 8 *N. W. Rep.* 862. —QUOTING Perley *v.* Eastern R. Co., 98 Mass. 414; Kellogg *v.* Chicago & N. W. R. Co., 26 Wis. 223.

173. "Public highway" does not include a railroad switch. *Coe* v. *New Jersey Midland R. Co.*, 28 *N. J. Eq.* 100, 14 *Am. Ry. Rep.* 17; *affirming* 28 *N. J. Eq.* 593.

174. "Public land" is such as is open to sale or other disposition under general laws. *Bardon* v. *Northern Pac. R. Co.*, 145 *U. S.* 535, 12 *Sup. Ct. Rep.* 856.

175. Public messengers.—The obligation of defendant company, under Cal. Act of April 4, 1864, to carry "public messengers," etc., free of charge has no application to a county treasurer carrying money to the state treasury. *Pfister* v. *Central Pac. R. Co.*, 70 *Cal.* 169, 11 *Pac. Rep.* 686.

176. "Public purposes," as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish the object for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest, or liberality. *People ex rel.* v. *Salem Tp. Board*, 20 *Mich.* 452.

177. "Public road," as used in the charter of a company, authorizing it to construct its railroad "across or along any public road," does not embrace the streets and alleys of a city. *Tennessee & A. R. Co.* v. *Adams*, 3 *Head* (*Tenn.*) 596.

178. "Purpresture" exists where one encloses or makes several to himself that which ought to be common to many. *People ex rel.* v. *Park & O. R. Co.*, 76 *Cal.* 156, 18 *Pac. Rep.* 141.

179. Railroad—Railroads.*—A railroad is an entire thing, not legally subject to coercive severance or dislocation. *Elizabethtown & P. R. Co.* v. *Elizabethtown*, 12 *Bush.* (*Ky.*) 233.

The word "railroad" should be confined to the highway in which the railway is laid, that is, the right of way. *Munkers* v. *Kansas City, St. J. & C. B. R. Co.*, 60 *Mo.* 334, 9 *Am. Ry. Rep.* 234.

Railroads are *quasi*-public institutions. They are authorized to facilitate, and not to control or force from legitimate and natural channels, or hinder or obstruct, the business of the country. *Dinsmore* v. *Louisville, C. & L. R. Co.*, 2 *Flipp.* (*U. S.*) 672, 2 *Fed. Rep.* 465.—QUOTED IN Scofield *v.* Lake Shore & M. S. R. Co., 23 Am. & Eng. R. Cas. 612, 43 Ohio St. 571, 54 Am. Rep. 846.

Railroads concern the public interest as matter of legal judgment. *Napa Valley R. Co.* v. *Napa County Sup'rs*, 30 *Cal.* 435.

Railroads are public highways, under the Ill. Const., not in the sense of public wagon roads, upon which every one may transact his own business with his own means of conveyance, but only in the sense of being compelled to accept of each and all, and take and carry to the extent of their ability. *Toledo, P. & W. R. Co.* v. *Pence*, 68 *Ill.* 524. —FOLLOWING Central Military Tract R. Co. *v.* Rockafellow, 17 Ill. 541.

180. Railroad and railway.†—The word "railroad" often applies to ordinary railroads, and the word "railway" to street or passenger railways, but the words are often used as synonymous, and were so used in Pa. Act of May 16, 1861, relating to merger. *Hestonville, M. & F. Pass. R. Co.* v. *Philadelphia*, 89 *Pa. St.* 210.

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* Legal status of railroad companies, see note, 29 AM. & ENG. R. CAS. 52.

† "Railroad" and "railway" as synonymous terms. Constitutional provision forbidding consolidation of "railroads" not applicable to street "railways," see 46 AM. & ENG. R. CAS. 229, *abstr.*

When either of the words "railroad" or "railway" is used in a statutory or constitutional provision, and the context is without indication that a particular kind of road is intended, the provision will be held applicable to every species of road embraced in the general sense of the word used. *Gyger* v. *Philadelphia City Pass. R. Co.*, 136 *Pa. St.* 96, 20 *Atl. Rep.* 399.

But though the words "railroad" and "railway" are thus synonymous, yet, when either one or the other of them is used in a provision, and it is evident from the context that a particular kind of road is intended, that kind of road only will be held to be the subject-matter of the enactment. *Gyger* v. *Philadelphia City Pass. R. Co.*, 136 *Pa. St.* 96, 20 *Atl. Rep.* 399.

181. "Railroad crossings of highways and streets" and "the approaches thereto within their respective rights of way," as used in Ill. Rev. St. 1889, ch. 114, § 8, par. 71, describe different portions of the space within the right of way of the company. Railroad "crossing" means that portion comprising the track or roadbed; the "approaches thereto," that portion extending from the track, on each side thereof, back so far as may be necessary, "so that at all times" the crossing "shall be safe as to persons and property." The words do not necessarily include the entire width of the railroad's right of way. *O'Fallon* v. *Ohio & M. R. Co.*, 45 *Ill. App.* 572.—DISTINGUISHING People ex rel. *v.* Chicago & A. R. Co., 67 Ill. 118.

182. "Railroad track" embraces property held for right of way, including superstructures thereon, and this is declared to be "real estate for purposes of taxation." *Ohio & M. R. Co.* v. *Weber*, 5 *Am. & Eng. R. Cas.* 101, 96 *Ill.* 443.

Under Indiana Revenue Laws, lands occupied by a company with its main track, side tracks, depot, roundhouse, coal sheds, and water tanks are to be valued and assessed for purposes of taxation by the state board of equalization as "railroad track," and cannot be assessed by the local authorities. *Pfaff* v. *Terre Haute & I. R. Co.*, 29 *Am. & Eng. R. Cas.* 181, 108 *Ind.* 144, 9 *N. E. Rep.* 93.—QUOTING Chicago & A. R. Co. *v.* People ex rel., 98 Ill. 350.

183. Railway.—The word "railway" should be confined to the rails when laid. *Munkers* v. *Kansas City, St. J. & C. B. R. Co.*, 60 *Mo.* 334, 9 *Am. Ry. Rep.* 234.

The word "railway" has been held to include a station; yet it is doubtful whether the power reserved to the public by 8 & 9 Vict. c. 20, § 92, to use "the railway," upon payments of tolls calculated at a certain rate per mile, includes stations. *Midland R. Co.* v. *Ambergate, N. & B. & E. J. R. Co.*, 10 *Hare* 359, 1 *Ry. & C. T. Cas.* 21.

The words "the railway," found in an act passed to amend previous railway acts of the same company, and to authorize the [illegible] of a junction railway, construed to [illegible] original line, its branches, and [illegible] junction railway, and not the junction railway alone. *Bristol & E. R. Co.* v. *Carton*, 8 *H. L. Cas.* 477, 30 *L. J. Ex.* 241, 1 *Ry. & C. T. Cas.* 22; *affirming* 3 *L. T.* 251, 4 *H. & N.* 831, 5 *Jur. N. S.* 1172, 28 *L. J. Ex.* 169.

184. "Railway corporation," as used in Kan. Laws of 1874, ch. 94, as to killing live stock, applies to a corporation operating a railroad in trust for the bondholders and stockholders. *Union Trust Co.* v. *Kendall*, 20 *Kan.* 515, 20 *Am. Ry. Rep.* 294.—FOLLOWING Central Branch R. Co. *v.* Ingram, 20 Kan. 66.

185. Real estate.—Under Me. Rev. St. 1857, ch. 6, § 4, the track of a road and the land on which it is constructed are not "real estate" for the purposes of taxation. *Portland, S. & P. R. Co.* v. *Saco*, 60 *Me.* 196.—DISTINGUISHING Worcester *v.* Western R. Corp. 4 Metc. (Mass.) 564.

The term "real estate," as used in N. Y. Laws 1850, ch. 140, and its amendments, covers all incorporeal hereditaments, easements, rights, and privileges which an elevated railroad may acquire. *In re Metropolitan El. R. Co.*, 18 *N. Y. S. R.* 134, 2 *N. Y. Supp.* 278.

186. "Reasonable attorney fee," as used in Kan. Act of 1874, concerning the killing of live stock by trains, depends on the labor necessitated by the extra ability of opposing counsel. In these cases, ten dollars for services before the justice and twenty-five dollars on appeal are reasonable. *Missouri River, Ft. S. & G. R. Co.* v. *Shirley*, 20 *Kan.* 660.

187. "Reasonable care" means substantially the same as ordinary care. *Ridenhour* v. *Kansas City Cable R. Co.*, 102 *Mo.* 270, 13 *S. W. Rep.* 889, 14 *S. W. Rep.* 760.

"Reasonable care and prudence" imply the converse of negligence; and if reasonable care and prudence would have pre-

vented the injury, then defendant is guilty of negligence. *Buck* v. *People's St. R., E. L. & P. Co.*, 46 *Mo. App.* 555.

188. "Reasonable rate."—(As used in Ohio Railroad Law of 1848.) That a company should fix a greater sum for a less distance than thirty miles than the maximum allowed for full thirty miles is unreasonable, as a matter of law. *Campbell* v. *Marietta & C. R. Co.*, 23 *Ohio St.* 168.—FOLLOWING Smith *v.* Pittsburg, Ft. W. & C. R. Co., 23 Ohio St. 17.

189. Reasonable time. — Whether the question of "reasonable time" is one of fact for the jury or law for the court must depend upon the circumstances of each particular case. If from the facts found or undisputed the court can draw a conclusion as to whether or not the time is reasonable, by the application of any legal rules or principles, the question is one of law. But if the circumstances be numerous and complicated, and such as to exclude the application of any general principle or definite rule of law, it is necessarily one of mere fact to be determined by the jury. *Pinney* v. *First Div. St. P. & P. R. Co.*, 19 *Minn.* 251 (*Gil.* 211), 20 *Am. Ry. Rep.* 71.

190. Receivers. — When lawfully appointed, receivers are not the representatives of the company or persons whose property may be placed under their management, though such property may in some cases be subjected to liability for charges arising under the permission of the courts appointing the receivers, or from the negligence of themselves and their employés. *Turner* v. *Cross*, 83 *Tex.* 218, 18 *S. W. Rep.* 578.

191. "Redeemable" and "redemption" are equivalent to "payable" and "payment," when used in a contract pledging stocks for security of a debt. *Swasey* v. *North Carolina R. Co.*, 1 *Hughes* (*U. S.*) 17.

192. Regular depot or station.—A house with a platform on the side of a track, at which freight is occasionally received and discharged, but at which no agent's office or books are kept, or bills of lading or receipts given, is not a "regular depot or station," within the meaning of N. Car. Code, § 1964, imposing a penalty for refusal to receive freight. *Kellogg* v. *Suffolk & C. R. Co.*, 35 *Am. & Eng. R. Cas.* 529, 100 *N. Car.* 158, 5 *S. E. Rep.* 379.

The terms "a regular depot," or "station," employed in the above statute, contemplate fixed and established places on the line of a railroad, or other transportation company equipped with suitable buildings and furnished with the necessary officers and servants for the regular transaction of business, for the receipt and delivery of freights, and the comforts and convenience of passengers. *Land* v. *Wilmington & W. R. Co.*, 40 *Am. & Eng. R. Cas.* 18, 104 *N. Car.* 48, 10 *S. E. Rep.* 80.

A "regular station" means the usual stopping place for the discharge of passengers; and a local usage, adopted by persons, of getting on or off for their own convenience at a place other than the regular station, as at a water tank, does not make the place a regular station. *Chicago & A. R. Co.* v. *Flagg*, 43 *Ill.* 364.

193. Regular trains.—The mere fact that a train does not stop at all stations does not prevent it from being a "regular passenger train," within the meaning of the Illinois act requiring such trains to stop at county seats. *Ohio & M. R. Co.* v. *People ex rel.*, 29 *Ill. App.* 561.

On the question of liability for a railroad accident, a train having been ordered to "run wild," and to keep clear of "regular" trains—*held*, that a regular train did not cease to be such because it was an hour behind time. *Phillips* v. *Chicago, M. & St. P. R. Co.*, 23 *Am. & Eng. R. Cas.* 453, 64 *Wis.* 475, 25 *N. W. Rep.* 544.

194. Remedial cases.—Under Minn. Const. art. 6, § 2, giving to the supreme court "original jurisdiction in such remedial cases as may be prescribed by law," under the term "remedial cases" the court has jurisdiction by *quo warranto* to enforce the forfeiture of a corporate charter. *State ex rel.* v. *St. Paul & S. C. R. Co.*, 35 *Minn.* 222, 28 *N. W. Rep.* 245.

195. "Repair."—To repair a street is to restore it to a former condition or state, after its decay or partial destruction. *State ex rel.* v. *Jacksonville St. R. Co.*, 50 *Am. & Eng. R. Cas.* 179, 29 *Fla.* 590, 10 *So. Rep.* 590.

196. Resident.— Independent of the case making them "inhabitants" and "residents," by construction, for certain purposes, the natural, ordinary, and literal construction of the words "residents of a town" would not include corporations, especially those whose places of business were elsewhere. The word "resident," occurring in the Constitution, or in a statute, ordinarily means an individual—a citizen--

and does not mean a corporation. *People* v. *Schoonmaker*, 63 *Barb.* (*N. Y.*) 44.

197. Res ipsa loquitur.—For application of the maxim, see *East Tenn., V. & G. R. Co.* v. *Stewart*, 21 *Am. & Eng. R. Cas.* 614, 13 *Lea* (*Tenn.*) 432.

198. Respondeat superior. — Expressing the liability of the master for the wrongful act of his servant. The maxim does not apply to a company where there is an independent contractor. *St. Louis, Ft. S. & W. R. Co.* v. *Willis*, 33 *Am. & Eng. R. Cas.* 397, 38 *Kan.* 330, 16 *Pac. Rep.* 728.—QUOTING Kansas C. R. Co. *v.* Fitzsimmons, 18 Kan. 34.

199. "Revenues of the (state) canals," as used in New York Constitution, means the income received by the state from these canals. *People* v. *New York C. R. Co.*, 24 *N. Y.* 485; *affirming* 34 *Barb.* 123.

200. "Review" of the court is intended to be founded upon the report of the commissioners so far as all matters which should there be stated are concerned, and not upon the bills of exceptions or statements in the sense of the Practice Act in relation to new trials. *Central Pac. R. Co.* v. *Pearson*, 35 *Cal.* 247.

201. "Right."—That which a person is entitled to have or to do, or to receive from others, within the limits prescribed by law. *Atchison & N. R. Co.* v. *Baty*, 6 *Neb.* 37, 15 *Am. Ry. Rep.* 63.

202. "Right of way."—The words "right of way" in a grant describe the tenure, not the land, granted. *Atlantic & P. R. Co.* v. *Lesueur*, (*Ariz.*) 37 *Am. & Eng. R. Cas.* 368, 19 *Pac. Rep.* 157.

"Right of way," as used in Kan. Const. art. 12, § 4, providing that "no right of way shall be appropriated to the use of any corporation until full compensation" is made, should not be construed as defining the quantity of interest to be transferred, but as meaning the right of passage through the grounds of another, irrespective of the interest or title acquired. *Challis* v. *Atchison, T. & S. F. R. Co.*, 16 *Kan.* 117.

The term "right of way" means right to pass over another's land. *Cass County* v. *Chicago, B. & Q. R. Co.*, 25 *Neb.* 348, 2 *L. R. A.* 188, 41 *N. W. Rep.* 246.

The "right of way" of a company ordinarily means the right held by the company in the lands over which its road runs. It is a right to use the lands for railway purposes; an easement. *Calcasieu Lumber Co.* v. *Harris*, 43 *Am. & Eng. R. Cas.* 570, 77 *Tex.* 18, 13 *S. W. Rep.* 453.

203. Risk—Owner's risk. — Unless the word "risk," as used in a bill of lading, be in some manner qualified, it must embrace all those circumstances which fall within the term. *Keeney* v. *Grand Trunk R. Co.*, 59 *Barb.* (*N. Y.*) 104.

It seems to be well settled, and by the court of last resort, that the expression "at the owner's risk," or any equivalent expression, in a shipping contract, does not cover the gross negligence of the employés of the carrier, so as to exempt the principal from liability for damage caused by it. *Keeney* v. *Grand Trunk R. Co.*, 59 *Barb.* (*N. Y.*) 104.

204. Road.—The word "road," as used in a street-car charter, is not a technical word, requiring explanation by the testimony of experts; nor does it alter the case that the president of the road and another witness interested therein testified that, at the time the franchise was granted, they understood it to include such appurtenances or conveniences as stables, shops, houses for storage, etc. *Atlanta St. R. Co.* v. *Atlanta*, 66 *Ga.* 104.

A way of a man over his own farm is not a "road," in the legal sense of the term, within the meaning of a provision in a railroad charter requiring the erection of bridges at road crossings. *Green* v. *Morris & E. R.* Co., 24 *N. J. L.* 486.

The "road" in the taxing section of an act, on which an annual tax is to be paid, is the road which the company is authorized and empowered, from time to time, to own and operate, comprising the extensions and branches thereof, and including its appendages. *State Board of Assessors* v. *Morris & E. R. Co.* 49 *N. J. L.* 193, 7 *Atl. Rep.* 826.

The word "road," in contemplation of a statute making it the duty of the lookout on trains to keep a watch for animals that may appear "upon the road," is not merely what is called strictly roadbed or track, but it is the whole road. *Nashville & C. R. Co.* v. *Anthony*, 1 *Lea* (*Tenn.*) 516. —LIMITED IN Louisville, N. & G. S. R. Co. *v.* Reidmond, 11 Lea 205.

Where a statute prescribes the duties of railroad employés "when any person, animal, or other obstruction appears upon the road," the word "road" means track,

and not the right of way. *Louisville, N. & G. S. R. Co.* v. *Reidmond*, 13 *Am. & Eng. R. Cas.* 515, 11 *Lea* (*Tenn.*) 205.—LIMITING Nashville & C. R. Co. *v.* Anthony, 1 Lea 516.

205. "Rolling stock" embraces the movable property belonging to a corporation, and is declared by the statute personal property for the purposes of taxation. By movable property is plainly meant such property as in its ordinary use is taken from one part of the line to another, such as cars, locomotives, and their attachments and usual accompaniments. *Ohio & M. R. Co. v. Weber*, 5 *Am. & Eng. R. Cas.* 101, 96 *Ill.* 443.

206. "Running switch."—A running switch consists either in detaching a portion of a train to be switched off while the cars are in motion, or the locomotive, without being coupled, may back up a car, or a portion of a train, with considerable speed, and, giving it a parting kick, send it off in any desired direction; and that a running switch was made, contrary to rule, may be proved by the actual condition of things at the time when the accident occurred. *Baltimore & O. R. Co.* v. *Kean*, 28 *Am. & Eng. R. Cas.* 580, 65 *Md.* 394, 5 *Atl. Rep.* 325.

207. "Safe machinery" means machinery so perfect that it may be used without danger resulting from any defect in it. The law does not make it incumbent on railway companies to provide such, but to use ordinary care to avoid such defects as may expose employés to danger while using it with ordinary care. *Gulf, C. & S. F. R. Co.* v. *Wells*, 81 *Tex.* 685, 17 *S. W. Rep.* 511.

208. Servants and employes.—Under an act of the legislature providing for the payment of money owing to "servants and employés" of a company upon a foreclosure, the secretary of the company is neither a "servant" nor an "employé." *Wells* v. *Southern Minn. R. Co.*, 1 *McCrary* (*U. S.*) 18, 1 *Fed. Rep.* 270.

209. Ship for exportation.—The words "ship for exportation" are not necessarily restricted to export to foreign countries, but may mean merely carrying out of port. *Stockton & D. R. Co.* v. *Barrett*, 11 *C. & F.* 590, 8 *Scott N. R.* 641.

210. Sic utere tuo ut alienum non laedas.—*Bannon* v. *State*, 49 *Ark.* 167, 4 *S. W. Rep.* 655. *Payne* v. *Western & A. R. Co.*, 18 *Am. & Eng. R. Cas.* 119, 13 *Lea* (*Tenn.*) 507, 49 *Am. Rep.* 666. *Laurel Fork & S. H. R. Co.* v. *West Va Transp. Co.*, 25 *W. Va.* 324.

211. "Sinking fund tax."—A tax raised to be applied to the payment of the principal and interest of a public loan. *Union Pac. R. Co.* v. *Dawson County*, 12 *Neb.* 254, 11 *N. W. Rep.* 307.

212. "Slight negligence" and "want of extraordinary care" are convertible terms, meaning one and the same thing. *Kansas Pac. R. Co.* v. *Peavey*, 11 *Am. & Eng. R. Cas.* 260, 29 *Kan.* 169, 44 *Am. Rep.* 630.

213. "Society," as applied to an action by a husband for injuries to his wife, where damages are claimed for loss of her society, means such capacities for usefulness, aid, and comfort as a wife as she possessed at the time of the injury. *Furnish* v. *Missouri Pac. R. Co.*, 102 *Mo.* 669, 15 *S. W. Rep.* 315.

214. "Some time."—Where there is a promise to repair machinery immediately, or within a fixed time, and a party relies upon its having been done, and is injured because of such reliance, he has a right of action; but where individuals who own a warehouse and side track hire an engine from a company to push cars in and out, and it throws sparks, and upon complaint the company agrees to repair it "some time," and the parties continue to use it, they cannot recover for property subsequently destroyed by escaping sparks. *Marquette, H. & O. R. Co.* v. *Spear*, 7 *Am. & Eng. R. Cas.* 486, 44 *Mich.* 169, 6 *N. W. Rep.* 202.

215. Station.—In a statute relating to the carriage of passengers, the word "station" is synonymous with "passenger depot." *State* v. *Indiana & I. S. R. Co.*, 56 *Am. & Eng. R. Cas.* 254, 133 *Ind.* 69, 32 *N. E. Rep.* 817.

A "station" is a halting place intermediate between the *termini* of a road, where passengers are taken up and let down, and is also applied to a terminus. *Goyeau* v. *Great Western R. Co.*, 25 *Grant's Ch.* (*U. C.*) 62.

216. "Sticks," as used by lumber dealers, ordinarily refers to sawed timber rather than unsawed logs. *Cincinnati, H. & D. R. Co.* v. *Dickey*, 30 *Ohio St.* 16.

217. "Stock," when used in reference to corporations, and in connection with the privilege of subscribing thereto, means "capital stock." *State ex rel.* v. *Cheraw &*

C. R. Co., 9 *Am. & Eng. R. Cas.* 631, 16 *So. Car.* 524.

218. "Street."—A street is a highway; and a grant or dedication of land for "streets" imparts an easement for public travel. *Cox* v. *Louisville, N. A. & C. R. Co.*, 48 *Ind.* 178, 8 *Am. Ry. Rep.* 296.

219. Structure.—A moving train is not a "structure," within Conn. Gen. St. tit. 16, ch. 7, § 10, making a company liable for an injury on a highway caused by a structure legally placed upon it. *Lee* v. *Barkhamsted*, 46 *Conn.* 213.

220. Subject to conditions expressed.—A company entered into a contract to carry live stock "subject to their tariff and conditions expressed." Among the conditions expressed was one that the owners undertook all risk of loss, injury, damage, and other contingencies in loading, unloading, conveyance, and otherwise; and that the company did not undertake to forward the animals by any particular train or at any specified hour, nor to deliver within any certain time, or for any particular market. The animals were started the same day, and carried a part of the distance, and when within sixty or seventy miles of the end of the road were, by a peremptory order, run onto a side track where they could neither be fed nor watered. There they were detained three or four days, and some died and the others were greatly injured. *Held*, that the "conditions expressed" would not permit of such a delay. *Keeney* v. *Grand Trunk R. Co.*, 59 *Barb.* (*N. Y.*) 104.

221. "Subscribe."—A statute authorizing a county to "subscribe" to railroad stock does not authorize the county court to issue bonds of the county to pay for it. *English* v. *Chicot County*, 26 *Ark.* 454.—DISTINGUISHING Seybert *v.* Pittsburg, 1 Wall. (U. S.) 272.

The word "subscribe," in contracts to take corporate stock, has a distinctively definite sense, and includes the idea of a promise to pay the amount subscribed in the manner agreed upon. *Cheraw & C. R. Co.* v. *White*, 14 *So. Car.* 51.

222. Subscriber — Stockholder.—There is no substantial distinction between the terms "subscriber" and "stockholder," and a subscriber may be sued for arrears of subscription for stock due from him, without proof that certificates of stock have been issued or tendered to him by the company. *Delaware R. Co.* v. *Tharp*, 1 *Houst.* (*Del.*) 149.

223. "Sufficiently fenced."—A complaint for killing stock which charges that the road was not "sufficiently fenced" is a sufficient allegation of noncompliance with a statute requiring it to be "securely fenced." *Evansville & T. H. R. Co.* v. *Tipton*, 101 *Ind.* 197.

224. "Suitable bridges," as used in Mass. St. of 1871, ch. 343, § 11, providing for a railroad viaduct in the city of Worcester, means such bridges as, in the judgment of the board of railroad commissioners, the safety and convenience of the public and the interests of the railroads require. *Mayor, etc., of Worcester* v. *Railroad Com'rs*, 113 *Mass.* 161.

225. "Surface waters."—Waters overflowing the banks of a creek, and spreading over the adjacent bottom land, and flowing down over the same, are "surface waters." *Abbott* v. *Kansas City, St. J. & C. B. R. Co.*, 20 *Am. & Eng. R. Cas.* 103, 83 *Mo.* 271, 53 *Am. Rep.* 581.

226. Surplus proceeds.—As to the meaning of the term "surplus proceeds," in Mo. Act of 1855, § 18, providing that "after the Hannibal and St. Joseph railroad shall be completed, equipped, and in operation, said road shall be required to pay into the treasury of the state the surplus proceeds of all land sales, or such other securities as may be provided by the company in a deed of trust or otherwise," *see Hannibal & St. J. R. Co.* v. *Bartlett*, 123 *Mass.* 15.

227. Survey.—A statement of the beginning of a road, the different stations made at the time of the survey, and the course and distance between the stations to the termination, is a "survey" within the meaning of a railroad charter providing that it shall be lawful for the company to take possession of the lands when a survey of the route located shall have been filed in the office of the secretary of state. *Attorney-General* v. *Stevens*, 1 *N. J. Eq.* 369.

228. "Taking" land by a railroad corporation consists of a series of acts, beginning with the entry for the purpose of location and terminating in the act of payment; and the land is not considered "taken" so as to divest the owner of the title until this last act is performed. *Fox* v. *Western Pac. R. Co.*, 31 *Cal.* 538.

229. Terminus—Termini.—"Terminus" is the extreme point at either end of a

railway, and is applied also to the buildings for offices, etc., at a railway extremity. *Goyeau* v. *Great Western R. Co.*, 25 *Grant's Ch.* (*U. C.*) 62.

The expression "at the *termini*," in the proviso of the first section of the Railroad Tax Act of New Jersey, approved April 2, 1873, means "near the *termini*." *State* (*West Jersey R. Co., Pros.*) v. *Receiver of Taxes*, 38 *N. J. L.* 299, 13 *Am. Ry. Rep.* 50.

230. "To change or limit" and "to lessen or abridge" are expressions of similar import. *Feige* v. *Michigan C. R. Co.*, 62 *Mich.* 1, 28 *N. W. Rep.* 685.

231. "To forward," as used in a contract of carriage, should be taken as signifying "to carry forward," not "to deliver to others for carriage." *Fatman* v. *Cincinnati, H. & D. R. Co.*, 2 *Disney* (*Ohio*) 248.

232. "Toll" ordinarily means a charge for the privilege of passing over a road or bridge, but it may be used in the sense of fare, or compensation for being carried. *Pennsylvania R. Co.* v. *Sly*, 65 *Pa. St.* 205.

"Toll" is a tribute or custom paid for passage, not for carriage; always something taken for a liberty or privilege, not for a service; and such is the common understanding of the world. Nobody supposes that tolls taken by a turnpike or canal company include charges for transportation, or that they are anything more than an excise demanded and paid for the privilege of using the way. *Com.* v. *New York, P. & O. R. Co.*, 145 *Pa. St.* 38, 22 *Atl. Rep.* 212.

A railroad company, furnishing its own conveyances, carrying nothing but passengers, and charging a certain price as fare, cannot be considered a "toll" collecting company. *State* (*Jersey City & B. R. Co., Pros.*) v. *Haight*, 30 *N. J. L.* 447.

233. Town. — The word "town," as used in Wis. Constitution, denotes a civil division composed of contiguous territory; and under the power granted to county boards by the statute "to set off, organize, vacate, and change the boundaries of the towns in their respective counties" (Rev. St. § 670, subd. 1), such a board cannot make a valid order changing the boundaries of a town so that it shall consist of two separate and detached tracts of land. *Chicago & N. W. R. Co.* v. *Oconto*, 50 *Wis.* 189, 6 *N. W. Rep.* 607.

The word "town" in the Railways Clauses Consolidation Act, 1845, § 11, means the space on which the dwelling-houses are collected so near to each other that they may be said to be continuous. This definition should be given to the jury on the trial of an issue as to whether a railway at a particular place passed through a town. *Elliott* v. *South Devon R. Co.*, 5 *Railw. Cas.* 500, 2 *Ex.* 725, 17 *L. J. Ex.* 262. — FOLLOWED IN Deards *v.* Goldsmith, 40 L. T. 328.

An open space occupied as a mere accessory to the convenience of dwelling-houses is in the "town" within the meaning of that word as used in the above statute. *Elliott* v. *South Devon R. Co.*, 5 *Railw. Cas.* 500, 2 *Ex.* 725, 17 *L. J. Ex.* 262. — FOLLOWED IN Deards *v.* Goldsmith, 40 L. T. 328.

234. "Track."—The track of a railroad is not merely the rails and ties upon which cars are run, but it is the "road, course, way," and includes all that enters into and composes the road, the course, and way. An embankment upon which the rails and ties are laid is a part of the whole that makes the railroad track. *Gates* v. *Chicago, St. P. & K. C. R. Co.*, 50 *Am. & Eng. R. Cas.* 164, 82 *Iowa* 518, 48 *N. W. Rep.* 1040.

235. "Traffic arising and terminating on the railway" means traffic that does not pass over any other railway. *Distington Iron Co.* v. *London & N. W. R. Co.*, 6 *Ry. & C. T. Cas.* 108.

236. "Transfer," as employed in Iowa Code, § 1310, refers to the act of removing freight, passengers, and express matter, and is intended to cover the removal of cars, with their burdens, from one road to another, as well as the change of their burdens from the cars of one company to those of another. *Council Bluffs* v. *Kansas City, St. J. & C. B. R. Co.* 45 *Iowa* 338.

237. Trustee of an express trust.— One who is described in a contract for the carriage of goods as consignor, consignee, and sole owner may sue the carrier for an overcharge, although he did not in fact pay it and was not the owner. He is "trustee of an express trust," within the statute. *Waterman* v. *Chicago, M. & St. P. R. Co.*, 18 *Am. & Eng. R. Cas.* 486, 61 *Wis.* 464, 21 *N. W. Rep.* 611.—QUOTING Hooper v. Chicago & N. W. R. Co., 27 Wis. 91.

238. "Turnpike road."—A road on which persons have the right to erect bars for the purpose of taking tolls. *Northam B. & R. Co.* v. *London & S. R. Co.*, 6 *M. & W.* 428, 1 *Railw. Cas.* 665, 4 *Jur.* 892.

"Turnpike road" in the Railways Clauses Consolidation Act (8 and 9 Vict. c. 20, § 50)

means a road which is repaired by tolls payable by passengers. *Reg.* v. *East & W. I. D. & B. J. R. Co.*, 1 *C. L. R.* 496, 2 *El. & Bl.* 466, 17 *Jur.* 1181, 22 *L. J. Q. B.* 380.

239. "Ultra vires."*—The words literally mean "beyond the powers of," and are usually applied to corporations and their officers. The words "*ultra vires*" and "illegal" represent totally different and distinct ideas. A contract may have both these defects, but it may have one without the other. *Bissell* v. *Michigan S. & N. I. R. Co.*, 22 *N. Y.* 258.

240. Unlawful.—The words "unlawful" and "wrongful," as pertaining to negligence, are synonymous, and therefore a plaintiff who asks to go to the jury on the question of defendant's act being wrongful does not thereby abandon the theory of negligence. *Wells* v. *Sibley*, 31 *N. Y. S. R.* 40, 9 *N. Y. Supp.* 343.

241. "Upon," as used in a contract of subscription: "Provided that upon such payment there shall be delivered to me a certificate of stock," makes covenants dependent. A tender of the stock is a prerequisite to a suit for the subscription. *Courtright* v. *Deeds*, 37 *Iowa* 503.

242. "Uses and purposes," as used in the Pa. Lateral Railroad Acts, are words intended to cover both the owner's present and his future needs. *Hays* v. *Briggs*, 3 *Pittsb.* (*Pa.*) 504.

243. "Value," as used in Minn. Laws 1857, ch. 1, § 13, providing for appraisal of the "value" of lands taken by a company for right of way, embraces not only the value of the strip of land taken, as an isolated parcel of land, but such additional value as attaches to it by reason of its connection with adjacent land of the same owner. *Scott* v. *St. Paul & C. R. Co.*, 21 *Minn.* 322, 18 *Am. Ry. Rep.* 421.—FOLLOWING Simmons *v.* St. Paul & C. R. Co., 18 Minn. 184; Grannis *v.* St. Paul & C. R. Co., 18 Minn. 194; Colvill *v.* St. Paul & C. R. Co., 19 Minn. 283.—REVIEWED IN Warren *v.* First Div. St. P. & P. R. Co., 21 Minn. 424.

244. "View," as used in Me. Rev. St. ch. 18, § 12, providing for a sheriff's jury to "view the premises," means more than "look at." They are to examine the land both from within and without the location of the railroad. *Wakefield* v. *Boston & M. R. Co.*, 63 *Me.* 385.

245. "Village."—Minn. Act of 1868, "to authorize the village of Lake City to aid in the construction of the St. Paul and Chicago railway," is not rendered inoperative by the inadvertent use of the word "village" for "town" in the title. *State ex rel.* v. *Lake City*, 25 *Minn.* 404.

246. "Vis major" means an irresistible force, but is often used as the equivalent of the words "act of God." *Nichols* v. *Marshland, L. R.* 10 *Ex.* 255.

The civil law as in force in Mexico does not hold a carrier liable where the subject of the bailment is taken away or destroyed by a *vis major*, and robbery is so considered when perpetrated by an irresistible force. *Cantu* v. *Bennett*, 39 *Tex.* 303.

But robbery does not release the carrier under the English common law. Lord Mansfield says that "if an armed force come to rob the carrier of the goods, he is liable." *Forward* v. *Pittard*, 1 *T. R.* 27.

The strict rule of the common law that makes the carrier liable in many cases for loss occurring through irresistible force applies only where there is an actual loss, and not where damages are claimed for a mere delay in carrying. An irresistible force, such as a mob, will excuse a carrier for a delay. *Haas* v. *Kansas City, Ft. S. & G. R. Co.*, 35 *Am. & Eng. R. Cas.* 572, 81 *Ga.* 792, 7 *S. E. Rep.* 629. *Pittsburgh, Ft. W. & C. R. Co.* v. *Hazen*, 84 *Ill.* 36. *Pittsburgh, C. & St. L. R. Co.* v. *Hollowell*, 65 *Ind.* 188. *Lake Shore & M. S. R. Co.* v. *Bennett*, 6 *Am. & Eng. R. Cas.* 391, 89 *Ind.* 457. *Geismer* v. *Lake Shore & M. S. R. Co.*, 102 *N. Y.* 563. *Gulf, C. & S. F. R. Co.* v. *Levi*, 42 *Am. & Eng. R. Cas.* 439, 76 *Tex.* 337, 13 *S. W. Rep.* 191, 8 *L. R. A.* 323; *reversing* 40 *Am. & Eng. R. Cas.* 115, 12 *S. W. Rep.* 677.

247. "Wages," as used in Ala. Exemption Act of 1868 in reference to "wages of laborers and employés," does not include the salary of the president of a railroad. *South & N. Ala. R. Co.* v. *Falkner*, 49 *Ala.* 115.

248. "Watercourse."—A stream of water usually flowing in a definite channel, having a bed or side or banks, and usually discharging itself into some other stream or body of water. *St. Louis, I. M. & S. R. Co.* v. *Schneider*, 30 *Mo. App.* 620.—QUOTING Luther *v.* Winnisimmet Co., 9 Cush. (Mass.) 171.

249. "While" means "during the time that," and seems necessarily to imply some

*See also ULTRA VIRES.

de[illegible] continuance. *Chicago & A. R. Co[illegible]sher*, 141 *Ill.* 614, 31 *N. E. Rep.* 406; *affirming* 38 *Ill. App.* 33.

250. "Wilful injury" is that which flows from an injurious act purposely committed with the intent to commit injury. *Citizens' St. R. Co.* v. *Willoeby*, 58 *Am. & Eng. R. Cas.* 485, 134 *Ind.* 563, 33 *N. E. Rep.* 627.

251. "Wilfully," as used in Iowa Act of 1862, ch. 169, § 2, imposing on railroads a penalty for wilfully neglecting to post up a schedule of fixed fares, means designedly, as opposed to inadvertently, and does not imply malice *Fuller* v. *Chicago & N. W. R. Co.*, 31 *Iowa* 187, 1 *Am. Ry. Rep.* 383.

252. "Wilful neglect" is a reckless indi[illegible]rence to the safety of human life, or a[illegible]ntional failure to perform a manifest d[illegible]he public. *Filbin* v. *Chesapeake & O. R. Co.*, 91 *Ky.* 444, 16 *S. W. Rep.* 92.

253. "Without any negligence."—Where a statute provides that a company must pay damages for injuries by fire, "unless said company can prove * * * that the injury complained of has been committed without any negligence" on its part, the words "without any negligence" must be construed to mean "without any negligence occasioned by the want of reasonable care." *Baltimore & S. R. Co.* v. *Woodruff*, 4 *Md.* 242.

"Without negligence," as used in such statute, means the exercise of reasonable care and diligence on the part of the company to avoid, as far as practicable, injury to property along the line of its road; that is to say, by having its engines properly constructed and in good condition and placed in charge of skilful and prudent persons and managed by such persons in a skilful and prudent manner. *Baltimore & O. R. Co.* v. *Shipley*, 39 *Md.* 251, 11 *Am. Ry. Rep.* 269.

WORKING AGREEMENTS.

Power to make, and their effect under English statutes, see LEASES, ETC., **129-142.**

WORKSHOPS.

Taking land for, when for a public use, see EMINENT DOMAIN, **187.**

WOUNDS.

Exhibition of, to the jury, see EVIDENCE, **41**; TRIAL, **44.**

WRECKING.

Trains, prosecution for, see CRIMINAL LAW, **43.**

WRECKS.

Caused by embankments giving way to a flood, see EMBANKMENTS, **6.**
Risks assumed from dangers incident to clearing away, see EMPLOYÉS, INJURIES TO, **292.**
Transfer of passengers beyond place of, see CARRIAGE OF PASSENGERS, **136.**

WRITING.

Necessity of, to validity of contract, see CONTRACTS, **13.**
— — — — — — subscription, see SUBSCRIPTIONS TO STOCK, **2.**
Requirement that instructions be in, see TRIAL, **134.**

WRIT OF ERROR.

To judgment in attachment, see ATTACHMENT, ETC., **70.**

WRITS.

See ATTACHMENT, ETC.; EXECUTION; MANDAMUS; PROHIBITION.

WRITTEN CONTRACTS.

Admissibility and effect of, as evidence, see EVIDENCE, **254.**

WRITTEN INSTRUMENTS.

Construction of, a question of law, see TRIAL, **97.**
Copies of, as secondary evidence, see EVIDENCE, **153.**

WYOMING.

Assessment and levy of taxes in, see TAXATION, **285.**

Y

YARDMASTER.

As fellow-servant of car inspector, see FELLOW-SERVANTS, **232.**

— — — with other employés, see FELLOW-SERVANTS, **447.**

Authority of, to employ physician, see MEDICAL SERVICES, **13.**

YARDS.

Duty to look out for trespassers in, see TRESPASSERS, INJURIES TO, **47.**

Effect of notice of defects in, see EMPLOYÉS, INJURIES TO, **229.**

Injuries to animals in, see ANIMALS, INJURIES TO, **202.**

— — children while trespassing in, see CHILDREN, INJURIES TO, **41.**

— — employés in, liability of companies jointly using, see EMPLOYÉS, INJURIES TO, **497.**

Negligence in allowing cars to move unattended in, a question for jury, see EMPLOYÉS, INJURIES TO, **696.**

Of railway, laying out streets and highways across, see CROSSING OF STREETS AND HIGHWAYS, **54.**

Right of one company to cross yards of another, see CROSSING OF RAILROADS, **18.**

Who deemed trespassers in, see TRESPASSERS, INJURIES TO, **9.**

YARD SWITCHMAN.

As fellow-servant of engineer, see FELLOW-SERVANTS, **302.**

YEAR.

Contracts not to be performed within—statute of frauds, see CONTRACTS, **18.**

TABLE OF CASES.

Aaron *v.* Second Ave. R. Co. (2 Daly (N. Y.) 127), Children, Inj. to, 137; Dam., 44; St. Rys., 502; Trial, 78.
Abbe *v.* Eaton (51 N. Y. 410), Bills of L., 17.
Abbett *v.* Chicago, M. & St. P. R. Co. (30 Minn. 482, 16 N. W. Rep. 266), Cross., Inj. at, 242, 250; Negl., 54.
Abbot *v.* Dwinnell (74 Wis. 514, 43 N. W. Rep. 496), Cross., Inj. at, 73, 198, 288, 297, 353; Witn., 154, 168.
Abbot *v.* Gore (40 Am. & Eng. R. Cas. 244, 74 Wis. 509, 43 N. W. Rep. 365), Fires, 64, 218, 254, 364.
Abbot *v.* Kalbus (39 Am. & Eng. R. Cas. 594, 74 Wis. 504, 43 N. W. Rep. 367), Fright. Teams, 2, 3; Nuis., 5.
Abbot *v.* McCadden (81 Wis. 563, 51 N. W. Rep. 1079), Death, etc., 229, 396.
Abbot *v.* Tolliver (71 Wis. 64, 36 N. W. Rep. 622), Car. of P., 630; Derailm., 7.
Abbott *v.* Canada C. R. Co. (24 Grant's Ch. (U. C.) 579), Mort., 195.
Abbott *v.* Georgia & N. C. R. Co. (90 N. Car. 462), Officers, 14.
Abbott *v.* Jewett (25 Hun (N. Y.), 603), Pl. 146.
Abbott *v.* Johnstown, G. & K. H. R. Co. (2 Am. & Eng. R. Cas. 541, 80 N. Y. 27, 36 Am. Rep. 572), Leases, 19, 40, 59.
Abbott *v.* Kansas City, St. J. & C. B. R. Co. (20 Am. & Eng. R. Cas. 103, 83 Mo. 271, 53 Am. Rep. 581), Bridges, 48; Flood. Lds., 30, 80; Words & Ph., 225.
Abbott *v.* McCartney (1 Holmes (U. S.) 80), Attach., 69.
Abbott *v.* New York & N. E. R. Co. (33 Am. & Eng. R. Cas. 146, 145 Mass. 450, 5 N. Eng. Rep. 527, 15 N. E. Rep. 91), Em. Dom., 77; Estop., 20; Priv. Ways, 2.
Abbott *v.* New York C. & H. R. R. Co. (12 Abb. Pr. N. S. (N. Y.) 465, 1 Sheld. 278), Proc., 10.
Abbott *v.* New York, L. E. & W. R. Co. (120 N. Y. 652, 24 N. E. Rep. 810, 31 N. Y. S. R. 649, 2 Silv. App. 599; affirming 46 Hun 680, 12 N. Y. S. R. 565), App. 60.
Abel *v.* Delaware & H. Canal Co. (28 Am. & Eng. R. Cas. 497, 103 N. Y. 581, 9 N. E. Rep. 325, 4 N. Y. S. R. 269, 57 Am. Rep. 773), Employés, Inj. to, 18, 664.
Abel *v.* Delaware & H. Canal Co. (48 Am. & Eng. R. Cas. 430, 128 N. Y. 662, 40 N. Y. S. R. 626, 28 N. E. Rep. 663, 3 Silv. App. 569; affirming 56 Hun 648, 31 N. Y. S. R. 356, 10 N. Y. Supp. 154), Employés, Inj. to, 18, 23.
Abend *v.* Terre Haute & I. R. Co. (17 Am. & Eng. R. Cas. 614, 111 Ill. 202), Contrib. Neg., 12; Employés, Inj. to, 445; Fel. Serv., 35, 267.
Abendroth *v.* Manhattan R. Co. (46 Am. & Eng. R. Cas. 128, 122 N. Y. 1, 25 N. E. Rep. 496, 33 N. Y. S. R. 475; affirming 22 J. & S. 417, 7 N. Y. S. R. 43, 19 Abb. N. Cas. 247; which reversed 20 J. & S. 274), Elev. Rys., 57, 159, 168.
Aberdare R. Co., In re (8 W. R. 603), Em. Dom., 1200.
Aberdeen *v.* Sykes (59 Miss. 236), Mun. Aid, 377.
Aberdeen Commercial Co. *v.* Great North of Scotland R. Co. (3 Ry. & C. T. Cas. 205), Charges, 87, 92, 118; Discrim., 6.
Aberdeen R. Co. *v.* Blakie (1 Macq. H. L. Cas. 461, 2 Eq. 1281), Direct., 45.
Aberystwith R. Co., In re (7 Jur. N. S. 510, 564; 30 L. J. Ch. 674, 4 L. T. 537), Incorp., 6.
Abington *v.* Cabeen (12 Am. & Eng. R. Cas. 581, 106 Ill. 200), Stat., 34.
Abington Tp. *v.* North Pa. R. Co. (2 Pa. Dist. 68), Cross. St. & H., 92; Sts. & H., 196.
Abraham *v.* Great Northern R. Co. (16 Q. B. 586, 15 Jur. 855, 20 L. J. Q. B. 322), Constr. Rys., 8; Rip. Rts., 9; Waters & W., 3.
Abraham *v.* Meyers (29 Abb. N. Cas. (N. Y.) 384), Injunc., 31; St. Rys., 90, 92, 100.
Abram *v.* Gulf, C. & S. F. R. Co. (83 Tex. 61, 18 S. W. Rep. 321), Tickets & F., 71, 78, 80.
Abrath *v.* North Eastern R. Co. (L. R. 11 Q. B. D. 440, 52 L. J. Q. B. D. 620, 49 L. T. 618, 32 W. R. 50, 47 J. P. 692, 15 Cox C. C. 354; reversing L. R. 11 Q. B. D. 79, 52 L. J. Q. B. D. 352; affirmed in L. R. 11 App. Cas. 247), Mal. Pros., 7.
Abthorp *v.* Bedford & C. R. Co. (8 L. T. 200), Tresp., 16.

Accola *v.* Chicago, B. & Q. R. Co. (70 Iowa 185, 30 N. W. Rep. 503), Animals, 564; Evid., 98.
Acheson *v.* New York C. & H. R. R. Co. (61 N. Y. 652), Car. of M., 142.
Acker *v.* Alexandria & F. R. Co. (84 Va. 648, 5 S. E. Rep. 688), Corp., 16.
Acker *v.* Walker (53 Iowa 454, 5 N. W. Rep. 584), Deeds, 52.
Ackerman *v.* Huff (36 Am. & Eng. R. Cas. 589, 71 Tex. 317, 9 S. W. Rep. 236), Em. Dom., 251, 393, 848; Pl., 13.
Ackerson *v.* Erie R. Co. (31 N. J. L. 309), Actions, 7.
Ackerson *v.* Erie R. Co. (32 N. J. L. 254), Car. of P., 635.
Ackerson *v.* Lodi Branch R. Co. (28 N. J. Eq. 542), Mort., 182.
Ackerson *v.* Niagara County Sup'rs (18 N. Y. Supp. 219; affirmed in 72 Hun 616, 55 N. Y. S. R. 277, 25 N. Y. Supp. 196), Mun. Aid, 421.
Ackerson *v.* Niagara County Sup'rs (25 N. Y. Supp. 196, 72 Hun 616, 55 N. Y. S. R. 277; affirming 18 N. Y. Supp. 219), Mun. Aid, 61, 421.
Ackley *v.* Chicago, M. & St. P. R. Co. (36 Wis. 252, 9 Am. Ry. Rep. 112), Charges, 82.
Ackley *v.* St. Louis, I. M. & S. R. Co. (30 Mo. App. 657), Fences, 103.
Acres *v.* Moyne (59 Tex. 623), Evid., 239; Sales of Rds., 12.
Adams *v.* Atchison, T. & S. F. R. Co. (49 Am. & Eng. R. Cas. 579, 46 Kan. 161, 26 Pac. Rep. 439), Animals, 181.
Adams *v.* Blankenstein (2 Cal. 413), Car. of M., 257.
Adams *v.* Boston, etc., R. Co. (4 Bankr. Reg. (99) 314), Bank'cy, 1.
Adams *v.* Boston, H. & E. R. Co. (1 Holmes, (U. S.) 30), Bank'cy, 1; Words & Ph., 30.
Adams *v.* Chicago, B. & N. R. Co. (36 Am. & Eng. R. Cas. 7, 39 Minn. 286, 39 N. W. Rep. 629, 1 L. R. A. 493, 38 Alb. L. J. 388), Em. Dom., 160; Sts. & H., 106, 134, 255.
Adams *v.* Durham & N. R. Co. (110 N. Car. 325, 14 S. E. Rep. 857), Easem., 11, 177; Nuis., 37.
Adams *v.* Great North of S. R. Co. ([1891] A. C. 31; affirming 16 Court Sess. Cas., 4th Series [Rettie], 843), Arb., 30; Words & Ph., 63.
Adams *v.* Great Western R. Co. (6 H. & N. 404, 9 W. R. 254, 3 L. T. 631), Jurisd. 5.
Adams *v.* Halifax (13 Nov. Sc. 344), St. Rys., 188.
Adams *v.* Hannibal & St. J. R. Co. (7 Am. & Eng. R. Cas. 414, 74 Mo. 553), Contrib. Neg., 42; Evid., 174.
Adams *v.* Hastings & D. R. Co. (18 Minn. 260 (Gil. 236), Em. Dom., 164, 1057, 1083; Sts. & H., 289.
Adams *v.* Haught (14 Tex. 243), Charges, 75.
Adams *v.* Iron Cliffs Co. (41 Am. & Eng. R. Cas. 414, 78 Mich. 271, 44 N. W. Rep. 270), Contrib. Neg., 84; Cross., Inj. at, 6; Death, etc., 233; Employés, Inj. to, 550; Fel. Serv., 286.
Adams *v.* Lancashire & Y. R. Co. (38 L. J. C. P. 277, L. R. 4 C. P. 739, 20 L. T. 850, 17 W. R. 884), Car. of P., 467.
Adams *v.* Lawrence County (2 Pittsb. (Pa.) 60), Mun. Aid, 272, 328.
Adams *v.* London & B. R. Co. (2 M. & G. 118, 2 H. & T. 285, 14 Jur. 679, 19 L. J. Ch. 557), Em. Dom., 1100, 1184.
Adams *v.* Louisville & N. R. Co. (21 Am. & Eng. R. Cas. 380, 82 Ky. 603), Car. of P., 425; Trial, 216.
Adams *v.* Mayor, etc., of Kokomo (Ind.) (12 Am. & Eng. R. Cas. 585), Mun. Aid, 253.
Adams *v.* Memphis & L. R. R. Co. (2 Coldw. (Tenn.) 645), Estop. 17; Mun. Corp. 45.
Adams *v.* Midland R. Co. (31 L. J. Ex. 35, 10 W. R. 84), App., 125.
Adams *v.* Missouri Pac. R. Co. (41 Am. & Eng. R. Cas. 105, 100 Mo. 555, 12 S. W. Rep. 637, 13 S. W. Rep. 509), Car. of P., 260, 265; Contrib. Neg., 82; Negl. 72; New Tr. 72.
Adams *v.* Natick (13 Allen (Mass.) 429), Fences, 12.
Adams *v.* New York, L. E. & W. R. Co. (49 N. Y. S. R. 854, 66 Hun 634, 21 N. Y. Supp. 681), Cross., Inj. at, 202, 255.
Adams *v.* Ohio Falls Car Co. (131 Ind. 375, 31 N. E. Rep. 57), Nuis. 19.
Adams *v.* Quincy, O. & K. C. R. Co. (52 Mo. App. 590), Animals, 127.
Adams *v.* St. Johnsbury & L. C. R. Co. (25 Am. & Eng. R. Cas. 172, 57 Vt. 240), Em. Dom., 437, 640.
Adams *v.* St. Louis Transfer Co. (5 Mo. App. 593), Death, etc., 258.
Adams *v.* Saratoga & W. R. Co. (10 N. Y. 328; reversing 11 Barb. 414), Ejectm. 28; Em. Dom., 47.
Adams County *v.* Burlington & M. R. Co. (39 Iowa 507), Estop., 32.
Adams County *v.* Burlington & M. R. R. Co. (22 Am. & Eng. R. Cas. 188, 112 U. S. 123, 5 Sup. Ct. Rep. 77), Fed. Cts., 25.
Adams Exp. Co. *v.* Board of Police (65 How. Pr. (N. Y.) 72, 12 Abb. N. Cas. 436), Grim. L., 50; Injunc., 26; Int. Com., 223.
Adams Exp. Co. *v.* Boskowitz (16 Am. & Eng. R. Cas. 102, 107 Ill. 660), Evid., 182, 217; Exp. Cos., 72, 88; Witn., 33.
Adams Exp. Co. *v.* Crenshaw (78 Ky. 136), Proc., 40; Trial, 5.
Adams Exp. Co. *v.* Cressap (6 Bush (Ky.) 572), Exp. Cos., 30.
Adams Exp. Co. *v.* Darnell (31 Ind. 20), Exp. Cos., 56, 59.
Adams Exp. Co. *v.* Denver & R. G. R. Co. (4 McCrary (U. S.) 77, 16 Fed. Rep. 712), Fed. Cts., 3, 9.
Adams Exp. Co. *v.* Egbert (36 Pa. St. 360), Exp. Cos., 90.
Adams Exp. Co. *v.* Guthrie (9 Bush (Ky.) 78), Lim. of Liab., 41.
Adams Exp. Co. *v.* Harris (40 Am. & Eng. R. Cas. 151, 120 Ind. 73, 21 N. E. Rep. 340), Bills of L., 71; Car. of M., 391, 668, Evid., 204; Pl., 9.

Adams Exp. Co. *v.* Haynes (42 Ill. 89), Bills of L., 6, 26, 28, 32.
Adams Exp. Co. *v.* Hill (43 Ind. 157), Exp. Cos., 83.
Adams Exp. Co. *v.* Holmes (Pa.) (30 Am. & Eng. R. Cas. 14, 9 Atl. Rep. 166), Exp. Cos., 32.
Adams Exp. Co. *v.* Jackson (55 Am. & Eng. R. Cas. 319, 92 Tenn. 326, 21 S. W. Rep. 666), Car. of M., 20; Exp. Cos., 15, 22, 38, 77; Words & Ph., 7.
Adams Exp. Co. *v.* King (3 Ill. App. 316), Exp. Cos., 70.
Adams Exp. Co. *v.* Lexington (83 Ky. 657), Mun. Corp., 6.
Adams Exp. Co. *v.* Loeb (7 Bush (Ky.) 499), Exp. Cos. 88.
Adams Exp. Co. *v.* McConnell (9 Am. & Eng. R. Cas. 240, 27 Kan. 238), Exp. Cos., 82.
Adams Exp. Co. *v.* McDonald (1 Bush (Ky.) 32), Exp. Cos., 37.
Adams Exp. Co. *v.* Nock (2 Duv. (Ky.) 562), Car. of M., 35, 437; Exp. Cos., 73.
Adams Exp. Co. *v.* Owensboro (85 Ky. 265, 3 S. W. Rep. 370), Mun. Corp., 6; Stat., 67.
Adams Exp. Co. *v.* Reagan (29 Ind. 21), Exp. Cos., 69, 70.
Adams Exp. Co. *v.* Schlessinger (75 Pa. St. 246), Charges, 71; Exp. Cos., 15; Witn., 9.
Adams Exp. Co. *v.* Sharpless (77 Pa. St. 516), Bills of L., 63, 73, 79; Exp. Cos., 30.
Adams Exp. Co. *v.* Stettaners (61 Ill. 184), Exp. Cos., 32, 73.
Adams Exp. Co. *v.* Trego (35 Md. 47), Exp. Cos., 15; Superint., 7.
Adams Exp. Co. *v.* Wentworth (1 Cin. Super. Ct. 142), Car. of M., 504.
Adams Exp. Co. *v.* Wilson (81 Ill. 339), Car. of M., 603.
Adamson *v.* Davis (47 Mo. 268), Lim. of Ac., 43.
Adamson *v.* Union R. Co. (74 Hun 3, 26 N. Y. Supp. 136, 56 N. Y. S. R. 214), St. Rys., 25.
Adden *v.* White Mts. N. H. R. Co. (55 N. H. 413, 11 Am. Ry. Rep. 246), Em. Dom., 701, 745.
Addison *v.* Lake Shore & M. S. R. Co. (15 Am. & Eng. R. Cas. 512, 48 Mich. 155, 12 N. W. Rep. 42), Death, etc., 138.
Addison *v.* Lewis (9 Am. & Eng. R. Cas. 702, 75 Va. 701), Direct., 46, 55; Mort., 31, 101, 107, 219; Receiv., 93.
Adelbert College *v.* Toledo, W. & W. R. Co. (47 Fed. Rep. 836), Rem. of C., 27, 29, 43.
Adkins *v.* Atlanta & C. A. L. R. Co. (31 Am. & Eng. R. Cas. 281, 27 So. Car. 71, 2 S. E. Rep. 849), Death, etc., 256; Employés, Inj. to, 5; Negl., 43; Penalty, 4.
Adler *v.* Kansas City, S. & M. R. Co. (92 Mo. 242, 10 West. Rep. 333, 4 S. W. Rep. 917), Assign., 1, 14; Words & Ph., 92.
Adler *v.* Metropolitan El. R. Co. (46 N. Y. S. R. 253, 18 N. Y. Supp. 858, 28 Abb. N. Cas. 198), Dam., 1; Elev. Rys., 26.
Adler *v.* Metropolitan El. R. Co. (138 N. Y. 173, 52 N. Y. S. R. 160, 33 N. E. Rep. 935; modifying 28 Abb. N. Cas. 198, 18 N. Y. Supp. 858, 46 N. Y. S. R. 253), Elev. Rys., 69, 71, 167.
Adler *v.* Metropolitan El. R. Co. (29 J. & S. (N. Y.) 85), Elev. Rys., 63.
Adolph *v.* Central Park, N. & E. R. R. Co. (65 N. Y. 554, mem.; reversing 1 J. & S. 186), St. Rys., 232.
Adolph *v.* Central Park, N. & E. R. R. Co. (76 N. Y. 530; affirming 11 J. & S. 199), St. Rys., 350, 457.
Adolph *v.* Minneapolis & P. R. Co. (42 Minn. 170, 43 N. W. Rep. 848), Em. Dom., 1029.
Advance E. & W. Co. *v.* Eddy (23 Ill. App. 352), Nuis., 39.
Adwin *v.* New York C. & H. R. R. Co. (60 Barb. (N. Y.) 590), Eject. Pass., 41.
Aerkfetz *v.* Humphreys (53 Am. & Eng. R. Cas. 459, 145 U. S. 418, 12 Sup. Ct. Rep. 835), Employés, Inj. to, 159, 328.
Ætna Ins. Co. *v.* Hannibal & St. J. R. Co. (3 Dill (U. S.) 1), Fire Ins., 18.
Ætna Ins. Co. *v.* Wheeler (49 N. Y. 616, 3 Am. Ry. Rep. 390; affirming 5 Lans. 480), Car. of M., 613, 625.
Ætna Life Ins. Co. *v.* Middleport (124 U. S. 534, 8 Sup. Ct. Rep. 625), Subrog., 6.
Ætna Life Ins. Co. *v.* Pleasant Tp. (53 Fed. Rep. 214), Mun. Aid, 46.
Ætna Nat. Bank *v.* Hollister (55 Conn. 188, 10 Atl. Rep. 550), Indem. Bonds, 1; Officers, 16.
Agassiz *v.* London Tramway Co. (21 W. R. 199), Evid., 175.
Agnew *v.* Brooklyn City R. Co. (20 Abb. N. Cas. 235, 13 Civ. Pro. 25, 9 N. Y. S. R. 719), St. Rys., 484.
Agnew *v.* Brooklyn City R. Co. (24 N. Y. S. R. 744), Children, Inj. to, 63.
Agnew *v.* Michigan C. R. Co. (20 Am. & Eng. R. Cas. 441, 56 Mich. 56, 22 N. W. Rep. 108), Animals, 536.
Agricultural Branch R. Co. *v.* Winchester (13 Allen (Mass.) 29), Subscr., 26, 42, 122, 131, 166, 171.
Ahl's Appeal (129 Pa. St. 49, 18 Atl. Rep. 475, 477), Constr. Rys., 42.
Ahlbeck *v.* St. Paul, M. & M. R. Co. (39 Minn. 424, 40 N. W. Rep. 364), Bagg., 58; Car. of P., 519.
Ahner *v.* New York, N. H. & H. R. Co. (39 N. Y. S. R. 196, 14 N. Y. Supp. 365, 20 Civ. Pro. 318), Proc., 48.
Ahrens *v.* McGilligat (23 U. C. C. P. 171), Attach., 41.
Aigen *v.* Boston & M. R. Co. (6 Am. & Eng. R. Cas. 426, 132 Mass. 423), Car. of M., 543, 628; Negl., 63.
Aiken *v.* Albany, V. & C. R. Co. (26 Barb. (N. Y.) 289), Deeds, 32.
Aiken *v.* Chicago, B. & Q. R. Co. (25 Am. & Eng. R. Cas. 377, 68 Iowa 363, 27 N. W. Rep. 281), Car. of M., 76; Witn., 95.
Aiken *v.* Milwaukee & St. P. R. Co. (37 Wis. 469), Em. Dom., 140; Mort., 197, 307.
Aiken *v.* Pennslyvania R. Co. (41 Am. & Eng. R. Cas. 571, 130 Pa. St. 380, 18 Atl. Rep. 619), Contrib. Neg., 44; Cross., Inj. at, 189, 232; Death, etc., 192.
Aiken *v.* Frankford & S. P. City Pass. R.

Co. (142 Pa. St. 47, 21 Atl. Rep. 781), St. Rys., 421.
Aiken *v.* Wasson (24 N. Y. 482), Constr. Rys., 93.
Aiken *v.* Westcott (14 Daly (N. Y.) 504, 9 N. Y. Supp. 481, 16 N. Y. S. R. 600), Bagg., 77; Exp. Cos., 87.
Aikin *v.* Westcott (123 N. Y. 363, 25 N. E. Rep. 503, 33 N. Y. S. R. 623), Bagg. 76.
Aikin *v.* Western R. Corp. (20 N. Y. 370; reversing 30 Barb. 305), Ferries, 6.
Ainley *v.* Manhattan R. Co. (47 Hun 206, 13 N. Y. S. R. 557), Husb. & W., 17; Trial, 39, 86.
Akersloot *v.* Second Ave. R. Co. (40 N. Y. S. R. 231, 27 J. & S. 555, 15 N. Y. Supp. 864; affirmed in 133 N. Y. 676, mem.; 31 N. E. Rep. 626, mem.), App., 115; Negl., 74; New. Tr., 74.
Akersloot *v.* Second Ave. R. Co. (52 Am. & Eng. R. Cas. 553, 131 N. Y. 599, 30 N. E. Rep. 195, 43 N. Y. S. R. 290, 4 Silv. App. 71; affirming 56 Hun 640, 30 N. Y. S. R. 146, 8 N. Y. Supp. 926), Children, Inj. to, 45; St. Rys., 366.
Akridge *v.* Atlanta & W. P. R. Co. (90 Ga. 232, 16 S. E. Rep. 81), Contrib. Neg., 108; Fright. Teams, 2; Sts. & H., 332.
Alabama *v.* Burr (115 U. S. 413, 6 Sup. Ct. Rep. 81), State Aid, 3, 5.
Alabama *v.* Montague (117 U. S. 602, 6 Sup. Ct. Rep. 911), Mort., 14.
Alabama, etc., R. Co. *v.* Jones (5 Bankr. Reg. 97), Bank'cy, 1.
Alabama & C. R. Co. In re (9 Blatchf. (U. S.) 390), Bank'cy, 2.
Alabama & F. R. Co. *v.* Burkett (42 Ala. 83), Em. Dom., 22, 54, 643, 727; Witn., 121.
Alabama & F. R. Co. *v.* Burkett (86 Ala. 569), Charters, 17, 42; Em. Dom., 696, 727; Pub. Lds., 42.
Alabama & F. R. Co. *v.* Kenney (39 Ala. 307), Em. Dom., 103.
Alabama & F. R. Co. *v.* Rowley (9 Fla. 508), Subscr., 66, 70.
Alabama & F. R. Co. *v.* Waller (48 Ala. 459), Death, etc., 129, 143; Fel. Serv., 1, 49, 138, 142, 462.
Alabama & M. R. R. Co. *v.* Johnson (42 Ala. 242), Evid., 230.
Alabama & M. R. R. Co. *v.* Sanford (36 Ala. 703), Evid., 180, 184, 240; Parties, 2; Witn., 13.
Alabama & T. R. R. Co. *v.* Burns (43 Ala. 169), Proc., 27.
Alabama & T. R. R. Co. *v.* Harris (25 Ala. 232), Subscr., 76.
Alabama & T. R. R. Co. *v.* Kidd (29 Ala. 221), Agency, 1, 2, 108; Evid., 185.
Alabama & T. R. R. Co. *v.* Kidd (35 Ala. 209), Car. of M., 353; Custom, 3.
Alabama & T. R. R. Co. *v.* Nabors (37 Ala. 489), Evid., 136.
Alabama & T. R. R. Co. *v.* Oaks (37 Ala. 694), Witn., 9.
Alabama & V. R. Co. *v.* Bolding (69 Miss. 255, 13 So. Rep. 844), Proc., 32, 48.
Alabama & V. R. Co. *v.* Brennan (69 Miss. 103, 10 So. Rep. 451), Tax., 268.
Alabama & V. R. Co. *v.* Brooks (65 Miss. 168, 13 So. Rep. 847), Libel & S., 7, 10.
Alabama & V. R. Co. *v.* Davis (69 Miss. 444, 13 So. Rep. 693), Cross., Inj. at, 323; Imp. Neg., 15; New Tr., 84.
Alabama & V. R. Co. *v.* Hanes (69 Miss. 160, 13 So. Rep. 246), Dam., 75; Pl., 135.
Alabama & V. R. Co. *v.* Phillips (70 Miss. 14, 11 So. Rep. 602), Cross., Inj. at, 351; Negl., 28; Trial, 119.
Alabama & V. R. Co. *v.* Purnell (69 Miss. 652, 13 So. Rep. 472), Car. of P., 635.
Alabama & V. R. Co. *v.* Stacey (68 Miss. 463, 9 So. Rep. 349), Car. of P., 239, 284.
Alabama & V. R. Co. *v.* Summers (68 Miss. 566, 10 So. Rep. 63), Fly. Switch, 1; Licensees, Inj. to, 29.
Alabama G. S. R. Co. *v.* Arnold (30 Am. & Eng. R. Cas. 546, 80 Ala. 600, 2 So. Rep. 337), Car. of P., 636; Contrib. Neg., 82; Evid., 169; Pl., 149; Stat. & D., 114, 140.
Alabama G. S. R. Co. *v.* Arnold (35 Am. & Eng. R. Cas. 466, 84 Ala. 159, 4 So. Rep. 359, 5 Am. St. Rep. 354), Dam., 19, 27, 28, 34; Negl., 33; Stat. & D., 103, 143.
Alabama G. S. R. Co. *v.* Carmichael (44 Am. & Eng. R. Cas. 286, 90 Ala. 19, 8 So. Rep. 87), Car. of P., 261.
Alabama G. S. R. Co. *v.* Carroll (53 Am. & Eng. R. Cas. 556, 97 Ala. 126, 11 So. Rep. 803), Employés, Inj. to, 499; Fel. Serv., 1, 17, 166, 222, 223.
Alabama G. S. R. Co. *v.* Chapman (31 Am. & Eng. R. Cas. 394, 80 Ala. 615, 2 So. Rep. 738), Animals, 67; Negl., 49; Tresp., Inj. to, 99.
Alabama G. S. R. Co. *v.* Chapman (83 Ala. 453, 3 So. Rep. 813; former appeal 80 Ala. 615), Pl., 149.
Alabama G. S. R. Co. *v.* Christian (82 Ala. 307, 1 So. Rep. 121), Animals, 607.
Alabama G. S. R. Co. *v.* Chumley (92 Ala. 317, 9 So. Rep. 286), Attach., 54.
Alabama G. S. R. Co. *v.* Cureton (68 Ga. 824), Charges, 10.
Alabama G. S. R. Co. *v.* Frazier (93 Ala. 45, 9 So. Rep. 303), Dam., 37, 86; Eject. Pass., 91, 115, 120; Evid., 173; Pl., 51; Witn., 100.
Alabama G. S. R. Co. *v.* Fulghum (87 Ga. 263, 13 S. E. Rep. 649), For. Corp., 20; Jurisd., 6.
Alabama G. S. R. Co. *v.* Gilbert (71 Ga. 591), Em. Dom., 66, 94, 147.
Alabama G. S. R. Co. *v.* Grabfelder (83 Ala. 200, 3 So. Rep. 432), Car. of M., 355, 737.
Alabama G. S. R. Co. *v.* Hawk (18 Am. & Eng. R. Cas. 194, 72 Ala. 112, 47 Am. Rep. 403), Car. of P., 199, 479; Evid., 175; Lim. of Ac., 12.
Alabama G. S. R. Co. *v.* Heddleston (31 Am. & Eng. R. Cas. 116, 82 Ala. 218, 3 So. Rep. 53), Eject. Pass., 78; Pl., 33.
Alabama G. S. R. Co. *v.* Hill (76 Ala. 303), Evid., 203; Superint., 1.
Alabama G. S. R. Co. *v.* Hill (44 Am. & Eng. R. Cas. 441, 90 Ala. 71, 8 So. Rep. 90), Car. of P., 637; Derailm., 6; Evid., 201; Negl., 3; Phys. Exam., 1.
Alabama G. S. R. Co. *v.* Hill (47 Am. & Eng. R. Cas. 500, 93 Ala. 514, 9 So. Rep.

722), App., 77; Car. of P., 553, 595, 637, 638; Dam., 87, 88; Derailm., 7; Evid., 92, 144; Phys. Exam., 5; Pl., 121; Witn., 164.
Alabama G. S. R. Co. *v.* Jones (15 Am. & Eng. R. Cas. 549, 71 Ala. 487), Animals, 51, 243, 561; Negl., 16, 23, 75.
Alabama G. S. R. Co. *v.* Killian (69 Ala. 277), Animals, 308, 311; Lim. of Ac., 61.
Alabama G. S. R. Co. *v.* Little (12 Am. & Eng. R. Cas. 37, 71 Ala. 611), Bills of L., 64, 85; Car. of M., 178, 461; Lim. of Liab., 3, 28, 40.
Alabama G. S. R. Co. *v.* McAlpine (15 Am. & Eng. R. Cas. 544, 71 Ala. 545), Animals, 48, 65, 243, 263, 279.
Alabama G. S. R. Co. *v.* McAlpine (22 Am. & Eng. R. Cas. 602, 75 Ala. 113), Animals, 51, 193, 194, 480, 513, 591; Negl., 9.
Alabama G. S. R. Co. *v.* McAlpine (80 Ala. 73), Animals, 516; Trial, 181.
Alabama G. S. R. Co. *v.* Moody (45 Am. & Eng. R. Cas. 524, 90 Ala. 46, 8 So. Rep. 57), Animals, 493.
Alabama G. S. R. Co. *v.* Moody (92 Ala. 279, 9 So. Rep. 238), Animals, 392, 567; Witn., 118.
Alabama G. S. R. Co. *v.* Mt. Vernon Co. (35 Am. & Eng. R. Cas. 657, 84 Ala. 173, 4 So. Rep. 356), Bills of L., 113; Car. of M., 586, 627; Evid., 151.
Alabama G. S. R. Co. *v.* Powers (19 Am. & Eng. R. Cas. 502, 73 Ala. 244), Animals, 57, 64, 562; New Tr., 98.
Alabama G. S. R. Co. *v.* Roebuck (23 Am. & Eng. R. Cas. 176, 76 Ala. 277), Animals, 308, 570, 577; Evid., 52.
Alabama G. S. R. Co. *v.* Sellers (93 Ala. 9, 9 So. Rep. 375), Car. of P., 603, 624, 636; Dam., 33; Pl., 120.
Alabama G. S. R. Co. *v.* Smith (81 Ala. 229, 1 So. Rep. 723), Lim. of Ac., 13.
Alabama G. S. R. Co. *v.* Smith (35 Am. & Eng. R. Cas. 150, 85 Ala. 208, 3 So. Rep. 795), Animals, 52.
Alabama G. S. R. Co. *v.* South & N. Ala. R. Co. (84 Ala. 570, 3 So. Rep. 286, 5 Am. St. Rep. 401), Contr., 105; Cross. Rys., 1, 2, 3.
Alabama G. S. R. Co. *v.* Tapia (94 Ala. 226, 10 So. Rep. 236), Eject. Pass., 103, 106, 120; Pl., 116; Witn., 94.
Alabama G. S. R. Co. *v.* Thomas (32 Am. & Eng. R. Cas. 464, 83 Ala. 343, 3 So. Rep. 802), Car. of L. S., 78, 101, 103, 150.
Alabama G. S. R. Co. *v.* Thomas (89 Ala. 294, 7 So. Rep. 762), Bills of L., 35; Car. of L. S., 103; Car. of M., 25, 455, 558, 560, 623; Jurisd., 4; Pl., 152; Words & Ph., 7.
Alabama G. S. R. Co. *v.* United States (25 Ct. of Cl., 30), Car. of Mails, 1, 2, 9, 16.
Alabama G. S. R. Co. *v.* Wilkinson (77 Ga. 75), Car. of P., 643.
Alabama G. S. R. Co. *v.* Yarbrough (83 Ala. 238, 3 Am. St. Rep. 715, 3 So. Rep. 447), Car. of P., 93, 350, 356; Evid., 28; Tresp., Inj. to, 13; Witn., 106.
Alabama Midland R. Co. *v.* Brown (98 Ala. 647, 13 So. Rep. 70), Evid., 184.
Alabama Midland R. Co. *v.* Coskry (92 Ala. 254, 9 So. Rep. 202), Evid., 151; Sts. & H., 212, 271.
Alabama Midland R. Co. *v.* Newton (94 Ala. 443, 10 So. Rep. 89), Em. Dom., 848, 887.
Alabama Midland R. Co. *v.* Williams (92 Ala. 277, 9 So. Rep. 203), Sts. & H., 157.
Alabama Nat. Bank *v.* Mobile & O. R. Co. (42 Mo. App. 284), Bills of L., 115.
Alabama, N. O., T. & P. J. R. Co. In re ([1891] 1 Ch. 213), Reorg., 19.
Alabama S. R. Nav. Co. *v.* Georgia Pac. R. Co. (87 Ala. 154, 6 So. Rep. 73), Nuis., 31.
Alair *v.* Northern Pac. R. Co. (55 Am. & Eng. R. Cas. 357, 53 Minn. 160, 54 N. W. Rep. 1072), Car. of L. S., 90.
Albachten *v.* Chicago, St. P. & K. C. R. Co. (40 Minn. 378, 42 N. W. Rep. 86), App., 1.
Albany *v.* Savannah, F. & W. R. Co. (71 Ga. 158), Tax., 13.
Albany *v.* Watervliet T. & R. Co. (108 N. Y. 14, 13 N. Y. S. R. 525, 15 N. E. Rep. 370, 11 Cent. Rep. 85; affirming 45 Hun 442, 12 N. Y. S. R. 443), St. Rys., 172.
Albany *v.* Watervliet T. & R. Co. (27 N. Y. Supp. 848, 57 N. Y. S. R. 453), Elec. Rys., 23.
Albany & S. R. Co. *v.* Dayton (10 Abb. Pr. N. S. (N. Y.) 182), Em. Dom., 792, 810, 884.
Albany & S. R. Co. *v.* Osborn (12 Barb. (N. Y.) 223), Tax., 276.
Albany & W. S. R. Co. *v.* Canaan (16 Barb. (N. Y.) 244), Tax., 276.
Albany Northern R. Co. *v.* Brownell (24 N. Y. 345), Cross. St. & H., 54; Stat., 6; Sts. & H., 25, 93.
Albany Northern R. Co. *v.* Cramer (7 How. Pr. (N. Y.) 164), Em. Dom., 500, 813.
Albany Northern R. Co. *v.* Lansing (16 Barb. (N. Y.) 68), Em. Dom., 512, 668.
Albert *v.* Bleecker St., etc., R. Co. (2 Daly (N. Y.) 389), St. Rys., 458, 463, 501.
Albert *v.* Gulf, C. & S. F. R. Co. (2 Tex. Civ. App. 664, 21 S. W. Rep. 779), Estop., 13; Evid., 164; Sts. & H., 5; Witn., 8.
Albert *v.* Northern C. R. Co. (98 Pa. St. 316), Fires, 221, 233, 280.
Albert *v.* Sweet (42 Am. & Eng. R. Cas. 216, 116 N. Y. 363, 22 N. E. Rep. 762, 26 N. Y. S. R. 738; affirming 3 N. Y. S. R. 738), Collis., 29; Witn., 179.
Albert R. Co., Ex parte (19 New Brun. 48), Em. Dom., 1232.
Albert R. Co. *v.* Peck (26 New Brun. 191), Att'ys, 3.
Alberti *v.* New York, L. E. & W. R. Co. (41 Am. & Eng. R. Cas. 201, 118 N. Y. 77, 23 N. E. Rep. 35, 27 N. Y. S. R. 865, 6 L. R. A. 765; affirming 43 Hun 421), Evid., 43, 236; Witn., 93, 168.
Albertson *v.* Keokuk & D. M. R. Co. (48 Iowa 292), Children, Inj. to, 134.
Albion River R. Co. *v.* Hesser (44 Am. & Eng. R. Cas. 125, 84 Cal. 435, 24 Pac. Rep. 288), Em. Dom., 657; Fixt., 5.
Albitz *v.* Minneapolis & P. R. Co. (40 Minn. 476, 42 N. W. Rep. 394), Right of W., 5.
Albright *v.* Penn (14 Tex. 290), Ferries, 10.
Alcorn *v.* Chicago & A. R. Co. (Mo.) (48

Am. & Eng. R. Cas. 138, 14 S. W. Rep. 943), Evid., 79, 84; Pl., 89.
Alcorn *v.* Chicago & A. R. Co. (53 Am. & Eng. R. Cas. 87, 108 Mo. 81, 18 S. W. Rep. 188), App., 68; Employés, Inj. to, 25, 99, 297, 550, 738; Evid., 87.
Alden *v.* Boston, H. & E. R. Co. (1 Fed. Cas. 328, 5 Bankr. Reg. 230), Receiv., 43.
Alden *v.* New York C. R. Co. (26 N. Y. 102), Car. of P., 184, 195.
Alden *v.* Pearson (3 Gray (Mass.) 342), Car. of M., 113, 176, 705.
Alderman *v.* Eastern R. Co. (115 Mass. 233), Car. of M., 651.
Aldermen, etc., *v.* Finley (10 Ark. 423), Pl., 45.
Aldham *v.* Brown (7 El. & Bl. 164, 3 Jur. N. S. 158; affirmed on appeal in 6 Jur. N. S. 41, 2 El. & El. 398, 29 L. J. Q. B. 33), Incorp., 6.
Aldrich *v.* Boston & W. R. Co. (100 Mass. 31), Car. of M., 367.
Aldrich *v.* Cheshire R. Co. (21 N. H. 359), Em. Dom., 867, 1000.
Aldrich *v.* Concord & M. R. Co. (N. H.) (58 Am. & Eng. R. Cas. 611), Evid., 87.
Aldrich *v.* Drury (8 R. I. 554), Constr. Rys., 10.
Aldrich *v.* Mercantile M. A. Assoc. (149 Mass. 457, 21 N. E. Rep. 873), Relief Assoc., 1.
Aldridge *v.* Great Western R. Co. (15 C. B. N. S. 582, 33 L. J. C. P. 161), Car. of M., 674, 442; Lim. of Liab., 4.
Aldridge *v.* Great Western R. Co. (4 Scott N. R. 156, 1 D., N. S. 247, 3 M. & G. 515), Fires, 317.
Aldridge *v.* Tuscumbia, C. & D. R. Co. (2 Stew. & P. (Ala.) 199), Em. Dom., 2, 5, 22, 180.
Alexander *v.* Atlantic, T. & O. R. Co. (67 N. Car. 198, 2 Am. Ry. Rep. 181), Bonds, 54; Paym., 2.
Alexander *v.* Central R. Co. (3 Dill. (U. S.) 487), Mort., 163.
Alexander *v.* Chicago, M. & St. P. R. Co. (41 Minn. 515, 43 N. W. Rep. 481), Animals, 547.
Alexander *v.* Crystal Palace R. Co. (30 Beav. 556, 8 Jur. N. S. 833, 31 L. J. Ch. 500), Em. Dom., 1101.
Alexander *v.* Grand Ave. R. Co. (54 Mo. App. 66), Contr., 84.
Alexander *v.* Hannibal & St. J. R. Co. (76 Mo. 494), Animals, 65, 445.
Alexander *v.* Louisville & N. R. Co. (25 Am. & Eng. R. Cas. 458, 83 Ky. 589), Car. of P., 131; Employés, Inj. to, 25, 306, 454; Fly. Switch, 2.
Alexander *v.* McDowell County Com'rs (70 N. Car. 208), Mun. Aid., 22, 339.
Alexander *v.* Missouri Pac. R. Co. (37 Mo. App. 609), Trial, 60.
Alexander *v.* North-Eastern R. Co. (11 Jur. N. S. 619, 34 L. J. Q. B. 152, 6 B. & S. 340, 13 W. R. 651), Libel & S., 2.
Alexander *v.* Pennsylvania Co. (48 Ohio St. 623, 30 N. E. Rep. 69), Fel. Serv., 164; Trial, 115.
Alexander *v.* Richmond & D. R. Co. (112 N. Car. 720, 16 S. E. Rep. 896), Contrib. Neg., 120; Cross., Inj. at, 275, 298, 351; Negl., 114; Sts. & H., 417.
Alexander *v.* Rochester City & B. R. Co. (48 Am. & Eng. R. Cas. 46, 128 N. Y. 13, 27 N. E. Rep. 950, 38 N. Y. S. R. 254; reversing 35 N. Y. S. R. 701, 12 N. Y. Supp. 685), St. Rys., 434.
Alexander *v.* Searcy, 36 Am. & Eng. R. Cas. 239 (81 Ga. 536, 8 S. E. Rep. 630), Estop., 26; Mort., 191.
Alexander *v.* Southern Exp. Co. (45 Ga. 24), Tax., 15.
Alexander *v.* Toronto & N. R. Co. (33 U. C. Q. B. 474), Car. of P., 339.
Alexander *v.* Toronto & N. R. Co. (35 U. C. Q. B. 453), Car. of P., 339.
Alexander Ave., In re (17 N. Y. Supp. 933, 63 Hun 630, mem., 44 N. Y. S. R. 546), Sts. & H., 25, 352.
Alexandria & F. R. Co. *v.* Alexandria & W. R. Co. (10 Am. & Eng. R. Cas. 23, 75 Va. 780), Em. Dom., 1, 57, 84, 88, 105, 249.
Alexandria & F. R. Co. *v.* Faunce (31 Gratt. (Va.) 761), Em. Dom., 988.
Alexandria & F. R. Co. *v.* Graham (31 Gratt. (Va.) 769), Deeds of Tr., 5.
Alexandria & F. R. Co. *v.* Herndon (87 Va. 193, 12 S. E. Rep. 289), Car. of P., 238, 271; Evid., 33; Stat. & D., 61, 76.
Alexandria & W. R. Co. *v.* Chew (27 Gratt. (Va.) 547), Deeds, 34.
Alexandria C., R. & B. Co. *v.* District of Columbia (7 Am. & Eng. R. Cas. 325, 1 Mackey (D. C.) 217), Tax., 1, 78, 145, 194, 253, 346, 351.
Alexandria C., R. & B. Co. *v.* District of Columbia (5 Mackey (D. C.) 376), Tax., 253, 332.
Alexandria, L. & H. R. Co. *v.* United States (26 Ct. of Cl. 327), Claims Against U. S. 14, 15.
Alexandria R. Co. *v.* National Junction R. Co. (1 MacArth. (D. C.) 203), Pl., 19.
Alfonso *v.* Philadelphia & R. R. Co. (8 Phila. (Pa.) 86), Stock, 32.
Alford *v.* Barnum (45 Cal. 482), Land Grants, 48.
Alford *v.* Chicago, R. I. & P. R. Co. (2 Int. Com. Rep. 771, 3 Int. Com. Com. 519), Int. Com., 102; Leases, 66.
Alfred *v.* Kankakee & S. W. R. Co. (92 Ill. 609), Em. Dom., 489.
Alger *v.* Mississippi & M. R. Co. (10 Iowa 268), Animals, 48, 248.
Alger *v.* New York El. R. Co. (28 J. & S. 1, 40 N. Y. S. R. 229, 15 N. Y. Supp. 960), Trial, 74, 86.
Allan *v.* Great Western R. Co. (33 U. C. Q. B. 483), Stat., 43.
Allard *v.* Chicago & N. W. R. Co. (73 Wis. 165, 40 N. W. Rep. 685), Fires, 217, 240.
Allard *v.* Gaston (70 Iowa 731, 29 N. W. Rep. 752), Mun. Aid, 118.
Allday *v.* Great Western R. Co. (5 B. & S. 903, 11 Jur. N. S. 12, 34 L. J. Q. B. 5, 13 W. R. 43, 11 L. T. 267), Car. of L. S. 21, 29, 93.
Alldred *v.* West Metropolitan Trans. Co. ([1891] 2 Q. B. 398), Tramw., 7.

Allegheny *v.* Campbell (107 Pa. St. 530), Dam., 106; Wharves, 4.
Allegheny *v.* Gibson (90 Pa. St. 397), Strikes, 8.
Allegheny City *v.* Western Pa. R. Co. (138 Pa. St. 375, 21 Atl. Rep. 763), Sts. & H., 355.
Allegheny County *v.* Cleveland & P. R. Co. (51 Pa. St. 228), Charters, 15; Citizens, 2; Fed. Cts., 3.
Allegheny Valley R. Co. *v.* Colwell (Pa.) (15 Atl. Rep. 927), Em. Dom., 1018.
Allegheny Valley R. Co. *v.* McLain (1 Am. & Eng. R. Cas. 464, 91 Pa. St. 442), Eject. Pass., 72.
Allegheny Valley R. Co. *v.* Pittsburg Junction R. Co. (122 Pa. St. 511, 6 Atl. Rep. 564), Cross. Rys., 18.
Allegheny Valley R. Co. *v.* Steele (1 Pennyp. (Pa.) 312), Agency, 45; Dam., 52; Trial, 106.
Allemong *v.* Simmons (47 Am. & Eng. R. Cas. 400, 124 Ind. 199, 23 N. E. Rep. 768), Direct., 41; Estop., 7.
Allen *v.* Androscoggin R. Co. (60 Me. 494), Em. Dom., 549.
Allen *v.* Atlanta St. R. Co. (54 Ga. 503), Death, etc., 5, 128.
Allen *v.* Baltimore & O. R. Co. (114 U. S. 311, 5 Sup. Ct. Rep. 925, 962), Tax., 347.
Allen *v.* Burlington, C. R. & N. R. Co. (5 Am. & Eng. R. Cas. 620, 57 Iowa 623, 11 N. W. Rep. 614), Employés, Inj. to, 85; Evid., 89; Witn., 102.
Allen *v.* Burlington, C. R. & N. R. Co. (64 Iowa 94, 19 N. W. Rep. 870), Employés, Inj. to, 85, 553.
Allen *v.* Cape Fear & Y. V. R. R. Co. (35 Am. & Eng. R. Cas. 532, 100 N. Car. 397, 6 S. E. Rep. 105), Discrim., 27; Libel & S., 3.
Allen *v.* Central R. Co. (42 Iowa 683), Evid., 241; Receiv., 125.
Allen *v.* Chicago, M. & St. P. R. Co. (44 Minn. 165, 46 N. W. Rep. 306), New. Tr., 23.
Allen *v.* Dallas & W. R. Co. (3 Woods (U. S.) 316), Bonds, 45; Mort., 120; Receiv., 11, 13, 23, 164.
Allen *v.* Dry Dock, E. B. & B. R. Co. (19 N. Y. S. R. 114, 2 N. Y. Supp. 738), St. Rys. 346; Witn., 40.
Allen *v.* Galveston City R. Co. (79 Tex. 631, 15 S. W. Rep. 498), St. Rys., 339.
Allen *v.* London & S. W. R. Co. (L. R. 6 Q. B. 65, 40 L. J. Q. B. 55, 11 Cox. C. C. 621, 23 L. T. N. S. 612, 19 W. R. 127), Agency, 95; False Imp., 12.
Allen *v.* Louisiana (2 Am. & Eng. R. Cas. 599, 103 U. S. 80), Mun. Aid, 169, 209.
Allen *v.* Louisville, N. A. & C. R. Co. (1 Int. Com. Rep. 621, 1 Int. Com. Com. 199), Int. Com., 52, 109.
Allen *v.* Maine C. R. Co. (30 Am. & Eng. R. Cas. 122, 79 Me. 327, 9 Atl. Rep. 895, 4 N. Eng. Rep. 543), Car. of M., 494, 504.
Allen *v.* Maine C. R. Co. (82 Me. 111, 19 Atl. Rep. 105), Contrib. Neg. 4, 5; Cross., Inj. at, 242.
Allen *v.* Manhattan R. Co. (28 J. & S. 230, 42 N. Y. S. R. 227, 17 N. Y. Supp. 187; affirmed in 137 N. Y. 561, 33 N. E. Rep. 338), Husb. & W., 23; New Tr., 33, 53.
Allen *v.* Mayor, etc., of Jersey City (49 Am. & Eng. R. Cas. 289, 53 N. J. L. 522, 22 Atl. Rep. 257), Charters, 65; Sts. & H., 52, 301, 303.
Allen *v.* Montgomery R. Co. (11 Ala. 437), Assign. for Cred., 4; Mort., 1, 65, 264; Pl., 83; Stock., 31; Stockh., 51, 54.
Allen *v.* New Haven & N. Co. (10 Am. & Eng. R. Cas. 298, 49 Conn. 243), Pl., 48.
Allen *v.* New Haven & N. Co. (14 Am. & Eng. R. Cas. 615, 50 Conn. 215), Cross., Inj. at, 332; Sts. & H., 409.
Allen *v.* New Jersey Southern R. Co. (49 How. Pr. (N. Y.) 14), Actions, 3; Dissol., 5; Parties, 11.
Allen *v.* Pennsylvania R. Co. (Pa.) (12 Atl. Rep. 493), Cross., Inj. at, 313.
Allen *v.* St. Louis, I. M. & S. R. Co. (72 Mo. 386), Trover, 15.
Allen *v.* Sewall (6 Wend. (N. Y.) 335; reversing 2 Wend. 327), Car. of M., 6.
Allen *v.* South Boston R. Co. (150 Mass. 200, 5 L. R. A. 716, 22 N. E. Rep. 917), Officers, 15; Stock, 13.
Allen *v.* Sullivan R. Co. (32 N. H. 446), Contr., 12.
Allen *v.* Texas & P. R. Co. (24 Am. & Eng. R. Cas. 18, 25 Fed. Rep. 513), Rem. of C., 7.
Allen *v.* Union Pac. R. Co. (7 Utah 239, 26 Pac. Rep. 297), Employés, Inj. to, 99, 646; Witn., 152.
Allen *v.* Utica, I. & E. R. Co. (15 Hun (N. Y.) 80), Em. Dom., 864.
Allen *v.* Wabash, St. L. & P. R. Co. (84 Mo. 646), Em. Dom., 983; Estop., 22.
Allen *v.* Wilmington & W. R. Co. (102 N. Car. 381, 9 S. E. Rep. 4), Em. Dom., 49, 274, 984; Eq., 23; Dam., 54; Pl., 179.
Allen *v.* Wilmington & W. R. Co. (106 N. Car. 515, 525, 11 S. E. Rep. 576, 826; adhering to 102 N. Car. 381, 9 S. E. Rep. 4), Estop., 25.
Allender *v.* Chicago, R. I. & P. R. Co. (37 Iowa 264, 8 Am. Ry. Rep. 115), Car. of P., 12, 14, 24; Contrib. Neg., 19, 21, 82; Negl., 62, 102.
Allender *v.* Chicago, R. I. & P. R. Co. (43 Iowa 276, 14 Am. Ry. Rep. 443), Car. of P., 213, 218, 368.
Allentown & B. Rapid Transit Co. (1 Pa. Dist. 430), Stat., 63.
Aller *v.* Cameron (3 Dill. (U. S.) 198), Mun. Aid, 359.
Allerton *v.* Boston & M. R. Co. (34 Am. & Eng. R. Cas. 563, 146 Mass. 241, 5 N. Eng. Rep. 825, 15 N. E. Rep. 621), Car. of P., 30; Cross., Inj. at, 326, 330; Death, etc., 136.
Allerton *v.* Chicago (9 Biss. (U. S.) 552, 6 Fed. Rep. 555), St. Rys., 287, 289.
Alley *v.* Adams County Sup'rs (76 Ill. 101), Mun. Aid, 235.
Allgood *v.* Merrybent & D. R. Co. (L. R. 33 Ch. D. 571), Em. Dom., 1209.
Allhands *v.* People (82 Ill. 234), Mand., 18.
Allibone *v.* Texas & P. R. Co. (2 Tex. App. (Civ. Cas.) 52), Fires, 133, 294, 303.
Alling *v.* Boston & A. R. Co. (126 Mass. 121), Bagg., 42.

Allison *v.* Chicago & N. W. R. Co. (42 Iowa 274), Abate, 3; App., 117; Car. of P., 560; Evid., 90; Trial, 39.
Allison *v.* Louisville, H. C. & W. R. Co. (9 Bush (Ky.) 247), Mun. Aid, 54, 299.
Allison *v.* Louisville, H. C. & W. R. Co. (10 Bush (Ky.) 1), Mun. Aid, 33.
Allison *v.* State (42 Ind. 354), Crim. L., 35.
Allison *v.* Western N. C. R. Co. (64 N. Car. 382), Agency, 84.
Allman *v.* Havanna, R. & E. R. Co. (88 Ill. 521, 21 Am. Ry. Rep. 347), Subscr., 50.
Allport *v.* Helena, B. V. & B. R. Co. (12 Mont. 279, 29 Pac. Rep. 966), Em. Dom., 546.
Allyn *v.* Boston & A. R. Co. (105 Mass. 77, 2 Am. Ry. Rep. 399), Cross., Inj. at, 285.
Allyn *v.* Providence, W. & B. R. Co. (4 R. I. 457), Location, etc., 14.
Almy *v.* California (24 How. (U. S.) 169), Int. Com., 186.
Alpern *v.* Churchill (53 Mich. 607, 19 N. W. Rep. 549), Evid., 86; Negl., 97.
Alsop *v.* Ohio & M. R. Co. (19 Ill. App. 292), Animals, 127.
Alsop *v.* Southern Exp. Co. (40 Am. & Eng. R. Cas. 1, 104 N. Car. 278, 6 L. R. A. 271, 41 Alb. L. J. 167, 10 S. E. Rep. 297), Exp. Cos., 7, 25, 43.
Altee *v.* South Carolina R. Co. (21 So. Car. 550, 53 Am. Rep. 699, n.), Employés, Inj. to), 59; Fel. Serv., 477.
Althorf *v.* Wolfe (22 N. Y. 355; affirming 2 Hilt. 344), Death, etc., 379.
Alton *v.* Hamilton & T. R. Co. (13 U. C. Q. B. 595), Flood. Lds., 69.
Alton *v.* Midland R. Co. (19 C. B. N. S. 213, 11 Jur. N. S. 672, 34 L. J. C. P. 292, 13 W. R. 918, 12 L. T. 703), Car. of P., 531; Parties, 2.
Alton & S. R. Co. *v.* Baugh (14 Ill. 211), Em. Dom., 142; Fences, 16.
Alton & S. R. Co. *v.* Carpenter (14 Ill. 190), Em. Dom., 732.
Alton & U. A. Horse R. Co. v. Deitz (50 Ill. 210), St. Rys. 222.
Alton, M. C. & N. A. R. Co. *v.* Northcott (15 Ill. 49), Constr. Rys., 112.
Altreuter *v.* Hudson River R. Co. (2 E. D. Smith (N. Y.) 151), Negl. 32; Sts. & H., 382.
Altrincham Union *v.* Cheshire Lines Committee (15 Q. B. D. 597, 5 Ry. & C. T. Cas. x.), Tax., 373.
Alvis *v.* Whitney (43 Ind. 83), Mun. Aid. 411.
Alvord *v.* Syracuse Sav. Bank (98 N. Y. 599; affirming 34 Hun 143), Mun. Aid., 344.
Amato *v.* Northern Pac. R. Co. (46 Fed. Rep. 561; affirmed in 49 Fed. Rep. 881; which is affirmed in 144 U. S. 465, 12 Sup. Ct. Rep. 740). Employés, Inj. to, 324, 580.
Ambergate N. & B. & E. J. R. Co. *v.* Midland R. Co. (2 El. & Bl. 793, 18 Jur. 243, 23 L. J. Q. B. 17), Distress, 1; Leases, 126.
Ambergate, N. & B. & E. J. R. Co. *v.* Mitchell (4 Ex. 540, 6 Railw. Cas. 235, 19 L. J. Ex. 89), Subscr., 54, 59, 61.
Ambergate, N. & B. & E. J. R. Co. *v.* Norcliffe (6 Ex. 629), Subscr., 59.
Ambler's Appeal (Pa.). (4 Atl. Rep. 187), Farm Cross., 1.
American & P. Tel. Co. *v.* Union Pac. R. Co. (1 McCrary (U. S.) 541, 1 Fed. Rep. 745), Ult. Vir., 25.
American Bank Note Co. *v.* Metropolitan El. R. Co. (45 N. Y. S. R. 322, 63 Hun 506, 18 N. Y. Supp. 532), Elev. Rys., 158; Judgm., 17.
American Bank Note Co. *v.* Metropolitan El. R. Co. (49 N. Y. S. R. 375, 66 Hun 627, mem., 20 N. Y. Supp. 819), Estop., 7.
American Bank Note Co. *v.* New York El. R. Co. (50 Am. & Eng. R. Cas. 292, 129 N. Y. 252, 29 N. E. Rep. 302, 41 N. Y. S. R. 531; modifying 27 J. & S. 175, 37 N. Y. S. R. 885, 13 N. Y. Supp. 626), Adv. Poss., 2, 4, 13; Elev. Rys., 56, 110, 160, 162, 184; Em. Dom., 726.
American Bank Note Co. *v.* New York El. R. Co. (27 J. & S. 175, 13 N. Y. Supp. 626, 37 N. Y. S. R. 885; modified in 129 N. Y. 252, 29 N. E. Rep. 302, 41 N. Y. S. R. 531), Elev. Rys., 51, 56, 85, 152.
American Cable R. Co. *v.* Mayor, etc., of N. Y. (56 Fed. Rep. 149), Pat. for Inv. 27.
American Cannel Coal Co. *v.* Huntington, T. C. & C. R. Co. (51 Am. & Eng. R. Cas. 653, 130 Ind. 98, 29 N. E. Rep. 566), Em. Dom., 476, 482, 515.
American C. R. Co. *v.* Miles (52 Ill. 174), Direct., 29; Reorg., 13; Usury, 2.
American Coal Co. *v.* Consolidation Coal Co. (46 Md. 15), Charges, 8, 46; Charters, 44; Cumberland & P. R. Co., 1.
American Constr. Co. *v.* Jacksonville, T. & K. W. R. Co. (148 U. S. 372, 13 Sup. Ct. Rep. 758), Fed. Cts., 21.
American Constr. Co. *v.* Jacksonville, T. & K. W. R. Co. (52 Fed. Rep. 937), Contempt, 3, 11; Receiv., 39.
American Contract Co. *v.* Cross (8 Bush (Ky.) 472), Bagg., 44.
American D. & I. Co. *v.* Trustees, etc. (35 N. J. Eq. 181), Mort., 311.
American Emigrant Co. *v.* Chicago, R. I. & P. R. Co. (47 Iowa 515), Land Grants, 74, 131.
American Emigrant Co. *v.* Fuller (83 Iowa 599, 50 N. W. Rep. 48), Land Grants, 131.
American Emigrant Co. *v.* Iowa R. Land Co. (52 Iowa 323, 3 N. W. Rep. 88), Land Grants, 131.
American Exp. Co. *v.* Baldwin (26 Ill. 504), Exp. Cos., 37, 39.
American Exp. Co. *v.* Brunswick (4 Ill. App. 606), Exp. Cos., 90.
American Exp. Co. *v.* Fletcher (25 Ind. 492), Exp. Cos., 48.
American Exp. Co. *v.* Greenhalgh (80 Ill. 68), Exp. Cos., 81.
American Exp. Co. *v.* Haggard (37 Ill. 465), Exp. Cos., 81, 84; Pl., 47.
American Exp. Co. *v.* Haire (21 Ind. 4), Exp. Cos., 19.
American Exp. Co. *v.* Hockett (30 Ind. 250), Car. of M., 256; Exp. Cos., 22, 59.
American Exp. Co. *v.* Lesem (39 Ill. 312), Exp. Cos., 15, 52, 53, 83.
American Exp. Co. *v.* Parsons (44 Ill. 312), Exp. Cos., 21.

American Exp. Co. *v.* Patterson (73 Ind. 430), Exp. Cos., 15.
American Exp. Co. *v.* People (133 Ill. 649, 24 N. E. Rep. 758, 9 L. R. A. 138, 31 Cent. L. J. 271), Exp. Cos., 6.
American Exp. Co. *v.* Perkins (42 Ill. 458), Exp. Cos., 27.
American Exp. Co. *v.* Piatt (51 Minn. 568, 53 N. W. Rep. 877), App., 135.
American Exp. Co. *v.* Sands (55 Pa. St. 140), Car. of M., 466.
American Exp. Co. *v.* Second Nat. Bank (69 Pa. St. 394), Car. of M., 588, 677.
American Exp. Co. *v.* Smith (33 Ohio St. 511), Car. of M., 26, 129, 135, 162; Exp. Cos., 31.
American Exp. Co. *v.* Spellman (90 Ill. 455), Evid., 1; Exp. Cos., 61.
American Exp. Co. *v.* Stack (29 Ind. 27), Exp. Cos., 48.
American Exp. Co. *v.* Wettstein (28 Ill. App. 96), Exp. Cos., 52.
American Graphic Co. *v.* Minneapolis, St. P. & S. S. M. R. Co. (44 Minn. 93, 46 N. W. Rep. 143), Agency, 11.
American Life Ins. Co. *v.* Bruce (12 Am. & Eng. R. Cas. 610, 105 U. S. 328), Mun. Aid, 382.
American L. S. & M. Transp. Co. *v.* Street S. C. Line (46 Fed. Rep. 782), Pat. for Inv., 39.
American L. & T. Co. *v.* East & W. R. Co. (36 Am. & Eng. R. Cas. 276, 37 Fed. Rep. 242), For. Corp., 12; Lis. Pend., 2.
American L. & T. Co. *v.* East & W. R. Co. (46 Fed. Rep. 101), Mort., 95.
American L. & T. Co. *v.* St. Louis & C. R. Co. (42 Fed. Rep. 819), Bonds, 46.
American L. & T. Co. *v.* Toledo, C. & S. R. Co. (29 Fed. Rep. 416), Mort., 217.
American L. & T. Co. *v.* Toledo, C. & S. R. Co. (47 Fed. Rep. 343), Contr., 81.
American Merchants' Union Exp. Co. *v.* Gilbert (57 Ill. 468), Witn., 50.
American Merchants' Union Exp. Co. *v.* Milk (73 Ill. 224), Exp. Cos., 48; Words & Ph., 7.
American Merchants' Union Exp. Co. *v.* Phillips (29 Mich. 515), Car. of L. S., 153; Exp. Cos., 25, 38.
American Merchants' Union Exp. Co. *v.* Schier (55 Ill. 140), Exp. Cos., 24, 41, 52, 55, 61; Words & Ph., 7.
American Merchants' Union Exp. Co. *v.* Willsie (79 Ill. 92), Exp. Cos., 53.
American Merchants' Union Exp. Co. *v.* Wolf (79 Ill. 430), Exp. Cos., 39, 45, 52, 56.
American P. M. Church *v.* Brooklyn El. R. Co. (12 N. Y. S. R. 500, 46 Hun 530), Elev. Rys., 28, 59; Trial, 2.
American T. & T. Co. *v.* Pearce (71 Md. 535, 18 Atl. Rep. 910), Tel. & T. Lines, 2.
American Transp. Co. *v.* Moore (5 Mich. 368), Lim. of Liab., 41.
American Union Exp. Co. *v.* Robinson (72 Pa. St. 274), Exp. Cos., 45.
American Union Exp. Co. *v.* St. Joseph (66 Mo. 675), Mun. Corp., 6; Tax., 36.
American Union Tel. Co. *v.* Union Pac. R. Co. (1 McCrary (U. S.) 188), Charters, 51; Corp., 9; Ult. Vir., 10, 25.
Americus, P. & L. R. Co. *v.* Luckie (87 Ga. 6, 13 S. E. Rep. 105), Contrib. Neg., 116.
Amerson *v.* Montgomery & M. R. Co. (50 Ala. 497), App., 6.
Ames *v.* Broadway & S. A. R. Co. (24 J. & S. (N. Y.) 3, 4 N. Y. Supp. 803, 24 N. Y. S. R. 818), Children, Inj. to, 144.
Ames *v.* Chicago, S. F. & C. R. Co. (39 Fed. Rep. 881), Rem. of C., 29.
Ames *v.* First Div. St. P. & P. R. Co. (12 Minn. 412 (Gil. 295), Car. of M., 706, 740.
Ames *v.* Kansas (16 Am. & Eng. R. Cas. 522, 111 U. S. 449, 4 Sup. Ct. Rep. 437), Rem. of C., 19.
Ames *v.* Lake Superior & M. R. Co. (21 Minn. 241), Charters, 29; Em. Dom., 448.
Ames *v.* New Orleans, M. & T. R. Co. (2 Woods (U. S.) 206), Bonds, 39; Mort., 304.
Ames *v.* Union County (17 Oreg. 600, 27 Am. & Eng. Corp. Cas. 60, 22 Pac. Rep. 118), Em. Dom., 314.
Ames *v.* Union R. Co. (117 Mass. 541, 6 Am. Ry. Rep. 260), Apprent., 1.
Amestoy *v.* Electric Rapid Transit Co. (95 Cal. 311, 30 Pac. Rep. 550), Contr., 56; Pl., 16.
Amey *v.* Allegheny City (24 How. (U. S.) 364), Mun. Aid, 17.
Amey *v.* Mayor, etc., of Allegheny City (24 How. (U. S.) 364), Mun. Aid., 272, 352.
Amherst & B. R. Co. *v.* Watson (4 Gray (Mass.) 61), Subscr., 187.
Ammerman *v.* Wyoming Canal Co. (40 Pa. St. 256), Bridges, 33, 35, 37.
Amos *v.* Mobile & O. R. Co. (63 Miss. 509), Death, etc., 89.
Amrine *v.* Kansas Pac. R. Co. (7 Kan. 178), Tax., 260.
Amsden *v.* Dubuque & S. C. R. Co. (13 Iowa 132), Pl., 169.
Amsden *v.* Dubuque & S. C. R. Co. (28 Iowa 542), Dam., 62.
Amsden *v.* Dubuque & S. C. R. Co. (32 Iowa 288, 10 Am. Ry. Rep. 9), Judgm., 21.
Amstein *v.* Gardner (16 Am. & Eng. R. Cas. 585, 134 Mass. 4), Animals, 278, 420, 567, 652.
Anchor Line *v.* Dater (68 Ill. 369), Car. of M., 578; Lim. of Liab., 14.
Anchor Line *v.* Knowles (66 Ill. 150), Car. of M., 434.
Anderson *v.* Bennett (38 Am. & Eng. R. Cas. 87, 16 Oreg. 515, 19 Pac. Rep. 765, 8 Am. St. Rep. 311), Employés, Inj. to, 38, 44, 99; Fel. Serv., 1, 3, 73, 89, 211, 212.
Anderson *v.* Canadian Pac. R. Co. (40 Am. & Eng. R. Cas. 624, 17 Ont. 747), Bagg., 98, 119; Lim. of Ac., 39.
Anderson *v.* Chicago, B. & Q. R. Co. (35 Neb. 95, 52 N. W. Rep. 840), Death, etc., 237, 380.
Anderson *v.* Chicago, B. & Q. R. Co. (25 Am. & Eng. R. Cas. 522, 117 Ill. 26, 7 N. E. Rep. 129), Tax., 257.
Anderson *v.* Cincinnati Southern R. Co. (14 Am. & Eng. R. Cas. 275, 30 Am. & Eng. R. Cas. 193, 86 Ky. 44, 5 S. W. Rep.

49, 9 Am. St. Rep. 263), Em. Dom., 371; Rip. Rts., 2; Waters & W., 12, 19, 20.
Anderson *v.* Clark (155 Mass. 368, 29 N. E. Rep. 589), Employés, Inj. to, 208.
Anderson *v.* Com. (18 Gratt. (Va.) 295), Stockh., 47; Tax., 105.
Anderson *v.* Great Western R. Co. (11 U. C. Q. B. 126), Waters & W., 19.
Anderson *v.* Jacksonville, P. & M. R. Co. (2 Woods (U. S.) 628), Exec., 22; Parties, 22.
Anderson *v.* Manhattan R. Co. (49 N. Y. S. R. 233, 1 Misc. 504, 21 N. Y. Supp. 1), Elev. Rys., 216; New Tr., 60.
Anderson *v.* Middle & E. T. C. R. Co. (52 Am. & Eng. R. Cas. 149, 91 Tenn. 44, 17 S. W. Rep. 803), Charters, 11; Incorp., 11; Subscr., 50, 52.
Anderson *v.* Milwaukee & St. P. R. Co. (37 Wis. 321), Fel. Serv., 164.
Anderson *v.* Minneapolis St. R. Co. (43 Am. & Eng. R. Cas. 294, 42 Minn. 490, 44 N. W. Rep. 518), St. Rys., 466.
Anderson *v.* Minnesota & N. W. R. Co. (38 Am. & Eng. R. Cas. 206, 39 Minn. 523, 41 N. W. Rep. 104), Employés, Inj. to, 143, 211, 691, 714.
Anderson *v.* Newcastle & R. R. Co. (12 Ind. 376), Subscr., 162, 172.
Anderson *v.* New Jersey Steamboat Co. (7 Robt. (N. Y.) 611), Fel. Serv., 154.
Anderson *v.* New York & N. E. R. Co. (60 Conn. 293, 22 Atl. Rep. 566), Cross., Inj. at, 21.
Anderson *v.* New York & N. H. R. Co. (1 Fed. Cas. 845, 6 Am. Law Rev. 754), Tickets & F., 104.
Anderson *v.* New York, L. E. & W. R. Co. (25 N. Y. S. R. 158, 53 Hun 633, mem., 2 Silv. Sup. Ct. 9, 6 N. Y. Supp. 182; affirmed in 125 N. Y. 701, mem., 34 N. Y. S. R. 1012), App., 120; Cross., Inj. at, 150, 298.
Anderson *v.* North Eastern R. Co. (4 L. T. 216, 9 W. R. 519), Bagg., 129.
Anderson *v.* Northern R. Co. (25 U. C. C. P. 301), Death, etc., 177.
Anderson *v.* North Pac. Lumber Co. (21 Oreg. 281, 28 Pac. Rep. 5), Negl., 64.
Anderson *v.* Oliver (138 Pa. St. 156, 20 Atl. Rep. 981), Employés, Inj. to, 493.
Anderson *v.* Railroad Co. (12 Phila. (Pa.) 369), Cross., Inj. at, 256.
Anderson *v.* Rochester, L. & N. F. R. Co. (9 How. Pr. (N. Y.) 553), Em. Dom., 128; Injunc., 14; Nuis., 3; Sts. & H., 231.
Anderson *v.* Rome, W. & O. R. Co. (54 N. Y. 334), App., 56; Evid., 202.
Anderson *v.* Santa Anna Tp. (116 U. S. 356, 6 Sup. Ct. Rep. 413), Mun. Aid, 22, 318.
Anderson *v.* Southern Minn. R. Co. (21 Minn. 30), Appear., 5.
Anderson *v.* State (38 Am. & Eng. R. Cas. 263, 27 Tex. App. 177, 11 S. W. Rep. 33), Crim. L., 29.
Anderson *v.* Stewart (76 Wis. 43, 44 N. W. Rep. 1091), Fences, 59.
Anderson *v.* Third Ave. R. Co. (9 Daly (N. Y.) 487), Evid., 241.
Anderson *v.* Toledo, W. & W. R. Co. (32 Iowa 86, 10 Am. Ry. Rep. 16), Bagg., 10.
Anderson *v.* Wabash, St. L. & P. R. Co. (18 Am. & Eng. R. Cas. 377, 65 Iowa, 131, 21 N. W. Rep. 485), Bagg., 107.
Anderson *v.* Wasatch & J. V. R. Co. (2 Utah 518), Fires, 15, 80, 264.
Anderson *v.* Winston (31 Fed. Rep. 528), Employés, Inj. to, 282; Fel. Serv., 308.
Anderson County *v.* Beal (113 U. S. 227, 5 Sup. Ct. Rep. 433), Mun. Aid, 352, 379.
Anderson County *v.* Houston & G. N. R. Co. (52 Tex. 228), Mun. Aid, 50, 402.
Anderson County Com'rs *v.* Paola & F. R. Co. (20 Kan. 534, 20 Am. Ry. Rep. 315; adhering to 16 Kan. 302), Mun. Aid, 397.
Anderson, L. & St. L. R. Co. *v.* Kernodle (54 Ind. 314), Em. Dom., 1004, 1009.
Andre *v.* Chicago & N. W. R. Co. (30 Iowa 107), Fences, 63.
Andreson *v.* Ogden, U. R. & D. Co. (8 Utah 128, 30 Pac. Rep. 305), Contrib. Neg., 75; Fel. Serv., 340; Witn., 121.
Andrew *v.* Chicago & N. W. R. Co. (45 Ill. App. 269), Death, etc., 125; Negl., 89.
Andrew *v.* Nantasket Beach R. Co. (152 Mass. 506, 25 N. E. Rep. 966), Adv. Poss., 2; Em. Dom., 269.
Andrews *v.* Capitol, N. O. St. & S. W. R. Co. (2 Mackey (D. C.) 137), St. Rys., 333, 416.
Andrews *v.* Central R. & B. Co. (45 Am. & Eng. R. Cas. 171, 86 Ga. 192, 12 S. E. Rep. 213), Cross., Inj. at, 309.
Andrews *v.* Chicago, M. & St. P. R. Co. (52 Am. & Eng. R. Cas. 252, 86 Iowa 677, 53 N. W. Rep. 399), Death, etc., 324, 350; Derailm., 6; Negl., 70.
Andrews *v.* Farmers' L. & T. Co. (22 Wis. 288), Em. Dom., 1043.
Andrews *v.* Hart (17 Wis. 297), Evid., 21; Subscr., 22.
Andrews *v.* Hartford & N. H. R. Co. (34 Conn. 57), Death, etc., 101.
Andrews *v.* Mason City & Ft. D. R. Co. (77 Iowa 669, 42 N. W. Rep. 513), Agency, 84; Contrib. Neg., 96; Fright. Teams, 1, 2; Pl., 150.
Andrews *v.* Michigan C. R. Co. (99 Mass. 534), Attach., 9.
Andrews *v.* New York & N. E. R. Co. (60 Conn. 293, 22 Atl. Rep. 566), Cross., Inj. at, 1, 125, 126; Negl., 65.
Andrews *v.* Ohio & M. R. Co. (14 Ind. 169), Evid., 275; Subscr., 67, 145.
Andrews *v.* Runyon (65 Cal. 629, 4 Pac. Rep. 669), Contrib. Neg., 125.
Andrews *v.* St. Louis Tunnel R. Co. (16 Mo. App. 299), Deeds of Tr., 11; Liens, 10, 19.
Andrews *v.* Smith (5 Fed. Rep. 833, 19 Blatchf. (U. S.) 100), Judgm., 26.
Andrews *v.* Worcester, N. & R. R. Co. (159 Mass. 64, 33 N. E. Rep. 1109), Stock., 44.
Andrews Soap Co. *v.* Pittsburgh, C. & St. L. R. Co. (3 Int. Com. Rep. 77, 4 Int. Com. Com. 41), Int. Com., 84.
Andrist *v.* Union Pac. R. Co. (30 Fed. Rep. 345), Car. of P., 128.
Androscoggin & K. R. Co. *v.* Androscog-

gin R. Co. (52 Me. 417), Charters, 95; Connect. L., 2, 5.
Androscoggin & K. R. Co. *v.* Stevens (28 Me. 434), Jurisd., 7.
Androscoggin R. Co. *v.* Auburn Bank (48 Me. 335), Pledge, etc., 3.
Androscoggin R. Co. *v.* Richards (41 Me. 233), Intox'ing L., 4.
Angel *v.* Hume (17 Hun (N. Y.) 374), Mun. Aid, 67, 90, 321.
Angel *v.* Pennsylvania R. Co. (37 N. J. Eq. 92), Pl., 160.
Angel *v.* Pennsylvania R. Co. (17 Am. & Eng. R. Cas. 128, 38 N. J. Eq. 58), Nuis., 15.
Angier *v.* East Tenn., V. & G. R. Co. (20 Am. & Eng. R. Cas. 618, 74 Ga. 634), Rem. of C., 36; Sales of Rds., 10.
Angle *v.* Chicago, St. P., M. & O. R. Co. (151 U. S. 1, 14 Sup. Ct. Rep. 240), Constr. Rys., 45.
Angle *v.* Mississippi & M. R. Co. (9 Iowa 487), Car. of M., 208, 349, 740; Evid., 201.
Angle *v.* Mississippi & M. R. Co. (18 Iowa 555), Agency, 57; Car. of M., 176, 279, 287, 289, 325.
Anglin *v.* Nickle (30 U. C. C. P. 72), Em. Dom., 1223, 1228, 1261, 1265.
Anglo-American P. & P. Co. *v.* Baier (31 Ill. App. 653), Employés, Inj. to, 773.
Annaker *v.* Chicago, R. I. & P. R. Co. (81 Iowa 267, 47 N. W. Rep. 68), Cross., Inj. at, 67, 137, 187; Dam., 101.
Annapolis & B. S. L. R. Co. *v.* Pumphrey (42 Am. & Eng. R. Cas. 599, 72 Md. 82, 19 Atl. Rep. 8), Animals, 173, 451; Cross., Inj. at, 115; Farm Cross., 12.
Annapolis & B. S. L. R. Co. *v.* Ross (68 Md. 310, 10 Cent. Rep. 546, 11 Atl. Rep. 820), Constr. Rys., 58, 115, 116, 118.
Annapolis & E. R. R. Co. *v.* Anne Arundel County Com'rs (1 Am. & Eng. R. Cas. 403, 2 Am. & Eng. R. Cas. 422, 103 U. S. 1), Tax., 148.
Annapolis & E. R. Co. *v.* Baldwin (11 Am. & Eng. R. Cas. 486, 60 Md. 88, 45 Am. Rep. 711), Dam., 12; Inj. to Cars by Cattle, 1.
Annapolis & E. R. Co. *v.* Baltimore F. Ins. Co. (32 Md. 37), Fire Ins., 5.
Annapolis & E. R. Co. *v.* Gantt (39 Md. 115, 11 Am. Ry. Rep. 210), Fires, 80, 82, 154, 233, 289, 320; Words & Ph., 42.
Annapolis County *v* Windsor & A. R. Co. (8 Nov. Sc. 397), Tax., 385.
Annapolis, W. & B. R. Co. In re (1 Int. Com. Rep. 315), Int. Com., 21.
Annas *v.* Milwaukee & N. R. Co. (27 Am. & Eng. R. Cas. 102, 67 Wis. 46, 30 N. W. Rep. 282, 57 Am. Rep. 388, n.), Collis., 15; Death, etc, 286, 429; Negl., 74; Passes, 34;
Anne Arundel County Com'rs *v.* Annapolis & E. R. R. Co. (47 Md. 592, 18 Am. Ry. Rep. 359), Tax, 175, 186.
Anniston & A. R. Co. *v.* Ledbetter (92 Ala. 326, 9 So. Rep. 73), Car. of M., 341; Pl., 155.
Anniston & C. R. Co. *v.* Jacksonville, G. & A. R. Co. (82 Ala. 207, 2 So. Rep. 710), Em. Dom., 103, 105, 114, 281.
Anson *v.* Somerset R. Co. (85 Me. 79, 26 Atl. Rep. 996), Mort., 131.
Anspach *v.* Mahoney & B. M. R. Co. (5 Phila. (Pa.) 491), Location, etc., 1.
Answers to Questions by Governor (37 Mo. 129), Sales of Rds., 10.
Answers to Questions by Governor (37 Mo. 139), Stat., 13.
Answers to Questions of Governor (49 Mo. 216), State Aid., 26.
Antelope County *v.* Chicago, B. & Q. R. Co. (4 McCrary (U. S.) 46, 16 Fed. Rep. 295), Fed. Cts., 10.
Anthony *v.* Jasper County (101 U. S. 693), Mun. Aid, 313, 314, 355.
Anthony *v.* Jasper County (4 Dill. (U. S.) 136), Mun. Aid, 357.
Anthony *v.* Louisville & N. R. Co. (27 Fed. Rep. 724), Negl., 85.
Anthony *v.* St. Louis, I. M. & S. R. Co. (76 Mo. 18), Animals, 610.
Anthony Salt Co. *v.* Missouri Pac. R. Co. 5 Int. Com. Com. 299, 4 Int. Com. Rep. 33), Int. Com., 83.
Antisdel *v.* Chicago & N. W. R. Co. (26 Wis. 145, 2 Am. Ry. Rep. 467), Animals, 141; Fences, 86.
Appeal Tax Court *v.* Gill (50 Md. 377), Tax, 174.
Appeal Tax Court *v.* Northern C. R. Co. (50 Md. 417), Tax, 132.
Appeal Tax Court *v.* Pullman Palace Car Co. (50 Md. 452), Tax, 94.
Appeal Tax Court *v.* Western Md. R. Co. (50 Md. 274), Tax, 87, 132, 264.
Appel *v.* Buffalo, N. Y. & P. R. Co. (111 N. Y. 550, 19 N. E. Rep. 93, 20 N. Y. S. R. 90; reversing 40 Hun, 632, 2 N. Y. S. R. 257), Employés, Inj. to, 189, 230.
Appleby, In re (26 Hun (N. Y.) 427), St. Rys., 302.
Appleby *v.* St. Paul City R. Co. (58 Am. & Eng. R. Cas. 65, 54 Minn. 169, 55 N. W. Rep. 1117), Eject. Pass., 27; St. Rys., 526.
Appleby Manor Road (1 Grant's Cas. (Pa.) 443), Sts. & H., 28.
Applegate *v.* Burlington & S. W. R. Co. (41 Iowa, 214), Evid., 178.
Applegate *v.* Ernst (3 Bush (Ky.) 648), Mun. Aid, 414; Tax, 12.
Apsey *v.* Detroit, L. & N. R. Co. (83 Mich. 432, 47 N. W. Rep. 319), App. 143.
Apsey *v.* Detroit, L. & N. R. Co. (83 Mich. 440, 47 N. W. Rep. 513), Contrib. Neg., 87.
Apitz *v.* Missouri Pac. R. Co. (17 Mo. App. 419), Contrib. Neg., 46.
Arabello *v.* San Antonio & A. P. R. Co. (Tex.) (11 S. W. Rep. 913), Employés, Inj. to, 523.
Arapahoe County Com'rs *v.* Kansas Pac. R. Co. (4 Dill. (U. S.) 277), Rem. of C., 8; Stockh., 123.
Arasmith, *v.* Temple (11 Ill. App. 39) Agency, 75, 80; Indep. Contr., 2.
Arbenz *v.* Wheeling & H. R. Co. (40 Am. & Eng. R. Cas. 284, 33 W. Va. 1, 5 L. R. A. 371, 10 S. E. Rep. 14), Excava., 1; Sts. & H., 99, 143.
Arbrush *v.* Oakdale (28 Minn. 61, 9 N. W. Rep. 30), Em. Dom., 740.

Arbuckle *v.* Illinois Midland R. Co. (81 Ill. 429), Consol., 42; Liens, 18.
Arcata *v.* Arcata & M. R. R. Co. (92 Cal. 639, 28 Pac. Rep. 676), Constr. Rys., 3; Sts. & H., 61, 103, 150.
Arcata & M., R. R. Co. *v.* Murphy (71 Cal. 122, 11 Pac. Rep. 881), Em. Dom., 461.
Archer *v.* Chicago, B. & Q. R. Co. (65 Iowa 611, 22 N. W. Rep. 894), Lim. of Ac., 60.
Archer *v.* Ft. Wayne & F. R. Co. (48 Am. & Eng. R. Cas. 50, 87 Mich. 101, 49 N. W. Rep. 488), St. Rys., 411.
Archer *v.* New York, N. H. & H. R. Co. (106 N. Y. 589, 13 N. E. Rep. 318, 11 N. Y. S. R. 32, 885, 9 Cent. Rep. 233; affirming 36 Hun 644, mem.), Evid., 143, 236, 246; Stat. & D., 69, 113.
Archer *v.* Sixth Ave. R. Co. (20 J. & S. (N. Y.) 378; affirmed in 108 N. Y. 632, mem., 15 N. E. Rep. 75, 13 N. Y. S. R. 899), Phys. Exam., 2.
Archer *v.* Terre Haute & I. R. Co. (7 Am. & Eng. R. Cas. 249, 102 Ill. 493), For. Corp., 28; Leases, 8, 29, 31; Tax, 68, 342, 343.
Archibald *v.* Mississippi & T. R. Co. (66 Miss. 424, 6 So. Rep. 238), Actions, 6.
Archibald *v* New York C. & H. R. R. Co. (38 N. Y. S. R. 790, 60 Hun 581, 14 N. Y. Supp. 801), App., 117.
Archibald *v.* Queen (2 Can Exch. 374), Car. of Mails, 3.
Arents *v.* Com. (18 Gratt. (Va.) 750), Coupons, 1, 5, 8, 13; State Aid, 37.
Areson *v.* Long Island R. Co. (10 N. Y. S. R. 331, 45 Hun 592), Death, etc., 239.
Arkansas & L. R. Co. *v.* Smith (42 Am. & Eng. R. Cas. 348, 53 Ark. 275, 13 S. W. Rep. 929), Charges, 48, 63.
Arkansas C. R. Co. *v.* McKay (30 Ark. 682), Liens, 40.
Arkansas Midland R. Co. *v.* Berry (44 Ark. 17), Tax., 158.
Arkansas Midland R. Co. *v.* Canman (52 Ark. 517, 13 S. W. Rep. 280), Car. of P., 153, 180, 183, 601.
Arkansas Midland R. Co. *v.* Whitley (49 Am. & Eng. R. Cas. 587, 54 Ark. 199, 15 S. W. Rep. 465), Cat. Gds., 5.
Armant *v.* New Orleas & C. R. Co. (41 La. Ann. 1020, 7 So. Rep. 35), Lim. of Ac., 18; Reorg., 4.
Armentrout *v.* St. Louis, K. C. & N. R. Co. (1 Mo. App. 158), Car. of M., 105, 483.
Armfield *v.* Solon (19 N. Y. Supp. 44, 45 N. Y. S. R. 905, 64 Hun 633, mem.; modified in 136 N. Y. 663, 49 N. Y. S. R. 848, 32 N. E. Rep. 1063), Mun. Aid., 307.
Armil *v.* Chicago, B. & Q. R. Co. (28 Am. & Eng. R. Cas. 467, 70 Iowa 130, 30 N. W. Rep. 42), Death, etc., 224; Evid., 175, 207.
Armington *v.* Barnet (15 Vt. 745), Em. Dom., 101.
Armistead *v.* North Staffordshire R. Co. (15 Jur. 944, 16 Q. B. 526, 20 L. J. Q. B. 249), Em. Dom., 1095, 1100, 1140, 1204, 1206.
Armistead L. Co. *v.* Louisville, N. O. & T. R. Co. (Miss.) (11 So. Rep. 472), App., 115.
Armitage *v.* Grand Junction R. Co. (6 D. P. C. 340, 3 M. & W. 244, 1 H. & H. 26), Pl., 51.
Armour *v.* Michigan C. R. Co. (65 N. Y. 111, 22 Am. Rep. 603; reversing 3 J. & S. 563), Agency, 67; Bills of L., 15, 121, 128.
Armstrong *v.* Chicago, M. & St. P. R. Co. (45 Minn. 85, 47 N. W. Rep. 459), Car. of M., 692; Evid., 19; Witn., 133.
Armstrong *v.* Chicago, M. & St. P. R. Co. (53 Minn. 183, 54 N. W. Rep. 1059), Car. of L. S., 81.
Armstrong *v.* Danahy (75 Hun 405, 27 N. Y. Supp. 60, 56 N. Y. S. R. 743), Subscr., 46, 172.
Armstrong *v.* Fargo (8 Hun (N. Y.) 175), Witn., 188.
Armstrong *v.* Grand Trunk R. Co. (18 New Brun. 445), Car. of M., 373, 453; Lim. of Liab., 14.
Armstrong *v.* Karshner (44 Am. & Eng. R. Cas. 238, 47 Ohio St. 276, 24 N. E. Rep. 897), Subscr., 115, 125, 129, 145, 210, 212.
Armstrong *v.* Lancashire & Y. R. Co. (33 L. T. 228, L. R. 10 Ex. 47, 44 L. J. Ex. 89, 23 W. R. 295), Employés, Inj. to, 337; Imp. Neg., 1.
Armstrong *v.* Missouri Pac. R. Co. (17 Mo. App. 403), Car. of L. S., 151, 156.
Armstrong *v.* New York C. & H. R. R. Co. (66 Barb. (N. Y.) 437; affirmed in 64 N. Y. 635, mem.), Car. of P., 281, 425; Negl., 61.
Armstrong *v.* Oregon S. L. & U. N. R. Co. (8 Utah 420, 32 Pac. Rep. 693), Fel. Serv., 115, 336.
Armstrong *v.* Pennsylvania R. Co. (38 N. J. L. 1, 13 Am. Ry. Rep. 9), Ult. Vir., 14.
Armstrong *v.* Portage, W. & N. W. R. Co. (1 Man. 344), Employés, 1.
Armstrong *v.* Taylor County Court (15 W. Va. 190), Prohib., 2.
Armstrong County *v.* Brinton (47 Pa. St. 367), Mun. Aid, 356, 364, 390.
Armsworth *v.* South Eastern R. Co. (11 Jur. 758), Death, etc., 42, 373.
Armsworthy *v.* Missouri River, Ft. S. & G. R. Co. (5 Dill. (U. S.) 491), Pub. Lds., 19.
Arnell *v.* London & N. W. R. Co. (12 C. B. 697), Tax., 380.
Arnold *v.* Delaware & H. Canal Co. (125 N. Y. 15, 25 N. E. Rep. 1064, 34 N. Y. S. R. 372; affirming 16 N. Y. S. R. 310, 1 N. Y. Supp. 409), Employés, Inj. to, 289.
Arnold *v.* Delaware & H. Canal Co. (6 N. Y. S. R. 368), Employés, Inj. to, 96, 145, 397.
Arnold *v.* Furness R. Co. (22 W. R. 613), Injunc., 24.
Arnold *v.* Georgia R. & B. Co. (50 Ga. 304), Charges, 26; Paym., 5; Trial, 7.
Arnold *v.* Hudson River R. Co. (49 Barb. (N. Y.) 108; reversed in 55 N. Y. 661, mem.), Em. Dom., 143, 173, 415.
Arnold *v.* Illinois C. R. Co. (83 Ill. 273), Car. of P., 332, 336; Lim. of Liab., 29; Tickets & F., 26.

Arnold *v.* Jones (26 Tex. 335), Bills of L., 40; Car. of M., 12; Words & Ph., 7.
Arnold *v.* Middletown (41 Conn. 206), Tax., 112.
Arnold *v.* Pennsylvania R. Co. (28 Am. & Eng. R. Cas. 189, 115 Pa. St. 135, 8 Atl. Rep. 213), Tresp., Inj. to, 12.
Arnold *v.* River R. Constr. Co. (35 Iowa 99, 5 Am. Ry. Rep. 189), Constr. Rys., 27.
Arnold *v.* Rock River V. U. R. Co. (5 Duer (N. Y.) 207), Bills & N., 2.
Arnold *v.* Shade (3 Phila. (Pa.) 82), Car. of M., 563.
Arnot *v.* Erie R. Co. (67 N. Y. 315, 15 Am. Ry. Rep. 133; affirming 5 Hun 608), Guar., 13.
Arnott *v.* Kansas Pac. R. Co. (19 Kan. 95, 14 Am. Ry. Rep. 246), Sales, 2.
Aroma *v.* State Auditor (15 Fed. Rep. 843), Mun. Aid, 330.
Aron *v.* Manhattan R. Co. (26 Fed. Rep. 314; affirmed in 132 U. S. 84, 10 Sup. Ct. Rep. 24), Pat. for Inv., 3, 31.
Aronson *v.* Cleveland & P. R. Co. (70 Pa. St. 68), Car. of M., 332.
Arrington *v.* Savannah & W. R. Co. (95 Ala. 434, 11 So. Rep. 7), Branch & L. Roads, 8; Constr. Rys., 106.
Arrington *v.* Wilmington & W. R. Co. (6 Jones (N. Car.) 68), Car. of M., 288.
Arrowsmith *v.* Nashville & D. R. Co. (57 Fed. Rep. 165), Car. of Mails, 18; Car. of P., 54, 525; Leases, 40.
Arthur *v.* Chicago, R. I. & P. R. Co. (16 Am. & Eng. R. Cas. 283, 61 Iowa 648, 17 N. W. Rep. 24), Fires, 339; Wareh., 8.
Arthur *v.* Commercial & R. Bank (17 Miss. 394), Assign., 15; Assign. for Cred., 3, 4; Exec., 3, 5; Franch., 4; Fraud. Conv., 1.
Arthur *v.* St. Paul & D. R. Co. (32 Am. & Eng. R. Cas. 449, 38 Minn. 95, 35 N. W. Rep. 718), Car. of M., 88, 255, 341; Charges, 73.
Artman *v.* Kansas C. R. Co. (22 Kan. 296), Fright. Teams, 5.
Artusy *v.* Missouri Pac. R. Co. (37 Am. & Eng. R. Cas. 288, 73 Tex. 191, 11 S. W. Rep. 177), Death, etc., 253; Tresp., Inj. to, 70, 107.
Artz *v.* Chicago, R. I. & P. R. Co. (34 Iowa 153, 5 Am. Ry. Rep. 469), Cross., Inj. at, 92, 307, 141, 321.
Artz *v.* Chicago, R. I. & P. R. Co. (38 Iowa 293), Comp. Neg., 27; Contrib. Neg., 11.
Artz *v.* Chicago, R. I. & P. R. Co. (44 Iowa 284), Cross., Inj. at, 307; Negl., 30; Witn., 34.
Asbach *v.* Chicago, B. & Q. R. Co. (74 Iowa 248, 37 N. W. Rep. 182), Animals, 136, 383.
Asbach *v.* Chicago, B. & Q. R. Co. (Iowa) (53 N. W. Rep. 90), Animals, 435.
Ascher *v.* Grand Trunk R. Co. (36 U. C. Q. B. 609), Car. of M., 494.
Ash *v.* Baltimore & O. R. Co. (44 Am. & Eng. R. Cas. 676, 72 Md. 144, 19 Atl. Rep. 643), Death, etc., 112, 118.
Ash *v.* Wilmington & N. R. Co. (148 Pa. St. 133, 23 Atl. Rep. 898), Cross., Inj. at, 232.
Ashbrook *v.* Frederick Ave. R. Co. (18 Mo. App. 290), Car. of P., 458; St. Rys., 410, 421.
Ashby *v.* Eastern R. Co. (5 Metc. (Ky.) 368), Em. Dom., 168; Parties, 6.
Ashcroft *v.* Boston & L. R. Co. (97 U. S. 189), Pat. for Inv., 10.
Ashcroft *v.* Boston & L. R. Co. (1 Holmes (U. S.) 366), Pat. for Inv., 49.
Ashcroft *v.* Eastern R. Co. (126 Mass. 196), Deeds, 39.
Ashenden *v.* London & B. R. Co. (L. R. 5 Ex. D. 190, 42 L. T. 586, 28 W. R. 511), Car. of L. S., 93; Lim. of Liab., 35.
Asher *v.* Louisville & N. R. Co. (87 Ky. 391, 8 S. W. Rep. 854), Em. Dom., 405, 646, 736.
Asher *v.* St. Louis, I. M. & S. R. Co. (19 Am. & Eng. R. Cas. 593, 79 Mo. 432), Animals, 351.
Asher *v.* St. Louis, I. M. & S. R. Co. (89 Mo. 116, 1 S. W. Rep. 123), Animals, 463.
Asheville St. R. Co. *v.* Asheville (109 N. Car. 688, 14 S. E. Rep. 316), St. Rys., 26.
Ashland C. & I. R. Co. *v.* Davidson (Ky.) (20 S. W. Rep. 270), Em. Dom., 957.
Ashland St. R. Co. *v.* Ashland (78 Wis. 271, 47 N. W. Rep. 619), St. Rys., 173.
Ashley *v.* Manhattan R. Co. (13 Daly (N. Y.) 205), Elev. Rys., 218.
Ashley *v.* Ryan (49 Ohio St. 504, 31 N. E. Rep. 721), Consol., 19.
Ashman *v.* Flint & P. M. R. Co. (53 Am. & Eng. R. Cas. 80, 90 Mich. 567, 51 N. W. Rep. 645), Agency, 40; Employés, Inj. to, 63, 64, 65, 738; Negl., 67; Pl., 142.
Ashtabula & N. L. R. Co. *v.* Smith (15 Ohio St. 328), Subscr., 8, 102, 189, 193, 224.
Ashton *v.* Detroit City R. Co. (41 Am. & Eng. R. Cas. 235, 78 Mich. 587, 44 N. W. Rep. 141), Evid., 33; Witn., 173.
Ashton *v.* Langdale (4 DeG. & S. 402, 20 L. J. Ch. 234, 17 L. T. O. S. 175), Debent., 1.
Ashuelot R. Co. *v.* Cheshire R. Co. (60 N. H. 356), Judgm., 39; Tender, 7.
Ashuelot R. Co. *v.* Elliot (57 N. H. 397, 13 Am. Ry. Rep. 491), Int., 16; Mort., 140; Stockh., 10.
Ashuelot R. Co. *v.* Elliott (58 N. H. 451), Charters, 41.
Askew *v.* Hooper (28 Ala. 634), Bills & N., 23.
Aspinwall *v.* Chicago & N. W. R. Co. (41 Wis. 474), Em. Dom., 140.
Aspinwall *v.* Daviess County Com'rs (22 How. (U. S.) 364), Mun. Aid, 3.
Aspinwall *v.* Ohio & M. R. Co. (20 Ind. 492), Citizens, 5; For. Corp., 12.
Assessment Board *v.* Alabama C. R. Co. (59 Ala. 551), Tax., 18, 246.
Assignments and Preferences Act, § 9, In re (20 Ont. App. 489), Ult. Vir., 13.
Associate Wholesale Grocers *v.* Missouri Pac. R. Co. (1 Int. Com. Rep. 393, 1 Int. Com. Com. 156), Int. Com., 88, 178.
Astley *v.* Manchester, S. & L. R. Co. (2 DeG. & J. 453, 4 Jur. N. S. 567, 27 L. J. Ch. 478), Em. Dom., 1121.
Aston Tp. *v.* McClure (102 Pa. St. 322), Sts. & H., 406.
Astor *v.* Arcade R. Co. (113 N. Y. 93, 20

N. E. Rep. 594, 22 N. Y. S. R. 1, 2 L. R. A. 789; affirming 48 Hun 562, 1 N. Y. Supp. 174, 16 N. Y. S. R. 141), Stat., 34; St. Rys., 12; Underground Rys., 1.
Astor *v.* New York Arcade R. Co. (1 N. Y. Supp. 174), Estop., 12.
Astor *v.* New York Arcade R. Co. (3 N. Y. S. R. 188), Nuis., 2, 19, 20, 28.
Astoria & S. C. R. Co. *v.* Hill (20 Oreg. 177, 25 Pac. Rep. 379), Subscr., 51, 81.
Atcherson *v.* Troy & B. R. Co. (1 Abb. App. Dec. (N. Y.) 13, 6 Abb. Pr. N. S. 329), Constr. Rys., 93.
Atchison *v.* Butcher (3 Kan. 104), Mun. Aid, 277.
Atchison *v.* Chicago, R. I. & P. R. Co. (80 Mo. 213), Car. of L. S., 145; Negl., 89; Parties, 5.
Atchison & D. R. Co. *v.* Lyon (5 Am. & Eng. R. Cas. 295, 24 Kan. 745), Em. Dom., 686, 674.
Atchison & N. R. Co. *v.* Bailey (10 Am. & Eng. R. Cas. 742, 11 Neb. 332, 9 N. W. Rep. 50), Children, Inj. to, 33; Trial, 74.
Atchison & N. R. Co. *v.* Baty (6 Neb. 37, 15 Am. Ry. Rep. 63), Animals, 10; Em. Dom., 1; Stat., 9; Words & Ph., 78, 201.
Atchison & N. R. Co. *v.* Boerner (34 Neb. 240, 51 N. W. Rep. 842), Em. Dom., 456, 867, 996.
Atchison & N. R. Co. *v.* Cash (27 Kan. 587), Animals, 126.
Atchison & N. R. Co. *v.* Flinn (1 Am. & Eng. R. Cas. 240, 24 Kan. 627), Children, Inj. to, 16, 122.
Atchison & N. R. Co. *v.* Forney (35 Neb. 607, 53 N. W. Rep. 585), Em. Dom., 848; Sts. & H., 122.
Atchison & N. R. Co. *v.* Garside (10 Kan. 552), Sts. & H., 293.
Atchison & N. R. Co. *v.* Gough (10 Am. & Eng. R. Cas. 151, 29 Kan. 94), Em. Dom., 454, 676.
Atchison & N. R. Co. *v.* Harper (19 Kan. 529), Evid., 75.
Atchison & N. R. Co. *v.* Loree (4 Neb. 446), Fright. Teams, 4.
Atchison & N. R. Co. *v.* Manley (42 Kan. 577, 22 Pac. Rep. 567), Ejectm., 9; Sts. & H., 69.
Atchison & N. R. Co. *v.* Miller (18 Am. & Eng. R. Cas. 545, 16 Neb. 661, 21 N. W. Rep. 451), Car. of M., 420; Charges, 39.
Atchison & N. R. Co. *v.* Plant (24 Neb. 127, 38 N. W. Rep. 33), Em. Dom., 775.
Atchison & N. R. Co. *v.* Reecher (1 Am. & Eng. R. Cas. 343, 24 Kan. 228), Agency, 62.
Atchison & N. R. Co. *v.* Troy (10 Kan. 513), Injunc., 17.
Atchison & N. R. Co. *v.* Washburn (5 Neb. 117, 19 Am. Ry. Rep. 139), Car. of L. S., 21; Lim. of Liab., 28.
Atchison, C. & P. R. Co. *v.* Phillips County Com'rs (4 Am. & Eng. R. Cas. 326, 25 Kan. 261), Consol., 33; Mun. Aid, 173, 207.
Atchison St. R. Co. *v.* Missouri Pac. R. Co. (14 Am. & Eng. R. Cas. 439, 31 Kan. 660, 3 Pac. Rep. 284), St. Rys., 9, 16, 79.
Atchison St. R. Co. *v.* Nave (36 Am. & Eng. R. Cas. 29, 38 Kan. 744, 17 Pac. Rep. 587), St. Rys., 82, 91, 207.
Atchison, T. & S. F. R. Co. *v.* Alsdurf (47 Ill. App. 200), Employés, Inj. to, 69, 183, 224; Side Tr., 6.
Atchison, T. & S. F. R. Co. *v.* Atchison County Com'rs (47 Kan. 722, 28 Pac. Rep. 999), Tax., 339.
Atchison, T. & S. F. R. Co. *v.* Bales (16 Kan. 252), Fires, 313, 321.
Atchison, T. & S. F. R. Co. *v.* Bayes (42 Kan. 609, 22 Pac. Rep. 741), New. Tr., 11.
Atchison, T. & S. F. R. Co. *v.* Benton (42 Kan. 698, 22 Pac. Rep. 698), Att'ys, 5; Spec. Perf., 23.
Atchison, T. & S. F. R. Co. *v.* Betts (31 Am. & Eng. R. Cas. 563, 10 Colo. 431, 15 Pac. Rep. 821), Animals, 126, 448, 479; Jurisd., 6.
Atchison, T. & S. F. R. Co. *v.* Blackshire (10 Kan. 477), Em. Dom., 588, 735; Evid., 111; Witn., 68.
Atchison, T. & S. F. R. Co. *v.* Bobb (5 Am. & Eng. R. Cas. 412, 24 Kan. 673), Land Grants, 28.
Atchison, T. & S. F. R. Co. *v.* Brassfield (51 Kan. 167, 32 Pac. Rep. 814), Fel. Serv., 180; Trial, 123; Witn., 165.
Atchison, T. & S. F. R. Co. *v.* Brewer (20 Kan. 669), Bagg., 56.
Atchison, T. & S. F. R. Co. *v.* Brown (6 Am. & Eng. R. Cas. 228, 26 Kan. 443; further appeal 15 Am. & Eng. R. Cas. 271, 31 Kan. 1), App., 12; Death, etc., 435.
Atchison, T. & S. F. R. Co. *v.* Brown (33 Kan. 757, 7 Pac. Rep. 517), Trial, 215.
Atchison, T. & S. F. R. Co. *v.* Burlingame Tp. (36 Kan. 628, 14 Pac. Rep. 271), Lim. of Ac., 18.
Atchison, T. & S. F. R. Co. *v.* Campbell (16 Kan. 200), Fires, 247; Trial, 208.
Atchison, T. & S. F. R. Co. *v.* Cochran (41 Am. & Eng. R. Cas. 48, 43 Kan. 225, 7 L. R. A. 414, 23 Pac. Rep. 151), Car. of M., 573; Car. of P., 517; Corp., 12; Stockh., 45.
Atchison, T. & S. F. R. Co. *v.* Combs (25 Kan. 729), Judgm., 7; Trial, 148.
Atchison, T. & S. F. R. Co. *v.* Cone (37 Kan. 567, 15 Pac. Rep. 499), Trial, 208.
Atchison, T. & S. F. R. Co. *v.* Cruzen (15 Am. & Eng. R. Cas. 515, 31 Kan. 718, 3 Pac. Rep. 520), Evid., 230.
Atchison, T. & S. F. R. Co. *v.* Cuthbert (14 Kan. 212), Constr. Rys., 39.
Atchison, T. & S. F. R. Co. *v.* Davis (15 Am. & Eng. R. Cas. 521, 31 Kan. 645, 3 Pac. Rep. 301), Animals, 58.
Atchison, T. & S. F. R. Co. *v.* Davis (25 Am. & Eng. R. Cas. 305, 34 Kan. 199, 8 Pac. Rep. 145), Car. of M., 585.
Atchison, T. & S. F. R. Co. *v.* Davis (34 Kan. 200, 8 Pac. Rep. 530; reversing 25 Am. & Eng. R. Cas. 305, 34 Kan. 199, 8 Pac. Rep. 146), Auxiliary Cos., 1.
Atchison, T. & S. F. R. Co. *v.* Dennis (32 Am. & Eng. R. Cas. 318, 38 Kan. 424, 17 Pac. Rep. 153), Fires, 5, 31, 79, 84.
Atchison, T. & S. F. R. Co. *v.* Denver & N. O. R. Co. (16 Am. & Eng. R. Cas. 57, 110 U. S. 667, 4 Sup. Ct. Rep. 185; revers-

ing 15 Fed. Rep. 650), Car. of M., 597; Connect. L., 2; Discrim., 59, 81; Stat. & D., 22.
Atchison, T. & S. F. R. Co. *v.* Dill (55 Am. & Eng. R. Cas. 375, 48 Kan. 210, 29 Pac. Rep. 148), Car. of L. S., 79; Car. of M., 437.
Atchison, T. & S. F. R. Co. *v.* Dwelle (44 Am. & Eng. R. Cas. 402, 44 Kan. 394, 24 Fac. Rep. 500), Eject. Pass., 48, 49; Tickets & F., 125.
Atchison, T. & S. F. R. Co. *v.* Edwards (20 Kan. 531, 20 Am. Ry. Rep. 311), Animals, 77.
Atchison, T. & S. F. R. Co. *v.* English (38 Kan. 110, 16 Pac. Rep. 82), App., 29, 92; Contr., 18; Pl., 177.
Atchison, T. & S. F. R. Co. *v.* Farrow (11 Am. & Eng. R. Cas. 239, 6 Colo. 498), Fel. Serv., 169.
Atchison, T. & S. F. R. Co. *v.* Feehan (47 Ill. App. 66), Cross., Inj. at, 188, 352; Death, etc., 153, 229, 252, 329.
Atchison, T. & S. F. R. Co. *v.* Fletcher (24 Am. & Eng. R. Cas. 34, 35 Kan. 236, 10 Pac. Rep. 596), Car. of M., 596; For. Corp., 7; Guar., 10; Leases, 31.
Atchison, T. & S. F. R. Co. *v.* Frazier (8 Am. & Eng. R. Cas. 72, 27 Kan. 463), App., 25; Witn., 164, 173.
Atchison, T. & S. F. R. Co. *v.* Frier (Tex. Civ. App.) (22 S. W. Rep. 6), Car. of P., 153, 571; New Tr., 65.
Atchison, T. & S. F. R. Co. *v.* Gabbert (22 Am. & Eng. R. Cas. 621, 34 Kan. 132, 8 Pac. Rep. 218), Animals, 287, 591; Witn., 118.
Atchison, T. & S. F. R. Co. *v.* Gants (34 Am. & Eng. R. Cas. 200, 38 Kan. 608, 17 Pac. Rep. 54), Car. of P., 66, 83, 250, 251, 258; Conduct., 1, 12; Eject. Pass., 23, 53, 59, 68, 78, 101; Evid., 290; Tresp., Inj. to, 17, 82, 90.
Atchison, T. & S. F. R. Co. *v.* Gibson (42 Kan. 34, 21 Pac. Rep. 788), Fires, 5, 289.
Atchison, T. & S. F. R. Co. *v.* Griffis (13 Am. & Eng. R. Cas. 432, 28 Kan. 539), Animals, 185.
Atchison, T. & S. F. R. Co. *v.* Hammer (22 Kan. 763), Flood. Lds., 35.
Atchison, T. & S. F. R. Co. *v.* Harvey (16 Am. & Eng. R. Cas. 352, 31 Kan. 750, 3 Pac. Rep. 568), Trial, 216.
Atchison, T. & S. F. R. Co. *v.* Hawkins (40 Am. & Eng. R. Cas. 201, 42 Kan. 355, 22 Pac. Rep. 322), Animals, 571; Trial, 153.
Atchison, T. & S. F. R. Co. *v.* Headland (58 Am. & Eng. R. Cas. 4, 18 Colo. 477, 33 Pac. Rep. 185), Car. of P., 22, 43, 46, 49, 581; Death, etc., 15; Evid., 106; Tresp., Inj. to, 12, 13.
Atchison, T. & S. F. R. Co. *v.* Hegwir (21 Kan. 622), Animals, 483.
Atchison, T. & S. F. R. Co. *v.* Hogue (50 Kan. 40, 31 Pac. Rep. 698), Eject. Pass., 130; Tickets & F., 29.
Atchison, T. & S. F. R. Co. *v.* Holt (11 Am. & Eng. R. Cas. 206, 29 Kan. 149), Employés, Inj. to, 134, 145, 148, 150; Fel. Serv., 64.
Atchison, T. & S. F. R. Co. *v.* Howard (49 Fed. Rep. 206, 4 U. S. App. 202, 1 C. C. A. 229), Employés, Inj. to, 718.
Atchison, T. & S. F. R. Co. *v.* Howe (32 Kan. 737, 5 Pac. Rep. 397), Ry. Com'rs, 42.
Atchison, T. & S. F. R. Co. *v.* Ireland (19 Kan. 405), Animals, 41.
Atchison, T. & S. F. R. Co. *v.* Irwin (35 Kan. 286, 10 Pac. Rep. 820), App., 41.
Atchison, T. & S. F. R. Co. *v.* Jefferson County Com'rs (12 Kan. 127), Mand. 1; Mun. Aid, 294, 446.
Atchison, T. & S. F. R. Co. *v.* Jefferson County Com'rs (17 Kan. 29), Mun. Aid, 127.
Atchison, T. & S. F. R. Co. *v.* Jefferson County Com'rs (21 Kan. 309), Mun. Aid, 204, 228, 240.
Atchison, T. & S. F. R. Co. *v.* Johns (34 Am. & Eng. R. Cas. 480, 36 Kan. 769, 14 Pac. Rep. 237), Car. of P., 447; Evid., 211; Stat. & D., 74, 134.
Atchison, T. & S. F. R. Co. *v.* Johnson (11 Am. & Eng. R. Cas. 1, 29 Kan. 218), Cham., 1.
Atchison, T. & S. F. R. Co. *v.* Jones (20 Kan. 527), Animals, 77; Words & Ph., 99.
Atchison, T. & S. F. R. Co. *v.* King (15 Am. & Eng. R. Cas. 330, 31 Kan. 708, 3 Pac. Rep. 565), Lim. of Ac., 62.
Atchison, T. & S. F. R. Co. *v.* Koehler (31 Am. & Eng. R. Cas. 312, 37 Kan. 463, 15 Pac. Rep. 567), Fel. Serv., 163, 179.
Atchison, T. & S. F. R. Co. *v.* Ledbetter (21 Am. & Eng. R. Cas. 555, 34 Kan. 326, 8 Pac. Rep. 411), Employés, Inj. to, 136, 611.
Atchison, T. & S. F. R. Co. *v.* Lenz (35 Ill. App. 330), Bridges, 43.
Atchison, T. & S. F. R. Co. *v.* Lindley (41 Am. & Eng. R. Cas. 72, 42 Kan. 714, 6 L. R. A. 646, 22 Pac. Rep. 703), Car. of L. S., 131.
Atchison, T. & S. F. R. Co. *v.* Long (46 Kan. 701, 27 Pac. Rep. 182), Waters & W., 31.
Atchison, T. & S. F. R. Co. *v.* Lujan (6 Colo. 338), Animals, 377.
Atchison, T. & S. F. R. Co. *v.* McCandliss (22 Am. & Eng. R. Cas. 296, 33 Kan. 366, 6 Pac. Rep. 587), Employés, Inj. to, 717; Trial, 210.
Atchison, T. & S. F. R. Co. *v.* McConnell (25 Kan. 370), Constr. Rys., 39.
Atchison, T. & S. F. R. Co. *v.* McGinnis (46 Kan. 109, 26 Pac. Rep. 453), App. 49; Dam., 18, 28, 72; Husb. & W., 30.
Atchison, T. & S. F. R. Co. *v.* McKee (37 Kan. 592, 15 Pac. Rep. 484), Employés, Inj. to, 93, 97, 251; Evid., 86; Fel. Serv., 21 ; 216.
Atchison, T. & S. F. R. Co. *v.* Mecklim (23 Kan. 167), Pub. Lds., 6.
Atchison, T. & S. F. R. Co. *v.* Miller (35 Am. & Eng. R. Cas. 100, 39 Kan. 419, 18 Pac. Rep. 486), Animals, 189; Witn., 105.
Atchison, T. & S. F. R. Co. *v.* Moore (11 Am. & Eng. R. Cas. 243, 29 Kan. 632), Fel. Serv., 164.
Atchison, T. & S. F. R. Co. *v.* Moore (15

Am. & Eng. R. Cas. 312, 31 Kan. 197, 1 Pac. Rep. 644), Employés, Inj. to, 774; Fel. Serv., 93, 409.
Atchison, T. & S. F. R. Co. *v.* Morgan (13 Am. & Eng. R. Cas. 499, 31 Kan. 77, 1 Pac. Rep. 298), Animals, 194; Comp. Neg., 22.
Atchison, T. & S. F. R. Co. *v.* Morgan (38 Am. & Eng. R. Cas. 658, 42 Kan. 23, 4 L. R. A. 284, 21 Pac. Rep. 809, 22 Pac. Rep. 995), Fixt., 1, 2, 8.
Atchison, T. & S. F. R. Co. *v.* Morgan (42 Am. & Eng. R. Cas. 184, 43 Kan. 1, 22 Pac. Rep. 995), Cross., Inj. at, 259; Trial, 215.
Atchison, T. & S. F. R. Co. *v.* O'Neill (49 Kan. 367, 30 Pac. Rep. 470), Negl., 89; Pl., 173.
Atchison, T. & S. F. R. Co. *v.* Osage County Com'rs (48 Kan. 576, 29 Pac. Rep. 1084), Cross., St. & H., 80.
Atchison, T. & S. F. R. Co. *v.* Parker (55 Fed. Rep. 595), Evid., 79, 87, 162.
Atchison, T. & S. F. R. Co. *v.* Parsons (42 Ill. App. 93), Cross., Inj. at, 5, 40; Licensees, Inj. to, 11.
Atchison, T. & S. F. R. Co. *v.* Patch (28 Kan. 470), Em. Dom., 550, 956; Sts. & H., 123.
Atchison, T. & S. F. R. Co. *v.* Plaskett (47 Kan. 107, 26 Pac. Rep. 401; motion for rehearing denied, 47 Kan. 112, 26 Pac. Rep. 403, 27 Pac. Rep. 824), Children, Inj. to, 21.
Atchison, T. & S. F. R. Co. *v.* Plunkett (2 Am. & Eng. R. Cas. 127, 25 Kan. 188), App., 53; Employés, Inj. to, 25, 281; Negl., 111; Trial, 219.
Atchison, T. & S. F. R. Co. *v.* Pracht (12 Am. & Eng. R. Cas. 267, 30 Kan. 66, 1 Pac. Rep. 319), Pub. Lds., 6.
Atchison, T. & S. F. R. Co. *v.* Priest (50 Kan. 16, 31 Pac. Rep. 674), Cross., Inj. at, 254.
Atchison, T. & S. F. R. Co. *v.* Randall (38 Am. & Eng. R. Cas. 255, 40 Kan. 421, 19 Pac. Rep. 783), Agency, 46, 105.
Atchison, T. & S. F. R. Co. *v.* Retford (18 Kan. 245, 15 Am. Ry. Rep. 278), Trial, 148.
Atchison, T. & S. F. R. Co. *v.* Rice (36 Kan. 593, 14 Pac. Rep. 229), False Imp., 18; Mal. Pros., 10.
Atchison, T. & S. F. R. Co. *v.* Riggs (15 Am. & Eng. R. Cas. 531, 31 Kan. 622, 3 Pac. Rep. 305), Animals, 158; Fires, 31.
Atchison, T. & S. F. R. Co. *v.* Roach (27 Am. & Eng. R. Cas. 257, 35 Kan. 740, 12 Pac. Rep. 93), Bagg., 19, 22; Car. of P., 501, 518.
Atchison, T. & S. F. R. Co. *v.* Roberts (3 Tex. Civ. App. 370, 22 S. W. Rep. 183), Bills of L., 88; Car. of M., 213.
Atchison, T. & S. F. R. Co. *v.* Rockwood (5 Am. & Eng. R. Cas. 432, 25 Kan. 292), Land Grants, 27, 28, 96.
Atchison, T. & S. F. R. Co. *v.* Sadler (38 Kan. 128, 16 Pac. Rep. 46), Employés, Inj. to, 141.
Atchison, T. & S. F. R. Co. *v.* Schneider (127 Ill. 144, 2 L. R. A. 422, 20 N. E. Rep. 41), Em. Dom., 570, 608, 609, 836, 896.
Atchison, T. & S. F. R. Co. *v.* Schroeder (47 Kan. 315, 27 Pac. Rep. 965), Employés, Inj. to, 223.
Atchison, T. & S. F. R. Co. *v.* Seeley (24 Kan. 265), App., 122.
Atchison, T. & S. F. R. Co. *v.* Shaft (19 Am. & Eng. R. Cas. 529, 33 Kan. 521, 6 Pac. Rep. 908), Animals, 87, 107; Fences, 24, 52, 59, 78.
Atchison, T. & S. F. R. Co. *v.* Shean (58 Am. & Eng. R. Cas. 360, 18 Colo. 368, 33 Pac. Rep. 108), Car. of P., 39, 137, 139, 232, 266, 269, 348, 453; Contrib. Neg., 82.
Atchison, T. & S. F. R. Co. *v.* Sly (41 Kan. 729, 21 Pac. Rep. 790), Trial, 212.
Atchison, T. & S. F. R. Co. *v.* Smith (8 Am. & Eng. R. Cas. 327, 28 Kan. 541), Children, Inj. to, 3, 122.
Atchison, T. & S. F. R. Co. *v.* Stanford (12 Kan. 354, 8 Am. Ry. Rep. 230), Fires, 96, 206, 238; Witn., 44, 63; Words & Ph., 130.
Atchison, T. & S. F. R. Co. *v.* Starkweather (21 Kan. 322), Estop., 32.
Atchison, T. & S. F. R. Co. *v.* State (22 Kan. 1), Cross., Inj. at, 99.
Atchison, T. & S. F. R. Co. *v.* Sumner County Com'rs (51 Kan. 617, 33 Pac. Rep. 312), Consol., 14; Stockh., 78.
Atchison, T. & S. F. R. Co. *v.* Temple (47 Kan. 7, 27 Pac. Rep. 98), Car. of L. S., 80.
Atchison, T. & S. F. R. Co. *v.* Thul (10 Am. & Eng. R. Cas. 783, 29 Kan. 466, 44 Am. Rep. 659), Phys. Exam., 1.
Atchison, T. & S. F. R. Co. *v.* Thul (32 Kan. 255, 49 Am. Rep. 484, 4 Pac. Rep. 352), Employés, Inj. to, 174; Trial, 143.
Atchison, T. & S. F. R. Co. *v.* Townsend (35 Am. & Eng. R. Cas. 352, 39 Kan. 115, 17 Pac. Rep. 804), Cross., Inj. at, 133, 287.
Atchison, T. & S. F. R. Co. *v.* United States (12 Ct. of Cl. 295), Land Grant Rds., 4, 9, 10.
Atchison, T. & S. F. R. Co. *v.* United States (15 Ct. of Cl. 1), Claims Against U. S., 16.
Atchison, T. & S. F. R. Co. *v.* United States (15 Ct. of Cl. 126), Land Grant Rds., 9, 10.
Atchison, T. & S. F. R. Co. *v.* Wagner (21 Am. & Eng. R. Cas. 637, 33 Kan. 660, 7 Pac. Rep. 204), Employés, Inj. to, 96, 99, 134, 136, 138, 182, 222.
Atchison, T. & S. F. R. Co. *v.* Walton (3 N. Mex. 319, 9 Pac. Rep. 351), Animals, 480, 495.
Atchison, T. & S. F. R. Co. *v.* Walz (40 Kan. 433, 19 Pac. Rep. 787), App., 85; Cross., Inj. at, 107, 344.
Atchison, T. & S. F. R. Co. *v.* Watson (37 Kan. 773, 15 Pac. Rep. 877), Mal. Pros., 15.
Atchison, T. & S. F. R. Co. *v.* Weaver (10 Kan. 344), Bills of Partic., 4; Em. Dom., 1056.
Atchison, T. & S. F. R. Co. *v.* Weber (21 Am. & Eng. R. Cas. 418, 33 Kan. 543, 6 Pac. Rep. 877), Car. of P., 146, 312, 313; Death, etc., 426.

Atchison, T. & S. F. R. Co. *v.* Wilson (24 Am. & Eng. R. Cas. 623, 35 Kan. 175, 10 Pac. Rep. 459), Tax., 260.
Atchison, T. & S. F. R. Co. *v.* Wilson (48 Fed. Rep. 57, 4 U. S. App. 25, 1 C. C. A. 25), Death, etc., 279, 397; Employés, Inj. to, 48; Fel. Serv., 61.
Atchison, T. & S. F. R. Co. *v.* Woodcock (18 Kan. 20), Tax., 16.
Atchison, T. & S. F. R. Co. *v.* Woodcock (42 Kan. 344, 22 Pac. Rep. 421), Trial, 220.
Atchison, T. & S. F. R. Co. *v.* Yates (21 Kan. 613), Animals, 110.
Athens Branch Bank *v.* Marietta & C. R. Co. (2 Disney (Ohio) 425), Jurisd., 4.
Athens, S. & W. Elec. St. R. Co. *v.* Sayre (156 Pa. St. 23, 26 Atl. Rep. 780), Injunc., 32.
Athol & E. R. Co. *v.* Prescott (110 Mass. 213), Subscr., 183.
Atkins *v.* Manhattan R. Co. (32 N. Y. S. R. 214, 10 N. Y. Supp. 432, 57 Hun 102), Witn., 164, 168.
Atkins *v.* Petersburg R. Co. (3 Hughes (U. S.) 307), Mort., 89.
Atkins *v.* Steacy (5 Dill. (U. S.) 381, n.), Stockh., 82.
Atkins *v.* Wabash, St. L. & P. R. Co. (26 Am. & Eng. R. Cas. 441, 29 Fed. Rep. 161), Receiv., 4, 167.
Atkinson *v.* Asheville St. R. Co. (113 N. Car. 581, 18 S. E. Rep. 254), Pl., 17; St. Rys., 16, 36.
Atkinson *v.* Atlantic & P. R. Co. (63 Mo. 367, 20 Am. Ry. Rep. 442), Fires, 343, 349.
Atkinson *v.* Chicago & N. W. R. Co. (70 Iowa 68, 29 N. W. Rep. 808), Just. P., 23.
Atkinson *v.* Chicago & N. W. R. Co. (69 Wis. 362, 34 N. W. Rep. 63), App., 144.
Atkinson *v.* Goodrich Transp. Co. (60 Wis. 141, 18 N. W. Rep. 764), Negl., 46, 72, 86.
Atkinson *v.* Grand Trunk R. Co. (17 Ont. 220), Cross., Inj. at, 204.
Atkinson *v.* Marietta & C. R. Co. (15 Ohio St. 21), Em. Dom., 365; Incorp., 3; Location, etc., 18; Mort., 2.
Atkyn *v.* Wabash R. Co. (41 Fed. Rep. 193, 22 Ohio L. J. 151), Contrib. Neg., 9; Death, etc., 381; Employés, Inj. to, 64, 230, 430.
Atlanta *v.* Central R. & B. Co. (53 Ga. 120), Em. Dom., 731.
Atlanta *v.* Gate City St. R. Co. (80 Ga. 276, 4 S. E. Rep. 269), Stat., 34; St. Rys., 281.
Atlanta *v.* Georgia Pac. R. Co. (74 Ga. 16), Tax., 13.
Atlanta *v.* Georgia R. & B. Co. (40 Ga. 471), Injunc., 48.
Atlanta *v.* Grant (57 Ga. 340), Exec., 1, 24.
Atlanta & C. A. L. R. Co. *v.* Harrison (76 Ga. 757), Proc., 32.
Atlanta & C. A. L. R. Co. *v.* Holcombe (76 Ga. 590), Car. of M., 741.
Atlanta & C. A. L. R. Co. *v.* Ray (22 Am. & Eng. R. Cas. 281, 70 Ga. 674), Employés, Inj. to, 136, 349, 596.
Atlanta & C. A. L. R. Co. *v.* Tanner (68 Ga. 384), App., 115; New Tr., 6.
Atlanta & C. A. L. R. Co. *v.* Woodruff (66 Ga. 707), Employés, Inj. to, 523.
Atlanta & F. R. Co. *v.* Blanton (80 Ga. 563, 6 S. E. Rep. 584), App., 113, 141.
Atlanta & F. R. Co. *v.* Kimberly (47 Am. & Eng. R. Cas. 307, 87 Ga. 161, 13 S. E. Rep. 277), Evid., 220; Indep. Contr., 6, 14.
Atlanta & F. R. Co. *v.* Western R. Co. (50 Fed. Rep. 790, 2 U. S. App. 227, 1 C. C. A. 676), Cred. Bill, 4.
Atlanta & F. R. Co. *v.* Wright (87 Ga. 487, 13 S. E. Rep. 578), Tax., 4.
Atlanta & L. R. Co. *v.* Hodnett (29 Ga. 461), Dam., 59; Evid., 208.
Atlanta & R. A. L. R. Co. *v.* Ayers (53 Ga. 12), Comp. Neg., 21; Fel. Serv., 171, 462, 502.
Atlanta & R. A. L. R. Co. *v.* Campbell (56 Ga., 586), Employés, Inj. to, 595.
Atlanta & R. A. L. R. Co. *v.* Mangham (49 Ga. 266), Arb., 31.
Atlanta & R. A. L. R. Co. *v.* State (1 Am. & Eng. R. Cas. 399, 63 Ga. 483), Tax., 158.
Atlanta & R. A. L. R. Co. *v.* Wood (48 Ga. 565, 11 Am. Ry. Rep. 406), Cross., Inj. at, 362; Sts. & H., 409.
Atlanta & W. P. R. Co. *v.* Condor (75 Ga. 51), Car. of P., 650.
Atlanta & W. P. R. Co. *v.* Dickerson (89 Ga. 455, 15 S. E. Rep. 534), Car. of P., 241, 428.
Atlanta & W. P. R. Co. *v.* Hodnett (36 Ga. 669), Contr., 2; Deeds, 51; Eq., 23; Evid., 21.
Atlanta & W. P. R. Co. *v.* Holcombe (88 Ga. 9, 13 S. E. Rep. 751), Evid., 296; Trial, 117.
Atlanta & W. P. R. Co. *v.* Hudson (62 Ga. 679), Animals, 80, 581.
Atlanta & W. P. R. Co. *v.* Johnson (66 Ga. 259), Dam., 44, 91, 92; Employés, Inj. to, 575, 757, 763; Evid., 291.
Atlanta & W. P. R. Co. *v.* Loftin (86 Ga. 43, 12 S. E. Rep. 186), New Tr., 16.
Atlanta & W. P. R. Co. *v.* Newton (45 Am. & Eng. R. Cas. 211, 85 Ga. 517, 11 S. E. Rep. 776), Death, etc., 181, 230, 241, 278, 284, 352.
Atlanta & W. P. R. Co. *v.* Smith (81 Ga. 620, 8 S. E. Rep. 446), App., 117; Car. of P., 649.
Atlanta & W. P. R. Co. *v.* Speer (32 Ga. 550), Spec. Perf., 16, 29.
Atlanta & W. P. R. Co. *v.* Texas Grate Co. (40 Am. & Eng. R. Cas. 130, 81 Ga. 602, 9 S. E. Rep. 600), Car. of M., 610, 737, 791; Evid., 275; Pl., 106.
Atlanta & W. P. R. Co. *v.* Venable (7 Am. & Eng. R. Cas. 35, 65 Ga. 55), Death, etc., 92.
Atlanta & W. P. R. Co. *v.* Venable (67 Ga. 697), Death, etc., 251, 325, 390.
Atlanta & W. P. R. Co. *v.* Webb (61 Ga. 586), Death, etc., 217.
Atlanta & W. P. R. Co. *v.* Wyly (8 Am. & Eng. R. Cas. 262, 65 Ga. 120), Cross., Inj. at, 129, 361.
Atlanta St. R. Co. *v.* Atlanta (66 Ga. 104), Tax., 172; Words & Ph., 204.

Atlanta St. R. Co. *v.* Jacobs (88 Ga. 647, 15 S. E. Rep. 825), Pl., 24; Trial, 131.
Atlantic & D. R. Co. *v.* Peake (87 Va. 130, 12 S. E. Rep. 348), Flood. Lds., 81.
Atlantic & D. R. Co. *v.* Reid (87 Va. 119, 12 S. E. Rep. 222), Em. Dom., 964.
Atlantic & G. R. Co. *v.* Allen (15 Fla. 637), Consol., 28; Franch., 1; Tax., 140, 150.
Atlantic & G. R. Co. *v.* Burt (49 Ga. 606), Animals, 447.
Atlantic & G. R. Co. *v.* Fuller (48 Ga. 423, 11 Am. Ry. Rep. 403), Em. Dom., 1058; Pl., 68.
Atlantic & G. R. Co. *v.* Georgia (98 U. S. 359), Tax., 23.
Atlantic & G. R. Co. *v.* Griffin (61 Ga. 11), Animals, 514.
Atlantic & G. R. Co. *v.* Mann (43 Ga. 200), Sts. & H., 261.
Atlantic & G. R. Co. *v.* State (55 Ga. 312), Tax., 23.
Atlantic & G. W. R. Co. *v.* Campbell (4 Ohio St. 583), Witn., 9, 121.
Atlantic & G. W. R. Co. *v.* Dunn (19 Ohio St. 162), Dam., 31; Eject. Pass., 112.
Atlantic & G. W. R. Co. *v.* Koblentz (21 Ohio St. 334), Em. Dom., 762.
Atlantic & G. W. R. Co. *v.* Robbins (35 Ohio St. 531), Em. Dom., 983.
Atlantic & N. C. R. Co. *v.* Carteret County Com'rs (75 N. Car. 474), Tax., 41, 159.
Atlantic & N. C. R. Co. *v.* Cowles (69 N. Car. 59), Officers, 6, 16.
Atlantic & O. R. Co. *v.* Sullivant (5 Ohio St. 276), Em. Dom., 72, 365, 962.
Atlantic & O. Tel. Co. *v.* Philadelphia, G. & N. R. Co. (8 Phila. (Pa.) 246), Tel. & T. Lines, 5.
Atlantic & P. R. Co. *v.* Cleino (2 Dill. (U. S.) 175), Tax., 335.
Atlantic & P. R. Co. *v.* Freeman (61 Mo. 80), Tresp., 24.
Atlantic & P. R. Co. *v.* Lesueur (Ariz.) (37 Am. & Eng. R. Cas. 368, 19 Pac. Rep. 157), Int. Com., 188; Tax., 19, 132, 145, 162; Words & Ph., 202.
Atlantic & P. R. Co. *v.* Reisner (18 Kan. 458, 16 Am. Ry. Rep. 36), Stat. Agts., 7.
Atlantic & P. R. Co. *v.* St. Louis (66 Mo. 228; reversing 3 Mo. App. 315), Branch & L. Roads, 7; Consol., 18; Constr. Rys., 3; Deeds, 3; Incorp., 11; Stat., 44; Sts. & H., 50, 84, 131.
Atlantic & P. R. Co. *v.* Yavapai County (Ariz.) (39 Am. & Eng. R. Cas. 543, 21 Pac. Rep. 768), Tax., 114, 132, 162, 247, 325.
Atlantic & P. Tel. Co. *v.* Baltimore & O. R. Co. (14 J. & S. (N. Y.) 377), Injunc., 12.
Atlantic & P. Tel. Co. *v.* Chicago, R. I. & P. R. Co. (6 Biss. (U. S.) 158), Tel. & T. Lines, 2.
Atlantic & P. Tel. Co. *v.* Union Pac. R. Co. (1 Fed. Rep. 745, 1 McCrary (U. S.) 541), Union Pac. R. Co., 8.
Atlantic & St. L. R. Co. *v.* Cumberland County Com'rs (28 Me. 112), Em. Dom., 770
Atlantic & St. L. R. Co. *v.* Cumberland County Com'rs (51 Me. 36), Em. Dom., 281.
Atlantic & St. L. R. Co. *v.* State (60 N. H. 133), Tax., 68.
Atlantic Ave. El. R. Co. In re (136 N. Y. 292, 32 N. E. Rep. 771, 49 N. Y. S. R. 389; affirming 58 Hun 609, 35 N. Y. S. R. 371, 12 N. Y. Supp. 228), Elev. Rys., 13; Rap. T. Acts, 1.
Atlantic Ave. R. Co. *v.* Johnson (134 N. Y. 375, 31 N. E. Rep. 903, 47 N. Y. S. R. 535; affirming 57 Hun 591, mem., 32 N. Y. S. R. 1052, 11 N. Y. Supp. 106), Leases, 4.
Atlantic Exp. Co. *v.* Wilmington & W. R. Co. (111 N. Car. 463, 16 S. E. Rep. 393), Exp. Cos., 9; Ry. Com'rs, 2, 32, 34.
Atlantic, M. & O. R. Co., Case of (4 Hughes (U. S.) 157), Children, Inj. to, 38; Receiv., 126; Tresp., Inj. to, 66.
Atlantic Mut. Ins. Co. *v.* McLoon (48 Barb. (N. Y.) 27), Car. of M., 49.
Atlantic, T. & O. R. Co. *v.* Carolina Nat. Bank (19 Wall. (U. S.) 548), Bonds, 59.
Atlantic, T. & O. R. Co. *v.* Johnston (70 N. Car. 348), Direct., 34.
Atlantic, T. & O. R. Co. *v.* Mecklenburg Com'rs (87 N. Car. 129), Tax., 97.
Atlantic, T. & O. R. Co. *v.* Morrison (82 N. Car. 141), Acct'ng., 1.
Atlantic, T. & O. R. Co. *v.* Sharpe (70 N. Car. 509), Just. P., 2.
Atlee *v.* Northwestern Union Packet Co. (21 Wall. (U. S.) 389), Wharves, 1.
Attorney-General, In re (50 Hun 511, 20 N. Y. S. R. 383, 3 N. Y. Supp. 464; affirming 2 N. Y. Supp. 684, 18 N. Y. S. R. 122), Quo War., 5.
Attorney-General *v.* Barry D. & R. Co. (35 Ch. D. 573), Sts. & H., 404.
Attorney-General *v.* Birmingham & D. J. R. Co. (2 Railw. Cas. 124, 1 Ry. & C. T. Cas. 18), Tickets & F., 136.
Attorney-General *v.* Boston & L. R. Co. (118 Mass. 345), Rip. Rts., 4.
Attorney-General *v.* Boston & M. R. Co. (109 Mass. 99), Consol., 37.
Attorney-General *v.* Chicago & E. R. Co. (26 Am. & Eng. R. Cas. 428, 112 Ill. 520), Injunc., 1; Quo War., 3, 6.
Attorney-General *v.* Chicago & N. W. R. Co. (35 Wis. 425), Att'y-Gen., 2; Charges, 9, 39, 58; Charters, 6, 17, 19, 42, 139; Evid., 270; Injunc., 25; Mort., 76; Name, 1.
Attorney-General *v.* Delaware & B. B. R. Co. (27 N. J. Eq. 1; affirmed in 27 N. J. Eq. 631), Bridges, 45; Injunc., 36.
Attorney-General *v.* Delaware & B. B. R. Co. (27 N. J. Eq. 631), Bridges, 2; Land Grants, 3.
Attorney-General *v.* Delaware & B. B. R. Co. (38 N. J. L. 282), Quo War., 2, 6.
Attorney-General *v.* Detroit Suburban R. Co. (96 Mich. 65, 55 N. W. Rep. 562), Quo War., 3.
Attorney-General *v.* Eastern Counties R. Co. (10 M. & W. 263, 12 L. J. Ex. 106; see 2 Railw. Cas. 823), Charters, 65.
Attorney-General *v.* Eastern R. Co. (21 Am.

& Eng. R. Cas. 237, 137 Mass. 45), Stat. & D., 52.
Attorney-General *v.* Ely, H. & S. R. Co. (L. R. 4 Ch. 194, 38 L. J. Ch. 258, 20 L. T. 1, 17 W. R. 350, 13 Sol. J. 651), Cross. St. & H., 86.
Attorney-General *v.* Erie & K. R. Co. (16 Am. & Eng. R. Cas. 652, 55 Mich. 15, 20 N. W. Rep. 696), Leases, 39; Quo War., 6.
Attorney-General *v.* Fitchburg R. Co. (26 Am. & Eng. R. Cas. 540, 142 Mass. 40, 6 N. E. Rep. 854), Charters, 180.
Attorney-General *v.* Furness R. Co. (47 L. J. Ch. D. 776, 38 L. T. 555, 20 W. R. 650), Cross. St. & H., 96.
Attorney-General *v.* Great Eastern R. Co. (18 W. R. 1187, 23 L. T. 344), Rip. Rts., 9; Waters & W., 15.
Attorney-General *v.* Great Eastern R. Co. (L. R. 6 Ch. 572, 19 W. R. 788), Waters & W., 6.
Attorney-General *v.* Great Eastern R. Co. (25 L. T. 867), Sts. & H., 422.
Attorney-General *v.* Great Eastern R. Co. (41 L. J. Ch. 505, L. R. 7 Ch. 475, 20 W. R. 599, 26 L. T. 749), Stat., 68.
Attorney-General *v.* Great Eastern R. Co. (L. R. 6 H. L. Cas. 367, 22 W. R. 281; affirming L. R. 7 Ch. 475, 41 L. J. Ch. 505, 26 L. T. 749, 20 W. R. 599), Sts. & H., 60.
Attorney-General *v.* Great Eastern R. Co. (L. R. 5 App. Cas. 473, 49 L. J. Ch. 545, 42 L. T. 810, 28 W. R. 769; affirming L. R. 11 Ch. D. 449, 48 L. J. Ch. 428, 40 L. T. 265, 27 W. R. 759), Charters, 51; Incorp., 4; Leases, 129; Ult. Vir., 1, 15.
Attorney-General *v.* Great Northern R. Co. (29 L. J. Ch. 794, 6 Jur. N. S. 1006), Quo War., 5.
Attorney-General *v.* Great Northern R. Co. (1 Drew & S. 154), Car. of M., 530; Charters, 54.
Attorney-General *v.* Great Southern & W. R. Co. (14 Ir. Com. Law Rep. 447), Bagg., 39.
Attorney-General *v.* Great Western R. Co. (L. R. 4 Ch. D. 735, 46 L. J. Ch. App. 192, 25 W. R. 330, 35 L. T. 921; affirming 35 L. T. 302, 24 W. R. 1015), Constr. Rys., 2.
Attorney-General *v.* Great Western R. Co. L. R. 7 Ch. 767), Branch & L. Roads, 3.
Attorney-General *v.* Hudson Tunnel R. Co. (27 N. J. Eq. 176; reversed in 27 N. J. Eq. 573), Tunnels, 2.
Attorney-General *v.* International Bridge Co. (22 Grant's Ch. (Ont.) 298), Bridges, 99.
Attorney-General *v.* International Bridge Co. (27 Grant's Ch. (Ont.) 37), Bridges, 26.
Attorney-General *v.* Joy (16 Am. & Eng. R. Cas. 643, 55 Mich. 94, 20 N. W. Rep. 806), Charters, 4; Stat., 34, 66.
Attorney-General *v.* Keily (22 Grant's Ch. (U. C.) 458), St. Rys., 169.
Attorney-General *v.* Lancashire & Y. R. Co. (2 H. & C. 792, 10 Jur. N. S. 705, 33 L. J. Ex. 163, 13 W. R. 8, 10 L. T. 95), Tax., 401.
Attorney-General *v.* Lombard & S. St. Pass. R. Co. (10 Phila. (Pa.) 352), Nuis., 2; St. Rys., 7.
Attorney-General *v.* London & N. W. R. Co. (1 Johns. 28), Car. of Mails, 6.
Attorney-General *v.* London & N. W. R. Co. (1 Am. & Eng. R. Cas. 578, L. R. 6 Q. B. D. 216, 50 L. J. Q. B. D. 170, 44 L. T. 236, 29 W. R. 346, 3 Ry. & C. T. Cas. xviii; affirming L. R. 5 Ex. D. 247, 49 L. J. Ex. D. 670, 42 L. T. 395, 28 W. R. 513), Tickets & F., 142.
Attorney-General *v.* MacDonald (6 Man. 372), Constr. Rys., 98.
Attorney-General *v.* Metropolitan R. Co. (50 L. J. Q. B. D. 573), Tickets & F., 142.
Attorney-General *v.* Metropolitan R. Co. (125 Mass. 515), St. Rys., 36, 191.
Attorney-General *v.* Metropolitan Dist. R. Co. (L. R. 5 Ex. D. 218, 42 L. T. 342, 28 W. R. 376; reversing 42 L. T. 93), Tickets & F., 142.
Attorney-General *v.* Mid-Kent R. Co. (L. R. 3 Ch. 100, 16 W. R. 258), Bridges, 41.
Attorney-General *v.* Midland R. Co. (3 Ont. 511), Ejectm., 26; Em. Dom., 1276.
Attorney-General *v.* Morris & E. R. Co. (19 N. J. Eq. 386; reversed in 19 N. J. Eq. 575), Charters, 65; Sts. & H., 38, 214, 230.
Attorney-General *v.* New Jersey R. & T. Co. (3 N. J. Eq. 136), Crim. L., 31; Nuis., 18.
Attorney-General *v.* New York & L. B. R. Co. (24 N. J. Eq. 49), Bridges, 14, 69, 71; Injunc., 8; Nuis., 3.
Attorney-General *v.* Niagara Falls Int. Bridge Co. (20 Grant's Ch. (U. C.) 34), Quo War., 5; Ult. Vir., 10.
Attorney-General *v.* Niagara Falls Int. Bridge Co. (20 Grant's Ch. (Ont.) 490), Bridges, 101.
Attorney-General *v.* Niagara Falls, W. P. & C. Tramway Co. (18 Ont. App. 453; affirming 19 Ont. 624), Sunday, 10.
Attorney-General *v.* Old Colony & N. R. Co. (12 Allen (Mass.) 404), Sts. & H., 21.
Attorney-General *v.* Old Colony R. Co. (56 Am. & Eng. R. Cas. 59, 160 Mass. 62, 35 N. E. Rep. 252), Tickets & F., 96.
Attorney-General *v.* Ontario, S. & H. R. Co. (6 Grant's Ch. (U. C.) 446), Discrim., 74.
Attorney-General *v.* Oxford, W. & W. R. Co. (31 L. J. Ex. 218, 1 Ry. & C. T. Cas. 21), Tickets & F., 142.
Attorney-General *v.* Paterson & H. R. R. Co. (9 N. J. Eq. 526), Bridges, 72; Waters & W., 5.
Attorney-General *v.* Petersburg & R. R. Co. (6 Ired. (N. Car.) 456), Charters, 77; Quo War., 8.
Attorney-General *v.* Ryan (5 Man. 81), Em. Dom., 1211, 1277; Injunc., 18.
Attorney-General *v.* Stevens (1 N. J. Eq. 369), Charters, 103; Words & Ph., 227.
Attorney-General *v.* Tewkesbury & M. R. Co. (1 DeG. J. & S. 423, 32 L. J. Ch. 482), Bridges, 9, 21; Em. Dom., 1141.
Attorney-General *v.* Toronto St. R. Co. (2 Chan. Chamb. (U. C.) 321), Pl., 146.

Attorney-General *v.* Toronto St. R. Co. (14 Grant's Ch. (U. C.) 673), St. Rys., 190.
Attorney-General *v.* Toronto St. R. Co. (15 Grant's Ch. (U. C.) 187), St. Rys., 190.
Attorney-General *v.* Ware River R. Co. (115 Mass. 400), Cross. Rys., 67.
Attorney-General *v.* Western Union Tel. Co. (33 Fed. Rep. 129), Tax., 32.
Attorney-General *v.* West Wisconsin R. Co. (36 Wis. 466, 9 Am. Ry. Rep. 141), Charters, 71.
Attorney-General *v.* Widnes R. Co. (30 L. T. 449, 22 W. R. 607), Sts. & H., 207.
Attorney-General of New Brunswick, Ex Parte (17 New Brun. 667), Mand., 3, 15.
Atwood *v.* Shenandoah Valley R. Co. (38 Am. & Eng. R. Cas. 534, 85 Va. 966, 9 S. E. Rep. 748), Agency, 27; Bonds, 44; Charters, 15; Mort., 192.
Au *v.* New York, L. E. & W. R. Co. (29 Fed. Rep. 72), Death, etc., 381; Employés, Inj. to, 370; Evid., 291; Fel. Serv., 73, 239; Negl., 3.
Aubuchon *v.* St. Louis & I. M. R. Co. (52 Mo. 522), Animals, 353.
Audenried *v.* Philadelphia & R. R. Co. (68 Pa. St. 370, 1 Am. Ry. Rep. 515), Discrim., 60; Wharves, 5.
Auditor *v.* Atchison, T. & S. F. R. Co. (6 Kan. 500), Tax., 260.
Auditor-General *v.* Pullman Palace Car Co. (34 Mich. 59), Tax., 266.
Auerback *v.* New York C. & H. R. R. Co. (89 N. Y. 281; reversing 60 How. Pr. 382), Tickets & F., 44, 88, 91.
Auger *v.* Ontario, S. & H. R. Co. (9 U. C. C. P. 164), Animals, 33.
Auger *v.* Ontario, S. & H. R. Co. (16 U. C. Q. B. 92), Animals, 340.
Augerstein *v.* Jones (139 Pa. St. 183, 21 Atl. Rep. 24), Employés, Inj. to, 96, 609.
Augusta & S. R. Co. *v.* Dorsey (68 Ga. 228), App., 124; Employés, Inj. to, 573; Fel. Serv., 472; Pl., 149; Witn., 155, 181, 182.
Augusta & S. R. Co. *v.* McElmurry (24 Ga. 75), Comp. Neg., 21; Cross., Inj. at, 172; Negl., 20, 30; Pl., 121.
Augusta & S. R. Co. *v.* Peacock (56 Ga. 146), Ex. & Ad., 4.
Augusta & S. R. Co. *v.* Randall (34 Am. & Eng. R. Cas. 439, 79 Ga. 304, 4 S. E. Rep. 674), Car. of P., 613, 639; Dam., 31; Evid., 28, 175; Stat., 32; St. Rys., 367.
Augusta & S. R. Co. *v.* Randall (85 Ga. 297, 11 S. E. Rep. 706), Contrib. Neg., 112; Dam., 71, 102; Evid., 57.
Augusta & S. R. Co. *v.* Renz (55 Ga. 126), Evid., 84; St. Rys., 374; Sunday, 10.
Augusta Bank *v.* Augusta (49 Me. 507), Mun. Aid, 35.
Augusta City Council *v.* Central R. Co. (78 Ga. 119), Tax., 13.
Augusta City Council *v.* Georgia R. & B. Co. (26 Ga. 651), Tax., 197.
Augusta City Council *v.* Port Royal & A. R. Co. (74 Ga. 658), Mun. Corp., 22; Stat., 34.
Augusta R. Co. *v.* Andrews (89 Ga. 653, 16 S. E. Rep. 203), Pl., 27.
Augusta R. Co. *v.* Glover (58 Am. & Eng. R. Cas. 269, 92 Ga. 132, 18 S. E. Rep. 406), Death, etc., 53, 158, 275, 411; Elec. Rys., 25; New Tr., 4; Pl., 175; St. Rys., 369, 370.
Augusta, T. & G. R. Co. *v.* Kittel (52 Fed. Rep. 63, 2 U. S. App. 409, 2 C. C. A. 615), Constr. Rys., 18; Estop., 25; Mort., 61, 75.
Auman *v.* Philadelphia & R. R. Co. (133 Pa. St. 93, 20 Atl. Rep. 1059), Witn., 44.
Aurora *v.* Chicago, B. & Q. R. Co. (119 Ill. 246, 10 N. E. Rep. 27; affirming 19 Ill. App. 360), Mun. Aid, 410.
Aurora *v.* West (22 Ind. 88), Bonds, 18; Mun. Aid, 184, 204.
Aurora *v.* West (7 Wall. (U. S.) 82), Int., 3; Judgm., 31.
Aurora & C. R. Co. *v.* Lawrenceburgh (56 Ind. 80, 18 Am. Ry. Rep. 136), Constr. Rys., 1; Cross. Rys., 7; Incorp., 11; Injunc., 22.
Aurora & C. R. Co. *v.* Miller (56 Ind. 88, 18 Am. Ry. Rep. 144), Em. Dom., 343.
Aurora Branch R. Co. *v.* Grimes (13 Ill. 585), Children, Inj. to, 120; Contrib. Neg., 2, 19, 104.
Austin *v.* Belleville & I. R. Co. (19 Ill. 310), Em. Dom., 883.
Austin *v.* Chicago, R. I. & P. R. Co. (91 Ill. 35), Stat. & D., 115.
Austin *v.* Great Western R. Co. (L. R. 2 Q. B. 442, 8 B. & S. 327, 36 L. J. Q. B. 201, 15 W. R. 863, 16 L. T. 320), Car. of P., 16; Children, Inj. to, 14; Tickets & F., 120.
Austin *v.* Gulf, C. & S. F. R. Co. (45 Tex. 234, 13 Am. Ry. Rep. 172), Mun. Aid, 50, 65, 115, 131, 228, 311.
Austin *v.* Long Island R. Co. (23 N. Y. Supp. 193, 52 N. Y. S. R. 746, 69 Hun 67), Death, etc., 202.
Austin *v.* Manchester, S. & L. R. Co. (10 C. B. 454, 7 Railw. Cas. 300, 16 Jur. 763, 21 L. J. C. P. 179), Car. of L. S., 64.
Austin *v.* Manchester, S. & L. R. Co. (16 Q. B. 600, 15 Jur. 670, 20 L. J. Q. B. 440), Car. of M., 732; Pl., 127.
Austin *v.* New York & E. R. Co. (25 N. J. L. 381), For. Corp., 17, 27; Negl., 5.
Austin *v.* Northern Pac. R. Co. (34 Minn. 351, 25 N. W. Rep. 798), New Tr., 90.
Austin *v.* Northern Pac. R. Co. (34 Minn. 473, 26 N. W. Rep. 607), Rem. of C., 23.
Austin *v.* Rutland R. Co. (45 Vt. 215, 2 Am. Ry. Rep. 46), Em. Dom., 1011; Wharves, 1.
Austin *v.* Rutland R. Co. (17 Fed. Rep. 466, 21 Blatchf. (U. S.) 358), Partit., 1.
Austin *v.* St. Louis & St. P. Packet Co. (15 Mo. App. 197), Car. of M., 23; Evid., 129; Words & Ph., 7.
Austin *v.* Staten Island R. T. R. Co. (39 N. Y. S. R. 76, 14 N. Y. Supp. 923), Cross., Inj. at, 22, 158.
Austin *v.* Talk (20 Tex. 164), Car. of M., 664.
Austin & N. C. R. Co. *v.* Gillaspie (1 Jones Eq. (N. Car.) 261), Spec. Perf., 11.
Austin & N. W. R. Co. *v.* Anderson (79 Tex. 427, 15 S. W. Rep. 484), Culverts, 1; Embankm., 5; Flood. Lds., 83; Nuis., 40.
Austin & N. W. R. Co. *v.* Anderson (85 Tex. 88, 19 S. W. Rep. 1025), Dam., 4; Flood. Lds., 60.
Austin & N. W. R. Co. *v.* Beatty (73 Tex.

592, 11 S. W. Rep. 858), Employés, Inj. to, 9; Negl., 9, 106.
Austin & N. W. R. Co. *v.* Daniels (62 Tex. 70), Liens, 39, 52, 60.
Austin & N. W. R. Co. *v.* Rucker (12 Am. & Eng. R. Cas. 258, 59 Tex. 587), Judgm., 9, 18; Liens, 52.
Austin City R. Co. *v.* Swisher (1 Tex. App. (Civ. Cas.) 33), Direct., 23; Officers, 7; Pres., 7.
Autenrieth *v.* St. Louis & S. F. R. Co. (36 Mo. App. 254), Cross. St. & H., 114; Dam., 95; Em. Dom., 645; Pl., 172.
Avery *v.* Kansas City & S. R. Co. (113 Mo. 561, 21 S. W. Rep. 90), Leases, 84.
Avery *v.* New York C. & H. R. R. Co. (31 Am. & Eng. R. Cas. 583, 106 N. Y. 142, 12 N. E. Rep. 619, 8 N. Y. S. R. 612, 7 Cent. Rep. 795; further appeal 121 N. Y. 31), Cov'ts, 7; Deeds, 12; Injunc., 16; Pl., 149.
Avery *v.* New York C. & H. R. R. Co. (17 N. Y. S. R. 392, 2 N. Y. Supp. 109; reversed in 121 N. Y. 31, 30 N. Y. S. R. 417, 24 N. E. Rep. 20), Pl., 13.
Avery *v.* New York C. & H. R. R. Co. (121 N. Y. 31, 24 N. E. Rep. 20, 30 N. Y. S. R. 471; reversing 2 N. Y. Supp. 101, 17 N. Y. S. R. 417), Car. of P., 60, 62; Cov'ts, 14; Dam., 102; Witn., 114, 120.
Avery *v.* New York C. & H. R. R. Co. (6 N. Y. Supp. 547, 24 N. Y. S. R. 918; affirmed in 117 N. Y. 660, mem., 22 N. E. Rep. 1134), Pl., 73, 78.
Avery *v.* New York C. & H. R. R. Co. (26 N. Y. S. R. 279, 7 N. Y. Supp. 341; reversed in 121 N. Y. 649, mem., 24 N. E. Rep. 24), Nuis., 28.
Avery *v.* Springport (14 Blatchf. (U. S.) 272), Mun. Aid, 307.
Avey *v.* Atchison, T. & S. F. R. Co. (11 Kan. 448), Eject. Pass., 82.
Avey *v.* Galveston, H. & S. A. R. Co. (81 Tex. 243, 16 S. W. Rep. 1015), Children, Inj. to, 103, 105, 167; Pl., 24.
Avey *v.* Galveston, H. & S. A. R. Co. (Tex.) (17 S. W. Rep. 31), Children, Inj. to, 112, 116.
Avinger *v.* South Carolina R. Co. (35 Am. & Eng. R. Cas. 519, 29 So. Car. 265, 7 S. E. Rep. 493), Car. of M., 35, 793; Trial, 71, 107.
Aycock *v.* Raleigh & A. A. L. R. Co. (89 N. Car. 321), Contrib. Neg., 63, 105; Evid., 229; Fires, 62, 63, 66, 261, 289; Leases, 111.
Aycock *v.* Wilmington & W. R. Co. (6 Jones (N. Car.) 231), Animals, 69; App., 107.
Aycrigg *v.* New York & E. R. Co. (30 N. J. L. 460), Agency, 73.
Ayers, In re (123 U. S. 443, 8 Sup. Ct. Rep. 164), States, 3.
Ayers *v.* French (41 Conn. 142), Trover, 6.
Ayers *v.* Minneapolis, St. P. & S. St. M. R. Co. (46 Minn. 134, 48 N. W. Rep. 683), App., 119.
Ayers *v.* Pennsylvania R. Co. (46 Am. & Eng. R. Cas. 549, 52 N. J. L. 405, 20 Atl. Rep. 54), Sts. & H., 2.
Ayers *v.* Richmond & D. R. Co. (33 Am. & Eng. R. Cas 269, 84 Va. 679, 5 S. E. Rep. 582), Employés, Inj. to, 100, 162; Fel. Serv., 238.
Ayles *v.* South-Eastern R. Co. (37 L. J. Ex. 104, L. R. 3 Ex. 146), Leases, 118.
Aylesworth *v.* Chicago, R. I. & P. R. Co. (30 Iowa 459), Animals, 53, 142, 145; Car. of L. S., 138.
Ayres *v.* Chicago & N. W. R. Co. (35 Am. & Eng. R. Cas. 679, 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. Rep. 432), Car. of L. S., 5, 24.
Ayres *v.* Chicago & N. W. R. Co. (40 Am. & Eng. R. Cas. 108, 75 Wis. 215, 43 N. W. Rep. 1122), Car. of L. S., 158; Evid., 116, 271; Witn., 131.
Ayres *v.* Chicago, R. I. & P. R. Co. (52 Iowa 478, 3 N. W. Rep. 522), Constr. Rys., 17.
Ayres *v.* Lawrence (63 Barb. (N. Y.) 454; reversed in 59 N. Y. 192), Mun. Aid, 300, 433.
Ayers *v.* Lawrence (59 N. Y. 192, 1 T. & C. Add. 5; reversing 63 Barb. 454), Mun. Aid, 299.
Ayres *v.* Pennsylvania R. Co. (48 N. J. L. 44, 3 Atl. Rep. 885, 57 Am. Rep. 538), Deeds, 39; Sts. & H., 13, 14.
Ayres *v.* Western R. Corp. (14 Blatchf. (U. S.) 9), Car. of M., 686.
Ayr Harbour Trustees *v.* Glasgow & S. W. R. Co. (4 Ry. & C. T. Cas. 90), Charges, 96, 105; Discrim., 59.
Ayrshire & W. R. Co. *v.* Glasgow & S. W. R. Co. (6 Ry. & C. T. Cas. 26), Car. of M., 537.
Aystin *v.* St. Louis & St. P. Packet Co. (15 Mo. App. 197), Pl., 180.

Baass *v.* Chicago & N. W. R. Co. (39 Wis. 296), Mort., 182.
Babcock *v.* Chicago & N. W. R. Co. (11 Am. & Eng. R. Cas. 63, 62 Iowa 593, 13 N. W. Rep. 740; adhered to on rehearing, 13 Am. & Eng. R. Cas. 477, 62 Iowa 598, 17 N. W. Rep. 909), Fires, 241, 252, 264.
Babcock *v.* Chicago & N. W. R. Co. (13 Am. & Eng. R. Cas. 477, 62 Iowa 598, 17 N. W. Rep. 909; rehearing denied in 11 Am. & Eng. R. Cas. 63, 62 Iowa 593, 13 N. W. Rep. 740), Fires, 268, 316.
Babcock *v.* Chicago & N. W. R. Co. (72 Iowa 197, 28 N. W. Rep. 644, 33 N. W. Rep. 628), App., 141; Fires, 173.
Babcock *v.* Fitchburg R. Co. (46 N. Y. S. R. 796, 64 Hun 636, 19 N. Y. Supp. 774), Fires, 100.
Babcock *v.* Fitchburg R. Co. (51 N. Y. S. R. 115, 67 Hun 469, 22 N. Y. Supp. 449; reversed in 140 N. Y. 308, 55 N. Y. S. R. 640, 35 N. E. Rep. 596), Fires, 40.
Babcock *v.* Fitchburg R. Co. (140 N. Y. 308, 55 N. Y. S. R. 640, 35 N. E. Rep. 596; reversing 51 N. Y. S. R. 115, 67 Hun 469), Death, etc., 266.
Babcock *v.* Helena (34 Ark. 499), Mun. Aid, 283.
Babcock *v.* Lake Shore & M. S. R. Co. (43 How. Pr. (N. Y.) 317). Car. of M., 558, 668.
Babcock *v.* Lake Shore & M. S. R. Co. (49

N. Y. 491, 3 Am. Ry. Rep. 381; reversing 43 How. Pr. 317), Car. of M., 604, 669.
Babcock *v.* Northern Pac. R. Co. (26 Fed. Rep. 756), Contr., 106.
Babcock *v.* Old Colony R. Co. (150 Mass. 467, 23 N. E. Rep. 325), Employés, Inj. to, 92, 152, 739; Fel. Serv., 342, 514.
Babcock *v.* St. Paul, M. & M. R. Co. (36 Minn. 147, 30 N. W. Rep. 449), Dam., 73.
Babcock *v.* Schuylkill & L. V. R. Co. (31 N. Y. S. R. 643, 9 N. Y. Supp. 845, 56 Hun 649), Jurisd., 6.
Babcock *v.* Schuylkill & L. V. R. Co. (39 N. Y. S. R. 506, 60 Hun 583, 15 N. Y. Supp. 193; affirmed in 133 N. Y. 420, 31 N. E. Rep. 30, 45 N. Y. S. R. 246), Subscr., 41.
Babcock *v.* Western R. Corp. (9 Metc. (Mass.) 553), Culverts, 2.
Baber *v.* Pittsburgh, C. & St. L. R. Co. (93 Ill. 342), App., 2.
Baby *v.* Great Western R. Co. (13 U. C. Q. B. 291), Mand., 9.
Bach *v.* New York El. R. Co. (60 Hun 128, 38 N. Y. S. R. 421, 14 N. Y. Supp. 620), Elev. Rys., 78.
Bacharach *v.* Chester Freight Line (42 Am. & Eng. R. Cas. 362, 133 Pa. St. 414, 19 Atl. Rep. 409), Car. of M., 238, 387, 713.
Backenstoe *v.* Wabash, St. L. & P. R. Co. (23 Mo. App. 148; affirmed in 86 Mo. 492, 1 West. Rep. 743), Animals, 211, 547, 608.
Backenstoe *v.* Wabash, St. L. & P. R. Co. (86 Mo. 492; affirming 23 Mo. App. 148), Animals, 464, 606.
Backus *v.* Detroit, W. T. & J. R. Co. (36 Am. & Eng. R. Cas. 436, 71 Mich. 645, 40 N. W. Rep. 60), Em. Dom., 722; Leases, 39.
Backus *v.* Gartner (89 Mich. 209, 50 N. W. Rep. 646), Em. Dom., 57, 830, 958.
Bacon *v.* Delaware, L. & W. R. Co. (143 Pa. St. 14, 21 Atl. Rep. 1002), Car. of P., 377; Trial, 183.
Bacon *v.* Mayor, etc., of Savannah (86 Ga. 301, 12 S. E. Rep. 580), St. Rys., 217.
Bacon *v.* Michigan C. R. Co. (20 Am. & Eng. R. Cas. 633, 55 Mich. 224, 21 N. W. Rep. 324, 54 Am. Rep. 372), Libel & S., 1, 7.
Bacon *v.* Michigan C. R. Co. (31 Am. & Eng. R. Cas. 358, 66 Mich. 166, 33 N. W. Rep. 181, 9 West. Rep. 709), Libel & S., 3, 10, 11.
Bacot, Ex parte (50 Am. & Eng. R. Cas. 597, 36 So. Car. 125, 15 S. E. Rep. 204), Em. Dom., 43, 99, 259, 528; Stat., 34.
Badgerow *v.* Grand Trunk R. Co. (19 Ont. 191), Death, etc., 258; Employés, Inj. to, 454.
Baettie *v.* Carolina C. R. Co. (46 Am. & Eng. R. Cas. 524, 108 N. Car. 425, 12 S. E. Rep. 913), Right of W., 4.
Bagaley *v.* Vanderbilt (16 Abb. N. Cas. (N. Y.) 359), Injunc., 1.
Bagby *v.* Atlantic, M. & O. R. Co. (86 Pa. St. 291), Receiv., 41, 42.
Bagg *v.* Wilmington, C. & A. R. Co. (49 Am. & Eng. R. Cas. 46, 109 N. Car. 279, 14 S. E. Rep. 79), Commerce, 2, 3, 8.
Bagnall *v.* London & N. W. R. Co. (7 H. & N. 423, 8 Jur. N. S. 16, 31 L. J. Ex. 121, 10 W. R. 232; affirmed in 1 H. & C. 544, 9 Jur. N. S. 254, 9 L. T. 419, 31 L. J. Ex. 480, 10 W. R. 802), Em. Dom., 1158; Mines, etc., 13.
Bagnalstown & W. R. Co. In re (4 Ir. Eq. 172), Mort., 4.
Bagnalstown & W. R. Co. In re (4 Ir. Eq. 505), Debent., 4.
Bahia & S. F. R. Co. In re (L. R. 3 Q. B. 584, 37 L. J. Q. B. 176, 18 L. T. 467, 16 W. R. 862, 9 B. & S. 844), Estoppel, 35; Stock, 79, 87.
Bahr *v.* Lombard (53 N. J. L. 233, 21 Atl. Rep. 190, 23 Atl. Rep. 167), Negl., 100.
Bahrenburgh *v.* Brooklyn City, H. P. & P. P. R. Co. (56 N. Y. 652), Children, Inj. to, 62.
Bailey, Ex parte (1 B. C. C. 66), Em. Dom., 1189.
Bailey, In re (31 Hun (N. Y.) 608, 66 How. Pr. 64), Att'ys, 20.
Bailey *v.* Atlantic & P. R. Co. (3 Dill. (U. S.) 22), Tax., 222.
Bailey *v.* Buchanan County (115 N. Y. 297, 22 N. E. Rep. 155, 26 N. Y. S. R. 128), Coupons, 12.
Bailey *v.* Chicago, M. & St. P. R. Co. (3 S. Dak. 531, 54 N. W. Rep. 596), Fires, 140, 339.
Bailey *v.* Dubuque Western R. Co. (13 Iowa 97), Exec., 30.
Bailey *v.* Hannibal & St. J. R. Co. (1 Dill. (U. S.) 174), Stock, 5.
Bailey *v.* Hannibal & St. J. R. Co. (17 Wall. (U. S.) 96), Divid., 14.
Bailey *v.* Hartford & C. V. R. Co. (37 Am. & Eng. R. Cas. 483, 56 Conn. 444, 16 Atl. Rep. 234), Cross., Inj. at, 1, 139; Fright. Teams, 2.
Bailey *v.* Hudson River R. Co. (49 N. Y. 70, 3 Am. Ry. Rep. 318), Car. of M., 304.
Bailey *v.* Hollister (26 N. Y. 112), Stockh., 37.
Bailey *v.* Lansing (13 Blatchf. (U. S.) 424), Coupons, 14, 20.
Bailey *v.* London, C. & D. R. Co. (2 Ry. & C. T. Cas. 99), Charges, 110.
Bailey *v.* Maguire (22 Wall. (U. S.) 215, 11 Am. Ry. Rep. 470), Tax., 145, 146, 245.
Bailey *v.* New Haven & N. Co. (107 Mass. 496), Witn., 138.
Bailey *v.* New York Arcade R. Co. (1 N. Y. Supp. 304, 48 Hun 621, 16 N. Y. S. R. 1007; affirmed in 113 N. Y. 615, mem., 20 N. E. Rep. 594, 22 N. Y. S. R. 1), Stat., 34; St. Rys., 121; Underground Rys., 1.
Bailey *v.* New York C. & H. R. R. Co. (22 Wall. (U. S.) 604, 11 Am. Ry. Rep. 121), Consol., 42; Rev., 6, 10.
Bailey *v.* New York C. & H. R. R. Co. (13 Am. & Eng. R. Cas. 333, 106 U. S. 109, 1 Sup. Ct. Rep. 62), Tax., 402.
Bailey *v.* Philadelphia, W. & B. R. Co. (4 Harr. (Del.) 389), Bridges, 1, 21, 68; Rip. Rts., 9.
Bailey *v.* Pittsburgh Coal R. Co. (139 Pa. St. 213, 21 Atl. Rep. 72), Receiv., 24.
Bailey *v.* Rome, W. & O. R. Co. (19 N. Y. S. R. 656, 49 Hun 377, 3 N. Y. Supp. 585),

Employés, Inj. to, 99, 136, 145, 182, 206, 662.
Bailey *v.* Rome, W. & O. R. Co. (55 Hun 509, 29 N. Y. S. R. 755, 8 N. Y. Supp. 780), Employés, Inj. to, 689; Witn., 145.
Bailey *v.* Rome, W. & O. R. Co. (139 N. Y. 302, 34 N. E. Rep. 918, 54 N. Y. S. R. 550; reversing 29 N. Y. S. R. 755, 8 N. Y. Supp. 780, 55 Hun 509), Employés, Inj. to, 143, 144, 145, 736; Evid., 94.
Bailey *v.* Shaw (24 N. H. 297), Car. of M., 163.
Bailey *v.* Sweeney (30 Am. & Eng. R. Cas. 328, 64 N. H. 296, 4 N. Eng. Rep. 287, 9 Atl. Rep. 543), Right of W., 20.
Bailey *v.* Troy & B. R. Co. (57 Vt. 252), Indep. Contr., 14.
Bailey *v.* Wescott (14 Daly (N. Y.) 506), Witn., 167.
Bailey *v.* Westcott (16 N. Y. S. R. 671, 4 N. Y. Supp. 482), Dam., 88.
Bailey Constr. Co. *v.* Purcell (88 Va. 300, 13 S. E. Rep. 456), Liens, 38.
Bailie *v.* Mosher (72 Ga. 740), Attach., 30.
Bain *v.* Richmond & D. R. Co. (41 Am. & Eng. R. Cas. 574, 105 N. Car. 363, 11 S. E. Rep. 311, 8 L. R. A. 299, 3 Int. Com. Rep. 149), Tax., 92.
Baines *v.* Babcock (95 Cal. 581, 27 Pac. Rep. 674, 30 Pac. Rep. 776), Stockh., 25, 31, 48.
Baird *v.* Chicago, R. I. & P. R. Co. (8 Am. & Eng. R. Cas. 128, 61 Iowa 359, 13 N. W. Rep. 731; adhered to in 12 Am. & Eng. R. Cas. 75, 16 N. W. Rep. 207), Employés, Inj. to, 398, 409.
Baird *v.* Daly (68 N. Y. 547), Evid., 85.
Baird *v.* St. Louis, I. M. & S. R. Co. (42 Am. & Eng. R. Cas. 281, 41 Fed. Rep. 592), Bills of L., 17; Charges, 10; Int. Com., 5.
Baird *v.* Schuylkill River E. S. R. Co. (154 Pa. St. 463, 25 Atl. Rep. 834), Em. Dom., 594, 1008; Trial, 183.
Baird *v.* Shore Line R. Co. (6 Blatchf. (U. S.) 276), Bridges, 87.
Baird *v.* Shore Line R. Co. (6 Blatchf. (U. S.) 461), Injunc., 50.
Baird *v.* United States (5 Ct. of Cl. 348), Claims Against U. S., 5.
Bajus *v.* Syracuse, B. & N. Y. P. Co. (28 Am. & Eng. R. Cas. 499, 103 N. Y. 312, 8 N. E. Rep. 529, 3 N. Y. S. R. 96; reversing 34 Hun 153), Employés, Inj. to, 17, 131.
Bajus *v.* Syracuse, B. & N. Y. R. Co. (5 N. Y. Supp. 804, 51 Hun 638, mem.; affirmed in 119 N. Y. 951, mem., 23 N. E. Rep. 1149, 29 N. Y. S. R. 993), Employés, Inj. to, 409, 610.
Baker *v.* Allegheny Valley R. Co. (8 Am. & Eng. R. Cas. 141, 95 Pa. St. 211), Employés, Inj. to, 577, 685.
Baker *v.* Brinson (9 Rich. (So. Car.) 201), Car. of M., 470.
Baker *v.* Chicago, B. & Q. R. Co. (73 Iowa 389, 35 N. W. Rep. 460), Animals, 49, 457; Negl., 105.
Baker *v.* Chicago, M. & St. P. R. Co. (41 Mo. App. 260), Fences, 103, 109.
Baker *v.* Chicago, R. I. & P. R. Co. (57 Mo. 265, 9 Am. Ry. Rep. 168), Em. Dom., 1021.
Baker *v.* Eighth Ave. R. Co. (41 N. Y. S. R. 353, 62 Hun 39, 16 N. Y. Supp. 319), Children, Inj. to, 60.
Baker *v.* Flint & P. M. R. Co. (68 Mich. 90, 12 West. Rep. 485, 35 N. W. Rep. 836), Children, Inj. to, 74, 104, 105.
Baker *v.* Flint & P. M. R. Co. (54 Am. & Eng. R. Cas. 131, 91 Mich. 298, 51 N. W. Rep. 897), Children, Inj. to, 146, 194.
Baker *v.* Gee (1 Wall. (U. S.) 333), Land Grants, 40.
Baker *v.* Hannibal & St. J. R. Co. (36 Mo. 543), Em. Dom., 449.
Baker *v.* Kansas City, C. & S. R. Co. (52 Mo. App. 602), Trover, 9, 15.
Baker *v.* Kansas City, St. J. & C. B. R. Co. (28 Am. & Eng. R. Cas. 61, 91 Mo. 152, 3 S. W. Rep. 486), Agency, 23, 52; Contr., 97, 109.
Baker *v.* London & S. W. R. Co. (8 B. & S. 645, L. R. 3 Q. B. 91, 37 L. J. Q. B. 53, 16 L. T. 126), Discov., 4.
Baker *v.* Long Island R. Co. (1 How. Pr. (N. Y.) 214), Ejectm., 24.
Baker *v.* Louisiana Portable R. Co. (34 La. Ann. 754), Receiv., 5.
Baker *v.* Louisville & N. R. Co. (Ky.) (17 S. W. Rep. 191), Death, etc., 20.
Baker *v.* Louisville & N. R. Co. (4 Bush (Ky.) 619), Pl., 41.
Baker *v.* Louisville & N. R. Co. (16 Am. & Eng. R. Cas. 149, 10 Lea (Tenn.) 304), Car. of L. S., 21.
Baker *v.* Manhattan R. Co. (118 N. Y. 533, 23 N. E. Rep. 885, 29 N. Y. S. R. 936; affirming 22 J. & S. 394, 7 N. Y. S. R. 68), Dam., 16; Elev. Rys., 214.
Baker *v.* Michigan S. & N. I. R. Co. (42 Ill. 73), Bills of L., 43; Car. of M., 696.
Baker *v.* Missouri Pac. R. Co. (19 Mo. App. 321), Car. of L. S., 139.
Baker *v.* Missouri Pac. R. Co. (34 Mo. App. 98), Car. of M., 422, 677.
Baker *v.* Pennsylvania Co. (142 Pa. St. 503, 21 Atl. Rep. 979), Dam., 67, 70, 73, 74; Trial, 122, 157.
Baker *v.* Raleigh & G. R. Co. (91 N. Car. 308), Death, etc., 66.
Baker *v.* Springfield & W. M. R. Co. (86 Mo. 75), Trusts, 7.
Baker *v.* Wasson (53 Tex. 150), Attach., 31; Stockh., 107.
Baker *v.* Western & A. R. Co. (68 Ga. 699), Employés, Inj. to, 238, 282; Fel. Serv., 171.
Bakewell *v.* Police Jury (20 La. Ann. 334), Tax., 62.
Bala & D. R. Co. *v.* Cambrian R. Co. (2 Ry. & C. T. Cas. 47), Leases, 119.
Balch *v.* Grand Rapids & I. R. Co. (67 Mich. 394, 11 West. Rep. 476, 34 N. W. Rep. 884), Death, etc., 374, 428.
Balch *v.* Grand Rapids & I. R. Co. (78 Mich. 654, 44 N. W. Rep. 151), New Tr., 29.
Balch *v.* New York & O. M. R. Co. (46 N. Y. 521), Constr. Rys., 93.
Balcheller *v.* Mascoutah (2 Fed. Cas. 504, 7

Chicago Leg. News 230), Mun. Aid, 61, 317.
Balcom *v.* Dubuque & S. C. R. Co. (21 Iowa 102), Animals, 186.
Baldraff *v.* Camden & A. R. Co. (2 Fed. Cas. 507), Bagg., 89.
Baldwin *v.* American Exp. Co. (23 Ill. 197), Exp. Cos., 41.
Baldwin *v.* Barney (12 R. I. 392), Sunday, 4.
Baldwin *v.* Chicago, M. & St. P. R. Co. (27 Am. & Eng. R. Cas. 402, 35 Minn. 354, 29 N. W. Rep. 5), Em. Dom., 646.
Baldwin *v.* Chicago, R. I. & P. R. Co. (50 Iowa 680), Employés, Inj. to, 193; Evid., 89.
Baldwin *v.* Dow (130 Mass. 416), Guar., 4.
Baldwin *v.* Grand Trunk R. Co. (37 Am. & Eng. R. Cas. 126, 64 N. H. 596, 7 N. Eng. Rep. 111, 15 Atl. Rep. 411), Eject. Pass., 65; Words & Ph., 113.
Baldwin *v.* Kouns (31 Am. & Eng. R. Cas. 347, 81 Ala. 272, 2 So. Rep. 638), Med. Serv., 19.
Baldwin *v.* Liverpool & G. W. Steamship Co. (74 N. Y. 125, 30 Am. Rep. 277; affirming 11 Hun 496), Charges, 33.
Baldwin *v.* London, C. & D. R. Co. (9 Am. & Eng. R. Cas. 175, L. R. 9 Q. B. D. 582), Car of M., 123, 789.
Baldwin *v.* Mississippi & M. R. Co. (5 Iowa 518), Jurisd., 7; Trial, 12.
Baldwin *v.* New York C. & H. R. R. Co. (2 N. Y. Supp. 481, 18 N. Y. S. R. 958), Release, 8.
Baldwin *v.* St. Louis, K & N. R. Co. (68 Iowa 37, 25 N. W. Rep. 918), Employés, Inj. to, 134; Fel. Serv., 308, 503; Witn., 145.
Baldwin *v.* St. Louis, K. & N. W. R. Co. (15 Am. & Eng. R. Cas. 166, 63 Iowa 210, 18 N. W. Rep. 884), Contrib. Neg., 28, 30; Fel. Serv., 498.
Baldwin *v.* St. Louis, K. & N. W. R. Co. (72 Iowa 45, 33 N. W. Rep. 356), Employés, Inj. to, 668.
Baldwin *v.* St. Louis, K. & N. W. R. Co. (75 Iowa 297, 39 N. W. Rep. 507), Fel. Serv., 85, 217, 220.
Baldwin *v.* Second St. Cable R. Co. (77 Cal. 390, 19 Pac. Rep. 644), Husb. & W., 27; Parties, 16.
Baldwin *v.* Western R. Corp. (4 Gray (Mass.) 333), Cross., Inj. at, 362; Evid., 164.
Balfour *v.* Louisville, N. O. & T. R. Co. (62 Miss. 508), Em. Dom., 1001.
Ball *v.* Grand Trunk R. Co. (16 U. C. C. P. 252), Fires, 21, 22, 83, 136, 246.
Ball *v.* Keokuk & N. W. R. Co. (20 Am. & Eng. R. Cas. 375, 62 Iowa 754, 16 N. W. Rep. 592), Lim. of Ac., 18.
Ball *v.* Keokuk & N. W. R. Co. (71 Iowa 306, 32 N. W. Rep. 354), Em. Dom., 328, 897.
Ball *v.* Keokuk & N. W. R. Co. (74 Iowa 132, 37 N. W. Rep. 110), Em. Dom., 575, 629, 734, 837; Witn., 160.
Ball *v.* Wabash, St. L. & P. R. Co. (25 Am. & Eng. R. Cas. 384, 83 Mo. 574), Car. of L. S., 96, 146; Lim. of Liab., 27.
Ballard *v.* Chicago, R. I. & P. R. Co. (51 Mo. App. 453), Employés, Inj. to, 441.
Ballard *v.* Hitchcock Mfg. Co. (21 N. Y. S. R. 548, 51 Hun 188, 4 N. Y. Supp. 940), Employés, Inj. to, 99, 650.
Ballard *v.* Louisville & N. R. Co. (Ky.) (5 S. W. Rep. 484), Em. Dom., 204.
Ballard *v.* New York, L. E. & W. R. Co. (126 Pa. St. 141, 19 Atl. Rep. 35), Death, etc., 258; Witn., 183.
Ballentine *v.* North Mo. R. Co. (40 Mo. 491), Car. of L. S., 11, 13; Car. of M., 57; Words & Ph., 7.
Ballou *v.* Chicago & N. W. R. Co. (5 Am. & Eng. R. Cas. 480, 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. Rep. 559), Employés, Inj. to, 126, 142, 238.
Ballou *v.* Earle (48 Am. & Eng. R. Cas. 31, 17 R. I. 441, 22 Atl. Rep. 1113), Exp. Cos., 72; Lim. of Liab., 28, 31.
Ballou *v.* Farnum (9 Allen (Mass.) 47), Mort., 153.
Ballou *v.* Farnum (11 Allen (Mass.) 73), Dam., 91.
Ballou *v.* Jasper County (3 Fed. Rep. 620), Mun. Aid., 352.
Ballou *v.* March (43 Am. & Eng. R. Cas. 709, 133 Pa. St. 64, 19 Atl. Rep. 304), Contr., 10.
Balls *v.* Metropolitan Board of Works (L. R. 1 Q. B. 337, 12 Jur. N. S. 183, 35 L. J. Q. B. 101, 14 W. R. 370, 13 L. T. 702), Em. Dom., 1144.
Balsley *v.* St. Louis, A. & T. H. R. Co. (25 Am. & Eng. R. Cas. 497, 119 Ill. 68, 8 N. E. Rep. 859), Leases, 41, 48.
Baltimore *v.* Baltimore & O. R. Co. (10 Wall. (U. S.) 543), Rev., 4.
Baltimore *v.* Connellsville & S. P. R. Co. (6 Phila. (Pa.) 190), Franch., 10.
Baltimore *v.* Pittsburgh & C. R. Co. (1 Abb. (U. S.) 9), Charters, 79, 82.
Baltimore *v.* Pittsburgh & C. R. Co. (3 Pittsb. (Pa.) 20), Int. Com., 215; Stat., 57; Words & Ph., 2.
Baltimore & C. V. R. E. Co.'s Appeal (Pa.) (3 Am. & Eng. R. Cas. 242, 10 W. N. C. (Pa.) 530), App., 123; Cross. Rys., 65.
Baltimore & D. P. R. Co. *v.* Pumphrey (74 Md. 86, 21 Atl. Rep. 559), Mun. Aid, 36, 67, 140, 231; Stat., 4.
Baltimore & H. R. Co. *v.* Algire (23 Am. & Eng. R. Cas. 145, 63 Md. 319), Em. Dom., 224, 231, 1073.
Baltimore & H. R. Co. *v.* Algire (25 Am. & Eng. R. Cas. 147, 65 Md. 337, 4 Atl. Rep. 293), License, 12.
Baltimore & H. R. Co. *v.* Hanover & McS. St. R. Co. (2 Pa. Dist. 774), Cross. Rys., 87.
Baltimore & H. de G. Turnpike Co. *v.* Northern C. R. Co. (15 Md. 193), Cert., 2.
Baltimore & H. de G. Turnpike Co. *v.* Union R. Co. (35 Md. 224), Charters, 67; Cross. Rys., 7.
Baltimore & L. Turnpike Co. *v.* Moale (71 Md. 353, 18 Atl. Rep. 658), Mort., 97.
Baltimore & O. & C. R. Co. *v.* Ralston (41 Ohio St. 573), Contr., 58.
Baltimore & O. & C. R. Co. *v.* Wagner (43 Ohio St. 75, 1 N. E. Rep. 91), Tax., 351.

Baltimore & O. & C. R. Co. *v.* Walborn (127 Ind. 142, 26 N. E. Rep. 207), Cross., Inj. at, 131; Negl., 67.
Baltimore & O. Exp. Co. *v.* Cooper (40 Am. & Eng. R. Cas. 97, 66 Miss. 558, 6 So. Rep. 327), Car. of M., 422.
Baltimore & O. R. Co., Ex parte (108 U. S. 566, 2 Sup. Ct. Rep. 876), Mand., 5.
Baltimore & O. R. Co. *v.* Adams Exp. Co. (18 Am. & Eng. R. Cas. 586, 22 Fed. Rep. 32), Discrim., 58.
Baltimore & O. R. Co. *v.* Adams Exp. Co. (18 Am. & Eng. R. Cas. 455, 22 Fed. Rep. 404), Discrim., 58; Exp. Cos., 80.
Baltimore & O. R. Co. *v.* Allen (17 Fed. Rep. 171), Tax., 292.
Baltimore & O. R. Co. *v.* Allen (17 Am. & Eng. R. Cas. 461, 22 Fed. Rep. 376), Tax., 132.
Baltimore & O. R. Co. *v.* Andrews (53 Am. & Eng. R. Cas. 523, 50 Fed. Rep. 728, 1 C. C. A. 636), Fel. Serv., 34, 237, 269.
Baltimore & O. R. Co. *v.* Arthur (12 Am. & Eng. R. Cas. 25, 90 N. Y. 234; reversing 25 Hun 454, mem.), Interpl., 2.
Baltimore & O. R. Co. *v.* Bahrs (28 Md. 647), App., 100.
Baltimore & O. R. Co. *v.* Baltimore & O. E. Relief Assoc. (77 Md. 566, 26 Atl. Rep. 1045), Relief Assoc., 10.
Baltimore & O. R. Co. *v.* Bambrey (Pa.) (16 Atl. Rep. 67), Eject. Pass., 74, 109.
Baltimore & O. R. Co. *v.* Baugh (54 Am. & Eng. R. Cas. 328, 149 U. S. 368, 13 Sup. Ct. Rep. 914), Fel. Serv., 25, 281.
Baltimore & O. R. Co. *v.* Belmont County (19 Ohio St. 589), Tax., 77.
Baltimore & O. R. Co. *v.* Bitner (15 W. Va. 467), Pl., 16.
Baltimore & O. R. Co. *v.* Blocher (27 Md. 277), App., 51; Car. of P., 70, 129, 612; Conduct., 12; Dam., 30; Eject. Pass., 23.
Baltimore & O. R. Co. *v.* Boteler (38 Md. 568, 10 Am. Ry. Rep. 506), Bridges, 40, 50; Dam., 98; Negl., 51, 114.
Baltimore & O. R. Co. *v.* Boyd (63 Md. 325), Dam., 23; Em. Dom., 390, 1061; Sts. & H., 281; Tresp., 8, 16.
Baltimore & O. R. Co. *v.* Boyd (30 Am. & Eng. R. Cas. 372, 67 Md. 32, 7 Cent. Rep. 435, 10 Atl. Rep. 315), Dam., 15, 23.
Baltimore & O. R. Co. *v.* Boyd (unreported; see 73 Md. xiii), Em. Dom., 658.
Baltimore & O. R. Co. *v.* Boyd (Md.) (20 Atl. Rep. 902), Em. Dom., 588.
Baltimore & O. R. Co. *v.* Brady (32 Md. 333), Car. of M., 433, 435, 468.
Baltimore & O. R. Co. *v.* Brant (17 Ill. App. 151), Passes, 2.
Baltimore & O. R. Co. *v.* Breinig (25 Md. 378), Car. of P., 95, 106, 139; Dam., 19; Sts. & H., 386; Tresp., Inj. to, 24.
Baltimore & O. R. Co. *v.* Brydon (25 Am. & Eng. R. Cas. 287, 65 Md. 198, 7 Cent. Rep. 396, 3 Atl. Rep. 306, 9 Atl. Rep. 126), Dam., 52; Evid., 1, 203; Sales, 7, 11.
Baltimore & O. R. Co. *v.* Campbell (3 Am. & Eng. R. Cas. 246, 36 Ohio St. 647, 38 Am. Rep. 617), Bagg., 19, 98, 115.
Baltimore & O. R. Co. *v.* Cannon (72 Md. 493, 20 Atl. Rep. 123), Relief Assoc., 11.
Baltimore & O. R. Co. *v.* Canton Co. (70 Md. 405, 17 Atl. Rep. 394), Direct., 39; Em. Dom., 492, 812.
Baltimore & O. R. Co. *v.* Carr (71 Md. 135, 17 Atl. Rep. 1052), Car. of P., 70, 75, 530, 555, 612, 625.
Baltimore & O. R. Co. *v.* Cary (28 Ohio St. 208, 14 Am. Ry. Rep. 97), Citizens, 2; For. Corp., 1; Rem. of C., 3, 35.
Baltimore & O. R. Co. *v.* Christie (5 W. Va. 325), Agency, 38; Bagg., 115.
Baltimore & O. R. Co. *v.* Colvin (32 Am. & Eng. R. Cas. 160, 118 Pa. St. 230, 10 Cent. Rep. 583, 12 Atl. Rep. 337, 20 W. N. C. 531), Employés, Inj. to, 1; Pl., 115.
Baltimore & O. R. Co. *v.* Davis (Pa.) (32 Am. & Eng. R. Cas. 563, 12 Atl. Rep. 335), Car. of M., 507.
Baltimore & O. R. Co. *v.* Depew (12 Am. & Eng. R. Cas. 64, 40 Ohio St. 121), Tresp., Inj. to, 105.
Baltimore & O. R. Co. *v.* District of Columbia (3 MacArth. (D. C.) 122), Tax., 187.
Baltimore & O. R. Co. *v.* Dorsey (37 Md. 19), Fires, 8, 288, 289.
Baltimore & O. R. Co. *v.* Fitzpatrick (35 Md. 32), Contrib. Neg., 47, 90; Cross., Inj. at, 308; Negl., 51; Trial, 100, 173.
Baltimore & O. R. Co. *v.* Fitzpatrick (36 Mo. 619), Children, Inj. to, 194.
Baltimore & O. R. Co. *v.* Ford (35 Fed. Rep. 170), Rem. of C., 35.
Baltimore & O. R. Co. *v.* Gallahue (12 Gratt. (Va.) 655), Attach., 11, 57, 61; Balt. & O. R. Co., 8.
Baltimore & O. R. Co. *v.* Gallahue (14 Gratt. (Va.) 563), Attach., 33.
Baltimore & O. R. Co. *v.* Gettle (3 W. Va. 376), Death, etc., 52, 130.
Baltimore & O. R. Co. *v.* Glenn (28 Md. 287), Citizens, 4, 5; Deeds, 50; Fraud. Conv., 2.
Baltimore & O. R. Co. *v.* Grant (132 Ind. 37, 31 N. E. Rep. 464), Animals, 610.
Baltimore & O. R. Co. *v.* Green (25 Md. 72), Car. of M., 254, 597.
Baltimore & O. R. Co. *v.* Harris (7 Wall. (U. S.) 574), App., 140.
Baltimore & O. R. Co. *v.* Harris (12 Wall. (U. S.) 65, 1 Am. Ry. Rep. 559), Charters, 13; Tickets & F., 18, 19.
Baltimore & O. R. Co. *v.* Hobbs (Md.) (19 Am. & Eng. R. Cas. 337), Cross., Inj. at, 289.
Baltimore & O. R. Co. *v.* Humphrey (9 Am. & Eng. R. Cas. 331, 59 Md. 390), Car. of M., 139.
Baltimore & O. R. Co. *v.* Jefferson County (29 Fed. Rep. 305), Mun. Aid, 24, 405; Stat., 34.
Baltimore & O. R. Co. *v.* Jemeson (13 W. Va. 833), Stat. Agts., 11.
Baltimore & O. R. Co. *v.* Jones (95 U. S. 439), Employés, Inj. to, 372.
Baltimore & O. R. Co. *v.* Kane (69 Md. 11, 13 Atl. Rep. 387, 12 Cent. Rep. 95), Car. of P., 384; Evid., 136.
Baltimore & O. R. Co. *v.* Kane (Md.) (17 Atl. Rep. 1032), Car. of P., 604.
Baltimore & O. R. Co. *v.* Kean (28 Am. &

Eng. R. Cas. 580, 65 Md. 394, 5 Atl. Rep. 325), Contrib. Neg., 10, 13, 16, 83; Dam., 67, 70, 71; Evid., 79; Words & Ph., 206.
Baltimore & O. R. Co. *v.* Keedy (49 Am. & Eng. R. Cas. 124, 75 Md. 320, 23 Atl. Rep. 643), Evid., 81; Negl., 18.
Baltimore & O. R. Co. *v.* Koontz (4 Am. & Eng. R. Cas. 105, 104 U. S. 5; reversing 29 Gratt. (Va.) 431, 17 Am. Ry. Rep. 351, 32 Gratt. 394), Rem. of C., 36.
Baltimore & O. R. Co. *v.* Koontz (77 Va. 608), Tax., 12.
Baltimore & O. R. Co. *v.* Lafferty (2 W. Va. 104), Assump., 3.
Baltimore & O. R. Co. *v.* Laffertys (14 Gratt. (Va.) 478), Constr. Rys., 65.
Baltimore & O. R. Co. *v.* Lamborn (12 Md. 257), Animals, 53, 213, 269, 297.
Baltimore & O. R. Co. *v.* Leapley (27 Am. & Eng. R. Cas. 167, 63 Md. 571, 4 Atl. Rep. 891), Car. of P., 431.
Baltimore & O. R. Co. *v.* McCullough (12 Gratt. (Va.) 595), Contr., 45.
Baltimore & O. R. Co. *v.* McElroy (35 Ohio St. 147), Animals, 125.
Baltimore & O. R. Co. *v.* McKenzie (24 Am. & Eng. R. Cas. 395, 81 Va. 71), Car. of P., 436; Contrib. Neg., 105; Employés, Inj. to, 99, 139, 293; Fel. Serv., 114, 214, 280, 511; Negl., 75.
Baltimore & O. R. Co. *v.* McWhinney (36 Ind. 436, 5 Am. Ry. Rep. 312), Bills of L., 84; Car. of M., 551.
Baltimore & O. R. Co. *v.* Mali (28 Am. & Eng. R. Cas. 628, 66 Md. 53, 5 Atl. Rep. 87), App., 99; Cross., Inj. at, 313; Sts. & H., 339.
Baltimore & O. R. Co. *v.* Marshall County Sup'rs (3 W. Va. 319), Tax., 60, 62, 145, 187, 352.
Baltimore & O. R. Co. *v.* Maryland (21 Wall. (U. S.) 456, 6 Am. Ry. Rep. 483), Charters, 72, 99; Int. Com., 185.
Baltimore & O. R. Co. *v.* May (25 Ohio St. 347, 10 Am. Ry. Rep. 155), Attach., 4.
Baltimore & O. R. Co. *v.* Morehead (5 W. Va. 293), Car. of M., 16, 21, 724.
Baltimore & O. R. Co. *v.* Mulligan (45 Md. 486), Animals, 58; Contrib. Neg., 48; Negl., 73.
Baltimore & O. R. Co. *v.* Noell (32 Gratt. (Va.) 394), Car. of P., 162, 197, 586; Death, etc., 72, 403; Leases, 61.
Baltimore & O. R. Co. *v.* North (23 Am. & Eng. R. Cas. 36, 103 Ind. 486, 3 N. E. Rep. 144), Em. Dom., 113.
Baltimore & O. R. Co. *v.* O'Donnell (49 Ohio. St. 489, 32 N. E. Rep. 476), Car. of M., 126, 159, 290, 299, 786; Trover, 14.
Baltimore & O. R. Co. *v.* Owings (28 Am. & Eng. R. Cas. 639, 65 Md. 502, 4 Atl. Rep. 899), Contrib. Neg., 28, 82; Cross., Inj. at, 5, 8, 174; Negl., 51.
Baltimore & O. R. Co. *v.* Parrette (55 Fed. Rep. 50), Em. Dom., 266.
Baltimore & O. R. Co. *v.* Pennsylvania R. Co. (17 Phila. (Pa.) 569), Balt. & O. R. Co., 7.
Baltimore & O. R. Co. *v.* Pittsburgh, C. & St. L. R. Co. (55 Fed. Rep. 701), Contr., 23; Estop., 33.
Baltimore & O. R. Co. *v.* Pittsburg, W. & K. R. Co. (10 Am. & Eng. R. Cas. 444, 17 W. Va. 812), Em. Dom., 3, 93, 111, 118, 281, 341, 351, 453, 519, 539, 573, 867, 919, 962; Rem. of C., 16, 34.
Baltimore & O. R. Co. *v.* Polly (14 Gratt. (Va.) 447), Constr. Rys., 58, 65; Trial, 45.
Baltimore & O. R. Co. *v.* Potomac Coal Co. (51 Md. 327), License, 12.
Baltimore & O. R. Co. *v.* Pumphrey (9 Am. & Eng. R. Cas. 331, 59 Md. 390), Car. of M., 311, 691, 757.
Baltimore & O. R. Co. *v.* Rathbone (1 W. Va. 87), Assump., 5; Bills of L., 104; Car. of M., 474; Lim. of Liab., 28; Pl., 127.
Baltimore & O. R. Co. *v.* Resley (7 Md. 297), Constr. Rys., 24, 26; Contr., 100.
Baltimore & O. R. Co. *v.* Ritchie (31 Md. 191), Abate, 4, 11, 15; Cross. St. & H., 24; Pl., 70.
Baltimore & O. R. Co. *v.* Rose (27 Am. & Eng. R. Cas. 125, 65 Md. 485, 4 Atl. Rep. 899), Stat. & D., 143; Wharves, 4.
Baltimore & O. R. Co. *v.* Rowan (23 Am. & Eng. R. Cas. 390, 104 Ind. 88, 3 N. E. Rep. 627), Employés, Inj. to, 57.
Baltimore & O. R. Co. *v.* Schultz (22 Am. & Eng. R. Cas. 579, 23 Am. & Eng. R. Cas. 211, 43 Ohio St. 270, 54 Am. Rep. 805, 1 N. E. Rep. 324), Animals, 143, 144, 591; Fences, 7, 80.
Baltimore & O. R. Co. *v.* Schumacher (29 Md. 168), Car. of M., 316, 575; Evid., 138.
Baltimore & O. R. Co. *v.* Schwindling (8 Am. & Eng. R. Cas. 544, 101 Pa. St. 258), Children, Inj. to, 23.
Baltimore & O. R. Co. *v.* Sherman (30 Gratt. (Va.) 602), Death, etc., 204, 279; Evid., 99.
Baltimore & O. R. Co. *v.* Shipley (31 Md. 368), Children, Inj. to, 188; Contrib. Neg., 87; Negl., 57, 61.
Baltimore & O. R. Co. *v.* Shipley (39 Md. 251, 11 Am. Ry. Rep. 269), Fires, 8, 28, 73, 75, 77, 83, 224, 256, 264, 274, 276, 289, 350; Words & Ph., 253.
Baltimore & O. R. Co. *v.* Skeels (3 W. Va. 556), Lim. of Liab., 2; Pl., 128.
Baltimore & O. R. Co. *v.* State (24 Md. 271), Death, etc., 394.
Baltimore & O. R. Co. *v.* State (29 Md. 252), Contrib. Neg., 21; Cross., Inj. at, 3; Death, etc., 292; Negl., 5; Sts. & H., 376.
Baltimore & O. R. Co. *v.* State (29 Md. 460), Death, etc., 331.
Baltimore & O. R. Co. *v.* State (30 Md. 47), Children, Inj. to, 74; Death, etc., 315; Negl., 18.
Baltimore & O. R. Co. *v.* State (33 Md. 542), Death, etc., 210, 394; Fel. Serv., 52, 462.
Baltimore & O. R. Co. *v.* State (36 Md. 366), Death, etc., 179, 294; Negl., 66; Tresp., Inj. to, 48, 104, 111.
Baltimore & O. R. Co. *v.* State (36 Md. 519), Paym., 4.
Baltimore & O. R. Co. *v.* State (41 Md. 268, 6 Am. Ry. Rep. 276), Death, etc., 395; Employés, Inj. to, 5, 248.
Baltimore & O. R. Co. *v.* State (45 Md. 596), Stat., 45.

Baltimore & O. R. Co. *v.* State (12 Am. & Eng. R. Cas. 149, 60 Md. 449), Car. of P., 42, 137, 139, 151, 276, 352; Contrib. Neg., 105; Cross., Inj. at, 237; Death, etc., 388; Evid., 47.

Baltimore & O. R. Co. *v.* State (19 Am. & Eng. R. Cas. 83, 62 Md. 479, 50 Am. Rep. 233), Evid., 202; Pl., 146; Sts. & H., 335; Tresp., Inj. to, 8.

Baltimore & O. R. Co. *v.* State (21 Am. & Eng. R. Cas. 202, 63 Md. 135), Car. of P., 14, 26, 139, 586, 592; Collis., 12, 14; Death, etc., 234, 381, 391; Stat. & D., 122.

Baltimore & O. R. Co. *v.* State (69 Md. 551, 18 Md. L. J. 824, 16 Atl. Rep. 212), Death, etc., 197; Licensees, Inj. to, 26; Tresp., Inj. to, 54.

Baltimore & O. R. Co. *v.* State (71 Md. 590, 18 Atl. Rep. 969), Children, Inj. to, 22; Negl., 57.

Baltimore & O. R. Co. *v.* State (41 Am. & Eng. R. Cas. 126, 72 Md. 36, 18 Atl. Rep. 1107), Car. of Mails, 18.

Baltimore & O. R. Co. *v.* State (75 Md. 526, 24 Atl. Rep. 14), App., 37; Evid., 175; Trial, 65.

Baltimore & O. R. Co. *v.* Strauss (37 Md. 237), Em. Dom., 1043; Sts. & H., 228.

Baltimore & O. R. Co. *v.* Stricker (51 Md. 47), Employés, Inj. to, 188.

Baltimore & O. R. Co. *v.* Sulphur Spring I. S. Dist. (2 Am. & Eng. R. Cas. 166, 96 Pa. St. 65, 42 Am. Rep. 529), Evid., 201; Flood. Lds., 22; Negl., 46.

Baltimore & O. R. Co. *v.* Sup'rs of Marshall County (3 W. Va. 319), Charters, 90, 99.

Baltimore & O. R. Co. *v.* Thompson (10 Md. 76), Animals, 418; Dam., 13; Em. Dom., 433; Witn., 157, 193.

Baltimore & O. R. Co. *v.* Van Ness (4 Cranch (U. S.) 595), Em. Dom., 180, 545; Stat., 61.

Baltimore & O. R. Co. *v.* Walker (36 Am. & Eng. R. Cas. 492, 45 Ohio St. 577, 14 West. Rep. 172, 16 N. E. Rep. 475), Cross. Rys., 76, 77.

Baltimore & O. R. Co. *v.* Wheeler (18 Md. 372), Attach., 11, 52.

Baltimore & O. R. Co. *v.* Wheeling (3 W. Va. 372), Tax., 61, 352.

Baltimore & O. R. Co. *v.* Wheeling (13 Gratt. (Va.) 40), Balt. & O. R. Co., 2; Stat., 57; Stockh., 92.

Baltimore & O. R. Co. *v.* Wheeling, P. & C. Transp. Co. (32 Ohio St. 116), Bridges, 49, 82; Negl., 18, 76.

Baltimore & O. R. Co. *v.* Whitacre (35 Ohio St. 627), Contrib. Neg., 12, 24, 84, 105; Cross., Inj. at, 250, 349.

Baltimore & O. R. Co. *v.* Whittaker (24 Ohio St. 642, 7 Am. Ry. Rep. 182), Contrib. Neg., 116.

Baltimore & O. R. Co. *v.* Whittington (30 Gratt. (Va.) 805), Contrib. Neg., 67, 105; Death, etc., 138; Employés, Inj. to, 33, 318.

Baltimore & O. R. Co. *v.* Wightman (29 Gratt. (Va.) 431, 17 Am. Ry. Rep. 351), Car. of P., 140, 162, 197, 586; Death, etc., 72, 274, 288, 386.

Baltimore & O. R. Co. *v.* Wilkens (44 Md. 11), Bills of L., 54, 56, 89, 108, 111, 118, 126.

Baltimore & O. R. Co. *v.* Wilson (31 Ohio St. 555), Animals, 349.

Baltimore & O. R. Co. *v.* Wood (45 Am. & Eng. R. Cas. 464, 47 Ohio St. 431, 24 N. E. Rep. 1077), Animals, 156, 274.

Baltimore & O. R. Co. *v.* Worthington (21 Md. 275), Derailm., 5, 6.

Baltimore & O. Relief Assoc. *v.* Post (39 Am. & Eng. R. Cas. 283, 122 Pa. St. 579, 15 Atl. Rep. 885), Evid. 247; Relief Assoc., 1, 2, 3, 4.

Baltimore & O. Tel. Co. *v.* Interstate Tel. Co. (54 Fed. Rep. 50, 8 U. S. App. 340, 4 C. C. A. 184; affirming 51 Fed. Rep. 49), Tel. & T. Lines, 7.

Baltimore & O. Tel. Co. *v.* Louisiana Western R. Co. (39 La. Ann. 659, 2 So. Rep. 67), Em. Dom., 242.

Baltimore & O. Tel. Co. *v.* Morgan's L. & T. R. & S. Co. (37 La Ann. 883), Em. Dom., 336.

Baltimore & P. R. Co. *v.* Dennison (3 MacArth. (D. C.) 245), Excava., 1.

Baltimore & P. R. Co. *v.* Edmonds (3 Mackey (D. C.) 526), Balt. & P. R. Co., 1.

Baltimore & P. R. Co. *v.* Fifth Baptist Church 11 Am. & Eng. R. Cas. 15, 108 U. S. 317, 2 Sup. Ct. Rep. 719), Nuis., 4, 5, 37; St. Rys., 228.

Baltimore & P. R. Co. *v.* Fifth Baptist Church (137 U. S. 568, 11 Sup. Ct. Rep. 185), Name, 3; Nuis., 37; Pl., 101.

Baltimore & P. R. Co. *v.* Grant (98 U. S. 398), Fed. Cts., 18.

Baltimore & P. R. Co. *v.* Hopkins (130 U. S. 210, 9 Sup. Ct. Rep. 503), Fed. Cts., 23.

Baltimore & P. R. Co. *v.* Magruder (34 Md. 79), Waters & W., 16.

Baltimore & P. R. Co. *v.* Philadelphia, W. & B. R. Co. (17 Phila. (Pa.) 396), Cross. Rys., 21.

Baltimore & P. R. Co. *v.* Reaney (42 Md. 117, 14 Am. Ry. Rep. 330), Excava., 4; Sts. & H., 47; Tunnels, 1, 4.

Baltimore & P. R. Co. *v.* Sixth Presbyterian Church (91 U. S. 127), Em. Dom., 922.

Baltimore & P. R. Co. *v.* Sixth Presbyterian Church (19 Wall. (U. S.) 62), Em. Dom., 962.

Baltimore & P. R. Co. *v.* Springer (Pa.) (13 Atl. Rep. 76), Em. Dom., 452, 751.

Baltimore & P. R. Co. *v.* State (54 Md. 648), Death, etc., 210; Negl., 53, 61.

Baltimore & P. R. Co. *v.* State (53 Am. & Eng. R. Cas. 379, 75 Md. 152, 23 Atl. Rep. 310), Death, etc., 157; Employés, Inj. to, 223.

Baltimore & P. R. Co. *v.* Trook (100 U. S. 112), Fed. Cts., 18.

Baltimore & P. Steamboat Co. *v.* Atkins (22 Pa. St. 522), Car. of M., 720.

Baltimore & P. Steamboat Co. *v.* Brown (54 Pa. St. 77), Bills of L., 24, 40, 41, 43; Car. of M., 593.

Baltimore & R. Turnpike Road *v.* State (71 Md. 573, 18 Atl. Rep. 884), Death, etc., 381, 416.

Baltimore & S. R. Co. *v.* Compton (2 Gill (Md.) 20), Em. Dom., 865, 977, 978.
Baltimore & S. R. Co. *v.* Faunce (6 Gill (Md.) 68), Paym., 6.
Baltimore & S. R. Co. *v.* Musselman (2 Grant's Cas. (Pa.) 348), Consol., 29.
Baltimore & S. R. Co. *v.* Nesbit (10 How. (U. S.) 395), Em. Dom., 32.
Baltimore & S. R. Co. *v.* Woodruff (4 Md. 242), Fires, 8, 25, 28, 238, 262, 288, 301; Words & Ph., 253.
Baltimore & Y. Turnpike Road *v.* Boone (45 Md. 344), St. Rys., 366, 531; Tickets & F., 113.
Baltimore & Y. Turnpike Road *v.* Cason (72 Md. 377, 20 Atl. Rep. 113), St. Rys., 412.
Baltimore & Y. Turnpike Road *v.* Leonhardt (27 Am. & Eng. R. Cas. 194, 66 Md. 70, 5 Atl. Rep. 346), Car. of P., 139, 151, 351, 362; St. Rys., 377, 425; Witn., 141.
Baltimore Belt R. Co. *v.* Baltzell (51 Am. & Eng. R. Cas. 669, 75 Md. 94, 23 Atl. Rep. 74), Em. Dom., 281, 291, 517.
Baltimore Belt R. Co. *v.* Lee (75 Md. 596, 23 Atl. Rep. 901), Em. Dom., 1, 371.
Baltimore Car-Wheel Co. *v.* North Baltimore Pass. R. Co. (21 Fed. Rep. 47), Pat. for Inv., 28.
Baltimore City Pass. R. Co. *v.* Hambleton 77 Md. 341, 26 Atl. Rep. 279), Stockh., 2.
Baltimore City Pass. R. Co. *v.* Kemp (18 Am. & Eng. R. Cas. 220, 61 Md. 74), Actions, 10; Car. of P., 612; Husb. & W., 37.
Baltimore City Pass. R. Co. *v.* Kemp (61 Md. 619, 48 Am. Rep. 134), Actions, 10; Dam., 9; Husb. & W., 31.
Baltimore City Pass. R. Co. *v.* McDonnell (43 Md. 534, 14 Am. Ry. Rep. 272), App., 65; Children, Inj. to, 74, 118, 123; Evid., 191; Negl., 49; St. Rys., 453, 481.
Baltimore City Pass. R. Co. *v.* Sewell (35 Md. 238), Stock., 2, 41, 55, 67, 68, 69, 70.
Baltimore City Pass. R. Co. *v.* Wilkinson (30 Md. 224), Car. of P., 68; St. Rys., 366, 373, 390, 408.
Baltimore, O. & C. R. Co. *v.* Crissman (11 Am. & Eng. R. Cas. 410, 83 Ind. 167), App., 34; Costs, 1.
Baltimore, O. & C. R. Co. *v.* Evarts (112 Ind. 533, 14 N. E. Rep. 369, 11 West. Rep. 875), Animals, 281; Pl., 93.
Baltimore, O. & C. R. Co. *v.* Illinois C. R. Co. (137 Ill. 9, 27 N. E. Rep. 38), Leases, 10.
Baltimore, O. & C. R. Co. *v.* Johnson (10 Am. & Eng. R. Cas. 408, 83 Ind. 420), Em. Dom., 880.
Baltimore, O. & C. R. Co. *v.* Ketring (41 Am. & Eng. R. Cas. 10, 122 Ind. 5, 23 N. E. Rep. 527), Tax., 76.
Baltimore, O. & C. R. Co. *v.* Kreiger (13 Am. & Eng. R. Cas. 602, 90 Ind. 380), Animals, 172; App., 87; Fences, 57.
Baltimore, P. & C. R. Co. *v.* Anderson (58 Ind. 413), Animals, 342, 359.
Baltimore, P. & C. R. Co. *v.* Highland (48 Ind. 381), Em. Dom., 210.
Baltimore, P. & C. R. Co. *v.* Johnson (59 Ind. 188), Em. Dom., 691; Fences, 16.
Baltimore, P. & C. R. Co. *v.* Johnson (59 Ind. 247), Witn., 53, 120.
Baltimore, P. & C. R. Co. *v.* Johnson (59 Ind. 480), Em. Dom., 636; Witn., 121.
Baltimore, P. & C. R. Co. *v.* Lansing (52 Ind. 229), Em. Dom., 691.
Baltimore, P. & C. R. Co. *v.* McClellan (59 Ind. 440), Animals, 88.
Baltimore, P. & C. R. Co. *v.* McDonald (68 Ind. 316), Eject. Pass., 9.
Baltimore, P. & C. R. Co. *v.* New Albany & S. R. Co. (53 Ind. 597), Rem. of C., 47.
Baltimore, P. & C. R. Co. *v.* Pixley (61 Ind. 22), Eject. Pass., 90, 134.
Baltimore, P. & C. R. Co. *v.* Stoner (59 Ind. 579), Witn., 121.
Baltimore, P. & C. R. Co. *v.* Thomas (60 Ind. 107), Animals, 73.
Baltimore Steam Packet Co. *v.* Smith (23 Md. 402), Bagg., 22, 107.
Baltimore Traction Co. *v.* Baltimore Belt R. Co. (151 U. S. 147, 14 Sup. Ct. Rep. 294), Fed. Cts., 25.
Baltimore Traction Co. *v.* State (58 Am. & Eng. R. Cas. 200, 78 Md. 409, 28 Atl. Rep. 307), St. Rys., 366, 393.
Baltimore Traction Co. *v.* Wallace (77 Md. 435, 26 Atl. Rep. 518), Elec. Rys., 32; St. Rys., 502, 511.
Baltimore Union Pass. R. Co. *v.* Mayor, etc., of Baltimore (41 Am. & Eng. R. Cas. 646, 71 Md. 405, 18 Atl. Rep. 917), St. Rys., 279; Tax., 264.
Baltzer *v.* Chicago, M. & N. R. Co. (83 Wis. 459, 53 N. W. Rep. 885), App., 50; Employés, Inj. to, 703.
Baltzer *v.* Kansas Pac. R. Co. (3 Mo. App. 574), Bonds, 54; Coupons, 18; Int., 18.
Baltzer *v.* Raleigh & A. A. L. R. Co. (24 Am. & Eng. R. Cas. 354, 115 U. S. 634, 6 Sup. Ct. Rep. 216), Constr. Rys., 74.
Baltzer *v.* State (104 N. Car. 265, 10 S. E. Rep. 153), State Aid, 28.
Bamberg *v.* South Carolina R. Co. (9 So. Car. 61), Car. of L. S., 50; Car. of M., 762; Negl., 76; Trial, 173.
Banbury & C. R. Co. *v.* Daniel (54 L. J. Ch. D. 265, 33 W. R. 321), Constr. Rys., 61.
Bancroft *v.* Boston & W. R. Corp. (97 Mass. 275), Car. of P., 448.
Bancroft *v.* Boston & W. R. Corp. (11 Allen (Mass.) 34), Death, etc., 82.
Bancroft *v.* Merchants' Despatch Transp. Co. (47 Iowa 262), Car. of M., 637, 668.
Banet *v.* Alton & S. R. Co. (13 Ill. 504), Subscr., 77, 125.
Bangor *v.* Smith (83 Me. 422, 22 Atl. Rep. 379), Commerce, 4.
Bangor & P. R. Co. *v.* Chamberlain (60 Me. 285), Em. Dom., 773.
Bangor & P. R. Co. *v.* Harris (21 Me. 533), Tax., 263.
Bangor & P. R. Co. *v.* McComb (60 Me. 290), Em. Dom., 701, 724, 760.
Bangor Bridge Co. *v.* McMahon (10 Me. 478), Subscr., 36.
Bangor, O. & M. R. Co. *v.* Smith (47 Me. 34), Charters, 46; Constr. Rys., 2; Cross. St. & H., 1; Evid., 116; Parties, 1; Side Tr., 1; Sts. & H., 46.

Banister *v.* Pennsylvania Co. (19 Am. & Eng. R. Cas. 570, 98 Ind. 220), Animals, 342, 520.
Bank *v.* New York County Sup'rs (7 Wall. (U. S.) 28), Tax., 138.
Bank of Ashland *v.* Jones (16 Ohio St. 145), Bonds, 14, 15; Sales, 1.
Bank of Augusta *v.* Earle (13 Pet. (U. S.) 519), For. Corp., 12.
Bank of Batavia *v.* New York, L. E. & W. R. Co. (32 Am. & Eng. R. Cas. 497, 106 N. Y. 195, 8 N. Y. S. R. 209, 7 Cent. Rep. 822, 12 N. E. Rep. 433; affirming 33 Hun 589), Bills of L., 114; Stat. Agts., 4.
Bank of Bellows Falls *v.* Rutland & B. R. Co. (28 Vt. 470), Mort., 150.
Bank of California *v.* Dunn (66 Cal. 38, 4 Pac. Rep. 916), State Aid, 14.
Bank of Commerce *v.* Dalrymple (16 Md. 17), Divid., 14.
Bank of Commerce *v.* Rutland & W. R. Co. (10 How. Pr. (N. Y.) 1), Bills & N., 19; For. Corp., 17; Proc., 30.
Bank of Ky. *v.* Adams Exp. Co. (1 Flipp. (U. S.) 242), Exp. Cos., 34, 60, 71.
Bank of Ky. *v.* Adams Exp. Co. (93 U. S. 174), Bills of L., 79; Exp. Cos., 34, 65.
Bank of Middlebury *v.* Edgerton (30 Vt. 182), Attach., 64; Franch., 4.
Bank of Montreal *v.* Thayer (2 McCrary (U. S.) 1), Receiv., 107.
Bank of Rome *v.* Rome (18 N. Y. 38; affirming 27 Barb. 65), Mun. Aid, 1, 9, 107.
Bank of Statesville *v.* Statesville (7 Am. & Eng. R. Cas. 178, 84 N. Car. 169), Mun. Aid, 306.
Bank of Toronto *v.* Cobourg, P. & M. R. Co. (26 Am. & Eng. R. Cas. 655, 7 Ont. 1), Debent., 2, 3, 6.
Bank of Toronto *v.* Cobourg, P. & M. R. Co. (10 Ont. 376), Bonds, 37.
Bank of Upper Canada *v.* Grand Trunk R. Co. (13 U. C. C. P. 304), Leases, 3.
Bank of Utica *v.* Hillard (5 Cow. (N. Y.) 153), Witn., 2.
Bank of Utica *v.* Hillard (5 Cow. (N. Y.) 410), Witn., 2.
Bankard *v.* Baltimore & O. R. Co. (34 Md. 197), Car. of L. S., 78; Lim. of Liab., 2.
Banks *v.* Highland St. R. Co. (19 Am. & Eng. R. Cas. 139, 136 Mass. 485), St. Rys., 514.
Banks *v.* Mayor, etc., of New York (7 Wall. (U. S.) 24), Tax., 138.
Banks *v.* Wabash Western R. Co. (40 Mo. App. 458), Employés, Inj. to, 16, 389; Fel. Serv., 347.
Bannigan *v.* Central Iowa R. Co. (7 Am. & Eng. R. Cas. 491, 58 Iowa 671, 12 N. W. Rep. 716), Trial, 19.
Bannon *v.* Baltimore & O. R. Co. (24 Md. 108), Children, Inj. to, 2, 123, 185, 191; Evid., 36; Negl., 3, 9, 18.
Bannon *v.* State (49 Ark. 167, 4 S. W. Rep. 655), Crim. L., 26; Words & Ph., 210.
Bansemer *v.* Toledo & W. R. Co. (25 Ind. 434), Car. of M., 12, 90, 337, 372.
Barbeau *v.* St. Catharines & N. C. R. Co. (15 Ont. 586), Em. Dom., 1219.
Barber *v.* Cincinnati, N. O. & T. P. R. Co. (Ky.) (21 S. W. Rep. 340), Employés, Inj. to, 162; Evid., 281.
Barber *v.* Essex (27 Vt. 62), Negl., 65; Pl., 138; Sts. & H., 31, 364.
Barber *v.* Nottingham & G. R. & C. Co. (15 C. B. N. S. 726, 33 L. J. C. P. 103, 12 W. R. 376, 9 L. T. 829), Em. Dom., 1187.
Barber *v.* Richmond & D. R. Co. (34 So. Car. 444, 13 S. E. Rep. 630), Negl., 41; Stat. & D., 83; Trial., 52, 65.
Barbour *v.* South Eastern R. Co. (34 L. T. 67), Car. of M., 186.
Barbour County *v.* Clark (50 Ala. 416), Mun. Aid, 406.
Barclay *v.* Culver (30 Hun (N. Y.) 1), Stock, 36.
Barclay R. & C. Co. *v.* Ingham (36 Pa. St. 194), Em. Dom., 170, 637.
Bard *v.* Augusta (30 Fed. Rep. 906), Mun. Aid, 77.
Barden *v.* Boston, C. & F. R. Co. (121 Mass. 426), Car. of P., 363, 471.
Bardon *v.* Northern Pac. R. Co. (145 U. S. 535, 12 Sup. Ct. Rep. 856), Land Grants, 81; Words & Ph., 174.
Bardstown & L. R. Co. *v.* Metcalfe (4 Mete. (Ky.) 199), Mort., 1, 6, 12, 175, 237.
Bardwell *v.* American Exp. Co. (35 Minn. 344, 28 N. W. Rep. 925), Evid., 275; Exp. Cos., 69.
Bardwell *v.* Mobile & O. R. Co. (63 Miss. 574), Car. of P., 431.
Bare *v.* Pennsylvania R. Co. (135 Pa. St. 95, 19 Atl. Rep. 935), Cross., Inj. at, 260.
Bark D. C. Murray, The (11 Sawy. (U. S.) 416), Car. of P., 616.
Barkdoll *v.* Pennsylvania R. Co. (Pa.) (13 Atl. Rep. 82), Employés, Inj. to, 275.
Barker *v.* Anniston, O. & O. St. R. Co. (92 Ala. 314, 8 So. Rep. 766), Husb. & W., 25, 34.
Barker *v.* Belknap (35 Vt. 168), Arb., 26.
Barker *v.* Brown (138 Mass. 340), Wareh., 7.
Barker *v.* Cairo & F. R. Co. (3 T. & C. (N. Y.) 328), Att'ys, 2.
Barker *v.* Coffin (31 Barb. (N. Y.) 556), Eject. Pass., 30; Tickets & F., 85, 89.
Barker *v.* Hannibal & St. J. R. Co. (91 Mo. 86, 14 S. W. Rep. 280), Death, etc., 127.
Barker *v.* Hannibal & St. J. R. Co. (37 Am. & Eng. R. Cas. 202, 98 Mo. 50, 11 S. W. Rep. 254), Tresp., Inj. to, 1, 23, 105.
Barker *v.* Hartman Steel Co. (129 Pa. St. 551, 18 Atl. Rep. 553), Em. Dom., 82.
Barker *v.* Hudson River R. Co. (4 Daly (N. Y.) 274), St. Rys., 448.
Barker *v.* Metropolitan R. Co. (17 C. B. N. S. 785, 10 Jur. N. S. 1127, 13 W. R. 82, 11 L. T. 312), Em. Dom., 1097.
Barker *v.* Midland R. Co. (18 C. B. 46, 25 L. J. C. P. 184, 1 Ry. & C. T. Cas. 17), Hacks, etc., 1.
Barker *v.* New York C. R. Co. (24 N. Y. 599), Car. of P., 242; Eject. Pass., 96.
Barker *v.* Perry (67 Iowa 146, 25 N. W. Rep. 100), Evid., 41, 236.
Barker *v.* Troy & B. R. Co. (27 Vt. 766), By-laws, 3; Constr. Rys., 19, 29, 51, 119; Estop., 30.
Barkley *v.* Missouri Pac. R. Co. (96 Mo. 367, 9 S. W. Rep. 793), Negl., 50; Stat. &

D., 63, 407, 408, 409; Tresp., Inj. to, 93, 118.
Barkley *v.* Union Pac. R. Co. (33 Fed. Rep. 794), Stat. &. D., 50.
Barkley *v.* Williams (26 Ill. App. 213), Contr., 56
Barksdull *v.* New Orleans & C. R. Co. (23 La. Ann. 180), Children, Inj. to, 56, 59.
Barlage *v.* Detroit, G. H. & M. R. Co. (17 Am. & Eng. R. Cas. 131, 54 Mich. 564, 20 N. W. Rep. 587), Em. Dom., 287.
Barley *v.* Chicago & A. R. Co. (4 Biss. (U. S.) 430), Death, etc., 163, 408; Negl., 28; Sts. & H., 369.
Barlow *v.* Chicago, R. I. & P. R. Co. (29 Iowa 276), Aband., 3; Deeds, 15; Em. Dom., 203.
Barlow *v.* McKinley (24 Iowa 69), Deeds, 12.
Barnard *v.* Norwich & W. R. Co. (4 Cliff. (U. S.) 351), Bank'cy, 6.
Barnard *v.* Vermont & M. R. Co. (7 Allen (Mass.) 512), Divid., 5.
Barnes *v.* Boston & M. R. Co. (130 Mass. 388), Spec. Perf., 6.
Barnes *v.* Chicago, M. & St. P. R. Co. (30 Am. & Eng. R. Cas. 453, 122 U. S. 1, 7 Sup. Ct. Rep. 1043), Mort., 179, 211.
Barnes *v.* Chicago, M. & St. P. R. Co. (8 Biss. (U. S.) 514), Reorg., 10.
Barnes *v.* District of Columbia (1 MacArth. (D. C.) 322), Balt. & P. R. Co., 1.
Barnes *v.* District of Columbia (91 U. S. 540), Sts. & H., 360.
Barnes *v.* Keene (132 N. Y. 13, 29 N. E. Rep. 1090, 42 N. Y. S. R. 853), Children, Inj. to, 184, 188.
Barnes *v.* Lacon (84 Ill. 461), Mun. Aid, 15, 169.
Barnes *v.* Marshall County (56 Iowa 20), Mun. Aid, 412.
Barnes *v.* Michigan Air Line R. Co. (30 Am. & Eng. R. Cas. 361, 65 Mich. 251, 32 N. W. Rep. 426), Em. Dom., 471.
Barnes *v.* Mobile & N. W. R. Co. (12 Hun (N. Y.) 126), For. Corp., 21.
Barnes *v.* Philadelphia & R. R. Co. (17 Wall. (U. S.) 294), Rev., 6, 10.
Barnes *v.* Southsea R. Co. (L. R. 27 Ch. D. 536, 51 L. T. 762, 32 W. R. 976), Em. Dom., 1101.
Barnes *v.* South Side R. Co. (2 Abb. Pr. N. S. (N. Y.) 415), Injunc., 14.
Barnes *v.* Syracuse, P. & O. R. Co. (12 N. Y. S. R. 354, 46 Hun 678), Employés, 13.
Barnesville & M. R. Co., In re (2 McCrary (U. S.) 216, 4 Fed. Rep. 10), Rem. of C., 55.
Barnett *v.* Atlantic & P. R. Co. (68 Mo. 56), Animals, 10, 617.
Barnett *v.* Chicago & L. H. R. Co. 4 Hun (N. Y.) 114, 6 T. & C. 358), For. Corp., 20, 25, 26.
Barnett *v.* East Tenn., V. & G. R. Co. (87 Ga. 766, 13 S. E. Rep. 904), App., 136; Car. of P., 551.
Barnett *v.* Great Eastern R. Co. (18 L. T. 408, 16 W. R. 793), Em. Dom., 1208.
Barnett *v.* Lucas (6 Ir. R. C. L. 247; affirming 5 Ir. R. C. L. 140), Death, etc., 163.
Barnett *v.* Northeastern R. Co. (87 Ga. 199, 13 S. E. Rep. 646), Trial, 77.
Barnett *v.* South London Tramways Co. (L. R. 18 Q. B. D. 815), Officers, 14.
Barney *v.* Burnstenbinder (64 Barb. (N. Y.) 212, 7 Lans. 210), Actions, 7; Car. of M., 194, 195.
Barney *v.* Daniels (32 Ind. 19), Exp. Cos., 2.
Barney *v.* Keokuk (4 Dill. (U. S.) 593), Stat. & D., 12.
Barney *v.* Keokuk (94 U. S. 324), Sts. & H., 143; Wharves, 1.
Barney *v.* New Albany & S. R. Co. (1 Handy (Ohio) 571), Proc., 19, 27.
Barney *v.* Northern Pac. R. Co. (56 How. Pr. (N. Y.) 23), Pl., 65.
Barney *v.* Oyster Bay & H. Steamboat Co. 67 N. Y. 301; affirming 2 T. & C. 598), Car. of P., 112.
Barney *v.* Winona & St. P. R. Co. (26 Am. & Eng. R. Cas. 522, 117 U. S. 228, 6 Sup. Ct. Rep. 654), Land Grants, 36, 51.
Barney *v.* Winona & St. P. R. Co. (24 Fed. Rep. 889; reversed in 117 U. S. 228, 6 Sup. Ct. Rep. 654), Land Grants, 36.
Barney & S. Mfg. Co. *v.* Hart (Ky.) (1 S. W. Rep. 414), Mort., 59.
Barnum *v.* Baltimore & O. R. Co. (5 W. Va. 10), Actions, 2; Eject. Pass., 84.
Barnum *v.* Chicago, M. & St. P. R. Co. (15 Am. & Eng. R. Cas. 513, 30 Minn. 461, 16 N. W. Rep. 364), Death, etc., 130, 135.
Barnum *v.* Minnesota Transfer R. Co. (33 Minn. 365, 23 N. W. Rep. 538), Nuis., 20.
Barnum *v.* Okolona (148 U. S. 393, 13 Sup. Ct. Rep. 638), Mun. Aid, 282, 322.
Barnum *v.* Sullivan County Sup'rs (137 N. Y. 179, 33 N. E. Rep. 162, 50 N. Y. S. R. 381; affirming 62 Hun 190, 41 N. Y. S. R. 845, 16 N. Y. Supp. 513), Mun. Aid, 421.
Barny *v.* Midland R. Co. (1 Ir. R. C. L. 130, 3 Ry. & C. T. Cas. xxi), Tickets & F., 145.
Barr *v.* Hannibal & St. J. R. Co. (30 Mo. App. 248), Animals, 65, 572.
Barr *v.* New York, L. E. & W. R. Co. (23 Am. & Eng. R. Cas. 745, 96 N. Y. 444), Stockh., 112.
Barr *v.* New York, L. E. & W. R. Co. (47 Am. & Eng. R. Cas. 329, 125 N. Y. 263, 26 N. E. Rep. 145, 34 N. Y. S. R. 743; reversing 52 Hun 555, 24 N. Y. S. R. 188, 5 N. Y. Supp. 623), Leases, 23.
Barre *v.* Reading City Pass. R. Co. (155 Pa. St. 170, 26 Atl. Rep. 99), Children, Inj. to, 52.
Barre R. Co. *v.* Montpelier & W. R. R. Co. (39 Am. & Eng. R. Cas. 17, 61 Vt. 1, 4 L. R. A. 785, 17 Atl. Rep. 923), Em. Dom, 110; Location, etc., 26; Side Tr., 1, 4.
Barrelle *v.* Pennsylvania R. Co. (4 N. Y. Supp. 127, 21 N. Y. S. R. 109; affirmed in 121 N. Y. 697, mem.), Evid., 50, 209, 212, 232; Witn., 42, 100.
Barret, In re (1 C. B. N. S. 423, 26 L. J. C. P. 83, 1 Ry. & C. T. Cas. 38), Injunc., 33; Ry. Com'rs 35.
Barrett *v.* American T. & T. Co. (138 N. Y. 491; affirming 56 Hun 430, 31 N. Y. S. R.

465, 10 N. Y. Supp. 138, 18 Civ. Pro. 363), Proc., 25.
Barrett *v.* Indianapolis & St. L. R. Co. (9 Mo. App. 226), Agency, 21; Car. of M., 544.
Barrett *v.* Malden & M. R. Co. (3 Allen (Mass.) 101), Agency, 105.
Barrett *v.* Manhattan R. Co. (44 N. Y. S. R. 185, 63 Hun 630, 18 N. Y. Supp. 71), Elev. Rys., 92, 93, 111, 148, 173.
Barrett *v.* Market St. R. Co. (40 Am. & Eng. R. Cas. 671, 81 Cal. 296, 22 Pac. Rep. 859), St. Rys., 306.
Barrett *v.* Midland R. Co. (1 F. & F. 361), Cross., Inj. at, 5.
Barrett *v.* Schuyler County Court (44 Mo. 197), Mun. Aid, 341, 344.
Barrett *v.* Smith (7 J. & S. 250, 14 N. Y. Supp. 307, 38 N. Y. S. R. 526; reversed in 128 N. Y. 607, 28 N. E. Rep. 23; see also 135 N. Y. 659, 32 N. E. Rep. 648), Evid., 142; Negl., 100.
Barrett *v.* Southern Pac. Co. (48 Am. & Eng. R. Cas. 532, 91 Cal. 296, 27 Pac. Rep. 666), Children, Inj. to, 24, 25, 29, 31, 115, 117; Negl., 74.
Barrett *v.* Spaids (70 Ill. 408), Attach., 6.
Barrett *v.* Stockton & D. R. Co. (2 M. & G. 134, 2 Scott N. R. 337, 11 C. & F. 590), Charges, 7.
Barrett *v.* Stockton & D. R. Co. (1 Railw. Cas. 443, 7 M. & G. 870; affirmed in 11 C. & F. 590, 1 Ry. & C. T. Cas. 22), Charges, 126.
Barrett *v.* Third Ave. R. Co. (8 Abb. Pr. N. S. (N. Y.) 205; affirmed in 45 N. Y. 628), Negl., 67; St. Rys., 325.
Barrett *v.* Third Ave. R. Co. (45 N. Y. 628; affirming 8 Abb. Pr. N. S. 205, 1 Sweeney 568), Car. of P., 139, 140; Release, 10; St. Rys., 316.
Barrie & N. R. Co. In re (22 U. C. Q. B. 25), Arb., 30.
Barringer *v.* Delaware & H. Canal Co. (19 Hun (N. Y.) 216), Fel. Serv., 16, 345.
Barringer *v.* New York C. & H. R. R. Co. (18 Hun (N. Y.) 398), Cross., Inj. at, 13.
Barrington *v.* Mississippi C. R. Co. (32 Miss. 370), Subscr., 133.
Barron *v.* Eldredge (100 Mass. 455), Car. of M., 75, 96.
Barron *v.* Illinois C. R. Co. (1 Biss. (U. S.) 412, 453), Death, etc., 43, 135.
Barrott *v.* Pullman Palace Car Co. (52 Am. & Eng. R. Cas. 498, 51 Fed. Rep. 796), Sleep. Car Cos., 35.
Barrow *v.* Ontario, S. & H. R. Co. (11 U. C. Q. B. 124), Subscr., 177.
Barry *v.* Hannibal & St. J. R. Co. (98 Mo. 62, 11 S. W. Rep. 308), Death, etc., 216; Employés, Inj. to, 331, 444; Negl., 67.
Barry *v.* Missouri, K. & T. R. Co. (29 Am. & Eng. R. Cas. 384, 27 Fed. Rep. 1), Coupons, 7; Fed. Cts., 4; Mort., 145; Words & Ph., 140.
Barry *v.* Missouri, K. & T. R. Co. (36 Am. & Eng. R. Cas. 332, 34 Fed. Rep. 829), Bonds, 39; Mort., 29.
Barry *v.* Missouri, K. & T. R. Co. (36 Fed. Rep. 228), Injunc., 17.
Barry *v.* Navan & K. R. Co. (11 Ir. R., C. L. 403), Stockh., 55.
Barry *v.* New York C. & H. R. R. Co. (13 Am. & Eng. R. Cas. 615, 92 N. Y. 289; affirming 28 Hun 441), Children, Inj. to, 106, 108; Death, etc., 262; Licensees, Inj. to, 19.
Barry *v.* Second Ave. R. Co. (41 N. Y. S. R. 342, 16 N. Y. Supp. 518; affirmed in 136 N. Y. 669, mem., 33 N. E. Rep. 336, 50 N. Y. S. R. 929), Children, Inj. to, 141, 144, 161; Evid., 202.
Barry *v.* Second Ave. R. Co. (1 Misc. 502, 49 N. Y. S. R. 705, 20 N. Y. Supp. 871), Evid., 62; Witn., 76, 176.
Barry R. Co. In re (L. R. 4 Ch. D. 315, 46 L. J. Ch. D. 206, 25 W. R. 201, 37 L. T. 125), Incorp., 4.
Barse *v.* Herkimer, N. & P. N. G. R. Co. (13 N. Y. S. R. 215, 47 Hun 632), Sts. & H., 186.
Barstow *v.* City R. Co. (42 Cal. 465), Direct., 28.
Barstow *v.* Old Colony R. Co. (28 Am. & Eng. R. Cas. 473, 143 Mass. 535, 10 N. E. Rep. 255), Cross., Inj. at, 255; Employés, Inj. to, 340; Fel. Serv., 10.
Barstow *v.* Pine Bluff, M. & N. O. R. Co. 57 Ark. 334), Mort., 120.
Bartee *v.* Houston & T. C. R. Co. (36 Tex. 648), Tresp., 7; Words & Ph., 163.
Bartemeyer *v.* Rohlfs (71 Iowa 582, 32 N. W. Rep. 673), Mun. Aid, 76, 80, 117, 118, 412.
Barter *v.* Wheeler (49 N. H. 9), Bills of L., 78; Car. of M., 318, 544, 628; Contr., 86; Estop., 35; Mort., 152.
Barthel *v.* Meader (72 Iowa 125, 33 N. W. Rep. 446), Mun. Aid, 412.
Bartholomew *v.* Farwell (41 Conn. 107), Evid., 226.
Bartholomew *v.* New York C. & H. R. R. Co. (27 Am. & Eng. R. Cas. 154, 102 N. Y. 716, 1 Silv. App. 72, 7 N. E. Rep. 623, 2 N. Y. S. R. 490), Car. of P., 471.
Bartholomew *v.* St. Louis, J. & C. R. Co. (53 Ill. 227), Bagg., 71, 117.
Bartholomew County Com'rs *v.* Bright (18 Ind. 93), Mun. Aid, 63.
Bartlett *v.* Dubuque & S. C. R. Co. (20 Iowa 188), Cat.-Gds., 3; Farm Cross., 13.
Bartlett *v.* Keim (35 Am. & Eng. R. Cas. 15, 50 N. J. L. 260, 11 Cent. Rep. 351, 13 Atl. Rep. 7), Receiv., 38, 138.
Bartlett *v.* New York & S. B. F. & S. Transp. Co. (25 J. & S. 348, 29 N. Y. S. R. 357, 8 N. Y. Supp. 309; affirmed in 130 N. Y. 650, mem., 41 N. Y. S. R. 951, mem., 29 N. E. Rep. 1033, mem.), Car. of P., 550; Ferries, 11.
Bartlett *v.* Pittsburgh, C. & St. L. R. Co. (18 Am. & Eng. R. Cas. 549, 94 Ind. 281), Car. of L. S., 70; Car. of M., 453; Pl., 127.
Bartlett *v.* Steamboat Philadelphia (32 Mo. 256), Car. of M., 246, 253.
Bartlett *v.* Street R. Co. (82 Mich. 658, 46 N. W. Rep. 1034), Employés, 19.
Bartlett *v.* West Metropolitan Tramways Co. ([1893] 3 Ch. 437), Receiv., 7.
Bartlette *v.* Norwich & W. R. Co. (33 Conn. 560), Connect. L., 5.

Bartley *v.* Georgia R. Co. (60 Ga. 182), Animals, 39.
Barton *v.* Barbour (3 MacArth. (D. C.) 212), Receiv., 125.
Barton *v.* Barbour (4 Am. & Eng. R. Cas. 1, 104 U. S. 126), Receiv., 49, 122, 125, 128; Trial, 2.
Barton *v.* New York C. & H. R. R. Co. (1 T. & C. (N. Y.) 297; affirmed in 56 N. Y. 660, mem.), Licensees, Inj. to, 10, 29; Stat. & D., 67.
Barton *v.* North Staffordshire R. Co. (L. R. 38 Ch. D. 458), Lim. of Ac., 33; Stock, 32.
Barton *v.* St. Louis & I. M. R. Co. (52 Mo. 253), Negl., 64.
Barton *v.* State (43 Am. & Eng. R. Cas. 333, 28 Tex. App. 483, 13 S. W. Rep. 783), Crim. L., 35.
Basch *v.* North Chicago St. R. Co. (40 Ill. App. 583), St. Rys., 407.
Baskerville *v.* Ottawa (20 Ont. App. 108), Sts. & H., 160.
Basnight *v.* Atlantic & N. C. R. Co. (111 N. Car. 592, 16 S. E. Rep. 323), Car. of M., 75, 320.
Bass *v.* Cantor (123 Ind. 444, 24 N. E. Rep. 147), Bailm., 2.
Bass *v.* Chicago & N. W. R. Co. (36 Wis. 450, 9 Am. Ry. Rep. 101), Car. of P., 64, 70, 73, 208, 224; Eject. Pass., 1.
Bass *v.* Chicago & N. W. R. Co. (39 Wis. 636, 12 Am. Ry. Rep. 414), Assault, 3, 20; New Tr., 102.
Bass *v.* Chicago & N. W. R. Co. (42 Wis. 654, 15 Am. Ry. Rep. 45), Agency, 113; Car. of P. 639, 640; Dam., 31; Eject. Pass., 117; Evid., 174, 219.
Bass *v.* Chicago, B. & Q. R. Co. (28 Ill. 9), Fires, 73, 130, 267, 276.
Bass *v.* Glover (1 Am. & Eng. R. Cas. 277, 53 Ga. 715), Car. of M., 310.
Bass *v.* Mayor, etc., of Columbus (30 Ga. 845), Mun. Aid, 20.
Bass *v.* Taft (137 U. S. 458, 11 Sup. Ct. Rep. 154), Mun. Aid, 447.
Bass *v.* Upton (1 Minn. 408 (Gil. 292), Charges, 69; Pl., 58; Wareh., 7.
Bassett *v.* Connecticut River R. Co. (32 Am. & Eng. R. Cas. 528, 145 Mass. 129, 5 N. Eng. Rep. 207, 13 N. E. Rep. 370), Car. of M., 321.
Bassett *v.* Connecticut River R. Co. (40 Am. & Eng. R. Cas. 118, 150 Mass. 178, 22 N. E. Rep. 890), Judgm., 30.
Basshor *v.* Baltimore & O. R. Co. (65 Md. 99, 3 Atl. Rep. 285), Liens, 19.
Baston *v.* Georgia R. Co. (60 Ga. 339), Negl., 89.
Batavia Bank *v.* New York, L. E. & W. R. Co. (32 Am. & Eng. R. Cas. 407, 106 N. Y. 195, 8 N. Y. S. R. 209, 7 Cent. Rep. 822, 12 N. E. Rep. 433; affirming 33 Hun 589), Bills of L., 108.
Batchelder *v.* Wendell (36 N. H. 204), Pl., 19.
Batchelor *v.* Buffalo & B. R. Co. (5 U. C. C. P. 127), Car. of P., 644; New Tr., 86.
Bate, In re (23 U. C. C. P. 32), Mun. Corp., 3.
Bate *v.* Canadian Pac. R. Co. (18 Can. Sup. Ct. 697), Bagg., 98.
Bateman *v.* Forty-second St., M. & St. N. A. R. Co. (5 N. Y. Supp. 13), Pl., 66.
Bateman *v.* Mid-Wales R. Co. (35 L. J. C. P. 205, 12 Jur. N. S. 453, L. R. 1 C. P. 499, 1 H. & R. 508, 14 W. R. 672), Bills & N., 4, 5, 22.
Bateman *v.* New York C. & H. R. R. Co. (47 Hun 426, 14 N. Y. S. R. 454), Dam., 42; Evid., 84; Stat. & D. 91; Trial, 101; Witn., 81.
Bates *v.* Boston & N. Y. C. R. Co. (10 Allen (Mass.) 251), Contr., 12.
Bates *v.* Cherry Valley, S. & A. R. Co. (3 T. & C. (N. Y.) 16; affirmed in 59 N. Y. 641, mem.), Constr. Rys., 25.
Bates *v.* Chicago, M. & St. P. R. Co. (14 Am. & Eng. R. Cas. 700, 60 Wis. 296, 19 N. W. Rep. 72, 50 Am. Rep. 369), Attach., 25, 44; Proc., 39.
Bates *v.* Great Western R. Co. (24 U. C. Q. B. 544), Pl., 50.
Bates *v.* Nashville, C. & St. L. R. Co. (90 Tenn. 36, 15 S. W. Rep. 1069), Children, Inj. to), 26, 175.
Bates *v.* New Orleans, J. & G. N. R. Co. (4 Abb. Pr. (N. Y.) 72, 13 How. Pr. 510), Attach., 25; For. Corp., 15; Proc., 16.
Bates *v.* New York & N. E. R. Co. (60 Conn. 259, 22 Atl. Rep. 538), Cross., Inj. at, 15, 143, 145.
Bates *v.* Old Colony R. Co. (34 Am. & Eng. R. Cas. 355, 147 Mass. 255, 17 N. E. Rep. 633), Car. of P., 336, 337; Discrim., 61.
Bates *v.* Pennsylvania R. Co. (2 Int. Com. Rep. 715, 3 Int. Com. Com. 435), Int. Com., 64, 72, 76, 165.
Bates *v.* Pennsylvania R. Co. (3 Int. Com. Rep. 296, 4 Int. Com. Com. 281), Int. Com., 166.
Bates *v.* St. Louis, I. M. & S. R. Co. (74 Mo. 60), Animals, 354.
Bates *v.* White (13 N. Y. S. R. 602), Charges, 77.
Bates County *v.* Winters (97 U. S. 83), Mun. Aid, 206, 383.
Bates County *v.* Winters (112 U. S. 325, 5 Sup. Ct. Rep. 157), Mun. Aid, 180, 207.
Bath *v.* Miller (51 Me. 341), Andros. R. Co., 2.
Bath *v.* Miller (53 Me. 308), Mort., 37.
Batman *v.* Kansas City, Ft. S. & M. R. Co. (53 Mo. App. 13), Animals, 604.
Baton Rouge, G. T. & O. R. Co. *v.* Kirkland (33 La. Ann. 622), Tax., 144.
Batterson *v.* Chicago & G. T. R. Co. (8 Am. & Eng. R. Cas. 123, 49 Mich. 184, 13 N. W. Rep. 508), Dam., 18; Employés, Inj. to, 96; Evid., 125; Pl., 24, 142.
Batterson *v.* Chicago & G. T. R. Co. (53 Mich. 125, 18 N. W. Rep. 584), Employés, Inj. to, 70; Side Tr., 6.
Battey *v.* Duxbury (23 Vt. 714), Sts. & H., 205.
Batting *v.* Bristol & E. R. Co. (9 W. R. 271, 3 L. T. 605), Crim. L., 35.
Battishill *v.* Humphreys (28 Am. & Eng. R. Cas. 507, 64 Mich. 494, 31 N. W. Rep. 894), Children, Inj. to, 69, 127, 128, 132; Cross., Inj. at, 71, 81; Trial, 110.
Battishill *v.* Humphreys (29 Am. & Eng. R. Cas. 411, 34 Am. & Eng. R. Cas. 69, 64

Mich. 514, 38 N. W. Rep. 581, 14 West. Rep. 863), Children, Inj. to, 167; Cross., Inj. at, 137, 206; Trial, 92.
Battle *v.* Wilmington & W. R. Co. (66 N. Car. 343), Animals, 453, 494.
Batton *v.* South & N. Ala. R. Co. (23 Am. & Eng. R. Cas. 514, 77 Ala. 591, 54 Am. Rep. 80), Car. of P., 308, 325.
Battrell *v.* Ohio River R. Co. (34 W. Va. 232, 12 S. E. Rep. 699), Em. Dom., 837.
Batty *v.* Duxbury (24 Vt. 155), Sts. & H., 396, 406.
Baucus *v.* Albany Northern R. Co. (8 How. Pr. (N. Y.) 70), Injunc., 32.
Bauer *v.* Kansas Pac. R. Co. (69 Mo. 219), Stat. & D., 62.
Bauer *v.* St. Louis, I. M. & S. R. Co. (46 Ark. 388), Employés, Inj. to, 182, 185, 209.
Baugh *v.* McDaniel (42 Ga. 641), Car. of M., 591, 600.
Baugh *v.* Texas & N. O. R. Co. (46 Am. & Eng. & R. Cas. 105, 80 Tex. 56, 15 S. W. Rep. 587), Nuis., 38, 40.
Baughman *v.* Louisville, E. & St. L. R. Co. (Ky.) (21 S. W. Rep. 757), Car. of L. S., 72, 136.
Baughman *v.* Shenango & A. R. Co. (6 Am. & Eng. R. Cas. 51, 92 Pa. St. 335, 37 Am. Rep. 690), Animals, 544.
Baulec *v.* New York & H. R. Co. (62 Barb. (N. Y.) 623, 5 Lans. 436, 12 Abb. Pr. N. S. 310; affirmed in 59 N. Y. 356, 17 Am. Rep. 325), Death, etc., 221, 228; Fel. Serv., 140, 471.
Baulec *v.* New York & H. R. Co. (59 N. Y. 356, 48 How. Pr. 309, 7 Am. Ry. Rep. 114; affirming 62 Barb. 623), Evid., 70; Fel. Serv., 150, 483; Negl., 55.
Bauman *v.* Union Pac. R. Co. (3 Dill. (U. S.) 367), Union Pac. R. Co., 9.
Baumeester *v.* Grand Rapids & I. R. Co. (28 Am. & Eng. R. Cas. 476, 63 Mich. 557, 30 N. W. Rep. 337), Tresp., Inj. to, 19.
Baush *v.* Camden & A. R. Co. (18 Phila. (Pa.) 392; affirmed by an equally divided court in 28 Am. & Eng. R. Cas. 142, 7 Atl. Rep. 731), Evid., 178; Passes, 36.
Bavington *v.* Pittsburgh & S. R. Co. (34 Pa. St. 358), Subscr., 78, 103, 112, 170, 222.
Baxendale *v.* Bristol & E. R. Co. (11 C. B. N. S. 787, 1 Ry. & C. T. Cas. 229), Discrim., 56.
Baxendale *v.* Eastern Counties R. Co. (4 C. B. N. S. 63, 27 L. J. C. P. 137), Charges, 28, 30; Discrim., 1.
Baxendale *v.* Great Eastern R. Co. (L. R. 4 Q. B. 244, 38 L. J. Q. B. 137, 10 B. & S. 212, 17 W. R. 412, 3 Ry. & C. T. Cas. xxv), Bills of L., 34; Car. of M., 438, 518, 520, 522, 528; Lim. of Liab., 9.
Baxendale *v.* Great Western R. Co. (5 C. B. N. S. 309, 28 L. J. C. P. 69, 4 Jur. N. S. 1241, 1 Ry. & C. T. Cas. 191), Discrim., 22.
Baxendale *v.* Great Western R. Co. (5 C. B. N. S. 336, 28 L. J. C. P. 81, 4 Jur. N. S. 1279, 1 Ry. & C. T. Cas. 202), Discrim., 63.
Baxendale *v.* Great Western R. Co. (14 C. B. N. S. 1, 9 Jur. N. S. 1174, 32 L. J. C. P. 225, 8 L. T. 833; affirmed in 16 C. B. N. S. 137, 10 Jur. N. S. 496, 33 L. J. C. P. 197, 12 W. R. 602, 9 L. T. 814), Charges, 114; Discrim., 19.
Baxendale *v.* Great Western R. Co. (16 C. B. N. S. 137, 2 Ry. & C. T. Cas. 16), Charges, 93.
Baxendale *v.* London & S. W. R. Co. (4 H. & C. 130, 35 L. J. Ex. 108, L. R. 1 Ex. 137, 12 Jur. N. S. 274, 14 W. R. 458, 14 L. T. 26), Charges, 30; Discrim., 41.
Baxendale *v.* London & S. W. R. Co. (12 C. B. N. S. 758, 1 Ry. & C. T. Cas. 231), Costs, 1; Discrim., 62.
Baxendale *v.* London, C. & D. R. Co. (44 L. J. Ex. 20, L. R. 10 Ex. 35, 23 W. R. 167, 32 L. T. 330, reversing 28 L. T. 349), Car. of M., 568.
Baxendale *v.* North Devon R. Co. (2 C. B. N. S. 324, 1 Ry. & C. T. Cas. 180), Discrim., 20.
Baxendale *v.* South Western R. Co. (35 L. J. Ex. 108, 1 Ry. & C. T. Cas. 20), Charges, 93; Connect. L., 4.
Baxendale *v.* West Midland R. Co. (3 Giff. 650; affirmed on appeal in 7 L. T. 297), Car. of M., 530.
Baxendale & L. & S. W. R. Co. In re (12 C. B. N. S. 758, 28 L. J. C. P. 81, 4 Jur. N. S. 1279), Car. of M., 532.
Baxter *v.* Boston & W. R. Corp. (102 Mass. 383), Fences, 97; Witn., 19.
Baxter *v.* Chicago, R. I. & P. R. Co. (55 Am. & Eng. R. Cas. 138, 87 Iowa 488, 54 N. W. Rep. 350), Animals, 456; Dam., 91; Fright. Teams, 2; Nuis., 6; Witn., 50.
Baxter *v.* New York, T. & M. R. Co. (Tex. Civ. App.) (22 S. W. Rep. 1002), Death, etc., 167.
Baxter *v.* Second Ave. R. Co. (3 Robt. (N. Y.) 510, 30 How. Pr. 219), Contrib. Neg., 4; Negl., 2; St. Rys., 506.
Baxter *v.* Spuyten Duyvil & P. M. R. Co. (61 Barb. (N. Y.) 428), Cross. St. & H., 91; Sts. & H., 222.
Baxter *v.* Troy & B. R. Co. (41 N. Y. 502), Cross., Inj. at, 198.
Baxtrom *v.* Chicago & N. W. R. Co. (117 Ill. 150, 7 N. E. Rep. 268), App., 2.
Bay City & E. S. R. Co. *v.* Austin (2 Mich. (N. P.) [Supp.] 2), Animals, 600; Fences, 27.
Bay City & E. S. R. Co. *v.* Austin (21 Mich. 390), Fences, 17.
Bay City Belt Line R. Co. *v.* Hitchcock (90 Mich. 533, 51 N. W. Rep. 808), Constr. Rys., 7; Em. Dom., 312, 314, 320, 457, 560; Incorp., 9.
Bayles *v.* Kansas Pac. R. Co. (40 Am. & Eng. R. Cas. 42, 13 Colo. 181, 5 L. R. A. 480, 2 Int. Com. Rep. 643, 22 Pac. Rep. 341), Charges, 23; Discrim., 4, 64; Parties, 11; Receiv., 49.
Bayley *v.* Eastern R. Co. (125 Mass. 62), Cross., Inj. at, 49; Witn., 96.
Bayley *v.* Great Western R. Co. (L. R. 26 Ch. D. 434, 51 L. T. 337), Em. Dom., 1098.
Bayley *v.* Manchester, S. & L. R. Co. (28 L. T. N. S. 366, L. R. 8 C. P. 148, 42 L. J. C. P. 78; affirming L. R. 7 C. P. 415, 41 L. J. C. P. 278), Agency, 73, 96; Eject. Pass., 70.

Bayliss v. Lafayette, M. & B. R. Co. (8 Biss. (U. S.) 193), Stockh., 99.
Bayliss v. Lafayette, M. & B. R. Co. (9 Biss. (U. S.) 90), Receiv., 86.
Baylor v. Baltimore & O. R. Co. (9 W. Va. 270), Animals, 53, 62, 341, 375.
Baylor v. Delaware, L. & W. R. Co. (40 N. J. L. 23, 17 Am. Ry. Rep. 344), Employés, Inj. to, 57.
Bay Shore R. Co. v. Harris (67 Ala. 6), Children, Inj. to, 69, 189; Tresp., 28.
Bay State Brick Co. v. Foster (115 Mass. 431), Sts. & H., 423.
Beach v. Bay State Steamboat Co. (30 Barb. (N. Y.) 433, 10 Abb. Pr. 71, 18 How. Pr. 335; reversing 6 Abb. Pr. 415, 27 Barb. 248, 16 How. Pr. 1), Death, etc., 121.
Beach v. Hungerford (19 Barb. (N. Y.) 258), Contr., 15.
Beach v. Smith (30 N. Y. 116; affirming 28 Barb. 254), Subscr., 135.
Beacon v. Pittsburgh, Y. & A. R. Co. (1 Pa. Dist. 618), Em. Dom., 130, 134, 717.
Beadell v. Eastern Counties R. Co. (26 L. J. C. P. 250, 2 C. B. N. S. 509, 1 Ry. & C. T. Cas. 56), Hacks, etc., 1.
Beadle v. Kansas City, Ft. S. & M. R. Co. (51 Kan. 248, 32 Pac. Rep. 910), Charges, 52.
Beadles v. Bless (27 Ill. 320), Contr., 54.
Beal v. Lowell & D. St. R. Co. (157 Mass. 444, 32 N. E. Rep. 653), Elec. Rys., 26.
Beal v. New York C. & H. R. R. Co. (41 Hun 172, 4 N. Y. S. R. 174; affirmed in 119 N. Y. 635, mem., 23 N. E. Rep. 1148, 29 N. Y. S. R. 991), Consol., 3; Em. Dom., 129.
Beal v. New York C. & H. R. R. Co. (3 How. Pr. N. S. (N. Y.) 329), Em. Dom., 132.
Beal v. South Devon R. Co. (3 H. & C. 337, 12 W. R. 1115, 11 L. T. 184; affirming 5 H. & N. 875, 29 L. J. Ex. 441, 8 W. R. 651), Car. of M., 479; Negl., 3.
Beale v. Pennsylvania R. Co. (86 Pa. St. 509), Em. Dom., 426, 882.
Beale v. Railway Co. (1 Dill. (U. S.) 568), Car. of P., 634.
Beall v. Pittsburgh, C. & St. L. R. Co. (38 W. Va. 525, 18 S. E. Rep. 729), Employés, Inj. to, 249.
Beals v. Illinois, M. & T. R. Co. (27 Fed. Rep. 721), Judgm., 36.
Beals v. Illinois, M. & T. R. Co. (133 U. S. 290, 10 Sup. Ct. Rep. 314), Stockh., 80.
Bean v. Atlantic & St. L. R. Co. (58 Me. 82), Fire Ins., 12; Fires, 153.
Bean v. Atlantic & St. L. R. Co. (63 Me. 293), Fires, 159.
Bean v. Howe (85 Pa. St. 260), Tresp., 4.
Bean v. Kulp (7 Phila. (Pa.) 650), Em. Dom., 72, 151, 436.
Bean v. Miller (69 Mo. 384), Constr. Rys., 41, 58, 81.
Bean v. St. Louis, I. M. & S. R. Co. (20 Mo. App. 641), Animals, 553.
Bean v. Western N. C. R. Co. (107 N. Car. 731, 12 S. E. Rep. 600), Employés, Inj. to, 190, 675; Pl., 74.
Beanstrom v. Northern Pac. R. Co. (46 Minn. 193, 48 N. W. Rep. 778), Cross., Inj. at, 177, 340.
Bear v. Burlington, C. R. & M. R. Co. (48 Iowa 619), Liens, 31; Mort., 106.
Beard v. Bowler (2 Bond (U. S.) 13), Pl., 125.
Beard v. Connecticut & P. R. R. Co. (48 Vt. 101, 16 Am. Ry. Rep. 375), Stat. & D., 101.
Beard v. Credit Valley R. Co. (23 Am. & Eng. R. Cas. 142, 9 Ont. 616), Lim. of Ac., 49.
Beard v. Illinois C. R. Co. (42 Am. & Eng. R. Cas. 445, 79 Iowa 518, 7 L. R. A. 280, 44 N. W. Rep. 800), Car. of M., 52, 109, 641, 644, 654.
Beard v. St. Louis, A. & T. H. R. Co. (42 Am. & Eng. R. Cas. 509, 79 Iowa 527, 44 N. W. Rep. 803), Car. of M., 52, 605, 610, 629.
Bearden v. Madison (73 Ga. 184), Sts. & H., 308.
Beardmer v. London & N. W. R. Co. (1 M. & G. 112, 1 H. & T. 161, 13 Jur. 327, 18 L. J. Ch. 432), Em. Dom., 1140.
Beardsley v. Beardsley (138 U. S. 262, 11 Sup. Ct. Rep. 318), Stock, 54.
Beardsley v. Johnson (121 N. Y. 224, 24 N. E. Rep. 380, 30 N. Y. S. R. 691; affirming 49 Hun 607, mem.), Direct., 3, 8; Evid., 117.
Beardsley v. Lehigh Valley R. Co. (48 N. Y. S. R. 485, 65 Hun 502, 20 N. Y. Supp. 458), Farm Cross., 8.
Beardsley v. Ontario Bank (31 Barb. (N. Y.) 619), Mort., 47.
Beattie v. Andrew County (56 Mo. 42), Mun. Aid, 312.
Beattie v. Carolina C. R. Co. (46 Am. & Eng. R. Cas. 524, 108 N. Car. 425, 12 S. E. Rep. 913), Aband., 6; Easem., 1, 9; Right of W., 2; Spec. Perf., 7.
Beattie v. Citizens' Pass. R. Co. (Pa.) (1 Atl. Rep. 574), St. Rys., 402
Beattie v. Delaware, L. & W. R. Co. (90 N. Y. 643, mem.; affirming 12 Wkly. Dig. 334), Evid., 18.
Beattie v. Grand Trunk R. Co. (41 Vt. 275), Witn., 64.
Beatty v. Central Iowa R. Co. (8 Am. & Eng. R. Cas. 210, 58 Iowa 242, 12 N. W. Rep. 332), Cross. St. & H., 18; Death, etc., 222; Negl., 32.
Beatty v. Lehigh Valley R. Co. (134 Pa. St. 294, 19 Atl. Rep. 745), Paym., 3.
Beattys v. Solon (45 N. Y. S. R. 899, 64 Hun 120, 19 N. Y. Supp. 37), Coupons, 12; Incorp., 8.
Beaty v. Baltimore & O. R. Co. (6 W. Va. 388), Flood. Lds., 73.
Beauchamp v. Great Western R. Co. (L. R. 3 Ch. 745, 38 L. J. Ch. 162, 19 L. T. 189, 16 W. R. 1155), Em. Dom., 1111.
Beauchamp v. International & G. N. R. Co. (9 Am. & Eng. R. Cas. 307, 56 Tex. 239), Car. of P., 250, 258; Time-tables, 1.
Beaudet v. North Shore R. Co. (15 Can. Sup. Ct. 44), Em. Dom., 1272.
Beaudin v. Central Vt. R. Co. (38 N. Y. S. R. 473, 60 Hun 581, mem., 14 N. Y. Supp. 700), Employés, Inj. to, 119.

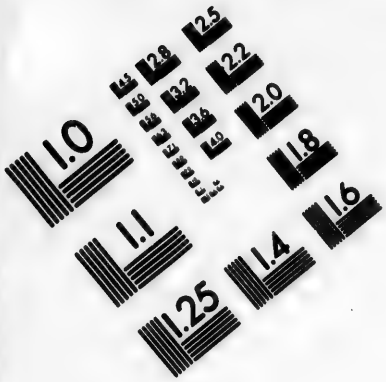
Beaumont *v.* Canadian Pac. R. Co. (5 Montr. L. R. (Sup. Ct.) 255), Bills of L., 67.
Beaver *v.* Grand Trunk R. Co. (22 Ont. 667), Eject. Pass., 9.
Beaver *v.* Grand Trunk R. Co. (58 Am. & Eng. R. Cas. 42, 20 Ont. App. 476; dismissing appeal from 22 Ont. 667; reversed in 59 Am. & Eng. R. Cas. 673, 22 Can. Sup. Ct. 498), Eject. Pass., 20; Tickets & F., 12, 33.
Beaver *v.* Pittsburg, C. & St. L. R. Co. (3 Int. Com. Rep. 564, 4 Int Com. Com. 733), Int. Com., 84.
Beaver County *v.* Armstrong (44 Pa. St. 63), Coupons, 12.
Bechdolt *v.* Grand Rapids & I. R. Co. (35 Am. & Eng. R. Cas. 168, 113 Ind. 343, 13 West. Rep. 53, 15 N. E. Rep. 686), Animals, 117; Fences, 58; Trial, 207.
Becher *v.* Great Eastern R. Co. (L. R. 5 Q. B. 241, 39 L. J. Q. B. 122, 3 Ry. & C. T. Cas xx, 18 W. R. 627, 22 L. T. 299), Bagg., 13.
Bechervaise *v.* Great Western R. Co. (40 L. J. C. P. 8, L. R. 6 C. P. 36, 23 L. T. 808, 19 W. R. 229), Discov., 1.
Bechtel *v.* New Orleans, M. & T. R. Co. (28 La. Ann. 522), Constr. Rys., 14.
Becht *v.* Corbin (92 N. Y. 658), Cross., Inj. at, 162.
Beck *v.* East River Ferry Co. (6 Robt. (N. Y.) 82), Imp. Neg., 19.
Beck *v.* Erie Terminal R. Co. (1 Pa. Dist. 449), Injunc., 17; Sts. & H., 223.
Beck *v.* Louisville, N. O. & T. R. Co. (65 Miss. 172, 3 So. Rep. 252), Ejectm., 6; Em. Dom., 1.
Beck *v.* Pennsylvania, P. & B. R. Co. (148 Pa. St. 271, 23 Atl. Rep. 900), Em. Dom., 1081, Witn., 124.
Beck *v.* United N. J. R. & C. Co. (39 N. J. L. 45), Em. Dom., 51.
Becke *v.* Missouri Pac. R. Co. (45 Am. & Eng. R. Cas. 174, 102 Mo. 544, 13 S. W. Rep. 1053), Death, etc., 368; Imp. Neg., 16; Negl., 27, 53.
Becker *v.* Baltimore & O. R. Co. (57 Fed. Rep. 188), Fed. Cts., 15; Fel. Serv., 25, 237.
Becker *v.* Baumgartner (5 Ind. App. 576, 32 N. E. Rep. 786), Employés, Inj. to, 145.
Becker *v.* Cherry Creek (53 N. Y. S. R. 555, 24 N. Y. Supp. 19, 70 Hun 6; affirmed in 139 N. Y. 658, mem., 54 N. Y. S. R. 935, mem.), Actions, 6; Trial, 8.
Becker *v.* Chicago, B. & Q. R. Co. (126 Ill. 436, 18 N. E. Rep. 564), Em. Dom., 839.
Becker *v.* Gulf City St. R. & R. E. Co. (80 Tex. 475, 15 S. W. Rep. 1094), Lim. of Ac., 10; Receiv., 20; Stockh., 98, 129.
Becker *v.* Metropolitan El. R. Co. (131 N. Y. 509, 43 N. Y. S. R. 726; affirming 14 N. Y. Supp. 312), Elev. Rys., 102.
Becker *v.* New York, L. E. & W. R. Co. (31 N. Y. S. R. 750, 57 Hun 585, 10 N. Y. Supp. 413), Animals, 366; Pl., 156.
Beckett *v.* Midland R. Co. (L. R. 3 C. P. 82, 17 L. T. 499, 37 L. J. C. P. 11, 16 W. R. 221), Em. Dom., 1156, 1191.
Beckett *v.* Midland R. Co. (1 H. & R. 189, L. R. 1 C. P. 241, 12 Jur. N. S. 231, 35 L. J. C. P. 163, 14 W. R. 393, 13 L. T. 672), Em. Dom., 1176.
Beckwith *v.* Cheshire R. Co. (27 Am. & Eng. R. Cas. 192, 143 Mass. 68, 8 N. E. Rep. 875), Car. of P., 16; Children, Inj. to, 14; Eject. Pass., 10, 65.
Beckwith *v.* Frisbie (32 Vt. 559), Charges, 40.
Beckwith *v.* Hartford, P. & F. R. Co. (29 Conn. 268), Int., 16.
Beckwith *v.* Kansas City & O. R. Co. (10 Am. & Eng. R. Cas. 442, 28 Kan. 484), Em. Dom., 941.
Beckwith *v.* New York C. & H. R. R. Co. (54 Hun (N. Y.) 446, 28 N. Y. S. R. 139, 292, 7 N. Y. Supp. 719, 721; affirmed in 125 N. Y. 759, mem., 36 N. Y. S. R. 1010), Children, Inj. to, 108; Contrib. Neg., 95; Cross., Inj. at, 137, 257, 259, 329; Evid., 143.
Beckwith *v.* New York C. R. Co. (64 Barb. (N. Y.) 299; reversed (?) 9 Alb. L. J. 45), Dam., 67; Trial, 117; Witn., 139, 119, 165, 166, 173.
Bedell *v.* Long Island R. Co. (44 N. Y. 367), Fires, 41, 268; Witn., 118.
Bedford *v.* Hannibal & St. J. R. Co. (46 Mo. 456), Fires, 264, 288.
Bedford *v.* Louisville, N. O. & T. R. Co. (65 Miss. 385, 4 So. Rep. 121), Animals, 69; Trial, 183.
Bedford & C. R. Co. *v.* Stanley (32 L. J. Ch. 60, 2 Johns. & H. 746), Vend. & P., 3, 6.
Bedford & N. R. Co. *v.* Midland R. Co. (4 Ry. & C. T. Cas. 170), Arb., 3.
Bedford County *v.* Nashville, C. & St. L. R. Co. (22 Am. & Eng. R. Cas. 75, 14 Lea (Tenn.) 525), Contr., 9, 10, 92.
Bedford R. Co. *v.* Bowser (48 Pa. St. 29), Direct., 26, 37, 40; Subscr., 120, 200.
Bedford, S., O. & B. R. Co. *v.* Rainbolt (21 Am. & Eng. R. Cas. 466, 99 Ind. 551), Bridges, 27, 51; Contrib. Neg., 53; Evid., 144.
Bee *v.* San Francisco & H. B. R. Co. (46 Cal. 248, 7 Am. Ry. Rep. 504), Evid., 201; Superint., 5.
Bee *v.* Stafford & U. R. Co. (23 W. R. 863), Em. Dom., 1150.
Beebe *v.* Ayres (28 Barb. (N. Y.) 275), Eject. Pass., 30; Tickets & F., 50.
Beecher *v.* Chicago & N. W. R. Co. (11 Biss. (U. S.) 246, 14 Fed. Rep. 211), Trusts, 10.
Beekman *v.* Hudson River W. S. R. Co. (36 Am. & Eng. R. Cas. 321, 35 Fed. Rep. 3), Mort., 170, 174, 183, 192, 193.
Beekman *v.* Saratoga & S. R. Co. (3 Paige (N. Y.) 45), Car. of P., 109; Charges, 4; Em. Dom., 40.
Beems *v.* Chicago, R. I. & P. R. Co. (6 Am. & Eng. R. Cas. 222, 10 Am. & Eng. R. Cas. 658, 58 Iowa 150, 12 N. W. Rep. 222), Death, etc., 178, 279, 307; Employés, Inj. to, 410; Negl., 84.
Beems *v.* Chicago, R. I. & P. R. Co. (67 Iowa 435, 25 N. W. Rep. 693), Death, etc., 284; Negl., 70; Pl., 93.

Beene *v.* Cahawba & M. R. Co. (3 Ala. 660), Name, 1; Subscr., 77.
Beers *v.* Housatonic R. Co. (19 Conn. 566), Contrib. Neg., 20; Negl., 5, 61.
Beers *v.* Wabash, St. L. & P. R. Co. (35 Am. & Eng. R. Cas. 646, 34 Fed. Rep. 244), Car. of M., 660; Receiv., 64; Strikes, 5.
Beery *v.* Chicago & N. W. R. Co. (73 Wis. 197, 40 N. W. Rep. 687), App., 66; New Tr., 100; Trial, 117.
Beery *v.* Chicago, R. I. & P. R. Co. (64 Mo. 533), Rem. of C., 54.
Beeson *v.* Busenbark (44 Am. & Eng. R. Cas. 584, 44 Kan. 669, 25 Pac. Rep. 48), Constr. Rys., 50; Stat., 42.
Beeson *v.* Chicago, R. I. & P. R. Co. (13 Am. & Eng. R. Cas. 45, 62 Iowa 173, 17 N. W. Rep. 448), Arrest, 2; Stat. & D., 144.
Beeson *v.* Green Mountain Gold Min. Co. (57 Cal. 20), Death, etc., 397.
Beeston Brewery Co. *v.* Midland R. Co. (5 Ry. & C. T. Cas. 53), Side Tr., 2.
Beggs *v.* Chicago, W. & M. R. Co. (75 Wis. 444, 44 N. W. Rep. 633), Fires, 253.
Behee *v.* Missouri Pac. R. Co. (71 Tex. 424, 9 S. W. Rep. 449), Libel & S., 9, 11.
Behrens *v.* Kansas Pac. R. Co. (8 Am. & Eng. R. Cas. 184, 5 Colo. 400), Contrib. Neg., 20; Negl., 102; Trial, 65.
Beideman *v.* Atlantic City R. Co. (N. J. Eq.) (19 Atl. Rep. 731), Injunc., 16.
Beilfus *v.* New York, L. E. & W. R. Co. (29 Hun (N. Y.) 556), Fel. Serv., 25, 338.
Beisegel *v.* New York C. R. Co. (14 Abb. Pr. N. S. (N. Y.) 29), Contrib. Neg., 83; Cross., Inj. at, 229; Negl., 30.
Beisiegel *v.* New York C. R. Co. (34 N. Y. 622; reversing 33 Barb. 429), Cross., Inj. at, 120, 121, 131; Tresp., Inj. to, 48.
Beisiegel *v.* New York C. R. Co. (40 N. Y. 9), Cross., Inj. at, 64, 67, 91; Dam., 93.
Beitman *v.* Steiner (98 Ala. 241, 13 So. Rep. 87), Contr., 65; Stock, 12, 28.
Belair *v.* Chicago & N. W. R. Co. (43 Iowa 662. 14 Am. Ry. Rep. 575), App., 66; Employés, Inj. to, 224, 250, 621, 737, 769; Witn., 145.
Belch *v.* Manitoba & N. W. R. Co. (4 Man. 198), Assump., 5.
Belch *v.* Missouri Pac. R. Co. (18 Mo. App. 80), Fires, 346; Witn., 120.
Belcher *v.* Manhattan R. Co. (1 N. Y. Supp. 349), Elev. Rys., 212; Evid., 298.
Belcher *v.* Missouri Pac. R. Co. (75 Mo. 514), Animals, 615.
Belden *v.* Burke (20 N. Y. Supp. 320), Bonds, 47.
Belden *v.* Burke (25 N. Y. Supp. 601, 72 Hun 51), Mort., 77, 81.
Belden *v.* New York & H. R. Co. (15 How. Pr. (N. Y.) 17), Proc., 39.
Belding *v.* Black Hills & Ft. P. R. Co. (52 Am. & Eng. R. Cas. 624, 3 So. Dak. 369, 53 N. W. Rep. 750), Death, etc., 32, 84, 90, 92, 378.
Belfast & B. R. Co. *v.* Keys (9 H. L. Cas. 556, 9 W. R. 793, 4 L. T. 841, 8 Jur. N. S. 367), Bagg., 37, 111, 112.
Belfast & C. D. R. Co. *v.* Strange (1 Ex. 739, 5 Railw. Cas. 548), Subscr., 90.
Belfast & M. L. R. Co. *v.* Belfast (23 Am. & Eng. R. Cas. 736, 77 Me. 445, 1 Atl. Rep. 362), Divid., 8.
Belfast & M. L. R. Co. *v.* Brooks (60 Me. 568), Mun. Aid, 115, 228.
Belfast & M. L. R. Co. *v.* Cottrell (66 Me. 185, 19 Am. Ry. Rep. 35), Subscr., 199.
Belfast & M. L. R. Co. *v.* Moore (60 Me. 561), Subscr., 39.
Belfast & M. L. R. Co. *v.* Unity (62 Me. 148), Contr., 8; Mun. Aid, 128; Subscr., 193.
Belfast C. R. Co. In re (19 W. R. 238), Em. Dom., 1107.
Belfast C. R. Co. *v.* Great Northern R. Co. (3 Ry. & C. T. Cas. 419), Charges, 103.
Belfast C. R. Co. *v.* Great Northern R. Co. (4 Ry. & C. T. Cas. 159), Charges, 97, 101, 118; Ry. Com'rs, 7.
Belfast C. R. Co. *v.* Great Northern R. Co. (4 Ry. & C. T. Cas. 379), Leases, 142.
Belger *v.* Dinsmore (51 N. Y. 166; reversing 51 Barb. 69, 34 How. Pr. 421), Exp. Cos., 61, 72.
Belknap *v.* Boston & M. R. Co. (49 N. H. 358), Dam., 18, 36; Eject. Pass., 123, 126; New Tr., 30, 82.
Belknap *v.* Wendell (21 N. H. 175), Partn., 1.
Bell *v.* Americus, P. & L. R. Co. (76 Ga. 754), Eq., 21; Subscr., 147.
Bell *v.* Central R. Co. (73 Ga. 520), Death, etc., 151.
Bell *v.* Chicago, B. & Q. R. Co. (64 Iowa 321, 20 N. W. Rep. 456), Fences, 87; Fires, 241.
Bell *v.* Chicago, B. & Q. R. Co. (74 Iowa 343, 37 N. W. Rep. 768), Em. Dom., 595, 676, 907.
Bell *v.* Chicago, St. L. & N. O. R. Co. (34 La. Ann. 785), Mort., 69, 170.
Bell *v.* Edwards (37 La. Ann. 475), Sts. & H., 151.
Bell *v.* Hannibal & St. J. R. Co. (4 Am. & Eng. R. Cas. 580, 72 Mo. 50), Contrib. Neg., 4; Cross., Inj. at, 104; Negl., 67; Tresp., Inj. to, 63; Trial, 164.
Bell *v.* Hannibal & St. J. R. Co. (86 Mo. 599), Death, etc., 210, 254; Negl., 49; Witn., 22.
Bell *v.* Hull & S. R. Co. (6 M. & W. 699, 2 Railw. Cas. 279), Em. Dom., 1100.
Bell *v.* Indianapolis, C. & L. R. Co. (53 Ind. 57), Receiv., 181.
Bell *v.* Kansas City, M. & B. R. Co. (68 Miss. 19, 8 So. Rep. 508), Lim. of Ac., 60.
Bell *v.* Kansas City, M. & B. R. Co. (Miss.) (9 So. Rep. 289), Sts. & H., 326.
Bell *v.* London & N. W. R. Co. (2 Ry. & C. T. Cas. 185), Discrim., 18.
Bell *v.* Louisville & N. R. Co. (1 Bush (Ky.) 404), War, 6.
Bell *v.* Midland R. Co. (3 DeG. & J. 673), Branch & L. Roads, 9.
Bell *v.* Midland R. Co. (10 C. B. N. S. 287, 7 Jur. N. S. 1200, 30 L. J. C. P. 273, 9 W. R. 612, 4 L. T. 293), Dam., 28; Wharves, 2.
Bell *v.* Mobile & O. R. Co. (4 Wall. (U. S.) 598), Mun. Aid, 181, 405.

Bell *v.* New York C. & H. R. R. Co. (29 Hun (N. Y.) 560), Contrib. Neg., 85.
Bell *v.* Norfolk Southern R. Co. (36 Am. & Eng. R. Cas. 651, 37 Am. & Eng. R. Cas. 270, 101 N. Car. 21, 7 S. E. Rep. 467), Flood. Lds., 29, 41, 45.
Bell *v.* Ohio & P. R. Co. (1 Grant's Cas. (Pa.) 105), Em. Dom., 987; Sts. & H., 79, 231.
Bell *v.* Ohio & P. R. Co. (25 Pa. St. 161), Nuis., 3; Sts. & H., 141.
Bell *v.* Pennsylvania, S. & N. E. R. Co. (N. J. Eq.) (10 Atl. Rep. 741), Stockh., 83, 118.
Bell *v.* St. Louis & I. M. R. Co. (6 Mo. App. 363), Car. of M., 206, 341.
Bell *v.* Western & A. R. Co. (70 Ga. 566), Employés, Inj. to, 282; Trial, 64.
Bell *v.* Windsor & A. R. Co. (24 Nov. Sc. 521), Car. of M., 193.
Bell's Gap R. Co. *v.* Christy (79 Pa. St. 54), Incorp., 6.
Bell's Gap R. Co. *v.* Pennsylvania (134 U. S. 232, 10 Sup. Ct. Rep. 533), Tax., 44.
Bella *v.* New York, L. & W. R. Co. (6 N. Y. Supp. 552, 24 N. Y. S. R. 921), Evid., 227.
Bellaire *v.* Baltimore & O. R. Co. (146 U. S. 117, 13 Sup. Ct. Rep. 16), Rem. of C., 16.
Bellefontaine & I. R. Co. *v.* Bailey (11 Ohio St. 333), Animals, 419, 575.
Bellefontaine & I. R. Co. *v.* Schruyhart (10 Ohio St. 116), Animals, 38.
Bellefontaine & I. R. Co. *v.* Snyder (18 Ohio St. 399), Children, Inj. to, 127, 128; Contrib. Neg., 6, 10.
Bellefontaine R. Co. *v.* Hunter (33 Ind. 335), Cross., Inj. at, 130, 313; Evid., 195.
Bellefontaine R. Co. *v.* Reed (33 Ind. 476), Animals, 239, 615.
Bellefontaine R. Co. *v.* Snyder (24 Ohio St. 670), Children, Inj. to, 136; Cross., Inj. at, 254.
Bellefontaine R. Co. *v.* Suman (29 Ind. 40), Animals, 352.
Belleville *v.* Illinois & St. L. R. Co. (49 Ill. App. 301), Jurisd., 19.
Belleville & I. R. Co. *v.* Gregory (15 Ill. 20), Charters, 3, 70.
Bellinger *v.* New York C. R. Co. (23 N. Y. 42), Waters & W., 13.
Bellingham Bay & B. C. R. Co. *v.* Strand (51 Am. & Eng R. Cas. 608, 4 Wash. 311, 30 Pac. Rep. 144), Em. Dom., 566, 573, 711.
Bellingham Bay R. & N. Co. *v.* Loose (2 Wash. 500, 27 Pac. Rep. 174), Em. Dom., 1057.
Bellman *v.* New York C. & H. R. R. Co. (5 N. Y. S. R. 153, 42 Hun 130; affirmed in 122 N. Y. 671, mem., 34 N. Y. S. R. 1015), Car. of P., 23, 120, 402; New Tr., 1.
Bellona Co.'s Case (3 Bland (Md.) 442), Em. Dom., 103, 276.
Belloni *v.* Sydney & L. R. Co. (9 Nov. Sc. 137), Appear., 8.
Bellows *v.* Pennsylvania & N. Y. C. & R. Co. (157 Pa. St. 51, 27 Atl. Rep. 685), Employés, Inj. to, 28.
Bellsdyke Coal Co. *v.* North British R. Co. (2 Ry. & C. T. Cas. 105), Charges, 91; Discrim., 5, 10.
Belmont *v.* Erie R. Co. (52 Barb. (N. Y.) 637), Bonds, 8; Eq., 25; Receiv., 12, 27; Stockh., 95.
Belmont Coal Co. *v.* Richer (31 W. Va. 858, 8 S. E. Rep. 609), Bailm., 2.
Belo *v.* Forsythe County Com'rs (76 N. Car. 489), Mun. Aid, 22, 279, 299, 354, 372, 377.
Belo *v.* Forsyth County Com'rs (82 N. Car. 415), Tax., 101, 220.
Beloit & M. R. Co. *v.* Palmer (19 Wis. 574), Subscr., 155.
Belt Line St. R. Co. *v.* Crabtree (2 Tex. App. (Civ. Cas.) 579), St. Rys., 191; Sts. & H., 212, 274.
Belt R. & S. Y. Co. *v.* Mann (107 Ind. 89, 7 N. E. Rep. 893), Contrib. Neg., 50.
Belton *v.* Baxter (54 N. Y. 245, 14 Abb. Pr. N. S. 404; reversing 1 J. & S. 182), Cross., Inj. at, 315.
Belvidere *v.* Warren R. Co. (34 N. J. L. 193), Tax., 274, 288.
Beman *v.* Rufford (1 Sim. N. S. 550, 15 Jur. 914, 20 L. J. Ch. 537, 6 Eng. L. & Eq., 106), Leases, 129; Stockh., 92.
Bemis *v.* Central Vt. R. Co. (25 Am. & Eng. R. Cas. 138, 58 Vt. 636, 3 Atl. Rep. 531), Witn., 99, 133.
Bemis *v.* Connecticut & P. R. R. Co. (42 Vt. 375), Animals, 38; Fences, 74.
Benbow *v.* Mayor, etc., of Iowa City (7 Wall. (U. S.) 313), Mand., 33.
Benbow *v.* North Carolina R. Co. (Phil. (N. Car.) 421), Car. of M., 262.
Bender *v.* Canada S. R. Co. (37 U. C. Q. B. 25), App., 115.
Benedict *v.* Arthur (6 U. C. Q. B. 204), Car. of M., 3.
Benedict *v.* Heineberg (43 Vt. 231), Exec., 3.
Benedict *v.* Seventh Ward R. Co. (24 N. Y. S. R. 169, 5 N. Y. Supp. 406, 51 Hun 111), Pl., 99; St. Rys., 205.
Benedict *v.* St. Joseph & W. R. Co. (14 Am. & Eng. R. Cas. 609, 19 Fed. Rep. 173), Mort., 216.
Bengtson *v.* Chicago, St. P., M. & O. R. Co. (47 Minn. 486, 50 N. W. Rep. 531), Employés, Inj. to, 182, 206, 612.
Benjamin *v.* Elmira, J. & C. R. Co. (49 Barb. (N. Y.) 441; affirmed (?) 54 N. Y. 675, mem.), Mort., 55, 74.
Benjamin *v.* Metropolitan St. R. Co. (50 Mo. App. 602), Negl., 19; Trial, 140; Witn., 131, 146, 156, 191.
Benjamin *v.* New York El. R. Co. (44 N. Y. S. R. 538, 17 N. Y. Supp. 908, 63 Hun 629), Elev. Rys., 116, 117.
Benjamin *v.* Sinclair (1 Bailey (So. Car.) 174), Bills of L., 22.
Bennet *v.* Camden & A. R. & T. Co. (14 N. J. L. 145), Em. Dom., 802, 811, 949, 958.
Bennett, Ex parte (26 So. Car. 317, 2 S. E. Rep. 389), Em. Dom., 315.
Bennett, In re (30 N. Y. S. R. 166, 9 N. Y. Supp. 915, 5 Silv. Sup. Ct. 464), Em. Dom., 488, 491.
Bennett *v.* American Exp. Co. (49 Am. & Eng. R. Cas. 56, 83 Me. 236, 22 Atl. Rep. 159), Car. of M., 296, 173; Int. Com., 4, 5.

Bennett *v.* Chicago & N. W. R. Co. (19 Wis. 145), Animals, 127, 200.
Bennett *v.* Covert (13 U. C. C. P. 555), App., 95.
Bennett *v.* Covert (24 U. C. Q. B. 38), Animals, 646; Fences, 10.
Bennett *v.* Drew (3 Bosw. (N. Y.) 355), Car. of M., 797.
Bennett *v.* Dutton (10 N. H. 481), Car. of P., 97.
Bennett *v.* Grand Trunk R. Co. (7 Ont. App. 470), Contrib. Neg., 83; Cross., Inj. at, 294.
Bennett *v.* Grand Trunk R. Co. (13 Am. & Eng. R. Cas. 627, 3 Ont. 446), Cross., Inj. at, 115; Stat. & D., 62, 63.
Bennett *v.* Louisville & N. R. Co. (1 Am. & Eng. R. Cas. 71, 102 U. S. 577), Stat. & D., 94.
Bennett *v.* Manchester, S. & L. R. Co. (6 C. B. N. S. 707), Car. of M., 529.
Bennett *v.* Minneapolis & P. R. Co. (42 Minn. 245, 44 N. W. Rep. 10), Em. Dom., 1029.
Bennett *v.* Missouri Pac. R. Co. (105 Mo. 642, 16 S. W. Rep. 947), App., 107; Words & Ph., 112.
Bennett *v.* New Jersey R. & T. Co. (36 N. J. L. 225, 12 Am. Ry. Rep. 79), St. Rys., 375, 381.
Bennett *v.* New York C. & H. R. R. Co. (16 N. Y. Supp. 765, 40 N. Y. S. R. 948; affirmed in 133 N. Y. 563, mem., 30 N. E. Rep. 1149, 44 N. Y. S. R. 930), Children, Inj. to, 175; Cross., Inj. at, 294; Imp. Neg., 19; New Tr., 67.
Bennett *v.* New York C. & H. R. R. Co. (69 N. Y. 594, 25 Am. Rep. 250; affirming 5 Hun 599), Eject. Pass., 15.
Bennett *v.* New York, N. H. & H. R. Co. (41 Am. & Eng. R. Cas. 184, 57 Conn. 422, 18 Atl. Rep. 668), Car. of P., 444.
Bennett *v.* Northern Pac. R. Co. (48 Am. & Eng. R. Cas. 182, 2 N. Dak. 112, 49 N. W. Rep. 408), Employés, Inj. to, 16, 154, 416, 429; Evid., 211.
Bennett *v.* Northern Pac. Exp. Co. (12 Oreg. 49, 6 Pac. Rep. 160), Car. of M., 259, 745; Exp. Cos., 39, 69, 89.
Bennett *v.* Northern Pac. R. Co. (3 N. Dak. 91, 54 N. W. Rep. 314), Employés, Inj. to, 406; Fel. Serv., 507.
Bennett *v.* Railroad Co. (7 Phila. (Pa.) 11), Tickets & F., 62.
Bennett *v.* S. A. R. E. B. & L. Assoc. (57 Tex. 72), Officers, 6.
Bennett *v.* Syndicate Ins. Co. (39 Minn. 254, 39 N. W. Rep. 488), Employés, Inj. to, 6; Negl., 67.
Bennett *v.* Union El. R. Co. (5 Silv. Sup. Ct. 464, 9 N. Y. Supp. 915), Arb., 8.
Bennett *v.* Wabash, St. L. & P. R. Co. (61 Iowa 355, 16 N. W. Rep. 210), Animals, 109.
Benning *v.* Atlantic & N. W. R. Co. (5 Montr. Super. 136), Em. Dom., 1269.
Benning *v.* Atlantic & N. W. R. Co. (6 Montr. L. R. 385; affirming 5 Montr. Super. 136), Em. Dom., 1254, 1260, 1262, 1263, 1269.
Benning *v.* Atlantic & N. W. R. Co. (20 Can. Sup. Ct. 177; affirming 6 Montr. L. R. 385, 5 Montr. Super. 136), Em. Dom., 1237.
Bennington *v.* Park (50 Vt. 178), Mun. Aid, 51, 340.
Bennitt *v.* Missouri Pac. R. Co. (46 Mo. App. 656), Bills of L., 53, 64; Car. of M., 621.
Bensley *v.* Mountain Lake Water Co. (13 Cal. 306), Em. Dom., 371.
Benson, Ex parte (18 So. Car. 38, 44 Am. Rep. 564), Discrim., 1, 69.
Benson, In re (29 U. C. Q. B. 529), Em. Dom., 1252.
Benson *v.* Baltimore Traction Co. (77 Md. 535, 26 Atl. Rep. 973), Licensees, Inj. to, 4.
Benson *v.* Central Pac. R. Co. (54 Am. & Eng. R. Cas. 126, 98 Cal. 45, 32 Pac. Rep. 809, 33 Pac. Rep. 206), Car. of P., 128; Children, Inj. to, 3; Negl., 41, 67; Tresp., Inj. to, 44.
Benson *v.* Chicago & A. R. Co. (20 Am. & Eng. R. Cas. 96, 78 Mo. 504), Flood. Lds., 46, 92; Waters & W., 9.
Benson *v.* Chicago & N. W. R. Co. (41 Ill. App. 227), Cross., Inj. at, 327; Trial, 157.
Benson *v.* Gray (154 Mass. 391, 28 N. E. Rep. 275), Car. of L. S., 50.
Benson *v.* Mayor, etc., of Albany (24 Barb. (N. Y.) 248), Mun. Aid, 44.
Benson *v.* New Jersey R. & T. Co. (9 Bosw. (N. Y.) 412), Car. of P., 120.
Bentham *v.* Hoyle (L. R. 3 Q. B. D. 289, 47 L. J. M. C. 51, 37 L. T. 753, 26 W. R. 314), Tickets & F., 143, 145.
Bentinck *v.* Norfolk Estuary Co. (3 Jur. N. S. 204), Em. Dom., 1138.
Bentley *v.* Atlanta (46 Am. & Eng. Corp. Cas. 211, 92 Ga. 623), Derailm., 9.
Bentley *v.* Bustard (16 B. Mon. (Ky.) 643), Car. of M., 29; Witn., 14.
Bentley *v.* Crammer (137 Pa. St. 244, 20 Atl. Rep. 709), App., 101.
Bentley *v.* Georgia Pac. R. Co. (86 Ala. 484, 6 So. Rep. 37), Tresp., Inj. to, 44, 101.
Bentley *v.* Manchester, S. & L. R. Co. ([1891] 3 Ch. 222), Em. Dom., 1190.
Bentley *v.* Wabash, St. L. & P. R. Co. (20 Am. & Eng. R. Cas. 365, 61 Iowa 229, 16 N. W. Rep. 104), Em. Dom., 859.
Benton *v.* Central R. Co. (42 Iowa 192), Contrib. Neg., 104; Cross., Inj. at, 254.
Benton *v.* Chicago, R. I. & P. R. Co. (55 Iowa 496, 8 N. W. Rep. 330), Children, Inj. to, 112; Death, etc., 160, 171, 401; Trial, 116.
Benton *v.* St. Louis & S. F. R. Co. (25 Mo. App. 155), Animals, 575; Trial, 202.
Benton County *v.* Rollens (26 Law. Ed. (U. S.) 213), Mun. Aid, 219.
Bentonville R. Co. *v.* Baker (45 Ark. 252), Em. Dom., 192, 254, 432, 685.
Bentonville R. Co. *v.* Stroud (45 Ark. 278), Em. Dom., 350, 369.
Benzon *v.* Burlington & M. R. R. Co. (18 Neb. 659), App., 127.
Bequette *v.* People's Transp. Co. (2 Oreg. 200), Comp. Neg., 23.
Berg *v.* Atchinson, T. & S. F. R. Co. (16 Am. & Eng. R. Cas. 229, 30 Kan. 561, 2 Pac. Rep. 639), Car. of M., 675.

Berg *v.* Chicago, M. & St. P. R. Co. (2 Am. & Eng R. Cas. 70, 50 Wis. 419, 7 N. W. Rep. 347). Employés, Inj. to, 166, 774; Evid., 291; Trial, 63, 204.
Bergeman *v.* Indianapolis & St. L. R. Co. (104 Mo. 77, 15 S. W. Rep. 992), Car. of M., 503.
Berger *v.* St. Paul, M. & M. R. Co. (39 Minn. 78, 38 N. W. Rep. 814), Employés, Inj. to, 30.
Bergert *v.* Davenport City R. Co. (34 Iowa 571), Animals, 286.
Berggren *v.* Fremont, E. & M. V. R. Co. (23 Neb. 620, 37 N. W. Rep. 470), Em. Dom., 763, 948.
Bergheim *v.* Great Eastern R. Co. (L. R. 3 C. P. D. 221, 47 L. J. C. P. D. 318, 38 L. T. N. S. 160, 26 W. R. 301, 3 Ry. & C. T. Cas. xx), Bagg., 79.
Bergman *v.* Manhattan R. Co. (39 N. Y. S. R. 150, 27 J. & S. 566, mem., 14 N. Y. Supp. 384; affirmed in 129 N. Y. 637, mem., 41 N. Y. S. R. 947, mem., 29 N. E. Rep. 1031, mem.), Trial, 3.
Bergman *v.* St. Louis, I. M. & S. R. Co. (28 Am. & Eng. R. Cas. 588, 88 Mo. 678), Cross., Inj. at, 283; Evid., 54; Sts. & H., 323; Witn., 177.
Bergman *v.* St. Paul, S. & T. F. R. Co. (21 Minn. 533, 18 Am. Ry. Rep. 434), Em. Dom., 978.
Bergner *v.* Chicago & A. R. Co. (13 Mo. App. 499), Car. of M. 222, 709.
Berje *v.* Texas & P. R. Co. (37 La. Ann. 468), Bills of L., 91; Car. of M., 125, 289.
Berke *v.* Twenty-third St. R. Co. (22 N. Y. S. R. 492, 52 Hun 611, mem., 4 N. Y. Supp. 905), St. Rys., 485.
Berkshire *v.* Missouri Pac. R. Co. (28 Mo. App. 225), Animals, 27.
Berlinquet *v.* Queen (13 Can. Sup. Ct. 26; affirming 1 Can. Exch. 346), Constr. Rys., 30.
Bermuda, The (27 Fed. Rep. 476, 23 Blatchf. (U. S.) 554), Bagg., 95.
Bernard *v.* Richmond, F. & P. R. Co. (85 Va. 792, 8 S. E. Rep. 785), Fires, 23; Negl., 32.
Bernards Tp. *v.* Stebbins (15 Am. & Eng. R. Cas. 634, 109 U. S. 341, 3 Sup. Ct. Rep. 252), Fed. Cts., 3; Mun. Aid, 307.
Berney *v.* Dinsmore (141 Mass. 42, 5 N. E. Rep. 273), Witn., 118.
Bernhard *v.* Rensselaer & S. R. Co. (1 Abb. App. Dec. (N. Y.) 131, 23 How. Pr. 166; affirming 32 Barb. 165, 19 How. Pr. 199), Contrib. Neg., 83; Trial, 184.
Bernhard *v.* Rochester R. Co. (68 Hun 360, 51 N. Y. S. R. 880, 22 N. Y. Supp. 821), Elec. Rys., 38; St. Rys., 234, 236.
Bernheimer *v.* Manhattan R. Co. (26 Abb. N. Cas. (N. Y.) 88, 13 N. Y. Supp. 913), Elev. Rys., 64, 72, 144.
Bernstein *v.* Dry Dock, E. B. & B. R. Co. (25 N. Y. Supp. 669, 72 Hun 46, 55 N. Y. S. R. 341), St. Rys., 405.
Bernstein *v.* Union Exp. Co. (40 Ohio St. 451), Exp. Cos., 81.
Beronio *v.* Southern Pac. R. Co. (46 Am. & Eng. R. Cas. 66, 86 Cal. 415, 24 Pac. Rep. 1093), Dam., 101; Judgm., 16.
Berrigan *v.* New York, L. E. & W. R. Co. (131 N. Y. 582, 30 N. E. Rep. 57, 42 N. Y. S. R. 858, 4 Silv. App. 35; reversing 59 Hun 627, 37 N. Y. S. R. 414, 14 N. Y. Supp. 26), Employés, Inj. to, 19.
Berringer *v.* Great Eastern R. Co. (L. R. 4 C. P. D. 163, 48 L. J. C. P. D. 400, 27 W. R. 681, 3 Ry. & C. T. Cas. xiii), Actions, 3; Car. of P., 528.
Berry *v.* Baltimore & D. P. R. Co. (41 Md. 446, 7 Am. Ry. Rep. 399), Stat., 2, 3.
Berry *v.* Central R. Co. (40 Iowa 564), Employés, Inj. to, 314.
Berry *v.* London, C. & D. R. Co. (4 Ry. & C. T. Cas. 310), Charges, 108, 113, 116; Ry. Com'rs, 29.
Berry *v.* Louisville, E. & St. L. R. Co. (128 Ind. 484, 28 N. E. Rep. 182), Death, etc., 88.
Berry *v.* Northeastern R. Co. (28 Am. & Eng. R. Cas. 575, 72 Ga. 137), Cross., Inj. at, 26; Death, etc., 48, 174, 208.
Berry *v.* Pennsylvania R. Co. (26 Am. & Eng. R. Cas. 396, 48 N. J. L. 141, 4 Atl. Rep. 303), Cross., Inj. at, 269, 279.
Berry *v.* Pusey (80 Ky. 166), Med. Serv., 16.
Berry *v.* St. Louis, S. & I. R. R. Co. (65 Mo. 172), Animals, 139; Fences, 69.
Berry *v.* San Francisco & N. P. R. Co. (50 Cal. 435), Tresp., 17.
Berryman *v.* Cincinnati Southern R. Co. (14 Bush (Ky.) 755), Subscr., 220, 226.
Bertelson *v.* Chicago, M. & St. P. R. Co. (5 Dak. 313, 40 N. W. Rep. 531), Death, etc., 332; Stat. & D., 112.
Bertrand *v.* Queen (2 Can. Exch. 285), Em. Dom., 1275.
Bery *v.* Marietta, P. & C. R. Co. (26 Ohio St. 673, 11 Am. Ry. Rep. 259), Subscr., 160.
Besel *v.* New York C. & H. R. R. Co. (70 N. Y. 171; reversing 9 Hun 457), Fel. Serv., 25, 37, 374.
Beseman *v.* Pennsylvania R. Co. (33 Am. & Eng. R. Cas. 107, 50 N. J. L. 235, 13 Atl. Rep. 164; affirmed in 52 N. J. L. 221), Em. Dom., 668.
Bess *v.* Chesapeake & O. R. Co. (53 Am. & Eng. R. Cas. 64, 35 W. Va. 492, 14 S. E. Rep. 234), Agency, 102.
Bessant *v.* Great Western R. Co. (8 C. B. N. S. 368), Animals, 90.
Bessex *v.* Chicago & N. W. R. Co. (45 Wis. 477, 18 Am. Ry. Rep. 58), Agency, 84; Employés, Inj. to, 83; Negl., 61.
Best *v.* Hamand (L. R. 12 Ch. D. 1, 48 L. J. Ch. 503, 27 W. R. 742), Em. Dom., 1121.
Bestor *v.* Wathen (60 Ill. 138), Contr., 56; Right of W., 8.
Bethea *v.* Northeastern R. Co. (26 So. Car. 91, 1 S. E. Rep. 372), Tickets & F., 16, 37, 72, 79, 80, 84.
Bethea *v.* Raleigh & A. R. Co. (106 N. Car. 279, 10 S. E. Rep. 1045), Animals, 253, 490.
Bethje *v.* Houston & C. T. R. Co. (26 Tex. 604), Animals, 495.
Bethlehem Iron Co. *v.* Philadelphia & S. S. R. Co. (49 N. J. Eq. 356, 23 Atl. Rep. 1077), Judicial S., 3, 4, 5.



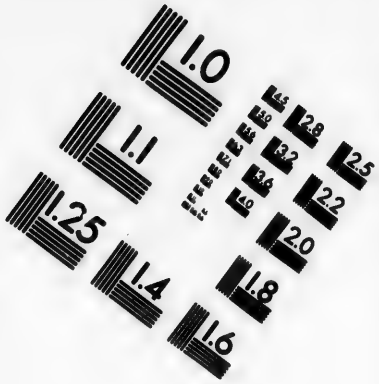
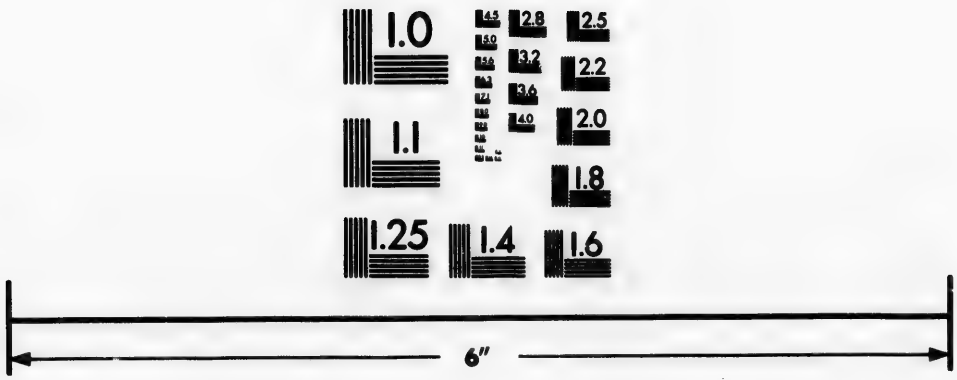
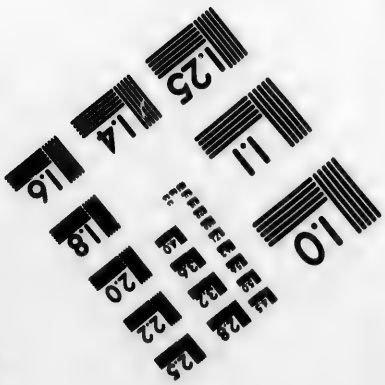


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Bethlehem's Petition (20 N. H. 210), Sts. & H., 31.
Bethmann *v.* Old Colony R. Co. (155 Mass. 352, 29 N. E. Rep. 587), Car. of P., 279, 455.
Betjeman *v.* New York El. R. Co. (20 N. Y. Supp. 628, 48 N. Y. S. R. 721, 1 Misc. 138), Elev. Rys., 113, 175, 181.
Bettridge *v.* Great Western R. Co. (3 Up. Can. E. & A. 58), Spec. Perf., 3.
Betts *v.* Farmers' L. & T. Co. (21 Wis. 80), Car. of L. S., 46, 70; Evid., 193.
Betts *v.* Great Eastern R. Co. (L. R. 8 Ex. 294, 43 L. J. Ex. 4), Em. Dom., 1110.
Betts *v.* Great Eastern R. Co. (49 L. J. Ex. 197, 42 L. T. 1, 28 W. R. 50; affirming L. R. 3 Ex. D. 182, 47 L. J. Ex. 4[illegible]; which affirmed L. R. 8 Ex. 294, 43 L. [illegible]. 4), Em. Dom., 1110.
Bettys *v.* Chicago, M. & St. P. [illegible] Co. (43 Iowa 602, 14 Am. Ry. Rep. 43[illegible], Judgm., 14, 16.
Bettys *v.* Milwaukee & St. P. R. Co. (37 Wis. 323), Animals, 292.
Beuhring *v.* Chesapeake & O. R. Co. (37 W. Va. 502, 16 S. E. Rep. 435), Fel. Serv., 1.
Beuttel *v.* Chicago, M. & St. P. R. Co. (26 Fed. Rep. 50), Rem. of C., 39.
Beveridge *v.* New York El. R. Co. (39 Am. & Eng. R. Cas. 199, 112 N. Y. 1, 19 N. E. Rep. 489, 20 N. Y. S. R. 962; affirming 42 Hun 656, 5 N. Y. S. R. 59), Divid., 11; Judgm., 17; Leases, 21, 24.
Bevier *v.* Delaware & H. Canal Co. (13 Hun (N. Y.) 254), Fires, 38, 105, 122, 247, 255, 293, 343.
Bevis *v.* Baltimore & O. R. Co. (26 Mo. App. 19), Evid., 204, 206; Sleep. Car Cos., 33, 34.
Beyel *v.* Newport News & M. V. R. Co. (34 W. Va. 538, 12 S. E. Rep. 532), Cross., Inj. at, 8, 130, 196, 198, 254, 287.
Beyman *v.* Black (47 Tex. 558), Words & Ph., 78.
Bez *v.* Chicago, R. I. & P. R. Co. (23 Ill. App. 137), Sts. & H., 225.
Bibb *v.* Norfolk & W. R. Co. (47 Am. & Eng. R. Cas. 651, 87 Va. 711, 14 S. E. Rep. 163), Indep. Contr., 1, 8, 9, 27.
Bibb County *v.* Central R. & B. Co. (40 Ga. 646), Tax., 175.
Bickford *v.* Canada Southern R. Co (14 Can. Sup. Ct. 743), Contr., 106.
Bickford *v.* Chatham (14 Ont. App. 32; affirming 10 Ont. 257; appeal dismissed in 16 Can. Sup. Ct. Rep. 235), Mun. Aid, 256.
Bickford *v.* Chatham (16 Can. Sup. Ct. 235; dismissing appeal from 14 Ont. App. 32, which affirms 10 Ont. 257), Mun. Aid, 237, 257.
Bickford *v.* Grand Junction R. Co. (1 Can. Sup. Ct. 696), Mort., 7, 30, 74.
Bickford *v.* Great Western R. Co. (28 U. C. C. P. 516), Contr., 8.
Bickford *v.* Welland R. Co. (17 Grant's Ch. (U. C.) 484), Injunc., 55.
Bidder *v.* North Staffordshire R. Co. (L. R. 4 Q. B. D. 412, 48 L. J. Q. B. D. 248, 40 L. T. 801, 27 W. R. 540), Deeds, 48; Em. Dom., 1201; Mines, etc., 10.
Biddle *v.* Hestonville, M. & F. Pass. R. Co. (26 Am. & Eng. R. Cas. 208, 112 Pa. St. 551, 4 Atl. Rep. 485), Children, Inj. to, 52.
Bidwell *v.* Pittsburgh, O. & E. L. Pass. R. Co. (114 Pa. St. 535, 6 Atl. Rep. 729), Stockh., 91.
Bielenberg *v.* Montana Union R. Co. (38 Am. & Eng. R. Cas. 275, 8 Mont. 271, 2 L. R. A. 813, 20 Pac. Rep. 314), Animals, 6; Stat., 27.
Bielman *v.* Chicago, St. P. & K. C. R. Co. (50 Mo. App. 151), Nuis., 7.
Bier *v.* Jeffersonville, M. & I. R. Co. (132 Ind. 78, 31 N. E. Rep. 471), Contrib. Neg. 53; Fel. Serv., 205.
Bierbauer *v.* New York C. & H. R. R. Co. (15 Hun (N. Y.) 559; affirmed in 77 N. Y. 588, mem.), Death, etc., 429.
Biering *v.* Gulf, C. & S. F. R. Co. (79 Tex. 584, 15 S. W. Rep. 576), Fires, 224, 248, 287, 291, 301.
Bigaouette *v.* North Shore R. Co. (17 Can. Sup. Ct. 363), Em. Dom., 1266; Rip. Rts., 10.
Bigelow *v.* Dawson (6 Cush. (Mass.) 97), Evid., 254.
Bigelow *v.* Heaton (4 Den. (N. Y.) 496, 6 Hill 43), Car. of M., 389, 393.
Bigelow *v.* Metropolitan St. R. Co. (48 Mo. App. 367), Dam., 44, 91, 92, 102; Trial, 162.
Bigelow *v.* Mississippi C. & T. R. Co. (2 Head (Tenn.) 624), Em. Dom., 275.
Bigelow *v.* North Mo. R. Co. (48 Mo. 510), Animals, 359.
Bigelow *v.* Union Freight R. Co. (20 Am. & Eng. R. Cas. 425, 137 Mass. 478), Receiv., 20.
Bigelow *v.* West Wis. R. Co. (27 Wis. 478, 2 Am. Ry. Rep. 20), Em. Dom., 372, 453, 819.
Bigelow *v.* York & C. R. Co. (37 Me. 320), Attach., 58.
Biggart *v.* Manhattan R. Co. (16 Daly 508, 12 N. Y. Supp. 549, 35 N. Y. S. R. 381), Elev. Rys., 188.
Biggerstaff *v.* St. Louis, K. C. & N. R. Co. (60 Mo. 567), Fences, 107.
Big Grove *v.* Wells (65 Ill. 263), Mun. Aid., 222.
Biggs *v.* Great Eastern R. Co. (16 W. R. 908, 18 L. T. 482), Libel & S., 8.
Biggs *v.* Lexington & B. S. R. Co. (79 Ky. 470), Lim. of Ac., 71.
Bigham *v.* Chicago, M. & St. P. R. Co. (79 Iowa 534, 44 N. W. Rep. 805), Med. Serv., 12.
Bilbee *v.* London, B. & S. C. R. Co. (18 C. B. N. S. 584, 11 Jur. N. S. 745, 34 L. J. C. P. 182, 13 W. R. 779, 13 L. T. 146), Cross., Inj. at, 85.
Biles *v.* Holmes (11 Ired. (N. Car.) 16), Negl., 53.
Biles *v.* Tacoma, O. & G. H. R. Co. (5 Wash. 509, 32 Pac. Rep. 211), Branch & L. Roads, 3; Deeds, 40.
Bill *v.* Darenth Valley R. Co. (1 H. & N. 305, 2 Jur. N. S. 595, 26 L. J. Ex. 81), Officers, 14.
Bill *v.* New Albany, etc., R. Co. (2 Biss. (U. S.) 390), Fed. Cts., 1; Jurisd., 9; Receiv., 19.

Billings, In re (10 U. C. Q. B. 273), Mun. Aid., 173.
Billings *v.* Fitchburg R. Co. (34 N. Y. S. R. 382, 58 Hun 605, mem., 11 N. Y. Supp. 837; affirmed (?) 128 N. Y. 644, mem., 40 N. Y. S. R. 978), Fires, 249, 309.
Billings *v.* Sanderson (8 Mont. 201, 19 Pac. Rep. 307), Contr., 10.
Billman *v.* Indianapolis, C. & L. R. Co. (6 Am. & Eng. R. Cas. 41, 76 Ind. 166, 40 Am. Rep. 230), Dam., 8; Fright. Teams, 1, 2; Words & Ph., 42.
Bills *v.* New York C. R. Co. (3 Am. & Eng. R. Cas. 318, 84 N. Y. 5), Car. of L. S., 32, 36, 151, 154.
Bindbeutal *v.* Street R. Co. (43 Mo. App. 463), Cable R'ys, 15; Negl., 1; St. Rys., 495.
Bingham *v.* Lamping (26 Pa. St. 340), Attach., 25; Car of M., 651.
Bingham *v.* Rogers (6 Watts & S. (Pa.) 495), Bagg., 114; Car. of M., 430.
Binghamton *v.* Binghamton & P. D. R. Co. (41 N. Y. S. R. 83, 61 Hun 479, 16 N. Y. Supp. 225), St. Rys., 139.
Binicker *v.* Hannibal & St. J. R. Co. (83 Mo. 660), Animals, 178, 303, 334.
Binks *v.* South Yorkshire R. Co. (3 B. & S. 244, 32 L. J. Q. B. 26, 11 W. R. 66, 7 L. T. 350), Excava., 2.
Binns *v.* Richmond & D. R. Co. (88 Va. 891, 14 S. E. Rep. 701), Employés, Inj. to, 14.
Birch *v.* Metropolitan El. R. Co. (15 Daly 453, 8 N. Y. Supp. 325, 29 N. Y. S. R. 318), Elev. Rys., 79.
Birchgrove Steel Co. *v.* Midland R. Co. (5 Ry. & C. T. Cas. 229), Charges, 110.
Bird *v.* Eggleton (22 Am. & Eng. R. Cas. 174, L. R. 29 Ch. D. 1012), Em. Dom., 1120, 1207.
Bird *v.* Flint & P. M. R. Co. (86 Mich. 79, 48 N. W. Rep. 691), Cross., Inj. at, 308.
Bird *v.* Georgia R. Co. (27 Am. & Eng. R. Cas. 39, 72 Ga. 655), Car. of M., 306, 390, 555, 560.
Bird *v.* Great Eastern R. Co. (11 Jur. N. S. 782, 34 L. J. C. P. 366, 19 C. B. N. S. 268), Em. Dom., 1163.
Bird *v.* Hannibal & St. J. R. Co. (30 Mo. App. 365), Flood. Lds., 53, 87; Lim. of Ac., 30.
Bird *v.* Wilmington & M. R. Co. (8 Rich. Eq. (So. Car.) 46), Charters, 188; Em. Dom., 1032.
Birdsall *v.* Twenty-third St. R. Co. (8 Daly (N. Y.) 419), Conduct., 6.
Birge *v.* Chicago, M. & St. P. R. Co. (14 Am. & Eng. R. Cas. 414, 20 Am. & Eng. R. Cas. 291, 65 Iowa 440, 21 N. W. Rep. 767), Em. Dom., 283, 298, 984, 1056.
Birkenhead *v.* London & N. W. R. Co. (L. R. 15 Q. B. D. 572, 55 L. J. Q. B. D. 48; affirming 49 J. P. 135), Embankm., 3.
Birkenhead, L. & C. J. R. Co. *v.* Brownrigg (4 Ex. 426, 19 L. J. Ex. 27, 13 Jur. 943), Subscr., 96.
Birkenhead, L. & C. J. R. Co. *v.* Pilcher (6 Railw. Cas. 564, 5 Ex. 121, 14 Jur. 297, 19 L. J. Ex. 207), Subscr., 161.
Birkett *v.* Knickerbocker Ice Co. (110 N. Y. 504, 18 N. E. Rep. 108, 18 N. Y. S. R. 130; affirming 41 Hun 404, 10 Civ. Pro. 52, 3 N. Y. S. R. 133), Children, Inj. to, 143; Death, etc., 403, 406.
Birkett *v.* Whitehaven Junction R. Co. (4 H. & N. 730, 28 L. J. Ex. 348), Death, etc., 292.
Birmingham *v.* Rochester City & B. R. Co. 37 N. Y. S. R. 317, 59 Hun 583, 14 N. Y. Supp. 13), Car. of P., 171, 196.
Birmingham *v.* Rochester City & B. R. Co. (137 N. Y. 13, 32 N. E. Rep. 995, 49 N. Y. S. R. 888; reversing 63 Hun 635, 45 N. Y. S. R. 724, 18 N. Y. Supp. 649), Bridges, 51; Car. of P., 171; St. Rys., 320.
Birmingham & D. Land Co. *v.* London & N. W. R. Co. (L. R. 22 Q. B. D. 435), Em. Dom, 1188
Birmingham & D. Land Co. *v.* London & N. W. R. Co. (L. R. 36 Ch. D. 650), Em. Dom., 1155.
Birmingham & D. Land Co. *v.* London & N. W. R. Co. (38 Am. & Eng. R. Cas. 635, L. R. 40 Ch. D. 268), Em. Dom., 1207.
Birmingham & L. J. R. Co., In re (3 Am. & Eng. R. Cas. 616, L. R. 18 Ch. D. 155, 50 L. J. Ch. D. 594, 45 L. T. 164, 29 W. R. 908), Receiv., 7.
Birmingham & L. J. R. Co., In re (L. R. 28 Ch. D. 652, 54 L. J. Ch. D. 580, 52 L. T. 729, 33 W. R. 517), Dissol., 31.
Birmingham & P. M. St. R. Co. *v.* Birmingham St. R. Co. (79 Ala. 465), Franch., 3; Sts. & H., 98.
Birmingham, B. & T. J. R. Co. *v.* Locke (1 Q. B. 256, 2 Railw. Cas. 867), Subscr., 173, 175.
Birmingham, B. & T. J. R. Co. *v.* White (4 P. & D. 649, 1 Q. B. 282, 2 Railw. Cas. 863, 5 Jur. 800), Discov., 5.
Birmingham Mineral R. Co. *v.* Bessemer (98 Ala. 274, 13 So. Rep. 487), Sts. & H., 10.
Birmingham Mineral R. Co. *v.* Harris (98 Ala. 326, 13 So. Rep. 377), Animals, 47, 243, 513, 516, 576; Trial, 89; Witn., 31, 44, 50, 57, 182.
Birmingham Mineral R. Co. *v.* Jacobs (49 Am. & Eng. R. Cas. 263, 92 Ala. 187, 9 So. Rep. 320), Cross. Rys., 82; Death, etc., 148.
Birmingham Mineral R. Co. *v.* Jacobs (55 Am. & Eng. R Cas. 299, 101 Ala. 140, 13 So. Rep. 408), Collis., 18, 35; Comp. Neg., 25.
Birmingham Mineral R. Co. *v.* Parsons (56 Am. & Eng. R. Cas. 223, 100 Ala. 662, 13 So. Rep. 602), Cat.-Gds., 1, 24.
Birmingham Mineral R. Co. *v.* Smith (44 Am. & Eng. R. Cas. 148, 89 Ala. 305, 7 So. Rep. 634), Em. Dom., 632.
Birmingham Mineral R. Co. *v.* Wilmer (97 Ala. 165, 11 So. Rep. 886), Contrib. Neg., 121; Evid., 65, 141, 247; Witn., 94.
Birmingham Union R. Co. *v.* Alexander (93 Ala. 133, 9 So. Rep. 525), Evid., 67, 91, 234.
Birmingham Union R. Co. *v.* Hale (90 Ala. 8, 8 So. Rep. 142), St. Rys., 441; Witn., 173.

Birmingham Union R. Co. *v.* Smith (90 Ala. 60, 8 So. Rep. 86), St. Rys., 367.
Birmingham Waterworks Co. *v.* London & N. W. R. Co. (4 L. T. 398), Constr. Rys., 9.
Birney *v.* Wabash, St. L. & P. R. Co. (20 Mo. App. 470), Car. of L. S., 146, 156
Bisaillon *v.* Blood (64 N. H. 565, 6 N. Eng. Rep. 908, 15 Atl. Rep. 147), Children, Inj. to, 127, 128.
Bischoff *v.* New York El. R. Co. (29 J. & S. (N. Y.) 211), Elev. Rys., 151, 167.
Bischoff *v.* New York El. R. Co. (138 N. Y. 257, 52 N. Y. S. R. 374, 33 N. E. Rep. 1073; affirming 46 N. Y. S. R. 863, 18 N. Y. Supp. 865), Elev. Rys., 85, 130, 131, 151, 166, 167.
Biscoe *v.* Great Eastern R. Co. (L. R. 16 Eq. 636, 21 W. R. 902), Em. Dom., 1086, 1207.
Bish *v.* Bradford (17 Ind. 490), Subscr., 14, 115, 145.
Bish *v.* Johnson (21 Ind. 299), Subscr., 128.
Bish *v.* Stout (77 Ind. 255), Mun. Aid, 167, 411.
Bishop *v.* Brainerd (28 Conn. 289), Consol., 6, 8.
Bishop *v.* Chicago & N. W. R. Co. (67 Wis. 610, 31 N. W. Rep. 219), Pl., 15.
Bishop *v.* Clay F. & M. Ins. Co. (45 Conn. 430), Fire Ins., 3.
Bishop *v.* Clay F. & M. Ins. Co. (49 Conn. 167), Fire Ins., 10.
Bishop *v.* Empire Transp. Co. (1 J. & S. (N. Y.) 99), Bills of L., 94.
Bishop *v.* Empire Transp. Co. (48 How. Pr. (N. Y.) 119), Bills of L., 24, 26, 125.
Bishop *v.* St. Paul City R. Co. (48 Minn. 26, 50 N. W. Rep. 927), Cable R'ys, 10; Dam., 9, 76; Evid., 289.
Bishop *v.* Union R. Co. (14 R. I. 314, 51 Am. Rep. 386), Children, Inj. to, 51.
Bissel *v.* Price (16 Ill. 408), Bills of L., 12, 17, 20, 23; Charges, 79.
Bissell *v.* Canada & St. L. R. Co. (39 Fed. Rep. 225), Rem. of C., 40.
Bissell *v.* Jeffersonville (24 How. (U. S.) 287), Mun. Aid, 22.
Bissell *v.* Michigan S. & N. I. R. Co. (22 N. Y. 258), Car. of P., 510, 532; Words & Ph., 239.
Bissell *v.* New York C. & H. R. R. Co. (67 Barb. (N. Y.) 385; affirmed in 67 Barb. 393, n.), Tickets & F., 131.
Bissell *v.* New York C. R. Co. (23 N. Y. 61), Sts. & H., 142
Bissell *v.* New York C. R. Co. (25 N. Y. 442; reversing 29 Barb. 602), Car of L. S., 127; Car. of P., 332, 336.
Bissell *v.* Saxton (66 N. Y. 55), Ry Com'rs, 25.
Bissell *v.* Spring Valley Tp. (15 Am. & Eng R. Cas. 585, 110 U. S. 162, 3 Sup. Ct. Rep. 555), Mun. Aid, 308, 335.
Bissell *v.* Spring Valley Tp. (124 U. S. 225, 8 Sup. Ct. Rep. 495), Judgm., 31.
Bitner *v.* Utah C. R. Co. (4 Utah 502, 11 Pac. Rep. 620), Cross., Inj. at, 131, 365.
Bittenbender *v.* Sunbury & E. R. Co. (40 Pa. St. 269), Assign. for Cred., 2.
Bittinger *v.* Bell (65 Ind. 445), Mun. Aid, 93, 411.
Bivins *v.* Georgia Pac. R. Co. (96 Ala. 325, 11 So. Rep. 68), Employés, Inj. to, 72.
Bixby *v.* Montpelier & St. J. R. Co. (49 Vt. 123, 17 Am. Ry. Rep. 140), Car. of P., 577.
Black *v.* Ashley (42 Am. & Eng. R. Cas. 428, 80 Mich. 90, 44 N. W. Rep. 1120), Car. of M., 255, 345, 674.
Black *v.* Brooklyn City R. Co. (34 Am. & Eng. R. Cas. 526, 108 N. Y. 640, 1 Silv. App. 580, 15 N. E. Rep. 389, 13 N. Y. S. R. 645), App., 44; St. Rys., 366, 384.
Black *v.* Burlington, C. R. & M. R. Co. (38 Iowa 515), Cross., Inj. at, 10, 183.
Black *v.* Camden & A. R. & T. Co. (45 Barb. (N. Y.) 40), Car. of L. S., 144, 156; Dam., 109.
Black *v.* Carrollton R. Co. (10 La. Ann. 33), Car. of P., 198; Children, Inj. to, 181, 183, 184, 191.
Black *v.* Chicago & N. W. R. Co. (18 Wis. 208), App., 131.
Black *v.* Chicago, B. & Q. R. Co. (30 Neb. 197, 46 N. W. Rep. 428), Car. of L. S., 13, 21, 22; Words & Ph., 7.
Black *v.* Cohen (52 Ga. 621), Mun. Aid, 28, 126, 340, 405.
Black *v.* Delaware & R. Canal Co. (22 N. J. Eq. 130; reversed in 24 N. J. Eq. 455), Connect. L., 1; Franch., 4.
Black *v.* Delaware & R. Canal Co. (24 N. J. Eq. 455), Charters, 21; Consol., 3, 4; Em. Dom., 101; Leases, 29.
Black *v.* Goodrich Transp. Co. (55 Wis. 319, 42 Am. Rep. 713, 13 N. W. Rep. 244), Car. of M., 173, 461; Lim. of Liab., 29, 43.
Black *v.* Lamb (12 N. J. Eq. 108), Evid., 188, 233.
Black *v.* Philadelphia & R. R. Co. (58 Pa. St. 249), Charters, 67; Nuis., 35.
Black *v.* Shreve (13 N. J. Eq. 455), Bonds, 12; Evid., 233, 188.
Black *v.* Sixth Ave. R. Co. (1 Daly (N. Y.) 536), St. Rys., 257.
Black *v.* Wabash, St. L. & P. R. Co. (25 Am. & Eng. R. Cas. 388, 111 Ill. 351), Car. of L. S., 84; Contr., 95, 109; Evid., 173, 189; Trial, 41; Witn., 67, 72.
Blackburn *v.* Selma, M. & M. R. Co. (2 Flipp. (U. S.) 525), Charters, 15; Fed. Cts., 10; Mort., 35, 171; Pl., 87.
Blackford *v.* Lehigh Valley R Co. (53 N. J. L. 56, 20 Atl. Rep. 735), Trial, 8.
Blackiston's Appeal (81 Pa. St. 339), Partn., 8.
Blackman *v.* Central R. & B. Co. (58 Ga. 189), Stockh., 81.
Blackman *v.* Lehman (63 Ala. 547, 35 Am. Rep. 57), Mun. Aid, 348.
Blackman *v.* London, B. & S. C. R. Co. (17 W. R. 769), Stat. & D., 87.
Blackmore *v.* Toronto St. R. Co. (38 U. C. Q. B. 172), Children, Inj. to, 54.
Blackmore *v.* Yates (L. R. 2 Ex. 225, 36 L. J. Ex. 121, 15 W. R. 750), Mort., 123.
Black River & M. R. Co. *v.* Barnard (9 Hun (N. Y.) 104), Em. Dom., 645, 657.
Black River & U. R. Co. *v.* Clarke (25 N. Y. 208; affirming 31 Barb. 258), Subscr., 102, 133.

Blackshire *v.* Atchison, T. & S. F. R. Co. (13 Kan. 514), Em. Dom., 395.
Blackstock *v.* New York & E. R. Co. (20 N. Y. 48; affirming 1 Bosw. 77), Agency, 71; Strikes, 2.
Blackwell *v.* Lynchburg & D. R. Co. (111 N. Car. 151, 16 S. E. Rep. 12), Blasting, 1, 3; Cross., Inj. at, 117.
Blackwell *v.* Old Colony R. Co. (122 Mass. 1), Bridges, 86; Crim. L., 33.
Blade *v.* Chicago, St. P. & F. du L. R. Co. (10 Wis. 4), Bills of L., 21.
Blaechinska *v.* Howard Mission, etc. (130 N. Y. 497, 29 N. E. Rep. 755, 42 N. Y. S. R. 387), Husb. & W., 30.
Blagen *v.* Thompson (56 Am. & Eng. R. Cas. 530, 23 Oreg. 239, 31 Pac. Rep. 647, 18 L. R. A. 315), Dam., 49; Sales of Rds., 7; Witn., 109.
Blain *v.* Pacific Exp. Co. (69 Tex. 74, 6 S. W. Rep. 679), Crim. L., 2.
Blaine *v.* Chesapeake & O. R. Co. (9 W. Va. 252), Animals, 34, 46, 436; Negl., 5.
Blair *v.* Chicago & A. R. Co. (89 Mo. 334, 1 S. W. Rep. 367), Husb. & W., 16, 17; Witn., 93.
Blair *v.* Chicago & A. R. Co. (89 Mo. 383, 1 S. W. Rep. 350), App., 29; Dam., 67, 70; Pl., 33; Release, 7; Witn., 93.
Blair *v.* Chicago & P. R. Co (11 Biss. (U. S.) 320, 12 Fed. Rep. 750), Mort., 317.
Blair *v.* Corby (29 Mo. 480), Constr. Rys., 82.
Blair *v.* Erie R. Co. (66 N. Y. 313), Car. of P., 53; Exp. Cos., 13; Lim. of Liab., 43.
Blair *v.* Grand Rapids & I. R. Co. (24 Am. & Eng. R. Cas. 430, 60 Mich. 124, 26 N. W. Rep. 855), Contrib. Neg., 28; Employés, Inj. to, 163, 203.
Blair *v.* Milwaukee & P. du C. R. Co. (20 Wis. 254), Car. of P., 179; Fences, 3, 102; Stat. & D., 8.
Blair *v.* Milwaukee & P. du C. R. Co. (20 Wis. 262), Witn., 121.
Blair *v.* Mound City R. Co. (31 Mo. App. 224), St. Rys., 439.
Blair *v.* Rutherford (31 Tex. 465), Subscr., 16, 134.
Blair *v.* St. Louis, H. & K. R. Co. (17 Am. & Eng. R. Cas. 337, 19 Fed. Rep. 861), Receiv., 88.
Blair *v.* St. Louis, H. & K. R. Co. (20 Fed. Rep. 348), Att'ys, 2.
Blair *v.* St. Louis, H. & K. R. Co. (22 Fed. Rep. 36), Consol., 42.
Blair *v.* St. Louis, H. & K. R. Co. (22 Fed. Rep. 471), Mort., 91, 226.
Blair *v.* St. Louis, H. & K. R. Co. (22 Fed. Rep. 769), Mort., 91.
Blair *v.* St. Louis, H. & K. R. Co. (23 Fed. Rep. 521), Mort., 110.
Blair *v.* St. Louis, H. & K. R. Co. (23 Fed. Rep. 523), Mort., 124.
Blair *v.* St. Louis, H. & K. R. Co. (23 Fed. Rep. 524), Mort., 101.
Blair *v.* St. Louis, H. & K. R. Co. (23 Fed. Rep. 704), Mort., 91.
Blair *v.* St. Louis, H. & K. R. Co. (24 Fed. Rep. 539), Deeds, 4; Em. Dom., 237.
Blair *v.* St. Louis, H. & K. R. Co. (25 Fed. Rep. 2), Fed. Cts., 13.
Blair *v.* St. Louis, H. & K. R. Co. (25 Fed. Rep., 232), Mort., 87, 209, 268.
Blair *v.* St. Louis, H. & K. R. Co. (25 Fed. Rep. 684), Mort., 103.
Blair *v.* St. Louis, H. & K. R. Co. (27 Fed. Rep. 176), Evid., 130.
Blair *v.* Walker (26 Fed. Rep. 73), Mort., 173.
Blair T. L. & L. Co. *v.* Kitteringham (43 Iowa 462), Land Grants, 100.
Blais *v.* Minneapolis & St. L. R. Co. (22 Am. & Eng. R. Cas. 571, 34 Minn. 57, 57 Am. Rep. 36, 24 N. W. Rep 8), Cat.-Gds., 18.
Blaisdell *v.* Connecticut River L Co. (145 Mass. 132, 13 N. E. Rep. 373), Car. of M., 321.
Blaisdell *v.* Portsmouth, G. F. & C. R. Co. (51 N. H. 483), Adv. Poss., 3; License, 12, 17.
Blaiser *v.* New York, L. E. & W. R. Co. (110 N. Y. 638, mem., 17 N. E. Rep. 692, 17 N. Y. S. R. 145, 13 Cent. Rep. 231), Cross., Inj. at, 329.
Blake *v.* Brown (80 Iowa 277, 45 N. W. Rep. 751), Bills & N., 6.
Blake *v.* Buffalo Creek R. Co. (56 N. Y. 485), Direct., 49.
Blake *v.* Burlington, C. R. & N. R. Co. (39 Am. & Eng. R. Cas. 405, 78 Iowa 57, 42 N. W. Rep. 580), Death, etc., 185.
Blake *v.* Canadian Pac. R. Co. (17 Ont. 177), Cross., Inj. at, 344.
Blake *v.* Holley (14 Ind. 383), Bills & N., 14.
Blake *v.* Maine C. R. Co. (70 Me. 60), Fel. Serv., 1, 102, 113, 142, 454, 490.
Blake *v.* Mayor, etc., of Macon (53 Ga. 172), Mun. Aid., 55, 301; Mun. Corp., 2.
Blake *v.* Michigan S. & N. I. R. Co. (17 How. Pr. (N. Y.) 228), Actions, 14.
Blake *v.* Midland R. Co. (18 Q. B. 93, 16 Jur. 562, 21 L. J. Q. B. 233), Death, etc., 381.
Blake *v.* Portsmouth & C. R. Co. (39 N. H. 435), Charters, 38; Words & Ph., 133.
Blake *v.* Rich (34 N. H. 282), Em. Dom., 128, 130.
Blake *v.* Watson (45 Conn. 323), Bonds, 47.
Blake *v.* Winona & St. P. R. Co. (19 Minn. 418 (Gil. 362), Charges, 8.
Blakeley *v.* Chicago, K. & N. R. Co. (25 Neb. 207, 40 N. W. Rep. 956), Em. Dom., 646; Witn., 123.
Blakely *v.* Chicago, J. K. & N. R. Co. (51 Am. & Eng. R. Cas. 368, 34 Neb. 284, 51 N. W. Rep. 767), Em. Dom., 157.
Blakely *v.* Hannibal & St. J. R. Co. (79 Mo. 388), Animals, 354.
Blakely *v.* Missouri Pac. R. Co. (79 Mo. 342), Just. P., 15.
Blakeman *v.* Benton (9 Mo. App. 107), Stockh., 42, 43.
Blakemore *v.* Lancashire & Y. R. Co. (1 F. & F. 76), Car. of M., 777.
Blaker *v.* New Jersey Midland R. Co. (30 N. J. Eq. 240, 18 Am. Ry. Rep. 81), Cross., Inj. at, 197, 254; Death, etc., 174.
Blamires *v.* Lancashire & Y. R. Co. (42 L. J. Ex. 182, L. R. 8 Ex. 283), Car. of P., 522.

Blanchard *v.* Detroit, L. & L. M. R. Co. (31 Mich. 43), Deeds, 10, 31.
Blanchard *v.* Fitchburg R. Co. (8 Cush. (Mass.) 280), Costs, 9.
Blanchard *v.* Isaacs (3 Barb. (N. Y.) 388), Car. of M., 67.
Blanchard *v.* Lake Shore & M. S. R. Co. (126 Ill. 416, 18 N. E. Rep. 799; affirming 27 Ill. App. 22), Contrib. Neg., 104; Cross., Inj. at, 118, 197; Death, etc., 103, 203, 204, 227, 243; Tresp., Inj. to, 3.
Blanchard *v.* Windsor & A. R. Co. (10 Nov. Sc. 8), Car. of P., 640; Evid., 157.
Bland *v.* Adams Exp. Co. (1 Duv. (Ky.) 233), Car. of M., 17; War, 10.
Bland *v.* Crowley (6 Railw. Cas. 756, 6 Ex. 522), Vend. & P., 3.
Bland *v.* Southern Exp. Co. (1 Hughes (U. S.) 343, 3 Fed. Cas. 667), Exp. Cos., 16.
Bland *v.* Southern Pac. R. Co. (3 Am. & Eng. R. Cas. 285, 55 Cal. 570, 36 Am. Rep. 50), Eject. Pass., 8.
Bland *v.* Southern Pac. R. Co. (65 Cal. 626, 4 Pac. Rep. 672), Eject. Pass., 79; Witn., 100.
Blanding *v.* Davenport, I. & D. R. Co. (57 Am. & Eng. R. Cas. 428, 88 Iowa 225, 55 N. W. Rep. 81), Liens, 18, 21; Officers, 2, 14.
Blanford *v.* Minneapolis & St. L. R. Co. (29 Am. & Eng. R. Cas. 289, 71 Iowa 310, 32 N. W. Rep. 357), Fences, 53.
Blankensee *v.* London & N. W. R. Co. (45 L. T. 761), Car. of M., 444.
Blanton *v.* McDowell County Com'rs (101 N. Car. 532, 8 S. E. Rep. 162), Mun. Aid, 422.
Blanton *v.* Richmond, F. & P. R. Co. (43 Am. & Eng. R. Cas. 617, 86 Va. 618, 10 S. E. Rep. 925), Branch & L. Roads, 5; Charters, 168; Words & Ph., 118.
Blatchford *v.* New York & N. H. R. Co. (5 Abb. Pr. (N. Y.) 276), Injunc., 52.
Blatchford *v.* Ross (5 Abb. Pr. N. S. (N. Y.) 434), Consol., 5; Direct., 30; Injunc., 48.
Biedsoe *v.* International R. Co. (40 Tex. 537), Mand., 6, 25; State Aid, 36.
Bleier *v.* Bushwick R. Co. (9 N. Y. S. R. 706), St. Rys., 423.
Blesch *v.* Chicago & N. W. R. Co. (43 Wis. 183, 17 Am. Ry. Rep. 90), App., 48; Sts. & H., 220, 281.
Blesch *v.* Chicago & N. W. R. Co. (44 Wis. 593), Actions, 14.
Blesch *v.* Chicago & N. W. R. Co. (48 Wis. 168, 2 N. W. Rep. 113), Em. Dom., 673, 1083.
Blessing *v.* St. Louis, K. C. & N. R. Co. (7 Mo. App. 594; affirmed on another point in 77 Mo. 410), Employés, Inj. to, 355.
Blessing *v.* St. Louis, K. C. & N. R. Co. (15 Am. & Eng. R. Cas. 298, 77 Mo. 410; affirming 7 Mo. App. 594), Fel. Serv., 429.
Blewett *v.* Front St. Cable R. Co. (51 Fed. Rep. 625, 7 U. S. App. 285, 2 C. C. A. 415; affirming 49 Fed. Rep. 126), App., 142; Dam., 39; Evid., 186.
Blewett *v.* Wyandotte, K. C. & N. R. Co. (72 Mo. 583), Animals, 124, 405.
Bleyle *v.* New York C. & H. R. R. Co. (11 N. Y. S. R. 585, 46 Hun 675, mem.; affirmed in 113 N. Y. 626, mem., 20 N. E. Rep. 877, 22 N. Y. S. R. 993), Cross., Inj. at, 113, 122, 145, 152, 160.
Blight *v.* Camden & A. R. Co. (143 Pa. St. 10, 21 Atl. Rep. 995), Death, etc., 235.
Blitch *v.* Central R. Co. (76 Ga. 333), Car. of P., 471; Evid., 52.
Blitz *v.* Union Steamboat Co. (51 Mich. 558, 17 N. W. Rep. 55), Car. of M., 46.
Bliven *v.* Hudson River R. Co. (36 N. Y. 403; affirming 35 Barb. 188), Car. of M., 297.
Block *v.* Atchison, T. & S. F. R. Co. (21 Fed. Rep. 529), Proc., 18.
Block *v.* Bourbon County Com'rs (99 U. S. 686), Mun. Aid, 165, 318.
Block *v.* Fitchburg R. Co. (21 Am. & Eng. R. Cas. 1, 139 Mass. 308, 1 N. E. Rep. 348), Bills of L., 66; Car. of M., 545.
Block *v.* Harlem Bridge, M. & F. R. Co. (28 N. Y. S. R. 495, 9 N. Y. Supp. 164, 55 Hun 607, mem.), Children, Inj. to, 66, 105, 109.
Blodgett *v.* Abbot (72 Wis. 516, 7 Am. St. Rep. 873, 40 N. W. Rep. 491), Agency, 14, 52; Car. of M., 564; Evid., 1; Trial, 107.
Blodgett *v.* Bartlett (50 Ga. 353), Car. of P., 233, 599; St. Rys., 402.
Blodgett *v.* Utica & B. R. R. Co. (64 Barb. (N. Y.) 580), Em. Dom., 1057.
Blomberg *v.* Stewart (67 Wis. 455, 30 N. W. Rep. 617), Animals, 351.
Blood *v.* Nashua & L. R. Co. (2 Gray (Mass.) 137), Bridges, 48.
Bloodgood *v.* Mohawk & H. R. R. Co. (18 Wend. (N. Y.) 9; reversing 14 Wend. 51), Em. Dom., 40.
Bloom *v.* Manhattan El. R. Co. (43 N. Y. S. R. 378, 63 Hun 629, 17 N. Y. Supp. 812), Dam., 44; Husb. & W., 29.
Bloomer *v.* State (48 Md. 521), Crim. L., 12.
Bloomfield *v.* Burlington & W. R. Co. (74 Iowa 607, 38 N. W. Rep. 431), Cross., Inj. at, 339.
Bloomfield & R. Nat. Gas-light Co. *v.* Calkins (62 N. Y. 386; affirming 1 T. & C. 549), Em. Dom., 796.
Bloomfield & R. Nat. Gas Light Co. *v.* Richardson (63 Barb. (N. Y.) 437), Em. Dom., 3, 70, 182.
Bloomfield R. Co. *v.* Burress (82 Ind. 83), Proc., 48.
Bloomfield R. Co. *v.* Grace (112 Ind. 128, 11 West. Rep. 368, 13 N. E. Rep. 680), Em. Dom., 81, 1008; Estop., 27; Indep. Contr., 16.
Bloomfield R. Co. *v.* Van Slike (107 Ind. 480, 8 N. E. Rep. 269), Receiv., 185.
Bloomingdale *v.* Du Rell (1 Idaho (N. S.) 33), Evid., 116.
Bloomingdale *v.* Memphis & C. R. Co. (6 Lea (Tenn.) 616), Car. of M., 491, 494, 502, 504, 513.
Bloomington *v.* Chicago & A. R. Co. (134 Ill. 451, 26 N. E. Rep. 366), Mun. Corp., 7; Sts. & H., 311, 343.
Bloomington *v.* Illinois C. R. Co. (49 Ill. App. 129), Cross. St. & H., 15; Sts. & H., 400.
Blossburg & C. R. Co. *v.* Tioga R. Co. (1

Abb. App. Dec. (N. Y.) 149, 1 Keyes 486), Leases, 38.
Blossburg & C. R. Co. *v.* Tioga R. Co. (5 Blatchf. (U. S.) 387), Lim. of Ac., 14.
Blossom *v.* Dodd (43 N. Y. 264), Bagg., 99; Lim. of Liab., 14.
Blossom *v.* Griffin (13 N. Y. 569), Car. of M., 34.
Blossom *v.* Milwaukee & C. R. Co. (1 Wall. (U. S.) 655), Judicial S., 6.
Blossom *v.* Milwaukee & C. R. Co. (3 Wall. (U. S.) 196), Mort., 244.
Bloyd *v.* St. Louis & S. F. R. Co. (58 Ark. 66, 22 S. W. Rep. 1089), Fel. Serv., 330.
Bluedorn *v.* Missouri Pac. R. Co. (108 Mo. 439, 18 S. W. Rep. 1103), Contrib. Neg., 87; Employés, Inj. to, 169; Fel. Serv., 57; Negl., 103; Sts. & H., 318, 322.
Blue Earth County *v.* St. Paul & S. C. R. Co. (10 Am. & Eng. R. Cas. 209, 28 Minn. 503, 11 N. W. Rep. 73), Em. Dom., 461; Evid., 83; Witn., 109.
Blue Ridge R. Co. In re (2 Hughes (U. S.) 224, 3 Fed. Cas. 750), Bank'cy, 2.
Blum *v.* Manhattan R. Co. (1 Misc. 119, 48 N. Y. S. R. 680, 20 N. Y. Supp. 722), Elev. Rys., 104; Trial, 55.
Blum *v.* Southern Pullman Palace Car Co. (1 Flipp. (U. S.) 500), Sleep. Car Cos., 35.
Blumantle *v.* Fitchburg R. Co. (127 Mass. 322), Bagg., 38.
Blumenthal *v.* Brainerd (38 Vt. 402), Agency, 39; Car. of M., 81, 86, 216, 330, 432, 433, 773; Lim. of Liab., 11; Receiv., 138.
Blumenthal *v.* Maine C. R. Co. (34 Am. & Eng. R. Cas. 247, 79 Me. 550, 5 N. Eng. Rep. 355, 11 Atl. Rep. 605), Bagg., 13, 37.
Blumenthal *v.* New York El. R. Co. (42 N. Y. S. R. 683, 17 N. Y. Supp. 481, 28 J. & S. 95; modified in 33 N. E. Rep. 337, 137 N. Y. 559, mem., 50 N. Y. S. R. 932), Elev. Rys., 122, 185, 191.
Blunk *v.* Atchison, T. & S. F. R. Co. (38 Fed. Rep. 311), Mal. Pros., 8, 16.
Blunt *v.* Carpenter (68 Iowa 265, 26 N. W. Rep. 438), Mun. Aid, 412.
Blunt *v.* Walker (11 Wis. 334), Direct., 59; Subscr., 27.
Blunt *v.* Walker (11 Wis. 349), Charters, 56.
Blythe *v.* Denver & R. G. R. Co. (15 Colo. 333, 25 Pac. Rep. 702), Car. of M., 20.
Board *v.* St. Louis, I. M. & S. R. Co. (36 Mo. App. 151), Animals, 159, 623.
Board *v.* Texas & P. R. Co. (36 Tex. 316, 13 Am. Ry. Rep. 259), Mun. Aid, 401.
Board of Assessors *v.* Morris & E. R. Co. (49 N. J. L. 193, 7 Atl. Rep. 826), Tax., 211.
Board of Com'rs *v.* Lafayette, M. & B. R. Co. (50 Ind. 85, 8 Am. Ry. Rep. 324), Abate., 1.
Board of Liquidation *v.* Louisville & N. R. Co. (109 U. S. 221, 3 Sup. Ct. Rep. 144), Mun. Corp., 47.
Board of Liquidation *v.* New Orleans (32 La. Ann. 915), St. Rys., 18.
Board of Trade Tel. Co. *v.* Barnett (107 Ill. 507), Sts. & H., 142; Tel. & T. Lines, 1.
Boards of Trade Union *v.* Chicago, M. & St. P. R. Co. (1 Int. Com. Rep. 608, 1 Int. Com. Com. 215), Int. Com., 31, 71.
Boardman *v.* Chicago & N. W. R. Co. (32 Iowa 391, 10 Am. Ry. Rep. 41), App., 23.
Boardman *v.* Lake Shore & M. S. R. Co. (4 Am. & Eng. R. Cas. 265, 84 N. Y. 157), Divid., 7, 8, 11; Evid., 233; Lim. of Ac., 73; Stat., 23; Stockh., 3, 93.
Boatmen's Sav. Bank *v.* Western & A. R. Co. (81 Ga. 221, 7 S. E. Rep. 125), Bills of L., 48.
Boatwright *v.* Northeastern R. Co. (25 So. Car. 128), Contrib. Neg., 82; Employés, Inj. to, 708; Fel. Serv., 1, 260, 271; Trial, 77.
Boaz *v.* Central R. Co. (87 Ga. 463, 13 S. E. Rep. 711), Car. of L. S., 49, 135, 159.
Bobbett *v.* South Eastern R. Co. (L. R. 9 Q. B. D. 424, 51 L. J. Q. B. D. 161, 46 L. T. N. S. 31; affirmed on evidence Weekly Notes [1882] p. 92), Adv. Poss., 1.
Bobolink, The (6 Sawy. (U. S.) 146), Car. of M., 327.
Bodine *v.* Camden & A. R. Co. (1 Phila. (Pa.) 28), Trial, 142.
Bodley *v.* Goodrich (7 How. (U. S.) 277), Assign. for Cred., 4.
Boehl *v.* Chicago, M. & St. P. R. Co. (45 Am. & Eng. R. Cas. 351, 44 Minn. 191, 46 N. W. Rep. 333), Car. of L. S., 24; Car. of M., 174; Lim. of Liab., 27.
Boehncke *v.* Brooklyn City R. Co. (51 N. Y. S. R. 434, 22 N. Y. Supp. 712), St. Rys., 346.
Bogard *v.* Louisville, E. & St. L. R. Co. (100 Ind. 491), Fel. Serv., 1, 18, 134, 151, 202, 369, 449, 454.
Bogart *v.* Delaware, L. & W. R. Co. (55 N. Y. S. R. 291, 72 Hun 412, 25 N. Y. Supp. 175), Death, etc., 311.
Bogenschutz *v.* Smith (84 Ky. 330, 1 S. W. Rep. 578), Contrib. Neg., 105; Employés, Inj. to, 537.
Boggess *v.* Chesapeake & O. R. Co. (37 W. Va. 297, 16 S. E. Rep. 525), Car. of P., 43, 431.
Boggs *v.* Brown (82 Tex. 41, 17 S. W. Rep. 830), Receiv., 185.
Boggs *v.* Chicago & N. W. R. Co. (29 Iowa 577), Animals, 536.
Boggs *v.* Chicago, B. & Q. R. Co. (54 Iowa 435, 6 N. W. Rep. 744), Farm Cross., 9.
Boggs *v.* Great Western R. Co. (23 U. C. C. P. 573), Animals, 226.
Boggs *v.* Martin (13 B. Mon. (Ky.) 239), Car. of M., 392; Charges, 86.
Boggs *v.* Missouri Pac. R. Co. (18 Mo. App. 274), Animals, 80; Fences, 92; Negl., 47.
Bogler *v.* Metropolitan El. R. Co. (48 N. Y. S. R. 399, 20 N. Y. Supp. 430), Elev. Rys., 191.
Bohan *v.* Milwaukee, L. S. & W. R. Co. (15 Am. & Eng. R. Cas. 374, 58 Wis. 30, 15 N. W. Rep. 801), Children, Inj. to, 109; Negl., 37, 66.
Bohan *v.* Milwaukee, L. S. & W. R. Co. (19 Am. & Eng. R. Cas. 276, 61 Wis. 391, 21 N. W. Rep. 241), Cross., Inj. at, 160, 259, 344; Trial, 79.
Bohan *v.* St. Paul & D. R. Co. (49 Minn. 488, 52 N. W. Rep. 133), App., 117.

Bohannan *v.* Hammond (42 Cal. 227), Car. of M., 25; Words & Ph., 7.
Bohlen *v.* Metropolitan El. R. Co. (121 N. Y. 546, 24 N. E. Rep. 932, 31 N. Y. S. R. 888; reversing 26 J. & S. 558, 30 N. Y. S. R. 278, 9 N. Y. Supp. 424), Elev. Rys., 180.
Bohlen *v.* Metropolitan El. R. Co. (39 N. Y. S. R. 151, 14 N. Y. Supp. 378, 27 J. & S. 565; reversed in 133 N. Y. 677, mem., 31 N. E. Rep. 626, 45 N. Y. S. R. 931), App., 94; Elev. Rys., 194.
Bohlman *v.* Green Bay & L. P. R. Co. (30 Wis. 105), Em. Dom., 1033.
Bohlman *v.* Green Bay & M. R. Co. (40 Wis. 157, 13 Am. Ry. Rep. 421), Em. Dom., 504.
Bohm *v.* Metropolitan El. R. Co. (50 Am. & Eng. R. Cas. 271, 129 N. Y. 576, 29 N. E. Rep. 802, 42 N. Y. S. R. 247; reversing 27 J. & S. 585, 38 N. Y. S. R. 1025, 14 N. Y. Supp. 950), Elev. Rys., 113, 127, 128, 135, 145, 164, 187; Em. Dom., 665.
Bohn *v.* Brown (33 Mich. 257), Stockh., 45.
Bohn *v.* Chicago, R. I. & P. R. Co. (106 Mo. 429, 17 S. W. Rep. 580), Employés, Inj. to, 99, 211, 609.
Boice *v.* Hudson River R. Co. (61 Barb. (N. Y.) 611), Tickets & F., 30, 87.
Boies *v.* Hartford & N. H. R. Co. (37 Conn. 272), Car. of M., 176; Wareh., 9.
Boing *v.* Raleigh & G. R. Co. (87 N. Car. 360), Animals, 452.
Boing *v.* Raleigh & G. R. Co. (91 N. Car. 199), Animals, 589.
Boland *v.* Missouri R. Co. (36 Mo. 484), Children, Inj. to, 63, 73, 75.
Boland *v.* Missouri R. Co. (36 Mo. 490), Children, Inj. to, 127.
Bolckow *v.* Foster (24 Grant's Ch. (U. C.) 333), Partn., 7.
Bolckow *v.* Foster (25 Grant's Ch. (U. C.) 476), Partn., 7.
Boldt *v.* New York C. R. Co. (18 N. Y. 432), Fel. Serv., 25, 439.
Bolger *v.* Metropolitan El. R. Co. (29 J. & S. 459, 48 N. Y. S. R. 399, 20 N. Y. Supp. 430), Elev. Rys., 36.
Bolinger *v.* St. Paul & D. R. Co. (29 Am. & Eng. R. Cas. 408, 36 Minn. 418, 31 N. W. Rep. 856), Cross., Inj. at, 85, 183, 294; Death, etc., 430.
Boll *v.* Adirondack R. Co. (22 N. Y. S. R. 365, 52 Hun 610, 4 N. Y. Supp. 769), Cross., Inj. at, 302.
Bolles *v.* Brimfield (120 U. S. 759, 7 Sup. Ct. Rep. 736), Mun. Aid, 22.
Bolton *v.* Georgia Pac. R. Co. (83 Ga. 659, 10 S. E. Rep. 352), Fel. Serv., 160; Pl., 148.
Bolton *v.* Lancashire & Y. R. Co. (L. R. 1 C. P. 431, 12 Jur. N. S. 317, 35 L. J. C. P. 137, 14 W. R. 430, 13 L. T. 764), Car. of M., 516
Bolton *v.* Manistee & G. R. R. Co. (95 Mich. 202, 54 N. W. Rep. 875), Pl., 133.
Bolton *v.* Pennsylvania Co. (88 Pa. St. 261), Attach., 34.
Bolton Junction R. Co., Ex parte (24 W. R. 451), Incorp., 6.
Bolton Tramways Act, In re (34 L. T. 230), Incorp., 6.
Bomar *v.* Louisiana N. & S. R. Co. (42 La. Ann. 983, 8 So. Rep. 478), Contrib. Neg., 1, 13; Employés, Inj. to, 101, 126.
Bomboy *v.* New York C. & H. R. R. Co. (47 Hun (N. Y.) 425, 14 N. Y. S. R. 291), Cross., Inj. at, 251.
Bon *v.* Railway Pass. A. Co. (56 Iowa 664, 10 N. W. Rep. 225), Acc. Ins., 11.
Bonaparte *v.* Baltimore, H. & L. R. R. Co. 49 Am. & Eng. R. Cas. 198, 75 Md. 340, 23 Atl. Rep. 784), Incorp., 8.
Bonaparte *v.* Camden & A. R. Co. (Baldw. (U. S.) 205), Em. Dom., 39, 180, 182, 378, 1033; Fed. Cts., 6; Injunc., 24.
Bonce *v.* Dubuque St. R. Co. (53 Iowa 278, 5 N. W. Rep. 177), Car. of P., 98, 361, 593.
Bond *v.* Evansville & T. H. R. Co. (23 Am. & Eng. R. Cas. 200, 100 Ind. 301), Animals, 88, 139, 221.
Bond *v.* Frost (8 La. Ann. 297), Car. of M., 179; Evid., 269.
Bond *v.* New York C. & H. R. R. Co. (52 N. Y. S. R. 637, 23 N. Y. Supp. 450, 69 Hun 476), Cross., Inj. at, 280, 296, 327.
Bond *v.* Pontiac, O. & P. A. R. Co. (26 Am. & Eng. R. Cas. 571, 62 Mich. 643, 29 N. W. Rep. 482), App., 36; Constr. Rys., 51; Evid., 116; Officers, 10.
Bond *v.* State (68 Miss. 648, 9 So. Rep. 353), Receiv., 178.
Bond *v.* Wabash, St. L. & P. R. Co. (23 Am. & Eng. R. Cas. 608, 67 Iowa 712, 25 N. W. Rep. 892), Discrim., 53.
Bond *v.* Wiltse (12 Wis. 611), Bills & N., 15.
Boner *v.* Merchants' Steamboat Co. (1 Jones N. Car.) 211), Car. of M., 125.
Bonham *v.* Charlotte, C. & A. R. Co. (3 Am. & Eng. R. Cas. 302, 13 So. Car. 267), Charges, 5; Custom, 6.
Bonham *v.* Charlotte, C. & A. R. Co. (9 Am. & Eng. R. Cas. 418, 16 So. Car. 633), Charges, 37.
Bonham *v.* Needles (103 U. S. 648), Mun. Aid, 29, 377.
Bonnell *v.* Delaware, L. & W. R. Co. (39 N. J. L. 189), Contrib. Neg., 85, 88; Cross., Inj. at, 319.
Bonnell *v.* Jewett (24 Hun (N. Y.) 524), Death, etc., 102.
Bonner *v.* Bean (80 Tex. 152, 15 S. W. Rep. 798), Employés, Inj. to, 179, 583, 777; New Tr., 24.
Bonner *v.* Bryant (1 Tex. Civ. App. 269, 21 S. W. Rep. 549), Fel. Serv., 373.
Bonner *v.* Bryant (79 Tex. 540, 15 S. W. Rep. 491), Employés, 4, 5; Release, 6.
Bonner *v.* De Mendoza (4 Tex. App. (Civ. Cas.) 392, 16 S. W. Rep. 976), Bagg., 82, 109.
Bonner *v.* Glenn (79 Tex. 531, 15 S. W. Rep. 572), Contrib. Neg., 118; Employés, Inj. to, 769; Stat. & D., 136.
Bonner *v.* Grumbach (2 Tex. Civ. App. 482, 21 S. W. Rep. 1010), Bagg., 80; Car. of P., 542, 582.
Bonner *v.* Hearne (39 Am. & Eng. R. Cas. 580, 75 Tex. 242, 12 S. W. Rep. 38), Receiv., 3.

Bonnet *v.* La None (80 Tex. 117, 15 S. W. Rep. 803), Employés, Inj. to, 45.
Bonner *v.* Mayfield (82 Tex. 234, 18 S. W. Rep. 305), Receiv., 141, 143; Witn., 34, 149.
Bonner *v.* Moore (3 Tex. Civ. App. 416, 22 S. W. Rep. 272), Employés, Inj. to, 29, 114, 636.
Bonner *v.* New Orleans (2 Woods (U. S.) 135), Bills & N., 18; Mun. Aid, 349.
Bonner *v.* Whitcomb (80 Tex. 178, 15 S. W. Rep. 899), App., 135; Fel. Serv., 149, 161, 501.
Bonner *v.* Wingate (78 Tex. 333, 14 S. W. Rep. 790), Culverts, 19.
Bonney *v.* Bushwick R. Co. (1 How. Pr. N. S. (N. Y.) 66), St. Rys., 372.
Boody *v.* Rutland & B. R. Co. (24 Vt. 660), Constr. Rys., 19, 27.
Boody *v.* Rutland & B. R. Co. (3 Blatchf. (U. S.) 25), Constr. Rys., 99; Contr., 74, 78; Custom, 6; Stock, 59.
Booe *v.* Junction R. Co. (10 Ind. 93), Charters, 45; Consol., 33.
Booge *v.* Pacific R. Co. (33 Mo. 212), Judgm., 16.
Booker, Ex parte (18 Ark. 338), Subscr., 184.
Booker *v.* Venice & C. R. Co. (5 Am. & Eng. R. Cas. 357, 101 Ill. 333), Em. Dom., 325, 708, 919.
Bookman *v.* New York El. R. Co. (137 N. Y. 302, 33 N. E. Rep. 333, 50 N. Y. S. R. 703; reversing 42 N. Y. S. R. 958, 17 N. Y. Supp. 951), Elev. Rys., 51, 104, 113, 160.
Books *v.* Borough of Danville (95 Pa. St. 158), Death, etc., 29.
Boon *v.* Steamboat Belfast (40 Ala. 184), Car. of M., 19.
Boone *v.* Clark (129 Ill. 466, 21 N. E. Rep. 850), Em. Dom., 202, 213; Pl., 103.
Boone *v.* Wabash, St. L. & P. R. Co. (20 Mo. App. 232), Pl., 107; Trial, 184.
Boone County *v.* Burlington & M. R. R. Co. (139 U. S. 684, 11 Sup. Ct. Rep. 687), Lim. of Ac., 46.
Booraem *v.* North Hudson County R. Co. (40 N. J. Eq. 557, 5 Atl. Rep. 106; affirming 39 N. J. Eq. 465), Injunc., 2; Sts. & H., 12.
Booraem *v.* Wood (27 N. J. Eq. 371; reversed in 28 N. J. Eq. 450, 14 Am. Ry. Rep. 202), Mort., 22.
Boorman *v.* American Exp. Co. (21 Wis. 152), Exp. Cos., 60, 87.
Boorman *v.* Atlantic & P. R. Co. (78 N. Y. 599; affirming 17 Hun 555), Discov., 7.
Boorman *v.* Pierce (56 How. Pr. (N. Y.) 251), Stockh., 95.
Booth *v.* Boston & A. R. Co. (67 N. Y. 593, mem.), New Tr., 7.
Booth *v.* Boston & A. R. Co. (73 N. Y. 38), Fel. Serv., 70.
Booth *v.* McIntyre (31 U. C. C. P. 183), Pub. Lds., 19.
Booth *v.* Rome, W. & O. T. R. Co. (57 Am. & Eng. R. Cas. 442, 140 N. Y. 267, 55 N. Y. S. R. 656, 35 N. E. Rep. 592; reversing 63 Hun 624, 44 N. Y. S. R. 9, 17 N. Y. Supp. 336), Blasting, 1, 4; Constr. Rys., 12; Nuis., 2.
Booth *v.* St. Louis F. E. Mfg. Co. (40 Fed. Rep. 1), Citizens, 5.
Boothby *v.* Androscoggin & K. R. Co. (51 Me. 318), Em. Dom., 668.
Bord *v.* New York C. & H. R. R. Co. (14 Abb. N. Cas. (N. Y.) 496, 1 How. Pr. N. S. 1, 6 Civ. Pro. 222), Costs, 4.
Borda *v.* Philadelphia & R. R. Co. (141 Pa. St. 484, 21 Atl. Rep. 665), App., 115.
Bordeaux *v.* Erie R. Co. (8 Hun (N. Y.) 579), Tickets & F., 27, 122.
Borden *v.* Delaware, L. & W. R. Co. (131 N. Y. 671, 30 N. E. Rep. 586, 43 N. Y. S. R. 935, 4 Silv. App. 151; affirming 61 Hun 620, 40 N. Y. S. R. 985, mem., 17 N. Y. Supp. 596), Death, etc., 254, 257, 258; Employés, Inj. to, 604.
Borden *v.* Richmond & D. R. Co. (113 N. Car. 570, 18 S. E. Rep. 392), Agency, 55.
Borden *v.* South Side R. Co. (5 Hun (N. Y.) 184; affirmed in 67 N. Y. 588, mem.), Adv. Poss., 3.
Bordentown & P. Steamboat Co. *v.* Flanagan (41 N. J. L. 115), Car. of M., 745.
Bordentown & S. A. Turnpike Road *v.* Camden & A. R. & T. Co. (17 N. J. L. 314), Charters, 103.
Borgman *v.* Omaha & St. L. R. Co. (41 Fed. Rep. 667), Fel. Serv., 445.
Borland *v.* Chicago, M. & St. P. R. Co. (78 Iowa 94, 42 N. W. Rep. 590), Fires, 298.
Borland *v.* Mississippi & M. R. Co. (8 Iowa 148), Em. Dom., 911.
Borst *v.* Lake Shore & M. S. R. Co. (4 Hun (N. Y.) 346; affirmed (?) 66 N. Y. 639, mem.), Fright. Teams, 3, 5.
Bort *v.* Snell (39 Hun (N. Y.) 388), Subscr., 15.
Bosch *v.* Burlington & M. R. Co. (44 Iowa 402), Dam., 10.
Boscowitz *v.* Adams Exp. Co. (93 Ill. 523), Exp. Cos., 34, 61.
Boss *v.* Northern Pac. R. Co. (2 N. Dak. 128, 49 N. W. Rep. 655), Employés, Inj. to, 41, 190, 370; Negl., 43, 82.
Boss *v.* Northern Pac. R. Co. (5 Dak. 308, 40 N. W. Rep. 590), Employés, Inj. to, 71, 156, 303.
Boss *v.* Providence & W. R. Co. (21 Am. & Eng. R. Cas. 364, 15 R. I. 149, 1 Atl. Rep. 9), Car. of P., 140, 142, 404.
Bossout *v.* Rome, W. & O. R. Co. (32 N. Y. S. R. 884, 10 N. Y. Supp. 602, 57 Hun 589; affirmed in 126 N. Y. 646, mem., 27 N. E. Rep. 853, 37 N. Y. S. R. 962), Collis., 36; Fel. Serv., 509.
Boster *v.* Chesapeake & O. R. Co. (52 Am. & Eng. R. Cas. 357, 36 W. Va. 318, 15 S. E. Rep. 158), Car. of P., 60, 70; Eject. Pass., 72, 132.
Bostock *v.* North Staffordshire R. Co. (3 Sm. & G. 283, 3 Jur. N. S. 245, 25 L. J. Ch. 325), Em. Dom., 1207.
Bostock *v.* North Staffordshire R. Co. (5 DeG. & S. 584), Nuis., 21.
Boston *v.* Brookline (156 Mass. 172, 30 N. E. Rep. 611), Em. Dom., 108.
Boston *v.* Chesapeake & O. R. Co. (12 Am. & Eng. R. Cas. 263, 76 Va. 180), Liens, 31, 36.

Boston *v.* Georgia R. Co. (63 Ga. 164), App., 86.
Boston & A. R. Co. In re (53 N. Y. 574, 5 Am. Ry. Rep. 92), Em. Dom., 105, 127.
Boston & A. R. Co. *v.* Boston (140 Mass. 87, 2 N. E. Rep. 943), Cross. St. & H., 41, 55.
Boston & A. R. Co. *v.* Boston & L. R. Co. (1 Int. Com. Rep. 571, 1 Int. Com. Com. 158), Int. Com., 109, 126, 127, 150.
Boston & A. R. Co. *v.* Briggs (7 Am. & Eng. R. Cas. 541, 132 Mass. 24), Fences, 15, 26, 41.
Boston & A. R. Co. *v.* Cambridge (55 Am. & Eng. R. Cas. 23, 159 Mass. 283, 34 N. E. Rep. 382), Cross. St. & H., 79, 99.
Boston & A. R. Co. *v.* Com. (157 Mass. 68, 31 N. E. Rep. 696), Tax., 265.
Boston & A. R. Co. *v.* Greenbush (52 N. Y. 510; Affirming 5 Lans. 461), Cross. St. & H., 48, 54.
Boston & A. R. Co. *v.* Hampden County Com'rs (116 Mass. 73), Cross. St. & H., 103, 105, 109, 111.
Boston & A. R. Co. *v.* Newton (148 Mass. 474, 20 N. E. Rep. 106), Cross. St. & H., 101.
Boston & A. R. Co. *v.* Pearson (128 Mass. 445), Partn., 1.
Boston & A. R. Co. *v.* Richardson (135 Mass. 473), Stock, 90.
Boston & A. R. Co. *v.* Shanly (107 Mass. 568, 3 Am. Ry. Rep. 396, 406), Car. of M., 194, 196, 197.
Boston & L. R. Co. *v.* Com. (100 Mass. 399), Tax., 265.
Boston & L. R. Co. *v.* Nashua & L. R. Corp. (139 Mass. 463), Arb., 6.
Boston & L. R. Co. *v.* Proctor (1 Allen (Mass.) 267), Tickets & F., 7, 90.
Boston & L. R. Corp. *v.* Boston & M. R. Co. (5 Cush. (Mass.) 375), Charters, 100.
Boston & L. R. Corp. *v.* Nashua & L. R. Co. (157 Mass. 258, 31 N. E. Rep. 1067), Ac'ts, 4; Contr., 105; Ry. Com'rs, 18.
Boston & L. R. Corp. *v.* Salem & L. R. Co. (2 Gray (Mass.) 1), Charters, 100; Em. Dom., 33, 101; Franch., 9; Leases, 31.
Boston & L. R. Corp. *v.* Winchester (55 Am. & Eng. R. Cas. 49, 156 Mass. 217, 30 N. E. Rep. 1139), Cross. St. & H., 101.
Boston & M. R. Co. In re (3 Int. Com. Rep. 717, 5 Int. Com. Com. 69), Int. Com., 182.
Boston & M. R. Co. *v.* Babcock (3 Cush. (Mass.) 228), Right of W., 10.
Boston & M. R. Co. *v.* Bartlett (10 Gray (Mass.) 384), Spec. Perf., 26.
Boston & M. R. Co. *v.* Brown (15 Gray (Mass.) 223), Charges, 78.
Boston & M. R. Co. *v.* Cambridge (8 Cush. (Mass.) 237), Tax., 189.
Boston & M. R. Co. *v.* Chipman (34 Am. & Eng. R. Cas. 336, 146 Mass. 107, 5 N. Eng. Rep. 572, 14 N. E. Rep. 940), Tickets & F., 68.
Boston & M. R. Co. *v.* County Com'rs (32 Am. & Eng. R. Cas. 271, 79 Me. 386, 4 N. Eng. Rep. 657, 10 Atl. Rep. 113), Cross. St. & H., 83, 88; Discrim., 82.
Boston & M. R. Co. *v.* Durgin (67 Me. 263), Forc. Ent., 2.
Boston & M. R. Co. *v.* Lowell & L. R. Co. (124 Mass. 368), Location, etc., 30.
Boston & M. R. Co. *v.* Mayor, etc., of Lawrence (2 Allen (Mass.) 107), Cross. St. & H., 45.
Boston & M. R. Co. *v.* Middlesex County (1 Allen (Mass.) 324), Cross. St. & H., 84, 103; Deeds, 43.
Boston & M. R. Co. *v.* Montgomery (119 Mass. 114), Witn., 151.
Boston & M. R. Co. *v.* Ordway (140 Mass. 510, 5 N. E. Rep. 627), Evid., 193, 194.
Boston & M. R. Co. *v.* Portland, S. & P. R. Co. (119 Mass. 498), Actions, 13.
Boston & M. R. Co. *v.* Portsmouth & D. R. Co. (57 N. H. 200), Injunc., 18.
Boston & M. R. Co. *v.* State (25 Am. & Eng. R. Cas. 538, 63 N. H. 571, 4 Atl. Rep. 571), Tax., 331.
Boston & M. R. Co. *v.* Trafton (151 Mass. 229, 23 N. E. Rep. 829), Tickets & F., 95.
Boston & M. R. Co. *v.* Warrior Mower Co. (76 Me. 251), Parties, 5.
Boston & M. R. Co. *v.* Wentworth (20 N. H. 406), Em. Dom., 780.
Boston & M. R. Co. *v.* Whitcher (1 Allen (Mass.) 497), Charges, 85.
Boston & M. R. Co. *v.* York County Com'rs (32 Am. & Eng. R. Cas. 271, 79 Me. 386, 4 N. Eng. Rep. 657, 10 Atl. Rep. 113), Stat., 13; Sts. & H., 93.
Boston & N. Y. A. L. R. Co. *v.* Coffin (12 Am. & Eng. R. Cas. 375, 50 Conn. 150), Mort., 20, 38.
Boston & P. R. Corp. *v.* Doherty (154 Mass. 314, 28 N. E. Rep. 277), Farm Cross., 3.
Boston & P. R. Corp. *v.* Lincoln (13 R. I. 705), Sts. & H., 29.
Boston & P. R. Corp. *v.* Midland R. Co. (1 Gray (Mass.) 340), Constr. Rys., 2; Evid., 237; Location, etc., 4, 18; Quo War., 6.
Boston & P. R. Corp. *v.* New York & N. E. R. Co. (12 R. I. 220), Jurisd., 9; Mort., 318.
Boston & P. R. Corp. *v.* New York & N. E. R. Co. (2 Am. & Eng. R. Cas. 300, 13 R. I. 260), Leases, 26
Boston & W. R. Corp. *v.* Haven (8 Allen (Mass.) 359), Mort., 156.
Boston & W. R. Corp. *v.* Old Colony R. Corp. (12 Cush. (Mass.) 605), Bridges, 82; Cross. Rys., 41; Em. Dom., 714; Sts. & H., 235; Wharves, 3.
Boston & W. R. Corp. *v.* Old Colony & F. R. R. Co. (3 Allen (Mass.) 142), Witn., 131, 151
Boston & W. R. Corp. *v.* Western R. Co. (14 Gray (Mass.) 253), Connect. L., 3; Ry. Com'rs, 9.
Boston, B. & G. R. Co. *v.* Wellington (113 Mass. 79), Subscr., 49, 77, 125.
Boston Chamber of Commerce *v.* Lake Shore & M. S. R. Co. (1 Int. Com. Rep. 754, 1 Int. Com. Com. 436), Int. Com., 70.
Boston, C. & M. R. Co. *v.* Boston & L. R. Co. (51 Am. & Eng. R. Cas. 106, 65 N. H. 393, 23 Atl. Rep. 529). Leases, 22, 31, 85, 100; Receiv., 12; Reorg., 1; Stockh., 119.

Boston, C. & M. R. Co. *v.* Gilmore R. Co. (37 N. H. 410), Attach., 29.
Boston, C. & M. R. Co. *v.* State (32 N. H. 215), Crim. L., 5, 6; Death, etc., 441.
Boston, C. & M. R. Co. *v.* State (60 N. H. 87), Tax., 273, 276.
Boston, C. & M. R. Co. *v.* State (62 N. H. 648), Tax., 99, 141, 273.
Boston, C. & M. R. Co. *v.* State (64 N. H. 490, 13 Atl. Rep. 874), Tax., 273.
Boston F. & P. Exch. *v.* New York & N. E. R. Co. (3 Int. Com. Rep. 493, 4 Int. Com. Com. 664), Int. Com., 22, 38, 138, 150.
Boston Gas Light Co. *v.* Old Colony & N. R. Co. (14 Allen (Mass.) 444), Priv. Ways, 9.
Boston, H. & E. R. Co., In re (9 Blatchf. (U. S.) 101; affirmed 9 Blatchf. 409), Bank'cy, 2.
Boston, H. T. & W. R. Co., In re (79 N. Y. 64; modifying 58 How. Pr. 67), Cross. Rys., 13, 21, 27, 31, 32, 33.
Boston, H. T. & W. R. Co., In re (22 Hun (N. Y.) 176), Em. Dom., 655.
Boston, H. T. & W. R. Co., In re (79 N. Y. 69; affirming in part (?) 22 Hun 176), Cross. Rys., 27.
Boston. H. T. & W. R. Co., In re (31 Hun (N. Y.) 461), Em. Dom., 438.
Boston, H. T. & W. R. Co., In re (10 Abb. N. Cas. (N. Y.) 104), Em. Dom., 337.
Boston, H. T. & W. R. Co. *v.* Troy & B. R. Co. (58 How. Pr. (N. Y.) 167), Cross. Rys., 13.
Boston Road, In re (27 Hun (N. Y.) 409), Em. Dom., 804, 924.
Boston Water Power Co. *v.* Boston & W. R. Co. (23 Pick (Mass.) 360), Bridges, 10; Em. Dom., 33, 126.
Bostwick *v.* Baltimore & O. R. Co. (45 N. Y. 712; reversing 55 Barb. 137), Bills of L., 44.
Bostwick *v.* Baltimore & O. R. Co. (55 Barb. (N. Y.) 137; reversed it seems in 45 N. Y. 712), Bills of L., 44.
Bostwick *v.* Minneapolis & P. R. Co. (49 Am. & Eng. R. Cas. 527, 2 N. Dak. 440, 51 N. W. Rep. 781), Animals, 48.
Boswell *v.* Hudson River R. Co. (10 Abb. Pr. (N. Y.) 442, 5 Bosw. 699), Car. of L. S., 127.
Boswell *v.* St. Louis, I. M. & S. R. Co. (7 Am. & Eng. R. Cas. 561, 73 Mo. 470), App., 136.
Bothe *v.* Dayton & M. R. Co. (10 Am. & Eng. R. Cas. 396, 37 Ohio St. 147), Em. Dom., 1012.
Bothwell *v.* Chicago, M. & St. P. R. Co. (7 Am. & Eng. R. Cas. 570, 59 Iowa 192, 13 N. W. Rep. 78), Animals, 460.
Botkin *v.* Livingston (21 Kan. 232), Contr., 9.
Botsford *v.* New Haven, M. & W. R. Co. (41 Conn. 454, 7 Am. Ry. Rep. 153), Liens, 25; Mort., 106.
Botto *v.* Missouri Pac. R. Co. (11 Mo. App. 589), Sts. & H., 215.
Bottomley *v.* Port Huron & N. W. R. Co. (44 Mich. 542, 7 N. W. Rep. 214), Constr. Rys., 91.
Bottoms *v.* Seaboard & R. R. Co. (109 N. Car. 72, 13 S. E. Rep. 738), New Tr., 5; Trial, 162.
Bouch *v.* Sevenoaks, M. & T. R. Co. (L. R. 4 Ex. D. 133, 48 L. J. Ex. D. 338, 40 L. T. N. S. 560, 27 W. R. 507), Attach., 27.
Boulo *v.* New Orleans, M. & T. R. Co. (55 Ala. 480), Injunc., 35.
Boulware *v.* Chicago & A. R. Co. (79 Mo. 494), Animals, 632.
Bound *v.* South Carolina R. Co. (43 Fed. Rep. 404), Att'ys, 15.
Bound *v.* South Carolina R. Co. (46 Fed. Rep. 315), Mort., 236; State Aid, 31.
Bound *v.* South Carolina R. Co. (51 Am. & Eng. R. Cas. 58, 47 Fed. Rep. 30), Mort., 91.
Bound *v.* South Carolina R. Co. (50 Fed. Rep. 312), Mort., 117.
Bound *v.* South Carolina R. Co. (50 Fed. Rep. 853), Mort., 139, 235.
Bound *v.* South Carolina R. Co. (51 Fed. Rep. 58), Receiv., 86.
Bound *v.* South Carolina R. Co. (55 Fed. Rep. 186), Mort., 243.
Bound *v.* South Carolina R. Co. (57 Fed. Rep. 485), Intox'ing L., 3.
Bound *v.* Wisconsin C. R. Co. (45 Wis. 543), Mun. Aid, 53, 142, 400.
Bourbon County Com'rs *v.* Block (99 U. S. 686), Judgm., 26; Mun. Aid, 378.
Bourdier *v.* Morgan's L. & T. R. Co. (35 La. Ann. 947), Flood. Lds., 5, 33.
Bourgeault *v.* Grand Trunk R. Co. (5 Montr. Super. 240), Employés, Inj. to, 189.
Bourget *v.* Queen (2 Can. Exch. 1), Em. Dom., 1250.
Bourke *v.* Cork & M. R. Co. (4 Ir. L. R. 682), Death, etc., 273.
Boutiller *v.* Steamboat Milwaukee (8 Minn. 97 (Gil. 72), Death, etc., 95.
Boutte *v.* Bryant (10 La. Ann. 659), Mun. Aid, 415.
Boutwell *v.* Townsend (37 Barb. (N. Y.) 205), Constr. Rys., 93; Stockh., 44.
Bouwmeester *v.* Grand Rapids & I. R. Co. (28 Am. & Eng. R. Cas. 476, 63 Mich. 557, 30 N. W. Rep. 337), Contrib. Neg., 50; Tresp., Inj. to, 64.
Bouwmeester *v.* Grand Rapids & I. R. Co. (31 Am. & Eng. R. Cas. 376, 67 Mich. 87, 10 West. Rep. 853, 34 N. W. Rep. 414), Death, etc., 210.
Bovee *v.* Danville (53 Vt. 183), Contrib. Neg., 104.
Bowden *v.* Fargo (2 Misc. (N. Y.) 551), Exp. Cos., 32.
Bowditch *v.* New Haven (40 Conn. 503), St. Rys., 140, 302.
Bowen *v.* Atlantic & F. B. V. R. Co. (14 Am. & Eng. R. Cas. 332, 17 So. Car. 574), App., 124; Em. Dom., 550, 643, 720, 914.
Bowen *v.* Canada Southern R. Co. (14 Ont. App. 1), Em. Dom., 1217; Words & Ph., 117.
Bowen *v.* Carolina, C. G. & C. R. Co. (34 So. Car. 217, 13 S. E. Rep. 421), Direct., 35; Pres., 13.
Bowen *v.* Chicago, B. & K. C. R. Co. (95 Mo. 268, 14 West. Rep. 744, 8 S. W. Rep.

230), Employés, Inj. to, 99, 617; Evid., 56; Fel. Serv., 1, 13, 312, 332.
Bowen *v.* Detroit City R. Co. (19 Am. & Eng. R. Cas. 131, 54 Mich. 496, 20 N. W. Rep. 559, 52 Am. Rep. 822), St. Rys., 317.
Bowen *v.* Flanagan (84 Va. 313, 4 S. E. Rep. 724), Inj. to Cars by Cattle, 1.
Bowen *v.* Hannibal & St. J. R. Co. (75 Mo. 426), Animals, 356.
Bowen *v.* Huntington (35 W. Va. 682, 14 S. E. Rep. 217), Witn., 189, 191.
Bowen *v.* Lease (5 Hill (N. Y.) 221), Assign. for Cred., 3.
Bowen *v.* Mt. Washington R. Co. (62 N. H. 502), Direct., 40.
Bowen *v.* New York C. R. Co. (18 N. Y. 408), Car. of P., 142, 149; Evid., 125.
Bowen *v.* St. Paul, M. & M. R. Co. (32 Am. & Eng. R. Cas. 370, 36 Minn. 522, 32 N. W. Rep. 751), Fires, 270, 296, 306, 318.
Bower *v.* Chicago, M. & St. P. R. Co. (19 Am. & Eng. R. Cas. 301, 61 Wis. 457, 21 N. W. Rep. 536), Cross., Inj. at, 258, 299, 326; Evid., 70.
Bower *v.* Burlington & S. W. R. Co. (42 Iowa 546), Leases, 40.
Bower *v.* Grayville & M. R. Co. (92 Ill. 223), Em. Dom., 875.
Bowers *v.* Pittsburgh, Ft. W. & C. R. Co. (158 Pa. St. 302, 27 Atl. Rep. 893), Tickets & F., 78, 79, 81.
Bowers *v.* Richmond & D. R. Co. (107 N. Car. 721, 12 S. E. Rep. 452), Car. of M., 723.
Bowers *v.* Union Pac. R. Co. (4 Utah 215, 7 Pac. Rep. 251), Contrib. Neg., 21, 105; Employés, Inj. to, 109, 208, 771; Negl., 76; Trial, 75.
Bowes *v.* Haywood (35 Mich. 241), Land Grants, 32.
Bowie *v.* Baltimore & O. R. Co. (1 MacArth. (D. C.) 94), Car. of L. S., 19; Car. of M., 62.
Bowie *v.* Baltimore & O. R. Co. (1 MacArth. (D. C.) 609), Car. of L. S., 15; Car. of M., 65; Witn., 103.
Bowie *v.* Buffalo, B. & G. R. Co. (7 U. C. C. P. 191), Car. of M., 91.
Bowie *v.* Greenville St. R. Co. (69 Miss. 196, 10 So. Rep. 574), St. Rys., 423.
Bowler *v.* European & N. A. R. Co. (67 Me. 395), Attach., 58.
Bowler *v.* Lane (3 Metc. (Ky.) 311), Death, etc., 151, 335, 418.
Bowles *v.* Rome, W. & O. R. Co. (46 Hun 324, 12 N. Y. S. R. 457; affirmed in 113 N. Y. 643, mem., 21 N. E. Rep. 414, 22 N. Y. S. R. 997), Car. of P., 572; Death, etc., 406.
Bowley *v.* Richmond & D. R. Co. (110 N. Car. 315, 14 S. E. Rep. 777), Rem. of C., 40, 49.
Bowlin *v.* Nye (10 Cush. (Mass.) 416), Trover, 2.
Bowling Green & M. R. Co. *v.* Warren County Court (10 Bush. (Ky.) 711), Charters, 53; Mun. Aid, 112.
Bowman *v.* Chicago & A. R. Co. (85 Mo. 533), Animals, 211.
Bowman *v.* Chicago & N. W. R. Co. (115 U. S. 611, 6 Sup. Ct. Rep. 192), Car. of M., 693.
Bowman *v.* Chicago & N. W. R. Co. (125 U. S. 465, 8 Sup. Ct. Rep. 689), Int. Com., 224.
Bowman *v.* Chicago, St. P. & K. C. R. Co. (86 Iowa 490, 53 N. W. Rep. 327), Sts. & H., 246.
Bowman *v.* Hilton (11 Ohio 303), Car. of M., 375.
Bowman *v.* Teall (23 Wend. (N. Y.) 306), Car. of M., 113.
Bowman *v.* Troy & B. R. Co. (37 Barb. (N. Y.) 516), Animals, 272.
Bowman *v.* Venice & C. R. Co. (14 Am. & Eng. R. Cas. 338, 102 Ill. 459), Em. Dom., 93, 259, 304, 325, 326, 558, 578.
Bowne *v.* Bilsland (83 Iowa 162, 49 N. W. Rep. 161), Land Grants, 26.
Boxby *v.* Montpelier & St. J. R. Co. (49 Vt. 123, 17 Am. Ry Rep. 140), Witn., 181.
Boyce *v.* Cheshire R. Co. (42 N. H. 97), Fires, 232.
Boyce *v.* Cheshire R. Co. (43 N. H. 627), Fires, 232.
Boyce *v.* Manhattan R. Co. (41 Am. & Eng. R. Cas. 111, 118 N. Y. 314, 23 N. E. Rep. 304, 28 N. Y. S. R. 692; affirming 22 J. & S. 286), Elev. Rys., 207; St. Rys., 389.
Boyce *v.* Wabash R. Co. (23 Am. & Eng. R. Cas. 172, 63 Iowa 70, 50 Am. Rep. 730, 18 N. W. Rep. 673), Animals, 292.
Boyd *v.* Brinckin (55 Cal. 427), Trusts, 2.
Boyd *v.* Chicago & A. R. Co. (84 Mo. 615), Att'ys, 13.
Boyd *v.* Hutchinson (18 Phila. (Pa.) 283), Death, etc., 386.
Boyd *v.* London & C. R. Co. (6 D. P. C. 721, 4 Bing. N. C. 669, 6 Scott 461), Actions, 5.
Boyd *v.* Negley (40 Pa. St. 377), Em. Dom., 258, 320, 529, 554.
Boyd *v.* Negley (53 Pa. St. 387), Location, etc., 17.
Boyd *v.* Peach Bottom R. Co. (90 Pa. St. 169), Subscr., 134, 200.
Boyd *v.* United States (116 U. S. 616, 6 Sup. Ct. Rep. 524), Witn., 86.
Boyd *v.* Wabash Western R. Co. (105 Mo. 371, 16 S. W. Rep. 909), Cross., Inj. at, 12, 251; Death, etc., 263.
Boyer *v.* St. Paul City R. Co. (54 Minn. 127, 55 N. W. Rep. 825), Elec. Rys., 30.
Boykin *v.* State (96 Ala. 16, 11 So. Rep. 66), Evid., 239.
Boylan *v.* Hot Springs R. Co. (40 Am. & Eng. R. Cas. 666, 132 U. S. 146, 10 Sup. Ct. Rep. 50), Eject. Pass., 37, 71; Tickets & F., 16, 81, 82.
Boyle *v.* Chicago, R. I. & P. R. Co. (2 Am. & Eng. R. Cas. 234, 56 Iowa 765, 9 N. W. Rep. 360), Employés, Inj. to, 697, 733.
Boyle *v.* Crawfordsville, F. & Ft. W. R. Co. (18 Ind. 457), Subscr., 109.
Boyle *v.* Missouri Pac. R. Co. (21 Mo. App. 416), Animals, 281, 619.
Boyle *v.* New York & N. E. R. Co. (151 Mass. 102, 23 N. E. Rep. 827), Employés, Inj. to, 202.
Boyle *v.* New York, L. E. & W. R. Co. (39 Hun (N. Y.) 171; affirmed in 115 N. Y.

636, mem., 2 Silv. App. 326, 21 N. E. Rep. 724, 23 N. Y. S. R. 731), Animals, 69.
Boyle *v.* Philadelphia & R. R. Co. (54 Pa. St. 310), Charges, 5.
Boynton *v.* Peterborough & S. R. Co. (4 Cush. (Mass.) 467), Em. Dom., 428.
Brabbitts *v.* Chicago & N. W. R. Co. (38 Wis. 289), Employés, Inj. to, 4, 139; Fel. Serv., 1, 79, 202, 213; Witn., 150, 178.
Brace *v.* New York C. R. C. (27 N. Y. 269), Cat.-Gds., 12.
Bracken *v.* Steamboat Gulnare (16 B. Mon. (Ky.) 444), Car. of Slaves, 8.
Bradburn *v.* Great Western R. Co. (L. R. 10 Ex. 1, 44 L. J. Ex. 9, 31 L. T. 464, 23 W. R. 468), Dam., 98.
Bradbury *v.* Kingston Coal Co. (157 Pa. St. 231, 27 Atl. Rep. 400), Employés, Inj. to, 184.
Braddock *v.* Philadelphia, M. & M. R. Co. (16 Am. & Eng. R. Cas. 436, 45 N. J. L. 363), Subscr., 45, 71, 144.
Braddock & T. C. R. Co. *v.* Braddock Elec. R. Co. (1 Pa. Dist. 44), Cross. Rys., 87; St. Rys., 30.
Braddy *v.* Kansas City, Ft. S. & M. R. Co. (47 Mo. App. 519), Animals, 562; Words & Ph., 24.
Bradford *v.* South Carolina R. Co. (7 Rich. (So. Car.) 201), Car. of M., 544.
Bradford *v.* South Carolina R. Co. (10 Rich. (So. Car.) 221), Car. of M., 543.
Bradford & Dist. T. Co., Ex parte ([1893] 3 Ch. 463), Aband., 11.
Bradford, E. & C. R. Co. *v.* New York, L. E. & W. R. Co. (1 N. Y. Supp. 363, 16 N. Y. S. R. 208, 48 Hun 621, mem.), Contr., 57.
Bradford, E. & C. R. Co. *v.* New York, L. E. & W. R. Co. (47 Am. & Eng. R. Cas. 374, 123 N. Y. 316, 25 N. E. Rep. 499, 33 N. Y. S. R. 614; reversing 16 N. Y. S. R. 208, 1 N. Y. Supp. 363), Spec. Perf., 16.
Bradford Tramway Co., In re (46 L. J. Ch. D. 89, 35 L. T. 827, L. R. 4 Ch. D. 18, 25 W. R. 88; reversing L. R. 2 Ch. D. 373, 34 L. T. 478, 24 W. R. 815), Dissol., 22; Tramw., 8.
Bradley *v.* Boston & M. R. Co. (2 Cush. (Mass.) 539), Cross., Inj. at, 2.
Bradley *v.* Buffalo, N. Y. & E. R. Co. (34 N. Y. 427), Cat.-Gds., 11; Fences, 59.
Bradley *v.* Chester Valley R. Co. (36 Pa. St. 141), Mort., 143.
Bradley *v.* Converse (4 Cliff. (U. S.) 366), Eq., 28.
Bradley *v.* Converse (4 Cliff. (U. S.) 375), Bank'cy, 8; Direct., 45; Eq., 9.
Bradley *v.* Farwell (1 Holmes (U. S.) 433), Bank'cy, 8; Direct., 60.
Bradley *v.* Ft. Wayne & E. R. Co. (94 Mich. 35, 53 N. W. Rep. 915), St. Rys., 367.
Bradley *v.* Great Western R. Co. (11 U. C. Q. B. 220), Fences, 47.
Bradley *v.* London & N.-W. R. Co. (5 Ex. 769, 1 L., M. & P. 597, 20 L. J. Ex. 3), Em. Dom., 1178.
Bradley *v.* Missouri Pac. R. Co. (30 Am. & Eng. R. Cas. 379, 91 Mo. 493, 4 S. W. Rep. 427), Ejectm., 12; Em. Dom., 412.
Bradley *v.* Nashville, C. & St. L. R. Co. (14 Lea (Tenn.) 374), Employés, Inj. to, 119, 283.
Bradley *v.* New York & N. H. R. Co. (21 Conn. 294), Corp., 2; Em. Dom., 180, 726.
Bradley *v.* New York C. R. Co. (62 N. Y. 99, 12 Am. Ry. Rep. 160; affirming 3 T. & C. 288), Employés, Inj. to, 3.
Bradley *v.* Northern Pac. R. Co. (38 Minn. 234, 36 N. W. Rep. 345), Em. Dom., 80, 930.
Bradley *v.* People (4 Wall. (U. S.) 459), Tax., 138.
Bradley *v.* San Antonio & A. P. R. Co. (80 Tex. 84, 16 S. W. Rep. 55), Stat. & D., 75.
Bradley *v.* Second Ave. R. Co. (8 Daly (N. Y.) 289), St. Rys., 510.
Bradner, In re (87 N. Y. 171), Contempt., 7.
Bradshaw, In re (12 Q. B. 562, 12 Jur. 998, 17 L. J. Q. B. 362, 5 Railw. Cas. 527), Em. Dom., 1173.
Bradshaw *v.* Irish N. W. R. Co. (7 Ir. C. L. 252, 21 W. R. 581, 3 Ry. & C. T. Cas. xi), Car. of M., 248, 260.
Bradshaw *v.* Lancashire & Y. R. Co. (L. R. 10 C. P. 189, 44 L. J. C. P. 148, 31 L. T. 847), Death, etc., 4.
Bradshaw *v.* Louisville & N. R. Co. (Ky.) 21 S. W. Rep. 346), Employés, Inj. to, 282.
Bradshaw *v.* Rome, W. & O. R. Co. (17 N. Y. S. R. 307, 49 Hun 605, 1 N. Y. Supp. 691), Fires, 29, 252, 356.
Bradshaw *v.* South Boston R. Co. (16 Am. & Eng. R. Cas. 386, 135 Mass. 407, 46 Am. Rep. 481), St. Rys., 526.
Bradwell *v.* Pittsburgh & W. E. Pass. R. Co. (139 Pa. St. 404, 20 Atl. Rep. 1046), Contrib. Neg., 105, 116; Dam., 99.
Bradwell *v.* Pittsburgh & W. E. Pass. R. Co. (153 Pa. St. 105, 25 Atl. Rep. 623; former appeal 139 Pa. St. 404, 20 Atl. Rep. 1046), St. Rys., 468, 499.
Brady *v.* Burlington, C. R. & N. R. Co. (72 Iowa 53, 33 N. W. Rep. 360), Employés, Inj. to, 648.
Brady *v.* Johnson (75 Md. 445, 26 Atl. Rep. 49), Mort., 42.
Brady *v.* Kansas City Cable R. Co. (111 Mo. 329, 19 S. W. Rep. 953), Cable R'ys, 4; Constr. Rys., 10.
Brady *v.* Little Miami R. Co. (34 Barb. (N. Y.) 249), Bills & N., 18.
Brady *v.* Manhattan R. Co. (127 N. Y. 46, 27 N. E. Rep. 368, 37 N. Y. S. R. 340; reversing 15 Daly 272, 25 N. Y. S. R. 585, 6 N. Y. Supp. 533), Elev. Rys., 207.
Brady *v.* Pennsylvania R. Co. (2 Int. Com. Rep. 78, 2 Int. Com. Com. 131), Int. Com., 37.
Brady *v.* Rensselaer & S. R. Co. (1 Hun (N. Y.) 378, 3 T. & C. 537), Animals, 99, 126, 146, 239, 281; Fences, 93.
Brady *v.* State (15 Lea (Tenn.) 628), Crim. L., 20.
Brady *v.* Toledo, A. A. & N. M. R. Co. (81 Mich. 616, 45 N. W. Rep. 1110), Cross., Inj. at, 289.
Braid *v.* Great Western R. Co. (10 U. C. C. P. 137), Death, etc., 302.
Brainard *v.* Boston & N. Y. C. R. Co. (12

Gray (Mass.) 407), Em. Dom., 360; Witn., 124.
Brainard *v.* Clapp (10 Cush. (Mass.) 6), Em. Dom., 138.
Brainard *v.* Connecticut River R. Co. (7 Cush. (Mass.) 506), Cross. St. & H., 113.
Brainard *v.* Missisquoi R. Co. (48 Vt. 107, 16 Am. Ry. Rep. 380), Em. Dom., 101, 123, 713.
Brainerd *v.* New York & H. R. Co. (10 Bosw. (N. Y.) 332), Bonds, 20.
Brainerd *v.* New York & H. R. Co. (25 N. Y. 496; affirming 10 Bosw. 332), Bonds, 20.
Brakken *v.* Minneapolis & St. L. R. Co. (7 Am. & Eng. R. Cas. 593, 29 Minn. 41, 11 N. W. Rep. 124), Em. Dom., 567; Sts. & H., 5, 134, 263.
Brakken *v.* Minneapolis & St. L. R. Co. (31 Minn. 45, 16 N. W. Rep. 459), Dam., 65.
Brammell *v.* Eastern Ky. R. Co. (Ky.) (22 S. W. Rep. 646), Em. Dom., 559.
Brampton & L. R. Co., In re (L. R. 10 Eq. 613, 39 L. J. Ch. 681, 18 W. R. 994, 23 L. T. 356), Dissol., 23.
Brampton & L. R. Co., In re (L. R. 10 Ch. 177, 44 L. J. Ch. 670, 23 W. R. 813, 33 L. T. 5; affirming 44 L. J. Ch. 537, L. R. 20 Eq. 620, 24 W. R. 113, 32 L. T. 592), Att'ys, 12.
Branch, Ex parte (53 Ala. 140), Intervent., 2.
Branch *v.* Atlantic & G. R. Co. (3 Woods (U. S.) 481), Charters, 69; Corp., 7; Deeds of Tr., 3; Mort., 7, 43, 69, 276.
Branch *v.* Charleston (92 U. S. 677), Tax., 65.
Branch *v.* Jesup (9 Am. & Eng. R. Cas. 558, 106 U. S. 468, 1 Sup. Ct. Rep. 495), Constr. Rys., 25; Mort., 43; Sales of Rds., 1, 11; Ult. Vir., 10.
Branch *v.* Macon & B. R. Co. (2 Woods (U. S.) 385), State Aid, 17.
Branch *v.* Port Royal & W. C. R. Co. (53 Am. & Eng. R. Cas. 276, 35 So. Car. 405, 14 S. E. Rep. 808), Employés, Inj. to, 537.
Branch *v.* Wilmington & W. R. Co. (77 N. Car. 347), Car. of M., 130; Penalty, 2.
Branch *v.* Wilmington & W. R. Co. (88 N. Car. 570), Car. of M., 125; Penalty, 2, 7.
Branch *v.* Wilmington & W. R. Co. (18 Am. & Eng. R. Cas. 621, 88 N. Car. 573), Bills of L., 103; Evid., 205.
Branch Bank *v.* Crocheron (5 Ala. 250), Bills & N., 8, 23.
Brand *v.* Lawrenceville Branch R. Co. (77 Ga. 506, 1 S. E. Rep. 255), Subscr., 105.
Brand *v.* Schenectady & T. R. Co. (8 Barb. (N. Y.) 368), Contrib. Neg., 4; Cross., Inj. at, 21; Negl., 5, 6; Tresp., Inj. to, 122.
Brandeis *v.* United States (3 Ct. of Cl. 99), Claims Against U. S., 1, 4.
Brandenburg *v.* St. Louis & S. F. R. Co. (44 Mo. App. 224), Animals, 153; Fences, 55, 59.
Brandon *v.* Brandon (2 Drew. & Sm. 305, 11 Jur. N. S. 30, 34 L. J. Ch. 333), Em. Dom., 1186.
Brandt *v.* Chicago, R. I. & P. R. Co. (26 Iowa 114), Animals, 630; Proc., 33; Tender, 4.
Branham *v.* Central R. Co. (78 Ga. 35, 1 S. E. Rep. 274), App., 24.
Branham *v.* Ft. Wayne & S. R. Co. (7 Ind. 524), Proc., 22.
Branham *v.* Record (42 Ind. 181), Subscr., 224.
Branin *v.* Connecticut & P. R. R. Co. (31 Vt. 214), Constr. Rys., 95.
Branley *v.* South Eastern R. Co. (12 C. B. N. S. 63, 31 L. J. C. P. 286, 9 Jur. N. S. 329, 6 L. T. 458, 1 Ry. & C. T. Cas. 20), Charges, 93; Discrim., 11.
Brann *v.* Chicago, R. I. & P. R. Co. (53 Iowa 595, 6 N. W. Rep. 5, 21 Am. Ry. Rep. 184), Employés, Inj. to, 93, 688; Fel. Serv., 95, 222, 224.
Brannenburg *v.* Indianapolis, P. & C. R. Co. (13 Ind. 103), Actions, 13.
Branner *v.* Branner (1 Lea (Tenn.) 101), Trover, 7.
Branner *v.* Hardy (18 La. Ann. 537), Mort., 249.
Branson *v.* Oregonian R. Co. (10 Oreg. 278), Contr., 77.
Branson *v.* Oregonian R. Co. (16 Am. & Eng. R. Cas. 517, 11 Oreg. 161, 2 Pac. Rep. 86), Sales, 11.
Branson *v.* Philadelphia (47 Pa. St. 329), Mun. Corp., 53.
Brantford, W. & L. E. R. Co. *v.* Huffman (19 Can. Sup. Ct. 336; affirming 18 Ont. App. 415), Constr. Rys., 39.
Brasen *v.* Seattle, L. S. & E. R. Co. (4 Wash. 754, 31 Pac. Rep. 34), Fires, 296.
Brasher *v.* Denver & R. G. R. Co. (12 Colo. 384, 21 Pac. Rep. 44), Car. of M., 258, 261.
Braslin *v.* Somerville Horse R. Co. (32 Am. & Eng. R. Cas. 406, 145 Mass. 64, 4 N. Eng. Rep. 888, 13 N. E. Rep. 65), Franch., 4; Leases, 43; St. Rys., 365.
Brassell *v.* New York C. & H. R. R. Co. (3 Am. & Eng. R. Cas. 380, 84 N. Y. 241), Car. of P., 453.
Brassey *v.* New York & N. E. R. Co. (17 Am. & Eng. R. Cas. 285, 22 Blatchf. (U. S.) 72, 19 Fed. Rep. 663), Receiv., 20.
Brassfield *v.* Hannibal & St. J. R. Co. (19 Mo. App. 651), Car. of P., 642.
Brassfield *v.* Patton (32 Mo. App. 572), Animals, 127.
Bravard *v.* Cincinnati, H. & L. R. Co. (115 Ind. 1, 14 West. Rep. 817, 17 N. E. Rep. 183), Em. Dom., 191, 1013, 1017; Stat., 4.
Braxton *v.* Hannibal & St. J. R. Co. (13 Am. & Eng. R. Cas. 494, 77 Mo. 455), Animals, 65, 194, 392.
Bray *v.* Seligman (9 Am. & Eng. R. Cas. 653, 75 Mo. 31), Partn., 9.
Bray *v.* South Eastern R. Co. (7 D. & L. 307, 19 L. J. Q. B. 11), Em. Dom., 1144.
Brayton *v.* Fall River (124 Mass. 95), Bridges, 1.
Brayton *v.* New York, L. E. & W. R. Co. (72 Hun 602, 54 N. Y. S. R. 763, 25 N. Y. Supp. 264), Proc., 30.
Brazelton *v.* Nashville & C. R. Co. (3 Head (Tenn.) 570), Set-off, 1.
Brazil *v.* Western N. C. R. Co. (93 N. Car. 313), Employés, Inj. to, 177.
Breckenfelder *v.* Lake Shore & M. S. R. Co.

(79 Mich. 560, 44 N. W. Rep. 957), Cross., Inj. at, 326; Death, etc., 279.
Brecon Markets Co. *v.* Neath & B. R. Co. (L. R. 7 C. P. 555, 27 L. T. 316), Charges, 73.
Breed *v.* Eastern R. Co. (5 Gray (Mass.) 470, n.), Em. Dom., 436.
Breed *v.* Mitchell (48 Ga. 533), Attach., 10; Car. of M., 106, 236.
Breed *v.* Nagle (46 Ga. 112), Evid., 151; Liens, 46.
Breed *v.* Northern Pac. R. Co. (35 Fed. Rep. 642), Evid., 110.
Breedlove *v.* Martinville & F. R. Co. (12 Ind. 114), Evid., 233; Subscr., 66, 112.
Breen *v.* New York C. & H. R. R. Co. (34 Am. & Eng. R. Cas. 523, 109 N. Y. 297, 16 N. E. Rep. 60, 14 N. Y. S. R. 835; affirming 40 Hun 638, mem.), Car. of P., 489, 572.
Breen *v.* Railway Transfer Co. (51 Minn. 4, 52 N. W. Rep. 975), New Tr., 17.
Breen *v.* Texas & P. R. Co. (44 Tex. 302), Stat., 34.
Breen *v.* Texas & P. R. Co. (50 Tex. 43), Eject. Pass. 9, 54; Tickets & F., 48, 60.
Breese *v.* Trenton Horse R. Co. (41 Am. & Eng. R. Cas. 230, 52 N. J. L. 250, 19 Atl. Rep. 204), St. Rys., 436.
Breeze *v.* Midland R. Co. (26 Grant's Ch. (U. C.) 225), Liens, 42.
Brehm *v.* Great Western R. Co. (34 Barb. (N. Y.) 256), Embankm., 6; Evid., 173; Negl., 47; Witn., 196.
Brehme *v.* Dinsmore (25 Md. 328), Exp. Cos., 72.
Bremmer *v.* Green Bay, S. P. & N. R. Co. (19 Am. & Eng. R. Cas. 575, 61 Wis. 114, 20 N. W. Rep. 687), Animals, 127.
Brenan *v.* Shelton (2 Bailey (So. Car.) 152), Pl., 12.
Brennan *v.* Fair Haven & W. R. Co. (45 Conn. 284, 17 Am. Ry. Rep. 263, 29 Am. Rep. 679), Children, Inj. to, 46.
Brennan *v.* Gordon (118 N. Y. 489, 23 N. E. Rep. 810, 29 N. Y. S. R. 829; reversing 14 Daly 47, 3 N. Y. S. R. 604), Employés, Inj. to, 29; Fel. Serv., 88, 143, 145.
Brennan *v.* Michigan C. R. Co. (93 Mich. 156, 53 N. W. Rep. 358), Employés, Inj. to, 402; Witn., 16.
Brennan *v.* New York C. & H. R. R. Co. (30 N. Y. S. R. 378, 55 Hun 611, 8 N. Y. Supp. 716), New Tr., 23.
Brentford & I. Tramways Co., In re (L. R. 26 Ch. D. 527, 53 L. J. Ch. D. 624, 50 L. T. 580, 32 W. R. 895), Dissol., 12.
Brentner *v.* Chicago, M. & St. P. R. Co. 7 Am. & Eng. R. Cas. 574, 58 Iowa 625, 12 N. W. Rep. 615), Animals, 142, 315, 312, 404, 537.
Brentner *v.* Chicago, M. & St. P. R. Co. (19 Am. & Eng. R. Cas. 448, 68 Iowa 530, 23 N. W. Rep. 245, 27 N. W. Rep. 505), Animals, 312, 480, 517, 578, 501.
Bresnahan *v.* Michigan C. R. Co. (8 Am. & Eng. R. Cas. 147, 49 Mich. 410, 13 N. W. Rep. 797), Death, etc., 204.
Brewer *v.* Boston, C. & F. R. Co. (113 Mass. 52), Cross. St. & H., 99, 114.
Brewer *v.* Flint & P. M. R. Co. (56 Mich. 620, 23 N. W. Rep. 440), Employés, Inj. to, 215.
Brewer *v.* Housatonic R. Co. (107 Mass. 277), Witn., 55.
Brewer *v.* New York, L. E. & W. R. Co. (47 Am. & Eng. R. Cas. 485, 124 N. Y. 59, 26 N. E. Rep. 324, 35 N. Y. S. R. 60; affirming 45 Hun 595, mem.), Car. of P., 53; Employés, Inj. to, 478; Exp. Cos., 13.
Brewer *v.* Union Pac. R. Co. (31 Hun (N. Y.) 545; affirmed (?) 101 N. Y. 647, mem.), Union Pac. R. Co., 12.
Brewster *v.* Michigan C. R. Co. (5 How. Pr. (N. Y.) 183), For. Corp., 25; Proc., 30.
Brewster *v.* Mongeon (3 Montr. L. R. 20), Em. Dom., 1274.
Brewster *v.* Sussex R. Co. (40 N. J. L. 57), Nuis., 40.
Brice *v.* Louisville & N. R. Co. (Ky.) (38 Am. & Eng. R. Cas. 38, 9 S. W. Rep. 288), Death, etc., 153; Employés, Inj. to, 214, 402; Pl., 176.
Brick *v.* Rochester, N. Y. & P. R. Co. (21 Am. & Eng. R. Cas. 605, 98 N. Y. 211; reversing (?) 31 Hun 453), Employés, Inj. to, 287; Fel. Serv., 221.
Brickell *v.* New York C. & H. R. R. Co. (42 Am. & Eng. R. Cas. 107, 120 N. Y. 290, 24 N. E. Rep. 449, 30 N. Y. S. R. 932; affirming 46 Hun 678, 12 N. Y. S. R. 450), Cross., Inj. at, 285; Imp. Neg., 25.
Bricker *v.* Missouri Pac. R. Co. (83 Mo. 391), Animals, 303, 335.
Bricker *v.* Philadelphia & R. R. Co. (40 Am. & Eng. R. Cas. 688, 132 Pa. St. 1, 18 Atl. Rep. 983), Car. of Mails, 18.
Brickman *v.* South Carolina R. Co. (8 So. Car. 173), Death, etc., 96.
Brickner *v.* New York C. R. Co. (2 Lans. (N. Y.) 506; affirmed in 49 N. Y. 672, mem.), Fel. Serv., 71, 92, 213.
Briddon *v.* Great Northern R. Co. (28 L. J. Ex. 51, 32 L. T. 94), Car. of M., 136.
Bridge *v.* Grand Junction R. Co. (3 M. & W. 244), Car. of P., 365; Imp. Neg., 1.
Bridgeport *v.* Bishop (33 Conn. 187), Tax., 149.
Bridgeport *v.* Housatonic R. Co. (15 Conn. 475), Mun. Aid, 22, 320.
Bridgeport *v.* New York & N. H. R. Co. (36 Conn. 255), Cross. St. & H., 41; Sts. & H., 342; Words & Ph., 97.
Bridgeport Bank *v.* New York & N. H. R. Co. (30 Conn. 231), Agency, 86; Stock, 38.
Bridge Prop'rs *v.* Hoboken L. & I. Co. (1 Wall. (U. S.) 116), Fed. Cts., 24.
Bridger *v.* Asheville & S. R. Co. (25 So. Car. 24), Children, Inj. to, 27, 32, 77, 103; Contrib. Neg., 94.
Bridger *v.* Asheville & S. R. Co. (27 So. Car. 456, 13 Am. St. Rep. 653, 3 S. E. Rep. 860), Children, Inj. to, 71, 105, 165, 186; Evid., 37, 67; Witn., 97, 99.
Bridges *v.* North London R. Co. (43 L. J. Q. B. 151, L. R. 7 Q. B. 213, 23 W. R. 62, 30 L. T. 844; reversing 40 L. J. Q. B. 188, L. R. 6 Q. B. 377, 19 W. R. 824, 24 L. T. 385), Car. of P., 275.
Bridges *v.* St. Louis, I. M. & S. R. Co. (6 Mo. App. 389), Employés, Inj. to, 94, 264, 353.

Bridges *v.* Sullivan County Sup'rs (92 N. Y. 570; affirming 27 Hun 175), Tax., 314.
Bridgman *v.* St. Johnsbury & L. C. R. Co. (23 Am. & Eng. R. Cas. 30, 58 Vt. 198, 2 Atl. Rep. 467), Em. Dom., 862, 863.
Briggs *v.* Boston & L. R. Co. (6 Allen (Mass.) 246), Car. of M., 656; Charges, 71.
Briggs *v.* Grand Trunk R. Co. (24 U. C. Q. B. 510), Time-tables, 1.
Briggs *v.* Lewiston & A. Horse R. Co. (32 Am. & Eng. R. Cas. 167, 79 Me. 363, 10 Atl. Rep. 47), St. Rys., 191, 212, 222.
Briggs *v.* Minneapolis St. R. Co. (52 Minn. 36, 53 N. W. Rep. 1019), Witn., 190.
Briggs *v.* Missouri Pac. R. Co. (82 Mo. 37), Animals, 356; Pl., 38.
Briggs *v.* New York C. & H. R. R. Co. (1 Sheld. (N. Y.) 402), Fires, 22.
Briggs *v.* New York C. & H. R. R. Co. (1 Sheld. (N. Y.) 433), Evid., 276, 287.
Briggs *v.* New York C. & H. R. R. Co. (30 Hun (N. Y.) 291), Bridges, 80.
Briggs *v.* New York C. & H. R. R. Co. (72 N. Y. 26), Fires, 215, 362.
Briggs *v.* New York C. R. Co. (28 Barb. (N. Y.) 515), Car. of M., 566, 786; Trover, 10.
Briggs *v.* St. Louis & S. F. R. Co. (111 Mo. 168, 20 S. W. Rep. 32), Animals, 392, 524, 584, 617, 632.
Briggs *v.* Union St. R. Co. (37 Am. & Eng. R. Cas. 204, 148 Mass. 72, 19 N. E. Rep. 19), St. Rys., 395, 398, 414.
Brigham *v.* Agricultural Branch R. Co. (1 Allen (Mass.) 316), Location, etc., 7.
Brigham *v.* Luddington (12 Blatchf. (U. S.) 237), Parties, 41, 25.
Brigham *v.* Port Royal & A. R. Co. (74 Ga. 365), Proc., 22.
Bright *v.* Central City St. R. Co. (88 Ga. 535, 15 S. E. Rep. 12), Intervent., 3.
Brighthope R. Co. *v.* Rogers (8 Am. & Eng. R. Cas. 710, 76 Va. 443), Fire Ins., 11; Fires, 38, 61, 241.
Brighton & D. R. Co., In re (L. R. 44 Ch. D. 28), Stock, 4.
Brignoli *v.* Chicago & G. E. R. Co. (4 Daly (N. Y.) 182), Car. of P., 618; Derailm., 4, 6.
Briesen *v.* Long Island R. Co. (31 Hun (N. Y.) 112), Nuis., 3.
Brill *v.* Eddy (115 Mo. 596, 22 S. W. Rep. 488), App., 68; Children, Inj. to, 11, 12, 17, 127, 128.
Brill *v.* Grand Trunk R. Co. (20 U. C. C. P. 9), Car. of M., 739.
Brill *v.* Grand Trunk R. Co. (20 U. C. C. P. 440), Car. of M., 711.
Brimberry *v.* Savannah, F. & W. R. Co. (78 Ga. 641, 3 S. E. Rep. 274), Nuis., 6.
Brimmer *v.* Rebman (138 U. S. 78, 11 Sup. Ct. Rep. 213), Int. Com., 227.
Brine *v.* Great Western R. Co. (2 B. & S. 402, 8 Jur. N. S. 410, 31 L. J. Q. B. 101, 10 W. R. 341, 6 L. T. 50), Pl., 76.
Brink *v.* Kansas City, St. J. & C. B. R. Co. (17 Mo. App. 177), Waters & W., 14.
Brintnall *v.* Saratoga & W. R. Co. (32 Vt. 665), Car. of M., 616.
Brisbane *v.* Delaware, L. & W. R. Co. (94 N. Y. 204; affirming 25 Hun 438), Divid., 4.
Brisbine *v.* St. Paul & S. C. R. Co. (23 Minn. 114, 17 Am. Ry. Rep. 65), Em. Dom., 345, 555; Rip. Rts., 1.
Briscoe *v.* Missouri Pac. R. Co. (25 Mo. App. 468), Animals, 351, 463.
Briscoe *v.* Southern Kan. R. Co. (40 Am. & Eng. R. Cas. 599, 40 Fed. Rep. 273), Animals, 295; Leases, 12, 40.
Brisenden *v.* Chamberlain (53 Fed. Rep. 307), Rem. of C., 12, 32.
Bristol *v.* Chicago & A. R. Co. (15 Ill. 436), Trial, 10.
Bristol *v.* Rensselaer & S. R. Co. (9 Barb. (N. Y.) 158), Car. of M., 259, 727, 724.
Bristol & E. R. Co. *v.* Collins (7 H. L. Cas. 194, 5 Jur. N. S. 1367, 29 L. J. Ex. 41), Car. of M., 633.
Bristol & E. R. Co. *v.* Garton (8 H. L. Cas. 477, 30 L. J. Ex. 241, 1 Ry. & C. T. Cas. 22; affirming 3 L. T. 251, 4 H. & N. 831, 5 Jur. N. S. 1172, 28 L. J. Ex. 169), Words & Ph., 183.
Bristol & E. R. Co. *v.* Garton (4 H. & N. 33, 5 Jur. N. S. 1172, 28 L. J. Ex. 169), Charges, 96.
Bristol & E. R. Co. *v.* Somerset & D. R. Co. (2 Ry. & C. T. Cas. 82), Contr., 32.
Bristol & E. R. Co. *v.* Tucker (13 C. B. N. S. 207, 7 L. T. 464), Sts. & H., 359.
Bristol & N. S. R. Co., In re (37 L. T. 527), Constr. Rys., 1.
Bristol & N. S. R Co., In re (L. R. 3 Q. B. D. 10, 47 L. J. Q. B. D. 48, 26 W. R. 236), Mand., 4, 12.
Bristol & N. S. R. Co. *v.* Somerset & D. R. Co. (22 W. R. 399), Em. Dom., 1126.
Bristol & N. S. R. Co. *v.* Somerset & D. R. Co. (22 W. R. 601), Em. Dom., 1126.
Bristol T. & C. Co. *v.* Mayor, etc., of Bristol (L. R. 25 Q. B. D. 427), Tramw., 3.
British & F. M. Ins. Co. *v.* Gulf, C. & S. F. R. Co. (21 Am. & Eng. R. Cas. 112, 63 Tex. 475), Car. of M., 718; Fire Ins., 1, 15.
British & N. S. R. Co., In re (L. R. 3 Q. B. D. 10, 47 L. J. Q. B. D. 48, 26 W. R. 236, 3 Ry. & C. T. Cas. xviii), Cross. St. & H., 96.
Britton *v.* Atlanta & C. A. L. R. Co. (18 Am. & Eng. R. Cas. 391, 88 N. Car. 536, 43 Am. Rep. 749), Car. of P., 60, 70, 326, 555; Col. Pers., 7, 9.
Britton *v.* Des Moines, O. & S. R. Co. (10 Am. & Eng. R. Cas. 412, 59 Iowa 540, 13 N. W. Rep. 710), Em. Dom., 629, 734.
Britton *v.* Grand Rapids St. R. Co. (90 Mich. 159, 51 N. W. Rep. 276), Dam., 93; St. Rys., 367, 373.
Britton *v.* Northern Pac. R. Co. (47 Minn. 340, 50 N. W. Rep. 231), Employés, Inj. to, 8.
Britton *v.* South Wales R. Co. (27 L. J. Ex. 355), App., 126.
Broadstreet *v.* Clark (65 Iowa 670, 22 N. W. Rep. 919), Attach., 35.
Broadway & S. A. R. Co., In re (69 Hun 275, 53 N. Y. S. R. 38, 23 N. Y. Supp. 609), Em. Dom., 292, 299, 884.
Broadway & S. A. R. Co., In re (73 Hun 7, 57 N. Y. S. R. 108), Em. Dom., 241, 321, 343.
Broadway & S. A. R. Co. *v.* Mayor, etc., of

N. Y. (49 Hun 126, 16 N. Y. S. R. 950, 1 N. Y. Supp. 646), St. Rys., 174, 273.
Broadway Surface R. Co., In re (34 Hun (N. Y.) 414), Em. Dom., 287; St. Rys., 112.
Broadway Underground R. Co., In re (23 Hun (N. Y.) 693), Underground Rys., 2.
Broadwell *v.* Butler (6 McLean (U. S.) 296), Bills of L., 105; Car. of M., 104, 128, 205, 750.
Brocaw *v.* Gibson County Com'rs (3 Am. & Eng. R. Cas. 573, 73 Ind. 543), Mun. Aid, 30, 209, 216, 226, 233, 411.
Brock *v.* Connecticut & P. R. R. Co. (35 Vt. 373), Fences, 76.
Brock *v.* Old Colony R. Co. (33 Am. & Eng. R. Cas. 96, 146 Mass. 194, 5 N. Eng. Rep. 724, 15 N. E. Rep. 555), Em. Dom., 295, 340; Location, etc., 14.
Brockbank *v.* Whitehaven Junction R. Co. 7 H. & N. 834, 31 L. J. Ex. 349), Husb. & W., 41.
Brockert *v.* Central Iowa R. Co. (75 Iowa 529, 39 N. W. Rep. 871), App., 121.
Brockert *v.* Central Iowa R. Co. (82 Iowa 369, 47 N. W. Rep. 1026), Animals, 312, 452, 648.
Brocket *v.* Ohio & P. R. Co. (14 Pa. St. 241), Em. Dom., 89.
Brocklebank *v.* East London R. Co. (L. R. 12 Ch. D. 839), Receiv., 75.
Brocklehurst *v.* Manchester, B., R. & O. S. Tramways Co. (26 Am. & Eng. R. Cas. 369, L. R. 17 Q. B. D. 118), Tramw., 6.
Brock Tp. *v.* Toronto & N. R. Co. (17 Grant's Ch. (U. C.) 425), Mun. Aid. 244, 267, 306.
Brock Tp. *v.* Toronto & N. R. Co. (37 U. C. Q. B. 372), Lim. of Ac., 49.
Brockville *v.* Sherwood (7 Grant's Ch. (U. C.) 297), Exec., 11.
Brockville & O. R. Co. *v.* Canada C. R. Co. (41 U. C. Q. B. 431), Bills & N., 4.
Brockway *v.* Innes (39 Mich. 47), Constr. Rys., 91.
Brockway *v.* Lascala (1 Edm. Sel. Cas. (N. Y.) 135), Car. of P., 134, 142, 394.
Broder *v.* Natoma W. & M. Co. (50 Cal. 621), Land Grants, 5.
Broderick *v.* Detroit Union R. S. & R. Co. (56 Mich. 261, 22 N. W. Rep. 802, 56 Am. Rep. 382), Employés, Inj. to, 277; Pl., 175.
Brodeur *v.* Valley Falls Co. (16 R. I. 448, 17 Atl. Rep. 54), Employés, Inj. to, 293; Fel. Serv., 113.
Brodie *v.* McCabe (33 Ark. 690), Mun. Aid, 407.
Brodie *v.* Northern R. Co. (6 Ont. 180), Car. of M., 684.
Broeck *v.* Wabash, St. L. & P. R. Co. (13 Ill. App. 556), Trial, 190.
Brogden, In re (9 C. B. N. S. 229, 30 L. J. C. P. 61, 4 L. T. 361), Em. Dom., 1178.
Broiestedt *v.* South Side R. Co. (55 N. Y. 220), Adv. Poss., 14.
Brokaw *v.* New Jersey R. & T. Co. (32 N. J. L. 328), Agency, 72, 82; Assault, 1.
Bromley *v.* Birmingham Mineral R. Co. (95 Ala. 397, 11 So. Rep. 341), Death, etc., 272, 291; Negl., 43.
Bronenberg *v.* Madison County Com'rs (41 Ind. 502), Mun. Aid, 148.
Bronk *v.* New York & N. H. R. Co. (95 N. Y. 656), App., 23.
Bronk *v.* New York & N. H. R. Co. (5 Daly (N. Y.) 454), Death, etc., 194.
Bronson, In re (1 Ont. 415), Charters, 64; Cross. St. & H., 95; Mun. Corp., 50.
Bronson, In re (13 Ont. Pr. 440), Em. Dom., 1227.
Bronson *v.* Coffin (108 Mass. 175), Deeds, 12; Fences, 10, 44.
Bronson *v.* Forty-second St., M. & St. N. A. R. Co. (50 N. Y. S. R. 740, 67 Hun 649, 21 N. Y. Supp. 695), New Tr., 73.
Bronson *v.* La Crosse & M. R. Co. (1 Wall. (U. S.) 405), App., 147; Judicial S., 6.
Bronson *v.* La Crosse & M. R. Co. (2 Wall. (U. S.) 283), Bonds, 44; Mort., 124, 199.
Bronson *v.* La Crosse & M. R. Co. (2 Black (U. S.) 524), App., 7; Mort., 186, 200, 212.
Brooke *v.* Chicago, R. I. & P. R. Co. (81 Iowa 504, 47 N. W. Rep. 74), Death, etc., 267, 305, 312; Evid., 77, 287; Trial, 126.
Brooke *v.* Grand Trunk R. Co. (15 Mich. 332), Tickets & F., 109.
Brooke *v.* New York, L. E. & W. R. Co. (21 Am. & Eng. R. Cas. 64, 108 Pa. St. 529, 1 Atl. Rep. 206), Agency, 67; Bills of L., 3, 15, 36, 121.
Brooke *v.* Toronto Belt Line R. Co. (21 Ont. 401), Em. Dom., 1219, 1221.
Brookfield *v.* New Brunswick & C. R. & L. Co. (13 New Brun. 409), Liens, 17.
Brookhaven, L. & M. Co. *v.* Illinois C. R. Co. (68 Miss. 432, 10 So. Rep. 66), App., 24; Fires, 299, 302, 361; Negl., 12.
Brookhouse *v.* Union R. Co. (132 Mass. 178), Jurisd., 20.
Brookins *v.* Central R. & B. Co. (48 Ga. 523, 11 Am. Ry. Rep. 383), Sts. & H., 342a.
Brooklyn *v.* Ætna L. Ins. Co. (99 U. S. 362), Coupons, 19; Judgm., 18.
Brooklyn *v.* Brooklyn City R. Co. (57 Barb. (N. Y.) 497, 8 Abb. Pr. N. S. 356; affirmed in 47 N. Y. 475), Dam., 16; St. Rys., 153.
Brooklyn *v.* Brooklyn City R. Co. (47 N. Y. 475; affirming 57 Barb. 497, 8 Abb. Pr. N. S. 356), St. Rys., 166.
Brooklyn & R. B. R. Co. *v.* Reid (21 Hun (N. Y.) 273), Refer., 1.
Brooklyn C. & J. R. Co. *v.* Brooklyn City R. Co. (33 Barb. (N. Y.) 420), St. Rys., 191, 250.
Brooklyn C. R. Co. *v.* Brooklyn City R. Co. (32 Barb. (N. Y.) 358), Consol., 1; St. Rys., 73, 94, 230.
Brooklyn City & N. R. Co. *v.* Coney Island & B. R. Co. (35 Barb. (N. Y.) 364), St. Rys., 48, 102, 106, 110.
Brooklyn City & N. R. Co. *v.* National Bank (102 U. S. 14), Bills & N., 15.
Brooklyn City R. Co. *v.* Furey (4 Abb. Pr. N. S. (N. Y.) 364), St. Rys., 276.
Brooklyn Crosstown R. Co. *v.* Brooklyn (37 Hun (N. Y.) 413), St. Rys., 267.
Brooklyn Crosstown R. Co. *v.* Brooklyn City R. Co. (51 Hun 600, 22 N. Y. S. R. 56, 3 N. Y. Supp. 901), Contr., 105.

Brooklyn El. R. Co., In re (46 Am. & Eng. R. Cas. 251, 125 N. Y. 434, 26 N. E. Rep. 474, 35 N. Y. S. R. 451; affirming 57 Hun 590, 32 N. Y. S. R. 1065, 11 N. Y. Supp. 161), Charters, 87; Elev. Rys., 1, 4.
Brooklyn El. R. Co., In re (27 N. Y. Supp. 493, 57 N. Y. S. R. 652), Elev. Rys., 36.
Brooklyn El. R. Co., In re (55 Hun 165, 28 N. Y. S. R. 627, 8 N. Y. Supp. 78), Elev. Rys., 163; Sts. & H., 276.
Brooklyn El. R. Co. *v.* Nagel (75 Hun 590, 27 N. Y. Supp. 669), Elev. Rys., 30; Em. Dom., 315.
Brooklyn Heights R. Co. *v.* Brooklyn (46 N. Y. S. R. 299, 18 N. Y. Supp. 876), Cable R'ys, 5; Sts. & H., 103.
Brooklyn Rapid Transit Co., In re (62 How. Pr. (N. Y.) 404), Elev. Rys., 24.
Brooklyn Steam Transit Co. *v.* Brooklyn (78 N. Y. 524), Charters, 83; Sts. & H., 132.
Brooklyn Trust Co. *v.* Hebron (51 Conn. 22), Mun. Aid, 156.
Brooklyn, W. & N. R. Co., In re (72 N. Y. 245, 55 How. Pr. 14), Charters, 88.
Brooklyn, W. & N. R. Co., In re (75 N. Y. 335), Charters, 83, 102.
Brooklyn, W. & N. R. Co., In re (81 N. Y. 69; affirming 19 Hun 314), Leases, 5.
Brooks *v.* American Exp. Co. (14 Hun (N. Y.) 364), Exp. Cos., 54.
Brooks *v.* Boston & M. R. Co. (16 Am. & Eng. R. Cas. 345, 135 Mass. 21), Car. of P., 420, 428.
Brooks *v.* Buffalo & N. F. R. Co. (1 Abb. Dec. (N. Y.) 211, 27 Barb. 532; affirming 25 Barb. 600), Cross., Inj. at, 251, 252.
Brooks *v.* Burlington & S. W. R. Co. (101 U. S. 443), Liens, 32; Mort., 91.
Brooks *v.* Chicago, M. & St. P. R. Co. (32 Am. & Eng R. Cas. 383, 73 Iowa 179, 34 N. W. Rep. 805), Fires, 214, 343; Witn., 55.
Brooks *v.* Davenport & St. P. R. Co. (37 Iowa 99), Em. Dom., 580.
Brooks *v.* Dick (4 Silv. App. 645, 135 N. Y. 652, 32 N. E. Rep. 230; affirming 17 N. Y. Supp. 259, 62 Hun 622, mem., 43 N. Y. S. R. 37), Reorg., 1, 18.
Brooks *v.* Dinsmore (3 N. Y. S. R. 587), Car. of M., 106, 108.
Brooks *v.* Hannibal & St. J. R. Co. (27 Mo. App. 573), Animals, 49.
Brooks *v.* Hannibal & St. J. R. Co. (35 Mo. App. 571), Animals, 62; Comp. Neg., 29, 48.
Brooks *v.* Kings County El. R. Co. (4 Misc. 288, 53 N. Y. S. R. 452, 23 N. Y. Supp. 1031), Elev. Rys., 216.
Brooks *v.* Lawrence (1 Edm. Sel. Cas. (N. Y.) 496), Agency, 31.
Brooks *v.* Lincoln St. R. Co. (37 Am. & Eng. R. Cas. 560, 22 Neb. 816, 36 N. W. Rep. 529), St. Rys., 453, 503.
Brooks *v.* London & N. W. R. Co. (33 W. R. 167), Farm Cross., 13.
Brooks *v.* Martin (2 Wall. (U. S.) 70), Partn., 2.
Brooks *v.* New York & E. R. Co. (13 Barb. (N. Y.) 594), Animals, 181; Cat.-Gds., 13.
Brooks *v.* New York & G. L. R. Co. (30 Hun (N. Y.) 47), Appear., 3; Dam., 31.
Brooks *v.* Northern Pac. R. Co. (47 Fed. Rep. 687), Employés, Inj. to, 212, 416.
Brooks *v.* Schwerin (54 N. Y. 343), Husb. & W., 16.
Brooks *v.* Vermont C. R. Co. (14 Blatchf. (U. S.) 463), Mort., 174.
Brooks *v.* Vermont C. R. Co. (17 Am. & Eng. R. Cas. 276, 22 Fed. Rep. 211), Reorg., 8.
Broosbooft, In re (L. R. 42 Ch. D. 250), Em. Dom., 1143.
Bross *v.* Cairo & V. R. Co. (9 Ill. App. 363), Set-off, 9.
Brossman *v.* Lehigh Valley R. Co. (113 Pa. St. 490, 6 Atl. Rep. 226, 57 Am. Rep. 479), Employés, Inj. to, 270.
Brothers *v.* South Carolina R. Co. (5 So. Car. 55), Animals, 51.
Brough *v.* Brantford, N. & P. B. R. Co. (25 Grant's Ch. (U. C.) 43), Em. Dom., 1278.
Broughton & P. P. Coal Co. *v.* Great Western R. Co. (4 Ry. & C. T. Cas. 191), Discrim., 6, 45.
Broussard *v.* Sabine & E. T. R. Co. (75 Tex. 702, 13 S. W. Rep. 68), App., 110.
Broussard *v.* Sabine & E. T. R. Co. (80 Tex. 329, 16 S. W. Rep. 30), Flood. Lds., 47, 87, 95.
Brouty *v.* Five Thousand Two Hundred and Fifty-Six Bundles of Elm Staves (21 Fed. Rep. 590), Bills of L., 17.
Brow *v.* Boston & A. R. Co. (157 Mass. 399, 32 N. E. Rep. 362), Cross., Inj. at, 51.
Brower *v.* Edson (47 Mich. 91, 10 N. W. Rep. 121), Contrib. Neg., 109.
Brower *v.* Second & T. St. Pass. R. Co. (3 Phila. (Pa.) 161), Subscr., 4, 7.
Brown, Ex parte (9 Am. & Eng. R. Cas. 723, 15 So. Car. 518), Receiv., 75, 82.
Brown, Ex parte (17 Am. & Eng. R. Cas. 302, 18 So. Car. 87), Receiv., 87.
Brown, Ex parte (58 Ala. 536, 21 Am. Ry. Rep. 101), Parties, 24.
Brown *v.* Adams (3 Tex. App. (Civ. Cas.) 462), Bills of L., 46, 97; Car. of M., 731, 795.
Brown *v.* Adams Exp. Co. (15 W. Va. 812), Lim. of Liab., 12, 28, 40.
Brown *v.* Alabama G. S. R. Co. (87 Ala. 370, 6 So. Rep. 295), Just. P., 3.
Brown *v.* Atchison, T. & S. F. R. Co. (10 Am. & Eng. R. Cas. 739, 29 Kan. 186; further appeal 15 Am. & Eng. R. Cas. 271, 31 Kan. 1), New Tr., 1.
Brown *v.* Atchison, T. & S. F. R. Co. (15 Am. & Eng. R. Cas. 271, 31 Kan. 1, 1 Pac. Rep. 605; former appeals 26 Kan. 443, 29 Kan. 186), Employés, Inj. to, 49, 413; Trial, 58.
Brown *v.* Atlanta & C. A. L. R. Co. (13 Am. & Eng. R. Cas. 479, 19 So. Car. 39), Car. of M., 102; Fires, 30, 256, 277.
Brown *v.* Barnes (151 Pa. St. 562, 25 Atl. Rep. 144), Car. of P., 428; Trial, 66.
Brown *v.* Beatty (34 Miss. 227), Em. Dom., 84, 234, 530, 741.
Brown *v.* Bristol & E. R. Co. (9 W. R. 872, 4 L. T. 830), Trial, 204.

Brown *v.* Broadway & S. A. R. Co. (18 J. & S. (N. Y.) 106), St. Rys., 513.
Brown *v.* Buck (54 Ark. 453, 16 S. W. Rep. 195), Liens, 19, 39.
Brown *v.* Buffalo & S. L. R. Co. (22 N. Y. 191), Death, etc., 85; Negl., 41.
Brown *v.* Buffalo, N. Y. & E. R. Co. (27 Hun (N. Y.) 342), Stockh., 126.
Brown *v.* Calumet River R. Co. (125 Ill. 600, 15 West. Rep. 556, 18 N. E. Rep. 283; affirming 37 Ill. App. 113), Em. Dom., 249, 358, 451, 618, 915; Quo War., 3.
Brown *v.* Camden & A. R. Co. (83 Pa. St. 316, 15 Am. Ry. Rep. 421), Bagg., 7, 89.
Brown *v.* Canadian Pac. R. Co. (3 Man. 496), Bagg., 67, 69, 70.
Brown *v.* Canadian Pac. R. Co. (4 Man. 396), Bagg., 101.
Brown *v.* Carolina C. R. Co. (83 N. Car. 128), Nuis., 20, 21; Receiv., 125.
Brown *v.* Cayuga & S. R. Co. (12 N. Y. 486), Flood. Lds., 7.
Brown *v.* Central Pac. R. Co. (68 Cal. 171, 8 Pac. Rep. 828), Death, etc., 137.
Brown *v.* Central Pac. R. Co. (Cal.) (12 Pac. Rep. 512), Employés, Inj. to, 182, 293; Fel. Serv., 138.
Brown *v.* Central Pac. R. Co. (72 Cal. 523, 14 Pac. Rep. 138; reversing on rehearing 12 Pac. Rep. 512), Fel. Serv., 36, 375.
Brown *v.* Chicago & A. R. Co. (80 Mo. 457), Flood. Lds., 88.
Brown *v.* Chicago, B. & K. C. R. Co. (101 Mo. 484, 14 S. W. Rep. 719), Adv. Poss., 8; Em. Dom., 1007.
Brown *v.* Chicago, M. & St. P. R. Co. (3 Am. & Eng. R. Cas. 444, 54 Wis. 342, 11 N. W. Rep. 356, 41 Am. Rep. 41), Car. of P., 225, 537, 560; Dam., 2; Negl., 48.
Brown *v.* Chicago, M. & St. P. R. Co. (80 Wis. 162, 49 N. W. Rep. 807), Car. of P., 426.
Brown *v.* Chicago, R. I. & P. R. Co. (51 Iowa 235), Eject. Pass., 67.
Brown *v.* Chicago, R. I. & P. R. Co. (64 Iowa 652, 21 N. W. Rep. 193), Death, etc., 278; Employés, Inj. to, 90.
Brown *v.* Chicago, R. I. & P. R. Co. (69 Iowa 161, 28 N. W. Rep. 487; affirming 64 Iowa 652, 21 N. W. Rep. 193), Employés, Inj. to, 201, 370; Fel. Serv., 464.
Brown *v.* Chicago, S. F. & C. R. Co. (36 Mo. App. 458), Liens, 53.
Brown *v.* Combs (29 N. J. L. 36), Deeds, 1.
Brown *v.* Com'rs for Railways (L. R. 15 App. Cas. 240), Em. Dom., 1188.
Brown *v.* Congress & B. St. R. Co. (8 Am. & Eng. R. Cas. 383, 49 Mich. 153, 13 N. W. Rep. 494), Negl., 100; St. Rys., 341.
Brown *v.* Corey (43 Pa. St. 495), Em. Dom., 128, 153, 664, 952.
Brown *v.* Corson (16 Oreg. 388, 19 Pac. Rep. 66, 21 Pac. Rep. 47), Land Grants, 106.
Brown *v.* Cunard Steamship Co. (147 Mass. 58, 16 N. E. Rep. 717), Bills of L., 83.
Brown *v.* Dibble (30 Am. & Eng. R. Cas. 241, 65 Mich. 520, 32 N. W. Rep. 656), Consol., 34; Mun. Aid, 258.
Brown *v.* Duluth, M. & N. R. Co. (54 Am. & Eng. R. Cas. 219, 53 Fed. Rep. 889), Stock, 10, 75, 96.
Brown *v.* Dunlap (3 So. Car. 101), Car. of M., 734.
Brown *v.* Duplessis (14 La. Ann. 854), St. Rys., 18, 231.
Brown *v.* Eastern & M. R. Co. (37 Am. & Eng. R. Cas. 558, 22 Q. B. D. 391), Nuis., 9.
Brown *v.* Eastern R. Co. (11 Cush. (Mass.) 97), Bagg., 98.
Brown *v.* European & N. A. R. Co. (58 Me. 384), Children, Inj. to, 79, 123.
Brown *v.* Florida Southern R. Co. (16 Am. & Eng. R. Cas. 463, 19 Fla. 472), Charters, 114; Land Grants, 130; Subscr., 36.
Brown *v.* Gay (42 Am. & Eng. R. Cas. 23, 76 Tex. 444, 13 S. W. Rep. 472), Parties, 15; Receiv., 131, 178, 185.
Brown *v.* Grand Trunk R. Co. (54 N. H. 535, 11 Am. Ry. Rep. 195), Car. of M., 324, 325.
Brown *v.* Grand Trunk R. Co. (24 U. C. Q. B. 350), Fences, 37, 69.
Brown *v.* Great Eastern R. Co. (46 L. J. M. C. 231, L. R. 2 Q. B. D. 406, 36 L. T. 767, 25 W. R. 792, 3 Ry. & C. T. Cas. xxii), Tickets & F., 149.
Brown *v.* Great Western R. Co. (52 L. T. 226), Car. of P., 455.
Brown *v.* Great Western R. Co. (52 L. T. 622), Negl., 64.
Brown *v.* Great Western R. Co. (2 Ont. App. 63; affirming 40 U. C. Q. B. 333), Collis., 30.
Brown *v.* Great Western R. Co. (3 Ry. & C. T. Cas. 523), Tickets & F., 138.
Brown *v.* Great Western R. Co. (9 Am. & Eng. R. Cas. 271, L. R. 9 Q. B. D. 744, 51 L. J. Q. B. D. 529, 47 L. T. 216, 30 W. R. 671, 4 Ry. & C. T. Cas. xvii; affirming 51 L. J. Q. B. D. 156, 45 L. T. 471, 30 W. R. 214), Charges, 107, 127; Tickets & F., 136, 137, 139.
Brown *v.* Griffin (71 Tex. 654, 9 S. W. Rep. 546), Cross., Inj. at, 110, 324.
Brown *v.* Hannibal & St. J. R. Co. (23 Mo. App. 209; affirmed in 99 Mo. 310), Husb. & W., 37.
Brown *v.* Hannibal & St. J. R. Co. (42 Am. & Eng. R. Cas. 87, 99 Mo. 310, 12 S. W. Rep. 655), Contrib. Neg., 85; Cross., Inj. at, 331, 357; Dam., 75, 76, 81, 89; New Tr., 52.
Brown *v.* Hannibal & St. J. R. Co. (27 Mo. App. 394), Animals, 40, 251, 536; Leases, 40.
Brown *v.* Hannibal & St. J. R. Co. (31 Mo. App. 661), Contrib. Neg., 75, 76, 109; Husb. & W., 23.
Brown *v.* Hannibal & St. J. R. Co. (33 Mo. 309), Animals, 29.
Brown *v.* Hannibal & St. J. R. Co. (50 Mo. 461, 3 Am. Ry. Rep. 540), Contrib. Neg., 48; Sts. & H., 409; Tresp., Inj. to, 48.
Brown *v.* Hannibal & St. J. R. Co. (66 Mo. 588), Eject. Pass., 60, 120; Evid., 211.
Brown *v.* Hertford County Com'rs (100 N. Car. 92, 5 S. E. Rep. 178), Mun. Aid, 9, 45.
Brown *v.* Hitchcock (4 Am. & Eng. R. Cas. 352, 36 Ohio St. 667), Stockh., 47, 51.

Brown *v.* Hodgson (4 Taunt. 189), Car. of M., 286.
Brown *v.* Kansas City, Ft. S. & G. R. Co. (38 Kan. 634, 16 Pac. Rep. 942), Car. of P., 70; Evid., 52; Tickets & F., 23, 28.
Brown *v.* Kansas City, St. J. & C. B. R. Co. (20 Mo. App. 427), Fences, 56.
Brown *v.* Lent (20 Vt. 529), Indep. Contr., 20.
Brown *v.* London & N. W. R. Co. (4 B. & S. 326, 10 Jur. N. S. 234), Jurisd., 5.
Brown *v.* London & N. W. R. Co. (32 L. J. Q. B. 318, 11 W. R. 884, 8 L. T. 695), Proc., 40.
Brown *v.* Louisville & N. R Co. (36 Ill. App. 140), Agency, 13; Bills of L., 6, 75; Car. of M., 436, 684.
Brown *v.* McGuffin (5 Prac. (Ont.) 231), Assign., 25.
Brown *v.* Maryland (12 Wheat. (U. S.) 419), Commerce, 11.
Brown *v.* Memphis & C. R. Co. (4 Fed. Rep. 37), Car. of P., 64.
Brown *v.* Memphis & C. R. Co. (5 Fed. Rep. 499; adhered to on rehearing in 1 Am. & Eng. R. Cas. 247, 7 Fed. Rep. 51), Car. of P., 74; Col. Pers., 6; Eject. Pass., 1; Stat., 23.
Brown *v.* Memphis & C. R. Co. (1 Am. & Eng. R. Cas. 247, 7 Fed. Rep. 51; adhering to 5 Fed. Rep. 499), Car. of P., 74; Dam., 102; Eject. Pass., 62, 121.
Brown *v.* Milliken (42 Kan. 769, 29 Am. & Eng. Corp. Cas. 151, 23 Pac. Rep. 167), Lim. of Ac., 10.
Brown *v.* Milwaukee & P. du C. R. Co. (21 Wis. 39), Animals, 126; Fences, 86.
Brown *v.* Milwaukee & St. P. R. Co. (22 Minn. 165, 19 Am. Ry. Rep. 298), Contrib. Neg., 4, 31, 87; Cross., Inj. at, 91, 231, 246.
Brown *v.* Minneapolis & St. L. R. Co. (31 Minn. 553, 18 N. W. Rep. 834), Fel. Serv., 214, 216, 415.
Brown *v.* Missouri, K. & T. R. Co. (64 Mo. 536), Eject. Pass., 112.
Brown *v.* Missouri, K. & T. R. Co. (67 Mo. 122), Evid., 102.
Brown *v.* Missouri Pac. R. Co. (85 Mo. 123), Just. P., 18.
Brown *v.* Missouri Pac. R. Co. (13 Mo. App. 462), Fires, 266, 322.
Brown *v.* Missouri Pac. R. Co. (14 Mo. App. 580), Animals, 384, 470.
Brown *v.* Mohawk & H. R. Co. (1 How. App. Cas. (N. Y.) 52), Witn., 140.
Brown *v.* Mott (22 Ohio St. 149), Bills of L., 38; Car. of M., 215, 602.
Brown *v.* New York & E. R. Co. (19 How. Pr. (N. Y.) 84), Receiv., 85.
Brown *v.* New York & E. R. Co. (22 How. Pr. (N. Y.) 451), Receiv., 77.
Brown *v.* New York C. & H. R. R. Co. (75 Hun, 355, 27 N. Y. Supp. 69, 56 N. Y. S. R. 748), Hacks, etc., 1.
Brown *v.* New York C. R. Co. (32 N. Y. 597; affirming 31 Barb. 385), Fly. Switch, 1; Imp. Neg., 19.
Brown *v.* New York C. R. Co. (34 N. Y. 404), Car. of P., 198, 211.
Brown *v.* New York C. R. Co. (44 N. Y. 79), Contr., 8.
Brown *v.* Pennsylvania R. Co. (15 Phila. (Pa.) 321), Death, etc., 267.
Brown *v.* Peterson (40 Pa. St. 377), Em. Dom., 554.
Brown *v.* Philadelphia & R. R. Co. (19 Phila. (Pa.) 372), Abate., 16.
Brown *v.* Philadelphia County Com'rs (21 Pa. St. 37), Mun. Aid, 74.
Brown *v.* Philadelphia, W. & B. R. Co. (10 Am. & Eng. R. Cas. 424, 58 Md. 539), Em. Dom., 74, 1039.
Brown *v.* Providence & S. R. Co. (12 R. I. 238), Witn., 121, 149.
Brown *v.* Providence, W. & B. R. Co. (5 Gray (Mass.) 35), Em. Dom., 611, 631, 638, 560, 705, 739.
Brown *v.* Railway Pass. A. Co. (45 Mo. 221), Acc. Ins., 2.
Brown *v.* Rauch (1 Wash. 497, 20 Pac. Rep. 785), Receiv., 122.
Brown *v.* Rome & D. R. Co. (36 Am. & Eng R. Cas. 571, 86 Ala. 206, 5 So. Rep. 195 Em. Dom., 276, 320, 439, 543.
Brown *v.* Rome, W. & O. R. Co. (45 Hun 439, 12 N. Y. S. R. 446), Witn., 91.
Brown *v.* Rome, W. & O. R. Co. (16 N. Y. S. R. 456, 48 Hun 619, mem., 1 N. Y. Supp. 286; affirmed in 121 N. Y. 669, mem.), Contrib. Neg., 83; Cross., Inj. at, 73, 294.
Brown *v.* St. Louis, I. M. & S. R. Co. (52 Ark. 120, 12 S. W. Rep. 203), Tresp., In to, 52.
Brown *v.* St. Paul & N. P. R. Co. (38 Minn. 506, 38 N. W. Rep. 698), Em. Dom., 298.
Brown *v.* St. Paul, M. & M. R. Co. (36 Minn. 236, 31 N. W. Rep. 941), Assump., 6.
Brown *v.* Scarboro (58 Am. & Eng. R. Cas. 364, 97 Ala. 316, 12 So. Rep. 289), Car. of P., 15, 34, 92, 461; Contrib. Neg., 92; Tresp., Inj. to, 12, 13.
Brown *v.* Seventy-third St. R. Co. (21 N. Y. S. R. 475, 4 N. Y. Supp. 192, 24 J. & S. 356; affirmed in 121 N. Y. 667, mem., 24 N. E. Rep. 1094, mem.), Cross., Inj. at, 246; Negl., 66.
Brown *v.* Southern Pac. R. Co. (7 Utah 288, 26 Pac. Rep. 579), App. 126; Fel. Serv., 145, 270; Trial, 163.
Brown *v.* Southwestern R. Co. (36 Ga. 377), Car. of Slaves, 6, 12, 13.
Brown *v.* State (62 Md. 439), State Aid, 23.
Brown *v.* Sullivan (71 Tex. 470, 10 S. W. Rep. 288), Dam., 71; Employés, Inj. to, 191, 295, 730; Fel. Serv., 266.
Brown *v.* Syracuse & U. R. Co. (5 Hill (N. Y.) 554), Ejectm., 25.
Brown *v.* Terre Haute & I. R. Co. (72 Mo. 567), Judgm., 43.
Brown *v.* Texas & P. R. Co. (42 La. Ann. 350, 7 So. Rep. 682), Cross., Inj. at, 8, 255; Negl., 24.
Brown *v.* Tinsley (Ky.) (21 S. W. Rep. 535), Mun. Aid, 33.
Brown *v.* Toledo, P. & W. R. Co. (35 Fed. Rep. 444), Receiv., 67, 149.
Brown *v.* Toronto & N. R. Co. (26 U. C. C. P. 206), Farm Cross., 3; Sts. & H., 214.
Brown *v.* Twenty-third St. R. Co. (4 N. Y. Supp. 192, 21 N. Y. S. R. 475, 24 J. & S.

356; affirmed in 121 N. Y. 667, mem., 24 N. E. Rep. 1094, mem.), St. Rys., 480, 489.
Brown *v.* Union R. Co. (51 Mo. App. 192), Dam., 102.
Brown *v.* Wabash R. Co. (96 Ill. 297), Eq., 24; Receiv., 186.
Brown *v.* Wabash, St. L. & P. R. Co. (18 Mo. App. 568), Car. of L. S., 24; Lim. of Liab., 3, 8, 22, 30.
Brown *v.* Wabash, St. L. & P. R. Co. (20 Mo. App. 222), Animals, 34, 188.
Brown *v.* Ward (9 How. Pr. (N. Y.) 497), Stock., 48.
Brown *v.* Warner (45 Am. & Eng. R. Cas. 95, 78 Tex. 543, 14 S. W. Rep. 1032), Receiv., 60.
Brown *v.* Windsor & A. R. Co. (14 Nov. Sc. 430), Tax., 386.
Brown *v.* Winona & St. P. R. Co. (27 Minn. 162, 38 Am. Rep. 285, 6 N. W. Rep. 484), Fel. Serv., 102.
Brown *v.* Winona & S. W. R. Co. (53 Minn. 259, 55 N. W. Rep. 123), Flood. Lds., 24.
Brown County *v.* Winona & St. Paul Land Co. (38 Minn. 397, 37 N. W. Rep. 949), Tax., 80.
Browne *v.* Brockville & O. R. Co. (20 U. C. Q. B. 202), Cross., Inj. at, 23.
Browne *v.* New York & N. E. R. Co. (158 Mass. 247, 33 N. E. Rep. 650), Employés, Inj. to, 407.
Browne *v.* Providence, H. & F. R. Co. (12 Gray (Mass.) 55), Animals, 153.
Browne *v.* Raleigh & G. R. Co. (47 Am. & Eng. R. Cas. 544, 108 N. Car. 34, 12 S. E. Rep. 958), Car of P., 78, 361, 377, 378.
Browne *v.* Strode (5 Cranch (U. S.) 303), Fed. Cts., 6.
Brownell *v.* Columbus & C. M. R. Co. (4 Int. Com. Rep. 285, 5 Int. Com. Com. 638), Int. Com., 74.
Brownell *v.* Greenwich (8 N. Y. S. R. 737, 44 Hun 611; affirmed in 114 N. Y. 518, 24 N. Y. S. R. 6, 22 N. E. Rep. 24), Mun. Aid, 316, 342, 371.
Brownell *v.* Greenwich (114 N. Y. 518, 22 N. E. Rep. 24, 24 N. Y. S. R. 6, 4 L. R. A. 685), Mun. Aid, 71, 352.
Brownell *v.* Pacific R. Co. (47 Mo. 239), Death, etc., 149; Evid., 171.
Brownell *v.* Troy & B. R. Co. (18 Blatchf. (U. S.) 243, 3 Fed. Rep. 761), Proc., 17.
Brownell *v.* Troy & B. R. Co. (15 Am. & Eng. R. Cas. 498, 55 Vt. 218), Sts. & H., 409.
Browning *v.* Camden & W. R. & T. Co. (4 N. J. Eq. 47), Em. Dom., 957.
Browning *v.* Goodrich Transp. Co. (78 Wis. 391, 47 N. W. Rep. 428), Car. of M., 176, 178, 668, 740.
Browning *v.* Long Island R. Co. (2 Daly (N. Y.) 117), Car. of M., 221; Lim. of Liab., 22; Witn., 149.
Browning *v.* New York, L. E. & W. R. Co. (46 N. Y. S. R. 505, 64 Hun 513, 19 N. Y. Supp. 453, 22 Civ. Pro. 193), Costs, 9.
Brownlee *v.* Lowe (117 Ind. 420, 20 N. E. Rep. 301), Constr. Rys., 17.
Brownlee *v.* Ohio, I. & I. R. Co. (18 Ind. 68), Estop., 5; Subscr., 8, 98, 145.
Brownsville Com'rs *v.* Loague (129 U. S. 493, 9 Sup. Ct. Rep. 327), Mun. Aid, 439.
Bruce *v.* Cincinnati R. Co. (83 Ky. 174), Death, etc., 110.
Bruce *v.* Manchester & K. R. Co. (19 Fed. Rep. 342), Fed. Cts., 13; Receiv., 38.
Bruce *v.* Manchester & K. R. Co. (25 Am. & Eng. R. Cas. 76, 117 U. S. 514, 6 Sup. Ct. Rep. 849), Mort., 168.
Bruen *v.* Manhattan R. Co. (14 N. Y. Supp. 788, 39 N. Y. S. R. 86; affirming 14 N. Y. Supp. 285, 20 Civ. Pro. 127; affirmed in 131 N. Y. 602, mem., 43 N. Y. S. R. 961), Elev. Rys., 198.
Bruffett *v.* Great Western R. Co. (25 Ill. 353), Consol., 43; Dissol., 8, 12; Sales of Rds., 3.
Brulard *v.* The Alvin (45 Fed. Rep. 766), Car. of P., 226.
Brundage *v.* Brundage (60 N. Y. 544; affirming 1 T. & C. 82), Wills, 1.
Brundred *v.* Rice (54 Am. & Eng. R. Cas. 446, 49 Ohio St. 640, 32 N. E. Rep. 169), Discrim., 25; Incorp., 6.
Brunell *v.* Canadian Pac. R. Co. (15 Ont. 375), Employés, Inj. to, 784.
Bruno *v.* Brooklyn City R. Co. (5 Misc. 327, 25 N. Y. Supp. 507, 55 N. Y. S. R. 215), App., 85; St. Rys., 426.
Brunswick & A. R. Co. *v.* Gale (56 Ga. 322), New Tr., 16.
Brunswick & A. R. Co. *v.* Hughes (52 Ga. 557, 7 Am. Ry. Rep. 137), Bonds, 13; Mort., 143.
Brunswick & A. R. Co. *v.* McLaren (47 Ga. 546, 11 Am. Ry. Rep. 412), Em. Dom., 547, 627, 636.
Brunswick & A. R. Co. *v.* State (48 Ga. 415), State Aid, 17.
Brunswick & W. R. Co. *v.* Clem (80 Ga. 534, 7 S. E. Rep. 84), Pl., 48; Trial, 138.
Brunswick & W. R. Co. *v.* Hoover (74 Ga. 426), Cross., Inj. at, 132; Death, etc., 239.
Brunswick & W. R. Co. *v.* Mayor, etc., of Waycross (88 Ga. 68, 13 S. E. Rep. 835), Sts. & H., 230.
Brusberg *v.* Milwaukee, L. S. & W. R. Co. (2 Am. & Eng. R. Cas. 264, 50 Wis. 231, 6 N. W. Rep. 821), Fires, 317; Trial, 139.
Brusberg *v.* Milwaukee, L. S. & W. R. Co. (7 Am. & Eng. R. Cas. 505, 55 Wis. 106, 12 N. W. Rep. 416), Fires, 203, 235, 314.
Brusch *v.* St. Paul City R. Co. (52 Minn. 512, 55 N. W. Rep. 57), Evid., 209; New Tr., 32.
Brush *v.* Manhattan R. Co. (44 N. Y. S. R. 111, 17 N. Y. Supp. 540; affirming 26 Abb. N. Cas. 73, 13 N. Y. Supp. 908), Elev. Rys., 69, 117, 149, 177.
Brush *v.* Sabula, A. & D. R. Co. (43 Iowa 554, 14 Am. Ry. Rep. 479), Lim. of Liab., 25.
Bruty *v.* Grand Trunk R. Co. (32 U. C. Q. B. 66), Bagg., 45, 105.
Bryan, In re (65 Cal. 375, 4 Pac. Rep. 304), Em. Dom., 347.
Bryan *v.* Chicago, R. I. & P. R. Co. (16 Am. & Eng. R. Cas. 335, 63 Iowa 464, 19 N. W. Rep. 295), Car. of P., 309; Conduct., 11.
Bryan *v.* Memphis & P. R. Co. (11 Bush (Ky.) 597, 14 Am. Ry. Rep. 395), Car. of M., 578.

Bryan *v.* Missouri Pac. R. Co. (32 Mo. App. 228), Car. of P., 137, 140; Passes, 31.
Bryan *v.* Southwestern R. Co. (41 Ga. 71), Dam., 50.
Bryant *v.* Bigelow Carpet Co. (7 Am. & Eng. R. Cas. 72, 131 Mass. 491), Constr. Rys., 9; Negl., 83; Waters & W., 10.
Bryant *v.* Burlington, C. R. & N. R. Co. (21 Am. & Eng. R. Cas. 593, 66 Iowa 305, 55 Am. Rep. 275, 23 N. W. Rep. 678), Employés, Inj. to, 201.
Bryant *v.* Central Vt. R. Co. (56 Vt. 710), Fires, 226.
Bryant *v.* Chicago, St. P., M. & O. R. Co. (58 Am. & Eng. R. Cas. 15, 53 Fed. Rep. 997, 4 C. C. A. 146), Car. of P. 55, 581, 609; Passes, 10.
Bryant *v.* Knox. & L. R. Co. (61 Me. 300), Em. Dom., 930.
Bryant *v.* Maine C. R. Co. (79 Me. 312, 9 Atl. Rep. 736), Ejectm., 14.
Bryant *v.* Randolph (133 N. Y. 70, 30 N. E. Rep. 657, 44 N. Y. S. R. 85), Sts. & H., 179, 186.
Bryant *v.* Rich (106 Mass. 180), Assault, 2.
Bryant *v.* Southwestern R. Co. (6 Am. & Eng. R. Cas. 388, 68 Ga. 805), Car. of L. S., 30, 78, 105.
Bryce *v.* Louisville, N. A. & C. R. Co. (25 N. Y. Supp. 1043, 73 Hun 233), Pl., 2.
Brymer *v.* Southern Pac. R. Co. (90 Cal. 496, 27 Pac. Rep. 371), App., 145; Employés, Inj. to, 99, 136, 627; Negl., 113.
Bryne *v.* Minneapolis & St. L. R. Co. (29 Minn. 200, 12 N W. Rep. 698), App., 105.
Bryson *v.* Ontario & Q. R. Co. (8 Ont. 380), Husb. & W., 6.
Buchanan *v.* Chicago, M. & St. P. R. Co. (35 Am. & Eng. R. Cas. 378, 75 Iowa 393, 39 N. W. Rep. 663), Agency, 91; Cross., Inj. at, 284; Witn., 106.
Buchanan *v.* Logansport, C. & S. W. R. Co. (71 Ind. 265), Ejectm., 26; License, 1, 16.
Buchanan *v.* Northern Pac. R. Co. (3 Int. Com. Rep. 655, 5 Int. Com. Com. 7), Int. Com., 33.
Buchanan *v.* Rome, W. & O. R. Co. (10 N. Y. S. R. 326, 45 Hun 593), Employés, Inj. to, 103; Fel. Serv., 17.
Buchanan *v.* West Jersey R. Co. (41 Am. & Eng. R. Cas. 59, 52 N. J. L. 265, 19 Atl. Rep. 254), Dam., 72.
Buchanan County Bank *v.* Cedar Rapids, I. F. & N. W. R. Co. (20 Am. & Eng. R. Cas. 417, 62 Iowa 494, 17 N. W. Rep. 737), Attach., 11.
Bucher *v.* Cheshire R. Co. (34 Am. & Eng. R. Cas. 389, 125 U. S. 555, 8 Sup. Ct. Rep. 974), Car. of P., 557; Judgm., 26.
Bucher *v.* Dillsburg & M. R. Co. (76 Pa. St. 306), Subscr., 16, 143.
Bucher *v.* Fitchburg R. Co. (6 Am. & Eng. R. Cas. 212, 131 Mass. 156, 41 Am. Rep. 216), Sunday, 5.
Bucher *v.* New York C. & H. R. R. Co. (21 Am. & Eng. R. Cas. 361, 98 N. Y. 128), Car. of P., 233, 420, 431.
Buchill *v.* Lott (4 Tex. App. (Civ. Cas.) 70, 15 S. W. Rep. 413), Subscr., 220.
Buchner *v.* Chicago, M. & N. W. R. Co. (56 Wis. 403, 14 N. W. Rep. 273), Eq., 23; Sts. & H., 162.
Buchner *v.* Chicago, M. & N. W. R. Co. (14 Am. & Eng. R. Cas. 447, 60 Wis. 264, 19 N. W. Rep. 56), Charters, 51; Cross. St. & H., 119; Em. Dom., 163; Sts. & H., 154, 157, 162, 185, 272; Words & Ph., 79.
Bucholz *v.* New York, L. E. & W. R. Co. (50 N. Y. S. R. 670, 66 Hun 377, 21 N. Y. Supp. 503), Sts. & H., 202.
Buck *v.* Cobourg & P. R. Co. (5 U. C. C. P. 552), Rip. Rts., 12.
Buck *v.* Connecticut & P. R. R. Co. (42 Vt. 370), Sts. & H., 406.
Buck *v.* Manhattan R. Co. (15 Daly 48, 2 N. Y. Supp. 718, 19 N. Y. S. R. 908), Elev. Rys., 210.
Buck *v.* Manhattan R. Co. (15 Daly 276, 6 N. Y. Supp. 524, 25 N. Y. S. R. 590), Elev. Rys., 210.
Buck *v.* Manhattan R. Co. (15 Daly (N. Y.) 550, 10 N. Y. Supp. 107, 32 N. Y. S. R. 51; affirmed in 134 N. Y. 589, mem., 31 N. E. Rep. 628, mem., 45 N. Y. S. R. 934), Car. of P., 150, 592, 595; Elev. Rys., 210; St. Rys., 442.
Buck *v.* Pennsylvania R. Co. (150 Pa. St. 170, 24 Atl. Rep. 678), Car. of M., 176, 177, 178, 453, 472.
Buck *v.* People's St. R., E. L. & P. Co. (46 Mo. App. 555), Children, Inj. to, 43, 48, 69, 117, 141, 147, 158, 182, 183, 184; St. Rys., 339; Words & Ph., 187.
Buck *v.* People's St. R., E. L. & P. Co. (52 Am. & Eng. R. Cas. 512, 108 Mo. 179, 18 S. W. Rep. 1090), Children, Inj. to, 43, 193; Pl., 140.
Buck *v.* Seymour (46 Conn. 156), Mort., 36, 40.
Buck *v.* Webb (33 N. Y. S. R. 824, 58 Hun 185, 11 N. Y. Supp. 617), Sleep. Car Cos., 14.
Buckfastleigh, T. & S. D. R. Co. *v.* South Devon R. Co. (1 Ry. & C. T. Cas. 321), Leases, 135; Tickets & F., 136.
Buckfield Branch R. Co. *v.* Benson (43 Me. 374), Appear., 5.
Buckfield Branch R. Co. *v.* Irish (39 Me. 44), Subscr., 36.
Buckingham *v.* Steubenville & I. R. Co. (10 Ohio St. 25), Em. Dom., 965.
Buckland *v.* Adams Exp. Co. (97 Mass. 124), Exp. Cos., 23.
Bucklew *v.* Central Iowa R. Co. (64 Iowa 603, 21 N. W. Rep. 103), Employés, Inj. to, 440, 720, 737; Fel. Serv., 465, 495; Stat., 8; Witn., 60.
Buckley *v.* Gould & C. Silver Min. Co. (8 Sawy. (U. S.) 394, 14 Fed. Rep. 833), Fel. Serv., 1, 136, 140, 202, 483.
Buckley *v.* Great Western R. Co. (18 Mich. 121), Car. of M., 168, 345, 728.
Buckley *v.* New York & H. R. Co. (11 J. & S. (N. Y.) 187), Tresp., Inj. to, 113.
Buckmaster *v.* Great Eastern R. Co. (23 L. T. 471, 3 Ry. & C. T. Cas. xxiv), Car. of P., 122, 125; Tickets & F., 20; Time-tables, 2, 3.
Buckner *v.* Hart (52 Fed. Rep. 835; affirmed in 56 Am. & Eng. R. Cas. 430, 54

Fed. Rep. 925, 2 U. S. App. 488, 5 C. C. A. 1), Elec. Rys., 2; St. Rys., 18.
Buckner *v.* Pacific & G. E. R. Co. (53 Ark. 16, 13 S. W. Rep. 332), Right of W., 4.
Buckner v. Savannah & C. R. Co. (7 So. Car. 325), Em. Dom., 428.
Bucksport & B. R. Co. *v.* Brewer (67 Me. 295, 16 Am. Ry. Rep. 344), Mun. Aid, 227.
Bucksport & B. R. Co. v. Buck (65 Me. 536, 9 Am. Ry. Rep. 293), Subscr., 49, 205.
Bucksport & B. R. Co. *v.* Buck (68 Me. 81, 19 Am. Ry. Rep. 10), Subscr. 123, 175.
Budd *v.* London & N. W. R. Co. (36 L. T. 802, 25 W. R. 752, 4 Ry. & C. T. Cas. 393), Discrim., 40, 44.
Budd v. Multnomah St. R. Co. (22 Am. & Eng. R. Cas. 27, 12 Oreg. 271, 7 Pac. Rep. 99), Trover, 6.
Budd *v.* Multnomah St. R. Co. (40 Am. & Eng. R. Cas. 551, 15 Oreg. 404, 15 Pac. Rep. 654), Franch., 9.
Budd *v.* Multnomah St. R. Co. (15 Oreg. 413, 15 Pac. Rep. 659), By-laws, 2; Subscr., 54, 55, 59, 180; Trover, 18.
Budd *v.* New Jersey R. & T. Co. (14 N. J. L. 467), Em. Dom., 967.
Buddy *v.* Wabash, St. L. & P. R. Co. (20 Mo. App. 206), Car. of M., 108, 334, 338.
Buek *v.* Metropolitan El. R. Co. (57 N. Y. S. R. 118, 73 Hun 251, 25 N. Y. Supp, 1048), Elev. Rys., 166.
Buel *v.* New York C. R. Co. (31 N. Y. 314), Car. of P., 439; Collis., 7; Witn., 167.
Buell *v.* Cincinnati, E. & Q. Constr. Co. (10 Biss. (U. S.) 555, 9 Fed. Rep. 351), Rem. of C., 32.
Buena Vista County *v.* Iowa Falls & S. C. R. Co. (22 Am. & Eng. R. Cas. 178, 112 U. S. 165, 5 Sup. Ct. Rep. 84), Estop., 7.
Buena Vista County *v.* Iowa Falls & S. C. R. Co. (46 Iowa 226), Estop., 31.
Buena Vista County *v.* Iowa Falls & S. C. R. Co. (55 Iowa 157, 7 N. W. Rep. 474), Land Grants, 131.
Buenemann *v.* St. Paul, N. & M. R. Co. (18 Am. & Eng. R. Cas. 153, 32 Minn. 390, 20 N. W. Rep. 379), App., 115; New Tr., 21.
Buesching *v.* St. Louis Gaslight Co. (73 Mo. 219, 39 Am. Rep. 503), Contrib. Neg., 105.
Buffalo, In re (Sheld. (N. Y.) 408), Em. Dom., 433, 649.
Buffalo, In re (25 N. Y. Supp. 218, 72 Hun 422), Em. Dom., 113; Mun. Corp., 27.
Buffalo, In re (64 N. Y. 547), Em. Dom., 496.
Buffalo, In re (68 N. Y. 167), Em. Dom., 105; Sts. & H., 25.
Buffalo *v.* New York, L. E. & W. R. Co. (54 N. Y. S. R. 150, 23 N. Y. Supp. 303), Sts. & H., 319, 323, 330, 331.
Buffalo *v.* New York, L. E. & W. R. Co. (27 N. Y. Supp. 297, 57 N. Y. S. R. 829, 6 Misc. 630, mem.), Sts. & H., 315.
Buffalo & A. R. Co. *v.* Cary (26 N. Y. 75), Subscr., 156.
Buffalo & E. R. Co. *v.* Com. (3 Brews. (Pa.) 374), Tax., 44, 61, 70, 111, 299.
Buffalo & E. R. Co. *v.* Com. (3 Brews. (Pa.) 386), Tax., 4.
Buffalo & G. R. Co., In re (37 N. Y. S. R. 343, 59 Hun 626, 14 N. Y. Supp. 1), Em. Dom., 921.
Buffalo & J. R. Co. *v.* Falconer (2 Am. & Eng. R. Cas. 593, 103 U. S. 821), Mun. Aid, 240.
Buffalo & J. R. Co. *v.* Gifford (1 Am. & Eng. R. Cas. 387, 87 N. Y. 294; affirming 22 Hun 359), Subscr., 8, 27, 29, 127, 129.
Buffalo & J. R. Co. *v.* Railroad Com'rs (5 Hun (N. Y.) 485), Mun. Aid., 67.
Buffalo & L. H. R. Co., In re (2 Ont. Pr. 88), Cross. Rys., 59.
Buffalo & L. H. R. Co., In re (14 U. C. Q. B. 397; affirming 2 Ont. Pr. 88), Cross. Rys., 59.
Buffalo & L. H. R. Co. *v.* Corbett (8 U. C. C. P. 536), Exec., 8.
Buffalo & L. H. R. Co. *v.* Goderich (21 U. C. Q. B. 97), Tax., 384.
Buffalo & L. H. R. Co. *v.* Whitehead (8 Grant's Ch. (U. C.) 157), Constr. Rys., 15.
Buffalo & N. F. R. Co. *v.* Buffalo (5 Hill. (N. Y.) 209), Sts. & H., 64.
Buffalo & N. Y. C. R. Co. *v.* Brainard (9 N. Y. 100), Em. Dom., 84.
Buffalo & N. Y. C. R. Co. *v.* Dudley (14 N. Y. 336), Subscr., 15, 38, 77, 89, 120, 122.
Buffalo & P. R. Co. *v.* Hatch (20 N. Y. 157), Incorp., 8, 10.
Buffalo & S. L. R. Co. *v.* Erie County Sup'rs (48 N. Y. 93, 2 Am. Ry. Rep. 163), Tax., 276.
Buffalo & S. L. R. Co. *v.* Reynolds (6 How. Pr. (N. Y.) 96), Em. Dom., 368, 496.
Buffalo Bayou, B. & C. R. Co. *v.* Ferris (26 Tex. 588), Em. Dom., 21, 44, 180, 374, 754, 1058, 1061.
Buffalo Bayou B. & C. R. Co. *v.* United States (16 Ct. of Cl. 238), Claims Against U. S., 15.
Buffalo, B. & L. R. Co. *v.* New York, L. E. & W. R. Co. (72 Hun 583, 54 N. Y. S. R. 872, 25 N. Y. Supp. 265), Cross. Rys., 85.
Buffalo, B. & L. R. Co. *v.* New York, L. E. & W. R. Co. (54 N. Y. S. R. 877, 72 Hun 587, 25 N. Y. Supp. 155), Cross. Rys., 85.
Buffalo, B. & G. R. Co. *v.* Parke (12 U. C. Q. B. 607), Incorp., 5; Subscr., 61.
Buffalo, C. & N. Y. R. Co. *v.* Pottle (23 Barb. (N. Y.) 21), Location, etc., 20; Subscr., 124.
Buffalo E. S. R. Co. *v.* Buffalo St. R. Co. (37 Am. & Eng. R. Cas. 200, 111 N. Y. 132, 19 N. E. Rep. 63, 19 N. Y. S. R. 574), Contr., 28; Stat., 25.
Buffalo, N. Y. & E. R. Co. *v.* Lampson (47 Barb. (N. Y.) 533), Direct., 44.
Buffalo, N. Y. & E. R. Co. *v.* Stigeler (61 N. Y. 348), Deeds, 17, 18.
Buffalo, N. Y. & P. R. Co., In re (32 Hun (N. Y.) 289), Em. Dom., 805.
Buffalo, N. Y. & P. R. Co. *v.* Com. (120 Pa. St. 537, 12 Cent. Rep. 707, 14 Atl. Rep. 443, 21 W. N. C. 513), Mand., 33.
Buffalo, N. Y. & P. R. Co. *v.* Harvey (107 Pa. St. 319), Em. Dom., 856.
Buffalo, N. Y. & P. R. Co. *v.* Overton (35 Hun (N. Y.) 157), Sts. & H., 117, 130.
Buffalo, P. & W. R. Co. *v.* O'Hara (9 Am. & Eng. R. Cas. 317, 3 Pennyp. (Pa.) 190), Lien of Liab., 27; Passes, 19, 32.
Buffalo Pipe Line Co. *v.* New York, L. E.

& W. R. Co. (10 Abb. N. Cas. (N. Y.) 107), Corp., 10; Deeds, 26, Rip. Rts., 3.
Buffalo, R. & P. R. Co. *v.* Du Bois Traction Pass. R. Co. (Pa.) (24 Atl. Rep. 179), Cross. Rys., 85.
Buffalo S. & C. Co. *v.* Delaware, L. & W. R. Co. (130 N. Y. 152, 29 N. E. Rep. 121, 41 N. Y. S. R. 259; affirming 27 N. Y. S. R. 216, 7 N. Y. Supp. 604), App. 115; Farm Cross., 3; Leases, 74.
Buffet *v.* Troy & B. R. Co. (40 N. Y. 168; affirming 36 Barb. 420), Car. of P., 24, 27, 510.
Buffington *v.* Atlantic & P. R. Co. (64 Mo. 246), Pl., 137.
Buffum *v.* New York & B. R. Co. (4 R. I. 221), Witn., 131.
Buhrens *v.* Dry Dock, E. B. & B. R. Co. (53 Hun 571, 25 N. Y. S. R. 191, 6 N. Y. Supp. 224; affirmed in 125 N. Y. 702, mem., 34 N. Y. S. R. 1012, mem., 26 N. E. Rep. 752), St. Rys., 234, 449, 496, 507.
Bulger *v.* Albany R. Co. (42 N. Y. 459), Children, Inj. to, 60, 125; St. Rys., 467.
Bulkley *v.* New York & N. H. R. Co. (27 Conn. 479), Animals, 56, 578; Ct.-Gds., 2.
Bull *v.* Mobile & M. R. Co. (67 Ala. 206), Fel. Serv., 34, 281.
Bullard *v.* Boston & M. R. Co. (27 Am. & Eng. R. Cas. 117, 64 N. H. 27, 5 Atl. Rep. 838), Evid., 46; Trial, 88.
Bullard *v.* Des Moines & Ft. D. R. Co. (122 U. S. 167, 7 Sup. Ct. Rep. 1149; affirming 62 Iowa 382, 17 N. W. Rep. 609), Land Grants, 25.
Bullard *v.* Northern Pac. R. Co. (45 Am. & Eng. R. Cas. 234, 10 Mont. 168, 25 Pac. Rep. 120), Int. Com., 20.
Bullinger *v.* Mackey (15 Blatchf. (U. S.) 550), Copyr., 1.
Bullington *v.* Newport News & M. V. Co. (32 W. Va. 436, 9 S. E. Rep. 876), Animals, 69, 587; App., 63.
Bullion *v.* State (7 Tex. App. 462), Crim. L., 35.
Bulliss *v.* Chicago, M. & St. P. R. Co. (76 Iowa 680, 39 N. W. Rep. 245), Fires, 48, 151, 243, 291; Witn., 19.
Bullivant *v.* Manning (41 U. C. Q. B. 517), Stockh., 66.
Bullock *v.* Curry (2 Metc. (Ky.) 171), Mun. Aid, 124, 143.
Bullock *v.* Wilmington & W. R. Co. (42 Am. & Eng. R. Cas. 93, 105 N. Car. 180, 10 S. E. Rep. 988), Cross., Inj. at, 14, 164, 206, 285.
Bulmer *v.* Bulmer (L. R. 25 Ch. D. 409, 53 L. J. Ch. D. 402, 32 W. R. 380), Death, etc., 71.
Bumgarner *v.* Cogswell (49 Mo. 259), Deeds, 3.
Bunch *v.* Great Western R. Co. (17 Q. B. D. 215, 55 L. J. Q. B. 525, 5 Ry. & C. T. Cas. viii), Bagg., 50, 79.
Buncombe County Com'rs *v.* Tommey (20 Am. & Eng. R. Cas. 495, 115 U. S. 122, 5 Sup. Ct. Rep. 626, 1186), Liens, 12, 24.
Bundy *v.* Keokuk & D. M. R. Co. (49 Iowa 207), Liens, 49.
Bunker *v.* Midland R. Co. (47 L. T. 476, 31 W. R. 231), Employés, Inj. to, 440, 782.
Bunn *v.* Delaware, L. & W. R. Co. (6 Hun (N. Y.) 303), Contrib. Neg., 112; Cross., Inj. at, 246.
Bunnell *v.* St. Paul, M. & M. R. Co. (29 Minn. 305, 13 N. W. Rep. 129), Fel. Serv., 142, 313.
Bunten *v.* Chicago, R. I. & P. R. Co. (50 Mo. App. 414), Judgm., 22; Lim. of Ac., 56; Nuis., 13, 29, 31.
Buntin *v.* Chicago, R. I. & P. R. Co. 41 Fed. Rep. 744), Lim. of Ac., 13.
Bunting *v.* Camden & A. R. Co. (81 Pa. St. 254, 15 Am. Ry. Rep. 570), Assign., 5.
Bunting *v.* Central Pac. R. Co. (14 Nev. 351), Contrib. Neg., 11, 42, 84; Cross., Inj. at, 254, 307.
Bunting *v.* Central Pac. R. Co. (6 Am. & Eng. R. Cas. 282, 16 Nev. 277), Contrib. Neg., 112; Evid., 294.
Bunting *v.* Hogsett (48 Am. & Eng. R. Cas. 87, 139 Pa. St. 363, 21 Atl. Rep. 31), Collis, 3; Dam., 64, 68, 92; Negl., 48, 58; Parties, 8.
Bunting *v.* Pennsylvania R. Co. (118 Pa. St. 204, 10 Cent. Rep. 892, 12 Atl. Rep. 448, 21 W. N. C. 181), Cross. Rys., 79.
Bunyea *v.* Metropolitan R. Co. (8 Mackey (D. C.) 76), Children, Inj. to, 182, 184, 185; Judgm., 42.
Burbank *v.* Illinois C. R. Co. (45 Am. & Eng. R. Cas. 593, 42 La. Ann. 1156, 8 So. Rep. 580), Stat. & D., 77, 98.
Burbridge *v.* Kansas City Cable R. Co. (36 Mo. App. 669), App., 78; Cross., Inj. at, 360; Pl., 60; St. Rys., 367; Trial, 123.
Burbridge *v.* New Albany & S. R. Co. (9 Ind. 546), Em. Dom., 433.
Burch *v.* Augusta, G. & S. R. Co (80 Ga. 296, 4 S. E. Rep. 850), Evid., 184.
Burch *v.* Davenport & St. P. R. Co. (46 Iowa 449), Rem. of C., 27.
Burchfield *v.* Northern C. R. Co. (57 Barb. (N. Y.) 589), Leases, 87.
Burdick *v.* Chicago, M. & St. P. R. Co. (87 Iowa 384, 54 N. W. Rep. 439), Fires, 343.
Burdick *v.* People (58 Am. & Eng. R. Cas. 28, 149 Ill. 600, 36 N. E. Rep. 948, 24 L. R. A. 152), Stat., 25; Tickets & F., 152.
Burditt *v.* New York C. & H. R. R. Co. (55 N. Y. S. R. 18, 71 Hun 361, 24 N. Y. Supp. 1137), Dam., 65; Witn., 99.
Bureau County Sup'rs *v.* Chicago, B. & Q. R. Co. (44 Ill. 229), Tax., 24, 257.
Burger *v.* Grand Rapids & I. R. Co. (20 Am. & Eng. R. Cas. 607, 22 Fed. Rep. 561), Consol., 37.
Burger *v.* Missouri Pac. R. Co. (112 Mo. 238, 20 S. W. Rep. 439), Children, Inj. to, 74, 107; Cross., Inj. at, 104; Evid., 54; Negl., 48, 62; Sts. & H., 307, 383, 418.
Burger *v.* Northern Pac. R. Co. (22 Minn. 343), Witn., 117.
Burger *v.* St. Louis, K. & N. W. R. Co. (52 Mo. App. 119), Animals, 34, 40, 251, 590, 635.
Burges *v.* Mabin (70 Iowa 633, 27 N. W. Rep. 464), Mun. Aid, 412.
Burgess *v.* Memphis, C. & N. W. R. Co. 18 Kan. 53, 15 Am. Ry. Rep. 181), Liens, 8.
Burgess *v.* St. Louis County R. Co. (99 Mo. 496, 12 S. W. Rep. 1050), Eq., 7.

Burgess *v.* Seligman (9 Am. & Eng. R. Cas. 655, 107 U. S. 20, 2 Sup. Ct. Rep. 10), Fed. Cts., 28; Stockh., 58.
Burgevin *v.* New York C. & H. R. R. Co. (52 N. Y. S. R. 617, 23 N. Y. Supp. 415), Bagg., 65, 66, 70.
Burgin *v.* Louisville & N. R. Co. (97 Ala. 274, 12 So. Rep. 395), Employés, Inj. to, 385.
Burgoyne *v.* Eastern & W. R. Co. (19 Civ. Pro. 384, 13 N. Y. Supp. 537), Receiv., 6.
Burham *v.* St. Louis & I. M. R. Co. (56 Mo. 338), Contrib. Neg., 16.
Burhop *v.* Milwaukee (18 Wis. 431), Cloud on T., 1.
Burhop *v.* Milwaukee (21 Wis. 257), Stat., 5, 63.
Burhop *v.* Roosevelt (20 Wis. 338), Mun. Aid, 401; Pl., 72.
Burk *v.* Hill (48 Ind. 52), Cov'ts, 11.
Burkam *v.* Ohio & M. R. Co. (43 Am. & Eng. R. Cas. 153, 122 Ind. 344, 23 N. E. Rep. 799), Estop., 23; Nuis., 15; Sts. & H., 211, 215.
Burke *v.* Broadway & S. A. R. Co. (49 Barb. (N. Y.) 529, 34 How. Pr. 239), Children, Inj. to, 75, 78, 79, 125.
Burke *v.* Brown (14 N. Y. S. R. 619), Employés, Inj. to, 681.
Burke *v.* Concord R. Co. (8 Am. & Eng. R. Cas. 552, 61 N. H. 160), Car. of M., 549; Charters, 54, 110; Land Grants, 3.
Burke *v.* Concord R. Co. (62 N. H. 531), Att'ys, 15.
Burke *v.* DeCastro & D. Sugar Refining Co. (11 Hun (N. Y.) 354), Negl., 80.
Burke *v.* Dublin Trunk Connecting R. Co. (37 L. J. Q. B. 50, 16 W. R. 107, L. R. 3 Q. B. 47, 8 B. & S. 773), Stockh., 29.
Burke *v.* Grand Trunk R. Co. (6 U. C. C. P. 484), Farm Cross., 1, 6.
Burke *v.* Lechmere (L. R. 6 Q. B. 297, 40 L. J. Q. B. 98, 19 W. R. 565), Subscr., 11.
Burke *v.* Louisville & N. R. Co. (7 Heisk. (Tenn.) 451, 12 Am. Ry. Rep. 497), Fires, 114, 233, 264, 272, 289, 339.
Burke *v.* Manchester, S. & L. R. Co. (18 W. R. 694, 22 L. T. 442), Car. of P. 205.
Burke *v.* Manhattan R. Co. (13 Daly (N. Y.) 75), Elev. Rys., 218, 220.
Burke *v.* Milwaukee, L. S. & W. R. Co. (83 Wis. 410, 53 N. W. Rep. 692), Agency, 99.
Burke *v.* Missouri Pac. R. Co. (29 Mo. App. 370), Waters & W., 28.
Burke *v.* Missouri Pac. R. Co. (51 Mo. App. 491), Car. of P., 48, 69, 591; Eject. Pass., 47.
Burke *v.* New York C. & H. R. R. Co. (49 N. Y. S. R. 370, 66 Hun 627, 20 N. Y. Supp. 808), Death, etc., 228.
Burke *v.* New York C. & H. R. R. Co. (57 N. Y. S. R. 7, 73 Hun 32, 25 N. Y. Supp. 1009), Cross., Inj. at, 193, 246, 252.
Burke *v.* Norwich & W. R. Co. (34 Conn. 474), Employés, 5; Trial, 118.
Burke *v.* Smith (16 Wall. (U. S.) 390, 4 Am. Ry. Rep. 37), Stockh., 52.
Burke *v.* South Eastern R. Co. (L. R. 5 C. P. D. 1, 49 L. J. C. P. D. 107, 41 L. T. 554, 28 W. R. 306, 44 J. P. 283, 3 Ry. & C. T. Cas. xv), Tickets & F., 67.
Burke *v.* State (34 Ohio St. 79, 21 Am. Ry. Rep. 77), Crim. L., 10.
Burke *v.* Syracuse, B. & N. Y. R. Co. (52 N. Y. S. R. 813, 23 N. Y. Supp. 458, 69 Hun 21), Employés, Inj. to, 664; Fel. Serv., 487.
Burke *v.* Witherbee (98 N. Y. 562), Employés, Inj. to, 97.
Burkholder *v.* Union Trust Co. (23 Am. & Eng. R. Cas. 656, 82 Mo. 572), Charges, 38, 51.
Burkinshaw *v.* Birmingham & O. J. R. Co. (6 Railw. Cas. 600, 5 Ex. 475, 20 L. J. Ex. 246), Em. Dom., 1100, 1129.
Burkle *v.* Ells (4 How. Pr. (N. Y.) 288), Car. of M., 691.
Burlander *v.* Milwaukee & St. P. R. Co. (26 Wis. 76), Attach., 36.
Burleigh *v.* Rochester (5 Fed. Rep. 607), Bills & N., 2; Mun. Aid., 279.
Burling *v.* Illinois C. R. Co. (85 Ill. 18), Employés, Inj. to, 393
Burlingame *v.* Central R. Co. (23 Blatchf. (U. S.) 142, 23 Fed. Rep. 706), Direct., 30.
Burlington *v.* Burlington & M. R. R. Co. (41 Iowa 134), Mun. Corp., 4.
Burlington *v.* Burlington St. R. Co. (49 Iowa 144), St. Rys., 26.
Burlington & C. R. Co. *v.* Liche (17 Colo. 280, 29 Pac. Rep. 175), Employés, Inj. to, 14, 99, 137, 260.
Burlington & C. R. Co. *v.* Schweikart (10 Colo. 178, 14 Pac. Rep. 329), Em. Dom., 224, 228, 381.
Burlington & H. County Ferry Co. *v.* Davis (48 Iowa 133), St. Rys., 44.
Burlington & M. R. R. Co. *v.* Abink (10 Am. & Eng. R. Cas. 686, 14 Neb. 95, 15 N. W. Rep. 317), Land Grants, 98.
Burlington & M. R. R. Co. *v.* Arms (16 Am. & Eng. R. Cas. 272, 15 Neb. 69, 17 N. W. Rep. 351), Car. of M., 227.
Burlington & M. R. R. Co. *v.* Beebe (14 Neb. 463, 16 N. W. Rep. 747), Fires, 243; Witn., 121.
Burlington & M. R. R. Co. *v.* Boestler (15 Iowa 555), Subscr., 213.
Burlington & M. R. R. Co. *v.* Brinkman (11 Am. & Eng. R. Cas. 438, 14 Neb. 70, 15 N. W. Rep. 197), Animals, 158.
Burlington & M. R. R. Co. *v.* Buffalo County (14 Neb. 51), 14 N. W. Rep. 539), Tax., 340.
Burlington & M. R. R. Co. *v.* Chicago Lumber Co. (15 Neb. 390, 19 N. W. Rep. 451), Charges, 26, 65, 67.
Burlington & M. R. R. Co. *v.* Clay County (13 Neb. 367, 13 N. W. Rep. 628), Mun. Aid, 419; Tax., 351.
Burlington & M. R. Co. *v.* Crockett (17 Neb. 570, 24 N. W. Rep. 219), Death, etc., 129.
Burlington & M. R. R. Co. *v.* Crockett (24 Am. & Eng. R. Cas. 390, 19 Neb. 138, 26 N. W. Rep. 921), Fel. Serv., 86, 258, 263.
Burlington & M. R. R. Co. *v.* Dobson (17 Neb. 450, 23 N. W. Rep. 353), Ejectm., 35; Em. Dom., 829.
Burlington & M. R. R. Co. *v.* Franzen (15 Am. & Eng. R. Cas. 530, 15 Neb. 365), Animals, 126.
Burlington & M. R. R. Co. *v.* Fremont

County (9 Wall. (U. S.) 89), Land Grants, 128.
Burlington & M. R. R. Co. *v.* Hayne (19 Iowa 137), Tax., 117.
Burlington & M. R. R. Co. *v.* Koonce (34 Neb. 479, 51 N. W. Rep. 1033), Cross., St. & H., 9.
Burlington & M. R. R. Co. *v.* Lancaster County (4 Neb. 293), Tax., 37, 75, 271.
Burlington & M. R. R. Co. *v.* Lancaster County Com'rs (7 Neb. 33), Side Tr., 1; Tax., 271.
Burlington & M. R. R. Co. *v.* Lancaster County Com'rs (12 Neb. 324, 11 N. W. Rep. 332), Tax., 271.
Burlington & M. R. R. Co. *v.* Lancaster County Com'rs (15 Neb. 251, 18 N. W. Rep. 71), Tax., 79, 271.
Burlington & M. R. R. Co. *v.* Lawson (10 Am. & Eng. R. Cas. 655, 58 Iowa 145, 12 N. W. Rep. 229), Land Grants, 8, 98.
Burlington & M. R. R. Co. *v.* Otoe County (1 Dill. (U. S.) 338), Mun. Aid, 391.
Burlington & M. R. R. Co. *v.* Penney (38 Iowa 255), Contr., 9.
Burlington & M. R. R. Co. *v.* Reinhackle (14 Am. & Eng. R. Cas. 169, 15 Neb. 279, 18 N. W. Rep. 69, 48 Am. Rep. 342), Em. Dom., 450; Sts. & H., 250.
Burlington & M. R. R. Co. *v.* Rose (1 Am. & Eng. R. Cas. 253, 11 Neb. 177, 8 N. E. Rep. 433), Car. of P., 81; Eject. Pass., 2.
Burlington & M. R. R. Co. *v.* Saline County Com'rs (7 Am. & Eng. R. Cas. 347, 12 Neb. 396, 11 N. W. Rep. 854), Tax., 271, 355.
Burlington & M. R. R. Co. *v.* Sater (1 Iowa 421), Em. Dom., 969.
Burlington & M. R. R. Co. *v.* Saunders County (16 Neb. 123, 19 N. W. Rep. 698), Mun. Aid, 419.
Burlington & M. R. R. Co. *v.* Saunders County (17 Neb. 318, 22 N. W. Rep. 560), Mun. Aid, 70.
Burlington & M. R. R. Co. *v.* Saunders County Com'rs (9 Neb. 507, 4 N. W. Rep. 240), Tax., 37, 271.
Burlington & M. R. R. Co. *v.* Schluntz (14 Am. & Eng. R. Cas. 182, 14 Neb. 421, 16 N. W. Rep. 439), Em. Dom., 551, 683; Witn., 112, 118.
Burlington & M. R. R. Co. *v.* Seward County Com'rs (10 Neb. 211, 4 N. W. Rep. 1016), Tax., 161, 271, 343, 355.
Burlington & M. R. R. Co. *v.* Shoemaker (22 Am. & Eng. R. Cas. 565, 18 Neb. 369), Animals, 73, 77, 580.
Burlington & M. R. R. Co. *v.* Sinnamon (9 Iowa 293), Em. Dom., 938.
Burlington & M. R. R. Co. *v.* Spearman (12 Iowa 112), Tax., 79, 169.
Burlington & M. R. R. Co. *v.* Spere (24 Neb. 125, 38 N. W. Rep. 35), Em. Dom., 775.
Burlington & M. R. R. Co. *v.* Thompson (16 Am. & Eng. R. Cas. 480, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. Rep. 622), Attach., 12, 34.
Burlington & M. R. R. Co. *v.* United States (18 Ct. of Cl. 618), Land Grant Rds., 7.
Burlington & M. R. Co. *v.* Wallace (28 Neb. 179, 44 N. W. Rep. 223), Evid., 170; Trial, 109; Witn., 82.
Burlington & M. R. R. Co. *v.* Webb (22 Am. & Eng. R. Cas. 617, 18 Neb. 215), Animals, 152, 386.
Burlington & M. R. R. Co. *v.* Wendt (12 Neb. 76, 10 N. W. Rep. 456), Animals, 448, 573; Trial, 64.
Burlington & M. R. R. Co. *v.* Westover (4 Neb. 268), Fires, 19, 20, 21, 66, 84, 112, 289, 316, 318.
Burlington & M. R. R. Co. *v.* White (5 Iowa 408), Subscr., 122.
Burlington & M. R. R. Co. *v.* White (28 Neb. 166, 44 N. W. Rep. 95), Em. Dom., 767; Witn., 118, 123.
Burlington & M. R. R. Co. *v.* York County Com'rs (7 Neb. 487), Tax., 344, 351.
Burlington & S. W. R. Co. *v.* Putnam, S. & L. Counties (5 Dill (U. S.) 289), Tax., 155.
Burlington, C. R. & M. R. Co. *v.* Benton County (56 Iowa 89, 8 N. W. Rep. 797), Estop., 4.
Burlington, C. R. & M. R. Co. *v.* Palmer (42 Iowa 222), Subscr., 218.
Burlington, C. R. & M. R. Co. *v.* Stewart (39 Iowa 267, 20 Am. Ry. Rep. 89), Mun. Aid, 165, 412.
Burlington, C. R. & M. R. Co. *v.* Verry (48 Iowa 458), Mort., 96.
Burlington, C. R. & M. R. Co. *v.* Whitney (43 Iowa 113), Contr., 71.
Burlington, C. R. & N. R. Co. *v.* Dey (45 Am. & Eng. R. Cas. 391, 82 Iowa 312, 48 N. W. Rep. 98), Charges, 62; Costs, 5; Int. Com., 10; Ry. Com'rs, 1, 27, 34.
Burlington, C. R. & N. R. Co. *v.* Dunn (122 U. S. 513, 7 Sup. Ct. Rep. 1262), Fed. Cts., 24.
Burlington, C. R. & N. R. Co. *v.* Northwestern Fuel Co. (31 Fed. Rep. 652), Contr., 64; Discrim., 13.
Burlington, K. & S. W. R. Co. *v.* Billings (38 Kan. 243, 16 Pac. Rep. 473), Em. Dom., 903.
Burlington, K. & S. W. R. Co. *v.* Johnson (33 Am. & Eng. R. Cas. 215, 38 Kan. 142, 16 Pac. Rep. 125), Homest., 2; Pub. Lds., 6, 39; Sts. & H., 38; Words & Ph., 105.
Burmeister *v.* New York El. R. Co. (15 J. & S. (N. Y.) 264), Indep. Contr., 11.
Burnam *v.* Banks (45 Mo. 349), Deeds, 15.
Burnell *v.* New York C. R. Co. (45 N. Y. 184, 6 Am. Rep. 61), Bagg., 6, 26, 68, 69.
Burnes *v.* Mayor, etc., of Atchison (2 Kan. 454), Mun. Aid, 413.
Burnes *v.* St. Louis, K. C. & N. R. Co. (71 Mo. 163), Judgm., 17.
Burnes *v.* Staten Island R. T. R. Co. (44 N. Y. S. R. 271, 63 Hun 628, mem., 17 N. Y. Supp. 741), Tresp., Inj. to, 65.
Burnett *v.* Burlington & M. R. R. Co. (19 Am. & Eng. R. Cas. 25, 16 Neb. 332, 20 N. W. Rep. 280), Children, Inj. to, 38; Trial, 29.
Burnett *v.* Great North of Scotland R. Co. (24 Am. & Eng. R. Cas. 647, L. R. 10 App. Cas. 147, 54 L. J. Q. B. D. 531, 53 L. T. 507), Car. of P., 214.

Burnett *v.* Nashville & C. R. Co. (4 Sneed (Tenn.) 528), Em. Dom., 129.
Burnham *v.* Bowen (17 Am. & Eng. R. Cas. 308, 111 U. S. 776, 4 Sup. Ct. Rep. 675), Mort., 102.
Burnham *v.* Chicago, D. & M. R. Co. (4 Dill (U. S.) 503), Rem. of C., 14.
Burnham *v.* Grand Trunk R. Co. (63 Me. 298), Eject. Pass., 30.
Burnham *v.* New York, P. & B. R. Co. (17 R. I. 544, 23 Atl. Rep. 638), Death, etc., 192.
Burnham *v.* Wabash Western R. Co. (91 Mich. 523, 52 N. W. Rep. 14), Car. of P., 31.
Burns *v.* Bellefontaine R. Co. (50 Mo. 139, 3 Am. Ry. Rep. 490), St. Rys., 410.
Burns *v.* Boston & L. R. Co. (101 Mass. 50), Employés, Inj. to, 397.
Burns *v.* Chicago, M. & St. P. R. Co. (28 Am. & Eng. R. Cas. 409, 69 Iowa 450, 30 N. W. Rep. 25), Death, etc., 269; Employés, Inj. to, 98, 110, 242, 509; Witn., 133.
Burns *v.* Cork & B. R. Co. (13 Ir. R. C. L. 543), Pl., 39.
Burns *v.* Dodge (9 Wis. 458), Em. Dom., 1076.
Burns *v.* Grand Rapids & I. R. Co. (113 Ind. 169, 12 West. Rep. 688, 15 N. E. Rep. 230), Death, etc., 109, 110.
Burns *v.* Iowa Homestead Co. (48 Iowa 279), Pl., 103.
Burns *v.* Milwaukee & M. R. Co. (9 Wis. 450), Em. Dom., 554; Estop., 8, 20.
Burns *v.* Multnomah R. Co. (10 Am. & Eng. R. Cas. 289, 8 Sawy. (U. S.) 543, 15 Fed. Rep. 177), Sts. & H., 75, 89, 168.
Burns *v.* North Chicago Rolling Mill Co. (19 Am. & Eng. R. Cas. 412, 60 Wis. 541, 19 N. W. Rep. 380), New Tr., 27; Tr., 220.
Burns *v.* North Chicago Rolling Mill Co. (65 Wis. 312, 27 N. W. Rep. 43), Cross., Inj. at, 78; Trial, 212.
Burns *v.* Staten Island R. T. R. Co. (10 N. Y. S. R. 352, 45 Hun 592, mem.), Fel. Serv., 1, 132.
Burnside *v.* Grand Trunk R. Co. (47 N. H. 554), Evid., 204; Pl., 35.
Burnside *v.* Union Steam Boat Co. (10 Rich. (So. Car.) 113), Fire Ins., 17; Witn., 18.
Burr *v.* Bucksport & B. R. Co. (64 Me. 130), Em. Dom., 831.
Burr *v.* Chariton County (2 McCreary (U. S.) 603, 12 Fed. Rep. 848), Mun. Aid, 362.
Burrall *v.* Bushwick R. Co. (75 N. Y. 211), Stock, 3, 68; Words & Ph., 33.
Burrell *v.* Chicago, M. & St. P. R. Co. (43 Minn. 363, 45 N. W. Rep. 849), Guard. & W., 2.
Burrell *v.* Gowen (44 Am. & Eng. R. Cas. 610, 134 Pa. St. 527, 19 Atl. Rep. 678), Fel. Serv., 425.
Burritt *v.* New Haven (42 Conn. 174), Cross., St. & H., 25, 117; Em. Dom., 165.
Burritt *v.* Rench (4 McLean (U. S.) 325), Car. of M., 104, 123, 719, 767.
Burroughs *v.* Housatonic R. Co. (15 Conn. 124), Fires, 30.
Burroughs *v.* North Carolina R. Co. (67 N. Car. 376, 2 Am. Ry. Rep. 213), Divid., 7.
Burroughs *v.* Norwich & W. R. Co. (100 Mass. 26), Agency, 14; Car. of M., 32, 420, 580.
Burrow *v.* Terre Haute & L. R. Co. (29 Am. & Eng. R. Cas. 574, 107 Ind. 432, 8 N. E. Rep. 167), Contr., 15; Em. Dom., 220, 222.
Burrows *v.* Erie R. Co. (63 N. Y. 556; reversing 3 T. & C. 44), Car. of P., 428.
Burry Port & G. V. R. Co., In re (54 L. J. Ch. D. 710, 52 L. T. 842, 33 W. R. 741), Mort., 122.
Burt *v.* Douglas County St. R. Co. (58 Am. & Eng. R. Cas. 158, 83 Wis. 229, 53 N. W. Rep. 447), Elec. Rys., 27.
Burt *v.* Farrar (24 Barb. (N. Y.) 518), Incorp., 9.
Burt *v.* Lima & H. F. R. Co. (48 N. Y. S. R. 553, 21 N. Y. Supp. 482), Sts. & H., 53, 249.
Burt *v.* Winona & St. P. R. Co. (31 Minn. 472, 18 N. W. Rep. 285, 289), Evid., 249.
Burtis *v.* Buffalo & S. L. R. Co. (24 N. Y. 269), Car. of M., 589.
Burton *v.* Galveston, H. & S. A. R. Co. (21 Am. & Eng. R. Cas. 218, 61 Tex. 526), Car. of P., 574.
Burton *v.* Great Northern R. Co. (9 Ex. 507, 23 L. J. Ex. 184), Contr., 27.
Burton *v.* Koshkonong (4 Fed. Rep. 373), Lim. of Ac., 41.
Burton *v.* Missouri Pac. R. Co. (32 Mo. App. 455), Death, etc., 130; Employés, Inj. to, 143, 221.
Burton *v.* North Mo. R. Co. (30 Mo. 372), Animals, 126.
Burton *v.* Philadelphia, W. & B. R. Co. (4 Harr. (Del.) 252), Fright. Teams, 1.
Burton *v.* Queen (1 Can. Exch. 87), Em. Dom., 1242, 1243.
Burton *v.* St. Paul, M. & M. R. Co. (33 Minn. 189, 22 N. W. Rep. 300), Mal. Pros., 7, 15.
Burton *v.* Severance (22 Oreg. 91, 29 Pac. Rep. 200), Witn., 120.
Burton *v.* Wilmington & W. R. Co. (82 N. Car. 504), Death, etc., 278, 344.
Burton Stock Car Co. *v.* Chicago, B. & Q. R. Co. (1 Int. Com. Rep. 329, 1 Int. Com. Com. 132), Int. Com., 73, 101.
Burton Tp. *v.* Tuttle (30 Ohio St. 62), Sts. & H., 425.
Burwell *v.* Raleigh & G. R. Co. (25 Am. & Eng. R. Cas. 410, 94 N. Car. 451), Car. of M., 181, 183, 663.
Busby *v.* St. Louis, K. C. & N. R. Co. (22 Am. & Eng. R. Cas. 589, 81 Mo. 43), Animals, 385, 619; Fences, 38, 90.
Busch *v.* Buffalo Creek R. Co. (29 Hun (N. Y.) 112), Fel. Serv., 57.
Busch *v.* New York, L. & W. R. Co. (34 N. Y. S. R. 7, 12 N. Y. Supp. 85), Nuis., 6.
Busey *v.* Hooper (35 Md. 15), Charters, 8; Evid., 124; Stockh., 2, 99; Subscr., 36.
Bush *v.* Barnett (96 Cal. 202, 31 Pac. Rep. 2), Car. of P., 572, 582.
Bush *v.* Christopher & T. S. R. Co. (41 N. Y. S. R. 92, 16 N. Y. Supp. 212), App., 54.
Bush *v.* Northern Pac. R. Co. (18 Am. & Eng. R. Cas. 559, 3 Dak. 444, 22 N. W. Rep. 508), App., 78; Car. of M., 698.

Bush *v.* St. Louis, K. C. & N. R. Co. (3 Mo. App. 62), Car. of M., 275; Wareh., 8.
Bushby *v.* New York, L. E. & W. R. Co. (107 N. Y. 374, 14 N. E. Rep. 407, 10 Cent. Rep. 238, 12 N. Y. S. R. 9; affirming 37 Hun 104), Employés, Inj. to, 18, 125.
Bushnell *v.* Beloit (10 Wis. 195), Mun. Aid, 1, 6, 10, 53, 54, 276.
Bushnell *v.* Chicago & N. W. R. Co. (69 Iowa 620, 29 N. W. Rep. 753), Agency, 18.
Business Men's Assoc. *v.* Chicago & N. W. R. Co. (2 Int. Com. Rep. 48, 2 Int. Com. Com. 73), Int. Com., 151, 155.
Business Men's Assoc. *v.* Chicago, St. P., M. & O. R. Co. (2 Int. Com. Rep. 41, 2 Int. Com. Com. 52), Int. Com., 35, 42.
Bussey *v.* Memphis & L. R. R. Co. (4 McCrary (U. S.) 405, 13 Fed. Rep. 330), Car. of M., 53, 141, 597, 778.
Bussian *v.* Milwaukee, L. S. & W. R. Co. (10 Am. & Eng. R. Cas. 716, 56 Wis. 325, 14 N. W. Rep. 452), Fright. Teams, 2, 5; Release, 8, 15; Sts. & H., 58, 408, 410.
Buster *v.* Hannibal & St. J. R. Co. (18 Mo. App. 578), Animals, 62.
Buster *v.* Humphreys (34 Fed. Rep. 507), Cross., Inj. at, 344.
Butcher *v.* London & S. W. R. Co. (16 C. B. 13, 3 C. L. R. 805, 1 Jur. N. S. 427, 24 L. J. C. P. 137, 3 W. R. 409), Bagg., 61.
Butcher *v.* Vaca Valley & C. L. R. Co. (Cal.) (22 Am. & Eng. R. Cas. 644, 5 Pac. Rep. 359), Fires, 174, 242, 254.
Butcher *v.* Vaca Valley & C. L. R. Co. (23 Am. & Eng. R. Cas. 356, 67 Cal. 518, 8 Pac. Rep. 174), Fires, 174.
Butcher *v.* West Virginia & P. R. Co. (37 W. Va. 180, 16 S. E. Rep. 457), Contrib. Neg., 5; Cross., Inj. at, 141, 206.
Butler *v.* Boston & A. R. Co. (24 Hun (N. Y.) 99), Trusts, 12.
Butler *v.* Chicago & N. W. R. Co. (71 Iowa 206, 32 N. W. Rep. 262), Animals, 462.
Butler *v.* Chicago, B. & Q. R. Co. (87 Iowa 206, 54 N. W. Rep. 208), Employés, Inj. to, 722; Fel. Serv., 175, 475; Witn., 49, 98.
Butler *v.* Dunham (27 Ill. 474), Mun. Aid, 6, 150.
Butler *v.* East Tenn. & V. R. Co. (9 Am. & Eng. R. Cas. 249, 8 Lea (Tenn.) 32), Car. of M., 224.
Butler *v.* Fayette County Sup'rs (46 Iowa 326), Mun. Aid, 412.
Butler *v.* Gettysburg & H. R. Co. (126 Pa. St. 160, 19 Atl. Rep. 37), Contrib. Neg., 88.
Butler *v.* Hudson River R. Co. (3 E. D. Smith (N. Y.) 571), Car. of M., 5, 65.
Butler *v.* Manchester, S. & L. R. Co. (33 Am. & Eng. R. Cas. 551, 21 Q. B. D. 207, 57 L. J. (App.) 564, 6 Ry. & C. T. Cas. 70), Ejectt. Pass., 19, 20.
Butler *v.* Manhattan R. Co. (4 Misc. (N. Y.) 401; affirming 3 Misc. 453, 52 N. Y. S. R. 498), Evid., 174, 212; Husb. & W., 23; Witn., 88.
Butler *v.* Manhattan R. Co. (52 N. Y. S. R. 498, 30 Abb. N. Cas. 78, 3 Misc. 453, 23 N. Y. Supp. 163; affirmed in 60 N. Y. S. R. 873, mem., 143 N. Y. 630, mem., 37 N. E. Rep. 826), New Tr., 60; Witn., 88, 93, 168, 189.
Butler *v.* Manhattan R. Co. (53 N. Y. S. R. 664), Dam., 69; Elev. Rys., 208.
Butler *v.* Milwaukee & St. P. R. Co. (28 Wis. 487, 5 Am. Ry. Rep. 454), Death, etc., 193; Fly. Switch, 1.
Butler *v.* New York & E. R. Co. (22 Barb. (N. Y.) 110), Assign., 3.
Butler *v.* Pittsburg & B. R. Co. (139 Pa. St. 195, 21 Atl. Rep. 500), Children, Inj. to, 89.
Butler *v.* Rahm (46 Md. 541, 18 Am. Ry. Rep. 86), Assign., 17; Bonds, 37; Mort., 13, 46, 70, 73, 79, 83.
Butler *v.* Richmond & D. R. Co. (88 Ga. 594, 15 S. E. Rep. 668), Acc. & Sat., 7.
Butman *v.* Vermont C. R. Co. (27 Vt. 500), Em. Dom., 867.
Butt *v.* Great Western R. Co. (11 C. B. 140, 20 L. J. C. P. 241), Pl., 74, 76.
Butterfield *v.* Central Pac. R. Co. (31 Cal. 264), Pub. Lds., 30.
Butterfield *v.* Cowing (112 N. Y. 486, 20 N. E. Rep. 369, 21 N. Y. S. R. 500), Bonds, 57.
Butterfield *v.* Western R. Corp. (10 Allen (Mass.) 532), Cross., Inj. at, 265.
Buttery *v.* Rome, W. & O. R. Co. (14 N. Y. S. R. 131), Adv. Poss., 4; Deeds, 34; Ejectm., 18.
Buttles *v.* Chicago, S. F. & C. R. Co. (43 Mo. App. 280), Fences, 90, 110.
Button *v.* Hudson River R. Co. (18 N. Y. 248), Contrib. Neg., 101, 104, 116.
Buttrick *v.* Nashua & L. R. Co. (62 N. H. 413), Stock, 82.
Butts *v.* St. Louis, I. M. & S. R. Co. (98 Mo. 272, 11 S. W. Rep. 754), Cross., Inj. at, 263.
Butts *v.* Vicksburg & M. R. Co. (63 Miss. 462), Lim. of Ac., 69.
Buttz *v.* Northern Pac. R. Co. (29 Am. & Eng. R. Cas. 455, 119 U. S. 55, 7 Sup. Ct. Rep. 100), Land Grants, 10, 75, 78, 81.
Butz *v.* Muscatine (8 Wall (U. S.) 575), Tax., 8.
Buxton *v.* Northeastern R. Co. (L. R. 3 Q. B. 549, 9 B. & S. 824, 37 L. J. Q. B. 258, 18 L. T. 795, 16 W. R. 1124), Fences, 12, 70.
Buzby *v.* Philadelphia Traction Co. (42 Am. & Eng. R. Cas. 144, 126 Pa. St. 559, 17 Atl. Rep. 895), Cable Rys., 13; Cross., Inj. at, 193.
Bybee *v.* Oregon & C. R. Co. (24 Am. & Eng. R. Cas. 127, 26 Fed. Rep. 586, 11 Sawy. (U. S.) 479), Land Grants, 106.
Bybee *v.* Oregon & C. R. Co. (46 Am. & Eng. R. Cas. 460, 139 U. S. 663, 11 Sup. Ct. Rep. 641), Em. Dom., 438; Estop., 14; Land Grants, 59.
Byers *v.* Denver Circle R. Co. (13 Colo. 552, 22 Pac. Rep. 951), Spec. Perf., 8.
Byers *v.* Des Moines Valley R. Co. (21 Iowa 54), Just. P., 7.
Byington *v.* Mississippi & M. R. Co. (11 Iowa 502), Tresp., 5.
Byran *v.* Southwestern R. Co. (37 Ga. 26), Contr., 73.
Byrd *v.* New Orleans City & L. R. Co. (43

La. Ann. 822, 9 So. Rep. 565), Cross., Inj. at, [illegible]; St. Rys., 387.
Byrd *v.* Ralston (3 Head (Tenn.) 477), Mun. Aid, 426.
Byrne *v.* Brooklyn City & N. R. Co. (6 Misc. 260, 26 N. Y. Supp. 760, 58 N. Y. S. R. 127), Evid., 75.
Byrne *v.* Brooklyn City R. Co. (6 Misc. 441, 27 N. Y. Supp. 126, 58 N. Y. S. R. 577), Employés, Inj. to, 12, 39.
Byrne *v.* Kansas City, Ft. S. & M. R. Co. (55 Fed. Rep. 44), Cham., 3.
Byrne *v.* Keokuk & W. R. Co. (47 Mo. App. 383), Drains, 3.
Byrne *v.* Minneapolis & St. L. R. Co. (38 Minn. 212, 36 N. W. Rep. 339), Evid., 55; Flood. Lds., 97.
Byrne *v.* New York C. & H. R. R. Co. (83 N. Y. 620; reversing 14 Hun 322), Children, Inj. to, 74.
Byrne *v.* New York C. & H. R. R. Co. (94 N. Y. 12; reversing 28 Hun 438), Cross., Inj. at, 111.
Byrne *v.* New York C. & H. R. R. Co. (104 N. Y. 362, 10 N. E. Rep. 539, 5 N. Y. S. R. 722, 58 Am. Rep. 512; affirming 36 Hun 647, mem.), Cross., Inj. at, 116, 146.
Byrnes *v.* New York, L. E. & W. R. Co. (71 Hun (N. Y.) 209), Employés, Inj. to, 25.
Byrnes *v.* New York, L. E. & W. R. Co. (113 N. Y. 251, 21 N. E. Rep. 50, 22 N. Y. S. R. 936, 4 L. R. A. 151; reversing 14 N. Y. S. R. 554), Fel. Serv., 29, 413; Trial, 80.
Byron *v.* Bell (16 Daly (N. Y.) 198, 10 N. Y. Supp. 693, 32 N. Y. S. R. 323), Constr. Rys., 65.
Bywaters *v.* Paris & G. N. R. Co. (38 Am. & Eng. R. Cas. 498, 73 Tex. 624, 11 S. W. Rep. 856), Charters, 83; Subscr., 116.

Cade *v.* Perrin (14 So. Car. 1), Mun. Aid, 425.
Cadle *v.* Muscatine Western R. Co. (44 Iowa 11), Sts. & H., 141, 279.
Cadmus *v.* Central R. Co. (31 N. J. L. 179), Em. Dom., 835.
Cadmus *v.* St. Louis B. & T. Co. (15 Mo. App. 86), Children, Inj. to, 124; Contrib. Neg., 48.
Cadwallader *v.* Grand Trunk R. Co. (9 Low Can. 169), Bagg., 36, 40, 45, 114.
Cadwallader *v.* Louisville, N. A. & C. R. Co. (128 Ind. 518, 27 N. E. Rep. 161), Cross., Inj. at, 279.
Cady *v.* Chicago, M. & St. P. R. Co. (5 Dak. 97, 37 N. W. Rep. 221), App., 70.
Caffyn *v.* State (91 Ind. 324), Mun. Aid, 411, 444.
Cafiero *v.* Welsh (8 Phila. (Pa.) 130), Bills of L., 12, 13.
Cage *v.* Louisville, N. O. & T. R. Co. (Miss.) (7 So. Rep. 509), Animals, 537.
Cagney *v.* Hannibal & St. J. R. Co. (69 Mo. 416), Employés, Inj. to, 211, 238.
Cagney *v.* Manhattan R. Co. (2 N. Y. Supp. 410), Elev. Rys., 215.
Cagwin *v.* Hancock (5 Am. & Eng. R. Cas. 150, 84 N. Y. 532; reversing 22 Hun 201), Mun. Aid, 106, 371.
Cahalan *v.* McTague (46 Fed. Rep. 251), Pub. Lds., 17.
Cahill *v.* Cincinnati, N. O. & T. P. R. Co. (49 Am. & Eng. R. Cas. 390, 92 Ky. 345, 18 S. W. Rep. 2), App., 38; Contrib. Neg., 83, 87, 105; Cross., Inj. at, 256; Farm Cross., 12; Imp. Neg., 25.
Cahill *v.* London & N. W. R. Co. (10 C. B. N. S. 154, 7 Jur. N. S. 1164, 30 L. J. C. P. 289, 9 W. R. 653, 4 L. T. N. S. 246; affirmed on appeal in 13 C. B. N. S. 818, 8 Jur. N. S. 1063, 31 L. J. C. P. 271, 10 W. R. 321), Bagg., 37.
Cahill *v.* Ragan (20 Mo. 451), Constr. Rys., 50.
Cahn *v.* Michigan C. R. Co. (71 Ill. 96), Car. of M., 215, 216.
Cahoon *v.* Chicago & N. W. R. Co. (85 Wis. 570, 55 N. W. Rep. 900), Cross., Inj. at, 109; Fright. Teams, 1.
Cain *v.* Chicago, R. I. & P. R. Co. (54 Iowa 255, 3 N. W. Rep. 736, 6 N. W. Rep. 268, 21 Am. Ry. Rep. 235), Homest., 2; Sts. & H., 62, 150, 214.
Cain *v.* Minneapolis & St. L. R. Co. (39 Minn. 297, 39 N. W. Rep. 635), Eject. Pass., 69.
Cairns *v.* Northeastern R. Co. (4 Ry. & C. T. Cas. 221), Charges, 113.
Cairo *v.* Zane (149 U. S. 122, 13 Sup. Ct. Rep. 803), Coupons, 12; Mun. Aid, 311, 352.
Cairo & F. R. Co. *v.* Hecht (29 Ark. 661), Charters, 33.
Cairo & F. R. Co. *v.* Hecht (95 U. S. 168), Charters, 23.
Cairo & F. R. Co. *v.* Parks (32 Ark. 131), Lim. of Ac., 17; Tax., 153, 164.
Cairo & F. R. Co. *v.* Titus (30 N. J. Eq. 502; reversed in 32 N. J. Eq. 397), New Tr., 97.
Cairo & F. R. Co. *v.* Titus (32 N. J. Eq. 397; reversing 30 N. J. Eq. 502), New Tr., 90
Cairo & F. R. Co. *v.* Trout (32 Ark. 17), Em. Dom., 281, 495, 517; Proc., 45.
Cairo & F. R. Co. *v.* Turner (31 Ark. 494), Em. Dom., 180, 373, 415, 1011.
Cairo & St. L. R. Co. *v.* Cauble (4 Ill. App. 133), Liens, 42.
Cairo & St. L. R. Co. *v.* Cauble (85 Ill. 555), Liens, 40.
Cairo & St. L. R. Co. *v.* Holbrook (92 Ill. 297), Proc., 45.
Cairo & St. L. R. Co. *v.* Killenberg (82 Ill. 295), Certif. of Indebt., 3.
Cairo & St. L. R. Co. *v.* Koerner (3 Ill. App. 248), Att'ys, 21.
Cairo & St. L. R. Co. *v.* Mahoney (82 Ill. 73), Med. Serv., 14, 18.
Cairo & St. L. R. Co. *v.* Murray (82 Ill. 76), Animals, 281.
Cairo & St. L. R. Co. *v.* Peoples (92 Ill. 97), Fences, 6.
Cairo & St. L. R. Co. *v.* Sparta (77 Ill. 505), Mun. Aid, 23, 169.
Cairo & St. L. R. Co. *v.* Warrington (92 Ill. 157), Fences, 6.
Cairo & St. L. R. Co. *v.* Watson (85 Ill. 531), Liens, 19.
Cairo & St. L. R. Co. *v.* Woosley (85 Ill.

370), Animals, 260, 285, 288; Em. Dom., 1079.
Cairo & V. R. Co. *v.* Delap (7 Ill. App. 60), Bills & N., 22.
Cairo & V. R. Co. *v.* Fackney (78 Ill. 116), Eq., 17; Liens, 53, 55.
Cairo & V. R. Co. *v.* Houry (5 Am. & Eng. R. Cas. 62, 77 Ind. 364), Flood. Lds., 80.
Cairo & V. R. Co. *v.* Joiner (72 Ill. 520), Proc., 45.
Cairo & V. R. Co. *v.* Parker (84 Ill. 613), Bills & N., 6.
Cairo & V. R. Co. *v.* People (92 Ill. 170), Sts. & H., 213, 297.
Cairo & V. R. Co. *v.* Stevens (5 Am. & Eng. R. Cas. 58, 73 Ind. 278), Waters & W., 28.
Cake *v.* Philadelphia & E. R. Co. (87 Pa. St. 307), Em. Dom., 56, 868.
Calcasieu Lumber Co. *v.* Harris (43 Am. & Eng. R. Cas. 570, 77 Tex. 18, 13 S. W. Rep. 453), Car. of M., 211; Right of W., 18; Words & Ph., 202.
Calderwood *v.* North Birmingham St. R. Co. (96 Ala. 318, 11 So. Rep. 66), St. Rys., 405.
Caldon *v.* Chicago, St. P., M. & O. R. Co (85 Wis. 527, 55 N. W. Rep. 955), Cat.-Gds., 14.
Caldwell *v.* Brown (53 Pa. St. 453), Death, etc., 380, 381; Fel. Serv., 1, 138.
Caldwell *v.* Central Park, N. & E. R. R. Co. (27 N. Y. Supp. 397, 57 N. Y. S. R. 489, 7 Misc. 67), Dam., 81, 102.
Caldwell *v.* Justices of Burke County (4 Jones Eq. (N. Car.) 323), Charters, 186; Mun. Aid, 45, 116.
Caldwell *v.* Murphy (1 Duer (N. Y.) 233), App., 85; Car. of P., 6, 139; Contrib. Neg., 16; Dam., 42, 86, 88.
Caldwell *v.* New Jersey Steamboat Co. (47 N. Y. 282), Car. of P., 193; Dam., 27; Evid., 144.
Caldwell *v.* Richmond & D. R. Co. (89 Ga. 550, 15 S. E. Rep. 678), Car. of P., 1, 227; Evid., 108; Leases, 53.
Caldwell *v.* Southern Exp. Co. (1 Flipp. (U. S.) 85), Exp. Cos., 31, 90.
Caldwell *v.* Vicksburg, S. & P. R. Co. (39 Am. & Eng. R. Cas. 245, 41 La. Ann. 624, 6 So. Rep. 217), Bridges, 20, 31, 50; Trial, 9.
Caldwell's Case (19 Wall. (U. S.) 264), Words & Ph., 168.
Caledonian R. Co. *v.* Belhaven (3 Macq. H. L. Cas. 56, 3 Jur. N. S. 573), Em. Dom., 1098; Mines, etc., 9.
Caledonian R. Co. *v.* Carmichael (2 H. L. Sc. Cas. 56), Em. Dom., 1200.
Caledonian R. Co. *v.* Colt (3 Macq. H. L. Cas. 833, 7 Jur. N. S. 475), Sts. & H., 184.
Caledonian R. Co. *v.* Glasgow & S. W. R. Co. (3 Ry. & C. T. Cas. 395), Leases, 122.
Caledonian R. Co. *v.* Great Northern R. Co. (2 Ry. & C. T. Cas. 377), Leases, 127.
Caledonian R. Co. *v.* Greenock & W. B. R. Co. (L. R. 2 Sc. App. 347, 2 Ry. & C. T. Cas. 15), Arb., 4.
Caledonian R. Co. *v.* Greenock & W. B. R. Co. (4 Ry. & C. T. Cas. 70), Charges, 98; Connect. L., 4.
Caledonian R. Co. *v.* Greenock & W. B. R. Co. (4 Ry. & C. T. Cas. 135), Charges, 105.
Caledonian R. Co. *v.* Lockhart (6 Jur. N. S. 1311, 8 W. R. 373, 3 L. T. N. S. 252, 3 Macq. H. L. Cas. 808), Arb., 19; Em. Dom., 1170.
Caledonian R. Co. *v.* North British R. Co. (2 Ry. & C. T. Cas. 271), Leases, 119.
Caledonian R. Co. *v.* North British R. Co. 2 Ry. & C. T. Cas. 285), Contr., 103; Words & Ph., 75.
Caledonian R. Co. *v.* North British R. Co. 3 Ry. & C. T. Cas. 56), Sleep. Car Cos., 1.
Caledonian R. Co. *v.* North British R. Co. (3 Ry. & C. T. Cas. 403), Charges, 96, 103; Connect. L., 3.
Caledonian R. Co. *v.* North British R. Co. (L. R. 6 App. Cas. 114, 29 W. R. 685), Contr., 105.
Caledonian R. Co. *v.* Ogilvy (2 Macq. H. L. Cas. 229), Cross., St. & H., 120; Em. Dom., 1188.
Caledonian R. Co. *v.* Solway Junction R. Co. (49 L. T. 526, 32 W. R. 164), Direct., 47.
Caledonian R. Co. *v.* Sprot (2 Macq. H. L. Cas. 449, 2 Jur. N. S. 623), Em. Dom., 1098; Mines, etc., 3.
Caledonian R. Co. *v.* Walker (6 Am. & Eng. R. Cas. 518, 46 L. T. 826, 30 W. R. 569, L. R. 7 App. Cas. 259), Em. Dom., 1150, 1191, 1196; Evid., 191; Nuis., 9.
Caley *v.* Philadelphia & C. County R. Co. (80 Pa. St. 363), Subscr., 108, 126.
Calhoun *v.* Delhi & M. R. Co. (28 Hun (N. Y.) 379, 64 How. Pr. 291), Agency, 107; Estop., 20; Mun. Aid, 67, 83, 91, 97, 429.
Calhoun *v.* Gulf, C. & S. F. R. Co. (84 Tex. 226, 19 S. W. Rep. 341), Cross., Inj. at, 136; Evid., 130; Negl., 63.
Calhoun *v.* Memphis & P. R. Co. (2 Flipp. (U. S.) 442), Mort., 39, 40.
Calhoun *v.* Millard (121 N. Y. 69, 24 N. E. Rep. 27, 30 N. Y. S. R. 759; affirming 16 N. Y. S. R. 46, 48 Hun 617, mem.), Judgm., 20; Mun. Aid, 404.
Calhoun *v.* St. Louis & S. E. R. Co. (9 Biss. (U. S.) 330, 14 Fed. Rep. 9), Mort., 100.
Calhoun County Sup'rs *v.* Galbraith (99 U. S. 214), Mun. Aid, 116, 136, 309, 311.
California, The (2 Sawy. (U. S.) 12), Bills of L., 21.
California *v.* Central Pac. R. Co. (33 Am. & Eng. R. Cas. 451, 127 U. S. 1, 8 Sup. Ct. Rep. 1073), Int. Com., 2, 188; Tax., 125.
California *v.* San Pable & T. R. Co. (149 U. S. 308, 13 Sup. Ct. Rep. 876), Tender, 6.
California C. R. Co. *v.* Hooper (76 Cal. 404, 18 Pac. Rep. 599), Em. Dom., 61, 256, 314, 592.
California Ins. Co. *v.* Union Compress Co. (133 U. S. 387, 10 Sup. Ct. Rep. 365), Fire Ins., 2.
California Northern R. Co. *v.* Butte County Sup'rs (18 Cal. 671), Mun. Aid, 60, 288; Tax., 334.
California Northern R. Co. *v.* Gould (21 Cal. 254), Pub. Lds., 20, 46.
California Pac. R. Co., In re (3 Sawy. (U. S.) 240, 11 Bankr. Reg. 193), Bank'cy, 1, 5.
California Pac. R. Co. *v.* Armstrong (46 Cal. 85, 7 Am. Ry. Rep. 259), Em. Dom., 657, 729.

California Pac. R. Co. *v.* Central Pac. R. Co. (47 Cal. 528, 7 Am. Ry. Rep. 532), Em. Dom., 958.
California Pac. R. Co. *v.* Central Pac. R. Co. (47 Cal. 549, 7 Am. Ry. Rep. 536), Em. Dom., 238; Injunc., 7.
California Pac. R. Co. *v.* Frisbie (41 Cal. 356, 3 Am. Ry. Rep. 62), Em. Dom., 803.
California Southern R. Co. *v.* Colton L. & W. Co. (Cal.) (14 Am. & Eng. R. Cas. 194, 2 Pac. Rep. 38), Em. Dom., 313, 463.
California Southern R. Co. *v.* Kimball (61 Cal. 90), Sts. & H., 113, 129.
California Southern R. Co. *v.* Southern Pac. R. Co. (65 Cal. 293, 4 Pac. Rep. 12), Em. Dom., 407.
California Southern R. Co. *v.* Southern Pac. R. Co. (65 Cal. 295, 4 Pac. Rep. 13), Em. Dom., 885.
California Southern R. Co. *v.* Southern Pac. R. Co. (17 Am. & Eng. R. Cas. 172, 65 Cal. 394, 4 Pac. Rep. 344), Citizens, 4; Trial, 8.
California Southern R. Co. *v.* Southern Pac. R. Co. (65 Cal. 409, 4 Pac. Rep. 388), Em. Dom., 240.
California Southern R. Co. *v.* Southern Pac. R. Co. (20 Am. & Eng. R. Cas. 309, 67 Cal. 59, 7 Pac. Rep. 123), Consol., 15; Cross. Rys., 21, 28; Em. Dom., 315, 319, 657, 693, 826, 937; Judgm., 5.
Calkins *v.* State (18 Ohio St. 366), Crim. L., 17.
Callaghan *v.* Delaware, L. & W. R. Co. (52 Hun 276, 22 N. Y. S. R. 594, 5 N. Y. Supp. 285), Cross., Inj. at, 280.
Callahan *v.* Burlington & M. R. R. Co. (23 Iowa 562), Indep. Contr., 22.
Callahan *v.* Des Moines (63 Iowa 705, 17 N. W. Rep. 470), Sts. & H., 159.
Callahan *v.* Eel River & E. R. Co. (92 Cal. 89, 28 Pac. Rep. 104), Children, Inj. to, 25.
Callahan *v.* Louisville & N. R. Co. (11 Fed. Rep. 536), Employés, Inj. to, 301; Incorp., 3; Rem. of C., 37.
Callahan *v.* Sharp (27 Hun (N. Y.) 85; affirmed in 95 N. Y. 672, mem.), Imp. Neg., 25.
Callanan *v.* Port Huron & N. W. R. Co. (61 Mich. 15, 27 N. W. Rep. 718), Actions, 15; Em. Dom., 1081.
Callaway County *v.* Foster (93 U. S. 567), Mun. Aid, 4, 178.
Callender *v.* Painesville & H. R. Co. (11 Ohio St. 516), Incorp., 10, 11.
Calligan *v.* New York C. & H. R. R. Co. (59 N. Y. 651), Cross., Inj. at, 261; Death, etc., 243.
Calne R. Co., In re (L. R. 9 Eq. 658), Em. Dom., 1123.
Calumet River R. Co. *v.* Brown (136 Ill. 322, 26 N. E. Rep. 501), Em. Dom., 140, 268, 437.
Calumet River R. Co. *v.* Moore (33 Am. & Eng. R. Cas. 179, 124 Ill. 329, 15 N. E. Rep. 764), Em. Dom., 451, 466, 580, 603, 671, 715, 732, 926.
Calvert *v.* Hannibal & St. J. R. Co. (34 Mo. 242), Animals, 495.
Calvert *v.* Hannibal & St. J. R. Co. (38 Mo. 467), Animals, 452.
Calvert *v.* State (34 Neb. 616, 52 N. W. Rep. 687), Injunc., 9.
Calvo *v.* Charlotte, C. & A. R. Co. (28 Am. & Eng. R. Cas. 327, 23 So. Car. 526, 55 Am. Rep. 28), Fel. Serv., 116, 352.
Cambeis *v.* Third Ave. R. Co. (48 N. Y. S. R. 709, 1 Misc. 158, 20 N. Y. Supp. 633), Evid., 198; St. Rys., 231.
Camblos *v.* Philadelphia & R. R. Co. (4 Brews. (Pa.) 563, 9 Phila. 411), Charges, 23, 30.
Cambrian R. Co., In re (19 W. R. 871, 24 L. T. 417), Reorg., 19.
Cambrian R. Co. *v.* London & N. W. R. Co. (2 Ry. & C. T. Cas. 311), Leases, 123.
Cambridge *v.* Cambridge R. Co. (10 Allen (Mass.) 50), St. Rys., 260.
Cambridge *v.* Charlestown Branch R. Co. (7 Metc. (Mass.) 70), Charters, 106.
Cambridge *v.* Railroad Com'rs (153 Mass. 161, 26 N. E. Rep. 241), Cross., St. & H., 45.
Cambridge R. Co. *v.* Charles River St. R. Co. (23 Am. & Eng. R. Cas. 62, 139 Mass. 454, 1 N. E. Rep. 925), St. Rys., 252.
Camden & A. R. & T. Co. *v.* Appeal Com'rs (18 N. J. L. 71), Tax., 191.
Camden & A. R. & T. Co. *v.* Belknap (21 Wend. (N. Y.) 354), Bagg., 53, 100.
Camden & A. R. & T. Co. *v.* Briggs (22 N. J. L. 623; affirming 21 N. J. L. 406), Charges, 5, 8, 73; Charters, 57.
Camden & A. R. & T. Co. *v.* Burke (13 Wend. (N. Y.) 611), Bagg., 2, 100.
Camden & A. R. & T. Co. *v.* Remer (4 Barb. (N. Y.) 127), Charters, 51; Pl., 82.
Camden & A. R. Co. *v.* Atlantic City Pass. R. Co. (26 N. J. Eq. 69), Injunc., 48.
Camden & A. R. Co. *v.* Baldauf (16 Pa. St. 67), Bagg., 89, 113; Car. of P., 331.
Camden & A. R. Co. *v.* Bausch (Pa.) (28 Am. & Eng. R. Cas. 172, 7 Atl. Rep. 731; affirming 18 Phila. (Pa.) 392), Passes, 13, 20.
Camden & A. R. Co. *v.* Coxe (Pa.) (26 Am. & Eng. R. Cas. 102), Guar., 8.
Camden & A. R. Co. *v.* Elkins (37 N. J. Eq. 273; affirming 36 N. J. Eq. 467), Direct., 13, 56.
Camden & A. R. Co. *v.* Forsyth (61 Pa. St. 81), Bills of L., 68.
Camden & A. R. Co. *v.* Hillegas, 18 N. J. L. 11), Tax., 149.
Camden & A. R. Co. *v.* Hoosey (6 Am. & Eng. R. Cas. 454, 99 Pa. St. 492, 44 Am. Rep. 120), Car. of P., 476.
Camden & A. R. Co. *v.* May's Landing & E. H. C. R. Co. (48 N. J. L. 530, 7 Atl. Rep. 523), Leases, 80; Ult. Vir., 6.
Camden & A. R. Co. *v.* Stewart (18 N. J. Eq. 489), Easem., 12.
Camden & R. Water Co. *v.* Ingraham (85 Me. 179, 27 Atl. Rep. 94), Em. Dom., 268.
Camden Horse R. Co. *v.* Citizens' Coach Co. (28 N. J. Eq. 145; reversed on another point in 29 N. J. Eq. 299), St. Rys., 238.
Cameron *v.* Charing Cross R. Co. (16 C. B. N. S. 430, 10 Jur. N. S. 635, 33 L. J. C. P. 313, 12 W. R. 803, 10 L. T. 381; reversed in 19 C. B. N. S. 764, 11 Jur. N. S. 282, 13

W. R. 390, 455, 12 L. T. 121), Em. Dom., 1133.
Cameron *v.* Charing Cross R. Co. (19 C. B. N. S. 764, 11 Jur. N. S. 282, 13 W. R. 390, 455, 12 L. T. 121; reversing 16 C. B. N. S. 430, 10 Jur. N. S. 635, 33 L. J. C. P. 313, 12 W. R. 803, 10 L. T. 381), Em. Dom., 1194.
Cameron *v.* Chicago, M. & St. P. R. Co. (42 Minn. 75, 43 N. W. Rep. 785), Em. Dom., 457.
Cameron *v.* Chicago, M. & St. P. R. Co. (51 Minn. 153, 53 N. W. Rep. 199), Em. Dom., 652.
Cameron *v.* Ontario, S. & H. R. U. Co. (14 U. C. Q. B. 612), Lim. of Ac., 58.
Cameron *v.* Pacific Exp. Co. (48 Mo. App. 99), Mal. Pros., 2.
Cameron *v.* Pittsburgh & L. E. R. Co. (157 Pa. St. 617, 27 Atl. Rep. 668), Em. Dom., 456, 597.
Cameron *v.* Rich (4 Strobh. (So. Car.) 168), Lim. of Liab., 38.
Cameron *v.* Stephenson (69 Mo. 372), Mun. Aid, 418.
Cameron *v.* Tome (24 Am. & Eng. R. Cas. 203, 64 Md. 507, 2 Atl. Rep. 837), Coupons, 10, 11.
Cameron *v.* Wellington, G. & B. R. Co. (28 Grant's Ch. (U. C.) 327; reversing 27 Grant's Ch. 95), Farm Cross., 4.
Cameron *v.* Wigle (24 Grant's Ch. (U. C.) 8), Em. Dom., 1214.
Camp *v.* Barney (4 Hun (N. Y.) 373, 6 T. & C. 622), Receiv., 74, 130.
Camp *v.* Coal Creek & W. G. R. Co. (14 Am. & Eng. R. Cas. 372, 11 Lea (Tenn.) 705), App., 12.
Camp *v.* Hartford & N. Y. Steamboat Co. (43 Conn. 333), Bills of L., 64; Car. of M., 451, 474.
Campanello *v.* New York C. & H. R. R. Co. (39 N. Y. S. R. 445, 15 N. Y. Supp. 670; affirmed in 136 N. Y. 644, mem., 32 N. E. Rep. 1015, 49 N. Y. S. R. 914), New Tr., 5.
Campbell, Appeal of (Pa.) (12 Atl. Rep. 843), Sts. & H., 210.
Campbell, In re (1 N. Y. S. R. 768), Em. Dom., 793.
Campbell *v.* Alford (57 Tex. 159), Bills of L., 124.
Campbell *v.* Atlanta & R. A. L. R. Co. (53 Ga. 488), Contrib. Neg., 105; Employés, Inj. to, 595.
Campbell *v.* Atlantic, M. & O. R. Co. (4 Hughes (U. S.) 170), Animals, 51, 455.
Campbell *v.* Bostick (Tex. Civ. App.) (22 S. W. Rep. 828), Libel & S., 3.
Campbell *v.* Buckman (49 Cal. 362), Land Grants., 50.
Campbell *v.* Champlain & St. L. R. Co. (18 How. Pr. (N. Y.) 412), Attach., 7.
Campbell *v.* Chicago, M. & St. P. R. Co. 86 Iowa 587, 53 N. W. Rep. 351), Int. Com., 10; Ry. Com'rs, 13.
Campbell *v.* Chicago, R. I. & P. R. Co. (35 Iowa 334), Animals, 312.
Campbell *v.* Chicago, R. I. & P. R. Co. (45 Iowa 76), Car. of P., 201; Death, etc., 224; Time-tables, 1.
Campbell *v.* Cincinnati Southern R. Co. (Ky.) (34 Am. & Eng. R. Cas. 113, 6 S. W. Rep. 337), Constr. Rys., 24, 51.
Campbell *v.* Conner (70 N. Y. 424), Car. of M., 383.
Campbell *v.* Duluth, S. S. & A. R. Co. (50 Fed. Rep. 241), Jurisd., 6.
Campbell *v.* Eveleth (83 Me. 50, 21 Atl. Rep. 784), Employés, Inj. to, 216; Trial, 74.
Campbell *v.* Frankford & S. C. R. Co. (139 Pa. St. 522, 21 Atl. Rep. 92), St. Rys., 180.
Campbell *v.* Great Western R. Co. (15 U. C. Q. B. 498), Animals, 283.
Campbell *v.* Great Western R. Co. (20 U. C. C. P. 345; affirmed in 20 U. C. C. P. 563), Husb. & W., 36.
Campbell *v.* Houston & T. C. R. Co. (2 Tex. Unrep. Cas. 473), Dam., 80; Death, etc., 40.
Campbell *v.* Indianapolis & V. R. Co. (30 Am. & Eng. R. Cas. 304, 110 Ind. 490, 9 West. Rep. 371, 11 N. E. Rep. 482), License, 3, 10, 16.
Campbell *v.* Jones (9 Low. Can. 10), Car. of M., 504, 517.
Campbell *v.* Kenosha (5 Wall (U. S.) 194), Mun. Aid, 22.
Campbell *v.* McCoy (3 Tex. Civ. App. 298, 23 S. W. Rep. 34), Contrib. Neg., 11, 116; Employés, Inj. to, 768.
Campbell *v.* McGregor (29 New Brun. 644), Constr. Rys., 47; Fires, 325; For. Corp., 18.
Campbell *v.* Marietta & C. R. Co. (23 Ohio St. 168), Charges, 36; Sales of Rds., 11, 12; Words & Ph., 188.
Campbell *v.* Metropolitan St. R. Co. (82 Ga. 320, 9 S. E. Rep. 1078), St. Rys., 128, 196, 200.
Campbell *v.* Missouri Pac. R. Co. (78 Mo. 639), Animals, 353.
Campbell *v.* New York & N. E. R. Co. (13 Am. & Eng. R. Cas. 589, 50 Conn. 128), Fences, 13, 20.
Campbell *v.* New York C. & H. R. R. Co. (35 Hun (N. Y.) 506), Employés, Inj. to, 20, 159.
Campbell *v.* New York C. & H. R. R. Co. (3 N. Y. Supp. 694, 49 Hun 611, mem., 19 N. Y. S. R. 659; affirmed in 121 N. Y. 669, mem.), Cross., Inj. at, 21, 293; Witn., 167.
Campbell *v.* New York C. & H. R. R. Co. (21 N. Y. S. R. 685, 4 N. Y. Supp. 265, 51 Hun 642; affirmed in 130 N. Y. 631, mem., 29 N. E. Rep. 150, 40 N. Y. S. R. 982), Cross., Inj. at, 284; Fright. Teams, 3, 4.
Campbell *v.* Northern Pac. R. Co. (51 Minn. 488, 53 N. W. Rep. 768), Assault, 4.
Campbell *v.* Northern R. Co. (26 Grant. Ch. (U. C.) 522), Car. of M., 550; Consol., 4.
Campbell *v.* O'Brien (10 Am. & Eng. R. Cas. 266, 75 Ind. 222), Sts. & H., 6.
Campbell *v.* Paris & D. R. Co. (71 Ill. 611), Mun. Aid, 74, 304.
Campbell *v.* Pennsylvania R. Co. (Pa) (24 Am. & Eng. R. Cas. 427, 2 Atl. Rep. 489), Employés, Inj. to, 286, 624; Fel. Serv., 25, 374.

Campbell *v.* Pittsburg & W. R. Co. (46 Am. & Eng. R. Cas. 353, 137 Pa. St. 574, 20 Atl. Rep. 949), Judgm., 49.
Campbell *v.* Point Pleasant & O. R. R. Co. (20 Am. & Eng. R. Cas. 157, 23 W. Va. 448), Indem. Bonds, 7.
Campbell *v.* Pullman Palace Car Co. (42 Fed. Rep. 484), Assault, 17; Car. of P., 308; Sleep. Car Cos., 15, 19.
Campbell *v.* Stillwater (32 Minn. 308, 50 Am. Rep. 567, 20 N. W. Rep. 320), Fright. Teams, 2.
Campbell *v.* Texas & N. O. R. Co. (1 Woods (U. S.) 368), Intervent., 1; Mort., 155, 184.
Campbell *v.* Texas & N. O. R. Co. (2 Woods (U. S.) 263), Deeds of Tr., 7; State Aid, 36.
Campbell *v.* Wiggins (85 Tex. 424, 21 S. W. Rep. 599), Stat., 51; Tax., 201.
Campbell *v.* Wiggins (2 Tex. Civ. App. 1, 20 S. W. Rep. 730), Consol., 4; Tax., 200, 201.
Campbell County *v.* Knoxville & K. R. Co. 6 Coldw. (Tenn.) 598), Mun. Aid, 71, 143, 161, 205, 273.
Campbell P. P. & M. Co. *v.* Manhattan R. Co. (47 Fed. Rep. 663), Pat. for Inv., 21.
Campbell P. P. & M. Co. *v.* Manhattan R. Co. (49 Fed. Rep. 930), Pat. for Inv., 19.
Campion *v.* Canadian Pac. R. Co. (43 Fed. Rep. 775), Car. of M., 42.
Canada Atl. R. Co., In re (3 Ont. 291), Mun. Aid, 297.
Canada Atl. R. Co. *v.* Cambridge Tp. (15 Can. Sup. Ct. 219; affirming 14 Ont. App. 299; reversing 11 Ont. 392), Mun. Aid, 125.
Canada Atl. R. Co. *v.* Moxley (15 Can. Sup. Ct. 145; affrming 14 Ont. App. 309), Fires, 210, 313.
Canada Atl. R. Co. *v.* Ottawa (8 Ont. 183), Mun. Aid, 244, 249.
Canada Atl. R. C. *v.* Ottawa (12 Ca Sup. Ct. 365; affirming 12 Ont. App. 234, which affirms 8 Ont. 201), Mun. Aid, 249.
Canada Atl. R. Co. *v.* Stanton (4 Montr. Super. 160), Citizens., 4.
Canada C. R. Co., In re (35 U. C. Q. B. 390), Mun. Aid, 297.
Canada C. R. Co. *v.* McLaren (8 Ont. App. 564; dismissing appeal from 32 U. C. C. P. 324), Evid., 228; Fires, 238, 247.
Canada C. R. Co. *v.* Murray (8 Can. Sup. Ct. 313), Constr. Rys., 113.
Canada C. R. Co. *v.* Queen (20 Grant's Ch. (U. C.) 273), Land Grants, 136, 137.
Canada R. Co. *v.* McDonald (25 U. C. Q. B. 384), App., 143.
Canada Southern R. Co., In re (41 U. C. Q. B. 195), Em. Dom., 1247, 1259, 1268.
Canada Southern R. Co. *v.* Clouse (35 Am & Eng. R. Cas. 296, 13 Can. Sup. Ct. 139; reversing 11 Ont. App. 287; varying 4 Ont. 28), Farm Cross., 4.
Canada Southern R. Co. *v.* Erwin (35 Am. & Eng. R. Cas. 311, 13 Can. Sup. Ct. 162; reversing 11 Ont. App. 306), Farm Cross., 4.
Canada Southern R. C. *v.* Gebhard (14 Am. & Eng. R. Cas. 581, 109 U. S. 527, 3 Sup. Ct. Rep. 363), Bonds, 47; Stat., 14.
Canada Southern R. Co. *v.* International Bridge Co. (8 App. Cas. 723, 4 Ry. & C. T. Cas. xvii), Bridges, 97; Charges, 21.
Canada Southern R. Co. *v.* International Bridge Co. (8 Fed. Rep. 190), Bridges, 94, 98.
Canada Southern R. Co. *v.* Jackson (17 Can. Sup. Ct. 316), Employés, Inj. to, 323; Stat., 59.
Canada Southern R. Co. *v.* Niagara Falls (22 Ont. 41), Ult. Vir., 9.
Canada Southern R. Co. *v.* Phelps (35 Am. & Eng. R. Cas. 207, 14 Can. Sup. Ct. 132), Fires, 47; Negl., 84.
Canadian Pac. R. Co., In re (6 Man. 598), Land Grants, 134.
Canadian Pac. R. Co., In re (7 Man. 389), Land Grants, 134.
Canadian Pac. R. Co. *v.* Burnett (5 Man. 395), Tax., 385.
Canadian Pac. R. Co. *v.* Calgary (5 Man. 37), Tax., 347.
Canadian Pac. R. Co. *v.* Charbonneau (6 Montr. L. R. (Q. B.) 287), Bills of L., 67.
Canadian Pac. R. Co. *v.* Conmee (11 Ont. Pr. 297), Discov., 6.
Canadian Pac. R. Co. *v.* Cornwallis (7 Man. 1), Tax., 389.
Canadian Pacific R. Co. *v.* Johnson (6 Montr. L. R. 213), Car. of P., 92; Tresp., Inj. to, 13.
Canadian Pac. R. Co. *v.* Little Seminary of Ste. Therese (16 Can. Sup. Ct. 606), App., 6; Em. Dom., 1220, 1272.
Canadian Pac. R. Co. *v.* Major (13 Can. Sup. Ct. 233; allowing appeal from 2 British Col. (part III) 287, 2 British Col. (part III) 295), Location, etc., 7.
Canadian Pac. R. Co. *v.* Northern Pac. & M. R. Co. (5 Man. 301), Charters, 154; Cross. Rys., 60, 61, 70.
Canadian Pac. R. Co. *v.* Robinson (54 Am. & Eng. R. Cas. 49, 19 Can. Sup. Ct. 292; reversing 6 Montr. L. R. 118, which affirmed 5 Montr. Super. 225), Death, etc., 101.
Canadian Pac. R. Co. *v.* Robinson (14 Can. Sup. Ct. 105; reversing 2 Montr. L. R. 25), Death, etc., 381.
Canadian Pac. R. Co. *v.* Vancouver (2 British Col. pt. II, 306), Dedica., 1; Land Grants, 135.
Canadian Pac. R. Co. *v.* Western Union Tel. Co. (17 Can. Sup. Ct. 151), Tel. & T. Lines, 6.
Canal & C. R. Co. *v.* Crescent City R. Co. (50 Am. & Eng. R. Cas. 374, 44 La. Ann. 485, 10 So. Rep. 888), Elec. Rys., 7; St. Rys., 241, 247.
Canal & C. R. Co. *v.* Orleans R. Co. (50 Am. & Eng. R. Cas. 369, 44 La. Ann. 54, 10 So. Rep. 389), St. Rys., 241, 247, 254.
Canal & C. R. Co. *v.* St. Charles St. R. Co. (44 La. Ann. 1069, 11 So. Rep. 702), Contr., 105; Reorg., 13; St. Rys., 247.
Canal & C. St. R. Co. *v.* Crescent City R. Co. (40 Am. & Eng. R. Cas. 329, 41 La. Ann. 561, 6 So. Rep. 849), Em. Dom., 112; St. Rys., 46, 48, 247.
Canal & C. St. R. Co. *v.* Hart (114 U. S. 654, 5 Sup. Ct. Rep. 1127), Attach., 70.

Canal & C. St. R. Co. *v.* New Orleans (30 Am. & Eng. R. Cas. 146, 39 La. Ann. 709, 2 So. Rep. 388), Franch., 9; St. Rys., 18.
Candee *v.* Pennsylvania R. Co. (21 Wis. 582), Bagg., 24.
Candelaria *v.* Atchison, T. & S. F. R. Co. (N. Mex.) (48 Am. & Eng. R. Cas. 565, 27 Pac. Rep. 497), Tresp., Inj. to, 1, 22, 31, 105; Trial, 183.
Candiff *v.* Louisville, N. O. & T. R. Co. (42 La. Ann. 477, 7 So. Rep. 601), Agency, 63.
Candy *v.* Midland R. Co. (38 L. T. 226), Car. of M., 805.
Canfield *v.* Baltimore & O. R. Co. (14 J. & S. (N. Y.) 238), Car. of M., 65.
Canfield *v.* Baltimore & O. R. Co. (75 N. Y. 144; reversing 11 J. & S. 562), Evid., 276.
Canfield *v.* Baltimore & O. R. Co. (16 Am. & Eng. R. Cas. 152, 93 N. Y. 532, 45 Am. Rep. 268), Car. of M., 135, 459.
Canfield *v.* Chicago & W. M. R. Co. (41 Am. & Eng. R. Cas. 566, 78 Mich. 356, 44 N. W. Rep. 385), Negl., 106; Sts. & H., 381.
Canfield *v.* New York C. & H. R. R. Co. (46 N. Y. S. R. 911, 19 N. Y. Supp. 839), Cross., Inj. at, 290, 293.
Canfield *v.* Northern R. Co. (18 Barb. (N. Y.) 586), Bills of L., 47, 98; Car. of M., 6,9; Charges, 71, 80.
Canney *v.* South Pac. Coast R. Co. (12 Am. & Eng. R. Cas. 310, 63 Cal. 501), Med. Serv., 9, 15.
Cannon *v.* Henry (78 Wis. 167, 47 N. W. Rep. 186), Agency, 61.
Cannon *v.* Louisville, E. & St. L. Con. R. Co. (34 Ill. App. 640), Fences, 10, 21, 96.
Cannon *v.* Midland G. W. R. Co. (6 Ir. L. R. 199, 3 Ry. & C. T. Cas. xv), Death, etc., 157; Stat. & D., 59.
Cannon *v.* Rowland (34 Ga. 422), Fel. Serv., 171.
Cannon *v.* Wildman (28 Conn. 472), Constr. Rys., 99.
Canova *v.* State (18 Fla. 512), Counties, 1; Mun. Aid, 409.
Cantillon *v.* Dubuque & N. W. R. Co. (78 [illegible] 42 N. W. Rep. 613), Mun. Aid, [illegible].
[illegible]ing *v.* Hannibal & St. J. R. Co. (54 Mo. & [illegible] 12 Am. Ry. Rep. 387), Bagg., 32; Car. of [illegible]; Witn., 155.
Canton *v.* Eastern R. Co. (45 Minn. 481, 48 N. W. Rep. 22), Fires, 160, 207, 274; Witn., 28.
Canton *v.* Smith (65 Me. 203), Mun. Aid, 115, 128, 141.
Canton, A. & N. R. Co. *v.* French (68 Miss. 22, 8 So. Rep. 512), Em. Dom., 1069, 1076.
Canton Co. *v.* Northern C. R. Co. (21 Md. 383), Spec. Perf., 4.
Cantrell *v.* Kansas City, M. & B. R. Co. (69 Miss. 435, 10 So. Rep. 580), Animals, 39, 573.
Cantrell *v.* Knoxville, C. G. & L. R. Co. (90 Tenn. 638, 18 S. W. Rep. 271), Bridges, 83; Rip. Rts., 9.
Cantu *v.* Bennett (39 Tex. 303), Car. of M., 19, 123; Words & Ph., 246.
Cantwell *v.* Dubuque W. R. Co. (17 How. Pr. (N. Y.) 16), Bills & N., 19.
Canty *v.* Clarke (44 U. C. Q. B. 505), Constr. Rys., 60.
Canty *v.* Latternar (15 Am. & Eng. R. Cas. 380, 31 Minn. 239, 17 N. W. Rep. 385), Att'ys, 13; Homest., 1; Pl., 12.
Cape Girardeau & S. C. M. R. Co. *v.* Dennis (67 Mo. 438), Em. Dom., 968.
Cape Girardeau County Court *v.* Hill (118 U. S. 68, 6 Sup. Ct. Rep. 951), Mun. Aid, 24; Stat., 66.
Cape Girardeau S. W. R. Co. *v.* Hatton (102 Mo. 45, 14 S. W. Rep. 763), Mun. Aid, 246.
Capehart *v.* Louisville & N. R. Co. (3 Int. Com. Rep. 278, 4 Int. Com. Com. 265), Int. Com., 18.
Capehart *v.* Seaboard & R. R. Co. (77 N. Car. 355) Lim. of Liab., 22.
Capehart *v.* Seaboard & R. R. Co. (81 N. Car. 438), Bills of L., 97; Lim. of Liab., 4, 27.
Capell *v.* Great Western R. Co. (10 Am. & Eng. R. Cas. 50, L. R. 9 Q. B. D. 459, 51 L. J. Q. B. D. 601, 47 L. T. 228; affirmed in 14 Am. & Eng. R. Cas. 393, L. R. 11 Q. B. D. 345, 52 L. J. Q. B. D. 348, 48 L. T. 505, 31 W. R. 555), Em. Dom., 1145.
Cape May & D. B. Nav. Co., In re (51 N. J. L. 78, 16 Atl. Rep. 191), Direct., 7, 13; Ex. & Ad., 5.
Cape May & S. L. R. Co. *v.* Cape May (9 Am. & Eng. R. Cas. 474, 35 N. J. Eq. 419), Mun. Corp., 1, 16.
Cape May & S. L. R. Co. *v.* Johnson (9 Am. & Eng. R. Cas. 476, 35 N. J. Eq. 422), Contempt, 1.
Capers *v.* Augusta, G. & S. R. Co. (76 Ga. 90), Em. Dom., 998.
Caples *v.* Central Pac. R. Co. (6 Nev. 265), Car. of P., 595; Dam., 43, 67, 70; Proc., 14, 40.
Caples *v.* Louisville, E. & St. L. R. Co. (17 Mo. App. 14), Car. of M., 760.
Capper *v.* Louisville, E. & St. L. R. Co. (21 Am. & Eng. R. Cas. 525, 103 Ind. 305, 2 N. E. Rep. 749), Employés, Inj. to, 4, 437; Fel. Serv., 1, 8, 79, 121, 213, 300, 308, 310, 364.
Carbine *v.* Bennington & R. R. Co. (38 Am. & Eng. R. Cas. 45, 61 Vt. 348, 17 Atl. Rep. 491), Employés, Inj. to, 188, 237, 491.
Card *v.* Manhattan R. Co. (1 Silv. App. 199, 103 N. Y. 670, mem., 9 N. E. Rep. 433, 3 N. Y. S. R. 641; reversing 37 Hun 644, mem.), Elev. Rys., 201.
Card *v.* New York & H. R. Co. (50 Barb. (N. Y.) 39), Animals, 63; Car. of P., 211; Cross., Inj. at, 12; Evid., 195.
Cardot *v.* Barney (63 N. Y. 281), Bank'cy, 6.
Cardwell *v.* American River Bridge Co. (113 U. S. 205, 5 Sup. Ct. Rep. 423), Bridges, 61.
Carey *v.* Berkshire R. Co. (1 Cush. (Mass.) 475), Death, etc., 1.
Carey *v.* Boston & M. R. Co. (158 Mass. 228, 33 N. E. Rep. 512), Employés, Inj. to, 212; Pl., 142.
Carey *v.* Chicago & N. W. R. Co. (67 Wis.

608, 31 N. W. Rep. 163), Employés, Inj. to, 528.
Carey *v.* Chicago, M. & St. P. R. Co. (20 Am. & Eng. R. Cas. 469, 61 Wis. 71, 20 N. W. Rep. 648), Animals, 216, 531; Fences, 86; Tresp., 21.
Carey *v.* Cincinnati & C. R. Co. (5 Iowa 357), Dissol., 11, 21; Incorp., 11.
Carey *v.* Houston & T. C. R. Co. (150 U. S. 170, 14 Sup. Ct. Rep. 63), Fed. Cts., 19.
Carey *v.* Houston & T. C. R. Co. (45 Fed. Rep. 438), Reorg., 1.
Carey *v.* Houston & T. C. R. Co. (52 Fed. Rep. 671), Mort., 170; Reorg., 10.
Cargle *v.* Nashville, C. & St. L. R. Co. (7 Lea. (Tenn.) 717), Children, Inj. to, 155.
Car Hire Case (15 So. Car. 613), Contr., 106.
Carl *v.* Sheboygan & F. du L. R. Co. (46 Wis. 625, 21 Am. Ry. Rep. 412), Em. Dom., 1063; Sts. & H., 281.
Carle *v.* Bangor & P. C. & R. Co. (43 Me. 269), Fel. Serv., 184.
Carleton Branch R. Co. *v.* Grand Southern R. Co. (21 New Brun. 339), Spec. Perf., 18.
Carley *v.* New York, O. & W. R. Co. (16 N. Y. S. R. 307, 1 N. Y. Supp. 63, 48 Hun 619, mem.), Witn., 146.
Carli *v.* Stillwater & St. P. R. Co. (16 Minn. 260 (Gil.) 234), Em. Dom., 142, 647, 740, 879.
Carli *v.* Stillwater St. R. & T. Co. (3 Am. & Eng. R. Cas. 226, 28 Minn. 373, 41 Am. Rep. 290, 10 N. W. Rep. 205), Rip. Rts., 6; Sts. & H., 139.
Carli *v.* Union Depot, St. R. & T. Co. (32 Minn. 101, 20 N. W. Rep. 89), Sts. & H., 290; Tresp., 19.
Carlile *v.* Dauchy (26 Neb. 337, 41 N. W. Rep. 1119), Constr. Rys., 50.
Carlin *v.* Chicago, R. I. & P. R. Co. (37 Iowa 316, 8 Am. Ry. Rep. 141), Contrib. Neg., 9, 104; Cross., Inj. at, 193; New Tr., 22.
Carlisle *v.* Cahawba & M. R. Co. (4 Ala. 70), Subscr., 78, 91, 165.
Carlisle *v.* Keokuk N. L. Packet Co. (82 Mo. 40), Car. of L. S., 139.
Carlisle *v.* Pullman Palace Car Co. (8 Colo. 320, 54 Am. Rep. 553, 7 Pac. Rep. 164), Tax., 94.
Carlisle *v.* Saginaw Valley & St. L. R. Co. (27 Mich. 315, 10 Am. Ry. Rep. 283), Subscr., 1.
Carlisle *v.* Terre Haute & R. R. Co. (6 Ind. 316), Bills & N., 11.
Carlson *v.* Duluth S. L. R. Co. (38 Minn. 305, 37 N. W. Rep. 341), Deeds, 40.
Carlson *v.* Oregon S. L. & U. N. R. Co. (53 Am. & Eng. R. Cas. 135, 21 Oreg. 450, 28 Pac. Rep. 497), Death, etc., 381; Employés, Inj. to, 287.
Carlson *v.* Phoenix Bridge Co. (132 N. Y. 273, 30 N. E. Rep. 750, 43 N. Y. S. R. 942; affirming 55 Hun 485, 29 N. Y. S. R. 553, 8 N. Y. Supp. 634), Employés, Inj. to, 95, 99.
Carlton *v.* Western & A. R. Co. (81 Ga. 531, 7 S. E. Rep. 623), Release, 23.
Carlton *v.* Wilmington & W. R. Co. (40 Am. Eng. R. Cas. 178, 104 N. Car. 365, 10 S. E. Rep. 516), Animals, 38, 62.
Carman *v.* Farmers' L. & T. Co. (70 Hun 283, 53 N. Y. S. R. 824, 24 N. Y. Supp. 39), Parties, 9; Stockh., 108.
Carman *v.* Steubenville & I. R. Co. (4 Ohio St. 399), Indep. Contr., 20.
Carmanty *v.* Mexican Gulf R. Co. (5 La. Ann. 703), Car. of P., 129, 131, 542.
Carmarthen & C. R. Co. *v.* Central Wales & C. J. R. Co. (2 Ry. & C. T. Cas. 23), Leases, 119.
Carmarthen & C. R. Co. *v.* Manchester & M. R. Co. (L. R. 8 C. P. 685, 42 L. J. C. P. 262), Connect. L., 3; Cross. Rys., 76.
Carmody *v.* Chicago & A. R. Co. (111 Ill. 69), Em. Dom., 186; Lim. of Ac., 52.
Carner *v.* Chicago, St. P., M. & O. R. Co. (43 Minn. 375, 45 N. W. Rep. 713), Fires, 356; Pub. Lds., 24.
Carney *v.* Caraquet R. Co. (29 New Brun. 425), Bridges, 55; Employés, Inj. to, 56, 438.
Carney *v.* Chicago, St. P., M. & O. R. Co. (46 Minn. 220, 48 N. W. Rep. 912), Death, etc., 192.
Caro *v.* Metropolitan El. R. Co. (14 J. & S. (N. Y.) 138), Elev. Rys., 63.
Caro *v.* Oregon & C. R. Co. (10 Oreg. 510), Proc., 43.
Carolina, C. G. & C. R. Co. *v.* Seigler (24 So. Car. 124), Subscr., 101, 111.
Carolina, C. G. & C. R. Co. *v.* Tribble (25 So. Car. 260.), Mun. Aid, 425.
Carolina C. R. Co. *v.* Love (81 N. Car. 434), Em. Dom., 507.
Carolina C. R. Co. *v.* McCaskill (25 Am. & Eng. R. Cas. 83, 94 N. Car. 746), Ejectm., 10; Em. Dom., 416, 981; Lim. of Ac., 48, 52.
Carolina C. R. Co. *v.* McCaskill (98 N. Car. 526, 4 S. E. Rep. 468), Em. Dom., 291, 562, 656, 853.
Carolina C. R. Co. *v.* Phillips (78 N. Car. 49), Em. Dom., 775.
Carolina C. R. Co. *v.* Wilmington (72 N. Car. 73), Tax., 41.
Carolina National Bank, Ex parte (18 So. Car. 289), Mort., 125; Receiv., 76.
Carpenter *v.* Boston & A. R. Co. (24 Hun (N. Y.) 104), Car. of Mails, 7; Car. of P., 278.
Carpenter *v.* Boston & A. R. Co. (21 Am. & Eng. R. Cas. 331, 97 N. Y. 494, 49 Am. Rep. 540), Car. of Mails, 7; Car. of P., 266, 278.
Carpenter *v.* Bristol County Com'rs (21 Pick. (Mass.) 258), Em. Dom., 531.
Carpenter *v.* Buena Vista County (5 Dill. (U. S.) 556), Mun. Aid, 154, 315.
Carpenter *v.* Buffalo, N. Y. & P. R. Co. (38 Hun (N. Y.) 116), Death, etc., 434.
Carpenter *v.* Catlin (44 Barb. (N. Y.) 75, 29 How. Pr. 423), Reorg., 7.
Carpenter *v.* Central Park, N. & E. R. R. Co. (11 Abb. Pr. N. S. (N. Y.) 416, 4 Daly 550, mem.), Appear., 3; St. Rys., 185, 318; Witn., 133, 145.
Carpenter *v.* Easton & A. R. Co. (24 N. J. Eq. 249), Em. Dom., 1036.
Carpenter *v.* Easton & A. R. Co. (24 N. J. Eq. 408), Em. Dom., 719.
Carpenter *v.* Easton & A. R. Co. (26 N. J.

Eq. 168; former decisions 24 N. J. Eq. 250, 408), Em. Dom., 1049.
Carpenter *v.* Easton & A. R. Co. (28 N. J. Eq. 390, 14 Am. Ry. Rep. 195), Dam., 111; Judgm., 6.
Carpenter *v.* Grand Trunk R. Co. (3 Am. & Eng. R. Cas. 432, 72 Me. 388, 39 Am. Rep. 340), Tickets & F., 51.
Carpenter *v.* Lathrop (51 Mo. 483), Mun. Aid, 108, 154, 160, 395.
Carpenter *v.* Mexican Nat. R. Co. (39 Fed. Rep. 315), 17 Wash. L. Rep. 630), Employés, Inj. to, 104, 204, 218, 219, 753, 756; Trial, 109.
Carpenter *v.* New York & N. H. R. Co. (11 How. Pr. (N. Y.) 481), Proc., 48.
Carpenter *v.* New York & N. H. R. Co. (5 Abb. Pr. (N. Y.) 277), Divid., 15; Stockh., 93, 95.
Carpenter *v.* New York, N. H. & H. R. Co. (13 N. Y. S. R. 718; affirming 10 N. Y. S. R. 712), Evid., 202.
Carpenter *v.* New York, N. H. & H. R. Co. (47 Am. & Eng. R. Cas. 421, 124 N. Y. 53, 26 N. E. Rep. 277, 34 N. Y. S. R. 854; affirming 15 N. Y. S. R. 345, 14 Daly 457; which reversed 13 N. Y. S. R. 718), Bagg., 84; Sleep. Car Cos., 27, 34.
Carpenter *v.* Oswego & S. R. Co. (24 N. Y. 655), Ejectm., 1, 9.
Carpenter *v.* Rommel (5 Phila. (Pa.) 34), Bonds, 20, 47.
Carpenter *v.* St. Louis, I. M. & S. R. Co. (20 Mo. App. 644), Animals, 602.
Carpenter *v.* St. Louis, I. M. & S. R. Co. (25 Mo. App. 110), Animals, 153, 503.
Carpenter *v.* Washington & G. R. Co. (31 Am. & Eng. R. Cas. 120, 121 U. S. 474, 7 Sup. Ct. Rep. 1002), St. Rys., 526.
Carpenter *v.* Westinghouse Air-Brake Co. (32 Fed. Rep. 434), For. Corp., 15; Proc., 20.
Carpue *v.* London & B. R. Co. (5 Q. B. 747, D. & M. 608, 3 Railw. Cas. 692, 8 Jur. 464, 13 L. J. Q. B. 138), Actions, 5; Evid., 125.
Carr *v.* Central Pac. R. Co. (55 Cal. 192), Pub. Lds., 21.
Carr *v.* Eel River & E. R. Co. (58 Am. & Eng. R. Cas. 239, 98 Cal. 366, 33 Pac. Rep. 213), Car. of P., 152, 219, 234, 428.
Carr *v.* Georgia R. & B. Co. (1 Ga. 524), Em. Dom., 404, 450; Employés, Inj. to, 182; Location, etc., 19.
Carr *v.* Georgia R. Co. (74 Ga. 73), Fixt., 6, 12.
Carr *v.* Lancashire & Y. R. Co. (7 Ex. 707, 7 Railw. Cas. 426, 17 Jur. 397, 21 L. J. Ex. 261), Lim. of Liab., 35.
Carr *v.* London & N. W. R. Co. (31 L. T. 785, L. R. 10 C. P. 307, 23 W. R. 747), Car. of M., 313.
Carr *v.* North River Constr. Co. (17 N. Y. S. R. 945, 48 Hun 266), Employés, Inj. to, 15, 223; Evid., 244.
Carr *v.* Quigley (57 Cal. 394), Pub. Lds., 35.
Carr *v.* Quigley (149 U. S. 652, 13 Sup. Ct. Rep. 961; reversing 79 Cal. 130, 21 Pac. Rep. 607), Land Grants, 49.
Carr *v.* Schafer (15 Colo. 48, 24 Pac. Rep. 873), Evid., 180.
Carraher *v.* San Francisco Bridge Co. (81 Cal. 98, 22 Pac. Rep. 480), Cross., Inj. at, 63, 65; Pl., 139; Trial, 150.
Carraher *v.* San Francisco Bridge Co. (100 Cal. 177, 34 Pac. Rep. 828), Priv. Rds., 3.
Carrico *v.* West Virginia C. & P. R. Co. (52 Am. & Eng. R. Cas. 393, 35 W. Va. 389, 14 S. E. Rep. 12), Car. of P., 127, 138, 140, 162, 178, 360, 491, 492, 594; Contrib. Neg., 4, 5, 10, 11, 15, 24, 68; Neg., 103; Tresp., Inj. to, 112.
Carrier *v.* Chicago, R. I. & P. R. Co. (42 Am. & Eng. R. Cas. 349, 79 Iowa 80, 44 N. W. Rep. 203, 6 L. R. A. 799), Lim. of Ac., 29.
Carriger *v.* East Tenn., V. & G. R. Co. (7 Lea (Tenn.) 388), Culverts, 5, 12, 21; Flood Lds., 24.
Carrington *v.* Louisville & N. R. Co. (41 Am. & Eng. R. Cas. 543, 88 Ala. 472, 6 So. Rep. 910), App., 59; Contrib. Neg., 50; Evid., 54; Negl., 114; Sts. & H., 332; Tresp., Inj. to, 26, 44.
Carrington *v.* Wycombe R. Co. (L. R. 3 Ch. 377, 37 L. J. Ch. 213, 18 L. T. 96, 16 W. R. 494), Em. Dom., 1111, 1115.
Carroll *v.* Casemore (20 Grant's Ch. (U. C.) 16), Stat. & D., 6.
Carroll *v.* East Tenn., V. & G. R. Co. (41 Am. & Eng. R. Cas. 307, 82 Ga. 452, 10 S. E. Rep. 163), Employés, Inj. to, 271, 424, 717; Evid., 30, 202.
Carroll *v.* Great Western R. Co. (14 U. C. Q. B. 614), Farm. Cross., 2.
Carroll *v.* Interstate Rapid Transit Co. (52 Am. & Eng. R. Cas. 273, 107 Mo. 653, 17 S. W. Rep. 889), Car. of P., 459; Elev. Rys., 201.
Carroll *v.* Manchester & L. R. Corp. (111 Mass. 1), Estop., 1.
Carroll *v.* Minnesota Valley R. Co. (13 Minn. 30 (Gil.) 18), Contrib. Neg., 39; Employés, Inj. to, 484.
Carroll *v.* Minnesota Valley R. Co. (14 Minn. 57 (Gil.) 42), Contrib. Neg., 39.
Carroll *v.* Missouri Pac. R. Co. (26 Am. & Eng. R. Cas. 268, 88 Mo. 239), Car. of L. S., 125; Death, etc., 9, 168.
Carroll *v.* New Orleans, J. & G. N. R. Co. (26 La. Ann. 447), Fire Ins., 11.
Carroll *v.* New York & N. H. R. Co. (1 Duer (N. Y.) 571), Car. of P., 496; Collis., 7.
Carroll *v.* Pennsylvania R. Co. (2 Pennyp. (Pa.) 159), Contrib. Neg., 30; Stat. & D., 115.
Carroll *v.* People's R. Co. (14 Mo. App. 490), Employés, 21; Officers, 14.
Carroll *v.* Southern Exp. Co. (37 So. Car. 452), Exp. Cos., 51.
Carroll *v.* Staten Island R. Co. (65 Barb. (N. Y.) 32; affirmed in 58 N. Y. 126), Sunday, 5.
Carroll *v.* Staten Island R. Co. (58 N. Y. 126, 7 Am. Ry. Rep. 25, 9 Am. Ry. Rep. 486; affirming 65 Barb. 32), Car. of P., 107, 137, 158, 182; Sunday, 2, 5.
Carroll *v.* Williston (44 Minn. 287, 46 N. W. Rep. 352), Employés, Inj. to, 103.
Carroll *v.* Wisconsin C. Co. (36 Am. & Eng. R. Cas. 648, 40 Minn. 168, 41 N. W. Rep. 661), Em. Dom., 720.

Carroll County *v.* Smith (15 Am. & Eng. R. Cas. 606, 111 U. S. 556, 4 Sup. Ct. Rep. 539), Mun. Aid, 1, 128, 365, 383.
Carroll County Sup'rs *v.* United States (18 Wall. (U. S.) 71), Mun. Aid, 445.
Carron *v.* Great Western R. Co. (14 U. C. Q. B. 192), Lim. of Ac., 56; Priv. Ways, 10.
Carron *v.* Wood (10 Mont. 500, 26 Pac. Rep. 388), Witn., 68.
Carson *v.* Central R. Co. (35 Cal. 325), Dam., 13; Nuis., 3, 34; St. Rys., 200; Sts. & H., 141, 150.
Carson *v.* Coleman (11 N. J. Eq. 106), Em. Dom., 374, 746.
Carson *v.* Federal St. & P. V. Pass. R. Co. (50 Am. & Eng. R. Cas. 462, 147 Pa. St. 219, 23 Atl. Rep. 369), St. Rys., 490, 491, 498.
Carson *v.* Harris (4 Greene (Iowa) 516), Car. of M., 645.
Carson *v.* Memphis & C. R. Co. (88 Tenn. 646, 13 S. W. Rep. 588), Attach., 35; Exec., 1.
Carstairs *v.* Mechanics' & T. Ins. Co. (16 Am. & Eng. R. Cas. 142, 18 Fed. Rep. 473), Fire Ins., 15.
Carsten *v.* Northern Pac. R. Co. (44 Am. & Eng. R. Cas. 392, 44 Minn. 454, 47 N. W. Rep. 49), Eject. Pass., 54, 103, 106; Tickets & F., 73.
Carter *v.* Berlin Mills Co. (58 N. H. 52), Indep. Contr., 7, 9.
Carter *v.* Boston & P. R. Corp. (139 Mass. 525, 2 N. E. Rep. 101), Bridges, 42.
Carter *v.* Chesapeake & O. R. Co. (26 W. Va. 644), Ejectm., 25.
Carter *v.* Columbia & G. R. Co. (15 Am. & Eng. R. Cas. 414, 19 So. Car. 20, 45 Am. Rep. 754), Contrib. Neg., 105; Death, etc., 174, 354; Negl., 1; Tresp., Inj. to, 79, 126; Trial, 71, 72.
Carter *v.* Kansas City Cable R. Co. (42 Fed. Rep. 37), Cable Rys., 9; Car. of P., 583; Negl., 33.
Carter *v.* Kansas City, St. J. & C. B. R. Co. (65 Iowa 287, 21 N. W. Rep. 607), Fires, 173, 223.
Carter *v.* Louisville, N. A. & C. R. Co. (22 Am. & Eng. R. Cas. 360, 98 Ind. 552, 49 Am. Rep. 780), Agency, 102; Tresp., Inj. to, 87.
Carter *v.* New York El. R. Co. (134 N. Y. 168, 31 N. E. Rep. 514, 45 N. Y. S. R. 848; affirming 25 J. & S. 279, 28 N. Y. S. R. 585, 7 N. Y. Supp. 678; which affirmed 14 N. Y. S. R. 859), Elev. Rys., 50, 51, 54, 116, 191; Mun. Corp., 49; Witn., 119.
Carter *v.* Oliver Oil Co. (34 So. Car. 211, 13 S. E. Rep. 419), Contrib. Neg., 75; Employés, Inj. to, 93, 100; Trial, 71.
Carter *v.* Rome & C. Constr. Co. (89 Ga. 158, 15 S. E. Rep. 36), Liens, 21, 40.
Carter *v.* Rosewald (108 Ill. 351), Parties, 17; Receiv., 126.
Carter County *v.* Sinton (120 U. S. 517, 7 Sup. Ct. Rep. 650), Mun. Aid, 270, 290.
Carton *v.* Illinois C. R. Co. (6 Am. & Eng. R. Cas. 305, 59 Iowa 148, 44 Am. Rep. 672, 13 N. W. Rep. 67), Commerce, 5; Int. Com., 215.
Cartwright *v.* Chicago & G. T. R. Co. (16 Am. & Eng. R. Cas. 321, 52 Mich. 606, 18 N. W. Rep. 380, 50 Am. Rep. 274), Car. of P., 229, 405.
Cartwright *v.* New York & M. R. Co. (30 Am. & Eng. R. Cas. 234, 59 Vt. 675, 4 N. Eng. Rep. 361, 9 Atl. Rep. 370), Constr. Rys., 95.
Carty *v.* London (43 Am. & Eng. R. Cas. 279, 18 Ont. 122), Cross., Inj. at, 226; St. Rys., 166.
Cary *v.* Cleveland & T. R. Co. (29 Barb. (N. Y.) 35), Bagg., 19, 60, 65; Contr., 89.
Cary *v.* St. Louis, K. C. & N. R. Co. (60 Mo. 209), Animals, 101, 353, 383.
Casady *v.* Lowry (49 Iowa 523), Mun. Aid, 132, 412.
Cascades R. Co. *v.* Sohns (1 Wash. T. 557), Stat., 66.
Case *v.* Chicago, R. I. & P. R. Co. (19 Am. & Eng. R. Cas. 142, 64 Iowa 762, 21 N. W. Rep. 30), Sts. & H., 392.
Case *v.* Chicago, R. I. & P. R. Co. (69 Iowa 449, 29 N. W. Rep. 596; affirming 64 Iowa 762), Negl., 102.
Case *v.* Kelly (43 Am. & Eng. R. Cas. 1, 133 U. S. 21, 10 Sup. Ct. Rep. 216; affirming 13 Am. & Eng. R. Cas. 70), Corp., 8; Em. Dom., 61; Evid., 111; Judgm., 6; Ult. Vir., 3.
Case *v.* New Orleans & C. R. Co. (2 Woods (U. S.) 236), Judgm., 30.
Case *v.* New York C. & H. R. R. Co. (75 Hun (N. Y.) 527, 27 N. Y. Supp. 496, 57 N. Y. S. R. 653), Cat.-Gds., 23; Cross., Inj. at, 45.
Case *v.* Northern C. R. Co. (59 Barb. (N. Y.) 644), Fires, 289.
Case *v.* St. Louis & S. F. R. Co. (13 Am. & Eng. R. Cas. 564, 75 Mo. 668), Animals, 141, 589.
Casement *v.* Brown (148 U. S. 615, 13 Sup. Ct. Rep. 672), Constr. Rys., 46.
Casey *v.* Canadian Pac. R. Co. (37 Am. & Eng. R. Cas. 172, 15 Ont. 574), Stat. & D., 115; Tresp., Inj. to, 41.
Casey *v.* Louisville & N. R. Co. (84 Ky. 79), Fel. Serv., 25, 37, 183, 379.
Casey *v.* New York C. & H. R. R. Co. (78 N. Y. 518; affirming 8 Daly 220, 6 Abb. N. Cas. 104), Cross., Inj. at, 350.
Casey *v.* People (132 Ill. 546, 29 Am. & Eng. Corp. Cas. 168, 24 N. E. Rep. 570), Mun. Aid, 108.
Cashman *v.* Brownlee (128 Ind. 266, 27 N. E. Rep. 560), Consol., 35; Estop., 13.
Cass *v.* Boston & L. R. Co. (14 Allen (Mass.) 448), Car. of M., 329; Wareh., 9.
Cass *v.* New York & N. H. R. Co. (1 E. D. Smith (N. Y.) 522), Bagg., 106.
Cass *v.* Pittsburg, V. & C. R. Co. (80 Pa. St. 31), Subscr., 72, 108, 194.
Cass County *v.* Chicago, B. & Q. R. Co. (25 Neb. 348, 2 L. R. A. 188, 41 N. W. Rep. 246), Tax., 271; Words & Ph., 202.
Cass County *v.* Gillett (100 U. S. 585), Mun. Aid, 136, 180, 214, 365.
Cass County *v.* Green (66 Mo. 498), Mun. Aid, 358.
Cass County *v.* Johnston (95 U. S. 360; affirming 3 Dill. 185), Mun. Aid, 40, 325, 449.

Cass County *v.* Jordan (95 U. S. 373), Mun. Aid, 222.
Cass County *v.* Morrison (5 Am. & Eng. R. Cas. 404, 28 Minn. 257, 9 N. W. Rep. 761), Land Grants, 72.
Cass County *v.* Shores (95 U. S. 375), Mun. Aid, 283.
Cassida *v.* Oregon R. & N. Co. (14 Oreg. 551, 13 Pac. Rep. 438), Children, Inj. to, 165; Evid., 54; Tresp., Inj. to, 50.
Cassidy *v.* Angell (12 R. I. 447), Contrib. Neg., 105.
Cassidy *v.* Chicago & N. W. R. Co. (70 Wis. 440, 35 N. W. Rep. 925), Em. Dom., 230.
Cassidy *v.* Kennebec & P. R. Co. (45 Me. 263), Em. Dom., 530.
Cassidy *v.* Maine C. R. Co. (17 Am. & Eng. R. Cas. 519, 76 Me. 488), Fel. Serv., 1, 261.
Cassidy *v.* Old Colony R. Co. (23 Am. & Eng. R. Cas. 83, 24 Am. & Eng. R. Cas. 271, 141 Mass. 174, 5 N. E. Rep. 142), Em. Dom., 135, 670.
Cassilay *v.* Young (4 B. Mon. (Ky.) 265), Car. of M., 166, 239.
Castanola *v.* Missouri Pac. R. Co. (21 Am. & Eng. R. Cas. 75, 24 Fed. Rep. 267), Car. of M., 513.
Castello *v.* Landwehr (28 Wis. 522), Death, etc., 398.
Casucci *v.* Alleghany & K. R. Co. (48 N. Y. S. R. 52, 65 Hun. 452, 20 N. Y. Supp. 343, 29 Abb. N. Cas. 252), Att'ys, 20.
Caswell *v.* Boston & W. R. Corp. (98 Mass. 194), Car. of P., 282, 442.
Caswell *v.* Chicago & N. W. R. Co. (42 Wis. 193, 15 Am. Ry. Rep. 162), App., 61; Fires, 116, 364.
Catalanotto *v.* Coney Island & B. R. Co. (27 N. Y. S. R. 47, 7 N. Y. Supp. 628), St. Rys., 332, 431.
Catawissa R. Co.'s Appeal (78 Pa. St. 59), Tax., 61.
Catawissa R. Co. *v.* Armstrong (49 Pa. St. 186), Comp. Neg., 31; Employés, Inj. to, 393; Fel. Serv., 127; Witn., 14.
Catawissa R. Co. *v.* Armstrong (52 Pa. St. 282), Death, etc., 290, 395.
Catawissa R. Co. *v.* Titus (49 Pa. St. 277), Parties, 6; Reorg., 15.
Caterham R. Co. *v.* London, B. & S. C. R. Co. (1 C. B. N. S. 410, 26 L. J. C. P. 16, 1 Ry. & C. T. Cas. 32), Branch & L. Roads, 14; Stat. & D., 24; Tickets & F., 54, 139.
Caterham R. Co. *v.* London, B. & S. C. R. Co. (1 C. B. N. S. 410, 26 L. J. C. P. 16, 1 Ry. & C. T. Cas. 32), Car. of P., 83; Discrim., 6.
Cateril *v.* Union Pac. R. Co. (2 Idaho 540, 21 Pac. Rep. 416), Stat. 27.
Cathcart *v.* Hannibal & St. J. R. Co. (19 Mo. App. 113), Animals, 65; Evid., 290.
Catlett *v.* St. Louis, I. M. & S. R. Co. (54 Am. & Eng. R. Cas. 113, 57 Ark. 461, 21 S. W. Rep. 1062), Children, Inj. to, 17, 18; Trial, 182.
Catlin *v.* Adirondack Co. (11 Abb. N. Cas. (N. Y.) 377; reversing 20 Hun 19), Car. of M. 691.
Catlin *v.* Green (120 N. Y. 441, 24 N. E. Rep. 941, 31 N. Y. S. R. 532; affirming 5 N. Y. S. R. 866), Eq., 7; Stock, 20.
Catlin *v.* Michigan C. R. Co. (66 Mich 358, 9 West. Rep. 857, 33 N. W. Rep. 515), Evid., 195.
Cattell *v.* Lowry (45 Iowa 478), Mun. Aid, 122, 412.
Cauley *v.* Pittsburg, C. & St. L. R. Co. (2 Am. & Eng. R. Cas. 4, 95 Pa. St. 398), Children, Inj. to, 115, 179; Tresp., Inj. to, 20.
Cauley *v.* Pittsburg, C. & St. L. R. Co. (4 Am. & Eng. R. Cas. 533, 98 Pa. St. 498), Children, Inj. to, 16, 161.
Cawfield *v.* Asheville St. R. Co. (111 N. Car. 597, 16 S. E. Rep. 703), Contrib. Neg., 105; St. Rys., 375, 387.
Cawley *v.* Winifrede R. Co. (31 W. Va. 116, 5 S. E. Rep. 318), Employés, Inj. to, 301; New Tr., 22.
Cawthra *v.* Hamilton & L. E. R. Co. (35 U. C. Q. B. 581), Em. Dom., 1265.
Cawthra *v.* Hamilton & N. W. R. Co. (41 U. C. Q. B. 187), Em. Dom., 1272.
Caxton *v.* Lexington & B. S. R. Co. (13 Bush (Ky.) 636, 17 Am. Ry. Rep. 12), Car. of P., 609.
Cayley *v.* Cobourg, P. & M. R. & M. Co. (14 Grant Ch. (U. C.) 571), Bonds, 40; Consol., 4, 44.
Caylus *v.* New York, K. & S. R. Co. (76 N. Y. 609, 49 How. Pr. 100; affirming 10 Hun 295), Judgm., 16.
Cayuga Lake R. Co. *v.* Kyle (64 N. Y. 185; affirming 5 T. & C. 659), Subscr., 156.
Cayuga R. Co. *v.* Niles (13 Hun (N. Y.) 170), Contr., 14.
Cecil *v.* Pacific R. Co. (47 Mo. 246), Animals, 136.
Cedar Falls & M. R. Co. *v.* Rich (33 Iowa 113), Contr., 70.
Cedar Park, In re (1 How Pr. N. S. (N. Y.) 257), Tax., 75.
Cedar Rapids & I. R. Co. *v.* Weiden (70 Mich. 390, 14 West. Rep. 642, 38 N. W. Rep. 294), Em. Dom., 13.
Cedar Rapids & M. R. R. Co. *v.* Boone County (34 Iowa 45, 5 Am. Ry. Rep. 59), Mun. Aid, 113, 130.
Cedar Rapids & M. R. R. Co. *v.* Carroll County (41 Iowa, 153), Land Grants, 58; Tax., 117, 259, 302, 327, 353.
Cedar Rapids & M. R. R. Co. *v.* Courtright (21 Wall. (U. S.) 310; affirming 35 Iowa 386, 5 Am. Ry. Rep. 67), Land Grants, 23.
Cedar Rapids & M. R. R. Co. *v.* Herring (52 Iowa 687, 3 N. W. Rep. 786), Land Grants, 100.
Cedar Rapids & M. R. R. Co. *v.* Herring (14 Am. & Eng. R. Cas. 537, 110 U. S. 27, 3 Sup. Ct. Rep. 485), Land Grants, 46, 53.
Cedar Rapids & M. R. R. Co. *v.* Jewell (12 Am. & Eng. R. Cas. 277, 61 Iowa 410, 16 N. W. Rep. 344), Pub. Lds., 5.
Cedar Rapids & M. R. R. Co. *v.* Sac County (46 Iowa 243), Tax., 117.
Cedar Rapids & M. R. R. Co. *v.* Woodbury County (29 Iowa 247), Tax., 117.
Cedar Rapids & St. P. R. Co. *v.* Spafford (41 Iowa 292), Contr., 58.

Cedar Rapids & St. P. R. Co. *v.* Stewart (25 Iowa 115), Agency, 10, 47; Assign., 12.
Cedar Rapids, I. F. & N. W. R. Co. *v.* Chicago, M. & St. P. R. Co. (10 Am. & Eng. R. Cas. 622, 60 Iowa 35, 14 N. W. Rep. 76), Em. Dom., 874, 940.
Cedar Rapids, I. F. & N. W. R. Co. *v.* Cowan (77 Iowa 535, 42 N. W. Rep. 436), Counties, 10; Mun. Aid, 412.
Cedar Rapids, I. F. & N. W. R. Co. *v.* Elseffer (84 Iowa 510, 51 N. W. Rep. 27), Mun. Aid, 412.
Cedar Rapids, I. F. & N. W. R. Co. *v.* Raymond (30 Am. & Eng. R. Cas. 345, 37 Minn. 204, 33 N. W. Rep. 704), Em. Dom., 144, 614, 640; Evid., 150.
Cedar Rapids, I. F. & N. W. R. Co. *v.* Ryan (30 Am. & Eng. R. Cas. 355, 36 Minn. 546, 33 N. W. Rep. 35), Em. Dom., 456, 630.
Cedar Rapids, I. F. & N. W. R. Co. *v.* Ryan (30 Am. & Eng. R. Cas. 357, 37 Minn. 38, 33 N. W. Rep. 6), Em. Dom., 596, 602, 629.
Cedar Rapids, I. F. & N. W. R. Co. *v.* Whelan (20 Am. & Eng. R. Cas. 395, 64 Iowa 694, 21 N. W. Rep. 141), Em. Dom., 959.
Center Tp. *v.* Hunt (16 Kan. 430), Parties, 17.
Central & M. R. Co. *v.* Henning (52 Tex. 466), Exec., 14; Liens, 43.
Central & M. R. Co. *v.* Morris (28 Am. & Eng. R. Cas. 50, 68 Tex. 49, 3 S. W. Rep. 457), Actions, 16; Car. of M., 727; Consol., 2; Leases, 39; Pl., 7; Proc., 5, 9, 45; Sales of Rds., 13.
Central Branch R. Co. *v.* Ingram (20 Kan. 66), Animals, 309.
Central Branch R. Co. *v.* Lea (20 Kan. 353), Animals, 268.
Central Branch R. Co. *v.* Phillipi (20 Kan. 9, 19 Am. Ry. Rep. 99), Animals, 65, 343, 626.
Central Branch U. P. R. Co. *v.* Andrews (5 Am. & Eng. R. Cas. 370, 26 Kan. 702; further appeal 14 Am. & Eng. R. Cas. 248, 30 Kan. 590, 2 Pac. Rep. 677), Sts. & H., 263.
Central Branch U. P. R. Co. *v.* Andrews (14 Am. & Eng. R. Cas. 248, 30 Kan. 590, 2 Pac. Rep. 677), Sts. & H., 265; Witn., 68.
Central Branch U. P. R. Co. *v.* Andrews (30 Am. & Eng. R. Cas. 352, 37 Kan. 162, 14 Pac. Rep. 509), Evid., 216; Witn., 109, 118.
Central Branch U. P. R. Co. *v.* Andrews (33 Am. & Eng. R. Cas. 205, 37 Kan. 641, 16 Pac. Rep. 338; former appeals 26 Kan. 702, 30 Kan. 590, 2 Pac. Rep. 677, 34 Kan. 563, 9 Pac. Rep. 213, 37 Kan. 162, 14 Pac. Rep. 509), Sts. & H., 242.
Central Branch U. P. R. Co. *v.* Andrews (41 Kan. 370, 21 Pac. Rep. 276), Evid., 231; Sts. & H., 168, 271; Trial, 169.
Central Branch U. P. R. Co. *v.* Atchison, T. & S. F. R. Co. (5 Am. & Eng. R. Cas. 389, 26 Kan. 669), Em. Dom., 50, 67.
Central Branch U. P. R. Co. *v.* Atchison, T. & S. F. R. Co. (10 Am. & Eng. R. Cas. 528, 28 Kan. 453), Em. Dom., 10, 58, 869, 957.
Central Branch U. P. R. Co. *v.* Butman (22 Kan. 639), Animals, 434; Evid., 76, 198.
Central Branch U. P. R. Co. *v.* Henigh (23 Kan. 347), Children, Inj. to, 94.
Central Branch U. P. R. Co. *v.* Hotham (22 Kan. 41), Fires, 264, 303, 313.
Central Branch U. P. R. Co. *v.* Nichols (24 Kan. 242), Animals, 584, 587; Witn., 113.
Central Branch U. P. R. Co. *v.* Pate (21 Kan. 539), Animals, 456.
Central Branch U. P. R. Co. *v.* Smith (23 Kan. 745), Mun. Aid, 32, 319, 356.
Central Branch U. P. R. Co. *v.* Twine (23 Kan. 585), Sts. & H., 214, 294.
Central Branch U. P. R. Co. *v.* Walters (24 Kan. 504), Animals, 380; Evid., 151.
Central Branch U. P. R. Co. *v.* Western Union Tel. Co. (1 McCrary (U. S.) 551, 3 Fed. Rep. 417), Tel. & T. Lines, 3.
Central Branch U. P. R Co. *v.* Wilcox (14 Kan. 259), Pub. Lds., 15.
Central City Horse R. Co. *v.* Ft. Clark Horse R. Co. (81 Ill. 523), St. Rys., 242.
Central Crosstown R. Co. *v.* Twenty-third St. R. Co. (53 How. Pr. (N. Y.) 45), Discov., 2; Witn., 2.
Central Crosstown R. Co. *v.* Twenty-third St. R. Co. (54 How. Pr. (N. Y.) 168), Stat., 34.
Centralia & C. R. Co. *v.* Brake (125 Ill. 393, 15 West. Rep. 149, 17 N. E. Rep. 820), Animals, 125; Em. Dom., 690, 701; Fences, 48.
Centralia & C. R. Co. *v.* Henry (31 Ill. App. 456), Em. Dom., 957, 977.
Centralia & C. R. Co. *v.* Rixman (30 Am. & Eng. R. Cas. 336, 121 Ill. 214, 12 N. E. Rep. 685, 10 West. Rep. 600), Em. Dom., 242, 578.
Central Iowa R. Co. *v.* Moulton & A. R. Co. (10 Am. & Eng. R. Cas. 138, 57 Iowa 24, 10 N. W. Rep. 639), Aband., 4.
Central Iowa R. Co. *v.* Piersol (65 Iowa 498, 22 N. W. Rep. 648), Injunc., 42.
Central Iowa R. Co. *v.* Wright County Sup'rs (22 Am. & Eng. R. Cas. 223, 67 Iowa 199, 25 N. W. Rep. 128), Tax., 26, 259.
Central M. T. R. Co. *v.* Rockafellow (17 Ill. 541), Animals, 38, 186, 571, 265; Pl., 107.
Central M. T. R. Co. *v.* Spurck (24 Ill. 587), Constr. Rys., 58.
Central Mills *v.* New York & N. E. R. Co. (127 Mass. 537), Agency, 114.
Central Nat. Bank *v.* Charlotte, C. & A. R. Co. (5 So. Car. 156), Bills & N., 2; Contr., 12.
Central Nat. Bank *v.* Hazard (30 Fed. Rep. 484, 24 Blatchf. (U. S.) 310), Mort., 255; Receiv., 104, 105.
Central Nat. Bank *v.* Worcester Horse R. Co. (13 Allen (Mass.) 105), Insolv., 1.
Central Ohio R. Co. *v.* Holler (7 Ohio St. 220), Em. Dom., 794.
Central Ohio R. Co. *v.* Lawrence (13 Ohio St. 66), Animals, 70, 545.
Central Ohio R. Co. *v.* Thompson (2 Bond (U. S.) 206), Bills & N., 21, 22.
Central Pac. R. Co. *v.* Beal (47 Cal. 151), Deeds, 13.

Central Pac. R. Co. *v.* Benity (5 Sawy. (U. S.) 118), Land Grants., 64.
Central Pac. R. Co. *v.* Dyer (1 Sawy. (U. S.) 641), Land Grants, 63, 67.
Central Pac. R. Co. *v.* Gallat'n (99 U. S. 700), Cent. Pac. R. Co., 3, 4, 5.
Central Pac. R. Co. *v.* Howard (51 Cal. 229, 12 Am. Ry. Rep. 98), Tax., 115.
Central Pac. R. Co. *v.* Howard (52 Cal. 227, 20 Am. Ry. Rep. 111), Tax., 115.
Central Pac. R. Co. *v.* Pearson (35 Cal. 247), Em. Dom., 509, 510, 604, 625, 644, 680, 786, 800, 805, 816, 896; Witn., 118; Words & Ph., 100, 200.
Central Pac. R. Co. *v.* Robinson (49 Cal. 446), Land Grants, 19.
Central Pac. R. Co. *v.* State Board of Equalization (13 Am. & Eng. R. Cas. 256, 60 Cal. 35), Tax., 97, 249.
Central Pac. R. Co. *v.* United States (21 Ct. of Cl. 180), Land Grant Rds., 1, 12.
Central Pac. R. Co. *v.* United States (24 Ct. of Cl. 145), Land Grant Rds., 8, 13.
Central Pac. R. Co. *v.* United States (28 Ct. of Cl. 427), Car. of Mails, 3, 12, 17.
Central Pass. R. Co. *v.* Kuhn (32 Am. & Eng. R. Cas. 16, 86 Ky. 578, 6 S. W. Rep. 441), Car. of P., 586; Collis., 22; Cross., Inj. at, 63, 68; Dam., 101; St. Rys., 339, 444.
Central Pass. R. Co. *v.* Rose (Ky.) (22 S. W. Rep. 745), Elec. Rys., 30; St. Rys., 447.
Central Pass. R. Co. *v.* Rose (Ky.) (33 S. W. Rep. 745), St. Rys., 375.
Central Pass. R. Co. *v.* Stevens (Ky) (22 S. W. Rep. 312), St. Rys., 430.
Central Pa. Tel. Co. *v.* Wilkesbarre & W. S. R. Co. (1 Pa. Dist. 628), Elec. Rys., 2, 13; St. Rys., 191; Tel. & T. Lines, 11.
Central R. & B. Co. *v.* Anderson (58 Ga. 393, 16 Am. Ry. Rep. 85), Car. of M., 80, 118, 406; Custom, 3.
Central R. & B. Co. *v.* Atlantic & G. R. Co. (50 Ga. 444), Trover, 7, 15.
Central R. & B. Co. *v.* Attaway (90 Ga. 656, 16 S. E. Rep. 956), Employés, Inj. to, 351, 647, 778.
Central R. & B. Co. *v.* Avant (32 Am. & Eng. R. Cas. 475, 80 Ga. 195, 5 S. E. Rep. 78), Car. of M., 675, 698; Pl., 89.
Central R. & B. Co. *v.* Brunswick &. W. R. Co. (87 Ga. 386, 13 S. E. Rep. 520), Actions, 11; Collis., 2; Sts. & H., 316., 322.
Central R. & B. Co. *v.* Bryant (89 Ga. 457, 15 S. E. Rep. 537), Animals, 322; Trial, 71.
Central R. & B. Co. *v.* Carr (23 Am. & Eng. R. Cas. 487, 76 Ala. 388), For. Corp., 7; Jurisd., 6; Proc., 16.
Central R. & B. Co. *v.* Carswell (54 Ga. 251), Jurisd., 7.
Central R. & B. Co. *v.* Cheatham (37 Am. & Eng. R. Cas. 282, 85 Ala. 292, 7 Am. St. Rep. 48, 4 So. Rep. 828), Crim. L., 2.
Central R. & B. Co. *v.* Davis (19 Ga. 437), Animals, 283.
Central R. & B. Co. *v.* Denson (83 Ga. 266, 9 S. E. Rep. 788), Death, etc., 151.
Central R. & B. Co. *v.* Denson (84 Ga. 774, 11 S. E. Rep. 1039), Tresp., Inj. to, 70.
Central R. & B. Co. *v.* Dickson (82 Ga. 629, 10 S. E. Rep. 203), Employés, Inj. to, 729.
Central R. & B. Co. *v.* Dixon (42 Ga. 327), Cross., Inj. at, 312.
Central R. & B. Co. *v.* Dodd (83 Ga. 507, 10 S. E. Rep. 206), App., 121.
Central R. & B. Co. *v.* Farmers' L. & T. Co. (56 Fed. Rep. 357), Receiv., 40.
Central R. & B. Co. *v.* Gamble (77 Ga. 584, 3 S. E. Rep. 287), Evid., 146; Pl., 8, 104, 111.
Central R. & B. Co. *v.* Georgia (92 U. S. 665), Consol., 23, 24, 20.
Central R. & B. Co. *v.* Georgia C. & I. Co. (32 So. Car. 319, 11 S. E. Rep. 192, 638), Attach., 7, 51; For. Corp., 4; Stat., 13.
Central R. & B. Co. *v.* Georgia F. & V. Exch. (55 Am. & Eng. R. Cas. 606, 91 Ga. 389, 17 S. E. Rep. 904), Car. of M., 581, 607.
Central R. & B. Co. *v.* Grant (46 Ga. 417, 11 Am. Ry. Rep. 427), Indep. Contr., 27.
Central R. & B. Co. *v.* Hasselkus (55 Am. & Eng. R. Cas. 586, 91 Ga. 382, 17 S. E. Rep. 838), Bills of L., 40, 53, 97; Car. of M., 702, 736.
Central R. & B. Co. *v.* Hines (19 Ga. 203), Lim. of Liab., 1.
Central R. & B. Co. *v.* Hollinshead (81 Ga. 208, 7 S. E. Rep. 172), Animals, 561; Cross., Inj. at, 15.
Central R. & B. Co. *v.* Ingram (95 Ala. 152), Animals, 577.
Central R. & B. Co. *v.* Ingram (98 Ala. 395), Animals, 71, 86, 529.
Central R. & B. Co. *v.* Kelly (58 Ga. 107, 16 Am. Ry. Rep. 114), Dam., 101; Employés, Inj. to, 595; Evid., 175; Witn., 121.
Central R. & B. Co. *v.* Kenney (58 Ga. 485, 16 Am. Ry. Rep. 131), Employés, Inj. to, 142, 243, 299, 617.
Central R. & B. Co. *v.* Kent (84 Ga. 351, 10 S. E. Rep. 965; further appeal 87 Ga. 402, 13 S. E. Rep. 502), Employés, Inj. to, 563, 669; Evid., 35, 36, 164; Witn., 136.
Central R. & B. Co. *v.* Kent (87 Ga. 402, 13 S. E. Rep. 502; former appeal 84 Ga. 351), Employés, Inj. to, 51, 669; Trial, 151.
Central R. & B. Co. *v.* Kitchens (83 Ga. 83, 9 S. E. Rep. 827), Death, etc., 151; Employés, Inj. to, 299, 427.
Central R. & B. Co. *v.* Lampley (23 Am. & Eng. R. Cas. 720, 76 Ala. 357, 52 Am. Rep. 334), Car. of Mails, 7, 8; Car. of M., 2.
Central R. & B. Co. *v.* Lanier (83 Ga. 587, 10 S. E. Rep. 279), Dam., 46; Employés, Inj. to, 8, 301; Fel. Serv., 171.
Central R. & B. Co. *v.* Lee (96 Ala. 444, 11 So. Rep. 424), Animals, 516.
Central R. & B. Co. *v.* Letcher (12 Am. & Eng. R. Cas. 115, 69 Ala. 106), Car. of P., 199, 415.
Central R. & B. Co. *v.* Macon (43 Ga. 605), Leases, 38.
Central R. & B. Co. *v.* Maltsby (90 Ga. 630, 16 S. E. Rep. 953), Employés, Inj. to, 654; Witn., 29, 34, 195.
Central R. & B. Co. *v.* Mayor, etc., of Macon (43 Ga. 605), Parties, 23.
Central R. & B. Co. *v.* Miles (41 Am. & Eng. R. Cas. 149, 88 Ala. 256, 6 So. Rep. 696), Car. of P., 234, 420, 479.
Central R. & B. Co. *v.* Nash (81 Ga. 580, 7 S. E. Rep. 808), Negl., 105; Trial, 50.

Central R. & B. Co. *v.* Neighbors (83 Ga. 444, 10 S. E. Rep. 115), Trial, 117.
Central R. & B. Co. *v.* Papot (59 Ga. 342), Divid., 4; Evid., 230; Witn., 16.
Central R. & B. Co. *v.* Passmore (90 Ga. 203, 15 S. E. Rep. 760), Dam., 64, 67, 91; Employés, Inj. to, 493.
Central R. & B. Co. *v.* Perry (58 Ga. 461, 16 Am. Ry. Rep. 122), Car. of P., 14, 26, 137, 149, 159, 199, 376; Stat. & D., 146.
Central R. & B. Co. *v.* Pettus (113 U. S. 116, 5 Sup. Ct. Rep. 387), Att'ys, 17.
Central R. & B. Co. *v.* Raiford (37 Am. & Eng. R. Cas. 481, 82 Ga. 400, 9 S. E. Rep. 169), Cross., Inj. at, 105, 200.
Central R. & B. Co. *v.* Roach (8 Am. & Eng. R. Cas. 79, 64 Ga. 635), Death, etc., 232, 335, 345, 394.
Central R. & B. Co. *v.* Roach (70 Ga. 434), Death, etc., 73; New Tr., 30.
Central R. & B. Co. *v.* Rogers (57 Ga. 336), Car. of M., 646.
Central R. & B. Co. *v.* Rylee (87 Ga. 491, 13 S. E. Rep. 584), Children, Inj. to, 41, 67.
Central R. & B. Co. *v.* Ryles (84 Ga. 420, 11 S. E. Rep. 499), Contrib. Neg., 19; Employés, Inj. to, 25; Fel. Serv., 470; Witn., 98.
Central R. & B. Co. *v.* Sawyer (78 Ga. 784, 3 S. E. Rep. 629), Car. of M., 399.
Central R. & B. Co. *v.* Sears (59 Ga. 436), Death, etc., 241; Employés, Inj. to, 414, 628.
Central R. & B. Co. *v.* Sims (80 Ga. 749, 7 S. E. Rep. 176), Employés, Inj. to, 196.
Central R. & B. Co. *v.* Skellie (86 Ga. 686, 12 S. E. Rep. 1017), Car. of M., 611, 766; Evid., 194; Witn., 106, 149.
Central R. & B. Co. *v.* Small (80 Ga. 519, 5 S. E. Rep. 794), Employés, Inj. to, 601.
Central R. & B. Co. *v.* Smith (25 Am. & Eng. R. Cas. 25, 76 Ala. 572, 52 Am. Rep. 353), Corp., 5; Ult. Vir., 28.
Central R. & B. Co. *v.* Smith (54 Ga. 499), Trial, 6.
Central R. & B. Co. *v.* Smith (34 Am. & Eng. R. Cas. 1, 78 Ga. 694, 3 S. E. Rep. 397), Contrib. Neg., 19; Negl., 52; Sts. & H., 324; Tresp., Inj. to, 106, 116.
Central R. & B. Co. *v.* Smith (34 Am. & Eng. R. Cas. 456, 80 Ga. 526, 5 S. E. Rep. 772), App., 89; Car. of P., 595, 607; Stat. & D., 102, 103.
Central R. & B. Co. *v.* Smith (82 Ga. 236, 8 S. E. Rep. 311), Trial, 67.
Central R. & B. Co. *v.* Smitha (85 Ala. 47, 4 So. Rep. 708), Car. of L. S., 24, 69, 70.
Central R. & B. Co. *v.* State (54 Ga. 401; reversed in 92 U. S. 665), Consol., 23; Tax., 23, 65.
Central R. & B. Co. *v.* Strickland (52 Am. & Eng. R. Cas. 216, 90 Ga. 562, 16 S. E. Rep. 352), Car. of P., 61, 70; Eject. Pass., 111, 120; Tickets & F., 28, 32.
Central R. & B. Co. *v.* Tucker (79 Ga. 128, 4 S. E. Rep. 5), Pl., 106.
Central R. & B. Co. *v.* Vaughan (93 Ala. 209, 9 So. Rep. 468), Tresp., Inj. to, 6, 51, 101, 111.
Central R. & B. Co. *v.* Ward (37 Ga. 515), Stock, 73; War, 5.
Central R. & B. Co. *v.* Warren (84 Ga. 329, 10 S. E. Rep. 918), Animals, 563, 582.
Central R. & B. Co. *v.* Wood (51 Ga. 515, 8 Am. Ry. Rep. 9), Dam., 73; Pl., 148.
Central R. Co., Appeal of (102 Pa. St. 38), Sts. & H., 28.
Central R. Co., In re (1 T. & C. (N. Y.) 419), Cross. Rys., 54.
Central R. Co. *v.* Allmon (45 Ill. App. 389; affirmed in 147 Ill. 471, 35 N. E. Rep. 726), Elec. Rys., 38; Witn., 34.
Central R. Co. *v.* Allmon (147 Ill. 471, 35 N. E. Rep., 725; affirming 45 Ill. App. 389), App., 63; Evid., 31; St. Rys., 480; Witn., 66.
Central R. Co. *v.* Brinson (8 Am. & Eng. R. Cas. 343, 64 Ga. 475), Children, Inj. to, 147, 152; Leases, 103; Negl., 101.
Central R. Co. *v.* Brinson (19 Am. & Eng. R. Cas. 42, 70 Ga. 207), Children, Inj. to, 79; Comp. Neg., 21; Cross., Inj. at, 141; Licensees, Inj. to, 23; Tresp., Inj. to, 3, 25, 54.
Central R. Co. *v.* Brunson (1 Am. & Eng. R. Cas. 308, 63 Ga. 504), Evid., 15; Jurisd., 7.
Central R. Co. *v.* Bryant (73 Ga. 722), Car. of L. S., 31, 68.
Central R. Co. *v.* Bunn (11 N. J. Eq. 336), Reorg., 13.
Central R. Co. *v.* Coggin (73 Ga. 689), Witn., 62, 104, 122.
Central R. Co. *v.* Collins (40 Ga. 582), Contr., 63; Corp., 12; Stockh., 123, 128, Subscr., 230.
Central R. Co. *v.* Combs (18 Am. & Eng. R. Cas. 298, 70 Ga. 533, 48 Am. Rep. 582), Car. of P., 511, 611; Connect. L., 3.
Central R. Co. *v.* Crosby (74 Ga. 737), Death, etc., 137, 153, 216; Employés, Inj. to, 387; Evid., 247; New Tr., 84.
Central R. Co. *v.* Curtis (87 Ga. 416, 13 S. E. Rep. 757), Sts. & H., 410.
Central R. Co. *v.* DeBray (71 Ga. 406), Agency, 98; Contrib. Neg., 2, 118; Employés, Inj. to, 89, 433, 776; Evid., 79; Fel. Serv., 171, 240; Negl., 103; Trial, 173; Witn., 143.
Central R. Co. *v.* Dwight Mfg. Co. (75 Ga. 609), Bills of L., 25.
Central R. Co. *v.* English (29 Am. & Eng. R. Cas. 530, 73 Ga. 366), Nuis., 28, 30.
Central R. Co. *v.* Feller (84 Pa. St. 226, 18 Am. Ry. Rep. 369), Cross., Inj. at, 82, 273.
Central R. Co. *v.* Flournoy (69 Ga. 763), Jurisd., 7; Trial, 69.
Central R. Co. *v.* Freeman (66 Ga. 170), Employés, Inj. to, 737.
Central R. Co. *v.* Freeman (75 Ga. 331), Car. of P., 137, 607; Evid., 143.
Central R. Co. *v.* Glass (60 Ga. 441), Eject. Pass., 64.
Central R. Co. *v.* Gleason (69 Ga. 200), Animals, 78, 538; Evid., 86; Stat. & D., 110.
Central R. Co. *v.* Gleason (72 Ga. 742), Wareh., 8.
Central R. Co. *v.* Green (86 Pa. St. 421), Col. Pers., 4.

Central R. Co. *v.* Green (86 Pa. St. 427), Col. Pers., 4.
Central R. Co. *v.* Hamilton (23 Am. & Eng. R. Cas. 207, 71 Ga. 461), Animals, 14, 287; Stat., 40.
Central R. Co. *v.* Harris (76 Ga. 501), Car. of P., 128; New Tr., 7.
Central R. Co. *v.* Harrison (73 Ga. 744), Employés, Inj. to, 403.
Central R. Co. *v.* Haslett (74 Ga. 59), Employés, Inj. to, 223, 238, 630.
Central R. Co. *v.* Hearne (32 Tex. 546), Charges, 51.
Central R. Co. *v.* Henderson (69 Ga. 715), Fel. Serv., 171; Stat. & D., 110, 118.
Central R. Co. *v.* Hetfield (18 N. J. Eq. 323), Em. Dom., 339.
Central R. Co. *v.* Hubbard (86 Ga. 623, 12 S. E. Rep. 1020), Death, etc., 137, 353; Negl., 71; New Tr., 19.
Central R. Co. *v.* Kisch (36 L. J. Ch. 849, 15 W. R. 821, 16 L. T. 500, L. R. 2 H. L. Cas. 99), Incorp., 6.
Central R. Co. *v.* Logan (30 Am. & Eng. R. Cas. 63, 77 Ga. 804, 2 S. E. Rep. 465), Car. of M., 591; Discrim., 50; Evid., 23; Leases, 92.
Central R. Co. *v.* Merkel (32 Tex. 723), Em. Dom., 1004.
Central R. Co. *v.* Mills (20 Am. & Eng. R. Cas. 613, 113 U. S. 249, 5 Sup. Ct. Rep. 456; affirming 16 Am. & Eng. R. Cas. 491, 20 Fed. Rep. 449), Rem. of C., 41.
Central R. Co. *v.* Mitchell (1 Am. & Eng. R. Cas. 145, 63 Ga. 173), Employés, Inj. to, 46, 445; Pl., 110; Trial, 29, 89; Witn., 147.
Central R. Co. *v.* Moore (61 Ga. 151), Death, etc., 235, 271; New Tr., 85.
Central R. Co. *v.* Moore (24 N. J. L. 824), Contrib. Neg., 11, 13, 85, 87, 88; Cross., Inj. at, 193; Trial, 83.
Central R. Co. *v.* Peacock (69 Md. 257, 14 Atl. Rep. 709), Agency, 96.
Central R. Co. *v.* Pennsylvania R. Co. (58 Am. & Eng. R. Cas. 619, 59 Fed. Rep. 192), Bridges, 77.
Central R. Co. *v.* Pennsylvania R. Co. (31 N. J. Eq. 475; reversed on another point 32 N. J. Eq. 755), Cert., 1; Charters, 63; Em. Dom., 109, 182, 1032; Incorp., 2; Injunc., 39; Subscr., 230.
Central R. Co. *v.* Pickett (87 Ga. 734, 13 S. E. Rep. 750), Car. of L. S., 150; Car. of M., 693, 730; Pl., 175.
Central R. Co. *v.* Richards (62 Ga. 306), Evid., 247.
Central R. Co. *v.* Rogers (66 Ga. 251) Car. of M., 111, 636, 638.
Central R. Co. *v.* Rouse (77 Ga. 393, 3 S. E. Rep. 307), Death, etc., 395.
Central R. Co. *v.* Russell (75 Ga. 810), App., 125; Cross., Inj. at, 181, 184.
Central R. Co. *v.* Sanders (27 Am. & Eng. R. Cas. 300, 73 Ga. 513), Derailm., 1; Evid., 125; Negl., 99.
Central R. Co. *v.* Sears (61 Ga. 279), Employé, Inj. to, 595.
Central R. Co. *v.* Sears (66 Ga. 499), Death, etc., 438.
Central R. Co. *v.* Senn (27 Am. & Eng. R. Cas. 304, 73 Ga. 705), Derailm., 6; Witn., 104, 121.
Central R. Co. *v.* Smith (69 Ga. 268), Car. of P., 546; Proc., 32.
Central R. Co. *v.* Smith (76 Ga. 209, 2 Am. St. Rep. 31), Car. of P., 291; Contrib. Neg., 51; Trial, 39.
Central R. Co. *v.* Smith (74 Md. 212, 21 Atl. Rep. 706), Car. of P., 416; St. Rys., 326; Words & Ph., 150.
Central R. Co. *v.* Standard Oil Co. (1 Am. & Eng. R. Cas. 36, 33 N. J. Eq. 127), Injunc., 2, 29.
Central R. Co. *v.* Standard Oil Co. (2 Am. & Eng. R. Cas. 286, 33 N. J. Eq. 372), Injunc., 19.
Central R. Co. *v.* State (32 N. J. L. 220), Cross., St. & H., 27.
Central R. Co. *v.* State Board of Assessors (49 N. J. L. 1, 7 Atl. Rep. 306), Int. Com., 205; Tax., 274.
Central R. Co. *v.* Stoermer (51 Fed. Rep. 518, 1 U. S. App. 276, 2 C. C. A. 360), Fel. Serv., 128; Pl., 60.
Central R. Co. *v.* Summerford (87 Ga. 626, 13 S. E. Rep. 588), Animals, 576.
Central R. Co. *v.* Swint (26 Am. & Eng. R. Cas. 482, 73 Ga. 651), Death, etc., 98, 117.
Central R. Co. *v.* Thompson (76 Ga. 770), Car. of P., 93, 140, 265, 342, 425; Death, etc., 174, 322; Negl., 63; New Tr., 6; Tresp., Inj. to, 3.
Central R. Co. *v.* Valentine (29 N. J. L. 561; affirming 29 N. J. L. 60), Deeds, 47.
Central R. Co. *v.* Van Horn (38 N. J. L. 133, 13 Am. Ry. Rep. 36), Car. of P., 230, 344, 543.
Central R. Co. *v.* Whitehead (74 Ga. 441), Car. of P., 29, 240; Leases, 103, 105.
Central R. Co. *v.* Wolff (74 Ga. 664), Evid., 178.
Central Sav. Bank *v.* Bellefontaine R. Co. (2 Mo. App. 601, mem.), App. 142.
Central Texas & N. W. R. Co. *v.* Hancock (Tex.) (27 Am. & Eng. R. Cas. 325), App., 55; Evid., 255.
Central Transp. Co. *v.* Pullman Palace Car Co. (45 Am. & Eng. R. Cas. 607, 139 U. S. 24, 11 Sup. Ct. Rep. 478), Sleep. Car Cos., 3.
Central Trust Co. *v.* Bridges (57 Fed. Rep. 753), Constr. Rys., 18, 74; Em. Dom., 230; Fed. Cts., 4; Liens, 18; Mort., 92.
Central Trust Co. *v.* Central Iowa R. Co. (38 Fed. Rep. 889), Costs, 10; Judgm., 38.
Central Trust Co. *v.* Chicago, K. & T. R. Co. (54 Fed. Rep. 598), Liens, 19, 31, 36, 39.
Central Trust Co. *v.* East Tenn., V. & G. R. Co. (30 Am. & Eng. R. Cas. 450, 30 Fed. Rep. 805), Judgm., 38; Mort., 227.
Central Trust Co. *v.* Florida R. & N. Co. (46 Am. & Eng. R. Cas. 370, 43 Fed. Rep. 751), Judgm., 2; Mort., 252.
Central Trust Co. *v.* Grant Locomotive Works (43 Am. & Eng. R. Cas. 503, 135 U. S. 207, 10 Sup. Ct. Rep. 736), Mort., 214, 266.
Central Trust Co. *v.* Iowa C. R. Co. (40 Fed. Rep. 851), Judgm., 26.
Central Trust Co. *v.* Kneeland (46 Am. &

Eng. R. Cas. 268, 138 U. S. 414, 11 Sup. Ct. Rep. 357), Mort., 17, 36.
Central Trust Co. *v.* Marietta & N. G. R. Co. (48 Fed. Rep. 14), Intervent., 2.
Central Trust Co. *v.* Marietta & N. G. R. Co. (48 Fed. Rep. 850, 2 U. S. App. 1, 1 C. C. A. 116; reversing 48 Fed. Rep. 32), Intervent., 3.
Central Trust Co. *v.* Marietta & N. G. R. Co. (48 Fed. Rep. 864, 2 U. S. App. 106, 1 C. C. A. 139), Mort., 56.
Central Trust Co. *v.* Marietta & N. G. R. Co. (48 Fed. Rep. 865, 2 U. S. App. 120, 1 C. C. A. 130), Mort., 56, 59.
Central Trust Co. *v.* Marietta & N. G. R. Co. (48 Fed. Rep. 868, 2 U. S. App. 95, 1 C. C. A. 133), Mort., 59.
Central Trust Co. *v.* Marietta & N. G. R. Co. (48 Fed. Rep. 875, 2 U. S. App. 113, 1 C. C. A. 140), Mort., 56.
Central Trust Co. *v.* Marietta & N. G. R. Co. (51 Fed. Rep. 15), Mort., 223.
Central Trust Co. *v.* New York City & N. R. Co. (33 Hun (N. Y.) 513), Mort., 163.
Central Trust Co. *v.* New York City & N. R. Co. (35 Am. & Eng. R. Cas. 9, 110 N. Y. 250, 18 N. Y. S. R. 30, 18 N. E. Rep. 92; reversing 47 Hun 587, 15 N. Y. S. R. 178), Receiv., 89; Tax., 89, 312.
Central Trust Co. *v.* New York City & N. R. Co. (18 Abb. N. Cas. (N. Y.) 381; modifying 18 Abb. N. Cas. 64), Mort., 202; Sales of Rds., 10; Stockh., 70.
Central Trust Co. *v.* Ohio C. R. Co. (23 Am. & Eng. R. Cas. 666, 23 Fed. Rep. 306), Receiv., 60.
Central Trust Co. *v.* Ohio C. R. Co. (36 Am. & Eng. R. Cas. 299, 36 Fed. Rep. 520), Evid., 139; Mort., 58; Trusts, 4.
Central Trust Co. *v.* Richmond, N., I. & B. R. Co. (54 Fed. Rep. 723), Liens, 21, 44, 49.
Central Trust Co. *v.* St. Louis, A. & T. R. Co. (40 Fed. Rep. 426), Proc., 32.
Central Trust Co. *v.* St. Louis, A. & T. R. Co. (42 Am. & Eng. R. Cas. 26, 41 Fed. Rep. 551), Consol., 37; Judgm., 26; Mort., 219; Receiv., 144.
Central Trust Co. *v.* Seasongood (130 U. S. 482, 9 Sup. Ct. Rep. 575), Fed. Cts., 13.
Central Trust Co. *v.* Sheffield & B. C., I. & R. Co. (42 Fed. Rep. 106), Liens, 19.
Central Trust Co. *v.* Sheffield & B. C., I. & R. Co. (44 Fed. Rep. 526), Receiv., 99, 103.
Central Trust Co. *v.* Sloan (23 Am. & Eng. R. Cas. 30 , 65 Iowa 655, 22 N. W. Rep. 916), Judgm., 37, 38; Receiv., 72.
Central Trust Co. *v.* South Atlantic & O. R. Co. (57 Fed. Rep. 3), Receiv., 4.
Central Trust Co. *v.* Tappen (25 N. Y. S. R. 635, 53 Hun 638, 6 N. Y. Supp. 918), Receiv., 99.
Central Trust Co. *v.* Texas & St. L. R. Co. (17 Am. & Eng. R. Cas. 334, 22 Fed. Rep. 135), Receiv., 4.
Central Trust Co. *v.* Texas & St. L. R. Co. (23 Fed. Rep. 673), Liens, 28; Mort., 91.
Central Trust Co. *v.* Texas & St. L. R. Co. (23 Fed. Rep. 703), Liens, 19.
Central Trust Co. *v.* Texas & St. L. R. Co. (23 Fed. Rep. 846), Mort., 198.
Central Trust Co. *v.* Texas & St. L. R. Co. (24 Fed. Rep. 151), Mort., 198.
Central Trust Co. *v.* Texas & St. L. R. Co. (24 Fed. Rep. 153), Mort., 186.
Central Trust Co. *v.* Texas & St. L. R. Co. (27 Fed. Rep. 178), Liens, 19; Mort., 98.
Central Trust Co. *v.* Texas & St. L. R. Co. (32 Fed. Rep. 448), Employés, 4; Fel. Serv., 95, 335; Intervent., 3.
Central Trust Co. *v.* Valley R. Co. (55 Fed. Rep. 903), Receiv., 86.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (23 Fed. Rep. 675), Att'ys, 12.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (23 Fed. Rep. 858), Receiv., 126.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (23 Fed. Rep. 863), Receiv., 146.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (24 Fed. Rep. 98), Mort., 87.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (25 Fed. Rep. 69), Mort., 226.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (25 Fed. Rep. 693), Mort., 217.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (26 Fed. Rep. 3), Receiv., 45.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (26 Fed. Rep. 11), Receiv., 44.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (26 Fed. Rep. 896), Tresp., Inj. to, 92.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (26 Fed. Rep. 897), Employés, Inj. to, 268, 371.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (27 Fed. Rep. 14), Tax., 36.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (27 Fed. Rep. 159), Cross., Inj. at, 54.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (27 Fed. Rep. 175), Intervent., 3.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (27 Fed. Rep. 794), Contr., 23.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (28 Fed. Rep. 871), Mort., 94.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (29 Fed. Rep. 546), Contr., 21, 105; Deeds, 8; Leases, 117; Spec. Perf., 14.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (29 Fed. Rep. 618), Receiv., 57.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (30 Fed. Rep. 332), Mort., 91, 229.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (30 Fed. Rep. 344), Fed. Cts., 15; Receiv., 32.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (31 Fed. Rep. 246), Children, Inj. to, 69; New Tr., 24; Refer., 4.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (31 Am. & Eng. R. Cas. 103, 31 Fed. Rep. 247), Bagg., 21; Car. of M., 577.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (31 Fed. Rep. 440), Contr., 108.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (32 Fed. Rep. 187), Receiv., 160.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (32 Fed. Rep. 566), Bridges, 85; Mort., 107.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (34 Fed. Rep. 254), Contr., 105.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (34 Fed. Rep. 259), Receiv., 83.
Central Trust Co. *v.* Wabash, St. L. & P.

R. Co. (34 Fed. Rep. 616), Death, etc., 431; Fel. Serv., 235.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (38 Fed. Rep. 63; modifying 34 Fed. Rep. 259), Receiv., 55.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (38 Fed. Rep. 561), Contr., 109; Estop., 30.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (40 Am. & Eng. R. Cas. 636, 39 Fed. Rep. 417; reversed in 54 Am. & Eng. R. Cas. 29, 148 U. S. 627), Bagg., 36.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (46 Am. & Eng. R. Cas. 301, 46 Fed. Rep. 26), Mort., 114, 232.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (46 Fed. Rep. 156), Fed. Cts., 8; Pl., 62.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (50 Fed. Rep. 857), Bailm., 2; Pl., 143.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (52 Fed. Rep. 908), Receiv., 59.
Central Trust Co. *v.* Wabash, St. L. & P. R. Co. (58 Am. & Eng. R. Cas. 642, 57 Fed. Rep. 441), App., 117; Culverts, 10, 14; Flood. Lds., 2, 22, 23, 90; Nuis., 12.
Central Vt. R. C. *v.* Royalton (58 Vt. 234, 4 Atl. Rep. 868), Cross. St. & H., 49, 94.
Central Vt. R. Co. *v.* St. John's (4 Montr. L. R. 466), Tax., 78.
Central Vt. R. Co. *v.* St. John's (14 Can. Sup. Ct. 288), Tax., 385..
Central Vt. R. Co. *v.* Woodstock (50 Vt. 452), Cross. Rys.. 15.
Central Wales & C. J. R. Co. *v.* Great Western R. Co. (2 Ry. & C. T. Cas. 191), Charges, 102; Discrim., 54.
Central Wales & C. J. R. Co. *v.* Great Western R. Co. (10 Q. B. D. 231, 52 L. J. Q. B. D. 211, 4 Ry & C. T. Cas. 110), Charges, 101, 102, 103.
Central Wales & C. J. R. Co. *v.* London & N. W. R. Co. (4 Ry. & C. T. Cas. 101), Discrim., 40.
Central Wales & C. J. R. Co. *v.* London & N. W. R. Co. (4 Ry. & C. T. Cas. 211), Charges, 97, 98, 100.
Centre Tp. *v.* Marion County Com'rs (70 Ind. 562), Mun. Aid, 411.
Chadbourne *v.* Delaware, L. & W. R. Co. (6 Daly (N. Y.) 215), Contrib. Neg., 104; Trial, 198.
Chadsey *v.* McCreery (27 Ill. 253), Bills & N., 13; Name, 2.
Chaffe *v.* Ludeling (27 La. Ann. 607), Stockh., 39.
Chaffe *v.* Mississippi & T. R. Co. (9 Am. & Eng. R. Cas. 426, 59 Miss. 182), Bills of L., 50.
Chaffee *v.* Boston & L. R. Corp. (104 Mass. 108), Car. of P., 453; Contrib. Neg., 82; Cross., Inj. at, 245.
Chaffee *v.* Middlesex R. Co. (146 Mass. 224, 6 N. Eng. Rep. 59, 16 N. E. Rep. 34), Bills & N., 3; Bonds, 21, 40; Sunday, 1.
Chaffee *v.* Old Colony R. Co. (52 Am. & Eng. R. Cas. 366, 17 R. I. 658, 24 Atl. Rep. 141), Car. of P., 377; Stat. & D., 122.
Chaffee *v.* Rutland R. Co. (4 Am. & Eng. R. Cas. 212, 53 Vt. 345), Contr., 11.
Chaffee *v.* Rutland R. Co. (16 Am. & Eng. R. Cas. 408, 55 Vt. 110), Attach., 42; Certif. of Indebt., 2, 3; Divid., 8.
Chalcraft *v.* Louisville, E. & St. L. R. Co. (113 Ill. 86), Em. Dom., 676; Farm. Cross., 3, 5.
Chalk *v.* Charlotte, C. & A. R. Co. (9 Am. & Eng. R. Cas. 106, 85 N. Car. 423), Car. of M., 362.
Challiss *v.* Atchison, T. & S. F. R. Co. (16 Kan. 117), Em. Dom., 30; Words & Ph., 202.
Challiss *v.* Atchison U. D. & R. Co. (45 Kan. 398, 25 Pac. Rep. 894), Union D. Cos., 3.
Chamberlain *v.* Baltimore & O. R. Co. (29 Am. & Eng. R. Cas. 533, 66 Md. 518, 8 Atl. Rep. 267), Right of W., 4; Waters & W., 31.
Chamberlain *v.* Buffalo, N. Y. & P. R. Co. (31 Hun (N. Y.) 339), Injunc., 53.
Chamberlain *v.* Burlington (19 Iowa 395), Mun. Aid, 19, 268.
Chamberlain *v.* Chester & B. R. Co. (1 Ex. 870, 18 L. J. Ex. 494), Ferries, 6.
Chamberlain *v.* Chicago, B. & Q. R. Co. (27 Fed. Rep. 181), Lim. of Ac., 11.
Chamberlain *v.* Connecticut C. R. Co. (54 Conn. 472, 4 N. Eng. Rep. 477, 9 Atl. Rep. 244), Arb., 4; Leases, 95.
Chamberlain *v.* Elizabethport Steam Cordage Co. (41 N. J. Eq. 43, 2 Atl. Rep. 775), Sts. & H., 74.
Chamberlain *v.* Farr (23 Vt. 265), Constr. Rys., 10.
Chamberlain *v.* Gilman (10 Colo. 94, 14 Pac. Rep. 107), Assign., 25.
Chamberlain *v.* Milwaukee & M. R. Co. (7 Wis. 425), Car. of P., 361; Contrib. Neg., 22, 105; Fel. Serv., 1.
Chamberlain *v.* Milwaukee & M. R. Co. (11 Wis. 238; overruled in 18 Wis. 700), Employés, Inj. to, 185; Fel. Serv., 1, 108, 114, 279.
Chamberlain *v.* Painesville & H. R. Co. (15 Ohio St. 225), Direct., 12; Subscr., 17, 101, 175, 189, 219.
Chamberlain *v.* St. Paul & S. C. R. Co. (92 U. S. 299), Land Grants, 35; State Aid, 24.
Chamberlain *v.* Scott (33 Vt. 80), Contr., 72.
Chamberlain *v.* West End of London & C. P. R. Co. (2 B. & S. 605, 9 Jur. N. S. 1051, 32 L. J. Q. B. 173, 11 W. R. 472, 8 L. T. 149), Em. Dom., 1100.
Chamberlain *v.* Wheatland (4 Silv. Sup. Ct. 165, 7 N. Y. Supp. 190), Imp. Neg., 19; Witn., 104.
Chamber of Commerce *v.* Great Northern R. Co. (5 Int. Com. Com. 571, 4 Int. Com. Com. 230), Int. Com., 36, 52, 121.
Chambers, Ex parte ([1893] 1 Ch. 47), Dissol., 31.
Chambers *v.* Baltimore & O. R. Co. (139 Pa. St. 347, 21 Atl. Rep. 2), Adv. Poss., 8.
Chambers *v.* Carteret & S. R. Co. (54 N. J. L. 85, 22 Atl. Rep. 995), Em. Dom., 961.
Chambers *v.* Cincinnati & G. R. Co. (10 Am. & Eng. R. Cas. 376, 69 Ga. 320), Em. Dom., 417, 1035.
Chambers *v.* London, C. & D. R. Co. (11 W. R. 479, 8 L. T. 235), Em. Dom., 1104.

Chambers *v.* Manchester & M. R. Co. (5 B. & S. 588, 33 L. J. Q. B. 268, 10 Jur. N. S. 700), Bonds, 3.
Chambers *v.* Western N. C. R. Co. (91 N. Car. 471), Employés, Inj. to, 384.
Chambers County *v.* Clews (21 Wall. (U. S.) 317), App., 111; Mun. Aid, 25, 368, 392.
Champaign County *v.* Reed (100 Ill. 304), Tax., 116, 164.
Champion *v.* Memphis & C. R. Co. (35 Miss. 692), Subscr., 98, 124.
Champlain & St. L. R. Co. *v.* Valentine (19 Barb. (N. Y.) 484), Ejectm., 13.
Champlin *v.* Railway Pass. A. Co. (6 Lans. (N. Y.) 71), Acc. Ins., 2, 9.
Chance *v.* East Tex. R. Co. (22 Am. & Eng. R. Cas. 169, 63 Tex. 152), Injunc., 16.
Chance *v.* St. Louis, I. M. & S. R. Co. (10 Mo. App. 351), Agency, 98.
Chandler *v.* De Graff (22 Minn. 471, 18 Am. Ry. Rep. 425), Sales, 1.
Chandler *v.* Erie Transfer R. Co. (19 Civ. Pro. 385, 13 N. Y. Supp. 573), Pl., 9.
Chandler *v.* Henry (30 Vt. 330), Exec., 11.
Chandler *v.* New York, N. H. & H. R. Co. (159 Mass. 589, 35 N. E. Rep. 89), Death, etc., 119, 258.
Chandler *v.* Northern Cross R. Co. (18 Ill. 190), Subscr., 81, 173.
Chandler *v.* Railroad Com'rs (141 Mass. 208, 5 N. E. Rep. 509), Sts. & H., 153.
Chaney *v.* Wabash, St. L. & P. R. Co. (18 Mo. App. 661), Animals, 549, 608.
Chapin *v.* Boston & P. R. Corp. (6 Cush. (Mass.) 422), Em. Dom., 559, 625.
Chapin *v.* Chicago & E. I. R. Co. (18 Ill. App. 47), Release, 10.
Chapin *v.* Chicago, M. & St. P. R. Co. (42 Am. & Eng. R. Cas. 542, 79 Iowa 582, 44 N. W. Rep. 820), Bills of L., 17; Car. of L. S., 151.
Chapin *v.* Connecticut River R. Co. (16 Gray (Mass.) 69), Attach., 11.
Chapin *v.* Siger (4 McLean (U. S.) 378), Bills of L., 42.
Chapin *v.* Sullivan R. Co. (39 N. H. 53, 564), Animals, 90, 160; Cat.-Gds., 13; Em. Dom., 135.
Chapin *v.* Vermont & M. R. Co. (8 Gray (Mass.) 575), Bonds, 28, 52.
Chaplin *v.* Com'rs of Highways (126 Ill. 264, 18 N. E. Rep. 765), Em. Dom., 132.
Chapman *v.* Albany & S. R. Co. (10 Barb. (N. Y.) 360), Sts. & H., 138, 158,, 293.
Chapman *v.* Atlanta & W. P. R. Co. (74 Ga. 547), Pl., 49.
Chapman *v.* Atlantic & St. L. R. Co. (37 Me. 92), Fires, 7; Stat., 29.
Chapman *v.* Barney (129 U. S. 677, 9 Sup. Ct. Rep. 426), For. Corp., 15; Pl., 144.
Chapman *v.* Chicago & N. W. R. Co. (26 Wis. 295, 3 Am. Ry. Rep. 551), Int., 14.
Chapman *v.* Delaware, L. & W. R. Co. (3 Lans. (N. Y.) 261), Ejectm., 19, 27.
Chapman *v.* Erie R. Co. (55 N. Y. 579, 17 Am. Ry. Rep. 357; reversing 1 T. & C. 526), Evid., 203; Fel. Serv., 153.
Chapman *v.* Great Western R. Co. (L. R. 5 Q. B. D. 278, 49 L. J. Q. B. D. 420, 42 L. T. 252, 28 W. R. 566, 4 Ry. & C. T. Cas. 11), Car. of M., 339, 352.
Chapman *v.* Kansas City, C. & S. R. Co. (114 Mo. 542, 21 S. W. Rep. 858), Sales, 7.
Chapman *v.* Mad River & L. E. R. Co. (6 Ohio St. 119), Contr., 68; Stockh., 118.
Chapman *v.* Monmouthshire R. & C. Co. (2 H. & N. 267, 27 L. J. Ex. 97), Em. Dom., 1187.
Chapman *v.* New Haven R. Co. (19 N. Y. 341), Imp. Neg., 19.
Chapman *v.* New Orleans, J. & G. N. R. Co. (21 La. Ann. 224), Car. of M., 292.
Chapman *v.* New York C. & H. R. R. Co. (14 Hun (N. Y.) 484), Evid., 50.
Chapman *v.* New York C. R. Co. (33 N. Y. 369; affirming 31 Barb. 399), Agency, 84.
Chapman *v.* Oshkosh & M. R. R. Co. (33 Wis. 629), Em. Dom., 169, 701.
Chapman *v.* Pittsburg & S. R. Co. (9 Am. & Eng. R. Cas. 484, 18 W. Va. 184), Attach., 63, 67; Constr. Rys., 76, 105; Em. Dom., 266; Evid., 105.
Chapman *v.* Pittsburg & S. R. Co. (26 W. Va. 299), Attach., 63; Mort., 19.
Chapman *v.* Pittsburg & S. R. Co. (26 W. Va. 324), Attach., 63.
Chapman *v.* Railroad Co. (7 Phila. (Pa.) 204), Car. of M., 218.
Chapman *v.* Utica & B. R. R. Co. (4 Lans. (N. Y.) 96), Constr. Rys., 93.
Chappell *v.* New York, N. H. & H. R. Co. (62 Conn. 195, 24 Atl. Rep. 997), Deeds, 32, 45.
Charland *v.* Queen (1 Can. Exch. 291; affirmed in 16 Can. Sup. Ct. 721, App'x.), Em. Dom., 1247.
Charlebois *v.* Gogebic & M. R. R. Co. (91 Mich. 59, 51 N. W. Rep. 812), Death, etc., 131; Indep. Contr., 15.
Charles *v.* St. Louis & I. M. R. Co. (58 Mo. 458), Tresp., 27; Witn., 19.
Charles River Branch R. Co. *v.* County Com'rs (7 Gray (Mass.) 389), Em. Dom., 331.
Charles River Bridge *v.* Warren Bridge (11 Pet. (U. S.) 420), Bridges, 90.
Charleston *v.* Branch (15 Wall. (U. S.) 470, n.), Tax., 158.
Charleston & S. Bridge Co. *v.* Comstock (36 W. Va. 263, 15 S. E. Rep. 69), Em. Dom., 49, 290, 235, 236, 257, 324, 360, 536, 537, 558, 565, 576, 898.
Charleston & S. R. Co. *v.* Blake (12 Rich. (So. Car.) 634), Em. Dom., 92, 228, 572, 624; Evid., 193.
Charleston & S. R. Co. *v.* Moore (35 Am. & Eng. R. Cas. 623, 80 Ga. 522, 5 S. E. Rep. 769), Car. of M., 203.
Charleston, C. & C. R. Co. *v.* Leech (43 Am. & Eng. R. Cas. 588, 33 So. Car. 175, 11 S. E. Rep. 631), Em. Dom., 193, 197; Partit., 2; Release, 28.
Charleston, C. & C. R. Co. *v.* Leech (35 So. Car. 146, 14 S. E. Rep. 730), Partit., 4.
Charlestown *v.* Middlesex County Com'rs (1 Allen (Mass.) 199), Tax., 195, 265.
Charlestown Branch R. Co. *v.* Middlesex County Com'rs (7 Metc. (Mass.) 78), Lim. of Ac., 23; Wharves, 1.
Charlick *v.* Flushing R. Co. (10 Abb. Pr. (N. Y.) 130), Discov., 7.

Charlotte & S. C. R. Co. *v.* Blakely (3 Strobh. (So. Car.) 245), Subscr., 3.
Charlotte, C. & A. R. Co. *v.* Gibbes (31 Am. & Eng. R. Cas. 464, 27 So. Car. 385, 4 S. E. Rep. 49), Consol., 40; Ry. Com'rs, 42; Tax., 6.
Charlotte, C. & A. R. Co. *v.* Gibbes (48 Am. & Eng. R. Cas. 595, 142 U. S. 386, 12 Sup. Ct. Rep. 255), Tax., 45.
Charlotte, C. & A. R. Co. *v.* Gow (59 Ga. 685), Stat. Agts., 11.
Charlotte, C. & A. R. Co. *v.* Wooten (87 Ga. 203, 13 S. E. Rep. 509), Car. of M., 123.
Charlton *v.* Newcastle & C. R. Co. (5 Jur. N. S. 1096), Ult. Vir., 8.
Charlton *v.* Rolleston (L. R. 28 Ch. D. 237, 54 L. J. Ch. D. 233, 51 L. T. 612), Em. Dom., 1146.
Charman *v.* Southeastern R. Co. (37 Am. & Eng. R. Cas. 495, 21 Q. B. D. 524), Animals, 460.
Chartiers R. Co. *v.* Hodgens (77 Pa. St. 187; but see 85 Pa. St. 501), Subscr., 126.
Chartiers R. Co. *v.* Hodgens (85 Pa. St. 501), Subscr., 120.
Chase *v.* American Steamboat Co. (10 R. I. 79), Death, etc., 30; Words & Ph., 105, 163.
Chase *v.* Burlington, C. R. & N. R. Co. (38 Am. & Eng. R. Cas. 148, 76 Iowa 675, 39 N. W. Rep. 196), Employés, Inj. to, 368, 765; Evid., 247; Fel. Serv., 501.
Chase *v.* East Tenn., V. & G. R. Co. (4 Am. & Eng. R. Cas. 349, 5 Lea (Tenn.) 415), Subscr., 183.
Chase *v.* Jamestown St. R. Co. (38 N. Y. S. R. 954, 60 Hun 582, mem., 15 N. Y. Supp. 35; affirmed in 133 N. Y. 619, mem., 30 N. E. Rep. 1150, 44 N. Y. S. R. 931), Car. of P., 238; Evid., 67; Husb. & W., 35; Negl., 91; Stat. & D., 78; St. Rys., 346, 384.
Chase *v.* Maine C. R. Co. (19 Am. & Eng. R. Cas. 356, 77 Me. 62, 52 Am. Rep. 744), Death, etc., 230, 341.
Chase *v.* Maine C. R. Co. (78 Me. 346, 5 Atl. Rep. 771), Cross., Inj. at, 253; Farm Cross., 12.
Chase *v.* New York C. R. Co. (24 Barb. (N. Y.) 273), Flood. Lds., 96.
Chase *v.* New York C. R. Co. (26 N. Y. 523), Tickets & F., 134.
Chase *v.* Second Ave. R. Co. (97 N. Y. 384, 49 Am. Rep. 531; reversing 16 J. & S. 220), Contr., 81.
Chase *v.* Senn (7 N. Y. Supp. 65), Evid., 182.
Chase *v.* South Pac. Coast R. Co. (42 Am. & Eng. R. Cas. 424, 83 Cal. 468, 23 Pac. Rep. 532), Jurisd., 7; Trial, 6.
Chase *v.* Sullivan R. Co. (20 N. H. 195), Em. Dom., 931, 939.
Chase *v.* Sycamore & C. R. Co. (38 Ill. 215), Evid., 233; Subscr., 193.
Chase. *v.* Vanderbilt (5 J. & S. (N. Y.) 334), Divid., 2.
Chase *v.* Vanderbilt (62 N. Y. 307, 12 Am. Ry. Rep. 141; affirming 5 J. & S. 334), Consol., 47.
Chase, M. M. (37 Fed. Rep. 708), Car. of M., 27.
Chaskel *v.* Metropolitan El. R. Co. (25 N. Y. S. R. 621, 53 Hun 636, 2 Silv. Sup. Ct. 36, 6 N. Y. Supp. 369), Discov., 8.
Chattanooga Board of Trade *v.* East Tenn., V. & G. R. Co. (5 Int. Com. Com. 546, 4 Int. Com. Rep. 213), Int. Com., 63, 114, 123.
Chattanooga, R. & C. R. Co. *v.* Brown (43 Am. & Eng. R. Cas. 611, 84 Ga. 256, 10 S. E. Rep. 730), Fences, 106.
Chattanooga, R. & C. R. Co. *v.* Cincinnati, N. O. & T. P. R. Co. (44 Fed. Rep. 456), Contr., 80.
Chattanooga, R. & C. R. Co. *v.* Clowdis (90 Ga. 258, 17 S. E. Rep. 88), App., 135; Contrib. Neg., 21; Death, etc., 125, 373.
Chattanooga, R. & C. R. Co. *v.* Davis (89 Ga. 708, 15 S. E. Rep. 626), Contr., 1; Em. Dom., 214; Evid., 173.
Chattanooga, R. & C. R. Co. *v.* East Rome Town Co. (89 Ga. 732, 16 S. E. Rep. 308), Pl., 148.
Chattanooga, R. & C. R. Co. *v.* Huggins (52 Am. & Eng. R. Cas. 473, 89 Ga. 494, 15 S. E. Rep. 848), Car. of P., 143, 153, 515, 544, 609; Evid., 257; New Tr., 17; Trial, 123, 159; Witn., 100.
Chattanooga, R. & C. R. Co. *v.* Jackson (86 Ga. 676, 13 S. E. Rep. 109), Name, 4.
Chattanooga, R. & C. R. Co. *v.* Jones (80 Ga. 264, 9 S. E. Rep. 1081), Em. Dom., 1034.
Chattanooga, R. & C. R. Co. *v.* Liddell (85 Ga. 482, 11 S. E. Rep. 853), Constr. Rys., 14; Derailm., 7; Evid., 28, 196; Trial, 146.
Chattanooga, R. & C. R. Co. *v.* Lyon (52 Am. & Eng. R. Cas. 307, 89 Ga. 16, 15 S. E. Rep. 24, 15 L. R. A. 857), Car. of P. 252.
Chattanooga, R. & C. R. Co. *v.* McLendon (86 Ga. 517, 12 S. E. Rep. 941), Ex. & Ad., 12.
Chattanooga, R. & C. R. Co. *v.* Owen (90 Ga. 265, 15 S. E. Rep. 853), Employés, Inj. to, 589, 590; New Tr., 5; Pl., 117; Witn., 28, 81.
Chattanooga, R. & C. R. Co. *v.* Palmer (89 Ga. 161, 15 S. E. Rep. 34), Animals, 233, 326.
Chattanooga, R. & C. R. Co. *v.* Whitehead (89 Ga. 190, 15 S. E. Rep. 44), Leases, 111.
Chattanooga, R. & C. R. Co. *v.* Whitehead (90 Ga. 47, 15 S E. Rep. 629), Death, etc., 174; Evid., 244.
Chattaroi R. Co. *v.* Kinner (14 Am. & Eng. R. Cas. 30, 81 Ky. 221), Charters, 19; Em. Dom., 31.
Chatterley Iron Co. *v.* North Staffordshire R. Co. (3 Ry. & C. T. Cas. 238), Charges, 87, 89, 116, 124; Ry. Com'rs, 29.
Chave *v.* New York & H. R. Co. (15 N. Y. S. R. 966, 48 Hun 620, 1 N. Y. Supp. 264), Children, Inj. to, 50.
Cheatham *v.* Red River Line (56 Fed. Rep. 248), Death, etc., 377, 392.
Check *v.* Little Miami R. Co. (2 Disney (Ohio) 237), Bagg., 55; Car. of P., 500, 517.
Cheeney *v.* Lafayette, B. & M. R. Co. (68 Ill. 570), Direct., 27, 29, 31.
Cheever *v.* Gilbert El. R. Co. (11 J. & S (N. Y.) 478), Officers, 2.

Cheever *v.* Pittsburg, S. & L. R. R. Co. (55 N. Y. S. R. 181, 72 Hun 380), Bills & N., 16.
Cheever *v.* Pittsburg, S. & L. E. R. Co. (26 N. Y. Supp. 829, 57 N. Y. S. R. 188, 74 Hun 539), Witn., 3.
Cheever *v.* Rutland & B. R. Co. (39 Vt. 653, 4 Am. Ry. Rep. 291), Mort., 215.
Cheltenham & G. W. U. R. Co. *v.* Daniel (2 Railw. Cas. 728, 2 Q. B. 281), Subscr., 175.
Chenango Bridge Co. *v.* Binghamton Bridge Co. (27 N. Y. 87, 26 How. Pr. 124; reversed in 3 Wall. (U. S.) 51), Charters, 48.
Cheney *v.* Boston & M. R. Co. (11 Metc. (Mass.) 121), Tickets & F., 7, 43.
Cheney *v.* Chicago, M. & N. R. Co. (75 Wis. 223, 43 N. W. Rep. 1152), Sts. & H., 184.
Cheney *v.* New York C. & H. R. R. Co. (16 Hun (N. Y.) 415), Cross., Inj. at, 166; New Tr., 24.
Cheraw & C. R. Co. *v.* Garland (14 So. Car. 63), Subscr., 51, 92.
Cheraw & C. R. Co. *v.* White (10 So. Car. 155), Charters, 72; Susbscr., 13.
Cheraw & C. R. Co. *v.* White (14 So. Car. 51), Charters, 73; Pl., 7, 9; Subscr., 89; Words & Ph., 221.
Cheraw & S. R. Co. *v.* Com'rs of Anson (17 Am. & Eng. R. Cas. 431, 88 N. Car. 519), Consol., 23; Location, etc., 18.
Cherokee & D. R. Co. *v.* Renken (77 Iowa 316, 42 N. W. Rep. 307), Cloud on T., 7.
Cherokee County Com'rs *v.* Wilson (15 Am. & Eng. R. Cas. 625, 109 U. S. 621, 3 Sup. Ct. Rep. 352), Mun. Aid, 446.
Cherokee Nation *v.* Southern Kan. R. Co. (44 Am. & Eng. R. Cas. 26, 135 U. S. 641, 10 Sup. Ct. Rep. 965; reversing 33 Fed. Rep. 900), Em. Dom., 100, 398, 896; Pub. Lds., 11.
Cherry *v.* Kansas City, Ft. S. & M. R. Co. (52 Mo. App. 499), Tickets & F., 48.
Cherry *v.* North & S. R. Co. (59 Ga. 446), Proc., 28.
Cherry *v.* North & S. R. Co. (11 Am. & Eng. R. Cas. 636, 65 Ga. 633), Liens, 38.
Cherry Creek *v.* Becker (123 N. Y. 161, 33 N. Y. S. R. 411, 25 N. E. Rep. 369; affirming 18 N. Y. S. R. 485, 2 N. Y. Supp. 514), Mun. Aid, 317, 332, 398.
Chesapeake & O. Canal Co. *v.* Baltimore & O. R. Co. (4 Gill & J. Md. 1), Charters, 17, 22, 26, 79; Dissol., 1, 11; Em. Dom., 104; Franch., 10; Fub. Lds., 28.
Chesapeake & O. Canal Co. *v.* Hoye (2 Gratt. (Va.) 514), Em. Dom., 793, 882.
Chesapeake & O. R. Co. *v.* Bobbett (5 W. Va. 138), Injunc., 16.
Chesapeake & O. R. Co. *v.* Bradford (6 W. Va. 220), Em. Dom., 322, 397, 844.
Chesapeake & O. R. Co. *v.* Com. (88 Ky. 368, 11 S. W. Rep. 87), Crim. L., 32.
Chesapeake & O. R. Co. *v.* Halstead (7 W. Va. 301), Em. Dom., 794.
Chesapeake & O. R. Co. *v.* Hickey (Ky.) (22 S. W. Rep. 441), Tresp., 9.
Chesapeake & O. R. Co. *v.* Hoard (16 W. Va. 270), Em. Dom., 250.
Chesapeake & O. R. Co. *v.* Huse (5 W. Va. 579), Injunc., 17.
Chesapeake & O. R. Co. *v.* Lee (84 Va. 642, 5 S. E. Rep. 579), Employés, Inj. to, 315, 339.
Chesapeake & O. R. Co. *v.* McMichael (Ky.) (15 S. W. Rep. 878), Fel. Serv., 34, 53, 126.
Chesapeake & O. R. Co. *v.* Miller (19 W. Va. 408), Tax., 51.
Chesapeake & O. R. Co. *v.* Miller (114 U. S. 176, 5 Sup. Ct. Rep. 813), Tax., 157.
Chesapeake & O. R. Co. *v.* Pack (6 W. Va. 397), Em. Dom., 57, 274, 508, 796, 808, 849, 948.
Chesapeake & O. R. Co. *v.* Paine (29 Gratt. (Va.) 502), Attach., 31.
Chesapeake & O. R. Co. *v.* Patton (5 W. Va. 234), Injunc., 4, 16.
Chesapeake & O. R. Co. *v.* Patton (6 W. Va. 147), Em. Dom., 381, 799.
Chesapeake & O. R. Co. *v.* Patton (9 W. Va. 648), Em. Dom., 49, 522, 895; New Tr., 101; Stat., 34.
Chesapeake & O. R. Co. *v.* Reeves (Ky. (11 S. W. Rep. 464), Car. of P., 427; Evid., 44, 175.
Chesapeake & O. R. Co. *v.* Tyree (7 W. Va. 693), Em. Dom., 643, 757.
Chesapeake & O. R. Co. *v.* United States (19 Ct. of Cl. 300), Car. of Mails, 5.
Chesapeake & O. R. Co. *v.* United States (20 Ct. of Cl. 49), Car. of Mails, 9, 13.
Chesapeake & O. R. Co. *v.* Virginia (94 U. S. 718, 16 Am. Ry. Rep. 155), Tax., 65, 194.
Chesapeake, O. & S. R. Co. *v.* Heath (87 Ky. 651, 9 S. W. Rep. 832), Appear., 1; Death, etc., 107.
Chesapeake, O. & S. R. Co. *v.* State (13 Lea (Tenn.) 348), Tax., 282.
Chesapeake, O. & S. W. R. Co. *v.* Barlow (86 Tenn. 537, 8 S. W. Rep. 147), New Tr., 5.
Chesapeake, O. & S. W. R. Co. *v.* Foster (88 Tenn. 671, 13 S. W. Rep. 694, 14 S. W. Rep. 428), Cross., Inj. at, 207.
Chesapeake, O. & S. W. R. Co. *v.* Griest (30 Am. & Eng. R. Cas. 149, 85 Ky. 619, 4 S. W. Rep. 323), Dissol., 30; Employés, Inj. to, 502; Sales of Rds., 14, 16.
Chesapeake, O. & S. W. R. Co. *v.* Hendricks (88 Tenn. 710, 13 S. W. Rep. 696, 14 S. W. Rep. 488), Death, etc., 436.
Chesapeake, O. & S. W. R. Co. *v.* Higgins (85 Tenn. 620, 4 S. W. Rep. 47), Death, etc., 53.
Chesapeake, O. & S. W. R. Co. *v.* Lauderdale County (16 Lea (Tenn.) 688, 1 S. W. Rep. 48), Mort., 258; Tax., 282.
Chesapeake, O. & S. W. R. Co. *v.* McMannon (Ky.) (33 Am. & Eng. R. Cas. 308, 8 S. W. Rep. 18), Fel. Serv., 161.
Chesapeake, O. & S. W. R. Co. *v.* State (16 Lea (Tenn.) 300), Sts. & H., 185.
Chesapeake, O. & S. W. R. Co. *v.* Wells (31 Am. & Eng. R. Cas. 111, 85 Tenn. 613, 4 S. W. Rep. 5), Col. Pers., 7.
Chesebro *v.* Montgomery (70 Mich. 650), Em. Dom., 860.
Cheshire County Telep. Co. *v.* State (63 N. H. 167), Tax., 72

Cheshire R. Co. *v.* Foster (51 N. H. 490), Car. of M., 304.
Chesley *v.* Pierce (32 N. H. 388), Stockh., 39.
Chester *v.* Baltimore & P. R. Co. (140 Pa. St. 275, 21 Atl. Rep. 320), Cross., St. & H., 24.
Chester *v.* Connecticut Valley R. Co. (41 Conn. 348), Injunc., 14; Ry. Com'rs, 18; Stat. & D., 51.
Chester & L. N. G. R. Co. *v.* Caldwell County Com'rs (72 N. Car. 486), Mun. Aid, 45.
Chester Nat. Bank *v.* Atlanta & [illegible] A. L. R. Co. (25 So. Car. 216), Car. of [illegible]; Leases, 45.
Chestnutwood *v.* Hood (68 Ill. 132), Mun. Aid, 126, 299.
Chevaillier *v.* Patton (10 Tex. 344), Car. of M., 115.
Chevallier *v.* Straham (2 Tex. 115), Car. of M., 2.
Chewett *v.* Great Western R. Co. (26 U. C. C. P. 118), Em. Dom., 1274.
Chicago *v.* Baer (41 Ill. 306), St. Rys., 278, 296; Tax., 257.
Chicago *v.* Cameron (120 Ill. 447, 11 N. E. Rep. 899), Mun. Aid, 327, 404.
Chicago *v.* Chicago & W. I. R. Co. (105 Ill. 73), Leases, 12; Sts. & H., 92, 106.
Chicago *v.* Cummings (144 Ill. 446, 33 N. E. Rep. 34), St. Rys., 140.
Chicago *v.* Evans (24 Ill. 52), Injunc., 31; Leases, 51; St. Rys., 79.
Chicago *v.* McLean (133 Ill. 148, 8 L. R. A. 765, 24 N. E. Rep. 527), Contrib. Neg., 82, 118; Dam., 71, 81.
Chicago *v.* Robbins (2 Black (U. S.) 418), Sts. & H., 396.
Chicago *v.* Rock Island R. Co. (20 Ill. 286), Tax., 326.
Chicago *v.* Sheldon (9 Wall. (U. S.) 50), St. Rys., 152, 303.
Chicago & A. R. Co. *v.* Addizoat (17 Ill. App. 632), Bagg., 65, 69.
Chicago & A. R. Co. *v.* Adler (56 Ill. 344, 3 Am. Ry. Rep. 278), Cross., Inj. at, 156, 162; Trial, 33.
Chicago & A. R. Co. *v.* Adler (39 Am. & Eng. R. Cas. 666, 129 Ill. 335, 21 N. E. Rep. 846; affirming 28 Ill. App. 102), Cross., Inj. at, 239, 286; Death, etc., 235, 294; Negl., 6, 56, 73.
Chicago & A. R. Co. *v.* Arnol (58 Am. & Eng. R. Cas. 411, 144 Ill. 261, 33 N. E. Rep. 204), Car. of P., 151, 152, 153, 232, 234, 288, 289, 291, 292, 293, 414, 471.
Chicago & A. R. Co. *v.* Arnol (46 Ill. App. 157), Car. of P., 288; Evid., 289; Witn., 100.
Chicago & A. R. Co. *v.* Barber (15 Ill. App. 630), Cross., Inj. at, 239.
Chicago & A. R. Co. *v.* Barnes (38 Am. & Eng. R. Cas. 297, 116 Ind. 126, 18 N. E. Rep. 459), Animals, 138, 178, 586.
Chicago & A. R. Co. *v.* Becker (76 Ill. 25), Children, Inj. to, 95; Death, etc., 344.
Chicago & A. R. Co. *v.* Becker (84 Ill. 483), Children, Inj. to, 82, 116, 120; Negl., 29.
Chicago & A. R. Co. *v.* Benjamin (63 Ill. 283, 7 Am. Ry. Rep. 392), Car. of M., 106.
Chicago & A. R. Co. *v.* Bloomfield (7 Ill. App. 211), Fires, 299.
Chicago & A. R. Co. *v.* Bock (17 Ill. App. 17), Animals, 417.
Chicago & A. R. Co. *v.* Bonifield (8 Am. & Eng. R. Cas. 493, 104 Ill. 223), Comp. Neg., 7; Death, etc., 429.
Chicago & A. R. Co. *v.* Bragonier (119 Ill. 51, 7 N. E. Rep. 688; reversing 11 Ill. App. 516), Employés, Inj. to, 93, 342, 348, 349, 416, 645, 646, 649, 655; Evid., 36.
Chicago & A. R. Co. *v.* Bragonier (13 Ill. App. 467), Trial, 92.
Chicago & A. R. Co. *v.* Buck (14 Ill. App. 394), Animals, 220; Fences, 79.
Chicago & A. R. Co. *v.* Buttolf (66 Ill. 347), Trial, 35.
Chicago & A. R. Co. *v.* Byrum (48 Ill. App. [illegible]1), Car. of P., 152; Contrib. Neg., 87.
Chicago & A. R. Co. *v.* Calkins (17 Ill. App. 55), Trial, 161.
Chicago & A. R. Co. *v.* Carey (115 Ill. 115, 3 N. E. Rep. 519), Death, etc., 133, 269, 354.
Chicago & A. R. Co. *v.* Chicago, V. & W. Coal Co. (79 Ill. 121), Charges, 49; Contr., 45; Discrim., 2; Sales of Rds., 14.
Chicago & A. R. Co. *v.* Clampit (63 Ill. 95, 7 Am. Ry. Rep. 133), Fires, 277.
Chicago & A. R. Co. *v.* Connors (25 Ill. App. 561), Flood. Lds., 41.
Chicago & A. R. Co. *v.* Crowder (49 Ill. App. 154), Contrib. Neg., 52, 102; Employés, Inj. to, 447.
Chicago & A. R. Co. *v.* Derkes (24 Am. & Eng. R. Cas. 251, 103 Ind. 520, 3 N. E. Rep. 239), Contr., 96; Ult. Vir., 7.
Chicago & A. R. Co. *v.* Dillon (32 Am. & Eng. R. Cas. 1, 123 Ill. 570, 15 N. E. Rep. 181, 13 West. Rep. 286; affirming 24 Ill. App. 203), App., 69; Cross., Inj. at, 92, 97, 111; Evid., 112; Pl., 4; Trial, 123; Witn., 96.
Chicago & A. R. Co. *v.* Dillon (17 Ill. App. 355), Comp. Neg., 4; Negl., 75.
Chicago & A. R. Co. *v.* Dunn (23 Ill. App. 148), Employés, Inj. to, 52.
Chicago & A. R. Co. *v.* Elmore (32 Ill. App. 418), App., 88.
Chicago & A. R. Co. *v.* Elmore (67 Ill. 176), Cross., Inj. at, 353.
Chicago & A. R. Co. *v.* Engle (58 Ill. 381), Animals, 99, 502; Fences, 54; Sts. & H., 391.
Chicago & A. R. Co. *v.* Engle (76 Ill. 317), Sts. & H., 390.
Chicago & A. R. Co. *v.* Engle (84 Ill. 397, 16 Am. Ry. Rep. 490), Animals, 48, 210, 246; Negl., 28.
Chicago & A. R. Co. *v.* Erickson (91 Ill. 613), Car. of L. S., 109, 110.
Chicago & A. R. Co. *v.* Fears (53 Ill. 115), Cross., Inj. at, 321.
Chicago & A. R. Co. *v.* Few (15 Ill. App. 125), Dam., 86; Employés, Inj. to, 98, 592.
Chicago & A. R. Co. *v.* Fietsam (123 Ill. 518, 15 N. E. Rep. 169, 12 West. Rep. 844; affirming 24 Ill. App. 210), Comp. Neg., 18; Death, etc., 174, 319.
Chicago & A. R. Co. *v.* Fietsam (19 Ill. App. 55), Evid., 175.

Chicago & A. R. Co. *v.* Fisher (31 Ill. App. 36), Car. of P., 117, 561.
Chicago & A. R. Co. *v.* Fisher (141 Ill. 614, 31 N. E. Rep. 406; affirming 38 Ill. App. 33), Car. of P., 458, 475, 483, 596, 608; Negl., 63, 109; Trial, 35; Words & Ph., 249.
Chicago & A. R. Co. *v.* Flagg (43 Ill. 364), Eject. Pass., 2, 19, 52, 65, 106; Tickets & F., 124; Words & Ph., 192.
Chicago & A. R. Co. *v.* Garvy (58 Ill. 83, 10 Am. Ry. Rep. 431), Cross., Inj. at, 132.
Chicago & A. R. Co. *v.* Gasaway (71 Ill. 570), Car. of L. S., 110.
Chicago & A. R. Co. *v.* Glenney (29 Am. & Eng. R. Cas. 527, 118 Ill. 487, 9 N. E. Rep. 203; reversing 28 Ill. App. 364), Flood Lds., 62.
Chicago & A. R. Co. *v.* Glinny (19 Ill. App. 639), App., 105, 117.
Chicago & A. R. Co. *v.* Goodwin (111 Ill. 273), Em. Dom., 582, 657, 1062.
Chicago & A. R. Co. *v.* Gregory (58 Ill. 226, 11 Am. Ry. Rep. 92), Children, Inj. to, 5, 69, 193.
Chicago & A. R. Co. *v.* Gretzner (46 Ill. 74), Comp. Neg., 4; Cross., Inj. at, 245, 248, 282, 343.
Chicago & A. R. Co. *v.* Hanley (26 Ill. App. 351), Animals, 489.
Chicago & A. R. Co. *v.* Henderson (66 Ill. 494), Animals, 209.
Chicago & A. R. Co. *v.* Henneberry (28 Ill. App. 110), Embankm., 4; Pl., 133.
Chicago & A. R. Co. *v.* Henneberry (42 Ill. App. 78), Constr. Rys., 4.
Chicago & A. R. Co. *v.* Henneberry (42 Ill. App. 126), Constr. Rys., 9.
Chicago & A. R. Co. *v.* Henry (17 Ill. App. 521), Animals, 629.
Chicago & A. R. Co. *v.* Higgins (58 Ill. 128, 10 Am. Ry. Rep. 434), Agency, 29, 30.
Chicago & A. R. Co. *v.* Hill (24 Ill. App. 619), Animals, 63.
Chicago & A. R. Co. *v.* Hogarth (38 Ill. 370), Animals, 234; Cross., Inj. at, 14.
Chicago & A. R. Co. *v.* Howard (38 Ill. 414), Cross., Inj. at, 156, 334.
Chicago & A. R. Co. *v.* Hoyt (31 Am. & Eng. R. Cas. 309, 122 Ill. 369, 9 West. Rep. 785, 12 N. E. Rep. 225), Fel. Serv., 114, 202, 206, 272.
Chicago & A. R. Co. *v.* Hoyt (16 Ill. App. 237), Fel. Serv., 2, 511.
Chicago & A. R. Co. *v.* Hunt (24 Ill. App. 644), Fires, 37, 40.
Chicago & A. R. Co. *v.* Jacobs (63 Ill. 178, 7 Am. Ry. Rep. 125), Contrib. Neg., 21; Cross., Inj. at, 242.
Chicago & A. R. Co. *v.* Johnson (116 Ill. 206, 4 N. E. Rep. 381), App., 69, 85; Bridges, 25; Comp. Neg., 4; Witn., 181.
Chicago & A. R. Co. *v.* Joliet, L. & A. R. Co. (14 Am. & Eng. R. Cas. 62, 105 Ill. 388), Cross. Rys., 36, 42, 76.
Chicago & A. R. Co. *v.* Kansas City, I. & P. R. Co. (110 Mo. 510, 19 S. W. Rep. 826), Cross. Rys., 39, 52, 55.
Chicago & A. R. Co. *v.* Keefe (47 Ill. 108), Fel. Serv., 119.
Chicago & A. R. Co. *v.* Kellam (92 Ill. 245), Animals, 198.
Chicago & A. R. Co. *v.* Kelly (127 Ill. 637, 21 N. E. Rep. 203; affirming 28 Ill. App. 655), Fel. Serv., 205, 438, 511; Fly. Switch, 1.
Chicago & A. R. Co. *v.* Kelly (25 Ill. App. 17), Fel. Serv., 511.
Chicago & A. R. Co. *v.* Kemp (25 Ill. App. 39), App., 117.
Chicago & A. R. Co. *v.* Kerr (148 Ill. 605, 35 N. E. Rep. 1117), Employés, Inj. to, 27, 46, 97.
Chicago & A. R. Co. *v.* Kerr (48 Ill. App. 231), Employés, Inj. to, 46.
Chicago & A. R. Co. *v.* Lamkin (97 Mo. 496, 10 S. W. Rep. 200), Tax., 36, 269.
Chicago & A. R. Co. *v.* Lammert (12 Ill. App. 408), Children, Inj. to, 74, 76, 184, 185; Fel. Serv., 10, 500.
Chicago & A. R. Co. *v.* Langley (2 Ill. App. 505), Comp. Neg., 4.
Chicago & A. R. Co. *v.* Legg (32 Ill. App. 218), Animals, 62, 413, 422.
Chicago & A. R. Co. *v.* Livingston County Sup'rs (68 Ill. 458), Tax., 257.
Chicago & A. R. Co. *v.* Logue (47 Ill. App. 292), Cross., Inj. at, 141; Death, etc., 130, 222.
Chicago & A. R. Co. *v.* McDaniels (63 Ill. 122, 7 Am. Ry. Rep. 60), Cross., Inj. at, 136, 141.
Chicago & A. R. Co. *v.* McDonald (21 Ill. App. 409), Collis., 34; Employés, Inj. to, 19; Fel. Serv., 257.
Chicago & A. R. Co. *v.* McKenna (14 Ill. App. 472), Contrib. Neg., 19; Death, etc., 254; Tresp., Inj. to, 112.
Chicago & A. R. Co. *v.* McLaughlin (47 Ill. 265), Children, Inj. to, 7; Negl., 79; Stat. & D., 63.
Chicago & A. R. Co. *v.* McMorrow (67 Ill. 218), Animals, 187.
Chicago & A. R. Co. *v.* Maddox (92 Mo. 469, 10 West. Rep. 42, 4 S. W. Rep. 417), Eq., 5; Injunc., 40.
Chicago & A. R. Co. *v.* Mahan (42 Ill. 158), Evid., 4.
Chicago & A. R. Co. *v.* Maher (91 Ill. 312), Deeds, 23.
Chicago & A. R. Co. *v.* Mahoney (4 Ill. App. 262), Employés, Inj. to, 96, 342.
Chicago & A. R. Co. *v.* Matthews (39 Ill. App. 541), Employés, Inj. to, 446, 649.
Chicago & A. R. Co. *v.* Matthews (48 Ill. App. 361), Employés, Inj. to, 23.
Chicago & A. R. Co. *v.* May (15 Am. & Eng. R. Cas. 320, 108 Ill. 288), Death, etc., 275; Fel. Serv., 73, 103, 198, 201, 210, 211, 213, 217, 218.
Chicago & A. R. Co. *v.* Means (48 Ill. App. 396), Evid., 282; Trial, 216.
Chicago & A. R. Co. *v.* Michie (83 Ill. 427), Car. of P., 21; Tresp., Inj. to, 13.
Chicago & A. R. Co. *v.* Mock (72 Ill. 141), Comp. Neg., 3; Death, etc., 342.
Chicago & A. R. Co. *v.* Mock (88 Ill. 87, 21 Am. Ry. Rep. 287), Death, etc., 183.
Chicago & A. R. Co. *v.* Munroe (85 Ill. 25), Employés, Inj. to, 238.

Chicago & A. R. Co. *v.* Murphy (53 Ill. 336), Fel. Serv., 273, 418, 496.
Chicago & A. R. Co. *v.* Murphy (17 Ill. App. 444), Contrib. Neg., 32.
Chicago & A. R. Co. *v.* Murray (62 Ill. 326, 7 Am. Ry. Rep. 308), Comp. Neg., 3, 16.
Chicago & A. R. Co. *v.* Murray (71 Ill. 601), Children, Inj. to, 73, 193.
Chicago & A. R. Co. *v.* New York, L. E. & W. R. Co. (22 Am. & Eng. R. Cas. 265, 24 Fed. Rep. 516), Rem. of C., 39.
Chicago & A. R. Co. *v.* O'Brien (34 Ill. App. 155), Farm Cross., 13; Fences, 80.
Chicago & A. R. Co. *v.* O'Bryan (15 Ill. App. 134), Fel. Serv., 113, 205.
Chicago & A. R. Co. *v.* Pennell (94 Ill. 448), Fires, 105, 113, 247, 317.
Chicago & A. R. Co. *v.* Pennell (110 Ill. 435), Fires, 251, 265, 276, 289; Witn., 34.
Chicago & A. R. Co. *v.* Pennsylvania Co. (1 Int. Com. Rep. 357, 1 Int. Com. Com. 86), Int. Com., 107.
Chicago & A. R. Co. *v.* People (67 Ill. 11 2 Am. Ry. Rep. 242), Charges, 4, 6, 8; Discrim., 43.
Chicago & A. R. Co. *v.* People (5 Am. & Eng. R. Cas. 94, 98 Ill. 350), Tax., 257.
Chicago & A. R. Co. *v.* People (99 Ill. 464), Tax., 257.
Chicago & A. R. Co. *v.* People (13 Am. & Eng. R. Cas. 42, 105 Ill. 657), Car. of P., 215; Charters, 31; Stat., 19.
Chicago & A. R. Co. *v.* People (41 Am. & Eng. R. Cas. 629, 129 Ill. 571, 22 N. E. Rep. 864, 25 N. E. Rep. 5), Tax., 257.
Chicago & A. R. Co. *v.* Pillsbury (Ill.) (8 N. E. Rep. 803), Car. of P., 79, 108, 111; Conduct, 1.
Chicago & A. R. Co. *v.* Pillsbury (31 Am. & Eng. R. Cas. 24, 123 Ill. 9, 14 N. E. Rep. 22, 11 West. Rep. 757), Assault, 10; Car. of P., 141, 160, 328; Strikes, 4; Trial, 95.
Chicago & A. R. Co. *v.* Platt (89 Ill. 141), Employés, Inj. to, 136.
Chicago & A. R. Co. *v.* Pondrom (51 Ill. 333), Comp. Neg., 7; New Tr., 30.
Chicago & A. R. Co. *v.* Pratt (14 Ill. App. 346), Employés, Inj. to, 96, 592.
Chicago & A. R. Co. *v.* Purvines (58 Ill. 38, 10 Am. Ry. Rep. 369), Car. of L. S., 146.
Chicago & A. R. Co. *v.* Quaintance (58 Ill. 389, 12 Am. Ry. Rep. 234), Fires, 50, 224, 266, 277.
Chicago & A. R. Co. *v.* Ragland (84 Ill. 375), Attach., 38, 39.
Chicago & A. R. Co. *v.* Randolph (53 Ill. 510), Car. of P., 83, 254, 256, 258, 426.
Chicago & A. R. Co. *v.* Rice (71 Ill. 567), Animals, 51; App., 122.
Chicago & A. R. Co. *v.* Riley (25 Ill. App. 569), Flood. Lds., 41; Lim. of Ac., 56.
Chicago & A. R. Co. *v.* Roberts (40 Ill. 503), Eject. Pass., 65, 104.
Chicago & A. R. Co. *v.* Robinson (8 Ill. App. 140), Comp. Neg., 20; Contrib. Neg., 104; Cross., Inj. at, 264.
Chicago & A. R. Co. *v.* Robinson (19 Am. & Eng. R. Cas. 396, 106 Ill. 142; reversing 9 Ill. App. 89), Cross., Inj. at, 160, 353.
Chicago & A. R. Co. *v.* Robinson (16 Ill. App. 229), Witn., 83.
Chicago & A. R. Co. *v.* Rockford, R. I. & St. L. R. Co. (72 Ill. 34), Cross. Rys., 80.
Chicago & A. R. Co. *v.* Rush (84 Ill. 570), Employés, Inj. to, 110, 406; Fel. Serv., 27, 31, 42, 48, 158, 379.
Chicago & A. R. Co. *v.* Saunders (85 Ill. 288), Animals, 142.
Chicago & A. R. Co. *v.* Schoeneman (90 Ill. 258), Spec. Perf., 17.
Chicago & A. R. Co. *v.* Scott (42 Ill. 132), Car. of M., 337, 367.
Chicago & A. R. Co. *v.* Sebring (16 Ill. App. 181), Crim. L., 2.
Chicago & A. R. Co. *v.* Sebring (19 Ill. App. 222), Crim. L., 2.
Chicago & A. R. Co. *v.* Shannon (43 Ill. 338), Agency, 40; Death, etc., 52, 381, 384, 436; Employés, Inj. to, 135, 141.
Chicago & A. R. Co. *v.* Shea (66 Ill. 471), Car. of M., 12, 122, 199, 203; Words & Ph., 7.
Chicago & A. R. Co. *v.* Shenk (30 Ill. App. 586; reversed on another point, 131 Ill. 283, 23 N. E. Rep. 436), App., 68; Evid., 45.
Chicago & A. R. Co. *v.* Simms (18 Ill. App. 68), Car. of M., 131; Lim. of Liab., 22.
Chicago & A. R. Co. *v.* Smith (78 Ill. 96), Em. Dom., 235, 297, 1025.
Chicago & A. R. Co. *v.* Smith (10 Ill. App. 359), Bills of Partic., 2; Fires, 300; Pl., 36.
Chicago & A. R. Co. *v.* Smith (11 Ill. App. 348), Fires, 23.
Chicago & A. R. Co. *v.* Smith (17 Ill. App. 58), Flood. Lds., 65.
Chicago & A. R. Co. *v.* Smith (21 Ill. App. 202), Med. Serv., 18.
Chicago & A. R. Co. *v.* Springfield & N. W. R. Co. (67 Ill. 142), Cross. Rys., 35, 43; Em. Dom., 865.
Chicago & A. R. Co. *v.* Stites (20 Ill. App. 648), Employés, Inj. to, 136, 607.
Chicago & A. R. Co. *v.* Suffern (38 Am. & Eng. R. Cas. 508, 129 Ill. 274, 21 N. E. Rep. 824; affirming 27 Ill. App. 404), Discrim., 23, 52; Mines, etc., 14; Side Tr., 2, 3.
Chicago & A. R. Co. *v.* Sullivan (63 Ill. 293), Comp. Neg., 4; Fel. Serv., 142, 150, 485; Employés, Inj. to, 45.
Chicago & A. R. Co. *v.* Summers (113 Ind. 10, 12 West. Rep. 205, 14 N. E. Rep. 733), Animals, 641; Words & Ph., 139.
Chicago & A. R. Co. *v.* Taylor (40 Ill. 280), Animals, 358.
Chicago & A. R. Co. *v.* Thompson (19 Ill. 578), Car. of M., 6.
Chicago & A. R. Co. *v.* Thrapp (5 Ill. App. 502), Car. of M., 133.
Chicago & A. R. Co. *v.* Umphenour (69 Ill. 198), Animals, 126; Fences, 82, 88.
Chicago & A. R. Co. *v.* Union Rolling Mill Co. (16 Am. & Eng. R. Cas. 626, 109 U. S. 702, 3 Sup. Ct. Rep. 594), Liens, 4, 30.
Chicago & A. R. Co. *v.* Utley (38 Ill. 410), Animals, 126, 571.
Chicago & A. R. Co. *v.* Walker (16 Am. & Eng. R. Cas. 553, 9 Lea (Tenn.) 475), Proc., 34.
Chicago & A. R. Co. *v.* Wiggins Ferry Co.

(9 Am. & Eng. R. Cas. 509, 108 U. S. 18), Rem. of C., 25.
Chicago & A. R. Co. *v.* Wiggins Ferry Co. (119 U. S. 615, 7 Sup. Ct. Rep. 398), Fed. Cts., 25.
Chicago & A. R. Co. *v.* Willard (31 Ill. App. 435), Eject. Pass., 1, 63; Tickets & F., 33, 35.
Chicago & A. R. Co. *v.* Wilson (63 Ill. 167), Negl., 84; New Tr., 67; Stat. & D., 84.
Chicago & A. R. Co. *v.* Woolridge (32 Ill. App. 237), Car. of P., 441; Negl., 105.
Chicago & C. S. R. Co. *v.* Peters (45 Mich. 636, 8 N. W. Rep. 584), Ac'ts, 2.
Chicago & E. I. R. Co. *v.* Bivans (142 Ill. 401, 32 N. E. Rep. 456; affirming 42 Ill. App. 450), Witn., 119.
Chicago & E. I. R. Co. *v.* Boggess (21 Ill. App. 336), Animals, 573.
Chicago & E. I. R. Co. *v.* Boggs (23 Am. & Eng. R. Cas. 282, 101 Ind. 522, 51 Am. Rep. 761), Cross., Inj. at, 20, 102, 133.
Chicago & E. I. R. Co. *v.* Conley (6 Ind. App. 9, 32 N. E. Rep. 96), Car. of P. 619; Eject. Pass., 69; New Tr., 36.
Chicago & E. I. R. Co. *v.* Conners (30 Ill. App. 307), Negl., 82.
Chicago & E. I. R. Co. *v.* Englewood Connecting R. Co. (17 Ill. App. 141), Cross. Rys., 38.
Chicago & E. I. R. Co. *v.* Flexman (9 Ill. App. 250), Assault, 4; Car. of P., 129, 304.
Chicago & E. I. R. Co. *v.* Geary (17 Am. & Eng. R. Cas. 606, 110 Ill. 383), Employés, Inj. to, 248; Evid., 134; Fel. Serv., 320, 491.
Chicago & E. I. R. Co. *v.* Gernand (21 Ill. App. 242), Animals, 462.
Chicago & E. I. R. Co. *v.* Gill (37 Ill. App. 61), Employés, Inj. to, 604.
Chicago & E. I. R. Co. *v.* Goyette (43 Am. & Eng. R. Cas. 36, 133 Ill. 21, 24 N. E. Rep. 549; affirming 32 Ill. App. 574), App., 72; Fires, 3, 59, 172, 253, 277.
Chicago & E. I. R. Co. *v.* Guertin (24 Am. & Eng. R. Cas. 385, 115 Ill. 466, 4 N. E. Rep. 507), Animals, 177, 382; Fences, 91.
Chicago & E. I. R. Co. *v.* Hagar (11 Ill. App. 498), Employés, Inj. to, 96, 147, 348; Fel. Serv., 1, 202.
Chicago & E. I. R. Co. *v.* Hall (8 Ill. App. 621), Evid., 75.
Chicago & E. I. R. Co. *v.* Hay (119 Ill. 493, 10 N. E. Rep. 29), Estop., 30; Judgm., 19; Spec. Perf., 26; Vend. & P., 4.
Chicago & E. I. R. Co. *v.* Hay (119 Ill. 507, 10 N. E. Rep. 34), Spec. Perf., 24.
Chicago & E. I. R. Co. *v.* Hedges (25 Am. & Eng. R. Cas. 550, 105 Ind. 398, 7 N. E. Rep. 801), Contrib. Neg., 85; Cross., Inj. at, 250; Death, etc., 148; Negl., 18; Tresp., Inj. to, 4, 23, 29, 122.
Chicago & E. I. R. Co. *v.* Hedges (37 Am. & Eng. R. Cas. 516, 118 Ind. 5, 20 N. E. Rep. 530), Contrib. Neg., 5; Cross., Inj. at, 263; Death, etc., 194; Trial, 216.
Chicago & E. I. R. Co. *v.* Hines (132 Ill. 161, 23 N. E. Rep. 1021; affirming 33 Ill. App. 271), Employés, Inj. to, 100, 225, 536, 542; Pl., 3.
Chicago & E. I. R. Co. *v.* Kamman (119 Ill. 362, 10 N. E. Rep. 217; affirming 19 Ill. App. 640), Tender, 4.
Chicago & E. I. R. Co. *v.* Katzenbach (38 Am. & Eng. R. Cas. 375, 118 Ind. 174, 20 N. E. Rep. 709), Agency, 60; Bills of L., 87; Car. of L. S., 160; Contr., 9; Evid., 181.
Chicago & E. I. R. Co. *v.* Kneirim (48 Ill. App. 243), Death, etc., 436; Fel. Serv., 231.
Chicago & E. I. R. Co. *v.* Loeb (8 Ill. App. 627), Pl., 124.
Chicago & E. I. R. Co. *v.* Loeb (27 Am. & Eng. R. Cas. 415, 118 Ill. 203, 8 N. E. Rep. 460), Sts. & H., 174, 258.
Chicago & E. I. R. Co. *v.* McAuley (121 Ill. 160, 11 N. E. Rep. 67), Lim. of Ac., 23.
Chicago & E. I. R. Co. *v.* McKeehan (5 Ind. App. 124, 31 N. E. Rep. 831), New Tr., 92.
Chicago & E. I. R. Co. *v.* McKnight (16 Ill. App. 596), Cross., Inj. at, 105; Death, etc., 166.
Chicago & E. I. R. Co. *v.* Modesitt (124 Ind. 212, 24 N. E. Rep. 986), Animals, 519; Witn., 134.
Chicago & E. I. R. Co. *v.* O'Connor (13 Ill. App. 62), Comp. Neg., 4, 14; Contrib. Neg., 113.
Chicago & E. I. R. Co. *v.* O'Connor (119 Ill. 586, 9 N. E. Rep. 263; affirming 19 Ill. App. 591), Abate., 14; Comp. Neg., 12; Contrib. Neg., 19; Employés, Inj. to, 652; Fel. Serv., 126; Negl., 63.
Chicago & E. I. R. Co. *v.* Ostrander (32 Am. & Eng. R. Cas. 361, 38 Am. & Eng. R. Cas. 346, 116 Ind. 259, 266, 12 West. Rep. 718, 15 N. E. Rep. 227, 19 N. E. Rep. 110), Evid., 127; Fires, 50, 264, 280; Negl., 75.
Chicago & E. I. R. Co. *v.* People (120 Ill. 667, 12 N. E. Rep. 207, 9 West. Rep. 740; affirming 24 Ill. App. 562), Fright. Teams, 2, 3.
Chicago & E. I. R. Co. *v.* People (44 Ill. App. 632), Sts. & H., 414.
Chicago & E. I. R. Co. *v.* Pratt (13 Ill. App. 477), Car. of L. S., 52.
Chicago & E. I. R. Co. *v.* Roberts (35 Ill. App. 137), Death, etc., 281.
Chicago & E. I. R. Co. *v.* Roberts (44 Ill. App. 179), Contrib. Neg., 19; Death, etc., 342.
Chicago & E. I. R. Co. *v.* Rung (104 Ill. 641), Employés, Inj. to, 140.
Chicago & E. I. R. Co. *v.* Shannon (43 Ill. App. 540), Death, etc., 269.
Chicago & E. I. R. Co. *v.* Tilton (26 Ill. App. 362), Cross., Inj. at, 238.
Chicago & E. I. R. Co. *v.* Tilton (29 Ill. App. 95; denying rehearing in 26 Ill. App. 362), Cross., Inj. at, 29, 351; Negl., 52.
Chicago & E. I. R. Co. *v.* Wiltse (24 Am. & Eng. R. Cas. 261, 116 Ill. 439, 6 N. E. Rep. 49), Branch & L. Roads, 3; Em. Dom., 3, 182, 185.
Chicago & E. R. Co. *v.* Blake (23 Am. & Eng. R. Cas. 97, 116 Ill. 163, 4 N. E. Rep. 488), Em. Dom., 454, 604, 732, 926; Witn., 109, 118.
Chicago & E. R. Co. *v.* Brannegan (5 Ind. App. 540, 32 N. E. Rep. 790), Animals, 281, 353, 519; Trial, 218.
Chicago & E. R. Co. *v.* Dresel (20 Am. &

Eng. R. Cas. 263, 110 Ill. 89), Em. Dom., 646, 769.
Chicago & E. R. Co. *v.* Flexman (8 Am. & Eng. R. Cas. 354, 103 Ill. 546), Assault, 5.
Chicago & E. R. Co. *v.* Holland (30 Am. & Eng. R. Cas. 590, 122 Ill. 461, 13 N. E. Rep. 145, 11 West. Rep. 51), Dam., 70, 73, 74; Employés, Inj. to, 756; Evid., 172; Phys. Exam., 2.
Chicago & E. R. Co. *v.* Jacobs (110 Ill. 414), App., 125; Em. Dom., 587, 591, 600.
Chicago & G. T. R. Co. *v.* Campbell (7 Am. & Eng. R. Cas. 545, 47 Mich. 265, 11 N. W. Rep. 152), Animals, 199; Fences, 58.
Chicago & G. T. R. Co. *v.* Crolie (33 Ill. App. 17), App., 108.
Chicago & G. T. R. Co. *v.* Foster (46 Ill. App. 621), Evid., 172.
Chicago & G. T. R. Co. *v.* Hough (61 Mich. 507, 28 N. W. Rep. 532), Cross., St. & H., 80.
Chicago & G. T. R. Co. *v.* Miller (50 Am. & Eng. R. Cas. 650, 91 Mich. 166, 51 N. W. Rep. 981), Estop., 35.
Chicago & G. T. R. Co. *v.* Newton (89 Mich. 549, 50 N. W. Rep. 879), New Tr., 103.
Chicago & G. T. R. Co. *v.* Wellman (49 Am. & Eng. R. Cas. 1, 143 U. S. 339, 12 Sup. Ct. Rep. 400; affirming 83 Mich. 592, 47 N. W. Rep. 489), Stat., 35; Tickets & F., 114, 115.
Chicago & G. E. R. Co. *v.* Fox (41 Ill. 106), Agency, 8.
Chicago & G. E. R. Co. *v.* Harney (28 Ind. 28), Employés, Inj. to, 284; Fel. Serv., 9, 132, 134.
Chicago & G. E. R. Co. *v.* Vosburgh (45 Ill. 311), Constr. Rys., 28; Contr., 78.
Chicago & G. S. R. Co. *v.* Jones (103 Ind. 386, 6 N. E. Rep. 8), Em. Dom., 327, 1039, 1046.
Chicago & G. W. R. Co. *v.* Dane (43 N. Y. 240), Contr., 8.
Chicago & G. W. R. Co. *v.* Travis (44 Ill. App. 466), Employés, Inj. to, 182, 238, 250; Death, etc., 276.
Chicago & G. W. R. Co. *v.* Wedel (144 Ill. 9, 32 N. E. Rep. 547), Evid., 2; Sts. & H., 292; Witn., 106.
Chicago & G. W. R. Co. *v.* Wedel (44 Ill. App. 215), App., 107.
Chicago & G. W. R. Land Co. *v.* Peck (112 Ill. 408), Deeds of Tr., 14, 19; Parties, 18.
Chicago & I. Coal R. Co. *v.* DeBaum (2 Ind. App. 281, 28 N. E. Rep. 447), Animals, 234, 342; Stat. & D., 73.
Chicago & I. Coal R. Co. *v.* Hunter (128 Ind. 213, 27 N. E. Rep. 477), Em. Dom., 670, 724.
Chicago & I. Coal R. Co. *v.* McDaniel (134 Ind. 166, 32 N. E. Rep. 728, 33 N. E. Rep. 769), Licensees, Inj. to, 2; Trial, 188.
Chicago & I. A. L. R. Co. *v.* Johnston (13 Am. & Eng. R. Cas. 181, 89 Ind. 88), Proc., 6.
Chicago & I. R. Co. *v.* Baker (73 Ill. 316), Em. Dom., 1008.
Chicago & I. R. Co. *v.* Davis (86 Ill. 20, 17 Am. Ry. Rep. 405), Em. Dom., 1075.
Chicago & I. R. Co. *v.* Hopkins (90 Ill. 316), Em. Dom., 358, 435, 591, 724, 926.
Chicago & I. R. Co. *v.* Lane (130 Ill. 116, 22 N. E. Rep. 513; affirming 30 Ill. App. 437), Contrib. Neg., 82; Cross., Inj. at, 73; Negl., 63, 64; Pl., 115.
Chicago & I. R. Co. *v.* Mallory (5 Am. & Eng. R. Cas. 139, 101 Ill. 583), Mun. Aid, 138, 295.
Chicago & I. R. Co. *v.* Pinckney (74 Ill. 277), Mun. Aid, 118, 252.
Chicago & I. R. Co. *v.* Pyne (30 Fed. Rep. 86), Bonds, 31.
Chicago & I. R. Co. *v.* Russell (91 Ill. 298), Employés, Inj. to, 140, 361, 450; Evid., 151.
Chicago & M. C. R. Co. *v.* Ritter (10 Am. & Eng. R. Cas. 202, 1 Tex. App. (Civ. Cas.) 107), Em. Dom., 645, 689, 754.
Chicago & M. L. S. R. Co. *v.* Sanford (23 Mich. 418, 1 Am. Ry. Rep. 10), Em. Dom., 320, 331, 818, 822.
Chicago & M. R. Co. *v.* Bull (20 Ill. 218), Em. Dom., 769.
Chicago & M. R. Co. *v.* Patchin (16 Ill. 198), Animals, 50.
Chicago & N. E. R. Co. *v.* Miller (6 Am. & Eng. R. Cas. 89, 46 Mich. 532, 9 N. W. Rep. 841), Cross., Inj. at, 131, 301, 334.
Chicago & N. E. R. Co. *v.* Sturgis (44 Mich. 538, 7 N. W. Rep. 213), Constr. Rys., 91; Liens, 52, 59.
Chicago & N. R. Co. *v.* Benham (25 Ill. App. 248), App., 136.
Chicago & N. W. R. Co. *v.* Ames (40 Ill. 249), Car. of L. S., 57.
Chicago & N. W. R. Co. *v.* Auditor-General (53 Mich. 79, 18 N. W. Rep. 586), Consol., 32; Tax., 67.
Chicago & N. W. R. Co. *v.* Bannerman (15 Ill. App. 100), Eject. Pas., 36; Tickets & F., 6.
Chicago & N. W. R. Co. *v.* Barrie (55 Ill. 226, 2 Am. Ry. Rep. 451), Animals, 30, 50, 150; Fences, 86.
Chicago & N. W. R. Co. *v.* Bayfield (37 Mich. 205), Death, etc., 383, 436; Employés, Inj. to, 14, 182, 185, 435, 436, 466; Fel. Serv., 73; Words & Ph., 160.
Chicago & N. W. R. Co. *v.* Becker (33 Ill. App. 290), Charges, 50.
Chicago & N. W. R. Co. *v.* Bensley (69 Ill. 630), Car. of M., 81.
Chicago & N. W. R. Co. *v.* Bliss (6 Ill. App. 411), Contrib. Neg., 41; Fel. Serv., 124, 198.
Chicago & N. W. R. Co. *v.* Boller (7 Ill. App. 625), Fires, 41.
Chicago & N. W. R. Co. *v.* Boone County Sup'rs (44 Ill. 240), Evid., 13, 243, 256; Tax., 257.
Chicago & N. W. R. Co. *v.* Bouck (33 Ill. App. 123), App., 115; Negl., 63.
Chicago & N. W. R. Co. *v.* Button (68 Ill. 409), Husb. & W., 25.
Chicago & N. W. R. Co. *v.* Carpenter (45 Ill. App. 294), Animals, 211, 481.
Chicago & N. W. R. Co. *v.* Carroll (5 Ill. App. 201), Car. of P., 6, 117, 151, 475.
Chicago & N. W. R. Co. *v.* Carroll (12 Ill. App. 643), Negl. 106.
Chicago & N. W. R. Co. *v.* Chapman (42

Am. & Eng. R. Cas. 392, 133 Ill. 96, 24 N. E. Rep. 417; affirming 30 Ill. App. 504), Car. of L. S., 88; Lim. of Liab., 3, 14, 18.
Chicago & N. W. R. Co. *v.* Chicago (132 Ill. 372, 23 N. E. Rep. 1036), Em. Dom., 63, 314.
Chicago & N. W. R. Co. *v.* Chicago (50 Am. & Eng. R. Cas. 150, 140 Ill. 309, 29 N. E. Rep. 1109), Cross., St. & H., 1, 10, 14, 16, 30, 75, 77, 78; Em. Dom., 158; Fences, 2, 3; Sts. & H., 18; Stat., 66.
Chicago & N. W. R. Co. *v.* Chicago (148 Ill. 141, 35 N. E. Rep. 881), Em. Dom., 50, 777, 847, 854; Sts. & H., 18.
Chicago & N. W. R. Co. *v.* Chicago & E. R. Co. (25 Am. & Eng. R. Cas. 158, 112 Ill. 589), Charters, 64; Em. Dom., 72, 106, 107, 332, 581, 599.
Chicago & N. W. R. Co. *v.* Chicago & P. R. Co. (6 Biss. (U. S.) 219), Cross. Rys., 66, 69; For. Corp., 28.
Chicago & N. W. R. Co. *v.* Chisholm (79 Ill. 584), Eject. Pass., 95, 98, 128; Tickets & F., 63.
Chicago & N. W. R. Co. *v.* Church (12 Ill. App. 17), Bills of L., 67; Car. of M., 674.
Chicago & N. W. R. Co. *v.* Clark (70 Ill. 276), Comp. Neg., 4.
Chicago & N. W. R. Co. *v.* Clark (2 Ill. App. 116), Death, etc., 341; Licensees, Inj. to, 9.
Chicago & N. W. R. Co. *v.* Coss (73 Ill. 394), Car. of P., 217; Stat. & D., 125.
Chicago & N. W. R. Co. *v.* Crane (20 Am. & Eng. R. Cas. 600, 113 U. S. 424, 5 Sup. Ct. Rep. 578), Rem. of C., 37.
Chicago & N. W. R. Co. *v.* Cummings (20 Ill. App. 333), Car. of P., 640.
Chicago & N. W. R. Co. *v.* Davis (53 Am. & Eng. R. Cas. 461, 53 Fed. Rep. 61, 10 U. S. App. 422, 3 C. C. A. 429), Employés, Inj. to, 315.
Chicago & N. W. R. Co. *v.* Dement (44 Ill. 74), Animals, 578; App., 115.
Chicago & N. W. R. Co. *v.* Dey (35 Fed. Rep. 866, 1 L. R. A. 744, 2 Int. Com. Rep. 325), Charges, 15; Injunc., 3; Ry. Com'rs, 14.
Chicago & N. W. R. Co. *v.* Dickinson (74 Ill. 249), Car. of M., 111, 758.
Chicago & N. W. R. Co. *v.* Diehl (52 Ill. 441), Animals, 569.
Chicago & N. W. R. Co. *v.* Dimick (2 Am. & Eng. R. Cas. 201, 96 Ill. 42), Comp. Neg., 1, 12; Cross., Inj. at, 250.
Chicago & N. W. R. Co. *v.* Drake (33 Ill. App. 114), Car. of P., 221; Contrib. Neg., 27.
Chicago & N. W. R. Co. *v.* Donahue (75 Ill. 106), Employés, Inj. to, 21, 248.
Chicago & N. W. R. Co. *v.* Dunleavy (39 Am. & Eng. R. Cas. 381, 129 Ill. 132, 22 N. E. Rep. 15; affirming 27 Ill. App. 438), Cross., Inj. at, 239; Death, etc., 194, 199; Licensees, Inj. to, 7; Negl., 28, 30; Sts. & H., 391; Trial, 203, 204, 208.
Chicago & N. W. R. Co. *v.* Dunn (59 Iowa 619), 13 N. W. Rep. 722), Animals, 306.
Chicago & N. W. R. Co. *v.* Fillmore (57 Ill. 265, 10 Am. Ry. Rep. 462), Bridges, 50; Evid., 206; New Tr., 79.
Chicago & N. W. R. Co. *v.* Ft. Howard (21 Wis. 44), Fixt., 9; Tax., 343.
Chicago & N. W. R. Co. *v.* Fuller (17 Wall. (U. S.) 560), Stat., 22.
Chicago & N. W. R. Co. *v.* Galt (44 Am. & Eng. R. Cas. 43, 133 Ill. 657, 24 N. E. Rep. 674, 23 N. E. Rep. 425), Em. Dom., 235, 320, 382.
Chicago & N. W. R. Co. *v.* Garfield (11 Ill. App. 87), Fires, 296, 301.
Chicago & N. W. R. Co. *v.* Gertsen (15 Ill. App. 614), Cross., Inj. at, 253, 270.
Chicago & N. W. R. Co. *v.* Goebel (119 Ill. 515, 10 N. E. Rep. 369; affirming 20 Ill. App. 163), Comp. Neg., 13; Cross., Inj. at, 210; Death, etc., 339, 354; Side Tr., 4.
Chicago & N. W. R. Co. *v.* Goss (17 Wis. 428), Animals, 260, 569.
Chicago & N. W. R. Co. *v.* Harris (54 Ill. 528), Animals, 153, 180, 183, 386.
Chicago & N. W. R. Co. *v.* Hart (13 Ill. App. 186), App., 122.
Chicago & N. W. R. Co. *v.* Hart (22 Ill. App. 207), Animals, 394.
Chicago & N. W. R. Co. *v.* Hatch (79 Ill. 137), Cross., Inj. at, 9, 254.
Chicago & N. W. R. Co. *v.* Hoag (90 Ill. 339), Flood. Lds., 56, 60, 87, 89; Lim. of Ac., 6, 75.
Chicago & N. W. R. Co. *v.* Howard (6 Ill. App. 569), Death, etc., 242, 275.
Chicago & N. W. R. Co. *v.* Hunerberg (16 Ill. App. 387), Side Tr., 4.
Chicago & N. W. R. Co. *v.* Ingersoll (65 Ill. 399), Car. of M., 742, 743; Witn., 107.
Chicago & N. W. R. Co. *v.* Jackson (55 Ill. 492, 1 Am. Ry. Rep. 569), Employés, Inj. to, 713, 760, 775; Fel. Serv., 83, 95, 222, 226; Pl., 142.
Chicago & N. W. R. Co. *v.* James (22 Wis. 194), Agency, 1, 45.
Chicago & N. W. R. Co. *v.* James (24 Wis. 388), Agency, 111.
Chicago & N. W. R. Co. *v.* Jefferson (14 Ill. App. 615), Sts. & H., 18, 139.
Chicago & N. W. R. Co. *v.* Jenkins (9 Am. & Eng. R. Cas. 113, 103 Ill. 588), Car. of M., 377; Pl., 41.
Chicago & N. W. R. Co. *v.* Johnson (27 Ill. App. 351), Employés, Inj. to, 650, 658.
Chicago & N. W. R. Co. *v.* Lee County Sup'rs (44 Ill. 248), Tax., 257.
Chicago & N. W. R. Co. *v.* McCahill (56 Ill. 28, 4 Am. Ry. Rep. 561), Fires, 247, 266, 288; Witn., 81.
Chicago & N. W. R. Co. *v.* McLaughlin (119 U. S. 566, 7 Sup. Ct. Rep. 1366), Fel. Serv., 163.
Chicago & N. W. R. Co. *v.* Merrill (48 Ill. 425), Car. of M., 270; Words & Ph., 37.
Chicago & N. W. R. Co. *v.* Miller (72 Ill. 144), Tax., 144, 257.
Chicago & N. W. R. Co. *v.* Montfort (60 Ill. 175, 12 Am. Ry. Rep. 332), Car. of M., 679.
Chicago & N. W. R. Co. *v.* Moranda (93 Ill. 302), Death, etc., 286; Fel. Serv., 106, 386.
Chicago & N. W. R. Co. *v.* Moranda (17 Am. & Eng. R. Cas. 564, 108 Ill. 576;

explaining 93 Ill. 302), Fel. Serv., 205, 206, 511; Trial, 146; Witn., 33, 98.
Chicago & N. W. R. Co. *v.* Mueller (44 Ill. App. 401), Trial, 148.
Chicago & N. W. R. Co. *v.* Nichols (57 Ill. 464, 10 Am. Ry. Rep. 471), Eq., 5.
Chicago & N. W. R. Co. *v.* Northern L. Packet Co. (70 Ill. 217), Car. of M., 568, 647, 669.
Chicago & N. W. R. Co. *v.* Oconto (50 Wis. 189, 6 N. W. Rep. 607), Words & Ph., 233.
Chicago & N. W. R. Co. *v.* Osborne (53 Am. & Eng. R. Cas. 18, 4 Int. Com. Rep. 257, 52 Fed. Rep. 912, 10 U. S. App. 430, 3 C. C. A. 347; reversing 49 Am. & Eng. R. Cas. 12, 48 Fed. Rep. 49), Int. Com., 125, 126, 132, 163.
Chicago & N. W. R. Co. *v.* Osborne (146 U. S. 354, 13 Sup. Ct. Rep. 281), Fed. Cts., 21.
Chicago & N. W. R. Co. *v.* Peacock (48 Ill. 253), App., 124; Eject. Pass., 65.
Chicago & N. W. R. Co. *v.* People (56 Ill. 365, 3 Am. Ry. Rep. 296), Car. of M., 426; Elevators, 6, 7, 8, 9.
Chicago & N. W. R. Co. *v.* People (91 Ill. 251), Estop., 21; Sts. & H., 69.
Chicago & N. W. R. Co. *v.* People (31 Am. & Eng. R. Cas. 487, 120 Ill. 104, 11 N. E. Rep. 418), Judgm., 14; Sts. & H., 343.
Chicago & N. W. R. Co. *v.* Reilly (40 Ill. App. 416), Car. of P., 139, 180, 347, 351; Contrib. Neg., 38, 50.
Chicago & N. W. R. Co. *v.* Ryan (70 Ill. 211), Cross., Inj. at, 125, 300; Negl., 105.
Chicago & N. W. R. Co. *v.* Sawyer (69 Ill. 285), Car. of M., 15, 210, 228; Words & Ph., 7.
Chicago & N. W. R. Co. *v.* Sayles (97 U. S. 554; reversing 3 Biss. 52), Pat. for Inv., 29.
Chicago & N. W. R. Co. *v.* Scates (90 Ill. 586), Car. of P., 129, 133, 380; Contrib. Neg., 82.
Chicago & N. W. R. Co. *v.* Scheuring (4 Ill. App. 533), Employés, Inj. to, 96, 294; Fel. Serv., 1, 138, 202.
Chicago & N. W. R. Co. *v.* Schumilowsky (8 Ill. App. 613), Children, Inj. to, 140; Sts. & H., 390.
Chicago & N. W. R. Co. *v.* Shultz (55 Ill. 421, 2 Am. Ry. Rep. 417), Animals, 315; Dam., 110.
Chicago & N. W. R. Co. *v.* Simonson (54 Ill. 504), Fires, 120.
Chicago & N. W. R. Co. *v.* Smith (4 Am. & Eng. R. Cas. 535, 46 Mich. 504, 9 N. W. Rep. 830, 4 Am. Rep. 669, n.), Children, Inj. to, 17, 83; Tresp., Inj. to, 69a.
Chicago & N. W. R. Co. *v.* Snyder (18 Ill. App. 640), Death, etc., 429.
Chicago & N. W. R. Co. *v.* Snyder (28 Am. & Eng. R. Cas. 611, 117 Ill. 376, 7 N. E. Rep. 604; reversing 18 Ill. App. 640; further appeal, 38 Am. & Eng. R. Cas. 188, 128 Ill. 655, 21 N. E. Rep. 520), Collis, 37; Cross. Rys., 82; Employés, Inj. to, 366; Fel. Serv., 7, 202, 206, 436; Negl., 109.
Chicago & N. W. R. Co. *v.* Snyder (38 Am. & Eng. R. Cas. 188, 128 Ill. 655, 21 N. E. Rep. 520; former appeal, 117 Ill. 376, 7 N. E. Rep. 604), Fel. Serv., 497; Trial, 168, 217.
Chicago & N. W. R. Co. *v.* Stanbro (87 Ill. 195, 18 Am. Ry. Rep. 180), Car. of M., 209, 294.
Chicago & N. W. R. Co. *v.* Stube (15 Ill. App. 39), Trial, 101.
Chicago & N. W. R. Co. *v.* Sweeney (52 Ill. 325), Death, etc., 219.
Chicago & N. W. R. Co. *v.* Swett (45 Ill. 197), Death, etc., 137, 346, 426; Em. Dom., 580; Employés, Inj. to, 41, 561; Fel. Serv., 1, 136, 202.
Chicago & N. W. R. Co. *v.* Taylor (69 Ill. 461), Employés, Inj. to, 93, 178.
Chicago & N. W. R. Co. *v.* Taylor (8 Ill. App. 108), Animals, 49, 77.
Chicago & N. W. R. Co. *v.* Thorson (11 Ill. App. 631), Comp. Neg., 2, 9.
Chicago & N. W. R. Co. *v.* Trayes (17 Ill. App. 136), Evid., 242.
Chicago & N. W. R. Co. *v.* Trayes (33 Ill. App. 307), Negl., 61; Sts. & H., 337.
Chicago & N. W. R. Co. *v.* Tuite (44 Ill. App. 535), Employés, Inj. to, 499; Fel. Serv., 511.
Chicago & N. W. R. Co. *v.* United States (9 Am. & Eng. R. Cas. 48, 104 U. S. 680), Car. of Mails, 10, 11.
Chicago & N. W. R. Co. *v.* United States (15 Ct. of Cl., 232), Land Grant Rds., 1, 5.
Chicago & N. W. R. Co. *v.* Van Dresar (22 Wis. 511), Car. of L. S., 9, 70.
Chicago & N. W. R. Co. *v.* Ward (61 Ill. 130, 12 Am. Ry. Rep. 434), Employés, Inj. to, 45, 119, 289.
Chicago & N. W. R. Co. *v.* Whitton (13 Wall. (U. S.) 270, 4 Am. Ry. Rep. 462), Citizens, 1, 2; Rem. of C., 1, 12.
Chicago & N. W. R. Co. *v.* Williams (44 Ill. 176), Car. of M., 741.
Chicago & N. W. R. Co. *v.* Williams (55 Ill. 185, 1 Am. Ry. Rep. 531), Col. Pers., 6, 13; Car. of P., 73; Eject. Pass., 1.
Chicago & O. C. & C. Co. *v.* Norman (49 Ohio St. 598, 32 N. E. Rep. 857), Employés, Inj. to, 542.
Chicago & P. R. Co. *v.* Francis (70 Ill. 238), Sts. & H., 257.
Chicago & P. R. Co. *v.* Hildebrand (47 Am. & Eng. R. Cas. 145, 136 Ill. 467, 27 N. E. Rep. 69), Em. Dom., 456, 671, 950, 991; Tax., 76.
Chicago & P. R. Co. *v.* Kaehler (79 Ill. 354), Proc., 45.
Chicago & P. R. Co. *v.* Stein (75 Ill. 41), Em. Dom., 711, 715; Pl., 157.
Chicago & R. I. R. Co. *v.* Fahey (52 Ill. 81), Bagg., 28.
Chicago & R. I. R. Co. *v.* Fell (22 Ill. 333), Cert., 6; Proc., 28.
Chicago & R. I. R. Co. *v.* Hutchins (34 Ill. 108), Animals, 305; Judgm., 18; Witn., 14.
Chicago & R. I. R. Co. *v.* McKean (40 Ill. 218), Cross., Inj. at, 133; New Tr., 30, 62.
Chicago & R. I. R. Co. *v.* Morris (26 Ill. 400), Death, etc., 41, 129; Pl., 180.
Chicago & R. I. R. Co. *v.* Northern I., C. & I. Co. (36 Ill. 60), Assump., 8.
Chicago & R. I. R. Co. *v.* Reid (24 Ill. 144), Animals, 168, 449; Cat.-Gds., 17.

Chicago & R. I. R. Co. *v.* Still (19 Ill. 499), Comp. Neg., 8; Cross., Inj. at, 348.
Chicago & R. I. R. Co. *v.* Ward (16 Ill. 522), Fences, 109.
Chicago & R. I. R. Co. *v.* Warren (16 Ill. 502), Car. of M., 236, 246.
Chicago & R. I. R. Co. *v.* Whipple (22 Ill. 105), Constr. Rys., 14.
Chicago & St. L. R. Co. *v.* Ashling (34 Ill. App. 99), Death, etc., 305; Evid., 175.
Chicago & S. E. R. Co. *v.* Cason (133 Ind. 49, 32 N. E. Rep. 827), Receiv., 22.
Chicago & S. W. R. Co. *v.* Northwestern Union Packet Co. (38 Iowa 377), Car. of M., 376, 392.
Chicago & S. W. R. Co. *v.* Swinney (38 Iowa 182), Homest., 1; Spec. Perf., 9.
Chicago & T. R. Co. *v.* Simmons (11 Ill. App. 147), Employés, Inj. to, 206; Fel. Serv., 308.
Chicago & W. I. R. Co. *v.* Ayers (14 Am. & Eng. R. Cas. 153, 106 Ill. 511), Em. Dom., 180, 713, 996.
Chicago & W. I. R. Co. *v.* Berg (10 Ill. App. 607), Sts. & H., 87, 272.
Chicago & W. I. R. Co. *v.* Bingenheimer (116 Ill. 226, 4 N. E. Rep. 840), Employés, Inj. to, 168; Trial, 33.
Chicago & W. I. R. Co. *v.* Bingenheimer (14 Ill. App. 125), Employés, Inj. to, 168.
Chicago & W. I. R. Co., *v.* Chicago, St. L. & P. R. Co. (15 Ill. App. 587), Cross. Rys., 22, 41; Sts. & H., 88.
Chicago & W. I. R. Co. *v.* Cogswell (44 Ill. App. 388), Em. Dom., 467, 670, 990, 991, 1000.
Chicago & W. I. R. Co. *v.* Dooling (95 Ill. 202), Em. Dom., 907.
Chicago & W. I. R. Co. *v.* Dunbar (1 Am. & Eng. R. Cas. 214, 95 Ill. 571), App., 5.
Chicago & W. I. R. Co. *v.* Dunbar (5 Am. & Eng. R. Cas. 253, 100 Ill. 110), Em. Dom., 93; Sts. & H., 43, 62, 65, 73, 91.
Chicago & W. I. R. Co. *v.* Englewood Connecting R. Co. (115 Ill. 375, 56 Am. Rep. 173, 4 N. E. Rep. 246), Cross. Rys., 34, 41.
Chicago & W. I. R. Co. *v.* Illinois C. R. Co. (113 Ill. 156), Cross. Rys., 8, 17, 72; Leases, 56.
Chicago & W. I. R. Co. *v.* Lake Shore & M. S. R. Co. (10 Biss. (U. S.) 122, 5 Fed. Rep. 19), Consol., 37.
Chicago & W. I. R. Co. *v.* Lake Shore & M. S. R. Co. (30 Ill. App. 129), Injunc., 30.
Chicago & W. I. R. Co. *v.* Maroney (5 Am. & Eng. R. Cas. 360, 95 Ill. 179), Em. Dom., 620.
Chicago & W. I. R. Co. *v.* Prussing (5 Am. & Eng. R. Cas. 289, 96 Ill. 203), Em. Dom., 390.
Chicago & W. I. R. Co. *v.* Roath (35 Ill. App. 349), Children, Inj. to, 20.
Chicago & W. I. R. Co. *v.* Rolvink (31 Ill. App. 596), Stat. & D., 149.
Chicago & W. I. R. Co. *v.* Schroeder (18 Ill. App. 328), Death, etc., 1, 115.
Chicago & W. I. R. Co. *v.* Slee (33 Ill. App. 416), Tresp., 13.
Chicago & W. I. R. Co. *v.* Thomlinson (33 Ill. App. 388), Contr., 98.
Chicago & W. I. R. Co. *v.* White (26 Ill. App. 586), Contrib. Neg., 19.
Chicago & W. M. R. Co. *v.* Huncheon (130 Ind. 529, 30 N. E. Rep. 636), Em. Dom., 130, 456.
Chicago & W. M. R. Co. *v.* Linard (20 Am. & Eng. R. Cas. 352, 94 Ind. 319), Tresp., 10.
Chicago & W. M. R. Co. *v.* Reid (74 Mich. 366, 41 N. W. Rep. 1083), Exec., 14.
Chicago, A. & St. L. R. Co. *v.* Gomes (46 Ill. App. 255), Cross., Inj. at, 164.
Chicago Board of Trade *v.* Chicago & A. R. Co. (4 Int. Com. Com. 158, 3 Int. Com. Rep. 233), Int. Com., 80.
Chicago Board of Underwriters *v.* Chicago & E. I. R. Co. (44 Ill. App. 253), Animals, 218.
Chicago, B. & K. C. R. Co. *v.* Guffey (29 Am. & Eng. R. Cas. 200, 120 U. S. 569, 7 Sup. Ct. Rep. 693), Branch & L. Roads, 18.
Chicago, B. & K. C. R. Co. *v.* Guffey (122 U. S. 561, 7 Sup. Ct. Rep. 1300), Tax., 17, 55.
Chicago, B. & N. R. Co. *v.* Bowman (122 Ill. 595, 13 N. E. Rep. 814, 11 West. Rep. 598), Em. Dom., 648, 650, 665, 671, 698, 724.
Chicago, B. & N. R. Co. *v.* Hawk (36 Ill. App. 327), Passes, 34.
Chicago, B. & N. R. Co. *v.* Hawk (42 Ill. App. 322; affirmed in 147 Ill. 399, 35 N. E. Rep. 139), Car. of M., 478; Pl., 107.
Chicago, B. & N. R. Co. *v.* Porter (43 Am. & Eng. R. Cas. 170, 43 Minn. 527, 46 N. W. Rep. 75), Em. Dom., 496; Side Tr., 1, 4.
Chicago, B. & Q. R. Co. *v.* Abend (7 Ill. App. 130), Employés, Inj. to, 99.
Chicago, B. & Q. R. Co. *v.* Aurora (5 Am. & Eng. R. Cas. 191, 99 Ill. 205), Mun. Aid, 323.
Chicago, B. & Q. R. Co. *v.* Aurora (5 Ill. App. 395), App., 140.
Chicago, B. & Q. R. Co. *v.* Avery (8 Ill. App. 133; affirmed in 109 Ill. 314), Comp. Neg., 4, 13; Employés, Inj. to, 126, 297.
Chicago, B. & Q. R. Co. *v.* Avery (17 Am. & Eng. R. Cas. 649, 109 Ill. 314; affirming 10 Ill. App. 210), Employés, Inj. to, 4, 126, 186; Fel. Serv., 3, 94; Negl., 107; Trial, 176.
Chicago, B. & Q. R. Co. *v.* Banker (44 Ill. 26), Animals, 437.
Chicago, B. & Q. R. Co. *v.* Barnard (32 Neb. 306, 49 N. W. Rep. 362), Death, etc., 212.
Chicago, B. & Q. R. Co. *v.* Bartlett (120 Ill. 603, 11 N. E. Rep. 867, 9 West. Rep. 469; affirming 20 Ill. App. 96), Officers, 12.
Chicago, B. & Q. R. Co. *v.* Bell (112 Ill. 360), App., 115; Death, etc., 152; Fel. Serv., 511; Pl., 135.
Chicago, B. & Q. R. Co. *v.* Blank (24 Ill. App. 438), Death, etc., 142, 436; Fel. Serv., 73, 217.
Chicago, B. & Q. R. Co. *v.* Boger (1 Ill. App. 472), Assault, 12; Eject. Pass., 65, 98; Tickets & F., 36.
Chicago, B. & N. R. Co. *v.* Bowman (122

Ill. 595, 13 N. E. Rep. 814, 11 West. Rep. 598), Witn., 3.
Chicago, B. & Q. R. Co. *v.* Boyd (118 Ill. 73, 7 N. E. Rep. 437), Leases, 1; Vend. & P., 2, 4.
Chicago, B. & Q. R. Co. *v.* Bradfield (63 Ill. 220), Animals, 209.
Chicago, B. & Q. R. Co. *v.* Bryan (90 Ill. 126), Eject. Pass., 50, 58, 69, 115, 123; Trial, 94.
Chicago, B. & Q. R. Co. *v.* Bryant (29 Ill. App. 17), Cat.-Gds., 28; Fences, 83.
Chicago, B. & Q. R. Co. *v.* Burlington, C. R. & N. R. Co. (34 Fed. Rep. 481), Car. of M., 660.
Chicago, B. & Q. R. Co. *v.* Carter (20 Ill. 390), Animals, 331, 343, 353.
Chicago, B. & Q. R. Co. *v.* Casey (9 Ill. App. 632), Agency, 63.
Chicago, B. & Q. R. Co. *v.* Cauffman (28 Ill. 513), Animals, 222.
Chicago, B. & Q. R. Co. *v.* Cauffman (38 Ill. 424), Animals, 246; Cross., Inj. at, 119, 160.
Chicago, B. & Q. R. Co. *v.* Chamberlain (84 Ill. 333, 16 Am. Ry. Rep. 466), Em. Dom., 57, 271, 309, 325, 429, 443, 505, 815, 867, 973; Exec., 25; Judgm., 14.
Chicago, B. & Q. R. Co. *v.* Chicago (134 Ill. 323, 25 N. E. Rep. 514; affirming 35 Ill. App. 206), Sts. & H., 96.
Chicago, B. & Q. R. Co. *v.* Clark (38 Am. & Eng. R. Cas. 192, 26 Neb. 645, 42 N. W. Rep. 703), Evid., 31; Indep. Contr., 11; Pl., 174; Trial, 148; Witn., 128.
Chicago, B. & Q. R. Co. *v.* Clark (2 Ill. App. 596), Employés, Inj. to, 182, 204; Leases, 116.
Chicago, B. & Q. R. Co. *v.* Cole (75 Ill. 591), Tax., 347, 356.
Chicago, B. & Q. R. Co. *v.* Coleman (18 Ill. 297), App., 122; Evid., 193; Pres., 1.
Chicago, B. & Q. R. Co. *v.* Colwell (3 Ill. App. 545), Comp. Neg., 2, 4; Death, etc., 341.
Chicago, B. & Q. R. Co. *v.* Damerell (81 Ill. 450), Cross., Inj. at, 254.
Chicago, B. & Q. R. Co. *v.* Dannel (48 Ill. App. 251), Animals, 219.
Chicago, B. & Q. R. Co. *v.* Dewey (26 Ill. 255), Car. of P., 451.
Chicago, B. & Q. R. Co. *v.* Dey (38 Fed. Rep. 656), Charges, 17; Injunc., 4, 56.
Chicago, B. & Q. R. Co. *v.* Dickson (63 Ill. 151, 7 Am. Ry. Rep. 45), Agency, 80; App., 80; Comp. Neg., 16.
Chicago, B. & Q. R. Co. *v.* Dickson (67 Ill. 122), Husb. & W., 25.
Chicago, B. & Q. R. Co. *v.* Dickson (88 Ill. 431, 21 Am. Ry. Rep. 328), Comp. Neg., 11; Fright. Teams, 2; Pl., 109.
Chicago, B. & Q. R. Co. *v.* Dickson (143 Ill. 368, 32 N. E. Rep. 380), Evid., 37; Pl., 107; Tresp., Inj. to, 108.
Chicago, B. & Q. R. Co. *v.* Dickson (42 Ill. App. 363), Collis., 15.
Chicago, B. & Q. R. Co. *v.* Dougherty (19 Am. & Eng. R. Cas. 292, 110 Ill. 521; reversing 14 Ill. App. 196; further appeal, 125 Ill. 127, 14 West. Rep. 400, 17 N. E. Rep. 1), App., 40; Cross., Inj. at, 147, 353.
Chicago, B. & Q. R. Co. *v.* Dougherty (12 Ill. App. 181), Comp. Neg., 2; Negl., 1, 28; Sts. & H., 327.
Chicago, B. & Q. R. Co. *v.* Dunn (52 Ill. 260), Husb. & W., 4.
Chicago, B. & Q. R. Co. *v.* Dunn (52 Ill. 451), Comp. Neg., 4; Fright. Teams, 6.
Chicago, B. & Q. R. Co. *v.* Dunn (61 Ill. 385, 12 Am. Ry. Rep. 427), Comp. Neg., 4; Cross., Inj. at, 1.
Chicago, B. & Q. R. Co. *v.* Dvorak (7 Ill. App. 555), Cross., Inj. at, 142.
Chicago, B. & Q. R. Co. *v.* Emmons (42 Ill. App. 138), Fires, 138, 261.
Chicago, B. & Q. R. Co. *v.* Epperson (26 Ill. App. 72), Explosions, 2.
Chicago, B. & Q. R. Co. *v.* Evans (45 Ill. App. 79), Cat.-Gds., 16.
Chicago, B. & Q. R. Co. *v.* Farrelly (3 Ill. App. 60), Animals, 127, 162.
Chicago, B. & Q. R. Co. *v.* Finch (42 Ill. App. 90), Animals, 174; Negl., 19.
Chicago, B. & Q. R. Co. *v.* Fitzgerald (40 Ill. App. 476), Fel. Serv., 469, 513.
Chicago, B. & Q. R. Co. *v.* Flint (22 Ill. App. 502), Contrib. Neg., 19.
Chicago, B. & Q. R. Co. *v.* Florens (32 Ill. App. 365), Cross., Inj. at, 13, 168, 288.
Chicago, B. & Q. R. Co. *v.* Frary (22 Ill. 34), Tax., 353.
Chicago, B. & Q. R. Co. *v.* George (19 Ill. 510), Car. of P., 139; Evid., 185; Witn., 100.
Chicago, B. & Q. R. Co. *v.* Goldman (46 Ill. App. 625), Trover., 17.
Chicago, B. & Q. R. Co. *v.* Goracke (32 Neb. 90, 48 N. W. Rep. 879), Animals, 614.
Chicago, B. & Q. R. Co. *v.* Gould (64 Iowa 343, 20 N. W. Rep. 464), Paym., 1.
Chicago, B. & Q. R. Co. *v.* Gregory (58 Ill. 272, 11 Am. Ry. Rep. 75), Employés, Inj. to, 88, 676; Fel. Serv., 114, 395.
Chicago, B. & Q. R. Co. *v.* Griffin (68 Ill. 499), Car. of P., 85; Eject. Pass., 44, 54, 78, 81, 127; Tickets & F., 60.
Chicago, B. & Q. R. Co. *v.* Gustin (35 Neb. 86, 52 N. W. Rep. 844), Evid., 225.
Chicago, B. & Q. R. Co. *v.* Haggerty (67 Ill. 113), Animals, 481; Sts. & H., 318, 326.
Chicago, B. & Q. R. Co. *v.* Hale (83 Ill. 360), Car. of L. S., 145, 157.
Chicago, B. & Q. R. Co. *v.* Hale (2 Ill. App. 150), Car. of M., 729, 809; Lim. of Liab., 8, 27.
Chicago, B. & Q. R. Co. *v.* Hans (111 Ill. 114), Fences, 60; Stat. & D., 98.
Chicago, B. & Q. R. Co. *v.* Harwood (80 Ill. 88), Cross., Inj. at, 178; Death, etc., 340, 381.
Chicago, B. & Q. R. Co. *v.* Harwood (90 Ill. 425), Comp. Neg., 4, 11; Cross., Inj. at, 135.
Chicago, B. & Q. R. Co. *v.* Hazzard (26 Ill. 373), Car. of P., 141, 189, 205, 243; Contrib. Neg., 52.
Chicago, B. & Q. R. Co. *v.* Hines (45 Ill. App. 299), Dam., 71.
Chicago, B. & Q. R. Co. *v.* Hoeffner (44 Ill. App. 137), Car. of M., 744.
Chicago, B. & Q. R. Co. *v.* Hogan (27 Neb.

801, 43 N. W. Rep. 1148), Animals, 117; Fences, 60.
Chicago, B. & Q. R. Co. *v.* Hogan (30 Neb. 636, 46 N. W. Rep. 1015), Fences, 54.
Chicago, B. & Q. R. Co. *v.* Holdsworth (47 Iowa 20), Tax., 332.
Chicago, B. & Q. R. Co. *v.* Housh (12 Ill. App. 88), Contrib. Neg., 110.
Chicago, B. & Q. R. Co. *v.* Hoyt (1 Ill. App. 374), Car. of M., 255.
Chicago, B. & Q. R. Co. *v.* Hull (24 Neb. 740), App., 68.
Chicago, B. & Q. R. Co. *v.* Iowa (94 U. S. 155, 16 Am. Ry. Rep. 169), Charges, 4, 6; Stat., 24.
Chicago, B. & Q. R. Co. *v.* Jackson (24 Am. & Eng. R. Cas. 105, 68 Iowa 301, 27 N. W. Rep. 248), Land Grants, 131.
Chicago, B. & Q. R. Co. *v.* James (26 Neb. 188, 41 N. W. Rep. 992), Fences, 30, 49.
Chicago, B. & Q. R. Co. *v.* Johnson (24 Ill. App. 468), Dam., 90.
Chicago, B. & Q. R. Co. *v.* Johnson (34 Ill. App. 351), App., 136.
Chicago, B. & Q. R. Co. *v.* Johnson (36 Ill. App. 564), Evid., 175, 247.
Chicago, B. & Q. R. Co. *v.* Johnson (8 Am. & Eng. R. Cas. 225, 103 Ill. 512), Comp. Neg., 9; Death, etc., 286; Witn., 128.
Chicago, B. & Q. R. Co. *v.* Jones (19 Ill. App. 648), Animals, 35.
Chicago, B. & Q. R. Co. *v.* Kennedy (22 Ill. App. 308), Cat.-Gds., 18.
Chicago, B. & Q. R. Co. *v.* Knox College (34 Ill. 195), Em. Dom., 1025.
Chicago, B. & Q. R. Co. *v.* Kriski (30 Neb. 215, 46 N. W. Rep. 520), Mal. Pros., 14.
Chicago, B. & Q. R. Co. *v.* Kuster (22 Ill. App. 188), Cross., Inj. at, 137, 193.
Chicago, B. & Q. R. Co. *v.* Landauer (54 Am. & Eng. R. Cas. 640, 36 Neb. 642, 54 N. W. Rep. 976), Car. of P., 234, 246, 247, 418, 427; Crim. L., 13; Negl., 67; New Tr., 20; Words & Ph., 69.
Chicago, B. & Q. R. Co. *v.* Lee (60 Ill. 501, 12 Am. Ry. Rep. 321), Death, etc., 343; Evid., 54, 259.
Chicago, B. & Q. R. Co. *v.* Lee (68 Ill. 576), Comp. Neg., 2, 3, 4, 16; Cross., Inj. at, 123, 142, 161, 254, 255, 264, 302; Negl., 42.
Chicago, B. & Q. R. Co. *v.* Lee (87 Ill. 454, 18 Am. Ry. Rep. 378), Comp. Neg., 9; Evid., 295.
Chicago, B. & Q. R. Co. *v.* Lewis (53 Iowa 101, 4 N. W. Rep. 842), Corp., 8; Deeds, 3; Land Grants, 23, 53, 216.
Chicago, B. & Q. R. Co. *v.* McGaha (19 Ill. App. 342), Cross., Inj. at, 150.
Chicago, B. & Q. R. Co. *v.* McGinnis (79 Ill. 269, 9 Am. Ry. Rep. 334), Em. Dom., 637; Sts. & H., 266.
Chicago, B. & Q. R. Co. *v.* McLallen (84 Ill. 109, 16 Am. Ry. Rep. 425), Car. of P., 60, 603; Collis., 34; Fel. Serv., 365; New Tr., 20.
Chicago, B. & Q. R. Co. *v.* Magee (60 Ill. 529), Animals, 183, 333; Trial, 138.
Chicago, B. & Q. R. Co. *v.* Mahara (47 Ill. App. 208), Stat. & D., 84, 112.
Chicago, B. & Q. R. Co. *v.* Manning (35 Am. & Eng. R. Cas. 618, 23 Neb. 552, 37 N. W. Rep. 462), Car. of M., 15; Proc., 15.
Chicago, B. & Q. R. Co. *v.* Martin (112 Ill. 16), Witn., 164.
Chicago, B. & Q. R. Co. *v.* Mehlsack (41 Am. & Eng. R. Cas. 60, 131 Ill. 61, 22 N. E. Rep. 812; reversing 33 Ill. App. 221), Car. of P., 600; Tresp., Inj. to, 82.
Chicago, B. & Q. R. Co. *v.* Mehlsack (44 Ill. App. 124), App., 41.
Chicago, B. & Q. R. Co. *v.* Merckes (36 Ill. App. 195), Employés, Inj. to, 99, 238, 299; Fel. Serv., 138.
Chicago, B. & Q. R. Co. *v.* Merrick County (36 Neb. 176, 54 N. W. Rep. 309), Tax., 353.
Chicago, B. & Q. R. Co. *v.* Montgomery (15 Ill. App. 205), Employés, Inj. to, 109, 242.
Chicago, B. & Q. R. Co. *v.* Morkenstein (24 Ill. App. 128), Pl., 125.
Chicago, B. & Q. R. Co. *v.* Notzki (66 Ill. 455), Cross., Inj. at, 211, 343, 353.
Chicago, B. & Q. R. Co. *v.* Olson (12 Ill. App. 245), Contrib. Neg., 31; Cross., Inj. at, 200; Death, etc., 211.
Chicago, B. & Q. R. Co. *v.* Otoe County (16 Wall. (U. S.) 667, 4 Am. Ry. Rep. 82), Mun. Aid, 41, 261.
Chicago, B. & Q. R. Co. *v.* Ottawa (148 Ill. 397, 36 N. E. Rep. 85; affirming 47 Ill. App. 73), Injunc., 3, 7.
Chicago, B. & Q. R. Co. *v.* Owen (21 Ill. App. 339), Car. of L. S., 24, 51; Negl., 18.
Chicago, B. & Q. R. Co. *v.* Paddock (75 Ill. 616), Right of W., 1; Tax., 257, 356.
Chicago, B. & Q. R. Co. *v.* Page (1 Biss. (U. S.) 461), Divid., 10.
Chicago, B. & Q. R. Co. *v.* Painter (15 Neb. 394, 19 N. W. Rep. 488), Car. of M., 497; Replev., 2.
Chicago, B. & Q. R. Co. *v.* Parks (18 Ill. 460), Car. of P., 72; Eject. Pass., 65, 132; Tickets & F., 122, 123.
Chicago, B. & Q. R. Co. *v.* Payne (49 Ill. 499), Comp. Neg., 1, 3, 4.
Chicago, B. & Q. R. Co. *v.* Payne (59 Ill. 534, 11 Am. Ry. Rep. 157), Comp. Neg., 1; Cross., Sts. & H., 25; Cross., Inj. at, 176.
Chicago, B. & Q. R. Co. *v.* People (77 Ill. 443, 8 Am. Ry. Rep. 92), Charges, 26; Discrim., 48.
Chicago, B. & Q. R. Co. *v.* People (136 Ill. 660, 27 N. E. Rep. 200), Tax., 257, 319.
Chicago, B. & Q. R. Co. *v.* Perkins (125 Ill. 127, 14 West. Rep. 400, 17 N. E. Rep. 1; affirming 26 Ill. App. 67; former appeal, 110 Ill. 523), Cross., Inj. at, 1; Death, etc., 225; Trial, 31.
Chicago, B. & Q. R. Co. *v.* Peterson (32 Ill. App. 139), Employés, Inj. to, 163.
Chicago, B. & Q. R. Co. *v.* Porter (36 Am. & Eng. R. Cas. 405, 72 Iowa 426, 34 N. W. Rep. 286), Em. Dom., 169; Estop., 22; Injunc., 35; Rip. Rts., 12.
Chicago, B. & Q. R. Co. *v.* Quincy (136 Ill. 489, 27 N. E. Rep. 232; reversing 32 Ill. App 377), Sts. & H., 70, 422.
Chicago, B. & Q. R. Co. *v.* Quincy (136 Ill. 563, 27 N. E. Rep. 192), Sts. & H., 300, 343.

Chicago, B. & Q. R. Co. *v.* Quincy (139 Ill. 355, 28 N. E. Rep. 1069), Sts. & H., 38, 88, 89, 90, 343.
Chicago, B. & Q. R. Co. *v.* Reno (113 Ill. 39), Spec. Perf., 16.
Chicago, B. & Q. R. Co. *v.* Resenfeld (70 Ill. 272), Cross., Inj. at, 325.
Chicago, B. & Q. R. Co. *v.* Richardson (42 Am. & Eng. R. Cas. 592, 28 Neb. 118, 44 N. W. Rep. 103), Animals, 396, 400.
Chicago, B. & Q. R. Co. *v.* Riddle (60 Ill. 534), Evid., 195.
Chicago, B. & Q. R. Co. *v.* Rogers (17 Ill. App. 638), Comp. Neg., 2.
Chicago, B. & Q. R. Co. *v.* Schaffer (34 Am. & Eng. R. Cas. 174, 124 Ill. 112, 14 West. Rep. 139, 16 N. E. Rep. 239; affirming 26 Ill. App. 280), Judgm., 17, 22.
Chicago, B. & Q. R. Co. *v.* Seirer (60 Ill. 295, 12 Am. Ry. Rep. 315), Animals, 142, 220; Fences, 88.
Chicago, B. & Q. R. Co. *v.* Sierer (13 Ill. App. 261), Farm Cross., 13.
Chicago, B. & Q. R. Co. *v.* Siders (88 Ill. 320, 21 Am. Ry. Rep. 304), Tax., 257, 343, 350.
Chicago, B. & Q. R. Co. *v.* Sims (17 Neb. 691, 24 N. W. Rep. 388), Animals, 158.
Chicago, B. & Q. R. Co. *v.* Skupa (16 Neb. 341, 20 N. W. Rep. 393), Forc. Ent., 2.
Chicago, B. & Q. R. Co. v. Smith (18 Ill. App. 119), Employés, Inj. to, 68, 97, 260.
Chicago, B. & Q. R. Co. *v.* South Park Com'rs (11 Ill. App. 562), Sts. & H., 343.
Chicago, B. & Q. R. Co. *v.* Spring (13 Ill. App. 174), Cross., Inj. at, 213.
Chicago, B. & Q. R. Co. *v.* Stafford (16 Ill. App. 84), Fel. Serv., 1, 160, 202.
Chicago, B. & Q. R. Co. *v.* Stamps (26 Ill. App. 219), Cross., Inj. at, 224.
Chicago, B. & Q. R. Co. *v.* Starmer (26 Neb. 630, 42 N. W. Rep. 706), Dam., 67.
Chicago, B. & Q. R. Co. *v.* Stumps (55 Ill. 367, 2 Am. Ry. Rep. 385), Children, Inj. to, 1; Evid., 291.
Chicago, B. & Q. R. Co. *v.* Stumps (69 Ill. 409), Children, Inj. to, 84; New Tr., 24; Sts. & H., 373; Tresp., Inj. to, 69a.
Chicago, B. & Q. R. Co. *v.* Sullivan (Ill.) (17 N. E. Rep. 460), App., 14, 69; Dam., 76, 101.
Chicago, B. & Q. R. Co. *v.* Sullivan (21 Ill. App. 580; affirmed in 15 West. Rep. 45, 17 N. E. Rep. 460), Car. of P., 646.
Chicago, B. & Q. R. Co. *v.* Sullivan (41 Am. & Eng. R. Cas. 463, 27 Neb. 673, 43 N. W. Rep. 415), Death, etc., 348; Fel. Serv., 218.
Chicago, B. & Q. R. Co. *v.* Sykes (2 Am. & Eng. R. Cas. 254, 96 Ill. 162; reversing 1 Ill. App. 520), Comp. Neg., 20; Conduct., 11, 12; Death, etc., 344; Stat. & D., 124.
Chicago, B. & Q. R. Co. *v.* The W. G. Woodsides (10 Iowa 465), Connect. L., 5.
Chicago, B. & Q. R. Co. *v.* Triplett (38 Ill. 482), Comp. Neg., 4; Cross., Inj. at, 122, 151, 273; Evid., 298; Tresp., Inj. to, 48.
Chicago, B. & Q. R. Co. *v.* Van Patten (64 Ill. 510), Comp. Neg., 4; Cross., Inj. at, 141, 269; Tresp., Inj. to, 65.
Chicago, B. & Q. R. Co. *v.* Van Patten (74 Ill. 91), Cross., Inj. at, 252; Death, etc., 342.
Chicago, B. & Q. R. Co. *v.* Warner (18 Am. & Eng. R. Cas. 100, 108 Ill. 538), Dam., 89, 102, 104; Employés, Inj. to, 399, 649; Evid., 108; Pl., 137.
Chicago, B. & Q. R. Co. *v.* Warner (123 Ill. 38, 14 N. E. Rep. 206; affirming 22 Ill. App. 462), App., 85, 118; Comp. Neg., 11, 14, 18; Contrib. Neg., 21.
Chicago, B. & Q. R. Co. *v.* Wasserman (20 Am. & Eng. R. Cas. 428, 22 Fed. Rep. 872), Em. Dom., 439.
Chicago, B. & Q. R. Co. *v.* Welch (44 Iowa 665), Rem. of C., 44.
Chicago, B. & Q. R. Co. *v.* Wells (42 Ill. App. 26), Animals, 572; Cross., Inj. at, 141; Negl., 107.
Chicago, B. & Q. R. Co. *v.* Wilcox (12 Ill. App. 42), Pl., 137.
Chicago, B. & Q. R. Co. *v.* Wilson (17 Ill. 123), Em. Dom., 187, 502.
Chicago, B. & Q. R. Co. *v.* Wilson (23 Ill. App. 63), Eject. Pass., 63.
Chicago, B. & Q. R. Co. *v.* Young (26 Ill. App. 115), Evid., 170; Fel. Serv., 114, 429; Pl., 107.
Chicago, C. & L. R. Co. *v.* West (37 Ind. 211, 3 Am. Ry. Rep. 239), Constr. Rys., 107.
Chicago, C. & St. L. R. Co. *v.* Dixon (49 Ill. App. 292), Employés, Inj. to, 137, 645.
Chicago City R. Co. *v.* Allerton (18 Wall. (U. S.) 233), Direct., 37.
Chicago City R. Co. *v.* Blanchard (35 Ill. App. 481), Employés, 9, 20.
Chicago City R. Co. *v.* Brady (35 Ill. App. 460), Negl., 66; St. Rys., 473.
Chicago City R. Co. *v.* Chicago (90 Ill. 573), St. Rys., 278, 295.
Chicago City R. Co. *v.* Delcourt (33 Ill. App. 430), St. Rys., 395.
Chicago City R. Co. *v.* Engel (35 Ill. App. 490), Car. of P., 155; St. Rys., 441.
Chicago City R. Co. *v.* Freeman (6 Ill. App. 608), Contrib. Neg., 110.
Chicago City R. Co. *v.* Gillam (27 Ill. App. 386), Death, etc., 381.
Chicago City R. Co. *v.* Hastings (35 Ill. App. 434), Dam., 74.
Chicago City R. Co. *v.* Hennessy (16 Ill. App. 153), Indep. Contr., 19.
Chicago City R. Co. *v.* Henry (62 Ill. 142, 6 Am. Ry. Rep. 365), Dam., 96; New Tr., 74.
Chicago City R. Co. *v.* Howison (86 Ill. 215), Injunc., 54.
Chicago City R. Co. *v.* Lewis (5 Ill. App. 242), Comp. Neg., 4; Contrib. Neg., 28; Negl., 99, 102.
Chicago City R. Co. *v.* McLaughlin (146 Ill. 353, 34 N. E. Rep. 796), Collis., 25; Death, etc., 245; Witn., 150.
Chicago City R. Co. *v.* McLaughlin (40 Ill. App. 496), Collis., 24, 26.
Chicago City R. Co. *v.* McMahon (8 Am. & Eng. R. Cas. 68, 103 Ill. 485), Agency, 105; Evid., 222.
Chicago City R. Co. *v.* Mogk (44 Ill. App. 17), Children, Inj. to, 65.
Chicago City R. Co. *v.* Mumford (3 Am.

& Eng. R. Cas. 312, 97 Ill. 560), New Tr., 60; St. Rys., 367, 406.
Chicago City R. Co. *v.* Pelletier (134 Ill. 120, 24 N. E. Rep. 770; affirming 33 Ill. App. 455), St. Rys., 523.
Chicago City R. Co. *v.* People (73 Ill. 541), St. Rys., 26, 54, 82, 104.
Chicago City R. Co. *v.* Robinson (36 Am. & Eng. R. Cas. 66, 127 Ill. 9, 4 L. R. A. 126, 18 N. E. Rep. 772; affirming 27 Ill. App. 26), Children, Inj. to, 127, 128; Death, etc., 315; Negl., 63; St. Rys., 367, 490.
Chicago City R. Co. *v.* Wilcox (Ill.) (43 Am. & Eng. R. Cas. 299, 24 N. E. Rep. 419), Children, Inj. to, 73, 128.
Chicago City R. Co. *v.* Wilcox (50 Am. & Eng. R. Cas. 464, 138 Ill. 370, 27 N. E. Rep. 899; affirming 33 Ill. App. 450), App., 71; Children, Inj. to, 67, 74, 103, 107, 127, 132.
Chicago City R. Co. *v.* Van Vleck (143 Ill. 480, 32 N. E. Rep. 262), Witn., 100.
Chicago City R. Co. *v.* Van Vleck (40 Ill. App. 367), Negl., 61.
Chicago City R. Co. *v.* Yancey (33 Ill. App. 94), Dam., 42.
Chicago City R. Co. *v.* Young (62 Ill. 238, 6 Am. Ry. Rep. 230), St. Rys., 341, 353.
Chicago Con. Bottling Co. *v.* Mitton (41 Ill. App. 154), Negl., 19.
Chicago, D. & V. R. Co. *v.* Bank of North America (82 Ill. 493), Jurisd., 7.
Chicago, D. & V. R. Co. *v.* Chicago (121 Ill. 176, 11 N. E. Rep. 907, 9 West. Rep. 493; affirming 20 Ill. App. 665), Sts. & H., 43, 83.
Chicago, D. & V. R. Co. *v.* Coyer (79 Ill. 373), Mun. Aid, 168.
Chicago, D. & V. R. Co. *v.* Field (86 Ill. 270), Injunc., 41.
Chicago, D. & V. R. Co. *v.* Fosdick (7 Am. & Eng. R. Cas. 427, 106 U. S. 47, 1 Sup. Ct. Rep. 10), Mort., 179, 189, 209, 317.
Chicago, D. & V. R. Co. *v.* Fosdick (12 Am. & Eng. R. Cas. 367, 106 U. S. 82, 1 Sup. Ct. Rep. 10), App., 144.
Chicago, D. & V. R. Co. *v.* Loewenthal (93 Ill. 433), Mort., 190, 241.
Chicago, D. & V. R. Co. *v.* St. Anne (101 Ill. 151), Mun. Aid, 266, 285.
Chicago, D. & V. R. Co. *v.* Smith (62 Ill. 268, 6 Am. Ry. Rep. 221), Contr., 64; Mun. Aid, 410.
Chicago, D. & C. Co. *v.* Garrity (115 Ill. 155, 3 N. E. Rep. 448), Side Tr., 2; Sts. & H., 73, 82, 98, 297.
Chicago, D. & M. R. Co. *v.* Keisel (43 Iowa 39), Name, 1.
Chicago, D. & M. R. Co. *v.* Olmstead (46 Iowa 316), Mun. Aid, 445.
Chicago, D. & M. R. Co. *v.* Schewe (45 Iowa 79), Subsc., 194.
Chicago, E. & L. S. R. Co. *v.* Adamick (33 Ill. App. 412), Death, etc., 433.
Chicago, E. & L. S. R. Co. *v.* Catholic Bishop (119 Ill. 525, 10 N. E. Rep. 372), Em. Dom., 433, 624, 644, 651, 653, 900.
Chicago, I. & D. R. Co. *v.* Cedar Rapids, I. F. & N. W. R. Co. (51 Am. & Eng. R. Cas. 438, 86 Iowa 500, 53 N. W. Rep. 305), Cross. Rys., 4.
Chicago, I. & D. R. Co. *v.* Estes (30 Am. & Eng. R. Cas. 276, 71 Iowa 603, 33 N. W. Rep. 124), Agency, 4; Em. Dom., 223.
Chicago, I. & K. R. Co. *v.* Knuffke (30 Am. & Eng. R. Cas. 387, 36 Kan. 367, 13 Pac. Rep. 582), Em. Dom., 145.
Chicago, I. & K. R. Co. *v.* Townsdin (38 Kan. 78, 15 Pac. Rep. 889), Em. Dom., 593.
Chicago, I. & K. R. Co. *v.* Townsdin (45 Kan. 771, 26 Pac. Rep. 427), Em. Dom., 771.
Chicago, I. & N. P. R. Co. *v.* Minnesota & N. W. R. Co. (29 Fed. Rep. 337), Rem. of C., 35.
Chicago, K. & N. R. Co. *v.* Behney (48 Kan. 47, 28 Pac. Rep. 980), Bills of Partic., 4; Cat.-Gds., 29, 33.
Chicago, K. & N. R. Co. *v.* Broquet (47 Kan. 571, 28 Pac. Rep. 717), Em. Dom., 579, 645.
Chicago, K. & N. R. Co. *v.* Brown (44 Kan. 384, 24 Pac. Rep. 497), Evid., 151; Fel. Serv., 502.
Chicago, K. & N. R. Co. *v.* Cook (43 Kan. 83, 22 Pac. Rep. 988), Em. Dom., 562.
Chicago, K. & N. R. Co. *v.* Davidson (49 Kan. 589, 31 Pac. Rep. 131), Em. Dom., 650, 651.
Chicago, K. & N. R. Co. *v.* Ellis (57 Am. & Eng. R. Cas. 480, 52 Kan. 41, 33 Pac. Rep. 478), Em. Dom., 877; Witn., 20.
Chicago, K. & N. R. Co. *v.* Griesser (48 Kan. 663, 29 Pac. Rep. 1082), Em. Dom., 282, 865.
Chicago, K. & N. R. Co. *v.* Hazels (26 Neb. 364, 42 N. W. Rep. 93), Em. Dom., 15, 646; Sts. & H., 122; Witn., 77.
Chicago, K. & N. R. Co. *v.* Hotz (47 Kan. 627, 28 Pac. Rep. 695), Cat.-Gds., 21.
Chicago, K. & N. R. Co. *v.* Manhattan (45 Kan. 419, 25 Pac. Rep. 879), Mun. Aid, 57.
Chicago, K. & N. R. Co. *v.* Neiman (47 Am. & Eng. R. Cas. 186, 45 Kan. 533, 26 Pac. Rep. 22), Witn., 121.
Chicago, K. & N. R. Co. *v.* Steck (51 Kan. 737, 33 Pac. Rep. 601), Waters & W., 28.
Chicago, K. & N. R. Co. *v.* Stewart (47 Kan. 704, 28 Pac. Rep. 1017), Witn., 159.
Chicago, K. & N. R. Co. *v.* Van Cleave (57 Am. & Eng. R. Cas. 522, 52 Kan. 665, 33 Pac. Rep. 472), Em. Dom., 424, 646, 708; Pub. Lds., 38.
Chicago, K. & N. R. Co. *v.* Wiebe (36 Am. & Eng. R. Cas. 642, 25 Neb. 542, 41 N. W. Rep. 297), Em. Dom., 646.
Chicago, K. & W. R. Co. *v.* Abbott (44 Kan. 170, 24 Pac. Rep. 352), Em. Dom., 335.
Chicago, K. & W. R. Co. *v.* Abilene Town-Site Co. (42 Kan. 97, 104, 21 Pac. Rep. 1112), Em. Dom., 942.
Chicago, K. & W. R. Co. *v.* Anderson (39 Am. & Eng. R. Cas. 41, 42 Kan. 297, 21 Pac. Rep. 1059), Em. Dom., 876; Homest., 2.
Chicago, K. & W. R. Co. *v.* Blevins (46 Kan. 370, 26 Pac. Rep. 687), Employés, Inj. to, 99, 134.
Chicago, K. & W. R. Co. *v.* Brunson (43

Kan. 371, 23 Pac. Rep. 495), App. 67; Em. Dom., 597.
Chicago, K. & W. R. Co. *v.* Chase County Com'rs (43 Kan. 760, 23 Pac. Rep. 1064), Mun. Aid, 87.
Chicago, K. & W. R. Co. *v.* Chase County Com'rs (49 Kan. 399, 30 Pac. Rep. 456), Mand., 27.
Chicago, K. & W. R. Co. *v.* Chautauqua County Com'rs (49 Kan. 763, 31 Pac. Rep. 736), Cross., St. & H., 75.
Chicago, K. & W. R. Co. *v.* Com'rs of Stafford County (36 Kan. 121, 12 Pac. Rep. 593), Consol., 14.
Chicago, K. & W. R. Co. *v.* Cosper (42 Kan. 561, 22 Pac. Rep. 634), Em. Dom., 559, 576; Farm. Cross., 5; Witn., 119.
Chicago, K. & W. R. Co. *v.* Dill (41 Kan. 736, 21 Pac. Rep. 778), Em. Dom., 906; Evid., 231.
Chicago, K. & W. R. Co. *v.* Donelson (45 Kan. 189, 25 Pac. Rep. 584), Witn., 149.
Chicago, K. & W. R. Co. *v.* Drake (47 Am. & Eng. R. Cas. 178, 46 Kan. 568, 26 Pac. Rep. 1039), Witn., 196.
Chicago, K. & W. R. Co. *v.* Easley (46 Kan. 337, 26 Pac. Rep. 731), Em. Dom., 873; Witn., 118.
Chicago, K. & W. R. Co. *v.* Emery (51 Kan. 16, 32 Pac. Rep. 631), Em. Dom., 641, 735.
Chicago, K. & W. R. Co. *v.* Evans (41 Kan. 94, 21 Pac. Rep. 216), Mun. Aid, 159.
Chicago, K. & W. R. Co. *v.* Fisher (49 Kan. 460, 30 Pac. Rep. 462), Car. of P., 151; Cross Inj. at, 8, 303.
Chicago, K. & W. R. Co. *v.* Grovier (39 Am. & Eng. R. Cas. 146, 41 Kan. 685, 21 Pac. Rep. 779), Em. Dom., 339, 551, 871.
Chicago, K. & W. R. Co. *v.* Hoffman (50 Kan. 697, 32 Pac. Rep. 382), Em. Dom., 897.
Chicago, K. & W. R. Co. *v.* Hurst (39 Am. & Eng. R. Cas. 127, 41 Kan. 740, 21 Pac. Rep. 781), Em. Dom., 469; Pub. Lds., 24.
Chicago, K. & W. R. Co. *v.* Hutchinson (45 Kan. 186, 25 Pac. Rep. 576), Cat.-Gds., 26.
Chicago, K. & W. R. Co. *v.* Makepeace (44 Kan. 676, 24 Pac. Rep. 1104), Mun. Aid, 240.
Chicago, K. & W. R. Co. *v.* Morrow (42 Kan. 339, 22 Pac. Rep. 413), Waters & W., 9.
Chicago, K. & W. R. Co. *v.* Mouriquand (45 Kan. 170, 25 Pac. Rep. 567), Witn., 149.
Chicago, K. & W. R. Co. *v.* Muller (47 Am. & Eng. R. Cas. 188, 45 Kan. 85, 25 Pac. Rep. 210), Witn., 74, 124.
Chicago, K. & W. R. Co. *v.* O'Connell (46 Kan. 581, 26 Pac. Rep. 947), Dam., 18.
Chicago, K. & W. R. Co. *v.* Osage County Com'rs (38 Kan. 597, 16 Pac. Rep. 828), Mun. Aid, 180, 221, 413.
Chicago, K. & W. R. Co. *v.* Ozark Tp. (46 Kan. 415, 26 Pac. Rep. 710), Mun. Aid, 279, 284.
Chicago, K. & W. R. Co. *v.* Palmer (44 Am. & Eng. R. Cas. 108, 44 Kan. 110, 24 Pac. Rep. 342), Em. Dom., 580.
Chicago, K. & W. R. Co. *v.* Parsons (51 Kan. 408, 32 Pac. Rep. 1083), Em. Dom., 570, 588, 644.
Chicago, K. & W. R. Co. *v.* Stafford County Com'rs (36 Kan. 121, 12 Pac. Rep. 593), Incorp., 8; Mun. Aid, 201.
Chicago, K. & W. R. Co. *v.* Stewart (50 Kan. 33, 31 Pac. Rep. 668), Witn., 127.
Chicago, K. & W. R. Co. *v.* Union Inv. Co. (56 Am. & Eng. R. Cas. 679, 51 Kan. 600, 33 Pac. Rep. 378), Sts. & H., 168, 263, 274.
Chicago, K. & W. R. Co. *v.* Watkins (40 Am. & Eng. R. Cas. 499, 43 Kan. 50, 22 Pac. Rep. 985), Dam., 99; Em. Dom., 390; Indep. Contr., 16.
Chicago, K. & W. R. Co. *v.* Wilkinson (42 Kan. 337, 22 Pac. Rep. 412), Em. Dom., 547, 945.
Chicago, K. & W. R. Co. *v.* Willits (47 Am. & Eng. R. Cas. 317, 45 Kan. 110, 25 Pac. Rep. 576), Em. Dom., 583, 1008.
Chicago, K. & W. R. Co. *v.* Woodward (47 Kan. 191, 27 Pac. Rep. 836), Em. Dom., 701, 735.
Chicago, K. & W. R. Co. *v.* Woodward (48 Kan. 599, 29 Pac. Rep. 1146), Em. Dom., 634.
Chicago, M. & N. R. Co. *v.* Eichman (47 Ill. App. 156), Farm Cross., 3; Flood. Lds., 82, 92; Leases, 47.
Chicago, M. & St. P. R. Co. *v.* Ackley (94 U. S. 179, 16 Am. Ry. Rep. 176), Charges, 8, 25.
Chicago, M. & St. P. R. Co. *v.* Artery (44 Am. & Eng. R. Cas. 573, 137 U. S. 507, 11 Sup. Ct. Rep. 129), Fel. Serv., 175; Witn., 34.
Chicago, M. & St. P. R. Co. *v.* Baker (102 Mo. 553, 15 S. W. Rep. 64), Em. Dom., 350, 437, 453, 506, 615, 742.
Chicago, M. & St. P. R. Co. *v.* Bean (69 Iowa 257, 28 N. W. Rep. 585), Em. Dom., 266, 974.
Chicago, M. & St. P. R. Co. *v.* Becker (32 Fed. Rep. 849), Charges, 18; For. Corp., 1, 4; Ry. Com'rs, 38; Rem. of C., 2.
Chicago, M. & St. P. R. Co. *v.* Carpenter (56 Fed. Rep. 451), Car. of L. S., 126, 132, 144; Employés, Inj. to, 58.
Chicago, M. & St. P. R. Co. *v.* Chicago Third Nat. Bank (134 U. S. 276, 10 Sup. Ct. Rep. 550; affirming 26 Fed. Rep. 820), Dissol., 30; Leases, 12, 57.
Chicago, M. & St. P. R. Co. *v.* Crawford County Sup'rs (48 Wis. 666, 5 N. W. Rep. 3), Tax., 182.
Chicago, M. & St. P. R. Co. *v.* Darke (148 Ill. 226, 35 N. E. Rep. 750), App., 107; Constr. Rys., 13; Em. Dom., 720, 991; Nuis., 5; Sts. & H., 219.
Chicago, M. & St. P. R. Co. *v.* Dowd (115 Ill. 659, 4 N. E. Rep. 368), Comp. Neg., 12; Death, etc., 319.
Chicago, M. & St. P. R. Co. *v.* Dumser (19 Am. & Eng. R. Cas. 545, 109 Ill. 402), Fences, 1, 2, 55, 59.
Chicago, M. & St. P. R. Co. *v.* Durant (46 Am. & Eng. R. Cas. 488, 44 Minn. 361, 46 N. W. Rep. 676), Spec. Perf., 16.
Chicago, M. & St. P. R. Co. *v.* Hall (90 Ill. 42), Sts. & H., 262, 274.
Chicago, M. & St. P. R. Co. *v.* Halsey (133 Ill. 248, 23 N. E. Rep. 1028; reversing 31 Ill. App. 601), Death, etc., 314.

Chicago, M. & St. P. R. Co. *v.* Harper (Ill.) (37 Am. & Eng. R. Cas. 549, 19 N. E. Rep. 31), Sts. & H., 394.
Chicago, M. & St. P. R. Co. *v.* Harper (128 Ill. 384, 21 N. E. Rep. 561; affirming 26 Ill. App. 621), Trial, 29.
Chicago, M. & St. P. R. Co. *v.* Hartshorn (30 Fed. Rep. 541), Mun. Aid, 412; Stat., 69.
Chicago, M. & St. P. R. Co. *v.* Hock (118 Ill. 587, 9 N. E. Rep. 2[illegible]), Em. Dom., 524, 680.
Chicago, M. & St. P. R. Co. *v.* Houston County (38 Minn. 531, 38 N. W. Rep. 619), Tax., 85.
Chicago, M. & St. P. R. Co. *v.* Hoyt (37 Ill. App. 64), Car. of M., 206.
Chicago, M. & St. P. R. Co. *v.* Hoyt (44 Ill. App. 48), Cov'ts, 17.
Chicago, M. & St. P. R. Co. *v.* Hoyt (54 Am. & Eng. R. Cas. 207, 149 U. S. 1, 13 Sup. Ct. Rep. 779; reversing 39 Fed. Rep. 415), Elevators, 11.
Chicago, M. & St. P. R. Co. *v.* Kendall (49 Ill. App. 398), Animals, 402, 404; Witn., 110.
Chicago, M. & St. P. R. Co. *v.* Keokuk & N. L. Packet Co. (108 Ill. 317), Receiv., 41, 48.
Chicago, M. & St. P. R. Co. *v.* Krueger (23 Ill. App. 639; affirmed in part 124 Ill. 457), App., 117; Comp. Neg., 2, 4.
Chicago, M. & St. P. R. Co. *v.* Krueger (124 Ill. 457, 17 N. E. Rep. 52; affirming in part 23 Ill. App. 639), Trial, 140.
Chicago, M. & St. P. R. Co. *v.* Lowell (58 Am. & Eng. R. Cas. 401, 151 U. S. 209, 14 Sup. Ct. Rep. 281), Car. of P., 404, 451, 452.
Chicago, M. & St. P. R. Co. *v.* McArthur (53 Fed. Rep. 464, 10 U. S. App. 546, 3 C. C. A. 594), Evid., 231; Fly. Switch, 4.
Chicago, M. & St. P. R. Co. *v.* Maher (27 Ill. App. 24), Cross., Inj. at, 338.
Chicago, M. & St. P. R. Co. *v.* Mason (27 Ill. App. 450), Comp. Neg., 4, 14.
Chicago, M. & St. P. R. Co. *v.* Melville (66 Ill. 329), Em. Dom., 381, 935.
Chicago, M. & St. P. R. Co. *v.* Minnesota (42 Am. & Eng. R. Cas. 285, 134 U. S. 418, 10 Sup. Ct. Rep. 702; reversing 38 Minn. 281), Charters, 20; Ry. Com'rs, 26; Stat., 22, 23; Tickets & F., 114.
Chicago, M. & St. P. R. Co. *v.* Minnesota C. R. Co. (10 Am. & Eng. R. Cas. 234, 4 McCrary (U. S.) 606, 14 Fed. Rep. 525), Sts. & H., 301.
Chicago, M. & St. P. R. Co. *v.* O'Sullivan (40 Ill. App. 369), Death, etc., 255; Evid., 78.
Chicago, M. & St. P. R. Co. *v.* O'Sullivan (143 Ill. 48, 32 N. E. Rep. 398), Death, etc., 222, 226, 238, 326; Witn., 104.
Chicago, M. & St. P. R. Co. *v.* Pfaender (23 Minn. 217, 17 Am. Ry. Rep. 44), Tax., 231.
Chicago, M. & St. P. R. Co. *v.* Phillips (14 Ill. App. 265), Animals, 283, 584.
Chicago, M. & St. P. R. Co. *v.* Randolph Town-Site Co. (47 Am. & Eng. R. Cas. 118, 103 Mo. 451, 15 S. W. Rep. 437), Em. Dom., 56, 224, 227, 463, 513, 524, 789.
Chicago, M. & St. P. R. Co. *v.* Ross (17 Am. & Eng. R. Cas. 501, 112 U. S. 377, 5 Sup. Ct. Rep. 184), Fel. Serv., 73, 146.
Chicago, M. & St. P. R. Co. *v.* Sabula (13 Am. & Eng. R. Cas. 443, 19 Fed. Rep. 177), Tax., 78.
Chicago, M. & St. P. R. Co. *v.* Shea (67 Iowa 728, 25 N. W. Rep. 901), Mun. Aid, 31, 123, 233, 412.
Chicago, M. & St. P. R. Co. *v.* Snyder (27 Ill. App. 476), App., 142.
Chicago, M. & St. P. R. Co. *v.* Staff (46 Ill. App. 499), Death, etc., 247.
Chicago, M. & St. P. R. Co. *v.* Standard (16 Ill. App. 145), Employés, Inj. to, 238; Trial, 148.
Chicago, M. & St. P. R. Co. *v.* Stewart (19 Fed. Rep. 5), Spec. Perf., 24.
Chicago, M. & St. P. R. Co. *v.* United States (14 Ct. of Cl. 125), Car. of Mails, 10; Land Grant Rds., 1, 5.
Chicago, M. & St. P. R. Co. *v.* United States (18 Ct. of Cl. 359), Car. of Mails, 10; Claims Against U. S., 7.
Chicago, M. & St. P. R. Co. *v.* United States (10 Am. & Eng. R. Cas. 621, 104 U. S. 687), Car. of Mails, 10.
Chicago, M. & St. P. R. Co. *v.* United States (35 Am. & Eng. R. Cas. 508, 127 U. S. 406, 8 Sup. Ct. Rep. 1194), Car. of Mails, 10.
Chicago. M. & St. P. R. Co. *v.* Wabash, St. L. & P. R. Co. (58 Am. & Eng. R. Cas. 703, 61 Fed. Rep. 993), Contr., 63.
Chicago, M. & St. P. R. Co. *v.* White (46 Ill. App. 446), Cross., Inj. at, 251.
Chicago, M. & St. P. R. Co. *v.* Wilson (42 Am. & Eng. R. Cas. 153, 133 Ill. 55, 24 N. E. Rep. 555; affirming 35 Ill. App. 346), App., 108; Contrib. Neg., 91; Cross., Inj. at, 79, 125, 136, 243, 254.
Chicago, M. & St. P. R. Co. *v.* Yando (26 Ill. App. 601), App., 121.
Chicago Municipal G. L. & F. Co. *v.* Lake (130 Ill. 42, 29 Am. & Eng. Corp. Cas. 230, 22 N. E. Rep. 616, 27 Ill. App. 346), Franch., 5.
Chicago, N. & S. W. R. Co. *v.* Mayor, etc., of Newton (36 Iowa 299), Pl., 9; Sts. & H., 62.
Chicago P. & P. Co. *v.* Chicago (88 Ill. 221), Mun. Corp., 18.
Chicago, P. & S. W. R. Co. *v.* Marseilles (84 Ill. 145, 16 Am. Ry. Rep. 442), Mun. Aid, 175, 233; Stock, 50.
Chicago, P. & S. W. R. Co. *v.* Marseilles (84 Ill. 643), Corp., 13.
Chicago, P. & St. L. R. Co. *v.* Aldrich (134 Ill. 9, 24 N. E. Rep. 763), Em. Dom., 541, 701, 724, 732, 891.
Chicago, P. & St. L. R. Co. *v.* Ayres (140 Ill. 644, 30 N. E. Rep. 687; affirming 39 Ill. App. 607), Connect. L., 5.
Chicago, P. & St. L. R. Co. *v.* Blume (137 Ill. 448, 27 N. E. Rep. 601), Em. Dom., 724, 905.
Chicago, P. & St. L. R. Co. *v.* Brinkman (47 Ill. App. 287), Em. Dom., 339, 682.
Chicago, P. & St. L. R. Co. *v.* Eaton (136

Ill. 9, 26 N. E. Rep. 575), Em. Dom., 541, 596, 600, 629, 646, 685, 690, 696, 781, 785.
Chicago, P. & St. L. R. Co. *v.* Greiney (137 Ill. 628, 25 N. E. Rep. 798), Em. Dom., 600, 646, 724, 914.
Chicago, P. & St. L. R. Co. *v.* Leah (41 Ill. App. 584), Sts. & H., 264, 276.
Chicago, P. & St. L. R. Co. *v.* Lewis (58 Am. & Eng. R. Cas. 126, 145 Ill. 67, 33 N. E. Rep. 960), App., 94; Car. of P., 151, 153, 166, 169, 198, 602; Evid., 93; Negl., 28, 41; Witn., 53, 99.
Chicago, P. & St. L. R. Co. *v.* Lewis (48 Ill. App. 274), Car. of P., 153, 587; Dam., 102; Derailm., 5; Evid., 91; Negl., 28.
Chicago, P. & St. L. R. Co. *v.* Nix (137 Ill. 141, 27 N. E. Rep. 81), Em. Dom., 720, 914; Witn., 118, 124, 153.
Chicago, P. & St. L. R. Co. *v.* Wolf (137 Ill. 360, 27 N. E. Rep. 78), Em. Dom., 619, 664, 732, 926.
Chicago Quartz Min. Co. *v.* Oliver (75 Cal. 194, 16 Pac. Rep. 780), Pub. Lds., 34.
Chicago R. Co. *v.* Volk (45 Ill. 175), Agency, 4.
Chicago R. Equipment Co. *v.* Merchants' Bank (136 U. S. 268, 10 Sup. Ct. Rep. 999), Bills & N., 2.
Chicago, R. I. & P. R. Co. *v.* Allfree (64 Iowa 500, 20 N. W. Rep. 779), Lim. of Ac., 7.
Chicago, R. I. & P. R. Co. *v.* Austin (69 Ill. 426), Death, etc., 344, 345; Tresp., Inj. to, 64; Trial, 157.
Chicago, R. I. & P. R. Co. *v.* Barrett (16 Ill. App. 17), Car. of P., 30, 36, 307, 640; Eject. Pass., 42, 91.
Chicago, R. I. & P. R. Co. *v.* Becker (38 Ill. App. 523), Employés, Inj. to, 97.
Chicago, R. I. & P. R. Co. *v.* Bell (70 Ill. 102), Cross., Inj. at, 107; Death, etc., 77, 229; Evid., 213.
Chicago, R. I. & P. R. Co. *v.* Boyce (73 Ill. 510), Bagg., 45, 72.
Chicago, R. I. & P. R. Co. *v.* Brisbane (24 Ill. App. 463), Eject. Pass., 7, 54; Tickets & F., 28.
Chicago, R. I. & P. R. Co. *v.* Brown (40 Iowa 333), Land Grants, 131.
Chicago, R. I. & P. R. Co. *v.* Bureau County Sup'rs (25 Ill. 580), Tax., 257.
Chicago, R. I. & P. R. Co. *v.* Carey (90 Ill. 514), Flood. Lds., 93.
Chicago, R. I. & P. R. Co. *v.* Chicago (Ill.) (27 N. E. Rep. 926; see, also, 139 Ill. 573, 28 N. E. Rep. 1108), Sts. & H., 300, 343.
Chicago, R. I. & P. R. Co. *v.* Chicago (139 Ill. 573, 28 N. E. Rep. 1108), Tax., 169, 257.
Chicago, R. I. & P. R. Co. *v.* Chicago (143 Ill. 641, 32 N. E. Rep. 178), Em. Dom., 238.
Chicago, R. I. & P. R. Co. *v.* Chicago (148 Ill. 479, 36 N. E. Rep. 72), Sts. & H., 18.
Chicago, R. I. & P. R. Co. *v.* Chicago & A. R. Co. (2 Int. Com. Rep. 721, 3 Int. Com. Com. 450), Int. Com., 143, 144.
Chicago, R. I. & P. R. Co. *v.* Clark (11 Ill. App. 104), Employés, Inj. to, 238; Stat. & D., 141.
Chicago, R. I. & P. R. Co. *v.* Clark (15 Am. & Eng. R. Cas. 261, 108 Ill. 113), Comp. Neg., 18, Death, etc., 230; Employés, Inj. to, 27, 136; Evid., 36.
Chicago, R. I. & P. R. Co. *v.* Clayton (78 Ill. 616), Bagg., 48, 57, 58.
Chicago, R. I. & P. R. Co. *v.* Clough (134 Ill. 586, 25 N. E. Rep. 664, 29 N. E. Rep. 184; affirming 33 Ill. App. 129), Cross., Inj. at, 77, 79, 202, 214, 279, 320; Pl., 118, 175; Trial, 174, 176.
Chicago, R. I. & P. R. Co. *v.* Collins (56 Ill. 212, 4 Am. Ry. Rep. 453), Bagg., 33, 119.
Chicago, R. I. & P. R. Co. *v.* Conklin (16 Am. & Eng. R. Cas. 116, 32 Kan. 55, 3 Pac. Rep. 762), Bagg., 6, 38.
Chicago, R. I. & P. R. Co. *v.* Davenport (51 Iowa 451), Tax., 69, 78.
Chicago, R. I. & P. R. Co. *v.* Denver & R. G. R. Co. (45 Fed. Rep. 304; see, also, 46 Fed. Rep. 145), Contr., 105.
Chicago, R. I. & P. R. Co. *v.* Denver & R. G. R. Co. (50 Am. & Eng. R. Cas. 60, 143 U. S. 596, 12 Sup. Ct. Rep. 479; modifying and affirming 45 Fed. Rep. 304), Leases, 54, 83
Chicago, R. I. & P. R. Co. *v.* Dey (76 Iowa 278, 41 N. W. Rep. 17), App., 144.
Chicago, R. I. & P. R. Co. *v.* Dignan (56 Ill. 487, 4 Am. Ry. Rep. 487), Employés, Inj. to, 167.
Chicago, R. I. & P. R. Co. *v.* Dingman (1 Ill. App. 162), Car. of P., 409.
Chicago, R. I. & P. R. Co. *v.* Doyle (18 Kan. 58, 15 Am. Ry. Rep. 187), Fel. Serv., 473, 475; Release, 5, 16.
Chicago, R. I. & P. R. Co. *v.* Eininger (114 Ill. 79, 29 N. E. Rep. 196), Cross., Inj. at, 359; Tresp., Inj. to, 43, 109; Trial, 39.
Chicago, R. I. & P. R. Co. *v.* Ellithorpe (78 Iowa 415, 43 N. W. Rep. 277), Sts. & H., 20.
Chicago, R. I. & P. R. Co. *v.* Fairclough (52 Ill. 106), Bagg., 74.
Chicago, R. I. & P. R. Co. *v.* Felton (33 Am. & Eng. R. Cas. 533, 125 Ill. 458, 15 West. Rep. 41, 17 N. E. Rep. 765; reversing 24 Ill. App. 376), Car. of P., 451, 592; Evid., 139; Trial, 142.
Chicago, R. I. & P. R. Co. *v.* Ferguson (3 Colo. App. 414, 33 Pac. Rep. 684), Indep. Contr., 1, 8.
Chicago, R. I. & P. R. Co. *v.* Fisher (66 Ill. 152), Car. of P., 257.
Chicago, R. I. & P. R. Co. *v.* Fitzsimmons (40 Ill. App. 360), Cross., Inj. at, 242; Death, etc., 211.
Chicago, R. I. & P. R. Co. *v.* Franks (55 Mo. 325), Just. P., 16.
Chicago, R. I. & P. R. Co. *v.* Givens (18 Ill. App. 404), Evid., 293; Negl., 41; Witn., 29.
Chicago, R. I. & P. R. Co. *v.* Grinnell (51 Iowa 476), Land Grants, 54, 116.
Chicago, R. I. & P. R. Co. *v.* Halleck (13 Ill. App. 643), Agency, 65.
Chicago, R. I. & P. R. Co. *v.* Harmon (12 Ill. App. 54), Car. of L. S., 25, 27, 63, 87.
Chicago, R. I. & P. R. Co. *v.* Harmon (16 Ill. App. 31), Evid., 263.
Chicago, R. I. & P. R. Co. *v.* Harmon (17 Ill. App. 640), Car. of L. S., 66, 89; Witn., 5.

Chicago, R. I. & P. R. Co. *v.* Henry (7 Ill. App. 322), Death, etc., 275; Fel. Serv., 114, 293, 433.
Chicago, R. I. & P. R. Co. *v.* Herring (57 Ill. 59), Eject. Pass., 33, 54.
Chicago, R. I. & P. R. Co. *v.* Houston (95 U. S. 697), Cross., Inj. at, 264, 265.
Chicago, R. I. & P. R. Co. *v.* Howard (7 Wall. (U. S.) 392), Cred. Bill, 7; Guar., 8; Mort., 277; Stockh., 21.
Chicago, R. I. & P. R. Co. *v.* Hurst (30 Iowa 73), Em. Dom., 932.
Chicago, R. I. & P. R. Co. *v.* Joliet (79 Ill. 25), Estop., 21; Nuis., 8; Sts. & H., 43, 83.
Chicago, R. I. & P. R. Co. *v.* Jones (13 Ill. App. 634), Sts. & H., 340.
Chicago, R. I. & P. R. Co. *v.* Koehler (47 Ill. App. 147), Car. of P., 378; Comp. Neg., 17.
Chicago, R. I. & P. R. Co. *v.* Lake (71 Ill. 333), Em. Dom., 3; Sts. & H., 18.
Chicago, R. I. & P. R. Co. *v.* Lewis (19 Am. & Eng. R. Cas. 224, 109 Ill. 120; affirming 13 Ill. App. 166), App., 116; Release, 5, 9, 16, 18.
Chicago, R. I. & P. R. Co. *v.* Lonergan (28 Am. & Eng. R. Cas. 491, 118 Ill. 41, 7 N. E. Rep. 55), Employés, Inj. to, 97, 98, 182; Negl., 33.
Chicago, R. I. & P. R. Co. *v.* McAra (52 Ill. 296), Car. of P., 211, 645.
Chicago, R. I. & P. R. Co. *v.* McGlinn (11 Am. & Eng. R. Cas. 435, 28 Kan. 274; affirmed in 19 Am. & Eng. R. Cas. 522, 114 U. S. 542, 5 Sup. Ct. Rep. 1005), Animals, 16.
Chicago, R. I. & P. R. Co. *v.* McKittrick (78 Ill. 619), Employés, Inj. to, 482, 767.
Chicago, R. I. & P. R. Co. *v.* Mason (11 Ill. App. 525), Attach., 39, 56.
Chicago, R. I. & P. R. Co. *v.* Moffitt (75 Ill. 524), Consol., 40, 45; Em. Dom., 170.
Chicago, R. I. & P. R. Co. *v.* Otto (52 Ill. 416), New Tr., 30; Trial, 132.
Chicago, R. I. & P. R. Co. *v.* Payzant (87 Ill. 125, 18 Am. Ry. Rep. 200), Car. of P., 645.
Chicago, R. I. & P. R. Co. *v.* People (4 Ill. App. 468), Em. Dom., 92; Tax., 257.
Chicago, R. I. & P. R. Co. *v.* Reidy (66 Ill. 43), Actions, 2; Stat., 27; Sts. & H., 390.
Chicago, R. I. & P. R. Co. *v.* Riley (74 Ill. 70), Eject. Pass., 131.
Chicago, R. I. & P. R. Co. *v.* Smith (29 Am. & Eng. R. Cas. 558, 111 Ill. 363), Deeds, 8; Em. Dom., 208, 220, 320, 646.
Chicago, R. I. & P. R. Co. *v.* Todd (91 Ill. 70), Pl., 134.
Chicago, R. I. & P. R. Co. *v.* Touhy (26 Ill. App. 99), Fel. Serv., 102, 293, 321, 475.
Chicago, R. I. & P. R. Co. *v.* Wisconsin, I. & N. R. Co. (36 Am. & Eng. R. Cas. 400, 76 Iowa 615, 41 N. W. Rep. 375), Em. Dom., 230.
Chicago, R. I. & P. R. Co. *v.* Witty (32 Neb. 275, 49 N. W. Rep. 183), Car. of L. S., 65.
Chicago, R. I. & P. R. Co. *v.* Young (96 Mo. 39, 15 West. Rep. 87, 8 S. W. Rep. 776), Em. Dom., 243, 274, 284.
Chicago, St. L. & N. O. R. Co. *v.* Abels (21 Am. & Eng. R. Cas. 105, 60 Miss. 1017), Car. of L. S., 80, 184, 461; Lim. of Liab., 27, 38.
Chicago, St. L. & N. O. R. Co. *v.* Doyle (8 Am. & Eng. R. Cas. 171, 60 Miss. 977), Death, etc., 110, 113; Fel. Serv., 1, 34, 306; States, 4.
Chicago, St. L. & N. O. R. Co. *v.* Jarrett (11 Am. & Eng. R. Cas. 455, 59 Miss. 470), Animals, 583; New Tr., 86.
Chicago, St. L. & N. O. R. Co. *v.* Jones (11 Am. & Eng. R. Cas. 450, 59 Miss. 465), Animals, 72, 250.
Chicago, St. L. & N. O. R. Co. *v.* McComb (17 Blatchf. (U. S.) 371), Rem. of C., 29, 49.
Chicago, St. L. & N. O. R. Co. *v.* Moss (20 Am. & Eng. R. Cas. 555, 60 Miss. 641), Stat., 30.
Chicago, St. L. & N. O. R. Co. *v.* Moss (21 Am. & Eng. R. Cas. 98, 60 Miss. 1003), Car. of M., 156, 463, 471; Lim. of Liab., 27.
Chicago, St. L. & N. O. R. Co. *v.* Packwood (7 Am. & Eng. R. Cas. 584, 59 Miss. 280), Animals, 51, 486; Assign., 20.
Chicago, St. L. & N. O. R. Co. *v.* Pounds (15 Am. & Eng. R. Cas. 510, 11 Lea (Tenn.) 127), Death, etc., 33, 378.
Chicago, St. L. & N. O. R. Co. *v.* Provine (18 Am. & Eng. R. Cas. 644, 61 Miss. 288), Bills of Partic., 4; Car. of M., 704.
Chicago, St. L. & N. O. R. Co. *v.* Pullman Southern Car Co. (56 Fed. Rep. 705), Lim. of Ac., 40.
Chicago, St. L. & N. O. R. Co. *v.* Pullman Southern Car Co. (139 U. S. 79, 11 Sup. Ct. Rep. 490), Sleep. Car Cos., 3, 4.
Chicago, St. L. & N. O. R. Co. *v.* Scurr (6 Am. & Eng. R. Cas. 341, 59 Miss. 456, 42 Am. Rep. 373), Car. of P., 638; Dam., 37, 38.
Chicago, St. L. & N. O. R. Co. *v.* Trotter (60 Miss. 442), Car. of P., 217; Negl., 100, 102.
Chicago, St. L. & N. O. R. Co. *v.* Trotter (18 Am. & Eng. R. Cas. 159, 61 Miss. 417), Car. of P., 601.
Chicago, St. L. & P. R. Co. *v.* Barnes (2 Ind. App. 213, 28 N. E. Rep. 328), Dam., 109; Fires, 101, 191; Negl., 89.
Chicago, St. L. & P. R. Co. *v.* Bills (104 Ind. 13, 3 N. E. Rep. 611), Car. of P., 15, 250; Eject. Pass., 58, 78, 82.
Chicago, St. L. & P. R. Co. *v.* Bills (37 Am. & Eng. R. Cas. 121, 118 Ind. 221, 20 N. E. Rep. 775), Eject. Pass., 81, 94; Evid., 64; Lim. of Ac., 13.
Chicago, St. L. & P. R. Co. *v.* Burger (124 Ind. 275, 24 N. E. Rep. 981), Fires, 66, 125, 363; Trial, 213.
Chicago, St. L. & P. R. Co. *v.* Champion (Ind.) (32 N. E. Rep. 874), App., 117; Evid., 77, 98.
Chicago, St. L. & P. R. Co. *v.* Cincinnati, W. & M. R. Co. (126 Ind. 513, 26 N. E. Rep. 204), Cross. Rys., 2.
Chicago, St. L. & P. R. Co. *v.* Eisert (127 Ind. 156, 26 N. E. Rep. 759), Sts. & H., 146, 214, 226.
Chicago, St. L. & P. R. Co. *v.* Fenn (2 Ind. App. 250, 29 N. E. Rep. 790), Animals,

186, 193, 216, 281, 547; Cross., Inj. at, 100, 240.
Chicago, St. L. & P. R. Co. *v.* Fry (131 Ind. 319, 28 N. E. Rep. 989), Death, etc., 153; Employés, Inj. to, 136, 154, 529, 548.
Chicago, St. L. & P. R. Co. *v.* Graham (3 Ind. App. 28, 29 N. E. Rep. 170), Car. of P., 60, 70; Eject. Pass., 6, 19, 69, 72; Tickets & F., 22, 32, 123.
Chicago, St. L. & P. R. Co. *v.* Gross (133 Ill. 37, 24 N. E. Rep. 563; affirming 35 Ill. App. 178), Death, etc., 219.
Chicago, St. L. & P. R. Co. *v.* Holdridge (118 Ind. 281, 20 N. E. Rep. 837), Eject. Pass., 131; Tickets & F., 70, 73.
Chicago, St. L. & P. R. Co. *v.* Hutchinson (32 Am. & Eng. R. Cas. 82, 120 Ill. 587, 11 N. E. Rep. 855), Contrib. Neg., 19, 31, 82, 83; Cross., Inj. at, 78, 279; Negl., 62; Trial, 122, 142, 154.
Chicago, St. L. & P. R. Co. *v.* Meyer (117 Ind. 563, 19 N. E. Rep. 320), Attach., 39.
Chicago, St. L. & P. R. Co. *v.* Nash (Ind.) (24 N. E. Rep. 884), Animals, 120, 328.
Chicago, St. L. & P. R. Co. *v.* Nash (1 Ind. App. 298, 27 N. E. Rep. 564), Animals, 186, 187, 195, 247, 262, 266, 328, 483; Contrib. Neg., 72; Pl., 20.
Chicago, St. L. & P. R. Co. *v.* Spilker (55 Am. & Eng. R. Cas. 200, 134 Ind. 380, 33 N. E. Rep. 280), App., 78; Cross., Inj. at, 246, 260, 335, 336, 343, 356, 360; Evid., 26, 31, 46, 47, 209; Imp. Neg., 26, 28; Trial, 218; Witn., 164.
Chicago, St. L. & P. R. Co. *v.* Welsh (118 Ill. 572, 9 N. E. Rep. 197), Comp. Neg., 6.
Chicago, St. L. & P. R. Co. *v.* Williams (131 Ind. 30, 30 N . E. Rep. 696), Fires, 96, 165, 249.
Chicago, St. L. & W. R. Co. *v.* Gates (30 Am. & Eng. R. Cas. 268, 120 Ill. 86, 11 N. E. Rep. 527), Em. Dom., 261, 969, 1010.
Chicago, St. P. & F. L. R. Co. *v.* McCarthy (20 Ill. 385), Agency, 3.
Chicago, St. P. & K. C. R. Co., In re (2 Int. Com. Rep. 137, 2 Int. Com. Com. 231), Int. Com., 40, 111, 115, 136.
Chicago, St. P. & K. C. R. Co. *v.* Anderson (47 Ill. App. 91), Death, etc., 194, 230.
Chicago, St. P. & K. C. R. Co. *v.* Kansas City. St. J. & C. B. R. Co. (38 Fed. Rep. 58), Consol., 40.
Chicago, St. P. & K. C. R. Co. *v.* Kansas City, St. J. & C. B. R. Co. (52 Fed. Rep. 178), Sts. & H., 94.
Chicago, St. P., M. & O. R. Co. *v.* Becker (35 Fed. Rep. 883), Charges, 15; Fed. Cts., 11.
Chicago, St. P., M. & O. R. Co. *v.* Cuming County (31 Neb. 374, 47 N. W. Rep. 1121), Mun. Aid, 419.
Chicago, St. P., M. & O. R. Co. *v.* Dakota Co. (28 Fed. Rep. 219), Fed. Cts., 10.
Chicago, St. P., M. & O. R. Co. *v.* Elliott (58 Am. & Eng. R. Cas, 161, 55 Fed. Rep. 949, 12 U. S. App. 381, 5 C. C. A. 347), Car. of L. S., 129, 131; Evid., 133; Negl., 19, 40, 48, 79.
Chicago, St. P., M. & O. R. Co. *v.* Gilbert (52 Fed. Rep. 711, 10 U. S. App. 375, 3 C. C. A. 264), Fires, 201, 233, 295.
Chicago, St. P., M. & O. R. Co. *v.* Lundstrom (21 Am. & Eng. R. Cas. 528, 16 Neb. 254, 49 Am. Rep. 718, 20 N. W. Rep. 198), Fel. Serv., 244; Sales of Rds., 16.
Chicago, St. P., M. & O. R. Co. *v.* Roberts (141 U. S. 690, 12 Sup. Ct. Rep. 123), Fed. Cts., 19.
Chicago, S. F. & C. R. Co. *v.* Bates (109 Mo. 53, 18 S. W. Rep. 1133), Em. Dom., 522.
Chicago, S. F. & C. R. Co. *v.* Bentz (38 Ill. App. 485), Contrib. Neg., 19, 110; Cross., Inj. at, 316.
Chicago, S. F. & C. R. Co. *v.* Elliott (108 Mo. 321, 18 S. W. Rep. 901), Em. Dom., 522.
Chicago, S. F. & C. R. Co. *v.* Elliott (117 Mo. 549, 24 S. W. Rep. 53), Em. Dom., 770, 902.
Chicago, S. F. & C. R. Co. *v.* Eubanks (32 Mo. App. 184), Em. Dom., 812.
Chicago, S. F. & C. R. Co. *v.* McGrew (104 Mo. 282, 15 S. W. Rep. 931), Em. Dom., 381, 463, 466, 664, 742.
Chicago, S. F. & C. R. Co. *v.* McGrew (113 Mo. 390, 21 S. W. Rep. 201), Em. Dom., 521.
Chicago, S. F. & C. R. Co. *v.* Miller (106 Mo. 458, 17 S. W. Rep. 499), Em. Dom., 14, 517, 525, 674.
Chicago, S. F. & C. R. Co. *v.* Phelps (125 Ill. 482, 15 West. Rep. 281, 17 N. E. Rep. 769), Em. Dom., 598, 637, 880, 957.
Chicago, S. F. & C. R. Co. *v.* Price (47 Am. & Eng. R. Cas. 298, 138 U. S. 185, 11 Sup. Ct. Rep. 290; affirming 38 Fed. Rep. 304), Constr. Rys., 60.
Chicago, S. F. & C. R. Co. *v.* Vivian (33 Mo. App. 583), App., 105; Em. Dom., 590.
Chicago, S. F. & C. R. Co. *v.* Ward (128 Ill. 349, 18 N. E. Rep. 828, 21 N. E. Rep. 562), Em. Dom., 451, 578, 713; Trial, 4.
Chicago, T. & M. C. R. Co. *v.* Titterington (84 Tex. 218, 19 S. W. Rep. 472), Em. Dom., 219; Homest., 1.
Chicago W. D. R. Co. *v.* Becker (128 Ill. 545, 21 N. E. Rep. 524; reversing 30 Ill. App. 200), Evid., 174.
Chicago W. D. R. Co. *v.* Bert (69 Ill. 388), St. Rys., 509.
Chicago W. D. R. Co. *v.* Bolton (37 Ill. App. 143), New Tr., 24.
Chicago W. D. R. Co. *v.* Conley (43 Ill. App. 347), Children, Inj. to, 196.
Chicago W. D. R. Co. *v.* Haviland (12 Ill. App. 561), New Tr., 72.
Chicago W. D. R. Co. *v.* Hughes (69 Ill. 170), St. Rys., 345, 445, 465.
Chicago W. D. R. Co. *v.* Hughes (87 Ill. 94), New Tr., 58.
Chicago W. D. R. Co. *v.* Ingraham (33 Ill. App. 351), Cross., Inj. at, 11.
Chicago W. D. R. Co. *v.* Ingraham (41 Am. & Eng. R. Cas. 243, 131 Ill. 659, 23 N. E. Rep. 350), Pl., 175; St. Rys., 450.
Chicago W. D. R. Co. *v.* Klaubler (9 Ill. App. 613), Car. of P., 476; Contrib. Neg., 122; Pl., 112.
Chicago W. D. R. Co. *v.* Lambert (119 Ill. 255, 10 N. E. Rep. 219; affirming 20 Ill. App. 654), Trial, 56, 164; Witn., 164.

Chicago W. D. R. Co. *v.* Mills (91 Ill. 39), Release, 4; St. Rys., 370.
Chicago W. D. R. Co. *v.* Mills (11 Am. & Eng. R. Cas. 128, 105 Ill. 63), Release, 4; St. Rys., 367.
Chicago W. D. R. Co. *v.* Rend (6 Ill. App. 243), St. Rys., 324.
Chicago W. D. R. Co. *v.* Ryan (43 Am. & Eng. R. Cas. 396, 131 Ill. 474, 23 N. E. Rep. 385; affirming 31 Ill. App. 621), Children, Inj. to, 61, 68, 118; Contrib. Neg., 47, 48, 50.
Chicago, W. & V. Coal Co *v.* Peterson (39 Ill. App. 114), Contr., 56; Negl., 3; Release, 22.
Chichester *v.* Union Transfer Co. (1 MacArth. (D. C.) 295), Abate, 4.
Chick *v.* Southwestern R. Co. (57 Ga. 357), Death, etc., 128, 132.
Chickaming Tp. *v.* Carpenter (106 U. S. 663, 1 Sup. Ct. Rep. 620), Fed. Cts., 3; Mun. Aid, 207, 283.
Chickering, In re (26 Am. & Eng. R. Cas. 646, 56 Vt. 82), Lim. of Ac., 12; Mort., 180.
Chicot County *v.* Davies (40 Ark. 200), Stat., 3.
Chicot County *v.* Lewis (3 Am. & Eng. R. Cas. 137, 103 U. S. 164), Mun. Aid, 204.
Chicot County *v.* Sherwood (148 U. S. 529, 13 Sup. Ct. Rep. 695), Mun. Aid, 387, 393.
Chidester *v.* Springfield & I. S. E. R. Co. (59 Ill. 87, 11 Am. Ry. Rep. 183), Contr., 44; Em. Dom., 200.
Child *v.* Hearn (L. R. 9 Ex. 176, 43 L. J. Ex. 100, 22 W. R. 864), Employés, Inj. to, 79; Fences, 84.
Child *v.* New York & N. H. R. Co. (2 Am. & Eng. R. Cas. 329, 129 Mass. 170), Reorg., 7.
Childs *v.* Central R. Co. (33 N. J. L. 323), Estop., 3; Sales of Rds., 12.
Childs *v.* Great Western R. Co. (6 U. C. C. P. 284), Car. of P., 335.
Childs *v.* Kansas City, St. J. & C. B. R. Co. (Mo.) (17 S. W. Rep. 954), App., 106; Em. Dom., 207, 988.
Childs *v.* Kansas City, St. J. & C. B. R. Co. (117 Mo. 414, 23 S. W. Rep. 373), Em. Dom., 1012, 1014, 1018, 1022.
Childs *v.* Little Miami R. Co. (1 Cin. Super. Ct. 480), Car. of M., 175.
Childs *v.* New Haven & N. Co. (14 Am. & Eng. R. Cas. 352, 133 Mass. 253), Em. Dom., 530, 739, 921.
Childs *v.* New Haven &. N. Co. (17 Am. & Eng. R. Cas. 139, 135 Mass. 570), Em. Dom., 785.
Childs *v.* New Orleans City R. Co. (33 La. Ann. 154), St. Rys., 503.
Childs *v.* Northern R. Co. (25 U. C. Q. B. 165), Car. of M., 506.
Childs *v.* Pennsylvania R. Co. (150 Pa. St. 73, 24 Atl. Rep. 341), Cross., Inj. at, 174, 178.
Childs *v.* Somerset & K. R. Co. (Brunner Col. Cas. (U. S.) 593), Assump., 1.
Chillicothe *v.* Brown (38 Mo. App. 609), Hacks, etc., 4.
Chillicothe *v.* Raynard (80 Mo. 185), Agency, 38; Bagg., 105.
Chilton *v.* Central Traction Co. (152 Pa. St. 425, 25 Atl. Rep. 606), Children, Inj. to, 69.
Chilton *v.* Chicago, R. I. & P. R. Co. (72 Iowa 689, 34 N. W. Rep. 473), App., 2.
Chilton *v.* London & C. R. Co. (5 Railw. Cas. 4, 16 M. & W. 212, 11 Jur. 149, 16 L. J. Ex. 89), False Imp., 1.
Chilton *v.* St. Louis & I. M. R. Co. (58 Am. & Eng. R. Cas. 571, 114 Mo. 88, 21 S. W. Rep. 457, 19 L. R. A. 269), Car. of P., 62; Col. Pers., 7.
Chilton *v.* Union Pac. R. Co. (8 Utah 47, 29 Pac. Rep. 963), Death, etc., 279, 326; Employés, Inj. to, 605; Ex. & Ad., 3.
Chiniquy *v.* People (78 Ill. 570), Mun. Aid, 229, 410.
Chippendale *v.* Lancashire & Y. R. Co. (7 Railw. Cas. 824, 15 Jur. 1106, 12 L. J. Q. B. 22), Car. of L. S., 64.
Chippewa County *v.* St. Paul, S. & T. F. R. Co. (41 Am. & Eng. R. Cas. 619, 42 Minn. 295, 44 N. W. Rep. 70), Tax., 119.
Chippewa County Sup'rs *v.* Auditor General (65 Mich. 408, 32 N. W. Rep. 651), Tax., 137, 164.
Chippewa Valley & S. R. Co. *v.* Chicago, St. P., M. & O. R. Co. (40 Am. & Eng. R. Cas. 408, 75 Wis. 224, 6 L. R. A. 601, 44 N. W. Rep. 17), Contr., 66; Words & Ph., 16.
Chisago County *v.* St. Paul & D. R. Co. (27 Minn. 109), Tax., 311.
Chisholm *v.* Chicago & N. R. Co. (2 Ill. App. 174), App., 115.
Chisholm *v.* Great Western R. Co. (10 U. C. C. P. 324), Animals, 361, 365.
Chisholm *v.* Montgomery (2 Woods (U. S.) 584), Mun. Aid, 73.
Chisholm *v.* Old Colony R. Co. (159 Mass. 3, 33 N. E. Rep. 927), Evid., 280.
Chism *v.* Price (54 Ark. 251, 15 S. W. Rep. 883, 1031), Land Grants, 129.
Choisser *v.* People (140 Ill. 21, 29 N. E. Rep. 546), Mun. Aid, 15, 23, 163, 248, 249, 250, 410.
Chollette *v.* Omaha & R. V. R. Co. (37 Am. & Eng. R. Cas. 16, 26 Neb. 159, 41 N. W. Rep. 1106), Car. of P., 509; Franch., 4.
Choppin *v.* New Orleans & C. R. Co. (17 La. Ann. 19), Dam., 102.
Chosen Freeholders of Hudson County *v.* State (24 N. J. L. 718; affirming 23 N. J. L. 206), Ferries, 8.
Chouteau *v.* Allen (70 Mo. 290), Mun. Aid, 72.
Chouteau *v.* Hannibal & St. J. R. Co. (28 Mo. App. 556), Fences, 60.
Chouteau *v.* Missouri Pac. R. Co. (57 Am. & Eng. R. Cas. 282, 122 Mo. 375, 22 S. W. Rep. 458), Dower, 1; Em. Dom., 130, 194.
Chouteau *v.* Union R. & T. Co. (22 Mo. App. 286), Contr., 52; Discrim., 74; Injunc., 10.
Chouteaux *v.* Leech (18 Pa. St. 224), Bills of L., 40, 41, 64; Car. of M., 126, 688.
Chowan & S. R. Co. *v.* Parker (105 N. Car. 246, 11 S. E. Rep. 328), Em. Dom., 17, 524.
Christ Church Inclosure Act, In re (35 Ch. D. 355), Em. Dom., 1156.

Christensen *v.* Union Trunk Line (6 Wash. 75, 32 Pac. Rep. 1018), Elec. Rys., 19, 21, 36; Evid., 39.
Christenson *v.* American Exp. Co. (15 Minn. 270) (Gil. 208), Car. of M., 32; Exp. Cos., 22, 23; Lim. of Liab., 28; Words & Ph., 49, 161.
Christian *v.* Atlantic & N. C. R. Co. (133 U. S. 233, 10 Sup. Ct. Rep. 260), State Aid, 28.
Christian *v.* Columbus & R. R. Co. (38 Am. & Eng. R. Cas. 261, 79 Ga. 460, 7 S. E. Rep. 216), Agency, 90; Death, etc., 105.
Christian *v.* Columbus & R. R. Co. (90 Ga. 124, 15 S. E. Rep. 701), Death, etc., 253, 278, 352.
Christian *v.* First Div. St. P. & P. R. Co. (20 Minn. 21) (Gil. 12), Car. of M., 419, 428.
Christian County Court *v.* Smith (Ky.) (12 S. W. Rep. 134), Mun. Aid, 148.
Christie *v.* Missouri Pac. R. Co. (32 Am. & Eng. R. Cas. 413, 94 Mo. 453, 7 S. W. Rep. 567, 13 West. Rep. 688), Charges, 50; Discrim., 21.
Christman *v.* Philadelphia & R. R. Co. (141 Pa. St. 604, 21 Atl. Rep. 738), Employés, Inj. to, 489.
Christopher & T. St. R. Co. *v.* Central Crosstown R. Co. (4 Hun (N. Y.) 630, mem., 67 Barb. 315), Injunc., 14.
Christopher & T. St. R. Co. *v.* Twenty-third St. R. Co. (48 N. Y. S. R. 805, 20 N. Y. Supp. 556), Costs, 4.
Christy *v.* Chesapeake & O. R. Co. (35 W. Va. 117, 12 S. E. Rep. 1111), Tresp., Inj. to, 28, 41.
Chrystal *v.* Troy & B. R. Co. (31 Am. & Eng. R. Cas. 411, 105 N. Y. 164, 11 N. E. Rep. 380, 6 N. Y. S. R. 833, 7 Cent. Rep. 245; reversing 38 Hun 641, mem.), Children, Inj. to, 3, 12, 39.
Chrystal *v.* Troy & B. R. Co. (124 N. Y. 519, 26 N. E. Rep. 1103, 36 N. Y. S. R. 699; reversing 52 Hun 55, 22 N. Y. S. R. 384; former appeal 31 Am. & Eng. R. Cas. 411, 105 N. Y. 164, 11 N. E. Rep. 380, 6 N. Y. S. R. 833, 7 Cent. Rep. 245; reversing 38 Hun 641, mem.), Children, Inj. to, 21; Evid., 145; Negl., 43.
Chubbuck *v.* Hannibal & St. J. R. Co. (77 Mo. 591), Animals, 168, 357.
Church *v.* Atchison, T. & S. F. R. Co. (1 Okla. 44, 29 Pac. Rep. 530), Car. of M., 543.
Church *v.* Chambers (3 Dana (Ky.) 274), Car. of Slaves, 5, 12.
Church *v.* Chicago, M. & St. P. R. Co. (50 Minn. 218, 52 N. W. Rep. 647), Agency, 26; Employés, Inj. to, 203.
Church *v.* Frost (3 T. & C. (N. Y.) 318), Replev., 5.
Church *v.* Grand Rapids & I. R. Co. (3 Am. & Eng. R. Cas. 198, 70 Ind. 161), Em. Dom., 306, 1004.
Church *v.* Northern C. R. Co. (45 Pa. St. 339), Em. Dom., 341, 959, 961.
Church *v.* Northern Pac. R. Co. (31 Fed. Rep. 529), Cross., Inj. at, 339.
Churchill *v.* Chicago & A. R. Co. (67 Ill. 390, 3 Am. Ry. Rep. 430), Eject. Pass., 88; Tickets & F., 48.
Churchill *v.* Salisburg & D. R. Co. (23 W. R. 894; varying 23 W. R. 534, 33 L. T. 216), Stat. & D., 39.
Churchman's Appeal, In re (17 Phila. (Pa.) 118), Eq., 1.
Church of the Holy Communion *v.* Paterson Extension R. Co. (43 Am. & Eng. R. Cas. 654, 46 N. J. Eq. 372, 20 Atl. Rep. 169), Spec. Perf., 16.
Chute *v.* Washburn (44 Minn. 312, 46 N. W. Rep. 555), Deeds, 31.
Ciancimino's T. & T. Co. *v.* Ciancimino (43 N. Y. S. R. 49, 17 N. Y. Supp. 125), Injunc., 61.
Cincinnati *v.* Morgan (3 Wall. (U. S.) 275), Mun. Aid, 58.
Cincinnati *v.* White (6 Pet. (U. S.) 431), Sts. & H., 12.
Cincinnati & C. A. L. R. Co. *v.* McCool (26 Ind. 140), Car. of M., 323, 334.
Cincinnati & C. A. L. R. Co. *v.* Marcus (38 Ill. 219), Bagg., 88.
Cincinnati & C. R. Co. *v.* McFarland (22 Ind. 459), Em. Dom., 341.
Cincinnati & C. R. Co. *v.* Washburn (25 Ind. 259), Spec. Perf., 16.
Cincinnati & E. R. Co. *v.* Bailey (10 Am. & Eng. R. Cas. 513, 39 Ohio St. 170), Em. Dom., 963.
Cincinnati & G. R. Co. *v.* Mims (71 Ga. 240), Em. Dom., 635, 907; Sts. & H., 272.
Cincinnati & I. R. Co. *v.* Zinn (18 Ohio St. 417), Em. Dom., 438.
Cincinnati & M. R. Co. *v.* Eaton (53 Ind. 307), Death, etc., 146.
Cincinnati & M. R. Co. v. Paskins (36 Ind. 380, 5 Am. Ry. Rep. 570), Leases, 103.
Cincinnati & S. R. Co. *v.* Carthage (5 Am. & Eng. R. Cas. 306, 36 Ohio St. 631), Dam., 60; Sts. & H., 354.
Cincinnati & S. R. Co. *v.* Longworth (30 Ohio St. 108), Em. Dom., 457, 618, 651, 749.
Cincinnati & S. R. Co. *v.* Spring Grove Ave. Co. (Ohio Prob. 87), Em. Dom., 184.
Cincinnati & S. G. A. St. R. Co. *v.* Cumminsville (14 Ohio St. 523), St. Rys., 16, 87, 196, 208.
Cincinnati & Z. R. Co. *v.* Smith (22 Ohio St. 227), Animals, 48, 62; Witn., 179.
Cincinnati Chronicle Co. *v.* White Line C. Transit Co. (1 Cin. Super. Ct. 300), Car. of M., 801.
Cincinnati College *v.* Nesmith (2 Cin. Super. Ct. 24), St. Rys., 205.
Cincinnati, C. G. & C. R. Co. *v.* Murrell (11 Heisk. (Tenn.) 715), Officers, 6, 14.
Cincinnati, H. & D. R. Co. *v.* Ahr (2 Cin. Super. Ct. 504), Flood. Lds., 39.
Cincinnati, H. & D. R. Co. *v.* Bunnell (61 Ind. 183), Animals, 382, 645.
Cincinnati, H. & D. R. Co. *v.* Carr. (11 Am. & Eng. R. Cas. 533, 38 Ohio St. 448), Waters & W., 14.
Cincinnati, H. & D. R. Co. *v.* Chester (57 Ind. 297), Actions, 11; Car. of P., 543; Death, etc., 149.
Cincinnati, H. & D. R. Co. *v.* Cole (29 Ohio St. 126), Charters, 35; Eject. Pass., 122.

Cincinnati, H. & D. R. Co. *v.* Dickey (30 Ohio St. 16), Contr., 78; Words & Ph., 216.
Cincinnati, H. & D. R. Co. *v.* Harter (26 Ohio St. 426, 13 Am. Ry. Rep. 386), Deeds, 3.
Cincinnati, H. & D. R. Co. *v.* Ives (21 N. Y. S. R. 67, 3 N. Y. Supp. 895), Trial, 9.
Cincinnati, H. & D. R. Co. *v.* Jewett (8 Am. & Eng. R. Cas. 702, 37 Ohio St. 649), Jurisd., 7; Receiv., 12, 23.
Cincinnati, H. & D. R. Co. *v.* Kassen (52 Am. & Eng. R. Cas. 427, 49 Ohio St. 230, 16 L. R. A. 674, 31 N. E. Rep. 282), Car. of P., 127; Contrib. Neg., 48.
Cincinnati, H. & D. R. Co. *v.* Leviston (19 Am. & Eng. R. Cas. 633, 97 Ind. 488), Animals, 339.
Cincinnati, H. & D. R. Co. *v.* McMullen (38 Am. & Eng. R. Cas. 165, 117 Ind. 439, 20 N. E. Rep. 287), Actions, 7; Death, etc., 311, 353; Employés, Inj. to, 119, 154, 347; Evid., 149; Fel. Serv., 95, 198, 199, 222, 225.
Cincinnati, H. & D. R. Co. *v.* Norris (61 Ind. 285), Animals, 645.
Cincinnati, H. & D. R. Co. *v.* Pontius (19 Ohio St. 221), Bills of L., 6, 28; Car. of M., 674, 677.
Cincinnati, H. & D. R. Co. *v.* Spratt (2 Duv. (Ky.) 4), Car. of M., 123, 544, 734.
Cincinnati, H. & D. R. Co. *v.* Street (50 Ind. 225), Animals, 266.
Cincinnati, H. & D. R. Co. *v.* Sullivan (32 Ohio St. 152), Sts. & H., 337.
Cincinnati, H. & D. R. Co. *v.* Waterson (4 Ohio St. 424), Animals, 139.
Cincinnati, H. & I. R. Co. *v.* Bartlett (58 Ind. 572, 19 Am. Ry. Rep. 17), Animals, 442.
Cincinnati, H. & I. R. Co. *v.* Butler (23 Am. & Eng. R. Cas. 262, 103 Ind. 31, 2 N. E. Rep. 138), Contrib. Neg., 104; Cross., Inj. at, 130, 133, 194, 198, 229.
Cincinnati, H. & I. R. Co. *v.* Carper (31 Am. & Eng. R. Cas. 36, 112 Ind. 26, 11 West. Rep. 223, 13 N. E. Rep. 122, 14 N. E. Rep. 352), Car. of P., 17, 30, 355; Conduct., 1.
Cincinnati, H. & I. R. Co. *v.* Clifford (33 Am. & Eng. R. Cas. 81, 113 Ind. 460, 13 West. Rep. 384, 15 N. E. Rep. 524), App., 109; Charters, 26; Constr. Rys., 3; Em. Dom., 50, 1013, 1014; Evid., 111; Trial, 196.
Cincinnati, H. & I. R. C. *v.* Eaton (18 Am. & Eng. R. Cas. 254, 94 Ind. 474, 48 Am. Rep. 179), Car. of P., 561.
Cincinnati, H. & I. R. Co. *v.* Ford (13 Am. & Eng. R. Cas. 571, 89 Ind. 92), Animals, 520.
Cincinnati, H. & I. R. Co. *v.* Hildreth (77 Ind. 504), Animals, 88, 122.
Cincinnati, H. & I. R. Co. *v.* Jones (31 Am. & Eng. R. Cas. 491, 111 Ind. 259, 9 West. Rep. 602, 12 N. E. Rep. 113), Animals, 424, 429, 517; Fences, 76.
Cincinnati, H. & I. R. Co. *v.* McDougall (108 Ind. 179, 8 N. E. Rep. 571), Animals, 444, 644; Evid., 5; Pl., 9; Proc., 36.
Cincinnati, H. & I. R. Co. *v.* Ridge (54 Ind. 39), Animals, 139.
Cincinnati Inclined Plane R. Co. *v.* City & S. Tel. Assoc. (46 Am. & Eng. R. Cas. 588, 48 Ohio St. 390, 27 N. E. Rep. 890), Elec. Rys., 13; Franch., 3.
Cincinnati, I. & C. R. Co. *v.* Clarkson (7 Ind. 595), Agency, 34.
Cincinnati, I., St. L. & C. R. Co. *v.* Case (42 Am. & Eng. R. Cas. 537, 122 Ind. 310, 23 N. E. Rep. 797), Car. of L. S., 12, 138.
Cincinnati, I., St. L. & C. R. Co. *v.* Cooper (120 Ind. 469, 22 N. E. Rep. 340, 6 L. R. A. 241), Car. of P., 146; Death, etc., 74, 75, 77; Negl., 4; Tresp., Inj. to, 18.
Cincinnati, I., St. L. & C. R. Co. *v.* Darling (130 Ind. 376, 30 N. E. Rep. 416), Contrib. Neg., 72.
Cincinnati, I., St. L. & C. R. Co. *v.* Davis (44 Am. & Eng. R. Cas. 459, 126 Ind. 99, 25 N. E. Rep. 878), Med. Serv., 12, 18.
Cincinnati, I., St. L. & C. R. Co. *v.* Dufrain (36 Ill. App. 352), Car. of P., 418.
Cincinnati, I., St. L. & C. R. Co. *v.* Gaines (104 Ind. 526, 54 Am. Rep. 334, 4 N. E. Rep. 34, 5 N. E. Rep. 746), Fright. Teams, 1, 3, 6.
Cincinnati, I., St. L. & C. R. Co. *v.* Geisel (119 Ind. 77, 21 N. E. Rep. 470), Charters, 56; Em. Dom., 205.
Cincinnati, I., St. L. & C. R. Co. *v.* Howard (124 Ind. 280, 24 N. E. Rep. 892), Cross., Inj. at, 221, 230, 256, 286, 287, 337; Evid., 172.
Cincinnati, I., St. L. & C. R. Co. *v.* Lang (38 Am. & Eng. R. Cas. 25, 118 Ind. 579, 21 N. E. Rep. 317), Employés, Inj. to, 428, 431, 617; Fel. Serv., 58.
Cincinnati, I., St. L. & C. R. Co. *v.* Long (31 Am. & Eng. R. Cas. 138, 112 Ind. 166, 11 West. Rep. 328, 13 N. E. Rep. 659), Cross., Inj. at, 88; Employés, Inj. to, 304, 496; Sts. & H., 339; Tresp., Inj. to, 52.
Cincinnati, I., St. L. & C. R. Co. *v.* Lutes (112 Ind. 276), Dam., 49, 58.
Cincinnati, I., St. L. & C. R. Co. *v.* Parker (109 Ind. 235, 9 N. E. Rep. 787), Animals, 519, 609.
Cincinnati, I., St. L. & C. R. Co. *v.* Pfitzer (Ohio Prob. 248), Em. Dom., 350, 645, 648, 649; Sts. & H., 120.
Cincinnati, I., St. L. & C. R. Co. *v.* Roesch (126 Ind. 445, 26 N. E. Rep. 171), Employés, Inj. to, 93, 96, 100, 102, 582, 609.
Cincinnati, I., St. L. & C. R. Co. *v.* Smith (127 Ind. 461, 26 N. E. Rep. 1009), Deeds, 9.
Cincinnati, I., St. L. & C. R. Co. *v.* Smock (133 Ind. 411, 33 N. E. Rep. 108), Trial, 217.
Cincinnati, La F. & C. R. Co. *v.* Danville & V. R. Co. (75 Ill. 113), Em. Dom., 316, 1036; Incorp., 11.
Cincinnati, La F. & C. R. Co. *v.* Ducharme (4 Ill. App. 178), Animals, 287.
Cincinnati, N. O. & T. P. R. Co. *v.* Adams (Ky.) (13 S. W. Rep. 428), Death, etc., 86, 96.
Cincinnati, N. O. & T. P. R. Co. *v.* Barker (56 Am. & Eng. R. Cas. 106, 94 Ky. 71, 21 S. W. Rep. 347), Fires, 43, 72, 91, 115, 236.

Cincinnati, N. O. & T. P. R. Co. *v.* Clark (57 Fed. Rep. 125), Fel. Serv., 424, 468.
Cincinnati, N. O. & T. P. R. Co. *v.* Com. (13 Am. & Eng. R. Cas. 270, 81 Ky. 492), Tax., 261.
Cincinnati, N. O. & T. P. R. Co. *v.* Conley (Ky.) (20 S. W. Rep. 816), Death, etc., 308; Employés, 5.
Cincinnati, N. O. & T. P. R. Co. *v.* Disbrow (76 Ga. 253), Car. of L. S., 154; Evid., 153.
Cincinnati, N. O. & T. P. R. Co. *v.* Kentucky (22 Am. & Eng. R. Cas. 225, 115 U. S. 321, 6 Sup. Ct. Rep. 57), Tax., 17, 28.
Cincinnati, N. O. & T. P. R. Co. *v.* Mealor (50 Fed. Rep. 725, 6 U. S. App. 86, 1 C. C. A. 633), Employés, Inj. to, 28; Fel. Serv., 411.
Cincinnati, N. O. & T. P. R. Co. *v.* Privitt (92 Ky. 223, 17 S. W. Rep. 484), Death, etc., 20, 41, 421.
Cincinnati, N. O. & T. P. R. Co. *v.* Russell (92 Tenn. 108, 20 S. W. Rep. 784), Animals, 27, 122, 297, 403; Fences, 93.
Cincinnati, P. & C. R. Co. *v.* Cochran (17 Ind. 516), App., 37.
Cincinnati R. Co. *v.* Commonwealth (80 Ky. 137), Crim. L., 31.
Cincinnati, R. & Ft. W. R. Co. *v.* Wood (82 Ind. 593), Fences, 52; Pl., 136; Witn., 27.
Cincinnati, S. & C. R. Co. *v.* Belle Centre (47 Am. & Eng. R. Cas. 72, 48 Ohio St. 273, 27 N. E. Rep. 464), Em. Dom., 105, 111.
Cincinnati, S. & C. R. Co. *v.* Cook (6 Am. & Eng. R. Cas. 317, 37 Ohio St. 265), Actions, 11; Tickets & F., 131, 132.
Cincinnati, S. & C. R. Co. *v.* Indiana, B. & W. R. Co. (26 Am. & Eng. R. Cas. 615, 44 Ohio St. 287, 7 N. E. Rep. 139), Leases, 1.
Cincinnati, S. & C. R. Co. *v.* Lee (37 Ohio St. 479), Att'ys, 12.
Cincinnati, S. & C. R. Co. *v.* Skillman (13 Am. & Eng. R. Cas. 31, 39 Ohio St. 444), Eject. Pass., 9, 17, 21, 48, 67; Tickets & F., 115.
Cincinnati, S. & C. R. Co. *v.* Sloan (31 Ohio St. 1, 15 Am. Ry. Rep. 376), Receiv., 1, 3, 166, 169.
Cincinnati, S. & M. R. Co., Ex parte (78 Ala. 258), Attach., 60.
Cincinnati Southern R. Co. *v.* Banning (Ohio Prob. 114), Em. Dom., 953.
Cincinnati Southern R. Co. *v.* Chattanooga Elec. St. R. Co. (44 Fed. Rep. 470), St. Rys., 36.
Cincinnati Southern R. Co. *v.* Guenther (19 Fed. Rep. 395), Tax., 245, 282.
Cincinnati Southern R. Co. *v.* Haas (22 Am. & Eng. R. Cas. 164, 42 Ohio St. 239), Em. Dom., 67.
Cincinnati Southern R. Co. *v.* Hudson (88 Ky. 480, 11 S. W. Rep. 509), Farm. Cross., 4.
Cincinnati St. R. Co. *v.* Smith (29 Ohio St. 201), St. Rys., 47.
Cincinnati, U. & Ft. W. R. Co. *v.* Pearce (28 Ind. 502), Bills of L., 40; Cov'ts, 18, 19; Evid., 178; Subscr., 23.
Cincinnati, U. & Ft. W. R. Co. *v.* Sipe (11 Ind. 67), Em. Dom., 250.
Cincinnati, W. & M. R. Co. *v.* Harris (61 Ind. 290), Actions, 8, 11; Em. Dom., 216.
Cincinnati, W. & M. R. Co. *v.* Hiltzhauer (99 Ind. 486), Animals, 266, 364.
Cincinnati, W. & M. R. Co. *v.* Peters (6 Am. & Eng. R. Cas. 126, 80 Ind. 168), Car. of P., 542, 550; Contrib. Neg., 53; Negl., 61.
Cincinnati, W. & M. R. Co. *v.* Stanley (Ind. App.) (27 N. E. Rep. 316), Animals, 199; Contrib. Neg., 53.
Cincinnati, W. & M. R. Co. *v.* Stanley (4 Ind. App. 364, 30 N. E. Rep. 1103), Animals, 624.
Cincinnati, W. & M. R. Co. *v.* Wells (39 Ind. 539, 10 Am. Ry. Rep. 372), Mun. Aid, 411.
Cincinnati, W. & B. R. Co. *v.* Hoffhines (40 Am. & Eng. R. Cas. 221, 46 Ohio St. 643, 22 N. E. Rep. 871), Animals, 469; Evid., 98.
Cincinnati, W. & Z. R. Co. *v.* Clinton County Com'rs (1 Ohio St. 77), Mun. Aid, 46, 286.
Cincinnati, W. & Z. R. Co. *v.* Iliff (13 Ohio St. 235), Deeds, 5.
Citizens' Bank *v.* Board of Liquidation (98 U. S. 140), Fed. Cts., 25.
Citizens' Coach Co. *v.* Camden Horse R. Co. (29 N. J. Eq. 299; reversing 28 N. J. Eq. 145), Injunc., 4, 5.
Citizens' Coach Co. *v.* Camden Horse R. Co. (1 Am. & Eng. R. Cas. 190, 33 N. J. Eq. 267, 36 Am. Rep. 542; affirming 31 N. J. Eq. 525), St. Rys., 230, 238.
Citizens' Horse R. Co. *v.* Belleville (47 Ill. App. 388), Jurisd., 19; Quo War., 1; St. Rys., 67, 81, 85, 91.
Citizens' Pass. R. Co., In re (2 Pittsb. (Pa.) 10), Charters, 48; Em. Dom., 103.
Citizens' Pass. R. Co. *v.* Donohugh (12 Phila. (Pa.) 258), Tax., 95.
Citizens' Pass. R. Co. *v.* Foxley (107 St. 537), Children, Inj. to, 66.
Citizens' Pass. R. Co. *v.* Ketcham (122 Pa. St. 228, 15 Atl. Rep. 733), St. Rys., 184.
Citizens' Pass. R. Co. *v.* Philadelphia (49 Pa. St. 251), Stock, 29; Tax., 280.
Citizens' S. & L. Assoc. *v.* Topeka (20 Wall. (U. S.) 655), Mun. Aid, 405; Tax., 3.
Citizens' St. R. Co. *v.* Carey (56 Ind. 396, 18 Am. Ry. Rep. 126), Children, Inj. to, 63.
Citizens' St. R. Co. *v.* City R. Co. (56 Am. & Eng. R. Cas. 415, 56 Fed. Rep. 746), Fed. Cts., 1; St. Rys., 26, 56.
Citizens' St. R. Co. *v.* Jones (34 Fed. Rep. 579), Franch., 5; St. Rys., 33, 57.
Citizens' St. R. Co. *v.* Memphis (56 Am. & Eng. R. Cas. 385, 53 Fed. Rep. 715), Consol., 32; Elec., Rys., 1; St. Rys., 14, 277.
Citizens' St. R. Co. *v.* Steen (19 Am. & Eng. R. Cas. 30, 42 Ark. 321), St. Rys., 375, 451, 456, 463.
Citizens' St. R. Co. *v.* Twiname (30 Am. & Eng. R. Cas 616, 111 Ind. 587, 10 West. Rep. 824, 13 N. E. Rep. 55), Car. of P., 554; St. Rys., 329, 330, 333.
Citizens' St. R. Co. *v.* Twiname (41 Am. & Eng. R. Cas. 227, 121 Ind. 375, 7 L. R. A.

352, 23 N. E. Rep. 159), Husb. & W., 16, 23.
Citizens' St. R. Co. *v.* Willoeby (58 Am. & Eng. R. Cas. 485, 134 Ind. 563, 33 N. E. Rep. 627), App., 92; Contrib. Neg., 50; Eject. Pass., 57, 58, 82; Evid., 41; St. Rys., 531; Trial, 186; Words & Ph., 250.
City & County of St. Louis *v.* Alexander (23 Mo. 483), Mun. Aid, 61, 125.
City & S. R. Co. *v.* Brauss (18 Am. & Eng. R. Cas. 324, 70 Ga. 368), Eject. Pass., 118; St. Rys., 531.
City & S. R. Co. *v.* Findley (76 Ga. 311), St. Rys., 338, 444; Trial, 124.
City & S. R. Co. *v.* Mayor, etc., of Savannah (77 Ga. 731, 4 Am. St. Rep. 106), St. Rys., 269.
City & S. R. Co. *v.* Waldhaur (84 Ga. 706, 11 S. E. Rep. 452), App., 119.
City & S. L. R. Co. *v.* London County Council ([1891] 2 Q. B. 513), Stat. & D., 12.
City Bank *v.* Rome, W. & O. R. Co. (44 N. Y. 136), Bills of L., 128.
City Council *v.* Port Royal & A. R. Co. (74 Ga. 658), Charters, 64.
City of Glasgow R. Co. *v.* Caledonian R. Co. (L. R. 2 H. L. Sc. App. 160), Em. Dom., 1114.
City of Kansas *v.* Kansas City, T. & W. R. Co. (84 Mo. 410), Em. Dom., 921, 926.
City of Kansas *v.* Kansas Pac. R. Co. (18 Kan. 331, 15 Am. Ry. Rep. 355), Em. Dom., 957.
City R. Co. *v.* Lee (34 Am. & Eng. R. Cas. 566, 50 N. J. L. 435, 7 Am. St. Rep. 798, 14 Atl. Rep. 883, 13 Cent. Rep. 273), St. Rys., 414, 427.
Claflin *v.* Boston & A. R. Co. (157 Mass. 489, 32 N. E. Rep. 659), Easem., 7, 8; Em. Dom., 221; Estop., 15; Evid., 133.
Claflin *v.* Boston & L. R. Co. (7 Allen (Mass.) 341), Car. of M., 303, 304.
Claflin *v.* South Carolina R. Co. (4 Am. & Eng. R. Cas. 231, 4 Hughes (U. S.) 12, 8 Fed. Rep. 118), Mort., 88.
Clampit *v.* Chicago, St. P. & K. C. R. Co. (49 Am. & Eng. R. Cas. 468, 84 Iowa 71, 50 N. W. Rep. 673), Cross., Inj. at, 166, 338, 343, 345, 361; Licensees, Inj. to, 6, 18; Pl., 111; Tresp., Inj. to, 56; Trial, 133, 191; Wan., 59.
Clapp *v.* Cedar County (5 Iowa 15), Judgm., 16; Mun. Aid, 31, 228, 344, 348, 354, 355, 361, 377; Pl., 56.
Clapp *v.* Clapp (4 Silv. Sup. Ct. 379, 7 N. Y. Supp. 495, 27 N. Y. S. R. 180), Receiv., 171.
Clapp *v.* Hudson River R. Co. (19 Barb. (N. Y.) 461), Car. of P., 646; New Tr., 28, 38.
Clapp *v.* Minneapolis & St. L. R. Co. (36 Minn. 6, 29 N. W. Rep. 340), Death, etc., 326; Employés, Inj. to, 189; Evid., 67; Witn., 133.
Clapp *v.* Spokane (53 Fed. Rep. 515), St. Rys., 38.
Clardy *v.* St. Louis, I. M. & S. R. Co. (7 Am. & Eng. R. Cas. 555, 73 Mo. 576), Animals, 127, 142, 145.
Clare *v.* Chicago, R. I. & P. R. Co. (19 Am. & Eng. R. Cas. 621, 79 Mo. 39), Fences, 108.
Clarence R. Co. *v.* Great N. of E., C. & H. J. R. Co. (13 M. & W. 706, 3 Railw. Cas. 426, 7 Jur. 65, 3 G. & D. 389, 4 Q. B. 46, 12 L. J. Q. B. 145), Cross. Rys., 1.
Claridge *v.* South Staffordshire T. Co. ([1892] 1 Q. B. 422), Actions, 3.
Clark, In re (2 Int. Com. Rep. 797, 3 Int. Com. Com. 649), Int. Com., 69.
Clark *v.* Barnard (108 U. S. 436, 2 Sup. Ct. Rep. 878), Charters, 12; Dam., 39.
Clark *v.* Bever (139 U. S. 96, 11 Sup. Ct. Rep. 468; affirming 31 Fed. Rep. 670), Rem. of C., 18; Stockh., 67.
Clark *v.* Boston & A. R. Co. (1 Am. & Eng. R. Cas. 134, 128 Mass. 1), Employés, Inj. to, 325.
Clark *v.* Boston & M. R. Co. (31 Am. & Eng. R. Cas. 548, 64 N. H. 323, 5 N. Eng. Rep. 48, 10 Atl. Rep. 676), Animals, 187; Cross., Inj. at, 177, 189.
Clark *v.* Boston, C. & M. R. Co. (24 N. H. 114), Em. Dom., 719, 1000; Stat., 63.
Clark *v.* Chapman (45 Ga. 486), Attach., 41; Proc., 22.
Clark *v.* Chicago & N. W. R. Co. (70 Wis. 593, 36 N. W. Rep. 326), Nuis., 31.
Clark *v.* Chicago & W. M. R. Co. (62 Mich. 358, 28 N. W. Rep. 914), Animals, 92.
Clark *v.* Chicago, B. & Q. R. Co. (4 McCrary (U. S.) 360, 15 Fed. Rep. 588), Negl., 89.
Clark *v.* Chicago, B. & Q. R. Co. (92 Ill. 43), Employés, Inj. to, 485.
Clark *v.* Chicago, M. & St. P. R. Co. (28 Minn. 69, 9 N. W. Rep. 75), Contrib. Neg., 105; Cross., Inj. at, 334.
Clark *v.* Chicago, M. & St. P. R. Co. (3 McCrary (U. S.) 591, 11 Fed. Rep. 355), Rem. of C., 39.
Clark *v.* Continental Imp. Co. (57 Ind. 135, 18 Am. Ry. Rep. 505), App., 131, 135; Contr., 93; Subscr., 5.
Clark *v.* Dyer (81 Tex. 339, 16 S. W. Rep. 1061), Flood. Lds., 53, 60, 70; Receiv., 70, 124.
Clark *v.* Eastern R. Co. (21 Am. & Eng. R. Cas. 307, 139 Mass. 423, 1 N. E. Rep. 128), Bagg., 74.
Clark *v.* Eighth Ave. R. Co. (36 N. Y. 135, 34 How. Pr. 315; affirming 32 Barb. 657), St. Rys., 443.
Clark *v.* Farrington (11 Wis. 306), Corp., 4, 5; Stock, 18; Subscr., 8, 22.
Clark *v.* Faxton (21 Wend. (N. Y.) 153), Car. of M., 432.
Clark *v.* Flint & P. M. R. Co. (5 Hun (N. Y.) 556), Trusts, 7.
Clark *v.* Grand Trunk R. Co. (29 U. C. Q. B. 136), Evid., 230.
Clark *v.* Great Western R. Co. (8 U. C. C. P. 191), Car. of M., 716.
Clark *v.* Hannibal & St. J. R. Co. (36 Mo. 202), Actions, 11; Animals, 126; Em. Dom., 1059; Flood. Lds., 35; Indep. Contr., 15; Judgm., 42; Trial, 183.
Clark *v.* Iowa City R. Co. (20 Wall. (U. S.) 583), Lim. of Ac., 19.
Clark *v.* Janesville (10 Wis. 136), Mun. Aid, 140, 352, 393.

Clark *v.* Janesville (13 Wis. 414), Mun. Aid, 140.
Clark *v.* Jeffersonville, M. & I. R. Co. (44 Ind., 248), Injunc., 35.
Clark *v.* Kansas City, St. L. & N. W. R. Co. (55 Iowa 455, 8 N. W. Rep. 328), Animals, 405.
Clark *v.* Lake Shore & M. S. R. Co. (94 N. Y. 217; affirming 26 Hun 475, mem.), Lim. of Ac., 4.
Clark *v.* Lowell & L. R. Co. (9 Gray (Mass.) 231), Charges, 69.
Clark *v.* Main Shore Line R. Co. (81 Me. 477, 17 Atl. Rep. 497), Em. Dom., 937.
Clark *v.* Manchester (62 N. H. 577), Abate., 14; Death, etc., 369.
Clark *v.* Manhattan R. Co. (1 N. Y. S. R. 163, 1 Silv. App. 36), Evid., 255.
Clark *v.* Merchants & M. Transp. Co. (151 Mass. 352, 24 N. E. Rep. 49), Employés, Inj. to, 551.
Clark *v.* Midland R. Co. (43 L. T. 381), Cross., Inj. at, 319.
Clark *v.* Missouri Pac. R. Co. (35 Kan. 350, 11 Pac. Rep. 134), Cross., Inj. at, 130, 254.
Clark *v.* Missouri Pac. R. Co. (48 Kan. 654, 29 Pac. Rep. 1138), Employés, Inj. to, 215, 260.
Clark *v.* New York, L. E. & W. R. Co. (40 Hun 605, 2 N. Y. S. R. 249; affirmed in 113 N. Y. 670, mem., 21 N. E. Rep. 1116, 23 N. Y. S. R. 994), Negl., 61; Tresp., Inj. to, 86, 110, 111; Trial, 127.
Clark *v.* New York, L. E. & W. R. Co. (20 N. Y. S. R. 681, 51 Hun 637, 3 N. Y. Supp. 607), Children, Inj. to, 17.
Clark *v.* Northern Pac. R. Co. (47 Minn. 380, 50 N. W. Rep. 365), Cross., Inj. at, 287.
Clark *v.* Ohio River R. Co. (45 Am. & Eng. R. Cas. 475, 34 W. Va. 200, 12 S. E. Rep. 505), Fences, 34.
Clark *v.* Pacific R. Co. (39 Mo. 184), Car. of M., 129.
Clark *v.* Pennsylvania R. Co. (145 Pa. St. 438, 22 Atl. Rep. 989), Waters & W., 15.
Clark *v.* Philadelphia & R. C. & I. Co. (16 Phila. (Pa.) 135), Car. of M., 502; Contr., 80.
Clark *v.* Richmond & D. R. Co. (18 Am. & Eng. R. Cas. 78, 78 Va. 709, 49 Am. Rep. 394), Contrib. Neg., 16, 48; Death., etc., 212.
Clark *v.* Rochester City & B. R. Co. (18 N. Y. S. R. 903, 50 Hun 600, 2 N. Y. Supp. 563), Deeds, 19; St. Rys., 62; Sts. & H., 136, 235.
Clark *v.* Rosedale (70 Miss. 542, 12 So. Rep. 600), Mun. Aid, 239, 242.
Clark *v.* St. Louis, K. C. & N. R. Co. (64 Mo. 440, 17 Am. Ry. Rep. 284), Car. of L. S., 135, 149, 729; Evid., 137.
Clark *v.* St. Paul & S. C. R. Co. (2 Am. & Eng. R. Cas. 240, 28 Minn. 128, 9 N. W. Rep. 581), Employés, Inj. to, 228.
Clark *v.* Second & T. St. Pass. R. Co. (3 Phila. (Pa.) 250), St. Rys., 197.
Clark *v.* Sheldon (106 N. Y. 104, 12 N. E. Rep. 341, 8 N. Y. S. R. 537, 7 Cent. Rep. 923), Mun. Aid, 421.
Clark *v.* Sheldon (134 N. Y. 333, 32 N. E. Rep. 23, 48 N. Y. S. R. 279; affirming 10 N. Y. S. R. 357), Mun. Aid, 421, 450.
Clark *v.* Southern Pac. R. Co. (27 Tex. 100), Witn., 18.
Clark *v.* Syracuse & U. R. Co. (11 Barb. (N. Y.) 112), Animals, 50, 213, 272, 383; Contrib. Neg., 5.
Clark *v.* Vermont & C. R. Co. (28 Vt. 103), Em. Dom., 989; Fences, 46; Indep. Contr., 9; License, 4.
Clark *v.* Western N. C. R. Co. (1 Winst. (N. Car.) 109), Animals, 494.
Clark *v.* White (59 Ind. 435), Constr. Rys., 106.
Clark *v.* Wilmington & W. R. Co. (18 Am. & Eng. R. Cas. 366, 91 N. Car. 506, 49 Am. Rep. 647), Eject. Pass., 17, 48.
Clark *v.* Wilmington & W. R. Co. (48 Am. & Eng. R. Cas. 546, 109 N. Car. 430, 14 S. E. Rep. 43), Contrib. Neg., 48; Death, etc., 210; Negl., 48; Tresp., Inj. to, 55, 61, 93; Trial, 101.
Clark *v.* Wootton (63 Md. 113), Attach., 26; Husb. & W., 9.
Clarke, In re (L. R. 21 Ch. D. 776, 52 L. J. Ch. D. 88), Em. Dom., 1143.
Clarke *v.* Blackmar (47 N. Y. 150), Sts. & H., 149.
Clarke *v.* Central R. & B. Co. (52 Am. & Eng. R. Cas. 115, 50 Fed. Rep. 338), Corp., 12; For. Corp., 6; Stockh., 20.
Clarke *v.* Central R. & B. Co. (54 Fed. Rep. 556), Receiv., 53.
Clarke *v.* Chicago, St. P., M. & O. R. Co. (33 Minn. 359, 23 N. W. Rep. 536), Fires, 109, 249.
Clarke *v.* Grand Trunk R. Co. (35 U. C. Q. B. 57), Em. Dom., 1276.
Clarke *v.* Hancock County Sup'rs (27 Ill. 305), Mun. Aid, 143, 148, 342.
Clarke *v.* Janesville (1 Biss. (U. S.) 98), Mun. Aid, 387.
Clarke *v.* Manchester, S. & L. R. Co. (1 Johns. & H. 631), Cross., St. & H., 7.
Clarke *v.* Needles (25 Pa. St. 338), Car. of M., 38, 73.
Clarke *v.* Omaha & S. W. R. Co. (4 Neb. 458, 19 Am. Ry. Rep. 423), Corp., 9; Reorg., 1; Stockh., 121.
Clarke *v.* Omaha & S. W. R. Co (5 Neb. 314), Sales of Rds., 2.
Clarke *v.* Pennsylvania Co. (132 Ind. 199, 31 N. E. Rep. 808), Contrib. Neg., 44; Fel. Serv., 115, 411.
Clarke *v.* Philadelphia, W. & B. R. Co. (4 Houst. (Del.) 158, 6 Am. Ry. Rep. 7), Int. Com., 204.
Clarke *v.* Rochester (28 N. Y. 605; affirming 24 Barb. 446, 5 Abb. Pr. 107, 14 How. Pr. 193; reversing 13 How. Pr. 204), Mun. Aid, 44.
Clarke *v.* Rochester & S. R. Co. (14 N. Y. 570), Car. of L. S., 24.
Clarke *v.* Rochester, L. & N. F. R. Co. (18 Barb. (N. Y.) 350), Farm. Cross., 3, 9.
Clarke *v.* Sarnia St. R. Co. (42 U. C. Q. B. 39), Ult. Vir., 24.
Clarkson *v.* Buchanan (53 Mo. 563), Land Grants, 133.
Clarkson *v.* Erie & N. S. Dispatch (6 Ill. App. 284), Consol., 40; Estop., 5.

Clarkson *v.* Hudson River R. Co. (12 N. Y. 304), Em. Dom., 50.
Clarkson *v.* Wabash, St. L. & P. R. Co. (84 Mo. 503), Animals, 619.
Clary *v.* Burlington & M. R. R. Co. (11 Am. & Eng. R. Cas. 493, 14 Neb. 232), Animals, 99.
Clary *v.* Iowa Midland R. Co. (37 Iowa 344), Animals, 126, 368, 644, 645.
Clawson *v.* Chicago & G. S. R. Co. (20 Am. & Eng. R. Cas. 56, 95 Ind. 152), Cross., St. & H., 3, 27.
Claxton *v.* Lexington & B. S. R. Co. (13 Bush (Ky.) 636, 17 Am. Ry. Rep. 12), Car. of P., 573; Contrib. Neg., 50; Death, etc., 423; Mines, etc., 11; Negl., 4.
Clay *v.* Central R. & B. Co. (42 Am. & Eng. R. Cas. 76, 84 Ga. 345, 10 S. E. Rep. 967), Death, etc., 16, 365.
Clay *v.* Chicago & A. R. Co. (17 Mo. App. 629), Negl., 88, 106.
Clay *v.* Chicago & A. R. Co. (24 Mo. App. 39), Negl., 61; Trial, 217.
Clay *v.* East Tenn. & V. R. Co. (6 Heisk. (Tenn.) 421, 12 Am. Ry. Rep. 38), Deeds of Tr., 7.
Clay *v.* Hawkins County Justices (5 Lea (Tenn.) 137), Mun. Aid, 320, 336.
Claybaugh *v.* Baltimore & O. R. Co. (108 Ind. 262, 9 N. E. Rep. 100), Drains, 2.
Claybrook *v.* Hannibal & St. J. R. Co. (19 Mo. App. 432), Eject. Pass., 119; Tickets & F., 74.
Clay County *v.* Society for Savings (5 Am. & Eng. R. Cas. 170, 104 U. S. 579), Mun. Aid, 61, 255, 342, 378.
Clayton *v.* Chicago, I. & D. R. Co. (67 Iowa 238, 25 N. W. Rep. 150), Em. Dom., 144, 566, 579, 591.
Clayton *v.* Great Western R. Co. (23 U. C. C. P. 137), Animals, 157.
Clearwater *v.* Meredith (1 Wall. (U. S.) 25), Consol., 12, 33.
Cleary *v.* City R. Co. (76 Cal. 240, 18 Pac. Rep. 269), Death, etc., 408.
Cleary *v.* Philadelphia & R. R. Co. (140 Pa. St. 19, 21 Atl. Rep. 242), Cross., Inj. at, 280.
Cleaveland *v.* Chicago & N. W. R. Co. (35 Iowa 220), Animals, 200.
Cleaveland *v.* Grand Trunk R. Co. (42 Vt. 449), Fires, 34, 264; Parties, 6.
Cleaveland County Com'rs *v.* Atlanta & C. A. L. R. Co. (13 Am. & Eng. R. Cas. 266, 86 N. Car. 541), Tax., 277.
Cleaves *v.* Pigeon Hill Granite Co. (145 Mass. 541, 5 N. Eng. Rep. 507, 14 N. E. Rep. 646), Cross., Inj. at, 230, 319.
Cleburne *v.* Gulf, C. & S. F. R. Co. (25 Am. & Eng. R. Cas. 130, 66 Tex. 457, 1. S. W. Rep. 342), Mun. Corp., 2.
Clegg *v.* Grand Trunk R. Co. (10 Ont. 708), Death, etc., 39.
Cleghorn *v.* New York C. & H. R. R. Co. (56 N. Y. 44, 6 Am. Ry. Rep. 179), Agency, 93; Dam., 38, 96.
Cleland *v.* Minneapolis & St. L. R. Co. (7 Am. & Eng. R. Cas. 589, 29 Minn. 170, 12 N. W. Rep. 461), App., 118.
Clemens *v.* Hannibal & St. J. R. Co. (53 Mo. 366, 12 Am. Ry. Rep. 351), Dam., 103; Fires, 268, 269, 288, 289, 334.
Clement *v.* Canfield (28 Vt. 302), Fences, 17.
Clement *v.* New York C. & H. R. R. Co. (30 N. Y. S. R. 713, 9 N. Y. Supp. 601, 56 Hun 643), Car. of M., 313; Tender, 1; Trover, 9.
Clement *v.* Rankin Knitting Co. (20 N. Y. S. R. 196, 3 N. Y. Supp. 169), Employés, Inj. to, 99.
Clement *v.* Wentworth County (22 U. C. C. P. 300), Mun. Aid, 153.
Clements *v.* Burlington, C. R. & N. R. Co. (74 Iowa 442, 38 N. W. Rep. 144), Evid., 20.
Clements *v.* East Tenn., V. & G. R. Co. (77 Ala. 533), Contrib. Neg., 11; Evid. 137.
Clements *v.* Warner (24 How. (U. S.) 394), Land Grants, 50.
Clementson *v.* Grand Trunk R. Co. (42 U. C. Q. B. 263), Bills of L., 52, 110; Car. of M., 494.
Clemings *v.* Chicago, R. I. & P. R. Co. (21 Mo. App. 606), Animals, 622.
Cleveland *v.* Central R. Co. (73 Ga. 793), Death, etc., 431.
Cleveland *v.* State Bank (16 Ohio St. 236), Mun. Aid, 191.
Cleveland & M. R. Co. *v.* Himrod Furnace Co. (3 Am. & Eng. R. Cas. 741, 37 Ohio St. 321, 41 Am. Rep. 509), Ult. Vir., 21.
Cleveland & M. R. Co. *v.* Himrod Furnace Co. (37 Ohio St. 434), New Tr., 82.
Cleveland & M. R. Co. *v.* Robbins (35 Ohio St. 483), Stock., 79.
Cleveland & M. V. R. Co. *v.* Wick (35 Ohio St. 247), Lim. of Ac., 48.
Cleveland & P. R. Co., In re (2 Pittsb. (Pa.) 348), Em. Dom., 109, 114; Stat., 57.
Cleveland & P. R. Co. *v.* Ball (5 Ohio St. 568), Em. Dom., 453, 609, 637, 749; Witn., 121.
Cleveland & P. R. Co. *v.* Kelley (5 Ohio St. 180), Constr. Rys., 25, 119.
Cleveland & P. R. Co. *v.* McConnell (26 Ohio St. 57, 11 Am. Ry. Rep. 266), Animals, 99.
Cleveland & P. R. Co. *v.* Rowan (66 Pa. St. 393), Death, etc., 233, 413.
Cleveland & P. R. Co. *v.* Sargent (19 Ohio St. 438), Car. of L. S., 52; Car. of M., 499.
Cleveland & P. R. Co. *v.* Speer (56 Pa. St. 325), Charters, 14, 67, 107; Em. Dom., 666; Sts. & H., 54.
Cleveland & P. R. Co. *v.* Stackhouse (10 Ohio St. 567), Em. Dom., 1068.
Cleveland & P. R. Co. *v.* Sutherland (19 Ohio St. 151), Car. of P., 630.
Cleveland & St. L. R. Co. *v.* Pattison (15 Ind. 70), Agency, 27.
Cleveland & T. R. Co. *v.* Johnson (10 Ohio St. 591), App., 123.
Cleveland & T. R. Co. *v.* Perkins (17 Mich. 296), Car. of L. S., 11; Witn., 115.
Cleveland & T. R. Co. *v.* Prentice (13 Ohio St. 373), Em. Dom., 315.
Cleveland, C. & C. R. Co. *v.* Bartram (11 Ohio St. 457), Car. of P., 43, 75; Dam., 38; Tickets & F., 46; Tresp., Inj. to, 13.
Cleveland, C. & C. R. Co. *v.* Crawford (24 Ohio St. 631, 7 Am. Ry. Rep. 172), Con-

trib. Neg., 86; Cross., Inj. at, 245, 254, 283; Death, etc., 178; Negl., 76.
Cleveland, C. & C. R. Co. *v.* Elliott (4 Ohio St. 474), Animals, 34, 279.
Cleveland, C. & C. R. Co. *v.* Keary (3 Ohio St. 201), Agency, 83; Fel. Serv., 1, 3, 73, 202, 218, 240.
Cleveland, C. & C. R. Co. *v.* Mara (26 Ohio St. 185, 13 Am. Ry. Rep. 335), Appear., 3; Evid., 174.
Cleveland, C. & C. R. Co. *v.* Terry (8 Ohio St. 570), Contrib. Neg., 21; Cross., Inj. at, 273.
Cleveland, C., C. & I. R. Co. *v.* Asbury (120 Ind. 289, 22 N. E. Rep. 140), Cross., Inj. at, 129; Negl., 90; Trial, 209.
Cleveland, C., C. & I. R. Co. *v.* Brown (45 Ind. 90), Animals, 145.
Cleveland, C., C. & I. R. Co. *v.* Closser (45 Am. & Eng. R. Cas. 275, 126 Ind. 348, 26 N. E. Rep. 159), Car. of M., 409; Contr., 63; Discrim., 1, 12, 64, 65, 68, 70.
Cleveland, C., C. & I. R. Co. *v.* Coburn (17 Am. & Eng. R. Cas. 37, 91 Ind. 557), Em. Dom., 213.
Cleveland, C., C. & I. R. Co. *v.* Crossley (36 Ind. 370, 5 Am. Ry. Rep. 552), Animals, 122, 387.
Cleveland, C., C. & I. R. Co. *v.* Elliott (28 Ohio St. 340, 14 Am. Ry. Rep. 123), Contrib. Neg., 86; Cross., Inj. at, 198, 254.
Cleveland, C., C. & I. R. Co. *v.* Harrington (49 Am. & Eng. R. Cas. 358, 131 Ind. 426, 30 N. E. Rep. 37), Contrib. Neg., 84; Cross., Inj. at, 245; Negl., 28; Sts. & H., 319, 328, 331; Trial, 110.
Cleveland, C., C. & I. R. Co. *v.* Long (24 Ohio St. 133), New Tr., 93.
Cleveland, C., C. & I. R. Co. *v.* McClung (28 Am. & Eng. R. Cas. 70, 119 U. S. 454, 7 Sup. Ct. Rep. 262; affirming 15 Fed. Rep. 905), Rem. of C., 11; Rev., 2.
Cleveland, C., C & I. R. Co. *v.* Manson (30 Ohio St. 451), Car. of P., 137, 144, 352; Children, Inj. to, 127.
Cleveland, C., C. & I. R. Co. *v.* Newbrander (11 Am. & Eng. R. Cas. 480, 40 Ohio St. 15), Cat.-Gds., 8.
Cleveland, C., C. & I. R. Co. *v.* Newell (8 Am. & Eng. R. Cas. 377, 75 Ind. 542), Derailm., 4, 6; Evid., 31; Trial, 149.
Cleveland, C., C. & I. R. Co. *v.* Newell (23 Am. & Eng. R. Cas. 492, 104 Ind. 264, 54 Am. Rep. 312, 3 N. E. Rep. 836), Dam., 25; Evid., 125, 209; Witn., 173.
Cleveland, C., C. & I. R. Co. *v.* Schneider (35 Am. & Eng. R. Cas. 334, 45 Ohio St. 678, 17 N. E. Rep. 321), Contrib. Neg., 84; Cross., Inj. at, 46, 48, 52, 67, 214.
Cleveland, C., C. & I. R. Co. *v.* Scudder (13 Am. & Eng. R. Cas. 561, 40 Ohio St. 173), Animals, 239.
Cleveland, C., C. & I. R. Co. *v.* Swift (42 Ind. 119), Animals, 109, 110.
Cleveland, C., C. & I. R. Co. *v.* Walrath (8 Am. & Eng. R. Cas. 371, 38 Ohio St. 461, 43 Am. Rep. 433), Sleep. Car Cos., 37, 38.
Cleveland, C., C. & I. R. Co. *v.* Wynant (100 Ind. 160), Negl., 89; Pl., 172.
Cleveland, C., C. & I. R. Co. *v.* Wynant (35 Am. & Eng. R. Cas. 328, 114 Ind. 525, 14 West. Rep. 512, 17 N. E. Rep. 118), Evid., 67; Fright. Teams, 3, 6; Pl., 5.
Cleveland, C., C. & I. R. Co. *v.* Wynant (119 Ind. 539, 20 N. E. Rep. 730), Fright. Teams, 6.
Cleveland, C., C. & I. R. Co. *v.* Wynant (55 Am. & Eng. R. Cas. 80, 134 Ind. 681, 34 N. E. Rep. 569), App., 121; Cross., Inj. at, 17; Evid., 285; Sts. & H., 417.
Cleveland, C., C. & St. L. R. Co. *v.* Abney (43 Ill. App. 92), Animals, 200.
Cleveland, C., C. & St. L. R. Co. *v.* Ahrens (42 Ill. App. 434), Animals, 49, 63, 211, 400, 481; Contrib. Neg., 91.
Cleveland, C., C. & St. L. R. Co. *v.* Arbaugh (47 Ill. App. 360), Contrib. Neg., 19; Cross., Inj. at, 225.
Cleveland, C., C. & St. L. R. Co. *v.* Backus (133 Ind. 513, 33 N. E. Rep. 421), Tax., 258.
Cleveland, C., C. & St. L. R. Co. *v.* Brown (56 Fed. Rep. 804), Employés, Inj. to, 102, 344, 770; Fel. Serv., 315.
Cleveland, C., C. & St. L. R. Co. *v.* Cincinnati (1 Ohio Prob. 269), Sts. & H., 98.
Cleveland, C., C. & St. L. R. Co. *v.* Doerr (41 Ill. App. 530), Cross., Inj. at, 4; Death, etc., 174; Evid., 84.
Cleveland, C., C. & St. L. R. Co. *v.* Ducharme (49 Ill. App. 520), Animals, 215, 284, 568.
Cleveland, C., C. & St. L. R. Co. *v.* Ketcham (133 Ind. 346, 33 N. E. Rep. 116), Car. of Mails, 17, 18; Car. of P., 18, 54; Tresp., Inj. to, 19.
Cleveland, C., C. & St. L. R. Co. *v.* McHenry 47 Ill. App. 301), Car. of P., 183, 358.
Cleveland, C., C. & St. L. R. Co. *v.* Monaghan (140 Ill. 474, 30 N. E. Rep. 869; affirming 41 Ill. App. 498), Death, etc., 245, 329.
Cleveland, C., C. & St. L. R. Co. *v.* Myers (43 Ill. App. 251), Animals, 117, 507; Fences, 58.
Cleveland, C., C. & St. L. R. Co. *v.* Prewitt (54 Am. & Eng. R. Cas. 198, 134 Ind. 557, 33 N. E. Rep. 367), Consol., 46; Evid., 211.
Cleveland, C., C. & St. L. R. Co. *v.* Rice (48 Ill. App. 51), Animals, 63; Pl., 37.
Cleveland, C., C. & St. L. R. Co. *v.* Richey (43 Ill. App. 247), Cross., Inj. at, 137, 141.
Cleveland, C., C. & St. L. R. Co. *v.* Roper (47 Ill. App. 320), Animals, 199.
Cleveland, C., C. & St. L. R. Co. *v.* Walter (45 Ill. App. 642), Employés, Inj. to, 59, 346, 380.
Cleveland, C., C. & St. L. R. C. *v.* Walter (147 Ill. 60, 35 N. E. Rep. 529; affirming 45 Ill. App. 642), App., 85; Bridges, 25; Employés, Inj. to, 57.
Cleveland, P. & A. R. Co. *v.* Curran (19 Ohio St. 1), Car. of L. S., 118, 127.
Cleveland, P. & A. R. Co. *v.* Erie (27 Pa. St. 380), Charters, 69, 70.
Cleveland, P. & A. R. Co. *v.* Pennsylvania (15 Wall. (U. S.) 300, 4 Brews. (Pa.) 183, 4 Am. Ry. Rep. 368), Tax., 44, 174.
Clews *v.* Brunswick & A. R. Co. (50 Ga. 522), Cred. Bill, 8.

Clews *v.* Brunswick & A. R. Co. (54 Ga. 315), State Aid, 17.
Clews *v.* First Mortgage Bondholders (51 Ga. 131), Insolv., 5.
Clews *v.* Lee County (2 Woods (U. S.) 474), Mun. Aid, 439.
Clews *v.* Rockford, R. I. & St. L. R. Co. (49 How. Pr. (N. Y.) 117), Proc., 35.
Clews *v.* Rockford, R. I. & St. L. R. Co. (2 Hun (N. Y.) 379, 4 T. & C. 669), Attach., 8.
Click *v.* Western N. C. R. Co. (98 N. Car. 390, 4 S. E. Rep. 183), Em. Dom., 238, 475.
Cliff *v.* Midland R. Co. (L. R. 5 Q. B. 258, 18 W. R. 456, 22 L. T. 382), Cross., Inj. at, 59.
Clifford *v.* Dam (12 J.& S. (N. Y.) 391), Dam., 67, 74.
Clifford *v.* Denver, S. P. & P. R. Co. (9 Colo. 333, 12 Pac. Rep. 219), Employés, Inj. to, 14, 15.
Clifford *v.* Old Colony R. Co. (141 Mass. 564, 6 N. E. Rep. 751), Fel. Serv., 290, 343.
Clifton *v.* State (73 Ala. 473), Crim. L., 6, 35; Witn., 6.
Clinch *v.* South Side R. Co. (1 Hun (N. Y.) 636, 4 T. & C. 224), Receiv., 16, 21.
Clinch *v.* South Side R. Co. (2 Hun (N. Y.) 154, 4 T. & C. 683), Receiv., 35.
Cline *v.* Crescent City R. Co. (41 La. Ann. 1031, 6 So. Rep. 851; further appeal 43 La. Ann. 327, 9 So. Rep. 122), St. Rys., 176.
Cline *v.* Crescent City R. Co. (43 La. Ann 327, 9 So. Rep. 122; former appeal 41 La Ann. 1031, 6 So. Rep. 851), St. Rys., 178, 231; Sts. & H., 347.
Clingan *v.* East Tenn., V. & G. R. Co. (2 Lea (Tenn.) 726), Trial, 27.
Clinton *v.* Cedar Rapids & M. R. R. Co. (24 Iowa 455), Charters, 105; Stat., 8; Sts & H., 62, 141.
Clinton *v.* Clinton & L. Horse R. Co. (37 Iowa 61), St. Rys., 199, 259; Sts. & H., 302.
Clinton *v.* Missouri Pac. R. Co. (122 U. S. 469, 7 Sup. Ct. Rep. 1268), Em. Dom., 901, 937.
Clinton *v.* Root (58 Mich. 182, 24 N. W. Rep. 667), Witn., 141
Clinton & P. H. R. Co. *v.* Brown (21 La. Ann. 248), Mort., 308.
Clinton & P. H. R. Co. *v.* Eason (14 La. Ann. 828), Lim. of Ac., 20; Subscr., 86.
Clinton & P. H. R. Co. *v.* Lee (22 La. Ann. 287), Comprom., 5; Lim. of Ac., 45; Mort., 305.
Clinton & P. H. R. Co. *v.* Tax Collector (30 La. Ann. 626), Tax., 349.
Clinton & P. H. R. Co. *v.* Whitaker (22 La. Ann. 209), Lim. of Ac., 45.
Clonmel Traders *v.* Waterford & L. R. Co. (4 Ry. & C. T. Cas. 92), Charges, 108; Leases, 131, 134.
Clopton *v.* Philadelphia & R. R. Co. (54 Pa. St. 356), Mort., 82.
Close *v.* Burlington, C. R. & N. R. Co. (17 Am. & Eng. R. Cas. 33, 64 Iowa 149, 19 N. W. Rep. 886), Cov'ts, 8; Deeds, 31, 36.
Close *v.* Lake Shore & M. S. R. Co. (37 Am. & Eng. R. Cas. 522, 73 Mich. 647, 41 N. W. Rep. 828), Cross., Inj. at, 297; Evid., 31; Sts. & H., 409, 411; Trial, 47; Witn., 66.
Clotworthy *v.* Hannibal & St. J. R. Co. (21 Am. & Eng. R. Cas. 371, 80 Mo. 220), Car. of P., 421, 427, 608.
Cloud *v.* St. Louis, I. M. & S. R. Co. (14 Mo. App. 136), Conduct., 1; Tickets & F., 79, 81.
Clough *v.* London & N. W. R. Co. (L. R. 7 Ex. 26, 41 L. J. Ex. 17, 25 L. T. 708), Car. of M., 313.
Clouse *v.* Canada Southern R. Co. (14 Am. & Eng. R. Cas. 456, 4 Ont. 28), Agency, 10; Mort., 76.
Clout, In re (46 L. T. 141), Em. Dom., 1178.
Clow *v.* Pittsburg Traction Co. (158 Pa. St. 410), Cable Rys., 8; Evid., 125.
Clowers *v.* Wabash, St. L. & P. R. Co. (21 Mo. App. 213), Employés, Inj. to, 93, 218; Fel. Serv., 73, 349, 496.
Clune *v.* Brooklyn El. R. Co. (15 N. Y. S. R. 825, 48 Hun 618, 1 N. Y. Supp. 239), Car. of P., 134.
Clune *v.* Milwaukee & N. R. Co. (75 Wis. 532, 44 N. W. Rep. 843), Fires, 110.
Clussman *v.* Long Island R. Co. (9 Hun (N. Y.) 618; affirmed (?) in 73 N. Y. 606, mem.), Stat. & D., 76.
Clute *v.* New York C. & H. R. R. Co. (120 N. Y. 267, 24 N. E. Rep. 317, 30 N. Y. S. R. 967; affirming 42 Hun 654, 5 N. Y. S. R. 117), Deeds, 24.
Clutzbeher *v.* Union Pass. R. Co. (Pa.) (1 Atl. Rep. 597), Children, Inj. to, 99.
Clyde *v.* Hubbard (88 Pa. St. 358), Car. of M., 576.
Clyde *v.* Knight (12 R. I. 194), Set-off, 3.
Clyde *v.* Richmond & D. R. Co. (55 Fed. Rep. 445), Mort., 176.
Clyde *v.* Richmond & D. R. Co. (56 Fed. Rep. 539), Intervent., 2; Receiv., 63.
Clyde *v.* Richmond & D. R. Co. (57 Fed. Rep. 436), Fed. Cts., 11; Ry. Com'rs, 26.
Clymer *v.* Central R. Co. (5 Blatchf. (U. S.) 317), Leases, 111.
Coakley *v.* Boston & M. R. Co. (159 Mass. 32, 33 N. E. Rep. 930), Sts. & H., 33.
Coal Creek Min. Co. *v.* Davis (90 Tenn. 711, 18 S. W. Rep. 387), Fel. Serv., 108.
Coale *v.* Hannibal & St. J. R. Co. (60 Mo. 227, 9 Am. Ry. Rep. 210), Fires, 156, 232, 264, 272, 288, 322.
Coal Run Coal Co. *v.* Strawn (15 Ill. App. 347), Employés, Inj. to, 487.
Coast Line R. Co. *v.* Boston (83 Ga. 387, 9 S. E. Rep. 1108), St. Rys., 413, 445.
Coast Line R. Co. *v.* Cohen (50 Ga. 451), Injunc., 14; Sts. & H., 69.
Coast Line R. Co. *v.* Mayor, etc., of Savannah (30 Fed. Rep. 646), Stat., 12; St. Rys., 148; Sts. & H., 342a.
Coates *v.* Boston & M. R. Co. (153 Mass. 297, 26 N. E. Rep. 864), Employés, Inj. to, 582, 688.
Coates *v.* Burlington, C. R. & N. R. Co. (15 Am. & Eng. R. Cas. 265, 62 Iowa 486, 17 N. W. Rep. 760), Death, etc., 235, 284, 344; Employés, Inj. to, 564, 596; Witn., 180.
Coates *v.* Missouri, K. & T. R. Co. (61 Mo.

38, 8 Am. Ry. Rep. 60), Fires, 124, 264, 277, 286.
Coates *v.* Moncton (25 New Brun. 605), Tax., 401.
Coates *v.* United States Exp. Co. (45 Mo. 238), Car. of M., 546; Exp. Cos., 76.
Cobb *v.* Columbia & G. R. Co. (37 So. Car. 194), Agency, 80.
Cobb *v.* Great Western R. Co. (58 Am. & Eng. R. Cas 169, [1893] 1 Q. B. 459), Car. of P., 329, 613.
Cobb *v.* Illinois & St. L. R. & C. Co. (68 Ill. 233), Em. Dom., 1037; Waters & W., 21.
Cobb *v.* Illinois C. R. Co. (38 Iowa 601), Car. of M., 41, 57, 66, 122, 131, 189, 587, 692, 763, 773, 793, 800; Lim. of Ac., 36, 74.
Cobb *v.* Illinois C. R. Co. (88 Ill. 394, 21 Am. Ry. Rep. 317), Car. of M., 140, 720.
Cobb *v.* Kansas City, Ft. S. & M. R. Co. (43 Mo. App. 313), Animals, 91, 131.
Cobb *v.* Mid Wales R. Co. (L. R. 1 Q. B. 342, 12 Jur. N. S. 228, 35 L. J. Q. B. 117, 14 W. R. 775), Em. Dom., 1108.
Cobourg & P. R. Co., In re (16 Grant's Ch. (U. C.) 571), Insolv., 4.
Cochecho R. Co. *v.* Farrington (26 N. H. 428), Trial, 15.
Cocheco Aqueduct Assoc. *v.* Boston & M. R. Co. (59 N. H. 312), Contr., 20.
Cocheco Aqueduct Assoc. *v.* Boston & M. R. Co. (62 N. H. 345), Pl., 147.
Cocheco Mfg. Co. *v.* Strafford (51 N. H. 455), Tax., 129.
Cochran *v.* Dinsmore (49 N. Y. S. R. 249), Exp. Cos., 87.
Cochran *v.* Iowa C. R. Co. (Iowa) (53 N. W. Rep. 225), Animals, 452.
Cock *v.* Stewart (85 Mo. 575), Tax., 36.
Cockcroft's Appeal (60 Conn. 161, 22 Atl. Rep. 482), Em. Dom., 870.
Cockle *v.* London & S. E. R. Co. (L. R. 7 C. P. 321, 41 L. J. C. P. 140, 20 W. R. 754, 27 L. T. 320), Car. of P., 241.
Coddington *v.* Brooklyn Crosstown R. Co. (26 Am. & Eng. R. Cas 393, 102 N. Y. 66, 5 N. E. Rep. 797; affirming 32 Hun 467), St. Rys., 332.
Coddington *v.* Gilbert (17 N. Y. 489; affirming 2 Abb. Pr. 242, 5 Duer 72), Attach., 22.
Coddington *v.* Pensacola & G. R. Co. (103 U. S. 409), Lim. of Ac., 46.
Code *v.* Carlton (18 Neb. 328), Assign., 25.
Codman *v.* Vermont & C. R. Co. (16 Blatchf. (U. S.) 165), Bills & N., 15.
Codman *v.* Vermont & C. R. Co. (17 Blatchf. (U. S.) 1), Bonds, 52, 57.
Cody *v.* Central Pac. R. Co. (4 Sawy. (U. S.) 114), Tickets & F., 59, 102.
Cody *v.* New York & N. E. R. Co. (151 Mass. 462, 7 L. R. A. 843, 24 N. E. Rep. 402), Car. of P., 497.
Coe *v.* Beckwith (10 Abb. Pr. (N. Y.) 296, 31 Barb. 339, 19 How. Pr. 398), Deeds of Tr., 12; Mort., 149.
Coe *v.* Caledonia & M. R. Co. (27 Minn. 197, 6 N. W. Rep. 621), Mun. Aid, 116, 117, 147.
Coe *v.* Cayuga Lake R. Co. (19 Blatchf. (U. S.) 522, 8 Fed. Rep. 534), Bills & N., 3.
Coe *v.* Columbus, P. & I. R. Co. (10 Ohio St. 372), Bonds, 15; Corp., 5, 7; Em. Dom., 224; Mort., 12, 37, 47, 88, 175, 239, 240, 269, 283.
Coe *v.* Delaware, L. & W. R. Co. (4 Am. & Eng. R. Cas. 513, 34 N. J. Eq. 266; reversing 31 N. J. Eq. 105), Estop., 35; Mort., 44.
Coe *v.* East & W. R. Co. (52 Fed. Rep. 531), Bonds, 2, 6, 7; Constr. Rys., 121; Mort., 270; Stockh., 9.
Coe. *v.* Johnson (18 Ind. 218), Deeds of Tr., 1.
Coe *v.* Knox County Bank (10 Ohio St. 412), Exec., 23.
Coe *v.* Louisville & N. R. Co. (3 Fed. Rep. 775), Stock Yards, 3.
Coe *v.* New Jersey Midland R. Co. (27 N. J. Eq. 37), Receiv., 95, 98.
Coe *v.* New Jersey Midland R. Co. (27 N. J. Eq. 110), Direct., 46.
Coe *v.* New Jersey Midland R. Co. (28 N. J. Eq. 27, 14 Am. Ry. Rep. 5), Injunc., 24.
Coe *v.* New Jersey Midland R. Co. (28 N. J. Eq. 31, 14 Am. Ry. Rep. 9), Receiv., 167.
Coe *v.* New Jersey Midland R. Co. (28 N. J. Eq. 100, 14 Am. Ry. Rep. 17; affirming 28 N. J. Eq. 593), Side Tr., 5; Words & Ph., 173.
Coe *v.* New Jersey Midland R. Co. (30 N. J. Eq. 21, 17 Am. Ry. Rep. 341), Em. Dom., 230.
Coe *v.* New Jersey Midland R. Co. (30 N. J. Eq. 440), Mun. Corp., 20.
Coe *v.* New Jersey Midland R. Co. (31 N. J. Eq. 105; reversed in 34 N. J. Eq. 266), Cross. Rys., 3; Direct., 46; Em. Dom., 73; Liens, 25; Mort., 88, 186, 253.
Coe *v.* Peacock (14 Ohio St. 187), Mort., 42, 164.
Coffee *v.* New York, N. H. & H. R. Co. (48 Am. & Eng. R. Cas. 370, 155 Mass. 21, 28 N. E. Rep. 1128), Employés, Inj. to, 1, 495; Evid., 37.
Coffin *v.* Kearney County Com'rs (57 Fed. Rep. 137), Mun. Aid, 355, 384.
Coffin *v.* New York C. R. Co. (64 Barb. (N. Y.) 379; affirmed in (?) 56 N. Y. 632), Car. of M., 204.
Coffin *v.* Northwestern C. Co. (19 Abb. N. Cas. (N. Y.) 383), Attach., 48.
Coffin *v.* St. Louis & S. F. R. Co. (22 Mo. App. 601), Cross., Inj. at, 149, 162.
Coffman *v.* Louisville & N. R. Co. (Ky.) (18 S. W. Rep. 1012), Fel. Serv., 1, 4.
Coggin *v.* Central R. Co. (62 Ga. 685), Consol., 46; Employés, Inj. to, 478, 491.
Coghill *v.* State (37 Ind. 111), Crim. L., 35.
Coghlan *v.* South Carolina R. Co. (51 Am. & Eng. R. Cas. 79, 142 U. S. 101, 12 Sup. Ct. Rep. 150), Int., 18; Refer., 6.
Cogsbill *v.* Mobile & G. R. Co. (92 Ala. 252, 9 So. Rep. 512), Adv. Poss., 5.
Cogswell *v.* New York, N. H. & H. R. Co. (103 N. Y. 10, 3 N. Y. S. R. 56, 8 N. E. Rep. 537; reversing 16 J. & S. 31), Em. Dom., 63; Nuis., 2, 5.
Cogswell *v.* New York, N. H. & H. R. Co. (105 N. Y. 319, 11 N. E. Rep. 518, 7 N. Y. S. R. 203, 12 Civ. Pro. 222; reversing 22 J. & S. 92), Trial, 3.

Cogswell *v.* Oregon & C. R. Co. (6 Oreg. 417), Tresp., Inj. to, 107.
Cogswell *v.* West. St. & N. E. Elec. R. Co. (52 Am. & Eng. R. Cas. 500, 5 Wash. 46, 31 Pac. Rep. 411), App., 100; Elec. Rys., 19, 21; Leases, 41; New Tr., 65; Pl., 110; St. Rys., 336, 427.
Cohen *v.* Dry Dock, E. B. & B. R. Co. (8 J. & S. (N. Y.) 368; affirmed in 69 N. Y. 170), St. Rys., 475.
Cohen *v.* Dry Dock, E. B. & B. R. Co. (69 N. Y. 170, 18 Am. Ry. Rep. 109; affirming 8 J. & S. 368), Agency, 73, 81.
Cohen *v.* Ellis (52 Hun (N. Y.) 133, 5 N. Y. Supp. 133), Bonds, 61.
Cohen *v.* Eureka & P. R. Co. (14 Nev. 376), Cross., Inj. at, 187, 195, 196, 258; Dam., 44; Trial, 78.
Cohen *v.* Frost (2 Duer (N. Y.) 335), Bagg., 79.
Cohen *v.* St. Louis, Ft. S. & W. R. Co. (22 Am. & Eng. R. Cas. 116, 34 Kan. 158, 55 Am. Rep. 242, 8 Pac. Rep. 138), Em. Dom., 383, 657, 760, 985.
Cohen *v.* Southeastern R. Co. (L. R. 2 Exch. D. 253, 46 L. J. Exch. D. 417, 36 L. T. 130, 25 W. R. 475, 3 Ry. & C. T. Cas. xxv; affirming L. R. 1 Exch. D. 217, 24 W. R. 522, 45 L. J. Exch. D. 298, 35 L. T. N. S. 213), Bagg., 4, 5, 101.
Cohen *v.* Southern Exp. Co. (45 Ga. 148), Exp. Cos., 77.
Cohen *v.* Southern Exp. Co. (53 Ga. 128), Exp. Cos., 86.
Cohen *v.* Wilkinson (12 Beav. 125, 13 Jur. 641, 18 L. J. Ch., 378), Constr. Rys., 1.
Cohens *v.* Virginia (6 Wheat. (U. S.) 264), Rem. of C., 9.
Cohn *v.* Central Pac. R. Co. (71 Cal. 488, 12 Pac. Rep. 498), Trial, 10, 12.
Cohn *v.* Louisville, N. O. & T. R. Co. (40 Am. & Eng. R. Cas. 338, 39 Fed. Rep. 227), Rem. of C., 38, 43.
Cohoes *v.* Delaware & H. Canal Co. (134 N. Y. 397, 31 N. E. Rep. 887, 47 N. Y. S. R. 612; reversing 54 Hun 558, 27 N. Y. S. R. 613, 7 N. Y. Supp. 885), Sts. & H., 422.
Colchester Tramways Co., In re ([1893] 1 Ch. 309), Tramw., 8.
Colcock *v.* Louisville, C. & C. R. Co. (1 Strobh. (So. Car.) 329), Custom, 1; Pres., 1.
Colcord *v.* Dryfus (1 Okla. 228, 32 Pac. Rep. 329), Car. of M., 493; Sales, 5.
Colcough *v.* Nashville & N. W. R. Co. (2 Head (Tenn.) 171), Em. Dom., 431, 667, 984.
Cole *v.* Carolina C. R. Co. (74 N. Car. 587), Trial, 86.
Cole *v.* Chicago & N. W. R. Co. (38 Iowa 311), Animals, 307, 534; Fences, 58.
Cole *v.* Chicago & N. W. R. Co. (67 Wis. 272, 30 N. W. Rep. 600), Employés, Inj. to, 543.
Cole *v.* Chicago & N. W. R. Co. (33 Am. & Eng. R. Cas. 274, 71 Wis. 114, 37 N. W. Rep. 84, 5 Am. St. Rep. 201), Employés, Inj. to, 281; Fel. Serv., 3.
Cole *v.* Chicago, B. & Q. R. Co. (47 Mo. App. 624), Cat.-Gds., 4, 16.
Cole *v.* Des Moines Valley R. Co. (76 Iowa 185, 40 N. W. Rep. 711), Land Grants, 116.
Cole *v.* Dyer (29 Ga. 434), Quo War., 6.
Cole *v.* Fall Brook Coal Co. (16 N. Y. Supp. 789, 40 N. Y. S. R. 834, 61 Hun 623, mem.), New Tr., 94.
Cole *v.* Goodwin (19 Wend. (N. Y.) 251), Bagg., 60; Lim. of Liab., 33.
Cole *v.* Lake Shore & M. S. R. Co. (81 Mich. 156, 45 N. W. Rep. 983), Witn., 71.
Cole *v.* Lake Shore & M. S. R. Co. (95 Mich. 77, 54 N. W. Rep. 638), Witn., 32, 141, 170.
Cole *v.* New York, L. E. & W. R. Co. (37 Hun (N. Y.) 394), Assign., 13.
Cole *v.* Rome, W. & O. R. Co. (25 N. Y. Supp. 276, 72 Hun 467, 55 N. Y. S. R. 245), Employés, Inj. to, 21.
Cole *v.* Rowen (50 Am. & Eng. R. Cas. 1, 88 Mich. 219, 50 N. W. Rep. 138), Hacks, etc., 1, 2.
Cole *v.* Wabash, St. L. & P. R. Co. (21 Mo. App. 443), Bailm., 2; Car. of M., 273.
Cole *v.* West London & C. P. R. Co. (27 Beav. 242, 5 Jur. N. S. 1114, 28 L. J. Ch. 767), Em. Dom., 1101.
Colegrove *v.* New York & N. H. R. Co. (20 N. Y. 492; affirming 6 Duer 382), Collis., 6; Contrib. Neg., 124; St. Rys., 185.
Coleman *v.* Flint & P. M. R. Co. (29 Am. & Eng. R. Cas. 247, 64 Mich. 160, 31 N. W. Rep. 47), Animals, 133; Sts. & H., 32.
Coleman *v.* Georgia R. & B. Co. (40 Am. & Eng. R. Cas. 690, 84 Ga. 1, 10 S. E. Rep. 498), Car. of P., 89, 90.
Coleman *v.* Kansas City, St. J. & C. B. R. Co. (36 Mo. App. 476), Flood. Lds., 23; Negl., 45; Waters &. W., 14.
Coleman *v.* Llanelly R. & D. Co. (17 L. T. 86, 15 W. R. 1014), Mort., 167.
Coleman *v.* Marin County Sup'rs (50 Cal. 493), Mun. Aid, 109, 113, 151.
Coleman *v.* New York & N. H. R. Co. (106 Mass. 160, 6 Am. Ry. Rep. 306), App. 50; Assault, 15; Eject. Pass., 59, 69, 91, 97, 99.
Coleman *v.* Northern Pac. R. Co. (36 Minn. 525, 32 N. W. Rep. 859), Adv. Poss., 8.
Coleman *v.* Oregonian R. Co. (57 Am. & Eng. R. Cas. 436, 25 Oreg. 286, 35 Pac. Rep. 656), Liens, 33.
Coleman *v.* St. Paul, M. & M. R. Co. (38 Minn. 260, 36 N. W. Rep. 638), Land Grants, 104.
Coleman *v.* Second Ave. R. Co. (38 N. Y. 201; affirming 48 Barb. 371), St. Rys., 19.
Coleman *v.* Second Ave. R. Co. (39 Am. & Eng. R. Cas. 456, 114 N. Y. 609, 21 N. E. Rep. 1064, 24 N. Y. S. R. 566; reversing 41 Hun 380, 1 N. Y. S. R. 580), St. Rys., 377, 380.
Coleman *v.* Southeastern R. Co. (4 H. & C. 699, 12 Jur. N. S. 944), Car. of P., 206; Children, Inj. to, 12, 14, 77.
Coleman *v.* Wilmington, C. & A. R. Co. (25 So. Car. 446), Employés, Inj. to, 14, 75; Fel. Serv., 260.
Coler *v.* Santa Fé County Com'rs (N. Mex.) (27 Pac. Rep. 619), Lim. of Ac., 41; Mun. Aid, 54, 347.
Coles *v.* Central R. & B. Co. (82 Ga. 149, 9 S. E. Rep. 127), Pl., 143; Trial, 9.

Coles *v.* Central R. & B. Co. (45 Am. & Eng. R. Cas. 328, 86 Ga. 251, 12 S. E. Rep. 749), Car. of M., 597, 599.
Coles *v.* Louisville, E. & St. L. R. Co. (41 Ill. App. 607), Bills of L., 32, 37, 64; Car. of L. S., 21, 80, 135, 141; Car. of M., 486, 674.
Colgan *v.* Allegheny Valley R. Co. (3 Pittsb. (Pa.) 394), Em. Dom., 418.
Colgan *v.* Jones (44 N. J. Eq. 274, 18 Atl. Rep. 55), Assign., 14.
Colgate *v.* Pennsylvania Co. (102 N. Y. 120, 6 N. E. Rep. 114, 1 N. Y. S. R. 166; affirming 31 Hun 297), Bills of L., 48, 114, 119.
Colglazier *v.* Louisville, N. A. & C. R. Co. (20 Am. & Eng. R. Cas. 611, 22 Fed. Rep. 568), Rem. of C., 34.
Collard *v.* Southeastern R. Co. (7 H. & N. 79, 7 Jur. N. S. 950, 30 L. J. Ex. 393, 9 W. R. 697, 4 L. T. 410), Car. of M., 769, 782.
Collender *v.* Dinsmore (55 N. Y. 200; reversing 64 Barb. 457), Evid., 182.
Collett *v.* London & N. W. R. Co. (16 Q. B. 984, 15 Jur. 1053, 20 L. J. Q. B. 411), Car. of Mails, 18; Car. of P., 54; Parties, 1.
Colley *v.* London & N. W. R. Co. (L. R. 5 Ex. D. 277, 49 L. J. Ex. D. 575, 42 L. T. 807, 29 W. R. 16), Flood. Lds., 52.
Collier *v.* Chicago & A. R. Co. (48 Mo. App. 398), Flood. Lds., 10, 34, 40.
Collier *v.* Dublin, W. & W. R. Co. (8 Ir. R., C. L. 21), Husb. & W., 23.
Collier *v.* Georgia R. Co. (76 Ga. 611), Fences, 67.
Collier *v.* Morgan's L. & T. R. & S. Co. (41 La. Ann. 37, 5 So. Rep. 537), Proc., 15.
Collier *v.* Southern Exp. Co. (32 Gratt (Va.) 718), Exp. Cos., 14.
Collingham *v.* Sloper (54 Am. & Eng. R. Cas. 623, [1893] 2 Ch. 96), Bonds, 31.
Collins *v.* Albany & S. R. Co. (12 Barb. (N. Y.) 492), New Tr., 23, 28, 29, 30, 82.
Collins *v.* Atlantic & P. R. Co. (65 Mo. 230), Animals, 31, 382.
Collins *v.* Barnes (83 Pa. St. 15), Constr. Rys., 75.
Collins *v.* Boston & M. R. Co. (10 Cush. (Mass.) 506), Bagg., 13, 37; Words & Ph., 23.
Collins *v.* Burlington, C. R. & N. R. Co. (83 Iowa 346, 49 N. W. Rep. 848), Contrib. Neg., 87; Employés, Inj. to, 315, 322.
Collins *v.* Central Bank (1 Ga. 435), Liens, 6.
Collins *v.* Chicago, St. P. & F. du L. R. Co. (14 Wis. 492), Pl., 10.
Collins *v.* Cincinnati, N. O. & T. P. R. Co. (Ky.) (18 S. W. Rep. 11), Employés, 4; Employés, Inj. to, 210.
Collins *v.* Davidson (19 Fed. Rep. 83), Contrib. Neg., 13, 42; Death, etc., 385.
Collins *v.* East Tenn., V. & G. R. Co. (9 Heisk. (Tenn.) 841, 20 Am. Ry. Rep. 46), Dam., 7; Death, etc., 33, 90, 94, 385, 393; Sts. & H., 296.
Collins *v.* Hammock (59 Ala. 448), Corp., 5.
Collins *v.* Long Island R. Co. (31 N. Y. S. R. 973, 10 N. Y. Supp. 701), Cross., Inj. at, 322.
Collins *v.* Long Island R. Co. (46 N. Y. S. R. 252, 18 N. Y. Supp. 779, 29 J. & S. 154), Cross., Inj. at, 216; New Tr., 5.
Collins *v.* New York C. & H. R. R. Co. (5 Hun (N. Y.) 499, 503; affirmed in 71 N. Y. 609), Fires, 49, 105, 128, 267, 294, 362.
Collins *v.* New York C. & H. R. R. Co. (32 Am. & Eng. R. Cas. 366, 109 N. Y. 243, 16 N. E. Rep. 50, 14 N. Y. S. R. 783, 12 Cent. Rep. 196; reversing 39 Hun 651, mem.), Fires, 231; Witn., 99.
Collins *v.* New York C. & H. R. R. Co. (33 N. Y. S. R. 569, 58 Hun 601, mem., 11 N. Y. Supp. 308; affirmed in 132 N. Y. 603, mem., 44 N. Y. S. R. 934, mem.), Fires, 254.
Collins *v.* New York, N. H. & H. R. Co. (4 N. Y. S. R. 874, 42 Hun 657, mem.; affirmed in 112 N. Y. 659, mem., 20 N. E. Rep. 412, mem., 20 N. Y. S. R. 977), Death, etc., 295.
Collins *v.* New York, N. H. & H. R. Co. (23 J. & S. 31, 8 N. Y. S. R. 164; affirmed in 112 N. Y. 665, mem., 20 N. E. Rep. 413), Death, etc., 219; Licensees, Inj. to, 2; Trial, 162.
Collins *v.* Northeastern El. R. Co. (2 Pa. Dist. 417), Elev. Rys., 3; Injunc., 19.
Collins *v.* St. Paul & S. C. R. Co. (8 Am. & Eng. R. Cas. 150, 30 Minn. 31, 14 N. W. Rep. 60), Fel. Serv., 25, 440.
Collins *v.* South Boston Horse R. Co. (26 Am. & Eng. R. Cas. 371, 142 Mass. 301, 7 N. E. Rep. 856), Children, Inj. to, 63, 74, 75, 141.
Collins *v.* South Staffordshire R. Co. (7 Ex. 5, 16 Jur. 843, 21 L. J. Ex. 247), Em. Dom., 1124, 1170.
Collins *v.* Toledo, A. A. & N. M. R. Co. (80 Mich. 390, 45 N. W. Rep. 178), Evid., 89; Stat. & D., 61, 98.
Collins *v.* Union Transp. Co. (10 Watts (Pa.) 384), Charges, 73.
Collinson *v.* Newcastle & D. R. Co. (1 C. & K. 546), Actions, 12; Priv. Ways, 13.
Collis *v.* New York C. & H. R. R. Co. (71 Hun 504, 24 N. Y. Supp. 1090, 55 N. Y. S. R. 82), Death, etc., 294; Children, Inj. to, 108; Tresp., Inj. to, 1, 121.
Collyer *v.* Pennsylvania R. Co. (49 N. J. L. 59, 6 Atl. Rep. 437), Employés, Inj. to, 99, 101; Fel. Serv., 15, 196; Tresp., Inj. to, 77.
Colman *v.* Eastern Counties R. Co. (10 Beav. 1, 11 Jur. 74, 16 L. J. Ch. 72), Guar., 5.
Colman *v.* Great Western R. Co. (4 Ry. & C. T. Cas. 108), Charges, 110.
Colomo *v.* Eaves (92 U. S. 484), Mun. Aid, 379.
Colorado C. R. Co. *v.* Allen (44 Am. & Eng. R. Cas. 193, 13 Colo. 229, 22 Pac. Rep. 605), Husb. & W., 6; Em. Dom., 235, 262, 265, 319, 326, 368, 369, 370, 644; Estop., 23.
Colorado C. R. Co. *v.* Caldwell (11 Colo. 545, 19 Pac. Rep. 542), Animals, 211, 301; Appear., 5.
Colorado C. R. Co. *v.* Holmes (8 Am. & Eng. R. Cas. 410, 5 Colo. 197; see 5 Colo. 516), Contrib. Neg., 5, 7, 10, 13; Negl., 53.
Colorado C. R. Co. *v.* Humphrey (10 Colo. 34, 26 Pac. Rep. 165), Em. Dom., 535, 536, 730.

Colorado C. R. Co. *v.* Lea (5 Colo. 192), Mun. Aid, 7, 252.
Colorado C. R. Co. *v.* Martin (17 Am. & Eng. R. Cas. 592, 7 Colo. 592, 4 Pac. Rep. 1118), Contrib. Neg., 13, 85, 87; Fel. Serv., 367.
Colorado C. R. Co. *v.* Mollandin (4 Colo. 154), Sts. & H., 211, 215.
Colorado C. R. Co. *v.* Ogden (3 Colo. 499), Employés, Inj. to, 46, 120, 136, 139, 141, 225, 301; Fel. Serv., 1, 56.
Colorado Eastern R. Co. *v.* Union Pac. R. Co. (44 Am. & Eng. R. Cas. 10, 41 Fed. Rep. 293), Charters, 64; Em. Dom., 93, 111, 188.
Colorado Midland R. Co. *v.* Bowles (14 Colo. 85, 23 Pac. Rep. 467), Pub. Lds., 46.
Colorado Midland R. Co. *v.* Brown (47 Am. & Eng. R. Cas. 164, 15 Colo. 193, 25 Pac. Rep. 87), App., 94; Em. Dom., 595, 638, 650.
Colorado Midland R. Co. *v.* Croman (16 Colo. 381, 27 Pac. Rep. 256), Em. Dom., 322, 921.
Colorado Midland R. Co. *v.* Jones (29 Fed. Rep. 193), Rem. of C., 15.
Colorado Midland R. Co. *v.* Naylon (17 Colo. 501, 30 Pac. Rep. 249), Employés, Inj. to, 287; Fel. Serv., 73, 76, 213, 341, 360, 371.
Colorado Midland R. Co. *v.* O'Brien (48 Am. & Eng. R. Cas. 235, 16 Colo. 219, 27 Pac. Rep. 701), Constr. Rys., 4; Dam., 102; Employés, Inj. to, 47, 208, 287, 435; Fel. Serv., 217, 315; New Tr., 23; Witn., 140.
Colorado Midland R. Co. *v.* Ruedi (2 Colo. App. 202, 29 Pac. Rep. 1034), Em. Dom., 253, 310.
Colorado Midland R. Co. *v.* Trevarthen (1 Colo. App. 152, 27 Pac. Rep. 1012), Em. Dom., 435; Sts. & H., 238.
Colstrum *v.* Minneapolis & St. L. R. Co. (33 Minn. 516, 24 N. W. Rep. 255), Nuis., 39.
Colt *v.* Barnes (7 Am. & Eng R. Cas. 129, 64 Ala. 108), State Aid, 8, 11.
Colt *v.* M'Mechen (6 Johns. (N. Y.) 160), Car. of M., 104.
Colt *v.* Sixth Ave. R. Co. (49 N. Y. 671, mem.; affirming 1 J. & S. 189), Trial, 79.
Colton *v.* Cleveland & P. R. Co. (67 Pa. St. 211), Bills of L., 80.
Colton *v.* Stanford (82 Cal. 351, 23 Pac. Rep. 16), Trusts, 1.
Columbia & G. R. Co. *v.* Gibbes (24 So. Car. 60), Charters, 8, 30; Reorg., 12.
Columbia & P. R. Co. *v.* Farrington (1 Wash. 202, 23 Pac. Rep. 413), Fires, 300.
Columbia & P. S. R. Co. *v.* Chilberg (6 Wash. 612, 34 Pac. Rep. 163), Tax., 13, 50, 182.
Columbia & P. S. R. Co. *v.* Hawthorne (3 Wash. T. 353, 19 Pac. Rep. 25), Employés, Inj. to, 134, 645, 648; New Tr., 72.
Columbia & P. S. R. Co. *v.* Hawthorne (53 Am. & Eng. R. Cas. 289, 144 U. S. 202, 12 Sup. Ct. Rep. 591; reversing 3 Wash. T. 353, 19 Pac. Rep. 25), Employés, Inj. to, 570.
Columbia & P. S. R. Co. *v.* Seattle (6 Wash. 332, 33 Pac. Rep. 824, 34 Pac. Rep. 725), Sts. & H., 30.
Columbia College Trustees *v.* Thacher (87 N. Y. 311, 10 Abb. N. Cas. 235; reversing 14 J. & S. 305, and modifying 70 N. Y. 440), Elev. Rys., 76.
Columbia County Com'rs *v.* King (13 Fla. 451), Mun. Aid, 290, 316, 409.
Columbus *v.* Columbus & S. R. Co. (37 Ind. 294, 3 Am. Ry. Rep. 70), Aband., 2.
Columbus *v.* Columbus St. R. Co. (32 Am. & Eng. R. Cas. 292, 45 Ohio St. 98, 12 N. E. Rep. 651), St. Rys., 168.
Columbus & I. C. R. Co. *v.* Arnold (31 Ind. 174), Direct., 34; Employés, Inj. to, 14, 46, 132, 138, 143, 525; Fel. Serv., 1, 3, 50, 102, 202, 400.
Columbus & I. C. R. Co. *v.* Farrell (31 Ind. 408), Car. of P., 230.
Columbus & S. R. Co. *v.* Richardson (7 Ind. 543), Em. Dom., 854.
Columbus & S. R. Co. *v.* Watson (26 Ind. 50), Spec. Perf., 16.
Columbus & T. R. Co. *v.* Steinfeld (22 Am. & Eng. R. Cas. 260, 42 Ohio St. 449), Eq., 21.
Columbus & W. R. Co., In re (2 Int. Com. Rep. 11, 1 Int. Com. Com. 626), Int. Com., 131.
Columbus & W. R. Co. *v.* Bradford (38 Am. & Eng. R. Cas. 214, 86 Ala. 574, 6 So. Rep. 90), Contrib. Neg., 87; Death, etc., 129, 219; Fel. Serv., 452.
Columbus & W. R. Co. *v.* Bridges (38 Am. & Eng. R. Cas. 136, 86 Ala. 448, 5 So. Rep. 864), Bridges, 23; Dam., 19; Death, etc., 285; Employés, Inj. to, 270, 367.
Columbus & W. R. Co. *v.* Flournoy (75 Ga. 745), Car. of M., 205, 784.
Columbus & W. R. Co. *v.* Kennedy (31 Am. & Eng. R. Cas. 92, 78 Ga. 646, 3 S. E. Rep. 267), Car. of L. S., 147; Evid., 12, 170; Negl., 99.
Columbus & W. R. Co. *v.* Ludden (42 Am. & Eng. R. Cas. 404, 89 Ala. 612, 7 So. Rep. 471), Car. of M., 241, 337, 339, 341; Custom, 4.
Columbus & W. R. Co. *v.* Tillman (79 Ga. 607, 5 S. E. Rep. 135), Car. of M., 646; Evid., 151.
Columbus & W. R. Co. *v.* Witherow (82 Ala. 190, 3 So. Rep. 23), Em. Dom., 272, 666; Injunc., 50; Sts. & H., 39, 230.
Columbus & W. R. Co. *v.* Wood (86 Ala. 164, 5 So. Rep. 463), Tresp., Inj. to, 44, 73.
Columbus & X. R. Co. *v.* Webb (12 Ohio St. 475), Employés, Inj. to, 105; Fel. Serv., 17, 222, 223.
Columbus, C. & I. C. R. Co. *v.* Grant County Com'rs (65 Ind. 427), Mun. Aid, 411.
Columbus, C. & I. C. R. Co. *v.* Powell (40 Ind. 37), Agency, 8; Car. of P., 17, 145, 251; Consol., 42; Eject. Pass., 15, 52, 64, 87; Tickets & F., 9.
Columbus, C. & I. C. R. Co. *v.* Skidmore (69 Ill. 566), Consol., 20, 47.
Columbus, C. & I. C. R. Co. *v.* Troesch (57 Ill. 155, 10 Am. Ry. Rep. 451), Employés, Inj. to, 612.

Columbus, C. & I. C. R. Co. *v.* Troesch (68 Ill. 545), Employés, Inj. to, 96, 136, 621; Fel. Serv., 140.
Columbus, H. V. & T. R. Co. *v.* Gardner (32 Am. & Eng. R. Cas. 243, 30 Am. & Eng. R. Cas. 409, 45 Ohio St. 309, 11 West. Rep. 264, 13 N. E. Rep. 69), Sts. & H., 270; Witn., 123.
Columbus, H. & G. R. Co. *v.* Braden (110 Ind. 558, 11 N. E. Rep. 357, 9 West. Rep. 193), Easem., 5; Evid., 147; Mort., 15, 252.
Columbus, P. & I. R. Co. *v.* Indianapolis & B. R. Co. (5 McLean (U. S.) 450), Connect. L., 4, 5.
Columbus, P. & I. R. Co. *v.* Simpson (5 Ohio St. 251), Em. Dom., 749.
Columbus, S. & C. R. Co. *v.* Mowatt (35 Ohio St. 284), Lim. of Ac., 50.
Columbus Southern R. Co. *v.* Wright (54 Am. & Eng. R. Cas. 255, 89 Ga. 574, 15 S. E. Rep. 293; affirmed in 151 U. S. 470, 14 Sup. Ct. Rep. 396), Tax., 23, 255.
Colvill *v.* Langdon (22 Minn. 565), Assault, 12.
Colvill *v.* St. Paul & C. R. Co. (19 Minn. 283 (Gil. 240), Em. Dom., 466, 701; Witn., 118.
Colvin *v.* Jones (3 Dana (Ky.) 576), Car. of M., 777.
Colwell *v.* Manhattan R. Co. (57 Hun 452, 32 N. Y. S. R. 991, 10 N. Y. Supp. 636), Dam., 90; Elev. Rys., 211.
Colwell *v.* New York & E. R. Co. (9 How. Pr. (N. Y.) 311), Actions, 11; Pl., 34.
Comaskey *v.* Northern Pac. R. Co. (N. Dak.) (55 N. W. Rep. 732), Dam., 67.
Combe *v.* London & S. W. R. Co. (31 L. T. 613), Car. of L. S., 7, 51.
Combs *v.* Smith (20 Am. & Eng. R. Cas. 209, 78 Mo. 32), Em. Dom., 742, 1079; Receiv., 143.
Comer *v.* Consolidated C. & M. Co. (34 W. Va. 533, 12 S. E. Rep. 476), Contrib. Neg., 105.
Comer *v.* State (62 Ala. 320), Crim. L., 48.
Comes *v.* Chicago, M. & St. P. R. Co. (78 Iowa 391, 43 N. W. Rep. 235), Fires, 298; Pl., 60.
Comings *v.* Hannibal & C. M. R. Co. (48 Mo. 512), Fences, 47, 108.
Comly *v.* Pennsylvania R. Co. (Pa.) (12 Atl. Rep. 496), Stat. & D., 118.
Commercial Bank *v.* Great Western R. Co. (22 U. C. Q. B. 233), Consol., 39; Direct., 38; Stat., 57.
Commercial Bank *v.* Great Western R. Co. (13 L. T. 105, 3 Moore P. C. C. N. S. 295), Corp., 7; Leases, 129; Mort., 9.
Commissioner for Railways *v.* Toohey (L. R. 9 App. Cas. 720, 53 L. J. P. C. 91, 51 L. T. 582), Tramw., 4.
Com'rs of Athens County *v.* Baltimore S. L. R. Co. (37 Ohio St. 205), Counties, 5.
Com'rs of Central Park, In re (63 Barb. (N. Y.) 282), Franch., 3.
Com'rs of Craven *v.* Atlantic & N. C. R. Co. (77 N. Car. 289), Bonds, 6.
Com'rs of Greenwood County *v.* Kansas City, E. & S. K. R. Co. (46 Kan. 104, 26 Pac. Rep. 397), Cross., St. & H., 80.
Com'rs of Mahoning County *v.* Pittsburg & W. R. Co. (45 Ohio St. 401, 15 N. E. Rep. 468), Bridges, 46.
Com'rs of Parks and Boulevards *v.* Chicago, D. & C. G. T. J. R. Co. (91 Mich. 291, 51 N. W. Rep. 934), Cross., St. & H., 77, 81; Ry. Com'rs, 21.
Com'rs of Parks and Boulevards *v.* Detroit, G. H. & M. R. Co. (51 Am. & Eng. R. Cas. 525, 93 Mich. 58, 52 N. W. Rep. 1083), Right of W., 23.
Com'rs of Parks and Boulevards *v.* Michigan C. R. Co. (50 Am. & Eng. R. Cas. 144, 90 Mich. 385, 51 N. W. Rep. 447), Cross., St. & H., 46, 81.
Com'rs of Parks & Boulevards *v.* Moesta 91 Mich. 149, 51 N. W. Rep. 903), Em. Dom., 554, 709.
Com'rs of Roads, etc. *v.* Shorter (50 Ga. 489), Mun. Aid, 279, 349.
Commonwealth *v.* Allegheny County Com'rs (32 Pa. St. 218), Mun. Aid, 47, 328.
Commonwealth *v.* Allegheny County Com'rs (37 Pa. St. 237), Mun. Aid, 350, 366, 393.
Commonwealth *v.* Allegheny County Com'rs (40 Pa. St. 348), Mun. Aid, 424.
Commonwealth *v.* Atlantic & G. W. R. Co. (53 Pa. St. 9), Consol., 18; Quo War., 9.
Commonwealth *v.* Baldwin (14 Phila. (Pa.) 93), Hacks, etc., 4; Sts. & H., 54.
Commonwealth *v.* Boston & A. R. Co. (121 Mass. 36), Death, etc., 52.
Commonwealth *v.* Boston & A. R. Co. (25 Am. & Eng. R. Cas. 17, 142 Mass. 146, 7 N. E. Rep. 716), Divid., 9.
Commonwealth *v.* Boston & L. R. Corp. (126 Mass. 61), Death, etc., 443, 447.
Commonwealth *v.* Boston & L. R. Corp. (134 Mass. 211), Death, etc., 446.
Commonwealth *v.* Boston & M. R. Co. (1 Am. & Eng. R. Cas. 457, 129 Mass. 500, 37 Am. Rep. 382), Death, etc., 442.
Commonwealth *v.* Boston & M. R. Co. (8 Am. & Eng. R. Cas. 297, 133 Mass. 383), Crim. L., 7, 19; Death, etc., 442, 447, 448.
Commonwealth *v.* Boston & M. R. Co. (3 Cush. (Mass.) 25), Att'y-Gen., 3; Em. Dom., 425, 539, 554, 577, 677, 764, 775, 920.
Commonwealth *v.* Boston & W. R. Corp. (101 Mass. 201), Cross., Inj. at, 45.
Commonwealth *v.* Boston & W. R. Corp. (11 Cush. (Mass.) 512), Death, etc., 444, 445.
Commonwealth *v.* Boston, B. & G. R. Co. (135 Mass. 550), Crim. L., 34.
Commonwealth *v.* Brockton St. R. Co. (30 Am. & Eng. R. Cas. 632, 143 Mass. 501, 10 N. E. Rep. 506), Death, etc., 442.
Commonwealth *v.* Brown (154 Mass. 55, 27 N. E. Rep. 776), Intox'ing L., 5.
Commonwealth *v.* Capp (48 Pa. St. 53), Crim. L., 36.
Commonwealth *v.* Carey (12 Cush. (Mass.) 246), Crim. L., 29.
Commonwealth *v.* Carroll (145 Mass. 403, 14 N. E. Rep. 618), Consol., 20; Crim. L., 42; Evid., 32.
Commonwealth *v.* Central Pass. R. Co. (52 Pa. St. 506), Charters, 53; Quo War., 1, 9, 12; Reorg., 2; St. Rys., 33, 70, 95.
Commonwealth *v.* Central Transp. Co. (145 Pa. St. 89, 22 Atl. Rep. 209), Tax., 107.

Commonwealth *v.* Chase (127 Mass. 7), Bridges, 81; Crim. L., 7.
Commonwealth *v.* Chesapeake & O. R. Co. (91 Ky. 118), Crim. L., 1; Leases, 60; Mun. Aid, 60.
Commonwealth *v.* Chesapeake & O. R. Co. (27 Gratt. (Va.) 344), Tax., 104, 194.
Commonwealth *v.* Clarkson (3 Pa. St. 277), Superint., 4.
Commonwealth *v.* Cleveland, P. & A. R. Co. (29 Pa. St. 370), Stock, 29; Tax., 70.
Commonwealth *v.* Coburn (132 Mass. 555), Death, etc., 446.
Commonwealth *v.* Connecticut River R. Co. (15 Gray (Mass.) 447), Actions, 9; Bagg., 59.
Commonwealth *v.* Corey (2 Pittsb. (Pa.) 444), Branch & L. Roads, 8, 14; Mand., 16.
Commonwealth *v.* Councils of Pittsburg (41 Pa. St. 278), Charters, 90.
Commonwealth *v.* Covington & C. Bridge Co. (Ky.) (54 Am. & Eng. R. Cas. 461, 21 S. W. Rep. 1042), Bridges, 94; Charters, 19; Ferries, 8; Int. Com., 225.
Commonwealth *v.* Cross Cut R. Co. (53 Pa. St. 62), Charters, 63.
Commonwealth *v.* Dame (8 Cush. (Mass.) 384), Witn., 6.
Commonwealth *v.* Delaware & H. Canal Co. (150 Pa. St. 245, 24 Atl. Rep. 599), Tax., 44, 289.
Commonwealth *v.* Delaware Div. Canal Co. (123 Pa. St. 594, 16 Atl. Rep. 584), Tax., 44.
Commonwealth *v.* Delaware, L. & W. R. Co. (145 Pa. St. 96, 22 Atl. Rep. 157), Tax., 70.
Commonwealth *v.* Eastern R. Co. (103 Mass. 254), Charters, 45.
Commonwealth *v.* Eastern R. Co. (5 Gray (Mass.) 473), Death, etc., 445.
Commonwealth *v.* Empire Pass. R. Co. (134 Pa. St. 237, 19 Atl. Rep. 629), Stockh., 8.
Commonwealth *v.* Erie & N. E. R. Co. (27 Pa. St. 339), Charters, 51, 57, 64; Quo War., 9; St. Rys., 7, 130; Sts. & H., 75, 403.
Commonwealth *v.* Erie & P. R. Co. (10 Phila. (Pa.) 465), Tax., 107.
Commonwealth *v.* Erie & W. Transp. Co. (107 Pa. St. 112), Stock, 27.
Commonwealth *v.* Erie R. Co. (98 Pa. St. 127), Tax., 61.
Commonwealth *v.* Fayette County R. Co. (55 Pa. St. 452), Tax., 107.
Commonwealth *v.* Fitchburg R. Co. (10 Allen (Mass.) 189), Crim. L., 6, 13.
Commonwealth *v.* Fitchburg R. Co. (8 Cush. (Mass.) 240), Charters, 132.
Commonwealth *v.* Fitchburg R. Co. (120 Mass. 372), Death, etc., 447.
Commonwealth *v.* Fitchburg R. Co. (126 Mass. 472), Death, etc., 448.
Commonwealth *v.* Fitchburg R. Co. (12 Gray (Mass.) 180), Branch & L. Roads, 19.
Commonwealth *v.* Fleming (130 Pa. St. 138, 18 Atl. Rep. 622), Exp. Cos., 52; Sales, 12.
Commonwealth *v.* Frankfort (92 Ky. 149, 17 S. W. Rep. 287), Branch & L. Roads, 6; Priv. Rds., 2; Sts. & H., 71.
Commonwealth *v.* Franklin Canal Co. (21 Pa. St. 117), Charters, 116; Connect. L., 2.
Commonwealth *v.* Griffin (3 Brews. (Pa.) 554, 7 Phila. 679), Crim. L., 16; Death, etc., 446; Employés, Inj. to, 432; Negl., 20.
Commonwealth *v.* Hamilton Mfg. Co. (12 Allen (Mass.) 298; affirmed in 6 Wall. (U. S.) 632), Tax., 32.
Commonwealth *v.* Hartford & N. H. R. Co. (14 Gray (Mass.) 379), Cross., St. & H., 1.
Commonwealth *v.* Hartwell (128 Mass. 415, 35 Am. Rep. 391), Crim. L., 29.
Commonwealth *v.* Haverhill (7 Allen (Mass.) 523), Sts. & H., 21.
Commonwealth *v.* Hicks (7 Allen (Mass.) 573), Crim. L., 35.
Commonwealth *v.* Hide & L. Ins. Co. (112 Mass. 136), Fire Ins., 5.
Commonwealth *v.* Housatonic R. Co. (27 Am. & Eng. R. Cas. 31, 143 Mass. 264, 9 N. E. Rep. 547), Commerce, 5.
Commonwealth *v.* Jeandell (2 Grant's Cas. (Pa.) 506), Crim. L., 50.
Commonwealth *v.* Keim (15 Phila. (Pa.) 1), Mand., 32.
Commonwealth *v.* Kennedy (18 Am. & Eng. R. Cas. 383, 136 Mass. 152), Crim. L., 40.
Commonwealth *v.* Killian (109 Mass. 345), Crim. L., 35.
Commonwealth *v.* Lehigh Ave. R. Co. (129 Pa. St. 405, 18 Atl. Rep. 414, 498), Charters, 55; Injunc., 28.
Commonwealth *v.* Lehigh Valley R. Co. (Pa.) (17 Atl. Rep. 179), Int. Com., 10, 197.
Commonwealth *v.* Lehigh Valley R. Co. (16 Phila. (Pa.) 584), Tax., 134.
Commonwealth *v.* Lehigh Valley R. Co. (13 Am. & Eng. R. Cas. 347, 104 Pa. St. 89), Tax., 60, 280, 289.
Commonwealth *v.* Lehigh Valley R. Co. (129 Pa. St. 308, 18 Atl. Rep. 125), Int. Com., 10.
Commonwealth *v.* Lehigh Valley R. Co. (129 Pa. St. 429, 47 Phila. Leg. Int. 406, 25 W. N. C. 15, 18 Atl. Rep. 406), Tax., 44, 53, 61, 67, 102.
Commonwealth *v.* Louisville & N. R. Co. (80 Ky. 291, 44 Am. Rep. 475), Crim. L., 50.
Commonwealth *v.* Louisville & N. R. Co. (37 Am. & Eng. R. Cas. 418, 89 Ky. 134, 9 S. W. Rep. 805), Tax., 12.
Commonwealth *v.* Maysville & B. S. R. Co. (Ky.) (21 S. W. Rep. 342), Tax., 161.
Commonwealth *v.* Metropolitan R. Co. (107 Mass. 236), Death, etc., 445, 447.
Commonwealth *v.* Nashua & L. R. Corp. (2 Gray (Mass.) 54), Crim. L., 31, 32.
Commonwealth *v.* Nashville, C. & St. L. R. Co. (Ky.) (54 Am. & Eng. R. Cas. 294, 20 S. W. Rep. 383), Tax., 152.
Commonwealth *v.* New York, L. E. & W. R. Co. (30 Am. & Eng. R. Cas. 136, 114 Pa. St. 340, 7 Atl. Rep. 756), Escheat, 1, 3.
Commonwealth *v.* New York, L. E. & W. R. Co. (129 Pa. St. 463, 18 Atl. Rep. 412), For. Corp., 7; Tax., 67.
Commonwealth *v.* New York, L. E. & W. R. Co. (43 Am. & Eng. R. Cas. 550, 132 Pa. St. 591, 19 Atl. Rep. 291), Escheat, 2.
Commonwealth *v.* New York, L. E. & W. R.

Co. (139 Pa. St. 457, 21 Atl. Rep. 528), Escheat, 2.
Commonwealth v. New York, L. E. & W. R. Co. (145 Pa. St. 200, 22 Atl. Rep. 807), Tax., 98.
Commonwealth v. New York, L. E. & W. R. Co. (150 Pa. St. 234, 24 Atl. Rep. 609), Tax., 44, 110.
Commonwealth v. New York, N. H. & H. R. Co. (112 Mass. 412), Crim. L., 32.
Commonwealth v. New York, P. & O. R. Co. (138 Pa. St. 58, 20 Atl. Rep. 951), Mand., 32; Sts. & H., 192, 193.
Commonwealth v. New York, P. & O. R. Co. (48 Am. & Eng. R. Cas. 633, 145 Pa. St. 38, 22 Atl. Rep. 212), Tax., 44, 67, 98; Words & Ph., 232.
Commonwealth v. Ohio & P. R. Co. (1 Grant Cas. (Pa.) 329), Agency, 20, 33, 107, 110.
Commonwealth v. Old Colony & F. R. R. Co. (14 Gray (Mass.) 93), Crim. L., 32.
Commonwealth v. Owensboro & N. R. Co. (17 Am. & Eng. R. Cas. 428, 81 Ky. 572), Tax., 155.
Commonwealth v. Patterson (158 Pa. St. 476, 27 Atl. Rep. 998), Stock, 10; Stockh., 13, 14, 15, 17.
Commonwealth v. Pennsylvania & O. R. Co. (2 Phila. (Pa.) 250), Witn., 6.
Commonwealth v. Pennsylvania & R. C. & I. Co. (137 Pa. St. 481, 20 Atl. Rep. 531, 580), Receiv., 58.
Commonwealth v. Pennsylvania & W. R. Co. (17 Phila. (Pa.) 609), Consol., 4; Name, 1.
Commonwealth v. Pennsylvania Canal Co. (66 Pa. St. 41), Em. Dom., 376.
Commonwealth v. Pennsylvania R. Co. (2 Phila. (Pa.) 250), Agency, 90.
Commonwealth v. Pennsylvania R. Co. (117 Pa. St. 637, 10 Cent. Rep. 632, 12 Atl. Rep. 38, 20 W. N. C. 448), Crim. L., 21.
Commonwealth v. Pennsylvania, S. & N. E. R. Co. (16 Phila. (Pa.) 596), Quo War., 2
Commonwealth v. Perkins (43 Ohio St. 400), Mun. Aid, 47, 183, 212, 286, 366, 424.
Commonwealth v. Philadelphia & R. C. & I. Co. (137 Pa. St. 481, 20 Atl. Rep. 531, 580), Tax., 108, 110, 280.
Commonwealth v. Philadelphia & R. R. Co. (135 Pa. St. 256, 19 Atl. Rep. 1051), Crim. L., 36.
Commonwealth v. Philadelphia & R. R. Co. (Pa.) (22 Atl. Rep. 235), Tax., 280.
Commonwealth v. Philadelphia & R. R. Co. (150 Pa. St. 312, 24 Atl. Rep. 612), Tax., 110, 289, 401, 403.
Commonwealth v. Philadelphia, G. & N. R. Co. (20 Pa. St. 518), Quo War., 4.
Commonwealth v. Philadelphia, N. & N. Y. R. Co. (2 Pa. Dist. 731), Tax., 289.
Commonwealth v. Pittsburg (34 Pa. St. 496), Mun. Aid, 77, 366.
Commonwealth v. Pittsburg (41 Pa. St. 278), Mun. Aid, 72, 205, 272.
Commonwealth v. Pittsburg (43 Pa. St. 391), Mun. Aid., 227.
Commonwealth v. Pittsburg & C. R. Co. (24 Pa. St. 159), Injunc., 18; Waters & W., 5.
Commonwealth v. Pittsburg & C. R. Co. (58 Pa. St. 26), Charters, 12, 77, 82,; Em. Dom., 42; Location, etc., 7.
Commonwealth v. Pittsburg, Ft. W. & C. R. Co. (74 Pa. St. 83, 2 Am. Ry. Rep. 220), Stock, 29; Tax., 107.
Commonwealth v. Pope (12 Cush. (Mass.) 272), Crim. L., 35.
Commonwealth v. Power (7 Metc. (Mass.) 596), Crim. L., 9; Stat. & D., 54, 56, 107.
Commonwealth v. Prop'rs of New Bedford Bridge (2 Gray (Mass.) 339), Crim. L., 1.
Commonwealth v. Pullman Palace Car Co. (2 Pa. Dist. 618), Tax., 280.
Commonwealth v. Ray (3 Gray (Mass.) 441), Crim. L., 24.
Commonwealth v. Richmond & P. R. Co. (24 Am. & Eng. R. Cas. 482, 81 Va. 355), Tax., 137, 140, 159.
Commonwealth v. Select & C. Councils of Pittsburg (34 Pa. St. 496), Mand., 27, 30, 31, 33; Mun. Aid, 452.
Commonwealth v. Smedley (17 Phila. (Pa.) 18), Franch., 3; St. Rys., 246.
Commonwealth v. Smith (10 Allen (Mass.) 448), Mort., 2.
Commonwealth v. Smith (92 Ky. 38, 17 S. W. Rep. 187), Int. Com., 213, 214, 215; Tax., 395.
Commonwealth v. Susquehanna & D. R. R. Co. (36 Am. & Eng. R. Cas. 269, 122 Pa. St. 306, 15 Atl. Rep. 448), Exec., 27.
Commonwealth v. Swift Run Gap Tp. Co. (2 Va. Cas. 362), Crim. L., 1.
Commonwealth v. Taylor (36 Pa. St. 263), Mun. Aid, 47, 396.
Commonwealth v. Temple (14 Gray (Mass.) 69), Crim. L., 35; St. Rys., 71.
Commonwealth v. Texas & P. R. Co. (1 Pennyp. (Pa.) 215), For. Corp., 11.
Commonwealth v. Texas & P. R. Co. (98 Pa. St. 90), For. Corp., 2, 5.
Commonwealth v. Tuckerman (10 Gray (Mass.) 173), Crim. L., 17.
Commonwealth v. United States Exp. Co. (157 Pa. St. 579, 27 Atl. Rep. 396), Tax., 71.
Commonwealth v. Vermont & M. R. Co. (4 Gray (Mass.) 22), Crim. L., 31; Cross., St. & H., 104.
Commonwealth v. Vermont & M. R. Co. (108 Mass. 7, 7 Am. Ry. Rep. 394), Car. of P., 55; Crim. L., 13; Death, etc., 267.
Commonwealth v. West Chester R. Co. (3 Grant. Cas. (Pa.) 200), Charters, 77.
Commonwealth v. White (6 Cush. (Mass.) 181), Crim. L., 10.
Commonwealth v. Wilkesbarre & K. S. R. Co. (127 Pa. St. 278, 17 Atl. Rep. 996), Crim. L., 31.
Commonwealth v. Wilmington & N. R. Co. (Pa.) (17 Atl. Rep. 5), Coupons, 1; Mort., 309.
Commonwealth v. Wilson (14 Phila. (Pa.) 384), Stat., 25; Tickets & F., 152.
Commonwealth v. Wilson (Pa.) (56 Am. & Eng. R. Cas. 230), Crim. L., 46.
Commonwealth v. Worcester & N. R. Co. (124 Mass. 561, 18 Am. Ry. Rep. 418), Charges, 36.

Compagnie, etc. v. Vincent (4 Montr. L. R. 404), Em. Dom., 1227.
Compton *v.* Long Island R. Co. (1 N. Y. S. R. 554, 41 Hun 642), Car. of P., 121.
Compton *v.* Susquehanna R. Co. (3 Bland (Md.) 386), Em. Dom., 458..
Compton *v.* Van Volkenburgh (34 N. J. L. 134), Trial, 100.
Compton *v.* Wabash, St. L. & P. R. Co. (33 Am. & Eng. R. Cas. 56, 45 Ohio St. 592, 16 N. E. Rep. 110, 18 N. E. Rep. 380), Consol., 30.
Comstock *v.* Affoelter (50 Mo. 411), Car. of M., 46.
Comstock *v.* Des Moines Valley R. Co. (32 Iowa 376, 10 Am. Ry. Rep. 23), Animals, 495; Fences, 60.
Comstock *v.* Grand Rapids (17 Am. & Eng. R. Cas. 457, 54 Mich. 641, 20 N. W. Rep. 623), Tax., 93, 132.
Comstock *v.* New York C. & H. R. R. Co. (48 Hun 225, 17 N. Y. S. R. 937), Dam., 65.
Conant *v.* Bellows Falls Canal Co. (29 Vt. 263), Leases, 9.
Conant *v.* Griffin (48 Ill. 410), Death, etc., 224, 380, 381.
Conant *v.* Millaudon (5 La. Ann. 26), Direct., 5.
Conboy *v.* Kansas City & S. W. R. Co. (42 Kan. 658, 22 Pac. Rep. 719), Homest., 1.
Concord *v.* Concord Horse R. Co. (38 Am. & Eng. R. Cas. 425, 65 N. H. 30, 18 Atl. Rep. 87), St. Rys., 122.
Concord *v.* Portsmouth Sav. Bank (92 U. S. 625), Mun. Aid, 252.
Concord *v.* Robinson (121 U. S. 165, 7 Sup. Ct. Rep. 937), Mun. Aid, 266, 273, 283.
Concord & P. R. Co. *v.* Forsaith (59 N. H. 122, 47 Am. Rep. 181), Discrim., 12.
Concord & P. R. Co. *v.* Portsmouth (64 N. H. 219, 9 Atl. Rep. 546), Cross., St. & H., 5.
Concordia Cemetery Assoc. *v.* Minnesota & N. W. R. Co. (30 Am. & Eng. R. Cas. 363, 121 Ill. 199, 12 N. E. Rep. 536, 10 West. Rep. 573), Em. Dom., 460, 558, 603, 620, 732; Franch., 8.
Concord R. Co. *v.* Clough (49 N. H. 257), Conduct., 8.
Concord R. Co. *v.* Greely (17 N. H. 47), Em. Dom., 3, 16, 180, 373.
Concord R. Co. *v.* Greely (20 N. H. 157), Em. Dom., 527.
Concord R. Co. *v.* Greely (23 N. H. 237), Em. Dom., 595, 599, 764; Witn., 144.
Condict *v.* Grand Trunk R. Co. (54 N. Y. 500, 6 Am. Ry. Rep. 410; affirming 4 Lans. 106), Car. of M., 53.
Condiff *v.* Kansas City, Ft. S. & G. R. Co. (48 Am. & Eng. R. Cas. 417, 45 Kan. 256, 25 Pac. Rep. 562), Employés, Inj. to, 334, 752.
Condon *v.* Great Western & W. R. Co. (16 Ir. C. L. 415), Death, etc., 411.
Condon *v.* Marquette, H. & O. R. Co. (18 Am. & Eng. R. Cas. 574, 55 Mich. 218, 21 N. W. Rep. 321, 54 Am. Rep. 367), Car. of M., 621.
Condon *v.* Missouri Pac. R. Co. (17 Am. & Eng. R. Cas. 583, 78 Mo. 567), Employés, Inj. to, 527; Fel. Serv., 95, 222, 224.
Condon *v.* South Side R. Co. (14 Gratt. (Va.) 302), Constr. Rys., 70.
Condy *v.* St. Louis, I. & M. & S. R. Co. (13 Mo. App. 587, see 85 Mo. 79), Car. of P., 205, 471.
Cone *v.* Delaware, L. & W. R. Co. (2 Am. & Eng. Cas. 57, 81 N. Y. 206, 37 Am. Rep. 491; affirming 15 Hun 172), Fel. Serv., 64, 66.
Cones *v.* Cincinnati, I., St. L. & C. R. Co. (114 Ind. 328, 16 N. E. Rep. 638, 14 West. Rep. 101), Cross., Inj. at, 278.
Coney Island & B. R. Co., In re (12 Hun (N. Y.) 451), Location, etc., 15, 16.
Coney Island & B. R. Co. *v.* Brooklyn Cable Co. (53 Hun (N. Y.) 169, 25 N. Y. S. R. 323, 6 N. Y. Supp. 108), Leases, 88.
Confer *v.* New York, L. E. & W. R. Co. (146 Pa. St. 31, 23 Atl. Rep. 202), Fires, 314.
Congar *v.* Chicago & N. W. R. Co. (24 Wis. 157), Car. of M., 190.
Congar *v.* Galena & C. U. R. Co. (17 Wis. 477), Agency, 12; Car. of M., 185, 559, 705, 713; Sales, 4.
Congdon *v.* Central Vt. R. Co. (20 Am. & Eng. R. Cas. 460, 56 Vt. 390, 48 Am. Rep. 793), Animals, 126; Fences, 85.
Conger *v.* Burlington & S. W. R. Co. (41 Iowa 419), Ejectm., 4; Em. Dom., 1031.
Conger *v.* Chicago & R. I. R. Co. (15 Ill. 366), Fences, 92.
Conger *v.* Flint & P. M. R. Co. (86 Mich. 76, 48 N. W. Rep. 695), Fel. Serv., 29, 434.
Conger *v.* Grand Trunk R. Co. (13 Ont. 160), Death, etc., 100.
Conger *v.* Hudson River R. Co. (6 Duer (N. Y.) 375), Car. of M., 28.
Conger *v.* New York, W. S. & B. R. Co. (43 Am. & Eng. R. Cas. 643, 120 N. Y. 29, 23 N. E. Rep. 983, 30 N. Y. S. R. 124; affirming 45 Hun 296, 10 N. Y. S. R. 392), Spec. Perf., 20.
Conger *v.* St. Paul, M. & M. R. Co. (45 Minn. 207, 47 N. W. Rep. 788), Evid., 289.
Congrave *v.* Southern Pac. R. Co. (48 Am. & Eng. R. Cas. 337, 88 Cal. 360, 26 Pac. Rep. 175), Fel. Serv., 1, 142, 168, 199.
Conhocton Stone Road Co. *v.* Buffalo, N. Y. & E. R. Co. (3 Hun (N. Y.) 523, 5 T. & C. 651), Evid., 282; Flood. Lds., 34, 72; Pl., 132; Witn., 136.
Conhocton Stone Road *v.* Buffalo, N. Y. & E. R. Co. (51 N. Y. 573, 10 Am. Rep. 646; reversing 52 Barb. 390), Nuis., 30.
Conine *v.* Junction & B. R. Co. (3 Houst. (Del.) 288), Contr., 12.
Conkey *v.* Milwaukee & St. P. R. Co. (31 Wis. 619, 2 Am. Ry. Rep. 353), Car. of M., 568, 628, 634.
Conklin *v.* New York C. & H. R. R. Co. (43 N. Y. S. R. 414, 63 Hun 628, 17 N. Y. Supp. 651), Car. of P., 281; Cross., Inj. at, 293.
Conklin *v.* New York El. R. Co. (18 Civ. Pro. 366, 13 N. Y. Supp. 782), Elev. Rys., 183.
Conklin *v.* New York, O. & W. R. Co. (26 Am. & Eng. R. Cas. 365, 102 N. Y. 107,

6 N. E. Rep. 663, 1 N. Y. S. R. 677; affirming 32 Hun 466, mem.), Sts. & H., 158, 161.
Conklin *v.* Old Colony R. Co. (154 Mass. 155, 28 N. E. Rep. 143), Animals, 54.
Conkling *v.* Butler (4 Biss. (U. S.) 22), Receiv., 147.
Conkling *v.* Manhattan R. Co. (36 N. Y. S. R. 124, 58 Hun 611, 12 N. Y. Supp. 846), Elev. Rys., 93, 97, 165.
Conlan *v.* New York C. & H. R. R. Co. (74 Hun 115, 26 N. Y. Supp. 659, 56 N. Y. S. R. 316), Contrib. Neg., 83; Employés, Inj. to, 295; Licensees, Inj. to, 7, 9.
Conley *v.* Cincinnati, N. O. & T. P. R. Co. (41 Am. & Eng. R. Cas. 537, 89 Ky. 402, 12 S. W. Rep. 764), Death, etc., 41; Tresp., Inj. to, 23, 31, 49.
Conley *v.* Columbus Tap R. Co. (44 Tex. 579), Estop., 30; Evid., 111.
Conley *v.* Forty-second St., M. & St. N. A. R. Co. (2 N. Y. Supp. 229, 24 J. & S. 607), St. Rys., 406.
Conley *v.* Richmond & D. R. Co. (52 Am. & Eng. R. Cas. 490, 109 N. Car. 692, 14 S. E. Rep. 303), Car. of P., 538; Death, etc., 138; Pl., 25, 67.
Conlin *v.* City Council of Charleston (15 Rich. (So. Car.) 201), Death, etc., 129; Fel. Serv., 113.
Conlin *v.* San Francisco & S. J. R. Co. (36 Cal. 404), Employés, Inj. to, 441, 549; Fel. Serv., 458.
Conlon *v.* City R. Co. (8 Nov. Sc. 209), St. Rys., 177, 183.
Conlon *v.* Eastern R. Co. (15 Am. & Eng. R. Cas. 99, 135 Mass. 195), Agency, 105; Indep. Contr., 19.
Conlon *v.* Oregon S. L. & U. N. R. Co. (21 Oreg. 462, 28 Pac. Rep. 501), Rem. of C., 7.
Conlon *v.* Oregon S. L. & U. N. R. Co. (53 Am. & Eng. R. Cas. 356, 23 Oreg. 499, 32 Pac. Rep. 397), Bridges, 52; Employés, Inj. to, 183, 288, 669.
Conmee *v.* Canadian Pac. R. Co. (16 Ont. 639), Arb., 18, 32.
Conn *v.* Chicago, B. & Q. R. Co. (50 Am. & Eng. R. Cas. 640, 48 Fed. Rep. 177), For. Corp., 1; Rem. of C., 31.
Connable *v.* Chicago, M. & St. P. R. Co. (10 Am. & Eng. R. Cas. 520, 60 Iowa 27, 14 N. W. Rep. 75), Em. Dom., 874.
Connecticut & P. R. R. Co. *v.* Bailey (24 Vt. 465), Charters, 87; Evid., 178; Subscr., 24, 29, 37.
Connecticut & P. R. R. Co. *v.* Bates (32 Vt. 420), Just. P., 11.
Connecticut & P. R. R. Co. *v.* Baxter (32 Vt. 805), Subscr., 143, 210.
Connecticut & P. R. R. Co. *v.* Cooper (30 Vt. 476), Citizens., 4.
Connecticut & P. R. R. Co. *v.* Holton (32 Vt. 43), Farm Cross., 5, 6; Tresp., 6, 8.
Connecticut & P. R. R. Co. *v.* Morris (14 Can. Sup. Ct. 318; affirming 2 Montr. L. R. 303), Exec., 8.
Connecticut & P. R. R. Co. *v.* Newell (31 Vt. 364), Assump., 4.
Connecticut & P. R. R. Co. *v.* St. Johnsbury (59 Vt. 320, 4 N. Eng. Rep. 897, 10 Atl. Rep. 573), Cross., St. & H., 94.
Connecticut F. Ins. Co. *v.* Erie R. Co. (73 N. Y. 399, 29 Am. Rep. 171; reversing 10 Hun 59), Fires, 138; Subrog., 4.
Connecticut Mut. L. Ins. Co. *v.* Cleveland, C. & C. R. Co. (26 How. Pr. (N. Y.) 225, 41 Barb. 9; affirming 23 How. Pr. 180), Bonds., 16; Coupons, 12; Guar., 7, 8; Judgm., 25; Jurisd., 6.
Connecticut Mut. L. Ins. Co. *v.* New York, N. H. & H. R. Co. (25 Conn. 265), Subrog., 4.
Connecticut River R. Co. *v.* Clapp (1 Cush. (Mass.) 559), Em. Dom., 574, 774, 824.
Connecticut River R. Co. *v.* Franklin County Com'rs (127 Mass. 50), Em. Dom., 33, 1053.
Connecticut River R. Co. *v.* Williston (16 Gray (Mass.) 64), Superint., 8.
Connell *v.* Mobile & O. R. Co. (Miss.) (7 So. Rep. 344), Car. of P., 83, 286.
Connell *v.* Prescott (20 Ont. App. 49), Contrib. Neg., 34.
Connelly *v.* Manhattan R. Co. (23 N. Y. Supp. 88, 68 Hun 456, 52 N. Y. S. R. 462), App., 74, 85; Car. of P., 158; Elev. Rys., 206.
Connelly *v.* Manhattan R. Co. (60 Hun 495, 39 N. Y. S. R. 561, 15 N. Y. Supp. 176), Witn., 154, 165.
Connelly *v.* Minneapolis Eastern R. Co. (38 Minn. 80, 35 N. W. Rep. 582), Fel. Serv., 290, 378; Pl., 107.
Connelly *v.* New York C. & H. R. R. Co. (8 Am. & Eng. R. Cas. 459, 88 N. Y. 346; reversing 25 Hun 311), Death, etc., 194.
Conner *v.* Citizens' St. R. Co. (26 Am. & Eng. R. Cas. 210, 105 Ind. 62, 55 Am. Rep. 177, 4 N. E. Rep. 441), Negl., 53; St. Rys., 366, 374; Trial, 213.
Conner *v.* Covington Transfer R. Co. (Ky.) (19 S. W. Rep. 597), Sts. & H., 208.
Conner *v.* Paul (12 Bush (Ky.) 144), Death, etc., 163.
Conner *v.* Southern Exp. Co. (37 Ga. 397), Proc., 22; Trial, 9.
Conners *v.* Burlington, C. R. & N. R. Co. (71 Iowa 490, 32 N. W. Rep. 465), Death, etc., 19; Employés, Inj. to, 445.
Conners *v.* Burlington, C. R. & N. R. Co. (74 Iowa 383, 37 N. W. Rep. 966), Employés, Inj. to, 200.
Conners *v.* Burlington, C. R. & N. R. Co. (87 Iowa 147, 53 N. W. Rep. 1092), Death, etc., 311; Employés, Inj. to, 644.
Conners *v.* Walsh (131 N. Y. 590, 30 N. E. Rep. 59, 42 N. Y. S. R. 868), App., 15.
Connolly *v.* Knickerbocker Ice Co. (39 Am. & Eng. R. Cas. 441, 114 N. Y. 104, 21 N. E. Rep. 101, 22 N. Y. S. R. 675; affirming 8 N. Y. S. R. 901), Children, Inj. to, 77, 111; St. Rys., 416.
Connolly *v.* New York & N. E. R. Co. (158 Mass. 8, 32 N. E. Rep. 937), Car. of P., 453; Stat. & D., 122.
Connolly *v.* Warren (106 Mass. 146), Bagg., 31.
Connoly *v.* Alabama & T. R. R. Co. (29 Ala. 373), Trial, 1.
Connor *v.* Chicago, R. I. & P. R. Co. (59

Mo. 285, 8 Am. Ry. Rep. 417), Words & Ph., 163.
Connor *v.* Green Pond, W. & B. R. Co. (23 So. Car. 427), Incorp., 3; Mun. Aid, 403.
Connor *v.* Vicksburg & M. R. Co. (35 Am. & Eng. R. Cas. 696, 36 Fed. Rep. 273), Citizens., 2; Fed. Cts., 4, 10.
Connors *v.* Great Western R. Co. (6 U. C. C. P. 108), Sts. & H., 59.
Connors *v.* Great Western R. Co. (13 U. C. Q. B. 401), Animals, 326, 376.
Connors *v.* Meservey (76 Iowa 691, 39 N. W. Rep. 388), Land Grants, 131.
Connyers *v.* Sioux City & P. R. Co. (78 Iowa 410, 43 N. W. Rep. 267), Animals, 198, 222.
Conolly *v.* Crescent City R. Co. (41 La. Ann. 57, 3 L. R. A. 133, 5 So. Rep. 259, 6 So. Rep. 526), St. Rys., 530.
Conover *v.* Pacific Exp. Co. (40 Mo. App. 31), Exp. Cos., 73; Lim. of Liab., 3.
Conroy *v.* Oregon Constr. Co. (10 Sawy. (U. S.) 630, 23 Fed. Rep. 71), Employés, Inj. to, 542; Words & Ph., 147.
Conroy *v.* Pennsylvania R. Co. (1 Pittsb. (Pa.) 440), Car. of P., 128, 139, 344; Death, etc., 151; Stat., 66.
Conroy *v.* Twenty-third St. R. Co. (52 How. Pr. (N. Y.) 49), Contrib. Neg., 82; St. Rys., 154.
Consolidated Channel Co. *v.* Central Pac. R. Co. (51 Cal. 269), Em. Dom., 179, 182.
Consolidated Coal Co. *v.* Bonner (43 Ill. App. 17), Employés, Inj. to, 99.
Consolidated Coal Co. *v.* Haenni (146 Ill. 614, 35 N. E. Rep. 162), App., 98; Dam., 21, 26; Employés, Inj. to, 182, 265, 266.
Consolidated P. Cable Co. *v.* Pacific Cable R. Co. (53 Fed. Rep. 382, 7 U. S. App. 434, 3 C. C. A. 566), Pat. for Inv., 27.
Consolidated P. Cable Co. *v.* Pacific Cable R. Co. (53 Fed. Rep. 385, 7 U. S. App. 444, 3 C. C. A. 570), Pat. for Inv., 27.
Consolidated R. T. & E. R. Co. *v.* O'Neill (25 Ill. App. 313), Eq., 12.
Consumers' Gas Trust Co. *v.* Harless (131 Ind. 446, 29 N. E. Rep. 1062), Em. Dom., 1, 2, 3, 29, 84, 385, 397.
Conter *v.* St. Paul & S. C. R. Co. (22 Minn. 342, 19 Am. Ry. Rep. 407), Em. Dom., 603.
Conter *v.* St. Paul & S. C. R. Co. (24 Minn. 313), Em. Dom., 870.
Continental Imp. Co. *v.* Ives (30 Mich. 448), Animals, 358; Fences, 46; Trial, 195.
Continental Imp. Co. *v.* Phelps (47 Mich. 299, 11 N. W. Rep. 167), Fences, 12; Stat., 34, 65.
Continental Imp. Co. *v.* Stead (95 U. S. 161), Cross., Inj. at, 119.
Contoocook Valley R. C. *v.* Barker (32 N. H. 363), Subscr., 50.
Contra Costa C. M. R. Co. *v.* Moss (23 Cal. 323), Car. of P., 108; Em. Dom., 117, 321, 326, 367.
Convers *v.* Atchison, T. & S. F. R. Co. (142 U. S. 671, 12 Sup. Ct. Rep. 351), Em. Dom., 845.
Convers *v.* Grand Rapids & I. R. Co. (18 Mich. 459), Em. Dom., 337.
Converse *v.* Boston & M. R. Co. (58 N. H. 521), Car. of M., 280.
Converse *v.* Ft. Scott (92 U. S. 503), Mun. Aid, 266.
Converse *v.* Norwich & N. Y. Transp. Co. (33 Conn. 166), Car. of M., 43, 610, 618.
Converse *v.* Washington & G. R. Co. (2 MacArth. (D. C.) 504), Eject. Pass., 57; St. Rys., 521.
Conway *v.* Belfast & N. C. R. Co. (11 Ir. R. C. L. 345; affirming 9 Ir. R. C. L. 498), Fel. Serv., 392.
Conway *v.* Canadian Pac. R. Co. (26 Am. & Eng. R. Cas. 576, 12 Ont. App. 708; affirming 19 Am. & Eng. R. Cas. 650, 7 Ont. 673), Animals, 153.
Conway *v.* Hannibal & St. J. R. Co. (24 Mo. App. 235), Employés, Inj. to, 609; Negl., 93.
Conway *v.* Illinois C. R. Co. (50 Iowa 465), Employés, Inj. to, 99, 530.
Conway *v.* McGregor & M. R. Co. (43 Iowa 32), Em. Dom., 940.
Conway *v.* Philadelphia, W. & B. R. Co. (17 Phila. (Pa.) 71), Cross., Inj. at, 46; Death, etc., 371.
Conway *v.* Troy & B. R. Co. (1 N. Y. S. R. 587, 41 Hun 639), Cross., Inj. at, 253, 318.
Conway Bank *v.* American Exp. Co. (8 Allen (Mass.) 512), Exp. Cos., 30.
Conway County *v.* Little Rock & Ft. S. R. Co. (39 Ark. 50), Att'ys, 5.
Conwell *v.* Springfield & N. W. R. Co. (81 Ill. 232), Em. Dom., 220, 222, 225.
Conwill *v.* Gulf, C. & S. F. R. Co. (85 Tex., 96, 19 S. W. Rep. 1017), Car. of P., 263.
Cook *v.* Beatrice (32 Neb. 80, 48 N. W. Rep. 828), Mun. Aid, 253.
Cook *v.* Burlington (30 Iowa 94), Sts. & H., 69.
Cook *v.* Burlington (36 Iowa 357), Sts. & H., 69.
Cook *v.* Central R. & B. Co. (67 Ala. 533), Comp. Neg., 25; Contrib. Neg., 42, 48, 50; Cross., Inj. at, 111; Death, etc., 356; Negl., 9; Tresp., Inj. to, 3, 64.
Cook *v.* Champlain Transp. Co. (1 Den. (N. Y.) 91), Appear., 3.
Cook *v.* Chicago, B. & Q. R. Co. (40 Iowa 451), Easem., 3, 13.
Cook *v.* Chicago, M. & St. P. R. Co. (83 Iowa 278, 49 N. W. Rep. 92), Sts. & H., 141, 285, 292.
Cook *v.* Chicago, R. I. & P. R. Co. (75 Iowa 169, 39 N. W. Rep. 253), App., 12.
Cook *v.* Chicago, R. I. & P. R. Co (45 Am. & Eng. R. Cas. 291, 81 Iowa 551, 46 N. W. Rep. 1080), Charges, 41; Discrim., 65; Lim. of Ac., 29.
Cook *v.* Clay St. Hill R. Co. (60 Cal. 604, 6 Am. & Eng. R. Cas. 175), Death, etc., 271, 277, 430, 431.
Cook *v.* Detroit & M. R. Co. (12 Am. & Eng. R. Cas. 459, 45 Mich. 453, 8 N. W. Rep. 74), Receiv., 20, 22.
Cook *v.* Detroit, G. H. & M. R. Co. (9 Am. & Eng. R. Cas. 443, 43 Mich. 349, 5 N. W. Rep. 390), Mort., 260.
Cook *v.* Erie R Co. (58 Barb. (N. Y.) 312), Car. of M., 216, 240, 249, 340.

Cook *v.* Hannibal & St. J. R. Co. (63 Mo. 397, 20 Am. Ry. Rep. 177), Fel. Serv., 217, 356.
Cook *v.* International & G. N. R. Co. (3 Tex. Civ. App. 125, 22 S. W. Rep. 1012), Partit., 6.
Cook *v.* Long Island R. Co. (47 N. Y. S. R. 200; affirmed in 138 N. Y. 642, mem., 53 N. Y. S. R. 930), Car. of P., 570.
Cook *v.* Metropolitan R. Co. (98 Mass. 361), St. Rys., 497.
Cook *v.* Milwaukee & St. P. R. Co. (36 Wis. 45), Animals, 339; Farm Cross., 4.
Cook *v.* Missouri Pac. R. Co. (19 Mo. App. 329), Contrib. Neg., 85; Pl., 24.
Cook *v.* New York C. & H. R. R. Co. (35 N. Y. S. R. 525, 59 Hun 617, 15 N. Y. Supp. 45; affirmed in 128 N. Y. 635, mem., 40 N. Y. S. R. 977, mem.), Death, etc., 202, 262.
Cook *v.* New York C. & H. R. R. Co. (10 Hun (N. Y.) 426), Death, etc., 439.
Cook *v.* New York C. & H. R. R. Co. (17 N. Y. S. R. 353, 49 Hun 605, 1 N. Y. Supp. 711), Dam., 88.
Cook *v.* New York C. R. Co. (5 Lans. (N. Y.) 401), Cross., Inj. at, 125; Death, etc., 224, 252.
Cook *v.* New York C. R. Co. (1 Abb. App. Dec. (N. Y.) 432, 3 Keyes, 476), Negl., 11; Trial, 79.
Cook *v.* New York El. R. Co. (52 N. Y. S. R. 253, 22 N. Y. Supp. 790, 3 Misc. 248), Elev. Rys., 101, 104, 175.
Cook *v.* North & S. R. Co. (46 Ga. 618, 11 Am. Ry. Rep. 424), Em. Dom., 1043.
Cook *v.* North & S. R. Co. (50 Ga. 211), Em. Dom., 490; Farm. Cross., 2.
Cook *v.* North Metropolitan Tramways Co. (L. R. 18 Q. B. D. 683), Employés, Inj. to, 783.
Cook *v.* St. Louis & K. R. Co. (56 Mo. 380), New Tr., 9.
Cook *v.* St. Louis, I. M. & S. R. Co. (8 Mo. App. 573), Fel. Serv., 1, 475, 483.
Cook *v.* St. Paul, M. & M. R. Co. (34 Minn. 45, 24 N. W. Rep. 311), Employés, Inj. to, 40, 135, 182, 225, 267, 471; Fel. Serv., 218.
Cook *v.* Sherman (16 Am. & Eng. R. Cas. 561, 4 McCrary (U. S.) 20, 20 Fed. Rep. 167), Contr., 59; Direct., 44.
Cook *v.* State (33 N. J. L. 474; reversing 32 N. J. L. 338), Tax., 81, 274.
Cook *v.* Union R. Co. (125 Mass. 57), St. Rys., 475.
Cook *v.* United States Exp. Co. (4 Hun (N. Y.) 272), Evid., 207.
Cook *v.* Western & A. R. Co. (69 Ga. 619), Death, etc., 269.
Cook *v.* Western & A. R. Co. (28 Am. & Eng. R. Cas. 317, 72 Ga. 48), Release, 26.
Cook County *v.* Chicago, B. & Q. R. Co. (35 Ill. 460), Em. Dom., 205; Tax., 132, 336, 347.
Cook County *v.* Great Western R. Co. (119 Ill. 218, 10 N. E. Rep. 564), Cross., St. & H., 2; Sts. & H., 84, 207.
Cooke *v.* Boston & L. R. Corp. (10 Am. & Eng. R. Cas. 328, 133 Mass. 185), Cross., St. & H., 100.
Cooke *v.* Illinois C. R. Co. (30 Iowa 202), Animals, 37.
Cooksey *v.* Kansas City, St. J. & C. B. R. Co. (17 Mo. App. 132), Just. P., 23.
Cooksey *v.* Kansas City, St. J. & C. B. R. Co. (74 Mo. 477), Animals, 304.
Coolbroth *v.* Maine C. R. Co. (21 Am. & Eng. R. Cas. 599, 77 Me. 165), Employés, Inj. to, 182, 183.
Cooley *v.* Brainerd (38 Vt. 394), Animals, 339.
Cooley *v.* Grand Trunk R. Co. (18 U. C. Q. B. 96), Animals, 276.
Cooley *v.* Minnesota Transfer Co. (55 Am. & Eng. R. Cas. 616, 53 Minn. 327, 55 N. W. Rep. 141), Attach., 14; Car. of M., 383; Pledge, etc., 3.
Cooley *v.* Port Wardens of Phila. (12 How. (U. S.) 299), Commerce, 10.
Coolidge *v.* Rome, W. & O. R. Co. (23 N. Y. S. R. 459, 52 Hun 613, 1 Silv. Sup. Ct. 214, 5 N. Y. Supp. 301), Fires, 316.
Cooling, In re (6 Railw. Cas. 246, L. R. 14 Q. B. 25, 14 Jur. 128, 19 L. J. Q. B. 25), Ferries, 6.
Coombs *v.* Bristol & E. R. Co. (3 H. & N. 1, 27 L. J. Ex. 269), Car. of M., 705.
Coombs *v.* Bristol & E. R. Co. (3 H. & N. 510, 27 L. J. Ex. 401), Parties, 5.
Coombs *v.* Fitchburg R. Co. (53 Am. & Eng. R. Cas. 353, 156 Mass. 200, 30 N. E. Rep. 1140), Employés, Inj to, 213.
Coombs *v.* Salt Lake & Ft. D. Co. (9 Utah 322, 34 Pac. Rep. 248), Em. Dom., 1044, 1075.
Coon *v.* North Carolina R. Co. (65 N. Car. 507), Bridges, 17.
Coon *v.* Syracuse & U. R. Co. (6 Barb. (N. Y.) 231), Fel. Serv., 1, 202.
Coon *v.* Syracuse & U. R. Co. (5 N. Y. 492; affirming 6 Barb. 231), App., 107; Fel. Serv., 25, 113, 439.
Coontz *v.* Missouri Pac. R. Co. (115 Mo. 669, 22 S. W. Rep. 572), Dam., 79, 93; Employés, Inj. to, 642, 748.
Cooper, Ex parte (2 Drew. & Sm. 312, 11 Jur. n. S. 103, 34 L. J. Ch. 373), Em. Dom., 1186.
Cooper *v.* Anniston & A. R. Co. (36 Am. & Eng. R. Cas. 581, 85 Ala. 106, 4 So. Rep. 689), Em. Dom., 863, 868, 957, 968.
Cooper *v.* Atchison, T. & S. F. R. Co. (39 Mo. App. 489), Animals, 576.
Cooper *v.* Central R. Co. (44 Iowa 134), Contrib. Neg., 4, 10; Employés, Inj. to, 18, 99, 645; Evid., 215; Fel. Serv., 284; Witn., 182.
Cooper *v.* Chester R. Co. (19 N. J. Eq. 199), Em. Dom., 398.
Cooper *v.* Corbin (13 Am. & Eng. R. Cas. 394, 105 Ill. 224), Judm., 21; Mort., 62, 252; Tax., 307.
Cooper *v.* Georgia Pac. R. Co. (92 Ala. 329, 9 So. Rep. 159), Car. of M., 653.
Cooper *v.* Grand Trunk R. Co. (49 N. H. 200), Parties, 16.
Cooper *v.* Hames (93 Ala. 280, 9 So. Rep. 341), Injunc., 65.
Cooper *v.* Lake Shore & M. S. R. Co. (66 Miss. 261, 10 West. Rep. 184, 33 N. W. Rep. 306), Children, Inj. to, 73, 75, 77;

Cross., Inj. at, 85, 166, 269; Dam., 1; Death, etc., 271, 344, 403; Evid., 247.
Cooper v. London & S. W. R. Co. (4 Jur. N. S. 762), Car. of M., 531.
Cooper v. London & S. W. R. Co. (27 L. J. N. S. C. P. 324, 4 C. B. N. S. 738, 1 Ry. & C. T. Cas. 185), Discrim., 54.
Cooper v. London, B. & S. C. R. Co. (L. R. 4 Ex. D. 88, 48 L. J. Ex. D. 434, 40 L. T. 324, 27 W. R. 474, 3 Ry. & C. T. Cas. xxii), Tickets & F., 57.
Cooper v. McKee (49 Iowa 286), Bills & N., 19.
Cooper v. McKee (53 Iowa 239, 5 N. W. Rep. 121), Bills & N., 11.
Cooper v. Milwaukee & P. du C. R. Co. (23 Wis. 668), Fel. Serv., 1, 146, 389.
Cooper v. Mullins (30 Ga. 146), Fel. Serv., 51.
Cooper v. New York C. & H. R. R. Co. (6 Hun (N. Y.) 276), Med. Serv., 7, 18.
Cooper v. Pittsburg, C. & St. L. R. Co. (24 W. Va. 37), Employés, Inj. to, 143, 590, 604; Fel. Serv., 73, 94, 95, 225, 397, 401.
Cooper v. Richmond & D. R. Co. (42 Fed. Rep. 697), Rem. of C., 47.
Cooper v. St. Paul City R. Co. (58 Am. & Eng. R. Cas. 598, 54 Minn. 379, 56 N. W. Rep. 42), Dam., 83; Evid., 49; New Tr., 70; Witn., 166, 171.
Cooper v. Second & T. St. Pass. R. Co. (3 Phila. (Pa.) 262), Injunc., 5.
Cooper v. Southwestern R. Co. (4 C. B. 738, 27 L. J. C. P. 324), Discrim., 18.
Cooper v. State (89 Ga. 222, 15 S. E. Rep. 291), Crim. L., 27.
Cooper v. Sullivan County (65 Mo. 542), Mun. Aid, 233.
Cooper v. Thompson (13 Blatchf. (U. S.) 434), Coupons, 3, 4, 16.
Cooper v. Young (22 Ga. 269), Car. of M., 804.
Coopers v. Wolf (15 Ohio St. 523), Exec., 15; Mort., 36.
Coops v. Lake Shore & M. S. R. Co. (31 Am. & Eng. R. Cas. 379, 66 Mich. 448, 10 West. Rep. 174, 33 N. W. Rep. 541), Death, etc., 211.
Coosa v. Barclay (30 Ala. 120), Bills of L., 1.
Cope v. Thames H. D. & R. Co. (6 Railw. Cas. 83, 3 Ex. 841, 18 L. J. Ex. 345), Direct., 25.
Copeland v. Copeland (7 Bush (Ky.) 349), Dower, 2.
Copeland v. Memphis & C. R. Co. (3 Woods (U. S.) 651), Charters, 13, 137; Rem. of C., 57.
Copeland v. Northeastern R. Co. (6 El. & Bl. 277, 2 Jur. N. S. 1162), Stock, 62.
Copley v. Burton (39 L. J. M. C. 141, L. R. 5 C. P. 489, 22 L. T. 888), Intox'ing L., 6.
Copley v. New Haven & N. Co. (19 Am. & Eng. R. Cas. 373, 130 Mass. 6), Cross., Inj. at, 318.
Copp v. Louisville & N. R. Co. (46 Am. & Eng. R. Cas. 634, 43 La. Ann. 511, 9 So. Rep. 441), Int. Com., 158.
Copp v. Louisville & N. R. Co. (53 Am. & Eng. R. Cas. 25, 50 Fed. Rep. 164), Lim. of Ac., 37.
Coppersmith v. Mound City R. Co. (51 Mo. App. 357), Trial, 35.
Coppins v. New York C. & H. R. R. Co. (43 Hun 26, 6 N. Y. S. R. 572), Employés, Inj. to, 671.
Coppins v. New York C. & H. R. R. Co. (44 Am. & Eng. R. Cas. 618, 122 N. Y. 557, 25 N. E. Rep. 915, 34 N. Y. S. R. 214; affirming 48 Hun 292, 17 N. Y. S. R. 916), Employés, Inj. to, 155; Fel. Serv., 59, 132, 133, 151.
Coppner v. Pennsylvania Co. (12 Ill. App. 600), Children, Inj. to, 9.
Coquard v. Union Depot Co. (10 Mo. App. 261), Pledge, etc., 3.
Corbett v. Fitchburg R. Co. (110 Mass. 204), Assign., 19.
Corbett v. St. Louis, I. M. & S. R. Co. (26 Mo. App. 621), Fel. Serv., 113; Witn., 88.
Corbett v. Twenty-third St. R. Co. (42 Hun (N. Y.) 587, 4 N. Y. S. R. 535), Car. of P., 303; False Imp., 11.
Corbett v. Twenty-third St. R. Co. (114 N. Y. 579, 21 N. E. Rep. 1033, 24 N. Y. S. R. 538), Abate., 5.
Corbin v. Cedar Rapids, I. F. & N. W. R. Co. (66 Iowa 73, 23 N. W. Rep. 270), Em. Dom., 954.
Corbin v. Wisconsin, I. & N. R. Co. (66 Iowa 269, 23 N. W. Rep. 662), Em. Dom., 493, 903.
Corcoran v. Boston & A. R. Co. (12 Am. & Eng. R. Cas. 226, 133 Mass. 507), Death, etc., 258.
Corcoran v. Chesapeake & O. Canal Co. (MacArth. (D. C.) 358), Coupons, 12.
Corcoran v. Chicago, M. & N. R. Co. (37 Ill. App. 417; affirmed in 149 Ill. 291, 37 N. E. Rep. 68), Sts. & H., 140.
Corcoran v. Concord & M. R. Co. (56 Fed. Rep. 1014), Tresp., Inj. to, 88.
Corcoran v. Delaware, L. & W. R. Co. (126 N. Y. 673, 27 N. E. Rep. 1022, 38 N. Y. S. R. 251, 4 Silv. App. 483), Employés, Inj. to, 18, 664.
Corcoran v. Delaware, L. & W. R. Co. (47 N. Y. S. R. 147, 19 N. Y. Supp. 994), Employés, Inj. to, 22.
Corcoran v. Holbrook (59 N. Y. 517), Fel. Serv., 73.
Corcoran v. New York El. R. Co. (19 Hun (N. Y.) 368), Tresp., Inj. to, 114.
Corcoran v. St. Louis, I. M. & S. R. Co. (105 Mo. 399, 16 S. W. Rep. 411), Contrib. Neg., 82, 87; Sts. & H., 415.
Cordell v. New York C. & H. R. R. Co. (64 N. Y. 535; reversing 6 Hun 461), Cross., Inj. at, 111, 136.
Cordell v. New York C. & H. R. R. Co. (70 N. Y. 119, 18 Am. Ry. Rep. 511), Cross., Inj. at, 295; Negl., 5.
Cordell v. New York C. & H. R. R. Co. (75 N. Y. 330), Death, etc., 192, 269.
Cords v. Third Ave. R. Co. (24 J. & S. 319, 4 N. Y. Supp. 439, 21 N. Y. S. R. 461), Negl., 40.
Cords v. Third Ave. R. Co. (24 J. & S. (N. Y.) 570, 4 N. Y. Supp. 713, 23 N. Y. S. R. 201), App., 37.

Core *v.* Ohio River R. Co. (38 W. Va. 456, 18 S. E. Rep. 596), Fel. Serv., 146, 148, 211, 221.
Corey *v.* Bath (35 N. H. 530), Sunday, 4.
Corey *v.* Buffalo, C. & N. Y. R. Co. (23 Barb. (N. Y.) 482), Sts. & H., 212, 257.
Corey *v.* Northern Pac. R. Co. (19 Am. & Eng. R. Cas. 352, 32 Minn. 457, 21 N. W. Rep. 479), Cross., Inj. at, 324.
Corinne Mill C. & S. Co. *v.* Johnson (7 Utah 327, 26 Pac. Rep. 922), Land Grants, 66.
Cork & B. R. Co. *v.* Caszenove (10 Q. B. 935, 11 Jur. 802), Subscr., 161.
Cork & B. R. Co. *v.* Goode (13 C. B. 827, 17 Jur. 555, 22 L. J. C. P. 198), Lim. of Ac., 42.
Cork & Y. R. Co., In re (L. R. 4 Ch. 748, 39 L. J. Ch. 277, 21 L. T. 735), Bonds, 31.
Cork & Y. R. Co. *v.* Paterson (18 C. B. 414), Consol., 21, 33.
Cork Distilleries Co. *v.* Great Southern & W. R. Co. (Ireland) (L. R. 7 H. L. Cas. 269, 8 Ir. C. L. 334; affirming 5 Ir. C. L. 177), Car. of M., 263.
Corley *v.* Georgia R. & B. Co. (49 Ga. 626), Pl., 8.
Corlin *v.* West End St. R. Co. (154 Mass. 197, 27 N. E. Rep. 1000), St. Rys., 394.
Corliss *v.* Worcester, N. & R. R. Co. (21 Am. & Eng. R. Cas. 208, 63 N. H. 404), Death, etc., 3, 276, 426.
Corneilson *v.* Eastern R. Co. (50 Minn. 23, 52 N. W. Rep. 224), Fel. Serv., 18, 131.
Cornell *v.* Clark (104 N. Y. 451, 10 N. E. Rep. 888, 5 N. Y. S. R. 772), Sales, 8.
Cornell *v.* Detroit Elec. R. Co. (46 Am. & Eng. R. Cas. 201, 82 Mich. 495, 46 N. W. Rep. 791), Elec. Rys., 36.
Cornell *v.* New York El. R. Co. (37 N. Y. S. R. 624, 13 N. Y. Supp. 511), Elev. Rys., 93, 173, 186.
Cornell *v.* St. Louis, K. & A. R. Co. (25 Kan. 613), Evid., 179.
Cornell *v.* Skaneateles R. Co. (40 N. Y. S. R. 1, 61 Hun 618, 15 N. Y. Supp. 581), Animals, 216.
Cornell *v.* Utica, I. & E. R. Co. (61 How. Pr. (N. Y.) 184), Contr., 15.
Cornish *v.* Accident Ins. Co. (23 Q. B. D. 453), Acc. Ins., 10.
Cornish *v.* Chicago, B. & Q. R. Co. (49 Iowa 378), Embankm., 4; Witn., 175.
Cornish *v.* Milwaukee & L. W. R. Co. (17 Am. & Eng. R. Cas. 142, 60 Wis. 476, 19 N. W. Rep. 443), Em. Dom., 773.
Cornish *v.* Toronto St. R. Co. (23 U. C. C. P. 355), St. Rys. 411.
Cornman *v.* Eastern Counties R. Co. (4 H. & N. 781, 29 L. J. Ex. 94), Stat. & D., 87.
Cornwall *v.* Charlotte, C. & A. R. Co. (97 N. Car. 11, 2 S. E. Rep. 659), Contrib. Neg., 11; Employés, Inj. to, 299, 383, 433, 440.
Cornwall *v.* Louisville & N. R. Co. (87 Ky. 72, 9 Ky. L. Rep. 924, 7 S. W. Rep. 553), Em. Dom., 211; Sts. & H., 111.
Cornwall *v.* Mills (12 J. & S. (N. Y.) 45), Death, etc., 374, 387, 437.
Cornwall *v.* Sullivan R. Co. (28 N. H. 161), Animals, 153; Fences, 31, 74.
Cornwall & L. R. Co.'s Appeal (125 Pa. St. 232, 23 W. N. C. 494, 46 Phila. Leg. Int. 360, 20 Pittsb. L. J. N. S. 59, 17 Atl. Rep. 427), Cross. Rys., 75, 81.
Cornwallis *v.* Canadian Pac. R. Co. (19 Can. Sup. Ct. 702), Tax., 385.
Cornwall Minerals R. Co., In re (48 L. T. 41), Mort., 98.
Corporation of Brantford *v.* Buffalo & L. H. R. Co. (29 U. C. Q. B. 607), Leases, 141.
Corporation of Pontiac County *v.* Ross (17 Can. Sup. Ct. 406), Debent., 5.
Correll *v.* Burlington, C. R. & M. R. Co. (38 Iowa 120), Cross., Inj. at, 186; Negl., 29.
Corrigall *v.* London & B. R. Co. (2 D., N. S. 851, 5 M. & G. 219, 3 Railw. Cas. 411, 6 Scott, N. R. 241, 12 L. J. C. P. 209), Em. Dom., 1146, 1185, 1186, 1189.
Corrigan *v.* Dry Dock, E. B. & B. R. Co. (14 Daly (N. Y.) 120, 6 N. Y. S. R. 243), Dam., 86; New Tr., 43.
Corrigan *v.* Great Northern & M. F. L. R. Cos. (L. R. 6 Ir. 90), Car. of L. S., 93.
Corrister *v.* Kansas City, St. J. & C. B. R. Co. (25 Mo. App. 619), Dam., 7; Eject. Pass., 110.
Corry *v.* Great Western R. Co. (L. R. 7 Q. B. D. 322, 50 L. J. Q. B. 386, 44 L. T. 701, 29 W. R. 623; affirming L. R. 6 Q. B. D. 237, 50 L. J. Q. B. 313), Fences, 35, 39.
Corser *v.* Russell (20 Abb. N. Cas. (N. Y.) 316), Bagg., 119; Receiv., 177.
Corson *v.* Maine C. R. Co. (17 Am. & Eng. R. Cas. 634, 76 Me. 244), Fel. Serv., 482.
Cort *v.* Ambergate, N. & B. & E. J. R. Co. (17 Q. B. 127, 15 Jur. 877, 20 L. J. Q. B. 460), Dam., 52.
Cortland & H. Horse R. Co., In re (31 Hun (N. Y.) 72; affirmed in 98 N. Y. 336) St. Rys., 113.
Cortland & H. Horse R. Co., In re (98 N. Y. 336), Cross. Rys., 51.
Corwin *v.* Campbell (45 How. Pr. (N. Y.) 9), Mun. Aid, 30.
Corwin *v.* Collett (16 Ohio St. 289), Vend. & P., 5.
Corwin *v.* Long Island R. Co. (2 City Ct. (N. Y.) 106), False Imp., 7.
Corwin *v.* New York & E. R. Co. (13 N. Y. 42), Animals, 153, 158, 386.
Corwin *v.* St. Louis & S. F. R. Co. (51 Kan. 451, 33 Pac. Rep. 99), Em. Dom., 435.
Cory *v.* Chicago, B. & K. C. R. Co. (44 Am. & Eng. R. Cas. 183, 100 Mo. 282, 13 S. W. Rep. 346), Em. Dom., 50, 253, 286, 317, 325, 348, 477, 504, 643, 854, 865, 1015, 1020, 1043, 1072; Estop., 33.
Coryell *v.* Hannibal & St. J. R. Co. (82 Mo. 441), Animals, 118, 576.
Cosby *v.* Owensboro & R. R. Co. (10 Bush (Ky.) 288), Cross., St. & H., 114; Embankm., 1; Sts. & H., 60, 137, 138, 141, 287.
Cosgrove *v.* New York C. & H. R. R. Co. (13 Hun (N. Y.) 329; see 87 N. Y. 88), Imp. Neg., 10.
Cosgrove *v.* New York C. & H. R. R. Co. (6 Am. & Eng. R. Cas. 35, 87 N. Y. 88, 41 Am. Rep. 355; see 13 Hun 329), Cross., Inj. at, 139.

Cosgrove *v.* Ogden (49 N. Y. 255), Agency, 46; Children, Inj. to, 143.
Cosgrove *v.* Tebo & N. R. Co. (54 Mo. 495), Constr. Rys., 92; Evid., 196.
Cossey *v.* London, B. & S. C. R. Co. (39 L. J. C. P. 174, L. R. 5 C. P. 146, 22 L. T. 19, 18 W. R. 493), Discov., 6.
Costello *v.* Philadelphia & R. R. Co. (2 Pa. Dist. 453), Employés, Inj. to, 45, 609.
Costello *v.* Syracuse, B. & N. Y. R. Co. (65 Barb. (N. Y.) 92; appeal dismissed (?) 55 N. Y. 641, mem.), Children, Inj. to, 75; Cross., Inj. at, 18; Death, etc., 224; Negl., 16; Tresp., Inj. to, 26.
Coster *v.* New Jersey R. & T. Co. (23 N. J. L. 227; affirmed in 24 N. J. L. 730), Em. Dom., 278, 291, 315, 814.
Coster *v.* New Jersey R. & T. Co. (24 N. J. L. 730; affirming 23 N. J. L. 227), Em. Dom., 80, 509, 921.
Costigan *v.* Mohawk & H. R. Co. (2 Den. (N. Y.) 609), Superint., 5.
Costigan *v.* Pennsylvania R. Co. (54 N. J. L. 233, 23 Atl. Rep. 810), Charters, 75; Nuis., 5; Pl., 21, 49; Release, 1.
Costikyan *v.* Rome, W. & O. R. Co. (35 N. Y. S. R. 163, 12 N. Y. Supp. 683, 58 Hun 590; affirmed in 128 N. Y. 633, mem., 40 N. Y. S. R. 977), Car. of P., 186; Death, etc., 186.
Costley *v.* Galveston City R. Co. (70 Tex. 112, 8 S. W. Rep. 113), Negl., 63; Witn., 6.
Cotchett *v.* Savannah & T. R. Co. (84 Ga. 687, 11 S. E. Rep. 553), Trial, 76.
Cother *v.* Midland R. Co. (2 Phillips 469, 17 L. J. Ch. N. S. 235), Em. Dom., 1086.
Cott *v.* Lewiston R. Co. (36 N. Y. 214, 34 How. Pr. 222), Waters & W., 23.
Cottam *v.* Eastern Counties R. Co. (30 L. J. Ch. 217), Debent., 11.
Cottam *v.* Guest (1 Am. & Eng. R. Cas. 574, L. R. 6 Q. B. D. 70, 50 L. J. Q. B. D. 174, 29 W. R. 305), Tramw., 4.
Cotten *v.* Fidelity & C. Co. (41 Fed. Rep. 506), Acc. Ins., 1, 10.
Cotten *v.* Leon County Com'rs (6 Fla. 610), Mun. Aid, 14, 56; Words & Ph., 67, 137.
Cotter *v.* Frankford & S. R. Co. (15 Phila. (Pa.) 255), Children, Inj. to, 15.
Cotter *v.* Metropolitan R. Co. (10 Jur. N. S. 1014, 10 L. T. 777, 12 W. R. 1021), Em. Dom., 1151.
Cotting *v.* New York & N. E. R. Co. (29 Am. & Eng. R. Cas. 371, 54 Conn. 156, 5 Atl. Rep. 851), Divid., 8.
Cotting *v.* Hamilton & T. R. Co. (14 U. C. Q. B. 87), Em. Dom., 1276.
Cotton *v.* New Providence (47 N. J. L. 401, 2 Atl. Rep. 253), Mun. Aid, 391.
Cotton *v.* New York, L. E. & W. R. Co. (48 N. Y. S. R. 89, 20 N. Y. Supp. 347), Animals, 170, 171.
Cottrill *v.* Chicago, M. & St. P. R. Co. (47 Wis. 634, 3 N. W. Rep. 376, 21 Am. Ry. Rep. 66), Collis., 36; Employés, Inj. to, 331, 354; Trial, 213.
Couch *v.* Charlotte, C. & A. R. Co. (28 Am. & Eng. R. Cas. 331, 22 So. Car. 557), Employés, Inj. to, 183; Evid., 36; Fel. Serv., 348; Trial, 64; Witn., 131.
Couch *v.* Watson Coal Co. (46 Iowa 17), Evid., 39; Witn., 146.
Coudy *v.* St. Louis, I. M. & S. R. Co. (27 Am. & Eng. R. Cas. 282, 85 Mo. 79), Car. of P., 544, 585; Trial, 61.
Coughlen *v.* Chicago, I. & K. R. Co. (30 Am. & Eng. R. Cas. 330, 36 Kan. 422, 13 Pac. Rep. 813), Em. Dom., 566.
Coughlin *v.* Boston Tow-boat Co. (151 Mass. 92, 23 N. E. Rep. 725), Employés, Inj. to, 551.
Coughlin *v.* New York C. & H. R. R. Co. (71 N. Y. 443, 27 Am. Rep. 75; reversing 8 Hun 136), Att'ys, 13, 19.
Coughtry *v.* Willamette St. R. Co. (21 Oreg. 245, 27 Pac. Rep. 1031), Evid., 143; Trial, 65.
Coulson *v.* Gzowski (22 U. C. Q. B. 33), Constr. Rys., 19.
Coulson *v.* Macpherson (23 U. C. Q. B. 129), Release, 14.
Coulter *v.* American M. U. Exp. Co. (56 N. Y. 585), Contrib. Neg., 44; Witn., 38.
Council Bluffs *v.* Kansas City, St. J. & C. B. R. Co. (45 Iowa 338), Commerce, 1, 4, 8; Sts. & H., 91; Words & Ph., 47, 236.
Council Bluffs & St. L. R. Co. *v.* Bentley (20 Am. & Eng. R. Cas. 401, 62 Iowa 446, 17 N. W. Rep. 668), Em. Dom., 274.
Council Grove, O. C. & O. R. Co. *v.* Center (42 Kan. 438, 22 Pac. Rep. 574), Em. Dom., 619.
Councill *v.* Western & A. R. Co. (1 Int. Com. Rep. 638, 1 Int. Com. Com. 339), Col. Pers., 14.
Counselman *v.* Hitchcock (48 Am. & Eng. R. Cas. 448, 142 U. S. 547, 12 Sup. Ct. Rep. 195; reversing 44 Fed. Rep. 268), Int. Com., 173; Witn., 86.
Counterman *v.* Dublin Tp. (38 Ohio St. 515), Mun. Aid, 423.
Countryman *v.* East Tenn., V. & G. R. Co. (89 Ga. 835, 16 S. E. Rep. 84), Employés, Inj. to, 319.
Coup *v.* Wabash, St. L. & P. R. Co. (18 Am. & Eng. R. Cas. 542, 56 Mich. 111, 22 N. W. Rep. 215, 56 Am. Rep. 374), Car. of L. S., 74.
Coupland *v.* Housatonic R. Co. (55 Am. & Eng. R. Cas. 380, 61 Conn. 531, 23 Atl. Rep. 870), Bills of L., 19, 107; Car. of L. S., 4, 9, 22, 24, 28, 43, 90, 97, 150; Car. of M., 200, 420; Evid., 253; Lim. of Liab., 31; Pl., 128.
Course *v.* New York, L. E. & W. R. Co. (17 N. Y. S. R. 715, 49 Hun 609, 2 N. Y. Supp. 312), Employés, Inj. to, 291.
Courser *v.* Vermont C. R. Co. (25 Vt. 476), Em. Dom., 233.
Courson *v.* Chicago, M. & St. P. R. Co. (71 Iowa 28, 32 N. W. Rep. 8), Animals, 288, 537.
Courtenay *v.* Fuller (65 Me. 156), Evid., 181.
Courtright *v.* Deeds (37 Iowa 503), Subscr., 212; Words & Ph., 241.
Courtwright *v.* Strickler (37 Iowa 382), Subscr., 217.
Cousins *v.* Hannibal & St. J. R. Co. (66 Mo. 572), Animals, 203, 649.
Cousins *v.* Lake Shore & M. S. R. Co. (96

Mich. 386, 56 N. W. Rep. 14), Car. of P., 377, 437; Trial, 139.
Cousins *v.* Third Ave. R. Co. (25 N. Y. S. R. 341, 53 Hun 634, 6 N. Y. Supp. 950), App., 117.
Coventry *v.* Great Eastern R. Co. (11 Q. B. D. 776, 52 L. J. Q. B. D. (App.) 694, 49 L. T. 641, 4 Ry. & C. T. Cas. xiii), Bills of L., 15, 125.
Coventry *v.* London, B. & S. C. R. Co. (L. R. 5 Eq. 104, 37 L. J. Ch. 90, 17 L. T. 368, 16 W. R. 267), Em. Dom., 1111, 1112, 1115.
Covey *v.* Hannibal & St. J. R. Co. (27 Mo. App. 170), Employés, Inj. to, 221, 424.
Covey *v.* Hannibal & St. J. R. Co. (28 Am. & Eng. R. Cas. 382, 86 Mo. 635), Employés, Inj. to, 99, 136, 139, 221.
Covey *v.* Pittsburg, Ft. W. & C. R. Co. (3 Phila. (Pa.) 173), Exec., 2, 32; Mort., 124.
Covington *v.* Chesapeak. & O. R. Co. (Ky.) (20 S. W. Rep. 538), Nuis., 16.
Covington *v.* Covington & C. Br. Co. (10 Bush (Ky.) 69), Agency, 45; Charters, 26; Mort., 5.
Covington *v.* Western & A. R. Co. (34 Am. & Eng. R. Cas. 469, 81 Ga. 273, 6 S. E. Rep. 503), App., 45; Car. of P., 427; Trial, 174.
Covington & C. Bridge Co. *v.* South Covington & C. St. R. Co. (Ky.) (50 Am. & Eng. R. Cas. 395, 19 S. W. Rep. 403), Bridges, 100, 101.
Covington & L. R. Co. *v.* Bowler (9 Bush (Ky.) 468), Direct., 45, 50, 53; Estop., 12; Jurisd., 9; Lim. of Ac., 59; Vend. & P., 6.
Covington & L. R. Co. *v.* Kenton County Court (12 B. Mon. (Ky.) 144), Mun. Aid, 287.
Covington & M. R. Co. *v.* Mayor, etc., of Athens (85 Ga. 367, 11 S. E. Rep. 663), Mun. Corp., 21.
Covington S. R. Transfer R. Co. *v.* Piel (33 Am. & Eng. R. Cas. 207, 87 Ky. 267, 8 S. W. Rep. 449), Em. Dom., 405, 643, 665.
Covington Stock Yards Co. *v.* Keith (49 Am. & Eng. R. Cas. 149, 139 U. S. 128, 11 Sup. Ct. Rep. 461), Car. of L. S., 16, 17.
Covington St. R. Co. *v.* Covington (9 Bush (Ky.) 127), St. Rys., 25.
Covington St. R. Co. *v.* Packer (9 Bush (Ky.) 455), Children, Inj. to, 185, 191.
Covington Transfer Co. *v.* Kelly (3 Am. & Eng. R. Cas. 335, 36 Ohio St. 86, 38 Am. Rep. 558), Imp. Neg., 20.
Cowan *v.* Bond (39 Fed. Rep. 54, 2 Int. Com. Rep. 542), Discrim., 7; Int. Com., 95.
Cowan *v.* Chicago, M. & St. P. R. Co. (80 Wis. 284, 50 N. W. Rep. 180), App., 68; Employés, Inj. to, 145; Fel. Serv., 57.
Cowan *v.* Muskegon R. Co. (84 Mich. 583, 48 N. W. Rep. 166), St. Rys., 181.
Cowan *v.* Third Ave. R. Co. (16 N. Y. S. R. 916, 1 N. Y. Supp. 612, 49 Hun 607, mem.), St. Rys., 490.
Cowan *v.* Third Ave. R. Co. (31 N. Y. S. R. 145, 9 N. Y. Supp. 610, 56 Hun 644, mem.; affirmed in 132 N. Y. 598, mem., 44 N. Y. S. R. 934, 30 N. E. Rep. 1152), Cable Rys., 19; Evid., 288; Witn., 31.
Cowan *v.* Union Pac. R. Co. (35 Fed. Rep. 43), Fences, 12.
Coward *v.* East Tenn., V. & G. R. Co. (16 Lea (Tenn.) 225, 57 Am. Rep. 226), Bagg., 36.
Cowden *v.* Pacific Coast Steamship Co. (54 Am. & Eng. R. Cas. 438, 94 Cal. 470, 29 Pac. Rep. 873), Discrim., 1.
Cowdrey *v.* Caneadea (21 Blatchf. (U. S.) 351, 16 Fed. Rep. 532), Mun. Aid, 55.
Cowdrey *v.* Galveston, H. & H. R. Co. (93 U. S. 352, 9 Am. Ry. Rep. 361), Att'ys, 15; Receiv., 81, 149.
Cowdrey *v.* Galveston, H. & H. R. Co. (1 Woods (U. S.) 331), Receiv., 49, 52, 148, 150, 155, 156, 160, 162, 172.
Cowell *v.* Colorado Springs Co. (100 U. S. 55), States, 4.
Cowes & N. R. Co. *v.* Board of Trade (43 L. J. Q. B. 242, 22 W. R. 807), Tel. & T. Lines, 11.
Cowgill *v.* Hannibal & St. J. R. Co. (33 Mo. App. 677), Animals, 126.
Cowhill *v.* Roberts (71 Hun (N. Y.) 127), Elev. Rys., 222; Employés, Inj. to, 101, 182, 206.
Cowles *v.* Chicago, R. I. & P. R. Co. (32 Iowa 515, 10 Am. Ry. Rep. 36), New Tr., 101.
Cowles *v.* Richmond & D. R. Co. (2 Am. & Eng. R. Cas. 90, 84 N. Car. 309, 37 Am. Rep. 620), Employés, Inj. to, 91; Fel. Serv., 90.
Cox *v.* Burlintgon & W. R. Co. (77 Iowa 478, 42 N. W. Rep. 429), App., 119; Pl., 153.
Cox *v.* Columbus & W. R. Co. (49 Am. & Eng. R. Cas. 111, 91 Ala. 392, 8 So. Rep. 824), Car. of M., 270.
Cox *v.* East Tenn., V. & G. R. Co. (68 Ga. 446), Bridges, 15, 24.
Cox *v.* Forest City & S. R. Co. (66 Iowa 289, 23 N. W. Rep. 672), Mun. Aid, 412.
Cox *v.* Foscue (37 Ala. 505), Car. of M., 166.
Cox *v.* Great Eastern R. Co. (38 L. J. C. P. 151, L. R. 4 C. P. 183), Charges, 65.
Cox *v.* Great Western R. Co. (6 Am. & Eng. R. Cas. 485, L. R. 9 Q. B. D. 106, 30 W. R. 816), Employés, Inj. to, 782; Fel. Serv., 195.
Cox *v.* Keahey (36 Ala. 340), Agency, 81.
Cox *v.* London & N. W. R. Co. (3 F. & F. 77), Car. of M., 21.
Cox *v.* Louisville, N. A. & C. R. Co. (48 Ind. 178, 8 Am. Ry. Rep. 296), Deeds, 19; Em. Dom., 384, 1010; Lim. of Ac., 48; Sts. & H., 12, 139; Words & Ph., 218.
Cox *v.* McLaughlin (76 Cal. 60, 18 Pac. Rep. 100; former appeals 44 Cal. 18, 47 Cal. 89, 54 Cal. 605, 52 Cal. 590, 63 Cal. 196), Constr. Rys., 36.
Cox *v.* Mason City & Ft. D. R. Co. (77 Iowa 20, 41 N. W. Rep. 475), Em. Dom., 456.
Cox *v.* Mayor, etc., of Griffin (18 Ga. 728), Injunc., 41, 52.
Cox *v.* Midland Counties R. Co. (3 Ex. 268, 13 Jur. 65, 18 L. J. Ex. 65), Med. Serv., 3, 11.
Cox *v.* Minneapolis, S. St. M. & A. R. Co. (38 Am. & Eng. R. Cas. 287, 41 Minn. 101, 42 N. W. Rep. 924), Animals, 95, 98, 127, 235, 520.

Cox *v.* New York C. & H. R. R. Co. (61 Barb. (N. Y.) 615), Proc., 10.
Cox *v.* New York C. & H. R. R. Co. (63 N. Y. 414; reversing 4 Hun 176, 6 T. & C. 405), Abate., 12.
Cox *v.* New York C. & H. R. R. Co. (11 Hun (N. Y.) 621), Abate., 12; New Tr., 36.
Cox *v.* Peterson (30 Ala. 608), Bills of L., 40; Car. of M., 263, 289, 750.
Cox *v.* Richmond & D. R. Co. (87 Ga. 747, 13 S. E. Rep. 827), Pl., 38, 147.
Cox *v.* St. Louis, I. M. & S. R. Co. (55 Ark. 454, 18 S. W. Rep. 630), Actions, 6.
Cox *v.* Western Pac. R. Co. (44 Cal. 18, 5 Am. Ry. Rep. 198), Contr., 26; Liens, 17.
Cox *v.* Western Pac. R. Co. (47 Cal. 87), Constr. Rys., 41.
Coxe *v.* Camden & A. R. Co. (17 Phila. (Pa.) 349), Leases, 79.
Coxe *v.* Lehigh Valley R. Co. (3 Int. Com. Rep. 460, 4 Int. Com. Com. 535), Int. Com., 48, 67, 72.
Coxen *v.* Great Western R. Co. (5 H. & N. 274, 29 L. J. Ex. 165, 1 L. T. 442), Car. of L. S., 105.
Coxon *v.* Northeastern R. Co. (4 Ry. & C. T. Cas. 284), Car. of M., 207; Charges, 113, 115, 116.
Coy *v.* Utica & S. R. Co. (23 Barb. (N. Y.) 643), Fright. Teams, 2; Negl., 43.
Coyle *v.* Baltimore & O. R. Co. (11 W. Va. 94, 18 Am. Ry. Rep. 487), Animals, 48, 433; Evid., 173, 206.
Coyle *v.* Chicago & A. R. Co. (27 Mo. App. 584), Car. of L. S., 113.
Coyle *v.* Chicago, M. & St. P. R. Co. (13 Am. & Eng. R. Cas. 526, 62 Iowa 518, 17 N. W. Rep. 771), Animals, 99; Fences, 54.
Coyle *v.* Long Island R. Co. (33 Hun (N. Y.) 37), Cross., Inj. at, 76.
Coyle *v.* Western R. Co. (47 Barb. (N. Y.) 152), Car. of M., 66.
Coyne *v.* Manhattan R. Co. (42 N. Y. S. R. 617, 62 Hun 620, 16 N. Y. Supp. 686), Witn., 167.
Coyne *v.* Union Pac. R. Co. (133 U. S. 370, 10 Sup. Ct. Rep. 382), Employés, Inj. to, 291; Fel. Serv., 343, 390.
Cozart *v.* Georgia R. & B. Co. (54 Ga. 379), Stockh., 122.
Craft *v.* Louisville & N. R. Co. (93 Ala. 22), Attach., 60.
Craft *v.* South Boston R. Co. (150 Mass. 207, 28 Am. & Eng. Corp. Cas. 579, 2 Bkg. L. J. 276, 5 L. R. A. 641, 22 N. E. Rep. 920), Assump., 4; Officers, 15.
Crafter *v.* Metropolitan R. Co. (1 H. & R. 164, L. R. 1 C. P. 300, 12 Jur. N. S. 272, 35 L. J. C. P. 132, 14 W. R. 334), Stat. & D., 101.
Crafton *v.* Hannibal & St. J. R. Co. (55 Mo. 580), Animals, 40.
Cragin *v.* New York C. R. Co. (51 N. Y. 61, 4 Am. Ry. Rep. 418), Car. of L. S., 25, 75; Words & Ph., 7.
Craig *v.* Andes (15 Am. & Eng. R. Cas. 662, 93 N. Y. 405), Mun. Aid, 93, 378, 429.
Craig *v.* Chicago & A. R. Co. (54 Mo. App. 523), Employés, Inj. to, 12, 93, 182, 293, 295; Fel. Serv., 138.
Craig *v.* Great Western R. Co. (24 U. C. Q. B. 504), Tickets & F., 41.
Craig *v.* Manhattan R. Co. (13 Daly 214; affirmed (?) 103 N. Y. 669, mem.), Elev. Rys., 221.
Craig *v.* Mt. Carbon Co. (45 Fed. Rep. 448), Tresp., Inj. to, 16.
Craig *v.* New York, N. H. & H. R. Co. (118 Mass. 431), Cross., Inj. at, 294.
Craig *v.* Rochester City & B. R. Co. (39 N. Y. 404; affirming 39 Barb. 494), St. Rys., 193.
Craighead *v.* Brooklyn City R. Co. (123 N. Y. 391, 25 N. E. Rep. 387, 33 N. Y. S. R. 620; reversing 25 N. Y. S. R. 941, 5 N. Y. Supp. 431), St. Rys., 352, 357.
Craker *v.* Chicago & N. W. R. Co. (36 Wis. 657), Agency, 73; Assault, 21; Car. of P., 308; Conduct., 11.
Cram, Ex parte (30 New Brun. 545), Tax., 286, 401.
Cram *v.* Metropolitan R. Co. (112 Mass. 38), Children, Inj. to, 87.
Cramer *v.* American Merchants' Union Exp. Co. (56 Mo. 524), Exp. Cos., 76.
Cramer *v.* Union Pac. R. Co. (3 Utah 504, 24 Pac. Rep. 911), Employés, Inj. to, 517.
Crampton *v.* Varna R. Co. (L. R. 7 Ch. 562, 20 W. R. 713, 41 L. J. Ch. 817), Eq., 2.
Crandall *v.* Lehigh Valley R. Co. (25 N. Y. Supp. 151, 72 Hun 431, 55 N. Y. S. R. 170), Cross., Inj. at, 255.
Crandall *v.* McIlrath (24 Minn. 127), Fel. Serv., 494.
Crandall *v.* Nevada (6 Wall. (U. S.) 35), Int. Com., 187.
Crane *v.* Chicago & N. W. R. Co. (74 Iowa 330, 7 Am. St. Rep. 479, 37 N. W. Rep. 397), Mand., 10.
Crane *v.* Chicago & N. W. R. Co. (17 Am. & Eng. R. Cas. 174, 20 Fed. Rep. 402), Rem. of C., 37; Spec. Perf., 2.
Crane *v.* Indiana N. & S. R. Co. (59 Ind. 165), Subscr., 225.
Crane *v.* Kansas Pac. R. Co. (131 U. S. 168, app'x), Constr. Rys., 105.
Crane *v.* Missouri Pac. R. Co. (25 Am. & Eng. R. Cas. 440, 87 Mo. 588), Employés, Inj. to, 109, 524, 537, 543, 665; Evid., 84, 164.
Crank *v.* Forty-second St. & St. N. A. R. Co. (25 N. Y. S. R. 53, 6 N. Y. Supp. 229, 53 Hun 425; affirmed in 127 N. Y. 648, mem., 27 N. E. Rep. 856, mem.), Dam., 44; Evid., 51; New Tr., 51; St. Rys., 444.
Cranston *v.* Cincinnati, H. & D. R. Co. (1 Handy (Ohio) 193), Animals, 38, 254.
Cranston *v.* New York C. & H. R. R. Co. (39 Hun (N. Y.) 308; reversed in 103 N. Y. 614), Cross., Inj. at, 291.
Cranston *v.* New York C. & H. R. R. Co. (103 N. Y. 614, 9 N. E. Rep. 500, 4 N. Y. S. R. 300; reversing 39 Hun 308), Trial, 147.
Cranston *v.* New York C. & H. R. R. Co. (32 N. Y. S. R. 592, 11 N. Y. Supp. 215, 57 Hun 590, mem.; affirmed in 125 N. Y. 724, mem., 35 N. Y. S. R. 994), Cross., Inj. at, 116.
Cranston *v.* Union Trust Co. (11 Am. & Eng. R. Cas. 638, 75 Mo. 29), Just. P., 2.

Crass *v.* Memphis & C. R. Co. (55 Am. & Eng. R. Cas. 659, 96 Ala. 447, 11 So. Rep. 480), Car. of M., 395, 396.
Craven *v.* Central Pac. R. Co. (72 Cal. 345, 13 Pac. Rep. 878), Car. of P., 595; Evid., 11, 65.
Craven *v.* Philadelphia & R. R. Co. (19 Phila. (Pa.) 409), Negl., 18; Trial, 74.
Craven Com'rs *v.* Atlantic & N. C. R. Co. (77 N. Car. 289), Usury, 1, 3.
Cravens *v.* Moore (61 Mo. 178), Pub. Lds., 17.
Cravens *v.* Rodgers (42 Am. & Eng. R. Cas. 656, 101 Mo. 247, 14 S. W. Rep. 106), Hacks, etc., 2.
Crawford *v.* Cincinnati, H. & D. R. Co. (26 Ohio St. 580, 13 Am. Ry. Rep. 387), Car. of P., 60, 70; Eject. Pass., 20.
Crawford *v.* Delaware, L. & W. R. Co. (1 N. Y. Supp. 339; affirmed in 121 N. Y. 652, mem., 24 N. E. Rep. 1092, mem.), Cross., Inj. at, 298.
Crawford *v.* Delaware, L. & W. R. Co. (22 J. & S. (N. Y.) 262), Cross., Inj. at, 146, 285.
Crawford *v.* Delaware, L. & W. R. Co. (23 J. & S. (N. Y.) 50), Cross., Inj. at, 76.
Crawford *v.* Delaware, L. & W. R. Co. (13 N. Y. S. R. 298, 23 J. & S. 255), Cross., Inj. at, 124, 298; Dam., 44; Evid., 294; Imp. Neg., 19.
Crawford *v.* Georgia Pac. R. Co. (86 Ga. 5, 12 S. E. Rep. 176), Negl., 104; New Tr., 97; Witn., 145.
Crawford *v.* Georgia R. Co. (62 Ga. 566), Car. of P., 572.
Crawford *v.* Great Western R. Co. (18 U. C. C. P. 510), Car. of M., 648, 668.
Crawford *v.* Metropolitan El. R. Co. (30 N. Y. S. R. 866, 120 N. Y. 624, 24 N. E. Rep. 305, 2 Silv. App. 505), Elev. Rys., 121.
Crawford *v.* Mobile & G. R. Co. (67 Ga. 405), Estop., 13; Sts. & H., 75.
Crawford *v.* New Jersey R. & T. Co. (28 N. J. L. 479), Penalty, 12.
Crawford *v.* New York C. & H. R. R. Co. (18 Hun (N. Y.) 108), Animals, 212.
Crawford *v.* Railroad Co. (3 Phila. (Pa.) 350), Children, Inj. to, 34.
Crawford *v.* Southern R. Assoc. (51 Miss. 222), Car. of M., 570, 588, 613.
Crawford *v.* State (15 Lea (Tenn.) 343, 54 Am. Rep. 423), Crim. L., 38.
Crawford *v.* Valley R. Co. (25 Gratt. (Va.) 467), Em. Dom., 814.
Crawford *v.* Western Union Tel. Co. (27 Fed. Rep. 544), Dam., 71.
Crawford *v.* Wolf (29 Iowa 567), Constr. Rys., 59.
Crawford County *v.* Pittsburg & E. R. Co. (32 Pa. St. 141), Mun. Aid, 109.
Crawford County Com'rs *v.* Louisville, N. A. & St. L. R. Co. (39 Ind. 192, 10 Am. Ry. Rep. 416), Mun. Aid, 30, 197, 289, 444.
Crawfordsville & W. R. Co. *v.* Wright (5 Ind. 252), Tresp., 14.
Crawley *v.* Georgia R. & B. Co. (82 Ga. 190, 8 S. E. Rep. 417; further appeal 85 Ga. 191), Cross., Inj. at, 181; Trial, 197.
Crawley *v.* Richmond & D. R. Co. (70 Miss. 340, 13 So. Rep. 74), Death, etc., 197.
Crawshaw *v.* York & N. M. R. Co. (1 B. C. C. 45, 16 Jur. 668, 21 L. J. Q. B. 274), Arb., 23.
Crawshay *v.* Soutter (6 Wall. (U. S.) 739), Mort., 297.
Craycroft *v.* Atchison, T. & S. F. R. Co. (18 Mo. App. 487), Car. of M., 443, 676.
Cream City R. Co. *v.* Chicago, M. & St. P. R. Co. (21 Am. & Eng. R. Cas. 70, 63 Wis. 93, 23 N. W. Rep. 425, 53 Am. Rep. 267), Bills of L., 34; Lim. of Liab., 43; Release, 3; Words & Ph., 38.
Creamer *v.* West End St. R. Co. (52 Am. & Eng. R. Cas. 558, 156 Mass. 320, 31 N. E. Rep. 391, 16 L. R. A. 490), Death, etc., 23, 174; St. Rys., 404.
Creason *v.* Wabash, St. L. & P. R. Co. (17 Mo. App. 111), Animals, 608.
Credit Co. *v.* Arkansas C. R. Co. (5 McCrary (U. S.) 23, 15 Fed. Rep. 46), Mort., 135, 262, 294, 297; Receiv., 96.
Credit Mobilier, In re (10 Phila. (Pa.) 2), Dissol., 11, 12.
Credit Valley R. Co., In re (24 Grant's Ch. (U. C.) 231), Em. Dom., 1228, 1247.
Credit Valley R. Co., In re (4 Ont. App. 532), Em. Dom., 1253.
Credit Valley R. Co. *v.* Great Western R. Co. (25 Grant's Ch. (U. C.) 507), Cross. Rys., 61.
Creed *v.* Pennsylvania R. Co. (86 Pa. St. 139), Car. of P., 22, 45, 581, 589; Conduct., 1.
Cregan *v.* Marston (126 N. Y. 568, 27 N. E. Rep. 952, 38 N. Y. S. R. 428; reversing 32 N. Y. S. R. 913, 10 N. Y. Supp. 681), Employes, Inj. to, 143.
Cregg *v.* Chicago & W. M. R. Co. (91 Mich. 624, 52 N. W. Rep. 62), Employés, Inj. to, 265.
Cregin *v.* Brooklyn Crosstown R. Co. (75 N. Y. 192, 31 Am. Rep. 459; affirming 56 How. Pr. 32), Abate., 14.
Cregin *v.* Brooklyn Crosstown R. Co. (56 How. Pr. (N. Y.) 465), Husb. & W., 18.
Cregin *v.* Brooklyn Crosstown R. Co. (18 Hun (N. Y.) 368), New Tr., 33.
Cregin *v.* Brooklyn Crosstown R. Co. (83 N. Y. 595, 38 Am. Rep. 474; reversing 19 Hun 341; see also 18 Hun 368), Abate., 14.
Crenshaw *v.* St. Louis, K. & N. W. R. Co. (54 Mo. App. 233), Fences, 58.
Crerar *v.* Milwaukee & St. P. R. Co. (35 Wis. 67), Attach., 53, 57.
Crescent City Live Stock Co. *v.* Butchers' Union Slaughter-house Co. (120 U. S. 141, 7 Sup. Ct. Rep. 472), Fed. Cts., 1.
Crescent City R. Co. *v.* New Orleans (44 La. Ann. 1057, 11 So. Rep. 681), Tax., 262.
Cressey *v.* Northern R. Co. (15 Am. & Eng. R. Cas. 540, 59 N. H. 564, 47 Am. Rep. 227), Animals, 281.
Cresson *v.* Philadelphia & R. R. Co. (11 Phila. (Pa.) 597), Tickets & F., 57.
Cresson, C. C. & N. Y. S. R. R. Co. *v.* Aunsman (Pa.) (11 Atl. Rep. 561), Em. Dom., 580, 645, 903.
Crew *v.* Pennsylvania R. Co. (1 Pa. Dist. 82), Discrim., 80.
Crew *v.* St. Louis, K. & N. W. R. Co. (20

Fed. Rep. 87), Contrib. Neg., 12; Employés, Inj. to, 20, 179, 423, 590; Evid., 291; Fel. Serv., 1, 56, 58, 142, 151, 153, 430, 432.
Crews *v.* Kansas City, St. J. & C. B. R. Co. (19 Mo. App. 302), Fires, 259, 277, 286.
Crews *v.* Richmond & D. R. Co. (1 Int. Com. Rep. 703, 1 Int. Com. Com. 401), Int. Com., 31, 42, 66.
Crewson *v.* Grand Trunk R. Co. (27 U. C. Q. B. 68), Flood. Lds., 24, 63.
Crine *v.* East Tenn., V. & G. R. Co. (84 Ga. 651, 11 S. E. Rep. 555), Car. of P., 289, 594.
Crisman *v.* Smith (36 Am. & Eng. R. Cas. 422, 44 N. J. Eq. 238, 14 Atl. Rep. 484, 12 Cent. Rep. 836), Em. Dom., 230.
Crissey *v.* Hestonville, M. & F. Pass. R. Co. (75 Pa. St. 83), Children, Inj. to, 110; Negl., 61; St. Rys., 352.
Crist *v.* Erie R. Co. (58 N. Y. 638, mem.; affirming 1 T. & C. 435), Fires, 232, 253.
Criswell *v.* Pittsburg, St. L. & C. R. Co. (33 Am. & Eng. R. Cas. 232, 30 W. Va. 798, 6 S. E. Rep. 31), Employés, Inj. to, 23; Fel Serv., 73, 217, 315.
Crocker *v.* Crane (21 Wend. (N. Y.) 211), Incorp., 8; Ry. Com'rs, 5; Subscr., 20, 150.
Crocker *v.* New London, W. & P. R. Co. (24 Conn. 249), Eject. Pass., 6.
Crocker *v.* Old Colony R. Co. (137 Mass. 417), Stock, 32.
Crocker *v.* Wolson (30 Cal. 663), Mun. Aid, 408.
Crockett *v.* Galveston, H. & S. A. R. Co. (80 Tex. 292, 16 S. W. Rep. 38), Pl., 14.
Croft *v.* Baltimore & O. R. Co. (1 MacArth. (D. C.) 492), Bagg., 19; Car. of P., 518.
Croft *v.* Bennington & R. R. Co. (64 Vt. 1, 23 Atl. Rep. 922), Em. Dom., 50, 142, 291.
Croft *v.* London & N. W. R. Co. (9 Jur. N. S. 962, 32 L. J. Q. B. 113, 3 B. & S. 436, 7 L. T. 741, 11 W. R. 360), Em. Dom., 1175.
Crolley *v.* Minneapolis & St. L. R. Co. (14 Am. & Eng. R. Cas. 47, 30 Minn. 541, 16 N. W. Rep. 422), Em. Dom., 972.
Crommelin *v.* New York & H. R. Co. (1 Abb. App. Dec. (N. Y.) 472, 4 Keyes 90), Car. of M., 377.
Crone *v.* New York C. & H. R. R. Co. (48 N. Y. S. R. 408, 20 N. Y. Supp. 529), Cross., Inj. at, 325.
Cronin *v.* Highland St. R. Co. (28 Am. & Eng. R. Cas. 122, 144 Mass. 249, 10 N. E. Rep. 833), St. Rys., 528.
Cronin *v.* Patrick County (4 Hughes (U. S.) 524), Mun. Aid, 311, 345.
Cronk *v.* Chicago, M. & St. P. R. Co. (54 Am. & Eng. R. Cas. 525, 3 S. Dak. 93, 52 N. W. Rep. 420), Fires, 26, 262, 271, 273, 275.
Cronkite *v.* Wells (32 N. Y. 247), Exp. Cos., 26.
Cronsky *v.* Missouri Pac. R. Co. (77 Mo. 362), Animals, 617.
Crooke *v.* Daviess County (36 Ind. 320), Mun. Aid, 118.
Crooks *v.* Second Ave. R. Co. (49 N. Y. S. R. 376, 66 Hun 626, mem., 20 N. Y. Supp. 813), St. Rys., 341.
Croom *v.* Chicago, M. & St. P. R. Co. (52 Minn. 296, 53 N. W. Rep. 1128), Car. of P., 113, 146.
Crosbie *v.* Chicago, I. & D. R. Co. (14 Am. & Eng. R. Cas. 463, 62 Iowa 189, 17 N. W. Rep. 481), Em. Dom., 211.
Crosby *v.* Delaware & H. Canal Co. (35 N. Y. S. R. 763, 59 Hun 617, 13 N. Y. Supp. 306; reversed in 128 N. Y. 641, mem., 40 N. Y. S. R. 85, 3 Silv. App. 550), Bailm., 1.
Crosby *v.* Detroit, G. H. & M. R. Co. (58 Mich. 458, 25 N. W. Rep. 463), Animals, 538; Fences, 86, 87; Negl., 67.
Crosby *v.* Lyon (37 Cal. 242), Mun. Aid, 26.
Crosby *v.* Maine C. R. Co. (69 Me. 418), Tickets & F., 71.
Crosby *v.* New London, W. & P. R. Co. (26 Conn. 121), Bonds, 56.
Crosby *v.* Roub (16 Wis. 616), Bills & N., 15.
Crosby *v.* St. Paul City R. Co. (34 Minn. 413, 26 N. W. Rep. 225), App., 23.
Cross *v.* Burlington & S. W. R. Co. (8 Am. & Eng. R. Cas. 263, 58 Iowa 62, 12 N. W. Rep. 71), Consol., 35.
Cross *v.* Graves (4 Tex. App. (Civ. Cas.) 149, 16 S. W. Rep. 102), Bills of L., 64; Evid., 182; Stat. Agts., 5.
Cross *v.* Lake Shore & M. S. R. Co. (35 Am. & Eng. R. Cas. 476, 69 Mich. 363, 14 West. Rep. 181, 37 N. W. Rep. 361), Stat. & D., 61, 94, 99; Witn., 175.
Cross *v.* McFaden (1 Tex. Civ. App. 461, 20 S. W. Rep. 846), Car. of L. S., 5.
Cross *v.* Peach Bottom R. Co. (1 Am. & Eng. R. Cas. 366, 90 Pa. St. 392), Subscr., 121.
Cross *v.* St. Louis, K. C. & N. R. Co. (14 Am. & Eng. R. Cas. 123, 77 Mo. 318), Sts. & H., 165.
Cross *v.* West Virginia C. & P. R. Co. (34 W. Va. 742, 12 S. E. Rep. 765), Mand., 32.
Cross *v.* West Virginia C. & P. R. Co. (47 Am. & Eng. R. Cas. 381, 35 W. Va. 174, 12 S. E. Rep. 1071), Direct., 5.
Cross *v.* West Virginia C. & P. R. Co. (37 W. Va. 342, 16 S. E. Rep. 587), Corp., 6; Direct., 2.
Crossan *v.* New York & N. E. R. Co. (40 Am. & Eng. R. Cas. 136, 149 Mass. 196, 21 N. E. Rep. 367), Car. of M., 657.
Crosstown St. R. Co., In re (52 N. Y. S. R. 295, 22 N. Y. Supp. 818), St. Rys., 63.
Crotty *v.* Oregon & T. R. Co. (3 Man. 182), For. Corp., 15. Proc., 24, 43, 47, 48.
Crouch *v.* Charleston & S. R. Co. (29 Am. & Eng. R. Cas. 495, 21 So. Car. 495), Bridges, 79; Contrib. Neg., 65, 105.
Crouch *v.* Great Northern R. Co. (11 Ex. 742, 25 L. J. Ex. 137, 1 Ry. & C. T. Cas. 26), Charges, 29, 47, 91.
Crouch *v.* Great Northern R. Co. (9 Ex. 557, 7 Railw. Cas. 787, 23 L. J. Ex. 148, 1 Ry. & C. T. Cas. 16), Charges, 29, 93.
Crouch *v.* Great Western R. Co. (2 H. & N. 491, 3 Jur. N. S. 796, 26 L. J. Ex. 418), Car. of M., 239.

Crouch *v.* London & N. W. R. Co. (7 Ex. 705, 21 L. J. Ex. 207), Pl., 50.
Crouch *v.* London & N. W. R. Co. (14 C. B. 255, 7 Railw. Cas. 717, 2 C. L. R. 188, 18 Jur. 148, 23 L. J. C. P. 73), Car. of M., 44, 199.
Crouch *v.* London & N. W. R. Co. (2 C. & K. 789), Charges, 30, 39; Evid., 267.
Crouch *v.* Louisville & N. R. Co. (42 Mo. App. 248), Agency, 12; Car. of M., 574, 588, 608; Contr., 86.
Crounse *v.* Syracuse, C. & N. Y. R. Co. (32 Hun (N. Y.) 497; affirmed (?) 97 N. Y. 631, mem.), Injunc., 66.
Crow *v.* Owensboro & N. R. Co. (17 Am. & Eng. R. Cas. 31, 82 Ky. 134), Deeds, 36.
Crow *v.* Wabash, St. L. & P. R. Co. (23 Mo. App. 357), Tresp., Inj. to, 114, 126.
Crowe *v.* New York C. & H. R. R. Co. (70 Hun 37, 53 N. Y. S. R. 558, 23 N. Y. Supp. 1100), Employés, Inj. to, 7, 194, 213, 326; Stat. & D., 62.
Crowell *v.* Merrill (60 Iowa 53, 14 N. W. Rep. 81), Mun. Aid, 412.
Crowell *v.* New Orleans & N. E. R. Co. (20 Am. & Eng. R. Cas. 306, 61 Miss. 631), Land. & T., 3, 4.
Crowley *v.* Burlington, C. R. & N. R. Co. (18 Am. & Eng. R. Cas. 56, 65 Iowa 658, 20 N. W. Rep. 467, 22 N. W. Rep. 918), Employés, Inj. to, 325, 511; Sts. & H., 322, 374.
Crowley *v.* City R. Co. (60 Cal. 628), App., 94.
Crowley *v.* Davis (63 Cal. 460), Injunc., 14.
Crowley *v.* Panama R. Co. (30 Barb. (N. Y.) 99), Citizens, 4; Death, etc., 28, 121.
Crowley *v.* St. Louis, I. M. & S. R. Co. (24 Mo. App. 119), App., 81; Contrib. Neg., 28, 88.
Crown Coal Co. *v.* Hiles (43 Ill. App. 310), Employés, Inj. to, 136.
Crowner *v.* Watertown & R. R. Co. (9 How. Pr. (N. Y.) 457), Em. Dom., 971.
Crown Hill R. Co. *v.* Armstrong (39 Ind. 418), Subscr., 42.
Crowninshield *v.* Cayuga County Sup'rs (124 N. Y. 583, 27 N. E. Rep. 242, 37 N. Y. S. R. 96), Mun. Aid, 421.
Croy *v.* Louisville, N. A. & C. R. Co. (19 Am. & Eng. R. Cas. 608, 97 Ind. 126), Animals, 73, 173, 443; Fences, 57.
Crozier *v.* Boston, N. Y. & M. Steamboat Co. (43 How. Pr. (N. Y.) 466), Bagg., 81.
Cruger *v.* Hudson River R. Co. (12 N. Y. 190), Em. Dom., 299, 818.
Crumbacker *v.* Tucker (9 Ark. 365), Car. of M., 314.
Crumley *v.* Kansas City, C. & S. R. Co. (32 Mo. App. 505), Fences, 11.
Crumlish *v.* Shenandoah Valley R. Co. (28 W. Va. 623), Stockh., 21, 79, 86, 125.
Crumlish *v.* Shenandoah Valley R. Co. (38 Am. & Eng. R. Cas. 577, 32 W. Va. 244, 9 S. E. Rep. 180), Mort., 305, 309; Trusts, 6; Vend. & P., 4.
Crumlish *v.* Wilmington & W. R. Co. (5 Del. Ch. 270), Constr. Rys., 63, 72.
Crumpley *v.* Hannibal & St. J. R. Co. (37 Am. & Eng. R. Cas. 357, 98 Mo. 34, 11 S. W. Rep. 244), Death, etc., 96, 368.
Crumpley *v.* Hannibal & St. J. R. Co. (111 Mo. 152, 19 S. W. Rep. 820), Contrib. Neg., 105; Cross., Inj. at, 162, 341.
Crutcher *v.* Kentucky (46 Am. & Eng. R. Cas. 637, 141 U. S. 47, 11 Sup. Ct. Rep. 851; reversing 40 Am. & Eng. R. Cas. 29, 89 Ky. 6, 12 S. W. Rep. 141), Int. Com., 214.
Crutcher *v.* Memphis & C. R. Co. (38 Ala. 579), Agency, 25.
Crutchfield *v.* Richmond & D. R. Co. (76 N. Car. 320, 14 Am. Ry. Rep. 292), Fel. Serv., 66; Trial, 141; Words & Ph., 4.
Crutchfield *v.* Richmond & D. R. Co. (78 N. Car. 300, 16 Am. Ry. Rep. 212), Employés, Inj. to, 238, 260, 297, 397.
Crutchfield *v.* St. Louis, K. C. & N. R. Co. (64 Mo. 255, 17 Am. Ry. Rep. 200), Animals, 299, 327; App., 85.
Crutsinger *v.* Missouri Pac. R. Co. (82 Mo. 64), Just. P., 13.
Cruty *v.* Erie R. Co. (3 T. & C. (N. Y.) 244), Employés, Inj. to, 183.
Cruver *v.* Chicago, M. & St. P. R. Co. (62 Iowa 460, 17 N. W. Rep. 661), Pl., 177.
Cuddeback *v.* Jewett (20 Hun (N. Y.) 187), Animals, 189.
Cuddy *v.* Horn (46 Mich. 596, 10 N. W. Rep. 32, 41 Am. Rep. 178), Imp. Neg., 2, 13.
Cuff *v.* Newark & N. Y. R. Co. (35 N. J. L. 17; affirmed in 35 N. J. L. 574), Dam., 7; Indep. Contr., 11, 14, 21.
Culberson *v.* Chicago, M. & St. P. R. Co. (50 Mo. App. 556), App., 44; Car. of P., 234; Witn., 26.
Culbertson & B. P. & P. Co. *v.* Chicago (111 Ill. 651), Bridges, 43 44.
Culbreth *v.* Philadelphia, W. & B. R. Co. (3 Houst. (Del.) 392), Car. of M., 12, 114, 216, 249, 324.
Culhane *v.* New York C. & H. R. R. Co. (67 Barb. (N. Y.) 562), Cross., Inj. at, 348.
Culhane *v.* New York C. & H. R. R. Co. (60 N. Y. 133, 10 Am. Ry. Rep. 142), Cross., Inj. at, 65; Evid., 63, 292.
Cull *v.* Grand Trunk R. Co. (10 Grant Ch. (U. C.) 491), Bridges, 62.
Cullen *v.* Delaware & H. Canal Co. (114 N. Y. 667, 2 Silv. App. 255, 21 N. E. Rep. 716, 23 N. Y. S. R. 719; reversing 40 Hun 637, mem.), Cross., Inj. at, 264; Death, etc., 194.
Cullen *v.* National Sheet Metal Roofing Co. (12 N. Y. S. R. 508), Employés, Inj. to, 99.
Cullen *v.* Norton (52 Hun 9, 22 N. Y. S. R. 221, 4 N. Y. Supp. 774; reargument denied in 24 N. Y. S. R. 103, 5 N. Y. Supp. 523), Death, etc., 294; Employés, Inj. to, 705.
Cullen *v.* Norton (126 N. Y. 1, 26 N. E. Rep. 905, 36 N. Y. S. R. 359; reversing 29 N. Y. S. R. 700, 9 N. Y. Supp. 174), Fel. Serv., 103.
Cully *v.* Baltimore & O. R. Co. (1 Hughes (U. S.) 536), Col. Pers., 1.
Culp *v.* Atchison & N. R. Co. (17 Kan. 475), Negl., 35.
Culver *v.* Chicago, R. I. & P. R. Co. (38 Mo. App. 130), Bridges, 10; Flood. Lds., 11; Lim. of Ac., 31; Waters & W., 13.

Cumberland & O. R. Co. *v.* Barren County Court (10 Bush (Ky.) 604), Mun. Aid, 33, 142, 197.
Cumberland & O. R. Co. *v.* Washington County Court Judge (10 Bush (Ky.) 564), Mun. Aid, 67, 287, 296.
Cumberland & P. R. Co. *v.* Pennsylvania R. Co. (10 Am. & Eng. R. Cas. 351, 57 Md. 267), Em. Dom., 341, 887.
Cumberland & P. R. Co. *v.* Slack (45 Md. 161), Dam., 57; Employés, 17; Superint., 6.
Cumberland & P. R. Co. *v.* State (37 Md. 156), Death, etc., 292.
Cumberland & P. R. Co. *v.* State (44 Md. 283, 45 Md. 229), Death, etc., 266; Employés, Inj. to, 100, 150, 182, 211; Explosions, 3; Fel. Serv., 3, 94, 114, 143, 144, 397, 408, 506; Negl., 61.
Cumberland & P. R. Co. *v.* State (73 Md. 74, 20 Atl. Rep. 785), Death, etc., 254.
Cumberland C. & I. Co. *v.* Scally (27 Md. 589), Fel. Serv., 1.
Cumberland Marine R. Co. *v.* Portland (37 Me. 444), Tax., 263.
Cumberland T. & T. Co. *v.* United Elec. R. Co. (43 Am. & Eng. R. Cas. 194, 42 Fed. Rep. 273), Elec. Rys., 13.
Cumberland Valley R. Co.'s Appeal (62 Pa. St. 218), Charges, 10, 46; Discrim., 20.
Cumberland Valley R. Co. *v.* Baab (9 Watts (Pa.) 458), Contr., 58.
Cumberland Valley R. Co. *v.* Hughes (11 Pa. St. 141), Leases, 112.
Cumberland Valley R. C. *v.* McLanahan (59 Pa. St. 23), Charters, 61; Ejectm., 6; Em. Dom., 984; License, 10.
Cumberland Valley R. Co. *v.* Maugans (18 Am. & Eng. R. Cas. 182, 61 Md. 53), Car. of P., 421.
Cumberland Valley R. Co. *v.* Myers (55 Pa. St. 288), Car. of P., 35.
Cumberland Valley R. Co. *v.* Rhoadarmer (107 Pa. St. 214), Sts. & H., 119.
Cumines *v.* Jefferson County Sup'rs (63 Barb. (N. Y.) 287; affirmed in 3 T. & C. 296, 64 N. Y. 626), Mun. Aid, 44.
Cuming *v.* Brooklyn City R. Co. (109 N. Y. 95, 21 Abb. N. Cas. 1, 16 N. E. Rep. 65, 14 N. Y. S. R. 788, 12 Cent. Rep. 219; reversing 38 Hun 362), Children, Inj. to, 182, 183, 184.
Cumming *v.* Barracouta (40 Fed. Rep. 498; reversing 39 Fed. Rep. 288), Car. of M., 702.
Cumming *v.* Brooklyn City R. Co. (24 N. Y. S. R. 718, 52 Hun 613, 1 Silv. Sup. Ct. 327, 5 N. Y. Supp. 476), Children, Inj. to, 194; Death, etc., 411; Evid., 80; New Tr., 34.
Cumming *v.* Brooklyn City R. Co. (104 N. Y. 669, 10 N. E. Rep. 855, 5 N. Y. S. R. 737, 1 Silv. App. 345; affirming 38 Hun 362), Children, Inj. to, 162, 166; Evid., 234.
Cummings *v.* National Furnace Co. (60 Wis. 603, 18 N. W. Rep. 742, 20 N. W. Rep. 695), Contrib. Neg., 15; Evid., 125; New Tr., 67.
Cummings *v.* New York & O. M. R. Co. (1 Lans. (N. Y.) 68), Constr. Rys., 93.
Cummings *v.* Pittsburg, C. & St. L. R. Co. (4 Am. & Eng. R. Cas. 524, 92 Pa. St. 82), Employés, Inj. to, 1, 487.
Cummings *v.* St. Louis, I. M. & S. R. Co. (70 Mo. 570), Animals, 10, 617.
Cummins *v.* Credit Valley R. Co. (21 Grant's Ch. (U. C.) 162), Em. Dom., 1235.
Cummins *v.* Dayton & U. R. Co. (Ind.) (9 Am. & Eng. R. Cas. 36), Car. of M., 579, 593.
Cummins *v.* Des Moines & St. L. R. Co. (17 Am. & Eng. R. Cas. 86, 63 Iowa 397, 19 N. W. Rep. 268), Em. Dom., 130, 562, 591, 621, 646, 678, 682, 795.
Cummins *v.* Evansville & T. H. R. Co. (36 Am. & Eng. R. Cas. 147, 115 Ind. 417, 15 West. Rep. 456, 18 N. E. Rep. 6), Evid., 124; Sts. & H., 192, 404.
Cummons *v.* Chicago & N. W. R. Co. (33 Iowa 187), Fires, 280.
Cunard *v.* Manhattan R. Co. (1 Misc. 151, 48 N. Y. S. R. 755, 20 N. Y. Supp. 724; reargument denied in 49 N. Y. S. R. 922, 21 N. Y. Supp. 1131, 2 Misc. 592, mem.), Elev. Rys., 174.
Cunningham *v.* Boston & A. R. Co. (153 Mass. 506, 27 N. E. Rep. 660), Location, etc., 14.
Cunningham *v.* Chicago, M. & St. P. R. Co. (12 Am. & Eng. R. Cas. 217, 5 McCrary (U. S.) 465, 17 Fed. Rep. 882), Contrib. Neg., 32, 41; Death, etc., 219.
Cunningham *v.* Edgefield & K. R. Co. (2 Head (Tenn.) 23), Subscr., 13, 143, 144, 202.
Cunningham *v.* Evansville & T. H. R. Co. (23 Am. & Eng. R. Cas. 347, 102 Ind. 478, 52 Am. Rep. 683, 1 N. E. Rep. 800), Fires, 195, 362.
Cunningham *v.* Garvin (10 Pa. St. 366), Assign. for Cred., 5.
Cunningham *v.* Grand Trunk R. Co. (31 U. C. Q. B. 350), Agency, 76.
Cunningham *v.* Great Northern R. Co. (16 Am. & Eng. R. Cas. 254, 49 L. T. 394), Car. of M., 188.
Cunningham *v.* Hannibal & St. J. R. Co. (70 Mo. 202), Animals, 621.
Cunningham *v.* Illinois C. R. Co. (77 Ill. 178), Contr., 76.
Cunningham *v.* International R. Co. (51 Tex. 503), Car. of P., 528; Indep. Contr., 1, 10, 18.
Cunningham *v.* Macon & B. R. Co. (14 Am. & Eng. R. Cas. 567, 109 U. S. 446, 3 Sup. Ct. Rep. 292), State Aid, 17.
Cunningham *v.* Massena Springs & Ft. C. R. Co. (20 N. Y. S. R. 638, 50 Hun 605, 3 N. Y. Supp. 98), Bills of Partic., 1.
Cunningham *v.* Massena Springs & Ft. C. R. Co. (44 N. Y. S. R. 723, 63 Hun 439, 18 N. Y. Supp. 600; affirmed in 138 N. Y. 614, mem., 51 N. Y. S. R. 933, 33 N. E. Rep. 1082), Agency, 108; Ult. Vir., 23.
Cunningham *v.* New York C. & H. R. R. Co. (49 Fed. Rep. 439), Witn., 139.
Cunningham *v.* Pacific R. Co. (61 Mo. 33), Em. Dom., 280.
Cunningham *v.* Pennsylvania, S. & N. E. R. Co. (11 N. Y. S. R. 663), Bonds, 11.
Cunningham *v.* Railroad Com'rs (56 Am. &

Eng. R. Cas. 301, 158 Mass. 104, 32 N. E. Rep. 959), Cert., 9; Stat. & D., 52.
Cunningham *v.* Rome R. Co. (27 Ga. 499), Injunc., 27.
Cunningham *v.* Seattle Elec. R. & P. Co. (3 Wash. 471, 28 Pac. Rep. 745), Eject. Pass., 126; False Imp., 4.
Cunningham *v.* Southern Exp. Co. (67 N. Car. 425), Proc., 16.
Cunningham *v.* State (27 Tex. App. 479, 11 S. W. Rep. 485), Crim. L., 27; Evid., 230.
Cunningham *v.* Union Pac. R. Co. (110 Mo. 208, 19 S. W. Rep. 822), App., 134.
Cunningham *v.* Union Pac. R. Co. (4 Utah 206, 7 Pac. Rep. 795), Employés, Inj. to, 42; Evid., 41, 125; Fel. Serv., 328.
Cunningham *v.* Vermont & M. R. Co. (12 Gray (Mass.) 411), Divid., 11.
Cunnington *v.* Great Northern R. Co. (49 L. T. 392, 48 J. P. 134), Car. of M., 725.
Curl *v.* Chicago, R. I. & P. R. Co. (11 Am. & Eng. R. Cas. 85, 63 Iowa 417, 16 N. W. Rep. 69, 19 N. W. Rep. 308), Eject. Pass., 119, 134; Evid., 175; Witn., 94.
Curley *v.* Illinois C. R. Co. (40 La. Ann. 810, 6 So. Rep. 103), Cross., Inj. at, 3.
Curley *v.* Missouri Pac. R. Co. (98 Mo. 13, 10 S. W. Rep. 593), Children, Inj. to, 83.
Curnan *v.* Delaware & O. R. Co. (138 N. Y. 480, 53 N. Y. S. R. 25; modifying 63 Hun 628, 44 N. Y. S. R. 923, 17 N. Y. Supp. 714), Constr. Rys., 119.
Curran *v.* Grand Trunk R. Co. (5 Montr. Super. 251), Death, etc., 192.
Curran *v.* Warren C. & M. Co. (36 N. Y. 153, 34 How. Pr. 250), Death, etc., 235.
Current *v.* Missouri Pac. R. Co. (86 Mo. 62), Employés, Inj. to, 142, 537; Pl., 117.
Currie *v.* Lewiston (15 Fed. Rep. 377, 21 Blatchf. (U. S.) 236), Mun. Aid, 336.
Currie *v.* Natchez, J. & C. R. Co. (20 Am. & Eng. R. Cas. 303, 61 Miss. 725), Em. Dom., 208, 1075, 1077, 1079; Estop., 23; Pl., 153; Stat. & D., 9.
Currie *v.* Waverly & N. Y. B. R. Co. (44 Am. & Eng. R. Cas. 100, 52 N. J. L. 381, 20 Atl. Rep. 56), Em. Dom., 456, 457, 650, 655.
Currier *v.* Boston & M. R. Co. (31 N. H. 209), Constr. Rys., 112; Evid., 151.
Currier *v.* Boston & M. R. Co. (34 N. H. 498), Evid., 13; Witn., 145.
Currier *v.* Concord R. Corp. (48 N. H. 321), Consol., 4; Injunc., 14.
Currier *v.* Marietta & C. R. Co. (11 Ohio St. 228), Em. Dom., 88.
Currier *v.* New York, W. S. & B. R. Co. (35 Hun (N. Y.) 355), Stockh., 79.
Currier *v.* Ogdensburg & L. C. R. Co. (25 N. Y. S. R. 87, 6 N. Y. Supp. 615, 2 Silv. Sup. Ct. 12; affirmed in 127 N. Y. 653, mem., 27 N. E. Rep. 857, mem.), App., 117; Sts. & H., 352.
Currier *v.* Ottawa City Pass. R. Co. (30 U. C. Q. B. 61), Constr. Rys., 19.
Currier *v.* West Side El. P. R. Co. (6 Blatchf. (U. S.) 487), Elev. Rys., 70; Parties, 6.
Curry *v.* Canadian Pac. R. Co. (17 Ont. 65), New Tr., 26.
Curry *v.* Chicago & N. W. R. Co. (43 Wis. 665), Animals, 28, 152, 213, 288, 386.
Curry *v.* Decatur County Sup'rs (13 Am. & Eng. R. Cas. 80, 61 Iowa 71, 15 N. W. Rep. 602), Pres., 5.
Curry *v.* Scott (54 Pa. St. 270), Stock, 7; Stockh., 15.
Curtenius *v.* Hoyt (37 Mich. 583), Mun. Aid, 299.
Curtin *v.* Great Southern & W. R. Co. (22 L. R. Ir. 219, 6 Ry. & C. T. Cas. 69), Death, etc., 254.
Curtin *v.* Nittany Valley R. Co. (44 Am. & Eng. R. Cas. 130, 135 Pa. St. 20, 19 Atl. Rep. 740), Em. Dom., 621, 693; Witn., 160.
Curtis *v.* Atlanta St. R. Co. (56 Fed. Rep. 596), Pat. for Inv., 33.
Curtis *v.* Avon, G. & Mt. M. R. Co. (49 Barb. (N. Y.) 148), Bagg., 64, 65; Evid., 173; Proc., 27.
Curtis *v.* Bradford (33 Wis. 190), Attach., 3.
Curtis *v.* Butler County (24 How. (U. S.) 435; affirming 1 Pittsb. (Pa.) 516), Mun. Aid, 283, 306.
Curtis *v.* Central R. Co. (6 McLean (U. S.) 401), Car. of P., 138, 209.
Curtis *v.* Chicago & N. W. R. Co. (18 Wis. 312), Car. of M., 413; Witn., 96.
Curtis *v.* Chicago, M. & St. P. R. Co. (13 Am. & Eng. R. Cas. 593, 62 Iowa 418, 17 N. W. Rep. 591), Farm. Cross., 9.
Curtis *v.* Delaware, L. & W. R. Co. (74 N. Y. 116), Bagg., 7, 15, 74, 107.
Curtis *v.* Detroit & M. R. Co. (27 Wis. 158, 5 Am. Ry. Rep. 368), Car. of P., 223, 366, 379; Pl., 110.
Curtis *v.* Eastern R. Co. (98 Mass. 428), Flood. Lds., 46.
Curtis *v.* Eastern R. Co. (14 Allen (Mass.) 55), Flood. Lds., 84.
Curtis *v.* Grand Trunk R. Co. (12 U. C. C. P. 89), Eject. Pass., 49.
Curtis *v.* Rochester & S. R. Co. (18 N. Y. 534; affirming 20 Barb. 282), Car. of P., 582; Dam., 44.
Curtis *v.* St. Paul, S. & T. F. R. Co. (20 Minn. 28 (Gil. 19), Em. Dom., 190, 546, 629, 701; Witn., 123.
Curtis *v.* St. Paul, S. & T. F. R. Co. (21 Minn. 497), Em. Dom., 845.
Curtis *v.* Sioux City & H. P. R. Co. (87 Iowa 622, 54 N. W. Rep. 339), Eject. Pass., 78, 106.
Curtis *v.* Vermont C. R. Co. (23 Vt. 613), Em. Dom., 694.
Curtner *v.* United States (57 Am. & Eng. R. Cas. 383, 149 U. S. 662, 13 Sup. Ct. Rep. 1041), Land Grants, 6.
Curwin *v.* Windsor & A. R. Co. (9 Nov. Sc. 493), Car. of P., 571.
Cushing *v.* Nantasket Beach R. Co. (27 Am. & Eng. R. Cas. 392, 143 Mass. 77, 9 N. E. Rep. 22), Em. Dom., 560.
Cushing *v.* Wells (98 Mass. 550), Car. of M., 759.
Cushman *v.* Bonfield (36 Ill. App. 436; affirmed in 139 Ill. 219, 28 N. E. Rep. 837), Reorg., 1.
Cushman *v.* Smith (34 Me. 247), Em. Dom., 12, 378, 416, 1055.

Cutler *v.* Madison County Sup'rs (56 Miss. 115), Mun. Aid, 338.
Cutler *v.* North London R. Co. (31 Am. & Eng. R. Cas. 105, 19 Q. B. D. 64, 5 Ry. & C. T. Cas. ix), Bagg., 97.
Cutright *v.* Stanford (81 Ill. 240), Judgm., 33; Stockh., 40.
Cutting, Ex parte (94 U. S. 14), Mand., 21.
Cutting *v.* Florida R. & N. Co. (30 Fed. Rep. 663), Int. Com., 31.
Cutting *v.* Florida R. & N. Co. (43 Fed. Rep. 747), Discrim., 69; Receiv., 65.
Cutting *v.* Florida R. & N. Co. (45 Fed. Rep. 444), Mort., 186.
Cutting *v.* Florida R. & N. Co. (46 Fed. Rep. 641), Int. Com., 8.
Cutting *v.* Florida R. & N. Co. (48 Fed. Rep. 508), Contr., 63.
Cutting *v.* Great Western Dispatch (13 Allen (Mass.) 381), Car. of M., 778.
Cutts *v.* Brainerd (42 Vt. 566), Car. of M., 612.
Cuyler *v.* Decker (20 Hun (N. Y.) 173), Death, etc., 176.
Cypher *v.* Huntingdon & B. T. M. R. & C. Co. (149 Pa. St. 359, 24 Atl. Rep. 225), Employés, Inj. to, 456.
Cyra *v.* Stewart (79 Wis. 72, 48 N. W. Rep. 50), Trial, 15.

Dacey *v.* Old Colony R. Co. (153 Mass. 112, 26 N. E. Rep. 437), Employés, Inj. to, 1, 302, 693, 703, 716; Fel Serv., 185.
Dacres *v.* Oregon R. & N. Co. (1 Wash. 525, 20 Pac. Rep. 601), Animals, 5, 6, 8, 26.
Dahl *v.* Milwaukee City R. Co. (19 Am. & Eng. R. Cas. 121, 62 Wis. 652, 22 N. W. Rep. 755), Children, Inj. to, 66; Contrib. Neg., 85.
Dahl *v.* Milwaukee City R. Co. (65 Wis. 371, 27 N. W. Rep. 185), Children, Inj. to, 144; St. Rys., 466.
Dahlberg *v.* Minneapolis St. R. Co. (18 Am. & Eng. R. Cas. 202, 32 Minn. 404, 21 N. W. Rep. 545), St. Rys., 332, 380.
Dahlstrom *v.* St. Louis, I. M. & S. R. Co. (35 Am. & Eng. R. Cas. 387, 96 Mo. 99, 8 S. W. Rep. 777, 15 West. Rep. 85), Negl., 104; Tresp., Inj. to, 2, 28, 36; Trial, 138.
Dahlstrom *v.* St. Louis, I. M. & S. R. Co. (108 Mo. 525, 18 S. W. Rep. 919), Cross., Inj. at, 173, 291; Sts. & H., 376, 379.
Daily *v.* New York & N. H. R. Co. (32 Conn. 356), Contrib. Neg., 2; Evid., 165.
Daily *v.* Richmond & D. R. Co. (42 Am. & Eng. R. Cas. 124, 106 N. Car. 301, 11 S. E. Rep. 320), Cross., Inj. at, 297; Tresp., Inj. to, 72.
Dalamatyr *v.* Milwaukee & T. du C. R. Co. (24 Wis. 578), Car. of P. 606.
Dale *v.* Brooklyn City, H. P. & P. P. R. Co. (1 Hun (N. Y.) 146, 3 T. & C. 686; affirmed in 60 N. Y. 638, mem.), St. Rys., 392; Witn., 139, 167.
Dale *v.* Delaware, L. & W. R. Co. (73 N. Y. 468), Evid., 84.
Dale *v.* St. Louis, K. C. & N. R. Co. (63 Mo. 455, 21 Am. Ry. Rep. 217), Employés, Inj. to, 45.
Dale *v.* Syracuse (71 Hun 449, 54 N. Y. S. R. 381, 24 N. Y. Supp. 968), Sts. & H., 364, 367.
Daley *v.* Boston & A. R. Co. (33 Am. & Eng. R. Cas. 298, 147 Mass. 101, 6 N. Eng. Rep. 349, 16 N. E. Rep. 690), Death, etc., 23; Employés, 6, 656; Pl., 143, 160.
Daley *v.* Norwich & W. R. Co. (26 Conn. 591), Children, Inj. to, 127, 128; New Tr., 23; Tresp., Inj. to, 93.
Dallas *v.* Atlantic, M. & O. R. Co. (2 MacArth. (D. C.) 146), Proc., 19.
Dallas *v.* Gulf, C. & S. F. R. Co. (21 Am. & Eng. R. Cas. 575, 61 Tex. 196), Employés, Inj. to, 182, 294; Fel. Serv., 1, 26, 153.
Dallas & G. R. Co. *v.* Able (37 Am. & Eng. R. Cas. 453, 72 Tex. 150, 9 S. W. Rep. 871), Constr. Rys., 47; Cross., Inj. at, 30; Cross., St. & H., 25; New Tr., 64; Sts. & H., 184.
Dallas & G. R. Co. *v.* Chenault (4 Tex. App. (Civ. Cas.) 171, 16 S. W. Rep. 173), Em. Dom., 574, 634.
Dallas & W. R. Co. *v.* Kinnard (Tex.) (18 S. W. Rep. 1062), Flood. Lds., 76.
Dallas & W. R. Co. *v.* Spicker (21 Am. & Eng. R. Cas. 160, 61 Tex. 427, 48 Am. Rep. 297), Contrib. Neg., 105, 106; Death, etc., 90, 282.
Dallas & W. R. Co. *v.* Spiker (59 Tex. 435), Death, etc., 94.
Dallas City R. Co. *v.* Beeman (74 Tex. 291, 11 S. W. Rep. 1102), Children, Inj. to, 60; Death, etc., 259; Fel. Serv., 483.
Dallas County *v.* Huidekoper (25 Law. Ed. (U. S.) 974), Mun. Aid, 393.
Dallas County *v.* McKenzie (15 Am. & Eng. R. Cas. 622, 110 U. S. 686, 4 Sup. Ct. Rep. 184), Mun. Aid, 136, 381.
Dallas County *v.* MacKenzie (94 U. S. 660), Mun. Aid, 357.
Dallas, P. & S. E. R. Co. *v.* Day (3 Tex. Civ. App. 353, 22 S. W. Rep. 538), Em. Dom., 350, 503, 561, 574; Witn., 126.
Dalrymple *v.* Lauman (23 Md. 376), Contr., 41.
Dalton *v.* Atlantic, M. & O. R. Co. (4 Hughes (U. S.) 180), Employés, Inj. to, 228.
Dalton *v.* Beers (38 Conn. 529), Eject. Pass., 11.
Dalton *v.* Midland R. Co. (12 C. B. 458), Interpl., 2.
Dalton *v.* Midland Counties R. Co. (13 C. B. 474, 17 Jur. 719, 22 L. J. C. P. 177, 1 C. L. R. 102), Divid., 13; Husb. & W., 35.
Dalton *v.* Southeastern R. Co. (4 C. B. N. S. 296, 4 Jur. N. S. 711, 27 L. J. C. P. 227), Death, etc., 414, 415.
Dalton *v.* West End St. R. Co. (159 Mass. 221, 34 N. E. Rep. 261), Att'ys, 10.
Dalton & M. R. Co. *v.* McDaniel (56 Ga. 191), Stockh., 31.
Daly *v.* Buffalo & L. H. R. Co. (16 U. C. Q. B. 238), Em. Dom., 1256.
Daly *v.* Chicago, M. & St. P. R. Co. (43 Minn. 319, 45 N. W. Rep. 611), Fires, 264, 277.
Daly *v.* Georgia Southern & F. R. Co. (36 Am. & Eng. R. Cas. 20, 80 Ga. 793, 7 S.

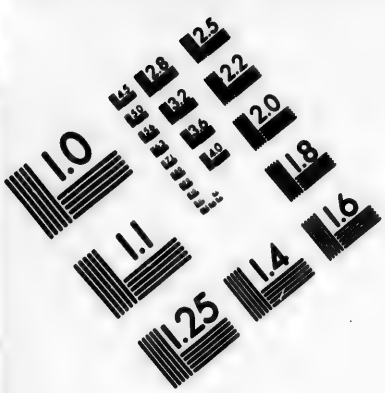
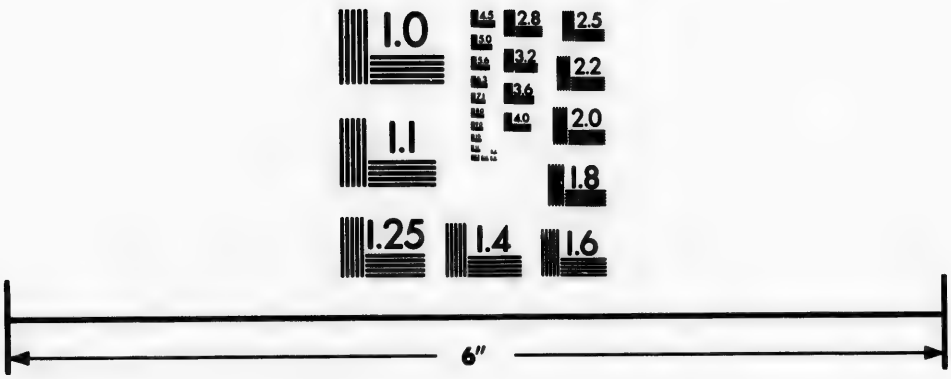




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E. Rep. 146), Mun. Corp., 44; Sts. & H., 42, 71, 80.
Daly *v.* New Jersey S. & I. Co. (155 Mass. 1, 29 N. E. Rep. 507), Death, etc., 23, 43, 52, 83.
Dalzell *v.* Long Island R. Co. (25 N. Y. S. R. 166, 53 Hun 633, mem., 1 Silv. Sup. Ct. 582, 6 N. Y. Supp. 167; appeal dismissed in 119 N. Y. 626, mem., 2 Silv. App. 531, 23 N. E. Rep. 487, 28 N. Y. S. R. 946), App., 124; New Tr., 72.
Dalzell *v.* Long Island R. Co. (119 N. Y. 626, 2 Silv. App. 531, 23 N. E. Rep. 487, 28 N. Y. S. R. 946; dismissing appeal from 53 Hun 633, 25 N. Y. S. R. 166, 1 Silv. Sup. Ct. 582, 6 N. Y. Supp. 167), App., 144.
Dalziel *v.* Grand Trunk R. Co. (1 Ont. Pr. 307), Words & Ph., 145.
Damon *v.* Baltimore & P. R. Co. (119 Pa. St. 287, 11 Cent. Rep. 701, 12 Atl. Rep. 217, 21 W. N. C. 170), Em. Dom., 94.
Damont *v.* New Orleans & C. R. Co. (9 La. Ann. 441), Car. of P., 426.
Damour *v.* Lyons City (44 Iowa 276), St. Rys., 188; Waters & W., 12.
Damrill *v.* St. Louis & S. F. R. Co. (27 Mo. App. 202), Cross., Inj. at, 254.
Dan *v.* Seattle Elec. R. & P. Co. (5 Wash. 466, 32 Pac. Rep. 103), Elec. Rys., 25; Trial, 129.
Dana *v.* New York C. & H. R. R. Co. (23 Hun (N. Y.) 473), Fel. Serv., 424.
Dana *v.* New York C. & H. R. R. Co. (50 How. Pr. (N. Y.) 428), Car. of M., 680; Lim. of Liab., 2.
Dana *v.* New York C. & H. R. R. Co. (92 N. Y. 639), Employés, Inj. to, 18, 20.
Danbury & N. R. Co. *v.* Norwalk (37 Conn. 109), Injunc., 27.
Danbury & N. R. Co. *v.* Wilson (22 Conn. 435), Evid., 25; Incorp., 11; Subscr., 11, 18, 103, 125, 165.
Dancey *v.* Grand Trunk R. Co. (52 Am. & Eng. R. Cas. 181, 19 Ont. App. 664), Eject. Pass., 53, 127; Tickets & F., 7.
Dandie *v.* Southern Pac. R. Co. (42 La. Ann. 686, 7 So. Rep. 792), Contrib. Neg., 4; Employés, Inj. to, 182, 204, 205, 330.
Danforth *v.* Philadelphia & C. M. S. L. R. Co. (30 N. J. Eq. 12, 18 Am. Ry. Rep. 66), Spec. Perf., 15.
Danforth *v.* Tennessee & C. R. Co. (93 Ala. 614, 11 So. Rep. 60), Constr. Rys., 40.
Daniel *v.* Chesapeake & O. R. Co. (53 Am. & Eng. R. Cas. 503, 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. Rep. 162), Fel. Serv., 96, 239.
Daniel *v.* Metropolitan R. Co. (L. R. 3 C. P. 591, 37 L. J. C. P. 280), Car. of P., 130; Indep. Contr., 9.
Daniel *v.* Metropolitan R. Co. (L. R. 5 H. L. Cas. 45, 20 W. R. 37, 40 L. J. C. P. 121, 24 L. T. 815), Indep. Contr., 7, 25.
Daniel Ball, The (10 Wall. (U. S.) 357), Int. Com., 8.
Daniels *v.* Chicago & N. W. R. Co. (35 Iowa 129, 5 Am. Ry. Rep. 82), Dedica., 3; Em. Dom., 1010.
Daniels *v.* Chicago & R. I. R. Co. (3 Wall. (U. S.) 250), Fed. Cts., 22.
Daniels *v.* Chicago, I. & N. R. Co. (41 Iowa 52), Em. Dom., 644.
Daniels *v.* Grand Trunk R. Co. (22 Am. & Eng. R. Cas. 609, 11 Ont. App. 471), Animals, 155.
Daniels *v.* Gualala Mill Co. (77 Cal. 300, 19 Pac. Rep. 519), Adv. Poss., 11.
Daniels *v.* Hart (118 Mass. 543), Fires, 9, 163; Mort., 3.
Daniels *v.* New York & N. E. R. Co. (48 Am. & Eng. R. Cas. 539, 154 Mass. 349, 28 N. E. Rep. 283), Children, Inj. to, 91.
Daniels *v.* St. Louis, K. C. & N. R. Co. (62 Mo. 43), Consol., 40.
Daniels *v.* Savannah, F. & W. R. Co. (86 Ga. 236, 12 S. E. Rep. 365), Death, etc., 46.
Daniels *v.* Staten Island R. T. R. Co. (28 N. Y. S. R. 87, 55 Hun 606, mem., 7 N. Y. Supp. 725), Death, etc., 320.
Daniels *v.* Staten Island R. T. Co. (125 N. Y. 407, 26 N. E. Rep. 466, 35 N. Y. S. R. 435; reversing 55 Hun 606, 28 N. Y. S. R. 87, 7 N. Y. Supp. 725), Cross., St. & H., 20; Death, etc., 340.
Daniels *v.* Union Pac. R. Co. (6 Utah 357, 23 Pac. Rep. 762), Fel. Serv., 17, 95, 114, 206, 222, 225; New Tr., 72.
Danner *v.* South Carolina R. Co. (4 Rich. (So. Car.) 329), Animals, 447, 466, 480.
Dano *v.* Mississippi, O. & R. R. R. Co. (27 Ark. 564), Liens, 46, 59; Words & Ph., 9, 85.
Danville *v.* Montpelier & St. J. R. Co. (43 Vt. 144), Mun. Aid, 78, 179, 301.
Danville, H. & W. R. Co. *v.* Com. (73 Pa. St. 29), Crim. L., 31; Sts. & H., 119, 195.
Danville, H. & W. R. Co. *v.* Gearhart (81 Pa. St. 260), Em. Dom., 595.
DaPonte *v.* New Orleans Transfer Co. (42 La. Ann. 696, 7 So. Rep. 608), Bagg., 77.
Darby *v.* Wright (3 Blatchf. (U. S.) 170), State Aid, 27.
D'Arc *v.* London & N. W. R. Co. (L. R. 9 C. P. 325, 22 W. R. 919, 30 L. T. 763), Car. of M., 459.
D'Arcy *v.* Tamar, K. H. & C. R. Co. (4 H. & C. 463, 14 W. R. 968, 36 L. J. Ex. 37, L. R. 2 Ex. 158, 14 L. T. 626), Contr., 12; Direct., 20.
Dardanelle & R. R. Co. *v.* Shinn (40 Am. & Eng. R. Cas. 570, 52 Ark. 93, 12 S. W. Rep. 183), Ferries, 7; Words & Ph., 102.
Dargan *v.* Carolina C. R. Co. (57 Am. & Eng. R. Cas. 536, 113 N. Car. 596, 18 S. E. Rep. 653), Em. Dom., 61, 128, 203, 235.
Dargan *v.* Pullman Palace Car Co. (Tex. App.) (26 Am. & Eng. R. Cas. 149), App., 86; Negl., 65; Sleep. Car Cos., 25.
Darling *v.* Boston & A. R. Co. (121 Mass. 118), Animals, 43, 482.
Darling *v.* Boston & W. R. Corp. (11 Allen (Mass.) 295), Car. of M., 543.
Darling *v.* Midland R. Co. (11 Ont. Pr. 32), Em. Dom., 1211.
Darling *v.* New York, P. & B. R. Co. (17 R. I. 708, 24 Atl. Rep. 462), Employés, Inj. to, 58.
Darlington *v.* LaClede County (4 Dill. (U. S.) 200), Mun. Aid, 360.
Darnley *v.* London, C. & D. R. Co. (L. R. 2 H. L. Cas. 43, 36 L. J. Ch. 404, 15 W. R. 817, 16 L. T. 217), Farm. Cross., 4.

Darracott *v.* Chesapeake & O. R. Co. 131 Am. & Eng. R. Cas. 157, 83 Va. 288, 2 S. E. Rep. 511), Employés, Inj. to, 275, 421.
Darrigan *v.* New York & N. E. R. Co. (23 Am. & Eng. R. Cas. 438, 52 Conn. 285, 52 Am. Rep. 590), Employés, Inj. to, 180; Fel. Serv., 427, 429; Witn., 139.
Dartmouth College *v.* Woodward (4 Wheat. (U. S.) 518), Charters, 17.
Darwin *v.* Charlotte, C. & A. R. Co. (23 So. Car. 531, 55 Am. Rep. 32), Contrib. Neg., 10, 50, 88; Tresp., Inj. to, 83, 84.
Dascomb *v.* Buffalo & S. L. R. Co. (27 Barb. (N. Y.) 221; affirmed in 24 How. Pr. 609), Cross., Inj. at, 198, 250, 251.
Dater *v.* Troy T. & R. Co. (2 Hill (N. Y.) 629), Em. Dom., 1012.
Daub *v.* Northern Pac. R. Co. (18 Fed. Rep. 625), Employés, Inj. to, 299; Evid., 192.
Daub *v.* Yonkers R. Co. (52 N. Y. S. R. 527, 23 N. Y. Supp. 268, 69 Hun 138), St. Rys., 354.
Daubert *v.* Pennsylvania R. Co. (155 Pa. St. 178, 26 Atl. Rep. 108), Ejectm., 1.
Daugherty *v.* Chicago, M. & St. P. R. Co. (Iowa) (54 N. W. Rep. 219), Animals, 564.
Daugherty *v.* Missouri R. Co. (21 Am. & Eng. R. Cas. 497, 81 Mo. 325, 51 Am. Rep. 239), Words & Ph., 35.
Dauphin & L. St. R. Co. *v.* Kennerly (74 Ala. 583), Tax., 60.
Davenport *v.* Alabama & C. R. Co. (2 Woods (U. S.) 519), Mort., 113.
Davenport *v.* Brooklyn City R. Co. (100 N. Y. 632, mem., 3 N. E. Rep. 305), St. Rys., 392.
Davenport *v.* Chicago, B. & N. R. Co. (76 Wis. 399, 45 N. W. Rep. 215), Animals, 182.
Davenport *v.* Chicago, R. I. & P. R. Co. (38 Iowa 633), App., 90; Tax., 26, 59, 319, 321.
Davenport *v.* Davenport & St. P. R. Co. (37 Iowa 624), App., 10.
Davenport *v.* Dows (15 Wall. (U. S.) 390), Fed. Cts., 26.
Davenport *v.* Dows (18 Wall. (U. S.) 626), Stockh., 78.
Davenport *v.* Mississippi & M. R. Co. (12 Iowa 539), Tax., 75, 134.
Davenport *v.* Mississippi & M. R. Co. (16 Iowa 348), Tax., 13, 79.
Davenport *v.* Pennsylvania R. Co. (2 Pa. Dist. 784), Discov., 7.
Davenport *v.* Stevenson (34 Iowa 225, 5 Am. Ry. Rep. 107), Sts. & H., 141.
Davenport & N. W. R. Co. *v.* Renwick (5 Am. & Eng. R. Cas. 90, 102 U. S. 180), Rip. Rts., 10.
Davenport & St. P. R. Co. *v.* O'Connor (40 Iowa 477), Subscr., 218.
Davenport & St. P. R. Co. *v.* Rogers (39 Iowa 298, 9 Am. Ry. Rep. 92, 20 Am. Ry. Rep. 85), Bills & N., 11.
Davenport C. R. Co. *v.* Davenport Gas Light Co. (43 Iowa 301, 14 Am. Ry. Rep. 437), Estop., 30.
Daves *v.* Southern Pac. R. Co. (98 Cal. 19, 32 Pac. Rep. 708), Employés, Inj. to, 93; Fel. Serv., 103, 138, 168, 198, 201, 214, 309, 344.
Davey *v.* Burlington, C. R. & M. R. Co. (31 Iowa 553), Words & Ph., 110.
Davey *v.* London & S. W. R. Co. (14 Am. & Eng. R. Cas. 650, L. R. 11 Q. B. D. 213), Cross., Inj. at, 264, 294.
Davey *v.* London & S. W. R. Co. (L. R. 12 Q. B. D. 70, 53 L. J. Q. B. D. 58, 49 L. T. 739, 48 J. P. 279; affirming L. R. 11 Q. B. D. 213, 52 L. J. Q. B. D. 665), Cross., Inj. at, 192, 265.
David *v.* Southwestern R. Co. (41 Ga. 223), Death, etc., 390.
Davidson, Ex parte (57 Fed. Rep. 883), Evid., 103; Pub. Lds., 33; Receiv., 39.
Davidson *v.* Boston & M. R. Co. (3 Cush. (Mass.) 91), Em. Dom., 261, 263, 369, 530, 576, 590, 719, 827.
Davidson *v.* Central Iowa R. Co. (35 Am. & Eng. R. Cas. 158, 75 Iowa 22, 39 N. W. Rep. 163), Animals, 219, 225, 383, 450.
Davidson *v.* Cornell (132 N. Y. 228, 30 N. E. Rep. 573, 43 N. Y. S. R. 887; reversing 31 N. Y. S. R. 982, 10 N. Y. Supp. 521), Employés, Inj. to, 208, 223, 717; Evid., 212.
Davidson *v.* Graham (2 Ohio St. 131), Lim. of Liab., 32.
Davidson *v.* Grange (4 Grant's Ch. (U. C.) 377), Direct., 7, 13; Subscr., 31.
Davidson *v.* Houston, E. & W. T. R. Co. (3 Tex. App. (Civ. Cas.) 473), Em. Dom., 470, 640, 754.
Davidson *v.* King (15 New Brun. 526), Em. Dom., 1216.
Davidson *v.* Michigan C. R. Co. (49 Mich. 428, 13 N. W. Rep. 804), Animals, 382, 586; Fences, 75.
Davidson *v.* Oregon & C. R. Co. (14 Am. & Eng. R. Cas. 267, 11 Oreg. 136, 1 Pac. Rep. 705), Drains, 5.
Davidson *v.* Ramsey County Com'rs (18 Minn. 482 (Gil. 432), Mun. Aid, 245.
Davidson *v.* St. Paul, M. & M. R. Co. (23 Am. & Eng. R. Cas. 352, 34 Minn. 51, 24 N. W. Rep. 324), Fires, 205; Witn., 179.
Davidson *v.* Southern Pac. R. Co. (44 Fed. Rep. 476), Dam., 42, 67, 70, 71, 73, 74; Employés, Inj. to, 101, 207, 238.
Davidson *v.* State (4 Tex. App. 545), Crim. L., 22.
Davies *v.* Lathrop (12 Fed. Rep. 353, 20 Blatchf. (U. S.) 397), Rem. of C., 32.
Davies *v.* St. Louis, K. C. & N. R. Co. (56 Iowa 192, 9 N. W. Rep. 117), Judgm., 37.
Daviess County *v.* Dickinson (117 U. S. 657, 6 Sup. Ct. Rep. 897), Mun. Aid, 313, 330, 342.
Daviess County *v.* Howard (13 Bush (Ky.) 101), Mun. Aid, 277.
Daviess County *v.* Huidekoper (98 U. S. 98), Mun. Aid, 360.
Davis, Ex parte (2 H. & N. 149, 26 L. J. M. C. 178), Crim. L., 10.
Davis *v.* Alabama & F. R. Co. (1 Woods (U. S.) 661), Bank'cy, 3; Receiv., 43.
Davis *v.* Baltimore & O. R. Co. (152 Pa. St. 314, 25 Atl. Rep. 498), Employés, Inj. to, 196, 240.
Davis *v.* Bangor & P. R. Co. (60 Me. 303), Em. Dom., 543.
Davis *v.* Button (78 Cal. 247, 20 Pac. Rep. 545, 18 Pac. Rep. 133), App., 117; Car.

of P., 1, 595; Contrib. Neg., 14; Evid., 284.
Davis *v.* Burlington & M. R. R. Co. (26 Iowa 549), Animals, 99, 130.
Davis *v.* Canadian Pac. R. Co. (12 Ont. App. 724), Animals, 102.
Davis *v.* Capitol Phosphate Co. (57 Fed. Rep. 118), Land Grants, 20.
Davis *v.* Cayuga & S. R. Co. (10 How. Pr. (N. Y.) 330), App., 92; Bagg., 33, 43, 57, 114.
Davis *v.* Central R. & B. Co. (17 Ga. 323), Citizens., 4; Jurisd., 7.
Davis *v.* Central R. Co. (60 Ga. 329), Children, Inj. to, 193.
Davis *v.* Central R. Co. (75 Ga. 645), Animals, 472.
Davis *v.* Central Vt. R. Co. (11 Am. & Eng. R. Cas. 173, 55 Vt. 84, 45 Am. Rep. 590), Employés, Inj. to, 60; Fel. Serv., 61, 73, 83, 380.
Davis *v.* Charles River Branch R. Co. (11 Cush. (Mass.) 506), Em. Dom., 526.
Davis *v.* Chautauqua Lake S. S. A. (2 N. Y. S. R. 365, 41 Hun 638), Agency, 73; Car. of M., 93; Tresp., 2; Trover., 9.
Davis *v.* Chicago & N. W. R. Co. (18 Wis. 175), Car. of P., 602.
Davis *v.* Chicago & N. W. R. Co. (15 Am. & Eng. R. Cas. 424, 58 Wis. 646, 17 N. W. Rep. 406, 46 Am. Rep. 667), Explosions, 3; Licensees, Inj. to, 7, 8, 22, 23; Tresp., Inj. to, 8.
Davis *v.* Chicago & N. W. R. Co. (46 Iowa 389, 16 Am. Ry. Rep. 45), Sts. & H., 146, 383.
Davis *v.* Chicago, R. I. & P. R. Co. (40 Iowa 292), Animals, 142, 145, 599.
Davis *v.* Chicago, R. I. & P. R. Co. (83 Iowa 744, 49 N. W. Rep. 77), Bagg., 97.
Davis *v.* Chicago, St. P., M. & O. R. Co. (45 Fed. Rep. 543), Car. of P., 55.
Davis *v.* Cobban (39 Iowa 392, 20 Am. Ry. Rep. 83), Contr., 45.
Davis *v.* Columbia & G. R. Co. (28 Am. & Eng. R. Cas. 440, 21 So. Car. 93), Death, etc., 274; Employés, Inj. to, 103, 608; Negl., 18; Trial, 71.
Davis *v.* Covington & M. R. Co. (77 Ga. 322, 2 S. E. Rep. 555), Em. Dom., 1038.
Davis *v.* Detroit & M. R. Co. (20 Mich. 105), Employés, Inj. to, 260; Fel. Serv., 90, 158, 199, 488, 492.
Davis *v.* Dumont (37 Iowa 47), Subscr., 143.
Davis *v.* Duncan (17 Am. & Eng. R. Cas. 295, 19 Fed. Rep. 477), Receiv., 70, 138, 171, 179.
Davis *v.* East Tenn. & G. R. Co. (1 Sneed (Tenn.) 94), Charters, 17; Land Grants, 125; Pub. Lds., 46.
Davis *v.* East Tenn., V. & G. R. Co (50 Am. & Eng. R. Cas. 137, 87 Ga. 605, 13 S. E. Rep. 567), Sts. & H., 37, 292.
Davis *v.* Gray (16 Wall. (U. S.) 203, 4 Am. Ry. Rep. 134), Receiv., 118; Land Grants, 126.
Davis *v.* Great Western R. Co. (20 U. C. Q. B. 27), Eject. Pass., 35.
Davis *v.* Hampshire County Com'rs (55 Am. & Eng. R. Cas. 52, 153 Mass. 218, 26 N. E. Rep. 848), Cross., St. & H., 27, 103, 115; Sts. & H., 153.
Davis *v.* Hannibal & St. J. R. Co. (19 Mo. App. 425), Animals, 55; Fences, 85, 86.
Davis *v.* Kansas City Belt R. Co. (46 Mo. App. 180), Contrib. Neg., 75, 84, 101, 113; Cross., Inj. at, 318.
Davis *v.* Kansas City, St. J. & C. B. R. Co. (53 Mo. 317), Eject. Pass., 32; Tickets & F., 38.
Davis *v.* Kansas City, S. & M. R. Co. (32 Fed. Rep. 863), Rem. of C., 23.
Davis *v.* Kendallville (5 Biss. (U. S.) 280), Mun. Aid, 180, 320, 377.
Davis *v.* La Crosse & M. R. Co. (12 Wis. 16), Em. Dom., 257, 1066.
Davis *v.* Lake Shore & M. S. R. Co. (114 Ind. 364, 14 West. Rep. 269, 16 N. E. Rep. 639), Tax., 342.
Davis *v.* Lehigh Valley R. Co. (46 N. Y. S. R. 735, 19 N. Y. Supp. 516, 64 Hun 492), Death, etc., 188.
Davis *v.* Leominster (1 Allen (Mass.) 182), Cross., St. & H., 37.
Davis *v.* London & B. R. Co. (2 F. & F. 588), Stat. & D., 101.
Davis *v.* Louisville, N. O. & T. R. Co. (69 Miss. 136, 10 So. Rep. 450), Car. of P., 352; Employés, Inj. to, 435; Trial, 103.
Davis *v.* Mayor, etc., of N. Y. (1 Duer (N. Y.) 451; affirmed in 9 N. Y. 263), Sts. & H., 225.
Davis *v.* Mayor, etc., of N. Y. (14 N. Y. 506; reversing 3 Duer 119), St. Rys., 19, 213.
Davis *v.* Memphis & C. R. Co. (39 Am. & Eng. R. Cas. 65, 87 Ala. 633, 6 So. Rep. 140), Adv. Poss., 13; Deeds, 25; Em. Dom., 204, 849.
Davis *v.* Memphis City R. Co. (22 Am. & Eng. R. Cas. 1, 22 Fed. Rep. 883), Pres., 10.
Davis *v.* Mercantile Trust Co. (152 U. S. 590, 14 Sup. Ct. Rep. 693), Mort., 214, 266.
Davis *v.* Michigan S. & N. I. R. Co. (20 Ill. 412), Car. of M., 337.
Davis *v.* Michigan S. & N. I. R. Co. (22 Ill. 278), Bagg., 22, 33, 57, 114.
Davis *v.* Milwaukee R. Co. (1 Mich. N. P. (Supp.) xxvi), Fel. Serv., 158.
Davis *v.* Missouri, K. & T. R. Co. (65 Mo. 441), Animals, 621.
Davis *v.* New York & E. R. Co. (1 Hilt. (N. Y.) 543), Car. of L. S., 156.
Davis *v.* New York & N. E. R. Co. (28 Am. & Eng. R. Cas. 223, 143 Mass. 301, 58 Am. Rep. 138, 9 N. E. Rep. 815), Death, etc., 109.
Davis *v.* New York C. & H. R. R. Co. (47 N. Y. 400, 2 Am. Ry. Rep. 394), Cross., Inj. at, 244, 251.
Davis *v.* New York, L. E. & W. R. Co. (20 Abb. N. Cas. 230), 5 N. Y. S. R. 819), Evid., 89.
Davis *v.* New York, L. E. & W. R. Co. (14 N. Y. S. R. 1; affirmed in 110 N. Y. 646, 17 N. E. Rep. 733, 17 N. Y. S. R. 172, 2 Silv. App. 94), Employés, Inj. to, 129; Judgm., 22; Pl., 117.
Davis *v.* New York, L. E. & W. R. Co. (110

N. Y. 646, 2 Silv. App. 94, 15 Civ. Pro. 62, 17 N. E. Rep. 733, 13 Cent. Rep. 162, 17 N. Y. S. R. 172; affirming 14 N. Y. S. R. 1), Pl., 149.
Davis *v.* New York, L. E. & W. R. Co. (23 N. Y. Supp. 358, 69 Hun 174, 52 N. Y. S. R. 740), Witn., 133.
Davis *v.* New York, N. H. & H. R. Co. (159 Mass. 532, 34 N. E. Rep. 1070), Fel. Serv., 185, 334.
Davis *v.* North Pa. R. Co. (2 Phila. (Pa.) 146), Em. Dom., 854.
Davis *v.* Northwestern R. Co. (4 Jur. N. S. 1303), Car. of M., 777; Dam., 102.
Davis *v.* Old Colony R. Co. (3 Am. & Eng. R. Cas. 543, 131 Mass. 258, 41 Am. Rep. 221), Guar., 1.
Davis *v.* Oregon & C. R. Co. (8 Oreg. 172), Car. of P., 394; Contrib. Neg., 28; Evid., 67.
Davis *v.* Providence & W. R. Co. (121 Mass. 134), Fires, 160.
Davis *v.* Richmond & D. R. Co. (30 So. Car. 613, 9 S. E. Rep. 105), Animals, 640.
Davis *v.* Rome, W. & O. R. Co. (56 Hun 372, 31 N. Y. S. R. 369, 10 N. Y. Supp. 334), Evid., 140.
Davis *v.* Rosedale St. R. Co. (75 Tex. 381, 12 S. W. Rep. 999), Injunc., 66.
Davis *v.* Russell (47 Me. 443), Em. Dom., 414, 497.
Davis *v.* St. Louis, I. M. & S. R. Co. (44 Am. & Eng. R. Cas. 690, 53 Ark. 117, 13 S. W. Rep. 801), Death, etc., 13; Employés, Inj. to, 217.
Davis *v.* San Lorenzo R. C. (47 Cal. 517), Em. Dom., 24.
Davis *v.* Southern Pac. R. Co. (98 Cal. 13, 32 Pac. Rep. 646), New Tr., 82.
Davis *v.* State (6 Tex. App. 166), Crim. L., 22.
Davis *v.* Third Ave. R. Co. (9 J. & S. (N. Y.) 31), Trial, 68.
Davis *v.* Titusville & O. C. R. Co. (30 Am. & Eng. R. Cas. 341, 114 Pa. St. 308, 6 Atl. Rep. 736), Em. Dom., 426; Evid., 158; Location, etc., 26.
Davis *v.* Tuscumbia, C. & D. R. Co. (4 Stew. & P. (Ala.) 421), Em. Dom., 84.
Davis *v.* Utah Southern R. Co. (3 Utah 218, 2 Pac. Rep. 521), Actions, 12; Negl., 109.
Davis *v.* Wabash R. Co. (46 Mo. App. 477), Animals, 383, 466.
Davis *v.* Wabash, St. L. & P. R. Co. (26 Am. & Eng. R. Cas. 315, 89 Mo. 340, 1 S. W. Rep. 327; reversing 13 Mo. App. 449), Car. of M., 12 21, 173, 179, 698; Words & Ph., 7.
Davis *v.* Wabash, St. L. & P. R. Co. (13 Mo. App. 449; reversed on other grounds in 89 Mo. 340), Car. of M., 758.
Davis Ave. R. Co. *v.* Mallon (57 Ala. 168, 20 Am. Ry. Rep. 405), Just. P., 7.
Davison *v.* Davis (125 U. S. 90, 8 Sup. Ct. Rep. 825), Stock, 60.
Davison *v.* Gillies (L. R. 16 Ch. D. 347, n., 50 L. J. Ch. D. 192, n., 44 L. T. 92, n.), Divid., 3, 8. 15.
Dawkins *v.* Gulf, C. & S. F. R. Co. (77 Tex. 232, 13 S. W. Rep. 984), Children, Inj. to, 19.
Dawson *v.* Boston & M. R. Co. (156 Mass. 127, 30 N. E. Rep. 466), Car. of P., 372, 564, 603.
Dawson *v.* Chicago & A. R. Co. (18 Am. & Eng. R. Cas. 521, 79 Mo. 296), Car. of M., 37, 57; Lim. of Liab., 19.
Dawson *v.* Iron Range & H. B. R. Co. (97 Mich. 33, 56 N. W. Rep. 106), Attach., 34, 36.
Dawson *v.* Louisville & N. R. Co. (Ky.) (11 Am. & Eng. R. Cas. 134), Car. of P., 634; Dam., 24, 37; Evid., 72; Trial, 114.
Dawson *v.* Manchester, S. & L. R. Co. (5 L. T. 682), Derailm., 4.
Dawson *v.* Midland R. Co. (4 . J. Ex. 49, L. R. 8 Ex. 8, 21 W. R. 56), Animals, 94; Fences, 106.
Dawson *v.* St. Louis, K. C. & N. R. Co. (76 Mo. 514), Car. of L. S., 44, 84.
Dawson County Com'rs *v.* McNamar (10 Neb. 276, 4 N. W. Rep. 991), Mun. Aid, 41.
Dawson Mfg. Co. *v.* Brunswick & A. R. Co. (51 Ga. 136), Contr., 106.
Day *v.* Brooklyn City R. Co. (12 Hun (N. Y.) 435; reversed in 76 N. Y. 593, mem.), Children, Inj. to, 54.
Day *v.* Fair Haven & W. R. Co. (23 Fed. Rep. 189; affirmed in 132 U. S. 98, 10 Sup. Ct. Rep. 11), Pat. for Inv., 2.
Day *v.* Fair Haven & W. R. Co. (132 U. S. 98, 10 Sup. Ct. Rep. 11; affirming 23 Fed. Rep. 189), Pat. for Inv., 50.
Day *v.* Flushing, N. S. & C. R. Co. (75 N. Y. 610), Death, etc., 194.
Day *v.* Grand Trunk R. Co. (5 U. C. C. P. 420), Sts. & H., 122.
Day *v.* Highland St. R. Co. (15 Am. & Eng. R. Cas. 150, 135 Mass. 113), Employés, Inj. to, 558; Sunday, 7, 10.
Day *v.* Joiner (6 Baxt. (Tenn.) 441), Tax., 171.
Day *v.* Louisville, N. O. & T. R. Co. (69 Miss. 589, 11 So. Rep. 25), Estop., 28; Injunc., 46.
Day *v.* New Orleans Pac. R. Co. (35 La. Ann. 694), Animals, 37, 366, 495; Fences, 13; Negl., 99.
Day *v.* New Orleans Pac. R. Co. (37 La. Ann. 131), Consol., 40.
Day *v.* New York C. R. Co. (51 N. Y. 583, 4 Am. Ry. Rep. 356; reversing 53 Barb. 250), Contr., 101.
Day *v.* New York C. R. Co. 31 Barb. (N. Y.) 548), Contr., 18; Stock Yards, 6.
Day *v.* New York C. R. Co. (22 Hun (N. Y.) 412; affirmed in 89 N. Y. 616; former appeal 31 Barb. 548), Contr., 20.
Day *v.* New York El. R. Co. (23 N. Y. Supp. 179, 52 N. Y. S. R. 319, 3 Misc. 616, mem.), Elev. Rys., 92.
Day *v.* New York, P. & O. R. Co. (20 Am. & Eng. R. Cas. 359, 41 Ohio St. 392), Right of W., 7.
Day *v.* Ogdensburg & L. C. R. Co. (35 Am. & Eng. R. Cas. 102, 107 N. Y. 129, 13 N. E. Rep. 765, 11 N. Y. S. R. 335; reversing 42 Hun 654, 4 N. Y. S. R. 772), Dissol., 4; Leases, 29, 93.
Day *v.* Owen (5 Mich. 520), Car. of P., 61, 64, 538.
Day *v.* Pittsburg, Y. & C. R. Co. (29 Am. &

Eng. R. Cas. 564, 44 Ohio St. 406, 7 N. E. Rep. 528), Em. Dom., 120.
Day *v.* Ridley (16 Vt. 48), Car. of M., 104, 108, 717.
Day *v.* Toledo, C. S. & D. R. Co. (2 Am. & Eng. R. Cas. 126, 42 Mich. 523, 4 N. W. Rep. 203), Employés, Inj. to, 274; Fel. Serv., 1.
Day *v.* Worcester, N. & R. R. C. (46 Am. & Eng. R. Cas. 324, 151 Mass. 302, 23 N. E. Rep. 824), Consol., 25, 30.
Dayharsh *v.* Hannibal & St. J. R. Co. (103 Mo. 570), Dam., 86; Employés, Inj. to, 40; Fel. Serv., 104, 335; Words & Ph., 25, 141.
Dayton & C. R. Co. *v.* Hatch (1 Disney (Ohio) 84), Charters, 35; Spec. Perf., 29; Stock, 8; Subscr., 208.
Dayton & M. R. Co. *v.* Miami County Infirmary (32 Ohio St. 566), Animals, 220.
Dayton & W. R. Co. *v.* Marshall (11 Ohio St. 497), Em. Dom., 247, 969.
Dayton, X. & B. R. Co. *v.* Lewton (20 Ohio St. 401), Em. Dom., 217; Judicial S., 2.
Deacon *v.* Great Western R. Co. (6 U. C. C. P. 241), Judgm., 22.
Deaderick *v.* Wilson (8 Baxt. (Tenn.) 108), Charters, 35; Consol., 13; Direct., 51; Sales of Rds., 5; Stockh., 6, 95.
Dealey *v.* Philadelphia & R. R. Co. (Pa.) (4 Atl. Rep. 170), Fel. Serv., 415, 512.
Dealing *v.* New York, N. H. & H. R. Co. (8 N. Y. S. R. 386), Attach., 54.
Dean *v.* Biggs (25 Hun (N. Y.) 122), Mort., 27.
Dean *v.* Chicago & N. W. R. Co. (43 Wis. 305), Car. of L. S., 156; Dam., 110.
Dean *v.* Chicago, M. & St. P. R. Co. (39 Minn. 413, 40 N. W. Rep. 270), App., 117; Fires, 254.
Dean *v.* East Tenn., V. & G. R. Co. (98 Ala. 586, 13 So. Rep. 489), Employés, 4; Employés, Inj. to, 631.
Dean *v.* Metropolitan El. R. Co. (119 N. Y. 540, 23 N. E. Rep. 1054, 30 N. Y. S. R. 81), Tresp., 9; Trial, 87.
Dean *v.* Omaha & St. L. R. Co. (54 Mo. App. 647), Animals, 154.
Dean *v.* Pennsylvania R. Co. (39 Am. & Eng. R. Cas. 697, 129 Pa. St. 514, 18 Atl. Rep. 718), Cross., Inj. at, 285; Imp. Neg., 21.
Dean *v.* Petersborough & C. R. Co. (2 Ont. Pr. 79), Em. Dom., 1266.
Dean *v.* St. Paul & D. R. Co. (53 Minn. 504, 55 N. W. Rep. 628), Assign., 4.
Dean *v.* St. Paul Union Depot Co. (39 Am. & Eng. R. Cas. 360, 41 Minn. 360, 5 L. R. A. 442, 43 N. W. Rep. 54), Union D. Cos., 9.
Dean *v.* Sullivan R. Co. (22 N. H. 316), Fences, 31.
Dean *v.* Vaccaro (2 Head (Tenn.) 488), Car. of M., 283, 758.
Deans *v.* Wilmington & W. R. Co. (45 Am. & Eng. R. Cas. 45, 107 N. Car. 686, 12 S. E. Rep. 77), Contrib. Neg., 48; Death, etc., 290; Negl., 67; Tresp., Inj. to, 67.
Dearborn *v.* Boston, C. & M. R. Co. (24 N. H. 179), Em. Dom., 565, 683; Witn., 9.
Dearden *v.* Townsend (6 B. & S. 861, L. R. 1 Q. B. 10, 12 Jur. N. S. 120, 35 L. J. M. C. 50, 14 W. R. 52, 13 L. T. 323), Tickets & F., 144.
Deaton *v.* Tennessee C. & R. Co. (12 Heisk. (Tenn.) 650), Contr., 18.
De Bary Baya M. Line *v.* Jacksonville, T. & K. W. R. Co. (40 Fed. Rep. 392), Discrim., 80.
Debbins *v.* Old Colony R. Co. (47 Am. & Eng. R. Cas. 531, 154 Mass. 402, 28 N. E. Rep. 274), Cross., Inj. at, 293.
De Berry *v.* Carolina C. R. Co. (100 N. Car. 310, 6 S. E. Rep. 723), Contrib. Neg., 120; Witn., 144.
De Betz's Petition (9 Abb. N. Cas. (N. Y.) 246), Mort., 155, 185; Reorg., 9.
Debovoise *v.* New York, L. E. & W. R. Co. (25 Am. & Eng. R. Cas. 335, 98 N. Y. 377, 50 Am. Rep. 683; affirming 30 Hun 479), Death, etc., 114, 115.
De Buol *v.* Freeport M. R. R. Co. (111 Ill. 499), Em. Dom. 42, 320, 367, 554, 601, 603, 605, 655, 709, 714.
DeCamp *v.* Mississippi & M. R. Co. (12 Iowa 348), Agency, 79.
Decatur County Com'rs *v.* State (12 Am. & Eng. R. Cas. 604, 86 Ind. 8), Mun. Aid, 444.
Dechert *v.* Indiana, B. & W. R. Co. (17 Ill. App. 74), Trial, 183.
Decker *v.* Baltimore & N. Y. R. Co. (30 Fed. Rep. 723), Waters & W., 3.
Decker *v.* Evansville, S. & N. R. Co. (133 Ind. 493, 33 N. E. Rep. 349), Sts. & H., 135, 224.
Decker *v.* Gardner (48 Am. & Eng. R. Cas. 683, 124 N. Y. 334, 26 N. E. Rep. 814, 36 N. Y. S. R. 267), Mort., 223; Receiv., 1, 36, 136.
Decker *v.* Hughes (68 Ill. 33), Mun. Aid, 3, 54, 161, 194, 314, 410.
Decuir *v.* Benson (27 La. Ann. 1), Col. Pers., 2.
Dedham & W. R. R. Co. *v.* Metropolitan R. Co. (8 Allen (Mass.) 279), Stat., 66.
Dedrick *v.* Missouri Pac. R. Co. (21 Mo. App. 433), Employés, Inj. to, 99, 100, 138.
Deeds *v.* Chicago, R. I. & P. R. Co. (69 Iowa 164, 28 N. W. Rep. 488), Trial, 151.
Deeds *v.* Chicago, R. I. & P. R. Co. (74 Iowa 154, 37 N. W. Rep. 124), Employés, Inj. to, 654.
Deerfield *v.* Connecticut River R. Co. (144 Mass. 325, 4 N. Eng. Rep. 189, 11 N. E. Rep. 105), Priv. Ways, 1, 2.
Deering *v.* York & C. R. Co. (31 Me. 172), Injunc., 18.
Deer Lake Co. *v.* Michigan L. & I. Co. (89 Mich. 180, 50 N. W. Rep. 807; former appeal 83 Mich. 11), Consol., 35.
De Forest *v.* Jewett (19 Hun (N. Y.) 509), Employés, Inj. to, 49, 209.
De Forest *v.* Jewett (8 Am. & Eng. R. Cas. 495, 88 N. Y. 264; affirming 23 Hun 490), Employés, Inj. to, 210, 231.
De Forth *v.* Wisconsin & M. R. Co. (5 Am. & Eng. R. Cas. 28, 52 Wis. 320, 9 N. W. Rep. 17, 38 Am. Rep. 737), Mun. Aid, 85; Sunday, 3.
Degg *v.* Midland R. Co. (1 H. & N. 773, 3

Jur. N. S. 395, 26 L. J. Ex. 171), Fel. Serv., 10, 209.
De Graff *v.* New York C. & H. R. R. Co. (76 N. Y. 125; affirming 3 T. & C. 255), Employés, Inj. to, 103, 108, 182, 470.
De Graff *v.* St. Paul & P. R. Co. (23 Minn. 144), Land Grants, 120; Words & Ph., 54.
De Graff *v.* Thompson (24 Minn. 452), Attach., 19.
De Graffenried *v.* Brunswick & A. R. Co. (57 Ga. 22), Receiv., 122.
DeGruy *v.* Aiken (43 La. Ann. 798, 9 So. Rep. 747), Wharves, 1, 4.
De Ham *v.* Mexican Nat. R. Co. (Tex. Civ. App.) (22 S. W. Rep. 249), Death, etc., 109.
Deigleman *v.* New York, L. & W. R. Co. (34 N. Y. S. R. 4, 12 N. Y. Supp. 83), Waters & W., 29.
Deikman *v.* Morgan's L. & T. R. & S. Co. (40 La. Ann. 787, 5 So. Rep. 76), Cross., Inj. at, 211.
Deisen *v.* Chicago, St. P., M. & O. R. Co. (43 Minn. 454, 45 N. W. Rep. 864), Death, etc., 292; Evid., 247.
Deitrichs *v.* Lincoln & N. W. R. Co. (13 Neb. 361, 13 N. W. Rep. 624), Em. Dom., 62, 67, 253; Witn., 146
De Kay *v.* Chicago, M. & St. P. R. Co. (39 Am. & Eng. R. Cas. 463, 41 Minn. 178, 4 L. R. A. 632, 43 N. W. Rep. 182), Car. of P., 38, 40, 371, 451.
Deker *v.* Hughes (68 Ill. 33), Mun. Aid, 133.
DeLacy *v.* Walcott (21 N. Y. Supp. 619, 2 Misc. 132, 50 N. Y. S. R. 527), Spec. Perf., 22.
Delafield *v.* Manhattan R. Co. (40 N. Y. S. R. 670, 16 N. Y. Supp. 157), Elev. Rys., 123, 126.
Delafield *v.* Union Ferry Co. (10 Bosw. (N. Y.) 216; affirmed (?) 51 N. Y. 671, mem.), Contrib. Neg., 100.
De Laine *v.* Alderman (31 So. Car. 267, 9 S. E. Rep. 950), Fixt., 11; Forc. Ent., 2.
Delamatyr *v.* Milwaukee & P. du C. R. Co. (24 Wis. 578), Car. of P., 398, 402; Contrib. Neg., 41.
Deland *v.* Platte County (54 Fed. Rep. 823), Mun. Aid, 278, 384.
Delane *v.* Central R. & B. Co. (59 Ga. 633), New Tr., 35.
Delaney *v.* Canadian Pac. R. Co. (21 Ont. 11), Em. Dom., 1279.
Delaney *v.* Milwaukee & St. P. R. Co. (33 Wis. 67), Contrib. Neg., 88; Licensees, Inj. to, 19; Negl., 53; Stat. & D., 115.
Delaplaine *v.* Chicago & N. W. R. Co. (42 Wis. 214, 15 Am. Ry. Rep. 28), Charters, 66; Em. Dom., 994; Rip. Rts., 1, 3.
Delaware & A. R. Co. *v.* Irick (23 N. J. L. 321), Subscr., 84, 123; Witn., 12, 13.
Delaware & H. Canal Co., In re (69 N. Y. 209), Em. Dom., 888.
Delaware & H. Canal Co. *v.* Com. (Pa.) (37 Am. & Eng. R. Cas. 359, 17 Atl. Rep. 175), Int. Com., 8, 197; Tax., 67.
Delaware & H. Canal Co. *v.* Webster (Pa.) (27 Am. & Eng. R. Cas. 160, 6 Atl. Rep. 841), Car. of P., 420, 429; Trial, 108.
Delaware & H. Canal Co. *v.* Whitehall (10 Am. & Eng. R. Cas. 227, 90 N. Y. 21), Cross., St. & H., 48.
Delaware & M. R. Co. *v.* Stump (8 Gill & J. (Md.), 479), Waters & W., 8.
Delaware & R. Canal Co. *v.* Camden & A. R. Co. (15 N. J. Eq. 13), Charters, 104.
Delaware & R. Canal Co. *v.* Camden & A. R. Co. (16 N. J. Eq. 321), Em. Dom., 101; Franch., 5; Injunc., 36; Nuis., 21; Par. & Comp. L., 4; Stat., 63.
Delaware & R. Canal Co. *v.* Raritan & D. B. R. Co. (14 N. J. Eq. 445), Em. Dom., 1038; Injunc., 16.
Delaware Bay & C. M. R. Co., In re (N. J. Eq.) (11 Atl. Rep. 261; adhered to on rehearing in 11 Atl. Rep. 737), Receiv., 14; Stat., 17.
Delaware Bay & C. M. R. Co. *v.* Markley (37 Am. & Eng. R. Cas. 421, 45 N. J. Eq. 139, 16 Atl. Rep. 436), Receiv., 1, 14.
Delaware County Bank *v.* Duncombe (48 Iowa 488), Bills & N., 24; Witn., 175.
Delaware County Com'rs *v.* Andrews (18 Ohio St. 49), Bonds, 25.
Delaware County Com'rs *v.* McClintock (51 Ind. 325), Mun. Aid, 299.
Delaware, L. & W. R. Co. *v.* Buffalo (48 N. Y. S. R. 501, 65 Hun 464, 20 N. Y. Supp. 448), Sts. & H., 53.
Delaware, L. & W. R. Co. *v.* Burkhard (15 N. Y. S. R. 517), App., 10.
Delaware, L. & W. R. Co. *v.* Burson (61 Pa. St. 369), Em. Dom., 692, 751, 760; Lim. of Ac., 6, 48; Release, 7.
Delaware, L. & W. R. Co. *v.* Cadow (35 Am. & Eng. R. Cas. 405, 120 Pa. St. 559, 14 Atl. Rep. 450), Tresp., Inj. to, 97.
Delaware, L. & W. R. Co. *v.* Central S. Y. & T. Co. (31 Am. & Eng. R. Cas. 83, 43 N. J. Eq. 71, 9 Cent. Rep. 111, 10 Atl. Rep. 490; affirmed in 43 N. J. Eq. 605, 12 Atl. Rep. 374, 13 Atl. Rep. 615), Injunc., 10; Land Grants, 123.
Delaware, L. & W. R. Co. *v.* Central S. Y. & T. Co. (43 N. J. Eq. 77, 10 Atl. Rep. 602), Injunc., 5.
Delaware, L. & W. R. Co. *v.* Central S. Y. & T. Co. (37 Am. & Eng. R. Cas. 607, 45 N. J. Eq. 50, 17 Atl. Rep. 146; affirmed 46 N. J. Eq. 280), Actions, 1; Wareh., 1, 6.
Delaware, L. & W. R. Co. *v.* Central S. Y. & T. Co. (42 Am. & Eng. R. Cas. 524, 46 N. J. Eq. 280, 19 Atl. Rep. 185; affirming 37 Am. & Eng. R. Cas. 607, 45 N. J. Eq. 50, 17 Atl. Rep. 146), Stock Yards, 2.
Delaware, L. & W. R. Co. *v.* Com. (66 Pa. St. 64), Tax., 44, 280.
Delaware, L. & W. R. Co. *v.* Converse (49 Am. & Eng. R. Cas. 323, 139 U. S. 469, 11 Sup. Ct. Rep. 569), Cross., Inj. at, 90, 218, 336, 345; Fly. Switch, 1.
Delaware, L. & W. R. Co. *v.* Corwith (37 N. Y. S. R. 728, 60 Hun 576, 14 N. Y. Supp. 245), Wareh., 3.
Delaware, L. & W. R. Co. *v.* Dailey (37 N. J. L. 526), Car. of P., 155; Witn., 72.
Delaware, L. & W. R. Co. *v.* Ditton (36 N. J. L. 361), Proc., 14.
Delaware, L. & W. R. Co. *v.* Erie R. Co. (21 N. J. Eq. 298), Bergen Tunnel, 1; Erie R. Co., 2; Receiv., 11.
Delaware, L. & W. R. Co. *v.* Gordon (46 N. Y. S. R. 733, 19 N. Y. Supp. 533, 64 Hun 637, mem.), Tax., 362.

Delaware, L. & W. R. Co. *v.* Hannon (37 N. J. L. 276), Rip. Rts., 6.
Delaware, L. & W. R. Co. *v.* Jones (128 Pa. St. 308, 18 Atl. Rep. 330), Death, etc., 189, 281.
Delaware, L. & W. R. Co. *v.* Mehrhof (53 N. J. L. 205, 23 Atl. Rep. 170), Bridges, 84.
Delaware, L. & W. R. Co. *v.* Napheys (1 Am. & Eng. R. Cas. 52, 90, Pa. St. 135), Car. of P., 583; Collis., 12, 14.
Delaware, L. & W. R. Co. *v.* Newton Coal Min. Co. (137 Pa. St. 314, 21 Atl. Rep. 171), Injunc., 6.
Delaware, L. & W. R. Co. *v.* Oxford Iron Co. (1 Am. & Eng. R. Cas. 205, 33 N. J. Eq. 192), Liens, 29, 30, 43.
Delaware, L. & W. R. Co. *v.* Salmon (39 N. J. L. 299, 14 Am. Ry. Rep. 226), Em. Dom., 989; Fires, 46, 58, 62, 82, 104, 121, 179, 320.
Delaware, L. & W. R. Co. *v.* Shelton (N. J.) (26 Atl. Rep. 937), Cross., Inj. at, 1.
Delaware, L. & W. R. Co. *v.* Toffey (38 N. J. L. 525, 13 Am. Ry. Rep. 75), Contrib. Neg., 88; Cross., Inj. at, 77.
Delaware, L. & W. R. Co. *v.* Trautwein (41 Am. & Eng. R. Cas. 187, 52 N. J. L. 169, 7 L. R. A. 435, 13 N. J. L. J. 72, 19 Atl. Rep. 178), Car. of M., 3; Car. of P., 107; Stat. & D., 61, 98, 100, 113; Sunday, 5.
Delaware, L. & W. R. Co. *v.* Walsh (47 N. J. L. 548, 4 Atl. Rep. 323), Eject. Pass, 106.
Delaware, L. & W. R. Co. *v.* Wilkesbarre & W. S. R. Co. (1 Pa. Dist. 627), Cross. Rys., 85.
Delaware R. Co. *v.* Tharp (1 Houst. (Del.) 149), Charters, 26; Subscr., 119, 127; Words & Ph., 222.
Delaware R. Co. *v.* Tharp (5 Harr. (Del.) 454), Charters, 42.
Delaware R. Constr. Co. *v.* Davenport & St. P. R. Co. (46 Iowa 406), Liens, 30.
Delaware River & L. R. Co. *v.* Rowland (Pa.) (30 Am. & Eng. R. Cas. 524, 9 Atl. Rep. 929), Subscr., 114.
Delaware State Grange *v.* New York, P. & N. R. Co. (2 Int. Com. Rep. 187, 2 Int. Com. Com. 309), Int. Com., 167.
Delaware State Grange *v.* New York, P. & N. R. Co. (3 Int. Com. Rep. 554, 4 Int. Com. Com. 588; rehearing denied in 5 Int. Com. Com. 161), Int. Com., 38.
Delie *v.* Chicago & N. W. R. Co. (5 Am. & Eng. R. Cas. 464, 51 Wis. 400, 8 N. W. Rep. 265), Employés, Inj. to, 766; Pl., 117.
De Lissa *v.* Missouri Pac. R. Co. (36 Mo. App. 706), Consol., 46; Fires, 194; Tresp., 11.
De Long *v.* Delaware, L. & W. R. Co. (37 Hun (N. Y.) 282), Evid., 177.
De Lucas *v.* New Orleans & C. R. Co. (38 La. Ann. 930), St. Rys., 527.
Del Valle *v.* Steamboat Richmond (27 La. Ann. 90), Bagg., 79.
Delzell *v.* Indianapolis & C. R. Co. (32 Ind. 45), St. Rys., 183.
De Mahy *v.* Morgan's L. & T. R. & S. Co. (58 Am. & Eng. R. Cas. 448, 45 La. Ann. 1329, 14 So. Rep. 61), Car. of P., 477; Evid., 76.
De Menacho *v.* Ward (23 Blatchf. (U. S.) 502, 27 Fed. Rep. 529), Discrim., 23.
Deming *v.* Grand Trunk R. Co. (48 N. H. 455), Agency, 6; Car. of M., 22, 735, 784; Pl., 127.
Deming *v.* Houlton (64 Me. 254), Mun. Aid, 377.
Deming *v.* Merchants' C. P. & S. Co. (90 Tenn. 306, 17 S. W. Rep. 89), Bills of L., 64, 73, 76; Car. of M., 74, 155; Fire Ins., 9, 11.
Deming *v.* Norfolk & W. R. Co. (16 Am. & Eng. R. Cas. 232, 21 Fed. Rep. 25), Car. of M., 547, 684.
Deming *v.* Norfolk & W. R. Co. (17 Phila. (Pa.) 540), Car. of M., 564, 637.
Demorest *v.* Midland R. Co. (10 Ont. Pr. 73), Em. Dom., 1232, 1274.
Demorest *v.* Midland R. Co. (10 Ont. Pr. 82), Mand., 37.
De Mott *v.* Laraway (14 Wend. (N. Y.) 225), Car. of M., 104.
Demueles *v.* St. Paul & N. P. R. Co. (44 Minn. 436, 46 N. W. Rep. 912), Sts. & H., 286.
Denaby Main Colliery Co. *v.* Manchester, S. & L. R. Co. (3 Ry. & C. T. Cas. 426), Charges, 89, 92.
Denaby Main Colliery Co. *v.* Manchester, S. & L. R. Co. (4 Ry. & C. T. Cas. 28), Discrim., 41.
Denaby Main Colliery Co. *v.* Manchester, S. & L. R. Co. (26 Am. & Eng. R. Cas. 293, 11 App. Cas. 97, 55 L. J. Q. B. 181, 6 Ry. & C. T. Cas. 133; affirming 14 Q. B. D. 209), Charges, 88; Discrim., 25, 28, 47, 66.
Denison *v.* Lesslie (3 Ont. App. 536; affirming 43 U. C. Q. B. 22), Stockh., 74.
Denison *v.* Smith (43 U. C. Q. B. 503), Stockh., 53.
Denman *v.* Johnston (85 Mich. 387, 48 N. W. Rep. 565), Contrib., Neg., 70; Evid., 247; Negl., 89; Words & Ph., 103.
Denman *v.* St. Paul & D. R. Co. (26 Minn. 357, 4 N. W. Rep. 605), Cross., Inj. at, 212.
Denmark *v.* Atlantic & N. C. R. Co. (107 N. Car. 185, 12 S. E. Rep. 54), Dam., 101.
Denner *v.* Chicago, M. & St. P. R. Co. (11 Am. & Eng. R. Cas. 503, 57 Wis. 218, 15 N. W. Rep. 158), Nuis., 22.
Denney *v.* Cleveland & P. R. Co. (28 Ohio St. 108, 14 Am. Ry. Rep. 73), Bonds, 40.
Dennick *v.* Central R. Co. (1 Am. & Eng. R. Cas. 309, 103 U. S. 11), Death, etc., 110; States, 4.
Dennis *v.* Louisville, N. A. & C. R. Co. (35 Am. & Eng. R. Cas. 141, 116 Ind. 42, 15 West. Rep. 547), 18 N. E. Rep. 179, 1 L. R. A. 448), Animals, 114, 236, 478.
Dennis *v.* Vicksburg, S. & P. R. Co. (34 La. Ann. 954), Tax., 144.
Dennison *v.* Taylor (15 Abb. N. Cas. (N. Y.) 439), Deeds, 39.
Denniston *v.* Chicago, A. & St. L. R. Co. (4 Biss. (U. S.) 414), Mort., 281.
Dennistoun *v.* New York & N. H. R. Co. (1 Hilt. (N. Y.) 62, 2 Abb. Pr. 278, 415), Rem. of C., 38.
Denny *v.* Dodson (13 Sawy. (U. S.) 68, 32

Fed. Rep. 899), Land Grants, 76, 78, 82, 83.
Denny *v.* Indiana & I. C. R. Co. (11 Ind. 293), Pl., 73.
Denny *v.* New York C. & H. R. R. Co. (5 Daly (N. Y.) 50), Tickets & F., 50.
Denny *v.* New York C. R. Co. (13 Gray (Mass.) 481), Car. of M., 20.
Dent *v.* London Tramways Co. (1 Am. & Eng. R. Cas. 592, L. R. 16 Ch. D. 344. 50 L. J. Ch. 190, 44 L. T. 91), Divid., 3, 8, 15.
Dent *v.* St. Louis, I. M. & S. R. Co. (83 Mo. 496), Animals, 607; Cat.-Gds., 13.
Denton *v.* Chicago, R. I. & P. R. Co. (52 Iowa 161, 2 N. W. Rep. 1093), Car. of M., 152.
Denton *v.* East Anglian R. Co. (3 C. & K. 16), Consol., 21.
Denton *v.* Great Northern R. Co. (5 El. & Bl. 860, 2 Jur. N. S. 185, 25 L. J. Q. B. 129), Car. of P., 122; Time-tables, 1, 3.
Denver *v.* Bayer (7 Colo. 113, 2 Pac. Rep. 6), Sts. & H., 122, 141, 194, 211, 225.
Denver *v.* Denver & S. F. R. Co. (17 Colo. 583, 31 Pac. Rep. 338), Nuis., 9.
Denver & B. P. R. T. Co. *v.* Dwyer (3 Colo. App. 408), Contrib. Neg., 48, 86; Trial, 116.
Denver & N. O. Constr. Co. *v.* Stout (8 Colo. 61, 5 Pac. Rep. 627), Sales, 7.
Denver & N. O. R. Co. *v.* Atchison, T. & S. F. R. C. (9 Am. & Eng. R. Cas. 374, 15 Fed. Rep. 650; reversed in 110 U. S. 667, 4 Sup. Ct. Rep. 185), Contrib., 63.
Denver & N. O. R. Co. *v.* Atchison, T. & S. F. R. Co. (12 Am. & Eng. R. Cas. 1, 5 McCrary (U. S.) 287, 16 Fed. Rep. 853), Contempt, 6, 10.
Denver & N. O. R. Co. *v.* Jackson (6 Colo. 340), App., 11.
Denver & N. O. R. Co. *v.* Lamborn (23 Am. & Eng. R. Cas. 115, 8 Colo. 380, 8 Pac. Rep. 582), Em. Dom., 969, 971, 974.
Denver & N. O. R. Co. *v.* Lamborn (9 Colo. 119, 10 Pac. Rep. 797), Em. Dom., 395.
Denver & R. G. R. Co., Ex parte (101 U. S. 711), Mand., 6.
Denver & R. G. R. Co. *v.* Alling (99 U. S. 463), Denver & R. G. R. Co., 1, 2.
Denver & R. G. R. Co. *v.* Bourne (32 Am. & Eng. R. Cas. 227, 11 Colo. 59, 16 Pac. Rep. 839), Sts. & H., 250, 265, 266.
Denver & R. G. R. Co. *v.* Chandler (8 Colo. 371, 8 Pac. Rep. 571), Animals, 77.
Denver & R. G. R. Co. *v.* Church (48 Am. & Eng. R. Cas. 627, 17 Colo. 1, 28 Pac. Rep. 468), Tax., 92, 93, 173, 250.
Denver & R. G. R. Co. *v.* Costes (1 Colo. App. 336, 28 Pac. Rep. 1129), Em. Dom., 559; Sts. & H., 243.
Denver & R. G. R. Co. *v.* Crawford (11 Colo. 598, 19 Pac. Rep. 673), Animals, 596; Stat., 67.
Denver & R. G. R. Co. *v.* Davidson (2 Colo. App. 443, 31 Pac. Rep. 181), Animals, 6, 9, 10.
Denver & R. G. R. Co. *v.* Denver, S. P. & P. R. Co. (14 Am. & Eng. R. Cas. 83, 5 McCrary (U. S.) 443, 17 Fed. Rep. 867), Em. Dom., 116.
Denver & R. G. R. Co. *v.* De Witt (1 Colo. App. 419, 29 Pac. Rep. 524), Car. of M., 145, 786; Exp. Cos., 33.
Denver & R. G. R. Co. *v.* Glasscott (4 Colo. 270), Evid., 13.
Denver & R. G. R. Co. *v.* Griffith (17 Colo. 598, 31 Pac. Rep. 171), Em. Dom., 357. 461, 600.
Denver & R. G. R. Co. *v.* Harris (15 Am. & Eng. R. Cas. 142, 3 N. Mex. 109, 2 Pac. Rep. 369; affirmed in 122 U. S. 597, 7 Sup. Ct. Rep. 1286), Employés, Inj. to, 483.
Denver & R. G. R. Co. *v.* Harris (31 Am. & Eng. R. Cas. 592, 122 U. S. 597, 7 Sup. Ct. Rep. 1286), Dam., 32.
Denver & R. G. R. Co. *v.* Henderson (31 Am. & Eng. R. Cas. 559, 10 Colo. 1, 13 Pac. Rep. 910), Animals, 301, 480, 495, 536.
Denver & R. G. R. Co. *v.* Henderson (10 Colo. 4, 13 Pac. Rep. 912), Animals, 301, 495, 536.
Denver & R. G. R. Co. *v.* Hill (40 Am. & Eng. R. Cas. 145, 13 Colo. 35, 4 L. R. A. 376, 2 Denver Leg. News 225, 21 Pac. Rep. 914), Car. of M., 390, 656.
Denver & R. G. R. Co. *v.* Hodgson (18 Colo. 117, 31 Pac. Rep. 954), Car. of P., 137, 139, 232, 281; Cross., Inj. at, 237.
Denver & R. G. R. Co. *v.* Morrison (3 Colo. App. 194), App., 117.
Denver & R. G. R. Co. *v.* Morton (3 Colo. App. 155, 32 Rac. Rep. 345), Contrib. Neg., 4; Fires, 253, 260.
Denver & R. G. R. Co. *v.* Olsen (4 Colo. 239), Animals, 60; Trial, 97.
Denver & R. G. R. Co. *v.* Otis (25 Am. & Eng. R. Cas. 232, 7 Colo. 198, 2 Pac. Rep. 925), Em. Dom., 239.
Denver & R. G. R. Co. *v.* Outcalt (2 Colo. App. 395, 31 Pac. Rep. 177), Animals, 6, 9, 10.
Denver & R. G. R. Co. *v.* Ryan (17 Colo. 98, 28 Pac. Rep. 79), Contrib. Neg., 101; Cross., Inj. at, 157, 242, 269.
Denver & R. G. R. Co. *v.* Schmitt (32 Am. & Eng. R. Cas. 231, 11 Colo. 56, 16 Pac. Rep. 842), Constr. Rys., 12; Evid., 47.
Denver & R. G. R. Co. *v.* Stark (16 Colo. 291, 26 Pac. Rep. 779), Em. Dom., 900.
Denver & R. G. R. Co. *v.* Stewart (1 Colo. App. 227, 28 Pac. Rep. 658), Animals, 264.
Denver & R. G. R. Co. *v.* United States Trust Co. (41 Fed. Rep. 720), Deeds of Tr., 9.
Denver & R. G. R. Co. *v.* United States (36 Am. & Eng. R. Cas. 429, 34 Fed. Rep. 838; affirmed in 150 U. S. 1, 16, 14 Sup. Ct. Rep. 11, 16), Pub. Lds., 23.
Denver & R. G. W. R. Co. *v.* Stancliff (4 Utah 117, 7 Pac. Rep. 530), Em. Dom., 657.
Denver & S. F. R. Co. *v.* Domke (36 Am. & Eng. R. Cas. 155, 11 Colo. 247, 17 Pac. Rep. 777), Em. Dom., 1038; Injunc., 32; Sts. & H., 78, 84.
Denver & S. F. R. Co. *v.* School Dist. No. 22 (14 Colo. 327, 23 Pac. Rep. 978), Ejectm., 3.
Denver & S. R. Co. *v.* Denver City R.

Co. (2 Colo. 673, 20 Am. Ry. Rep. 339), Eq., 2; Incorp., 3, 27; Mun. Corp., 31; Nuis., 20; St. Rys., 7, 53; Sts. & H., 233.
Denver Circle R. Co. *v.* Bigler (10 Colo. 428, 15 Pac. Rep. 726), Mun. Corp., 31; Sts. & H., 141.
Denver Circle R. Co. *v.* Clark (10 Colo. 427, 15 Pac. Rep. 726), Mun. Corp., 31; Sts. & H., 141.
Denver Circle R. Co. *v.* Martin (10 Colo. 428, 15 Pac. Rep. 726), Mun. Corp., 31; Sts. & H., 141.
Denver Circle R. Co. *v.* Nestor (10 Colo. 403, 15 Pac. Rep. 714), Mun. Corp., 31; Sts. & H., 141.
Denver Circle R. Co. *v.* Wiggins (10 Colo. 426, 15 Pac. Rep. 726), Mun. Corp., 31; Sts. & H., 141.
Denver City I. & W. Co. *v.* Middaugh (12 Colo. 434, 21 Pac. Rep. 565), Em. Dom., 239, 683.
Denver City R. Co. *v.* Denver (2 Colo. App. 34, 30 Pac. Rep. 1048), Mun. Corp., 6.
Denver, M. & A. R. Co. *v.* Cowgill (44 Kan. 325, 24 Pac. Rep. 475), Cat.-Gds., 25.
Denver Pac. R. Co. *v.* United States (12 Ct. of Cl. 237), Denver Pac. R. Co., 1; Land Grant Rds., 1, 12.
Denver R. L. & C. Co. *v.* Union Pac. R. Co. (34 Fed. Rep. 386), Em. Dom., 346, 353; Pl., 167.
Denver, S. P. & P. R. Co. *v.* Conway (8 Colo. 1, 54 Am. Rep. 537, 5 Pac. Rep. 142), Agency, 39; Dam., 64; Explosions, 1; Fires, 349; Negl., 81.
Denver, S. P. & P. R. Co. *v.* Driscoll (38 Am. & Eng. R. Cas. 105, 12 Colo. 520, 21 Pac. Rep. 708), Fel. Serv., 73, 217, 355, 357, 360, 361; Trial, 35.
Denver, S. P. & P. R. Co. *v.* Frame (18 Am. & Eng. R. Cas. 637, 6 Colo. 382), Car. of M., 708, 795.
Denver, S. P. & P. R. Co. *v.* Pickard (18 Am. & Eng. R. Cas. 284, 8 Colo. 163, 6 Pac. Rep. 149), Car. of P., 378, 383, 580; Negl., 102; Time-tables, 1; Trial, 65.
Denver, S. P. & P. R. Co. *v.* Riley (7 Colo. 494, 4 Pac. Rep. 785), Constr. Rys., 66, 68.
Denver, S. P. & P. R. Co. *v.* Roberts (18 Am. & Eng. R. Cas. 627, 6 Colo. 333), Bagg., 57.
Denver, S. P. & P. R. Co. *v.* Wilson (12 Colo. 20, 20 Pac. Rep. 340), Death, etc., 87; Employés, Inj. to, 669, 733; Witn., 141.
Denver, S. P. & P. R. Co. *v.* Woodward (4 Colo. 1, 162), Death, etc., 15, 164, 284, 386; Derailm., 4; Ex. & Ad., 2; Negl., 101; Stat., 16.
Denver, T. & G. R. Co. *v.* De Graff (2 Colo. App. 42, 29 Pac. Rep. 664), Fires, 1, 33, 137, 253.
Denver, T. & G. R. Co. *v.* Robbins (2 Colo. App. 313, 30 Pac. Rep. 261), Negl., 48, 72; Sts. & H., 410, 413.
Denver, T. & G. R. Co. *v.* Simpson (16 Colo. 55, 26 Pac. Rep. 339), Employés, Inj. to, 112.
Denver, U. & P. R. Co. *v.* Barsaloux (15 Colo. 290, 25 Pac. Rep. 165), Sts. & H., 141.
Denver, U. & P. R. Co. *v.* Toohey (15 Colo. 297, 25 Pac. Rep. 166), Release, 29.
Denver, W. & P. R. Co. *v.* Church (14 Am. & Eng. R. Cas. 320, 7 Colo. 143, 2 Pac. Rep. 218), Jurisd., 8.
De Pauw *v.* Stubblefield (132 Ind. 182, 31 N. E. Rep. 796), Negl., 67.
Deppe *v.* Chicago, R. I. & P. R. Co. (36 Iowa 52), Employés, Inj. to, 297; Fel. Serv., 140, 163, 173.
Deppe *v.* Chicago, R. I. & P. R. Co. (38 Iowa 592), Employés, Inj. to, 14, 143, 307, 769; Fel. Serv., 495; Trial, 188.
Derby *v.* Framingham & L. R. Co. (119 Mass. 516), Em. Dom., 506.
Derby *v.* Gage (25 Am. & Eng. R. Cas. 233, 60 Mich. 1, 26 N. W. Rep. 820), Em. Dom., 777, 854.
Derby *v.* Kentucky C. R. Co. (Ky.) (4 S. W. Rep. 303), Death, etc., 211, 268; Employés, Inj. to, 97, 207.
De Reamer *v.* Pacific Exp. Co. (84 Mo. 529), Exp. Cos., 24.
Deremer *v.* Delaware, L. & W. R. Co. (54 N. J. L. 407, 24 Atl. Rep. 481), Death, etc., 137.
Dering *v.* New York C. & H. R. R. Co. (50 N. Y. S. R. 832, 67 Hun 650, 22 N. Y. Supp. 344), Employés, Inj. to, 322.
De Rochemont *v.* Boston & M. R. Co. (64 N. H. 500, 15 Atl. Rep. 131), Estop., 13.
Derosia *v.* Winona & St. P. R. Co. (18 Minn. 133, (Gil. 119) 8 Am. Ry. Rep. 363), Car. of M., 205, 328, 341, 351.
Derr *v.* Lehigh Valley R. Co. (158 Pa. St. 365, 27 Atl. Rep. 1002), Death, etc., 122; Employés, Inj. to, 201.
Derrenbacher *v.* Lehigh Valley R. Co. (4 Am. & Eng. R. Cas. 624, 87 N. Y. 636, mem.; reversing 21 Hun 612, 59 How. Pr. 283), Negl., 81.
Derry *v.* Lowry (6 Phila. (Pa.) 30), Col. Pers., 7.
Dervin *v.* Herrman (26 J. & S. 193, 31 N. Y. S. R. 179, 9 N. Y. Supp. 722), Employés, Inj. to, 135.
Deschamps *v.* Second & T. St. Pass. R. Co. (3 Phila. (Pa.) 279), Eq., 10.
Deselms *v.* Baltimore & O. R. Co. (149 Pa. St. 432, 24 Atl. Rep. 283), Death, etc., 191.
Deseret Salt Co. *v.* Tarpey (51 Am. & Eng. R. Cas. 276, 142 U. S. 241, 12 Sup. Ct. Rep. 158), Land Grants, 5.
Desjardins Canal Co. *v.* Great Western R. Co. (27 U. C. Q. B. 363), Bridges, 69, 76.
Desjardins Canal Co. *v.* Great Western R. Co. (2 Up. Can. E. & A. 330; reversing 9 Grant's Ch. (U. C.) 503), Eq., 7.
Des Moines *v.* Chicago, R. I. & P. R. Co. (41 Iowa 569), Sts. & H., 105.
Des Moines & Ft. D. R. Co. *v.* Wabash, St. L. & P. R. Co. (43 Am. & Eng. R. Cas. 694, 135 U. S. 576, 10 Sup. Ct. Rep. 753), Mort., 97.
Des Moines & M. R. Co. *v.* Alley (3 McCrary (U. S.) 589, 16 Fed. Rep. 732), Pl., 82.
Des Moines & M. R. Co. *v.* Chicago & N. W. R. Co. (2 McCrary (U. S.) 531, 7 Fed. Rep. 748), Actions, 3.

Des Moines & M. R. Co. *v.* Lowry (51 Iowa 486, 1 N. W. Rep. 782), Mun. Aid, 412.
Des Moines N. & R. Co. *v.* Cooper (41 Iowa 275), Land Grants, 22.
Des Moines N. & R. Co. *v.* Polk County (10 Iowa 1), Land Grants, 116.
Des Moines St. R. Co. *v.* Des Moines B. G. St. R. Co. (32 Am. & Eng. Cas. 209, 73 Iowa 513, 33 N. W. Rep. 610, 35 N. W. Rep. 602), Mun. Corp., 14; St. Rys., 44, 54, 55.
Des Moines St. R. Co. *v.* Des Moines B. G. St. R. Co. (36 Am. & Eng. R. Cas. 132, 74 Iowa 585, 38 N. W. Rep. 496), Contempt, 12; St. Rys., 265.
Des Moines Valley R. Co. *v.* Graff (27 Iowa 99), Mun. Aid, 233; Subscr., 15.
Desmond *v.* St. Louis, A. & T. H. R. Co. (77 Ill. 631), Consol., 43.
De Soucey *v.* Manhattan R. Co. (39 N. Y. S. R. 79, 15 N. Y. Supp. 108), Elev. Rys., 204; Evid., 174; Witn., 168.
Despatch Line *v.* Glenny (41 Ohio St. 166), Car. of M., 740.
Despatch Line of Packets *v.* Bellamy Mfg. Co. (12 N. H. 205), Agency, 11, 116; Bills & N., 12; Direct., 2, 20, 38.
De Steiger *v.* Hannibal & St. J. R. Co. (7 Am. & Eng. R. Cas. 492, 73 Mo. 33), Fires, 349.
Dester *v.* Ross (85 Mich. 370, 48 N. W. Rep. 530), Receiv., 116.
De Stuckle *v.* Tehuantepec R. Co. (30 Hun (N. Y.) 34), Costs, 4.
Detlor *v.* Grand Trunk R. Co. (15 U. C. Q. B. 595), Em. Dom., 1279.
Detroit *v.* Detroit & M. R. Co. (23 Mich. 173), Sts. & H., 3.
Detroit *v.* Detroit City R. Co. (54 Fed. Rep. 1), Rem. of C., 42.
Detroit *v.* Detroit City R. Co. (56 Am. & Eng. R. Cas. 337, 56 Fed. Rep. 867), Judgm., 17; Nuis., 9; St. Rys., 23.
Detroit *v.* Detroit City R. Co. (37 Mich. 558), St. Rys., 133.
Detroit *v.* Detroit City R. Co. (39 Am. & Eng. R. Cas. 538, 76 Mich. 421, 43 N. W. Rep. 447), Tax., 9, 33.
Detroit *v.* Ft. Wayne & B. I. R. Co. (95 Mich. 456, 54 N. W. Rep. 958), St. Rys., 90, 261.
Detroit *v.* Ft. Wayne & E. R. Co. (50 Am. & Eng. R. Cas. 447, 90 Mich. 646, 51 N. W. Rep. 688), Mand., 8; St. Rys., 172, 259, 264, 294.
Detroit *v.* Wabash, St. L. & P. R. Co. (63 Mich. 712, 30 N. W. Rep. 321), Em. Dom., 34; Proc., 45; Stat. Agts., 1.
Detroit & B. C. R. Co. *v.* Busch (9 Am. & Eng. R. Cas. 151, 43 Mich. 571, 6 N. W. Rep. 90), Trover, 4.
Detroit & B. C. R. Co. *v.* McKenzie (9 Am. & Eng. R. Cas. 15, 43 Mich. 609, 5 N. W. Rep. 1031), Car. of M., 586, 791; Charges, 48, 49.
Detroit & B. Plank Road Co. *v.* Detroit Citizens' St. R. Co. (97 Mich. 583, 56 N. W. Rep. 940), St. Rys., 239; Turnp., 6.
Detroit & M. R. Co. *v.* Adams (15 Mich. 458), Car. of M., 440.
Detroit & M. R. Co. *v.* Brown (37 Mich. 533), Injunc., 44.
Detroit & M. R. Co. *v.* Curtis (23 Wis. 152), App., 46; Car. of P., 376, 609.
Detroit & M. R. Co. *v.* Farmers' Bank (20 Wis. 122), Car. of M., 674, 675.
Detroit & M. R. Co. *v.* Van Steinburg (17 Mich. 99), Contrib. Neg., 87, 104; Cross., Inj. at, 320, 361; Evid., 36, 78, 178; Negl., 61; Witn., 64, 128.
Detroit & P. R. Co., In re (2 Dougl. (Mich.) 367), Em. Dom., 532.
Detroit Board of Trade *v.* Grand Trunk R. Co. (2 Int. Com. Rep. 199, 2 Int. Com. Com. 315), Int. Com., 95.
Detroit Car Works, In re (14 Bankr. Reg. 243), Bank'cy, 2.
Detroit City R. Co. *v.* Mills (46 Am. & Eng. R. Cas. 608, 85 Mich. 634, 48 N. W. Rep. 1007), Elec. Rys., 1, 7, 16; Stat., 34; St. Rys., 191; Sts. & H., 138.
Detroit City St. R. Co. *v.* Guthard (51 Mich. 180, 16 N. W. Rep. 328), Tax., 60.
Detroit, E. R. & I. R. Co. *v.* Barton (61 Ind. 293), Animals, 284, 294, 329.
Detroit, E. R. & I. R. Co. *v.* Bearss (39 Ind. 598, 10 Am. Ry. Rep. 382), Mun. Aid, 92, 119, 122, 262.
Detroit, E. R. & I. R. Co. *v.* Blodgett (61 Ind. 315), Animals, 329.
Detroit, G. H. & M. R. Co. *v.* Detroit (91 Mich. 444, 52 N. W. Rep. 52), Cross., St. & H., 74.
Detroit, G. H. & M. R. Co. *v.* Hayt (19 Am. & Eng. R. Cas. 627, 55 Mich. 347, 21 N. W. Rep. 367, 911), Animals, 403.
Detroit, H. & I. R. Co. *v.* Forbes (30 Mich. 165), Contr., 17; Em. Dom., 201; Pl., 18, 131.
Detroit, H. & I. R. Co. *v.* Younghaus (2 Mich. (N. P.) 143), Attach., 44.
Detroit, L. & L. M. R. Co. *v.* Starnes (38 Mich. 698), Subscr., 221.
Detroit, L. & N. R. Co. *v.* Probate Judge (28 Am. & Eng. R. Cas. 285, 63 Mich. 676, 30 N. W. Rep. 598), Cross., St. & H., 11, Em. Dom., 247.
Detroit, M. & T. R. Co. *v.* Detroit (49 Mich. 47, 12 N. W. Rep. 904), Cross., St. & H., 72; Em. Dom., 235; Proc., 35.
Detroit, S. & D. R. Co. *v.* Gartner (95 Mich. 318, 54 N. W. Rep. 946), Em. Dom., 315, 502.
Detroit Transp. Co. *v.* Board of Assessors 91 Mich, 382, 51 N. W. Rep. 978), Citizens., 5; Tax., 128.
Detroit Union R. D. & S. Co. *v.* Detroit (88 Mich. 347, 50 N. W. Rep. 302), Tax., 170.
Detroit W. T. & J. R. Co. *v.* Backus (14 Am. & Eng. R. Cas. 404, 48 Mich. 582, 12 N. W. Rep. 861), Cert., 2.
Detroit W. T. & J. R. Co. *v.* Crane (10 Am. & Eng. R. Cas. 502, 50 Mich. 182, 15 N. W. Rep. 73), Em. Dom., 544, 832, 920.
De Vau *v.* Pennsylvania & N. Y. C. & R. Co. (130 N. Y. 632, mem., 3 Silv. App. 562, 28 N. E. Rep. 532, 40 N. Y. S. R. 487; reversing 27 N. Y. S. R. 573, 7 N. Y. Supp. 692), Employés, Inj. to, 605.
Devereaux *v.* Kilkenny & G. S. & W. R.

Co. (1 L., M. & P. 788, 5 Ex. 834, 14 Jur. 1028, 20 L. J. Ex. 37), Stockh., 29.
Devereux *v.* Buckley (34 Ohio St. 16, 21 Am. Ry Rep. 72), Car. of M., 782.
Deverill *v.* Grand Trunk R. Co. (25 U. C. Q. B. 517), Fel. Serv., 422, 486.
Deverson *v.* Eastern R. Co. (58 N. H. 129), Evid., 37, 172.
Deville *v.* Southern Pac. R. Co. (50 Cal. 383, 12 Am. Ry. Rep. 180), Tresp., Inj. to, 93.
Devine *v.* Boston & A. R. Co. (159 Mass. 348, 34 N. E. Rep. 539), Fel. Serv., 98, 118, 265.
Devine *v.* St. Paul & S. C. R. Co. (22 Minn. 8, 19 Am. Ry. Rep. 353), Fences, 51.
Devine *v.* Savannah, F. & W. R. Co. (89 Ga. 541, 15 S. E. Rep. 781), Employés, Inj. to, 366.
Devino *v.* Central Vt. R. Co. (63 Vt. 98, 20 Atl. Rep. 953), Negl., 89; Pl., 35.
Devitt *v.* Pacific R. Co. (50 Mo. 302, 3 Am. Ry. Rep. 533), Employés, Inj. to, 365.
Devlin, In re (40 U. C. Q. B. 160), Sts. & H., 243.
Devlin *v.* Atlantic Ave. R. Co. (32 N. Y. S. R. 958, 57 Hun 591, mem., 10 N. Y. Supp. 848), St. Rys., 358.
Devlin *v.* Grand Trunk R. Co. (30 U. C. Q. B. 537), Car. of M., 685.
Devlin *v.* Second Ave. R. Co. (44 Barb. (N. Y.) 81), Constr. Rys., 59.
Devlin *v.* Smith (89 N. Y. 470; reversing in part 25 Hun 206), Employés, Inj. to, 96.
Devlin *v.* Wabash, St. L. & P. R. Co. (28 Am. & Eng. R. Cas. 524, 87 Mo. 545), Employés, Inj. to, 46, 227, 345; Evid., 202.
Devoe *v.* Ithaca & O. R. Co. (5 Paige (N. Y.) 521), Receiv., 22.
Devoy *v.* Boston & A. R. Co. (52 Am. & Eng. R. Cas. 488, 156 Mass. 161, 30 N. E. Rep. 557), Death, etc., 222.
Dewald *v.* Kansas City, Ft. S. & G. R. Co. (47 Am. & Eng. R. Cas. 557, 44 Kan. 586, 24 Pac. Rep. 1101), Contrib. Neg., 98; Death, etc., 174, 188; Negl., 53.
Dewey *v.* Chicago & N. W. R. Co. (31 Iowa 373, 2 Am. Ry. Rep. 369), New Tr., 24.
Dewey *v.* Chicago, R. I. & P. R. Co. (31 Iowa 373), Animals, 145; Death, etc., 215, 253.
Dewey *v.* Detroit, G. H. & M. R. Co. (53 Am. & Eng. R. Cas. 550, 90 Mich. 230, 16 L. R. A. 342, 52 N. W. Rep. 942; reversed on rehearing in 97 Mich. 329, 56 N. W. Rep. 756), Employés, Inj. to, 171; Fel. Serv., 95, 222, 224.
Dewey *v.* Detroit, G. H. & M. R. Co. (97 Mich. 329, 52 N. W. Rep. 942, 56 N. W. Rep. 756), Employés, Inj. to, 154; Fel. Serv., 17, 222.
Dewey *v.* Toledo, A. A. & N. M. R. Co. (50 Am. & Eng. R. Cas. 607, 91 Mich. 351, 51 N. W. Rep. 1063,) Consol., 40; Evid., 200; Ult. Vir., 23.
Dewire *v.* Boston & M. R. Co. (37 Am. & Eng. R. Cas. 57, 148 Mass. 343, 19 N. E. Rep. 523, 2 L. R. A. 166), Car. of P., 23; Collis., 7; Tresp., Inj. to, 11.
De Witt *v.* Chicago, B. & Q. R. Co. (41 Fed. Rep. 484), Bonds, 39.
De Witt *v.* Elmira Transfer R. Co. (134 N. Y. 495, 32 N. E. Rep. 42, 48 N. Y. S. R. 320; affirming 55 Hun 612, 29 N. Y. S. R. 613, 5 Silv. Sup. Ct. 568, 9 N. Y. Supp 149), Mun. Corp., 35.
Dexter *v.* Syracuse, B. & N. Y. R. Co. (42 N. Y. 326), Bagg., 29.
Dey *v.* Chicago, M. & St. P. R. Co. (47 Am. & Eng. R. Cas. 17, 45 Fed. Rep. 82), Rem. of C., 4.
Deyo *v.* New York C. R. Co. (34 N. Y. 9), Car. of P., 570; Trial, 68.
Deyo *v.* Otoe County (37 Fed. Rep. 246), Mun. Aid, 337, 389.
Diamond *v.* Lawrence County (37 Pa. St. 353), Mun. Aid, 345, 365, 376.
Diamond *v.* Northern Pac. R. Co. (29 Am. & Eng. R. Cas. 117, 6 Mont. 580, 13 Pac. Rep. 367), Fires, 12, 59, 232, 270, 288, 301.
Diamond Brick Co. *v.* New York C. & H. R. R. Co. (58 Hun (N. Y.) 396, 34 N. Y. S. R. 637, 12 N. Y. Supp. 22), Animals, 221; Farm Cross., 13.
Diamond Brick Co. *v.* New York C. & H. R. R. Co. (28 N. Y. S. R. 95, 7 N. Y. Supp. 868, 5 Silv. Sup. 321, 55 Hun 605, mem.), Animals, 181; Farm Cross., 13.
Dibb *v.* Dry Dock, E. B. & B. R. Co. (16 N. Y. S. R. 922, 49 Hun 607, 1 N. Y. Supp. 640), Employés, Inj. to, 238, 395.
Dibble *v.* Brown (12 Ga. 217), Bagg., 1, 3, 30, 37, 114.
Dibble *v.* New York & E. R. Co. (25 Barb. (N. Y.) 183), Death, etc., 169.
Dice *v.* Willamette T. & L. Co. (8 Oreg. 60), Car. of P., 38.
Dick *v.* Indianapolis, C. & L. R. Co. (8 Am. & Eng. R. Cas. 101, 38 Ohio St. 389), Employés, Inj. to, 155; Fel. Serv., 516.
Dickens *v.* New York C. R. Co. (1 Abb. App. Dec. (N. Y.) 504), Car. of P., 414; Death, etc., 426.
Dickens *v.* New York C. R. Co. (13 How. Pr. (N. Y.) 228), Death, etc., 149.
Dickerman *v.* St. Paul Union Depot Co. (45 Am. & Eng. R. Cas. 596, 44 Minn. 433, 46 N. W. Rep. 907), Union D. Cos., 7.
Dickerson *v.* Burlington & M. R. R. Co. (44 Am. & Eng. R. Cas. 465, 43 Kan. 702, 23 Pac. Rep. 936), Proc., 45.
Dickerson *v.* Yetzer (53 Iowa 681, 6 N. W. Rep. 41, 21 Am. Ry. Rep. 176), Tax., 117.
Dickie *v.* Boston & A. R. Co. (8 Am. & Eng. R. Cas. 203, 131 Mass. 516), Bridges, 56.
Dickins *v.* New York C. R. Co. (23 N. Y. 158; reversing 28 Barb. 41), Death, etc., 47.
Dickinson *v.* Chesapeake & O. R. Co. (7 W. Va. 390), Arb., 18, 32; Spec. Perf., 28; Words & Ph., 1.
Dickinson *v.* Gray (Ky.) (9 S. W. Rep. 281), Constr. Rys., 78.
Dickinson *v.* London & N. W. R. Co. (1 H. & R. 399), Animals, 191.
Dickinson *v.* New Haven & N. R. Co. (155 Mass. 16, 34 N. E. Rep. 334), Sts. & H., 348.
Dickinson *v.* Northeastern R. Co. (2 H. & C. 735, 33 L. J. Ex. 91, 12 W. R. 52, 9 L. T. 299), Death, etc., 50.
Dickinson *v.* Port Huron & N. R. Co. (21

Am. & Eng. R. Cas. 456, 53 Mich. 43, 18 S. W. Rep. 553), Car. of P., 178, 462.
Dickson *v.* Baltimore & P. R. Co. (3 MacArth. (D. C.) 362), Sts. & H., 212.
Dickson *v.* Broadway & S. A. R. Co. (41 How. Pr. (N. Y.) 151, 1 J. & S. 330; appeal dismissed in 47 N. Y. 507), Pl., 140; St. Rys., 377, 405.
Dickson *v.* Chicago, B. & Q. R. Co. (81 Ill. 215), Jurisd., 7.
Dickson *v.* Chicago, R. I. & P. R. Co. (2 Am. & Eng. R. Cas. 538, 71 Mo. 575), Nuis., 12, 26.
Dickson *v.* Covert (17 Grant's Ch. (U. C.) 321), Spec. Perf., 16.
Dickson *v.* Great Northern R. Co. (28 Am. & Eng. R. Cas 92, 18 Q. B. D. 176, 56 L. J. Q. B. 111, 55 L. T. 868, 5 Ry. & C. T. Cas. 8), Car. of L. S., 117.
Dickson *v.* Merchants' Elevator Co. (44 Mo. App. 498), Bills of L., 56, 115, 119; Trover, 15.
Dickson *v.* Missouri Pac. R. Co. (104 Mo. 491, 16 S. W. Rep. 381), App., 118; Contrib. Neg., 82; Cross., Inj. at, 86, 355; Imp. Neg., 16; Negl., 18; Pl., 110.
Dickson *v.* Ridge Ave. Pass. R. Co. (19 Phila. (Pa.) 430), Evid., 233; St. Rys., 414.
Dickson *v.* Swansea Vale & N. & B. J. R. Co. (17 W. R. 51, 19 L. T. 346, L. R. 4 Q. B. 44, 38 L. J. Q. B. 17), Bonds, 58.
Diebold *v.* Pennsylvania R. Co. (50 N. J. L. 478, 12 Cent. Rep. 799, 14 Atl. Rep. 576), Licensees, Inj. to, 1; Stat. & D., 115; Tresp., Inj. to, 94.
Diedrich *v.* Northwestern Union R. Co. (42 Wis. 248, 15 Am. Ry. Rep. 9), Em. Dom., 562; Rip. Rts., 1, 6, 8; Sts. & H., 7; Waters & W., 1; Wharves, 1.
Diedrich *v.* Northwestern Union R. Co. (47 Wis. 662, 3 N. W. Rep. 749), App., 34; Evid., 10; Witn., 149, 152.
Diedrichs *v.* Northwestern Union R. Co. (33 Wis. 219), Injunc., 16.
Diehl *v.* Lehigh Iron Co. (140 Pa. St. 487, 21 Atl. Rep. 430), Employés, Inj. to, 266.
Diel *v.* Missouri Pac. R. Co. (37 Mo. App. 454), Mal. Pros., 4.
Dietrich *v.* Baltimore & H. S. R. Co. (11 Am. & Eng. R. Cas. 115, 58 Md. 347), Children, Inj. to, 86; Contrib. Neg., 87; Evid., 175, 202.
Dietrich *v.* Murdock (42 Mo. 279), Em. Dom., 46, 987.
Dietrich *v.* Pennsylvania R. Co. (71 Pa. St. 432, 3 Am. Ry. Rep. 435), Tickets & F., 1, 41, 47.
Dietrichs *v.* Lincoln & N. W. R. Co. (12 Neb. 225, 10 N. W. Rep. 718), Em. Dom., 618, 842.
Dietrichs *v.* Lincoln & N. W. R. Co. (13 Neb. 43, 13 N. W. Rep. 13), Pl., 35; Refer., 5.
Dietrichs *v.* Lincoln & N. W. R. Co. (10 Am. & Eng. R. Cas. 119, 14 Neb. 355, 15 N. W. Rep. 728), Em. Dom., 561.
Diffendal *v.* Virginia Midland R. Co. (46 Am. & Eng. R. Cas. 496, 86 Va. 459, 10 S. E. Rep. 536), Easem., 13.
Diggle *v.* London & B. R. Co. (6 Railw. Cas. 590, 5 Ex. 442, 14 Jur. 937, 19 L. J. Ex. 308), Contr., 12.
Dill *v.* South Carolina R. Co. (7 Rich. (So. Car.) 158), Bagg., 3, 57, 114, 123.
Dill *v.* Wabash Valley R. Co. (21 Ill. 91), Subscr., 158, 163.
Dillard *v.* Louisville & N. R. Co. (2 Lea (Tenn.) 288), Bills of L., 31; Lim. of Liab., 7, 40.
Dillard *v.* St. Louis, K. G. & N. R. Co. (58 Mo. 69), Animals, 607.
Dillaye *v.* New York C. R. Co. (56 Barb. (N. Y.) 30), Car. of P., 292; Stat & D., 61.
Dilley *v.* Wilkesbarre & K. P. R. Co. (2 Pa. Dist. 91), Nuis., 35; Sts. & H., 141.
Dillingham *v.* Anthony (37 Am. & Eng. R. Cas. 1, 73 Tex. 47, 3 L. R. A. 634, 11 S. W. Rep. 139), Agency, 113; Assault, 4, 19.
Dillingham *v.* Fischl (1 Tex. Civ. App. 546, 21 S. W. Rep. 354), Bills of L., 4; Car. of M., 213; Charges, 57.
Dillingham *v.* Parker (80 Tex. 572, 16 S. W. Rep. 335), Agency, 100; Negl., 63.
Dillingham *v.* Russell (37 Am. & Eng. R. Cas. 1, 73 Tex. 47, 3 L. R. A. 634, 11 S. W. Rep. 139), App., 64; Receiv., 71, 124.
Dillingham *v.* Scales (78 Tex. 205, 14 S. W. Rep. 566), App., 39; Trial, 198.
Dillon *v.* Barnard (1 Holmes (U. S.) 386), Mort., 87.
Dillon *v* Barnard (21 Wall. (U. S.) 430), Liens, 17.
Dillon *v.* Connecticut River R. Co. (154 Mass. 478, 28 N. E. Rep. 899), Tresp., Inj. to, 29.
Dillon *v.* Kansas City S. B. R. Co. (43 Fed. Rep. 109), Em. Dom., 1045.
Dillon *v.* Manhattan R. Co. (16 N. Y. S. R. 767, 49 Hun (N. Y.) 608, 1 N. Y. Supp. 679), Car. of P., 219; Elev. Rys., 214.
Dillon *v.* New York & E. R. Co. (1 Hilt. (N. Y.) 231), Car. of M., 615.
Dillon *v.* Sixth Ave. R. Co. (16 J. & S. (N. Y.) 283; affirmed in 97 N. Y. 627, mem.), Direct., 39; Employés, Inj. to, 606.
Dillon *v.* Union Pac. R. Co. (3 Dill. (U. S.) 319), Employés, Inj. to, 2; Fel. Serv., 1, 71, 142, 160.
Diman *v.* Providence, W. & B. R. Co. (5 R. I. 130), Subscr., 164.
Dimes *v.* Grand Junction Canal Co. (9 Q. B. 469, 11 Jur. 429, 16 L. J. Q. B. 107), Em. Dom., 1106.
Dimick *v.* Chicago & N. W. R. Co. (80 Ill. 338), Cross., Inj. at, 302.
Dimmey *v.* Wheeling & E. G. R. Co. (27 W. Va. 32), Contrib. Neg., 20, 71, 74; Death, etc., 96, 221, 429; St. Rys., 401; Witn., 45, 65.
Dimmick *v.* Brodhead (75 Pa. St. 464), Em. Dom., 1055.
Dimmick *v.* Council Bluffs & St. L. R. Co. (10 Am. & Eng. R. Cas. 105, 58 Iowa 637, 12 N. W. Rep. 710), Em. Dom., 851, 856.
Dimmick *v.* Council Bluffs & St. L. R. Co. (14 Am. & Eng. R. Cas. 226, 62 Iowa 409, 17 N. W. Rep. 595), Trial, 139.
Dimmick *v.* Milwaukee & St. P. R. Co. (18 Wis. 471), Car. of M., 349; Evid., 13.
Dimmitt *v.* Hannibal & St. J. R. Co. (40

Mo. App. 654), Car. of P., 440; Derailm., 1, 4, 5; New Tr., 49.
Dimmitt *v.* Kansas City, St. J. & C. B. R. Co. (46 Am. & Eng. R. Cas. 699, 103 Mo. 433, 15 S. W. Rep. 761), Car. of M., 590, 610.
Dimmock *v.* North Staffordshire R. Co. (4 F. & S. 1058), Fires, 315.
Dimpfel *v.* Ohio & M. R. Co. (9 Biss. (U. S.) 127), Ult. Vir., 1, 6.
Dimpfelf *v.* Ohio & M. R. Co. (16 Am. & Eng. R. Cas. 461, 110 U. S. 209, 3 Sup. Ct. Rep. 573), Stockh., 96.
Dingeldein *v.* Third Ave. R. Co. (37 N. Y. 575; reversing 9 Bosw. 79), Parties, 1.
Dingley *v.* Star Knitting Co. (134 N. Y. 552, 32 N. E. Rep. 35, 48 N. Y. S. R. 336), Employés, Inj. to, 95.
Dininny *v.* New York & N. H. R. Co. (49 N. Y. 546, 4 Am. Ry. Rep. 457), Bagg., 63, 66.
Dinsmore *v.* Atlantic & P. R. Co. (46 How. Pr. (N. Y.) 193), Parties, 18.
Dinsmore *v.* Central R. Co. (16 Am. & Eng. R. Cas. 450, 19 Fed. Rep. 153), Abate., 3.
Dinsmore *v.* Louisville, C. & L. R. Co. (2 Flipp (U. S.) 672, 2 Fed. Rep. 465), Discrim., 61; Estop., 20; Exp. Cos., 7; Words & Ph., 179.
Dinsmore *v.* Louisville, N. A. & C. R. Co. (3 Fed. Rep. 593), Contempt, 6; Exp. Cos., 11.
Dinsmore *v.* New York Board of Police (12 Abb. N. Cas. (N. Y.) 436, 65 How. Pr. 72), Crim. L., 50; Int. Com., 223; Sunday, 2.
Dinsmore *v.* Philadelphia & R. R. Co. (11 Phila. (Pa.) 483), Pl., 81.
Dinsmore *v.* Racine & M. R. Co. (12 Wis. 649), Mort., 39.
Dintruff *v.* Rochester City & B. R. Co. (32 N. Y. S. R. 730, 57 Hun 585, 10 N. Y. Supp. 402), Children, Inj. to, 58.
Dinwiddie *v.* Louisville & N. R. Co. (15 Am. & Eng. R. Cas. 483, 9 Lea (Tenn.) 309, Car. of P., 197.
Dinwoodie *v.* Chicago, M. & St. P. R. Co. (70 Wis. 160, 35 N. W. Rep. 296), Animals, 548, 552.
Dionne *v.* Canadian Pac. R. Co. (1 Montr. L. R. (Sup. Ct.) 168), Bills of L., 74.
Diphwys Casson Slate Co. *v.* Festiniog R. Co. (2 Ry. & C. T. Cas. 73), Discrim., 8, 18, 24.
Directors of Poor *v.* Wrightsville, Y. & G. R. Co. (7 Watts & S. (Pa.) 236), Em. Dom., 895.
Disabled Soldiers & Sailors, In re (1 Int. Com. Com. 28, 1 Int. Com. Rep. 75), Int. Com., 179.
Disbrow *v.* Chicago & N. W. R. Co. (70 Ill. 246), Pl., 102; Refresh. Rooms, 3.
Disher *v.* New York C. & H. R. R. Co. (2 N. Y. S. R. 276, 41 Hun 637, mem.; affirmed in 114 N. Y. 619, mem., 21 N. E. Rep. 415, 22 N. Y. S. R. 1000), Employés, Inj. to, 99, 104, 182, 689; Evid., 283.
Distington Iron Co. *v.* London & N. W. R. Co. (6 Ry. & C. T. Cas. 108), Charges, 89, 91; Words & Ph., 235.
District Attorney *v.* Lynn & B. R. Co. (16 Gray (Mass.) 242), Injunc., 24.
District of Columbia *v.* Baltimore & P. R. Co. (4 Am. & Eng. R. Cas. 179, 1 Mackey (D. C.) 314), Sts. & H., 362, 380, 396.
District of Columbia *v.* Washington & G. R. Co. (4 Am. & Eng. R. Cas. 161, 1 Mackey (D. C.) 361), Assump., 2; Lim. of Ac., 6; St. Rys., 144.
District of Columbia *v.* Washington & G. R. Co. (4 Mackey (D. C.) 214), St. Rys., 144.
Ditberner *v.* Chicago, M. & St. P. R. Co. (47 Wis. 138, 2 N. W. Rep. 69), Contrib. Neg., 22; Employés, Inj. to, 660, 721; Fel. Serv., 163, 194.
Ditchett *v.* Spuyten Duyvil & P. M. R. Co. (67 N. Y. 425, 15 Am. Ry. Rep. 109; reversing 5 Hun 165), Fences, 73; Leases, 44.
Dix *v.* Shaver (14 Hun (N. Y.) 392), Subscr., 220, 228.
Dixon *v.* Baltimore & P. R. Co. (3 Am. & Eng. R. Cas. 201, 1 Mackey (D. C.) 78), Em. Dom., 426, 518, 643; Lim. of Ac., 6; Sts. & H., 235.
Dixon *v.* Brooklyn City & N. R. Co. (26 Am. & Eng. R. Cas. 203, 100 N. Y. 170, 3 N. E. Rep. 65), Release, 4; St. Rys., 356.
Dixon *v.* Caledonian R. Co. (L. R. 5 App. Cas. 820, 43 L. T. 513, 29 W. R. 249), Mines, etc., 5.
Dixon *v.* Chicago & A. R. Co. (53 Am. & Eng. R. Cas. 589, 109 Mo. 413, 19 S. W. Rep. 412), Employés, Inj. to, 159, 717; Fel. Serv., 1, 120, 130.
Dixon *v.* Chicago, R. I. & P. R. Co. (18 Am. & Eng. R. Cas. 525, 64 Iowa 531, 21 N. W. Rep. 17), Car. of M., 45.
Dixon *v.* Columbus & I. R. Co. (4 Biss. (U. S.) 137), Bills of L., 40, 41; Car. of M., 167, 401, 588; Evid., 138.
Dixon *v.* Hannibal & St. J. R. Co. (31 Mo. 409), Proc., 40.
Dixon *v.* Livingston County (70 Mo. 239), Counties, 6.
Dixon *v.* Mobile & G. R. Co. (80 Ga. 212, 5 S. E. Rep. 496), App., 79.
Dixon *v.* New York C. & H. R. R. Co. (51 Hun 644, 4 N. Y. Supp. 296, 22 N. Y. S. R. 61), Animals, 95, 122; Fences, 58.
Dixon *v.* Richmond & D. R. Co. (74 N. Car. 538, 13 Am. Ry. Rep. 99), Car. of M., 654.
Dixon *v.* Rockwell, S. & D. R. Co. (75 Iowa 367, 39 N. W. Rep. 646), Em. Dom., 932.
Dixon County *v.* Field (15 Am. & Eng. R. Cas. 595, 111 U. S. 83, 4 Sup. Ct. Rep. 315), Mun Aid, 252, 383.
Dixon Tp. *v.* Sumner County Com'rs (25 Kan. 519), Mun. Aid, 163.
Dlabola *v.* Manhattan R. Co. (15 Daly 470, 29 N. Y. S. R. 149, 8 N. Y. Supp. 334; affirmed in 134 N. Y. 585, mem., 45 N. Y. S. R. 934, 31 N. E. Rep. 628), Car. of P. 139; Elev. Rys., 206; Witn., 137.
Dlauhi *v.* St. Louis, I. M. & S. R. Co. (105 Mo. 645, 16 S. W. Rep. 281), Children, Inj. to, 174.
Doan *v.* Michigan C. R. Co. (17 Ont. App. 481; reversing 18 Ont. 482), Contrib. Neg., 80.
Doan *v.* St. Louis, K. & N. W. R. Co. (38 Mo. App. 408), Car. of L. S., 39; Car. of M., 78; Lim. of Liab., 31.

Dobbin *v.* Michigan C. R. Co. (21 Am. & Eng. R. Cas. 85, 56 Mich. 522, 23 N. W. Rep. 204), Car. of M., 708.
Dobbin *v.* Richmond & D. R. Co. (81 N. Car. 446), Fel. Serv., 1, 202, 218, 313, 355, 363.
Dobbins *v.* Brown (119 N. Y. 188, 28 N. Y. S. R. 957; reversing 15 N. Y. S. R. 1010, 1 N. Y. Supp. 360), Death, etc., 238.
Dobbins *v.* Higgins (78 Ill. 440), Constr. Rys., 41.
Dobbins *v.* Orange & A. R. Co. (37 Ga. 240), Attach., 17.
Dobiecki *v.* Sharp (8 Am. & Eng. R. Cas. 485, 88 N. Y. 203), Death, etc., 292, 355; Stat. & D., 113.
Dodd *v.* St. Louis & H. R. Co. (108 Mo. 581, 18 S. W. Rep. 1117), Ejectm., 2, 5.
Dode *v.* Manhattan R. Co. (70 Hun. (N. Y.) 374, 54 N. Y. S. R. 286), Costs, 4; Elev. Rys., 196.
Dodge *v.* Boston & A. R. Co. (155 Mass. 448, 29 N. E. Rep. 1086), Fel. Serv., 17.
Dodge *v.* Boston & B. Steamship Co. (37 Am. & Eng. R. Cas. 67, 148 Mass. 207, 19 N. E. Rep. 373, 2 L. R. A. 83), Car. of P., 39, 155, 403.
Dodge *v.* Boston & P. R. Corp. (51 Am. & Eng. R. Cas. 388, 154 Mass. 299, 28 N. E. Rep. 243), Passes, 1.
Dodge *v.* Burlington, C. R. & M. R. Co. (34 Iowa 276, 5 Am. Ry. Rep. 507), Cross., Inj. at, 61.
Dodge *v.* Burns (6 Wis. 514), Estop., 9.
Dodge *v.* Essex County Com'rs (3 Metc. (Mass.) 380), Em. Dom., 705.
Dodge *v.* Memphis (51 Fed. Rep. 165), Mun. Aid, 329.
Dodge *v.* Meyer (61 Cal. 405), Bills of L., 12, 56, 58, 112, 127.
Dodge *v.* Omaha & S. W. R. Co. (28 Am. & Eng. R. Cas. 260, 20 Neb. 276, 29 N. W. Rep. 936), Em. Dom., 260, 437; Mort., 181; Words & Ph., 156.
Dodge *v.* Pennsylvania R. Co. (36 Am. & Eng. R. Cas. 180, 43 N. J. Eq. 351, 10 Cent. Rep. 655, 11 Atl. Rep. 751; affirmed in 45 N. J. Eq. 366, 19 Atl. Rep. 622), Injunct., 2, 5; Sts. & H., 142, 215.
Dodge *v.* Platte County (2 Am. & Eng. R. Cas. 583, 82 N. Y. 218; reversing 16 Hun 285), Mun. Aid, 278, 383.
Dodson *v.* Grand Trunk R. Co. (7 Can. L J. N. S. 263), Lim. of Liab., 36.
Dodson *v.* Grand Trunk R. Co. (8 Nov. Sc. 405), Lim. of Liab., 36.
Doe *v.* Iowa R. Land Co. (54 Iowa 657, 7 N. W. Rep. 118), Tax., 117.
Doe *v.* Lane (11 Miss. 763), Charters, 143.
Doe *v.* Larmore (116 U. S. 198, 6 Sup. Ct. Rep. 365), Land Grants, 18.
Doggett *v.* Florida Land Co. (99 U. S. 72), Parties, 20; State Aid, 16.
Doggett *v.* Illinois C. R. Co. (34 Iowa 284, 5 Am. Ry. Rep. 389), Employés, Inj. to, 374
Doggett *v.* Richmond & D. R. Co. (78 N. Car. 305, 16 Am. Ry. Rep. 193), Contrib. Neg., 5, 16; Fires, 81, 82, 106, 110, 279.
Doggett *v.* Richmond & D. R. Co. (81 N. Car. 459), Animals, 273, 535, 567.
Doing *v.* New York, O. & W. R. Co. (43 N. Y. S. R. 820, 63 Hun 626, 17 N. Y. Supp. 689), New Tr., 1.
Doing *v.* New York, O. & W. R. Co. (73 Hun 270, 26 N. Y. Supp. 405), Employés, Inj. to, 96, 664.
Dolan *v.* Delaware & H. Canal Co. (71 N. Y. 285), Cross., Inj. at, 77, 244; Trial, 173.
Dolan *v.* Newburgh, D. & C. R. Co. (42 Am. & Eng. R. Cas. 611, 120 N. Y. 571, 24 N. E. Rep. 824, 31 N. Y. S. R. 852; reversing 46 Hun 681, mem.), Animals, 199; Fences, 46, 61.
Dolliff *v.* Boston & M. R. Co. (68 Me. 173), Deeds, 23.
Dolores No. 2 L. & C. Co. *v.* Hartman (17 Colo. 138, 29 Pac. Rep. 378), Em. Dom., 769.
Dolrey *v.* Ontario, S. & H. R. U. Co. (11 U. C. Q. B. 600), Animals, 153.
Dominguez *v.* Orleans R. Co. (35 La. Ann. 751), St. Rys., 461.
Domschke *v.* Metropolitan El. R. Co. (74 Hun 442, 26 N. Y. Supp. 840, 1117, 57 N. Y. S. R. 189), Elev. Rys., 88.
Donahoe *v.* New York & N. E. R. Co. (159 Mass. 125, 34 N. E. Rep. 87), Evid., 30; Witn., 152.
Donahoe *v.* Old Colony R. Co. (153 Mass. 356, 26 N. E. Rep. 868), Employés, Inj. to, 1, 501, 703, 716.
Donahoe *v.* Wabash, St. L. & P. R. Co. (83 Mo. 543), Children, Inj. to, 38.
Donahoe *v.* Wabash, St. L. & P. R. Co. (83 Mo. 560, 53 Am. Rep. 594), Contrib. Neg., 33; Negl., 20.
Donahue *v.* Enterprise R. Co. (32 So. Car. 299, 11 S. E. Rep. 95), Contrib. Neg., 65; Employés, Inj. to, 543.
Donald *v.* Northeastern R. Co. (6 Ry. & C. T. Cas. 53), Car. of M., 537.
Donald *v.* St. Louis, K. C. & N. R. Co. (44 Iowa 157), Cat.-Gds., 22.
Donald *v.* St. Louis, K. C. & N. R. Co. (52 Iowa 411, 3 N. W. Rep. 462), Em. Dom., 1063.
Donaldson *v.* Milwaukee & St. P. R. Co. (21 Minn. 293, 20 Am. Ry. Rep. 15), Contrib. Neg., 87, 100; Tresp., Inj. to, 94.
Donaldson *v.* Mississippi & M. R. Co. (18 Iowa 280), App., 117; Death, etc., 73, 279, 307; Evid., 247; Fel. Serv., 124; Witn., 148.
Donegan *v.* Erhardt (42 Am. & Eng. R. Cas. 580, 119 N. Y. 468), Car. of P., 179.
Donisthorpe *v.* Fremont, E. & M. V. R. Co. (43 Am. & Eng. R. Cas. 583, 30 Neb. 142, 46 N. W. Rep. 240), Em. Dom., 228.
Donivan *v.* Manhattan R. Co. (1 Misc. (N. Y.) 368, 49 N. Y. S. R. 722, 21 N. Y. Supp. 457), Agency, 93, 113; App., 49; Assault, 19; Dam., 29.
Donnaher *v.* State (16 Miss. 649), St. Rys., 263; Sts. & H., 117, 249.
Donnegan *v.* Erhardt (42 Am. & Eng. R. Cas. 580, 119 N. Y. 468, 23 N. E. Rep. 1051, 29 N. Y. S. R. 589, 7 L. R. A. 527; reversing 16 N. Y. S. R. 579, 23 J. & S.

502, 3 N. Y. Supp. 820), Employés, Inj. to, 79; Fences, 13, 102.
Donnel *v.* Portland & O. R. Co. (76 Me. 33), Attach., 58.
Donnelly *v.* Boston & M. R. Co. (42 Am. & Eng. R. Cas. 182, 151 Mass. 210, 24 N. E. Rep. 38), Cross., Inj. at, 298; Licensees, Inj. to, 3.
Donnelly *v.* Brooklyn City R. Co. (34 Am. & Eng. R. Cas. 103, 109 N. Y. 16, 15 N. E. Rep. 733, 14 N. Y. S. R. 29, 11 Cent. Rep. 875; reversing 39 Hun 657, mem.), Fel. Serv., 1, 202; Tresp., Inj. to, 115.
Donner *v.* Dayton & C. R. Co. (1 Cin. Super. Ct. 130), Direct., 40.
Donohue *v.* Brooklyn City R. Co. (38 N. Y. S. R. 485, 14 N. Y. Supp. 639), Death, etc., 292; Fel. Serv., 56.
Donohue *v.* Lake Shore & M. S. R. Co. (47 N. Y. S. R. 161, 19 N. Y. Supp. 961), Death, etc., 269.
Donohue *v.* St. Louis, I. M. & S. R. Co. (28 Am. & Eng. R. Cas. 673, 91 Mo. 357, 2 S. W. Rep. 424, 3 S. W. Rep. 848), Cross., Inj. at, 205, 251, 283, 294; Death, etc., 200; Trial, 59.
Donovan *v.* Boston & M. R. Co. (158 Mass. 450, 33 N. E. Rep. 583), Evid., 249, 252.
Donovan *v.* Hannibal & St. J. R. Co. (26 Am. & Eng. R. Cas. 588, 89 Mo. 147, 1 S. W. Rep. 232), Animals, 126, 238; Contrib. Neg., 75; Fences, 100.
Donovan *v.* Long Island R. Co. (51 N. Y. S. R. 183, 67 Hun 73, 22 N. Y. Supp. 62), Cross., Inj. at, 259.
Donovan *v.* South & N. Ala. R. Co. (79 Ala. 429), Children, Inj. to, 171.
Donovan *v.* Texas & P. R. Co. (29 Am. & Eng. R. Cas. 320, 64 Tex. 519), Actions, 1; Car. of M., 427.
Doo *v.* London & C. R. Co. (1 Railw. Cas. 257), Em. Dom., 1124, 1127.
Doolan *v.* Carr (125 U. S. 618, 8 Sup. Ct. Rep. 1228), Land Grants, 49.
Doolan *v.* Midland R. Co. (2 App. Cas. 792, 3 Ry. & C. T. Cas. xxv), Estop., 3; Lim. of Liab., 35.
Doolan *v.* Midland R. Co. (25 W. R. 882, 37 L. T. 317; reversing L. R. 10 Ir. C. L. 47, and restoring 9 Ir. C. L. 20), Car. of L. S., 93; Car. of M., 529.
Dooley *v.* Missouri Pac. R. Co. (36 Mo. App. 381), Animals, 137, 144.
Dooley *v.* Missouri Pac. R. Co. (45 Mo. App. 308), Attach., 66.
Dooley *v.* Mobile & O. R. Co. (69 Miss. 648, 12 So. Rep. 956), Tresp., Inj. to, 29, 105.
Doolittle, In re (23 Fed. Rep. 544), Strikes, 5.
Doolittle *v.* Atchison, T. & S. F. R. Co. (20 Kan. 329), Counties, 9.
Doolittle *v.* East Tenn., V. & G. R. Co. (80 Ga. 658, 6 S. E. Rep. 918), Injunc., 13.
Doolittle *v.* Galena & C. U. R. Co. (14 Ill. 381), Cert., 5.
Doolittle *v.* McCullough (12 Ohio St. 360), Constr. Rys., 119.
Doolittle *v.* Selectmen of Branford (49 Am. & Eng. R. Cas. 279, 59 Conn. 402, 22 Atl. Rep. 336), Cross., St. & H., 103, 104, 106, 111.
Dooly Block *v.* Salt. Lake R. T. Co. (56 Am. & Eng. R. Cas. 513, 9 Utah 31, 33 Pac. Rep. 229), App., 123; St. Rys., 198, 208; Sts. & H., 141.
Dooner *v.* Pennsylvania R. Co. (142 Pa. St. 36, 21 Atl. Rep. 755), Dam., 13.
Doran *v.* Brooklyn & N. Y. Ferry Co. (46 N. Y. S. R. 310), Assault, 19.
Doran *v.* Central Pac. R. Co. (24 Cal. 245), Land Grants, 48; Pub. Lds., 40.
Doran *v.* Chicago, M. & St. P. R. Co. (73 Iowa 115, 34 N. W. Rep. 619), Animals, 260.
Doran *v.* Great Western R. Co. (14 U. C. Q. B. 403), Agency, 48.
Dorlan *v.* East Brandywine & W. R. Co. (46 Pa. St. 520), Em. Dom., 712; Witn., 4.
Dorman *v.* Broadway R. Co. (16 N. Y. S. R. 753, 1 N. Y. Supp. 334), Death, etc., 408.
Dorman *v.* Broadway R. Co. (117 N. Y. 655, mem., 23 N. E. Rep. 162, 27 N. Y. S. R. 841, 2 Silv. App. 422; reversing 25 N. Y. S. R. 1009, 5 N. Y. Supp. 769), Death, etc., 254; St. Rys., 462.
Dorman *v.* Missouri Pac. R. Co. (17 Mo. App. 337), Animals, 353.
Dorn *v.* Crank (96 Cal. 381, 31 Pac. Rep. 528), Receiv., 100.
D'Oro *v.* Atlantic Ave. R. Co. (37 N. Y. S. R. 411, 13 N. Y. Supp. 789; affirmed in 129 N. Y. 632, mem., 41 N. Y. S. R. 946, mem., 29 N. E. Rep. 1030, mem.), Employés, Inj. to, 641, 642; St. Rys., 477, 490, 518.
Dorr *v.* New Jersey Steam Nav. Co. (4 Sandf. (N. Y.) 136), Lim. of Liab., 2, 12, 27.
Dorr *v.* New Jersey Steam Nav. Co. (11 N. Y. 485), Lim. of Liab., 11.
Dorrah *v.* Illinois C. R. Co. (30 Am. & Eng. R. Cas. 576, 65 Miss. 14, 7 Am. St. Rep. 629, 3 So. Rep. 36), Car. of P., 230, 638; Dam., 71.
Dorsey *v.* Phillips & C. Constr. Co. (42 Wis. 583, 15 Am. Ry. Rep. 148), Employés, Inj. to, 228.
Dorsey *v.* St. Louis, A. & T. H. R. Co. (58 Ill. 65), Cov'ts, 3.
Dorsheimer *v.* Glenn (51 Fed. Rep. 404, 4 U. S. App. 500, 2 C. C. A. 309), Subscr., 170.
Dorwin *v.* Westbrook (71 Hun (N. Y.) 405, 54 N. Y. S. R. 390, 24 N. Y. Supp. 955), Constr. Rys., 59.
Doss *v.* Missouri, K. & T. R. Co. (59 Mo. 27, 8 Am. Ry. Rep. 462), Car. of P., 90, 91, 420; Contrib. Neg., 25; Dam., 32.
Doty *v.* Chicago, St. P. & K. C. R. Co. (49 Minn. 499, 52 N. W. Rep. 135), App., 117.
Doty *v.* Michigan C. R. Co. (8 Abb. Pr. (N. Y.) 427), For. Corp., 26.
Doty *v.* Strong (1 Pinn. (Wis.) 313), Car. of M., 35, 748.
Douai *v.* Metropolitan El. R. Co. (14 N. Y. S. R. 264: affirmed in 124 N. Y. 623, mem., 35 N. Y. S. R. 996), Pl., 95.
Doud *v.* Mason City & Ft. D. R. Co. (36 Am. & Eng. R. Cas. 633, 76 Iowa 438, 41 N. W. Rep. 65), Em. Dom., 452, 650, 683, 1061.
Doud *v.* Wisconsin, P. & S. R. Co. (65 Wis. 108, 25 N. W. Rep. 533), Stockh., 97.
Dougan *v.* Champlain Transp. Co. (56 N. Y. 1), Evid., 86.

Dougherty *v.* Chicago, B. & Q. R. Co. (86 Ill. 467, 17 Am. Ry. Rep. 489), Car. of P., 424.
Dougherty *v.* Missouri R. Co. (21 Am. & Eng. R. Cas. 497, 81 Mo. 325, 51 Am. Rep. 239; affirming 9 Mo. App. 478), Car. of P., 142; St. Rys., 326, 442.
Dougherty *v.* Missouri R. Co. (34 Am. & Eng. R. Cas. 488; see also 37 Am. & Eng. R. Cas. 206, 97 Mo. 647, 15 West. Rep. 235, 8 S. W. Rep. 900, 11 S. W. Rep. 251), App., 85; Contrib. Neg., 117; Pl., 107, 149; St. Rys., 325, 388, 441, 445.
Dougherty *v.* Rome, W. & O. R. Co. (45 N. Y. S. R. 154, 18 N. Y. Supp. 841, 64 Hun 633, mem.; affirmed in 138 N. Y. 641, 53 N. Y. S. R. 929, 34 N. E. Rep. 512), Employés, Inj. to, 125; New Tr., 59.
Dougherty *v.* Wabash, St. L. & P. R. Co. (19 Mo. App. 419), Location, etc., 1, 17.
Dougherty *v.* Western & A. R. Co. (53 Ga. 304), Estop., 20; Land Grants, 114; Officers, 2.
Doughty *v.* Atlantic & N. C. R. Co. (78 N. Car. 22), Actions, 9; Penalty, 9.
Doughty *v.* Firbank (L. R. 10 Q. B. D. 358, 52 L. J. Q. B. D. 480, 48 L. T. 530, 48 J. P. 55), Employés, Inj. to, 782.
Doughty *v.* Somerville & E. R. Co. (7 N. J. Eq. 51), Em. Dom., 495.
Doughty *v.* Somerville & E. R. Co. (21 N. J. L. 442), Em. Dom., 47, 278, 293, 336, 494.
Douglas *v.* Chatham (41 Conn. 211), Mun. Aid, 27, 240, 291, 295, 330.
Douglas *v.* East Tenn., V. & G. R. Co. (88 Ga. 282, 14 S. E. Rep. 616), Fright. Teams, 2.
Douglas *v.* London & N. W. R. Co. (3 Kay & J. 173, 3 Jur. N. S. 181), Em. Dom., 1152.
Douglas *v.* Mayor, etc., of Placerville (18 Cal. 643), Mun. Aid, 408.
Douglas *v.* Niantic Sav. Bank (3 Am. & Eng. R. Cas. 54, 97 Ill. 228), Mun. Aid, 247, 305, 352.
Douglas *v.* People's Bank (32 Am. & Eng. R. Cas. 510, 86 Ky. 176, 5 S. W. Rep. 420), Bills of L., 108, 125, 264.
Douglas *v.* Richmond & D. R. Co. (106 N. Car. 65, 10 S. E. Rep. 1048), Rem. of C., 41.
Douglas *v.* Texas Mex. R. Co. (63 Tex. 564), Fel. Serv., 73, 78, 91, 113, 315, 367, 404.
Douglas County *v.* Walbridge (38 Wis. 179), Mun. Aid, 242.
Douglas County Com'rs *v.* Bolles (94 U. S. 104), Incorp., 11; Mun. Aid, 378.
Douglas County Com'rs *v.* Union Pac. R. Co. (5 Kan. 615), Land Grants, 117; Tax., 118.
Douglass *v.* Cline (12 Bush (Ky.) 608, 18 Am. Ry. Rep. 273), Mort., 34, 215, 219, 227; Receiv., 2, 92.
Douglass *v.* Pike County (101 U. S. 677), Mun. Aid, 318.
Douglass *v.* Grand Trunk R. Co. (5 Ont. App. 585), Animals, 93.
Douglass *v.* Hannibal & St. J. R. Co. (53 Mo. App. 473), Car. of L. S., 36.
Douglass *v.* Montgomery & W. P. R. Co. (37 Ala. 638), Bagg., 114.
Douglass *v.* New York & E. R. Co. (Clarke (N. Y.) 174), Em. Dom., 222.
Douglass *v.* Rome, W. & O. R. Co. (23 N. Y. S. R. 456, 52 Hun 613, mem., 1 Silv. Sup. Ct. 210, 5 N. Y. Supp. 214), Fires, 314.
Douglass *v.* Railroad Co. (1 Phila. (Pa.) 337), Bagg., 123.
Douglass *v.* State (34 N. J. L. 485; affirming 34 N. J. L. 82), Tax., 149
Douglass *v.* Thomas (103 Ind. 187, 2 N. E. Rep. 562), Em. Dom., 205.
Dousman *v.* Wisconsin & L. S. M. & S. Co. (40 Wis. 418), Stockh., 105.
Dover Harbour *v.* London, C. & D. R. Co. (3 DeG., F. & J. 559, 30 L. J. Ch. 474), Cross., St. & H., 7.
Dow *v.* Beidleman (49 Ark. 325, 5 S. W. Rep. 297), Charters, 20; Mort., 242; Stat., 25; Tickets & F., 135.
Dow *v.* Beidelman (34 Am. & Eng. R. Cas. 322, 125 U. S. 680, 8 Sup. Ct. Rep. 1028), Stat., 25.
Dow *v.* Iowa C. R. Co. (70 Hun 186, 53 N. Y. S. R. 898, 24 N. Y. Supp. 292; affirmed in 144 N. Y. 426, 39 N. E. Rep. 398), Reorg., 5; Spec. Perf., 7.
Dow *v.* Kansas Pac. R. Co. (8 Kan. 642, 5 Am. Ry. Rep. 401), Fel. Serv., 1, 49, 454.
Dow *v.* King (40 Am. & Eng. R. Cas. 233, 52 Ark. 282, 12 S. W. Rep. 577), Replev., 4; Trover, 20.
Dow *v.* Memphis & L. R. R. Co. (17 Am. & Eng. R. Cas. 324, 20 Fed. Rep. 260), Mort., 163, 166, 216, 219.
Dow *v.* Memphis & L. R. R. Co. (20 Fed. Rep. 768), Mort., 213.
Dow *v.* Memphis & L. R. R. Co. (33 Am. & Eng. R. Cas. 12, 124 U. S. 652, 8 Sup. Ct. Rep. 673; reversing 20 Fed. Rep. 768), Mort., 34.
Dow *v.* Memphis & L. R. R. Co. (23 Blatchf. (U. S.) 84, 32 Fed. Rep. 185), Trusts, 9.
Dow *v.* Portland Steam Packet Co. (84 Me. 490, 24 Atl. Rep. 945), Car. of L. S., 25, 55; Words & Ph., 7.
Dowd *v.* Chicago, M. & St. P. R. Co. (58 Am. & Eng. R. Cas. 18, 84 Wis. 105, 54 N. W. Rep. 24), Car. of P., 90; Licensees, Inj. to, 11; Stat. & D., 77.
Dowdy *v.* Georgia R. Co. (88 Ga. 726, 16 S. E. Rep. 62), Death, etc., 174; Witn., 94.
Dowell *v.* Burlington, C. R. & N. R. Co. (15 Am. & Eng. R. Cas. 153, 62 Iowa 629, 17 N. W. Rep. 907), Acc. & Stat., 4; Employés, Inj. to, 90, 605.
Dowell *v.* Vicksburg & M. R. Co. (18 Am. & Eng. R. Cas. 42, 61 Miss. 519), Employés, Inj. to, 169, 384.
Dowling *v.* New York C. & H. R. R. Co. (12 Am. & Eng. R. Cas. 73, 90 N. Y. 670), Children, Inj. to, 74.
Dowling *v.* Pontypool, C. & N. R. Co. (L. R. 18 Eq. 714, 43 L. J. Ch. 761), Em. Dom., 1088, 1089, 1125, 1207; Side Tr., 2; Witn., 145.
Downer *v.* St. Paul & C. R. Co. (22 Minn. 251), Dedica., 2.
Downer *v.* St. Paul & C. R. Co. (23 Minn. 271), Dedica., 4.

Downes *v.* Maryland & D. R. Co. (37 Md. 100), Witn., 16.
Downey *v.* Chesapeake & O. R. Co. (28 W. Va. 732), Car. of P., 351, 461, 463, 639; Contrib. Neg., 4, 11, 48, 110.
Downey *v.* Hendrie (8 Am. & Eng. R. Cas. 386, 46 Mich. 498, 41 Am. Rep. 177, 9 N. W. Rep. 828), Evid., 108; St. Rys., 345, 429.
Downey *v.* Inman & I. S. S. Co. (2 N. Y. Supp. 659, 18 N. Y. S. R. 1017), Bagg., 121; Negl., 67.
Downey *v.* Philadelphia & R. R. Co. (Pa.) (58 Am. & Eng. R. Cas. 594, 29 Atl. Rep. 126), Collis., 20, 21.
Downey *v.* Sawyer (157 Mass. 418, 32 N. E. Rep. 654), Employés, Inj. to, 30, 266, 662.
Downie *v.* Hoover (12 Wis. 174), Corp., 9.
Downie *v.* White (12 Wis. 176), Evid., 178; Subscr., 168.
Downing *v.* Chicago, R. I. & P. R. Co. (43 Iowa 96, 14 Am. Ry. Rep. 406), Cat.-Gds., 9, 27, 28.
Downing *v.* Des Moines N. W. R. Co. (14 Am. & Eng. R. Cas. 317, 63 Iowa 177, 18 N. W. Rep. 862), Em. Dom., 942.
Downing *v.* McFadden (18 Pa. St. 334), Govt. Rds., 1.
Downs *v.* Central Vt. R. Co. (38 N. Y. S. R. 228, 14 N. Y. Supp. 573, 60 Hun 580), Animals, 332.
Downs *v.* New York & N. H. R. Co. (36 Conn. 287), Eject. Pass., 287.
Downs *v.* New York C. R. Co. (47 N. Y. 83, 1 Am. Ry. Rep. 542), Children, Inj. to, 141; Evid., 215, 223.
Downs *v.* New York C. R. Co. (56 N. Y. 664; affirming 1 T. & C. add. 20), App., 116.
Downs *v.* Seattle & M. R. Co. (5 Wash. 778, 32 Pac. Rep. 745, 33 Pac. Rep. 973), App., 111; Em. Dom., 1056.
Downs *v.* Union Pac. R. Co. (4 Kan. 201), Pl., 94.
Downs *v.* Yonge (17 Ga. 295), Right of W., 4.
Dows *v.* Congdon (16 How. Pr. (N. Y.) 571), Em. Dom., 141.
Dows *v.* Elmwood (34 Fed. Rep. 114; appeal dismissed in 136 U. S. 651, 10 Sup. Ct. Rep. 1074), Mun. Aid, 322, 343.
Doxsey *v.* Long Island R. Co. (35 Hun (N. Y.) 362), Rip. Rts., 9.
Doyle *v.* Boston & A. R. Co. (145 Mass. 386, 5 N. Eng. Rep. 454, 14 N. E. Rep. 461), Death, etc., 198, 234.
Doyle *v.* Chicago, St. P. & K. C. R. Co. (39 Am. & Eng. R. Cas. 314, 77 Iowa 607, 42 N. W. Rep. 555), Employés, Inj. to, 113, 612; Evid., 47, 125.
Doyle *v.* Kansas City & S. R. Co. (113 Mo. 280, 20 S. W. Rep. 970), Em. Dom., 304, 458, 463, 646, 742, 926, 1005, 1007, 1009.
Doyle *v.* Kiser (6 Ind. 242), Bagg., 37, 45, 88.
Doyle *v.* Lynn & B. R. Co. (118 Mass. 195, 9 Am. Ry. Rep. 277), Sunday, 4; Words & Ph., 45.
Doyle *v.* Main Shore Line R. Co. (80 Me. 136, 13 Atl. Rep. 275), App., 125.
Doyle *v.* Manhattan R. Co. (15 Daly (N. Y.) 475, 8 N. Y. Supp. 324, 29 N. Y. S. R. 316), App., 64; Elev. Rys., 113, 163.
Doyle *v.* Manhattan R. Co. (37 N. Y. S. R. 604, 59 Hun 625, 13 N. Y. Supp. 536), Evid., 74; Witn., 100.
Doyle *v.* Manhattan R. Co. (128 N. Y. 488, 28 N. E. Rep. 495, 40 N. Y. S. R. 474; reversing 16 Daly 506, 35 N. Y. S. R. 373, 12 N. Y. Supp. 548), Elev. Rys., 107, 121, 123.
Doyle *v.* Metropolitan El. R. Co. (136 N. Y. 505, 32 N. E. Rep. 1008, 49 N. Y. S. R. 746; affirming 1 Misc. 376, 29 Abb. N. Cas. 272, 49 N. Y. S. R. 118, 20 N. Y. Supp. 865), Refer., 1.
Doyle *v.* Pennsylvania & N. Y. C. & R. Co. (54 N. Y. S. R. 719, 139 N. Y. 637, 34 N. E. Rep. 1063), Cross., Inj. at, 218, 300.
Doyle *v.* St. Paul, M. & M. R. Co. (41 Am. & Eng. R. Cas. 376, 42 Minn. 79, 43 N. W. Rep. 787), Employés, Inj. to, 17, 136, 206; Evid., 37, 205; Witn., 133.
Doyle *v.* Union Pac. R. Co. (147 U. S. 413, 13 Sup. Ct. Rep. 333), Employés, 5; Leases, 11; Trial, 121.
Doyscher *v.* Chicago, M. & St. P. R. Co. (43 Minn. 427, 45 N. W. Rep. 719), Fires, 34.
Drady *v.* Des Moines & Ft. D. R. Co. (14 Am. & Eng. R. Cas. 130, 57 Iowa 393, 10 N. W. Rep. 754), Em. Dom., 985; Side Tr., 1; Sts. & H., 150.
Draffin *v.* Charleston, C. & C. R. Co. (34 So. Car. 464, 13 S. E. Rep. 427), Sales, 7.
Drain *v.* St. Louis, I. M. & S. R. Co. (86 Mo. 574; reversing 10 Mo. App. 531), Contrib. Neg., 85; Cross., Inj. at, 255; New Tr., 64.
Drake *v.* Chicago & A. R. Co. (51 Mo. App. 562), Cross., Inj. at, 264.
Drake *v.* Chicago, R. I. & P. R. Co. (17 Am. & Eng. R. Cas. 45, 63 Iowa 302, 50 Am. Rep. 746, 19 N. W. Rep. 215), Em. Dom., 665, 685; Evid., 126; Flood. Lds., 40; Lim. of Ac., 56; Nuis., 12.
Drake *v.* Chicago, R. I. & P. R. Co. (29 Am. & Eng. R. Cas. 514, 70 Iowa, 59, 29 N. W. Rep. 804), Evid., 207; Flood. Lds., 64; Trial, 119.
Drake *v.* Gilmore (52 N. Y. 389), Death, etc., 65.
Drake *v.* Hudson River R. Co. (7 Barb. (N. Y.) 508), Em. Dom., 172, 666; Nuis., 3, 18; Sts. & H., 133, 141, 223.
Drake *v.* Kiely (4 Am. & Eng. R. Cas. 592, 93 Pa. St. 492), Tresp., 28.
Drake *v.* Lake Shore & M. S. R. Co. (69 Mich. 168, 37 N. W. Rep. 70), Attach., 37.
Drake *v.* New York, L. & W. R. Co. (75 Hun 422, 27 N. Y. Supp. 739, 57 N. Y. S. R. 345), Flood. Lds., 14.
Drake *v.* Pennsylvania R. Co. (137 Pa. St. 352, 20 Atl. Rep. 994), Car. of P., 65, 69, 369, 404, 566.
Drake *v.* Philadelphia & E. R. Co. (51 Pa. St. 240), Animals, 138.
Drake *v.* St. Louis & S. F. R. Co. (35 Mo. App. 553), Pl., 66.
Drake *v.* Union Pac. R. Co. (2 Idaho 453, 21 Pac. Rep. 560), Employés, Inj. to, 206.

Draper *v.* Delaware & H. Canal Co. (42 Am. & Eng. R. Cas. 411, 118 N. Y. 118, 23 N. E. Rep. 131, 27 N. Y. S. R. 931; affirming 42 Hun 654, mem.), Car. of M., 350; Wareh., 10.
Draper *v.* Springport (5 Am. & Eng. R. Cas. 205, 104 U. S. 501), Mun. Aid, 307.
Draper *v.* Williams (2 Mich. 536), Em. Dom., 193; Right of W., 5.
Draper *v.* Worcester & N. R. Co. (11 Metc. (Mass.) 505), Witn., 14.
Drath *v.* Burlington & M. R. R. Co. (20 Am. & Eng. R. Cas. 385, 15 Neb. 367, 18 N. W. Rep. 717), Em. Dom., 842, 969.
Dreher *v.* Iowa S. W. R. Co. (10 Am. & Eng. R. Cas. 221, 59 Iowa 599, 13 N. W. Rep. 754), Em. Dom., 588, 596.
Dresbach *v.* California Pac. R. Co. (3 Am. & Eng. R. Cas. 281, 57 Cal. 462), Car. of M., 208, 612.
Dresser *v.* West Virginia Transp. Co. (8 W. Va. 553), Car. of M., 738.
Drew, The (15 Fed. Rep. 826), Car. of M., 275.
Drew *v.* Central Pac. R. Co. (51 Cal. 425, 12 Am. Ry. Rep. 222), Car. of P., 41; Tickets & F., 40.
Drew *v.* Comstock (57 Mich. 176, 23 N. W. Rep. 721), Agency, 19.
Drew *v.* New York & E. R. Co. (81* Pa. St. 46), Stat., 12.
Drew *v.* Red Line Transit Co. (3 Mo. App. 495), Car. of M., 471; Lim. of Liab., 15.
Drew *v.* Sixth Ave. R. Co. (26 N. Y. 49), Agency, 84; Children, Inj. to, 142, 182.
Drew *v.* Sixth Ave. R. Co. (1 Abb. Dec. (N. Y.) 556, 3 Keyes 429), St. Rys., 339.
Drew Glass Co. *v.* Ohio & M. R. Co. (44 Mo. App. 416), Car. of M., 676.
Drexel *v.* Pennsylvania & N. Y. C. & R. Co. (6 Phila. (Pa.) 503), Mort., 314.
Drinkwater *v.* Dinsmore (80 N. Y. 390; reversing 16 Hun 250), Employés, Inj. to, 764.
Drinkwater *v.* Portland Marine R. Co. (18 Me. 35), Attach., 28.
Driscoll *v.* Market St. Cable R. Co. (97 Cal. 553, 32 Pac. Rep. 591), Cable Rys., 16; St. Rys., 432, 454, 455, 488.
Driscoll *v.* West End St. R. Co. (159 Mass. 142, 34 N. E. Rep. 171), Elec. Rys., 38.
Driver *v.* Western Union R. Co. (32 Wis. 569), Em. Dom., 454, 464, 609.
Drover *v.* Evans (59 Ind. 454), Subscr., 94, 95.
Drucker *v.* Manhattan R. Co. (30 Am. & Eng. R. Cas. 418, 106 N. Y. 157, 12 N. E. Rep. 568, 8 N. Y. S. R. 599; affirming 19 J. & S. 429), App., 107; Elev. Rys., 107, 127, 157.
Drucker *v.* Metropolitan El. R. Co. (56 N. Y. S. R. 130, 73 Hun 102, 25 N. Y. Supp. 922), Elev. Rys., 109, 175.
Drummond *v.* Southern Pac. R. Co. (7 Utah 118, 25 Pac. Rep. 733), Tickets & F., 39, 59, 151.
Drury *v.* Cross. (7 Wall. (U. S.) 299), Mort., 264.
Drury *v.* Midland R. Co. (127 Mass. 571), Em. Dom., 270, 315, 339, 519, 625, 715, 760, 863.
Dryden *v.* Grand Trunk R. Co. (60 Me. 512), Tickets & F., 95.
Dryden *v.* St. Joseph & D. C. R. Co. (23 Kan. 525), App., 81; Judgm., 15.
Dryden *v.* Smith (79 Mo. 525), Animals, 356, 366.
Dry Dock, E. B. & B. R. Co. *v.* Mayor, etc., of N. Y. (55 Barb. (N. Y.) 298), St. Rys., 38.
Dry Dock, E. B. & B. R. Co. *v.* Mayor, etc., of N. Y. (47 Hun 221, 13 N. Y. S. R. 391), St. Rys., 274.
Dry Dock, E. B. & B. R. Co. *v.* North & E. R. R. Co. (3 Misc. (N. Y.) 61, 51 N. Y. S. R. 771, 22 N. Y. Supp. 556), Incorp., 12; Leases, 105; Pl., 47.
Drymala *v.* Thompson (26 Minn. 40, 1 N. W. Rep. 255), Fel. Serv., 73, 88, 93, 94, 114.
Duame *v.* Chicago & N. W. R. Co. (35 Am. & Eng. R. Cas. 416, 72 Wis. 523, 7 Am. St. Rep. 879, 40 N. W. Rep. 394), Cross., Inj. at, 81, 326.
Duanesburgh *v.* Jenkins (40 Barb. (N. Y.) 574), Mun. Aid, 13, 100, 104, 269, 355.
Duanesburgh *v.* Jenkins (57 N. Y. 177; reversing 46 Barb. 294), Mun. Aid, 100, 337.
Dubach *v.* Hannibal & St. J. R. Co. (29 Am. & Eng. R. Cas. 609, 89 Mo. 483, 1 S. W. Rep. 86), Sts. & H., 50, 228.
Dubbs *v.* Philadelphia & R. R. Co. (148 Pa. St. 66, 23 Atl. Rep. 883), Farm Cross., 3, 10.
Dube *v.* Lewiston (83 Me. 211, 22 Atl. Rep. 112), Fel. Serv., 308, 312, 512.
Dube *v.* Queen (2 Can. Exch. 381), Govt. Rds., 13.
Dube *v.* Queen (3 Can. Exch. 147), Car. of P., 195; Govt. Rds., 13.
Dublin, In re (7 Ir. L. R. 173), Em. Dom., 1148.
Dublin & D. R. Co. *v.* Navan & K. R. Co. (5 Ir. Eq. 393), Em. Dom., 1088, 1090.
Dublin & M. R. Co. *v.* Midland G. W. R. Co. (3 Ry. & C. T. Cas. 379), Car. of M., 538; Leases, 73, 131, 134.
Dublin & R. R. Co., In re (L. R. 1 Ir. Ch. 98), Dissol., 23, 30.
Dublin & W. R. Co. *v.* Black (7 Railw. Cas. 434, 8 Ex. 181, 22 L. J. Ex. 94), Subscr., 97, 161.
Dublin S. Packet Co. *v.* London & N. W. R. Co. (4 Ry. & C. T. Cas. 10), Charges, 98; Discrim., 44; Tickets & F., 140.
Dublin Whiskey Distillery Co. *v.* Midland G. W. R. Co. (4 Ry. & C. T. Cas. 32), Injunc., 10, 33; Ry. Com'rs, 19.
Dublin, W. & W. R. Co. *v.* Slattery (L. R. 3 App. Cas. 1155, 39 L. T. 365, 27 W. R. 191), Contrib. Neg., 42; Cross., Inj. at, 297; Death, etc., 160; Negl., 66.
Du Bois Traction Pass. R. Co. *v.* Buffalo, R. & P. R. Co. (149 Pa. St. 1, 24 Atl. Rep. 179), Cross. Rys., 86; Elec. Rys., 5.
Dubuque *v.* Chicago, D. & M. R. Co. (47 Iowa 196), Tax., 26, 60, 259.
Dubuque *v.* Illinois C. R. Co. (39 Iowa 56, 20 Am. Ry. Rep. 124), Mun. Corp., 4; Tax., 26, 132.

Dubuque & D. R. Co. *v.* Diehl (20 Am. & Eng. R. Cas. 299, 64 Iowa 635, 21 N. W. Rep. 117), Em. Dom., 447.
Dubuque & P. R. Co., Ex parte (1 Wall. (U. S.) 69), App., 146.
Dubuque & P. R. Co. *v.* Litchfield (23 How. (U. S.) 66), Land Grants, 4, 22.
Dubuque & P. R. Co. *v.* Shinn (5 Iowa 516), Em. Dom., 938.
Dubuque & P. R. Co. *v.* Webster County (21 Iowa 235), Tax., 117, 259.
Dubuque & S. C. R. Co. *v.* Cedar Falls & M. R. Co. (76 Iowa 702, 39 N. W. Rep. 691), Injunc., 7.
Dubuque & S. C. R. Co. *v.* Des Moines Valley R. Co. (54 Iowa 89, 6 N. W. Rep. 157, 21 Am. Ry. Rep. 245), Land Grants, 116.
Dubuque & S. C. R. Co. *v.* Des Moines Valley R. Co. (14 Am. & Eng. R. Cas. 532, 109 U. S. 329, 3 Sup. Ct. Rep. 188; affirming 54 Iowa 89, 6 N. W. Rep. 157), Land Grants, 22, 23, 25.
Dubuque & S. C. R. Co. *v.* Dubuque (17 Iowa 120), Tax., 13.
Dubuque & S. C. R. Co. *v.* Richmond (19 Wall. (U. S.) 584, 7 Am. Ry. Rep. 235), Int. Com., 28.
Dubuque & S. C. R. Co. *v.* Webster County Sup'rs (40 Iowa 16), Tax., 337.
Dubuque County *v.* Dubuque & P. R. Co. (4 Greene (Iowa) 1), Mun. Aid, 1, 80.
Dubuque S. W. R. Co. *v.* Cedar Rapids & M. R. R. Co. (25 Am. & Eng. R. Cas. 91, 66 Iowa 366, 23 N. W. Rep. 758), Contr., 95; Land Grants, 23.
Ducat *v.* Chicago (48 Ill. 172), Citizens., 1.
Duck River Valley N. G. R. Co. *v.* Cochrane (3 Lea (Tenn.) 478), Em. Dom., 819, 1056, 1081.
Duckworth *v.* Johnson (4 H. & N. 653, 5 Jur. N. S. 630, 29 L. J. Ex. 25), Death, etc., 88, 273.
Dudley *v.* Minnesota & N. W. R. Co. (36 Am. & Eng. R. Cas. 593, 77 Iowa 408, 42 N. W. Rep. 359), Em. Dom., 453, 631, 698, 837.
Dudley *v.* Price (10 B. Mon. (Ky.) 84), Dissol., 30; Stockh., 25, 31.
Dudley *v.* Toledo, A. A. & N. M. R. Co. (65 Mich. 655, 9 West. Rep. 334, 32 N. W. Rep. 884), Constr. Rys., 91.
Dudley *v.* Westcott (18 N. Y. Supp. 130; reversing 15 N. Y. Supp. 952), Children, Inj. to, 61, 125.
Duff *v.* Allegheny Valley R. Co. (2 Am. & Eng. R. Cas. 1, 91 Pa. St. 458, 36 Am. Rep. 675), Death, etc., 160; Tresp., Inj. to, 69a.
Duff *v.* Great Northern R. Co. (L. R. 4 Ir. 178, 3 Ry. & C. T. Cas. xiv), Car. of L. S., 128.
Duffy *v.* Chicago & N. W. R. Co. (32 Wis. 269), App., 45; Cross., Inj. at, 244; Sts. & H., 182.
Duffy *v.* Chicago & N. W. R. Co. (34 Wis. 188, 8 Am. Ry. Rep. 1), New Tr., 46.
Duffy *v.* Missouri Pac. R. Co. (19 Mo. App. 380), Children, Inj. to, 73, 75; Cross., Inj. at, 176, 206.
Duffy *v.* New York & H. R. Co. (2 Hilt. (N. Y.) 496), Animals, 139, 153, 386; Cov'ts, 4.
Duffy *v.* Thompson (4 E. D. Smith (N. Y.) 178), Bagg., 40, 45.
Dufolt *v.* Gorman (1 Minn. 301 (Gil. 234), Charges, 69.
Dufour *v.* Central Pac. R. Co. (67 Cal. 319, 7 Pac. Rep. 769), Contrib. Neg., 20, 82.
Dugan *v.* Chicago, St. P., M. & O. R. Co. (85 Wis. 609, 55 N. W. Rep. 894), App., 69; Contrib. Neg., 103; Evid., 244; New Tr., 31.
Dugan *v.* St. Paul & D. R. Co. (40 Minn. 544, 42 N. W. Rep. 538), Pl., 24.
Dugan *v.* St. Paul & D. R. Co. (43 Minn. 414, 45 N. W. Rep. 851), App., 64; Fright. Teams, 2.
Duggan *v.* Lake Shore & M. S. R. Co. (1 Sheld. (N. Y.) 399), Attach., 54.
Duggan *v.* Peoria, D. & E. R. Co. (42 Ill. App. 536), Animals, 127; Fences, 85; Pl., 179; Sts. & H., 323, 325.
Duggan *v.* Third Ave. R. Co. (55 N. Y. S. R. 777, 26 N. Y. Supp. 79), Trial, 141.
Duggan *v.* Wabash Western R. Co. (46 Mo. App. 266), App. 124.
Duggins *v.* Watson (15 Ark. 118, 60 Am. Dec. 560), Imp. Neg., 2.
Duke *v.* Baltimore & C. V. R. Extension Co. (129 Pa. St. 422, 18 Atl. Rep. 566), Sts. & H., 242.
Duke *v.* Great Western R. Co. (14 U. C. Q. B. 369), Eject. Pass., 82.
Duke *v.* Great Western R. Co. (14 U. C. Q. B. 377), Eject. Pass., 20.
Duke *v.* Kansas City, Ft. S. & M. R. Co. (39 Mo. App. 105), Animals, 159, 474.
Duke *v.* Missouri Pac. R. Co. (41 Am. & Eng. R. Cas. 221, 99 Mo. 347, 12 S. W. Rep. 636), Dam., 73, 90.
Duke *v.* Rhode Island Locomotive Works (11 R. I. 599), Attach., 56.
Dukes *v.* Eastern Distilling Co. (51 Hun 605, 4 N. Y. Supp. 562), Employés, Inj. to, 344; Nuis., 23.
Dulaney *v.* Missouri Pac. R. Co. (21 Mo. App. 597), Death, etc., 125.
Du Laurans *v.* First Div. St. P. & P. R. Co. (15 Minn. 49 (Gil. 29), Eject. Pass., 6, 8, 119; New Tr., 30; Tickets & F., 28, 125.
Duling *v.* Philadelphia, W. & B. R. Co. (27 Am. & Eng. R. Cas. 84, 66 Md. 120, 6 Atl. Rep. 592), Car. of P., 258.
Duluth *v.* Mallett (43 Minn. 204, 45 N. W. Rep. 154), Sts. & H., 309.
Duluth *v.* St. Paul & D. R. Co. (49 Minn. 201, 51 N. W. Rep. 1163), Sts. & H., 7.
Duluth & W. R. Co. *v.* West (51 Minn. 163, 53 N. W. Rep. 197), Em. Dom., 453, 652.
Duluth Transfer R. Co. *v.* Northern Pac. R. Co. (51 Minn. 218, 53 N. W. Rep. 366), Em. Dom., 154.
Dumas *v.* Stone (65 Vt. 442, 25 Atl. Rep. 1097), Employés, Inj. to, 149.
Dumble *v.* Cobourg & P. R. Co. (29 Grant's Ch. (U. C.) 121), Em. Dom., 1232.
Dumble *v.* Peterborough & L. C. R. Co. (12 Grant's Ch. (U. C.) 74), Stockh., 90.
Dumphy *v.* Humboldt County Sup'rs (58 Iowa 273, 12 N. W. Rep. 306), Mun. Aid, 412.
Dun *v.* Seaboard & R. R. Co. (16 Am. & Eng. R. Cas. 363, 78 Va. 645, 49 Am. Rep.

388), Car. of P., 488; Contrib. Neg., 10, 13; Negl., 53, 54, 75.
Dunaberg & W. R. Co. *v.* Hopkins (36 L. T. 733), Constr. Rys., 70; Sales, 15.
Dunbar *v.* Boston & P. R. Corp. (110 Mass. 26), Car. of M., 275.
Dunbar *v.* Harrison (18 Ohio St. 24), Cred. Bill, 3.
Dunbar *v.* Port Royal & A. R. Co. (19 So. Car. 601), Car. of M., 731.
Dunbar *v.* Port Royal & A. R. Co. (55 Am. & Eng. R. Cas. 466, 36 So. Car. 110, 15 S. E. Rep. 357), Car. of M., 580, 685, 724, 736.
Duncan *v.* Atlantic, M. & O. R. Co. (4 Hughes (U. S.) 125), Mort., 243, 300.
Duncan *v.* Canadian Pac. R. Co. (21 Ont. 355), Animals, 158.
Duncan *v.* Central Pass. R. Co. (85 Ky. 525, 4 S. W. Rep. 228), Deeds, 29.
Duncan *v.* Missouri Pac. R. Co. (22 Mo. App. 614), Lim. of Ac., 48.
Duncan *v.* Missouri Pac. R. Co. (46 Mo. App. 198), Contrib. Neg., 5, 10, 48; Cross., Inj. at, 266, 316.
Duncan *v.* Mobile & O. R. Co. (2 Woods (U. S.) 542), Mort., 128.
Duncan *v.* Mobile & O. R. Co. (3 Woods (U. S.) 567), Agency, 36; App., 133; Coupons, 6, 11; Mort., 250; Pres., 1.
Duncan *v.* Pennsylvania R. Co. (7 Am. & Eng. R. Cas. 1, 94 Pa. St. 435), Branch & L. Roads, 7.
Duncan *v.* Pennsylvania R. Co. (13 Phila. (Pa.) 68), Branch & L. Roads, 4, 15; Em. Dom., 667; Sts. & H., 149.
Duncan *v.* Preferred Mut. Ac. A. of N. Y. (36 N. Y. S. R. 928, 27 J. & S. 145, 13 N. Y. Supp. 620), Acc. Ins., 2, 9, 10, 11.
Duncan *v.* St. Louis, I. M. & S. R. Co. (91 Mo. 67, 3 S. W. Rep. 835), Animals, 386; Fences, 87, 96.
Duncan *v.* South Carolina R. Co. (2 Rich. (So. Car..) 613), Bailm., 2; Car. of Slaves, 3.
Duncan *v.* State (52 Am. & Eng. R. Cas. 646, 29 Fla. 439, 10 So. Rep. 815), Crim. L., 11; Words & Ph., 27.
Duncan *v.* Wyatt Park R. Co. (48 Mo. App. 659), St. Rys., 402.
Duncomb *v.* New York, H. & N. R. Co. (22 Hun (N. Y.) 133), Direct., 63.
Duncomb *v.* New York, H. & N. R. Co. (4 Am. & Eng. R. Cas. 293, 84 N. Y. 190; reversing 23 Hun 291), Bonds, 38; Direct., 44, 45, 52; Pledge, etc., 3; Mort., 9, 79, 270.
Duncomb *v.* New York, H. & N. R. Co. (13 Am. & Eng. R. Cas. 84, 88 N. Y. 1; affirming 23 Hun 291, mem.), Mort., 269.
Dundalk Western R. Co. *v.* Tapster (1 G. & D. 657, 1 Q. B. 667, 5 Jur. 699, 2 Railw. Cas. 586), Subscr., 80.
Dungan *v.* Safford (41 Ohio St. 15), Subscr., 169.
Dunham *v.* Boston & A. R. Co. (46 Hun (N. Y.) 245, 11 N. Y. S. R. 472), Car. of M., 82.
Dunham *v.* Boston & M. R. Co. (70 Me. 164), Car. of M., 632.
Dunham *v.* Bower (77 N. Y. 76), Judgm., 16.
Dunham *v.* Cincinnati, P. & C. R. Co. (1 Wall. (U. S.) 254), Mort., 120, 207.
Dunham *v.* Eaton & H. R. Co. (1 Bond (U. S.) 492), Pl., 82.
Dunham *v.* Indianapolis & St. L. R. Co. (7 Biss. (U. S.) 223), Pat. for Inv., 13.
Dunham *v.* Isett (15 Iowa 284), Attach., 22; Mort., 12, 83; Pl., 16.
Dunham *v.* Troy Union R. Co. (1 Abb. App. Dec. (N. Y.) 565, 3 Keyes 543), Direct., 39.
Dunkirk *v.* Lake Shore & M. S. R. Co. (75 Hun 366, 27 N. Y. Supp. 105, 56 N. Y. S. R. 767), Cross., St. & H., 23.
Dunkirk & A. V. R. Co. *v.* Mead (1 Am. & Eng. R. Cas. 166, 90 Pa. St. 454), Animals, 155.
Dunkirk Colliery Co. *v.* Manchester, S. & L. R. Co. (2 Ry. & C. T. Cas. 402), Charges, 115.
Dunklin County *v.* District County Court (23 Mo. 449), Land Grants, 133.
Dunkman *v.* Wabash, St. L. & P. R. Co. (95 Mo. 232, 10 West. Rep. 396, 4 S. W. Rep. 670; modifying 16 Mo. App. 548), Contrib. Neg., 48; Sts. & H., 376; Tresp., Inj. to, 53.
Dunlap *v.* International Steamboat Co. (98 Mass. 371), Bagg., 29, 119.
Dunlap *v.* Northeastern R. Co. (130 U. S. 649, 9 Sup. Ct. Rep. 647), Contrib. Neg., 87.
Dunlap *v.* Northern Pac. R. Co. (35 Minn. 203, 28 N. W. Rep. 240), Tickets & F., 100.
Dunlap *v.* Richmond & D. R. Co. (81 Ga. 136, 7 S. E. Rep. 283), Employés, Inj. to, 136, 308.
Dunlap *v.* Toledo, A. A. & G. T. R. Co. (46 Mich. 190, 9 N. W. Rep. 249), Cert., 8; Em. Dom., 287, 958.
Dunlap *v.* Toledo, A. A. & G. T. R. Co. (10 Am. & Eng. R. Cas. 185, 50 Mich. 470, 15 N. W. Rep. 555), Em. Dom., 101, 981, 1003.
Dunlavy *v.* Chicago, R. I. & P. R. Co. (21 Am. & Eng. R. Cas. 542, 66 Iowa 435, 23 N. W. Rep. 911), Conduct., 11; Contrib. Neg., 98; Employés, Inj. to, 692.
Dunlieth & D. Bridge Co. *v.* Dubuque (32 Iowa 427), Tax., 13.
Dunlop *v.* Canada C. R. Co. (45 U. C. Q. B. 74), Em. Dom., 1162.
Dunn, Ex parte (6 So. Car. 307), Fed. Cts., 27.
Dunn, Ex parte (8 So. Car. 207), Att'y-Gen., 3; Receiv., 30; State Aid, 30.
Dunn *v.* Burleigh (62 Me. 24), Land Grants, 118.
Dunn *v.* Burlington, C. R. & N. R. Co. (35 Minn. 73, 27 N. W. Rep. 448), Evid., 89; New Tr., 79.
Dunn *v.* Cass Ave. & F. G. R. Co. (98 Mo. 652, 11 S. W. Rep. 1009), Negl., 105; St. Rys., 404.
Dunn *v.* Cass Ave. & F. G. R. Co. (21 Mo. App. 188), Children, Inj. to, 177, 182; Negl., 72; St. Rys., 267.
Dunn *v.* Chicago & N. W. R. Co. (7 Am. & Eng. R. Cas. 573, 58 Iowa 674, 12 N. W. Rep. 734), Animals, 142, 145, 409, 576; Evid., 160.
Dunn *v.* Grand Trunk R. Co. (58 Me. 187), Car. of P., 46.

Dunn *v.* Hannibal & St. J. R. Co. (68 Mo. 268), Car of L. S., 30, 82, 102, 103; Dam., 110.
Dunn *v.* Hartford & W. H. R. Co. (43 Conn. 434), Agency, 115.
Dunn *v.* Missouri Pac. R. Co. (45 Mo. App. 29), Attach., 38, 46.
Dunn *v.* North Mo. R. Co. (24 Mo. 493), Liens, 24.
Dunn *v.* Pennsylvania R. Co. (20 Phila. (Pa.) 258), Car. of P., 217, 410, 471; Dam., 41, 67, 70; Words & Ph., 138.
Dunnigan *v.* Chicago & N. W. R. Co. (18 Wis. 28), Animals, 169.
Dunning *v.* Bond (38 Fed. Rep. 813), Cross., Inj. at, 209.
Dunning *v.* New Albany & S. R. Co. (2 Ind. 437), Pl., 45.
Dunnovan *v.* Green (57 Ill. 63), Mun. Aid, 2, 29, 120, 126, 127.
Dunphy *v.* Erie R. Co. (10 J. & S. (N. Y.) 128), Eject. Pass., 30.
Dunsford *v.* Michigan C. R. Co. (20 Ont. App. 577), Animals, 178.
Dunsmore *v.* Central Iowa R. Co. (72 Iowa 182, 33 N. W. Rep. 456), Nuis., 27.
Dunson *v.* New York C. R. Co. (3 Lans. (N. Y.) 265), Car. of M., 621.
Dunstan *v.* Northern Pac. R. Co. (2 N. Dak. 46, 49 N. W. Rep. 426), Deeds, 40.
Duntley *v.* Boston & M. R. Co. (N. H.) (20 Atl. Rep. 327), Car. of L. S., 86.
Du Pont *v.* Northern Pac. R. Co. (16 Am. & Eng. R. Cas. 456, 18 Fed. Rep. 467, 21 Blatchf. (U. S.) 534), Stockh., 102.
Dupuis *v.* Chicago & N. W. R. Co. (23 Am. & Eng. R. Cas. 93, 115 Ill. 97, 3 N. E. Rep. 720), Em. Dom., 460, 603, 637, 646, 650, 652.
Durand *v.* New Haven & N. Co. (42 Conn. 211), Charters, 46; Pl., 74.
Durant *v.* Essex County (7 Wall. (U. S.) 107), Judgm., 30.
Durant *v.* Iowa County (Woolw. (U. S.) 69), Coupons, 1; Mun. Aid, 344, 365.
Durant *v.* Kenyon (32 Hun (N. Y.) 634), Mort., 78.
Durbin *v.* Oregon R. & N. Co. (32 Am. & Eng. R. Cas. 149, 17 Oreg. 5, 11 Am. St. Rep. 778, 17 Pac. Rep. 5), Cross., Inj. at, 256, 287, 327.
Durfee *v.* Johnstown, G. & K. Horse R. Co (71 Hun 279, 24 N. Y. Supp. 1016, 54 N. Y. S. R. 526), Leases, 19; St. Rys., 367.
Durfee *v.* Old Colony & F. R. R. Co. (5 Allen (Mass.) 230), Leases, 38; Stockh., 89.
Durfee *v.* Peoria, D. & E. R. Co. (140 Ill. 435, 30 N. E. Rep. 686), Aband., 2.
Durfee *v.* Union Pac. R. Co. (9 Utah 213, 33 Pac. Rep. 944), Eject. Pass., 65; New Tr., 36.
Durgin *v.* American Exp. Co. (N. H.) (45 Am. & Eng. R. Cas. 325, 20 Atl. Rep. 328), Exp. Cos., 62, 72; Lim. of Liab., 28.
Durgin *v.* Munson (9 Allen (Mass.) 396), Fel. Serv., 469.
Durham *v.* Richmond & D. R. Co. (104 N. Car. 261, 10 S. E. Rep. 208), Injunc., 48.
Durham *v.* Richmond & D. R. Co. (108 N. Car. 399, 12 S. E. Rep. 1040, 13 S. E. Rep. 1), Evid., 99.
Durham *v.* Wilmington & W. R. Co. (82 N. Car. 352), Animals, 480.
Durham & N. R. Co. *v.* Bullock Church (44 Am. & Eng. R. Cas. 151, 104 N. Cas. 525, 10 S. E. Rep. 761), Em. Dom., 550, 595, 600, 629; Witn., 119.
Durham & N. R. Co. *v.* Richmond & D. R. Co. (44 Am. & Eng. R. Cas. 108, 106 N. Car. 16, 10 S. E. Rep. 1041), Em. Dom., 57, 248, 312.
Durham & N. R. Co. *v.* North Carolina R. Co. (108 N. Car. 304, 12 S. E. Rep. 983; former appeal 106 N. Car. 16, 10 S. E. Rep. 1041), Em. Dom., 982.
Durham & S. R. Co. *v.* Walker (2 G. & D. 326, 3 Railw. Cas. 36, 2 Q. B. 940), Em. Dom., 1204; Mines, etc., 10.
Durkee *v.* Board of Liquidation (3 Am. & Eng. R. Cas. 135, 103 U. S. 646), Mun. Aid, 34; State Aid, 19.
Durkee *v.* Central Pac. R. Co. (25 Am. & Eng. R. Cas. 350, 56 Cal. 388, 38 Am. Rep. 59), Children, Inj. to, 181, 185; Evid., 202.
Durkee *v.* Central Pac. R. Co. (Cal.) (9 Pac. Rep. 99), Children, Inj. to, 168.
Durkee *v.* Central Pac. R. Co. (69 Cal. 533, 58 Am. Rep. 562, 11 Pac. Rep. 130), Evid., 175.
Durkee *v.* Saratoga & W. R. Co. (4 How. Pr. (N. Y.) 226), Pl., 32.
Durkin *v.* Sharp (8 Am. & Eng. R. Cas. 225; affirming 22 Hun 132, 12 Wkly. Dig. 421), Employés, Inj. to, 661.
Dutchess & C. County R. Co. *v.* Mabbett (58 N. Y. 397, 7 Am. Ry. Rep. 339), Incorp., 9.
Dutenhofer *v.* Adirondacks R. Co. (38 N. Y. S. R. 710, 60 Hun 578, 14 N. Y. Supp. 558), Bonds, 5.
Dutton *v.* Wabash, St. L. & P. R. Co. (66 Iowa 352, 23 N. W. Rep. 739), App., 55.
Duval *v.* Hunt (34 Fla. 85, 15 So. Rep. 876), Fel. Serv., 170.
Duval *v.* United States (25 Ct. of Cl. 46), Car. of Mails, 16.
Duvall *v.* Baltimore & O. R. Co. (49 Am. & Eng. R. Cas. 313, 73 Md. 516, 21 Atl. Rep. 496), Evid., 89; Fright. Teams, 3.
Duxbury *v.* Vermont C. R. Co. (26 Vt. 751), Sts. & H., 206.
Duyckinck *v.* New York El. R. Co. (3 Silv. App. 317, 34 N. Y. S. R. 876), Elev. Rys., 55, 58, 160.
Duygan *v.* Third Ave. R. Co. (6 Misc. (N. Y.) 66, 26 N. Y. Supp. 79, 55 N. Y. S. R. 777), App., 45.
Dwenger *v.* Chicago & G. T. R. Co. (20 Am. & Eng. R. Cas. 26, 98 Ind. 153), Sts. & H., 215, 216.
Dwight *v.* Central Vt. R. Co. (20 Blatchf. (U. S.) 200, 9 Fed. Rep. 785), Stockh., 128.
Dwight *v.* Elmira, C. & N. R. Co. (132 N. Y. 199, 30 N. E. Rep. 398, 43 N. Y. S. R. 723; reversing 56 Hun 646, 31 N. Y. S. R. 1005, mem., 10 N. Y. Supp. 950), Fires, 340, 344.
Dwight *v.* Smith (13 Fed. Rep. 50), Bonds, 36.

Dwinelle *v.* New York C. & H. R. R. Co. (44 Am. & Eng. R. Cas. 384, 120 N. Y. 117, 24 N. E. Rep. 319, 30 N. Y. S. R. 578, 8 L. R. A. 224, 17 Am. St. Rep. 611; reversing 45 Hun 139, 9 N. Y. S. R. 838), Agency, 97; Assault, 15; Car. of P., 28, 609; Sleep. Car Cos., 19, 37, 38.
Dwyer *v.* American Exp. Co. (8 Am. & Eng. R. Cas. 159, 55 Wis. 453, 13 N. W. Rep. 471), Fel. Serv., 450.
Dwyer *v.* American Exp. Co. (53 Am. & Eng. R. Cas. 612, 82 Wis. 307, 52 N. W. Rep. 304), Fel. Serv., 1, 56, 76, 134, 202.
Dwyer *v.* Chicago, St. P. & O. R. Co. (84 Iowa 479, 51 N. W. Rep. 244), Death, etc., 377.
Dwyer *v.* Gulf, C. & S. F. R. Co. (32 Am. & Eng. R. Cas. 461, 69 Tex. 707, 7 S. W. Rep. 504), Car. of M., 264, 293.
Dwyer *v.* Gulf, C. & S. F. R. Co. (3 Tex. App. (Civ. Cas.) 104), Charges, 55.
Dwyer *v.* New York, L. E. & W. R. Co. (47 N. J. L. 9), Contrib. Neg., 32.
Dwyer *v.* New York, L. E. & W. R. Co. (28 Am. & Eng. R. Cas. 155, 48 N. J. L. 373, 7 Atl. Rep. 417), Contrib. Neg., 85, 88.
Dwyer *v.* St. Louis & S. F. R. Co. (52 Fed. Rep. 87), Employés, Inj. to, 229; New Tr., 30; Trial, 183.
Dyar *v.* Farmington (70 Me. 515), Mun. Aid, 35.
Dye *v.* Delaware, L. & W. R. Co. (53 Am. & Eng. R. Cas. 286, 130 N. Y. 671, mem., 29 N. E. Rep. 320, 41 N. Y. S. R. 690, 3 Silv. App. 610), Employés, Inj. to, 584; Evid., 67.
Dye *v.* Virginia Midland R. Co. (9 Mackey (D. C.) 63), Agency, 6; Car. of P., 242; Evid., 102.
Dyer *v.* Erie R. Co. (71 N. Y. 228), Cross., Inj. at, 122, 138, 145, 226; Imp. Neg., 19.
Dyer *v.* Grand Trunk R. Co. (42 Vt. 441), Car. of M., 388.
Dyer *v.* Great Northern R. Co. (51 Minn. 345, 53 N. W. Rep. 714), Car. of M., 713.
Dyer *v.* Pacific R. Co. (34 Mo. 127), Animals, 356, 359.
Dyer *v.* Wightman (66 Pa. St. 425), Land. & T., 2.
Dyer *v.* Placer County (90 Cal. 276, 27 Pac. Rep. 197), Crim. L., 44; Stat., 66.
Dyer County *v.* Chesapeake, O. & S. W. R. Co. (38 Am. & Eng. R. Cas. 676, 87 Tenn. 712, 11 S. W. Rep. 943), Cross., St. & H., 25, 29, 34, 38; Judgm., 17; Reorg., 12.
Dyke *v.* Erie R. Co. (45 N. Y. 113), Car. of P., 631.
Dyment *v.* Northern & N. W. R. Co. (11 Ont. 343), Evid., 182.
Dymock *v.* Missouri, K. & T. R. Co. (54 Mo. App. 400), Bills of L., 64, 112, 114, 116, 123, 124.
Dynes *v.* Shaffer (19 Ind. 165), Subscr., 152.
Dysinger *v.* Cincinnati, S. & M. R. Co. (93 Mich. 646, 53 N. W. Rep. 825), Employés, Inj. to, 202.
Dyson *v.* London & N. W. R. Co. (2 Am. & Eng. R. Cas. 629, L. R. 7 Q. B. D. 32, 50 L. J. M. C. 78, 44 L. T. 609, 29 W. R. 565, 3 Ry. & C. T. Cas. xxiv), Tickets & F., 145.
Dyson *v.* New York & N. E. R. Co. (57 Conn. 9, 17 Atl. Rep. 137), Cross., Inj. at, 12, 147, 169, 185, 344; Evid., 49.

Eades *v.* Clark (23 J. & S. 132, 11 N. Y. S. R. 725), Employés, Inj. to, 595.
Eads *v.* Metropolitan St. R. Co. (43 Mo. App. 536), Car. of P., 304, 309, 314; Eject. Pass., 42, 54; St. Rys., 522.
Eagan *v.* Fitchburg R. Co. (101 Mass. 315), Cross., Inj. at, 222.
Eagan *v.* Missouri Pac. R. Co. (6 Mo. App. 594), Dam., 108.
Eagle *v.* Charing Cross R. Co. (L. R. 2 C. P. 638, 36 L. J. C. P. 297, 16 L. T. 593, 15 W. R. 1016), Easem., 14.
Eagle *v.* Kohn (84 Ill. 292), Mun. Aid, 228, 332, 344.
Eagle *v.* White (6 Whart. (Pa.) 505), Car. of M., 86.
Eakright *v.* Logansport & N. I. R. Co. (13 Ind. 404), Incorp., 1, 9; Subscr., 107.
Eames *v.* Boston & W. R. Co. (14 Allen (Mass.) 151), Animals, 184.
Eames *v.* Salem & L. R. Co. (98 Mass. 560), Animals, 153; Fences, 75.
Eames *v.* Texas & N. O. R. Co. (22 Am. & Eng. R. Cas. 540, 63 Tex. 660), Animals, 62; Negl., 49.
Eames *v.* Worcester & N. R. Co. (105 Mass. 193, 2 Am. Ry. Rep. 462), Fences, 39.
Earhart *v.* New Orleans & C. R. Co. (17 La. Ann. 243), Death, etc., 21.
Earl *v.* Tupper (45 Vt. 275), Death, etc., 378; Evid., 209.
Earle *v.* Cadmus (2 Daly (N. Y.) 237), Bagg., 99.
Earle *v.* Seattle, L. S. & E. R. Co. (56 Fed. Rep. 909), Franch., 4; Stockh., 116, 125.
Early *v.* Lake Shore & M. S. R. Co. (30 Am. & Eng. R. Cas. 163, 66 Mich. 349, 9 West. Rep. 863, 33 N. W. Rep. 813), Evid., 67; Stat. & D., 96.
Early *v.* Reed (60 Mo. 528), Assign., 1.
Earlywine *v.* Topeka, S. & W. R. Co. (43 Kan. 746, 23 Pac. Rep. 940), Em. Dom., 135.
Earnest *v.* Southern Exp. Co. (1 Woods (U. S.) 573), Exp. Cos., 28; Lim. of Liab., 27.
Easley *v.* Missouri Pac. R. Co. (113 Mo. 236, 20 S. W. Rep. 1073), Cross., St. & H., 52; Cross., Inj. at, 242; Evid., 170; Negl., 29.
Eason *v.* East Tenn., V. & G. R. Co. (51 Fed. Rep. 935, 2 U. S. App. 272, 2 C. C. A. 549), Death, etc., 351.
Eason *v.* Sabine & E. T. R. Co. (65 Tex. 577), Employés, Inj. to, 203; Fel. Serv., 209.
East Ala. R. Co. *v.* Doe (20 Am. & Eng. R. Cas. 566, 114 U. S. 340, 5 Sup. Ct. Rep. 869), Exec., 3.
East Ala. R. Co. *v.* Tennessee & C. R. R. Co. (29 Am. & Eng. R. Cas. 363, 78 Ala. 274), Estop., 3; Right of W., 1.
East & W. I. Dock & L. & B. J. R. Co., In re (5 Railw. Cas. 527), Arb., 10.
East & W. I. Dock Co., In re (L. R. 38 Ch. D. 576), Receiv., 7.
East & W. I. Dock Co., In re (L. R. 44 Ch. D. 38), Insolv., 6.

East & W. I. Dock Co. v. Shaw (39 Ch. D. 524), Charges, 92.
East & W. J. R. Co. v. Great Western R. Co. (1 Ry. & C. T. Cas. 331), Charges, 103.
East & W. J. R. Co. v. Great Western R. Co. (2 Ry. & C. T. Cas. 147), Charges, 97.
East & W. J. R. Co. v. Northampton & B. J. R. Co. (2 Ry. & C. T. Cas. 293), Car. of P., 191; Leases, 126
East & W. R. Co. v. East Tenn., V. & G. R. Co. (22 Am. & Eng. R. Cas. 81, 75 Ala. 275), Injunc., 22, 24, 50, 51, 52; Jurisd., 14.
East & W. R. Co. v. Sims (80 Ga. 807, 6 S. E. Rep. 595), Employés, Inj. to, 461.
East Anglian R. Co. v. Eastern Counties R. Co. (16 Jur. 249, 21 L. J. C. P. 23, 7 Railw. Cas. 150, 11 C. B. 775), Constr. Rys., 1; Leases, 13, 17.
East Boston Freight R. Co. v. Eastern R. Co. (13 Allen (Mass.) 422), Mort., 7.
East Boston Freight R. Co. v. Hubbard (10 Allen (Mass.) 459, note), Bonds, 4.
East Brandywine & W. R. Co. v. Ranck (78 Pa. St. 454), Em. Dom., 647.
Eastburn v. Norfolk & W. R. Co. (34 W. Va. 681, 12 S. E. Rep. 819), Contrib. Neg., 10, 13; Employés, Inj. to, 453.
East End St. R. Co. v. Doyle (88 Tenn. 747, 9 L. R. A. 100, 13 S. W. Rep. 936), Em. Dom., 163; Sts. & H., 250.
Easter v. Little Miami R. Co. (14 Ohio St. 48), Animals, 139.
Easterbrook v. Erie R. Co. (51 Barb. (N. Y.) 94), Flood. Lds., 96.
Eastern & M. R. Co., In re (45 Am. & Eng. R. Cas. 71, L. R. 45, Ch. D. 367), Receiv., 76, 84.
Eastern & M. R. Co. v. Midland R. Co. (4 Ry. & C. T. Cas. 323), Leases, 137.
Eastern & M. R. Co. v. Midland R. Co. (5 Ry. & C. T. Cas. 235), Leases, 139.
Eastern Counties R. Co. v. Broom (6 Exch. 314, 15 Jur. 297, 20 L. J. Exch. 196, 6 Railw. Cas. 743), Agency, 106, 109; Assault, 2, 3; False Imp., 13.
Eastern Counties R. Co. v. Hawkes (5 H. L. Cas. 331, 24 L. J. Ch. 601), Vend. & P., 6, 7.
Eastern Counties R. Co. v. Marriage (9 H. L. Cas. 32, 14 L. J. Ex. 73, 7 Jur. N. S. 53, 8 W. R. 748), Em. Dom., 1108.
Eastern Counties R. Co. v. Philipson (16 C. B. 2, 24 L. J. C. P. 140), Contr., 45; Cov'ts, 2.
Eastern R. Co., In re (120 Mass. 412), Mort., 131.
Eastern R. Co. v. Benedict (5 Gray (Mass.) 561), Parties, 2.
Eastern R. Co. v. Boston & M. R. Co. (111 Mass. 125), Em. Dom., 33, 651.
Eastern R. Co. v. Concord & P. R. Co. (47 N. H. 108), Ry. Com'rs, 26.
Eastern R. Co. v. Loring (26 Am. & Eng. R. Cas. 92, 138 Mass. 381), Stat. Agts., 11.
Eastern R. Co. v. Portsmouth (62 N. H. 344), Cross., St. & H., 40.
Eastern R. Co. v. Relief F. Ins. Co. (98 Mass. 420), Fire Ins., 1, 7, 8.
Eastern R. Co. v. Rogers (124 Mass. 527), Eastern R. Co., 3.
Eastern R. Co. v. United States (129 U. S. 391, 9 Sup. Ct. Rep. 320; affirming 20 Ct. of Cl. 23), Car. of Mails, 11.
Eastern Townships Bank v. St. Johnsbury & L. C. R. Co. (40 Am. & Eng. R. Cas. 566, 40 Fed. Rep. 423), Guar., 10, 13; Leases, 15.
Eastern Union R. Co. v. Cochrane (9 Ex. 197, 7 Railw. Cas. 792, 23 L. J. Ex. 61), Consol., 26; Indem. Bonds, 5.
Eastern Union R. Co. v. Eastern Counties R. Co. (2 El. & Bl. 530, 22 L. J. Q. B. 371), Arb., 23.
Eastern Union R. Co. v. Hart (8 Ex. 116, 17 Jur. 89, 22 L. J. Ex. 20), Contr., 1; Mort., 4.
Eastern Union R. Co. v. Symonds (5 Ex. 237, 19 L. J. Ex. 287), Evid., 228.
East Gloucestershire R. Co. v. Bartholomew (L. R. 3 Ex. 15, 17 L. T. 256, 37 L. J. Ex. 17), Stockh., 63.
Eastham v. Blackburn R. Co. (9 Ex. 758, 23 L. J. Ex. 199), Em. Dom., 1134.
East Lancashire R. Co. v. Croxton (5 Ex. 287, 6 Railw. Cas. 214, 1 L., M. & P. 298, 19 L. J. Ex. 313), Subscr., 87.
East Lincoln v. Davenport (94 U. S. 801), Mun. Aid, 207.
East Line & R. R. R. Co. v. Boon (Tex.) (1 S. W. Rep. 632), New Tr., 24.
East Line & R. R. R. Co. v. Brinker (68 Tex. 500, 3 S. W. Rep. 99), Cross., Inj. at, 331.
East Line & R. R. R. Co. v. Culberson (68 Tex. 664, 5 S. W. Rep. 820), Death, etc., 94.
East Line & R. R. R. Co. v. Culberson (38 Am. & Eng. R. Cas. 225, 72 Tex. 375, 3 L. R. A. 567, 10 S. W. Rep. 706), Death, etc., 94, 103; Leases, 62.
East Line & R. R. R. Co. v. Garrett (52 Tex. 133), Em. Dom., 197, 219.
East Line & R. R. R. Co. v. Hall (64 Tex. 615), Actions, 13; Car. of M., 77, 95, 709; Witn., 34.
East Line & R. R. R. Co. v. Hart (2 Tex. App. (Civ. Cas.) 370), Fires, 256, 277, 280.
East Line & R. R. R. Co. v. Lee (71 Tex. 538, 9 S. W. Rep. 604), Car. of P., 645.
East Line & R. R. R. Co. v. Rushing (34 Am. & Eng. R. Cas. 367, 69 Tex. 306, 6 S. W. Rep. 834), Car. of P., 205, 596; Consol., 4; Corp., 16; Pl., 42; Sales of Rds., 11.
East Line & R. R. R. Co. v. Scott (68 Tex. 694, 5 S. W. Rep. 501), Evid., 255; Fel. Serv., 143, 483.
East Line & R. R. R. Co. v. Scott (71 Tex. 703, 10 S. W. Rep. 99, 298), Employés, Inj. to, 102, 720; Fel. Serv., 479; Trial, 21, 165.
East Line & R. R. R. Co. v. Scott (38 Am. & Eng. R. Cas. 16, 72 Tex. 70, 10 S. W. Rep. 99, 298), Att'ys, 10; Comprom., 4, 7; Contr., 10, 16; Employés, 1; Employés, Inj. to, 444.
East Line & R. R. R. Co. v. Scott (41 Am. & Eng. R. Cas. 396, 75 Tex. 84, 12 S. W. Rep. 995), Pl., 148.
East Line & R. R. R. Co. v. Smith (65 Tex.

167), Car. of P., 182; Death, etc., 429; Negl., 63.
East Line & R. R. R. Co. *v.* State (40 Am. & Eng. R. Cas. 574, 75 Tex. 434, 12 S. W. Rep. 690), Charters, 52, 90; Consol., 5; Franch., 10; Par. & Comp. L., 1; Parties, 10; Quo War., 11; Receiv., 1; Sales of Rds., 10.
East Line & R. R. R. So. *v.* Terry (50 Tex. 129), Attach., 53.
East London R. Co., In re (24 Q. B. D. 507), Em. Dom., 1186.
East London R. Co. *v.* London, B. & S. C. R. Co. (2 Ry. & C. T. Cas. 413), Leases, 131.
East London R. Co. *v.* Whitechurch (43 L. J. M. C. 159, 22 W. R. 665, L. R. 7, H. L. 81, 30 L. T. 412; reversing L. R. 7 Ex. 424, 42 L. J. M. C. 18, 27 L. T. 494, which reversed L. R. 7 Ex. 248, 41 L. J. M. C. 133, 26 L. T. 635, 20 W. R. 705), Tax., 369.
East London Union *v.* Metropolitan R. Co. (38 L. J. Ex. 225, L. R. 4 Ex. 309), Em. Dom., 1205.
Eastman *v.* Chicago & N. W. R. Co. (39 Fed. Rep. 552), Pat. for Inv., 16.
East N. Y. & J. R. Co. *v.* Elmore (5 Hun (N. Y.) 214), Officers, 15.
East N. Y. & J. R. Co. *v.* Lighthall (5 Abb. Pr. N. S. (N. Y.) 458, 36 How. Pr. 481, 6 Robt. 407), Pres., 1; Subscr., 19.
East Oakland Tp. *v.* Skinner (94 U. S. 255), Mun. Aid, 74.
Easton *v.* Dudley (45 Am. & Eng. R. Cas. 340, 78 Tex. 236, 14 S. W. Rep. 583), Stat. Agts., 3, 5.
Easton *v.* Houston & T. C. R. Co. (32 Fed. Rep. 893), Fel. Serv., 37, 290; Receiv., 142.
Easton *v.* Houston & T. C. R. Co. (32 Fed. Rep. 897), Charges, 45.
Easton *v.* Houston & T. C. R. Co. (39 Am. & Eng. R. Cas. 588, 38 Fed. Rep. 12), Mort., 111.
Easton *v.* Houston & T. C. R. Co. (38 Fed. Rep. 784), Receiv., 61.
Easton *v.* Houston & T. C. R. Co. (39 Fed. Rep. 65), Employés, Inj. to, 142; Fel. Serv., 381.
Easton *v.* Houston & T. C. R. Co. (40 Fed. Rep. 189), Mort., 156, 158.
Easton *v.* Houston & T. C. R. Co. (44 Fed. Rep. 718), Mort., 245.
Easton *v.* New York & L. B. R. Co. (9 Phila. (Pa.) 475), Bridges, 87.
Easton & A. R. Co. *v.* Greenwich (25 N. J. Eq. 565), Location, etc., 18; Sts. & H., 422.
Easton, S. E. & W. E. Pass. R. Co. *v.* Easton (43 Am. & Eng. R. Cas. 253, 133 Pa. St. 505, 19 Atl. Rep. 486), St. Rys., 266, 311.
Easton Transit Co., In re (2 Pa. Dist. 649), St. Rys., 101.
East Pa. R. Co. *v.* Hiester (40 Pa. St. 53), Em. Dom., 021, 638, 676.
East Pa. R. Co. *v.* Hottenstine (47 Pa. St. 28), Em. Dom., 698.
East Pa. R. Co. *v.* Schollenberger (54 Pa. St. 144), Em. Dom., 1, 155; Release, 29.
East River Bridge & C. I. Steam Transit Co., In re (26 Hun (N. Y.) 490, 10 Abb. N. Cas. 245; appeal dismissed in 92 N. Y. 644, mem.), Elev. Rys., 24.
East Saginaw City R. Co. *v.* Bohn (27 Mich. 503, 10 Am. Ry. Rep. 309), Children, Inj. to, 44, 116.
East Saginaw & St. C. R. Co. *v.* Benham (28 Mich. 459, 12 Am. Ry. Rep. 356), Em. Dom., 62, 299, 429, 545.
East St. Louis *v.* Lockhead (7 Ill. App. 83), Sts. & H., 249.
East St. Louis *v.* O'Flynn (119 Ill. 200, 10 N. E. Rep. 395), Sts. & H., 31.
East St. Louis & C. R. Co. *v.* Eisentraut (134 Ill. 96, 24 N. E. Rep. 760), Waters & W., 15.
East St. Louis & C. R. Co. *v.* Eisentraut (34 Ill. App. 563), Waters & W., 15.
East St. Louis & C. R. Co. *v.* Frazier (26 Ill. App. 437), Dam., 70.
East St. Louis & C. R. Co. *v.* Gerber (82 Ill. 632), Animals, 644, 645.
East St. Louis & C. R. Co. *v.* Nugent (147 Ill. 254, 35 N. E. Rep. 464), Adv. Poss., 8.
East St. Louis Connecting R. Co. *v.* Dwyer (41 Ill. App. 522), Death, etc., 291; Employes, Inj. to, 540.
East St. Louis Connecting R. Co. *v.* East St. Louis Union R. Co. (17 Am. & Eng. R. Cas. 163, 108 Ill. 265), Charters, 48; Par. & Comp. L., 4.
East St. Louis Connecting R. Co. *v.* Enright (47 Ill. App. 494), Employés, Inj. to, 555; Fel. Serv., 90, 365.
East St. Louis Connecting R. Co. *v.* O'Hara (49 Ill. App. 282), Sts. & H., 318, 326, 378.
East St. Louis Connecting R. Co. *v.* People (119 Ill. 182, 10 N. E. Rep. 397), Tax., 257, 350.
East St. Louis Connecting R. Co. *v.* Wabash, St. L. & P. R. Co. (24 Ill. App. 279; reversed on other grounds in 123 Ill. 594, 15 N. E. Rep. 45, 12 West. Rep. 834), Evid., 227.
East St. Louis Connecting R. Co. *v.* Wabash, St. L. & P. R. Co. (32 Am. & Eng. R. Cas. 522, 123 Ill. 594, 15 N. E. Rep. 45, 12 West. Rep. 834; reversing 24 Ill. App. 279), Car. of M., 94.
East St. Louis P. & P. Co. *v.* McElroy (29 Ill. App. 504), Employés, Inj. to, 96, 352.
East St. Louis Union R. Co. *v.* East St. Louis (39 Ill. App. 398), Sts. & H., 102.
East Tenn. & G. R. Co. *v.* Evans (6 Heisk. (Tenn.) 607), Abate., 7.
East Tenn. & G. R. Co. *v.* Montgomery (44 Ga. 278, 3 Am. Ry. Rep. 373), Car. of M., 613.
East Tenn. & G. R. Co. *v.* Nelson (1 Coldw. (Tenn.) 272), Car. of M., 57, 140; Parties, 5.
East Tenn. & G. R. Co. *v.* St. John (5 Sneed (Tenn.) 524), Negl., 11; Tresp., Inj. to, 74.
East Tenn. & G. R. Co. *v.* Whittle (27 Ga. 535), Car. of L. S., 6, 48.
East Tenn. & V. R. Co. *v.* Gammon (5 Sneed (Tenn.) 567), By-laws, 1; Subscr., 15, 36, 120.
East Tenn. & V. R. Co. *v.* Love (3 Head (Tenn.) 63), Em. Dom., 4, 369, 440.
East Tenn. & V. R. Co. *v.* Rogers (6

Heisk. (Tenn.) 143, 12 Am. Ry. Rep. 47), Car. of M., 603.
East Tenn. & V. R. Co. *v.* Swaney (5 Lea (Tenn.) 119), Tresp., Inj. to, 42.
East Tenn. & W. N. C. R. Co. *v.* Collins (85 Tenn. 227, 1 S. W. Rep. 883), Fel. Serv., 268, 270, 457.
East Tenn. & W. N. C. R. Co. *v.* Winters (85 Tenn. 240, 1 S. W. Rep. 790), Car. of P., 198; Death, etc., 312; New Tr., 101; Tresp., Inj. to, 123; Trial, 147, 188.
East Tenn., G. & V. R. Co. *v.* Henderson (1 Lea (Tenn.) 1), Animals, 319.
East Tenn., V. & G. R. Co. *v.* Aiken (89 Tenn. 245, 14 S. W. Rep. 1082), Comp. Neg., 24; Employés, Inj. to, 99.
East Tenn., V. & G. R. Co. *v.* Atlanta & F. R. Co. (49 Fed. Rep. 608), Actions, 6; Citizens., 3; Jurisd., 7; Receiv., 4, 40.
East Tenn., V. & G. R. Co. *v.* Baker (94 Ala. 632, 10 So. Rep. 211), Animals, 576.
East Tenn., V. & G. R. Co. *v.* Bayliss (19 Am. & Eng. R. Cas. 480, 74 Ala. 150), Animals, 52, 296, 423, 480; Lim. of Ac., 61; Negl., 54, 76.
East Tenn., V. & G. R. Co. *v.* Bayliss (22 Am. & Eng. R. Cas. 596, 75 Ala. 466), Animals, 34, 51, 62; Trial, 91.
East Tenn., V. & G. R. Co. *v.* Bayliss (77 Ala. 429, 54 Am. Rep. 69), Animals, 67.
East Tenn., V. & G. R. Co. *v.* Brumley (6 Am. & Eng. R. Cas. 356, 5 Lea (Tenn.) 401), Car. of M., 674.
East Tenn., V. & G. R. Co. *v.* Burnett (14 Am. & Eng. R. Cas. 370, 11 Lea (Tenn.) 525), Em. Dom., 763.
East Tenn., V. & G. R. Co. *v.* Burney (85 Ga. 635, 11 S. E. Rep. 1028), App., 89.
East Tenn., V. & G. R. Co. *v.* Carloss (77 Ala. 443), Animals, 332, 342, 391; Pl., 137.
East Tenn., V. & G. R. Co. *v.* Clark (19 Am. & Eng. R. Cas. 345, 74 Ala. 443), Cross., Inj. at, 221.
East Tenn., V. & G. R. Co. *v.* Conner (15 Lea (Tenn.) 254), Car. of P., 411.
East Tenn., V. & G. R. Co. *v.* Cox (57 Ga. 252), Husb. & W., 31.
East Tenn., V. & G. R. Co. *v.* Culler (75 Ga. 704), Animals, 490; New Tr., 23.
East Tenn., V. & G. R. Co. *v.* Davis (91 Ala. 615, 8 So. Rep. 349), Evid., 193; Witn., 106.
East Tenn., V. & G. R. Co. *v.* De Armond (86 Tenn. 73, 6 Am. St. Rep. 816, 5 S. W. Rep. 600), Fel. Serv., 108, 123, 200, 467.
East Tenn., V. & G. R. Co. *v.* Deaver (79 Ala. 216), Animals, 193; Car. of P., 202; Cross., Inj. at, 149, 168, 179.
East Tenn., V. & G. R. Co. *v.* Duffield (18 Am. & Eng. R. Cas. 35, 12 Lea (Tenn.) 63, 47 Am. Rep. 319), Employés, Inj. to, 437.
East Tenn., V. & G. R. Co. *v.* Duggan (51 Ga. 212, 6 Am. Ry. Rep. 195), Employés, Inj. to, 581; Fel. Serv., 171.
East Tenn., V. & G. R. Co. *v.* Eanes (8 Baxt. (Tenn.) 221), Death, etc., 250.
East Tenn., V. & G. R. Co. *v.* Fain (19 Am. Eng. R. Cas. 102, 12 Lea (Tenn.) 35), Negl., 47, 76; Tresp., Inj. to, 116, 126.
East Tenn., V. & G. R. Co. *v.* Feathers (15 Am. & Eng. R. Cas. 446, 10 Lea (Tenn.) 103), Cross., Inj. at, 106.
East Tenn., V. & G. R. Co. *v.* Fleetwood (90 Ga. 23, 15 S. E. Rep. 778), Assault, 13; Car. of P., 650; Trial, 20.
East Tenn., V. & G. R. Co. *v.* Frazier (139 U. S. 288, 11 Sup. Ct. Rep. 517; affirming 40 Am. & Eng. R. Cas. 358, 88 Tenn. 138, 12 S. W. Rep. 537), Mort., 8.
East Tenn., V. & G. R. Co. *v.* Gurley (17 Am. & Eng. R. Cas. 568, 12 Lea (Tenn.) 46), Car. of P., 166; Comp. Neg., 24; Contrib. Neg., 41, 44; Death, etc., 278; Employés, Inj. to, 45, 223, 225; Fel. Serv., 151, 497; New Tr., 4; Trial, 189.
East Tenn., V. & G. R. Co. *v.* Hale (27 Am. & Eng. R. Cas. 36, 85 Tenn. 69, 1 S. W. Rep. 620), Car. of M., 735, 761, 778.
East Tenn., V. & G. R. Co. *v.* Hamblen County (102 U. S. 273), Tax., 156.
East Tenn., V. & G. R. Co. *v.* Hartley (73 Ga. 5), Death, etc., 194, 239.
East Tenn., V. & G. R. Co. *v.* Hayes (83 Ga. 558, 10 S. E. Rep. 350), Release, 16.
East Tenn., V. & G. R. Co. *v.* Henderson (1 Lea (Tenn.) 1), Assign., 3.
East Tenn., V. & G. R. Co. *v.* Hesters (90 Ga. 11, 15 S. E. Rep. 828), Fires, 98, 218, 266, 289.
East Tenn., V. & G. R. Co. *v.* Holmes (58 Am. & Eng. R. Cas. 253, 97 Ala. 332, 12 So. Rep. 286), Car. of P., 411, 424, 425, 608.
East Tenn., V. & G. R. Co. *v.* Hughes (Ga.) (58 Am. & Eng. R. Cas. 373, 17 S. E. Rep. 949), Car. of P., 431.
East Tenn., V. & G. R. Co. *v.* Hull (41 Am. & Eng. R. Cas. 495, 88 Tenn. 33, 12 S. W. Rep. 419), Comp. Neg., 24.
East Tenn., V. & G. R. Co. *v.* Humphreys (15 Am. & Eng. R. Cas. 472, 12 Lea (Tenn.) 200), Cross., Inj. at, 207; Stat., 50; Tresp., Inj. to, 46; Trial, 162.
East Tenn., V. & G. R. Co. *v.* Hunt (15 Lea (Tenn.) 261), Car. of M., 377; Charges, 75; Trover, 12.
East Tenn., V. & G. R. Co. *v.* Hyde (89 Ga. 721, 15 S. E. Rep. 621), App., 125.
East Tenn., V. & G. R. Co. *v.* Johnson (85 Ga. 497, 11 S. E. Rep. 809), Car. of M., 646, 648, 742; Witn., 94.
East Tenn., V. & G. R. Co. *v.* Johnston (22 Am. & Eng. R. Cas. 437, 75 Ala. 596, 51 Am. Rep. 489), Car. of L. S., 9, 21, 41, 65, 144, 148, 156.
East Tenn., V. & G. R. Co. *v.* Kelly (55 Am. & Eng. R. Cas. 621, 91 Tenn. 699, 20 S. W. Rep. 312), Car. of M., 334, 350, 758.
East Tenn., V. & G. R. Co. *v.* King (88 Ga. 443, 14 S. E. Rep. 708), Eject. Pass., 27; Trial, 132.
East Tenn., V. & G. R. Co. *v.* King (31 Am. & Eng. R. Cas. 385, 81 Ala. 177, 2 So. Rep. 152), Cross., Inj. at, 141; Death, etc., 363; Tresp., Inj. to, 48, 94.
East Tenn., V. & G. R. Co. *v.* Kornegay (92 Ala. 328, 9 So. Rep. 557), Stat. & D., 115.
East Tenn., V. & G. R. Co. *v.* Lee (90 Tenn. 570, 18 S. W. Rep. 268), App., 49, 82.
East Tenn., V. & G. R. Co. *v.* Lewis (89

Tenn. 235, 14 S. W. Rep. 603), Employés, Inj. to, 499.
East Tenn., V. & G. R. Co. *v.* Lilly (49 Am. & Eng. R. Cas. 495, 90 Tenn. 563, 18 S. W. Rep. 243), Abate., 4; Death, etc., 33.
East Tenn., V. & G. R. Co. *v.* Lockhart (79 Ala. 315), Car. of P., 612, 623, 624; Dam., 9, 72.
East Tenn., V. & G. R. Co. *v.* McKeney (Tenn.) (1 S. W. Rep. 500), Fel. Serv., 482.
East Tenn., V. & G. R. Co. *v.* McKnight (15 Lea (Tenn.) 336), Employés, 19.
East Tenn., V. & G. R. Co. *v.* Mahoney (89 Tenn. 311, 15 S. W. Rep. 652), Name, 4; New Tr., 99.
East Tenn., V. & G. R. Co. *v.* Maloy (31 Am. & Eng. R. Cas. 352, 77 Ga. 237, 2 S. E. Rep. 941), Death, etc., 89; Employés, Inj. to, 10, 336, 625, 634; Evid., 162, 165.
East Tenn., V. & G. R. Co. *v.* Markens (88 Ga. 60, 13 S. E. Rep. 855), Cross., Inj. at, 153, 216; Imp. Neg., 4.
East Tenn., V. & G. R. Co. *v.* Massengill (15 Lea (Tenn.) 328), Car. of P., 227.
East Tenn., V. & G. R. Co. *v.* Matthews (85 Ga. 457, 11 S. E. Rep. 841), Constr. Rys., 24.
East Tenn., V. & G. R. Co. *v.* Mitchell (11 Heisk. (Tenn.) 400), Car. of P., 6, 139, 582; Death, etc., 393.
East Tenn., V. & G. R. Co. *v.* Perkins (88 Ga. 1, 13 S. E. Rep. 952), Employés, Inj. to, 103, 182.
East Tenn., V. & G. R. Co. *v.* Pratt (85 Tenn. 9, 1 S. W. Rep. 618), Death, etc., 136; Tresp., Inj. to, 46.
East Tenn., V. & G. R. Co. *v.* Rush (15 Lea (Tenn.) 145), Employés, Inj. to, 300, 321; Fel. Serv., 198, 199, 269.
East Tenn., V. & G. R. Co. *v.* Scales (2 Lea (Tenn.) 688), Animals, 52; Sts. & H., 296.
East Tenn., V. & G. R. Co. *v.* Selcer (7 Lea (Tenn.) 557), Animals, 68.
East Tenn., V. & G. R. C. *v.* Sellers (85 Ga. 853, 11 S. E. Rep. 543), Injunc., 13.
East Tenn., V. & G. R. Co. *v.* Smith (15 Am. & Eng. R. Cas. 224, 9 Lea (Tenn.) 685), Employés, Inj. to, 95, 243.
East Tenn., V. & G. R. Co. *v.* Smith (89 Tenn. 114, 14 S. W. Rep. 1077), Employés, Inj. to, 415; Fel. Serv., 504.
East Tenn., V. & G. R. Co. *v.* Smith (90 Ga. 558, 16 S. E. Rep. 950), New Tr., 103.
East Tenn., V. & G. R. Co. *v.* Southern Tel. Co. (112 U. S. 306, 5 Sup. Ct. Rep. 168), Em. Dom., 401; Fed. Cts., 18.
East Tenn., V. & G. R. Co. *v.* Staub (7 Lea (Tenn.) 397), Contr., 18; Dam., 57; Employés, 8.
East Tenn., V. & G. R. Co. *v.* Stewart (21 Am. & Eng. R. Cas. 614, 13 Lea (Tenn.) 432), Employés, Inj. to, 592, 595, 604; Words & Ph., 197.
East Tenn., V. & G. R. Co. *v.* Suddeth (86 Ga. 388, 12 S. E. Rep. 682), Employés, Inj. to, 14, 625; Jurisd., 10.
East Tenn., V. & G. R. Co. *v.* Swaney (5 Lea (Tenn.) 119), Sts. & H., 296.
East Tenn., V. & G. R. Co. *v.* Telford (89 Tenn. 293, 14 S. W. Rep. 776), Em. Dom., 130, 131, 147.
East Tenn., V. & G. R. Co. *v.* Thompson (94 Ala. 636, 10 So. Rep. 280), Employés, Inj. to, 84; Evid., 89, 161.
East Tenn., V. & G. R. Co. *v.* Toppins (11 Am. & Eng. R. Cas. 222, 10 Lea (Tenn.) 58), Death, etc., 394; Employés, Inj. to, 53, 352.
East Tenn., V. & G. R. Co. *v.* Turvaville (97 Ala. 122, 12 So. Rep. 63), Employés, Inj. to, 30, 515.
East Tenn., V. & G. R. Co. *v.* Warmack (86 Ga. 351, 12 S. E. Rep. 813), App., 66; Trial, 171.
East Tenn., V. & G. R. Co. *v.* Watson (90 Ala. 41, 7 So. Rep. 813), Animals, 65, 332, 392, 576; Evid., 231; Witn., 70, 105, 110.
East Tenn., V. & G. R. Co. *v.* Watters (77 Ga. 69), Animals, 78.
East Tenn., V. & G. R. Co. *v.* White (8 Am. & Eng. R. Cas. 65, 5 Lea (Tenn.) 540), Dam., 91; Tresp., Inj. to, 46.
East Tenn., V. & G. R. Co. *v.* Wright (76 Ga. 532), Bills of L., 102; Car. of M., 624; Tender, 2; Witn., 141.
Eatman *v.* New Orleans Pac. R. Co. (35 La. Ann. 1018), Cat.-Gds., 22; Costs, 5.
Eaton *v.* Aspinwall (19 N. Y. 119; affirming 6 Duer 176), Stockh., 63.
Eaton *v.* Boston & L. R. Co. (11 Allen (Mass.) 500), Car. of P., 556; Imp. Neg., 12; Stat., 54.
Eaton *v.* Boston, C. & M. R. Co. (51 N. H. 504, 1 Am. Ry. Rep. 44), Em. Dom., 171, 687, 993; Release, 29.
Eaton *v.* Cleveland, St. L. & K. C. R. Co. (41 Fed. Rep. 421), Liens, 42.
Eaton *v.* Delaware, L. & W. R. Co. (57 N. Y. 382, 7 Am. Ry. Rep. 67), Car. of P., 581; Conduct., 2.
Eaton *v.* Erie R. Co. (51 N. Y. 544, 5 Am. Ry. Rep. 524), Sts. & H., 386, 387.
Eaton *v.* European & N. A. R. Co. (59 Me. 520), Em. Dom., 51, 895; Indep. Contr., 16, 22; Location, etc., 14; Officers, 10.
Eaton *v.* Farmer (46 N. H. 200), Crim. L., 27.
Eaton *v.* Fitchburg R. Co. (2 Am. & Eng. R. Cas. 183, 129 Mass. 364), Cross., Inj. at, 72.
Eaton *v.* Neumark (37 Fed. Rep. 375; affirming 33 Fed. Rep. 891), Car. of M., 214.
Eaton *v.* Oregon R. & N. Co. (45 Am. & Eng. R. Cas. 481, 19 Oreg. 371, 24 Pac. Rep. 413), Animals, 351, 447, 463.
Eaton *v.* Oregon R. & N. Co. (43 Am. & Eng. R. Cas. 57, 24 Pac. Rep. 415, 19 Oreg. 391), Animals, 644; Fires, 107; Pl., 175.
Eaton *v.* St. Louis, I. M. & S. R. Co. (12 Mo. App. 386), Car. of M., 222.
Eaton & H. R. Co. *v.* Hunt (20 Ind. 457), For. Corp., 15; Mort., 163.
Eaton & H. R. Co. *v.* Varnum (10 Ohio St. 622), App., 12.
Eau Claire Board of Trade *v.* Chicago, M. & St. P. R. Co. (5 Int. Com. Com. 264, 4 Int. Com. Rep. 65), Int. Com., 53, 66, 68.
Eberhardt *v.* Pennsylvania Co. (15 Ill. App. 541), Injunc., 43.

Ebersole *v.* Northern C. R. Co. (23 Hun (N. Y.) 114), Trial, 196.
Ebright *v.* Mineral R. & M. Co. (Pa.) (15 Atl. Rep. 709), Negl., 19, 72.
Eby *v.* Northern Pac. R. Co. (13 Phila. (Pa.) 144), Jurisd., 4.
Eby *v.* Northern Pac. R. Co. (13 Phila. (Pa.) 161), Rem. of C., 7.
Eccles *v.* Union Pac. R. Co. (48 Am. & Eng. R. Cas. 38, 7 Utah 335, 26 Pac. Rep. 924), Release, 17.
Eccleshill Local Board, In re (L. R. 13 Ch. D. 365, 49 L. J. Ch. 214, 28 W. R. 536), Em. Dom., 1200.
Ecclesiastical Com'rs *v.* London & S. W. R. Co. (14 C. B. 743, 18 Jur. 911, 23 L. J. C. P. 177), Em. Dom., 1106.
Ecclesiastical Com'rs for England *v.* Northeastern R. Co. (L. R. Ch. D. 845, 36 L. T. 174), Mines, etc., 12.
Ecclesiastical Com'rs for England *v.* Northeastern R. Co. (47 L. J. Ch. D. 20), Consol., 45.
Echols *v.* Louisville & N. R. Co. (42 Am. & Eng. R. Cas. 454, 90 Ala. 366, 7 So. Rep. 655), Car. of M., 760, 761.
Echols *v.* New Orleans, J. & G. N. R. Co. (52 Miss. 610), Contr., 28, 72.
Ecker *v.* Chicago, B. & Q. R. Co. (1 Am. & Eng. R. Cas. 357, 8 Mo. App. 223), Agency, 11; Leases, 53, 82, 87.
Eckerd *v.* Chicago & N. W. R. Co. (27 Am. & Eng. R. Cas. 114, 70 Iowa 353, 30 N. W. Rep. 615), Car. of P., 409; Dam., 90.
Eckert *v.* Long Island R. Co. (57 Barb. (N. Y.) 555; affirmed in 43 N. Y. 502), Car. of P., 345; Contrib. Neg., 33.
Eckert *v.* Long Island R. Co. (43 N. Y. 502; affirming 57 Barb. 555), Death, etc., 177.
Eckert *v.* St. Louis, I. M. & S. R. Co. (13 Mo. App. 352; affirmed on another point sub nom. in Bergman *v.* St. Louis, I. M. & S. R. Co. 88 Mo. 678), Evid., 54; Witn., 177.
Eckert *v.* St. Louis T. Co. (2 Mo. App. 36), Agency, 75; Contrib. Neg., 16.
Eckfelt *v.* Starr (5 Phila. (Pa.) 497), Injunc., 7.
Ecliff *v.* Wabash, St. L. & P. R. Co. (64 Miss. 196, 31 N. W. Rep. 180), Children, Inj. to, 100, 106; Contrib. Neg., 87; Tresp., Inj. to, 12.
Eclipse Tow-boat Co. *v.* Pontchartrain R. Co. (24 La. Ann. 1), Contr., 62.
Eddy *v.* Adams (Tex.) (18 S. W. Rep. 490), Employés, Inj. to, 127.
Eddy *v.* Elliott (4 Tex. App. (Civ. Cas.) 248, 15 S. W. Rep. 41), Eject. Pass., 5.
Eddy *v.* Harris (47 Am. & Eng. R. Cas. 473, 78 Tex. 661, 15 S. W. Rep. 107), Car. of P., 642; Tickets & F., 74.
Eddy *v.* Kinney (60 Vt. 554, 15 Atl. Rep. 198), Animals, 239.
Eddy *v.* Lafayette (49 Fed. Rep. 798, 4 U. S. App. 243, 1 C. C. A. 432), Animals, 16, 480.
Eddy *v.* Lafayette (49 Fed. Rep. 807, 4 U. S. App. 247, 1 C. C. A. 441), Fires, 44, 61, 62, 144, 194, 257, 265, 304, 347, 348; Receiv., 124, 133.
Eddy *v.* Letcher (57 Fed. Rep. 115), Death, etc., 75.
Eddy *v.* Ottawa City Pass. R. Co. (31 U. C. Q. B. 569), St. Rys., 177.
Eddy *v.* People (127 Ill. 428, 20 N. E. Rep. 83), Mun. Aid, 242, 317.
Eddy *v.* Powell (49 Fed. Rep. 814, 4 U. S. App. 259, 1 C. C. A. 448), Cross., Inj. at, 309; Pl., 146.
Eddy *v.* Rider (79 Tex. 53), Car. of P., 60, 61; Cross. Rys., 78.
Eddy *v.* Still (3 Tex. Civ. App. 346, 22 S. W. Rep. 525), App., 81; Stat. & D., 142.
Eddy *v.* Wallace (52 Am. & Eng. R. Cas. 265, 49 Fed. Rep. 801, 4 U. S. App. 264, 1 C. C. A. 435), Car. of P., 260, 291; Contrib. Neg., 101; Dam., 45.
Eden *v.* Lexington & F. R. Co. (14 B. Mon. (Ky.) 165), Death, etc., 1.
Edens *v.* Hannibal & St. J. R. Co. (5 Am. & Eng. R. Cas. 459, 72 Mo. 212), App., 52; Pl., 24.
Edenville *v.* Chicago, M. & St. P. R. Co. (77 Iowa 69, 41 N. W. Rep. 568), Cross., St. & H., 11.
Edgar *v.* Castello (14 So. Car. 20), Death, etc., 45.
Edgar *v.* Northern R. Co. (22 Am. & Eng. R. Cas. 433, 11 Ont. App. 452; affirming 4 Ont. 201), Car. of P., 420.
Edgerton *v.* New York & H. R. Co. (39 N. Y. 227; affirming 35 Barb. 389), Car. of P., 287.
Edgewood R. Co.'s Appeal (79 Pa. St. 257), Branch & L. Roads, 4; Em. Dom., 178.
Edinburgh & G. R. Co. *v.* Campbell (9 L. T. 151), Bridges, 16, 38.
Edinburgh & G. R. Co. *v.* Stirling & D. R. Co. (15 Sc. Sess. Cas. (2d Series) 48, 2 Ry. & C. T. Cas. 21), Stat., 48.
Edinburgh & L. R. Co. *v.* Dawson (7 D. P. C. 573, 1 W., W. & H. 561, 3 Jur. 55), Costs, 6.
Edinburgh, P. & D. R. Co. *v.* Philip (2 Macq. H. L. Cas. 514, 3 Jur. N. S. 249), Branch & L. Roads, 3; Contr., 2; Vend. & P., 3.
Edinburgh St. Tramways Co. *v.* Black (L. R. 2 Sc. App. Cas. 336), Tramw., 1.
Edinburgh St. Tramways Co. *v.* Torbain (L. R. 3 App. Cas. 58, 37 L. T. 288), Tramw., 5.
Edmonds *v.* Baltimore & P. R. Co. (20 Am. & Eng. R. Cas. 38, 114 U. S. 453, 5 Sup. Ct. Rep. 1098), Sts. & H., 37.
Edmunds *v.* Merchants' Despatch Transp. Co. (16 Am. & Eng. R. Cas. 250, 135 Mass. 283), Car. of M., 261.
Edmunds *v.* St. Louis R. Co. (3 Mo. App. 603), Dam., 30, 105; Evid., 211; Negl., 102.
Edmundson, In re (17 Q. B. 67), Em. Dom., 1166.
Edmundson *v.* Pittsburg, M. & Y. R. Co. (23 Am. & Eng. R. Cas. 423, 111 Pa. St. 316, 2 Atl. Rep. 404), Em. Dom., 373; Indep. Contr., 20.
Edridge *v.* Rochester City & B. R. Co. (54 Hun 194, 26 N. Y. S. R. 909, 7 N. Y. Supp. 439), Estop., 13.
Edrington *v.* Louisville, N. O. & T. R. Co. (41 La. Ann. 96, 6 So. Rep. 19), Fires, 35.

Edsall *v.* Camden & A. R. & T. Co. (50 N. Y. 661, mem.), Lim. of Liab., 43.
Edson *v.* Central R. Co. (40 Iowa 47, 8 Am. Ry. Rep. 412), Animals, 49, 536.
Edwards *v.* Cameron's C., etc., R. Co. (16 Q. B. 336, note, 6 Exch. 269), Bills & N., 5.
Edwards *v.* Cheraw & D. R. Co. (32 So. Car. 117, 10 S. E. Rep. 822), Car. of M., 259, 740.
Edwards *v.* Chicago, R. I. & P. R. Co. (76 Mo. 399), Animals, 630.
Edwards *v.* Grand Junction R. Co. (7 Sim. 337; affirmed on appeal in 1 M. & C. 650, 6 L. J. Ch. 47), Incorp., 6.
Edwards *v.* Grand Trunk R. Co. (48 Me. 379), Contr., 14.
Edwards *v.* Grand Trunk R. Co. (54 Me. 105), Contr., 14.
Edwards *v.* Great Western R. Co. (11 C. B. 588, 21 L. J. C. P. 72, 20 Ry. & C. T. Cas. 16), Actions, 5; Charges, 30, 116; Charters, 119; Discrim., 13, 55; Int., 1.
Edwards *v.* Great Western R. Co. (12 C. B. 419), Costs, 11.
Edwards *v.* Hannibal & St. J. R. Co. (66 Mo. 567), Animals, 86, 299; Fences, 54.
Edwards *v.* Kansas City, St. J. & C. B. R. Co. (74 Mo. 117), Animals, 368; Cat.-Gds., 15.
Edwards *v.* Kilkenny & G. S. & W. R. Co. (1 C. B. N. S. 409), Stockh., 29.
Edwards *v.* Lake Shore & M. S. R. Co. (81 Mich. 364, 45 N. W. Rep. 827), Tickets & F., 79.
Edwards *v.* London & N. W. R. Co. (L. R. 5 C. P. 445, 39 L. J. C. P. 241, 18 W. R. 834, 22 L. T. N. S. 656), Agency, 95.
Edwards *v.* Marcy (2 Aller (Mass.) 486), Trial, 106.
Edwards *v.* Midland R. Co. (1 Am. & Eng. R. Cas. 571, L. R. 6 Q. B. D. 287, 50 L. J. Q. B. D. 281, 43 L. T. 694, 29 W. R. 609), Corp., 5; Mal. Pros., 3.
Edwards *v.* People (88 Ill. 340), Mun. Aid, 138, 207.
Edwards *v.* Philadelphia & R. R. Co. (148 Pa. St. 531, 23 Atl. Rep. 894), Animals, 229.
Edwards *v.* Union Bank (1 Fla. 158), Trial, 10.
Edwards *v.* White Line Transit Co. (104 Mass. 159), Car. of M., 296.
Edwards *v.* Williamson (16 Am. & Eng. R. Cas. 668, 70 Ala. 145), Mun. Aid, 406.
Edwardsville R. Co. *v.* Sawyer (92 Ill. 377), Ejectm., 9.
Eells *v.* Johann (27 Fed. Rep. 327), Judgm., 50.
Eells *v.* St. Louis, K. & N. W. R. Co. (55 Am. & Eng. R. Cas. 339, 52 Fed. Rep. 903), Car. of L. S., 87; Fed. Cts., 15; Lim. of Liab., 27.
Eel River & E. R. Co. *v.* Field (22 Am. & Eng. R. Cas. 91, 67 Cal. 429, 7 Pac. Rep. 814), Em. Dom., 61.
Eels *v.* American T. & T. Co. (65 Hun 516, 20 N. Y. Supp. 600), Em. Dom., 163.
Egan *v.* Chicago, M. & St. P. R. Co. (53 Fed. Rep. 675), Rem. of C., 49.
Egan *v.* Forty-second St., M. & St. N. A. R. Co. (4 N. Y. Supp. 530, 19 N. Y. S. R. 676), St. Rys., 179.
Egbert *v.* Lake Shore & M. S. R. Co. (56 Am. & Eng. R. Cas. 648, 6 Ind. App. 350, 33 N. E. Rep. 659), Sts. & H., 142, 157.
Egerer *v.* New York C. & H. R. R. Co. (50 Am. & Eng. R. Cas. 228, 130 N. Y. 108, 29 N. E. Rep. 95, 41 N. Y. S. R. 488; reversing 49 Hun 605, 17 N. Y. S. R. 225, 2 N. Y. Supp. 69), Sts. & H., 212.
Eggers *v.* Manhattan R. Co. (42 N. Y. S. R. 123, 27 Abb. N. Cas. 463, 18 N. Y. Supp. 181, 21 Civ. Pro. 403), Elev. Rys., 171.
Egginton *v.* Pearl (33 L. T. 428), Tramw., 5.
Eggleston *v.* Gulf, C. & S. F. R. Co. (4 Tex. App. (Civ. Cas.) 501, 18 S. W. Rep. 137), New Tr., 88.
Eggleston *v.* New York & H. R. Co. (35 Barb. (N. Y.) 162), License, 17.
Eggmann *v.* St. Louis, A. & T. H. R. Co. (47 Ill. App. 507), Tresp., Inj. to, 10, 29, 40, 51.
Ehret *v.* Kansas City, St. J. & C. B. R. Co. (20 Mo. App. 251), Animals, 127, 548.
Ehret *v.* Schuylkill River E. S. R. Co. (151 Pa. St. 158, 24 Atl. Rep. 1068), Em. Dom., 255, 609.
Ehrisman *v.* East Harrisburg City Pass. R. Co. (51 Am. & Eng. R. Cas. 190, 150 Pa. St. 180, 24 Atl. Rep. 596, 30 W. N. C. 373, 23 Pittsb. L. J. N. S. 73, 9 Lanc. L. Rev. 356), Cross., Inj. at, 232, 262, 277; Elec. Rys., 32.
Ehrman *v.* Brooklyn City R. Co. (38 N. Y. S. R. 990, 60 Hun 580, 14 N. Y. Supp. 336; affirmed in 131 N. Y. 576, mem., 42 N. Y. S. R. 948), Children, Inj. to, 63; New Tr., 79.
Eichelburger *v.* Pittsburg, C. & St. L. R. Co. (Ohio) (9 Am. & Eng. R. Cas. 158), Attach., 37; Evid., 132.
Eichels *v.* Evansville St. R. Co. (5 Am. & Eng. R. Cas. 274, 78 Ind. 261, 41 Am. Rep. 561), St. Rys., 7, 15, 22, 211.
Eighme *v.* Rome, W. & O. R. Co. (32 N. Y. S. R. 757, 10 N. Y. Supp. 600, 57 Hun 586), Fires, 73.
Eilert *v.* Green Bay & M. R. Co. (48 Wis. 606, 4 N. W. Rep. 769), Cross., Inj. at, 258, 338.
Eisenberg *v.* Missouri Pac. R. Co. (33 Mo. App. 85), Evid., 234; Licensees, Inj. to, 11.
Ekman *v.* Minneapolis St. R. Co. (34 Minn. 24, 24 N. W. Rep. 291), Pl., 24.
Ela *v.* American Merchants' U. Exp. Co. (29 Wis. 611), Bills of L., 115; Car. of M., 714; Exp. Cos., 48, 81.
Elder *v.* Charlotte, C. & A. R. Co. (13 So. Car. 279), Charges, 37.
Eldon Tp. *v.* Toronto & N. R. Co. (24 Grant's Ch. (U. C.) 396), Mun. Aid, 267.
Eldred *v.* Sexton (19 Wall. (U. S.) 189), Pub. Lds., 17.
Eldredge *v.* Atlas Steamship Co. (28 N. Y. S. R. 501, 8 N. Y. Supp. 433), Employés, Inj. to, 716.
Eldridge *v.* Long Island R. Co. (1 Sandf. (N. Y.) 89), Car. of P., 542; Negl., 89.

Eldridge *v.* Minneapolis & St. L. R. Co. (21 Am. & Eng. R. Cas. 494, 32 Minn. 253, 20 N. W. Rep. 151), Derailm., 6.
Eldridge *v.* Smith (34 Vt. 484), Em. Dom., 62, 187, 190; Mort., 13, 20.
Electric Imp. Co. *v.* San Jose & S. C. R. Co. (Cal.) (31 Pac. Rep. 455), Constr. Rys., 112.
Electric R. Co. *v.* Common Council (84 Mich. 257, 47 N. W. Rep. 567), Elec. Rys., 11.
Electric R. Signal Co. *v.* Hall R. Signal Co. (114 U. S. 87, 5 Sup. Ct. Rep. 1069), Pat. for Inv., 16.
Elfelt *v.* Stillwater St. R. Co. (53 Minn. 68, 55 N. W. Rep. 116), St. Rys., 191.
Elgin *v.* Baltimore & O. R. Co. (74 Md. 61, 21 Atl. Rep. 688), Contr., 44.
Elgin Canning Co. *v.* Atchison, T. & S. F. R. Co. (24 Fed. Rep. 866), For. Corp., 18.
Elgin, J. & E. R. Co. *v.* Fletcher (39 Am. & Eng. R. Cas. 120, 128 Ill. 619, 21 N. E. Rep. 577), Em. Dom., 576, 694.
Elgin, J. & E. R. Co. *v.* Raymond (47 Ill. App. 242; affirmed on other grounds in 148 Ill. 241, 35 N. E. Rep. 729), Children, Inj. to, 166.
Elgin, J. & E. R. Co. *v.* Raymond (148 Ill. 241, 35 N. E. Rep. 729; affirming on other grounds 47 Ill. App. 242), Children, Inj. to, 166, 173; Cross., Inj. at, 38, 203, 338; Negl., 28; Trial, 165.
Elham Valley R. Co., In re (38 L. T. 501, 26 W. R. 606), Direct., 3.
Eliason *v.* Coleman (9 Am. & Eng. R. Cas. 433, 86 N. Car. 235), Officers, 10.
Elizabeth *v.* Central R. Co. (53 N. J. L. 491, 22 Atl. Rep. 47), Land Grants, 123.
Elizabethtown *v.* Chesapeake, O. & S. W. R. Co. (Ky.) (22 S. W. Rep. 609), Mun. Aid, 230; Sales of Rds., 13.
Elizabethtown & P. R. Co. *v.* Elizabethtown (12 Bush (Ky.) 233), Fixt., 9; Tax., 141, 144, 303; Words & Ph., 179.
Elizabethtown & P. R. Co. *v.* Geoghegan (9 Bush (Ky.) 56), Constr. Rys., 35; Dam., 39.
Elizabethtown & P. R. Co. *v.* Helm (8 Bush (Ky.) 681), Em. Dom., 57, 434, 452, 666, 669; Witn., 127.
Elizabethtown & P. R. Co. *v.* Pottinger (10 Bush (Ky.) 185), Constr. Rys., 120; Dam., 49.
Elizabethtown & P. R. Co. *v.* Thompson (14 Am. & Eng. R. Cas. 111, 79 Ky. 52), Sts. & H., 136, 142.
Elizabethtown Gas Light Co. *v.* Green (36 N. J. Eq. 118, 18 Atl. Rep. 844), Franch., 9.
Elizabethtown, L. & B. S. R. Co. *v.* Carter County (Ky.) (18 S. W. Rep. 370), Mun. Aid, 414.
Elizabethtown, L. & B. S. R. Co. *v.* Combs (10 Bush (Ky.) 382), Dam., 48; Sts. & H., 133, 274, 284, 287.
Elkhorn L. & T. L. Co. *v.* Dixon County (35 Neb. 426, 53 N. W. Rep. 382), Tax., 121, 271.
Elkins *v.* Boston & A. R. Co. (115 Mass. 190, 7 Am. Ry. Rep. 456), Cross., Inj. at, 267, 274; Evid., 27; Trial, 197; Witn., 40.
Elkins *v.* Boston & M. R. Co. (19 N. H. 337), Bailm., 6; Car. of M., 202, 706.
Elkins *v.* Boston & M. R. Co. (23 N. H. 275), Car. of M., 5; 67; Evid., 1.
Elkins *v.* Camden & A. R. Co. (9 Am. & Eng. R. Cas. 590, 36 N. J. Eq. 5), Consol., 1; Stockh., 102.
Elkins *v.* Camden & A. R. Co. (9 Am. & Eng. R. Cas. 639, 36 N. J. Eq. 233), Divid., 8.
Elkins *v.* Camden & A. R. Co. (11 Am. & Eng. R. Cas. 579, 36 N. J. Eq. 241), Direct., 56.
Elkins *v.* Camden & A. R. Co. (36 N. J. Eq. 467; affirmed in 37 N. J. Eq. 273), Direct., 15.
Elkins *v.* Empire Transp. Co. (81 Pa. St. 315), Bills of L., 84.
Ell *v.* Northern Pac. R. Co. (48 Am. & Eng. R. Cas. 318, 1 N. Dak. 336), Dam., 109; Fel. Serv., 1, 73, 76, 103, 198, 201, 309.
Elledge *v.* National City & O. R. Co. (100 Cal. 282, 34 Pac. Rep. 720), Employés, Inj. to, 44, 93; Evid., 174; Fel. Serv., 213, 214.
Ellerman *v.* Chicago J. R. & U. S. Co. (49 N. J. Eq. 217, 23 Atl. Rep. 287), Contr., 1, 61; Corp., 5; Direct., 59; Guar., 8; Incorp., 2; Ult. Vir., 1.
Ellet *v.* St. Louis, K. C. & N. R. Co. (12 Am. & Eng. R. Cas. 183, 76 Mo. 518), Car. of P., 176; Culverts, 14; Drains, 3; Negl., 88; Pl., 169.
Ellicottville & G. V. Plank Road Co. *v.* Buffalo & P. R. Co. (20 Barb. (N. Y.) 644), Em. Dom., 371; Sts. & H., 118; Turnp., 6.
Elling *v.* Thexton (7 Mont. 330, 16 Pac. Rep. 931), Evid., 98; Northern Pac. R. Co., 3.
Ellinger *v.* Missouri Pac. R. Co. (112 Mo. 525, 20 S. W. Rep. 800), Rip. Rts., 12.
Ellinger *v.* Philadelphia, W. & B. R. Co. (58 Am. & Eng. R. Cas. 429, 153 Pa. St. 213, 25 Atl. Rep. 1132), Car. of P., 129, 133, 249, 325.
Elliot *v.* Chicago, M. & St. P. R. Co. (38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 41 N. W. Rep. 758, 3 L. R. A. 363), Death, etc., 230; Employés, Inj. to, 326; Fel. Serv., 254.
Elliot *v.* Concord (27 N. H. 204), Sts. & H., 364.
Elliot *v.* Fair Haven & W. R. Co. (32 Conn. 579), St. Rys., 191.
Elliot *v.* Fitchburg R. Co. (10 Cush. (Mass.) 191), Waters & W., 18.
Elliot *v.* Northeastern R. Co. (10 H. L. Cas. 333, 9 Jur. N. S. 555, 32 L. J. Ch. 402, 11 W. R. 604, 8 L. T. 337), Deeds, 23; Mines, etc., 3, 9.
Elliott *v.* Buffalo & L. H. R. Co. (16 U. C. Q. B. 289), Stat., 39.
Elliott *v.* Canadian Pac. R. Co. (12 Ont. Pr. 593), Death, etc., 250.
Elliott *v.* Chicago, M. & St. P. R. Co. (150 U. S. 245, 14 Sup. Ct. Rep. 85), Trial, 183.
Elliott *v.* East Pa. R. Co. (99 U. S. 573), Rev., 9.
Elliott *v.* Hannibal & St. J. R. Co. (66 Mo. 683), Animals, 99, 299.
Elliott *v.* New York C. & H. R. R. Co. (53 Hun 78, 24 N. Y. S. R. 835, 6 N. Y. Supp. 363), Eject. Pass., 41.

Elliott *v.* New York C. & H. R. R. Co. (33 N. Y. S. R. 861, 11 N. Y. Supp. 691), Car. of P., 338, 341.
Elliott *v.* St. Louis & I. M. R. Co. (67 Mo. 272), Employés, Inj. to, 136.
Elliott *v.* South Devon R. Co. (5 Railw. Cas. 500, 2 Ex. 725, 17 L. J. Ex. 262), Words & Ph., 233.
Elliott *v.* Western & A. R. Co. (58 Ga. 454), Eject. Pass., 127.
Elliott Nat. Bank *v.* Western & A. R. Co. 2 Lea (Tenn.) 676), Bills & N., 12.
Ellis *v.* Boston, H. & E. R. Co. (107 Mass. 1), Bank'cy, 11; Mort., 83; Officers, 2; Receiv., 49.
Ellis *v.* Central Pac. R. Co. (5 Nev. 255), Agency, 45.
Ellis *v.* Great Western R. Co. (L. R. 9 C. P. 551, 43 L. J. C. P. 304, 31 L. T. 874), Cross., Inj. at, 160.
Ellis *v.* Hilton (78 Mich. 150, 6 L. R. A. 454, 43 N. W. Rep. 1048), Animals, 582.
Ellis *v.* Houston (4 N. Y. Supp. 732), Employés, Inj. to, 329.
Ellis *v.* Hulse (L. R. 23 Q. B. D. 24), Words & Ph., 124.
Ellis *v.* Kansas City, St. J. & C. B. R. Co. (63 Mo. 131, 20 Am. Ry. Rep. 411), Nuis., 6.
Ellis *v.* Kyger (90 Mo. 600, 3 S. W. Rep. 23), Deeds, 31, 35.
Ellis *v.* Lake Shore & M. S. R. Co. (138 Pa. St. 506, 21 Atl. Rep. 140), Cross., Inj. at, 180, 244; Trial, 120.
Ellis *v.* London & S. W. R. Co. (2 H. & N. 424, 3 Jur. N. S. 1008, 26 L. J. Ex. 349), Animals, 288; Tresp., 1.
Ellis *v.* Louisville & N. R. Co. (8 Baxt. (Tenn.) 530), Tax., 46.
Ellis *v.* Milwaukee City R. Co. (27 Am. & Eng. R. Cas. 77, 67 Wis. 135, 30 N. W. Rep. 218, 58 Am. Rep. 858), St. Rys., 260.
Ellis *v.* Missouri Pac. R. Co. (83 Mo. 372), Animals, 631.
Ellis *v.* New York, L. E. & W. R. Co. (17 Am. & Eng. R. Cas. 641, 95 N. Y. 546; reversing 29 Hun 278), Employés, Inj. to, 111; Fel. Serv., 56, 64.
Ellis *v.* Northern Pac. R. Co. (77 Wis. 114, 45 N. W. Rep. 811), Mun. Aid, 252.
Ellis *v.* Northern Pac. R. Co. (80 Wis. 459, 50 N. W. Rep. 397; former appeal 77 Wis. 114, 45 N. W. Rep. 811), Judgm., 31.
Ellis *v.* Portsmouth & R. R. Co. (2 Ired. (N. Car.) 138), Negl., 101.
Ellis *v.* Rock Island & M. C. R. Co. (125 Ill. 82, 14 West. Rep. 372, 17 N. E. Rep. 62), Em. Dom., 657.
Ellis *v.* Swanzey (26 N. H. 266), Sts. & H., 200.
Ellis *v.* Wabash, St. L. & P. R. Co. (17 Mo. App. 126), Animals, 383; Cross., St. & H., 17, 37.
Ellison *v.* Georgia R. Co. (87 Ga. 691, 13 S. E. Rep. 809), Death, etc., 151; Employés, Inj. to, 496; Pl., 145.
Ellison *v.* Mobile & O. R. Co. (36 Miss. 572), Direct., 37; Subscr., 148.
Ellison *v.* Truesdale (49 Minn. 240, 51 N. W. Rep. 918), Death, etc., 258.
Ells *v.* Missouri Pac. R. Co. (40 Mo. App. 165), Em. Dom., 201.
Ells *v.* Pacific R. Co. (48 Mo. 231), Animals, 139; Fences, 55.
Ells *v.* Pacific R. Co. (51 Mo. 200, 3 Am. Ry. Rep. 12), Em. Dom., 277.
Ells *v.* Pacific R. Co. (55 Mo. 278), Animals, 379, 604.
Ellsworth *v.* Central R. Co. (34 N. J. L. 93), Em. Dom., 507; Farm Cross., 6; New Tr., 28.
Ellsworth *v.* St. Louis, A. & T. H. R. Co. (98 N. Y. 553; affirming 33 Hun 7), Bonds, 47; Contr., 86.
Ellsworth *v.* Southern Minn. R. Co. (31 Minn. 543, 18 N. W. Rep. 822), License, 12.
Ellsworth *v.* United States (14 Ct. of Cl. 382), Paym., 5; Rev., 2, 3; Wareh., 12.
Ellsworth, M., N. & S. E. R. Co. *v.* Gates (39 Am. & Eng. R. Cas. 45, 41 Kan. 574, 21 Pac. Rep. 632), Em. Dom., 444, 663.
Ellsworth, M., N. & S. E. R. Co. *v.* Maxwell (39 Kan. 651, 18 Pac. Rep. 819), Em. Dom., 464, 912; New Tr., 26.
Elmborg *v.* St. Paul City R. Co. (51 Minn. 70, 52 N. W. Rep. 969), Negl., 6.
Elmer *v.* Locke (15 Am. & Eng. R. Cas. 300, 135 Mass. 575), Employés, Inj. to, 61.
Elmira *v.* Maple Ave. R. Co. (21 N. Y. S. R. 544, 4 N. Y. Supp. 943, 51 Hun 638), St. Rys., 118.
Elmira I. & S. Rolling Mill Co. *v.* Erie R. Co. (26 N. J. Eq. 284), Receiv., 49.
Elmira Rolling Mill Co. *v.* Erie R. Co. (28 N. J. Eq. 400, 14 Am. Ry. Rep. 199), Connect. L., 4.
Elmore *v.* Naugatuck R. Co. (23 Conn. 457), Car. of M., 604.
Elmore *v.* Sands (54 N. Y. 512), Eject. Pass., 35.
Elmsley *v.* Georgia Pac. R. Co. (Miss.) (10 So. Rep. 41), Animals, 63.
Elsas *v.* Second Ave. R. Co. (30 N. Y. S. R. 414, 56 Hun 161, 9 N. Y. Supp. 210), Dam., 43; Witn., 168.
Elvey *v.* Illinois C. R. Co. (2 Int. Com. Rep. 804, 3 Int. Com. Com. 652), Int. Com., 58.
Elwell *v.* Eastern R. Co. (124 Mass. 160, 17 Am. Ry. Rep. 396), Eastern R. Co., 1.
Elwell *v.* Fosdick (43 Am. & Eng. R. Cas. 450, 134 U. S. 500, 10 Sup. Ct. Rep. 598), Mort., 298.
Elwell *v.* Grand Junction R. Co. (5 M. & W. 669, 8 D. P. C. 225), Pl., 77.
Elwell *v.* Grand St. & N. R. Co. (67 Barb. (N. Y.) 83; affirmed in 67 Barb. 85, n.), Mort., 45, 64.
Elwell *v.* Puget Sound & C. R. Co. (7 Wash. 487, 35 Pac. Rep. 376), Agency, 70; Bills & N., 12.
Elwood *v.* New York C. & H. R. R. Co. (4 Hun (N. Y.) 808), Death, etc., 183.
Ely *v.* Norfolk Southern R. Co. (102 N. Car. 42, 8 S. E. Rep. 779), Estop., 3.
Ely *v.* Pittsburg, C., C. & St. L. R. Co. (158 Pa. St. 233, 27 Atl. Rep. 970), Cross., Inj. at, 277; Trial, 70.
Ely *v.* St. Louis, K. C. & N. R. Co. (16 Am.

& Eng. R. Cas. 342, 77 Mo. 34), App., 41; Car. of P., 176.
Elyton Land Co. *v.* Mingea (43 Am. & Eng. R. Cas. 309, 89 Ala. 521, 7 So. Rep. 666), Contrib. Neg., 109; Evid., 254; Imp. Neg., 3, 27; Pl., 149, 152.
Elyton Land Co. *v.* South & N. Ala. R. Co. (51 Am. & Eng. R. Cas. 371, 95 Ala. 631, 10 So. Rep. 270), Ejectm., 14; Em. Dom., 134; Right of W., 18.
Elyton Land Co. *v.* South & N. Ala. R. Co. (57 Am. & Eng. R. Cas. 299, 100 Ala. 396, 14 So. Rep. 207), Em. Dom., 213.
Emanuel Hospital *v.* Metropolitan Dist. R. Co. (19 L. T. 692), Em. Dom., 1203.
Emblen *v.* Myers (6 H. & N. 54, 30 L. J. Ex. 71), Dam., 28.
Emerson *v.* Auburn & O. L. R. Co. (13 Hun (N. Y.) 150), Proc., 30.
Emerson *v.* European & N. A. R. Co. (67 Me. 387), Mort., 33.
Emerson *v.* New York & N. E. R. Co. (16 Am. & Eng. R. Cas. 404, 14 R. I. 555), Judgm., 19.
Emerson *v.* Niagara Nav. Co. (2 Ont. 528), Agency, 96.
Emerson *v.* Peteler (35 Minn. 481, 29 N. W. Rep. 311), Children, Inj. to, 2.
Emerson *v.* St. Louis & H. R. Co. (111 Mo. 161, 19 S. W. Rep. 1113), Car. of L. S., 4, 139; Pl., 4.
Emerson *v.* Western Union R. Co. (75 Ill. 176), Em. Dom., 50, 657.
Emery *v.* Raleigh & G. R. Co. (37 Am. & Eng. R. Cas. 253, 102 N. Car. 209, 9 S. E. Rep. 139), Culverts, 2, 13, 14, 22, 23, 24.
Emery *v.* St. Louis, K. & N. W. R. Co. (77 Mo. 339), Set-off, 10.
Emigh *v.* Baltimore & O. R. Co. (4 Hughes (U. S.) 271, 6 Fed. Rep. 283), Pat. for Inv., 13.
Emigh *v.* Chamberlain (1 Biss. (U. S.) 367), Pat. for Inv., 12.
Emigh *v.* Chicago, B. & Q. R. Co. (2 Fish. Pat. Cas. 387), Pat. for Inv., 13.
Emigh *v.* Chicago, B. & Q. R. Co. (1 Biss. (U. S.) 400), Pat. for Inv., 13, 29.
Emigh *v.* Pittsburg, Ft. W. & C. R. Co. (4 Biss. (U. S.) 114), Actions, 2.
Eminence *v.* Deposit Bank (12 Bush (Ky.) 538), Mun. Aid, 414.
Eminence *v.* Grasser (81 Ky. 52), Estop., 31; Mun. Aid, 340, 393.
Emma Cotton Seed Oil Co. *v.* Hale (56 Ark. 232, 19 S. W. Rep. 600), Employés, Inj. to, 229, 267.
Emmerson *v.* St. Louis & H. R. Co. (35 Mo. App. 621), Animals, 103, 281, 548, 608, 634.
Emmitt *v.* Springfield, J. & P. R. Co. (31 Ohio St. 23, 16 Am. Ry. Rep. 266), Subscr., 204.
Emmons *v.* Minneapolis & St. L. R. Co. (35 Minn. 503, 29 N. W. Rep. 202), Fences, 2, 104.
Emmons *v.* Minneapolis & St. L. R. Co. (35 Am. & Eng. R. Cas. 126, 38 Minn. 215, 36 N. W. Rep. 340), Fences, 101.
Emmons *v.* Minneapolis & St. L. R. Co. (40 Am. & Eng. R. Cas. 236, 41 Minn. 133, 42 N. W. Rep. 789), Witn., 152.
Empey *v.* Grand Ave. Cable Co. (45 Mo. App. 422), New Tr., 20.
Empire Tp. *v.* Darlington (101 U. S. 87), Mun. Aid, 208, 365.
Empire Transp. Co. *v.* Steele (70 Pa. St. 188), Car. of M., 749.
Empire Transp. Co. *v.* Wallace (68 Pa. St. 302, 1 Am. Ry. Rep. 443), Car. of M., 46.
Empire Transp. Co. *v.* Wamsutta O. & M. Co. (63 Pa. St. 14), Car. of M., 153; Negl., 52.
Emry *v.* Raleigh & G. R. Co. (52 Am. & Eng. R. Cas. 695, 109 N. Car. 589, 14 S. E. Rep. 352, 15 L. R. A. 332), Flood. Lds., 80; Negl., 63.
Emslie *v.* Young (5 Am. & Eng. R. Cas. 422, 24 Kan. 732), Land Grants, 8; Pub. Lds., 2.
Enches *v.* New York, L. E. & W. R. Co. (135 Pa. St. 194, 19 Atl. Rep. 939), Car. of P., 420, 600.
Endress *v.* Lake Shore & M. S. R. Co. (19 N. Y. S. R. 481, 2 N. Y. Supp. 719; affirmed (?) 117 N. Y. 640, mem., 22 N. E. Rep. 1130, 27 N. Y. S. R. 977), Cross., Inj. at, 258, 269; Death, etc., 195, 197, 255.
Enfield *v.* Jordan (119 U. S. 680, 7 Sup. Ct. Rep. 358), Bonds, 47; Mun. Aid, 76, 253, 311; Judgm., 20.
Enfield Toll Bridge Co. *v.* Hartford & N. H. R. Co. (17 Conn. 40), Charters, 18.
Enfield Toll Bridge Co. *v.* Hartford & N. H. R. Co. (17 Conn. 454), Em. Dom., 101, 118.
Engelhardt *v.* Brooklyn (3 Misc. (N. Y.) 30), Em. Dom., 437.
England *v.* Boston & M. R. Co. (153 Mass. 490, 27 N. E. Rep. 1), Car. of P., 425.
Engle *v.* Chicago, M. & St. P. R. Co. (77 Iowa 661, 37 N. W. Rep. 6, 42 N. W. Rep. 512), Fires, 103, 263, 276, 281, 295.
Englewood Connecting R. Co. *v.* Chicago & E. I. R. Co. (25 Am. & Eng. R. Cas. 227, 117 Ill. 611, 6 N. E. Rep. 684), Cross. Rys., 26.
English *v.* Chicago, M. & St. P. R. Co. (24 Fed. Rep. 906), Employés, Inj. to, 282.
English *v.* Chicot County (26 Ark. 454), Mun. Aid, 273; Words & Ph., 221.
English *v.* Delaware & H. Canal Co. (66 N. Y. 454, 23 Am. Rep. 69; affirming 4 Hun 683), Eject. Pass., 62, 63.
English *v.* New Haven & N. R. Co. (32 Conn. 240), Charters, 44; Stat., 15.
Enk *v.* Brooklyn City R. Co. (45 N. Y. S. R. 627, 64 Hun 634, 19 N. Y. Supp. 130), Death, etc., 183.
Ennis *v.* Wood River Branch R. Co. (12 R. I. 73), Em. Dom., 560, 842.
Ennis & W. C. R. Co., In re (L. R. 3 Ir. Ch. 94), Dissol., 12; Incorp., 4.
Ennis & W. C. R. Co., In re (L. R. 15 Ir. 180), Dissol., 23.
Ennor *v.* Galena & S. W. R. Co. (14 Ill. App. 327; reversed in 116 Ill. 55, 4 N. E. Rep. 762), New Tr., 90.
Eno *v.* Metropolitan El R. Co. (24 J. & S. 313, 8 N. Y. Supp. 197), Elev. Rys., 36, 182.
Enoch *v.* Spokane Falls & N. R. Co. (6 Wash. 393, 33 Pac. Rep. 966), Em. Dom., 756; Pub. Lds., 18.
Enos *v.* Chicago, St. P. & K. C. R. Co. (39

Am. & Eng. R. Cas. 72, 78 Iowa 28, 42 N. W. Rep. 575), Em. Dom., 734; Sts. & H., 254.
Enright *v.* People (21 How. Pr. (N. Y.) 383), Crim. L., 46; Tickets & F., 152.
Enright *v.* San Francisco & S. J. R. Co. (33 Cal. 230), Animals, 93, 113; Fences, 39, 75; Witn., 145.
Enright *v.* Toledo, A. A. & N. M. R. Co. (93 Mich. 409, 53 N. W. Rep. 536), Fel. Serv., 45, 277.
Ensey *v.* Cleveland & St. L. R. Co. (10 Ind. 178), Estop., 5; Subscr., 95.
Ensley R. Co. *v.* Chewning (50 Am. & Eng. R. Cas. 46, 93 Ala. 24, 9 So. Rep. 458), Car. of P., 268, 542; Dam., 27; Negl., 41; Stat. & D., 115; Sts. & H., 334; Trial, 172; Witn., 58.
Eppendorf *v.* Brooklyn City & N. R. Co. (69 N. Y. 195, 18 Am. Ry. Rep. [illegible] affirming 51 How. Pr. 475), St. Rys., 394, 397.
Eppes *v.* Mississippi, G. & T. R. Co. (35 Ala. 33), Subscr., 66, 125, 190; Words & Ph., 120.
Erb *v.* Great Western R. Co. (3 Ont. App. 446; affirming 42 U. C. Q. B. 90), Agency, 73; Bills of L., 24, 124.
Erb *v.* Great Western R. Co. (5 Can. Sup. Ct. 179), Stat. Agts., 4.
Erd *v.* Chicago & N. W. R. Co. (41 Wis. 65), Fires, 121.
Erickson *v.* Milwaukee, L. S. & W. R. Co. (83 Mich. 281, 47 N. W. Rep. 237), Employés, Inj. to, 532.
Erickson *v.* Milwaukee, L. S. & W. R. Co. (93 Mich. 414, 53 N. W. Rep. 393), Fel. Serv., 217, 315, 323.
Erickson *v.* St. Paul & D. R. Co. (41 Minn. 500, 43 N. W. Rep. 332, 5 L. R. A. 786), Employés, Inj. to, 159, 163, 328, 488.
Erickson *v.* Twenty-third St. R. Co. (71 Hun (N. Y.) 108), Contrib. Neg., 84.
Erie & A. R. Co. *v.* Atlantic & G. W. R. Co. (3 Pittsb. (Pa.) 232), Arb., 29.
Erie & N. Y. C. R. Co. *v.* Owen (32 Barb. (N. Y.) 616), Stockh., 1; Subscr., 10.
Erie & N. Y. C. R. Co. *v.* Patrick (2 Abb. App. Dec. (N. Y.) 72, 2 Keyes 256), Abate., 2.
Erie & N. R. Co. *v.* Great Western R. Co. (19 Grant's Ch. (U. C.) 43), Em. Dom. 1231.
Erie & N. R. Co. *v.* Great Western R. Co. (21 Grant's Ch. (U. C.) 171), Injunc., 37.
Erie & N. R. Co. *v.* Rousseau (46 Am. & Eng. R. Cas. 539, 17 Ont. App. 483), Adv. Poss., 1.
Erie & N. E. R. Co. *v.* Casey (26 Pa. St. 287), Charters, 38, 39, 44.
Erie & P. Despatch *v.* Cecil (112 Ill. 180), Agency, 55, 107; Contr., 110; Evid., 249, 254; Witn., 50.
Erie & P. Dispatch *v.* St. Louis Cotton Compress Co. (6 Mo. App. 172), Wareh., 2.
Erie & P. Dispatch *v.* Stanley (22 Ill. App. 459), Car. of M., 764; Witn., 84.
Erie & P. R. Co.'s Appeal (3 Pennyp. (Pa.) 164), Deeds, 54; Pl., 87.
Erie & P. R. Co. *v.* Douthet (88 Pa. St. 243, 32 Am. Rep. 451), Passes, 3, 4.
Erie & P. R. Co. *v.* Johnson (101 Pa. St. 555), Fences, 99.
Erie & W. Transp. Co. *v.* Dater (91 Ill. 195), Bills of L., 25, 26, 30.
Erie & W. V. R. Co. *v.* Knowles (117 Pa. St. 77, 11 Atl. Rep. 250), Em. Dom., 1006.
Erie & W. V. R. Co. *v.* Smith (125 Pa. St. 259, 17 Atl. Rep. 443), Death, etc., 241, 267.
Erie City Pass. R. Co. *v.* Schuster (113 Pa. St. 412, 57 Am. Rep. 471, 6 Atl. Rep. 269), Children, Inj. to, 69, 127.
Erie Dispatch *v.* Johnson (40 Am. & Eng. R. Cas. 113, 87 Tenn. 490, 11 S. W. Rep. 441), Bills of L., 86; Trover, 9.
Erie R. Co. *v.* Ackerson (33 N. J. L. 33), Int., 4.
Erie R. Co. *v.* Com. (66 Pa. St. 84), Tax., 9.
Erie R. Co. *v.* Com. (3 Brews. (Pa.) 368), Tax., 9.
Erie R. Co. *v.* Decker (78 Pa. St. 293), Fires, 172.
Erie R. Co. *v.* Delaware, L. & W. R. Co. (21 N. J. Eq. 283), Estop., 26; Injunc., 6, 9, 22, 24; Location, etc., 28.
Erie R. Co. *v.* Heath (8 Blatchf. (U. S.) 413), Witn., 2.
Erie R. Co. *v.* Heath (9 Blatchf. (U. S.) 226), Reorg., 4.
Erie R. Co. *v.* Lockwood (28 Ohio St. 358, 14 Am. Ry. Rep. 143), Car. of M., 471, 636, 757, 773.
Erie R. Co. *v.* Pennsylvania (15 Wall. (U. S.) 282, 4 Brews. (Pa.) 202; reversing 62 Pa. St. 286), Int. Com., 200.
Erie R. Co. *v.* Pennsylvania (21 Wall. (U. S.) 492, 6 Am. Ry. Rep. 206), Tax., 44, 70.
Erie R. Co. *v.* Ramsey (45 N. Y. 637; affirming 57 Barb. 449), Injunc., 12.
Erie R. Co. *v.* State (31 N. J. L. 531; reversing 30 N. J. L. 473), Int. Com., 185, 204.
Erie R. Co. *v.* Stringer (32 Ohio St. 468), For. Corp., 5; Rem. of C., 54.
Erie R. Co. *v.* Union L. & E. Co. (35 N. J. L. 240), Contr., 53.
Erie R. Co. *v.* Vanderbilt (5 Hun (N. Y.) 123), Corp., 17; Direct., 53.
Erie R. Co. *v.* Wilcox (84 Ill. 239, 16 Am. Ry. Rep. 457), Car. of M., 190, 433, 455, 674.
Erie R. Co. *v.* Wilkesbarre C. & I. Co. (9 Phila. (Pa.) 262), Bonds, 1.
Ernst *v.* Hudson River R. Co. (24 How. Pr. (N. Y.) 97; reversing 19 How. Pr. 205), Contrib. Neg., 104; Trial, 182.
Ernst *v.* Hudson River R. Co. (35 N. Y. 9, 32 How. Pr. 61, 3 Abb. Pr. N. S. 82; reversing 32 Barb. 159), Contrib. Neg., 84, 88; Cross., Inj. at, 78, 121, 131, 271, 313; Death, etc., 199; Trial, 63.
Ernst *v.* Hudson River R. Co. (39 N. Y. 61, 36 How. Pr. 84), Cross., Inj. at, 65, 70, 264.
Errington *v.* Metropolitan Dist. R. Co. (6 Am. & Eng. R. Cas. 562, L. R. 19 Ch. D. 559, 51 L. J. Ch. 305, 46 L. T. 443, 30 W. R. 663), Em. Dom., 1089, 1092.

Erskine *v.* Milwaukee & St. P. R. Co. (94 U. S. 619, 16 Am. Ry. Rep. 154), Rev., 9.
Erskine *v.* Peck (13 Mo. App. 280; affirmed in 83 Mo. 465), Stockh., 55.
Ervin *v.* Oregon R. & N. Co. (22 Hun. (N. Y.) 566), Discov., 3.
Ervin *v.* Oregon R. & N. Co. (62 How. Pr. (N. Y.) 490), For. Corp., 16, 18, 23.
Ervin *v.* Oregon R. & N. Co. (28 Hun (N. Y.) 269; affirming 62 How. Pr. 490), For. Corp., 24.
Ervin *v.* Oregon R. & N. Co. (20 Fed. Rep. 577), Stockh., 22, 117.
Ervin *v.* Oregon R. & N. Co. (23 Blatchf. (U. S.) 517, 27 Fed. Rep. 625), Stockh., 117.
Erwin *v.* Davenport (9 Heisk. (Tenn.) 44, 19 Am. Ry. Rep. 274), Death, etc., 150; Receiv., 47.
Esch *v.* Chicago, M. & St. P. R. Co. (36 Am. & Eng. R. Cas. 620, 72 Wis. 229, 39 N. W. Rep. 129), Em. Dom., 453, 588, 623.
Eskridge *v.* Cincinnati, N. O. & T. P. R. Co. (42 Am. & Eng. R. Cas. 176, 89 Ky. 367, 12 S. W. Rep. 580), Cross., Inj. at, 130, 176, 352; Death, etc., 180, 341; Evid., 36; Negl., 4; Pl., 157.
Eslich *v.* Madison City & Ft. D. R. Co. (75 Iowa 443, 39 N. W. Rep. 700), Em. Dom., 327, 704; Sts. & H., 264; Witn., 68.
Esrey *v.* Southern Pac. Co. (88 Cal. 399, 26 Pac. Rep. 211), Contrib. Neg., 9, 10, 11, 50; Stat. & D., 126; Tresp., Inj. to, 64.
Essery *v.* Grand Trunk R. Co. (21 Ont. 224), Em. Dom., 1234; Lim. of Ac., 48.
Essex *v.* Day (52 Conn. 483), Mun. Aid, 358.
Essex Bridge Co. *v.* Tuttle (2 Vt. 393), Subscr., 82.
Essex County R. Co. *v.* Lunenburgh (49 Vt. 143), Mun. Aid, 314.
Estabrooks *v.* Peterborough & S. R. Co. (12 Cush. (Mass.) 224), Em. Dom., 993.
Esterley's Appeal (54 Pa. St. 192), Liens, 22.
Estes *v.* Atlantic & St. L. R. Co. (63 Me. 308), Animals, 288; Fences, 79, 81.
Estes *v.* Chicago, I. & D. R. Co. (72 Iowa 33 N. W. Rep. 647), Judgm., 14.
[illegible] St. Paul, M. & M. R. Co. (27 N. Y. [illegible]4, 55 Hun 605, 7 N. Y. Supp. 863), [illegible].
[illegible] v. New York, L. E. & W. R. Co. (41 [illegible] 849), Car. of L. S., 146, 156; For. Corp., 22; New Tr., 18.
Eswin *v.* St. Louis, I. M. & S. R. Co. (35 Am. & Eng. R. Cas. 390, 96 Mo. 290, 9 S W. Rep. 577), Children, Inj. to, 74, 107; Cross., Inj. at, 248; Sts. & H., 376, 377; Tresp., Inj. to, 126.
Etherington *v.* Prospect Park & C. I. R. Co. (4 Am. & Eng. R. Cas. 617, 88 N. Y. 641; affirming 24 Hun 235, mem.), Death, etc., 329.
Etter *v.* Missouri Pac. R. Co. (2 Tex. App. (Civ. Cas.) 48), Penalty, 6, 10; Tickets & F., 132.
Eubank *v.* Edina (88 Mo. 650), Appear., 6.
Eulrich *v.* Richter (37 Wis. 226), Waters & W., 9.
Eureka & T. R. Co. *v.* McGrath (74 Cal. 49, 15 Pac. Rep. 360), Em. Dom., 890.
Eureka Springs R. Co. *v.* Timmons (40 Am. & Eng. R. Cas. 698, 51 Ark. 459, 11 S. W. Rep. 690), App., 85; Car. of P., 4, 139, 140, 180, 524, 555; Derailm., 4.
European & N. A. R. Co., Ex parte (13 New Brun. 479), Tax., 385.
European & N. A. R. Co. *v.* Dunn (16 New Brun. 320), Subscr., 67.
European & N. A. R. Co. *v.* McLeod (16 New Brun. 3), Subscr., 6, 63; Exec., 11.
European & N. A. R. Co. *v.* Poor (59 Me. 277), Direct., 48.
European & N. A. R Co. *v.* Thomas (14 New Brun. 42), Subscr., 182.
European C. R. Co., In re (41 L. J. Ch. 251, L. R. 13 Eq. 255, 26 L. T. 92), Direct., 37; Stockh., 36.
European C. R. Co., In re (L. R. 8 Eq. 438), Subscr., 160.
European C. R. Co., In re (L. R. 4 Ch. D. 33, 46 L. J. Ch. 57, 35 L. T. 583, 25 W. R. 92), Int., 16.
Euston *v.* Pendleton St. R. Co. (2 Cin. Super. Ct. 64), Mort., 266.
Evans *v.* American I. & T. Co. (42 Fed. Rep. 519, 24 Ohio L. J. 140), Children, Inj. to, 193.
Evans *v.* Atlantic & N. W. R. Co. (6 Montr. Super. 493), Em. Dom., 1245, 1275.
Evans *v.* Atlantic & P. R. Co. (62 Mo. 49), Employés, Inj. to, 304.
Evans *v.* Atlantic & W. P. R. Co. (56 Ga. 498), Agency, 20; Car. of M., 548, 655.
Evans *v.* Bristol & E. R. Co. (10 W. R. 559), Car. of M., 247.
Evans *v.* Burlington & M. R. R. Co. (21 Iowa 374), Animals, 44.
Evans *v.* Cincinnati, S. & M. R. Co. (78 Ala. 341), Contr., 96, 101; Stat. Agts., 1.
Evans *v.* Cleveland & P. R. Co. (2 Pittsb. (Pa.) 483), Guar., 8.
Evans *v.* Cleveland & P. R. Co. (5 Phila. (Pa.) 512), Coupons, 6, 17.
Evans *v.* Concord R. Corp. (N. H.) (21 Atl. Rep. 105), Death, etc., 262, 269.
Evans *v.* Dublin & D. R. Co. (3 Railw. Cas. 760, 14 M. & W. 142, 2 D. & L. 865, 9 Jur. 474, 14 L. J. Ex. 245), Proc., 27
Evans *v.* Dunbar (117 Mass. 546), Car. of L. S., 135.
Evans *v.* Fitchburg R. Co. (111 Mass. 142), Car. of L. S., 22, 24.
Evans *v.* Grand Rapids, L. & D. R. Co. (68 Mich. 602, 13 West. Rep. 170, 36 N. W. Rep. 687), Homest., 1, 2.
Evans *v.* Haefner (29 Mo. 141), Em. Dom., 146, 400, 864.
Evans *v.* International R. T. R. Co. (106 Mo 594, 17 S. W. Rep. 489), Trial, 139.
Evans *v.* Interstate R. T. R. Co. (106 Mo. 594, 17 S. W. Rep. 489), Consol., 29.
Evans *v.* Lake Shore & M. S. R. Co. (12 Hun (N. Y.) 289), Employés, Inj. to, 182, 211, 470.
Evans *v.* Lake Shore & M. S. R. Co. (88 Mich. 442, 50 N. W. Rep. 386), Cross., Inj. at, 46, 201.
Evans *v.* Lancashire & Y. R. Co. (1 El. &

Bl. 754, 17 Jur. 878, 22 L. J. Q. B. 254), Em. Dom., 1173.
Evans *v.* Louisville, N. O. & T. R. Co. (70 Miss. 527, 12 So. Rep. 581), Fel. Serv., 190.
Evans *v.* McLucas (11 Am. & Eng. R. Cas. 310, 15 So. Car. 67), Fixt., 6.
Evans *v.* Memphis & C. R. Co. (56 Ala. 246, 18 Am. Ry. Rep. 350), Charges, 8; Tickets & F., 23.
Evans *v.* Missouri, I. & N. R. Co. (64 Mo. 453, 17 Am. Ry. Rep. 209), Em. Dom., 1044.
Evans *v.* Oregon R. & N. Co. (1 Int. Com. Rep. 641, 1 Int. Com. Com. 325), Int. Com., 32, 33.
Evans *v.* Sabine & E. T. R. Co. (Tex.) (18 S. W. Rep. 493), Employés, Inj. to, 485; Fel. Serv., 12.
Evans *v.* St. Louis, I. M. & S. R. Co. (11 Mo. App. 463), Eject. Pass., 66, 114; Tickets & F., 91.
Evans *v.* St. Louis, I. M. & S. R. Co. (16 Mo. App. 522), Employés, 20.
Evans *v.* St. Louis, I. M. & S. R. Co. (24 Mo. App. 114), Employés, 1, 2, 8.
Evans *v.* St. Paul & S. C. R. Co. (30 Minn. 489, 16 N. W. Rep. 271), Animals, 239; Fences, 86.
Evans *v.* Savannah & W. R. Co. (90 Ala. 54, 7 So. Rep. 758), Embankm., 1, 5; Sts. & H., 12.
Evans & H. Fire Brick Co. *v.* St. Louis & S. F. R. Co. (17 Mo. App. 624), Negl., 43.
Evans & H. Fire Brick Co. *v.* St. Louis & S. F. R. Co. (21 Mo. App. 648), Animals, 204; Contrib. Neg., 76.
Evansich *v.* Gulf, C. & S. F. R. Co. (57 Tex. 123), Children, Inj. to, 147.
Evansich *v.* Gulf, C. & S. F. R. Co. (6 Am. & Eng. R. Cas. 182, 57 Tex. 126), Children, Inj. to, 24, 75, 103, 154.
Evansich *v.* Gulf, C. & S. F. R. Co. (61 Tex. 24), Children, Inj. to, 33; Witn., 71.
Evansville & C. R. Co. *v.* Androscoggin Mills (22 Wall. (U. S.) 594, 11 Am. Ry. Rep. 113), Car. of M., 612.
Evansville & C. R. Co. *v.* Barbee (74 Ind. 169), Animals, 90, 160, 576.
Evansville & C. R. Co. *v.* Baum (26 Ind. 70), Agency, 83; Assault, 4; Eject. Pass., 88.
Evansville & C. R. Co. *v.* Dexter (24 Ind. 411), Employés, Inj. to, 542; Fel. Serv., 452.
Evansville & C. R. Co. *v.* Dick (9 Ind. 433), Constr. Rys., 10.
Evansville & C. R. Co. *v.* Duncan (28 Ind. 441), Car. of P., 117, 433, 496, 546, 604.
Evansville & C. R. Co. *v.* Epperson (59 Ind. 438), Animals, 329.
Evansville & C. R. Co. *v.* Hiatt (17 Ind. 102), Contrib. Neg., 53, 79; Tresp., Inj. to, 100.
Evansville & C. R. Co. *v.* Kargus (10 Ind. 182), Animals, 607.
Evansville & C. R. Co. *v.* Lawrence (29 Ind. 622), App., 91.
Evansville & C. R. Co. *v.* Lowdermilk (11 Ind. 120), Death, etc., 42, 174.
Evansville & C. R. Co. *v.* Marsh (57 Ind. 505, 18 Am. Ry. Rep. 482), Car. of M., 657.
Evansville & C. R. Co. *v.* Miller (30 Ind. 209), Em. Dom., 512, 523, 845.
Evansville & C. R. Co. *v.* Ross (12 Ind. 446), Animals, 22, 289.
Evansville & C. R. Co. *v.* Smith (65 Ind. 92), App., 118, 122.
Evansville & C. R. Co. *v.* Snapp (61 Ind. 303), App., 122.
Evansville & C. R. Co. *v.* Wolf (59 Ind. 89), Children, Inj. to, 121, 130; Death, etc., 350; Trial, 111.
Evansville & C. R. Co. *v.* Young (28 Ind. 516), Car. of L. S., 145; Custom, 3; Lim. of Liab., 28.
Evansville & I. R. Co. *v.* Frank (3 Ind. App. 96, 29 N. E. Rep. 419), Debent., 9, 13, 14; Mort., 255.
Evansville & I. R. Co. *v.* Gilmore (1 Ind. App. 468, 27 N. E. Rep. 992), Tickets & F., 122.
Evansville & I. R. Co. *v.* Hays (118 Ind. 214, 20 N. E. Rep. 736), Tax., 306.
Evansville & I. R. Co. *v.* Spellbring (1 Ind. App. 167, 27 N. E. Rep. 239), Actions, 7; Med. Serv., 5. 15, 18.
Evansville & R. R. Co. *v.* Doan (3 Ind. App. 453, 29 N. E. Rep. 940), Employés, Inj. to, 100, 182.
Evansville & R. R. Co. *v.* Freeland (4 Ind. App. 207, 30 N. E. Rep. 803), Med. Serv., 6.
Evansville & R. R. Co. *v.* Kyte (6 Ind. App. 52, 32 N. E. Rep. 1134), Actions, 8; Eject. Pass., 71.
Evansville & R. R. Co. *v.* Swift (128 Ind. 34, 27 N. E. Rep. 420), Em. Dom., 630, 893.
Evansville & T. H. R. Co. *v.* Carvener (32 Am. & Eng. R. Cas. 134, 113 Ind. 51, 14 N. E. Rep. 738, 12 West. Rep. 203), Animals, 189; Sts. & H., 176, 414.
Evansville & T. H. R. Co. *v.* Crist (116 Ind. 446, 19 N. E. Rep. 310, 2 L. R. A. 450), Contrib. Neg., 28; Cross., Inj. at, 284; Fright. Teams, 2; Witn., 128, 168.
Evansville & T. H. R. Co. *v.* Erwin (9 Am. & Eng. R. Cas. 252, 84 Ind. 457), Bills of L., 56, 123.
Evansville & T. H. R. Co. *v.* Griffin (100 Ind. 221, 50 Am. Rep. 783), Contrib. Neg., 72; Licensees, Inj. to, 12; Negl., 1.
Evansville & T. H. R. Co. *v.* Guyton (33 Am. & Eng. R. Cas. 311, 115 Ind. 450, 14 West. Rep. 301, 17 N. E. Rep. 101), Dam., 89; Fel. Serv., 139, 142, 146, 148, 238, 483; Trial, 100.
Evansville & T. H. R. Co. *v.* McKee (22 Am. & Eng. R. Cas. 366, 99 Ind. 519, 50 Am. Rep. 102), Agency, 94; False Imp., 6.
Evansville & T. H. R. Co. *v.* Montgomery (9 Am. & Eng. R. Cas. 195, 85 Ind. 494), App., 64.
Evansville & T. H. R. Co. *v.* Mosier (22 Am. & Eng. R. Cas. 569, 101 Ind. 597), Animals, 180, 463, 506; Evid., 137; Fences, 57.
Evansville & T. H. R. Co. *v.* Mosier (114 Ind. 447, 14 West. Rep. 290, 17 N. E. Rep. 100), Animals, 178; Farm Cross., 13.
Evansville & T. H. R. Co. *v.* Nye (113 Ind. 223, 15 N. E. Rep. 261, 12 West. Rep. 727), Adv. Poss., 2; Em. Dom., 1020.

Evansville & T. H. R. Co. *v.* Taft (2 Ind. App. 237, 28 N. E. Rep. 443), Negl., 89; New Tr., 26.
Evansville & T. H. R. Co. *v.* Tipton (101 Ind. 197), Animals, 328; Words & Ph., 223.
Evansville & T. H. R. Co. *v.* Willis (19 Am. & Eng. R. Cas. 565, 93 Ind. 507), Animals, 96; Fences, 60.
Evansville, H. & N. R. Co. *v.* Com. (9 Bush (Ky.) 438), Tax., 155.
Evansville, H. & N. R. Co. *v.* Grady (6 Bush (Ky.) 144), Em. Dom., 413, 988.
Evansville, I. & C. S. L. R. Co. *v.* Cochran (10 Ind 560), Witn., 123.
Evansville, I. & C. S. L. R. Co. *v.* Dunn (17 Ind. 603), Subscr., 229.
Evansville, I. & C. S. L. R. Co. *v.* Evansville (15 Ind. 395), Mun. Aid, 79, 173.
Evansville, I. & C. S. L. R. Co. *v.* Fitzpatrick (10 Ind. 120), Em. Dom., 691, 733, 843; Witn., 121.
Evansville, I. & C. S. L. R. Co. *v.* Meeds (11 Ind. 273), Subscr., 25.
Evansville, I. & C. S. L. R. Co. *v.* Posey (12 Ind. 363), Subscr., 145.
Evansville, I. & C. S. L. R. Co. *v.* Shearer (10 Ind. 244), Subscr., 193.
Evansville, I. & C. S. L. R. Co. *v.* Tressler (10 Ind. 548), Subscr., 105.
Evansville, R. & E. R. Co. *v.* Harrington (8 Am. & Eng. R. Cas. 395, 82 Ind. 534), App., 119.
Evansville, T. H. & C. R. Co. *v.* Wright (38 Ind. 64, 10 Am. Ry. Rep. 255), Subscr., 153.
Everdell *v.* Sheboygan & F. du L. R. Co. (41 Wis. 395), Attach., 8, 11, 27.
Everett *v.* Cedar Rapids & M. R. Co. (28 Iowa 417), Cert., 10.
Everett *v.* Central Iowa R. Co. (31 Am. & Eng. R. Cas. 550, 73 Iowa 442, 35 N. W. Rep. 609), Animals, 319; Assign., 3.
Everett *v.* Chicago, R. I. & P. R. Co. (27 Am. & Eng. R. Cas. 98, 69 Iowa 15, 28 N. W. Rep. 410), Eject. Pass., 67; Tickets & F., 123.
Everett *v.* Oregon S. L. & U. N. R. Co. (9 Utah 340, 34 Pac. Rep. 289), Car. of P., 43, 45; Tresp., Inj. to, 111.
Everett *v.* Parks (62 Barb. (N. Y.) 9), Evid., 240.
Everett *v.* Southern Exp. Co. (46 Ga. 303), Exp. Cos., 27.
Everett *v.* Texas Mexican R. Co. (67 Tex. 430, 3 S. W. Rep. 678), Trusts, 2.
Everett *v.* Union Pac. R. Co. (10 Am. & Eng. R. Cas. 203, 59 Iowa 243, 13 N. W. 109), Em. Dom., 580; Evid., 2; Witn., 52.
Everhart *v.* Terre Haute & I. R. Co. (4 Am. & Eng. R. Cas. 599, 78 Ind. 292, 41 Am. Rep. 567), Fel. Serv., 10; Tresp., Inj. to, 12.
Everhart *v.* West Chester & P. R. Co. (28 Pa. St. 339), Estop., 19; Subscr., 73, 120.
Everse *v.* Northwest R. Co. (2 Montr. Super. 290), Em. Dom., 1277.
Eversfield *v.* Mid-Sussex R. Co. (5 Jur. N. S. 776, 3 De G. & J. 286), Charters, 53; Em. Dom., 1090.
Evershed *v.* London & N. W. R. Co. (L. R. 2 Q. B. D. 254, 46 L. J. Q. B. D. 289, 36 L. T. 12, 26 W. R. 102), Charges, 127; Discrim., 25, 26.
Evershed *v.* London & N. W. R. Co. (3 App. Cas. 1029, 48 L. J. Q. B. (H. L.) 22, 3 Ry. & C. T. Cas. xvi), Charges, 127; Discrim., 26.
Everston *v.* National Bank (66 N. Y. 14), Coupons, 4, 5, 13.
Evison *v.* Chicago, St. P., M. & O. R. Co. (45 Minn. 370, 48 N. W. Rep. 6), Evid., 296; Sts. & H., 328; Trial, 117.
Evoy *v.* Expressmen's Aid Soc. (51 N. Y. S. R. 38, 66 Hun 636, mem., 21 N. Y. Supp. 641), Proc., 6.
Ewald *v.* Chicago & N. W. R. Co. (33 Am. & Eng. R. Cas. 326, 70 Wis. 420, 36 N. W. Rep. 12, 591), Employés, 4; Fel. Serv., 25, 437.
Eward *v.* Lawrenceburgh & U. M. R. Co. (7 Ind. 711), Em. Dom., 47.
Ewell *v.* Chicago & N. W. R. Co. (29 Fed. Rep. 57), Death, etc., 19.
Ewen *v.* Chicago & N. W. R. Co. (38 Wis. 613), Children, Inj. to, 102, 125; Cross., Inj. at, 112, 271; Death, etc., 275, 286, 315, 386; Trial, 70.
Ewing *v.* Alabama & V. R. Co. (68 Miss. 551, 9 So. Rep. 295), Em. Dom., 67, 186.
Ewing *v.* Atlantic Ave. R. Co. (34 N. Y. S. R. 113, 11 N. Y. Supp. 626), St. Rys., 476.
Ewing *v.* Chicago & A. R. Co. (72 Ill. 25), Animals, 126, 207, 260, 281, 288; Fences, 93.
Ewing *v.* Pittsburg, C., C. & St. L. R. Co. (48 Am. & Eng. R. Cas. 506, 147 Pa. St. 40, 23 Atl. Rep. 340), Dam., 14; Derailm., 9.
Ewing *v.* Versailles Tp. (146 Pa. St. 309, 23 Atl. Rep. 338), Animals, 547.
Excelsior Grain Binder Co. *v.* Stayner (58 How. Pr. (N. Y.) 273), Subscr., 140.
Exeter Road Trustees, Ex parte (16 Jur. 669), Sts. & H., 359.
Exhaust Ventilator Co. *v.* Chicago, M. & St. P. R. Co. (69 Wis. 454, 34 N. W. Rep. 509), Evid., 179.
Exmouth Docks Co., In re (L. R. 17 Eq. 181, 43 L. J. Ch. 110, 29 L. T. 573, 22 W. R. 104), Dissol., 11, 12, 15.
Export Trade of Boston, In re (1 Int. Com. Rep. 25, 1 Int. Com. Com. 24), Int. Com., 70.
Exposition Cotton Mills *v.* Western & A. R. Co. (40 Am. & Eng. R. Cas. 169, 83 Ga. 441, 10 S. E. Rep. 113), Pl., 148.
Exposition R. & I. Co. *v.* Canal St. Exposition R. Co. (42 La. Ann. 370, 7 So. Rep. 627), Subscr., 50.
Express Companies, In re (1 Int. Com. Rep. 22), Int. Com., 23.
Express Companies, In re (1 Int. Com. Rep. 677, 1 Int. Com. Com. 349), Int. Com., 23.
Eyerly *v.* Jasper County (72 Iowa 149, 33 N. W. Rep. 609), Mun. Aid, 412.
Eyton *v.* Denbigh, R. & C. R. Co. (38 L. J. Ch. 74, 16 W. R. 928), Distress, 1.

Faber *v.* St. Paul, M. & M. R. Co. (8 Am. & Eng. R. Cas. 277, 29 Minn. 465, 13 N. W. Rep. 902), Cross., Inj. at, 294; Pl., 112.
Fabiell *v.* Eastern Counties R. Co. (2 Exch. 344, 17 L. J. Exch. 223), Arb., 31.
Facer *v.* Midvale Steel Work Co. (38 Fed. Rep. 231), Pat. for Inv., 3.
Fagundes *v.* Central Pac. R. Co. (79 Cal. 97, 3 L. R. A. 824, 21 Pac. Rep. 437), Fel. Serv., 73, 251.
Fahy *v.* Fargo (17 N. Y. Supp. 344, 43 N. Y. S. R. 589, 63 Hun 625, mem.), Exp. Cos., 18.
Fahy *v.* Rome, W. & O. R. Co. (36 N. Y. S. R. 67, 13 N. Y. Supp. 24, 59 Hun 619; affirmed in 128 N. Y. 677, mem., 29 N. E. Rep. 148, 40 N. Y. S. R. 979), Employés, Inj. to, 689.
Fair *v.* London & N. W. R. Co. (21 L. T. 326, 18 W. R. 66), Dam., 67.
Fair *v.* Pennsylvania R. Co. (Pa.) (14 Atl. Rep. 236), Employés, Inj. to, 123.
Fairbank *v.* Cincinnati, N. O. & T. P. R. Co. (54 Fed. Rep. 420, 9 U. S. App. 212, 4 C. C. A. 403), Appear., 7; Fed. Cts., 10; Proc., 28.
Fairbanks *v.* Barlow (14 Can. Sup. Ct. 217; affirming 2 Montr. L. R. 332), Pres., 4.
Fairbanks *v.* Great Western R. Co. (35 U. C. Q. B. 523), Sts. & H., 182.
Fairchild *v.* Michigan C. R. Co. (8 Ill. App. 591), Att'ys, 5.
Fairchild *v.* New Orleans & N. E. R. Co. (60 Miss. 931, 45 Am. Rep. 427), Indep. Contr., 17.
Fairchild *v.* New Orleans & N. E. R. Co. (62 Miss. 177), Fences, 103.
Fairchild *v.* Ogdensburg, C. & R. R. Co. (15 N. Y. 337), Bills & N., 1.
Fairchild *v.* Philadelphia, W. & B. R. Co. (148 Pa. St. 527, 24 Atl. Rep. 79), Bills of L., 68; Contr., 85; Lim. of Liab., 27.
Fairchild *v.* St. Louis (97 Mo. 85, 11 S. W. Rep. 60), Dam., 13; Sts. & H., 216.
Faires *v.* San Antonio & A. R. Co. (80 Tex. 43, 15 S. W. Rep. 588), Em. Dom., 220.
Fairfax *v.* New York C. & H. R. R. Co. (5 J. & S. (N. Y.) 516), Bagg., 49.
Fairfax *v.* New York C. & H. R. R. Co. (8 J. & S. (N. Y.) 128; see also 67 N. Y. 11; reversing 5 J. & S. 516), Bagg., 27; Trial, 73.
Fairfax *v.* New York C. & H. R. R. Co. (67 N. Y. 11, 15 Am. Ry. Rep. 141; reversing 5 J. & S. 516), Bagg., 74.
Fairfax *v.* New York C. & H. R. R. Co. (73 N. Y. 167; affirming 11 J. & S. 18; referring to 67 N. Y. 11, 15 Am. Ry. Rep. 141, which reversed 5 J. & S. 516), Bagg., 17, 74, 123.
Fairfield's Appeal (39 Am. & Eng. R. Cas. 689, 57 Conn. 167, 17 Atl. Rep. 764), Cross., St. & H., 101, 103, 104; Ry. Com'rs, 21.
Fairfield *v.* Gallatin County (100 U. S. 47, 21 Am. Ry. Rep. 438), Mun. Aid, 253.
Fairmount & A. St. Pass. R. Co. *v.* Stutler (54 Pa. St. 375), Children, Inj. to, 148.
Fairview R. Co. *v.* Spillman (23 Oreg. 587, 32 Pac. Rep. 688), Incorp., 8; Subscr., 47, 162, 176, 200.
Faison *v.* Alabama & V. R. Co. (69 Miss. 569, 13 So. Rep. 37), Car. of M., 654.
Falconer *v.* Buffalo & J. R. Co. (69 N. Y. 491; affirming 7 Hun 499), Mun. Aid, 101, 242, 281.
Falconer *v.* European & N. A. R. Co. (14 New Brun. 179), Animals, 536.
Falconer *v.* Queen (2 Can. Exch. 82), Em. Dom., 1236, 1248.
Faley *v.* Georgia R. Co. (76 Ga. 597), Car. of M., 1.
Falk *v.* New York, S. & W. R. Co. (N. J.) (58 Am. & Eng. R. Cas. 191, 29 Atl. Rep. 157), Car. of P., 236.
Falken *v.* Housatonic R. Co. (63 Conn. 258, 27 Atl. Rep. 1117), Dam., 100.
Falkenan *v.* Fargo (44 How. Pr. (N. Y.) 325), Exp. Cos., 70, 71.
Falker *v.* New York, W. S. & B. R. Co. (17 Abb. N. Cas. (N. Y.) 279), Sts. & H., 143.
Falkiner *v.* Grand Junction R. Co. (16 Am. & Eng. R. Cas. 591, 4 Ont. 350), Att'ys, 12; Direct., 35.
Falkiner *v.* Great S. & W. of Ireland R. Co. (5 Ir. R. C. L. 213), Death, etc., 256.
Falkner *v.* Ohio & M. R. Co. (55 Ind. 369), Eject. Pass., 23, 54.
Falkner *v.* Somerset & D. R. Co. (42 L. J. Ch. 851, L. R. 16 Eq. 458), Em. Dom., 1101, 1115.
Fallon *v.* Central Park, N. & E. R. R. Co. (64 N. Y. 13; affirming 6 Daly 8), Children, Inj. to, 144.
Fallon *v.* Missouri & M. R. Co. (1 Dill. (U. S.) 121), Constr. Rys., 102.
Fall River Iron Works Co. *v.* Old Colony & F. R. R. Co. (5 Allen (Mass.) 221), Charters, 66; Location, etc., 4; Nuis., 18.
Fall River R. Co. *v.* Chase (125 Mass. 483), Em. Dom., 524.
Falls *v.* San Francisco & N. P. R. Co. (97 Cal. 114, 31 Pac. Rep. 901), Car. of P., 219; Stat. & D., 61, 71.
Falotio *v.* Broadway & S. A. R. Co. (9 Daly (N. Y.) 243), Children, Inj. to, 171.
Falvey *v.* Georgia R. Co. (76 Ga. 597), Car. of M., 602, 646.
Falvey *v.* Northern Transp. Co. (15 Wis. 129), Car. of M., 468.
Fancher *v.* New York, L. E. & W. R. Co. (75 Hun 350, 27 N. Y. Supp. 62, 56 N. Y. S. R. 745), Employés, Inj. to, 687.
Fanning *v.* Long Island R. Co. (2 T. & C. (N. Y.) 585), Animals, 172, 413.
Fanning *v.* Osborne (25 Am. & Eng. R. Cas. 252, 102 N. Y. 441, 7 N. E. Rep. 307, 2 N. Y. S. R. 64; affirming in part 34 Hun 121), Nuis., 2.
Fanter *v.* Clark (15 Ill. App. 470), Fel. Serv., 102.
Farber *v.* Missouri Pac. R. Co. (32 Mo. App 378), Agency, 75.
Farber *v.* Missouri Pac. R. Co. (116 Mo. 81, 22 S. W. Rep. 631; affirming 32 Mo. App. 378), Agency, 103; Car. of P., 81, 309; Tickets & F., 115; Tresp., Inj. to, 82; Witn., 179.
Faren *v.* Sellers (39 La. Ann. 1011, 3 So. Rep. 363), Employés, Inj. to, 12; Fel. Serv., 57.

Farewell *v.* Grand Trunk R. Co. (15 U. C. C. P. 427), Eject. Pass., 35, 54, 76, 84, 86.
Fargey *v.* Grand Junction R. Co. (4 Ont. 232), Consol., 42.
Fargo *v.* Auditor-General (22 Am. & Eng. R. Cas. 216, 57 Mich. 598, 24 N. W. Rep. 538), Stat., 34; Tax., 93.
Fargo *v.* Ledger-Standard Co. (59 Ind. 496), Exp. Cos., 2.
Fargo *v.* Louisville, N. A. & C. R. Co. (10 Biss. (U. S.) 273, 6 Fed. Rep. 787), Citizens., 2; Corp., 3.
Fargo *v.* Michigan (31 Am. & Eng. R. Cas. 452, 121 U. S. 230, 7 Sup. Ct. Rep. 857), Int. Com., 105.
Fargo *v.* New York & N. E. R. Co. (23 N. Y. Supp. 360, 52 N. Y. S. R. 205, 3 Misc. 205), Exp. Cos., 10; Injunc., 10.
Fargo *v.* Oil Creek & A. R. R. Co. (81* Pa. St. 266), Injunc., 12.
Fargo *v.* Redfield (18 Am. & Eng. R. Cas. 463, 22 Fed. Rep. 373, 22 Blatchf. (U. S.) 527), Discrim., 33.
Fargo *v.* Southeastern R. Co. (28 Fed. Rep. 906), Costs., 8.
Fargo & S. W. R. Co. *v.* Brewer (3 N. Dak. 34, 53 N. W. Rep. 177), Tax., 144.
Faris *v.* Reynolds (70 Ind. 359), Mun. Aid, 411.
Farish *v.* Reigle (11 Gratt. (Va.) 697), Car. of P., 98, 99, 102, 103, 640.
Farley *v.* Chicago, B. & N. R. Co. (36 Ill. App. 517), Counties, 8.
Farley *v.* Chicago, R. I. & P. R. Co. (42 Iowa 234), Cross., St. & H., 10, 18, 30.
Farley *v.* Chicago, R. I. & P. R. Co. (2 Am. & Eng. R. Cas. 108, 56 Iowa 337, 9 N. W. Rep. 230), Death, etc., 79; Employés, Inj. to, 323.
Farley *v.* Hill (39 Fed. Rep. 513), Evid., 275.
Farley *v.* Hill (150 U. S. 572, 14 Sup. Ct. Rep. 186), Spec. Perf., 15.
Farley *v.* Moran (Cal.) (31 Pac. Rep. 158), Fences, 42.
Farley *v.* Philadelphia Traction Co. (132 Pa. St. 58, 18 Atl. Rep. 1090), St. Rys., 377.
Farley *v.* Richmond & D. R. Co. (81 Va. 783), Contrib. Neg., 10, 13.
Farley *v.* St. Louis, K. C. & N. R. Co. (72 Mo. 338), Animals, 647.
Farley *v.* St. Paul, M. & M. R. Co. (4 McCrary (U. S.) 138, 14 Fed. Rep. 114), Eq., 3; Mort., 286; Words & Ph., 91.
Farlow *v.* Kelly (11 Am. & Eng. R. Cas. 104, 108 U. S. 288, 2 Sup. Ct. Rep. 555), Car. of P., 491; Collis., 3.
Farmer *v.* Central Iowa R. Co. (67 Iowa 136, 24 N. W. Rep. 895), Employés, Inj. to, 304.
Farmer *v.* Grand Trunk R. Co. (21 Ont. 299), Death, etc., 258; Relief Assoc., 6.
Farmer *v.* London & N. W. R. Co. (20 Q. B. D. 788, 6 Ry. & C. T. Cas. 70), Tax., 365.
Farmer *v.* Medcap (19 Mo. App. 250), Proc., 32.
Farmer *v.* Wilmington & W. R. Co. (20 Am. & Eng. R. Cas. 481, 88 N. Car. 564), Animals, 282; Contrib. Neg., 5, 12, 15.
Farmers' & M. Bank *v.* Champlain Transp. Co. (16 Vt. 52), Car. of M., 79, 250.
Farmers' & M. Bank *v.* Champlain Transp. Co. (18 Vt. 131), Lim. of Liab., 16; Witn., 7.
Farmers' & M. Bank *v.* Champlain Transp. Co. (23 Vt. 186), Car. of M., 93; Lim. of Liab., 11.
Farmers' & M. Bank *v.* Detroit & M. R. Co. (17 Wis. 372), Car. of M., 122.
Farmers' & M. Bank *v.* Eldred (20 Wis. 196), Em. Dom., 954.
Farmers' & M. Bank *v.* Erie R. Co. (72 N. Y. 188), Bills of L., 126.
Farmers' & M. Nat. Bank *v.* Philadelphia & R. R. Co. (14 Phila. (Pa.) 456), Receiv., 11, 47, 94, 97.
Farmers' L. & T. Co., In re (129 U. S. 206, 9 Sup. Ct. Rep. 265), Receiv., 108.
Farmers' L. & T. Co. *v.* Ansonia (61 Conn. 76, 23 Atl. Rep. 705), St. Rys., 296.
Farmers' L. & T. Co. *v.* Burlington & S. W. R. Co. (32 Fed. Rep. 805), Mort., 284.
Farmers' L. & T. Co. *v.* Canada & St. L. R. Co. (47 Am. & Eng. R. Cas. 271, 127 Ind. 250, 26 N. E. Rep. 784), Deeds of Tr., 11; Judgm., 46; Liens, 41, 42, 49; Mort., 101, 106.
Farmers' L. & T. Co. *v.* Candler (47 Am. & Eng. R. Cas. 296, 87 Ga. 241, 13 S. E. Rep. 560), Liens, 17, 42.
Farmers' L. & T. Co. *v.* Cary (13 Wis. 110), Mort., 32.
Farmers' L. & T. Co. *v.* Central Iowa R. Co. (4 Dill. (U. S.) 533), App., 147.
Farmers' L. & T. Co. *v.* Central R. Co. (4 Dill. (U. S.) 546), Reorg., 1.
Farmers' L. & T. Co. *v.* Central R. Co. (1 McCrary (U. S.) 352, 2 Fed. Rep. 751), Receiv., 148.
Farmers' L. & T. Co. *v.* Central R. Co. (2 McCrary (U. S.) 181, 7 Fed. Rep. 537), Mort., 234.
Farmers' L. & T. Co. *v.* Central R. Co. (2 McCrary (U. S.) 318, 8 Fed. Rep. 60), Receiv., 159, 161, 162.
Farmers' L. & T. Co. *v.* Central R. Co. (12 Am. & Eng. R. Cas. 461, 5 McCrary (U. S.) 421, 17 Fed. Rep. 758), Receiv., 186.
Farmers' L. & T. Co. *v.* Chicago & A. R. Co. (24 Am. & Eng. R. Cas. 166, 27 Fed. Rep. 146), Deeds of Tr., 16, 19; Receiv., 2, 19; Trusts, 5.
Farmers' L. & T. Co. *v.* Chicago & A. R. Co. (43 Am. & Eng. R. Cas. 436, 42 Fed. Rep. 6), Mort., 58.
Farmers' L. & T. Co. *v.* Chicago & A. R. Co. (44 Fed. Rep. 653), Mort., 267.
Farmers' L. & T. Co. *v.* Chicago, P. & S. W. R. Co. (18 Fed. Rep. 484), Leases, 66.
Farmers' L. & T. Co. *v.* Chicago, P. & S. R. Co. (39 Fed. Rep. 143), Land Grants, 62.
Farmers' L. & T. Co. *v.* Commercial Bank (11 Wis. 207), Mort., 40.
Farmers' L. & T. Co. *v.* Commercial Bank (15 Wis. 424), Mort., 37.
Farmers' L. & T. Co. *v.* Fisher (17 Wis. 114), Mort., 38; Pl., 67.
Farmers' L. & T. Co. *v.* Green Bay & M.

R. Co. (10 Biss. (U. S.) 203, 6 Fed. Rep. 100), Mort., 191, 246, 284.
Farmers' L. & T. Co. *v.* Green Bay & M. R. Co. (11 Biss. (U. S.) 334, 12 Fed. Rep. 773), Corp., 8; Ult. Vir., 27.
Farmers' L. & T. Co. *v.* Green Bay, W. & St. P. R. Co. (46 Am. & Eng. R. Cas. 296, 45 Fed. Rep. 664), Mort., 121.
Farmers' L. & T. Co. *v.* Houston & T. C. R. Co. (44 Fed. Rep. 115), Mort., 181.
Farmers' L. & T. Co. *v.* Hughes (11 Hun (N. Y.) 130), Mort., 133.
Farmers' L. & T. Co. *v.* Kansas City, W. & N. W. R. Co. (53 Fed. Rep. 182), Mort., 180, 215, 219, 228.
Farmers' L. & T. Co. *v.* McHenry (9 Abb. N. Cas. (N. Y.) 235), Injunc., 40.
Farmers' L. & T. Co. *v.* Missouri, I. & N. R. Co. (17 Am. & Eng. R. Cas. 314, 21 Fed. Rep. 264), Insolv., 6; Mort., 128.
Farmers' L. & T. Co. *v.* Newman (127 U. S. 649, 8 Sup. Ct. Rep. 1364), Mort., 275.
Farmers' L. & T. Co. *v.* New Rochelle & P. R. Co. (10 N. Y. Supp. 810, 57 Hun 376, 32 N. Y. S. R. 714; affirmed in 126 N. Y. 624, mem., 27 N. E. Rep. 410, mem., 36 N. Y. S. R. 1012), Mort., 184; Mun. Corp., 48.
Farmers' L. & T. Co. *v.* Nova Scotia C. R. Co. (24 Nov. Sc. 542), Mort., 163.
Farmers' L. & T. Co. *v.* Oregon & C. R. Co. (11 Sawy. (U. S.) 115, 24 Fed. Rep. 407), Mort., 5, 18.
Farmers' L. & T. Co. *v.* Postal Tel. Co. (55 Conn. 334, 11 Atl. Rep. 184), Mort., 169.
Farmers' L. & T. Co. *v.* St. Joseph & D. C. R. Co. (1 McCrary (U. S.) 247, 2 Fed. Rep. 117), Leases, 20.
Farmers' L. & T. Co. *v.* St. Joseph & D. C. R. Co. (3 Dill. (U. S.) 412), Mort., 65.
Farmers' L. & T. Co. *v.* San Diego Street Car Co. (45 Fed. Rep. 518), Mort., 201; Pledge, etc., 4.
Farmers' L. & T. Co. *v.* San Diego Street Car Co. (49 Fed. Rep. 188), Mort., 16, 174.
Farmers' L. & T. Co. *v.* Texas Western R. Co. (32 Fed. Rep. 359), Mort., 174.
Farmers' L. & T. Co. *v.* Toledo & S. H. R. Co. (43 Fed. Rep. 223), Mort., 185.
Farmers' L. & T. Co. *v.* Toledo & S. H. R. Co. (57 Am. & Eng. R. Cas. 144, 54 Fed. Rep. 759, 4 C. C. A. 561), Bonds, 1; Pledge, etc., 3; Sales of Rds., 5.
Farmers' L. & T. Co. *v.* Vicksburg & M. R. Co. (33 Fed. Rep. 778), Mort., 102.
Farmers' L. & T. Co. *v.* Waterman (12 Am. & Eng. R. Cas. 398, 106 U. S. 265, 1 Sup. Ct. Rep. 131), Mort., 296, 297.
Farmers' R. Co. *v.* Reno, O. C. & P. R. Co. (53 Pa. St. 224), Injunc., 33.
Farmington *v.* Sandy River Nat. Bank (85 Me. 46, 26 Atl. Rep. 965), Eq., 12.
Farnham *v.* Benedict (107 N. Y. 159, 13 N. E. Rep. 784, 11 N. Y. S. R. 450; reversing 39 Hun 22), Incorp., 8, 9; Mun. Aid, 325, 334.
Farnham *v.* Camden & A. R. Co. (55 Pa. St. 53), Bills of L., 36, 64; Car. of M., 473; Lim. of Liab., 24.
Farnsworth *v.* Baltimore & O. R. Co. (28 W. Va. 815), App., 2.
Farnsworth *v.* Drake (11 Ind. 101), Bills & N., 21.
Farnsworth *v.* Lime Rock R. Co. (47 Am. & Eng. R. Cas. 64, 83 Me. 440, 22 Atl. Rep. 373), Charters, 6, 90; Em. Dom., 80, 324; Incorp., 3.
Farnsworth *v.* Minnesota & P. R. Co. (92 U. S. 49), Land Grants, 35, 120.
Farnsworth *v.* Terre Haute, A. & St. L. R. Co. (29 Mo. 75), Attach., 9; For. Corp., 25.
Farr *v.* Great Western R. Co. (35 U. C. Q. B. 534), Car. of L. S., 77.
Farr *v.* Lyons (21 Blatchf. (U. S.) 116), Fed. Cts., 7.
Farran *v.* Chicago & N. W. R. Co. (21 Wis. 435), Trial, 158.
Farrant *v.* First Div. St. P. & P. R. Co. (13 Minn. 311 (Gil. 286), Sts. & H., 173.
Farrar *v.* East Tenn., V. & G. R. Co. (1 Int. Com. Rep. 764, 1 Int. Com. Com. 480), Int. Com., 109.
Farrell *v.* Houston, W. S. & P. F. R. Co. (21 N. Y. S. R. 84, 51 Hun 640, mem., 4 N. Y. Supp. 597), St. Rys., 410.
Farrell *v.* Richmond & D. R. Co. (37 Am. & Eng. R. Cas. 704, 102 N. Car. 390, 3 L. R. A. 647, 9 S. E. Rep. 302), Car. of M., 248, 491, 492, 497, 498, 510, 512.
Farrell *v.* St. Paul & N. P. R. Co. (38 Minn. 394, 38 N. W. Rep. 100), Trial, 86.
Farrell *v.* Union Trust Co. (13 Am. & Eng. R. Cas. 552, 77 Mo. 475), Animals, 368, 651.
Farrell *v.* Waterbury Horse R. Co. (46 Am. & Eng. R. Cas. 207, 60 Conn. 239, 21 Atl. Rep. 675, 22 Atl. Rep. 544), App., 14; Negl., 52, 65.
Farrell *v.* Winchester Ave. R. Co. (61 [illegible], 127, 23 Atl. Rep. 757), Elec. Rys., [illegible].
Farrington *v.* South Boston R. Co. (150 Mass. 406, 23 N. E. Rep. 109), Stock, 13, 69.
Farrington *v.* Tourtelott (39 Fed. Rep. 738), Vend. & P., 1.
Farris *v.* Cass Ave. & F. G. R. Co. (80 Mo. 325; affirming 8 Mo. App. 538), Children, Inj. to, 12, 68, 131.
Farris *v.* Chicago, S. F. & C. R. Co. (51 Mo. App. 297), Dam., 104.
Farve *v.* Louisville & N. R. Co. (42 Fed. Rep. 441), Cross., Inj. at, 322; Negl., 25, 42, 101.
Farwell *v.* Boston & W. R. Corp. (4 Metc. (Mass.) 49), Fel. Serv., 1, 42, 202, 419.
Farwell *v.* Dewey (12 Mich. 436), Constr. Rys., 91.
Farwell *v.* Walbridge (6 Montr. L. R. 77; reversing 3 Montr. Super. 238), Mort., 151.
Farwell Farmers' Warehouse Assoc. *v.* Minneapolis, St. P. & S. St. M. R. Co. (57 Am. & Eng. R. Cas. 55, 55 Minn. 8, 56 N. W. Rep. 248), Discrim., 51.
Fash *v.* Third Ave. R. Co. (1 Daly (N. Y.) 148), St. Rys., 178.
Fatchell *v.* St. Louis & I. M. R. Co. (28 Mo. 178), Just. P., 2.
Fath *v.* Tower Grove & L. R. Co. (50 Am. & Eng. R. Cas. 426, 105 Mo. 537, 16 S. W.

Rep. 913; affirming 39 Mo. App. 447), App., 51; St. Rys., 268.
Fatman *v.* Cincinnati, H. & D. R. Co. (2 Disney (Ohio) 248), Car. of M., 179, 485; Words & Ph., 231.
Faucher *v.* North Shore R. Co. (12 Quebec L. R. 88), Tresp., Inj. to, 4.
Faulkner *v.* Delaware & R. Canal Co. (1 Den. (N. Y.) 441), Lim. of Ac., 73.
Faulkner *v.* Erie R. Co. (49 Barb. (N. Y.) 324), Employés, Inj. to, 2, 56, 99, 136; Fel. Serv., 1, 3, 113, 138.
Faulkner *v.* Hart (12 J. & S. (N. Y.) 471), Insolv., 2.
Faulkner *v.* Hart (82 N. Y. 413, 37 Am. Rep. 574; reversing 12 J. & S. 471), Car. of M., 335.
Faulkner *v.* South. Pac. R. Co. (51 Mo. 311, 3 Am. Ry. Rep. 293), Car. of M., 57, 778.
Faunce *v.* Burke (16 Pa. St. 469), Constr. Rys., 83.
Fauntleroy *v.* Hannibal (5 Dill. (U. S.) 219), Int., 16.
Faust *v.* Passenger R. Co. (3 Phila. (Pa.) 164), Em. Dom., 161; St. Rys., 199.
Faust *v.* Second & T. St. Pass. R. Co. (3 Phila. (Pa.) 164), St. Rys., 34.
Faust *v.* South Carolina R. Co. (8 So. Car. 118), Car. of M., 296.
Faviell *v.* Eastern Counties R. Co. (2 Exch. 344, 6 D. & L. 54, 17 L. J. Exch. 297, 17 L. J. Exch. 223), Att'ys, 6.
Favor *v.* Boston & L. R. Corp. (114 Mass. 550), Fright. Teams, 3.
Favre *v.* Louisville & N. R. Co. (47 Am. & Eng. R. Cas. 594, 91 Ky. 541, 16 S. W. Rep. 370), Car. of P., 485; Contrib. Neg., 74.
Fawcett *v.* Pittsburg, C. & St. L. R. Co. (19 Am. & Eng. R. Cas. 1, 24 W. Va. 755), Side Tr., 4; Words & Ph., 111.
Fawcett *v.* York & N. M. R. Co. (16 Q. B. 610, 15 Jur. 173, 20 L. J. Q. B. 222), Animals, 191; Cross., Inj. at, 48.
Faxton *v.* McCosh (12 Iowa 527), Tax., 104.
Fay *v.* Minneapolis & St. L. R. Co. (11 Am. & Eng. R. Cas. 193, 30 Minn. 231, 15 N. W. Rep. 241), Employés, Inj. to, 25, 94, 154, 420.
Fay *v.* Parker (53 N. H. 342), Assault, 19.
Fayerweather *v.* Phenix Ins. Co. (42 Am. & Eng. R. Cas. 337, 118 N. Y. 324, 23 N. E. Rep. 192, 28 N. Y. S. R. 689; affirming 22 J. & S. 545), Fire Ins., 15.
Fayette County Court *v.* Lexington & B. S. R. Co. (17 B. Mon. (Ky.) 335), Mun. Aid, 112.
Fayetteville & L. R. R. Co. *v.* Combs (39 Am. & Eng. R. Cas. 140, 51 Ark. 324, 11 S. W. Rep. 418), Em. Dom., 591, 644, 686, 926; Witn., 109.
Fayetteville & L. R. R. Co. *v.* Hunt (39 Am. & Eng. R. Cas. 130, 51 Ark. 330, 11 S. W. Rep. 418), Em. Dom., 350.
Fayolle *v.* Texas & P. R. Co. (D. C.) (3 Am. & Eng. R. Cas. 532), Eq., 28; Injunc., 13.
Fazende *v.* Morgan (31 La. Ann. 549), Em. Dom., 196, 210, 231.
Fearn *v.* West Jersey Ferry Co. (143 Pa. St. 122, 22 Atl. Rep. 708), Car. of P., 584.
Fearns *v.* Atchison, T. & S. F. R. Co. (33 Kan. 275, 6 Pac. Rep. 237), Pub. Lds., 20.
Federal St. & P. V. R. Co. *v.* Gibson (11 Am. & Eng. R. Cas. 142, 96 Pa. St. 83), Car. of P., 586; St. Rys., 442.
Feeney *v.* Brooklyn City R. Co. (36 Hun (N. Y.) 197), Actions, 9; Costs, 7.
Feeney *v.* Long Island R. Co. (39 Am. & Eng. R. Cas. 639, 116 N. Y. 375, 22 N. E. Rep. 402, 26 N. Y. S. R. 729, 5 L. R. A. 544; affirming 42 Hun 657, 5 N. Y. S. R. 63), Cross., Inj. at, 48, 306; Dam., 16, 44, 47; Witn., 88.
Fehnrich *v.* Michigan C. R. Co. (87 Mich. 606, 49 N. W. Rep. 890), Contrib. Neg., 42; Cross., Inj. at, 315; Tresp., Inj. to, 4.
Feige *v.* Michigan C. R. Co. (62 Mich. 1, 28 N. W. Rep. 685), Car. of M., 345, 430; Lim. of Liab., 2; Words & Ph., 230.
Feinberg *v.* Delaware, L. & W. R. Co. (45 Am. & Eng. R. Cas 348, 52 N. J. L. 451, 20 Atl. Rep. 33), Car. of L. S., 40, 119.
Feital *v.* Middlesex R. Co. (109 Mass. 398), Evid., 125; St. Rys., 348, 365; Sunday, 4.
Felder *v.* Columbia & G. R. Co. (27 Am. & Eng. R. Cas. 264, 21 So. Car. 35, 53 Am. Rep. 656), Bagg., 24; Car. of P., 499; Car. of M., 662.
Felder *v.* Louisville, C. & C. R. Co. (2 McMull. (So. Car.) 403), Tresp., Inj. to, 103.
Fell *v.* Burlington, C. R. & M. R. Co. (43 Iowa 177), Evid., 234.
Fell *v.* Charleston, C. & C. R. Co. (33 So. Car. 198, 11 S. E. Rep. 691), Trial, 63.
Fell *v.* Northern Pac. R. Co. (44 Fed. Rep. 248), Dam., 31; Eject. Pass., 64, 117, 126.
Fellows *v.* Goodman (49 Mo. 62), False Imp., 1.
Fellows *v.* Smith (131 Mass. 363), Attach., 34.
Felton *v.* Chicago, R. I. & P. R. Co. (27 Am. & Eng. R. Cas. 229, 69 Iowa 577, 29 N. W. Rep. 618), Car. of P., 315.
Fenelon Falls *v.* Victoria R. Co. (29 Grant's Ch. (U. C.) 4), Sts. & H., 297, 358.
Fenn *v.* Kinsey (45 Mich. 446, 8 N. W. Rep. 64), Land Grants, 119.
Fenn *v.* Timpson (4 E. D. Smith (N. Y.) 276), Exp. Cos., 86.
Fenner *v.* Buffalo & S. L. R. Co. (44 N. Y. 505; reversing 46 Barb. 103), Car. of M., 347, 617.
Fenner *v.* London & S. E. R. Co. (41 L. J. Q. B. 313, L. R. 7 Q. B. 767, 20 W. R. 830, 26 L. T. 971), Discov., 6.
Fent *v.* Toledo, P. & W. R. Co. (59 Ill. 349, 11 Am. Ry. Rep. 167), Fires, 90, 320, 334, Trial, 58; Words & Ph., 42.
Fenter *v.* Toledo, St. L. & K. C. R. Co. (29 Ill. App. 250), Nuis., 30.
Fenton *v.* Second Ave. R. Co. (126 N. Y. 625, 26 N. E. Rep. 967, 36 N. Y. S. R. 385, 4 Silv. App. 380; reversing 56 Hun 99, 29 N. Y. S. R. 962, 9 N. Y. Supp. 162), St. Rys., 448, 462.
Fenwick *v.* East London R. Co. (44 L. J. Ch. 602, L. R. 20 Eq. 544, 23 W. R. 901), Em. Dom., 1207.
Ferguson *v.* Central Iowa R. Co. (5 Am. &

Eng. R. Cas. 614, 58 Iowa 293, 12 N. W. Rep. 293), Employés, Inj. to, 409.
Ferguson *v.* Columbus & R. R. Co. (75 Ga. 637), Evid., 175; Trial, 70.
Ferguson *v.* Columbus & R. R. Co. (77 Ga. 102), Children, Inj. to, 25.
Ferguson *v.* Fall Brook Coal Co. (4 N. Y. S. R. 423), Employés, Inj. to, 210.
Ferguson *v.* Galt (23 U. C. C. P. 66), Constr. Rys., 59, 110.
Ferguson *v.* Virginia & T. R. Co. (13 Nev. 184), Farm Cross., 14.
Ferguson *v.* Wisconsin C. R. Co. (19 Am. & Eng. R. Cas. 285, 63 Wis. 145, 23 N. W. Rep. 123), Cross., Inj. at, 365; Evid., 130; Fly. Switch, 1, 2.
Fergusson *v.* London, B. & S. C. R. Co. (3 De G., J. & S. 653, 33 L. J. Ch. 29, 11 W. R. 1088, 9 L. T. 134, 33 Beav. 103), Em. Dom., 1104.
Fernandes *v.* Sacramento City R. Co. (52 Cal. 45, 20 Am. Ry. Rep. 101), Contrib. Neg., 12, 82, 90.
Fernow *v.* Chicago, M. & St. P. R. Co. (36 Am. & Eng. R. Cas. 420, 75 Iowa 526, 39 N. W. Rep. 869), Dissol., 32.
Fernow *v.* Dubuque & S. W. R. Co. (22 Iowa 528), Animals, 138; Fences, 84.
Fero *v.* Buffalo & S. L. R. Co. (22 N. Y. 209), Fires, 22, 27, 29, 246, 325.
Ferren *v.* Old Colony R. Co. (143 Mass. 197, 9 N. E. Rep. 608), Employés, Inj. to, 692, 716.
Ferrers *v.* Stafford & U. R. Co. (41 L. J. Ch. 362, L. R. 13 Eq. 524, 20 W. R. 478, 26 L. T. 652), Em. Dom., 1209.
Ferrie *v.* Great Western R. Co. (15 U. C. Q B. 513), Death, etc., 285.
Ferris, In re (56 Conn. 396, 15 Atl. Rep. 751), Injunc., 15.
Ferris *v.* Grand Trunk R. Co. (16 U. C. Q. B. 474), Animals, 276.
Ferris *v.* St. Louis & H. R. Co. (30 Mo. App. 122), Animals, 153.
Ferris *v.* Union Ferry Co. (36 N. Y. 312), Ferries, 11.
Ferris *v.* Van Buskirk (18 Barb. (N. Y.) 397), Fences, 75.
Ferry *v.* Manhattan R. Co. (44 Am. & Eng. R. Cas. 331, 118 N. Y. 497, 23 N. E. Rep. 822, 29 N. Y. S. R. 933; affirming 22 J. & S. 325, 6 N. Y. S. R. 821), App., 83.
Festner *v.* Omaha & S. W. R. Co. (20 Am. & Eng. R. Cas. 238, 17 Neb. 280, 22 N. W. Rep. 557), Em. Dom., 575; Trial, 91.
Fettrich *v.* Dickenson (22 How. Pr. (N. Y.) 248), St. Rys., 233.
Fibel *v.* Livingston (64 Barb. (N. Y.) 179), Bills of L., 81; Exp. Cos., 73; Lim. of Liab., 3.
Fick *v.* Chicago & N. W. R. Co. (34 Am. & Eng. R. Cas. 378, 68 Wis. 469, 32 N. W. Rep. 527), Assault, 6; Trial, 219.
Fick *v.* Pennsylvania R. Co. (157 Pa. St. 622, 27 Atl. Rep. 783), Culverts, 9, 14.
Fickle *v.* St. Louis, K. C. & N. R. Co. (54 Mo. 219, 12 Am. Ry. Rep. 376), Animals, 313, 487; App., 92.
Fidelity I. & S. D. Co. *v.* Shenandoah Iron Co. (42 Fed. Rep. 372), Mort., 92; Receiv., 95.
Fidelity I., T. & S. D. Co. *v.* Huntington (117 U. S. 280, 6 Sup. Ct. Rep. 733), Rem. of C., 40.
Fidelity I., T. & S. D. Co. *v.* Shenandoah Valley R. Co. (38 Am. & Eng. R. Cas. 559, 86 Va. 1, 13 Va. L. J. 309, 9 S. E. Rep. 759), Estop., 35; Liens, 55; Mort., 304; Receiv., 84; Stat., 34.
Fidelity I., T. & S. D. Co. *v.* Shenandoah Valley R. Co. (38 Am. & Eng. R. Cas. 577, 32 W. Va. 244, 9 S. E. Rep. 180), Contr., 12; Intervent., 1; Mort., 148.
Fidelity I., T. & S. D. Co. *v.* Shenandoah Valley R. Co. (43 Am. & Eng. R. Cas. 350, 33 W. Va. 761, 11 S. E. Rep. 58), Attach., 42; Bonds, 39; Dam., 61; Liens, 1.
Fidelity I., T. & S. D. Co. *v.* United N. J. R. & C. Co. (12 Am. & Eng. R. Cas. 404, 36 N. J. Eq. 405), Mort., 135.
Fidelity I., T. & S. D. Co. *v.* West Pa. & S. C. R. Co. (122 Pa. St. 565, 16 Atl. Rep. 100), Deeds of Tr., 4.
Fidelity I., T. & S. D. Co. *v.* Western Pa. & S. C. R. Co. (138 Pa. St. 494, 21 Atl. Rep. 21), Bonds, 41; Mort., 11.
Fidelity T. & S. V. Co. *v.* Mobile St. R. Co. (53 Fed. Rep. 687), Elec. Rys., 15; Em. Dom., 102, 160; Receiv., 45; St. Rys., 44.
Fidelity T. & S. V. Co. *v.* Mobile St. R. Co. (53 Fed. Rep. 850), Intervent., 2; Proc., 20.
Fidelity T. & S. V. Co. *v.* Mobile St. R. Co. (54 Fed. Rep. 26), Mort., 287.
Fiedler *v.* St. Louis, I. M. & S. R. Co. (54 Am. & Eng. R. Cas. 162, 107 Mo. 645, 18 S. W. Rep. 847), Tresp., Inj. to, 20, 35.
Field *v.* Carnarvon & L. R. Co. (L. R. 5 Eq. 190, 37 L. J. Ch. 176, 18 L. T. 534, 16 W. R. 273), Em. Dom., 1095.
Field *v.* Chicago & R. I. R. Co. (71 Ill. 458), Bills of L., 32, 67.
Field *v.* Chicago, B. & Q. R. Co. (8 Am. & Eng. R. Cas. 425, 4 McCrary (U. S.) 573, 14 Fed. Rep. 332), Cross., Inj. at, 61.
Field *v.* Chicago, R. I. & P. R. Co. (21 Mo. App. 600), Drains, 3; Waters & W., 28.
Field *v.* Chicago, R. I. & P. R. Co. (76 Mo. 614), Flood. Lds., 27, 70.
Field *v.* Missouri Pac. R. Co. (46 Mo. App. 449), Trial, 59.
Field *v.* Newport, A. & H. R. Co. (3 H. & N. 409, 27 L. J. Ex. 396), Car. of M., 398; Charges, 127; Distress, 2; Tender, 7.
Field *v.* New York C. R. Co. (32 N. Y. 339; affirming 29 Barb. 176), Fires, 235, 247, 288.
Field *v.* Vermont & M. R. Co. (4 Cush. (Mass.) 150), Em. Dom., 910.
Fielder *v.* Montgomery & E. R. Co. (51 Ala. 178), Mun. Aid, 183.
Fields *v.* Hartford & W. Horse R. Co. (54 Conn. 9, 4 Atl. Rep. 105), St Rys., 162.
Fields *v.* Wabash, St. L. & P. R. Co. (80 Mo. 203), Animals, 351, 608.
Fiero *v.* New York C. & H. R. R. Co. (71 Hun (N. Y.) 213), Employés, Inj. to, 310.
Fietsam *v.* Hay (122 Ill. 293, 13 N. E. Rep. 501, 11 West. Rep. 581), Franch., 1, 4.
Fifield *v.* Maine C. R. Co. (62 Me. 77), Exec., 12, 20; Trover, 8.
Fifield *v.* Northern R. Co. (42 N. H. 225), Employés, Inj. to, 82, 145.

Fifth Ave. Bank *v.* Forty-second St. & G. S. F. R. Co. (137 N. Y. 231, 33 N. E. Rep. 378, 50 N. Y. S. R. 712; affirming 63 Hun 629, 44 N. Y. S. R. 379, 17 N. Y. Supp. 826), Stock, 39.
Fifth Baptist Church *v.* Baltimore & P. R. Co. (2 Mackey D. C. 458), Int., 15.
Fifth Nat. Bank *v.* New York El. R. Co. (22 Am. & Eng. R. Cas. 146, 24 Fed. Rep. 114), Elev. Rys., 132.
Fifth Nat. Bank *v.* New York El. R. Co. (28 Fed. Rep. 231; motion to dismiss denied in 118 U. S. 608, 7 Sup. Ct. Rep. 23; affirmed in 43 Am. & Eng. R. Cas. 403, 135 U. S. 432), Elev. Rys., 120.
Fifth Nat. Bank *v.* Pittsburg & C. S. R. Co. (1 Fed. Rep. 190), Receiv., 3, 172.
Fifty-four First Mortgage Bonds, In re (9 Am. & Eng. R. Cas. 739, 15 So. Car. 304), Receiv., 30.
Fifty-four First Mortgage Bonds, In re (9 Am. & Eng. R. Cas. 723, 15 So. Car. 518), Receiv., 30.
Filbert *v.* Delaware & H. Canal Co. (121 N. Y. 207, 23 N. E. Rep. 1104, 30 N. Y. S. R. 494; reversing 24 J. & S. 170, 18 N. Y. S. R. 964, 2 N. Y. Supp. 623), Fel. Serv., 425, 426.
Filbin *v.* Chesapeake & O. R. Co. (91 Ky. 444, 16 S. W. Rep. 92), Right of W., 24; Words & Ph., 252.
Filer *v.* New York C. R. Co. (49 N. Y. 42, 3 Am. Ry. Rep. 460), Dam., 42, 88; Witn., 191.
Filer *v.* New York C. R. Co. (49 N. Y. 47, 3 Am. Ry. Rep. 466), Car. of P., 422; Husb. & W., 16; Negl., 56.
Filer *v.* New York C. R. Co. (59 N. Y. 351, 7 Am. Ry. Rep. 111), Car. of P., 432.
Filer *v.* New York C. R. Co. (68 N. Y. 124), Car. of P., 430.
Files *v.* Boston & A. R. Co. (149 Mass. 204, 21 N. E. Rep. 311), Car. of P., 21, 459; Tresp., Inj. to, 13.
Files *v.* State (42 Ark. 529, 3 S. W. Rep. 817), Tax., 330.
Fillebrown *v.* Grand Trunk R. Co. (55 Me. 462), Car. of M., 12, 433; Words & Ph., 7.
Filli *v.* Delaware, L. & W. R. Co. (37 Fed. Rep. 65), Fed. Cts., 5.
Finance Co. *v.* Charleston, C. & C. R. Co. (48 Fed. Rep. 188), Mort., 91.
Finance Co. *v.* Charleston, C. & C. R. Co. (51 Am. & Eng. R. Cas. 55, 49 Fed. Rep. 693), Mort., 100.
Finance Co. *v.* Charleston, C. & C. R. Co. (52 Fed. Rep. 678), Mort., 110.
Finance Co. of Pa. *v.* Charleston, C. & C. R. Co. (45 Fed. Rep. 436), Receiv., 9.
Finance Co. of Pa. *v.* Charleston, C. & C. R. Co. (46 Fed. Rep. 426), Att'ys, 17.
Finance Co. of Pa. *v.* Charleston, C. & C. R. Co. (46 Fed. Rep. 508), Receiv., 143.
Finance Co. of Pa. *v.* Charleston, C. & C. R. Co. (48 Fed. Rep. 45), Att'ys, 17.
Finance Co. of Pa. *v.* Charleston, C. & C. R. Co. (52 Fed. Rep. 524), Receiv., 97.
Finance Co. of Pa. *v.* Charleston, C. & C. R. Co. (52 Fed. Rep. 526), Att'ys, 17; Mort., 283; Receiv., 92.
Finch *v.* Central R. Co. (42 Iowa 304), Animals, 582, 615.
Finch *v.* Chicago, M. & St. P. R. Co. (46 Minn. 250, 48 N. W. Rep. 915), Fences, 28, 101; Witn., 146, 161.
Finch *v.* Great Western R. Co. (L. R. 5 Ex. D. 254, 41 L. T. 731, 28 W. R. 229), Priv. Ways, 6.
Finch *v.* Northern Pac. R. Co. (47 Minn. 36, 49 N. W. Rep. 329), Eject. Pass., 125.
Finch *v.* Riverside & A. R. Co. (46 Am. & Eng. R. Cas. 107, 87 Cal. 597, 25 Pac. Rep. 765), St. Rys., 24, 69, 220.
Finck *v.* London & S. W. R. Co. (L. R. 33 Ch. D. 330), Em. Dom., 1140.
Finegan *v.* L'Engle (8 Fla. 413), Constr. Rys., 60.
Fink *v.* Albany & S. R. Co. (4 Lans. (N. Y.) 147), Eject. Pass., 16, 107.
Fink *v.* Manhattan R. Co. (15 Daly 479, 24 Abb. N. Cas. 81, 18 Civ. Pro. 141, 8 N. Y. Supp. 327, 29 N. Y. S. R. 153), Elev. Rys., 98.
Fink *v.* Missouri Furnace Co. (10 Mo. App 61; reversed on other grounds in 82 Mo. 276), Children, Inj. to, 69, 146.
Fink *v.* Missouri Furnace Co. (82 Mo. 276; reversing 10 Mo. App. 61), Indep. Contr., 1.
Fink *v.* Republican Valley R. Co. (27 Neb. 660, 43 N. W. Rep. 418), Em. Dom., 826.
Finklestein *v.* New York C. & H. R. R. Co. (41 Hun (N. Y.) 34, 2 N. Y. S. R. 680), Children, Inj. to, 101; Cross., Inj. at, 77, 146; Negl., 70.
Finlay *v.* Bristol R. Co. (7 Exch. 409, 7 Railw. Cas. 449, 21 L. J. Exch. 117), Assump., 7.
Finlayson *v.* Chicago, B. & Q. R. Co. (1 Dill. (U. S.) 579), Tresp., Inj. to, 10, 54, 92.
Finley *v.* Hudson Elec. R. Co. (46 N. Y. S. R. 202, 64 Hun 373, 19 N. Y. Supp. 621), Elec. Rys., 29.
Finn *v.* Valley City St. & C. R. Co. (86 Mich. 74, 48 N. W. Rep. 696), St. Rys., 367.
Finn *v.* Western R. Corp. (102 Mass. 283), Car. of M., 190, 708; Lim. of Ac., 36.
Finn *v.* Western R. Corp. (112 Mass. 524), Car. of M., 709.
Finnegan *v.* Chicago, St. P., M. & O. R. Co. (48 Minn. 378, 51 N. W. Rep. 122), Car. of P., 28.
Finnegan *v.* Lee (18 How. Pr. (N. Y.) 186), Bonds, 47.
Finnell *v.* Delaware, L. & W. R. Co. (129 N. Y. 669, 29 N. E. Rep. 825, 3 Silv. App. 643, 42 N. Y. S. R. 354; reversing 36 N. Y. S. R. 1020), Employés, Inj. to, 70, 412; Side Tr., 6.
Finnell *v.* Southern Kan. R. Co. (33 Fed. Rep. 427), Lim. of Ac., 8.
Finney *v.* Lamb (54 Ind. 1), Mun. Aid, 148.
Finney *v.* Northern Pac. R. Co. (12 Am. & Eng. R. Cas. 17, 3 Dak. 270, 16 N. W. Rep. 500), New Tr., 22.
Finnie *v.* Southwestern R. Co. (26 L. T. 14, 1 Ry. & C. T. Cas. 18), Charges, 94.
Finnis to Forbes, Ex parte Tower Ward

School Trustees (L. R. 24 Ch. D. 591, 53 L. J. Ch. D. 141, 48 L. T. 814, 32 W. R. 55), Em. Dom., 1099.
Fire Ins. Assoc. *v.* Merchants' & M. Transp. Co. (28 Am. & Eng. R. Cas. 43, 66 Md. 339, 7 Atl. Rep. 905), Fire Ins., 1.
First Baptist Church *v.* Schenectady & T. R. Co. (5 Barb. (N. Y.) 79), Agency, 72; Nuis., 5.
First Baptist Church *v.* Utica & S. R. Co. (6 Barb. (N. Y.) 313), Nuis., 3, 5, 28.
First Congregational Church *v.* Milwaukee & L. W. R. Co. (43 Am. & Eng. R. Cas. 182, 77 Wis. 158, 45 N. W. Rep. 1086), Sts. & H., 148, 161.
First Div. St. P. & P. R. Co. *v.* Parcher (14 Minn. 297 (Gil. 224), Charters, 141; St. Paul & P. R. Co., 1; State Aid, 24; Tax., 207.
First Div. St. P. & P. R. Co. *v.* St. Paul (21 Minn. 526, 18 Am. Ry. Rep. 435), Tax., 147; Words & Ph., 20.
First Nat. Bank *v.* Anderson (12 Am. & Eng. R. Cas. 411, 75 Va. 250), Deeds of Tr., 5.
First Nat. Bank *v.* Arlington (16 Blatchf. (U. S.) 57), Mun. Aid, 335, 394.
First Nat. Bank *v.* Bennington (16 Blatchf. (U. S.) 53), Mun. Aid, 386.
First Nat. Bank *v.* Caldwell (4 Dill. (U. S.) 314), Mort., 86.
First Nat. Bank *v.* Concord (50 Vt. 257), Mun. Aid, 19, 204, 218, 340.
First Nat. Bank *v.* Davenport & St. P. R. Co. (45 Iowa 120), Attach., 16.
First Nat. Bank *v.* Davies (43 Iowa 424), Stock, 37.
First Nat. Bank *v.* Dorset (16 Blatchf. (U. S.) 62), Mun. Aid, 102.
First Nat. Bank *v.* Eitemiller (14 Ill. App. 22), Comp. Neg., 4, 14.
First Nat. Bank *v.* Hendrie (49 Iowa 402), Bills & N., 6.
First Nat. Bank *v.* Hurford (29 Iowa 579), Evid., 208; Subscr., 15, 144, 157.
First Nat. Bank *v.* Jenkins (64 N. Car. 719), State Aid, 28.
First Nat. Bank *v.* Marietta & C. R. Co. (20 Ohio St. 259), Bagg., 84.
First Nat. Bank *v.* Northern R. Co. (58 N. H. 203), Car. of M., 310.
First Nat. Bank *v.* Portland & O. R. Co. (2 Fed. Rep. 831), Attach., 24.
First Nat. Bank *v.* Shedd (30 Am. & Eng. R. Ca 439, 112 U. S. 74, 7 Sup. Ct. Rep. 807), Mort., 299.
First Nat. Bank *v.* Wabash, St. L. & P. R. Co. (61 Iowa 700, 17 N. W. Rep. 48), New Tr., 96.
First Nat. Bank *v.* West River R. Co. (46 Vt. 633), Interpl., 1.
First Nat. Bank *v.* West River R. Co. (49 Vt. 167, 17 Am. Ry. Rep. 150), Em. Dom., 975.
First Nat. Bank *v.* Wheeler (72 N. Y. 201), Mun. Aid, 393.
First Nat. Bank *v.* Wolcott (19 Blatchf. (U. S.) 370, 7 Fed. Rep. 892), Mun. Aid, 342 384.
First Nat. Fire Ins. Co. *v.* Salisbury (4 Am. & Eng. R. Cas. 480, 130 Mass. 303), Mort., 136, 138; Pl., 82.
Firth *v.* Midland R. Co. (L. R. 20 Eq. 100, 23 W. R. 509, 32 L. T. 219), Spec. Perf., 4.
Fischer *v.* Merchants' Dispatch Transp. Co. (13 Mo. App. 133), Agency, 9; Contr., 43; Evid., 183; Witn., 102.
Fiser *v.* Mississippi & T. R. Co. (32 Miss. 359), Subscr., 16, 89.
Fish *v.* Chapman (2 Ga. 349), Car. of M., 2, 4, 12, 15; Words & Ph., 7.
Fish *v.* Wolfe (50 Iowa 636), Constr. Rys., 36.
Fishbourne *v.* Great Southern & W. R. Co. (2 Ry. & C. T. Cas. 224), Bills of L., 47.
Fisher *v.* Chicago & G. T. R. Co. (77 Mich. 546, 43 N. W. Rep. 926), Employés, Inj. to, 206.
Fisher *v.* Chicago & S. R. Co. (10 Am. & Eng. R. Cas. 14, 104 Ill. 323), Em. Dom., 184, 895.
Fisher *v.* Delaware & H. Canal Co. (153 Pa. St. 379, 26 Atl. Rep. 18), App., 115; Employés, Inj. to, 460.
Fisher *v.* Evansville & C. R. Co. (7 Ind. 407), Subscr., 27, 66.
Fisher *v.* Farmers' L. & T. Co. (21 Wis. 73), Animals, 43, 213, 284.
Fisher *v.* Geddes (15 La. Ann. 14), Bagg., 1.
Fisher *v.* Howard (34 L. J. M. C. 42, 11 Jur. N. S. 305, 13 W. R. 145, 11 L. T. 373), Intox'ing L., 6.
Fisher *v.* Metropolitan El. R. Co. (34 Hun (N. Y.) 433), Dam., 32; Leases, 19.
Fisher *v.* Monongahela Connecting R. Co. (131 Pa. St. 292, 18 Atl. Rep. 1016), Contrib. Neg., 82, 85; Cross., Inj. at, 307.
Fisher *v.* New York & N. E. R. Co. (17 Am. & Eng. R. Cas. 80, 135 Mass. 107), Priv. Ways, 2, 9.
Fisher *v.* New York C. & H. R. R. Co. (46 N. Y. 644), Tickets & F., 133, 134.
Fisher *v.* Oregon S. L. & U. N. R. Co. (53 Am. & Eng. R. Cas. 539, 22 Oreg. 533, 16 L. R. A. 519, 30 Pac. Rep. 425), Fel. Serv., 214, 215; Witn., 145.
Fisher *v.* Pennsylvania Co. (Pa.) (2 Atl. Rep. 878), Estop., 22.
Fisher *v.* Pennsylvania R. Co. (126 Pa. St. 293, 17 Atl. Rep. 607), Animals, 192.
Fisher *v.* Seligman (9 Am. & Eng. R. Cas. 670, 75 Mo. 13), Estop., 1; Stockh., 58, 59.
Fisher *v.* Southern Pac. R. Co. (89 Cal. 399, 26 Pac. Rep. 894), Car. of P., 143, 153, 297; Employés, Inj. to, 168; New Tr., 81; Witn., 73.
Fisher *v.* Warwick R. Co. (12 R. I. 287), Em. Dom., 853.
Fisher *v.* West Virginia & P. R. Co. (W. Va.) (58 Am. & Eng. R. Cas. 337, 19 S. E. Rep. 578), Car. of P., 139, 147, 151, 342, 473; Contrib. Neg., 28, 86; Leases, 13.
Fisk *v.* Central Pac. R. Co. (72 Cal. 38, 13 Pac. Rep. 144), Employés, Inj. to, 461, 471; Fel. Serv., 9, 57.
Fisk *v.* Chicago, M. & St. P. R. Co. (74 Iowa 424, 38 N. W. Rep. 132), Trial, 139.
Fisk *v.* Chicago, R. I. & P. R. Co. (3 Abb. Pr., N. S. (N. Y.) 453, 53 Barb. 472), Rem. of C., 35.
Fisk *v.* Chicago, R. I. & P. R. Co. (4 Abb.

Pr. N. S. (N. Y.) 378, 53 Barb. 513, 36 How. Pr. 20), Injunc., 28; Jurisd., 6; Ult. Vir., 4.
Fisk *v.* Fitchburg R. Co. (158 Mass. 238, 33 N. E. Rep. 510), Employés, Inj. to, 210.
Fisk *v.* Newton (1 Den. (N. Y.) 45), Car. of M., 240; Trover, 4.
Fisk *v.* Potter (2 Abb. App. Dec. (N. Y.) 138, 2 Keyes 64), Mort., 129.
Fisk *v.* Union Pac. R. Co. (10 Blatchf. (U. S.) 518), Dissol., 25.
Fisselmayer *v.* Third Ave. R. Co. (2 N. Y. S. R. 75), Children, Inj. to, 68, 141, 144.
Fitch *v.* Broadway & S. A. R. Co. (26 J. & S. 575, 32 N. Y. S. R. 376, 10 N. Y. Supp. 225), New Tr., 65.
Fitch *v.* Buffalo, N. Y. & P. R. Co. (13 Hun (N. Y.) 668), Animals, 262.
Fitch *v.* Mayor, etc., of N. Y. (23 J. & S. 494, 2 N. Y. Supp. 700; affirmed in 119 N. Y. 608, mem., 23 N. E. Rep. 1143, mem.), St. Rys., 322.
Fitch *v.* Missouri Pac. R. Co. (45 Mo. 322), Fires, 277.
Fitch *v.* Newberry (1 Dougl. (Mich.) 1), Car. of M., 42, 375; Replev., 1.
Fitch *v.* New Haven, N. L. & S. R. Co. (30 Conn. 38), Ferries, 3.
Fitch *v.* New York, P. & B. R. Co. (59 Conn. 414, 20 Atl. Rep. 345), Em. Dom., 128, 136.
Fitch *v.* Pacific R. Co. (45 Mo. 322), Fires, 106, 250, 264, 269.
Fitchburg *v.* Cheshire R. Co. (110 Mass. 210), Paupers, 1.
Fitchburg & W. R. Co. *v.* Hanna (6 Gray (Mass.) 539), Car. of M., 73; Charges, 86.
Fitchburg R. & D. Co. *v.* Grand Junction R. Co. (4 Allen (Mass.) 198), Stat., 6.
Fitchburg R. Co. *v.* Boston & M. R. Co. (3 Cush. (Mass.) 58), Em. Dom., 506, 919, 958; Wharves, 1.
Fitchburg R. Co. *v.* Charlestown M. F. Ins. Co. (7 Gray (Mass.) 64), Fire Ins., 5.
Fitchburg R. Co. *v.* Eastern R. Co. (6 Allen (Mass.) 98), Em. Dom., 836.
Fitchburg R. Co. *v.* Freeman (12 Gray (Mass.) 401), Witn., 184.
Fitchburg R. Co. *v.* Frost (147 Mass. 118, 6 N. Eng. Rep. 374, 16 N. E. Rep. 773), Priv. Ways, 2.
Fitchburg R. Co. *v.* Gage (12 Gray (Mass.) 393), Charges, 85; Discrim., 15, 56.
Fitchburg R. Co. *v.* Grand Junction R. & D. Co. (1 Allen (Mass.) 552), Ry. Com'rs, 3; Stat., 54.
Fitchburg R. Co. *v.* Grand Junction R. & D. Co. (4 Allen (Mass.) 198), Charters, 45.
Fitchburg R. Co. *v.* New Haven & N. Co. (14 Am. & Eng. R. Cas. 95, 134 Mass. 547), Cross. Rys., 69; Injunc., 27.
Fitchburg R. Co. *v.* Page (7 Am. & Eng. R. Cas. 86, 131 Mass. 391), Adv. Poss., 12.
Fitchburg R. Co. *v.* Prescott (47 N. H. 62), Tax., 96.
Fitchett *v.* North Pa. R. Co. (5 Phila. (Pa.) 132), Coupons, 22.
Fithian *v.* New York & E. R. Co. (31 Pa. St. 114), Attach., 12, 26.
Fithian *v.* New York & E. R. Co. (2 Phila. (Pa.) 318), Attach., 26.
Fitterling *v.* Missouri Pac. R. Co. (20 Am. & Eng. R. Cas. 454, 79 Mo. 504), Animals, 178, 608; Cat.-Gds., 13.
Fitton *v.* Brooklyn City R. Co. (25 N. Y. S. R. 948, 5 N. Y. Supp. 641; affirmed in 127 N. Y. 650, mem., 27 N. E. Rep. 856), Evid., 74; New Tr., 57; St. Rys., 367.
Fitts *v.* Cream City R. Co. (15 Am. & Eng. R. Cas. 462, 59 Wis. 323, 18 N. W. Rep. 186), Negl., 62; St. Rys., 311; Trial, 71; Witn., 133, 151.
Fitts *v.* Waldeck (51 Wis. 567, 8 N. W. Rep. 363), Death, etc., 143.
Fitz *v.* Minnesota C. R. Co. (11 Minn. 414 (Gil. 304), Minneapolis & C. V. R. Co., 1.
Fitz *v.* Nantasket Beach R. Co. (36 Am. & Eng. R. Cas. 631, 148 Mass. 35, 18 N. E. Rep. 592), Em. Dom., 591.
Fitzgerald *v.* Adams Exp. Co. (24 Ind. 447), Evid., 278; Exp. Cos., 25.
Fitzgerald *v.* Baltimore & P. R. Co. (8 Mackey (D. C.) 513), Balt. & P. R. Co., 1.
Fitzgerald *v.* Boston & A. R. Co. (156 Mass. 293, 31 N. E. Rep. 7), Fel. Serv., 1, 185.
Fitzgerald *v.* Chicago, K. & W. R. Co. (48 Kan. 537, 29 Pac. Rep. 703), Em. Dom., 404, 997.
Fitzgerald *v.* Chicago, R. I. & P. R. Co. (50 Iowa 79), Eject. Pass., 119.
Fitzgerald *v.* Chicago, R. I. & P. R. Co. (18 Mo. App. 391), Animals, 204.
Fitzgerald *v.* Evans (49 Fed. Rep. 426, 4 U. S. App. 154, 1 C. C. A. 307), App., 144; Mort., 266.
Fitzgerald *v.* Grand Trunk R. Co. (4 Ont. App. 601; affirming 28 U. C. C. P. 586), Bills of L., 104; Car. of M., 430; Words & Ph., 103.
Fitzgerald *v.* Grand Trunk R. Co. (49 Am. & Eng. R. Cas. 8, 63 Vt. 169, 22 Atl. Rep. 76), Discrim., 65.
Fitzgerald *v.* Grand Trunk R. Co. (27 U. C. C. P. 528), Car. of M., 400.
Fitzgerald *v.* Great Western R. Co. (39 U. C. Q. B. 525), Car. of M., 448.
Fitzgerald *v.* Honkomp (44 Ill. App. 365), Employés, Inj. to, 284; Fel. Serv., 103, 201, 310.
Fitzgerald *v.* Long Island R. Co. (21 N. Y. S. R. 942, 3 N. Y. Supp. 230, 50 Hun 605, mem.; affirmed in 117 N. Y. 653, mem., 22 N. E. Rep. 1133, 27 N. Y. S. R. 980), Cross., Inj. at, 47, 214; Death, etc., 198.
Fitzgerald *v.* Long Island R. Co. (10 N. Y. S. R. 433, 45 Hun 591), Cross., Inj. at, 214.
Fitzgerald *v.* Midland R. Co. (34 L. T. 771, 3 Ry. & C. T. Cas. xxii), Car. of P., 121, 124; Time-tables, 3.
Fitzgerald *v.* Missouri Pac. R. Co. (50 Am. & Eng. R. Cas. 622, 45 Fed. Rep. 812), Consol., 37; Judgm., 26; Pub. Lds., 41; Rem. of C., 25, 55, 58; Stockh., 3.
Fitzgerald *v.* New York C. & H. R. R. Co. (36 N. Y. S. R. 755, 12 N. Y. Supp. 932), Employés, Inj. to, 58, 270, 365.
Fitzgerald *v.* St. Paul, M. & M. R. Co. (8 Am. & Eng. R. Cas. 310, 29 Minn. 336,

43 Am. Rep. 212, 13 N. W. Rep. 168), Children, Inj. to, 124; Fences, 71.
Fitzgerald *v.* Weston (52 Wis. 354, 9 N. W. Rep. 13), Death, etc., 241; Evid., 175.
Fitzgerald & M. Constr. Co. *v.* Fitzgerald (137 U. S. 98, 11 Sup. Ct. Rep. 36), Constr. Rys., 122; Proc., 21, 48.
Fitzpatrick *v.* Boston & M. R. Co. (84 Me. 33, 24 Atl. Rep. 432), Priv. Ways, 8, 16.
Fitzpatrick *v.* Chicago & W. I. R. Co. (31 Ill. App. 649), Constr. Rys., 14.
Fitzpatrick *v.* Cusack (12 Low. Can. 306), Car. of M., 387.
Fitzpatrick *v.* Fitchburg R. Co. (1 Am. & Eng. R. Cas. 154, 128 Mass. 13), Children, Inj. to, 165.
Fitzpatrick *v.* Garrisons & W. P. Ferry Co. (49 Hun 288, 17 N. Y. S. R. 736, 1 N. Y. Supp. 794), Ferries, 9.
Fitzpatrick *v.* Great Western R. Co. (12 U. C. Q. B. 645), Collis., 10.
Fitzpatrick *v.* Missouri Pac. R. Co. (34 Mo. App. 280), Just. P., 19, 20.
Fitzpatrick *v.* New Albany & S. R. Co. (7 Ind. 436), Fel. Serv., 108, 121, 462.
Fitzpatrick *v.* New York & M. B. R. Co. (24 N. Y. S. R. 636, 53 Hun 629, mem., 2 Silv. Sup. Ct. 192, 5 N. Y. Supp. 685), False Imp., 16.
Fitzpatrick *v.* New York El. R. Co. (43 N. Y. S. R. 360, 62 Hun 621, 17 N. Y. Supp. 943), Elev. Rys., 93.
Fitzpatrick *v.* New York, N. H. & H. R. Co. (16 J. & S. (N. Y.) 539), Death, etc., 192.
Fitzpatrick *v.* Pennsylvania R. Co. (10 Phila. (Pa.) 141), Em. Dom., 433, 519.
Fitzsimmons *v.* Southern Exp. Co. (40 Ga. 330), Exp. Cos., 47.
Flack *v.* Hughes (67 Ill. 384), Mun. Aid, 410.
Flagg *v.* Chicago, D. & C. G. T. J. R. Co. (56 Am. & Eng. R. Cas. 317, 96 Mich. 30, 55 N. W. Rep. 444), Fences, 58; Fright. Teams, 4, 5.
Flagg *v.* Manhattan R. Co. (4 Am. & Eng. R. Cas. 140, 10 Fed. Rep. 413, 20 Blatchf. (U. S.) 142), Direct., 55.
Flagg *v.* Manhattan R. Co. (17 J. & S. 251; affirmed (?) 101 N. Y. 624, mem.), Elev. Rys., 209.
Flagg *v.* Mayor, etc., of Palmyra (33 Mo. 440), Mun. Aid, 320, 354, 449.
Flaherty *v.* Minneapolis & St. L. R. Co. (39 Minn. 328, 40 N. W. Rep. 160, 1 L. R. A. 680), Collis., 6; Imp. Neg., 14.
Flanagan *v.* Baltimore & O. R. Co. (83 Iowa 639, 50 N. W. Rep. 60), App., 73, 79; Dam., 25, 78.
Flanagan *v.* Chicago & N. W. R. Co. (45 Wis. 98, 18 Am. Ry. Rep. 73), Negl., 33.
Flanagan *v.* New York, N. H. & H. R. Co. (29 N. Y. S. R. 543, 55 Hun 611, mem., 5 Silv. Sup. Ct. 495, 8 N. Y. Supp. 744; affirmed in 125 N. Y. 773, mem., 36 N. Y. S. R. 1011), Car. of P., 229, 234, 247.
Flanders *v.* Chicago, St. P., M. & O. R. Co. (51 Minn. 193, 53 N. W. Rep. 544), Employés, Inj. to, 618, 678, 716.
Flanders *v.* Norwood (141 Mass. 17, 5 N. E. Rep. 256), Bridges, 54.
Flannagan *v.* Chicago & N. W. R. Co. (2 Am. & Eng. R. Cas. 150, 50 Wis. 462, 7 N. W. Rep. 337; former appeal 45 Wis. 98), Employés, Inj. to, 23, 146, 261.
Flannery *v.* Baltimore & O. R. Co. (4 Mackey (D. C.) 111), Assault, 9; Dam., 32.
Flannery *v.* Kansas City, St. J. & C. B. R. Co. (23 Mo. App. 120; affirmed 97 Mo. 192), Animals, 442.
Flannery *v.* St. Louis, I. M. & S. R. Co. (44 Mo. App. 396), Fires, 339, 349; Witn., 24.
Flannigan *v.* Canadian Pac. R. Co. (38 Am. & Eng. R. Cas. 362, 17 Ont. 6), Fires, 66.
Flash *v.* New Orleans, J. & G. N. R. Co. (23 La. Ann. 353), Evid., 138; Lim. of Ac., 36.
Flatley *v.* Memphis & C. R. Co. (9 Heisk. (Tenn.) 230), Abate., 17.
Flattes *v.* Chicago, R. I. & P. R. Co. (35 Iowa 191, 5 Am. Ry. Rep. 518), Animals, 69, 200.
Flaunery *v.* Waterford & L. R. Co. (11 Ir. R. C. L. 30), Evid., 125.
Fleck *v.* Union R. Co. (16 Am. & Eng. R. Cas. 372, 134 Mass. 480), St. Rys., 420.
Fleckenstein *v.* Dry Dock, E. B. & B. R. Co. (105 N. Y. 655, 11 N. E. Rep. 951, 1 Silv. App. 447, 8 N. Y. S. R. 32), St. Rys., 231.
Fleece *v.* Indiana & I. C. R. Co. (8 Ind. 460), Subscr., 21, 80.
Fleissner *v.* New York C. & H. R. R. Co. (40 N. Y. S. R. 711, 61 Hun 623, 16 N. Y. Supp. 18), Cross., Inj. at, 339.
Fleming, Ex parte (2 Wall. (U. S.) 759), Mort., 291.
Fleming *v.* Brooklyn City R. Co. (1 Abb. N. Cas. (N. Y.) 433), Licensees, Inj. to, 15.
Fleming *v.* Chicago, D. & M. R. Co. (34 Iowa 353, 5 Am. Ry. Rep. 133), Em. Dom., 645, 668, 721.
Fleming *v.* Delaware & H. Canal Co. (8 Hun (N. Y.) 358), Witn., 121.
Fleming *v.* Ernst (2 Bush (Ky.) 128), Death, etc., 102.
Fleming *v.* Manchester & S. R. Co. (L. R. 4 Q. B. D. 81, 39 L. T. 555, 27 W. R. 481; reversing 26 W. R. 741), Car. of M., 776.
Fleming *v.* Mills (5 Mich. 420), Car. of M., 751.
Fleming *v.* Newport R. Co. (L. R. 8 App. Cas. 265), Em. Dom., 1159.
Fleming *v.* Pennsylvania R. Co. (134 Pa. St. 477, 19 Atl. Rep. 740), Employés, Inj. to, 1.
Fleming *v.* Pittsburg, C., C. & St. L. R. Co. (158 Pa. St. 130, 27 Atl. Rep. 858), Car. of P., 586.
Fleming *v.* St. Paul & D. R. Co. (27 Minn. 111, 6 N. W. Rep. 448), Employés, Inj. to, 234; Fences, 9.
Fleming *v.* St. Paul City R. Co. (47 Am. & Eng. R. Cas. 290, 47 Minn. 124, 49 N. W. Rep. 661), Liens, 37.
Fleming *v.* Soutter (6 Wall. (U. S.) 747), Mort., 302.
Fleming's Petition, In re (16 Wis. 70), App., 13; Direct., 6.
Flemming *v.* Camden & A. R. Co. (16 Phila. (Pa.) 60), Pledges, etc., 3.
Flemming *v.* Western Pac. R. Co. (49 Cal.

253, 7 Am. Ry. Rep. 265), Contrib. Neg., 9; Cross., Inj. at, 303; Negl., 53.
Fletcher *v.* Atlantic & P. R. Co. (64 Mo. 484, 17 Am. Ry. Rep. 303), Cross., Inj. at, 264, 267; Negl., 53.
Fletcher *v.* Auburn & S. R. Co. (25 Wend. (N. Y.) 462), Embankm., 1.
Fletcher *v.* Boston & M. R. Co. (1 Allen (Mass.) 9), Collis., 29; Leases, 111, 114; Licensees, Inj. to, 8; Negl., 6.
Fletcher *v.* Fitchburg R. Co. (149 Mass. 127, 3 L. R. A. 743, 21 N. E. Rep. 302), Cross., Inj. at, 296, 327.
Fletcher *v.* Great Western R. Co. (5 H. & N. 689, 29 L. J. Ex. 253, 8 W. R. 501, 6 Jur. N. S. 961, 4 H. & N. 242, 28 L. J. Ex. 147), Em. Dom., 1107; Mines, etc., 3.
Fletcher *v.* New Orleans & N. E. R. Co. (19 Fed. Rep. 731), Constr. Rys., 65.
Fletcher *v.* Peck (6 Cranch (U. S.) 87), Stat., 68.
Fletcher *v.* Rutland & B. R. Co. (39 Vt. 633), Stat., 12.
Fletcher *v.* St. Louis, K. C. & N. R. Co. (7 Am. & Eng. R. Cas. 556, 73 Mo. 142), Fences, 44.
Fletcher *v.* Somerset R. Co. (74 Me. 434), Exec., 19.
Flike *v.* Boston & A. R Co. (53 N. Y. 549, 5 Am. Ry. Rep. 392), Employés, Inj. to, 4, 177; Fel. Serv., 79, 211, 213.
Flinn *v.* New York C. & H. R. R. Co. (34 N. Y. S. R. 451, 58 Hun 230, 12 N. Y. Supp. 341), Location, etc., 1; Negl., 32, 106.
Flinn *v.* New York C. & H. R. R. Co. (51 N. Y. S. R. 103, 67 Hun 631, 22 N. Y. Supp. 473), Fires, 37, 200, 316.
Flinn *v.* Philadelphia, W. & B. R. Co. (1 Houst. (Del.) 469), Car. of L. S., 129; Fel. Serv., 1, 3, 133.
Flint *v.* Norwich & N. Y. Transp. Co. (34 Conn. 554), Assault, 9.
Flint *v.* Norwich & W. R. Co. (110 Mass. 222), Fright. Teams, 3.
Flint & P. M. R. Co. *v.* Detroit & B. C. R. Co. (64 Mich. 350, 31 N. W. Rep. 281), Cross. Rys., 29, 40, 44, 47, 48, 49, 57, 80; Em. Dom., 134, 321, 513, 793, 939.
Flint & P. M. R. Co. *v.* Dewey (14 Mich. 477), Contr., 9; Pres., 1.
Flint & P. M. R. Co. *v.* Gordon (41 Mich. 420), Homest., 3; Pub. Lds., 7, 39.
Flint & P. M. R. Co. *v.* Lull (28 Mich. 510, 12 Am. Ry. Rep. 296), Animals 99; Fences, 56.
Flint & P. M. R. Co. *v.* Rich (91 Mich. 293, 51 N. W. Rep. 1001), Aband., 4, 8.
Flint & P. M. R. Co. *v.* Stark (38 Mich. 714), Car. of P., 213, 219, 538.
Flint & P. M. R. Co. *v.* Weir (37 Mich. 111), Bagg., 9, 105.
Flint & P. M. R. Co. *v.* Willey (5 Am. & Eng. R. Cas. 305, 47 Mich. 88, 10 N. W. Rep. 120), Sts. & H., 177.
Flood *v.* Brooklyn El. R. Co. (75 Hun 601, 27 N. Y. Supp. 662), Elev. Rys., 101.
Florence, E. & W. V. R. Co. *v.* Pember (45 Kan. 625, 26 Pac. Rep. 1), Em. Dom., 635, 686.
Florence, E. D. & W. V. R. Co. *v.* Shepherd (50 Kan. 438, 31 Pac. Rep. 1002), Em. Dom., 735.
Florida *v.* Anderson (91 U. S. 667), Exec., 27; Fed. Cts., 17; State Aid, 16.
Florida *v.* Pullman Palace Car Co. (37 Mo. App. 598), Contrib. Neg., 105, 106; Sleep. Car Cos., 32.
Florida, A. & G. C. R. Co. *v.* Pensacola & G. R. Co. (10 Fla. 145), Charters, 160.
Florida C. & P. R. Co. *v.* State (56 Am. & Eng. R. Cas. 306, 31 Fla. 482, 13 So. Rep. 103), Contr., 59; Mand., 1, 11, 28, 30; Stat. & D., 38.
Florida C. R. Co. *v.* Schutte (3 Am. & Eng. R. Cas. 1, 103 U. S. 118; affirming 3 Woods (U. S.) 692), Bonds, 19; Judgm., 26; State Aid, 16.
Florida, M. & G. R. Co. *v.* Varnedoe (81 Ga. 175, 7 S. E. Rep. 129), Agency, 111; Evid., 203.
Florida R. & N. Co. *v.* Webster (25 Fla. 394, 5 So. Rep. 714), Car. of L. S., 132; Car. of P., 168, 169; New Tr., 28.
Florida R. Co. *v.* Smith (21 Wall. (U. S.) 255, 7 Am. Ry. Rep. 382), Constr. Rys., 107, 109.
Florida Southern R. Co. *v.* Brown (23 Fla. 104, 1 So. Rep. 512), Sts. & H., 142, 143, 237.
Florida Southern R. Co. *v.* Hirst (52 Am. & Eng. R. Cas. 409, 30 Fla. 1, 11 So. Rep. 506), Car. of P., 13, 52, 60, 70, 82, 137, 498, 570, 591, 597; Contrib. Neg., 4, 50, 111; Dam., 27.
Florida Southern R. Co. *v.* Katz (28 Am. & Eng. R. Cas. 133, 23 Fla. 139, 1 So. Rep. 473), Car. of P., 520; Eject. Pass., 69.
Florida Southern R. Co. *v.* Loring (51 Fed. Rep. 932, 2 U. S. App. 310, 2 C. C. A. 546), Adv. Poss., 4.
Flower *v.* Baltimore & P. R. Co. (132 Pa. St. 524, 19 Atl. Rep. 274), Em. Dom., 570.
Flower *v.* London, B. & S. C. R. Co. (2 Drew. & Sm. 330, 11 Jur. N. S. 406, 34 L. J. Ch. 540, 13 W. R. 518, 12 L. T. 10), Em. Dom., 1089.
Flower *v.* Pennsylvania R. Co. (69 Pa. St. 210), Agency, 76; Employés, Inj. to, 203.
Flowers *v.* Southeastern R. Co. (16 L. T. 329), Car. of M., 520.
Floyd *v.* Indianapolis & C. R. Co. (8 Ind. 469), Constr. Rys., 107.
Floyd *v.* Perrin (30 So. Car. 1, 8 S. E. Rep. 14), Mun. Aid, 48.
Floyd County *v.* Rome St. R. Co. (77 Ga. 614, 3 S. E. Rep. 3), Bridges, 13; Injunc., 37; St. Rys., 87, 191; Sts. & H., 203.
Floyd County Com'rs *v.* Shorter (50 Ga. 489), Mun. Aid, 171.
Fluker *v.* Georgia R. & B. Co. (38 Am. & Eng. R. Cas. 379, 81 Ga. 461, 8 S. E. Rep. 529, 2 L. R. A. 843), Assault, 6; License, 13, 18; Stat. & D., 57.
Flynn *v.* Central Park, etc., R. Co. (17 J. & S. (N. Y.) 81), St. Rys., 362, 522.
Flynn *v.* Central R. Co. (51 N. Y. S. R. 84, 22 N. Y. Supp. 383, 2 Misc. 508; affirming 15 N. Y. Supp. 328, 27 Abb. N. Cas. 31, 20 Civ. Pro. 179), Jurisd., 6.

Flynn *v.* Des Moines & St. L. R. Co. (63 Iowa 490, 19 N. W. Rep. 312), Agency, 116; Constr. Rys., 99.
Flynn *v.* Eastern M. R. Co. (83 Wis. 238, 53 N. W. Rep. 494), Death, etc., 194.
Flynn *v.* Erie Preserving Co. (12 N. Y. S. R. 88), Employés, Inj. to, 460, 472.
Flynn *v.* Hudson River R. Co. (6 How. Pr. (N. Y.) 308), Judgm., 5; Proc., 28.
Flynn *v.* Kansas City, St. J. & C. B. R. Co. (18 Am. & Eng. R. Cas. 23, 78 Mo. 195), Death, etc., 216, 233, 368; Employés, Inj. to, 225, 452.
Flynn *v.* Manhattan R. Co. (1 Misc. 188, 48 N. Y. S. R. 670, 20 N. Y. Supp. 652), Evid., 63; Witn., 81.
Flynn *v.* New York El. R. Co. (17 J. & S. (N. Y.) 60), Excava., 1, 2.
Flynn *v.* New York El. R. Co. (18 J. & S. (N. Y.) 375), App., 40.
Flynn *v.* St. Louis & S. F. R. Co. (43 Mo. App. 424), Car. of M., 653; Lim. of Liab., 40.
Flynn *v.* San Francisco & S. J. R. Co. (40 Cal. 14), Contrib. Neg., 11; Fires, 31, 62, 68, 125.
Flynn *v.* Wabash, St. L. & P. R. Co. (18 Ill. App. 235), Employés, Inj. to, 141.
Flynn *v.* White Breast C. & M. Co. (72 Iowa 738, 32 N. W. Rep. 471), Cov'ts, 12.
Flynt *v.* Chicago, B. & Q. R. Co. (38 Mo. App. 94), Tresp., 15; Trial, 157.
Foard *v.* Atlantic & N. C. R. Co. (8 Jones (N. Car.) 235), Car. of M., 180, 319, 801.
Fober *v.* Rome, W. & O. R. Co. (43 Am. & Eng. R. Cas. 137, 121 N. Y. 505, 24 N. E. Rep. 919, 31 N. Y. S. R. 828, 8 L. R. A. 453, 42 Alb. L. J. 147; reversing 50 Hun 603, mem.), Em. Dom., 161.
Foels *v.* Town of Tonawanda (20 N. Y. Supp. 447), Abate., 14.
Fogerty *v.* Minneapolis & St. L. R. Co. (30 Minn. 185, 14 N. W. Rep. 878), App., 121.
Fogg *v.* Blair (133 U. S. 534, 10 Sup. Ct. Rep. 338), Mort., 107.
Fogg *v.* Blair (139 U. S. 118, 11 Sup. Ct. Rep. 476), Stockh., 75.
Fogg *v.* Boston & L. R. Corp. (148 Mass. 513, 20 N. E. Rep. 109), Libel & S., 5, 7.
Fogg *v.* Nevada C. O. R. Co. (43 Am. & Eng. R. Cas. 105, 20 Nev. 429, 23 Pac. Rep. 840), Nuis., 27; Parties, 20; St. Rys., 200; Sts. & H., 219.
Fogg *v.* St. Louis, H. & K. R. Co. (5 McCrary (U. S.) 449, 17 Fed. Rep. 871), Lim. of Ac. 12.
Foggan *v.* Lake Shore & M. S. R. Co. (40 N. Y. S. R. 718, 61 Hun 623, 16 N. Y. Supp. 25), Car. of M., 504.
Fogus *v.* Chicago & A. R. Co. (50 Mo. App. 250), Employés, Inj. to, 435, 733; Evid., 34.
Foley *v.* Chicago & N. W. R. Co. (6 Am. & Eng. R. Cas. 161, 48 Mich. 622, 12 N. W. Rep. 879, 42 Am. Rep. 481), Employés, Inj. to, 273; Explosions, 5.
Foley *v.* Chicago, R. I. & P. R. Co. (64 Iowa 644, 21 N. W. Rep. 124), Employés, Inj. to, 15; Fel. Serv., 177, 308, 333.
Foley *v.* Western N. Y. & P. R. Co. (46 N. Y. S. R. 680, 19 N. Y. Supp. 826), Employés, 12.
Follet *v.* Toronto St. R. Co. (15 Ont. App. 346), St. Rys., 496.
Follis *v.* Port Hope & L. R. Co. (9 U. C. C. P. 50), Lim. of Ac., 49.
Folsom *v.* Batchelder (22 N. H. 47), Car. of M., 745.
Folsom *v.* Star U. L. F. Freight Line (54 Iowa 490, 6 N. W. Rep. 702), Pl., 9, 55.
Foltz *v.* St. Louis & S. F. R. Co. (57 Am. & Eng. R. Cas. 582, 60 Fed. Rep. 316), Em. Dom., 865; Injunc., 19.
Fones *v.* Phillips (39 Ark. 17), Fel. Serv., 73, 79, 102, 213, 314.
Fonseca *v.* Cunard Steamship Co. (153 Mass. 553, 27 N. E. Rep. 665), Bagg., 101.
Fontaine *v.* Southern Pac. R. Co. (1 Am. & Eng. R. Cas. 159, 54 Cal. 645), Animals, 19, 644; Fences, 18.
Fooks, Ex parte (3 Ex. 728), Em. Dom., 1178.
Foot *v.* New Haven & N. Co. (23 Conn. 214), Flood. Lds., 59.
Foot *v.* Rutland & W. R. Co. (32 Vt. 633), Constr. Rys., 99; Direct., 38.
Foote *v.* Hancock (15 Blatchf. (U. S.) 343), Coupons, 16; Mun. Aid, 179, 373, 374, 377, 378.
Foote *v.* Johnson County (5 Dill. (U. S.) 281), Mun. Aid, 40, 318.
Foote *v.* Manhattan R. Co. (36 N. Y. S. R. 119, 58 Hun 478, 12 N. Y. Supp. 516), Elev. Rys., 79, 89.
Foote *v.* Mt. Pleasant (1 McCrary (U. S.) 101), Bonds, 46; Mun. Aid, 369.
Foran *v.* McIntyre (45 U. C. Q. B. 288), License, 11.
Foran *v.* New York C. & H. R. R. Co. (64 Hun 510, 46 N. Y. S. R. 423, 19 N. Y. Supp. 417), Cross., Inj. at, 293.
Forbes *v.* Atlantic & N. C. R. Co. (76 N. Car. 454, 14 Am. Ry. Rep. 313), Animals, 39, 224.
Forbes *v.* Boston & L. R. Co. (9 Am. & Eng. R. Cas. 76, 80, 133 Mass. 154), Bills of L., 52, 110, 119; Car. of M., 264; Trover, 3, 9, 18.
Forbes *v.* Davis (18 Tex. 268), Bagg., 110.
Forbes *v.* Delashmutt (68 Iowa 164, 26 N. W. Rep. 56), Em. Dom., 960, 1036.
Forbes *v.* Memphis, E. P. & P. R. Co. (2 Woods (U. S.) 323), Corp., 1; Intervent., 2; Stockh., 86.
Forbes *v.* Michigan C. R. Co. (20 Ont. App. 584), Prohib., 1.
Force *v.* Batavia (61 Ill. 99), Mun. Aid, 112.
Ford *v.* Anderson (139 Pa. St. 261, 21 Atl. Rep. 18), Employés, Inj. to, 94, 621.
Ford *v.* Central Iowa R. Co. (17 Am. & Eng. R. Cas. 599, 69 Iowa 627, 21 N. W. Rep. 587, 29 N. W. Rep. 755), Death, etc., 263; Evid., 131.
Ford *v.* Chicago & N. W. R. Co. (14 Wis. 609), Em. Dom., 62, 449; Sts. & H., 142, 230, 250, 260.
Ford *v.* Fitchburg R. Co. (110 Mass. 240), Employés, Inj. to, 150.
Ford *v.* Head (34 Hun (N. Y.) 146), Bills of L., 49.
Ford *v.* Kansas City & I. S. L. R. Co. (52

Mo. App. 439), Dissol., 3; Proc., 22; Receiv., 11, 12.
Ford *v.* Lake Shore & M. S. R. Co. (2 Silv. App. 460; affirming 17 N. Y. S. R. 393), Fel. Serv., 1.
Ford *v.* Lake Shore & M. S. R. Co. (41 Am. & Eng. R. Cas. 369, 117 N. Y. 638, 22 N. E. Rep. 946, 27 N. Y. S. R. 246; reversing 17 N. Y. S. R. 393, 2 N. Y. Supp. 1), Fel. Serv., 29.
Ford *v.* Lake Shore & M. S. R. Co. (48 Am. & Eng. R. Cas. 201, 124 N. Y. 493, 26 N. E. Rep. 1101, 36 N. Y. S. R. [illegible]; distinguishing 117 N. Y. 638), Em. Inj. to, 18, 20, 23, 173, 186.
Ford *v.* Lincoln County Com'rs (64 Me. 408), Em. Dom., 656.
Ford *v.* London & S. W. R. Co. (7 Ry. & C. T. Cas. 111), Discrim., 16.
Ford *v.* London & S. W. R. Co. (2 T. & F. 730), Car. of P., 149.
Ford *v.* Metropolitan & M. D. R. Co. (25 Am. & Eng. R. Cas. 182, 17 Q. B. D. 12; affirming 1 C. & E. 593), Em. Dom., 1156, 1196.
Ford *v.* St. Louis, K. & N. W. R. Co. (54 Iowa 723, 7 N. W. Rep. 126), Constr. Rys., 38, 40; Evid., 250.
Ford *v.* Santa Cruz R. Co. (59 Cal. 290), Sts. & H., 135, 214.
Fordham *v.* London, B. & S. C. R. Co. (L. R. 4 C. P. 619, 38 L. J. C. P. 324, 17 W. R. 896; affirming L. R. 3 C. P. 368, 37 L. J. C. P. 176), Car. of P., 206.
Fordyce *v.* Beecher (2 Tex. Civ. App. 29, 21 S. W. Rep. 179), Assault, 4; Dam., 90; Receiv., 178.
Fordyce *v.* Board of Com'rs (28 Ind. 454), App., 1, 9.
Fordyce *v.* Chancey (2 Tex. Civ. App. 24, 21 S. W. Rep. 181), Car. of P., 595; Evid., 86; Receiv., 64, 178.
Fordyce *v.* Culver (2 Tex. Civ. App. 569, 22 S. W. Rep. 237), Employés, Inj. to, 123.
Fordyce *v.* Dixon (70 Tex. 694, 8 S. W. Rep. 504), Parties, 6; Receiv., 123.
Fordyce *v.* Jackson (56 Ark. 594, 20 S. W. Rep. 528, 597), App., 72; Car. of P., 53, 211, 590; Exp. Cos., 13; New Tr., 60.
Fordyce *v.* Johnson (56 Ark. 430, 19 S. W. Rep. 1050), Car. of M., 661.
Fordyce *v.* Lowman (57 Ark. 160, 20 S. W. Rep. 1090), Employés, Inj. to, 271.
Fordyce *v.* McCants (51 Ark. 509, 11 S. W. Rep. 694), Death, etc., 273, 405; Evid., 163.
Fordyce *v.* McCants (55 Ark. 384, 18 S. W. Rep. 371), Death, etc., 434.
Fordyce *v.* M'Flynn (56 Ark. 424, 19 S. W. Rep. 961), Car. of L. S., 19.
Fordyce *v.* Manuel (82 Tex. 527, 18 S. W. Rep. 657), Eject. Pass., 134; Tickets & F., 29.
Fordyce *v.* Merrill (49 Ark. 277, 5 S. W. Rep. 329), Stat. & D., 103.
Fordyce *v.* Stone (50 Ark. 250, 7 S. W. Rep. 129), Lim. of Ac., 23.
Fordyce *v.* Withers (1 Tex. Civ. App. 540, 20 S. W. Rep. 766), Car. of P., 587, 601; Dam., 45; Derailm., 4, 6; Evid., 88; Receiv., 124, 130.
Fordyce *v.* Wolfe (82 Tex. 239, 18 S. W. Rep. 145), Em. Dom., 1064.
Fordyce *v.* Yarborough (1 Tex. Civ. App. 260, 21 S. W. Rep. 421), Employés, Inj. to, 15, 23, 36, 142, 146.
Fore *v.* Western N. C. R. Co. (101 N. Car. 526, 8 S. E. Rep. 335), Em. Dom., 1056, 1082; Lim. of Ac., 55.
Foreman *v.* Great Eastern R. Co. (2 Ry. & C. T. Cas. 202), Discrim., 42, 45.
Foreman *v.* Great Western R. Co. (38 L. T. 851, 3 Ry. & C. T. Cas. xxviii), Lim. of Liab., 5, 7.
Foreman *v.* Pennsylvania R. Co. (1 Pa. Dist. 233), Stat. & D., 114.
Forepaugh *v.* Delaware, L. & W. R. Co. (40 Am. & Eng. R. Cas. 78, 128 Pa. St. 217, 18 Atl. Rep. 503), Car. of M., 477.
Forest Glen B. & T. Co. *v.* Chicago, M. & St. P. R. Co. (33 Ill. App. 565), Fires, 21, 37, 40, 302.
Forey *v.* Syracuse, B. & N. Y. R. Co. (12 N. Y. S. R. 198, 46 Hun 678, mem.; affirmed in 122 N. Y. 667, mem., 34 N. Y. S. R. 1015), Employés, Inj. to, 18, 388.
Forman *v.* New Orleans & C. R. Co. (36 Am. & Eng. R. Cas. 38, 40 La. Ann. 446, 4 So. Rep. 246), St. Rys., 260, 308.
Forney *v.* Fremont, E. & M. V. R. Co. (33 Am. & Eng. R. Cas. 162, 23 Neb. 465, 36 N. W. Rep. 806), Em. Dom., 93, 94, 681.
Forrest *v.* Luddington (12 Am. & Eng. R. Cas. 330, 68 Ala. 1), Abate., 2; State Aid, 11, 12.
Forrest *v.* Manchester, S. & L. R. Co. (30 Beav. 40), Ferries, 3.
Forrest *v.* Union Pac. R. Co. (47 Fed. Rep. 1), Proc., 46; Rem. of C., 55.
Forrester *v.* Scott (92 Cal. 398, 28 Pac. Rep. 575), Land Grants, 113.
Forsee *v.* Alabama G. S. R. Co. (63 Miss. 66), Eject. Pass., 119; Evid., 11, 64, 206; Tickets & F., 26.
Forster *v.* Cumberland Valley R. Co. (23 Pa. St. 371), Lim. of Ac., 5.
Forster *v.* Manchester & M. R. Co. (49 L. J. Ch. D. 454), Vend. & P., 6.
Forsyth *v.* Boston & A. R. Co. (103 Mass. 510), Car. of P., 445.
Forsythe *v.* Walker (9 Pa. St. 148), Car. of M., 33.
Fort *v.* Goodwin (36 So. Car. 445, 15 S. E. Rep. 723), Em. Dom., 20, 84.
Fort *v.* Union Pac. R. Co. (2 Dill. (U. S.) 259; affirmed in 17 Wall. (U. S.) 553), Fel. Serv., 91, 312.
Ft. Clark Horse R. Co. *v.* Anderson (108 Ill. 64), Injunc., 7.
Ft. Clark St. R. Co. *v.* Ebaugh (49 Ill. App. 582), St. Rys., 312, 520.
Ft. Dodge *v.* Minneapolis & St. L. R. Co. (55 Am. & Eng. R. Cas. 58, 87 Iowa 389, 54 N. W. Rep. 243), Cross., St. & H., 12; Receiv., 4; Sts. & H., 408; Trial, 54.
Ft. Erie *v.* Ft. Erie Ferry R. Co. (13 Ont. Pr., 444), Trial, 36.
Fortier *v.* Pennsylvania Co. (18 Ill. App. 260), Car. of M., 610, 679.
Ft. Leavenworth R. Co. *v.* Lowe (114 U. S. 525, 5 Sup. Ct. Rep. 995), Tax., 27, 90.

Ft. Plain Bridge Co. *v.* Smith (30 N. Y. 44), Charters, 48.
Ft. Scott, W. & W. R. Co. *v.* Fox (40 Am. & Eng. R Cas. 331, 42 Kan. 490, 22 Pac. Rep. 583), Sts. & H., 135, 212.
Ft. Scott, W. & W. R. Co. *v.* Holman (45 Kan. 167, 25 Pac. Rep. 585), Animals, 308.
Ft. Scott, W. & W. R. Co. *v.* Karracker (46 Kan. 511, 26 Pac. Rep. 1027), Fires, 5, 167, 263, 289.
Ft. Scott, W. & W. R. Co. *v.* Tubbs (49 Am. & Eng. R. Cas. 685, 47 Kan. 630, 28 Pac. Rep. 612), Fires, 5, 109, 167, 187, 188, 340.
Fort St. & E. R. Co. *v.* Schneider (15 Mich. 74), St. Rys., 139.
Fort St. Union Depot Co. *v.* Backus (92 Mich. 33, 52 N. W. Rep. 790), Em. Dom., 109, 119, 362, 554, 571, 832; Union D. Cos., 3.
Fort St. Union Depot Co. *v.* Jones (83 Mich. 415, 47 N. W. Rep. 349), Em. Dom., 274, 279, 568, 841.
Fort St. Union Depot Co. *v.* Morton (47 Am. & Eng. R. Cas. 41, 83 Mich. 265, 47 N. W. Rep. 228), Em. Dom., 545; Union D. Cos., 2.
Fort St. Union Depot Co. *v.* State R. Cross. Board (45 Am. & Eng. R. Cas. 113, 81 Mich. 248, 45 N. W. Rep. 973), Cross. Rys., 9; Sts. & H., 126.
Fortune *v.* Missouri R. Co. (10 Mo. App. 252), St. Rys., 360, 403.
Ft. Wayne *v.* Lake Shore & M. S. R. Co. (132 Ind. 558, 32 N. E. Rep. 215), Cross., St. & H., 41; Deeds, 43; Em. Dom., 108.
Ft. Wayne & E. R. Co. *v.* Detroit (34 Mich. 78), St. Rys., 142.
Ft. Wayne & E. St. R. Co. *v.* Detroit (39 Mich. 543), St. Rys., 142.
Ft. Wayne, C. & L. R. Co. *v.* Beyerle (28 Am. & Eng. R. Cas. 306, 110 Ind. 100, 11 N. E. Rep. 6), Employés, Inj. to, 476.
Ft. Wayne, C. & L. R. Co. *v.* Gruff (132 Ind. 13, 31 N. E. Rep. 460), Contrib. Neg., 53; Employés, Inj. to, 347.
Ft. Wayne, C. & L. R. Co. *v.* Herbold (23 Am. & Eng. R. Cas. 221, 99 Ind. 91), Animals, 122, 162, 520; Cat.-Gds., 3; Fences, 52.
Ft. Wayne, C. & L. R. Co. *v.* O'Keefe (4 Ind. App. 249, 30 N. E. Rep. 916), Animals, 73, 78, 266, 559.
Ft. Wayne, C. & L. R. Co. *v.* Sherry (126 Ind. 334, 25 N. E. Rep. 898), Em. Dom., 202.
Ft. Wayne, C. & L. R. Co. *v.* Woodward (31 Am. & Eng. R. Cas. 546, 112 Ind. 118, 11 West. Rep. 101, 13 N. E. Rep. 260), Animals, 223.
Ft. Wayne, J. & S. R. Co. *v.* Gildersleeve (33 Mich. 133), Employés, Inj. to, 97, 100, 274.
Ft. Wayne, J. & S. R. Co. *v.* Husselman (65 Ind. 73), App., 118.
Ft. Wayne, J. & S. R. Co. *v.* McDonald (48 Ind. 241), Pl., 14.
Ft. Wayne, M. & C. R. Co. *v.* Clark (59 Ind. 191), Animals, 641.
Ft. Wayne, M. & C. R. Co. *v.* Grove (47 Ind. 133), App., 115.
Ft. Wayne, M. & C. R. Co. *v.* Hinebaugh (43 Ind. 354), Animals, 642.
Ft. Wayne, M. & C. R. Co. *v.* McClurg (47 Ind. 138), Animals, 441.
Ft. Wayne, M. & C. R. Co. *v.* Mellett (17 Am. & Eng. R. Cas. 293, 92 Ind. 535), Receiv., 79, 125, 137.
Ft. Wayne, M. & C. R. Co. *v.* Mussetter (48 Ind. 286), Animals, 328.
Ft. Worth & D. C. R. Co. *v.* Burton (4 Tex. App. (Civ. Cas.) 292, 15 S. W. Rep. 197), Fright. Teams, 6.
Ft. Worth & D. C. R. Co. *v.* Floyd (Tex. Civ. Cas.) (21 S. W. Rep. 544), Death, etc., 90.
Ft. Worth & D. C. R. Co. *v.* Fuller (3 Tex. Civ. App. 340, 22 S. W. Rep. 1006), Car. of L. S., 106.
Ft. Worth & D. C. R. Co. *v.* Graves (Tex. Civ. App.) (21 S. W. Rep. 606), Employés, Inj. to, 56.
Ft. Worth & D. C. R. Co. *v.* Greathouse (49 Am. & Eng. R. Cas. 157, 82 Tex. 104, 17 S. W. Rep. 834), Car. of L. S., 38, 80, 89, 148, 158, 161, 162; Witn., 142.
Ft. Worth & D. C. R. Co. *v.* Hogsett (67 Tex. 685, 4 S. W. Rep. 365), Fires, 21, 62, 66, 339, 340; Trial, 53; Witn., 115.
Ft. Worth & D. C. R. Co. *v.* Johnson (2 Tex. App. (Civ. Cas.) 179), Agency, 61.
Ft. Worth & D. C. R. Co. *v.* Lillard (4 Tex. App. (Civ. Cas.) 123, 16 S. W. Rep. 654), Int. Com., 217; Pl., 94.
Ft. Worth & D. C. R. Co. *v.* Mackney (83 Tex. 410, 18 S. W. Rep. 949), App., 83; Cross., Inj. at, 175; Fel. Serv., 47, 498; Trial, 194.
Ft. Worth & D. C. R. Co. *v.* Measles (81 Tex. 474), Children, Inj. to, 30, 160, 164.
Ft. Worth & D. C. R. Co. *v.* Ratliffe (2 Tex. App. (Civ. Cas.) 600), Fires, 66, 252, 339.
Ft. Worth & D. C. R. Co. *v.* Riley (Tex. App.) (27 Am. & Eng. R. Cas. 49, 1 S. W. Rep. 446), Car. of L. S., 16.
Ft. Worth & D. C. R. Co. *v.* Robertson (Tex.) (16 S. W. Rep. 1093), Children, Inj. to, 25, 189; New Tr., 72.
Ft. Worth & D. C. R. Co. *v.* Scott (2 Tex. App. (Civ. Cas.) 137), Dam., 65; Em. Dom., 706; Flood. Lds., 40; Nuis., 6.
Ft. Worth & D. C. R. Co. *v.* Taliaferro (4 Tex. App (Civ. Cas.) 545, 19 S. W. Rep. 432), Cross., Inj. at, 284.
Ft. Worth & D. C. R. Co. *v.* Thompson (75 Tex. 501, 12 S. W. Rep. 742), Witn., 37, 153, 180.
Ft. Worth & D. C. R. Co. *v.* Thompson (2 Tex. Civ. App. 170, 21 S. W. Rep. 137), Employés, Inj. to, 189; Evid., 31, 89; Negl., 110; Pl., 110; Witn., 98, 149.
Ft. Worth & D. C. R. Co. *v.* Tomlinson (4 Tex. App. (Civ. Cas.) 175, 16 S. W. Rep. 866), Evid., 143; Fires, 299.
Ft. Worth & D. C. R. Co. *v.* Ward (2 Tex. Civ. App. 598, 21 S. W. Rep. 607), Witn., 120.
Ft. Worth & D. C. R. Co. *v.* Williams (42 Am. & Eng. R. Cas. 464, 77 Tex. 121, 13 S. W. Rep. 637), Car. of L. S., 106; Car. of M., 586, 624, 633.
Ft. Worth & D. C. R. Co. *v.* Wilson (85

Tex. 516, 22 S. W. Rep. 578), Death, etc., 70, 94, 151.
Ft. Worth & D. C. R. Co. *v.* Wilson (3 Tex. Civ. App. 583, 24 S. W. Rep. 686), Agency, 42; Employés, Inj. to, 209, 338; Witn., 185.
Ft. Worth & N. O. R. Co. *v.* Pearce (75 Tex. 281, 12 S. W. Rep. 864), Parties, 14; Sts. & H., 276; Trial, 119.
Ft. Worth & N. O. R. Co. *v.* Wallace (40 Am. & Eng. R. Cas. 248, 74 Tex. 581, 12 S. W. Rep. 227), App., 125; Fires, 172, 201, 274, 294, 345, 359.
Ft. Worth & R. G. R. Co. *v.* Culver (4 Tex. App. (Civ. Cas.) 25, 14 S. W. Rep. 1013), Em. Dom., 573.
Ft. Worth & R. G. R. Co. *v.* Downie (82 Tex. 383, 17 S. W. Rep. 620), Sts. & H., 151, 244, 276.
Ft. Worth & R. G. R. Co. *v.* Jennings (46 Am. & Eng. R. Cas. 574, 76 Tex. 373, 13 S. W. Rep. 270, 8 L. R. A. 180), Em. Dom., 157; Injunc., 24.
Ft. Worth & R. G. R. Co. *v.* Kell (4 Tex. App. (Civ. Cas.) 214, 16 S. W. Rep. 936), Em. Dom., 632.
Ft. Worth St. R. Co. *v.* Queen City R. Co. (71 Tex. 165, 9 S. W. Rep. 94), Em. Dom., 142; Franch., 9.
Ft. Worth St. R. Co. *v.* Rosedale St. R. Co. (68 Tex. 163, 7 S. W. Rep. 381), App., 147; Injunc., 19.
Ft. Worth St. R. Co. *v.* Rosedale St. R. Co. (32 Am. & Eng. R. Cas. 283, 68 Tex. 169, 4 S. W. Rep. 534), Charters, 51; St. Rys., 48, 50, 67.
Ft. Worth St. R. Co. *v.* Witton (74 Tex. 202, 11 S. W. Rep. 1091), Children, Inj. to, 150, 189, 193; St. Rys., 451.
Forty-second St. & G. S. F. R. Co. *v.* Thirty-fourth St. R. Co. (20 J. & S. (N. Y.) 252; appeal dismissed in 102 N. Y. 691, mem.), Injunc., 14; Nuis., 2; Par. & Comp. L., 6.
Forward *v.* Pittard (1 T. R. 27), Words & Ph., 246.
Forwood *v.* Toronto (56 Am. & Eng. R. Cas. 445, 22 Ont. 351), St. Rys., 357.
Fosdick *v.* Schall (99 U. S. 235), Mort., 59.
Fordick *v.* Southwestern Car Co. (99 U. S. 256), Mort., 56.
Fordick *v.* Sturges (1 Biss. (U. S.) 255), Stock, 75.
Foss *v.* Boston & M. R. Co. (N. H.) (47 Am. & Eng. R. Cas. 566, 21 Atl. Rep. 222), Car. of P., 145, 263, 350, 414.
Foss *v.* Chicago, M. & St. P. R. Co. (19 Am. & Eng. R. Cas. 112, 33 Minn. 392, 23 N. W. Rep. 553), Stat. Agts., 9; Stat. & D., 67.
Foss *v.* Hinkell (78 Cal. 158, 20 Pac. Rep. 393), Land Grants, 97; Pub. Lds., 35.
Fossier *v.* Morgan's L. & T. R. & S. Co. (McGloin (La.) 349), Animals, 62.
Foster, In re (32 U. C. Q. B. 503), Em. Dom., 1230.
Foster *v.* Atlantic & P. R. Co. (3 Mo. App. 566), Contr., 12.
Foster *v.* Callaway County (3 Dill. (U. S.) 200), Mun. Aid, 153.
Foster *v.* Chicago & A. R. Co. (84 Ill. 164, 16 Am. Ry. Rep. 452), App., 70; Employés, Inj. to, 411.
Foster *v.* Cleveland, C., C. & St. L. R. Co. (56 Fed. Rep. 434), Dam., 11; Discrim., 29; Evid., 146.
Foster *v.* Fitch (36 Conn. 236), Charters, 62.
Foster *v.* Great Western R. Co. (3 Ry. & C. T. Cas. 14), Canals, 7.
Foster *v.* Great Western R. Co. (L. R. 8 Q. B. D. 515, 51 L. J. Q. B. D. 233, 46 L. T. 74, 30 W. R. 398, 4 N. & M. 58; reversing L. R. 8 Q. B. D. 25, 51 L. J. Q. B. D. 51, 45 L. T. 538), Charges, 19; Ry. Com'rs, 6.
Foster *v.* Kenosha (12 Wis. 616), Mun. Aid, 13, 18, 428.
Foster *v.* Mansfield, C. & L. M. R. Co. (36 Am. & Eng. R. Cas. 281, 36 Fed. Rep. 627), Constr. Rys., 124.
Foster *v.* Mansfield, C. & L. M. R. Co. (57 Am. & Eng. R. Cas. 245, 146 U. S. 88, 13 Sup. Ct. Rep. 28), Mort., 284, 294.
Foster *v.* Minnesota C. R. Co. (14 Minn. 360 (Gil. 277), Fel. Serv., 25, 113, 440.
Foster *v.* Missouri Pac. R. Co. (115 Mo. 165, 21 S. W. Rep. 916), Employés, Inj. to, 8, 155, 716; Fel. Serv., 202, 312, 396; New Tr., 72.
Foster *v.* New York C. & H. R. R. Co. (2 How. Pr. N. S. (N. Y.) 416), Negl., 66; Stat. & D., 114.
Foster *v.* St. Louis, I. M. & S. R. Co. (44 Mo. App. 11), Animals, 142, 384.
Foster *v.* St. Louis, I. M. & S. R. Co. (90 Mo. 116, 2 S. W. Rep. 138), Animals, 78, 604.
Foster & G. W. R. Co., In re (32 U. C. Q. B. 162), Em. Dom., 1225.
Fotherby *v.* Metropolitan R. Co. (L. R. 2 C. P. 188, 36 L. J. C. P. 88, 12 Jur. N. S. 1005, 15 W. R. 112, 15 L. T. 243), Em. Dom., 1183.
Fotheringham *v.* Adams Exp. Co. (36 Fed. Rep. 352; see also 34 Fed. Rep. 646), False Imp., 6, 21.
Fotheringham *v.* Adams Exp. Co. (34 Fed. Rep. 646), Mal. Pros., 11.
Fouché *v.* Rome St. R. Co. (84 Ga. 233, 10 S. E. Rep. 726), St. Rys., 199.
Fouhy *v.* Pennsylvania R. Co. (Pa.) (2 Atl. Rep. 536), Fright. Teams, 1.
Foulger *v.* Steadman (L. R. 8 Q. B. 65, 42 L. J. M. C. 3, 26 L. T. 395), Crim. L., 45; Hacks, etc., 2.
Foulke *v.* San Diego & G. S. P. R. Co. (51 Cal. 365, 11 Am. Ry. Rep. 494), Contr., 13.
Foulkes *v.* Metropolitan Dist. R. Co. (L. R. 5 C. P. D. 157, 49 L. J. C. P. D. 361, 42 L. T. 345, 28 W. R. 526; affirming L. R. 4 C. P. D. 267, 48 L. J. C. P. D. 555, 41 L. T. 95), Car. of P., 526.
Fountaine *v.* Carmarthen & C. R. Co. (37 L. J. Ch. 429, L. R. 5 Eq. 316, 16 W. R. 476), Debent., 4.
Four Mile Valley R. Co. *v.* Bailey (18 Ohio St. 208), Constr. Rys., 49; Subscr., 115.
Fournet *v.* Morgan L. & T. R. & S. Co. (43 La. Ann. 1202, 11 So. Rep. 541), Car. of P., 415.

Fowlds *v.* Evans (52 Minn. 551, 54 N. W. Rep. 743), Agency, 7; Contr., 72.
Fowle *v.* Canadian Pac. R. Co. (13 Ont. Pr. 413), Discov., 10.
Fowle *v.* New Haven & N. Co. (107 Mass. 352), Judgm., 22.
Fowle *v.* New Haven & N. Co. (112 Mass. 334), Judgm., 22.
Fowler's Petition (9 Abb. N. Cas. (N. Y.) 268), Receiv., 145.
Fowler *v.* Baltimore & O. R. Co. (8 Am. & Eng. R. Cas. 480, 18 W. Va. 579), Contrib. Neg., 11, 44, 68; Dam., 107; Trial, 59; Words & Ph., 138.
Fowler *v.* Broadway & S. A. R. Co. (36 N. Y. S. R. 806, 59 Hun 623, 13 N. Y. Supp. 453), New Tr., 45.
Fowler *v.* Buffalo & J. R. Co. (1 Sheld. (N. Y.) 525), Liens, 24, 38.
Fowler *v.* Chicago & N. W. R. Co. (17 Am. & Eng. R. Cas. 536, 61 Wis. 159, 21 N. W. Rep. 40), Fel. Serv., 40.
Fowler *v.* Davenport (21 Tex. 626), Bills of L., 106; Car. of M., 758, 774.
Fowler *v.* Detroit & M. R. Co. (7 Mich. 79), Proc., 36.
Fowler *v.* Farmers' L. & T. Co. (21 Wis. 77), Cat.-Gds., 28; St. & D., 1, 8.
Fowler *v.* Kennebec & P. R. Co. (31 Me. 197), Constr. Rys., 24.
Fowler *v.* Liverpool & G. W. Steam Co. (9 Am. & Eng. R. Cas. 235, 87 N. Y. 190), Car. of M., 418.
Fowler *v.* New York C. & H. R. R. Co. (74 Hun 141, 26 N. Y. Supp. 218, 56 N. Y. S. R. 307), Contrib. Neg., 104; Cross., Inj. at, 247; Evid., 293.
Fowler *v.* Pittsburg, Ft. W. & C. R. Co. (35 Pa. St. 22), Attach., 27.
Fowler *v.* Strawberry Hill (74 Iowa 644, 38 N. W. Rep. 521), Sts. & H., 365.
Fowler *v.* Westervelt (17 Abb. Pr. (N. Y.) 59), Sts. & H., 352.
Fowles *v.* Great Western R. Co. (7 Ex. 699, 7 Railw. Cas. 421, 17 Jur. 214, 22 L. J. Ex. 76), Car. of M., 677.
Fowlkes *v.* Nashville & D. R. Co. (5 Baxt. (Tenn.) 663), Death, etc., 102, 375.
Fowlkes *v.* Nashville & D. R. Co. (9 Heisk. (Tenn.) 829), Dam., 68; Death, etc., 84, 101.
Fox *v.* Adams Exp. Co. (116 Mass. 292), Bagg., 116.
Fox *v.* Baltimore & O. R. Co. (34 W. Va. 466, 12 S. E. Rep. 757), Sts. & H., 256, 264, 266; Trial, 48.
Fox *v.* Boston & M. R. Co. (37 Am. & Eng. R. Cas. 632, 148 Mass. 220, 19 N. E. Rep. 222, 1 L. R. A. 702), Car. of M., 147, 581.
Fox *v.* Brooklyn City R. Co. (27 N. Y. Supp. 895, 7 Misc. 285), St. Rys., 358.
Fox *v.* Catharine & B. St. R. Co. (1 Pa. Dist. 507), Elec. Rys., 2.
Fox *v.* Chicago, St. P. & K. C. R. Co. (53 Am. & Eng. R. Cas. 430, 86 Iowa 368, 53 N. W. Rep. 259), Conduct., 4; Dam., 90; Employés, Inj. to, 333, 384.
Fox *v.* Hempfield R. Co. (1 Pittsb. (Pa.) 372), Contr., 94.
Fox *v.* Hempfield R. Co. (2 Abb. (U. S.) 151, 3 Pittsb. (Pa.) 289), Exec., 17; Jurisd., 9.
Fox *v.* Mayor, etc., of N. Y. (53 N. Y. S. R. 902, 70 Hun 181, 24 N. Y. Supp. 43), Stat. & D., 83; St. Rys., 330, 349, 389.
Fox *v.* Missouri Pac. R. Co. (85 Mo. 879), Cross., Inj. at, 211.
Fox *v.* Nipissing R. Co. (29 Grant's Ch. (U. C.) 11), Receiv., 117.
Fox *v.* Peninsular W. L. & C. Works (92 Mich. 243, 52 N. W. Rep. 623), Evid., 50, 223; Witn., 65, 144, 164.
Fox *v.* Pullman Palace Car Co. (16 Mo. App. 122), Conduct., 6.
Fox *v.* Seal (22 Wall. (U. S.) 424), Liens, 17.
Fox *v.* Toronto & N. R. Co. (26 Grant Ch. (Ont.) 352), App., 133.
Fox *v.* Western Pac. R. Co. (31 Cal. 538), Em. Dom., 153, 401, 415, 1062; Words & Ph., 228.
Foxworthy *v.* Lincoln & F. R. Co. (13 Neb. 398, 14 N. W. Rep. 394), Mun. Aid, 159.
Foy *v.* Blackstone (31 Ill. 538), Subscr., 117.
Foy *v.* Central Vt. R. Co. (65 Vt. 242, 26 Atl. Rep. 954), Trial, 159.
Foy *v.* London, B. & S. C. R. Co. (18 C. B. N. S. 225, 13 W. R. 293, 11 L. T. 606), Car. of P., 229.
Foy *v.* Troy & B. R. Co. (24 Barb. (N. Y.) 382), Car. of M., 603, 665.
Frace *v.* New York, L. E. & W. R. Co. (52 N. Y. S. R. 102, 22 N. Y. Supp. 958), Fires, 251, 321; Witn., 182.
Fraker *v.* St. Paul, M. & M. R. Co. (15 Am. & Eng. R. Cas. 256, 32 Minn. 54, 19 N. W. Rep. 349), Employés, Inj. to, 192, 289, 594; Fel. Serv., 339, 446.
Fraloff *v.* New York C. & H. R. R. Co. (10 Blatchf. (U. S.) 16), Bagg., 34, 123.
Fraloff *v.* New York C. & H. R. R. Co. (48 How. Pr. (N. Y.) 535; affirmed in 100 U. S. 24), Bagg., 126.
France *v.* Erie R. Co. (2 Hun (N. Y.) 513, 5 T. & C. 12), Animals, 189, 486.
France *v.* Louisville & N. R. Co. (Ky.) (22 S. W. Rep. 851), Tresp., Inj. to, 55.
Francis *v.* Atchison, T. & S. F. R. Co. (19 Kan. 303, 19 Am. Ry. Rep. 20), Tax., 27, 287.
Francis *v.* Dubuque & S. C. R. Co. (25 Iowa 60), Car. of M., 215, 334, 335.
Francis *v.* Howard County (54 Fed. Rep. 487; affirming 50 Fed. Rep. 44), Mun. Aid, 363.
Francis *v.* Kansas City, St. J. & C. B. R. Co. (53 Am. & Eng. R. Cas. 410, 110 Mo. 387, 19 S. W. Rep. 935), Employés, Inj. to, 18, 20, 427, 428, 450.
Francis *v.* New York & B. El. R. Co. (108 N. Y. 93, 15 N. E. Rep. 192, 13 N. Y. S. R. 87, 10 Cent. Rep. 481; affirming 37 Hun 643, mem., 17 Abb. N. Cas. 1), Em. Dom., 198.
Francis *v.* New York Steam Co. (114 N. Y. 380, 21 N. E. Rep. 988, 23 N. Y. S. R. 543; affirming 13 Daly 510, 1 N. Y. S. R. 261), St. Rys., 380.
Francis *v.* Rome, W. & O. R. Co. (36 N. Y. S. R. 745, 59 Hun 620, 12 N. Y. Supp. 939), Employés, 13.
Francis *v.* St. Louis Transfer Co. (5 Mo.

App. 7), Car. of P., 128, 613; Transfer Cos., 1.
Francoeur *v.* Newhouse (14 Sawy. (U. S.) 600), Adv. Poss., 2; Land Grants, 47.
Francoeur *v.* Newhouse (40 Am. & Eng. R. Cas. 439, 40 Fed. Rep. 618), Land Grants, 63, 66, 68.
Frandsen *v.* Chicago, R. I. & P. R. Co. (36 Iowa 372), App., 117; Employés, Inj. to, 435; Fel. Serv., 173.
Frank *v.* Adams Exp. Co. (18 La. Ann. 279), Exp. Cos., 18.
Frank *v.* Denver & R. G. R. Co. (23 Fed. Rep. 123), Mort., 59; Receiv., 56.
Frank *v.* Erie & G. V. R. Co. (46 Am. & Eng. R. Cas. 356, 33 N. Y. S. R. 235, 122 N. Y. 197, 25 N. E. Rep. 332; modifying and affirming 7 N. Y. S. R. 814, 44 Hun 624, mem.), Leases, 97, 98.
Frank *v.* Evansville & I. R. Co. (30 Am. & Eng. R. Cas. 224, 111 Ind. 132, 12 N. E. Rep. 105), Em. Dom., 204.
Frank *v.* Ingalls (21 Am. & Eng. R. Cas. 277, 41 Ohio St. 560), Tickets & F., 4, 11, 24.
Frank *v.* Memphis & C. R. Co. (52 Miss. 570), Car. of M., 147, 563.
Frank *v.* New Orleans & C. R. Co. (20 La. Ann. 25), Death, etc., 21, 88.
Frank *v.* Otis (2 N. Y. S. R. 679), Employés, Inj. to, 102.
Frankel *v.* Chicago, B. & P. R. Co. (28 Am. & Eng. R. Cas. 257, 70 Iowa 424, 30 N. W. Rep. 679), Em. Dom., 774, 862.
Frankford & B. Turnpike Co. *v.* Philadelphia & T. R. Co. (54 Pa. St. 345), Fires, 30, 40, 44, 257.
Frankford & P. Pass. R. Co. *v.* Philadelphia (58 Pa. St. 119), St. Rys., 259, 270, 289.
Frankford & S. P. C. Pass. R. Co. *v.* Philadelphia (Pa.) (25 Am. & Eng. R. Cas. 262, 4 Atl. Rep. 550), St. Rys., 133.
Frankfort & K. R. Co. *v.* Windsor (51 Ind. 238), Witn., 109.
Frankfort Bridge Co. *v.* Williams (9 Dana (Ky.) 404), Bridges, 102.
Frankle *v.* Jackson (30 Fed. Rep. 398), Receiv., 118; Sts. & H., 169, 274.
Franklin *v.* Forty-second St. & G. S. F. R. Co. (3 N. Y. Supp. 229, 50 Hun 605, 21 N. Y. S. R. 944; affirmed in 121 N. Y. 673, mem., 24 N. E. Rep. 1095), St. Rys., 358, 433.
Franklin *v.* Southeastern R. Co. (3 H. & N. 211, 4 Jur. N. S. 565, 29 L. J. Ex. 25), Death, etc., 88, 385, 434.
Franklin *v.* Southern C. M. R. Co. (85 Cal. 63, 24 Pac. Rep. 723), Car. of P., 138, 142, 261; Contrib. Neg., 88.
Franklin *v.* Winona & St. P. R. Co. (31 Am. & Eng. R. Cas. 211, 37 Minn. 409, 5 Am. St. Rep. 856, 34 N. W. Rep. 898), Culverts, 9, 20; Employés, Inj. to, 55, 710; Fel. Serv., 57, 462.
Franklin County *v.* Nashville, C. & St. L. R. Co. (17 Am. & Eng. R. Cas. 445, 12 Lea (Tenn.) 521), Tax., 125, 282.
Franklin County Court *v.* Louisville & N. R. Co. (25 Am. & Eng. R. Cas. 535, 84 Ky. 59), Tax., 56, 261.
Franz *v.* Sioux City & P. R. Co. (55 Iowa 107, 7 N. W. Rep. 472), Sts. & H., 141.
Fraser *v.* Charleston & S. R. Co. (75 Ga. 222), Trial, 75.
Fraser *v.* Grand Trunk R. Co. (26 U. C. Q. B. 488), Pl., 127.
Fraser *v.* Hickman (12 U. C. C. P. 584), Exec., 15; Stockh., 1, 30, 71; Subscr., 106.
Fraser *v.* Robertson (13 U. C. C. P. 184), Stockh., 54, 73.
Frash *v.* Glendy (68 Ind. 364), Lim. of Ac., 59.
Frayser *v.* Richmond & A. R. Co. (25 Am. & Eng. R. Cas. 597, 81 Va. 388), Mort., 140; Receiv., 87.
Frayser *v.* State (16 Lea (Tenn.) 671), Crim. L., 36; St. Rys., 129.
Frazer *v.* South & N. Ala. R. Co. (28 Am. & Eng. R. Cas. 565, 81 Ala. 185, 1 So. Rep. 85), Comp. Neg., 25; Contrib. Neg., 32; Evid., 131; Tresp., Inj. to, 54, 60.
Frazier *v.* East Tenn., V. & G. R. Co. (40 Am. & Eng. R. Cas. 358, 88 Tenn. 138, 12 S. W. Rep. 537), Consol., 1, 2, 4; Cred. Bill, 2; Evid., 99; Mort., 2, 96, 260; Set-off, 1; Stat., 34.
Frazier *v.* Keokuk, C., St. J. & C. B. R. Co. (48 Iowa 571), Car. of L. S., 11.
Frazier *v.* Pennsylvania R. Co. (38 Pa. St. 104), Fel. Serv., 146, 155, 160, 236.
Frech *v.* Philadelphia, W. & B. R. Co. (39 Md. 574, 10 Am. Ry. Rep. 474), Contrib. Neg., 13; Negl., 103; Tresp., Inj. to, 64.
Fredenburg *v.* Northern C. R. Co. (114 N. Y. 582, 21 N. E. Rep. 1049, 24 N. Y. S. R. 550; affirming 41 Hun 640, mem.), Employés, Inj. to, 29.
Frederick *v.* Easton (40 Pa. St. 419), Attach., 67.
Frederick *v.* Marquette, H. & O. R. Co. (37 Mich. 342), Tickets & F., 6, 8.
Fredericks *v.* Northern C. R. Co. (58 Am. & Eng. R. Cas. 91, 157 Pa. St. 103, 27 Atl. Rep. 689), App., 76, 89; Car. of P., 133, 149, 151, 325, 590; Collis., 13.
Fredericksburgh *v.* Grand Trunk R. Co. (6 Grant's Ch. (U. C.) 555), Sts. & H., 59.
Fredericton & St. M. R. Bridge Co., Ex parte (29 New Brun. 127), Tax., 385.
Freeberg *v.* St. Paul Plow Works (48 Minn. 99, 50 N. W. Rep. 1026), Witn., 133.
Freeburg Coal Co. *v.* Union R. & T. Co. (10 Mo. App. 596), Car. of M., 578.
Freedle *v.* North Carolina R. Co. (4 Jones (N. Car.) 89), Em. Dom., 748.
Freehold & N. Y. R. Co. *v.* Hodgson (29 Am. & Eng. R. Cas. 393, 39 N. J. Eq. 518), Exec., 16.
Freel *v.* Market St. Cable R. Co. (97 Cal. 40, 31 Pac. Rep. 730), Trial, 38; Witn., 90.
Freeland *v.* Pennsylvania R. Co. (66 Pa. St. 91), Flood. Lds., 23.
Freeman *v.* Detroit, M. & M. R. Co. (30 Am. & Eng. R. Cas. 623, 65 Mich. 577, 9 West. Rep. 117, 32 N. W. Rep. 833), Car. of P., 214; Penalty, 5.
Freeman *v.* Duluth, S. S. & A. R. Co. (37

Am. & Eng. R. Cas. 501, 74 Mich. 86, 41 N. W. Rep. 872, 3 L. R. A. 594), Cross., Inj. at, 69, 71, 231, 266, 294.
Freeman *v.* Howe (24 How. (U. S.) 450), Attach., 5.
Freeman *v.* Louisville & N. R. Co. (32 Fla. 420, 13 So. Rep. 892), Parties, 1.
Freeman *v.* Matlock (67 Ind. 99), Bills & N., 6.
Freeman *v.* Minneapolis & St. L. R. Co. (37 Am. & Eng. R. Cas. 410, 28 Minn. 443, 10 N. W. Rep. 594), Leases, 29, 44.
Freeman *v.* Ontario & Q. R. Co. (6 Ont. 413), Em. Dom., 1258.
Freeman *v.* Panama R. Co. (7 Hun (N. Y.) 122), Charters, 3, 157.
Freeman *v.* Stine (15 Phila. (Pa.) 37), Direct., 43, 51.
Freeman *v.* Travelers Ins. Co. (144 Mass. 572, 4 N. Eng. Rep. 621, 12 N. E. Rep. 372), Witn., 180.
Freeman *v.* Winchester (18 Miss. 577), Receiv., 120; Subscr., 77.
Freestone, In re (1 H. & N. 93, 2 Jur. N. S 525, 25 L. J. M. C. 121), Crim. L., 25.
Freidenrich *v.* Baltimore & O. R. Co. (2 Am. & Eng. R. Cas. 280, 53 Md. 201), Eject. Pass., 97; Tickets & F., 64.
Freidman *v.* Dry Dock, E. B. & B. R. Co. (3 N. Y. S. R. 557), Evid., 125.
Frelinghuysen *v.* Central R. Co. (28 N. J. Eq. 388), Em. Dom., 853.
Frelsen *v.* Southern Pac. Co. (44 Am. & Eng. R. Cas. 319, 42 La. Ann. 673, 7 So. Rep. 800), Derailm., 1; Negl., 18.
Fremantle *v.* London & N. W. R. Co. (10 C. B. N. S. 89, 31 L. J. C. P. 12, 9 W. R. 611, 2 F. & F. 337), Fires, 316, 317.
Fremont & M. Counties *v.* Burlington & M. R. R. Co. (22 Iowa 91), Land Grants, 23.
Fremont Bldg. Assoc. *v.* Sherwin (6 Neb. 48), Mun. Aid, 158.
Fremont, E. & M. V. R. Co. *v.* Bates (57 Am. & Eng. R. Cas. 711, 40 Neb. 381, 58 N. W. Rep. 959), Em. Dom., 460, 596.
Fremont, E. & M. V. R. Co. *v.* Brown County (24 Am. & Eng. R. Cas. 616, 18 Neb. 516, 26 N. W. Rep. 194), Tax., 126.
Fremont, E. & M. V. R. Co. *v.* Crum (43 Am. & Eng. R. Cas. 71, 30 Neb. 70, 46 N. W. Rep. 217), Fires, 343.
Fremont, E. & M. V. R. Co. *v.* Lamb (5 Am. & Eng. R. Cas. 367, 11 Neb. 592, 10 N. E. Rep. 493), Animals, 158; Em. Dom., 598; Farm Cross., 2.
Fremont, E & M. V. R. Co. *v.* Marley (25 Neb. 138, 40 N. W. Rep. 948), App., 28; Flood. Lds., 46, 48; Int., 13; Pl., 164; Witn., 112.
Fremont, E. & M. V. R. Co. *v.* Mattheis (35 Neb. 48, 52 N. W. Rep. 698), Em. Dom., 49, 317.
Fremont, E. & M. V. R. Co. *v.* Meeker (44 Am. & Eng. R. Cas. 115, 28 Neb. 94, 44 N. W. Rep. 79), Em. Dom., 548, 646, 682, 826.
Fremont, E. & M. V. R. Co. *v.* Pounder (36 Neb. 247, 54 N. W. Rep. 509), Fences, 49.
Fremont, E. & M. V. R. Co. *v.* Setright (34 Neb. 253, 51 N. W. Rep. 833), Em. Dom., 1003.
Fremont, E. & M. V. R. Co. *v.* Whalen (5 Am. & Eng. R. Cas. 364, 11 Neb. 585, 10 N. W. Rep. 491), Em. Dom., 683, 743; Witn., 109.
French *v.* Buffalo & E. R. Co. (2 Abb. App. Dec. (N. Y.) 196, 4 Keyes 108), Car. of M., 475; Lim. of Liab., 23.
French *v.* Dauchy (134 N. Y. 543, 31 N. E. Rep. 1041, 47 N. Y. S. R. 900; affirming 57 Hun 100, 32 N. Y. S. R. 544, 10 N. Y. Supp. 468), Receiv., 34.
French *v.* Detroit, G. H. & M. R. Co. (89 Mich. 537, 50 N. W. Rep. 914), Contrib. Neg., 99; Cross., Inj. at, 225; Stat. & D., 126.
French *v.* Langdon (76 Wis. 29, 44 N. W. Rep. 1111), Constr. Rys., 97.
French *v.* New Orleans & C. R. Co. (2 La. Ann. 80), Sts. & H., 12.
French *v.* Philadelphia & R. R. Co. (13 Phila. (Pa.) 187), Philadelphia & R. R. Co., 1.
French *v.* Shoemaker (12 Wall. (U. S.) 86), App., 7.
French *v.* Star Union Transp. Co. (134 Mass. 288), Trover, 8.
French *v.* Taunton Branch R. Co. (116 Mass. 537, 7 Am. Ry. Rep. 460), Cross., Inj. at, 329.
French *v.* Teschemaker (24 Cal. 518), Mun. Aid, 26, 203.
French *v.* United States (16 Ct. of Cl. 419), Claims Against U. S., 12.
French *v.* Western N. Y. & P. R. Co. (25 N. Y. Supp. 229, 72 Hun 469, 54 N. Y. S. R. 762), Animals, 154.
French Spiral Spring Co. *v.* New England Car Trust (32 Fed. Rep. 44), Contr., 11.
Freshwater *v.* Pittsburg, W. & K. R. Co. (6 W. Va. 503), App., 31; Injunc., 19.
Frick *v.* Mercer County (138 Pa. St. 523, 21 Atl. Rep. 6), Mun. Aid, 74, 395.
Frick *v.* St. Louis, K. C. & N. R. Co. (5 Mo. App. 435; affirmed on other points in 75 Mo. 542), Contrib. Neg., 16; Sts. & H., 338.
Frick *v.* St. Louis, K. C. & N. R. Co. (10 Am. & Eng. R. Cas. 776, 75 Mo. 542), Children, Inj. to, 135, 144, 182, 183, 184.
Frick *v.* St. Louis, K. C. & N. R. Co. (8 Am. & Eng. R. Cas. 280, 75 Mo. 595), Car. of P., 596; Children, Inj. to, 37, 127, 172; Cross., Inj. at, 1; Negl., 70; Sts. & H., 369; Tresp., Inj. to, 50.
Fried *v.* New York C. R. Co. (25 How. Pr. (N. Y.) 285, 1 Sheldon 1), Assign., 3.
Friedlander *v.* Delaware & H. Canal Co. (34 N. Y. S. R. 650, 58 Hun 605, 13 N. Y. Supp. 323), Easem., 10.
Friedlander *v.* Texas & P. R. Co. (40 Am. & Eng. R. Cas. 70, 130 U. S. 416, 9 Sup. Ct. Rep. 570), Stat. Agts., 10.
Friedman *v.* Dry Dock, E. B. & B. R. Co. (33 N. Y. S. R. 649, 11 N. Y. Supp. 429), Cross., Inj. at, 318.
Friedman *v.* Railroad Co. (7 Phila. (Pa.) 203), Evid., 165.
Friel *v.* Citizens' R. Co. (115 Mo. 503, 22 S. W. Rep. 498), Employés, Inj. to, 97, 99.
Friend *v.* London, C. & D. R. Co. (L. R. 2 Ex. D. 437, 46 L. J. Ex. D. 696, 36 L. T. 729, 25 W. R. 735), Discov., 6.

Friend *v.* Woods (6 Gratt. (Va.) 189), Car. of M., 15; Words & Ph., 7.
Fries *v.* Pennsylvania R. Co. (98 Pa. St. 142), Judgm., 17.
Fries *v.* Southern Pa. R. & M. Co. (85 Pa. St. 73, 18 Am. Ry. Rep. 375), Em. Dom., 406.
Friess *v.* New York C. & H. R. R. Co. (51 N. Y. S. R. 391, 67 Hun 205, 22 N. Y. Supp. 104), Cross., Inj. at, 84, 218.
Frink *v.* Coe (4 Greene (Iowa) 555), Car. of P., 636; Tender, 7.
Frink *v.* Southern Exp. Co. (82 Ga. 33, 8 S. E. Rep. 862, 3 L. R. A. 482), Conduct., 7.
Frisbie *v.* Chesapeake & O. R. Co. (57 Fed. Rep. 1), Pl., 11; Rem. of C., 58.
Frith *v.* Dubuque (45 Iowa 406), Sts. & H., 214, 236, 242.
Frith *v.* Simpson (48 J. P. 150), Crim. L., 23.
Fritts *v.* New York & N. E. R. Co. (62 Conn. 503, 26 Atl. Rep. 347), Animals, 581; App., 123.
Fritz *v.* Erie City Pass. R. Co. (155 Pa. St. 472, 26 Atl. Rep. 653), Elec. Rys., 8.
Fritz *v.* First Div. St. P. & P. R. Co. (22 Minn. 404, 19 Am. Ry. Rep. 404), Animals, 205, 211, 270, 449, 457.
Fritz *v.* Kansas City, C. B. & St. J. R. Co. (13 Am. & Eng. R. Cas. 558, 61 Iowa 323, 16 N. W. Rep. 144), Animals, 459; Fences, 89.
Fritz *v.* Milwaukee & St. P. R. Co. (34 Iowa 337), Animals, 158.
Frizzelle *v.* Oregon R. & N. Co. (22 Oreg. 463, 30 Pac. Rep. 313), Ejectm., 17.
Froelich *v.* Southern Exp. Co. (67 N. Car. 1), Exp. Cos., 80.
Front St. Cable R. Co. *v.* Johnson (47 Am. & Eng. R. Cas. 287, 2 Wash. 112, 25 Pac. Rep. 1084), Liens, 48.
Front St., M. & O. R. Co. *v.* Butler (50 Cal. 574, 12 Am. Ry. Rep. 183), Contr., 44, 45.
Frost *v.* Eastern R. Co. (64 N. H. 220, 4 N. Eng. Rep. 527, 9 Atl. Rep. 790), Children, Inj. to, 24; Tresp., Inj. to, 75, 76.
Frost *v.* Grand Trunk R. Co. (10 Allen (Mass.) 387), Car. of P., 274.
Frost *v.* Milwaukee & N. R. Co. (96 Mich. 470, 56 N. W. Rep. 19), Cross., Inj. at, 14, 225.
Frost *v.* Reed (30 N. H. 17), Assign., 20.
Frothingham *v.* Broadway & S. A. R. Co. (9 Civ. Pro. (N. Y.) 304), Discov., 8; Stockh., 79, 96, 100.
Fruin *v.* Crystal R. Co. (89 Mo. 397, 14 S. W. Rep. 557), Constr. Rys., 30; Contr., 42.
Fry *v.* Dubuque & S. W. R. Co. (45 Iowa 416), Dam., 44.
Fry *v.* Lexington & B. S. R. Co. (2 Metc. (Ky.) 314), Subscr., 1, 93, 125.
Fry *v.* Louisville, N. A. & C. R. Co. (22 Am. & Eng. R. Cas. 442, 103 Ind. 265, 2 N. E. Rep. 744), Bills of L., 54, 89; Charges, 51.
Fry *v.* People's Pass. R. Co. (17 Phila. (Pa.) 61), St. Rys., 435.
Fry *v.* State (63 Ind. 552), Tickets & F., 13.
Frye *v.* Atlantic & St. L. R. Co. (47 Me. 523), Fires, 166, 170.
Frye *v.* Chicago, B. & Q. R. Co. (73 Ill. 399), Car. of L. S., 110.
Frye *v.* Tucker (24 Ill. 180), Bills & N., 14.
Fryer, In re (45 L. J. Ch. 96, L. R. 20 Eq. 468), Em. Dom., 1154.
Fryer *v.* Central R. & B. Co. (50 Ga. 581), Coroners, 2.
Fulgam *v.* Macon & B. R. Co. (44 Ga. 597), Subscr., 81.
Fulks *v.* St. Louis & S. F. R. Co. (52 Am. & Eng. R. Cas. 280, 111 Mo. 335, 19 S. W. Rep. 818), Car. of P., 376, 382, 384, 597; Contrib. Neg., 105.
Fuller *v.* Baltimore & O. E. Relief Assoc. (67 Md. 433, 10 Atl. Rep. 237), Pl., 76; Relief Assoc., 7.
Fuller *v.* Boston & A. R. Co. (14 Am. & Eng. R. Cas. 695, 133 Mass. 491), Contrib. Neg., 54; Cross., Inj. at, 128.
Fuller *v.* Chicago & N. W. R. Co. (31 Iowa 187, 1 Am. Ry. Rep. 383), Charges, 12, 45, 53; Words & Ph., 46, 251.
Fuller *v.* Chicago & N. W. R. Co. (31 Iowa 211, 1 Am. Ry. Rep. 377), Charges, 53; Trial, 188.
Fuller *v.* Chicago, R. I. & P. R. Co. (14 Am. & Eng. R. Cas. 149, 61 Iowa 125, 15 N. W. Rep. 861), Trial, 193.
Fuller *v.* Dame (18 Pick. (Mass.) 472), Right of W., 8; Stat. & D., 38.
Fuller *v.* Jamestown St. R. Co. (75 Hun 273, 26 N. Y. Supp. 1078), Evid., 174; St. Rys., 325, 366.
Fuller *v.* Jewett (1 Am. & Eng. R. Cas. 109, 80 N. Y. 46, 36 Am. Rep. 575), Employés, Inj. to, 4, 145, 150; Fel. Serv., 79, 213, 370.
Fuller *v.* Mayor, etc., of Jackson (92 Mich. 197, 52 N. W. Rep. 1075), Dam., 77; Witn., 189.
Fuller *v.* Naugatuck R. Co. (21 Conn. 557), Car. of P., 142, 566; Husb. & W., 31, 36; Pl., 7.
Fuller *v.* Port Royal & A. R. Co. (24 So. Car. 132), Animals, 576.
Fulmer *v.* Illinois C. R. Co. (68 Miss. 355, 8 So. Rep. 517), Fly. Switch, 1.
Fulton *v.* Chicago, St. P., M. & O. R. Co. (1 Int. Com. Rep. 375, 1 Int. Com. Com. 104), Int. Com., 170.
Fulton *v.* Grand Trunk R. Co. (17 U. C. Q. B. 428), Eject. Pass., 9.
Fulton *v.* Lydecker (17 N. Y. Supp. 451), Car. of M., 307.
Fulton *v.* Short Route Rapid Transfer Co. (32 Am. & Eng. R. Cas. 256, 85 Ky. 640, 7 Am. St. Rep. 619, 4 S. W. Rep. 332), Elev. Rys., 1, 73; Sts. & H., 107, 137.
Fulton County N. G. R. Co. *v.* Butler (48 Ill. App. 301), Cross., Inj. at, 212; Negl., 98.
Fulton County St. R. Co. *v.* McConnell (87 Ga. 756, 13 S. E. Rep. 828), Indep. Contr., 26.
Fulton County Sup'rs *v.* Mississippi & W. R. Co. (21 Ill. 338), Mun. Aid, 148; Pl., 39; Subscr., 119.
Funkhouser *v.* Peck (67 Mo. 19), Land Grants, 43, 133.
Funston *v.* Chicago, R. I. & P. R. Co. (14 Am. & Eng. R. Cas. 640, 61 Iowa 452, 16 N. W. Rep. 518), Cross., Inj. at, 150, 295, 365; Evid., 80, 215; Witn., 96.

Furley *v.* Chicago, M. & St. P. R. Co. (Iowa) (57 Am. & Eng. R. Cas. 26, 57 N. W. Rep. 719), Car. of L. S., 111.
Furlong *v.* South L. T. Co. (48 J. P. 329, 1 C. & E. 316), Agency, 94.
Furman *v.* Chicago, R. I. & P. R. Co. (6 Am. & Eng. R. Cas. 280, 57 Iowa 42, 10 N. W. Rep. 272), Husb. & W., 3.
Furman *v.* Chicago, R. I. & P. R. Co. (62 Iowa 395, 17 N. W. Rep. 598), Husb. & W., 3.
Furman *v.* Chicago, R. I. & P. R. Co. (23 Am. & Eng. R. Cas. 730, 68 Iowa 219, 26 N. W. Rep. 83), Car. of M., 233.
Furman *v.* Chicago, R. I. & P. R. Co. (45 Am. & Eng. R. Cas. 385, 81 Iowa 540, 46 N. W. Rep. 1049; former appeals 6 Am. & Eng. R. Cas. 280, 57 Iowa 42, 10 N. W. Rep. 272, 62 Iowa 395, 17 N. W. Rep. 598, 23 Am. & Eng. R. Cas. 730, 68 Iowa 219, 26 N. W. Rep. 83), Car. of M., 298; Husb. & W., 3.
Furman *v.* Union Pac. R. Co. (32 Am. & Eng. R. Cas. 500, 106 N. Y. 579, 13 N. E. Rep. 587, 11 N. Y. S. R. 192; reversing 35 Hun 669, mem.), Bills of L., 48; Car. of M., 264, 273, 651.
Furness R. Co. *v.* Cumberland Bldg. Soc. (52 L. T. 144, 49 J. P. 292), Em. Dom., 1100.
Furness R. Co. *v.* Inland Revenue Com'rs (10 Jur. N. S. 1133, 33 L. J. Ex. 173, 13 W. R. 10, 10 L. T. 161), Stock, 4.
Furnish *v.* Missouri Pac. R. Co. (102 Mo. 438, 13 S. W. Rep. 1044), App., 126; Car. of P., 140, 143, 164, 166; Derailm., 4.
Furnish *v.* Missouri Pac. R. Co. (102 Mo. 669, 15 S. W. Rep. 315), Husb. & W., 17, 20, 23; New Tr., 33; Words & Ph., 213.
Furniss *v.* Hudson River R. Co. (5 Sandf. (N. Y.) 551), Em. Dom., 929.
Furniss *v.* Midland R. Co. (L. R. 6 Eq. 473), Em. Dom., 1101.
Furst *v.* Second Ave. R. Co. (72 N. Y. 542), Evid., 202.
Furstenheim *v.* Memphis & O. R. Co. (9 Heisk. (Tenn.) 238, 19 Am. Ry. Rep. 409), Bagg., 24.
Fusili *v.* Missouri Pac. R. Co. (45 Mo. App. 535), Cross., Inj. at, 79, 86, 215, 254, 292; Negl., 67.

Gabriel *v.* Seattle & M. R. Co. (7 Wash. 515, 35 Pac. Rep. 410), App., 2.
Gadbois *v.* Chicago, M. & St. P. R. Co. (75 Iowa 530, 39 N. W. Rep. 871), Employés, Inj. to, 14; Trial, 137; Witn., 72.
Gaddis *v.* Richland County (92 Ill. 119), Mun. Aid, 23, 112, 355.
Gadsden & A. U. R. Co. *v.* Causler (58 Am. & Eng. R. Cas. 258, 97 Ala. 235, 12 So. Rep. 439), Car. of P., 132, 261, 403, 482; Trial, 148.
Gaffney *v.* Brooklyn City R. Co. (6 Misc. 1, 58 N. Y. S. R. 119, 25 N. Y. Supp. 996), St. Rys., 386.
Gaffney *v.* New York & N. E. R. Co. (31 Am. & Eng. R. Cas. 265, 15 R. I. 456, 4 N. Eng. Rep. 33, 7 Atl. Rep. 284), Employés, Inj. to, 206, 210, 386; Fel. Serv., 19, 414.
Gaffney *v.* Pennsylvania R. Co. (Ky.) (1 S. W. Rep. 677), App., 105.
Gafford *v.* American M. & I. Co. (77 Iowa 736, 42 N. W. Rep. 550), Bills & N., 24; Officers, 15.
Gage *v.* Charleston (3 So. Car. 491), Mun. Aid, 209.
Gage *v.* Chicago (141 Ill. 642, 31 N. E. Rep. 163), Em. Dom., 350, 908.
Gage *v.* Delaware, L. & W. R. Co. (14 Hun (N. Y.) 446), Employés, Inj. to, 146.
Gage *v.* Louisville, N. O. & T. R. Co. (88 Tenn. 724, 14 S. W. Rep. 73), Trial, 136.
Gage *v.* Newmarket R. Co. (16 Jur. 1136, 21 L. J. Q. B. 398, 18 Q. B. 457, 7 Railw. Cas. 168), Cov'ts, 14; Ult. Vir., 11; Vend. & P., 3.
Gagg *v.* Vetter (41 Ind. 228), Negl., 75.
Gahagan *v.* Boston & L. R. Co. (1 Allen (Mass.) 187), Contrib. Neg. 87; Evid., 37; Sts. & H., 138; Witn., 106.
Gainard *v.* Rochester City & B. R. Co. (7 N. Y. S. R. 103), St. Rys., 326, 366.
Gainard *v.* Rochester City & B. R. Co. (18 N. Y. S. R. 692, 2 N. Y. Supp. 470, 50 Hun 22; affirmed in 121 N. Y. 661, mem., 24 N. E. Rep. 1092, mem.), Car. of P., 139, 142; Contrib. Neg., 88; Dam., 42; Evid., 28; St. Rys., 335, 359, 366, 376, 384.
Gaines *v.* Union T. & I. Co. (28 Ohio St. 418, 14 Am. Ry. Rep. 158), Bills of L., 30, 80; Car. of M., 468, 485; Lim. of Liab., 42.
Gainesville, H. & W. R. Co. *v.* Hall (44 Am. & Eng. R. Cas. 51, 78 Tex. 169, 14 S. W. Rep. 259), Em. Dom., 174, 175; Witn., 124.
Gainesville, H. & W. R. Co. *v.* Wapples (3 Tex. App. (Civ. Cas.) 482), Em. Dom., 573, 596, 618.
Gainesville, J. & S. R. Co. *v.* Martin (84 Ga. 61, 10 S. E. Rep. 542), Contr., 90.
Gainesville, J. & S. R. Co. *v.* Wall (75 Ga. 282), Animals, 472.
Gains *v.* Chicago, R. I. & P. R. Co. (47 Mo. App. 173; see 37 Mo. App. 676), Witn., 131.
Gaither *v.* Kansas City, etc., R. Co. (27 Fed. Rep. 544), Death, etc., 380; New Tr., 5.
Gale *v.* Delaware, L. & W. R. Co. (7 Hun (N. Y.) 670), Tickets & F., 89.
Gale *v.* New York C. & H. R. R. Co. (76 N. Y. 594; affirming 53 How. Pr. 385, 13 Hun 1), App., 125; Cross., Inj. at, 26; Witn., 39, 41.
Gale *v.* Troy & B. R. Co. (51 Hun (N. Y.) 470, 21 N. Y. S. R. 702, 4 N. Y. Supp. 295; affirming 2 N. Y. Supp. 354, 17 N. Y. S. R. 970), Consol., 30.
Galena & C. U. R. Co. *v.* Appleby (28 Ill. 283), Charters, 27; Pl., 153.
Galena & C. U. R. Co. *v.* Crawford (25 Ill. 435), Animals, 122, 496; Stat., 26.
Galena & C. U. R. Co. *v.* Dill (22 Ill. 265), Cross., Inj. at, 9, 98; Evid., 52; Stat., 19.
Galena & C. U. R. Co. *v.* Fay (16 Ill. 558), Car. of P., 361, 364, 466, 555; Comp. Neg., 7; Evid., 176.
Galena & C. U. R. Co. *v.* Griffin (31 Ill. 303), Animals, 52; Fences, 58.
Galena & C. U. R. Co. *v.* Jacobs (20 Ill. 478), Comp. Neg., 4; License, 2; Tresp., Inj. to, 2.

Galena & C. U. R. Co. *v.* Loomis (13 Ill. 548), Cross., Inj. at, 100, 103, 141.
Galena & C. U. R. Co. *v.* Menzies (26 Ill. 122), Attach., 27.
Galena & C. U. R. Co. *v.* Pound (22 Ill. 399), Em. Dom., 314, 865, 1077.
Galena & C. U. R. Co. *v.* Rae (18 Ill. 488), Car. of M., 42, 47, 57, 58, 63, 136, 375.
Galena & C. U. R. Co. *v.* Sumner (24 Ill. 631), Animals, 353, 358.
Galena & C. U. R. Co. *v.* Welch (24 Ill. 31), Witn., 14.
Galena & C. U. R. Co. *v.* Yarwood (15 Ill. 468), Car. of P., 440.
Galena & C. U. R. Co. *v.* Yarwood (17 Ill. 509), Car. of P., 345, 583; Contrib. Neg., 42.
Galena & S. W. R. Co. *v.* Barrett (2 Am. & Eng. R. Cas. 520, 95 Ill. 467), Bonds, 60; Contr., 21; Pl., 79.
Galena & S. W. R. Co. *v.* Birkbeck (70 Ill. 208), Em. Dom., 357, 453.
Galena & S. W. R. Co. *v.* Ennor (116 Ill. 55, 4 N. E. Rep. 762; reversing 14 Ill. App. 327), Injunc., 41; Set-off, 4; Subscr., 33, 206, 211.
Galena & S. W. R. Co. *v.* Ennor (123 Ill. 505, 14 N. E. Rep. 673, 12 West. Rep. 761), Judgm., 50.
Galena & S. W. R. Co. *v.* Haslam (73 Ill. 494), Em. Dom., 438, 566; Trial, 35; Witn., 124.
Galena & S. W. R. Co. *v.* Stahl (103 Ill. 67), Attach., 20, 22; Mort., 207.
Gallaghar *v.* Ashby (26 Barb. (N. Y.) 143), Constr. Rys., 93.
Gallagher *v.* Bowie (66 Tex. 265), Car. of P., 98, 100; Husb. & W., 15.
Gallagher *v.* Christopher & T. St. R. Co. (14 Daly 366, 13 N. Y. S. R. 80), Employés, 14.
Gallagher *v.* Coney Island & B. R. Co. (24 N. Y. S. R. 746, 4 N. Y. Supp. 870), St. Rys., 475.
Gallagher *v.* Fayette County R. Co. (38 Pa. St. 102), Injunc., 7.
Gallagher *v.* Great Western R. Co. (8 Ir. R., C. L. 326, 3 Ry. & C. T. Cas. xxviii), Lim. of Liab., 5, 7, 35.
Gallagher *v.* Kemmerer (144 Pa. St. 509, 22 Atl. Rep. 970), Witn., 127.
Gallagher *v.* Market St. R. Co. (67 Cal. 13, 6 Pac. Rep. 869), Evid., 245.
Gallagher *v.* New York & N. E. R. Co. (40 Am. & Eng. R. Cas. 197, 57 Conn. 442, 18 Atl. Rep. 786, 5 L. R. A. 737), Animals, 106; Fences, 62.
Gallagher *v.* Proctor (84 Me. 41, 24 Atl. Rep. 459), Contrib. Neg., 104.
Gallagher *v.* West End. St. R. Co. (52 Am. & Eng. R. Cas. 520, 156 Mass. 157, 30 N. E. Rep. 480), St. Rys., 396.
Gallaher *v.* Crescent City R. Co. (37 La. Ann. 288), Children, Inj. to, 60.
Gallatin Canal Co. *v.* Lay (10 Mont. 528, 26 Pac. Rep. 1001), Witn., 119.
Gallena *v.* Hot Springs R. Co. (4 McCrary (U. S.) 371, 13 Fed. Rep. 116), Assault, 2; Car. of P., 651; Eject. Pass., 58, 65, 118; Witn., 28.
Galliers *v.* Metropolitan R. Co. (40 L. J. Ch. 544, L. R. 11 Eq. 410, 19 W. R. 795), Em. Dom., 1153.
Gallin *v.* London & N. W. R. Co. (23 W. R. 308, 32 L. T. 550, 44 L. J. Q. B. 89, L. R. 10 Q. B. 212), Car. of L. S., 128; Passes, 21.
Galloway *v.* Chicago, R. I. & P. R. Co. (58 Am. & Eng. R. Cas. 245, 87 Iowa 458, 54 N. W. Rep. 447), Car. of P., 429, 430, 596, 609; Negl., 1; Trial, 103.
Galloway *v.* Jenkins (63 N. Car. 147), State Aid, 28.
Galloway *v.* Western & A. R. Co. (57 Ga. 512), Employés, Inj. to, 181, 436; Estop., 32; Fel. Serv., 171; Western & A. R. Co., 2.
Gallup *v.* Albany R. Co. (7 Lans. (N. Y.) 471; affirmed in 65 N. Y. 1), Land. & T., 6.
Galpin *v.* Chicago & N. W. R. Co. (19 Wis. 604), Animals, 242, 495; Negl., 99.
Galt *v.* Adams Exp. Co. (MacArth. & M. (D. C.) 124), Car. of M., 201; Exp. Cos., 61, 72; Lim. of Liab., 27.
Galt *v.* Archer (7 Gratt. (Va.) 307), Car. of M., 397.
Galt *v.* Erie & N. R. Co. (14 Grant's Ch. (U. C.) 499), Mort., 167.
Galt *v.* Erie & N. R. Co. (15 Grant's Ch. (U. C.) 637), Mort., 93.
Galt *v.* Erie & N. R. Co. (19 U. C. C. P. 357), Mort., 167.
Galveston *v.* Barbour (62 Tex. 172), Children, Inj. to, 185.
Galveston *v.* Galveston City R. Co. (46 Tex. 435, 13 Am. Ry. Rep. 274), Estop., 1; St. Rys., 158; Sts. & H., 166.
Galveston & R. R. R. Co. *v.* Shepherd (21 Tex. 274), Proc., 22.
Galveston, B. & C. N. G. R. Co. *v.* Gross (47 Tex. 428), Land Grants, 126; Mand., 25.
Galveston C. R. Co. *v.* Gulf Land Co. (2 Tex. Civ. App. 326, 21 S. W. Rep. 959), Leases, 69.
Galveston C. R. Co. *v.* Hewitt (67 Tex. 473, 3 S. W. Rep. 705), Car. of P., 89, 107, 137; Children, Inj. to, 64; Cross., Inj. at, 164, 194; Negl., 1, 2; St. Rys., 450, 452, 465.
Galveston City R. Co. *v.* Hook (40 Ill. App. 547), Proc., 18, 20.
Galveston City R. Co. *v.* Nolan (3 Am. & Eng. R. Cas. 387, 53 Tex. 139), Death, etc., 96; St. Rys., 177.
Galveston, H. & H. R. Co. *v.* Allison (12 Am. & Eng. R. Cas. 28, 59 Tex. 193), Car. of M., 165, 666, 667.
Galveston, H. & H. R. Co. *v.* Cooper (70 Tex. 67, 8 S. W. Rep. 68), App., 39; Stat. & D., 64.
Galveston, H. & H. R. Co. *v.* Cowdrey (11 Wall. (U. S.) 459), Bonds, 45, 47; Mort., 88, 178.
Galveston, H. & H. R. Co. *v.* Crispi (73 Tex. 236, 11 S. W. Rep. 187), Car. of P., 263.
Galveston, H. & H. R. Co. *v.* Moore (59 Tex. 64, 46 Am. Rep. 265), Children, Inj. to, 127, 128, 137.
Galveston, H. & S. A. R. Co. *v.* Arispe (48 Am. & Eng. R. Cas. 350, 81 Tex. 517, 17 S. W. Rep. 47), App., 100; Death, etc., 334; Employés, Inj. to, 197; Evid., 247; Fel. Serv., 355, 391.
Galveston, H. & S. A. R. Co. *v.* Ball (80

Tex. 602, 16 S. W. Rep. 441), Bills of L., 97; Car. of M., 481, 762, 773.
Galveston, H. & S. A. R. Co. *v.* Becht (Tex. Civ. App.) (21 S. W. Rep. 971), Flood. Lds., 91.
Galveston, H. & S. A. R. Co. *v.* Bell (2 Tex. Unrep. Cas. 517), Car. of M., 800.
Galveston, H. & S. A. R. Co. *v.* Bibb (3 Tex. App. (Civ. Cas.) 330), Constr. Rys., 11.
Galveston, H. & S. A. R. Co. *v.* Blakeney (39 Am. & Eng. R. Cas. 114, 73 Tex. 180, 11 S. W. Rep. 174), Em. Dom., 428.
Galveston, H. & S. A. R. Co. *v.* Boothe (3 Tex. App. (Civ. Cas.) 433), Car. of L. S., 80.
Galveston, H. & S. A. R. Co. *v.* Borsky (2 Tex. Civ. App. 545, 21 S. W. Rep. 1011), Flood. Lds., 48, 97; Pl., 149.
Galveston, H. & S. A. R. Co. *v.* Bracken (14 Am. & Eng. R. Cas. 691, 59 Tex. 71), Cross., Inj. at, 254; Death, etc., 174.
Galveston, H. & S. A. R. Co. *v.* Buckley (1 Tex. App. (Civ. Cas.) 377), Animals, 587.
Galveston, H. & S. A. R. Co. *v.* Butler (9 Am. & Eng. R. Cas. 552, 56 Tex. 506), Parties, 22.
Galveston, H. & S. A. R. Co. *v.* Carter (Tex. App.) (18 S. W. Rep. 196), App., 142.
Galveston, H. & S. A. R. Co. *v.* Chambers (73 Tex. 296, 11 S. W. Rep. 279), Children, Inj. to, 95.
Galveston, H. & S. A. R. Co. *v.* Cook (Tex.) (16 S. W. Rep. 1038), Cross., Inj. at, 118; Death, etc., 310.
Galveston, H. & S. A. R. Co. *v.* Cooper (2 Tex. Civ. App. 42, 20 S. W. Rep. 990), Car. of P., 385, 646; Dam., 78, 92; Trial, 173; Witn., 132.
Galveston, H. & S. A. R. Co. *v.* Daniels (1 Tex. Civ. App. 695, 20 S. W. Rep. 955), Employés, Inj. to, 55; Negl., 96; Trial, 148; Witn., 104.
Galveston, H. & S. A. R. Co. *v.* Davidson (21 Am. & Eng. R. Cas. 431, 61 Tex. 204), Negl., 106.
Galveston, H. & S. A. R. Co. *v.* Delahunty (4 Am. & Eng. R. Cas. 628, 53 Tex. 206), Employés, Inj. to, 96, 681; Fel. Serv., 366, 410.
Galveston, H. & S. A. R. Co. *v.* Donahoe (9 Am. & Eng. R. Cas. 287, 56 Tex. 162), Agency, 93; False Imp., 16; Proc., 5.
Galveston, H. & S. A. R. Co. *v.* Douglass (1 Tex. App. (Civ. Cas.) 29), Car. of M., 778, 783.
Galveston, H. & S. A. R. Co. *v.* Dowe (70 Tex. 1, 6 S. W. Rep. 790), Eq., 2; Injunc., 3.
Galveston, H. & S. A. R. Co. *v.* Drew (59 Tex. 10), Employés, Inj. to, 223.
Galveston, H. & S. A. R. Co. *v.* Dunlavy (11 Am. & Eng. R. Cas. 673, 56 Tex. 256), Dam., 38; Trial, 190.
Galveston, H. & S. A. R. Co. *v.* Faber (63 Tex. 344), Fel. Serv., 1, 142, 153, 376; Trial, 139.
Galveston, H. & S. A. R. Co. *v.* Faber (77 Tex. 153, 8. S. W. Rep. 64), Negl., 57; Trial, 63.
Galveston, H. & S. A. R. Co. *v.* Farmer (38 Am. & Eng. R. Cas. 75, 73 Tex. 85, 11 S. W. Rep. 156), Fel. Serv., 132, 414.
Galveston, H. & S. A. R. Co. *v.* Freeman (57 Tex. 156), Animals, 319; Assign., 20.
Galveston, H. & S. A. R. Co. *v.* Gage (63 Tex. 568), Proc., 44.
Galveston, H. & S. A. R. Co. *v.* Garrett (73 Tex. 262, 13 S. W. Rep. 62), Employés, Inj. to, 100, 182, 185.
Galveston, H. & S. A. R. Co. *v.* Gildea (2 Tex. App. (Civ. Cas.) 204), Car. of M., 741.
Galveston, H. & S. A. R. Co. *v.* Gonzales (57 Am. & Eng. R. Cas. 71, 151 U. S. 496, 14 Sup. Ct. Rep. 401), Appear., 7; Citizens., 3, 4; Trial, 9.
Galveston, H. & S. A. R. Co. *v.* Harman (2 Tex. App. (Civ. Cas.) 128), Car. of L. S., 80.
Galveston, H. & S. A. R. Co. *v.* Hatch (Tex. Civ. App.) (22 S. W. Rep. 10), Fires, 336, 364.
Galveston, H. & S. A. R. Co. *v.* Henry (25 Am. & Eng. R. Cas. 264, 65 Tex. 685), Constr. Rys., 58.
Galveston, H. & S. A. R. Co. *v.* Horne (35 Am. & Eng. R. Cas. 238, 69 Tex. 643, 9 S. W. Rep. 440), Fires, 266, 277, 345; Trial, 5, 25.
Galveston, H. & S. A. R. Co. *v.* Hume (59 Tex. 47), Attach., 1.
Galveston, H. & S. A. R. Co. *v.* Jessee (2 Tex. App. (Civ. Cas.) 351), Dam., 11; Evid., 13; Pl., 15.
Galveston, H. & S. A. R. Co. *v.* Johnson (74 Tex. 256, 11 S. W. Rep. 1113), Constr. Rys., 19, 51, 116; Lim. of Ac., 35.
Galveston, H. & S. A. R. Co. *v.* Johnson (Tex.) (19 S. W. Rep. 867), App., 69; Car. of L. S., 144, 156, 161; New Tr., 39.
Galveston, H. & S. A. R. Co. *v.* Kutac (72 Tex. 643, 11 S. W. Rep. 127), App., 39; Cross., Inj. at, 264, 269; Death, etc., 49, 94; Imp. Neg., 27, 28; Judgm., 18; Trial, 132.
Galveston, H. & S. A. R. Co. *v.* Kutac (37 Am. & Eng. R. Cas. 470, 76 Tex. 473, 13 S. W. Rep. 327), Agency, 85; Death, etc., 34, 49, 94; Evid., 31; Imp. Neg., 26; Trial, 142.
Galveston, H. & S. A. R. Co. *v.* Le Gierse (51 Tex. 189), Car. of P., 377; Contrib. Neg., 110; Dam., 34, 38, 101; Death, etc., 34, 147; Stat., 36; Witn., 37.
Galveston, H. & S. A. R. Co. *v.* Lempe (11 Am. & Eng. R. Cas. 201, 59 Tex. 19), Employés, Inj. to, 182, 218.
Galveston, H. & S. A. R. Co. *v.* McDonald (53 Tex. 510), Attach., 1.
Galveston, H. & S. A. R. Co. *v.* Matula (79 Tex. 577, 15 S. W. Rep. 573), Cross., St. & H., 36; Death, etc., 399; Negl., 13.
Galveston, H. & S. A. R. Co. *v.* Matula (Tex.) (19 S. W. Rep. 376), App., 135; Cross., Inj. at, 192, 193, 338; Dam., 65; Evid., 75.
Galveston, H. & S. A. R. Co. *v.* Moeser (3 Tex. App. (Civ. Cas.) 295), Animals, 185.
Galveston, H. & S. A. R. Co. *v.* Mud Creek

I. A. & M. Co. (1 Tex. App. (Civ. Cas.) 169), Em. Dom., 85, 235, 257, 314.
Galveston, H. & S. A. R. Co. *v.* O'Neal (4 Tex. App. (Civ. Cas.) 128, 16 S. W. Rep. 537), Cross., St. & H., 68.
Galveston, H. & S. A. R. Co. *v.* Perry (81 Tex. 466, 17 S. W. Rep. 40), Em. Dom., 192.
Galveston, H. & S. A. R. Co. *v.* Pfeuffer (11 Am. & Eng. R. Cas. 373, 56 Tex. 66), Actions, 3; Em. Dom., 215, 219, 1018.
Galveston, H. & S. A. R. Co. *v.* Porfert (37 Am. & Eng. R. Cas. 540, 72 Tex. 344, 10 S. W. Rep. 207), Cross., Inj. at, 225, 243; Negl., 63; New Trial, 76; Trial, 190.
Galveston, H. & S. A. R. Co. *v.* Porfert (1 Tex. Civ. App. 716, 20 S. W. Rep. 870), Cross., Inj. at, 365; Witn., 35.
Galveston, H. & S. A. R. Co. *v.* Roemer (1 Tex. Civ. App. 191, 20 S. W. Rep. 843), Actions, 9; Lim. of Ac., 38, 60.
Galveston, H. & S. A. R. Co. *v.* Ryon (34 Am. & Eng. R. Cas. 30, 70 Tex. 56, 7 S. W. Rep. 687), Tresp., Inj. to, 44.
Galveston, H. & S. A. R. Co. *v.* Ryon (80 Tex. 59, 15 S. W. Rep. 588), Death, etc., 201, 203.
Galveston, H. & S. A. R. Co. *v.* Schwartz (2 Tex. App. (Civ. Cas.) 664), Ac'ts, 1; Pl., 52.
Galveston, H. & S. A. R. Co. *v.* Seymour (63 Tex. 345), Flood. Lds., 93.
Galveston, H. & S. A. R. Co. *v.* Smith (2 Tex. App. (Civ. Cas.) 129), Car. of M., 699.
Galveston, H. & S. A. R. Co. *v.* Smith (59 Tex. 406), Car. of P., 422.
Galveston, H. & S. A. R. Co. *v.* Smith (44 Am. & Eng. R. Cas. 598, 76 Tex. 611, 13 S. W. Rep. 562), Fel. Serv., 76, 77, 88, 356, 409, 410.
Galveston, H. & S. A. R. Co. *v.* Smith (81 Tex. 479, 17 S. W. Rep. 133), Att'ys, 7; Bagg., 69, 122; Pl., 9.
Galveston, H. & S. A. R. Co. *v.* State (38 Tex. 224), Tax., 196.
Galveston, H. & S. A. R. Co. *v.* State (77 Tex. 367, 12 S. W. Rep. 988, 13 S. W. Rep. 619), Land Grants, 126.
Galveston, H. & S. A. R. Co. *v.* State (51 Am. & Eng. R. Cas. 287, 81 Tex. 572, 17 S. W. Rep. 67), Charters, 82, 83; Land Grants, 126; Quo War., 1; Side Tr., 1.
Galveston, H. & S. A. R. Co. *v.* Stealey (66 Tex. 468, 1 S. W. Rep. 186), Evid., 227.
Galveston, H. & S. A. R. Co. *v.* Stovall (3 Tex. App. (Civ. Cas.) 307), Car. of L. S., 157.
Galveston, H. & S. A. R. Co. *v.* Sullivan (2 Tex. Unrep. Cas. 315), Employés, Inj. to, 308; Fel. Serv., 359.
Galveston, H. & S. A. R. Co. *v.* Tait (63 Tex. 233), Flood. Lds., 36, 80; Waters & W., 21.
Galveston, H. & S. A. R. Co. *v.* Thornsberry (Tex.) (17 S. W. Rep. 521), Car. of P., 538, 542, 575, 606, 619, 626; Comp. Neg., 22; Pl., 116; Stat. & D., 102; Witn., 42.
Galveston, H. & S. A. R. Co. *v.* Turner (1 Tex. App. (Civ. Cas.) 344), Animals, 586.
Galveston, H. & S. A. R. Co. *v.* Van Winkle (3 Tex. App. (Civ. Cas.) 538), Car. of M., 237, 546; Evid., 225.
Galveston, H. & S. A. R. Co. *v.* Ware (30 Am. & Eng. R. Cas. 203, 67 Tex. 635, 4 S. W. Rep. 13), Flood. Lds., 101; Pl., 72.
Galveston, H. & S. A. R. Co. *v.* Ware (74 Tex. 47, 11 S. W. Rep. 918), Injunc., 42; Proc., 45.
Galveston, H. & S. A. R. Co. *v.* Ware (2 Tex. App. (Civ. Cas.) 312), Cert., 6.
Galveston, H. & S. A. R. Co. *v.* Watson (1 Tex. App. (Civ. Cas.) 465), Car. of M., 236, 800.
Galveston, H. & S. A. R. Co. *v.* Wesch (85 Tex. 593, 22 S. W. Rep. 957), App., 39; New Tr., 83; Witn., 54, 74.
Galveston, H. & S. A. R. Co. *v.* Wesch (Tex. Civ. App.) (21 S. W. Rep. 62), Pl., 113; Witn., 68, 130.
Galveston, H. & S. A. R. Co. *v.* Wesch (Tex. Civ. App.) (21 S. W. Rep. 313; affirmed 21 S. W. Rep. 1014), App., 142; New Tr., 66.
Galveston Oil Co. *v.* Thompson (76 Tex. 235, 13 S. W. Rep. 60), Contrib. Neg., 90; Employés, Inj. to, 466.
Galveston R. & T. Co. *v.* Burkett (2 Tex. Civ. App. 308, 21 S. W. Rep. 958), Fel. Serv., 453, 455.
Galveston Wharf Co. *v.* Gulf, C. & S. F. R. Co. (36 Am. & Eng. R. Cas. 668, 72 Tex. 454, 10 S. W. Rep. 537), Em. Dom., 238, 251; Tresp., 17.
Galveston Wharf Co. *v.* Gulf, C. & S. F. R. Co. (81 Tex. 494, 17 S. W. Rep. 57), Charters, 57; Sts. & H., 151.
Galway *v.* Metropolitan El. R. Co. (128 N. Y. 132, 28 N. E. Rep. 479, 40 N. Y. S. R. 145; affirming 58 Hun 610, 35 N. Y. S. R. 628, 13 N. Y. Supp. 47), Elev. Rys., 66, 169; Lim. of Ac., 58.
Gamble *v.* Central R. & B. Co. (80 Ga. 595, 7 S. E. Rep. 315), Assign., 9; Attach., 41.
Gamble *v.* Great Western R. Co. (3 Up. Can. Error & App. 163), Bagg., 80.
Gamble *v.* Great Western R. Co. (24 U. C. Q. B. 407), Bagg., 82.
Gammage *v.* Georgia Southern R. Co. (10 Am. & Eng. R. Cas. 371, 65 Ga. 614), Em. Dom., 1034.
Gandy *v.* Chicago & N. W. R. Co. (30 Iowa 420), Fires, 252, 266.
Ganea *v.* Southern Pac. R. Co. (51 Cal. 140), Mal. Pros., 9.
Ganley *v.* Brooklyn City R. Co. (28 N. Y. S. R. 94, 5 Silv. Sup. 319, 7 N. Y. Supp. 854, 55 Hun 605), App., 117.
Gann *v.* Northeastern R. Co. (57 Fed. Rep. 417), Rem. of C., 43.
Gann *v.* Worman (69 Ind. 458), Death, etc., 88.
Gannell *v.* Ford (5 L. T. 604), Car. of L. S., 70.
Gannon *v.* Housatonic R. Co. (112 Mass. 234), Fel. Serv., 55.
Gano *v.* Chicago & N. W. R. Co. (49 Wis. 57, 5 N. W. Rep. 45), Agency, 114.
Gano *v.* Chicago & N. W. R. Co. (13 Am. & Eng. R. Cas. 132, 60 Wis. 12, 17 N. W. Rep. 15), Estop., 3.
Gant *v.* Chicago, R. I. & P. R. Co. (79 Mo. 502), Appear., 5.

Gard *v.* Durant (4 Cliff. (U. S.) 113), Rem. of C., 7.
Garden Grove Bank *v.* Humeston & S. R. Co. (23 Am. & Eng. R. Cas. 695, 67 Iowa 526, 25 N. W. Rep. 761), Bills of L., 7, 47.
Gardiner *v.* Boston & W. R. Corp. (9 Cush. (Mass.) 1), Indem. Bonds., 2; Lim. of Ac., 50; Sts. & H., 160.
Gardinier *v.* New York C. & H. R. R. Co. (1 Silv. App. 195, 103 N. Y. 674, mem., 9 N. E. Rep. 182, 3 N. Y. S. R. 693; reversing 36 Hun 647, mem.), Death, 254; Sts. & H., 184.
Gardner *v.* Bennett (6 J. & S. (N. Y.) 197), Evid., 173; Indep. Contr., 7.
Gardner *v.* Boston & M. R. Co. (70 Me. 181), Agency, 17.
Gardner *v.* Boston Water Power Co. (9 Allen (Mass.) 466), Bridges, 11.
Gardner *v.* Burlington, C. R. & N. R. Co. (68 Iowa 588), Cross., Inj. at, 362.
Gardner *v.* Chace (2 R. I. 112), Bills of L., 40.
Gardner *v.* Charing Cross R. Co. (2 Johns. & H. 248, 8 Jur. N. S. 151, 31 L. J. Ch. 181, 10 W. R. 120, 5 L. T. 418), Em. Dom., 1101, 1136.
Gardner *v.* Chicago, R. I. & P. R. Co. (17 Ill. App. 262), Comp. Neg., 2; Death, etc., 230.
Gardner *v.* Detroit, L. & N. R. Co. (97 Mich. 240, 56 N. W. Rep. 603), Cross., Inj. at, 231, 251, 255, 276.
Gardner *v.* Hall (Phill. (N. Car.) 21), Tax., 41; Words & Ph., 72.
Gardner *v.* Michigan C. R. Co. (24 Am. & Eng. R. Cas. 435, 58 Mich. 584, 26 N. W. Rep. 301), Employés, Inj. to, 293, 418.
Gardner *v.* Michigan C. R. Co. (150 U. S. 349, 14 Sup. Ct. Rep. 140), Employés, Inj. to, 716; Fel. Serv., 60; Judgm., 29.
Gardner *v.* New Haven & N. Co. 18 Am. & Eng. R. Cas. 170, 51 Conn. 143, 50 Am. Rep. 12), Car. of L. S., 126.
Gardner *v.* New York & N. E. R. Co. (17 R. I. 790, 24 Atl. Rep. 831), Stat., 47.
Gardner *v.* Smith (7 Mich. 410), Animals, 123.
Gardner *v.* State (21 N. J. L. 557), Tax., 223.
Gardner *v.* Walsh (95 Mich. 505, 55 N. W. Rep. 355), Subscr., 212.
Garesché *v.* Lewis (15 Mo. App. 565; affirmed in 93 Mo. 197), Stockh., 24, 68.
Gargan *v.* Louisville, N. A. & C. R. Co. (89 Ky. 212, 12 S. W. Rep. 259), Sts. & H., 106.
Garland *v.* Chicago & N. W. R. Co. (8 Ill. App. 571), Cross., Inj. at, 241, 269, 297; Negl., 41; Trial, 196.
Garland *v.* Maine C. R. Co. (85 Me. 519, 27 Atl. Rep. 615), Animals, 195, 197.
Garland *v.* Montgomery County Revenue Board (87 Ala. 223, 6 So. Rep. 402), Bridges, 1, 7.
Garmoe *v.* Sturgeon (65 Iowa 147), Tax., 329, 330.
Garner *v.* Hannibal & St. J. R. Co. (34 Mo. 235), Animals, 361, 365.
Garnett *v.* Jacksonville, St. A. & H. R. R. Co. (20 Fla. 889), Sts. & H., 232.
Garoni *v.* Compagnie Nat. de Navigation (14 N. Y. Supp. 797, 39 N. Y. S. R. 63; affirmed in 131 N. Y. 614, mem., 30 N. E. Rep. 865), New Tr., 72.
Garrahy *v.* Kansas City, St. J. & C. B. R. Co. (25 Fed. Rep. 258), Fel. Serv., 124.
Garrard *v.* Pittsburg & C. R. Co. (29 Pa. St. 154), Bonds, 46.
Garrett *v.* Banstead & E. D. R. Co. (4 DeG., J. & S. 462), Constr. Rys., 102.
Garrett *v.* Chicago & N. W. R. Co. (36 Iowa 121), Dam., 109; Fires, 266, 304; Negl., 97.
Garrett *v.* Dillsburg & M. R. Co. (78 Pa. St. 465), Incorp., 11; Subscr., 131.
Garrett *v.* May (19 Md. 177), Bonds, 44.
Garrigus *v.* Parke County Com'rs (39 Ind. 66), Mun. Aid, 148.
Garris *v.* Portsmouth & R. R. Co. (2 Ired. (N. Car.) 324), Animals, 51, 605.
Garrison *v.* Babbage Transp. Co. (32 Am. & Eng. R. Cas. 525, 94 Mo. 130, 6 S. W. Rep. 701), Judgm., 47.
Garteiser *v.* Galveston, H. & S. A. R. Co. (2 Tex. Civ. App. 230, 21 S. W. Rep. 631), Agency, 41; Employés, Inj. to, 159, 652; Imp. Neg., 22; Licensees, Inj. to, 6; Negl., 63.
Gartland *v.* Toledo, W. & W. R. Co. (67 Ill. 498), Fel. Serv., 9.
Garton *v.* Bristol & E. R. Co. (4 H. & N. 33, 5 Jur. N. S. 1172, 28 L. J. Ex. 169), Discrim., 10.
Garton *v.* Bristol & E. R. Co. (1 B. & S. 112, 7 Jur. N. S. 1234, 30 L. J. Q. B. 273, 9 W. R. 734, 5 Jur. N. S. 1313, 28 L. J. C. P. 306, 6 C. B. N. S. 639, 1 Ry. & C. T. Cas. 218), Car. of M., 35; Charges, 29, 39, 65, 107, 114; Discrim., 15, 22, 27, 32, 55.
Garton *v.* Great Western R. Co. (5 C. B. N. S. 669, 28 L. J. C. P. 158, 1 Ry. & C. T. Cas. 214), Discrim., 26.
Garton *v.* Great Western R. Co. (4 Jur. N. S. 1036, 27 L. J. Q. B. 375), Proc., 23, 40.
Garton *v.* Great Western R. Co. (El. Bl. & El. 837, 5 Jur. N. S. 1244, 28 L. J. Q. B. 321), Actions, 5.
Garver *v.* Kent (70 Ind. 428), Receiv., 1, 118.
Garvey *v.* Camden & A. R. Co. (1 Hilt. (N. Y.) 280, 4 Abb. Pr. 171), Bagg., 105, 106, 114.
Garwood *v.* New York C. & H. R. R. Co. (45 Hun 128, 9 N. Y. S. R. 448), Evid., 245; Witn., 155.
Garwood *v.* New York C. & H. R. R. Co. (2 Am. & Eng. R. Cas. 490, 83 N. Y. 400, 38 Am. Rep. 452; affirming 17 Hun 356), Waters & W., 20, 31.
Garwood *v.* New York C. & H. R. R. Co. (2 N. Y. S. R. 701, 41 Hun 637, mem.; affirmed in 116 N. Y. 649, mem., 2 Silv. App. 409, 26 N. Y. S. R. 620), Waters & W., 20.
Garwood *v.* New York C. & H. R. R. Co. (2 Silv. App. 409, 116 N. Y. 649, mem., 22 N. E. Rep. 396, 26 N. Y. S. R. 620; affirming 2 N. Y. S. R. 701), Evid., 71.
Gashweiler *v.* Wabash, St. L. & P. R. Co. (25 Am. & Eng. R. Cas. 403, 83 Mo. 112,

53 Am. Rep. 558), Bills of L., 101; Car. of M., 337; Wareh., 9.
Gas Light Co. *v.* Rome, W. & O. R. Co. (51 Hun 119, 24 N. Y. S. R. 154, 5 N. Y. Supp. 459), Ejectm., 34; Pl., 148.
Gas Light Co. *v.* Rome, W. & O. R. Co. (11 Civ. Pro. (N. Y.) 239), Ejectm., 9, 13, 21.
Gass *v.* New York, P. & B. R. Co. (99 Mass. 220), Car. of M., 547, 625.
Gassaway *v.* Georgia Southern R. Co. (69 Ga. 347), Employés, Inj. to, 617; Fel. Serv., 171.
Gasway *v.* Atlanta & W. P. R. Co. (58 Ga. 216, 16 Am. Ry. Rep. 99), Agency, 98; Car. of P., 305; Conduct., 11; Dam., 31.
Gately *v.* Kniss (64 Iowa 537, 21 N. W. Rep. 21), Assump., 1.
Gates *v.* Boston & N. Y. A. L. R. Co. (24 Am. & Eng. R. Cas. 143, 53 Conn. 333, 5 Atl. Rep. 695), Mort., 77; Reorg., 9.
Gates *v.* Burlington, C. R. & M. R. Co. (39 Iowa 45), Contrib. Neg., 11, 112; Cross., Inj. at, 98.
Gates *v.* Chicago & A. R. Co. (44 Mo. App. 488), Fires, 350; Witn., 145.
Gates *v.* Chicago, M. & St. P. R. Co. (53 Am. & Eng. R. Cas. 245, 2 S. Dak. 422, 50 N. W. Rep. 907), Employés, Inj. to, 86, 144; Fel. Serv., 1, 4; Trial, 217.
Gates *v.* Chicago, St. P. & K. C. R. Co. (50 Am. & Eng. R. Cas. 164, 82 Iowa 518, 48 N. W. Rep. 1040), Sts. & H., 160, 249; Words & Ph., 234.
Gates *v.* Kansas City, B. & T. R. Co. (111 Mo. 28, 19 S. W. Rep. 957), Nuis., 19, 20.
Gates *v.* Northern Pac. R. Co. (64 Wis. 64, 24 N. W. Rep. 494), Assign., 20; Bridges, 75.
Gates *v.* Pennsylvania R. Co. (150 Pa. St. 50, 24 Atl. Rep. 638), Bridges, 42, 54.
Gates *v.* Pennsylvania R. Co. (154 Pa. St. 566, 26 Atl. Rep. 598), App., 1; Contrib. Neg., 90; Employés, Inj. to, 717.
Gates *v.* Southern Minn. R. Co. (2 Am. & Eng. R. Cas. 237, 28 Minn. 110, 9 N. W. Rep. 579), Employés, Inj. to, 46, 99.
Gates *v.* State (128 N. Y. 221, 28 N. E. Rep. 373, 40 N. Y. S. R. 87), Employés, Inj. to, 29.
Gatzmer *v.* Philadelphia & A. C. R. Co. (26 Am. & Eng. R. Cas. 403, 39 N. J. Eq. 363), Set-off, 4.
Gault *v.* Concord R. Co. (63 N. H. 356), Evid., 191; Witn., 140.
Gaus *v.* St. Louis, K. & N. W. R. Co. (113 Mo. 308, 20 S. W. Rep. 658), Em. Dom., 164.
Gavett *v.* Manchester & L. R. Co. (16 Gray (Mass.) 501), Car. of P., 415; Trial, 183.
Gavin *v.* Decatur County Com'rs (12 Am. & Eng. R. Cas. 685, 81 Ind. 480), Mun. Aid, 431.
Gavisk *v.* Pacific R. Co. (49 Mo. 274), Evid., 193.
Gay *v.* Boston & A. R. Co. (141 Mass. 407, 6 N. E. Rep. 236), Priv. Ways, 2.
Gay *v.* Essex Elec. St. R. Co. (159 Mass. 238), Children, Inj. to, 60, 92.
Gay *v.* Essex Elec. St. R. Co. (159 Mass. 242), Children, Inj. to, 60, 92.
Gay *v.* Fremont, E. & M. V. R. Co. (5 Dak. 514, 41 N. W. Rep. 757), Animals, 51.
Gay *v.* New Orleans Pac. R. Co. (32 La. Ann. 277), Em. Dom., 1049.
Gay *v.* Wadley (86 Ga. 103, 12 S. E. Rep. 298), Animals, 466.
Gayden *v.* Louisville, N. O. & T. R. Co. (39 La. Ann. 269, 1 So. Rep. 792), App., 3; Em. Dom., 211; Estop., 26.
Gayle *v.* Cahawba & M. R. Co. (8 Ala. 586), Assump., 3.
Gaylord *v.* Ft. Wayne, M. & C. R. Co. (6 Biss. (U. S.) 286), Dissol., 13; Jurisd., 3; Pl., 161; Receiv., 40.
Gaynor *v.* Old Colony & N. R. Co. (100 Mass. 208), Car. of P., 31, 455; Contrib. Neg., 28, 82, 104.
Gear *v.* Chicago, C. & D. R. Co. (39 Iowa 23), Em. Dom., 643, 719; Sts. & H., 11.
Gear *v.* Chicago, C. & D. R. Co. (43 Iowa 83), Crim. L., 21; Em. Dom., 718.
Gear *v.* Dubuque & S. C. R. Co. (20 Iowa 523), Em. Dom., 849.
Geauyeau *v.* Great Western R. Co. (3 Ont. App. 412; reversing 25 Grant's Ch. 62), Deeds, 13.
Gebhard *v.* Detroit, G. H. & M. R. Co. (79 Mich. 586, 44 N. W. Rep. 1045), App., 142.
Gebhart *v.* Junction R. Co. (12 Ind. 484), Subscr., 91.
Geddes *v.* Metropolitan R. Co. (103 Mass. 391), St. Rys., 366.
Geddes *v.* Toronto St. R. Co. (14 U. C. C. P. 513), Bonds, 3; Debent., 6, 15.
Gedling, In re (53 L. T. 244), Em. Dom., 1148.
Gee *v.* Lancashire & Y. R. Co. (6 H. & N. 211, 30 L. J. Ex. 11, 9 W. R. 103, 3 L. T. 328), Car. of M., 804.
Gee *v.* Metropolitan R. Co. (21 W. R. 584, L. R. 8 Q. B. 161, 42 L. J. Q. B. 105, 28 L. T. 282), Car. of P., 465.
Gee *v.* Missouri Pac. R. Co. (31 Am. & Eng. R. Cas. 1, 92 Mo. 208, 10 West. Rep. 282, 4 S. W. Rep. 739), Car. of P., 289.
Gee *v.* St. Louis, I. M. & S. R. Co. (80 Mo. 283), Animals, 127.
Geiger *v.* Filor (8 Fla. 325), Nuis., 3.
Geiger *v.* Western Md. R. Co. (41 Md. 4), Constr. Rys., 35, 43.
Geismer *v.* Lake Shore & M. S. R. Co. (26 Am. & Eng. R. Cas. 287, 102 N. Y. 563, 7 N. E. Rep. 828, 2 N. Y. S. R. 514; reversing 34 Hun 50), Car. of M., 136, 204; Strikes, 1; Words & Ph., 246.
Geist *v.* Detroit City R. Co. (91 Mich. 446, 51 N. W. Rep. 1112), App., 39; Cross., Inj. at, 319.
Geitz *v.* Milwaukee City R. Co. (72 Wis. 307, 39 N. W. Rep. 866), St. Rys., 378, 426.
Gelen *v.* Hall (2 H. & N. 379), Crim. L., 44.
Gelpcke *v.* Blake (19 Iowa 263), Subscr., 167.
Gelpcke *v.* Dubuque (1 Wall. (U. S.) 175), Mun. Aid, 22, 31, 182, 318, 344, 354.
Gelpcke *v.* Dubuque (1 Wall. (U. S.) 220), Mun. Aid, 271.
Gelpeke *v.* Milwaukee & H. R. Co. (11 Wis. 454), Receiv., 40.
Geltz *v.* St. Louis & S. F. R. Co. (38 Mo. App. 579), Animals, 608.
Gelvin *v.* Kansas City, St. J. & C. B. R. Co.

(21 Mo. App. 273), Car. of L. S., 150; Car. of M., 778; Stat. Agts., 3.
Genereux *v.* Cuthbert (9 Can. Sup. Ct. 102), Crim. L., 1.
Genesee Valley C. R. Co. *v.* Slaight (17 N. Y. S. R. 241, 49 Hun 35, 14 Civ. Pro. 420, 1 N. Y. Supp. 554), Ejectm., 20.
Genet *v.* Delaware & H. Canal Co. (21 N. Y. S. R. 455, 4 N. Y. Supp. 633, 24 J. & S. 290), Judgm., 42.
Genet *v.* Delaware & H. Canal Co. (29 N. Y. S. R. 954, 8 N. Y. Supp. 822, 56 Hun 640, mem.), Jurisd., 6.
Genet *v.* Delaware & H. Canal Co. (35 N. Y. S. R. 552, 58 Hun 492; see 12 N. Y. Supp. 572), Leases, 77.
Geneva, I. & S. R. Co. *v.* Sage (35 Hun (N. Y.) 95), Charges, 70.
Genoa *v.* Woodruff (92 U. S. 502), Coupons, 12.
Gentry *v.* Richmond & D. R. Co. (38 So. Car. 284, 16 S. E. Rep. 893), Culverts, 24, 25; Flood. Lds., 83.
Genung *v.* New York & N. E. R. Co. (50 N. Y. S. R. 511, 66 Hun 632, 21 N. Y. Supp. 97), Fires, 196, 260, 268, 269.
Geoghegan *v.* Atlas Steamship Co. (51 N. Y. S. R. 868, 22 N. Y. Supp. 749, 3 Misc. 224), Contrib. Neg., 104; Death, etc., 115; Fel. Serv., 198; Trial, 65.
George *v.* Cahawba & M. R. Co. (8 Ala. 234), Set-off, 3.
George *v.* Chicago, Ft. M. & D. M. R. Co (85 Iowa 590, 52 N. W. Rep. 512), Pl., 53.
George *v.* Chicago, M. & St. P. R. Co. (51 Wis. 603, 8 N. W. Rep. 374), Death, etc., 102, 154.
George *v.* St. Louis, I. M. & S. R. Co. (1 Am. & Eng. R. Cas. 294, 34 Ark. 613), Car. of P., 126, 139, 140, 342, 584; Derailm., 4, 5; Release, 19.
George *v.* Wabash Western R. Co. (40 Mo. App. 433), Agency, 42; Flood. Lds., 3; Nuis., 2, 12.
George's Creek C. & I. Co. *v.* New Central Coal Co. (40 Md. 425), Em. Dom., 282, 303, 497, 890.
Georgetown, B. & L. R. Co. *v.* Doyle (9 Colo. 549, 30 Am. & Eng. R. Cas. 231, 13 Pac. Rep. 699), Blasting, 5.
Georgetown, B. & L. R. Co. *v.* Eagles (30 Am. & Eng. R. Cas. 228, 9 Colo. 544, 13 Pac. Rep. 696), Blasting, 3; Corp., 15; Negl., 5.
Georgetown, B. & L. R. Co. *v.* Haggart (27 Am. & Eng. R. Cas. 375, 9 Colo. 346, 12 Pac. Rep. 215), Em. Dom., 322.
Georgia *v.* Atkins (1 Abb. (U. S.) 22), Words & Ph., 62.
Georgia *v.* Atlantic & G. R. Co. (3 Woods (U. S.) 434), Exec., 18; Tax., 307.
Georgia *v.* Jesup (12 Am. & Eng. R. Cas. 419, 106 U. S. 458, 1 Sup. Ct. Rep. 363), Mort., 297.
Georgia, C. & N. R. Co. *v.* Archer (87 Ga. 237, 13 S. E. Rep. 636), Em. Dom., 1034.
Georgia, C. & N. R. Co. *v.* Ridlehuber (38 So. Car. 308, 17 S. E. Rep. 24), Em. Dom., 57, 424, 577.
Georgia, C. & N. R. Co. *v.* Scott (38 So. Car. 34, 16 S. E. Rep. 185), Em. Dom., 56, 194.
Georgia Midland & G. R. Co. *v.* Curry (90 Ga. 250, 15 S. E. Rep. 751), New Tr., 103.
Georgia Midland & G. R. Co *v.* Columbus Southern R. Co. (51 Am. & Eng. R. Cas. 538, 89 Ga. 205, 15 S. E. Rep. 305), Cross. Rys., 38.
Georgia Midland & G. R. Co. *v.* Evans (87 Ga. 673, 13 S. E. Rep. 580), Children, Inj. to, 72; Contrib. Neg., 57; Cross., Inj. at, 12; Death, etc., 229; Trial, 168.
Georgia Midland & G. R. Co. *v.* Harris (83 Ga. 393, 9 S. E. Rep. 786), Animals, 493.
Georgia Pac. R. Co. *v.* Blanton (84 Ala. 154, 4 So. Rep. 621), Children, Inj. to, 5, 68; Sts. & H., 392; Tresp., Inj. to, 58.
Georgia Pac R. C. *v.* Bowers (86 Ga. 22, 12 S. E. Rep. 182), Collis., 35; Employés, Inj. to, 769; Trial, 143.
Georgia Pac. R. Co. *v.* Brooks (66 Miss. 583, 6 So. Rep. 467), Constr. Rys., 45, 102.
Georgia Pac. R. Co. *v.* Brooks (84 Ala. 138, 4 So. Rep. 289), Employés, Inj. to, 95.
Georgia Pac. R. Co. *v.* Bryans (77 Ga. 429), Employés, Inj. to, 599.
Georgia Pac. R. Co. *v.* Davis (92 Ala. 300, 9 So. Rep. 252), Contrib. Neg., 103; Employés, Inj. to, 89, 228, 305, 430, 521, 523, 589; Fel. Serv., 96.
Georgia Pac. R. Co. *v.* Dooley (48 Am. & Eng. R. Cas. 437, 86 Ga. 294, 12 S. E. Rep. 923), Employés, Inj. to, 25; Evid., 37.
Georgia Pac. R. Co. *v.* Elliott (85 Ga. 183, 11 S. E. Rep. 580), Employés, Inj. to, 768.
Georgia Pac. R. Co. *v.* Freeman (83 Ga. 583, 10 S. E. Rep. 277), Cross., Inj. at, 122; Dam., 41; Evid., 291, 295.
Georgia Pac. R. Co. *v.* Fullerton (79 Ala. 298), Animals, 27, 590; Dam., 110.
Georgia Pac. R. Co. *v.* Gaines (44 Am. & Eng. R. Cas. 1, 88 Ala. 377, 7 So. Rep. 382), Consol., 32; Corp., 8; Evid., 105.
Georgia Pac. R. Co. *v.* Hudson (89 Ga. 558, 16 S. E. Rep. 70), Employés, Inj. to, 657, 717; New Tr., 60.
Georgia Pac. R. Co. *v.* Hughart (90 Ala. 36, 8 So. Rep. 62), Car. of M., 461, 682.
Georgia Pac. R. Co. *v.* Hughes (39 Am. & Eng. R. Cas. 674, 87 Ala. 610, 6 So. Rep. 413), Evid., 143; Imp. Neg., 3.
Georgia Pac. R. Co. *v.* Lee (92 Ala. 262, 9 So. Rep. 230), Cross., Inj. at, 254, 283, 297.
Georgia Pac. R. Co. *v.* Love (91 Ala. 432, 8 So. Rep. 714), Car. of P., 602.
Georgia Pac. R. Co. *v.* Mapp (80 Ga. 631, 6 S. E. Rep. 24), Employés, Inj. to, 388.
Georgia Pac. R. Co. *v.* O'Shields (90 Ala. 29, 8 So. Rep. 248), Contrib. Neg., 49, 50; Cross., Inj. at, 270.
Georgia Pac. R. Co. *v.* Propst (83 Ala. 518, 3 So. Rep. 764), Agency, 73; Children, Inj. to, 147; Conduct, 4; Employés, Inj. to, 98, 420; Fel. Serv., 102, 240; Name, 4; Witn., 179.
Georgia Pac. R. Co. *v.* Propst (38 Am. & Eng. R. Cas. 11, 85 Ala. 203, 4 So. Rep. 711), Conduct., 4; Employés, Inj. to, 530.
Georgia Pac. R. Co. *v.* Propst (44 Am. &

Eng. Cas. 548, 90 Ala. 1, 7 So. Rep. 635), Evid., 149; Trial, 164.
Georgia Pac. R. Co. *v.* Richardson (80 Ga. 727, 7 S. E. Rep. 119), Pl., 27.
Georgia Pac. R. Co. *v.* Rigden (85 Ga. 867, 11 S. E. Rep. 603), App., 117.
Georgia Pac. R. Co. *v.* Robinson (68 Miss. 643, 10 So. Rep. 60), Car. of P., 23.
Georgia Pac. R. Co. *v.* Strickland (80 Ga. 776, 6 S. E. Rep. 27, 12 Am. St. Rep. 282), Adv. Poss., 2; Estop., 26; Evid., 151.
Georgia Pac. R. Co. *v.* Underwood (44 Am. & Eng. R. Cas. 367, 90 Ala. 49, 8 So. Rep. 116), Car. of P., 492; Collis., 5.
Georgia Pac. R. Co. *v.* Weaver (85 Ga. 869, 11 S. E. Rep. 614), App., 117.
Georgia Pac. R. Co. *v.* West (66 Miss. 310, 6 So. Rep. 207), Car. of P., 246, 422.
Georgia Pac. R. Co. *v.* Wilks (38 Am. & Eng. R. Cas 665, 86 Ala. 478, 6 So. Rep. 34), Consol., 32; Corp., 8; Em. Dom., 93; Pl., 144.
Georgia Penitentiary Co. *v.* Nelms (71 Ga. 301), Crim. L., 3.
Georgia R. & B. Co. *v.* Anderson (33 Ga. 110), Animals, 30, 393.
Georgia R. & B. Co. *v.* Baker (88 Ga. 28, 13 S. E. Rep. 831), Em. Dom., 921.
Georgia R. & B. Co. *v.* Berry (78 Ga. 744, 4 S. E. Rep. 10), Evid., 55.
Georgia R. & B. Co. *v.* Brown (48 Am. & Eng. R. Cas. 368, 86 Ga. 320, 12 S. E. Rep. 812), Fel. Serv., 503.
Georgia R. & B. Co. *v.* Clark (90 Ga. 4, 15 S. E. Rep. 786), New Tr., 17.
Georgia R. & B. Co. *v.* Cox. (64 Ga. 619), App., 117.
Georgia R. & B. Co. *v.* Crawley (87 Ga. 191, 13 S. E. Rep. 508; former appeal 82 Ga. 190), Animals, 594.
Georgia R. & B. Co. *v.* Daniel (89 Ga. 463, 15 S. E. Rep. 538), Cross., Inj. at, 105, 181; Tresp., Inj. to, 92.
Georgia R. & B. Co. *v.* Dougherty (86 Ga. 744, 12 S. E. Rep. 747), Eject. Pass., 70, 97, 99, 127.
Georgia R. & B. Co. *v.* Eskew (47 Am. & Eng. R. Cas. 635, 86 Ga. 641, 12 S. E. Rep. 1061), Dam., 33; Eject. Pass., 29, 53, 95, 110, 121, 136.
Georgia R. & B. Co. *v.* Friddell (79 Ga. 489, 7 S. E. Rep. 214), Employés, Inj. to, 496.
Georgia R. & B. Co. *v.* Garr (57 Ga. 277), Death, etc., 48.
Georgia R. & B. Co. *v.* Georgia F. & V. Exch. (55 Am. & Eng. R. Cas. 606, 91 Ga. 389, 17 S. E. Rep. 904), Car. of M., 18.
Georgia R. & B. Co. *v.* Goldwire (56 Ga. 196), App., 115; Fel. Serv., 171.
Georgia R. & B. Co. *v.* Hamilton (59 Ga. 171), Estop., 28.
Georgia R. & B. Co. *v.* Kirkpatrick (35 Ga. 144), Trial, 9.
Georgia R. & B. Co. *v.* McCurdy (45 Ga. 288), App., 125; Car. of P., 227, 431.
Georgia R. & B. Co. *v.* McDade (59 Ga. 73), Employes, Inj. to, 297, 381; Time-tables, 1, 2.
Georgia R. & B. Co. *v.* Mc[illegible]r, etc., of Macon (86 Ga. 585, 13 S. E. Rep. 21), Land Grants, 114.
Georgia R. & B. Co. *v.* Miller (90 Ga. 571, 16 S. E. Rep. 939), Fel. Serv., 171; New Tr., 1; Pl., 142, 152.
Georgia R. & B. Co. *v.* Monroe (49 Ga. 373), Animals, 480; Trial, 6.
Georgia R. & B. Co. *v.* Murden (86 Ga. 434, 12 S. E. Rep. 630), Car. of P., 67; Eject. Pass., 1, 6.
Georgia R. & B. Co. *v.* Murray (45 Am. & Eng. R. Cas. 334, 85 Ga. 343, 11 S. E. Rep. 779), Car. of M., 657.
Georgia R. & B. Co. *v.* Neely (56 Ga. 540), Animals, 21, 240; Comp. Neg., 21; Negl., 61.
Georgia R. & B. Co. *v.* Nelms (39 Am. & Eng. R. Cas. 355, 83 Ga. 70, 9 S. E. Rep. 1049, 29 Cent. L. J. 352), Employés, Inj. to, 218; Evid., 67; Words & Ph., 127.
Georgia R. & B. Co. *v.* Oaks (52 Ga. 410, 7 Am. Ry. Rep. 143), Death, etc., 105, 284, 338; Stat., 21, 66.
Georgia R. & B. Co. *v.* Phillips (78 Ga. 619, 3 S. E. Rep. 449), App., 24.
Georgia R. & B. Co. *v.* Reid (55 Am. & Eng. R. Cas. 363, 91 Ga. 377, 17 S. E. Rep. 934), Car. of L. S., 31, 144; Evid., 183; New Tr., 22.
Georgia R. & B. Co. *v.* Rhodes (56 Ga. 645), Employés, Inj. to, 186, 208, 331, 387, 439; Time-tables, 1.
Georgia R. & B. Co. *v.* Scott (37 Ga. 94), Trover, 16, 17.
Georgia R. & B. Co. *v.* Seymour (53 Ga. 499), Jurisd., 7.
Georgia R. & B. Co. *v.* Smith (9 Am. & Eng. R. Cas. 385, 70 Ga. 694), Charges, 14; Ry. Com'rs, 2.
Georgia R. & B. Co. *v.* Smith (35 Am. & Eng. R. Cas. 511, 128 U. S. 174, 9 Sup. Ct. Rep. 47), Charges, 4, 14; Charters, 19, 28.
Georgia R. & B. Co. *v.* Smith (40 Am. & Eng. R. Cas. 123, 83 Ga. 626, 10 S. E. Rep. 235), Contr., 44; Evid., 183, 190; Pl., 152; Trial, 177.
Georgia R. & B. Co. *v.* Smith (85 Ga. 530, 11 S. E. Rep. 859), Evid., 216.
Georgia R. & B. Co. *v.* Thompson (86 Ga. 327, 12 S. E. Rep. 640), Bagg., 74.
Georgia R. & B. Co. *v.* Usry (82 Ga. 54, 8 S. E. Rep. 186), Car. of P., 402.
Georgia R. & B. Co. *v.* Walker (87 Ga. 204, 13 S. E. Rep. 511), Animals, 402; New Tr., 22.
Georgia R. & B. Co. *v.* Wall (80 Ga. 202, 7 S. E. Rep. 639), Animals, 62, 480.
Georgia R. & B. Co. *v.* Wilhoit (78 Ga. 714, 3 S. E. Rep. 698), Animals, 493; Negl., 99.
Georgia R. & B. Co. *v.* Willis (28 Ga. 317), Animals, 480.
Georgia R. & B. Co. *v.* Wynn (42 Ga. 331), Cross., Inj. at, 131; Death, etc., 47.
Georgia R. Commission *v.* Clyde Steamship Co. (5 Int. Com. Com. 324), Int. Com., 22.
Georgia R. Co. *v.* Beatie (66 Ga. 438, 42 Am. Rep. 75), Car. of L. S., 62.
Georgia R. Co. *v.* Bird (76 Ga. 13), Animals, 513.
Georgia R. Co. *v.* Bryans (77 Ga. 429), Evid., 35.
Georgia R. Co. *v.* Carr (73 Ga. 557), Fright. Teams, 3; Sts. & H., 333.

Georgia R. Co. *v.* Cole (68 Ga. 623), Car. of M., 144, 555, 790.
Georgia R. Co. *v.* Cole (73 Ga. 713), Trial, 29.
Georgia R. Co. *v.* Cole (77 Ga. 77), Trial, 147.
Georgia R. Co. *v.* Cox (61 Ga. 455), Cross., Inj. at, 115.
Georgia R. Co. *v.* Fisk (65 Ga. 714), Animals, 494; Just. P., 16.
Georgia R. Co. *v.* Gann (68 Ga. 350), Bills of L., 64; Car. of M., 644, 653.
Georgia R. Co. *v.* Hart (60 Ga. 550), Deeds, 10; Trial, 29.
Georgia R. Co. *v.* Hayden (71 Ga. 518, 51 Am. Rep. 274), Car. of P., 124, 613; Collis, 3; Dam., 11.
Georgia R. Co. *v.* Homer (27 Am. & Eng. R. Cas. 186, 73 Ga. 251), Car. of P., 137; Dam., 86; Eject. Pass., 91, 100, 112, 121; Evid., 160.
Georgia R. Co. *v.* Ivey (28 Am. & Eng. R. Cas. 392, 73 Ga. 499), Fel. Serv., 163, 171.
Georgia R. Co. *v.* Kicklighter (63 Ga. 708), New Tr., 93.
Georgia R. Co. *v.* Lawrence (74 Ga. 534), Fires, 22, 247.
Georgia R. Co. *v.* Newsome (60 Ga. 492), Negl., 101.
Georgia R. Co. *v.* Olds (77 Ga. 673), Eject. Pass., 29, 116; Tickets & F., 8.
Georgia R. Co. *v.* Pittman (26 Am. & Eng. R. Cas. 474, 73 Ga. 325), App., 81; Death, etc., 7, 290, 314, 323, 395, 431; Trial, 100, 132.
Georgia R. Co. *v.* Sigman (77 Ga. 71), App., 117.
Georgia R. Co. *v.* Smith (76 Ga. 634), Evid., 16.
Georgia R. Co. *v.* Spears (66 Ga. 485), Bills of L., 45; Car. of L. S., 21, 68, 127.
Georgia R. Co. *v.* Thomas (68 Ga. 744), New Tr., 7; Pl., 149.
Georgia R. Co. *v.* Thomas (73 Ga. 350), App., 85; Trial, 180.
Georgia R. Co. *v.* Williams (74 Ga. 723), Cross., Inj. at, 153; Evid., 244; Trial, 94.
Georgia Southern & F. R. Co. *v.* Asmore (52 Am. & Eng. R. Cas. 324, 88 Ga. 529, 15 S. E. Rep. 13), Eject. Pass., 48.
Georgia Southern & F. R. Co. *v.* Harvey (84 Ga. 372, 10 S. E. Rep. 971), Mun. Corp., 44.
Georgia Southern & F. R. Co. *v.* Jones (90 Ga. 292, 15 S. E. Rep. 824), Em. Dom., 891.
Georgia Southern & F. R. Co. *v.* Ray (43 Am. & Eng. R. Cas. 95, 84 Ga. 376, 11 S. E. Rep. 352), Injunc., 19; Sts. & H., 225.
Georgia Southern & F. R. Co. *v.* Small (47 Am. & Eng. R. Cas. 116, 87 Ga. 355, 13 S. E. Rep. 515), Em. Dom., 578.
Georgia Southern R. Co. *v.* Bigelow (68 Ga. 219), Eject. Pass., 136; Proc., 28; Tickets & F., 91.
Georgia Southern R. Co. *v.* Neel (68 Ga. 609), App., 124; Employés, Inj. to, 760; Pl., 61.
Georgia Southern R. Co. *v.* Reeves (11 Am. & Eng. R. Cas. 333, 64 Ga. 492), Cov'ts, 5; Deeds, 12.
Gerald *v.* Elley (45 Iowa 322), Deeds, 53.
Gerard *v.* Pennsylvania R. Co. (12 Phila. (Pa.) 394), Tresp., Inj. to, 9.
Gerber *v.* Metropolitan El. R. Co. (23 N. Y. Supp. 166, 52 N. Y. S. R. 444, 3 Misc. 427), Elev. Rys., 118, 119, 128, 175, 183, 193.
Gerbig *v.* New York, L. E. & W. R. Co. (51 N. Y. S. R. 534, 67 Hun 649, mem., 69 Hun 177, n., 22 N. Y. Supp. 21), Witn., 99.
Gerbig *v.* New York, L. E. & W. R. Co. (75 Hun 605, 27 N. Y. Supp. 594), Employés, Inj. to, 562.
Gere *v.* New York C. & H. R. R. Co. (19 Abb. N. Cas. (N. Y.) 193), Injunc., 49; Leases, 25, 28, 30; Stockh., 95.
Gere *v.* New York C. & H. R. R. Co. (38 Hun (N. Y.) 231), Injunc., 53.
Gerety *v.* Philadelphia, W. & B. R. Co. (81 Pa. St. 274, 16 Am. Ry. Rep. 164), Cross., Inj. at, 316.
Gerhard *v.* Neese (36 Tex. 635), Car. of M., 129.
Gerke *v.* California Steam Nav. Co. (9 Cal. 251), Negl., 5, 62.
Gerke Brewing Co. *v.* Louisville & N. R. Co. (5 Int. Com. Com. 596, 4 Int. Com. Rep. 267), Int. Com., 112, 114.
Germain *v.* Montreal & N. Y. R. Co. (6 Low. Can. 172), Car. of P., 182; Lim. of Ac., 51.
German *v.* Chicago & N. W. R. Co. (38 Iowa 127), Car. of L. S., 21, 94.
German *v.* Minneapolis & St. L. R. Co. (78 Iowa 509, 43 N. W. Rep. 303), Death, etc., 236.
Germania Fire Ins. Co. *v.* Memphis & C. R. Co. (72 N. Y. 90, 28 Am. Rep. 115; affirming 7 Hun 233), Bills of L., 27, 40, 73, 79.
Germann *v.* Suburban Rapid Transit Co. (13 N. Y. Supp. 897, 37 N. Y. S. R. 360; affirmed in 128 N. Y. 681, mem., 29 N. E. Rep. 149, mem.), Employés, Inj. to, 322, 488, 772; Negl., 20; New Tr., 61; Witn., 166.
German Sav. Bank *v.* Franklin County (128 U. S. 526, 9 Sup. Ct. Rep. 159), Mun. Aid, 233, 314, 355, 384.
Germantown Pass. R. Co. *v.* Brophy (16 Am. & Eng. R. Cas. 361, 105 Pa. St. 38), St. Rys., 380.
Germantown Pass. R. Co. *v.* Citizens' Pass. R. Co. (151 Pa. St. 138, 24 Atl. Rep. 1103), St. Rys., 36, 72.
Germantown Pass. R. Co. *v.* Fitler (60 Pa. St. 124), Subscr., 180, 188.
Germantown Pass. R. Co. *v.* Walling (2 Am. & Eng. R. Cas. 20, 97 Pa. St. 55, 37 Am. Rep. 711, n.), St. Rys., 410.
Germond *v.* Central Vt. R. Co. (65 Vt. 126, 26 Atl. Rep. 401), Contrib. Neg., 85; Trial, 200.
Gernsheim *v.* Central Trust Co. (16 N. Y. Supp. 127, 61 Hun 625, mem., 40 N. Y. S. R. 967), Reorg., 5, 15.
Gernsheim *v.* Olcott (7 N. Y. Supp. 872; reversed on another point in 31 N. Y. S. R. 321, 10 N. Y. Supp. 438), Mort., 173.
Gernsheim *v.* Olcott (31 N. Y. S. R. 321, 10 N. Y. Supp. 438; reversing 7 N. Y. Supp. 872), Reorg., 4.

Gerrard *v.* Omaha, N. & B. H. R. Co. (20 Am. & Eng. R. Cas. 423, 14 Neb. 270, 15 N. W. Rep. 231), Em. Dom., 561.
Gerren *v.* Hannibal & St. J. R. Co. (60 Mo. 405), Animals, 204; Lim. of Ac., 61.
Gerstle *v.* Union Pac. R. Co. (23 Mo. App. 361), Car. of P., 483; Trial, 108.
Gervais *v.* Chicago, R. I. & P. R. Co. (35 N. Y. S. R. 129, 58 Hun 610, 20 Civ. Pro. 95, 12 N. Y. Supp. 312), Pl., 65.
Gervais *v.* Chicago, R. I. & P. R. Co. (13 N. Y. Supp. 589), For. Corp., 27.
Gessley *v.* Missouri Pac. R. Co. (26 Mo. App. 156), Trial, 138.
Gessley *v.* Missouri Pac. R. Co. (32 Mo. App. 413), Employés, Inj. to, 157; Side Tr., 4.
Gest *v.* New Orleans, St. L. & C. R. Co. (30 La. Ann. 28), Receiv., 45.
Getty *v.* Hudson River R. Co. (6 How. Pr. (N. Y.) 269), Pl., 31.
Getty *v.* Hudson River R. Co. (8 How. Pr. (N. Y.) 177), Pl., 31.
Getty *v.* Hudson River R. Co. (21 Barb. (N. Y.) 617), Bridges, 9, 70.
Gettysburg B. F. Assoc. *v.* Gettysburg Elec. R. Co. (2 Pa. Dist. 659), Att'y-Gen., 5; St. Rys., 13.
Gettysburg Memorial Assoc. *v.* Sherfy (117 Pa. St. 256, 9 Cent. Rep. 156, 10 Atl. Rep. 758), Em. Dom., 941.
Getz's Appeal (3 Am. & Eng. R. Cas. 186, 10 W. N. C. (Pa.) 453), Side Tr., 1.
Getz *v.* Philadelphia & R. R. Co. (105 Pa. St. 547), Em. Dom., 255, 708, 762.
Geveke *v.* Grand Rapids & I. R. Co. (22 Am. & Eng. R. Cas. 551, 57 Mich. 589, 24 N. W. Rep. 675), Cross., Inj. at, 324; Dam., 14, 67, 70, 71, 72, 73; Witn., 4.
Ghormley *v.* Dinsmore (19 J. & S. (N. Y.) 196), Car. of M., 200, 475, 489.
Ghormley *v.* Dinsmore (21 J. & S. (N. Y.) 36), Exp. Cos., 72.
Giant Powder Co. *v.* Oregon Pac. R. Co. (43 Am. & Eng. R. Cas. 622, 42 Fed. Rep. 470, 8 L. R. A. 700, 14 Sawy. (U. S.) 560), Liens, 19, 22, 35.
Gibbes *v.* Greenville & C. R. Co. (4 Am. & Eng. R. Cas. 459, 13 So. Car. 228), Charters, 26; Consol., 4; Mort., 90, 186; State Aid, 31, 32; Trusts, 14.
Gibbes *v.* Greenville & C. R. Co. (12 Am. & Eng. R. Cas. 360, 15 So. Car. 224), Bonds, 63.
Gibbon *v.* Hammersmith & C. R. Co. (9 Jur. N. S 221, 32 L. J. Ch. 337, 11 W. R. 299, 8 L. T. 43), Em. Dom., 1105.
Gibbons *v.* Chicago, B. & Q. R. Co. (66 Iowa 231, 23 N. W. Rep. 644), Employés, Inj. to, 385.
Gibbons *v.* Farwell (63 Mich. 344, 29 N. W. Rep. 855), Car. of M., 296, 304.
Gibbons *v.* Missouri Pac. R. Co. (40 Mo. App. 146), Em. Dom., 780, 977.
Gibbons *v.* Mobile & G. N. R. Co. (36 Ala. 410), Mun. Aid, 20, 25, 54, 57, 72, 173, 406.
Gibbons *v.* Ogden (9 Wheat. (U. S.) 1), Commerce, 6.
Gibbons *v.* Wilkesbarre & S. St. R. Co. (56 Am. & Eng. R. Cas. 600, 155 Pa. St. 279, 26 Atl. Rep. 417), Elec. Rys., 35, 36; St. Rys., 233, 482, 494, 511.
Gibbons *v.* Wisconsin Valley R. Cc. (13 Am. & Eng. R. Cas. 469, 58 Wis. 335, 17 N. W. Rep. 132), Fires, 240, 318.
Gibbons *v.* Wisconsin Valley R. Co. (62 Wis. 546, 22 N. W. Rep. 533), Fires, 316; Trial, 154.
Gibbons *v.* Wisconsin Valley R. Co. (25 Am. & Eng. R. Cas. 479, 66 Wis. 161, 28 N. W. Rep. 170), Contrib. Neg., 83; Fires, 254, 318, 320, 324.
Gibbs *v.* Chicago, M. & St. P. R. Co. (26 Minn. 427, 4 N. W. Rep. 819), Fright. Teams, 2.
Gibbs *v.* Drew (16 Fla. 147), Forc. Ent., 2.
Gibbs *v.* Great Western R. Co. (15 Am. & Eng. R. Cas. 336, L. R. 12 Q. B. D. 208, 53 L. J. Q. B. D. 543, 50 L. T. 7, 32 W. R. 329, 48 J. P. 230; affirming L. R. 11 Q. B. D. 22, 48 L. T. 640, 31 W. R. 722), Employés, Inj. to, 782; Fel. Serv., 195.
Gibbs *v.* Missouri Pac. R. Co. (11 Mo. App. 459), Just. P., 8.
Gibert *v.* Washington City, V. M. & G. S. R. Co. (1 Am. & Eng. R. Cas. 473, 33 Gratt. (Va.) 586), Leases, 101; Mort., 238; Receiv., 32.
Gibert *v.* Washington City, V. M. & G. S. R. Co. (1 Am. & Eng. R. Cas. 512, 33 Gratt. (Va.) 645), Exec., 16.
Gibson *v.* American Merchants' Union Exp. Co. (1 Hun (N. Y.) 387, 3 T. & C. 501), Exp. Cos., 76, 79.
Gibson *v.* Culver (17 Wend. (N. Y.) 305), Car. of M., 82.
Gibson *v.* East Tenn., V. & G. R. Co. (30 Fed. Rep. 904), Eject. Pass., 102, 121.
Gibson *v.* Erie R. Co. (63 N. Y. 449, 20 Am. Rep. 552; reversing 5 Hun 31), Death, etc., 215; Employés, Inj. to, 206, 210.
Gibson *v.* Lenhart (101 Pa. St. 522), Bonds, 45.
Gibson *v.* Lewis (11 Bankr. Reg. 247), Bank'cy, 10.
Gibson *v.* Lewis (11 Phila. (Pa.) 476), Stockh., 33.
Gibson *v.* Mason (5 Nev. 283), Mun. Aid, 8, 19, 42, 420.
Gibson *v.* Memphis & C. R. Co. (31 Fed. Rep. 553), Costs, 1.
Gibson *v.* Midland R. Co. (15 Am. & Eng. R. Cas. 507, 2 Ont. 658), Death, etc., 46.
Gibson *v.* Northern C. R. Co. (22 Hun (N. Y.) 289), Fel. Serv., 17, 222, 231, 486.
Gibson *v.* Oregon S. L. & U. N. R. Co. (23 Oreg. 493, 32 Pac. Rep. 295), Employés, Inj. to, 28, 182, 183, 324.
Gibson *v.* Pacific R. Co. (46 Mo. 163), Fel. Serv., 1, 64, 148.
Gibson *v.* Richmond & D. R. Co. (37 Fed. Rep. 743, 2 L. R. A. 467), Bonds, 52; State Aid, 28.
Gibson *v.* St. Louis, K. C. & N. R. Co. (76 Mo. 549; affirming 7 Mo. App. 586), Assump., 1.
Gibson *v.* Southeastern R. Co. (1 F. & F. 23), Fires, 246, 345.
Gibson County *v.* Pullman Southern Car

Co. (42 Fed. Rep. 572), Stat., 34; Tax., 17, 56, 94, 398.
Giddings *v.* San Antonio (47 Tex. 548), Mun. Aid, 50.
Giermann *v.* St. Paul, M. & M. R. Co. (42 Minn. 5, 43 N. W. Rep. 483), Trial, 183.
Giesy *v.* Cincinnati, W. & Z. R. Co. (4 Ohio St. 308), Em. Dom., 41, 186, 558, 648, 749.
Gifford *v.* New Jersey R. & T. Co. (10 N. J. Eq. 171), Bridges, 96; Charters, 152; Corp., 4; Stockh., 89, 121.
Gifford *v.* Republican Valley & K. R. Co. (20 Neb. 538, 31 N. W. Rep. 11), App., 140; Em. Dom., 936.
Giger *v.* Chicago & N. W. R. Co. (80 Iowa 492, 45 N. W. Rep. 906), Animals, 547; Cat.-Gds., 18.
Gilbert *v.* Flint & P. M. R. Co. (15 Am. & Eng. R. Cas. 491, 51 Mich. 488, 16 N. W. Rep. 868, 47 Am. Rep. 592), Evid., 98.
Gilbert *v.* Greeley, S. L. & P. R. Co. (40 Am. & Eng. R. Cas. 300, 13 Colo. 501, 22 Pac. Rep. 814), Em. Dom., 7, 373; Sts. & H., 408.
Gilbert *v.* Missouri Pac. R. Co. (23 Mo. App. 65), Animals, 456.
Gilbert *v.* Morris C. & B. Co. (8 N. J. Eq. 495), Nuis., 18.
Gilbert *v.* New York C. & H. R. R. Co. (6 T. & C. (N. Y.) 662, 4 Hun 378), Car. of M., 98.
Gilbert *v.* North London R. Co. (1 C. & E. 31), Car. of P., 195.
Gilbert *v.* Savannah, G. & N. A. R. Co. (69 Ga. 396), Constr. Rys., 4; Culverts, 4, 21. Em. Dom., 670, 731.
Gilbert *v.* Third Av R. Co. (22 J. & S. 270, 8 N. Y. S. R. 152), Evid., 77; St. Rys., 397.
Gilbert Car Mfg. Co. *v.* Mann (3 N. Y. S. R. 301), Sales, 10.
Gilbert El. R. Co., In re (38 Hun (N. Y.) 438), Elev. Rys., 65, 127.
Gilbert El. R. Co., In re (70 N. Y. 361, 3 Abb. N. Cas. 434; affirming 9 Hun 303), Elev. Rys., 7, 8, 12, 52, 186.
Gilbough *v.* Norfolk & P. R. Co. (1 Hughes (U. S.) 410), Bonds, 47.
Gilchrist *v.* Helena, H. S. & S. R. Co. (47 Fed. Rep. 593), For. Corp., 5; Mort., 66.
Gilchrist *v.* Helena, H. S. & S. R. Co. (49 Fed. Rep. 519), Insolv., 3.
Gilchrist *v.* Queen (2 Can. Exch. 300), Animals, 71.
Gildersleeve *v.* Wolfe Island R. & C. Co. (3 Chan. Cham. (U. C.) 358), Pl., 39.
Giles *v.* Boston & M. R. Co. (55 N. H. 552), Animals, 153.
Giles *v.* Fargo (17 N. Y. Supp. 476), Exp. Cos., 71.
Giles *v.* Fargo (28 J. & S. (N. Y.) 117), Bills of L., 40.
Giles *v.* Great Western R. Co. (36 U. C. Q. B. 360), Death, etc., 254.
Giles *v.* London, C. & D. R. Co. (1 Drew. & Sm. 406, 7 Jur. N. S. 509, 30 L. J. Ch. 603, 9 W. R. 587, 5 L. T. 479), Em. Dom., 1101.
Giles *v.* Taff Vale R. Co. (2 El. & Bl. 822, 18 Jur. 510, 23 L. J. Q. B. 43), Agency, 2; Trover, 7.
Gilhooly *v.* New York & S. S. N. Co. (1 Daly (N. Y.) 197), Bagg., 62, 65.
Gilkerson *v.* Brown (61 Ill. 486), Tax., 85.
Gilkey *v.* Paine (80 Me. 319, 14 Atl. Rep. 205), Divid., 9.
Gill *v.* Atlantic & G. W. R. Co. (27 Ohio St. 240), Animals, 116, 139.
Gill *v.* Great Eastern R. Co. (26 L. T. 945), Car. of P., 229.
Gill *v.* Manchester, S. & L. R. Co. (42 L. J. Q. B. 89, L. R. 8 Q. B. 186, 21 W. R 525, 28 L. T. 587), Car. of L. S., 51, 107.
Gill *v.* Milwaukee & L. W. R. Co. (76 Wis. 293, 45 N. W. Rep. 23), Em. Dom., 505, 506.
Gill *v.* Rochester & P. R. Co. (37 Hun (N. Y.) 107), Eject. Pass., 67.
Gillam *v.* Sioux City & St. P. R. Co. (26 Minn. 268, 3 N. W. Rep. 353), Animals, 153, 386; Fences, 3, 9.
Gillenwater v. Madison & I. R. Co. (5 Ind. 339), Agency, 72; Car. of P., 8, 9, 57, 129, 131; Fel. Serv., 108, 462; Passes, 11.
Gillespie *v.* Ft. Wayne & S. R. Co. (17 Ind. 243), Charters, 115.
Gillespie *v.* Goddard (1 Pittsb. (Pa.) 306), Witn., 11.
Gillespie *v.* Newburgh (54 N. Y. 468), Embankm., 7.
Gillespie *v.* St. Louis, K. C. & N. R. Co. (6 Mo. App. 554), Car. of P., 158, 176, 591; Culverts, 14; Pl., 48; Words & Ph., 7.
Gillespie *v.* Stanton (8 Baxt. (Tenn.) 284), Liens, 25.
Gillett *v.* Logan County Sup'rs (67 Ill. 256), Mun. Aid, 292.
Gillett *v.* Missouri Valley R. Co. (55 Mo. 315), Mal. Pros., 4, 7.
Gillett *v.* Western R. Co. (8 Allen (Mass.) 560), Animals, 582; Cross., Inj. at, 28.
Gillette *v.* Chester & M. R. Co. (2 Pa. Dist. 450), Elec. Rys. 9; Stat., 34; Words & Ph., 31.
Gillham *v.* Madison County R. Co. (49 Ill. 484), Waters & W., 28.
Gilliam *v.* South & N. Ala. R. Co. (15 Am. & Eng. R. Cas. 138, 70 Ala. 268), Agency, 76.
Gilligan *v.* New York & H. R. Co. (1 E. D. Smith (N. Y.) 453), Children, Inj. to, 165, 182, 184; New Tr., 22.
Gilliland *v.* Chicago & A. R. Co. (19 Mo. App. 411), Animals, 645; Leases, 17; Negl., 48.
Gillingham *v.* Ohio River R. Co. (51 Am. & Eng. R. Cas 222, 35 W. Va. 588, 14 L. R. A. 798, 14 S. E. Rep. 243), Car. of P., 1, 22, 108, 129, 151, 303, 581; False Imp., 4, 20.
Gillingham *v.* Walker (44 L. T. 715, 29 W. R. 896), Tickets & F., 147.
Gillinwater *v.* Mississippi & A. R. Co. (13 Ill. 1), Em. Dom., 86.
Gillis *v.* Duluth, N. S. & S. W. R. Co. (34 Minn. 301, 25 N. W. Rep. 603), Officers, 10.
Gillis *v.* Great Western R. Co. (12 U. C. Q. B. 427), Animals, 153.
Gillis *v.* Pennsylvania R. Co. (59 Pa. St. 129), Stat. & D., 73.

Gillis *v.* Wilmington, O. & E. C. R. Co. (108 N. Car. 441, 13 S. E. Rep. 11, 215), Officers, 10.
Gillison *v.* Savannah & C. R. Co. (7 So. Car. 173), Em. Dom., 852, 862.
Gillispie *v.* Coney Island & B. R. Co. (41 N. Y. S. R. 97, 16 N. Y. Supp. 850), Collis., 11.
Gillshannon *v.* Stony Brook R. Corp. (10 Cush. (Mass.) 228), Fel. Serv., 439.
Gillson *v.* North Grey R. Co. (35 U. C. Q. B. 475), Indep. Contr., 12.
Gilman *v.* Des Moines Valley R. Co. (41 Iowa 22), Mort., 156.
Gilman *v.* Des Moines Valley R. Co. (42 Iowa 495), Mort., 282.
Gilman *v.* Eastern R. Co. (13 Allen (Mass.) 433), Fel. Serv., 150, 156, 389.
Gilman *v.* Eastern R. Corp. (10 Allen (Mass.) 233), Fel. Serv., 153, 421.
Gilman *v.* European & N. A. R. Co. (60 Me. 235), Animals, 279; Fences, 38.
Gilman *v.* Illinois & M. Tel. Co. (91 U. S. 603), Mort., 83.
Gilman *v.* Illinois & M. Tel. Co. (1 McCrary (U. S.) 170), Mort., 104.
Gilman *v.* New Orleans & S. R. Co. (72 Ala. 566), State Aid, 7, 12.
Gilman *v.* Philadelphia (3 Wall. (U. S.) 713), Bridges, 60.
Gilman *v.* Sheboygan (2 Black (U. S.) 510), Mun. Aid, 53.
Gilman *v.* Sheboygan & F. du L. R. Co. (37 Wis. 317), Reorg., 13.
Gilman *v.* Sheboygan & F. du L. R. Co. (40 Wis. 653, 13 Am. Ry. Rep. 468), Em. Dom., 1035; Lim. of Ac., 54.
Gilman *v.* Sioux City & P. R. Co. (13 Am. & Eng. R. Cas. 538, 62 Iowa 299, 17 N. W. Rep. 520), Animals, 109, 536.
Gilman, C. & S. R. Co. *v.* Kelly (77 Ill. 426), Direct., 48, 49.
Gilman, C. & S. R. Co. *v.* Spencer (76 Ill. 192), Animals, 125, 568.
Gilmer *v.* Mobile & M. R. Co. (79 Ala. 569), Cov'ts, 5.
Gilmore *v.* Atlantic & P. R. Co. (35 Barb. (N. Y.) 279), Employés, 13.
Gilmore *v.* Carman (9 Miss. 279), Bills of L., 64, 70.
Gilmore *v.* Federal St. & P. V. Pass. R. Co. (153 Pa. St. 31, 25 Atl. Rep. 651), Elec. Rys., 36; St. Rys., 450.
Gilmore *v.* Hannibal & St. J. R. Co. (67 Mo. 323), Car. of L. S., 109; Int. Com., 219.
Gilmore *v.* Northern Pac. R. Co. (15 Am. & Eng. R. Cas. 304, 9 Sawy. (U. S.) 558, 18 Fed. Rep. 866), Fel. Serv., 73, 80, 91, 94, 108, 462.
Gilmore *v.* Philadelphia & R. R. Co. (56 Am. & Eng. R. Cas. 279, 154 Pa. St. 375, 25 Atl. Rep. 774), Stat. & D., 92, 95.
Gilmore *v.* Pittsburg, V. & C. R. Co. (104 Pa. St. 275), Em. Dom., 613, 706.
Gilmore *v.* Utica (43 Am. & Eng. R. Cas. 225, 121 N. Y. 561, 24 N. E. Rep. 1009, 31 N. Y. S. R. 880; reversing 55 Hun 514, 29 N. Y. S. R. 781, 9 N. Y. Supp. 912), St. Rys., 130, 143, 156, 170, 302.
Gilson *v.* Delaware & H. Canal Co. (65 Vt. 213, 26 Atl. Rep. 70), Dam., 13.
Gilson *v.* Jackson County Horse R. Co. (12 Am. & Eng. R. Cas. 132, 76 Mo. 282), Car. of P., 142, 151, 601; Contrib. Neg., 108.
Gilstrap *v.* St. Louis, M. & O. A. L. R. Co. (50 Mo. 491, 3 Am. Ry. Rep. 245), Bills & N., 1.
Gilyard *v.* State (98 Ala. 59, 13 So. Rep. 391), Crim. L., 42.
Ginna *v.* Second Ave. R. Co. (67 N. Y. 596, mem.; affirming 8 Hun 494), St. Rys., 414, 415.
Ginnon *v.* New York & H. R. Co. (3 Robt. (N. Y.) 25), St. Rys., 399.
Giordano *v.* Manhattan R. Co. (31 N. Y. S. R. 134, 9 N. Y. Supp. 258, 56 Hun 642), Elev. Rys., 57; Judgm., 2.
Giraldo *v.* Coney Island & B. R. Co. (16 N. Y. Supp. 774, 62 Hun 620, 42 N. Y. S. R. 915; affirmed in 135 N. Y. 648, mem., 48 N. Y. S. R. 931), App., 73; Children, Inj. to, 58; St. Rys., 465.
Girard College P. R. Co. *v.* 13th & 15th Sts. R. Co. (7 Phila. (Pa.) 620), Aband., 6.
Girard Life Ins., A. & T. Co. *v.* Cooper (51 Fed. Rep. 332, 4 U. S. App. 631, 2 C. C. A. 245), App., 14; Constr. Rys., 16; Receiv., 60.
Girardot *v.* Midland R. Co. (4 Ry. & C. T. Cas. 291), Discrim., 45.
Girardot *v.* Midland R. Co. (5 Ry. & C. T. Cas. 60), Side Tr., 2.
Girdwood *v.* North British R. Co. (4 Sc. Sess. Cas. (4th Series) 115, 3 Ry. & C. T. Cas. xviii), Stat. & D., 92.
Girtman *v.* Central R. & B. Co. (1 Ga. 173), Animals, 15, 605.
Girvan & P. J. R. Co. *v.* Glasgow & S. W. R. R. Co. (5 Ry. & C. T. Cas. 215), Charges, 122.
Given *v.* Des Moines (70 Iowa 637, 27 N. W. Rep. 803), Cross., St. & H., 87.
Givens *v.* Kentucky C. R. Co. (89 Ky. 231, 12 S. W. Rep. 257), Death, etc., 96.
Givens *v.* Kentucky C. R. Co. (Ky.) (15 S. W. Rep. 1057), Children, Inj. to, 34.
Glaessner *v.* Anheuser-Busch-Brew. Assoc. (100 Mo. 508, 13 S. W. Rep. 707), Nuis., 2; Sts. & H., 76.
Glaize *v.* South Carolina R. Co. (1 Strobh. (S. Car.) 70, Attach., 8; So. Car. R. Co., 2; Tax., 127.
Glandon *v.* Chicago, M. & St. P. R. Co. (24 Am. & Eng. R. Cas. 366, 68 Iowa 457, 27 N. W. Rep. 457), Animals, 91.
Glasberg *v.* Dry Dock, E. B. & B. R. Co. (12 Civ. Pro. (N. Y.) 50), Paupers, 2.
Glasco *v.* New York C. R. Co. (36 Barb. (N. Y.) 557), Bagg., 13, 113.
Glascock *v.* Central Pac. R. Co. (73 Cal. 137, 14 Pac. Rep. 518), Contrib. Neg., 29, 87, 105; Cross., Inj. at, 234.
Glascock *v.* Chicago & A. R. Co. (69 Mo. 589), Car. of L. S., 158.
Glaser *v.* Lewis (17 Phila. (Pa.) 345), Fires, 232, 313.
Glasgow & S. W. R. Co. *v.* Mackinnon (27 Am. & Eng. R. Cas. 1, 11 App. Cas. 386, 5 Ry. & C. T. Cas. xii), Discrim., 17; Words & Ph., 126.
Glasgow Union R. Co. *v.* Hunter (L. R. 2 H. L. Sc. Cas. 78), Em. Dom., 1155, 1197, 1198

Glasier *v.* Frederickton Branch R. Co. (13 New Brun. 3), Em. Dom., 1235.
Glass *v.* Memphis & C. R. Co. (94 Ala. 581, 10 So. Rep. 215), Cross., Inj. at, 191; Evid., 47, 70, 126; Tresp., Inj. to, 4, 10, 44, 56.
Glassey *v.* Hestonville, M. & F. Pass. R. Co. (57 Pa. St. 172), Children, Inj. to, 127, 134.
Glaze *v.* Western & A. R. Co. (67 Ga. 761), Adv. Poss., 1.
Gleadell *v.* Thomson (56 N. Y. 194; affirming 3 J. & S. 232), Charges, 86.
Gleason *v.* Goodrich Transp. Co. (32 Wis. 85, 14 Am. Ry. Rep. 716), Bagg., 11, 29, 41, 61, 81, 100; Car. of M., 72.
Gleason *v.* New York & N. E. R. Co. (159 Mass. 68, 34 N. E. Rep. 79), Employés, Inj. to, 209.
Gleason *v.* Vermont C. R. Co. (25 Vt. 37), Set-off, 1, 2.
Glebe Lands of Great Yeldham, In re (L. R. 9 Eq. 68), Em. Dom., 1148.
Gleeson *v.* United States (22 Ct. of Cl. 82), Car. of Mails, 19.
Gleeson *v.* United States (23 Ct. of Cl. 207), Car. of Mails, 19.
Gleeson *v.* Virginia Midland R. Co. (28 Am. & Eng. R. Cas. 202, 5 Mackey (D. C.) 356), Evid., 125; Negl., 114; New Tr., 6.
Gleeson *v.* Virginia Midland R. Co. (1 App. Cas. (D. C.) 185), App., 83.
Gleeson *v.* Virginia Midland R. Co. (47 Am. & Eng. R. Cas. 513, 140 U. S. 435, 11 Sup. Ct. Rep. 859), Car. of P., 170, 583; Embankm., 6.
Glen *v.* Grand Trunk R. Co. (2 Ont. Pr. 377), Em. Dom., 1275.
Glendening *v.* Sharp (22 Hun (N. Y.) 78), Death, etc., 194.
Glenn *v.* Charlotte & S. C. R. Co. (63 N. Car. 510), Car. of M., 96; Lim. of Liab., 6.
Glenn *v.* Columbia & G. R. Co. (21 So. Car. 466), Negl., 43; Trial, 63.
Glenn *v.* Southern Exp. Co. (35 Am. & Eng. R. Cas. 627, 86 Tenn. 594, 8 S. W. Rep. 152), Exp. Cos., 69.
Glenn *v.* York County Com'rs (6 So. Car. 412), Words & Ph., 65.
Glennon *v.* Chicago, M. & St. P. R. Co. (79 Ill. 501), Em. Dom., 792.
Glenville *v.* St. Louis R. Co. (51 Mo. App. 629), Cable R'ys, 6.
Glick *v.* Baltimore & O. R. Co. (8 Mackey (D. C.) 412), Sts. & H., 169.
Glidden *v.* Union Pac. R. Co. (30 Fed. Rep. 660), Land Grants, 93.
Gloninger *v.* Pittsburg & C. R. Co. (46 Am. & Eng. R. Cas. 276, 139 Pa. St. 12, 21 Atl. Rep. 211), Bonds, 1; Mort., 12, 35; Stock, 22, 110.
Gloucester Ferry Co. *v.* Pennsylvania (114 U. S. 196, 5 Sup. Ct. Rep. 826), Ferries, 14.
Glover *v.* London & S. W. R. Co. (17 L. T. 139, L. R. 3 Q. B. 25, 37 L. J. Q. B. 57), Eject. Pass., 103.
Glover *v.* Manhattan R. Co. (66 How. Pr. (N. Y.) 77), Elev. Rys., 54.
Glover *v.* Manhattan R. Co. (19 J. & S. (N. Y.) 1), Elev. Rys., 68, 74, 119.
Glover *v.* North Staffordshire R. Co. (16 Q. B. 912, 15 Jur. 673, 20 L. J. Q. B. 376), Em. Dom., 1100, 1156.
Glover *v.* Scotten (82 Mich. 369, 46 N. W. Rep. 936), Employés, Inj. to, 372, 373.
Gloversville *v.* Johnstown, G. & K. Horse R. Co. (49 N. Y. S. R. 315, 66 Hun 627, 21 N. Y. Supp. 146), Injunc., 13.
Glovinsky *v.* Cunard Steamship Co. (53 N. Y. S. R. 528, 4 Misc. 266, 24 N. Y. Supp. 136), Bagg., 31, 97.
Glushing *v.* Sharp (19 Am. & Eng. R. Cas. 372, 96 N. Y. 676), Cross., Inj. at, 290.
Glyn *v.* Aberdare Valley R. Co. (6 C. B. N. S. 359, 5 Jur. N. S. 1011, 28 L. J. C. P. 271), Em. Dom., 1180.
Gobert *v.* Washington City, V. M. & G. S. R. Co. (1 Am. & Eng. R. Cas. 473, 33 Gratt. (Va.) 586), Coupons, 12.
Goddard *v.* Chicago & N. W. R. Co. (54 Wis. 548), Animals, 536.
Goddard *v.* Grand Trunk R. Co. (57 Me. 202), Agency, 97; Assault, 2, 18; Dam., 32.
Goddard *v.* London & S. W. R. Co. (1 Ry. & C. T. Cas. 308), Charges, 110; Discrim., 18.
Goddard *v.* Stockman (5 Am. & Eng. R. Cas. 164, 74 Ind. 400), Mun. Aid, 93, 97, 159, 411.
Goddin *v.* Crump (8 Leigh (Va.) 120), Mun. Aid, 52; Subscr., 231.
Goddin *v.* Evans (18 Ohio St. 150), Subscr., 23.
Godfrey *v.* Ohio & M. R. Co. (37 Am. & Eng. R. Cas. 8, 116 Ind. 30, 15 West. Rep. 533, 18 N. E. Rep. 61), Indem. Bonds, 3; Pl., 169; Receiv., 185; Tickets & F., 5, 118.
Godley *v.* Pugh (29 Ohio St. 438), Dissol., 24.
Godwin *v.* Whitehead (88 Va. 600, 14 S. E. Rep. 344), Reorg., 18.
Godwin *v.* Wilmington & W. R. Co. (104 N. Car. 146, 10 S. E. Rep. 136), Animals, 589.
Goedgen *v.* Manitowoc County Sup'rs (2 Biss. (U. S.) 328), Mun. Aid, 183, 184.
Goelet *v.* Metropolitan Transit Co. (48 Hun 520, 15 N. Y. S. R. 936, 1 N. Y. Supp. 74), Elev. Rys., 75.
Goetz *v.* Hannibal & St. J. R. Co. (50 Mo. 472, 3 Am. Ry. Rep. 427), Tickets & F., 55, 110.
Goff *v.* Great Northern R. Co. (3 El. & El. 672, 30 L. J. Q. B. 148, 7 Jur. N. S. 286, 3 L. T. 850), False Imp., 3.
Goff *v.* Norfolk & W. R. Co. (36 Fed. Rep. 299), Employés, Inj. to, 465, 470.
Goff *v.* Toledo, St. L. & K. C. R. Co. (28 Ill. App. 529), Agency, 12; Employés, Inj. to, 140.
Goforth *v.* Rutherford R. Constr. Co. (96 N. Car. 535, 2 S. E. Rep. 361), Mun. Aid, 148.
Gogarty *v.* Great Southern & W. R. Co. (9 Ir. R. C. L. 233; reversing 8 Ir. R. C. L. 344), Evid., 138.
Goggin *v.* Kansas Pac. R. Co. (12 Kan. 416), Car. of L. S., 80.
Gohen *v.* Texas Pac. R. Co. (2 Woods (U. S.) 346), Death, etc., 10.
Goins *v.* Chicago, R. I. & P. R. Co. (37 Mo.

App. 221), Employés, Inj. to, 29, 99, 225, 306.
Goins *v.* Chicago, R. I. & P. R. Co. (37 Mo. App. 676), Employés, Inj. to, 471.
Goins *v.* Chicago, R. I. & P. R. Co. (47 Mo. App. 173; see 37 Mo. App. 676), Children, Inj. to, 158; Death, etc., 231; Employés, Inj. to, 473; Witn., 180; Words & Ph., 87.
Goins *v.* Western R. Co. (59 Ga. 426), Car. of P., 541.
Goins *v.* Western R. Co. (68 Ga. 190), Car. of P., 635.
Gold *v.* Housatonic R. Co. (1 Gray (Mass.) 424), Attach., 12.
Gold *v.* Vermont C. R. Co. (19 Vt. 478), Em. Dom., 523.
Goldberg *v.* New York C. & H. R. R. Co. (4 Silv. App. (N. Y.) 166), Car. of P., 84.
Goldberg *v.* New York C. & H. R. R. Co. (133 N. Y. 561, 30 N. E. Rep. 597, 44 N. Y. S. R. 71; reversing 60 Hun 586, 39 N. Y. S. R. 785, 15 N. Y. Supp. 579), Car. of P., 281.
Goldberg *v.* New York C. & H. R. R. Co. (54 N. Y. S. R. 90, 71 Hun 613, mem., 24 N. Y. Supp. 1143), Car. of P., 404.
Goldberger *v.* Manhattan R. Co. (3 Misc. 441, 52 N. Y. S. R. 320, 23 N. Y. Supp. 176), Refer., 7.
Golden *v.* Metropolitan El. R. Co. (1 Misc. 142, 48 N. Y. S. R. 725, 20 N. Y. Supp. 630), Elev. Rys., 104, 190.
Golden *v.* Romer (20 Hun (N. Y.) 438), Warch., 9.
Golden, B. & L. R. Co. *v.* Haggart (27 Am. & Eng. R. Cas. 375, 9 Colo. 346, 12 Pac. Rep. 215), Em. Dom., 807.
Goldey *v.* Pennsylvania R. Co. (30 Pa. St. 242), Lim. of Liab., 32; Negl., 85.
Goldsmith *v.* Augusta & S. R. Co. (62 Ga. 468), Tax., 60, 255, 333.
Goldsmith *v.* Central R. Co. (62 Ga. 509), Tax., 333.
Goldsmith *v.* Chicago & A. R. Co. (12 Mo. App. 479), Car. of M., 615.
Goldsmith *v.* Georgia R. Co. (62 Ga. 485), Charters, 3; Tax., 255, 333.
Goldsmith *v.* Great Eastern R. Co. (44 L. T. 181, 29 W. R. 651), Car. of M., 479.
Goldsmith *v.* Rome R. Co. (62 Ga. 473), Charters, 3; Tax., 227.
Goldsmith *v.* Southwestern R. Co. (62 Ga. 495), Tax., 333.
Goldsmith *v.* Swift (25 Hun (N. Y.), 201), Divid., 6.
Goldstein *v.* Chicago, M. & St. P. R. Co. (46 Wis. 404, 21 Am. Ry. Rep. 391), Fright. Teams, 5; Negl., 53.
Goll *v.* Manhattan R. Co. (24 N. Y. S. R. 24, 5 N. Y. Supp. 185, 25 J. & S. 74; affirmed (?) 125 N. Y. 714, mem., 35 N. Y. S. R. 993), Elev. Rys., 216, 220; Witn., 167.
Goltra *v.* People (53 Ill. 224), Ex. & Ad., 7.
Goltz *v.* Milwaukee, L. S. & W. R. Co. (41 Am. & Eng. R. Cas. 282, 76 Wis. 136, 44 N. W. Rep. 752), Employés, Inj. to, 238.
Goltz *v.* Winona & St. P. R. Co. (22 Minn. 55, 19 Am. Ry. Rep. 359), Contrib. Neg., 28.
Gonsior *v.* Minneapolis & St. L. R. Co. (36 Minn. 385, 31 N. W. Rep. 515), Fel. Serv., 335.
Gonthier *v.* New Orleans, J. & G. N. R. Co. (28 La. Ann. 67), Bagg., 120.
Gonzales *v.* New York & H. R. Co. (1 J. & S. (N. Y.) 57), Car. of P., 393, 411.
Gonzales *v.* New York & H. R. Co. (38 N. Y. 440; reversing 6 Robt. 93, 297), App., 53; Contrib. Neg., 4; Cross., Inj. at, 250; Negl., 53.
Gonzales *v.* New York & H. R. Co. (39 How. Pr. (N. Y.) 407; reversing 1 Sweeny 506; former appeal 38 N. Y. 440), Car. of P., 161, 182, 198, 200, 201, 265, 276, 281, 453, 581; Death, etc., 188; Time-tables, 1; Trial, 72.
Gonzales *v.* New York & H. R. Co. (50 How. Pr. (N. Y.) 126), Death, etc., 188.
Gonzales *v.* Sullivan (16 Fla. 791), Tax., 150.
Gooch *v.* McGee (83 N. Car. 59, 35 Am. Rep. 558), Exec., 3.
Good *v.* Galveston, H. & S. A. R. Co. (Tex.) (40 Am. & Eng. R. Cas. 98, 11 S. W. Rep. 854), Car. of L. S., 35, 80, 146; Pl., 60.
Good *v.* New York, L. E. & W. R. Co. (18 N. Y. S. R. 773, 50 Hun 601, 2 N. Y. Supp. 419), Animals, 222, 576; New Tr., 20; Witn., 29.
Good *v.* Sherman (37 Tex. 660), Exec., 21; Injunc., 41.
Goodbar *v.* Wabash R. Co. (53 Mo. App. 434), Bagg., 73.
Gooderham *v.* Toronto & N. R. Co. (17 Am. & Eng. R. Cas. 339, 8 Ont. App. 685), Receiv., 149.
Gooderham *v.* Toronto & N. R. Co. (28 Grant's Ch. (U. C.) 212), Receiv., 150.
Goodfellow *v.* Boston, H. & E. R. Co. (106 Mass. 461, 8 Am. Ry. Rep. 45), Employés, Inj. to, 488.
Goodhue *v.* Grand Trunk R. Co. (3 Montr. L. R. 114), Fires, 134.
Goodin *v.* Cincinnati & W. Canal Co. (18 Ohio St. 169), Acct'ng, 2; Estop., 26; Stockh., 84.
Goodin *v.* Evans (18 Ohio St. 150), Corp.
Gooding *v.* Atchison, T. & S. F. R. (
A.n. & Eng. R. Cas. 466, 32 Kan.
Pac. Rep. 136), Animals, 56.
Goodlett *v.* Louisville & N. R. Co. (33 Am
& Eng. R. Cas. 1, 122 U. S. 391, 7 Sup. Ct. Rep. 1254), Citizens, 2; Contrib. Neg., 123.
Goodman *v.* Cincinnati & C. R. Co. (2 Disney (Ohio) 176), Deeds of Tr., 20; Mort., 160.
Goodman *v.* Hannibal & St. J. R. Co. (45 Mo. 33), Fixt., 6.
Goodman *v.* Oregon R. & N. Co. (49 Am. & Eng. R. Cas. 87, 22 Oreg. 14, 28 Pac. Rep. 894), Car. of M., 26.
Goodman *v.* Richmond & D. R. Co. (81 Va. 576), Employés, Inj. to, 124.
Goodman *v.* Simonds (20 How. (U. S.) 343), Mun. Aid, 352.
Goodnow *v.* Litchfield (4 McCrary (U. S.) 215), Assign., 16.
Goodrel *v.* Kreichbaum (70 Iowa 362, 30 N. W. Rep. 872), For. Corp., 4.
Goodrich *v.* Beaman (37 Iowa 563), Tax., 192.
Goodrich *v.* New York C. & H. R. R. Co. (41 Am. & Eng. R. Cas. 259, 116 N. Y. 398, 22 N. E. Rep. 397, 26 N. Y. S. R. 767,

5 L. R. A. 750; affirming 3 N. Y. S. R. 774), Contrib. Neg., 42; Employés, Inj. to, 111, 121, 154, 196, 221, 737.
Goodrich *v.* Pennsylvania & N. Y. C. & R. Co. (29 Hun (N. Y.) 50), Collis., 9; Employés, Inj. to, 690.
Goodrich *v.* Reynolds (31 Ill. 490), Bills & N., 14; Incorp., 11; Subscr., 21, 82, 145.
Goodridge *v.* Union Pac. R. Co. (35 Fed. Rep. 35), Discrim., 80; Lim. of Ac., 29, 37.
Goodridge *v.* Union Pac. R. Co. (37 Fed. Rep. 182; affirmed in 54 Am. & Eng. R. Cas. 423, 149 U. S. 680, 13 Sup. Ct. Rep. 970), Discrim., 15, 80.
Goodsell *v.* Hartford & N. H. R. Co. (33 Conn. 51), Death, etc., 364.
Goodsell *v.* Taylor (41 Minn. 207, 42 N. W. Rep. 873), Evid., 123; Witn., 141.
Goodwin, In re (13 U. C. C. P. 254), Mand., 31.
Goodwin *v.* Baltimore & O. R. Co. (58 Barb. (N. Y.) 195; reversed in 50 N. Y. 154), Car. of M., 83, 323.
Goodwin *v.* Baltimore & O. R. Co. (50 N. Y. 154; reversing 58 Barb. 195), Car. of M., 217.
Goodwin *v.* Boston & M. R. Co. (63 Me. 363), Em. Dom., 775.
Goodwin *v.* Boston & M. R. Co. (52 Am. & Eng. R. Cas. 380, 84 Me. 203, 24 Atl. Rep. 816), Car. of P., 472.
Goodwin *v.* Burke (10 N. Y. Supp., 628) App., 43.
Goodwin *v.* Central R. & B. Co. (96 Ala. 445, 11 So. Rep. 393), Death, etc., 206.
Goodwin *v.* Chicago, R. I. & P. R. Co. (11 Am. & Eng. R. Cas. 460, 75 Mo. 73), Animals, 381; Cross., Inj. at, 184; Negl., 63.
Goodwin *v.* Hardy (57 Me. 143), Divid., 4.
Goodwin *v.* Kansas City, Ft. S. & M. R. Co. (43 Mo. App. 359), Animals, 505.
Goodwin *v.* New York, N. H. & H. R. Co. (43 Conn. 494, 11 Am. Ry. Rep. 9), Stockh., 94.
Goodwin *v.* Ottawa & P. R. Co. (13 U. C. C. P. 254), Name, 2; Stock, 63.
Goodwin *v.* Ottawa & P. R. Co. (22 U. C. Q. B. 186), Mand., 32.
Goodwyn *v.* Douglas (1 Cheves (So. Car.) 174), Car. of M., 709.
Googins *v.* Boston & A. R. Co. (155 Mass. 505, 30 N. E. Rep. 71), Em. Dom., 129.
Goose *v.* Grand Trunk R. Co. (17 Ont. 721), New Tr., 10.
Gordon *v.* Boston & M. R. Co. (58 N. H. 396), Evid., 62; Sts. & H., 369.
Gordon *v.* Cheltenham & G. W. U. R. Co. (5 Beav. 229, 2 Railw. Cas. 800), Em. Dom., 1086.
Gordon *v.* Chicago, S. F. & C. R. Co. (44 Mo. App. 201), Animals, 137; Fences, 46, 103.
Gordon *v.* Grand St. & N. R. Co. (40 Barb. (N. Y.) 546), Car. of P., 11, 13, 14, 25; St. Rys., 331.
Gordon *v.* Great Western R. Co. (3 Am. & Eng. R. Cas. 619, 51 L. J. Q. B. 58, L. R. 8 Q. B. D. 44, 4 Ry. & C. T. Cas. xix), Car. of L. S., 56, 97.
Gordon *v.* Great Western R. Co. (25 U. C. C. P. 488), Car. of M., 668.
Gordon *v.* Great Western R. Co. (34 U. C. Q. B. 224), Car. of M., 578.
Gordon *v.* Lafayette County (74 Mo. 426), Tax., 314.
Gordon *v.* Longest (16 Pet. (U. S.) 97), Rem. of C., 22.
Gordon *v.* Manchester & L. R. Co. (52 N. H. 596), Car. of P., 122; Time-tables, 2.
Gordon *v.* Reynolds Card Mfg. Co. (14 N. Y. S. R. 394), Employés, Inj. to, 15.
Gordon *v.* Richmond, F. & P. R. Co. (22 Am. & Eng. R. Cas. 33, 78 Va. 501), Divid., 2, 8.
Gordon *v.* Richmond, F. & P. R. Co. (81 Va. 621), Cred. Bill, 1.
Gordon *v.* Tweedy (74 Ala. 232), Stock, 72.
Gordon Hardware Co. *v.* San Francisco & S. R. R. Co. (47 Am. & Eng. R. Cas. 293, 86 Cal. 620, 25 Pac. Rep. 125), Liens, 31, 35.
Gordy *v.* New York, P. & N. R. Co. (75 Md. 297, 23 Atl. Rep. 607), Employés, Inj. to, 423, 582.
Gore *v.* Norwich & N. Y. Transp. Co. (2 Daly (N. Y.) 254), Bagg., 81.
Gorgas *v.* Philadelphia, H. & P. R. Co. (51 Am. & Eng. R. Cas. 593, 144 Pa. St. 1, 22 Atl. Rep. 715), Em. Dom., 568, 573, 591, 716, 751; Witn., 118, 127.
Gorham, In re (43 How. Pr. (N. Y.) 263), Mun. Aid, 91.
Gorham *v.* Kansas City & S. R. Co. (113 Mo. 408, 20 S. W. Rep. 1060), App., 81; Dam., 41; Employés, Inj. to, 99, 363; New Tr., 56.
Gorham *v.* New York C. & H. R. R. Co. (23 Hun 449), Death, etc., 273.
Gorham Mfg. Co. *v.* Fargo (3 J. & S. (N. Y.) 434, 45 How. Pr. 90), Exp. Cos., 28.
Gorman *v.* Minneapolis & St. L. R. Co. (78 Iowa 509, 43 N. W. Rep. 303), Death, etc., 297; Employés, Inj. to, 175, 397, 422; Evid., 149, 162, 247; Fel. Serv., 146; Negl., 106; Trial, 204.
Gorman *v.* Pacific R. Co. (26 Mo. 441), Animals, 46, 165, 405; Fences, 2, 12, 65, 97; Negl., 5.
Gorman *v.* Southern Pac. R. Co. (97 Cal. 1, 31 Pac. Rep. 1112), Eject. Pass., 11, 65, 70, 72, 106, 112, 135.
Gormley *v.* Ohio & M. R. Co. (5 Am. & Eng. R. Cas. 581, 72 Ind. 31), Contrib. Neg., 53; Fel. Serv., 297.
Gorton *v.* Erie R. Co. (45 N. Y. 660), Cross., Inj. at, 264, 269.
Goshen *v.* England (119 Ind. 368, 21 N. E. Rep. 977), Dam., 5; Witn., 88, 166.
Goshen Tp. *v.* Springfield, Mt. V. & P. R. Co. (12 Ohio St. 624), Mun. Aid, 398.
Goshorn *v.* Ohio County Sup'rs (1 W. Va. 308), Mun. Aid, 272.
Goshorn *v.* Smith (92 Pa. St. 435), Negl., 59, 60.
Goss *v.* Missouri Pac. R. Co. (50 Mo. App. 614), Death, etc., 392; Evid., 212; Witn., 192; Words & Ph., 160.
Gossin *v.* Williams & M. L. & T. R. & S. Co. (36 La. Ann. 186), Actions, 8.
Gothard *v.* Alabama G. S. R. Co. (67 Ala. 114), Contrib. Neg., 14, 48; Cross., Inj. at, 286, 289.

Gott *v.* Adams Exp. Co. (100 Mass. 320), Exp. Cos., 87.
Gott *v.* Dinsmore (111 Mass. 45), Car. of M., 440; Evid., 194; Exp. Cos., 26, 63.
Gottlieb *v.* New York, L. E. & W. R. Co. (24 Am. & Eng. R. Cas. 421, 100 N. Y. 462, 3 N. E. Rep. 344; affirming 29 Hun 637), Employés, Inj. to, 154, 611, 737.
Gottschalk *v.* Chicago, B. & Q. R. Co. (14 Am. & Eng. R. Cas. 157, 14 Neb. 550, 16 N. W. Rep. 475), Sts. & H., 214.
Gottschalk *v.* Lincoln & N. W. R. Co. (10 Am. & Eng. R. Cas. 118, 14 Neb. 389, 15 N. W. Rep. 695), Em. Dom., 1038.
Gould *v.* Bangor & P. R. Co. (82 Me. 122, 19 Atl. Rep. 84), Animals, 141; Estop., 16.
Gould *v.* Chicago, B. & Q. R. Co. (22 Am. & Eng. R. Cas. 289, 66 Iowa 590, 24 N. W. Rep. 227), Employés, Inj. to, 17, 83.
Gould *v.* Chicago, M. & St. P. R. Co. (5 McCrary (U. S.) 502, 18 Fed. Rep. 155), Eject. Pass., 48, 50.
Gould *v.* Hill (2 Hill (N. Y.) 623), Car. of M., 484.
Gould *v.* Hudson River R. Co. (6 N. Y. 522; affirming 12 Barb. 616), Em. Dom., 169.
Gould *v.* Little Rock, M. R. & T. R. Co. (52 Fed. Rep. 680), Deeds of Tr., 4.
Gould *v.* Newburyport R. Co. (14 Gray (Mass.) 472), Attach., 11.
Gould *v.* Northern Pac. R. Co. (50 Minn. 516, 52 N. W. Rep. 924), Fires, 246.
Gould *v.* Oneonta (71 N. Y. 298; affirming 3 Hun 401, 6 T. & C. 43), Subscr., 41.
Gould *v.* Seney (5 N. Y. Supp. 928), Acct'ng, 1; Consol., 9.
Gould *v.* Seney (31 N. Y. S. R. 729, 9 N. Y. Supp. 818; modifying 5 N. Y. Supp. 928), Consol., 15.
Gould *v.* Staffordshire Potteries Waterworks Co. (5 Exch. 214, 1 L. M. & P. 264, 6 Railw. Cas. 568, 14 Jur. 528, 19 L. J. Exch. 281), Arb., 16.
Gould *v.* Sterling (23 N. Y. 439; reversing 29 Barb. 442), Mun. Aid, 106.
Gould *v.* Sterling (23 N. Y. 456), Mun. Aid, 107, 380.
Goulin *v.* Canada Southern Bridge Co. (64 Mich. 190, 31 N. W. Rep. 44), Employés, Inj. to, 400.
Gourley *v.* St. Louis & S. F. R. Co. (25 Mo. App. 144), Animals, 575.
Gourley *v.* St. Louis & S. F. R. Co. (35 Mo. App. 87), Animals, 415; Pl., 149.
Government St. R. Co *v.* Hanlon (53 Ala. 70), App., 103; Children, Inj. to, 127, 128; Contrib. Neg., 10, 56; Pl., 23.
Governor of North Carolina *v.* Raleigh & G. R. Co. (3 Ired. Eq. (N. Car.) 471), Proc., 40.
Gowan *v.* St. Paul, S. & T. F. R. Co. (25 Minn. 328), Fences, 28.
Gowdy *v.* Lyon (9 B. Mon. (Ky.) 112), Bills of L., 22.
Gowen, Appeal of (1 Am. & Eng. R. Cas. 437, 10 W. N. C. (Pa.) 85), Stockh., 11.
Gowen *v.* Glaser (Pa.) (10 Atl. Rep. 417), Fires, 45, 205, 308.
Gowen *v.* Harley (56 Am. & Eng. R. Cas. 238, 56 Fed. Rep. 973), Employés, Inj. to, 95, 103, 183, 206, 330; Fed. Cts., 1; Receiv., 131.
Gowen *v.* Penobscot R. Co. (44 Me. 140), Charters, 33; Em. Dom., 1060.
Gower *v.* Chicago, M. & St. P. R. Co. (45 Wis. 182), Trial, 71.
Goyeau *v.* Great Western R. Co. (25 Grant's Ch. (U. C.) 62), Words & Ph., 73, 215, 229.
Grabbe *v.* St. Louis Drayage Co. (42 Mo. App. 522), Just. P., 9.
Grable *v.* Louisville & N. R. Co. (2 Lea (Tenn.) 246), Witn., 14.
Grace *v.* Adams (100 Mas. 505), Bills of L., 27, 40, 41, 73, 79.
Gradin *v.* St. Paul & D. R. Co. (11 Am. & Eng. R. Cas. 644, 30 Minn. 217, 14 N. W. Rep. 881), Car. of P., 93; Tresp., Inj. to, 12.
Graeff *v.* Philadelphia & R. R. Co. (Pa.) (58 Am. & Eng. R. Cas. 431, 28 Atl. Rep. 1107), Car. of P., 129, 133, 270.
Graetz *v.* McKenzie (3 Wash. 194, 28 Pac. Rep. 331), Death, etc., 38.
Graf *v.* Chicago & N. W. R. Co. (94 Mich. 579, 54 N. W. Rep. 388), Cross., Inj. at, 12; Death, etc., 192.
Graff *v.* Bloomer (9 Pa. St. 114), Car. of M., 149.
Graff *v.* Pittsburg & S. R. Co. (31 Pa. St. 489), Estop., 36; Subscr., 73, 110, 168.
Graffam *v.* Boston & M. R. Co. (67 Me. 234, 15 Am. Ry. Rep. 372), Bagg., 14.
Graffim *v.* Charleston, C. & C. R. Co. (So. Car.) (47 Am. & Eng. R. Cas. 304), Contr., 98, 99.
Graft *v.* Baltimore & O. R. Co. (Pa.) (8 Atl. Rep. 206), Relief Assoc., 5.
Grafton *v.* Baltimore & O. R. Co. (17 Am. & Eng. R. Cas. 200, 21 Fed. Rep. 309), Sts. & H., 241.
Grafton *v.* Eastern Counties R. Co. (8 Ex. 699), Contr., 45.
Grafton & G. R. Co *v.* Foreman (20 Am. & Eng. R. Cas. 215, 24 W. Va. 662), Em. Dom., 525, 545, 757; Witn., 122.
Graham *v.* Birkenhead, L. & C. J. R. Co. (6 Eng. L. & Eq. 132), Stockh., 92.
Graham *v.* Boston & A. R. Co. (156 Mass. 4, 30 N. E. Rep. 359), Employés, Inj. to, 567, 735; Trial, 161.
Graham *v.* Boston, H. & E. R. Co. (25 Am. & Eng. R. Cas. 53, 118 U. S. 161, 6 Sup. Ct. Rep. 1009; affirming 14 Fed. Rep. 753), Charters, 12; For. Corp., 2; Judgm., 33; Mort., 174, 191, 294.
Graham *v.* Burlington, C. R. & N. R. Co. (34 Am. & Eng. R. Cas. 397, 39 Minn. 81, 38 N. W. Rep. 812), Car. of P., 601; Collis., 14, 18; Trial, 139.
Graham *v.* Chapman (11 N. Y. Supp. 318, 33 N. Y. S. R. 349, 58 Hun 602), Employés, Inj. to, 227; Receiv., 72.
Graham *v.* Charlotte & S. C. R. Co. (64 N. Car. 631), Trial, 5.
Graham *v.* Chicago, M. & St. P. R. Co. (49 Wis. 532, 5 N. W. Rep. 944), Car. of M., 736.
Graham *v.* Chicago, M. & St. P. R. Co. (3 Am. & Eng. R. Cas. 289, 53 Wis. 473, 10 N. W. Rep. 609), Charges, 40, 47.

Graham *v.* Columbus & I. C. R. Co. (27 Ind. 260), Em. Dom., 1010.
Graham *v.* Connersville & N. C. J. R. Co. (36 Ind. 463, 3 Am. Ry. Rep. 28), Em. Dom., 656.
Graham *v.* Davis (4 Ohio St. 362), Bills of L., 72; Car. of M., 453, 470.
Graham *v.* Delaware & H. Canal Co. (46 Hun (N. Y.) 386, 12 N. Y. S. R. 390), Actions, 12; Animals, 132; Fences, 7, 11, 69; Negl., 79.
Graham *v.* Great Western R. Co. (41 U. C. Q. B. 324), Collis., 4.
Graham *v.* Hannibal & St. J. R. Co. (28 Fed. Rep. 744), Death, etc., 163.
Graham *v.* Hendricks (22 La. Ann. 523), Sales, 1.
Graham *v.* La Crosse & M. R. Co. (1 Am. & Eng. R. Cas. 416, 102 U. S. 148), Assign., 1; Fraud. Conv., 3.
Graham *v.* La Crosse & M. R. Co. (3 Wall. (U. S.) 704), Judgm., 10.
Graham *v.* La Crosse & M. R. Co. (10 Wis. 459), Exec., 30.
Graham *v.* Mt. Sterling Coalroad Co. (14 Bush (Ky.) 425), Liens, 24.
Graham *v.* Northern R. Co. (10 Grant's Ch. (U. C.) 259), Waters & W., 21.
Graham *v.* Pacific R. Co. (66 Mo. 536), Car. of L. S., 123, 124; Eject. Pass., 119, 126; New Tr., 30.
Graham *v.* Pennsylvania Co. (47 Am. & Eng. R. Cas. 522, 139 Pa. St. 149, 21 Atl. Rep. 151), App., 143; Witn., 99, 105.
Graham *v.* Pennsylvania R. Co. (39 Fed. Rep. 596, 12 N. J. L. J. 231), Car. of P., 403.
Graham *v.* Pittsburg & L. E. R. Co. (51 Am. & Eng. R. Cas. 619, 145 Pa. St. 504, 22 Atl. Rep. 983, 48 Phila. Leg. Int. 538, 22 Pittsb. L. J. (N. S.) 164), Em. Dom., 452, 454, 458.
Graham *v.* Strader (5 B. Mon. (Ky.) 173), Car. of Slaves, 8, 12, 13.
Graham *v.* Toronto, G. & B. R. Co. (23 U. C. C. P. 541), Agency, 78; Car. of P., 298.
Grahlman *v.* Chicago, St. P. & K. C. R. Co. (42 Am. & Eng. R. Cas. 588, 78 Iowa 564, 5 L. R. A. 813, 43 N. W. Rep. 529), Cat.-Gds., 18, 28; Witn., 97.
Gram *v.* Northern Pac. R. Co. (45 Am. & Eng. R. Cas. 544, 1 N. Dak. 252, 46 N. W. Rep. 972), Fires, 62, 66, 161, 192, 216, 254, 320, 326.
Gramlich *v.* Germantown Branch R. Co. (9 Phila. (Pa.) 78), Contrib. Neg., 87; Cross., Inj. at, 224.
Grand *v.* Michigan C. R. Co. (48 Am. & Eng. R. Cas. 383, 83 Mich. 564, 47 N. W. Rep. 837), Employés, Inj. to, 64, 409.
Grand Chute *v.* Winegar (15 Wall. (U. S.) 355), Mun. Aid, 353.
Grand Gulf R. & B. Co. *v.* State (18 Miss. 428), Quo War., 3.
Grand Junction & M. R. Co. *v.* Peterborough (13 App. Cas. 136), Charters, 118.
Grand Junction R. & D. Co. *v.* Middlesex County Com'rs (14 Gray (Mass.) 553), Cross. Rys., 22, 29; Em. Dom., 255, 326; Location, etc., 16.
Grand Junction R. Co., In re (44 U. C. Q. B. 203), Em. Dom., 1270.
Grand Junction R. Co. *v.* Bickford (23 Grant's Ch. (U. C.) 302), Mort., 10, 79.
Grand Junction R. Co. *v.* Hastings County (25 Grant's Ch. (U. C.) 40), Mun. Aid, 55, 196.
Grand Junction R. Co. *v.* Midland R. Co. (7 Ont. App. 681), Name, 1; Sales of Rds., 1.
Grand Junction R. Co. *v.* Peterborough County (8 Can. Sup. Ct. 76; affirming 6 Ont. App. 339), Mun. Aid. 249.
Grand Junction R. Co. *v.* Peterborough County (6 Ont. App. 339; reversing 45 U. C. Q. B. 302), Em. Dom., 1212, 1221; Mand., 19; Mun. Aid 297.
Grand Junction R. Co *v.* Peterboro County (10 Ont. Pr. 107), Costs, 3.
Grand Junction R. Co. *v.* Peterborough County (13 Ont. App. 420), Mand., 19.
Grand Junction R. Co. *v.* Pope (30 U. C. C. P. 633), Constr. Rys., 107.
Grand Junction R. Co. *v.* White (8 M. & W. 214), Tresp., 3.
Grand Rapids *v.* Grand Rapids & I. R. Co. (58 Mich. 641), Cross., St. & H., 72, 79; Estop., 4.
Grand Rapids *v.* Grand Rapids & I. R. Co. (66 Mich. 42, 9 West. Rep. 573, 33 N. W. Rep. 15), Cross., St. & H., 75; Em. Dom., 101, 109.
Grand Rapids *v.* Luce (92 Mich. 92, 52 N. W. Rep. 635), Em. Dom., 593.
Grand Rapids & B. C. R. Co. *v.* Van Deusen (29 Mich. 431), Constr. Rys., 27, 41.
Grand Rapids & I. R. Co. *v.* Boyd (65 Ind. 526), Car. of P., 126, 127, 131, 151; Trial, 216.
Grand Rapids & I. R. Co. *v.* Cameron (45 Mich. 451, 8 N. W. Rep. 99), Animals, 281.
Grand Rapids & I. R. Co. *v.* Diller (110 Ind. 223, 9 N. E. Rep. 710), Evid., 195.
Grand Rapids & I. R. Co. *v.* Ellison (Ind.) (18 N. E. Rep. 507), Trial, 215.
Grand Rapids & I. R. Co. *v.* Ellison (39 Am. & Eng. R. Cas. 480, 117 Ind. 234, 20 N. E. Rep. 135), Car. of P., 129, 131, 137, 354, 609; Collis., 7; Cross. Rys., 80; Negl., 26; Witn., 141.
Grand Rapids & I. R. Co. *v.* Heisel (38 Mich. 62; further appeal 47 Mich. 393, 11 N. E. Rep. 212), Nuis., 3; Sts. & H., 142.
Grand Rapids & I. R. Co. *v.* Heisel (10 Am. & Eng. R. Cas. 260, 47 Mich. 393, 11 N. W. Rep. 212), Em. Dom., 646, 985; Sts. & H., 14, 106, 168, 212, 264, 290; Trial, 112.
Grand Rapids & I. R. Co. *v.* Horn (41 Ind. 479), Em. Dom., 724, 733.
Grand Rapids & I. R. Co. *v.* Huntley (38 Mich. 537), Car. of P., 6, 126, 143, 151, 195; Evid., 31, 91, 177; Negl., 41, 100; Witn., 128, 129, 139, 140, 164; Words & Ph., 7.
Grand Rapids & I. R. Co. *v.* Judson (34 Mich. 506), Cat.-Gds., 31; Negl., 100.
Grand Rapids & I. R. Co. *v.* Jones (81 Ind. 523), Animals, 126; Fences, 78.
Grand Rapids & I. R. Co. *v.* McAnnally (98 Ind. 412), Trial, 219.
Grand Rapids & I. R. Co. *v.* Martin (41 Mich. 667), Contrib. Neg., 22, 29; Dam., 86; Stat. & D., 97, 100, 113.

Grand Rapids & I. R. Co. *v.* Monroe (47 Mich. 152, 10 N. W. Rep. 179), Animals, 141.
Grand Rapids & I. R. Co. *v.* Sanders (17 Hun (N. Y.) 552; reversing 54 How. Pr. 214), Mun. Aid, 376.
Grand Rapids & I. R. Co. *v.* Showers (2 Am. & Eng. R. Cas. 9, 71 Ind. 451), Employés, Inj. to, 465.
Grand Rapids & I. R. Co. *v.* Southwick (30 Mich. 444), Animals, 329, 332, 349; Pl., 45.
Grand Rapids & I. R. Co. *v.* Weiden (70 Mich. 390, 14 West. Rep. 642, 38 N. W. Rep. 294), Em. Dom., 61, 274, 279, 346, 366, 709, 925.
Grand Rapids Booming Co. *v.* Jarvis (30 Mich. 308), Em. Dom., 171; Flood. Lds., 93.
Grand Rapids, L. & D. R. Co. *v.* Chesebro (39 Am. & Eng. R. Cas. 159, 74 Mich. 466, 42 N. W. Rep. 66), Em. Dom., 238, 244, 276, 338, 384, 459, 549, 555, 567, 576, 665, 670, 672, 839; Witn., 174.
Grand Rapids, L. & D. R. Co. *v.* Weiden (69 Mich. 572, 14 West. Rep. 59, 37 N. W. Rep. 872), Cert., 2, 11; Em. Dom., 324, 325, 595.
Grand Rapids, N. & L. S. R. Co. *v.* Alley (34 Mich. 18), Em. Dom., 257, 271.
Grand Rapids, N. & L. S. R. Co. *v.* Grand Rapids & I. R. Co. (35 Mich. 265, 15 Am. Ry. Rep. 317), Em. Dom., 112.
Grand Rapids, N. & L. S. R. Co. *v.* Van Driele (24 Mich. 409, 4 Am. Ry. Rep. 171), Em. Dom., 321, 820.
Grand Rapids St. R. Co. *v.* West Side St. R. Co. (7 Am. & Eng. R. Cas. 95, 48 Mich. 433, 12 N. W. Rep. 643), St. Rys., 51, 80.
Grand Tower M. & T. Co. *v.* Ullman (89 Ill. 244), Car. of M., 95; Receiv., 183.
Grand Trunk R. Co., In re (2 Int. Com. Rep. 496, 3 Int. Com. Com. 89), Int. Com., 15, 61, 133, 142.
Grand Trunk R. Co., Ex parte (6 Low. Can. 54), Em. Dom., 1233.
Grand Trunk R. Co. *v.* Amey (20 U. C. C. P. 6), App., 8.
Grand Trunk R. Co. *v.* Beckett (16 Can. Sup. Ct. 713; affirming 13 Ont. App. 174, which affirms 8 Ont. 601), Cross., Inj. at, 300; Death, etc., 261, 379.
Grand Trunk R. Co. *v.* Credit Valley R. Co. (26 Grant's Ch. (U. C.) 572), Injunc., 24.
Grand Trunk R. Co. *v.* Credit Valley R. Co. (27 Grant's Ch. (U. C.) 232), Pub. Lds., 19.
Grand Trunk R. Co. *v.* Cummings (11 Am. & Eng. R. Cas. 254, 12 Am. & Eng. R. Cas. 204, 106 U. S. 700, 1 Sup. Ct. Rep. 493), App., 84, 113; Fel. Serv., 57, 58, 461.
Grand Trunk R. Co. *v.* Dyer (49 Vt. 74), Deeds, 20.
Grand Trunk R. Co. *v.* Fitzgerald (5 Can. Sup. Ct. 204), Bills of L., 43.
Grand Trunk R. Co. *v.* Fitzgerald (19 Can. Sup. Ct. 359), Parties, 7.
Grand Trunk R. Co. *v.* Ives (55 Am. & Eng. R. Cas. 159, 144 U. S. 408, 12 Sup. Ct. Rep. 679), Contrib. Neg., 83, 98; Cross., Inj. at, 71, 75, 102, 221; Employés, Inj. to, 299; Negl., 18, 30, 67.
Grand Trunk R. Co. *v.* Jennings (13 App. Cas. 800), Death, etc., 39, 379.
Grand Trunk R. Co. *v.* Latham (63 Me. 177), Agency, 31; Costs, 12.
Grand Trunk R. Co. *v.* Lees (9 U. C. C. P. 249), Mort., 68, 304.
Grand Trunk R. Co. *v.* McMillan (42 Am. & Eng. R. Cas. 468, 16 Can. Sup. Ct. 543; allowing appeal 15 Ont. App. 14, which affirms 12 Ont. 103), Car. of M., 486, 602, 674, 675.
Grand Trunk R. Co. *v.* Meegan (1 Montr. L. R. 364), Fires, 32.
Grand Trunk R. Co. *v.* Miville (14 Low. Can. 469), Flood. Lds., 44.
Grand Trunk R. Co. *v.* Richardson (91 U. S. 454), Fires, 16, 26, 94, 202, 222, 233; Words & Ph., 12.
Grand Trunk R. Co. *v.* Rosenberger (19 Am. & Eng. R. Cas. 8, 9 Can. Sup. Ct. 311; affirming 8 Ont. App. 482, which affirms 32 U. C. C. P. 349), Cross., Inj. at, 104.
Grand Trunk R. Co. *v.* Sibbald (20 Can. Sup. Ct. 259; affirming 18 Ont. App. 184, 19 Ont. 164), Cross., Inj. at, 139; Sts. & H., 176.
Grand Trunk R. Co. *v.* Stevens (95 U. S. 655), Passes, 37.
Grand Trunk R. Co. *v.* Vogel (27 Am. & Eng. R. Cas. 18, 11 Can. Sup. Ct. 612; affirming 10 Ont. App. 162, which affirms 2 Ont. 197), Car. of L. S., 77.
Grand Trunk R. Co. *v.* Walker (25 Law. Ed. (U. S.) 977), Negl., 20.
Granger *v.* Boston & A. R. Co. (146 Mass. 276, 5 N. Eng. Rep. 821, 15 N. E. Rep. 619), Cross., Inj. at, 211.
Granier *v.* Louisiana Western R. Co. (42 La. Ann. 880, 8 So. Rep. 614), Eject. Pass., 91; Tickets & F., 63.
Granite R. Co. *v.* Bacon (15 Pick. (Mass.) 239), Bills & N., 8.
Grannahan *v.* Hannibal & St. J. R. Co. (30 Mo. 546), Constr. Rys., 92; Just. P., 1.
Grannis *v.* Cherokee Tp. (47 Fed. Rep. 427), Mun. Aid, 338.
Grannis *v.* Chicago, St. P. & K. C. R. Co. (81 Iowa 444, 46 N. W. Rep. 1067), Employés, Inj. to, 32, 121, 305, 776; Evid., 47.
Grannis *v.* St. Paul & C. R. Co. (18 Minn. 194) (Gil. 178), Em. Dom., 837.
Grant *v.* Baltimore & P. R. Co. 22 MacArth. (D. C.) 277), Sts. & H., 412.
Grant *v.* Courter (24 Barb. (N. Y.) 232), Mun. Aid, 44.
Grant *v.* East & W. R. Co. (50 Fed. Rep. 795, 2 U. S. App. 182, 1 C. C. A. 681), App., 7.
Grant *v.* East & W. R. Co. (54 Fed. Rep. 569, 2 U. S. App. 182, 4 C. C. A. 511; affirming 52 Fed. Rep. 531), Stock, 6; Subscr., 19, 24.
Grant *v.* Great Western R. Co. (7 U. C. C. P. 438), Ex. & Ad., 1.
Grant *v.* Green (46 Ill. 469), Constr. Rys., 101.
Grant *v.* Hannibal & St. J. R. Co. (25 Mo. App. 227), Animals, 67.
Grant *v.* Hartford & N. H. R. Co. (93 U. S. 225), Rev., 7.
Grant *v.* Iowa R. Land Co. (54 Iowa 673, 7 N. W. Rep. 113), Tax., 117.

Grant *v.* Moseley (29 Ala. 302), Negl., 1; Words & Ph., 138.
Grant *v.* Northern Pac. R. Co. (22 Ont. 645), Car. of M., 193.
Grant *v.* Pennsylvania & N. Y. C. & R. Co. (4 Silv. App. (N. Y.) 302), Evid., 142.
Grant *v.* Pennsylvania & N. Y. C. & R. Co. (133 N. Y. 657, 31 N. E. Rep. 220, 45 N. Y. S. R. 305; reversing 59 Hun 616, mem., 35 N. Y. S. R. 999, 14 N. Y. Supp. 948), Negl., 47.
Grant *v.* Raleigh & G. R. Co. (108 N. Car. 462, 13 S. E. Rep. 209), App., 68; Evid., 90; Negl., 103; Side Tr., 4; Witn., 95.
Grant *v.* Savannah, G. & N. A. R. Co. (51 Ga. 348, 7 Am. Ry. Rep. 81), Constr. Rys., 29, 70.
Grant *v.* Union Pac. R. Co. (45 Fed. Rep. 673), Contrib. Neg., 83; Dam., 67; Employés, Inj. to, 14, 74, 665; Negl., 70.
Grant *v.* Union Pac. R. Co. (6 Utah 270, 21 Pac. Rep. 996), Witn., 3.
Grant *v.* United Kingdom S. R. Co. (40 Ch. D., 135), Direct., 25.
Grantham Canal Co. *v.* Ambergate, N. & E. & B. J. R. Co. (15 Jur. 991, 21 L. J. Q. B. 322), Stat., 48.
Grantham C. Nav. *v.* Hall (13 M. & W. 114; affirmed in 14 M. & W. 880, 1 Ry. & C. T. Cas. 23), Charges, 127.
Grasse *v.* Milwaukee, L. S. & W. R. Co. (36 Wis. 582), Farm Cross., 11; Witn., 65.
Gratiot *v.* Missouri Pac. R. Co. (Mo.) (49 Am. & Eng. R. Cas. 398, 16 S. W. Rep. 384), Cross., Inj. at, 269, 318, 365; Negl., 29; Pl., 110.
Gratiot *v.* Missouri Pac. R. Co. (Mo.) (19 S. W. Rep. 31), Cross., Inj. at, 259.
Gratiot *v.* Missouri Pac. R. Co. (55 Am. & Eng. R. Cas. 108, 116 Mo. 450, 21 S. W. Rep. 1094), App., 125; Cross., Inj. at, 131, 218, 320; Negl., 24, 29, 67; Sts. & H., 318, 326.
Gratz *v.* Pennsylvania R. Co. (41 Pa. St. 447), Leases, 28; State Aid, 29.
Gratz *v.* Redd (4 B. Mon. (Ky.) 178), Arb., 2; Cred. Bill, 2, 7; Direct., 53; Evid., 233; Mort., 30; Subscr., 181.
Grau *v.* St. Louis, K. C. & N. R. Co. (54 Mo. 240, 12 Am. Ry. Rep. 376), Animals, 604, 625.
Gravelle *v.* Minneapolis & St. L. R. Co. (3 McCrary (U. S.) 352, 10 Fed. Rep. 711), Contrib. Neg., 4; Employés, Inj. to, 93, 99, 182, 630; Fel. Serv., 1, 202, 218, 490; Negl., 1.
Graves *v.* Chicago, M. & St. P. R. Co. (47 Minn. 429, 50 N. W. Rep. 474), Fences, 89.
Graves *v.* Hartford & N. Y. Steamboat Co. (38 Conn. 143), Car. of M., 339.
Graves *v.* Harwood (9 Barb. (N. Y.) 477), Bills of L., 17.
Graves *v.* Lake Shore & M. S. R. Co. (16 Am. & Eng. R. Cas. 108, 137 Mass. 33, 50 Am. Rep. 282), Bills of L., 81; Car. of M., 444.
Graves *v.* Northern Pac. R. Co. (19 Am. & Eng. R. Cas. 436, 5 Mont. 556, 6 Pac. Rep. 16, 51 Am. Rep. 81), Animals, 8; Stat., 28; Trial, 1.
Graves *v.* State (63 Ala. 134), Crim. L., 10.
Graville *v.* Manhattan R. Co. (34 Am. & Eng. R. Cas. 375, 105 N. Y. 525, 12 N. E. Rep. 51, 8 N. Y. S. R. 20; reversing 13 Daly 32), Car. of P., 473.
Graville *v.* New York C. & H. R. R. Co. (1 Silv. App. 331, 5 N. Y. S. R. 721; affirming 34 Hun 224), App., 2.
Gray, In re (44 L. T. 567), Vend. & P., 3.
Gray, In re (L. R. 1 Q. B. D. 696, 45 L. J. Q. B. D. 818, 24 W. R. 758, 34 L. T. 757), Em. Dom., 1144.
Gray *v.* Burlington & M. R. Co. (37 Iowa 119), Em. Dom., 202; Farm Cross., 4, 7, 9; Words & Ph., 8.
Gray *v.* Chicago, I. & N. R. Co. (10 Wall. (U. S.) 454), Bridges, 60.
Gray *v.* Chicago, M. & St. P. R. Co. (75 Iowa 100, 39 N. W. Rep. 213), App., 109.
Gray *v.* Cincinnati Southern R. Co. (11 Fed. Rep. 683), Car. of P., 60, 72; Col. Pers., 6, 8, 13.
Gray *v.* Danbury (29 Am. & Eng. R. Cas. 486, 54 Conn. 574, 10 Atl. Rep. 198), Bridges, 20, 25, 54.
Gray *v.* Delaware, L. & W. R. Co. (16 J. & S. (N. Y.) 121), Contr., 75.
Gray *v.* First Div. St. P. & P. R. Co. (13 Minn. 315 (Gil. 289), Em. Dom., 160; Sts. & H., 106, 238.
Gray *v.* Hinton (2 McCrary (U. S.) 167, 7 Fed. Rep. 81), Subscr., 211.
Gray *v.* Jackson (51 N. H. 9), Car. of M., 404, 616.
Gray *v.* Lowell & L. R. Co. (4 Cush. (Mass.) 609), Em. Dom., 774.
Gray *v.* McLaughlin (26 Iowa 279), Evid., 211.
Gray *v.* Manhattan R. Co. (51 N. Y. S. R. 905, 22 N. Y. Supp. 771, 3 Misc. 239), Elev. Rys., 196.
Gray *v.* Manhattan R. Co. (16 Daly (N. Y.) 510), Elev. Rys., 192.
Gray *v.* Manhattan R. Co. (128 N. Y. 499, 28 N. E. Rep. 498, 40 N. Y. S. R. 478; affirming 35 N. Y. S. R. 32, 12 N. Y. Supp. 542, 16 Daly 510), App., 15; Elev. Rys., 120 190; Injunc., 9.
Gray *v.* Missouri River Packet Co. (64 Mo. 47), Car. of M., 120, 762; Dam., 107.
Gray *v.* Northeastern R. Co. (48 L. T. 904, 4 Ry. & C. T. Cas. xv), Cross., Inj. at, 122, 137.
Gray *v.* Philadelphia & R. R. Co. (22 Am. & Eng. R. Cas. 351, 24 Fed. Rep. 168, 23 Blatchf. (U. S.) 265), Fel. Serv., 126; Imp. Neg., 24.
Gray *v.* Rochester City & B. R. Co. (40 N. Y. S. R. 715, 61 Hun 212, 15 N. Y. Supp. 927), Car. of P., 168.
Gray *v.* St. Louis, I. M. & S. R. Co. (54 Mo. App. 666), Car. of M., 766, 800.
Gray *v.* St. Louis & S. F. R. Co. (22 Am. & Eng. R. Cas. 106, 81 Mo. 126), Em. Dom., 77, 133, 238, 971, 1019, 1027.
Gray *v.* Scott (66 Pa. St. 345), Children, Inj. to, 94.
Gray *v.* Second Ave. R. Co. (65 N. Y. 561; affirming (?) 2 J. & S. 510), St. Rys., 501.
Gray *v.* White Mountains (N. H.) R. Co. (56 N. H. 182, 20 Am. Ry. Rep. 450), Stat., 68.

Gray *v.* York (15 Blatchf. (U. S.) 335), Mun. Aid, 338.
Grayville & M. R. Co. *v.* Burns (92 Ill. 302), Evid., 156.
Grayville & M. R. Co. *v.* Christy (92 Ill. 337), Em. Dom., 429.
Greany *v.* Long Island R. Co. (24 Am. & Eng. R. Cas. 473, 101 N. Y. 419, 5 N. E. Rep. 425; affirming 31 Hun 173), Cross., Inj. at, 247; Evid., 298; Trial, 79.
Great C. R. Co. *v.* Gulf, C. & S. F. R. Co. (26 Am. & Eng. R. Cas. 114, 63 Tex. 529), St. Rys., 26, 86
Great Eastern R. Co. *v.* East London R. Co. (44 L. T. 903), Receiv., 83.
Great Eastern R. Co. *v.* Hackney Dist. Board of Works (13 Am. & Eng. R. Cas. 404, L. R. 8 App. Cas. 687, 52 L. J. M. C. 105, 49 L. T. 509, 31 W. R. 769; reversing L. R. 9 Q. B. D. 412, 51 L. J. M. C. 57, 46 L. T. 679, 30 W. R. 765), Sts. & H., 359.
Great Eastern R. Co. *v.* Harwich (41 L. T. 533, 3 Ry. & C. T. Cas. xiii), Rev., 1.
Great Eastern R. Co. *v.* Haughley (L. R. 1 Q. B. 666, 12 Jur. N. S. 596, 35 L. J. M. C. 229, 14 L. T. 548, 14 W. R. 779), Tax., 367, 375.
Great Eastern R. Co. *v.* Turner (42 L. J. Cg. 83, L. R. 8 Ch. 149, 27 L. T. 697, 21 W. R. 163), Corp., 12.
Great Falls & C. R. Co. *v.* Copp (38 N. H. 124), Subscr., 62.
Great Northern R. Co., In re (L. R. 25 Ch. D. 788, 53 L. J. Ch. D. 445, 50 L. T. 87, 32 W. R. 519), Contr., 80.
Great Northern R. Co. *v.* Behrens (7 H. & N. 950, 8 Jur. N. S. 567, 31 L. J. Ex. 299, 10 W. R. 389, 8 L. T. 328; affirming 6 H. & N. 366, 30 L. J. Ex. 153, 9 W. R. 338, 3 L. T. 863), Car. of M., 526.
Great Northern R. Co. *v.* Belfast C. R. Co. (3 Ry. & C. T. Cas. 411), Charges, 98, 101.
Great Northern R. Co. *v.* Eastern Counties R. Co. (9 Hare 306, 7 Railw. Cas. 643, 21 L. J. Ch. 837, 1 Ry. & C. T. Cas. 19), Contr., 56; Injunc., 4.
Great Northern R. Co. *v.* Harrison (10 Ex. 376, 2 C. L. R. 1136, 23 L. J. Ex. 308), Fasses, 14.
Great Northern R. Co. *v.* Harrison (12 C. B. 576, 16 Jur. 565, 22 L. J. C. P. 815), Contr., 69; Cov'ts, 1.
Great Northern R. Co. *v.* Hawcroft (21 L. J. Q. B. 178, 16 Jur. 196), Car. of P., 122.
Great Northern R. Co. *v.* Kennedy (7 D. & L. 197, 4 Ex. 417), Subscr., 186.
Great Northern R. Co. *v.* Morville (7 Railw. Cas. 830, 16 Jur. 528, 21 L. J. Q. B. 319), Car. of M., 522.
Great Northern R. Co. *v.* Rimell (18 C. B. 575), Car. of M., 96, 524.
Great Northern R. Co. *v.* Sheperd (21 L. J. Exch. 114), Bagg., 46.
Great Northern R. Co. *v.* Sheperd (8 Exch. 30, 7 Railw. Cas. 310, 21 L. J. Exch. 286), Bagg., 29, 37, 38, 80.
Great Northern R. Co. *v.* South Yorkshire R. & R. D. Co. (9 Ex. 642, 23 L. J. Ex. 186), Ult. Vir., 19.
Great Northern R. Co. *v.* Swaffield (43 L. J. Ex. 89, L. R. 9 Ex. 132, 30 L. T. 562), Car. of M., 239.
Great Northern R. Co. *v.* Tahourdin (20 Am. & Eng. R. Cas. 562, L. R. 13 Q. B. D. 320, 53 L. J. Q. B. D. 69, 50 L. T. 186, 32 W. R. 559), Exec., 13.
Great Northern R. Co. *v.* Taylor (1 H. & R. 471, L. R. 1 C. P. 385, 12 Jur. N. S. 372, 35 L. J. C. P. 210, 14 W. R. 639, 14 L. T. 363), Car. of M., 28.
Great Northern R. Co. *v.* Walsh (47 Fed. Rep. 406), Int. Com., 228.
Great Northern R. Co. *v.* Whitham (43 L. J. C. P. 1, L. R. 9 C. P. 16), Contr., 10.
Great Northern R. Co. *v.* Winder ([1892] 2 Q. B. 595), Tickets & F., 141, 145.
Great Northern R. Co. *v.* Wyles (2 C. B. N. S. 344), Charges, 67.
Great North of England R. Co. *v.* Biddulph (7 M. & W. 243, 2 Railw. Cas. 401), Subscr., 59, 68, 89.
Great North of Scotland R. Co. *v.* Highland R. Co. (5 Ry. & C. T. Cas. 103), Car. of P., 522.
Great Southern & W. R. Co., Ex parte (11 Ir. Eq. 497), Em. Dom., 1143.
Great Southern & W. R. Co. *v.* Robertson (11 Ir. C. L. 63), Discrim., 32.
Great Western R. Co., Ex parte (L. R. 22 Ch. D. 470, 52 L. J. Ch. D. 734, 48 L. T. 196, 31 W. R. 419, 4 Ry. & C. T. Cas. xvi), Car. of M., 380; Charges, 40.
Great Western R. Co., Ex parte (14 Am. & Eng. R. Cas. 429, L. R. 24 Ch. D. 569, 53 L. J. Ch. 200, 49 L. T. 494, 32 W. R. 147), Em. Dom., 1148.
Great Western R. Co., In re (1 Ont. Pr. 243), Em. Dom., 1265.
Great Western R. Co., In re (1 Ont. Pr. 288), Em. Dom., 1259, 1268.
Great Western R. Co., In re (1 Ont. Pr. 378), Em. Dom., 1263.
Great Western R. Co., In re (23 U. C. C. P. 28), Tax., 10.
Great Western R. Co. *v.* Attorney-General (L. R. 1 H. L. 1, 12 Jur. N. S. 417, 35 L. J. Ex. 123, 14 W. R. 519, 14 L. T. 33), Tickets & F., 142.
Great Western R. Co. *v.* Baby (12 U. C. Q. B. 106), Em. Dom., 1260, 1262, 1264, 1268.
Great Western R. Co. *v.* Bacon (30 Ill. 347), Animals, 353.
Great Western R. Co. *v.* Badgworth (L. R. 2 Q. B. 251, 36 L. J. M. C. 33, 2 Ry. & C. T. Cas. 19), Tax., 373.
Great Western R. Co. *v.* Bagge (23 Am. & Eng. R. Cas. 715, L. R. 15 Q. B. D. 625, 54 L. J. Q. B. 599, 53 L. T. 225, 5 Ry. & C. T. Cas. vii), Charges, 74.
Great Western R. Co. *v.* Bailie (5 B. & S. 928, 11 Jur. N. S. 264, 34 L. J. M. C. 31, 13 W. R. 203, 11 L. T. 418), Stat. & D., 27.
Great Western R. Co. *v.* Bennett (2 H. L. Cas. 27, 15 W. R. 647, 16 L. T. 186, 36 L. J. Q. B. 133), Em. Dom., 1107, 1158; Mines, etc., 3.
Great Western R. Co. *v.* Bishop (L. R. 7 Q. B. 550, 41 L. J. M. C. 120, 20 W. R. 969, 26 L. T. 905), Nuis., 6.
Great Western R. Co. *v.* Blake (7 H. & N. 987, 8 Jur. N. S. 1013, 31 L. J. Ex. 346, 10 W. R. 388, 7 L. T. 94), Car. of P., 508.
Great Western R. Co. *v.* Blower (41 L. J. C. P. 268, L. R. 7 C. P. 655, 20 W. R.

776, 27 L. T. 883, 3 Ry. & C. T. Cas. xii), Car. of L. S., 23, 24.
Great Western R. Co. *v.* Braid (1 Moore P. C. C. N. S. 101, 9 Jur. N. S. 339, 11 W. R. 444, 8 L. T. 31), Constr. Rys., 9.
Great Western R. Co. *v.* Bristol Port R. & P. Co. (5 Ry. & C. T. Cas. 94), Car. of P., 522; Leases, 118.
Great Western R. Co. *v.* Brown (3 Can. Sup. Ct. 159), Cross. Rys., 82.
Great Western R. Co. *v.* Bunch (13 App. Cas. 31, 57 L. J. Q. B. 361), Bagg., 50, 79, 80.
Great Western R. Co. *v.* Burns (60 Ill. 284, 12 Am. Ry. Rep. 309), Car. of M., 58, 504.
Great Western R. Co. *v.* Central Wales & C. J. R. Co. (4 Ry. & C. T. Cas. 358), Leases, 137.
Great Western R. Co. *v.* Central Wales & C. J. R. Co. (5 Ry. & C. T. Cas. 1), Charges, 106.
Great Western R. Co. *v.* Crouch (3 H. & N. 183, 4 Jur. N. S. 457, 27 L. J. Ex. 345), Car. of M., 239, 375.
Great Western R. Co. *v.* Davies (39 L. T. 475), Animals, 178.
Great Western R. Co. *v.* Decatur (33 Ill. 381), Fright. Teams, 3.
Great Western R. Co. *v.* Dodds (12 U. C. Q. B. 133), Em. Dom., 1265.
Great Western R. Co. *v.* Dougall (12 U. C. Q. B. 131), Em. Dom., 1265, 1268.
Great Western R. Co. *v.* Fawcett (1 Moore P. C. C. N. S. 101, 9 Jur. N. S. 339, 11 W. R. 444, 8 L. T. 31), Car. of P., 586; Constr. Rys., 4; Derailm., 4; Evid., 280.
Great Western R. Co. *v.* Ferman (8 U. C. C. P. 221), Tax., 389.
Great Western R. Co. *v.* Galt & G. R. Co. (8 Grant's Ch. (U. C.) 283), Mort., 160.
Great Western R. Co. *v.* Geddis (33 Ill. 304), Animals, 192.
Great Western R. Co. *v.* Glenister (22 W. R. 72, 29 L. T. 422), Car. of M., 479.
Great Western R. Co. *v.* Goodman (12 C. B. 313, 16 Jur. 862, 21 L. J. C. P. 197), Lim. of Liab., 13.
Great Western R. Co. *v.* Grand Trunk R. Co. (24 U. C. Q. B. 107), Contr., 8.
Great Western R. Co. *v.* Grand Trunk R. Co. (25 U. C. Q. B. 37), Contr., 8.
Great Western R. Co. *v.* Hanks (25 Ill. 241), Evid., 295.
Great Western R. Co. *v.* Hanks (36 Ill. 281), Animals, 351, 353, 358.
Great Western R. Co. *v.* Hawkins (18 Mich. 427), Car. of L. S., 7, 137.
Great Western R. Co. *v.* Haworth (39 Ill. 346), Fires, 54, 120; Witn., 79.
Great Western R. Co. *v.* Helm (27 Ill. 198), Animals, 353.
Great Western R. Co. *v.* Hodgson (44 U. C. Q. B. 187), Replev., 1, 2; Wareh., 2.
Great Western R. Co. *v.* Hunt (12 U. C. Q. B. 124), Em. Dom., 1265.
Great Western R. Co. *v.* Jones (13 Grant's Ch. (U. C.) 355), Em. Dom., 1249.
Great Western R. Co. *v.* Jones (2 Chan. Chamb. (U. C.) 219), Land Grants, 137.
Great Western R. Co. *v.* Lutz (32 U. C. C. P. 166), Ejectm., 14.
Great Western R. Co. *v.* McCarthy (29 Am. & Eng. R. Cas. 87, 12 App. Cas. 218; reversed in Ir. L. R. 18 Q. B. D. 1), Car. of L. S., 68.
Great Western R. Co. *v.* McComas (33 Ill. 185), Car. of M., 313, 710.
Great Western R. Co. *v.* McDonald (18 Ill. 172), Bills of L., 20.
Great Western R. Co. *v.* McEwan (28 U. C. Q. B. 528), Replev., 3, 4.
Great Western R. Co. *v.* McEwan (30 U. C. Q. B. 559), Tresp., 25.
Great Western R. Co. *v.* May (43 L. J. Q. B. 233, 31 L. T. 137, L. R. 7 H. L. Cas. 283, 23 W. R. 141; affirming L. R. 8 Q. B. 26, 42 L. J. Q. B. 6, 27 L. T. 620, 21 W. R. 295, L. R. 7 Q. B. 364, 41 L. J. Q. B. 104, 26 L. T. 17, 20 W. R. 328), Em. Dom., 1109, 1113, 1118.
Great Western R. Co. *v.* Melksham (34 J. P. 102, 2 Ry. & C. T. Cas. 20), Tax., 363.
Great Western R. Co. *v.* Miller (12 U. C. Q. B. 654), Em. Dom., 1253.
Great Western R. Co. *v.* Miller (19 Mich. 305), Eject. Pass., 57, 65, 68.
Great Western R. Co. *v.* Morthland (30 Ill. 451), Animals, 31, 127.
Great Western R. Co. *v.* Pocock (41 L. T. 415, 3 Ry. & C. T. Cas. xxii), Tickets & F., 77, 119.
Great Western R. Co. *v.* Preston & B. R. Co. (17 U. C. Q. B. 477), Leases, 134.
Great Western R. Co. *v.* Queen (1 El. & Bl. 874, 16 Jur. 675), Branch & L. Roads, 14.
Great Western R. Co. *v.* Railway Com'rs (2 Am. & Eng. R. Cas. 617, 7 Q. B. D. 182, 50 L. J. Q. B. 483, 45 L. T. 206, 29 W. R. 901; affirming 45 L. T. 65), Charges, 19; Discrim., 50; Tickets & F., 138.
Great Western R. Co. *v.* Redmayne (L. R. 1 C. P. 329, 12 Jur. N. S. 692, 35 L. J. C. P. 123, 14 W. R. 206, 1 H. & R. 97), Car. of M., 805.
Great Western R. Co. *v.* Rimell (27 L. J. C. P. 201), Car. of M., 524.
Great Western R. Co. *v.* Rogers (27 U. C. Q. B. 214), Tax., 387.
Great Western R. Co. *v.* Rogers (29 U. C. Q. B. 245), Tax., 386, 389.
Great Western R. Co. *v.* Rolph (1 Ont. Pr. 50), Em. Dom., 1261.
Great Western R. Co. *v.* Rouse (15 U. C. Q. B. 168), Tax., 384.
Great Western R. Co. *v.* Severn & W. & S. B. R. Co. (5 Ry. & C. T. Cas. 170), Charges, 100, 101, 103, 123.
Great Western R. Co. *v.* Smith (26 W. R. 130; affirming L. R. 2 Ch. D. 235, 45 L. J. Ch. 235, 34 L. T. 267, 24 W. R. 443), Mines, etc., 8.
Great Western R. Co. *v.* Sutton (L. R. 4 H. L. Cas. 226, 38 L. J. Ex. 177, 18 W. R. 92, 1 Ry. & C. T. Cas. 20; affirmed in 3 H. & C. 800, 35 L. J. Ex. 18), Charges, 9, 39, 91, 93; Discrim., 10, 55.
Great Western R. Co. *v.* Swindon & C. R. Co. (L. R. 9 App. Cas. 787, 53 L. J. Ch. 1075, 51 L. T. 798, 32 W. R. 957, 48 J. P. 821; affirming L. R. 22 Ch. D. 677, 53 L. J. Ch. 306, 47 L. T. 709, 31 W. R. 479), Cross. Rys., 58.

Great Western R. Co. *v.* Thompson (17 Ill. 131), Animals, 48, 50.
Great Western R. Co. *v.* Toorner (11 W. R. 464), Charges, 31.
Great Western R. Co. *v.* Vilaire (11 U. C. C. P. 509), Animals, 113; Fences, 40.
Great Western R. Co. *v.* Warner (19 Grant's Ch. (U. C.) 506), Em. Dom., 1264.
Great Western R. Co. *v.* Waterford & L. R. Co. (L. R. 17 Ch. D. 493, 50 L. J. Ch. D. 513, 44 L. T. N. S. 723, 29 W. R. 826), Arb., 1, 2.
Great Western R. Co. *v.* Wheeler (20 Mich. 419), Agency, 43.
Great Western R. Co. *v.* Willis (18 C. B. N. S. 748, 34 L. J. C. P. 195, 12 L. T. 349), Evid., 195.
Greaves *v.* Gouge (52 How. Pr. (N. Y.) 58; affirming 49 How. Pr. 79; affirmed in 69 N. Y. 154, 54 How. Pr. 272), Parties, 9.
Greeley *v.* Federal St. & P. V. Pass. R. Co. (153 Pa. St. 218, 25 Atl. Rep. 796), Elec. Rys., 21.
Greeley *v.* Maine C. R. Co. (53 Me. 200), Flood. Lds., 45.
Greeley *v.* St. Paul, M. & M. R. Co. (19 Am. & Eng. R. Cas. 559, 33 Minn. 136, 53 Am. Rep. 16, 22 N. W. Rep. 179), Cat.-Gds., 11; Fences, 56.
Greeley, S. L. & P. R. Co. *v.* Yeager (11 Colo. 345, 18 Pac. Rep. 211), Dam., 28.
Green *v.* Boody (21 Ind. 10), Pl., 54.
Green *v.* Boston & L. R. Co. (128 Mass. 221, 35 Am. Rep. 370), Car. of M., 444, 570, 745, 797.
Green *v.* Canaan (29 Conn. 157), Corp., 10; Dedica., 1.
Green *v.* Charlotte, C. & A. R. Co. (6 So. Car. 342), Words & Ph., 71a.
Green *v.* Clark (5 Den. (N. Y.) 497), Judgm., 16.
Green *v.* Cross (79 Tex. 130, 15 S. W. Rep. 220), Employés, Inj. to, 227.
Green *v.* Delaware & H. Canal Co. (38 Hun (N. Y.) 51), Sts. & H., 320.
Green *v.* Dyersburg (2 Flipp. (U. S.) 477), Mun. Aid, 233, 273, 322, 324.
Green *v.* Eastern R. Co. (52 Minn. 79, 53 N. W. Rep. 808), Cross., Inj. at, 139; Sts. & H., 319.
Green *v.* Erie R. Co. (11 Hun (N. Y.) 333), Contrib. Neg., 48, 83.
Green *v.* Hudson River R. Co. (16 How. Pr. (N. Y.) 263; affirmed in 31 Barb. 260), Death, etc., 46.
Green *v.* Hudson River R. Co. (2 Abb. App. Dec. (N. Y.) 277), Death, etc., 47.
Green *v.* Hudson River R. Co. (32 Barb. (N. Y.) 25; affirmed in 30 How. Pr. 593, n.), Death, etc., 222, 402; New Tr., 7.
Green *v.* Indianapolis & St. L. R. Co. (56 Mo. 556), Car. of M., 108.
Green *v.* Milwaukee & St. P. R. Co. (38 Iowa 100), Bagg., 48.
Green *v.* Milwaukee & St. P. R. Co. (41 Iowa 410), Bagg., 48, 54.
Green *v.* Missouri Pac. R. Co. (82 Mo. 653), Em. Dom., 400, 974; Pres., 9.
Green *v.* Morris & E. R. Co. (24 N. J. L. 486), Farm Cross., 5, 7, 14, 15; Words & Ph., 204.
Green *v.* New York C. R. Co. (12 Abb. Pr. N. S. (N. Y.) 473, 4 Daly 553), Bagg., 19, 115; Car. of M., 589.
Green *v.* North Carolina R. Co. (73 N. Car. 524), Sales, 3.
Green *v.* North Carolina R. Co. (77 N. Car. 95), Contr., 17.
Green *v.* Pacific Exp. Co. (37 Mo. App. 537), Exp. Cos., 50, 69.
Green *v.* Pennsylvania R. Co. (36 Fed. Rep. 66), Dam., 21; Stat. & D., 76, 94.
Green *v.* Portland (32 Me. 431), Priv. Rds., 2.
Green *v.* Southern Exp. Co. (41 Ga. 515), False Imp., 3; Jurisd., 10; New Tr., 28, 72; Release, 11.
Green *v.* Southern Exp. Co. (45 Ga. 305), Exp. Cos., 28; New Tr., 23.
Green *v.* Tacoma (51 Fed. Rep. 622), Em. Dom., 1010.
Green *v.* Taylor, B. & H. R. Co. (79 Tex. 604, 15 S. W. Rep. 685), Flood. Lds., 73, 80, 85, 86.
Green & B. R. Nav. Co. *v.* Chesapeake, O. & S. W. R. Co. (37 Am. & Eng. R. Cas. 238, 88 Ky. 1, 10 S. W. Rep. 6), Bridges, 61.
Green & B. R. Nav. Co. *v.* Palmer (83 Ky. 646), Waters & W., 7.
Green & C. St. Pass. R. Co. *v.* Bresmer (4 Am. & Eng. R. Cas. 647, 97 Pa. St. 103), St. Rys., 517.
Green & C. St. Pass. R. Co. *v.* Moore (64 Pa. St. 79), Lim. of Ac., 35.
Green Bay & M. R. Co. *v.* Union Steamboat Co. (107 U. S. 98, 2 Sup. Ct. Rep. 221), Charters, 70.
Green County *v.* Conness (15 Am. & Eng. R. Cas. 613, 109 U. S. 104, 3 Sup. Ct. Rep. 69), Consol., 24, 32; Mun. Aid, 316, 318.
Green County *v.* Daniel (3 Am. & Eng. R. Cas. 105, 102 U. S. 187), Mun. Aid, 310, 388, 439.
Greene *v.* Minneapolis & St. L. R. Co. (15 Am. & Eng. R. Cas. 214, 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. Rep. 378), Employés, Inj. to, 441.
Greene *v.* New York C. & H. R. R. Co. (16 J. & S. (N. Y.) 333, 2 Civ. Pro. 427), Death, etc., 101.
Greene *v.* New York C. & H. R. R. Co. (65 How. Pr. (N. Y.) 154, 12 Abb. N. Cas. 124), Easem., 4; Parties, 4.
Greene *v.* St. John & M. R. Co. (22 New Brun. 252), Car. of M., 36; Charges, 85.
Greene *v.* Tacoma (53 Fed. Rep. 562), Jurisd., 8.
Greene *v.* West Cheshire R. Co. (L. R. 13 Eq. 44, 41 L. J. Ch. 17, 25 L. T. 409, 20 W. R. 54), Side Tr., 2; Spec. Perf., 9.
Greeneville & P. R. N. G. R. Co. *v.* Johnson (8 Baxt. (Tenn.) 332), Subscr., 25, 123.
Greenfield *v.* Chicago & N. W. R. Co. (83 Iowa 270, 49 N. W. Rep. 95), Fires, 254, 322, 343.
Greenhill *v.* Isle of Wight (Newport Junction) R. Co. (23 L. T. 885, 19 W. R. 345), Spec. Perf., 3, 15.
Greenleaf *v.* Ludington (15 Wis. 558), Stock, 79.
Greenleaf *v.* Brooklyn, F. & C. I. R. Co. (21 N. Y. S. R. 946, 50 Hun 606), Deeds, 18.

Greenleaf *v.* Brooklyn, F. & C. I. R. Co. (37 Hun (N. Y.) 435), Em. Dom., 882.
Greenleaf *v.* Dubuque & S. C. R. Co. (33 Iowa 52), Employés, Inj. to, 225, 305, 748; Negl., 75.
Greenleaf *v.* Illinois C. R. Co. (29 Iowa 14), Employés, Inj. to, 120, 136, 138, 223, 284, 590, 604; Negl., 75.
Greenleaf *v.* Norfolk Southern R. Co. (91 N. Car. 33), Contr., 4.
Greenlee *v.* East Tenn., V. & G. R. Co. (4 Am. & Eng. R. Cas. 351, 5 Lea (Tenn.) 418), Death, etc., 48.
Greenock & W. B. R. Co. *v.* Caledonian R. Co. (2 Ry. & Ct. Cas. 132), Leases, 137.
Greenock & W. B. R. Co. *v.* Caledonian R. Co. (2 Ry. & C. T. Cas. 136), Charges, 99.
Greenock & W. B. R. Co. *v.* Caledonian R. Co. (2 Ry. & C. T. Cas. 227), Charges, 102.
Greenock & W. B. R. Co. *v.* Caledonian R. Co. (3 Ry. & Ct. Cas. 145), Leases, 142.
Greenock & W. B. R. Co. *v.* Caledonian R. Co. (5 Ry. & C. T. Cas. 205), Leases, 133.
Greenock & W. B. R. Co. *v.* Caledonian R. Co. (8 Scott. L. R. 634, 3 Ry. & C. T. Cas. 22), Connect. L., 4.
Greenop *v.* Southeastern R. Co. (2 Ry. & C. T. Cas. 319), Charges, 100; Discrim., 66.
Green Ridge R. Co. *v.* Brinkman (23 Am. & Eng. R. Cas. 342, 64 Md. 52, 20 Atl. Rep. 1024, 54 Am. Rep. 755), Fires, 225, 261, 264, 288, 320.
Greenup County *v.* Maysville & B. S. R. Co. (88 Ky. 659, 11 S. W. Rep. 774), Injunc., 3; Sts. & H., 186, 198.
Greenville & C. R. Co. *v.* Cathcart (4 Rich. (So. Car.) 89), Subscr., 77.
Greenville & C. R. Co. *v.* Coleman (5 Rich. (So. Car.) 118), Subscr., 7, 121, 125.
Greenville & C. R. Co. *v.* Maffett (8 So. Car. 307), Agency, 30.
Greenville & C. R. Co. *v.* Nunnamaker (4 Rich. (So. Car.) 107), Em. Dom., 507, 800.
Greenville & C. R. Co. *v.* Partlow (5 Rich. (So. Car.) 428), Em. Dom., 752.
Greenville & C. R. Co. *v.* Partlow (6 Rich. (So. Car.) 286), Em. Dom., 774.
Greenville & C. R. Co. *v.* Partlow (14 Rich. (So. Car.) 237), Tresp., 8.
Greenville & C. R. Co. *v.* Smith (6 Rich. (So. Car.) 91), Subscr., 104.
Greenville & C. R. Co. *v.* Woodsides (5 Rich. (So. Car.) 145), Subscr., 134.
Greenwald *v.* Marquette, H. & O. R. Co. (8 Am. & Eng. R. Cas. 133, 49 Mich. 197, 13 N. W. Rep. 513), Fel. Serv., 387.
Greenwich *v.* Easton & A. R. Co. (24 N. J. Eq. 217; affirmed in 25 N. J. Eq. 565), Charters, 54; Sts. & H., 52, 297.
Greenwood *v.* Lake Shore R. Co. (10 Gray (Mass.) 373), Appear., 6.
Greenwood *v.* Lancashire & Y. R. Co. (6 Ry. & C. T. Cas. 39), Charges, 94, 118; Discrim., 5, 10, 40.
Greenwood *v.* Manhattan R. Co. (46 N. Y. S. R. 908, 29 J. & S. 253, 19 N. Y. Supp. 702), Elev. Rys., 105, 106.
Greenwood *v.* Philadelphia, W. & B. R. Co. (124 Pa. St. 572, 17 Atl. Rep. 188), Cross., Inj. at, 233.
Greenwood *v.* Pierce (58 Tex. 130), Agency, 47; Dam., 52.
Greenwood *v.* Union Freight R. Co. (9 Am. & Eng. R. Cas. 526, 105 U. S. 13), Charters, 41, 43; Stockh., 78.
Greenwood *v.* Wilton R. Co. (23 N. H. 261), Deeds, 19; Em. Dom., 995; Priv. Ways, 14.
Greenwood Lake & P. J. R. Co. *v.* New York & G. L. R. Co. (47 N. Y. S. R. 550, 134 N. Y. 435; affirming 28 N. Y. S. R. 739, 8 N. Y. Supp. 26, 55 Hun 606, 5 Silv. Sup. Ct. 305), Easem., 3.
Greenwood Lake Imp. Co. *v.* New York & G. L. R. Co. (30 N. Y. S. R. 364, 55 Hun 610, 5 Silv. Sup. Ct. 522, 8 N. Y. Supp. 711), Deeds, 27.
Greer *v.* Chartiers R. Co. (96 Pa. St. 391, 42 Am. Rep. 548), Subscr., 8.
Greer *v.* Louisville & N. R. Co. (94 Ky. 169, 21 S. W. Rep. 649), Employés, Inj. to, 692; Fel. Serv., 183; Pl., 117; Witn., 132.
Greer *v.* New York C. & H. R. R. Co. (37 Hun (N Y.) 346; affirmed (?) 107 N. Y. 682, mem., 14 N. E. Rep. 610, 12 N. Y. S. R. 865), Deeds, 19.
Gregg *v.* Farmers' & M. Bank (80 Mo. 251), Attach., 27.
Gregg *v.* Illinois C. R. Co. (47 Ill. App. 590), Car. of M., 394.
Gregg *v.* Illinois C. R. Co. (147 Ill. 550, 35 N. E. Rep. 343), Car. of M., 81, 89, 232, 366, 389, 394.
Gregg *v.* Mayor, etc., of Baltimore (14 Md. 479), Stockh., 124.
Gregg *v.* San Francisco & N. P. R. Co. (59 Cal. 312), New Tr., 82.
Gregg *v.* Union Pac. R. Co. (48 Mo. App. 494), Elevators, 4; Tresp., 22.
Gregory *v.* Burlington & M. R. R. Co. (1 Am. & Eng. R. Cas. 270, 10 Neb. 250, 4 N. W. Rep. 1025), Eject. Pass., 37; Tickets & F., 56.
Gregory *v.* Chicago, M. & St. P. R. Co. (3 McCrary (U. S.) 374, 10 Fed. Rep. 529), Discov., 7.
Gregory *v.* Cleveland, C. & C. R. Co. (4 Ohio St. 675), Em. Dom., 949.
Gregory *v.* Cleveland, C., C. & I. R. Co. (31 Am. & Eng. R. Cas. 440, 112 Ind. 385, 14 N. E. Rep. 228), Evid., 121; Negl., 87; Pl., 20; Tresp., Inj. to, 29.
Gregory *v.* Halifax & C. B. R. & C. Co. (16 Nov. Sc. 436), Constr. Rys., 107; Pl., 46.
Gregory *v.* New York, L. E. & W. R. Co. (24 Am. & Eng. R. Cas. 83, 40 N. J. Eq. 38), For. Corp., 15.
Gregory *v.* New York, L. E. & W. R. Co (8 N. Y. Supp. 525, 28 N. Y. S. R. 726, 55 Hun, 303), Dam., 42, 43, 67, 105; Witn., 192.
Gregory *v.* Ohio River R. Co. (37 W. Va. 606, 16 S. E. Rep. 819), Agency, 74; Employés, Inj. to, 424; Trial, 93.
Gregory *v.* Southern Pac. R. Co. (2 Tex. Civ. App. 279, 21 S. W. Rep. 417), Death, etc., 206.
Gregory *v.* Wabash R. Co. (46 Mo. App. 574), Car. of M., 38, 75.
Gregory *v.* West Midland R. Co. (2 H. & C. 944, 10 Jur. N. S. 243, 33 L. J. Ex. 155, 12 W. R. 528), Car. of L. S., 93.
Grenada County Sup'rs *v.* Brogden (112 U. S. 261, 5 Sup. Ct. Rep. 125), Mun. Aid, 22.

Grennan *v.* McGregor (78 Cal. 258, 20 Pac. Rep. 559), Deeds, 40.
Gressley *v.* Missouri Pac. R. Co. (26 Mo. App. 156), Trial, 158.
Grethen *v.* Chicago, M. & St. P. R. Co. (19 Am. & Eng. R. Cas. 342, 22 Fed. Rep. 609), Children, Inj. to, 124; Tresp., Inj. to, 96.
Greve *v.* Dunham (60 Iowa 108, 14 S. W. Rep. 130), Car. of M., 510.
Greve *v.* First Div. St. P. & P. R. Co. (26 Minn. 66, 1 N. W. Rep. 816), Em. Dom., 657.
Grey *v.* Mobile Trade Co. (55 Ala. 387), Lim. of Liab., 27; Negl., 9.
Gridley *v.* Lafayette, B. & M. R. Co. (71 Ill. 200), Pres., 13.
Grierson *v.* Cheshire Lines' Committee (L. R. 19 Eq. 83, 44 L. J. Ch. 35, 31 L. T. 428, 23 W. R. 68), Em. Dom., 1102.
Griesser *v.* McIlrath (4 McCrary (U. S.) 412, 13 Fed. Rep. 373), Discrim., 81.
Griffee *v.* Burlington & M. R. R. Co. (2 Int. Com. Rep. 194, 2 Int. Com. Com. 301), Int. Com., 90; Passes, 5.
Griffin *v.* Augusta & K. R. Co. (70 Ga. 164), Em. Dom., 1043; Reorg., 12.
Griffin *v.* Boston & A. R. Co. (38 Am. & Eng. R. Cas. 184, 148 Mass. 143, 19 N. E. Rep. 166, 1 L. R. A. 698), Employés, Inj. to, 617, 690, 716.
Griffin *v.* Chicago, R. I. & P. R. Co. (68 Iowa 638, 27 N. W. Rep. 792), Contrib. Neg., 123; Cross., Inj. at, 254.
Griffin *v.* Great Western R. Co. (15 U. C. Q. B. 507), Car. of L. S., 19.
Griffin *v.* Kingston & P. R. Co. (17 Ont. 660), Copyr., 2.
Griffin *v.* Long Island R. Co. (101 N. Y. 348, 4 N. E. Rep. 740, 1 N. Y. S. R. 56, 9 Civ. Pro. 84; reversing 34 Hun 632, mem.), Replev., 4.
Griffin *v.* Long Island R. Co. (102 N. Y. 449, 7 N. E. Rep. 735, 2 N. Y. S. R. 454), Judgm., 16.
Griffin *v.* Montgomery & W. P. R. Co. (26 Ga. 111), Evid., 175.
Griffin *v.* Ohio & M. R. Co. (124 Ind. 326, 24 N. E. Rep. 888), Employés, Inj. to, 182, 184.
Griffin *v.* Shreveport & A. R. Co. (40 Am. & Eng. R. Cas. 295, 41 La. Ann. 808, 6 So. Rep. 624), Embankm., 3; Em. Dom., 172.
Griffin *v.* State (4 Tex. App. 390), Crim. L., 17.
Griffin *v.* Utica & B. R. R. Co. (41 Hun (N. Y.) 448, 3 N. Y. S. R. 155), Car. of P., 502.
Griffin *v.* Wabash, St. L. & P. R. Co. (22 Mo. App. 621), Comprom., 2.
Griffith *v.* Baltimore & O. R. Co. (44 Fed. Rep. 574), Children, Inj. to, 128; Cross., Inj. at, 184, 264; Dam., 21, 88; Evid., 75, 143, 282, 291; New Tr., 90; Trial, 184.
Griffith *v.* Burlington, C. R. & N. R. Co. (31 Am. & Eng. R. Cas. 227, 72 Iowa 645, 34 N. W. Rep. 609), Death, etc., 299.
Griffith *v.* Charlotte, C. & A. R. Co. (23 So. Car. 25, 55 Am. Rep. 1), Actions, 1.
Griffith *v.* Chicago, B. & P. R. Co. (74 Iowa 85, 36 N. W. Rep. 901), Pres., 1.
Griffith *v.* Missouri Pac. R. Co. (98 Mo. 168, 11 S. W. Rep. 559), Car. of L. S., 129, 132; New Tr., 71.
Griffith *v.* Utica & M. R. Co. (43 N. Y. S. R. 835, 63 Hun 626, 17 N. Y. Supp. 692; affirmed in 137 N. Y. 566, mem., 50 N. Y. S. R. 933), Contrib. Neg., 125; Evid., 28; Husb. & W., 27; Negl., 61; St. Rys., 377, 432; Witn., 19, 50, 76, 165.
Griffiths *v.* London & St. K. Dock Co. (L. R. 13 Q. B. D. 259, 53 L. J. Q. B. D. 504, 51 L. T. 533, 33 W. R. 35, 49 J. P. 100; affirming L. R. 12 Q. B. D. 493, 50 L. T. 755, 32 W. R. 831, 48 J. P. 328), Employés, Inj. to, 543.
Griffiths *v.* New Jersey & N. Y. R. Co. (5 Misc. 320, 25 N. Y. Supp. 812), Employés, Inj. to, 508.
Griggs *v.* Detroit & M. R. Co. (10 Mich. 117), Mort., 139.
Griggs *v.* Griggs (56 N. Y. 504; affirming 66 Barb. 287), Mun. Aid, 190.
Griggs *v.* Houston (8 Am. & Eng. R. Cas 359, 104 U. S. 553), Constr. Rys., 47.
Grimes *v.* Louisville, N. A. & C. R. Co. (3 Ind. App. 573, 30 N. E. Rep. 200), Cross., Inj. at, 17; Negl., 47.
Grimes *v.* Minneapolis, L. & M. R. Co. (31 Am. & Eng. R. Cas. 123, 37 Minn. 66, 33 N. W. Rep. 33), Passes, 1.
Grimes *v.* Pennsylvania Co. (36 Fed. Rep. 72), Car. of P., 24; Stat. & D., 103; Time-tables, 1.
Grimmell *v.* Chicago & N. W. R. Co. (31 Am. & Eng. R. Cas. 537, 73 Iowa 93, 34 N. W. Rep. 758), Animals, 198; Witn., 183.
Grimshawe *v.* Grand Trunk R. Co. (15 U. C. Q. B. 224), Em. Dom., 1220.
Grimshawe *v.* Grand Trunk R. Co. (19 U. C. Q. B. 493), Em. Dom., 1276.
Grinde *v.* Milwaukee & St. P. R. Co. (42 Iowa 376), Pl., 174.
Grindle *v.* Eastern Exp. Co. (67 Me. 317), Car. of M., 807.
Grinnell *v.* Chicago, R. I. & P. R. Co. (5 Am. & Eng. R. Cas. 447, 103 U. S. 739; affirming 51 Iowa 476), Land Grants, 23.
Grinnell *v.* Mississippi & M. R. Co. (18 Iowa 570), Em. Dom., 636, 943.
Grinter *v.* Kansas Pac. R. Co. (23 Kan. 642), Pub. Lds., 13.
Grippen *v.* New York C. R. Co. (40 N. Y. 34), Cross., Inj. at, 124, 251; Negl., 44.
Grisim *v.* Milwaukee City R. Co. (84 Wis. 19, 54 N. W. Rep. 104), St. Rys., 444.
Grissell *v.* Housatonic R. Co. (32 Am. & Eng. R. Cas. 349, 54 Conn. 447, 4 N. Eng. Rep. 85, 9 Atl. Rep. 137), Fires, 2; Stat., 29.
Griswold *v.* Buffalo, B. & G. R. Co. (2 Prac. (Ont.) 178), Attach., 33.
Griswold *v.* Carthage, J. & S. C. R. Co. (18 Mo. App. 52), Liens, 39.
Griswold *v.* Central Vt. R. Co. (20 Blatchf. (U. S.) 212, 9 Fed. Rep. 797), Eq., 27, 28.
Griswold *v.* Chicago & N. W. R. Co. (23 Am. & Eng. R. Cas. 463, 64 Wis. 652, 26 N. W. Rep. 101), Car. of P., 90.
Griswold *v.* Illinois C. R. Co. (Iowa) (53 N. W. Rep. 295), Contr., 53.

Griswold *v.* Illinois C. R. Co. (Iowa) (57 Am. & Eng. R. Cas. 59, 57 N. W. Rep. 844; reversing 56 Am. & Eng. R. Cas. 100, 53 N. W. Rep. 295), Fires, 200.
Griswold *v.* Metropolitan El. R. Co. (122 N. Y. 102, 640, 25 N. E. Rep. 331, 33 N. Y. S. R. 232, 642; modifying 14 Daly 484, 15 N. Y. S. R. 350), Elev. Rys., 83.
Griswold *v.* New York & N. E. R. Co. (26 Am. & Eng. R. Cas. 280, 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. Rep. 261), Passes, 9, 23, 28.
Griswold *v.* New York C. & H. R. R. Co. (42 Am. & Eng. R. Cas. 221, 115 N. Y. 61. 21 N. E. Rep. 726, 23 N. Y. S. R. 729; affirming 44 Hun 236, 7 N. Y. S. R. 804), Witn., 167.
Griswold *v.* St. Louis, K. C. & N. R. Co. (8 Mo. App. 582), Em. Dom., 988; Tax., 102.
Griswold *v.* Seligman (4 Am. & Eng. R. Cas. 371, 72 Mo. 110), Evid., 179; Stockh., 58, 59.
Griswold *v.* Webb (40 Am. & Eng. R. Cas. 683, 16 R. I. 649, 19 Atl. Rep. 143), Hacks, etc., 2.
Griveaud *v.* St. Louis C. & W. R. Co. (33 Mo. App. 458), Cable Rys., 18; Dam., 93.
Groff *v.* Cincinnati & I. R. Co. (1 Cin. Super. Ct. 264), Death, etc., 373; Employés, Inj. to, 55, 236.
Grogan *v.* Adams Exp. Co. (30 Am. & Eng. R. Cas. 9, 114 Pa. St. 523, 7 Atl. Rep. 134), Car. of M., 453.
Groh *v.* Eckert (3 Brews. (Pa.) 116), Release, 29.
Groll *v.* Prospect Park & C. I. R. Co. (22 N. Y. S. R. 656, 51 Hun 643, 4 N. Y. Supp. 80), Stat. & D., 134.
Groner *v.* Delaware & H. Canal Co. (153 Pa. St. 390, 26 Atl. Rep. 7), Trial, 184.
Gross *v.* Pennsylvania, P. & B. R. Co. (42 N. Y. S. R. 808, 62 Hun 619, 16 N. Y. Supp. 616), Employés, Inj. to, 331, 736; Trial, 109.
Gross *v.* Pennsylvania, P. & B. R. Co. (47 N. Y. S. R. 374, 20 N. Y. Supp. 28, 65 Hun 191), Release, 27.
Grossman *v* Dodd (43 N. Y. S. R. 375, 63 Hun 324, 17 N. Y. Supp. 855), Exp. Cos., 73.
Grossman *v.* Fargo (6 Hun (N. Y.) 310), Exp. Cos., 59.
Grosso *v.* Delaware, L. & W. R. Co. (50 N. J. L. 317, 11 Cent. Rep. 574, 13 Atl. Rep. 233), Death, etc., 1, 81; Words & Ph., 43.
Grostick *v.* Detroit, L. & N. R. Co. (49 Am. & Eng. R. Cas. 332, 90 Mich. 594, 51 N. W. Rep. 667), Cross., Inj. at, 253.
Grostick *v.* Detroit, L. & N. R. Co. (96 Mich. 495, 56 N. W. Rep. 24), Trial, 14.
Grosvenor *v.* Hampstead Junction R. Co. (1 De G. & J. 446, 3 Jur. N. S. 1085, 26 L. J. Ch. 731), Em. Dom., 1103.
Grosvenor *v.* New York C. R. Co. (39 N. Y. 34, 5 Abb. Pr. N. S. 345), Car. of M., 62, 72.
Grote *v.* Chester & H. R. Co. (2 Exch. 251, 5 Railw. Cas. 649). Bridges, 51.
Grotenkemper *v.* Harris (25 Ohio St. 510), Death, etc., 43, 44.
Grove *v.* Burlington, C. R. & N. R. Co. (75 Iowa 163, 39 N. W. Rep. 248), Animals, 56, 215.
Grover *v.* American Exp. Co. (11 Fed. Rep. 386), Proc., 17.
Grover & B. S. Mach. Co. *v.* Missouri Pac. R. Co. (70 Mo. 672, 35 Am. Rep. 444). Car. of M., 593; Stat. Agts., 3.
Groves *v.* Kansas City, St. J. & C. B. R. Co. (57 Mo. 304), Constr. Rys., 92.
Grows *v.* Maine C. R. Co. (67 Me. 100, 16 Am. Ry. Rep. 326), Contrib. Neg., 87; Cross., Inj. at, 264; Negl., 41.
Grows *v.* Maine C. R. Co. (69 Me. 412), Cross., Inj. at, 316; Pl., 160.
Grubbs *v.* Vicksburg & B. R. Co. (50 Ala. 398), Subscr., 69.
Grube *v.* Missouri Pac. R. Co. (41 Am. & Eng. R. Cas. 357, 98 Mo. 330, 11 S. W. Rep. 736, 4 L. R. A. 776), Fel. Serv., 479, 502; Sts. & H., 322.
Gruber *v.* Washington & J. R. Co. (21 Am. & Eng. R. Cas. 438, 92 N. Car. 1), Car. of P., 1, 283; Ult. Vir., 28.
Grummond *v.* State (10 Ohio 510), Crim. L., 27.
Grund *v.* Pendergast (58 Barb. (N. Y.) 216), Car. of M., 47.
Grundy *v.* Louisville & N. R. Co. (Ky.) (2 S. W. Rep. 899), Animals, 39, 493, 515, 554.
Guaranty Trust & S. D. Co. *v.* Green Cove S. & M. R. Co. (45 Am. & Eng. R. Cas. 689, 139 U. S. 137, 11 Sup. Ct. Rep. 512), Mort., 135, 162, 203; Proc., 42.
Guay *v.* Queen (17 Can. Sup. Ct. 30; reversing 2 Can. Exch. 18), Em. Dom., 1235.
Gudger *v.* Richmond & D. R. Co. (43 Am. & Eng. R. Cas. 606, 106 N. Car. 481, 11 S. E. Rep. 515), Lim. of Ac., 48; Right of W., 18.
Gudger *v.* Western N. C. R. Co. (19 Am. & Eng. R. Cas. 144, 87 N. Car. 325), Parties, 8; Rem. of C., 27, 31.
Guenther *v.* St. Louis, I. M. & S. R. Co. (34 Am. & Eng. R. Cas. 47, 95 Mo. 286, 14 West. Rep. 735, 8 S. W. Rep. 371), Licensees, Inj. to, 27; Tresp., Inj. to, 105.
Guenther *v.* St. Louis, I. M. & S. R. Co. (108 Mo. 18, 18 S. W. Rep. 846), Death, etc., 368; Tresp., Inj. to, 3, 57.
Guesnard *v.* Louisville & N. R. Co. (23 Am. & Eng. R. Cas. 691, 76 Ala. 453), Car. of M., 379.
Guess *v.* South Carolina R. Co. (30 So. Car. 163, 9 S. E. Rep. 18), Animals, 216; Contrib. Neg., 9, 11.
Guess *v.* Stone Mt. G. & R. Co. (67 Ga. 215), Injunc., 3.
Guess *v.* Stone Mt. G. & R. Co. (28 Am. & Eng. R. Cas. 236, 72 Ga. 320), Em. Dom., 731, 907; Sts. & H., 290; Trial, 112.
Guest *v.* Poole & B. R. Co. (L. R. 5 C. P. 553, 39 L. J. C. P. 329, 18 W. R. 836, 22 L. T. 589), Em. Dom., 1087.
Guest *v.* Worcester, B. & L. R. Co. (38 L. J. C. P. 23), Stockh., 58.
Guffey *v.* Hannibal & St. J. R. Co. (53 Mo. App. 462), Car. of P., 288, 289, 291, 584; Negl., 100.
Guggenheim *v.* Lake Shore & M. S. R. Co.

(22 Am. & Eng. R. Cas. 546, 57 Mich. 488, 24 N. W. Rep. 827), Cross., Inj. at, 298.
Guggenheim *v.* Lake Shore & M. S. R. Co. (32 Am. & Eng. R. Cas. 89, 66 Mich. 150, 9 West. Rep. 903, 33 N. W. Rep. 167), Cross., Inj. at, 71, 169, 256, 297; Death, etc., 229, 235, 270, 295; Evid., 70; Sts. & H., 411; Witn., 128.
Guidet *v.* New York, L. E. & W. R. Co. (9 N. Y. S. R. 26, 44 Hun 628, mem.; affirmed in 120 N. Y. 649, mem., 24 N. E. Rep. 1102, mem., 31 N. Y. S. R. 998, mem.), Evid., 117.
Guilbault *v.* McGrevy (18 Can. Sup. Ct. 609), Constr. Rys., 80.
Guilfoos *v.* New York C. & H. R. R. Co. (69 Hun (N. Y.) 593, 53 N. Y. S. R. 538, 23 N. Y. Supp. 925), Animals, 80; Cov'ts, 9; Fences, 41; Nuis., 3.
Guilford *v.* Minneapolis, S. St. M. & A. R. Co. (51 Am. & Eng. R. Cas. 98, 48 Minn. 560, 51 N. W. Rep. 658), Bonds, 16, 31, 48; Deeds of Tr., 16.
Guillaume *v.* General Transp. Co. (100 N. Y. 491, 3 N. E. Rep. 489), Bills of L., 43.
Guinault *v.* Louisville & N. R. Co. (40 Am. & Eng. R. Cas. 340, 41 La. Ann. 571, 6 So. Rep. 850), Citizens., 3; Rem. of C., 47.
Guinn *v.* Iowa C. R. Co. (4 McCrary (U. S.) 566, 14 Fed. Rep. 323), Rem. of C., 26.
Guinn *v.* Wabash, St. L. & P. R. Co. (20 Mo. App. 453), Car. of L. S., 11, 14.
Guirney *v.* St. Paul, M. & M. R. Co. (44 Am. & Eng. R. Cas. 654, 43 Minn. 496, 46 N. W. Rep. 78), Injunc., 57.
Guiterman *v.* Liverpool, N. Y. & P. Steamship Co. (83 N. Y. 358; reversing 9 Daly 119), Witn., 191.
Guley *v.* Northwestern C. & T. Co. (7 Wash. 491, 35 Pac. Rep. 372), Children, Inj. to, 177; Trial, 183.
Gulf, C. & S. F. R. Co. *v.* Abney (3 Tex. App. (Civ. Cas. 485), Em. Dom., 573, 595, 632.
Gulf, C. & S. F. R. Co. *v.* Adair (4 Tex. App. (Civ. Cas.) 55, 14 S. W. Rep. 1076), Car. of M., 591; Charges, 27.
Gulf, C. & S. F. R. Co. *v.* Adams (3 Tex. App. (Civ. Cas.) 493), Eject. Pass., 43; Pl., 116.
Gulf, C. & S. F. R. Co. *v.* Anderson (42 Am. & Eng. R. Cas. 160, 76 Tex. 244, 13 S. W. Rep. 196), Cross., Inj. at, 243, 293; Pl., 176; Trial, 204.
Gulf, C. & S. F. R. Co. *v.* Bacon (3 Tex. Civ. App. 55, 21 S. W. Rep. 783), Actions, 13.
Gulf, C. & S. F. R. Co. *v.* Bagley (3 Tex. Civ. App. 207, 22 S. W. Rep. 68), Negl., 63.
Gulf, C. & S. F. F. R. Co. *v.* Baird (40 Am. & Eng. R. Cas. 160, 75 Tex. 256, 12 S. W. Rep. 530), Car. of L. S., 106.
Gulf, C. & S. F. R. Co. *v.* Benson (32 Am. & Eng. R. Cas. 330, 69 Tex. 407, 5 S. W. Rep. 822), Fires, 287, 289, 318.
Gulf, C. & S. F. R. Co. *v.* Blohn (73 Tex. 637, 4 L. R. A. 764, 11 S. W. Rep. 867), Fel. Serv., 1, 281, 490.
Gulf, C. & S. F. R. Co. *v.* Bock (63 Tex. 245), Sts. & H., 214, 249, 250, 253, 293.
Gulf, C. & S. F. R. Co. *v.* Booton (4 Tex. App. (Civ. Cas.) 103, 15 S. W. Rep. 502), Car. of M., 237.
Gulf, C. & S. F. R. Co. *v.* Booton (4 Tex. App. (Civ. Cas.) 389, 15 S. W. Rep. 909), Car. of M., 760.
Gulf, C. & S. F. R. Co. *v.* Box (81 Tex. 670, 17 S. W. Rep. 375), Cross., Inj. at, 155; Fright. Teams, 5; Husb. & W., 22.
Gulf, C. & S. F. R. Co. *v.* Breitling (Tex.) (12 S. W. Rep. 1121), Cross., Inj. at, 350; Negl., 24.
Gulf, C. & S. F. R. Co. *v.* Brentford (79 Tex. 619, 15 S. W. Rep. 561), Employés, Inj. to, 224, 238, 251, 252.
Gulf, C. & S. F. R. Co. *v.* Buford (2 Tex. Civ. App. 115, 21 S. W. Rep. 272), Car. of P., 552; Contrib. Neg., 116.
Gulf, C. & S. F. R. Co. *v.* Butcher (52 Am. & Eng. R. Cas. 615, 83 Tex. 309, 18 S. W. Rep. 583), App., 39; Phys. Exam., 5; Stat. & D., 79.
Gulf, C. & S. F. R. Co. *v.* Campbell (41 Am. & Eng. R. Cas. 100, 76 Tex. 174, 13 S. W. Rep. 19), Car. of P., 49, 295; Dam., 73; Tresp., Inj. to, 13.
Gulf, C. & S. F. R. Co. *v.* Clark (18 Am. & Eng. R. Cas. 628, 2 Tex. App. (Civ. Cas.) 459), Car. of M., 201, 263, 755, 794, 795; Trial, 95, 170.
Gulf, C. & S. F. R. Co. *v.* Cole (4 Tex. App. (Civ. Cas.) 144, 16 S. W. Rep. 176), Car. of L. S., 38.
Gulf, C. & S. F. R. Co. *v.* Coleman (2 Tex. Civ. App. 548, 21 S. W. Rep. 936), Cert., 6.
Gulf, C. & S. F. R. Co. *v.* Compton (44 Am. & Eng. R. Cas. 637, 75 Tex. 667, 13 S. W. Rep. 667), Death, etc., 46; Evid., 84, 219; Negl., 106; Witn., 132, 192.
Gulf, C. & S. F. R. Co. *v.* Coon (69 Tex. 730, 7 S. W. Rep. 492), Dam., 4; New Tr., 83.
Gulf, C. & S. F. R. Co. *v.* Dawkins (77 Tex. 228, 13 S. W. Rep. 982), Agency, 76; Car. of P., 16, 51; Children, Inj. to, 14; Evid., 141.
Gulf, C. & S. F. R. Co. *v.* Day (Tex. Civ. App.) (22 S. W. Rep. 772), Fires, 345, 348.
Gulf, C. & S. F. R. Co. *v.* Dodson (3 Tex. App. (Civ. Cas.) 466), Cross., Inj. at, 242.
Gulf, C. & S. F. R. Co. *v.* Donahoo (59 Tex. 128), Em. Dom., 390; Flood. Lds., 41; Husb. & W., 2; Right of W., 2.
Gulf, C. & S. F. R. Co. *v.* Donnelly (70 Tex. 371, 8 S. W. Rep. 52), Employés, Inj. to, 141, 249.
Gulf, C. & S. F. R. Co. *v.* Doran (2 Tex. Unrep. Cas. 442), Constr. Rys., 14; Em. Dom., 220; Pl., 149.
Gulf, C. & S. F. R. Co. *v.* Dorsey (2 Tex. Unrep. Cas. 247), Employés, Inj. to, 496.
Gulf, C. & S. F. R. Co. *v.* Dorsey (25 Am. & Eng. R. Cas. 446, 60 Tex. 148), Employés, Inj. to, 497, 771.
Gulf, C. & S. F. R. Co. *v.* Dunman (74 Tex. 265, 11 S. W. Rep. 1094), Deeds, 36.
Gulf, C. & S. F. R. Co. *v.* Dunman (4 Tex. App. (Civ. Cas.) 147, 16 S. W. Rep. 421), Car. of L. S., 160; Evid., 35.
Gulf, C. & S. F. R. Co. *v.* Dunman (85 Tex. 176, 19 S. W. Rep. 1073), Ejectm., 34; Witn., 111.

Gulf, C. & S. F. R. Co. *v.* Dwyer (42 Am. & Eng. R. Cas. 503, 75 Tex. 572, 12 S. W. Rep. 1001), Car. of M., 213; Evid., 1; Int. Com., 217.
Gulf, C. & S. F. R. Co. *v.* Dwyer (55 Am. & Eng. R. Cas. 442, 84 Tex. 194), Bills of L., 4; Penalty, 10.
Gulf, C. & S. F. R. Co. *v.* Eddins (60 Tex. 656), Em. Dom., 724; Sts. & H., 214, 249, 250, 253.
Gulf, C. & S. F. R. Co. *v.* Ellidge (49 Fed. Rep. 356, 4 U. S. App. 136, 1 C. C. A. 295), Animals, 575.
Gulf, C. & S. F. R. Co. *v.* Ellis (35 Am. & Eng. R. Cas. 292, 70 Tex. 307, 7 S. W. Rep. 722), Cross., St. & H., 10; Farm Cross., 5.
Gulf, C. & S. F. R. Co. *v.* Ellis (Tex.) (49 Am. & Eng. R. Cas. 509, 18 S. W. Rep. 723), Animals, 9.
Gulf, C. & S. F. R. Co. *v.* Ellis (Tex. Civ. App.) (21 S. W. Rep. 933), Animals, 9.
Gulf, C. & S. F. R. Co. *v.* Ellis (54 Fed. Rep. 481, 10 U. S. App. 640, 4 C. C. A. 454), Animals, 62, 450, 472, 515.
Gulf, C. & S. F. R. Co. *v.* Ellison (70 Tex. 491, 7 S. W. Rep. 785), Car. of L. S., 21, 36.
Gulf, C. & S. F. R. Co. *v.* Evansich (61 Tex. 3), Children, Inj. to, 1, 31, 175; Negl., 84.
Gulf, C. & S. F. R. Co. *v.* Evansich (63 Tex. 54), Children, Inj. to, 28, 182; Evid., 67.
Gulf, C. & S. F. R. Co. *v.* Farmer (3 Tex. Civ. App. 458, 22 S. W. Rep. 515), Just. P., 12.
Gulf, C. & S. F. R. Co. *v.* Fields (2 Tex. App. (Civ. Cas.) 700), Fires, 68, 129.
Gulf, C. & S. F. R. Co. *v.* Fink (Tex.) (18 S. W. Rep. 492), New Tr., 37.
Gulf, C. & S. F. R. Co. *v.* Flake (1 Tex. App. (Civ. Cas.) 99), Constr. Rys., 14; Indep. Contr., 5.
Gulf, C. & S. F. R. Co. *v.* Ford (3 Tex. App. (Civ. Cas.) 187), Fires, 143.
Gulf, C. & S. F. R. Co. *v.* Ft. Worth & N. O. R. Co. (68 Tex. 98, 2 S. W. Rep. 199, 3 S. W. Rep. 564), App., 7.
Gulf, C. & S. F. R. Co. *v.* Fossett (66 Tex. 338, 1 S. W. Rep. 259), App., 102.
Gulf, C. & S. F. R. Co. *v.* Fox (Tex.) (33 Am. & Eng. R. Cas. 543, 6 S. W. Rep. 569), App., 69 74; Car. of P., 221; Stat. & D., 111, 141; Tickets & F., 28; Witn., 104.
Gulf, C. & S. F. R. Co. *v.* Frederickson (Tex.) (19 S. W. Rep. 124), Evid., 75; Flood. Lds., 85.
Gulf, C. & S. F. R. Co. *v.* Freeman (4 Tex. App. (Civ. Cas.) 419, 16 S. W. Rep. 109), Car. of M., 277.
Gulf, C. & S. F. R. Co. *v.* Fuller (22 Am. & Eng. R. Cas. 154, 63 Tex. 467), Em. Dom., 379, 754; Sts. & H., 214.
Gulf, C. & S. F. F. Co. *v.* Galveston, H. & S. A. R. Co. (52 Am. & Eng. R. Cas. 99, 83 Tex. 509, 18 S. W. Rep. 956), Contr., 105; Judgm., 41.
Gulf, C. & S. F. R. Co. *v.* Gasscamp (34 Am. & Eng. R. Cas. 6, 69 Tex. 545, 7 S. W. Rep. 227), Bridges, 55; Negl., 1.
Gulf, C. & S. F. R. Co. *v.* Gatewood (79 Tex. 89, 14 S. W. Rep. 913), Car. of L. S., 70, 85, 104; Strikes, 1.
Gulf, C. & S. F. R. Co. *v.* Gibson (Tex. Civ. App.) (21 S. W. Rep. 936), Animals, 440.
Gulf, C. & S. F. R. Co. *v.* Godair (3 Tex. Civ. App. 514, 22 S. W. Rep. 777), Car. of L. S., 106, 159.
Gulf, C. & S. F. R. Co. *v.* Golding (Tex.) (23 Am. & Eng. R. Cas. 732, 3 Tex. App. (Civ. Cas.) 60), Bills of L., 66, 97; Car. of M., 545.
Gulf, C. & S. F. R. Co. *v.* Gordon (70 Tex. 80, 7 S. W. Rep. 695), Dam., 45; Estop., 35; Trial, 219.
Gulf, C. & S. F. R. Co. *v.* Gowan (Tex.) (34 Am. & Eng. R. Cas. 210, 8 S. W. Rep. 57), Flood. Lds., 73.
Gulf, C. & S. F. R. Co. *v.* Graves (10 Am. & Eng. R. Cas. 199, 1 Tex. App. (Civ. Cas.) 301), Jurisd., 15; Sts. & H., 212, 214, 234.
Gulf, C. & S. F. R. Co. *v.* Greenlee (23 Am. & Eng. R. Cas. 322, 62 Tex. 344), App., 56, 124; Cross., Inj. at, 61; Cross. Sts. & H., 18; Dam., 87; Imp. Neg., 26.
Gulf, C. & S. F. R. Co. *v.* Greenlee (35 Am. & Eng. R. Cas. 425, 70 Tex. 553, 8 S. W. Rep. 129), App., 73, 97; Contrib. Neg., 82; Cross., Inj. at, 243, 262, 351.
Gulf, C. & S. F. R. Co. *v.* Gross (Tex. Civ. App.) (21 S. W. Rep. 186), Evid., 53; Stat. & D., 79.
Gulf, C. & S. F. R. Co. *v.* Harmonson (Tex. Civ. App.) (22 S. W. Rep. 764), Flood. Lds., 70, 77; Witn., 1222.
Gulf, C. & S. F. R. Co. *v.* Harriett (80 Tex. 73, 15 S. W. Rep. 556), Acc. & Sat., 3; Collis., 18; Dam., 90; Evid., 28, 78; Trial, 136.
Gulf, C. & S. F. R. Co. *v.* Hathaway (41 Am. & Eng. R. Cas. 219, 75 Tex. 557, 12 S. W. Rep. 990), Cross. Rys., 79; Trial, 189.
Gulf, C. & S. F. R. Co. *v.* Head (4 Tex. App. (Civ. Cas.) 313, 15 S. W. Rep. 504), Car. of P., 263, 598; Husb. & W., 20.
Gulf, C. & S. F. R. Co. *v.* Hedrick (Tex.) (7 S. W. Rep. 353), Flood. Lds., 97.
Gulf, C. & S. F. R. Co. *v.* Helsley (20 Am. & Eng. R. Cas. 89, 62 Tex. 503), Em. Dom., 580; Flood. Lds., 12, 26, 40, 92.
Gulf, C. & S. F. R. Co. *v.* Henry (52 Am. & Eng. R. Cas. 230, 84 Tex. 678, 19 S. W. Rep. 870), Tickets & F., 42, 45, 89.
Gulf, C. & S. F. R. Co. *v.* Hepner (52 Am. & Eng. R. Cas. 670, 83 Tex. 136, 18 S. W. Rep. 441), Evid., 73; Flood. Lds., 73, 88; Witn., 72, 95, 104.
Gulf, C. & S. F. R. Co. *v.* Hewson (3 Tex. App. (Civ. Cas.) 303), Just. P., 18.
Gulf, C. & S. F. R. Co. *v.* Hodges (76 Tex. 90, 13 S. W. Rep. 64), Negl., 9, 18.
Gulf, C. & S. F. R. Co. *v.* Holliday (65 Tex. 512), Flood. Lds., 20, 21, 72, 82, 99.
Gulf, C. & S. F. R. Co. *v.* Holt (11 Am. & Eng. R. Cas. 72, 1 Tex. App. (Civ. Cas), 477), App., 117; Fires, 213, 232, 252, 254, 266, 280, 282, 289; Trial, 134.
Gulf, C. & S. F. R. Co. *v.* Holtcamp (3 Tex. App. (Civ. Cas.) 527), Sts. & H., 176.
Gulf, C. & S. F. R. Co. *v.* Hudson (77 Tex. 494, 14 S. W. Rep. 158), Animals, 126, 386, 522; Fences, 93.

Gulf, C. & S. F. R. Co. *v.* Hurley (74 Tex. 593, 12 S. W. Rep. 226), Dam., 76; Eject. Pass., 89.
Gulf, C. & S. F. R. Co. *v.* Hutcheson (3 Tex. App. (Civ. Cas.) 120), Consol., 44; Just. P., 7.
Gulf, C. & S. F. R. Co. *v.* Ions (3 Tex. Civ. App. 619, 22 S. W. Rep. 1011), Bagg., 17, 46.
Gulf, C. & S. F. R. Co. *v.* Jackson (4 Tex. App. (Civ. Cas.) 73, 15 S. W. Rep. 128), Bagg., 111, 123.
Gulf, C. & S. F. R. Co. *v.* Jacobs (3 Tex. Civ. App. 485, 23 S. W. Rep. 145), Agency, 59.
Gulf, C. & S. F. R. Co. *v.* James (73 Tex. 12, 10 S. W. Rep. 744), Mal. Pros., 9, 12, 16; Trial, 100.
Gulf, C. & S. F. R. Co. *v.* Johnson (71 Tex. 619, 1 L. R. A. 730, 9 S. W. Rep. 602), New Tr., 38.
Gulf, C. & S. F. R. Co. *v.* Johnson (83 Tex. 628, 19 S. W. Rep. 151), Employés, Inj. to, 99, 211, 531, 574; Fel. Serv., 57; Pl., 142; Witn., 75.
Gulf, C. & S. F. R. Co. *v.* Johnson (54 Fed. Rep. 474, 10 U. S. App. 629, 4 C. C. A. 447), Animals, 62; Fires, 112, 150, 240.
Gulf, C. & S. F. R. Co. *v.* Johnson (1 Tex. Civ. App. 103, 20 S. W. Rep. 1123), Death, etc., 430; Employés, Inj. to, 45.
Gulf, C. & S. F. R. Co. *v.* Johnson (3 Tex. App. (Civ. Cas.) 151), Fires, 250, 264, 277.
Gulf, C. & S. F. R. Co. *v.* Jones (1 Tex. Civ. App. 372, 21 S. W. Rep. 145), Fences, 110.
Gulf, C. & S. F. R. Co. *v.* Jones (3 Tex. App. (Civ. Cas.) 39), Farm Cross., 2; Flood. Lds., 16; Lim. of Ac., 12.
Gulf, C. & S. F. R. Co. *v.* Jones (63 Tex. 524), Em. Dom., 232.
Gulf, C. & S. F. R. Co. *v.* Jones (73 Tex. 232, 11 S. W. Rep. 185), Trial, 90, 92.
Gulf, C. & S.F. R. Co. *v.* Jones (76 Tex. 350, 13 S. W. Rep. 374), Employés, Inj. to, 461, 465; New Tr., 44.
Gulf, C. & S. F. R. Co. *v.* Jones (51 Am. & Eng. R. Cas. 415, 82 Tex. 156, 17 S. W. Rep. 534), Stat. & D., 37.
Gulf, C. & S. F. R. Co. *v.* Keith (74 Tex. 287, 11 S. W. Rep. 1117), Animals, 126, 582; Fright. Teams, 2.
Gulf, C. & S. F. R. Co. *v.* Kerfoot (51 Am. & Eng. R. Cas. 682, 85 Tex. 267, 20 S. W. Rep. 59), Em. Dom., 946.
Gulf, C. & S. F. R. Co. *v.* Key (4 Tex. App. (Civ. Cas.) 448, 16 S. W. Rep. 106; modifying 16 S. W. Rep. 543), App., 126; Car. of L. S., 156.
Gulf, C. & S. F. R. Co. *v.* Killebrew (Tex.) (20 S. W. Rep. 182), App., 81; Car. of P., 491.
Gulf, C. & S. F. R. Co. *v.* Killebrew (Tex. Civ. App.) (20 S. W. Rep. 1005; reversing 20 S. W. Rep. 182), Car. of P., 496.
Gulf, C. & S. F. R. Co. *v.* King (80 Tex. 681, 16 S. W. Rep. 641), Injunc., 42.
Gulf, C. & S. F. R. Co. *v.* Kirkbride (79 Tex. 457, 15 S. W. Rep. 495), Eject. Pass., 90, 97, 98.
Gulf, C. & S. F. R. Co. *v.* Kluge (4 Tex. App. (Civ. Cas.) 577, 17 S. W. Rep. 944), Fires, 62, 292, 358.
Gulf, C. & S. F. R. Co. *v.* Kuenhle (4 Tex. App. (Civ. Cas.) 427, 16 S. W. Rep. 177), Eject. Pass., 54, 56, 58, 97.
Gulf, C. & S. F. R. Co. *v.* Lamkin (23 Am. & Eng. R. Cas. 652, 3 Tex. App. (Civ. Cas.) 106), Charges, 11, 27.
Gulf, C. & S. F. R. Co. *v.* Levi (Tex.) (40 Am. & Eng. R. Cas. 115, 12 S. W. Rep. 677), Car. of M., 19.
Gulf, C. & S. F. R. Co. *v.* Levi (42 Am. & Eng. R. Cas. 439, 76 Tex. 337, 13 S. W. Rep. 191, 8 L. R. A. 323; reversing 40 Am. & Eng. R. Cas. 115, 12 S. W. Rep. 677), Car. of M., 26; Strikes, 1, 3; Words & Ph., 7, 246.
Gulf, C. & S. F. R. Co. *v.* Levy (12 Am. & Eng. R. Cas. 90, 96, 59 Tex. 542, 46 Am. Rep. 269), Negl., 79; Sunday, 2; Tel. & T. Lines, 9; Trial, 51.
Gulf, C. & S. F. R. Co. *v.* Levy (Tex.) (19 Am. & Eng. R. Cas. 151), Tel. & T. Lines, 7, 10.
Gulf, C. & S. F. R. Co. *v.* Levy (59 Tex. 563), Dam., 1, 63, 71; Tel. & T. Lines, 9.
Gulf, C. & S. F. R. Co. *v.* Locker (78 Tex. 279, 14 S. W. Rep. 611), Flood. Lds., 73; Witn., 104.
Gulf, C. & S. F. R. Co. *v.* London (3 Tex. App. (Civ. Cas.) 499), Cat.-Gds., 9; Em. Dom., 691.
Gulf, C. & S. F. R. Co. *v.* Looney (52 Am. & Eng. R. Cas. 197, 85 Tex. 158, 19 S. W. Rep. 1039), Car. of P., 330, 516; Tickets & F., 92, 106.
Gulf, C. & S. F. R. Co. *v.* Loonie (84 Tex. 259, 19 S. W. Rep. 385), Car. of M., 786; Charges, 55.
Gulf, C. & S. F. R. Co. *v.* Lyons (2 Tex. App. (Civ. Cas.) 133), Em. Dom., 395.
Gulf, C. & S. F. R. Co. *v.* McCarty (82 Tex. 608, 18 S. W. Rep. 716), Bills of L., 97; Car. of L. S., 79, 158; Trial, 118.
Gulf, C. & S. F. R. Co. *v.* McCorquodale (35 Am. & Eng. R. Cas. 653, 71 Tex. 41, 9 S. W. Rep. 80), Car. of L. S., 14, 144, 145; Evid., 1.
Gulf, C. & S. F. R. Co. *v.* McGowan (26 Am. & Eng. R. Cas. 274, 65 Tex. 640), Agency, 83; Car. of P., 333; Passes, 10, 20, 33.
Gulf, C. & S. F. R. Co. *v.* McGowan (Tex.) (34 Am. & Eng. R. Cas. 210, 8 S. W. Rep. 57), Evid., 55.
Gulf, C. & S. F. R. Co. *v.* McGowan (73 Tex. 355, 11 S. W. Rep. 336), Evid., 75, 84; Negl., 16; Pl., 152.
Gulf, C. & S. F. R. Co. *v.* McLean (74 Tex. 646, 12 S. W. Rep. 843), Contrib. Neg., 89; Fires, 32.
Gulf, C. & S. F. R. Co. *v.* McMannewitz (34 Am. & Eng. R. Cas. 428, 70 Tex. 73, 8 S. W. Rep. 66), Car. of P., 595; Dam., 4; Pl., 110.
Gulf, C. & S. F. R. Co. *v.* McWhirter (77 Tex. 356, 14 S. W. Rep. 26), Children, Inj. to, 26, 73, 139; Negl., 86.
Gulf, C. & S. F. R. Co. *v.* Maetze (18 Am. & Eng. R. Cas. 613, 2 Tex. App. (Civ.

Cas.) 553), Car. of M., 191, 236, 482, 799, 801; Contr., 86; Dam., 11, 55, 56.
Gulf, C. & S. F. R. Co. *v.* Matthews (3 Tex. Civ. App. 493, 23 S. W. Rep. 90), Fires, 345.
Gulf, C. & S. F. R. Co. *v.* Montgomery (85 Tex. 64, 19 S. W. Rep. 1015), Bridges, 55; Cross. Sts. & H., 9; Evid., 174; Sts. & H., 176; Words & Ph., 105.
Gulf, C. & S. F. R. Co. *v.* Moody (3 Tex. Civ. App. 622, 22 S. W. Rep. 1009), Eject. Pass., 1, 54, 124; Trial, 137.
Gulf, C. & S. F. R. Co. *v.* Moore (69 Tex. 157, 6 S. W. Rep. 631), Agency, 79; Contrib. Neg., 82; Evid., 175.
Gulf, C. & S. F. R. Co. *v.* Morris (35 Am. & Eng. R. Cas. 94, 67 Tex. 692, 4 S. W. Rep. 156), Charters, 51; Dissol., 8; Leases, 16; Mort., 252; Sales of Rds., 11.
Gulf, C. & S. F. R. Co. *v.* Necco (Tex.) (15 S. W. Rep. 1102), New Tr., 37.
Gulf, C. & S. F. R. Co. *v.* Necco (Tex.) (18 S. W. Rep. 564), Sts. & H., 274.
Gulf, C. & S. F. R. Co. *v.* Neely (64 Tex. 344), Subscr., 36.
Gulf, C. & S. F. R. Co. *v.* Newell (38 Am. & Eng. R. Cas. 503, 73 Tex. 334, 11 S. W. Rep. 342), Charters, 59; Consol., 16; Reorg., 12, 13; Stat. & D., 40.
Gulf, C. & S. F. R. Co. *v.* Norfleet (45 Am. & Eng. R. Cas. 207, 78 Tex. 321, 14 S. W. Rep. 703), Phys. Exam., 2.
Gulf, C. & S. F. R. Co. *v.* Pettis (69 Tex. 689, 7 S. W. Rep. 93), Derailm., 8; Employes, Inj. to, 136.
Gulf, C. & S. F. R. Co. *v.* Pettit (3 Tex. Civ. App. 588, 22 S. W. Rep. 761), Car. of M., 723, 800.
Gulf, C. & S. F. R. Co. *v.* Poindexter (70 Tex. 98, 7 S. W. Rep. 316), Em. Dom., 1072.
Gulf, C. & S. F. R. Co. *v.* Pomeroy (30 Am. & Eng. R. Cas. 200, 67 Tex. 408, 3 S. W. Rep. 722), Culverts, 1, 14; Embankm., 4; Flood. Lds., 12.
Gulf, C. & S. F. R. Co. *v.* Pool (34 Am. & Eng. R. Cas. 187, 70 Tex. 713, 8 S. W. Rep. 535), Flood. Lds., 22, 98.
Gulf, C. & S. F. R. Co. *v.* Preston (74 Tex. 181, 11 S. W. Rep. 1108), Flood. Lds., 70, 71.
Gulf, C. & S. F. R. Co. *v.* Rather (3 Tex. Civ. App. 72, 21 S. W. Rep. 951), Eject. Pass., 40; Tickets & F., 8.
Gulf, C. & S. F. R. Co. *v.* Rawlins (80 Tex. 579, 16 S. W. Rep. 430), Injunc., 42; Judgm, 1; Proc., 9.
Gulf, C. & S. F. R. Co. *v.* Redeker (67 Tex. 181, 2 S. W. Rep. 513), Contrib. Neg., 66, 105; Employés, Inj. to, 45, 48, 474, 476.
Gulf, C. & S. F. R. Co. *v.* Redeker (41 Am. & Eng. R. Cas. 296, 75 Tex. 310, 12 S. W. Rep. 855), Employés, Inj. to, 458, 465; New Tr., 82.
Gulf, C. & S. F. R. Co. *v.* Reed (48 Am. & Eng. R. Cas. 423, 80 Tex. 362, 15 S. W. Rep. 1105), Agency, 79, 93, 107; Nuis., 6.
Gulf, C. & S. F. R. Co. *v.* Reed (Tex. Civ. App.) (22 S. W. Rep. 283), Dam., 71; Nuis., 6.
Gulf, C. & S. F. R. Co. *v.* Richards (83 Tex. 203, 18 S. W. Rep. 611), Constr. Rys., 4; Witn., 104, 119.
Gulf, C. & S. F. R. Co. *v.* Richardson (79 Tex. 649, 15 S. W. Rep. 689), Tel. & T. Lines, 10.
Gulf, C. & S. F. R. Co. *v.* Ricker (Tex.) (17 S. W. Rep. 382), Constr. Rys., 108, 116.
Gulf, C. & S. F. R. Co. *v.* Riordan (Tex. Civ. App.) (22 S. W. Rep. 519), Death, etc., 262.
Gulf, C. & S. F. R. Co. *v.* Ritter (4 Tex. App. (Civ. Cas.) 212, 16 S. W. Rep. 969), Animals, 77.
Gulf, C. & S. F. R. Co. *v.* Ross (4 Tex. App. (Civ. Cas.) 129, 16 S. W. Rep. 536), Em. Dom., 573.
Gulf, C. & S. F. R. Co. *v.* Rowland (35 Am. & Eng. R. Cas. 286, 70 Tex. 298, 7 S. W. Rep. 718), Charters, 26; Cross. Sts. & H., 10; Farm Cross., 2; Fences, 1; Stat., 16.
Gulf, C. & S. F. R. Co. *v.* Rowland (52 Am. & Eng. R. Cas. 298, 82 Tex. 166, 18 S. W. Rep. 96), Evid., 44.
Gulf, C. & S. F. R. Co. *v.* Ryan (4 Tex. App. (Civ. Cas.) 529, 18 S. W. Rep. 866), Car. of P., 263.
Gulf, C. & S. F. R. Co. *v.* Schwabbe (1 Tex. Civ. App. 573, 21 S. W. Rep. 706), Employés, Inj. to, 99; Fel. Serv., 3, 310, 399.
Gulf, C. & S. F. R. Co. *v.* Sebastian (3 Tex. App. (Civ. Cas.) 464), Trial, 21.
Gulf, C. & S. F. R. Co. *v.* Shearer (1 Tex. Civ. App. 343, 21 S. W. Rep. 133), App., 68, 70; Contrib. Neg., 17; Employés, Inj. to, 309, 559; Trial, 166.
Gulf, C. & S. F. R. Co. *v.* Silliphant (70 Tex. 623, 8 S. W. Rep. 673), Dam., 71; Employés, Inj. to, 138, 182, 186.
Gulf, C. & S. F. R. Co. *v.* Simonton (2 Tex. Civ. App. 558, 22 S. W. Rep. 285), Cat.-Gds., 7, 25; Dam., 77; Witn., 135.
Gulf, C. & S. F. R. Co. *v.* Smith (72 Tex. 122, 9 S. W. Rep. 865, 2 L. R. A. 281), Cov'ts, 9.
Gulf, C. & S. F. R. Co. *v.* Smith (74 Tex. 276, 11 S. W. Rep. 1104), Car. of P., 543; Derailm., 4; Evid., 96; Negl., 102; New Tr., 51; Witn., 99.
Gulf, C. & S. F. R. Co. *v.* Smith (3 Tex. Civ. App. 483, 23 S. W. Rep. 89), Fires, 155.
Gulf, C. & S. F. R. Co. *v.* State (36 Am. & Eng. R. Cas. 481, 72 Tex. 404, 1 L. R. A. 849, 10 S. W. Rep. 81, 2 Int. Com. Rep. 335), Contr., 63; Evid., 100; Int. Com., 217.
Gulf, C. & S. F. R. Co. *v.* Styron (2 Tex. Unrep. Cas. 275), Children, Inj. to, 154.
Gulf, C. & S. F. R. Co. *v.* Styron (66 Tex. 421, 1 S. W. Rep. 161), Children, Inj. to, 25, 154, 194.
Gulf, C. & S. F. R. Co. *v.* Summers (3 Tex. App. (Civ. Cas.) 417), Dam., 83.
Gulf, C. & S. F. R. Co. *v.* Sumrow (4 Tex. App. (Civ. Cas.) 579, 18 S. W. Rep. 135), Dam., 83.
Gulf, C. & S. F. R. Co. *v.* Tacquard (3 Tex. App. (Civ. Cas.) 179), Em. Dom., 44, 64.
Gulf, C. & S. F. R. Co. *v.* Tacquard (3 Tex. App. (Civ. Cas.) 305), Just. P., 18.
Gulf, C. & S. F. R. Co. *v.* Tennant (Tex. Civ. App.) (22 S. W. Rep. 761), Car. of L. S. 104.
Gulf, C. & S. F. R. Co. *v.* Thompson (2 Tex.

App. (Civ. Cas.) 500), Jurisd., 15; Sts. & H., 239.
Gulf, C. & S. F. R. Co. *v.* Thompson (4 Tex. App. (Civ. Cas.) 219, 16 S. W. Rep. 174), Fires, 365; Lim. of Ac., 57.
Gulf, C. & S. F. R. Co. *v.* Thompson (Tex. Civ. App.) (21 S. W. Rep. 186), Car. of L. S., 104.
Gulf, C. & S. F. R. Co. *v.* Trawick (30 Am. & Eng. R. Cas. 49, 68 Tex. 314, 4 S. W. Rep. 507), Car. of L. S., 68; Lim. of Ac., 3; Words & Ph., 7.
Gulf, C. & S. F. R. Co. *v.* Trawick (80 Tex. 270, 15 S. W. Rep. 568, 18 S. W. Rep. 948), Car. of L. S., 3, 16, 142.
Gulf, C. & S. F. R. Co. *v.* Vancil (2 Tex. Civ. App. 427, 21 S. W. Rep. 303), Bagg., 125, 126; Witn., 122.
Gulf, C. & S. F. R. Co. *v.* Vaughn (4 Tex. App. (Civ. Cas.) 269, 16 S. W. Rep. 775), Car. of L. S., 80, 104.
Gulf, C. & S. F. R. Co. *v.* Walker (37 Am. & Eng. R. Cas. 342, 70 Tex. 126, 7 S. W. Rep. 831), Employés, Inj. to, 564; Sts. & H., 372, 393; Tresp., Inj. to, 126.
Gulf, C. & S. F. R. Co. *v.* Wallace (2 Tex. Civ. App. 270, 21 S. W. Rep. 973), Animals, 199.
Gulf, C. & S. F. R. Co. *v.* Wallen (26 Am. & Eng. R. Cas. 219, 65 Tex. 568), Car. of P., 437; Negl., 97.
Gulf, C. & S. F. R. Co. *v.* Washington (49 Fed. Rep. 347, 4 U. S. App. 121, 1 C. C. A. 286), Animals, 62, 88, 327, 349, 388, 497; App., 18; Fed. Cts., 3; Negl., 89; Witn., 94.
Gulf, C. & S. F. R. Co. *v.* Wells (Tex.) (16 S. W. Rep. 1025), Employés, Inj. to, 6, 93, 267, 579; Fel. Serv., 349.
Gulf, C. & S. F. R. Co. *v.* Wells (81 Tex. 685, 17 S. W. Rep. 511), Employés, Inj. to, 632, 638; Words & Ph., 207.
Gulf, C. & S. F. R. Co. *v.* Wheat (68 Tex. 133, 3 S. W. Rep. 455), Fires, 144.
Gulf, C. & S. F. R. Co. *v.* Wilhelm (3 Tex. App. (Civ. Cas.) 558), Car. of L. S., 72, 138, 141.
Gulf, C. & S. F. R. Co. *v.* Wilhelm (4 Tex. App. (Civ. Cas.) 413, 16 S. W. Rep. 109), Car. of L. S., 138.
Gulf, C. & S. F. R. Co. *v.* Williams (Tex.) (7 S. W. Rep. 88), Contrib. Neg., 105; Evid., 282.
Gulf, C. & S. F. R. Co. *v.* Williams (70 Tex. 159, 8 S. W. Rep. 78), Car. of P., 246.
Gulf, C. & S. F. R. Co. *v.* Williams (39 Am. & Eng. R. Cas. 292, 72 Tex. 159, 12 S. W. Rep. 172), Employés, Inj. to, 98, 212.
Gulf, C. & S. F. R. Co. *v.* Wilson (69 Tex. 739, 7 S. W. Rep. 653), Tel. & T. Lines, 8, 9.
Gulf, C. & S. F. R. Co. *v.* Wilson (79 Tex. 371, 15 S. W. Rep. 280), Car. of Mails, 18; Car. of P., 13, 54, 598, 648; Derailm., 2, 3.
Gulf, C. & S. F. R. Co. *v.* Witt (2 Tex. App. (Civ. Cas.) 677), Pl., 134.
Gulf, C. & S. F. R. Co. *v.* Witte (68 Tex. 295, 4 S. W. Rep. 490), App., 69; Fires, 250, 270, 277, 280.
Gulf, C. & S. F. R. Co. *v.* Wright (1 Tex. Civ. App. 402, 21 S. W. Rep. 80), Car. of L. S., 138, 154; Stat. Agts., 5; Witn., 55, 121.
Gulf, C. & S. F. R. Co. *v.* Wright (2 Tex. Civ. App. 463, 21 S. W. Rep. 399), Evid., 201, 204; Tickets & F., 19.
Gulf, C. & S. F. R. Co. *v.* Yell (3 Tex. App. (Civ. Cas.) 437), Cat.-Gds., 9.
Gulf, C. & S. F. R. Co. *v.* York (74 Tex. 364, 12 S. W. Rep. 68), Evid., 202; Tresp., Inj. to, 106; Trial, 173.
Gulf, C. & S. F. R. Co. *v.* York (2 Tex. App. (Civ. Cas.) 718), Car. of L. S., 53, 80.
Gulf, C. & S. F. R. Co. *v.* Zimmerman (81 Tex. 605, 17 S. W. Rep. 239), Car. of M., 151; Lim. of Liab., 21.
Gulf City St. R. & R. E. Co. *v.* Galveston (32 Am. & Eng. R. Cas. 300, 69 Tex. 660, 7 S. W. Rep. 520), St. Rys., 139.
Gulf City St. R. Co. *v.* Galveston City R. Co. (65 Tex. 502), St. Rys., 1; Sts. & H., 90.
Gulf, H. & S. A. R. Co. *v.* Davidson (21 Am. & Eng. R. Cas. 431, 61 Tex. 204), Car. of P., 509.
Gulf, W. T. & P. R. Co. *v.* Cornell (84 Tex. 541, 19 S. W. Rep. 703), Pub. Lds., 27.
Gulf, W. T. & P. R. Co. *v.* Ryan (33 Am. & Eng. R. Cas. 289, 69 Tex. 665, 7 S. W. Rep. 83), Car. of P., 182; Employés, Inj. to, 429; Fel. Serv., 142, 253.
Gulliher *v.* Chicago, R. I. & P. R. Co. (59 Iowa 416, 13 N. W. Rep. 429), Release, 14.
Gulliver *v.* Adams Exp. Co. (38 Ill. 504), Exp. Cos., 29, 41.
Gumb *v.* Twenty-third St. R. Co. (26 J. & S. 1, 30 N. Y. S. R. 253, 9 N. Y. Supp. 316), Cross., Inj. at, 221.
Gumb *v.* Twenty-third St. R. Co. (43 Am. & Eng. R. Cas. 315, 114 N. Y. 411, 21 N. E. Rep. 993, 23 N. Y. S. R. 748; reversing 21 J. & S. 466, 1 N. Y. S. R. 715), Dam., 76, 84, 90; Evid., 75.
Gummere *v.* Lehigh Valley R. Co. (1 Pa. Dist. 585), Injunc., 4; Par. & Comp. L., 1.
Gumz *v.* Chicago, St. P. & M. R. Co. (5 Am. & Eng. R. Cas. 583, 52 Wis. 672, 10 N. W. Rep. 11), Employés, Inj. to, 14; Fel. Serv., 87, 194; Trial, 63.
Gunn *v.* Cambridge R. Co. (30 Am. & Eng. R. Cas. 652, 144 Mass. 430, 11 N. E. Rep. 678), Death, etc., 1.
Gunn *v.* Central R. Co. (74 Ga. 509), Partn., ...
Gunn *v.* Ohio River R. Co. (54 Am. & Eng. R. Cas. 167, 36 W. Va. 165, 14 S. E. Rep. 465), Animals, 62; App., 38.
Gunn *v.* Wisconsin & M. R. Co. (70 Wis. 203, 35 N. W. Rep. 281), Cross., Inj. at, 288.
Gunter *v.* Wicker (85 N. Car. 310), Contrib. Neg., 48.
Gurley *v.* Armstead (148 Mass. 267, 19 N. E. Rep. 389), Trover, 8.
Gurley *v.* Missouri Pac. R. Co. (93 Mo. 445, 12 West. Rep. 330, 6 S. W. Rep. 218), Pl., 107, 115.
Gurley *v.* Missouri Pac. R. Co. (104 Mo. 211, 16 S. W. Rep. 11), App., 126; Cross. Sts. & H., 33; Evid., 273; Licensees, Inj. to, 17, 24; Sts. & H., 412.
Gurney *v.* Atlantic & G. W. R. Co. (58 N.

Y. 358, 9 Am. Ry. Rep. 520; reversing 2 T. & C. 446), Receiv., 86; Words & Ph., 80.
Gurney *v.* Grand Trunk R. Co. (37 N. Y. S. R. 155, 14 N. Y. Supp. 321, 59 Hun 625), Bagg., 5.
Gurney *v.* Grand Trunk R. Co. (37 N. Y. S. R. 557, 13 N. Y. Supp. 645; affirmed in 138 N. Y. 638, mem., 53 N. Y. S. R. 929), Death, etc., 110, 111.
Gurney *v.* Minneapolis & St. C. R. Co. (41 Minn. 223, 43 N. W. Rep. 2), Em. Dom., 571.
Gustafsen *v.* Washburn & M. Mfg. Co. (153 Mass. 468, 27 N. E. Rep. 179), Death, etc., 83, 299.
Guta *v.* Lake Shore & M. S. R. Co. (81 Mich. 291, 45 N. W. Rep. 821), Cross, Inj. at, 251.
Gutbrecht *v.* Prospect Park & C. I. R. Co. (28 Hun (N. Y.) 497), App., 131.
Guthrie *v.* Louisville & N. R. Co. (15 Am. & Eng. R. Cas. 209, 11 Lea (Tenn.) 372), Employés, Inj. to, 94.
Guthrie *v.* Maine C. R. Co. (81 Me. 572, 18 Atl. Rep. 295), Employés, Inj. to, 688.
Guthrie *v.* Pittsburg, C. & St. L. R. Co. (158 Pa. St. 433, 27 Atl. Rep. 1052), Tax., 104.
Gutridge *v.* Missouri Pac. R. Co. (94 Mo. 468, 13 West. Rep. 644, 7 S. W. Rep 476), Employés, Inj. to, 99, 154, 524; Witn., 145, 176.
Gutridge *v.* Missouri Pac. R. Co. (105 Mo. 520, 16 S. W. Rep. 943), App., 115; Employés, Inj. to, 93, 143, 144, 216, 342, 567, 688.
Guy *v.* Grand Trunk R. Co. (10 Ont. Pr. 372), Proc., 48.
Guy *v.* New York, O. & W. R. Co. (30 Hun (N. Y.) 399), Death, etc., 259.
Guysboro *v.* St. Mary's (19 Nov. Sc. 134), Em. Dom., 1251.
Gwathmey *v.* Little Miami R. Co. (12 Ohio St. 92), Leases, 64.
Gwinner *v.* Lehigh & D. G. R. Co. (55 Pa. St. 126), Em. Dom., 937.
Gwyn *v.* Richmond & D. R. Co. (6 Am. & Eng. R. Cas. 452, 85 N. Car. 429, 39 Am. Rep. 708), Car. of M., 500, 713.
Gwynn *v.* Southeastern R. Co. (18 L. T. 738), Libel & S., 9.
Gyger *v.* Philadelphia City Pass. R. Co. (17 Phila. (Pa.) 86), Injunc., 4.
Gyger *v.* Philadelphia City Pass. R. Co. (136 Pa. St. 96, 20 Atl. Rep. 309), Par. & Comp. L., 6; Words & Ph., 180.

Haas *v.* Buffalo, N. Y. & P. R. Co. (40 Hun (N. Y.) 145), Employés, Inj. to, 209.
Haas *v.* Chicago & N. W. R. Co. (41 Wis. 44), Death, etc., 360; Sts. & H., 317.
Haas *v.* Grand Rapids & I. R. Co. (8 Am. & Eng. R. Cas. 268, 47 Mich. 401, 11 N. W. Rep. 216), Cross., Inj. at, 61, 66, 209, 301; Death, etc., 194.
Haas *v.* Kansas City, Ft. S. & G. R. Co. (35 Am. & Eng. R. Cas. 572, 81 Ga. 792, 7 S. E. Rep. 620), Bills of L., 115; Car. of M., 143, 712, 710; Words & Ph. 246.
Haase *v.* Oregon R. & N. Co. (44 Am. & Eng. R. Cas. 360, 19 Oreg. 354, 24 Pac. Rep. 238), Car. of P., 43, 371; Evid., 220; Tresp., Inj. to, 13.
Hackensack Imp. Com. *v.* New Jersey Midland R. Co. (22 N. J. Eq. 94), Injunc., 9.
Hackett *v.* Boston, C. & M. R. Co. (35 N. H. 390), Car. of M., 771; Witn., 96.
Hackett *v.* Multnomah R. Co. (12 Oreg. 124, 6 Pac. Rep. 659), Ferries, 2.
Hackett *v.* Western Union Tel. Co. (80 Wis. 187, 49 N. W. Rep. 822), Indep. Contr., 26.
Hackett *v.* Wilson (12 Oreg. 25, 6 Pac. Rep. 652), Ferries, 1, 2.
Hackford *v.* New York C. R. Co. (6 Lans. (N. Y.) 381, 43 How. Pr. 222, 13 Abb. Pr. N. S. 18; affirmed in 53 N. Y. 654), Contrib. Neg., 62; Cross., Inj. at, 304.
Hackford *v.* New York C. & H. R. R. Co. (53 N. Y. 654; affirming 13 Abb. Pr. N. S. 18, 43 How. Pr. 222, 6 Lans. 381), App., 33; Cross., Inj. at, 219.
Hackley *v.* Mack (60 Mich. 591, 27 N. W. Rep. 871), Exec., 12; Tax., 310.
Hadd *v.* United States & C. Exp. Co. (6 Am. & Eng. R. Cas. 443, 52 Vt. 335, 36 Am. Rep. 757), Exp. Cos., 62, 76.
Hadden *v.* Metropolitan El. R. Co. (75 Hun 63, 26 N. Y. Supp. 995), Elev. Rys., 107, 139, 160, 188.
Hadden *v.* St. Louis, I. M. & S. R. Co. (57 How. Pr. (N. Y.) 390), Abate., 2.
Haddock *v.* Delaware, L. & W. R. Co. (3 Int. Com. Rep. 302, 4 Int. Com. Com. 296), Int. Com., 16, 150, 168.
Haden *v.* Sioux City & P. R. Co. (Iowa) (48 N. W. Rep. 733), Employés, Inj. to, 308, 327; Evid., 247.
Hadencamp *v.* Second Ave. R. Co. (1 Sweeney (N. Y.) 490), Car. of P., 181; St. Rys., 411.
Hadley *v.* Central Branch U. P. R. Co. (22 Kan. 359), Animals, 329, 349.
Hadley *v.* Russell (40 N. H. 109), Stockh., 30, 61.
Haesley *v.* Winona & St. P. R. Co. (46 Minn. 233, 48 N. W. Rep. 1023), Children, Inj. to, 34.
Haff *v.* Minneapolis & St. L. R. Co. (4 McCrary (U. S.) 622, 14 Fed. Rep. 558), Contrib. Neg., 41, 44; Cross., Inj. at, 216; Negl., 43, 73; Stat. & D., 120.
Hagan *v.* Chicago, D. & C. G. T. J. R. Co. (49 Am. & Eng. R. Cas. 670, 86 Mich. 615, 49 N. W. Rep. 500), Fires, 10, 35, 321, 362; Negl., 41.
Hagan *v.* Philadelphia & G. F. R. Co. (15 Phila. (Pa.) 278), St. Rys., 399.
Hagan *v.* Philadelphia & T. R. Co. (5 Phila. (Pa.) 179), Cross., Inj. at, 184.
Hagar *v.* Providence & W. R. Co. (3 R. I. 88), Dam., 31.
Hagar *v.* Brainerd (44 Vt. 294, 1 Am. Ry. Rep. 128), Em. Dom., 427.
Hagen *v.* Kean (3 Dill. (U. S.) 124), Death, etc., 96; Words & Ph., 165.
Hagenlocher *v.* Coney Island & B. R. Co. (99 N. Y. 136, 1 N. E. Rep. 530), Evid., 177.
Hager *v.* Southern Pac. R. Co. (98 Cal. 300, 33 Pac. Rep. 119), Contrib. Neg., 23; Cross., Inj. at, 321.

Hagerstown Bank *v.* Adams Exp. Co. (45 Pa. St. 419), Exp. Cos., 16.
Hagerty *v.* Great Western R. Co. (44 U. C. Q. B. 319), Mal. Pros., 4.
Haggard *v.* Atlantic & P. R. Co. (63 Mo. 302), Animals, 617.
Haggerty *v.* Brooklyn City & N. R. Co. (6 Abb. N. Cas. 129, 61 N. Y. 624), Evid., 98; Witn., 106.
Haggerty *v.* Central R. Co. (31 N. J. L. 349), Death, etc., 41.
Haggerty *v.* Flint & P. M. R. Co. (26 Am. & Eng. R. Cas. 196, 59 Mich. 366, 26 N. W. Rep. 639, 60 Am. Rep. 301), Eject. Pass., 14, 125.
Hagins *v.* Cape Fear & Y. V. R. Co. (106 N. Car. 537, 11 S. E. Rep. 590), Fel. Serv., 1, 455.
Hagner *v.* Pennsylvania S. V. R. Co. (154 Pa. St. 475, 25 Atl. Rep. 1082), Em. Dom., 94, 153; Location, etc., 3, 17.
Hagood *v.* Southern (117 U. S. 52, 6 Sup. Ct. Rep. 608), State Aid, 34; Tax., 292.
Hahn *v.* Chicago, M. & St. P. R. Co. (78 Wis. 396, 47 N. W. Rep. 620), Cross., Inj. at, 228, 256.
Hahn *v.* Chicago, O. & St. J. R. Co. (43 Iowa 333, 14 Am. Ry. Rep. 461), Em. Dom., 940.
Hahn *v.* Southern Pac. R. Co. (51 Cal. 605, 12 Am. Ry. Rep. 226), Fright. Teams, 2.
Haigh *v.* London & N. W. R. Co. (1 F. & F. 646, 8 W. R. 6), Animals, 178.
Haigh *v.* Royal Mail Steam Packet Co. (52 L. J. Q. B. D. 640, 49 L. T. 802, 48 J. P. 230, 5 Asp. M. C. 189, 4 Ry. & C. T. Cas. xv; affirming 52 L. J. Q. B. D. 395, 48 L. T. 267, 5 Asp. M. C. 47), Death, etc., 42.
Haight *v.* New York C. R. Co. (7 Lans. (N. Y.) 11), Cross., Inj. at, 269.
Haight *v.* New York El. R. Co. (49 How. Pr. (N. Y.) 20), Charters, 86; Tickets & F., 130.
Haight *v* Pittsburg, Ft. W. & C. R. Co. (3 Pittsb. (Pa.) 105), Rev., 5.
Haight *v.* Pittsburg, Ft. W. & C. R. Co. (6 Wall. (U. S.) 15), Rev., 5.
Hain *v.* Lebanon & A. St. R. Co. (1 Pa. Dist. 452), St. Rys., 92, 208.
Haines *v.* Chicago, St. P., M. & O. R. Co. (29 Minn. 160, 43 Am. Rep. 199, 12 N. W. Rep. 447), Bagg., 37.
Haines *v.* Illinois C. R. Co. (41 Iowa 227), Cross., Inj. at, 254; Trial, 161.
Haines *v.* St. Louis, D. M. & N. R. Co. (20 Am. & Eng. R. Cas. 260, 65 Iowa 216, 21 N. W. Rep. 573), Em. Dom., 466.
Haire *v.* Rome R. Co. (57 Fed. Rep. 321), Rem. of C., 40.
Haisch *v.* Keokuk & D. M. R. Co. (71 Iowa 606, 33 N. W. Rep. 126), Lim. of Ac., 31.
Haislip *v.* Wilmington & W. R. Co. (102 N. Car. 376, 8 S. E. Rep. 926), Charters, 189; Em. Dom., 706, 748.
Haisten *v.* Savannah, G. & N. A. R. Co. (51 Ga. 199, 6 Am. Ry. Rep. 424), Spec. Perf., 5, 6.
Haldan *v.* Great Western R. Co. (30 U. C. C. P. 89), Car. of P., 389.
Haldeman *v.* Hillsborough & C. R. Co. (2 Handy (Ohio) 101), Assign. for Cred., 5; Attach., 47; Stock, 61.
Haldeman *v.* Pennsylvania C. R. Co. (50 Pa. St. 425), Em. Dom., 981; License, 7.
Haldimand County *v.* Hamilton & N. W. R. Co. (27 U. C. C. P. 228), Mun. Aid, 237, 254.
Hale *v.* Bonner (49 Am. & Eng. R. Cas. 135, 82 Tex. 33, 17 S. W. Rep. 605), Dam., 63, 71.
Hale *v.* Burlington, C. R. & N. R. Co. (2 McCrary (U. S.) 558, 13 Fed. Rep. 203), Liens, 30; Mort., 261.
Hale *v.* Columbia & G. R. Co. (34 So. Car. 292, 13 S. E. Rep. 537), Cross., Inj. at, 118; Trial, 63, 64.
Hale *v.* Frost (99 U. S. 389), Mort., 31.
Hale *v.* Grand Trunk R. Co. (60 Vt. 605, 7 N. Eng. Rep. 48, 15 Atl. Rep. 300, 1 L. R. A. 187), Car. of Mails, 18.
Hale *v.* Hampshire County Com'rs (137 Mass. 111), Tax., 99.
Hale *v.* Missouri Pac. R. Co. (36 Neb. 266, 54 N. W. Rep. 517), Car. of L. S., 34, 155.
Hale *v.* Nashua & L. R. Co. (60 N. H. 333), Bonds, 38; Mort., 182, 191, 196; Parties, 22; Receiv., 76.
Hale *v.* Point Pleasant & O. R. R. Co. (20 Am. & Eng. R. Cas. 162, 23 W. Va. 454), Injunc., 2.
Hales *v.* London & N. W. R. Co. (4 B. & S. 66, 32 L. J. Q. B. 292, 11 W. R. 856, 8 L. T. 421), Car. of M., 46, 125, 786.
Halesowen R. Co. *v.* Great Western R. Co. (4 Ry. & C. T. Cas. 224), Ry. Com'rs, 6.
Haley *v.* Chicago & N. W. R. Co. (21 Iowa 15), Contrib. Neg., 12; Death, etc., 305; Eject. Pass., 77.
Haley *v.* Earle (30 N. Y. 208), Contrib. Neg., 15.
Haley *v.* Hannibal & St. J. R. Co. (86 Mo. 112), Proc., 45.
Haley *v.* Jump River Lumber Co. (81 Wis. 412, 51 N. W. Rep. 321, 956), Evid., 90; Trial, 203.
Haley *v.* Mobile & O. R. Co. (8 Am. & Eng. R. Cas. 541, 7 Baxt. (Tenn.) 239), Dam., 31; Death, etc., 96, 418; Employés, Inj. to, 1.
Haley *v.* New York C. & H. R. R. Co. (7 Hun (N. Y.) 84), Employés, Inj. to, 327.
Haley *v.* St. Louis, K. C. & N. R. Co. (69 Mo. 614), Fires, 224.
Halferty *v.* Wabash, St. L. & P. R. Co. (82 Mo. 90), Animals, 73, 102; Cross., Inj. at, 165.
Halff *v.* Allyn (60 Tex. 278), Bills of L., 37, 38; Car. of M., 510, 512.
Halford *v.* Cameron's C., etc., R. Co. (16 Q. B. 442, 15 Jur. 335, 20 L. J. Q. B. 160), Bills & N., 5.
Halifax City R. Co. *v.* Queen (2 Can. Exch. 433), Em. Dom., 1274.
Hall's Appeal (56 Pa. St. 238), Branch & L. Roads, 16.
Hall *v.* Baker (74 Wis. 118, 42 N. W. Rep. 104), Mun. Aid, 53, 67, 173.
Hall *v.* Boston & W. R. Co. (14 Allen (Mass.) 439), Car. of M., 273, 303.
Hall *v.* Brown (54 N. H. 495, 11 Am. Ry. Rep. 231), Cross., Inj. at, 52; Fright. Teams, 3; Sts. & H., 404.

Hall *v.* Carney (140 Mass. 131, 3 N. E. Rep. 14), Attach., 29.
Hall *v.* Cheney (36 N. H. 26), Car. of M., 108, 727.
Hall *v.* Chesapeake, O. & S. W. R. Co. (Tenn.) (12 Am. & Eng. R. Cas. 41), Eq., 1; Injunc., 10.
Hall *v.* Chicago, B. & N. R. Co. (46 Minn. 439, 49 N. W. Rep. 239), Collis., 36; Employés, Inj. to, 431, 622; New Tr., 79.
Hall *v.* Chicago, M. & St. P. R. Co. (48 Wis. 317, 4 N. W. Rep. 325), Evid., 11.
Hall *v.* Chicago, R. I. & P. R. Co. (84 Iowa 311, 51 N. W. Rep. 150), App., 135; Witn., 38.
Hall *v.* Cincinnati, H. & D. R. Co. (1 Disn. (Ohio) 58), Assign., 22.
Hall *v.* Cooperstown & S. V. R. Co. (49 Hun 373, 19 N. Y. S. R. 646, 3 N. Y. Supp. 584), Employés, Inj. to, 15.
Hall *v.* De Cuir (95 U. S. 485), Int. Com., 222.
Hall *v.* Dimond (63 N. H. 565, 3 Atl. Rep. 423), Car. of M., 394.
Hall *v.* Galveston, H. & S. A. R. Co. (39 Fed. Rep. 18), Death, etc., 403; Employés, Inj. to, 747; Fel. Serv., 424.
Hall *v.* Grand Trunk R. Co. (34 U. C. Q. B. 517), Car. of M., 81.
Hall *v.* Houston & T. C. R. Co. (39 Tex. 286), Tax., 283, 353.
Hall *v.* London, B. & S. C. R. Co. (17 Q. B. D. 230, 5 Ry. & C. T. Cas. 28), App., 6.
Hall *v.* London, B. & S. C. R. Co. (22 Am. & Eng. R. Cas. 446, L. R. 15 Q. B. D. 505, 53 L. T. 345), Charges, 64, 65, 66; Ry. Com'rs, 6.
Hall *v.* London & N. W. R. Co. (35 L. T. 848), Discov., 3.
Hall *v.* London, B. & S. C. R. Co. (4 Ry. & C. T. Cas. 398), Charges, 108, 115, 116 118, 119.
Hall *v.* McFadden (19 New Brun. 340), Car. of P., 216, 219, 223.
Hall *v.* McFadden (21 New Brun. 586), Car. of P., 536.
Hall *v.* Memphis & C. R. Co. (9 Fed. Rep. 585), Eject. Pass., 53.
Hall *v.* Memphis & C. R. Co. (9 Am. & Eng. R. Cas. 348, 15 Fed. Rep. 57), Actions, 10; Eject. Pass., 35, 63, 65, 100.
Hall *v.* Missouri Pac. R. Co. (8 Am. & Eng. R. Cas. 106, 74 Mo. 298), Employés, Inj. to, 83, 536; Fel. Serv., 83, 321, 342, 353; Trial, 117.
Hall *v.* Mobile & M. R. Co. (58 Ala. 10), Mort., 86; Officers, 4.
Hall *v.* Nashville & C. R. Co. (13 Wall. (U. S.) 367, 3 Am. Ry. Rep. 409), Fire Ins., 11.
Hall *v.* Northeastern R. Co. (33 L. T. 306, 23 W. R. 860, L. R. 10 Q. B. 437, 44 L. J. Q. B. 164), Car. of L. S., 128; Passes, 21.
Hall *v.* Pennsylvania Co. (16 Am. & Eng. R. Cas. 165, 90 Ind. 459), Pl., 127.
Hall *v.* Pennsylvania R. Co. (3 Am. & Eng. R. Cas. 274, 1 Fed. Rep. 226), Bills of L., 77.
Hall *v.* Pennsylvania R. Co. (14 Phila. (Pa.) 414), Car. of M., 143.
Hall *v.* Peoria & E. R. Co. (143 Ill. 163, 32 N. E. Rep. 598), Acc. & Sat., 5; Spec. Perf., 28.
Hall *v.* Pickering (40 Me. 548), Em. Dom., 494, 1055, 1056; Location, etc., 19.
Hall *v.* Power (12 Met. (Mass.) 482), Assault, 12; Stat. & D., 107.
Hall *v.* Renfro (3 Metc. (Ky.) 51), Car. of L. S., 24; Car. of M., 12; Ferries, 10; Words & Ph., 7.
Hall *v.* Rose Hill & E. Road Co. (70 Ill. 673), Stock, 41, 42.
Hall *v.* Selma & T. R. Co. (6 Ala. 741), Subscr., 133, 146, 171, 172.
Hall *v.* South Carolina R. Co. (25 So. Car. 564), Eject. Pass., 93; Ry. Com'rs, 38.
Hall *v.* South Carolina R. Co. (34 Am. & Eng. R. Cas. 311, 28 So. Car. 261, 5 S. E. Rep. 623), Car. of P., 634; Eject. Pass., 65, 67, 112, 118.
Hall *v.* Sullivan R. Co. (Brun. Col. Cas. (U. S.) 613), Franch., 4; Mort., 163.
Hall *v.* Union Pac. R. Co. (16 Fed. Rep. 744, 5 McCrary (U. S.) 257), Employés, Inj. to, 680.
Hall *v.* Union Pac. R. Co. (3 Dill. (U. S.) 515), Mand., 25, 28.
Hall *v.* Vermont & M. R. Co. (28 Vt. 401), Contr., 2; Direct., 27, 29; Lim. of Ac., 34; Proc., 41.
Hallack *v.* Johnson (12 Colo. 244, 20 Pac. Rep. 700), New Tr., 66.
Hallahan *v.* New York, L. E. & W. R. Co. (26 Am. & Eng. R. Cas. 169, 102 N. Y. 194, 6 N. E. Rep. 287, 1 N. Y. S. R. 367), Evid., 170; Witn., 104.
Hallenbeck *v.* Hahn (2 Neb. 377), Mun. Aid, 2, 6, 41.
Halliday *v.* St. Louis, K. C. & N. R. Co. (6 Am. & Eng. R. Cas. 433, 74 Mo. 159, 41 Am. Rep. 309), Car. of M., 648.
Hallidie *v.* Sutter St. R. Co. (63 Cal. 575), Sales, 8.
Halligan *v.* Chicago & R. I. R. Co. (15 Ill. 558), Tresp., 10.
Halligan *v.* Wade (21 Ill. 470), Land. & T., 7.
Hallihan *v.* Hannibal & St. J. R. Co. (2 Am. & Eng. R. Cas. 117, 71 Mo. 113), Death, etc., 214.
Halloran *v.* New York & H. R. Co. (2 E. D. Smith (N. Y.) 257), Animals, 272; Cat.-Gds., 12.
Halpin *v.* Third Ave. R. Co. (8 J. & S. (N. Y.) 175), Contrib. Neg., 87; New Tr., 98; St. Rys., 392.
Halsey *v.* Lehigh Valley R. Co. (45 N. J. L. 26), Evid., 203; Waters & W., 20.
Halsey *v.* Rapid Transit St. R. Co. (46 Am. & Eng. R. Cas. 76, 47 N. J. Eq. 380, 20 Atl. Rep. 859), Charters, 52; Elec. Rys., 18; Sts. & H., 138.
Halsey *v.* Rome, W. & O. R. Co. (12 N. Y. S. R. 319, 46 Hun 678, mem.; affirmed in 113 N. Y. 632, mem., 20 N. E. Rep. 876, 22 N. Y. S. R. 992), Contrib. Neg., 82, 87.
Halsey *v.* Warden (25 Kan. 128), Bills of L., 47, 50.
Halsted *v.* Manhattan R. Co. (26 J. & S. 270, 32 N. Y. S. R. 109, 11 N. Y. Supp. 44), Trial, 32.

Halsted *v.* Manhattan R. Co. (2 Misc. 498, 51 N. Y. S. R. 82, 22 N. Y. Supp. 390), Elev. Rys., 170.
Halton County *v.* Grand Trunk R. Co. (19 Ont. App. 252), Mun. Aid, 263.
Halverson *v.* Minneapolis & St. L. R. Co. (19 Am. & Eng. R. Cas. 526, 32 Minn. 88, 19 N. W. Rep. 392), Animals, 90; Fences, 77.
Ham *v.* Delaware & H. Canal Co. (142 Pa. St. 617, 21 Atl. Rep. 1012), Eject. Pass., 22, 50, 80; Trial, 175.
Ham *v.* Delaware & H. Canal Co. (58 Am. & Eng. R. Cas. 520, 155 Pa. St. 548, 26 Atl. Rep. 757), Eject. Pass., 64, 80, 91; Trial, 48.
Ham *v.* Grand Trunk R. Co. (11 U. C. C. P. 86), Cross., Inj. at, 145; Death, etc., 157.
Ham *v.* Newburgh, D. & C. R. Co. (52 N. Y. S. R. 536, 69 Hun 137, 23 N. Y. Supp. 107), Cat.-Gds. 15, 16.
Ham *v.* Toledo, W. & W. R. Co. (29 Ohio St. 174), Mand., 2.
Ham *v.* Wisconsin, I. & N. R. Co. (14 Am. & Eng. R. Cas. 204, 61 Iowa 716, 17 N. W. Rep. 157), Em. Dom., 456, 645, 689.
Haman *v.* Omaha Horse R. Co. (35 Neb. 74, 52 N. W. Rep. 830), St. Rys., 524.
Hambleton *v.* Central Ohio R. Co. (44 Md. 551), Stock, 90.
Hamblin *v.* Western Land Co. (57 Am. & Eng. R. Cas. 376, 147 U. S. 531, 13 Sup. Ct. Rep. 353), Land Grants, 8.
Hambly *v.* Delaware, M. & V. R. Co. (21 Fed. Rep. 541), Constr. Rys., 26; Dam., 58.
Hamburg-American Packet Co. *v.* Gattman (127 Ill. 598, 20 N. E. Rep. 662; affirming 27 Ill. App. 182), Bagg., 35, 37, 46.
Hamden *v.* New Haven & N. Co. (27 Conn. 158), Sts. & H., 193.
Hamel *v.* Brooklyn & N. Y. Ferry Co. (25 N. Y. S. R. 153, 53 Hun 634, mem., 1 Silv. Sup. Ct. 584, 6 N. Y. Supp. 102; affirmed in 125 N. Y. 707, mem., 26 N. E. Rep. 753, 34 N. Y. S. R. 1013), False Imp., 3.
Hamilton *v.* Annapolis & E. R. R. Co. (1 Md. Ch. 107; affirmed in 1 Md. 553), Em. Dom., 371, 864, 865; Franch., 10; Quo War., 8.
Hamilton *v.* Chattanooga, R. & C. R. Co. (3 Int. Com. Rep. 482, 4 Int. Com. Com. 686), Int. Com., 66.
Hamilton *v.* Clarion, M. & P. R. Co. (144 Pa. St. 34, 23 Atl. Rep. 53), Consol., 33; Cred. Bill, 7, 9, 10.
Hamilton *v.* Covert (16 U. C. C. P. 205), Branch & L. Roads, 12; Sts. & H., 216.
Hamilton *v.* Delaware, L. & W. R. Co. (50 N. J. L. 263, 11 Cent. Rep. 562, 13 Atl. Rep. 29), Death, etc., 194.
Hamilton *v.* Des Moines Valley R. Co. (36 Iowa 31), Employés, Inj. to, 173, 655; Negl., 105; Trial, 126, 188, 204; Witn., 131, 180.
Hamilton *v.* Des Moines & K. C. R. Co. (84 Iowa 131, 50 N. W. Rep. 567), Fires, 295, 206, 207, 344.
Hamilton *v.* Galveston, H. & S. A. R. Co. (4 Am. & Eng. R. Cas. 528, 54 Tex. 556), Death., etc., 224; Employés, Inj. to, 459, 477.
Hamilton *v.* Georgia R. Co. (78 Ga. 328), Agency, 87.
Hamilton *v.* Grand Trunk R. Co. (23 U. C. Q. B. 600), Car. of M., 480.
Hamilton *v.* Hannibal & St. J. R. Co. (39 Kan. 56, 18 Pac. Rep. 57), Death, etc., 86, 109.
Hamilton *v.* Iron Mountain Co. (4 Mo. App. 564), Blasting, 2; Fel. Serv., 217, 324.
Hamilton *v.* Manhattan R. Co. (25 J. & S. 491, 29 N. Y. S. R. 28, 24 Abb. N. Cas. 156, 8 N. Y. Supp. 546, 18 Civ. Pro. 164), Elev. Rys., 186.
Hamilton *v.* Manhattan R. Co. (26 J. & S. (N. Y.) 17, 30 N. Y. S. R. 17, 9 N. Y. Supp. 313), Elev. Rys., 168.
Hamilton *v.* Missouri Pac. R. Co. (87 Mo. 85), Animals, 518; Dam., 6; Fences, 29.
Hamilton *v.* Morgan's L. & T. R. & S. Co. (42 La. Ann. 824, 8 So. Rep. 586), Dam., 1, 16, 26; Death, etc., 87, 419; Sts. & H., 378.
Hamilton *v.* Newcastle & D. R. Co. (9 Ind. 359), Agency, 2; Bills & N., 4, 21.
Hamilton *v.* New York & H. R. Co. (9 Paige (N. Y.) 171), Charters, 121; Sts. & H., 232.
Hamilton *v.* New York C. R. Co. (51 N. Y. 100, 4 Am. Ry. Rep. 423), Tickets & F., 43.
Hamilton *v.* Nickerson (1 Allen (Mass.) 308), Trover, 4.
Hamilton *v.* Richmond & D. R. Co. (83 Ga. 346, 9 S. E. Rep. 670), Employés, Inj. to, 319.
Hamilton *v.* Savannah, F. & W. R. Co. (52 Am. & Eng. R. Cas. 130, 49 Fed. Rep. 412), Parties, 22, 25; Par. & Comp. L., 2.
Hamilton *v.* Spokane & P. R. Co. (51 Am. & Eng. R. Cas. 352, 2 Idaho 898, 28 Pac. Rep. 408), Land Grants, 1.
Hamilton *v.* Texas & P. R. Co. (21 Am. & Eng. R. Cas. 336, 64 Tex 251), Stat. & D., 74.
Hamilton *v.* Third Ave. R. Co. (13 Abb. Pr. N. S. (N. Y.) 318), Assault, 1; Dam., 31; Eject. Pass., 52.
Hamilton *v.* Third Ave. R. Co. (8 J. & S. (N. Y.) 376), New Tr., 36.
Hamilton *v.* Third Ave. R. Co. (53 N. Y. 25, 5 Am. Ry. Rep. 362; reversing 3 J. & S. 118, 44 How. Pr. 294, 13 Abb. Pr. N. S. 318), St. Rys., 531.
Hamilton *v.* Third Ave. R. Co. (6 Misc. (N. Y.) 382, 26 N. Y. Supp. 754, 56 N. Y. S. R. 397), Cable Rys., 19; Trial, 85.
Hamilton *v.* Vicksburg, S. & P. R. Co. (29 Am. & Eng. R. Cas. 490, 119 U. S. 280, 7 Sup. Ct. Rep. 206), Bridges, 69, 85.
Hamilton *v.* Vicksburg, S. & P. R. Co. (34 La. Ann. 970, 44 Am. Rep. 451), Waters & W., 11.
Hamilton *v.* Wabash, St. L. & P. R. Co. (25 Am. & Eng. R. Cas. 294, 21 Mo. App. 152), Animals, 409, 435.
Hamilton *v.* Western N. C. R. Co. (30 Am. & Eng. R. Cas. 1, 96 N. Car. 308, 3 S. E. Rep. 164), Bills of L., 44; Car. of M., 147.
Hamilton *v.* Wilder (31 Vt. 695), Trusts, 12.

Hamilton & B. Road Co. *v.* Great Western R. Co. (17 U. C. Q. B. 567), Stat., 56.
Hamilton & N. W. R. Co., In re (39 U. C. Q. B. 93), Mun. Aid, 267.
Hamilton & N. W. R. Co., In re (44 U. C. Q. B. 626), Em. Dom., 1266, 1273.
Hamilton & P. D. R. Co. *v.* Gore Bank (20 Grant's Ch. (U. C.) 100), Officers, 2, 14.
Hamilton & R. Hydraulic Co. *v.* Cincinnati, H. & D. R. Co. (29 Ohio St. 341), Contr., 15; Estop., 19.
Hamilton County Com'rs *v.* State (36 Am. & Eng. R. Cas. 210, 115 Ind. 64, 4 N. E. Rep. 580, 17 N. E. Rep. 855), Mun. Aid, 173, 188, 197, 251, 444; Reorg., 6.
Hamlin *v.* European & N. A. R. Co. (4 Am. & Eng. R. Cas. 503, 72 Me. 83), Mort., 38.
Hamlin *v.* Great Northern R. Co. (1 H. & N. 408, 2 Jur. N. S. 1122, 26 L. J. Ex. 20), Car. of P., 613; Time-tables, 3.
Hamlin *v.* Jerrard (4 Am. & Eng. R. Cas. 488, 72 Me. 62), Mort., 49.
Hamlin *v.* Meadville (6 Neb. 227), Mun. Aid, 158, 250.
Hamm *v.* New York C. & H. R. R. Co. (18 J. & S. (N. Y.) 78), Cross., Inj. at, 296.
Hammack *v.* White (11 C. B. N. S. 594, 31 L. J. C. P. 129), Evid., 143.
Hammans *v.* Chicago, R. I. & P. R. Co. (83 Iowa 287, 48 N. W. Rep. 978), Animals, 380.
Hammans *v.* Great Western R. Co. (4 Ry. & C. T. Cas. 181), Car. of M., 535; Ry. Com'rs, 6.
Hammer *v.* Chicago, R. I. & P. R. Co. (10 Am. & Eng. R. Cas. 772, 61 Iowa 56, 15 N. W. Rep. 597), Death, etc., 359; Employés, Inj. to, 505.
Hammersmith & C. R. Co. *v.* Brand (L. R. 4 H. L. Cas. 171, 21 L. T. 238, 38 L. J. Q. B. 265, 18 W. R. 12; reversing L. R. 2 Q. B. 223, 7 B. & S. 1, 36 L. J. Q. B. 137, 16 L. T. 101, 15 W. R. 437), Em. Dom., 1197.
Hammett *v.* Little Rock & N. R. Co. (20 Ark. 204), Charters, 87, 134; Pl., 47.
Hammill *v.* Louisville & N. R. Co. (93 Ky. 343, 20 S. W. Rep. 263), Employés, Inj. to, 607.
Hammock *v.* Farmers' L. & T. Co. (7 Am. & Eng. R. Cas. 465, 105, U. S. 77), Mort., 311; Receiv., 3.
Hammond *v.* Beeson (112 Mo. 100, 20 S. W. Rep. 474), Constr. Rys., 81.
Hammond *v.* Chicago & G. T. R. Co. (48 Am. & Eng. R. Cas. 377, 83 Mich. 334, 47 N. W. Rep. 965), Employés, Inj. to, 272.
Hammond *v.* Chicago & N. W. R. Co. (43 Iowa 168, 14 Am. Ry. Rep. 412), Animals, 56, 176, 543.
Hammond *v.* M'Clures (1 Bay (So. Car.) 101), Charges, 75.
Hammond *v.* New York, C. & St. L. R. Co. (5 Ind. App. 526, 31 N. E. Rep. 817), Sts. & H., 330.
Hammond *v.* Northeastern R. Co. (6 So. Car. 130), Car. of Mails, 18; Car. of P., 54; Pl., 121.
Hammond *v.* Port Royal & A. R. Co. (11 Am. & Eng. R. Cas. 352, 15 So. Car. 10), Deeds, 36, 37; Em. Dom., 211; Reorg., 14; Sales of Rds., 16.
Hammond *v.* Port Royal & A. R. Co. (16 So. Car. 567), Cov'ts, 8.
Hammond *v.* Schweitzer (112 Ind. 246, 11 West. Rep. 661, 13 N. E. Rep. 869), Negl., 89.
Hammond *v.* Sioux City & P. R. Co. (49 Iowa 450), Animals, 288.
Hammond *v.* Worcester County Com'rs (154 Mass. 509, 28 N. E. Rep. 902), Sts. & H., 34.
Hamor *v.* Eastern R. Co. (133 Mass. 315), Eastern R. Co., 4.
Hampden P. & C. Co. *v.* Springfield, A. & N. E. R. Co. (124 Mass. 118, 17 Am. Ry. Rep. 453), Em. Dom., 459.
Hampton *v.* Pullman Palace Car Co. (42 Mo. App. 134), Sleep. Car Cos., 24, 33, 35.
Hance *v.* Cayuga & S. R. Co. (26 N. Y. 428), Animals, 272.
Hance *v.* Pacific Exp. Co. (48 Mo. App. 179), Car. of L. S., 23; Car. of M., 174.
Hancock *v.* Chicot County (32 Ark. 575), Mun. Aid, 73, 323.
Hancock *v.* Louisville & N. R. Co. (145 U. S. 409, 12 Sup. Ct. Rep. 969), Leases, 31; Mun. Aid, 59, 414.
Hancock *v.* Richmond & P. R. Co. (3 Gratt. (Va.) 313), App., 10.
Hancock *v.* Toledo, P. & W. R. Co. (11 Biss. (U. S.) 148, 9 Fed. Rep. 738), Reorg., 1.
Hancock Mut. L. Ins. Co. *v.* Worcester, N. & R. R. Co. (39 Am. & Eng. R. Cas. 227, 149 Mass. 214, 21 N. E. Rep. 364), Consol., 33.
Hand *v.* Columbus County Sup'rs (31 Hun (N. Y.) 531), Evid., 117; Mun. Aid, 421.
Hand *v.* Savannah & C. R. Co. (10 So. Car. 406), Refer., 1.
Hand *v.* Savannah & C. R. Co. (12 So. Car. 314), Mort., 200; State Aid, 32; Tax., 62.
Hand *v.* Savannah & C. R. Co. (12 Am. & Eng. R. Cas. 488, 13 So. Car. 467), Judicial S., 1, 4; Mort., 243.
Hand *v.* Savannah & C. R. Co. (17 So. Car. 210), Bonds, 42; Coupons, 9; Judgm., 44; Mort., 268, 280, 282; Receiv., 78; State Aid, 32, 33; Tax., 234.
Hand *v.* Savannah & C. R. Co. (21 So. Car. 162), Att'ys, 15.
Handelun *v.* Burlington, C. R. & N. R. Co. (72 Iowa 709, 32 N. W. Rep. 4), Employés, Inj. to, 15; Fel. Serv., 175; Negl., 49.
Handley *v.* Chesapeake & O. R. Co. (9 W. Va. 474), Constr. Rys., 96.
Handley *v.* Houston & T. C. R. Co. (2 Tex. Unrep. Cas. 282), Car. of P., 95; Tresp., Inj. to, 12.
Handy *v.* Cleveland & M. R. Co. (31 Fed. Rep. 689), Receiv., 65, 167.
Handy *v.* Philadelphia & R. R. Co. (1 Phila. (Pa.) 31), Evid., 111; Stat., 49.
Hanes *v.* Dayton & S. E. R. Co. (40 Ohio St. 95), Subscr., 113.
Hanes *v.* North Carolina R. Co. (109 N. Car. 400, 13 S. E. Rep. 896), Em. Dom., 787, 788, 801.
Haney *v.* Gulf, C. & S. F. R. Co. (3 Tex. App. (Civ. Cas.) 336), Em. Dom., 689; Sts. & H., 216, 276.
Haney *v.* Pittsburg, C., C. & St. L. R. Co. (38 W. Va. 570, 18 S. E. Rep. 748), Con-

trib. Neg., 41, 44; Employés, Inj. to, 333, 387; Fel. Serv., 73, 218, 252.
Hanford *v.* St. Paul & D. R. Co. (39 Am. & Eng. R. Cas. 25, 43 Minn. 104, 42 N. W. Rep. 596; reargued and reaffirmed in 44 Am. & Eng. R. Cas. 205), Em. Dom., 168; Rip. Lds., 5, 11.
Hanger *v.* Little Rock Junction R. Co. (52 Ark. 61, 11 S. W. Rep. 965), Ferries, 6.
Hankerson *v.* Southwestern R. Co. (59 Ga. 593), Evid., 284.
Hankins *v.* Chicago & N. W. R. Co. (100 Ill. 466), App., 2.
Hankins *v.* Kimball (57 Ind. 42), Ex. & Ad., 9.
Hankins *v.* New York, L. E. & W. R. Co. (55 Hun 51, 28 N. Y. S. R. 59, 8 N. Y. Supp. 272), Fel. Serv., 133, 427.
Hanks *v.* Boston & A. R. Co. (35 Am. & Eng. R. Cas. 321, 147 Mass. 495, 7 N. Eng. Rep. 139, 18 N. E. Rep. 218), Cross., Inj. at, 297, 340; Licensees, Inj. to, 3, 20.
Hanley *v.* Grand Trunk R. Co. (62 N. H. 274), Employés, Inj. to, 99, 182; Fel. Serv., 1, 56, 153.
Hanley *v.* Harlem R. Co. (1 Edm. Sel. Cas. (N. Y.) 359), Car. of P., 170; Negl., 15.
Hanlin *v.* Chicago & N. W. R. Co. (20 Am. & Eng. R. Cas. 70, 61 Wis. 515, 21 N. W. Rep. 623), Em. Dom., 668, 1074; Flood. Lds., 33.
Hanlon *v.* Missouri Pac. R. Co. (104 Mo. 381, 16 S. W. Rep. 233), App., 125; Cross., Inj. at, 262; Evid., 72; Negl., 97; Sts. & H., 378, 386; Trial, 110; Words & Ph., 143.
Hanlon *v.* South Boston Horse R. Co. (2 Am. & Eng. R. Cas. 18, 129 Mass. 310), Pl., 110; St. Rys., 481.
Hanna *v.* Chattanooga & N. R. Co. (88 Tenn. 310, 6 L. R. A. 727, 12 S. W. Rep. 718), Employés, 5.
Hanna *v.* Cincinnati & Ft. W. R. Co. (20 Ind. 30), Subscr., 128.
Hanna *v.* Grand Trunk R. Co. (41 Ill. App. 116), Actions, 1, 7; Death, etc., 111.
Hanna *v.* Jeffersonville R. Co. (32 Ind. 113), Death, etc., 101.
Hanna *v.* Terre Haute & I. R. Co. (119 Ind. 316, 21 N. E. Rep. 903), Animals, 187, 262.
Hannah *v.* Connecticut River R. Co. (154 Mass. 529, 28 N. E. Rep. 682), Employés, Inj. to, 422, 670, 706.
Hannah *v.* Richmond & D. R. Co. (10 Am. & Eng. R. Cas. 270, 87 N. Car. 351), Abate., 5; Just. P., 3.
Hannaher *v.* St. Paul, M. & M. R. Co. (5 Dak. 1, 37 N. W. Rep. 717), Em. Dom., 220; Flood. Lds., 30, 84.
Hannibal *v.* Fauntleroy (105 U. S. 408), Mun. Aid, 133.
Hannibal *v.* Hannibal & St. J. R. Co. (49 Mo. 480, 1 Am. Ry. Rep. 40), Cross., St. & H., 42.
Hannibal & St. J. R. Co. *v.* Bartlett (123 Mass. 15), Words & Ph., 226.
Hannibal & St. J. R. Co. *v.* Crane (102 Ill. 249, 40 Am. Rep. 582), Attach., 9.
Hannibal & St. J. R. Co. *v.* Crawford (68 Mo. 80), Fixt., 7.
Hannibal & St. J. R. Co. *v.* Fox (15 Am. & Eng. R. Cas. 325, 31 Kan. 586, 3 Pac. Rep. 320), Employés, Inj. to, 38; Fel. Serv., 214, 333.
Hannibal & St. J. R. Co. *v.* Green (68 Mo. 169), Agency, 45; Deeds, 2.
Hannibal & St. J. R. Co. *v.* Husen (95 U. S. 465, 15 Am. Ry. Rep. 325), Car. of L. S., 109.
Hannibal & St. J. R. Co. *v.* Kanaley (39 Kan. 1, 17 Pac. Rep. 324), Employés, Inj. to, 18, 99, 161, 431; Evid., 78; Trial, 11; Witn., 68.
Hannibal & St. J. R. Co. *v.* Kenney (41 Mo. 271), Animals, 251, 331.
Hannibal & St. J. R. Co. *v.* Mahoney (42 Mo. 467), Tresp., 22.
Hannibal & St. J. R. Co. *v.* Marion County (36 Mo. 294), Mun. Aid, 40, 179, 340.
Hannibal & St. J. R. Co. *v.* Martin (111 Ill. 219; affirming 11 Ill. App. 386), Car. of P., 205, 343, 352, 528, 532, 595, 602, 619; Dam., 71.
Hannibal & St. J. R. Co. *v.* Missouri River Packet Co. (34 Am. & Eng. R. Cas. 157, 125 U. S. 260, 8 Sup. Ct. Rep. 874), Bridges, 68; Fed. Cts., 25.
Hannibal & St. J. R. Co. *v.* Moore (37 Mo. 338), Land Grants, 121.
Hannibal & St. J. R. Co. *v.* Moore (45 Mo. 443), Ejectm., 10.
Hannibal & St. J. R. Co. *v.* Morton (20 Mo. 70), Em. Dom., 963.
Hannibal & St. J. R. Co. *v.* Morton (27 Mo. 317), Em. Dom., 348, 476, 477, 935.
Hannibal & St. J. R. Co. *v.* Muder (49 Mo. 165, 1 Am. Ry. Rep. 8), Em. Dom., 187, 325, 921.
Hannibal & St. J. R. Co. *v.* Rowland (29 Mo. 337), Em. Dom., 484.
Hannibal & St. J. R. Co. *v.* Shacklett (30 Mo. 550), Tax., 144, 198.
Hannibal & St. J. R. Co. *v.* Shepley (1 Mo. App. 254), Words & Ph., 71.
Hannibal & St. J. R. Co. *v.* Shortridge (86 Mo. 662), Ejectm., 35.
Hannibal & St. J. R. Co. *v.* Smith (41 Mo. 310), Land Grants, 42, 133.
Hannibal & St. J. R. Co. *v.* Smith (9 Wall (U. S.) 95), Land Grants, 5, 128.
Hannibal & St. J. R. Co. *v.* Snead (65 Mo. 239), Land Grants, 133.
Hannibal & St. J. R. Co. *v.* State Board of Equalization (64 Mo. 294), Cert., 11; Tax., 36.
Hannibal & St. J. R. Co. *v.* Swift (12 Wall. (U. S.) 262, 1 Am. Ry. Rep. 434), Bagg., 3, 5, 43, 80; Car. of M., 78.
Hannibal Bridge Co. *v.* Schaubacher (57 Mo. 582), Em. Dom., 667, 678.
Hanover Junction & S. R. Co. *v.* Grubb (82 Pa. St. 36, 15 Am. Ry. Rep. 442), Subscr., 51, 201.
Hanover Junction & S. R. Co. *v.* Haldeman (82 Pa. St. 36, 15 Am. Ry. Rep. 442), Subscr., 198.
Hanover R. Co. *v.* Coyle (55 Pa. St. 396), Cross., Inj. a. 290; Dam., 93; Evid., 173; Leases, 108.
Hanrahan *v.* Manhattan R. Co. (53 Hun 420, 24 N. Y. S. R. 790, 6 N. Y. Supp. 395; af-

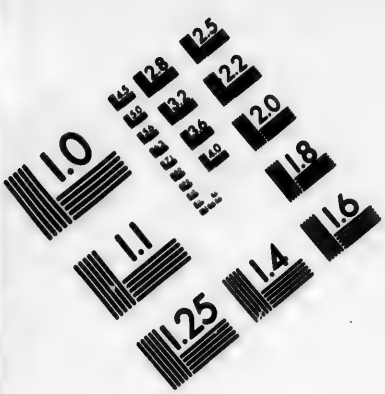
firmed in 130 N. Y. 658, mem., 41 N. Y. S. R. 950), Elev. Rys., 207; Evid., 67.
Hanrathy *v.* Northern C. R. Co. (46 Md. 280, 18 Am. Ry. Rep. 188), Employés, Inj. to, 95, 281, 592; Fel. Serv., 412.
Hans *v.* Louisiana (134 U. S. 1, 10 Sup. Ct. Rep. 504), Fed. Cts., 11.
Hansberger *v.* Pacific R. Co. (43 Mo. 196), Animals, 607, 633.
Hanscom *v.* Minneapolis St. R. Co. (54 Am. & Eng. R. Cas. 226, 53 Minn. 119, 54 N. W. Rep. 944), Med. Serv., 3.
Hansee *v.* Brooklyn El. R. Co. (66 Hun 384, 50 N. Y. S. R. 255, 21 N. Y. Supp. 230), Evid., 28, 69; Pl., 110; Witn., 31.
Hansen *v.* Chicago, M. & St. P. R. Co. (83 Wis. 631, 53 N. W. Rep. 909), Death, etc., 194.
Hansen *v.* Flint & P. M. R. Co. (37 Am. & Eng. R. Cas. 628, 73 Wis. 346, 41 N. W. Rep. 529), Bills of L., 3; Car. of M., 561.
Hansen *v.* New York & B. Bridge (9 N. Y. S. R. 726, 45 Hun 590), Fel. Serv., 483.
Hansford *v.* Payne (11 Bush (Ky.) 380), Death, etc., 148, 419; Negl., 4.
Hanson *v.* Chicago, M. & St. P. R. Co. (61 Iowa 588, 16 N. W. Rep. 734), Em. Dom., 1034.
Hanson *v.* European & N. A. R. Co. (62 Me. 84), Assault, 2, 12, 13, 21.
Hanson *v.* Flint & P. M. R. Co. (37 Am. & Eng. R. Cas. 628, 73 Wis. 346, 41 N. W. Rep. 529), Car. of M., 612.
Hanson *v.* Lancashire & Y. R. Co. (20 W. R. 297), Evid., 125.
Hanson *v.* Mansfield R. & T. Co. (38 La. Ann. 111, 58 Am. Rep. 162), Car of P., 129, 180, 343, 356.
Hanson *v.* Minneapolis & St. L. R. Co. (32 Am. & Eng. R. Cas. 13, 37 Minn. 355, 34 N. W. Rep. 223), Contrib. Neg., 98; Cross., Inj. at, 218; Employés, Inj. to, 449.
Hanson *v.* Vernon (27 Iowa 28), Mun. Aid, 31.
Harbach *v.* Des Moines & K. C. R. Co. (43 Am. & Eng. R. Cas. 115, 80 Iowa 593, 44 N. W. Rep. 348), Judgm., 13; Sts. & H., 233.
Harben *v.* Phillips (No. 2) (48 L. T. 741), Direct., 17.
Harborne R. Co. *v.* London & N. W. R. Co. (2 Ry. & C. T. Cas. 169), Charges, 109.
Harborne *v.* London & N. W. R. Co. (2 Ry. & C. T. Cas. 326), Leases, 135.
Harcourt *v.* Good (39 Tex. 455), Mun. Aid, 427.
Hard *v.* Vermont & C. R. Co. (32 Vt. 473), Employés, Inj. to, 151; Explosions, 3; Fel. Serv., 102, 198, 201.
Hardcastle *v.* South Yorkshire R. Co. (4 H. & N. 67, 5 Jur. N. S. 150, 28 L. J. Ex. 139), Excava., 3.
Harden *v.* Atchison & N. R. Co. (4 Neb. 521), Pl., 55, 56.
Harden *v.* New York C. & H. R. R. Co. (17 J. & S. (N. Y.) 503), Employés, Inj. to, 78, 319.
Hardenbergh *v.* St. Paul, M. & M. R. Co. (34 Am. & Eng. R. Cas. 359, 39 Minn. 3, 38 N. W. Rep. 625, 12 Am. St. Rep. 610), Car. of P., 93, 224; Eject. Pass., 65; Tresp., Inj. to, 17.
Hardenbergh *v.* St. Paul, M. & M. R. Co. (41 Minn. 200, 42 N. W. Rep. 933), App., 23.
Hardenbergh *v.* Van Keuren (4 Abb. N. Cas. (N. Y.) 43; reversed in 16 Hun 17), Mun. Aid, 103, 337.
Harder *v.* Rome, W. & O. R. Co. (17 N. Y. S. R. 570, 49 Hun 610, 2 N. Y. Supp. 70), Licensees, Inj. to, 27.
Hardesty *v.* Pyle (15 Fed. Rep. 778), Exec., 15; Mort., 57.
Hardin *v.* Iowa, R. & C. Co. (40 Am. & Eng. R. Cas. 394, 78 Iowa 726, 6 L. R. A. 52, 43 N. W. Rep. 543), Bills & N., 12; Deeds of Tr., 19; Evid., 133.
Hardin County *v.* Louisville & N. R. Co. (92 Ky. 412, 17 S. W. Rep. 860), Estop., 4; Mun. Aid, 173.
Harding *v.* Board of Land & Works (L. R. 11 App. Cas. 208), Em. Dom., 1199.
Harding *v.* Chicago & A. R. Co. (80 Mo. 659), Just. P., 13.
Harding *v.* Chicago & G. T. R. Co. (21 Am. & Eng. R. Cas. 410, 56 Mich. 628, 23 N. W. Rep. 445), Pl., 141.
Harding *v.* Chicago, St. P., M. & O. R. Co. (1 Int. Com. Rep. 375, 1 Int. Com. Com. 104), Int. Com., 164.
Harding *v.* International Nav. Co. (12 Fed. Rep. 168), Car. of M., 543.
Harding *v.* Metropolitan R. Co. (L. R. 7 Ch. 154, 41 L. J. Ch. 371, 20 W. R. 321, 26 L. T. 109), Em. Dom., 1130, 1131.
Harding *v.* Nettleton (86 Mo. 658), Receiv., 126.
Harding *v.* New York, L. E. & W. R. Co. (36 Hun (N. Y.) 72), Dam., 71.
Harding *v.* Rockford, R. I. & St. L. R. Co. (65 Ill. 90), Mun. Aid, 117, 184, 322.
Hardman *v.* Brett (37 Fed. Rep. 803), Car. of M., 123.
Hardwick *v.* Georgia R. & B. Co. (85 Ga. 507, 11 S. E. Rep. 832), Pl., 20.
Hardy *v.* Atchison, T. & S. F. R. Co. (18 Am. & Eng. R. Cas. 432, 32 Kan. 698, 5 Pac. Rep. 6), Commerce, 2; Int. Com., 3, 216.
Hardy *v.* Carolina C. R. Co. (76 N. Car. 5, 14 Am. Ry. Rep. 309), Employés, Inj. to, 14, 101; Fel. Serv., 1, 142, 202.
Hardy *v.* Merriweather (14 Ind. 203), Aband., 3; Bills & N., 14; Subscr., 98, 148.
Hardy *v.* Minneapolis & St. L. R. Co. (36 Fed. Rep. 657), Death, etc., 222; Fel. Serv., 447; New Tr., 24.
Hardy *v.* New York C. & H. R. R. Co. (34 N. Y. S. R. 902, 58 Hun 607, 12 N. Y. Supp. 55), Eject. Pass., 19.
Hardy *v.* North Carolina C. R. Co. (74 N. Car. 734), Car. of P., 166; Embankm., 6.
Hare *v.* London & N. W. R. Co. (2 J. & H. 80, 7 Jur. N. S. 1145, 30 L. J. Ch. 817, 1 Ry. & C. T. Cas. 24), Cham., 4; Contr., 62; Ult. Vir., 19.
Hare *v.* Waring (3 M. & W. 362, 1 H. & H. 90), Stock, 78, 84.
Hargis *v.* East Tenn., V. & G. R. Co. (90 Ga. 42), Attach., 46.

Hargis *v.* Kansas City, C. & S. R. Co. (43 Am. & Eng. R. Cas. 599, 100 Mo. 210, 13 S. W. Rep. 680), Adv. Poss., 5; Vend. & P., 4.
Hargis *v.* St. Louis, A. & T. R. Co. (75 Tex. 19, 12 S. W. Rep. 953), Animals, 62, 232; Fright. Teams, 1, 5.
Hargreaves *v.* Lancaster & P. J. R. Co. (1 Railw. Cas. 416), Evid., 111.
Haring *v.* New York & E. R. Co. (13 Barb. (N. Y.) 9), Contrib. Neg., 88; Trial, 183.
Harkins *v.* Philadelphia & R. R. Co. (15 Phila. (Pa.) 286), Death, etc., 46.
Harkins *v.* Pullman Palace Car Co. (52 Fed. Rep. 724), Death, etc., 393, 431.
Harkness *v.* Manhattan R. Co. (11 N. Y. S. R. 732; affirming 22 J. & S. 174; affirmed in 113 N. Y. 627, mem., 20 N. E. Rep. 877), Leases, 22; Stockh., 77, 110.
Harlan *v.* St. Louis, K. C. & N. R. Co. (64 Mo. 480, 17 Am. Ry. Rep. 300), Cross., Inj. at, 208.
Harlan *v.* St. Louis, K. C. & N. R. Co. (65 Mo. 22), Cross., Inj. at, 3, 206; Death, etc., 174; Negl., 43.
Harlan *v.* St. Paul, M. & M. R. Co. (15 Am. & Eng. R. Cas. 130, 31 Minn. 427, 18 N. W. Rep. 147), Set-off, 6.
Harlan *v.* Wabash, St. L. & P. R. Co. (18 Mo. App. 483), Animals, 36, 40.
Harlem Bridge, M. & F. R. Co. *v.* Southern Boulevard R. Co. (41 Hun 553, 3 N. Y. S. R. 316), Stat., 66.
Harley *v.* Buffalo Car Mfg. Co. (15 N. Y. Supp. 37), Employés, Inj. to, 682.
Harley *v.* Buffalo Car Mfg. Co. (20 N. Y. Supp. 354, 48 N. Y. S. R. 58, 65 Hun 624, mem.), Employés, Inj. to, 585.
Harley *v.* Eutawville R. Co. (31 So. Car. 151, 9 S. E. Rep. 782), Animals, 59.
Harley *v.* Louisville & N. R. Co. (57 Fed. Rep. 144), Fel. Serv., 43, 316.
Harlow *v.* Fitchburg R. Co. (8 Gray (Mass.) 237), Bagg., 113.
Harlow *v.* Marquette, H. & O. R. Co. (41 Mich. 336), Em. Dom., 228; License, 3, 17.
Harmon *v.* Auditor of Public Accounts (123 Ill. 122, 13 N. E. Rep. 161), Mun. Aid, 316, 410.
Harmon *v.* Charleston & S. R. Co. (88 Ga. 261, 14 S. E. Rep. 574), App., 117.
Harmon *v.* Clayton (51 Iowa 36), Pub. Lds., 20.
Harmon *v.* Columbia & G. R. Co. (28 So. Car. 401, 13 Am. St. Rep. 686, 5 S. E. Rep. 835), Animals, 644.
Harmon *v.* Columbia & G. R. Co. (32 So. Car. 127, 10 S. E. Rep. 877), Animals, 233; Witn., 106.
Harmon *v.* Louisville, N. O. & T. R. Co. (87 Tenn. 614, 11 S. W. Rep 703), Nuis., 40; Sts. & H., 219, 275.
Harmon *v.* New York & E. R. Co. (28 Barb. (N. Y.) 323), Bills of L., 14; Car. of M., 202.
Harmon *v.* Washington & G. R. Co. (30 Am. & Eng. R. Cas. 627, 6 Mackey (D. C.) 57, 8 Cent. Rep. 738), St. Rys., 406; Trial, 142, 202.
Harmon *v.* Washington & G. R. Co. (7 Mackey (D. C.) 255), Contrib. Neg., 16, 87, 101, 105, 114; St. Rys., 423.
Harmony *v.* Bingham (1 Duer (N. Y.) 209), Bills of L., 78, 106; Car. of M., 413.
Harned *v.* Missouri Pac. R. Co. (51 Mo. App. 482), Animals, 536; Car. of L. S., 83, 97.
Harnett *v.* Westcott (24 J. & S. 213, 3 N. Y. Supp. 7, 18 N. Y. S. R. 962), Evid., 193, 203.
Harney *v.* Indianapolis, C. & D. R. Co (32 Ind. 244), Mun. Aid, 248, 411.
Harold *v.* New York C. & H. R. R. Co. (13 Daly (N. Y.) 89), Employés, Inj. to, 486.
Harold *v.* New York C. & H. R. R. Co. (13 Daly (N. Y.) 378; affirmed in 108 N. Y. 664, mem., 15 N. E. Rep. 445, 13 N. Y. S. R. 903), New Tr., 67; Witn., 170.
Harp *v.* The Grand Era (1 Woods (U. S.) 184), Car. of M., 541.
Harpending *v.* Munson (12 Am. & Eng. R. Cas. 408, 91 N. Y. 650), Direct., 50, 52; Mort., 280.
Harper, Ex parte (L. R. 18 Eq. 539, 22 W. R. 942), Em. Dom., 1171.
Harper, In re (44 L. J. Ch. 507, L. R. 20 Eq. 39, 23 W. R. 371, 33 L. T. 214), Em. Dom., 1178.
Harper *v.* Cincinnati, N. O. & T. P. R. Co. (Ky.) (22 S. W. Rep. 849), Connect. L., 4, 5.
Harper *v.* Erie R. Co. (32 N. J. L. 88), Contrib. Neg., 88.
Harper *v.* Indianapolis & St. L. R. Co. (44 Mo. 488), Fel. Serv., 149; Pl., 117.
Harper *v.* Indianapolis & St. L. R. Co. (47 Mo. 567), Agency, 89; Fel. Serv., 64, 132, 138.
Harper *v.* Lexington & O. R. Co. (2 Dana (Ky.) 227), Em. Dom., 235.
Harper *v.* Newport News & M. V. Co. (90 Ky. 359, 14 S. W. Rep. 340), Citizens., 4; Employés, Inj. to, 130; Leases, 40; Trial, 11.
Harper *v.* Norfolk & W. R. Co. (36 Fed. Rep. 102), Death, etc., 94, 97; Employés, Inj. to, 518.
Harr *v.* New York C. & H. R. R. Co. (114 N. Y. 623, mem., 2 Silv. App. 260, 21 N. E. Rep. 425, 23 N. Y. S. R. 187; affirming 47 Hun 632, mem., 13 N. Y. S. R. 227), Employés, Inj. to, 413.
Harrell *v.* Albemarle & R. R. Co. (110 N. Car. 215, 14 S. E. Rep. 687), Animals, 401; Fright. Teams, 3.
Harrell *v.* Owens (1 Dev. & B. (N. Car.) 273), Car. of M., 12; Words & Ph., 7.
Harrell *v.* Wilmington & W. R. Co. (42 Am. & Eng. R. Cas. 417, 106 N. Car. 258, 11 S. E. Rep. 286), Car. of M., 66.
Harrigan *v.* Savannah, F. & W. R. Co. (84 Ga. 793, 11 S. E. Rep. 905), New Tr., 18.
Harriman *v.* Pittsburg, C. & St. L. R. Co. (32 Am. & Eng. R. Cas. 37, 45 Ohio St. 11, 12 N. E. Rep. 451), Agency, 101; Children, Inj. to, 8; Explosions, 2; Licensees, Inj. to, 19; Negl., 43, 48.
Harriman *v.* Southam (16 Ind. 190), Estop., 13.

Harrington *v.* Chicago, R. I. & P. R. Co. (71 Mo. 384), Animals, 153, 182.
Harrington *v.* Manchester & L. R. Co. (62 N. H. 77), New Tr., 10.
Harrington *v.* Metropolitan R. Co. (13 L. T. 583, 658), Em. Dom., 1124.
Harrington *v.* New York C. & H. R. R. Co. (19 N. Y. S. R. 20, 50 Hun 602, mem., 4 N. Y. Supp. 640), Fel. Serv., 148, 482.
Harrington *v.* Plainview (27 Minn. 224, 6 N. W. Rep. 777), Mun. Aid, 123, 301, 432.
Harrington *v.* St. Paul & S. C. R. Co. (17 Minn. 215 (Gil. 188) 4 Am. Ry. Rep. 216, 8 Am. Ry. Rep. 247), Dam., 101; Em. Dom., 162, 1001; Nuis., 33; Sts. & H., 232.
Harrington *v.* Worcester, L. & S. St. R. Co. (157 Mass. 579, 32 N. E. Rep. 955), New Tr., 14.
Harriott *v.* New Jersey R. Co. (8 Abb. Pr. (N. Y.) 284, 2 Hilt. 262), For. Corp., 24.
Harris, Appeal of (Pa.) (12 Atl. Rep. 743), Pledge, etc., 2.
Harris *v.* Central R. Co. (30 Am. & Eng. R. Cas. 581, 78 Ga. 525, 3 S. E. Rep. 355), Cross., Inj. at, 182; Death, etc., 151, 222; Evid., 47, 160; Pl., 150; Trial, 103.
Harris *v.* Cheshire R. Co. (R. I.) (16 Atl. Rep. 512), Car. of M., 607, 754.
Harris *v.* Cockermouth & W. R. Co. (3 C. B. N. S. 693, 27 L. J. N. S. C. P. 162, 4 Jur. N. S. 230, 1 Ry. & C. T. Cas. 97), Discrim., 16, 24.
Harris *v.* Delaware, L. & W. R. Co. (61 N. Y. 656), Car. of M., 773.
Harris *v.* Detroit City R. Co. (76 Mich. 227, 42 N. W. Rep. 1111), App., 69; Evid., 211; Witn., 100.
Harris *v.* Duval (2 Int. Com. Rep. 514, 3 Int. Com. Com. 128), Int. Com., 170, 171.
Harris *v.* Elliott (10 Pet. (U. S.) 25), Sts. & H., 30.
Harris *v.* Grand Trunk R. Co. (26 Am. & Eng. R. Cas. 323, 15 R. I. 371, 5 Atl. Rep. 305), Car. of M., 613.
Harris *v.* Great Western R. Co. (45 L. J. Q. B. 729, L. R. 1 Q. B. D. 515, 25 W. R. 63, 34 L. T. 647), Bagg., 130, 131.
Harris *v.* Hannibal & St. J. R. Co. (37 Mo. 307), Judgm., 45.
Harris *v.* Hannibal & St. J. R. Co. (27 Am. & Eng. R. Cas. 216, 89 Mo. 233, 1 S. W. Rep. 325), Car. of P., 359, 471.
Harris *v.* Howe (39 Am. & Eng. R. Cas. 498, 74 Tex. 534, 12 S. W. Rep. 224), Car. of P., 511, 573.
Harris *v.* London & S. W. R. Co. (3 Ry. & C. T. Cas. 331), Stat. & D., 30.
Harris *v.* Louisville, N. O. & T. R. Co. (35 Fed. Rep. 116), Agency, 94.
Harris *v.* Midland R. Co. (25 W. R. 63, 3 Ry. & C. T. Cas. xxvi), Car. of L. S., 92, 149; Lim. of Liab., 7.
Harris *v.* Minneapolis & St. L. R. Co. (33 Minn. 459, 23 N. W. Rep. 850), Cross., Inj. at, 339.
Harris *v.* Minneapolis & St. L. R. Co. (37 Minn. 47, 33 N. W. Rep. 12), Death, etc., 194.
Harris *v.* Mississippi V. & S. I. R. Co. (51 Miss. 602), Charters, 62; Dissol., 1, 5; Quo War., 8.
Harris *v.* Missouri Pac. R. Co. (40 Mo. App. 255), Employés, Inj. to, 315.
Harris *v.* New Orleans, O. & G. W. R. Co. (16 La. Ann. 140), Lim. of Ac., 35.
Harris *v.* Norfolk & W. R. Co. (88 Va. 560, 14 S. E. Rep. 335), Fel. Serv., 248.
Harris *v.* Northern Ind. R. Co. (20 N. Y. 232), Car. of L. S., 9, 20, 32, 36.
Harris *v.* Panama R. Co. (3 Bosw. (N. Y.) 7), Car. of M., 794; Evid., 245; Witn., 95, 118.
Harris *v.* Panama R. Co. (4 J. & S. (N. Y.) 373, 5 Bosw. 312; affirmed in 58 N. Y. 660, mem.), App., 124; Witn., 70, 149.
Harris *v.* Pennsylvania & N. Y. C. & R. Co. (Pa.) (9 Atl. Rep. 174), Canals, 5.
Harris *v.* Richmond & D. R. Co. (31 So. Car. 87, 9 S. E. Rep. 690), Pl., 95.
Harris *v.* Roberts (12 Neb. 631, 12 N. W. Rep. 89), Contr., 17; Stat. & D., 37.
Harris *v.* St. Louis, I. M. & S. R. Co. (23 Mo. App. 328), Animals, 475.
Harris *v.* Schuylkill River E. S. R. Co. (141 Pa. St. 242, 21 Atl. Rep. 590), Em. Dom., 452, 576, 602, 751.
Harris *v.* Schuylkill River E. S. R. Co. (156 Pa. St. 252, 27 Atl. Rep. 297), Em. Dom., 921.
Harris *v.* Somerset & K. R. Co. (47 Me. 298), Constr. Rys., 19, 25; Proc., 41.
Harris *v.* State (14 Lea (Tenn.) 485), Crim. L., 35.
Harris *v.* Stevens (31 Vt. 79), Stat. & D., 54, 55, 132.
Harris *v.* Story (2 E. D. Smith (N. Y.) 363), Employés, 15.
Harris *v.* Union Pac. R. Co. (4 McCrary (U. S.) 454, 13 Fed. Rep. 591), Dam., 67, 70, 71, 74; Employés, Inj. to, 81; Negl., 1, 98.
Harris *v.* Wabash R. Co. (51 Mo. App. 125), Animals, 333.
Harrisburg & E. R. Co., Appeal of (Pa.) (36 Am. & Eng. R. Cas. 249, 15 Atl. Rep. 459), Parties, 21.
Harrisburg & P. R. Co. *v.* Peffer (84 Pa. St. 295, 18 Am. Ry. Rep. 393), Em. Dom., 854.
Harrisburg City Pass. R. Co. *v.* Harrisburg (149 Pa. St. 465, 24 Atl. Rep. 56), St. Rys., 13.
Harrisburg, P. M. & L. R. Co. *v.* Bucher (7 Watts (Pa.) 33), Em. Dom., 322.
Harrison *v.* Annapolis & E. R. R. Co. (50 Md. 490), Charters, 113; Deeds of Tr., 20; Estop., 17.
Harrison *v.* Arkansas Valley R. Co. (4 McCrary (U. S.) 264, 13 Fed. Rep. 522), Consol., 42; Stock, 53; Stockh., 85.
Harrison *v.* Central R. Co. (31 N. J. L. 293), Employés, Inj. to, 7, 55; Fel. Serv., 1, 56.
Harrison *v.* Cornwall Minerals R. Co. (3 Am. & Eng. R. Cas. 606, L. R. 18 Ch. D. 334; affirming 1 Am. & Eng. R. Cas. 601, L. R. 16 Ch. D. 66), Debent., 10; Mort., 87.
Harrison *v.* Denver & R. G. W. R. Co. (7 Utah 523, 27 Pac. Rep. 728), Employés, Inj. to, 278, 617; Trial, 40.
Harrison *v.* Detroit, L. & N. R. Co. (41 Am. & Eng. R. Cas. 398, 79 Mich. 409, 44 N. W. Rep. 1034), Fel. Serv., 366, 409; Trial, 202.

Harrison *v.* Fink (42 Fed. Rep. 787), Assault, 13; Eject. Pass., 6, 48.
Harrison *v.* Great Northern R. Co. (10 Jur. N. S. 992, 33 L. J. Ex. 266, 12 W. R. 1081, 10 L. T. 621, 3 H. & C. 231), Flood. Lds., 28.
Harrison *v.* Iowa Midland R. Co. (36 Iowa 323), Em. Dom., 597, 630, 636.
Harrison *v.* Kansas City, C. & S. R. Co. (50 Mo. App. 332), Agency, 23; Evid., 207.
Harrison *v.* Lexington & F. R. Co. (9 B. Mon. (Ky.) 470), Em. Dom., 211; Vend. & P., 6.
Harrison *v.* London & N. W. R. Co. (1 C. & E. 540), Death, etc., 47.
Harrison *v.* London, B. & S. C. R. Co. (6 Jur. N. S. 954, 29 L. J. Q. B. 209, 2 B. & S. 122, 8 W. R. 524, 2 L. T. 423; reversed in 8 Jur. N. S. 740, 31 L. J. Q. B. 113, 6 L. T. 466), Car. of L. S., 70, 92, 116; Charges, 22.
Harrison *v.* Martinsville & F. R. Co. (16 Ind. 505), Pl., 60.
Harrison *v.* Mexican R. Co. (L. R. 19 Eq. 358, 44 L. J. Ch. 403, 23 W. R. 403, 32 L. T. 82), Divid., 8; Stock, 4, 22.
Harrison *v.* Missouri Pac. R. Co. (7 Am. & Eng. R. Cas. 382, 74 Mo. 364, 41 Am. Rep. 318), Car. of M., 51, 400; Contrib. Neg., 77; Stat. Agts., 5.
Harrison *v.* Missouri Pac. R. Co. (88 Mo. 625), Animals, 590.
Harrison *v.* New Orleans Pac. R. Co. (34 La. Ann. 462, 44 Am. Rep. 438), Sts. & H., 45.
Harrison *v.* Northeastern R. Co. (22 W. R. 335, 29 L. T. 844), Licensees, Inj. to, 19.
Harrison *v.* Stewart (1 Taney (U. S.) 485), Car. of M., 123.
Harrold *v.* Great Western R. Co. (14 L. T. 440), Car. of P., 179; Fences, 70.
Harrold *v.* New York El. R. Co. (24 Hun (N. Y.) 184), New Tr., 81.
Harrold *v.* Winona & St. P. R. Co. (47 Minn. 17, 49 N. W. Rep. 389), Trial, 165; Witn., 165.
Harroun *v.* Chicago & W. M. R. Co. (68 Mich. 208, 12 West. Rep. 556, 35 N. W. Rep. 914), App., 59.
Harrow *v.* Ohio River R. Co. (38 W. Va. 711), Just. P., 1.
Harrow *v.* St. Paul & D. R. Co. (43 Minn. 71, 44 N. W. Rep. 881), Animals, 440, 587.
Harshbarger *v.* Midland R. Co. (131 Ind. 177, 27 N. E. Rep. 352, 30 N. E. Rep. 1083), Em. Dom., 1003.
Harshman *v.* Bates County (3 Dill. (U. S.) 150), Consol., 34.
Harshman *v.* Bates County (92 U. S. 569), Mun. Aid, 128, 206, 384.
Hart's Appeal (96 Pa. St. 355), Constr. Rys., 25, 94; Insolv., 6.
Hart *v.* Baltimore & O. R. Co. (6 W. Va. 336), App., 60; Charges, 44; Evid., 99; Lim. of Ac., 13; Pl., 9.
Hart *v.* Baxendale (6 Ex. 769, 16 Jur. 126, 21 L. J. Ex. 123), Car. of M., 518, 521.
Hart *v.* Benton-Bellefontaine R. Co. (7 Mo. App. 446), Exec., 14.
Hart *v.* Boston, H. & E. R. Co. (40 Conn. 524), Aband., 1; Dissol., 18.
Hart *v.* Boston, R. B. & L. R. Co. (121 Mass. 510), Liens, 21.
Hart *v.* Brockway (57 Mich. 189, 23 N. W. Rep. 725), Direct., 53.
Hart *v.* Buckner (56 Am. & Eng. R. Cas. 430, 54 Fed. Rep. 925, 2 U. S. App. 488, 5 C. C. A. 1; affirming 52 Fed. Rep. 835), St. Rys., 25, 206, 207, 208.
Hart *v.* Charlotte, C. & A. R. Co. (33 So. Car. 427, 12 S. E. Rep. 9), App., 63, 100; Dam., 37, 90.
Hart *v.* Chicago & N. W. R. Co. (27 Am. & Eng. R. Cas. 59, 69 Iowa 485, 29 N. W. Rep. 597), Car. of L. S., 45; Commerce, 8.
Hart *v.* Chicago, R. I. & P. R. Co. (56 Iowa 166, 7 N. W. Rep. 9, 9 N. W. Rep. 116), Cross., Inj. at, 2, 73.
Hart *v.* Delaware, L. & W. R. Co. (51 N. Y. S. R. 291, 67 Hun 648, mem., 22 N. Y. Supp. 3), Employés, Inj. to, 622.
Hart *v.* Delaware, L. & W. R. Co. (27 N. Y. Supp. 767), Employés, Inj. to, 601.
Hart *v.* Devereux (41 Ohio St. 565), Cross., Inj. at, 215.
Hart *v.* Eastern Union R. Co. (6 Railw. Cas. 818, 7 Ex. 246; affirmed in 8 Ex. 116, 17 Jur. 89, 22 L. J. Ex. 20), Debent., 12.
Hart *v.* Hudson River Bridge Co. (80 N. Y. 622), Death, etc., 259.
Hart *v.* Hudson River Bridge Co. (84 N. Y. 56), Death, etc., 235.
Hart *v.* Lauman (29 Barb. (N. Y.) 410), Constr. Rys., 67; Contr., 79; Stock, 54.
Hart *v.* McFarland (13 Pa. St. 182), Assign. for Cred., 4.
Hart *v.* Metropolitan El. R. Co. (15 Daly 391, 7 N. Y. Supp. 753, 27 N. Y. S. R. 813), Elev. Rys., 99; Pl., 31.
Hart *v.* New Orleans & C. R. Co. (4 La. Ann. 261), Pl., 94.
Hart *v.* Ogdensburg & L. C. R. Co. (51 N. Y. S. R. 468, 67 Hun 556, 22 N. Y. Supp. 401), Evid., 262.
Hart *v.* Ogdensburg & L. C. R. Co. (52 N. Y. S. R. 799, 23 N. Y. Supp. 639, 69 Hun 378), Bonds, 31; Consol., 11; Evid., 108.
Hart *v.* Ogdensburg & L. C. R. Co. (69 Hun (N. Y.) 497, 52 N. Y. S. R. 834, 23 N. Y. Supp. 713), App., 21; Discov., 3, 8.
Hart *v.* Pennsylvania R. Co. (2 McCrary (U. S.) 333), Car. of L. S., 86.
Hart *v.* Pennsylvania R. Co. (18 Am. & Eng. R. Cas. 604, 112 U. S. 331, 5 Sup. Ct. Rep. 151), Lim. of Liab., 31.
Hart *v.* Rensselaer & S. R. Co. (8 N. Y. 37), Bagg., 17.
Hart *v.* St. Charles St. R. Co. (30 La. Ann. 758), Stock, 24.
Hart *v.* Western R. Corp. (13 Metc. (Mass.) 99), Fires, 9, 93, 138; Stat., 29.
Hartan *v.* Eastern R. Co. (114 Mass. 44), Car. of P., 503.
Harter Tp. *v.* Kernochan (3 Am. & Eng. R. Cas. 82, 103 U. S. 562), Mun. Aid, 247, 352; Rem. of C., 26.
Hartfield *v.* Roper (21 Wend. (N. Y.) 614), Children, Inj. to, 125.
Hartford *v.* New York & N. E. R. Co. (59 Conn. 250, 22 Atl. Rep. 37), License, 9; Sts. & H., 32.

Hartford & C. W. R. Co., In re (65 How. Pr. (N. Y.) 133), Em. Dom., 320.
Hartford & N. H. R. Co. *v.* Andrews (36 Conn. 213), Death, etc., 99.
Hartford & N. H. R. Co. *v.* Boorman (12 Conn. 530), Subscr., 74.
Hartford & N. H. R. Co. *v.* Croswell (5 Hill (N. Y.) 383), Subscr., 119.
Hartford & N. H. R. Co. *v.* Grant (9 Blatchf. (U. S.) 542), Bridges, 9.
Hartford & N. H. R. Co. *v.* Jackson (24 Conn. 514), Contr., 8.
Hartford & N. H. R. Co. *v.* Kennedy (12 Conn. 499), Subscr., 78.
Hartford & N. H. R. Co. *v.* New York & N. H. R. Co. (3 Robt. (N. Y.) 411), Connect. L., 5; Contr., 58.
Hartigan *v.* Southern Pac. Co. (86 Cal. 142, 24 Pac. Rep. 851), Death, etc., 163; Ex. & Ad., 8.
Hartley *v.* Keokuk & N. W. R. Co. (85 Iowa 455, 52 N. W. Rep. 352), Em. Dom., 212, 228, 233, 324, 355, 520, 528, 636, 937; Pl., 73; Witn., 121.
Hartman, In re (9 Abb. Pr. N. S. (N. Y.) 124), Em. Dom., 286.
Hartman *v.* Belleville & O. R. Co. (64 Ill. 24), Em. Dom., 940.
Hartman *v.* Cincinnati, I., St. L. & C. R. Co. (4 Ind. App. 370, 30 N. E. Rep. 930), Trial, 61.
Hartman *v.* Louisville & N. R. Co. (48 Mo. App. 619), New Tr., 82.
Hartman *v.* Pennsylvania R. Co. (144 Pa. St. 345, 22 Atl. Rep. 701), Death, etc., 254.
Hartman *v.* Reading & P. R. Co. (Pa.) (13 Atl. Rep. 774), Em. Dom., 568.
Hartmann *v.* Louisville & N. R. Co. (39 Mo. App. 88), Bills of L., 36; Car. of M., 347; Contr., 89.
Hartness *v.* Great Western R. Co. (2 Mich. N. P. 80), Lim. of Liab., 2.
Hartshorn *v.* Burlington, C. R. & N. R. Co. (52 Iowa 613, 3 N. W. Rep. 648), Em. Dom., 597, 698, 767, 1005.
Hartshorn *v.* Milwaukee & St. P. R. Co. (23 Wis. 692), Mort., 293.
Hartson *v.* First Div. St. P. & P. R. Co. (21 Minn. 517), App., 100.
Hartvig *v.* Northern Pac. Lumber Co. (19 Oreg. 522, 25 Pac. Rep. 358), Employés, Inj. to, 18.
Hartwell *v.* Northern Pac. Exp. Co. (37 Am. & Eng. R. Cas. 635, 5 Dak. 463, 3 L. R. A. 342, 41 N. W. Rep. 732), Bills of L., 6; Car. of M., 438; Exp. Cos., 69.
Hartwig *v.* Chicago & N. W. R. Co. (1 Am. & Eng. R. Cas. 65, 49 Wis. 358, 5 N. W. Rep. 865), Car. of P., 274, 456, 569, 607; Trial, 192.
Harty *v.* Appleby (19 Grant's Ch. (U. C.) 205), Deeds, 7.
Harty *v.* Central R. Co. (42 N. Y. 468), Cross., Inj. at, 108, 200.
Harty *v.* St. Louis, I. M. & S. R. Co. (95 Mo. 368, 14 West. Rep. 760, 8 S. W. Rep. 562), Employés, Inj. to, 568, 613; Negl., 93; Trial, 139.
Hartz *v.* St. Paul & S. C. R. Co. (21 Minn. 358, 18 Am. Ry. Rep. 430), App., 92; Em. Dom., 1008.
Hartzig *v.* Lehigh Valley R. Co. (154 Pa. St. 364, 26 Atl. Rep. 310), Car. of P., 407.
Harvard Branch R. Corp. *v.* Rand (8 Cush. (Mass.) 218), Em. Dom., 774.
Harvard Co. *v.* Pennsylvania Co. (3 Int. Com. Rep. 257, 4 Int. Com. Com. 212), Int. Com., 44.
Harvey *v.* Baltimore & O. R. Co. (70 Md. 319, 17 Atl. Rep. 88), Abate., 4.
Harvey *v.* Canadian Pac. R. Co. (3 Man. 43), Costs, 1.
Harvey *v.* Canadian Pac. R. Co. (3 Man. 266), Trial, 50.
Harvey *v.* Connecticut & P. R. R. Co. (124 Mass. 421, 18 Am. Ry. Rep. 9), Car. of M., 412, 783.
Harvey *v.* Eastern R. Co. (116 Mass. 269), Car. of P., 377.
Harvey *v.* Georgia Southern & F. R. Co. (56 Am. & Eng. R. Cas. 630, 90 Ga. 66, 15 S. E. Rep. 783), Sts. & H., 214.
Harvey *v.* Grand Trunk R. Co. (7 Ont. App. 715; affirming 9 Ont. Pr. 80), Parties, 8.
Harvey *v.* Kansas, N. & D. R. Co. (45 Kan. 228, 25 Pac. Rep. 578), Injunc., 39.
Harvey *v.* Lackawanna & B. R. Co. (47 Pa. St. 428), Em. Dom., 580, 709, 997.
Harvey *v.* Lloyd (3 Pa. St. 331), Branch & L. Rds., 2; Em. Dom., 307.
Harvey *v.* Louisville & N. R. Co. (3 Int. Com. Rep. 793, 5 Int. Com. Com. 153), Int. Com., 90; Passes, 5.
Harvey *v.* New York C. & H. R. R. Co. (19 Hun (N. Y.) 556), Employés, Inj. to, 301, 669, 699; Evid., 84.
Harvey *v.* New York C. & H. R. R. Co. (8 Am. & Eng. R. Cas. 515, 88 N. Y. 481; reversing 25 Hun 62), Fel. Serv., 486.
Harvey *v.* New York C. & H. R. R. Co. (32 N. Y. S. R. 817, 57 Hun 589, 10 N. Y. Supp. 645), Employés, Inj. to, 17; Fel. Serv., 25, 446.
Harvey *v.* Rose (26 Ark. 3), Ferries, 10.
Harvey *v.* Terre Haute & I. R. Co. (6 Mo. App. 585; affirmed on other grounds 74 Mo. 538), Car. of M., 704, 705, 765.
Harvey *v.* Terre Haute & I. R. Co. (6 Am. & Eng. R. Cas. 293, 74 Mo. 538), Car. of L. S., 136; Lim. of Liab., 31.
Harvey *v.* Thomas (10 Watts (Pa.) 63), Branch & L. Roads, 2, 14, 17.
Harvey *v.* West Side El. R. Co. (13 Hun (N. Y.) 392), Officers, 15.
Harvie *v.* South Devon R. Co. (32 L. T. 1, 23 W. R. 202; reversing 23 W. R. 42), Em. Dom., 1104.
Harwell *v.* Columbus & W. R. Co. (1 Int. Com. Rep. 631, 1 Int. Com. Com. 236), Int. Com., 64, 114.
Harwood *v.* Brownell (48 Iowa 657), Mun. Aid, 412, 445.
Harwood *v.* Cincinnati & C. A. L. R. Co. (17 Wall. (U. S.) 78), Mort., 288, 294.
Harwood *v.* Quinby (44 Iowa 385), Lim. of Ac., 44; Mun. Aid, 412.
Harwood & C. F. & M. R. Co. *v.* Case (37 Iowa 692), Mun. Aid, 109, 445.
Haseltine *v.* Concord R. Co. (35 Am. & Eng. R. Cas. 236, 64 N. H. 545, 15 Atl. Rep. 143), Fires, 13, 33, 237.
Haskell *v.* Brown (65 Ill. 29), Bills & N., 16; Subscr., 169.



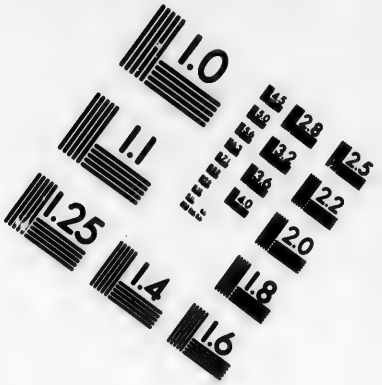
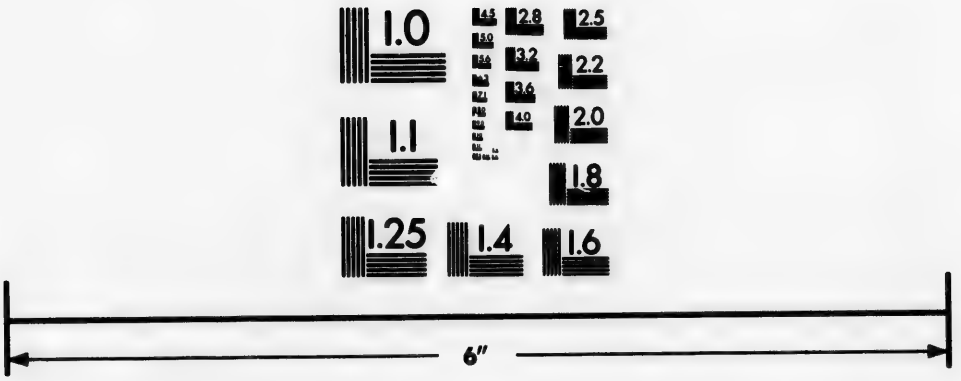
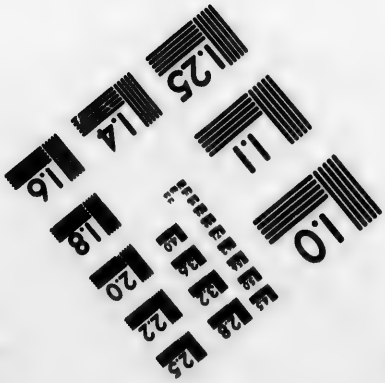


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Haskell *v.* Northern Adirondack R. Co. (74 Hun 380, 26 N. Y. Supp. 595, 56 N. Y. S. R. 303), Dam., 66.
Haskin *v.* New York C. & H. R. R. Co. (65 Barb. (N. Y.) 129; affirmed in 56 N. Y. 608, mem.), Fel. Serv., 162, 486; Stat. & D., 70.
Haskings *v.* St. Louis, K. C. & N. R. Co. (58 Mo. 302), Evid., 123.
Haslam *v.* Adams Exp. Co. (6 Bosw. (N. Y.) 235), Exp. Cos., 22, 40; Witn., 60.
Haslam *v.* Galena & S. W. R. Co. (64 Ill. 353), Em. Dom., 532, 542, 664.
Hasse *v.* American Exp. Co. (94 Mich. 133, 53 N. W. Rep. 918), Exp. Cos., 52, 57.
Hassell *v.* Wilcox (40 Am. & Eng. R. Cas. 385, 130 U. S. 493, 9 Sup. Ct. Rep. 590), Mort., 109.
Hassenyer *v.* Michigan C. R. Co. (6 Am. & Eng. R. Cas. 59, 48 Mich. 265, 12 N. W. Rep. 155, 42 Am. Rep. 470), Contrib. Neg., 10; Cross., Inj. at, 226; Negl., 61.
Hasson *v.* Oil Creek & A. R. Co. (8 Phila. (Pa.) 556), Em. Dom., 150.
Hastings *v.* Amherst & B. R. Co. (9 Cush. (Mass.) 596), Charters, 94; Quo War., 4.
Hastings *v.* Burlington & M. R. R. Co. (38 Iowa 316), Em. Dom., 974, 975.
Hastings *v.* New York, O. & W. R. Co. (25 N. Y. S. R. 249, 53 Hun 638, 3 Silv. App. 422, 6. N. Y. Supp. 836), Car. of L. S., 122.
Hastings *v.* Northern Pac. R. Co. (53 Fed. Rep. 224), Car. of P., 363; Trial, 93.
Hastings *v.* Pepper (11 Pick. (Mass.) 41), Car. of M., 21, 114.
Hastings & A. R. Co. *v.* Miles (56 Iowa 447, 9 N. W. Rep. 336), Em. Dom., 214.
Hastings & D. R. Co. *v.* St. Paul, S. & T. F. R. Co. (44 Fed. Rep. 817; affirming 32 Fed. Rep. 821), Land Grants, 7.
Hastings & D. R. Co. *v.* Whitney (24 Am. & Eng. R. Cas. 106, 34 Minn. 538, 27 N. W. Rep. 69), Land Grants, 37.
Hastings & D. R. Co. *v.* Whitney (40 Am. & Eng. R. Cas. 426, 132 U. S. 357, 10 Sup. Ct. Rep. 112), Land Grants, 8.
Hastings & G. I. R. Co. *v.* Ingalls (20 Am. & Eng. R. Cas. 60, 15 Neb. 123, 16 N. W. Rep. 762), App., 93; Em. Dom., 270; Pub. Lds., 24; Sts. & H., 139.
Hastings Town Council *v.* Southeastern R. Co. (3 Ry. & C. T. Cas. 179), Stat. & D., 30.
Hasty *v.* Sears (157 Mass. 123, 21 N. E. Rep. 759), Fel. Serv., 196.
Haswell *v.* Vermont C. R. Co. (23 Vt. 228), Em. Dom., 396.
Hatch, In re (11 J. & S. (N. Y.) 89), Words & Ph., 78.
Hatch *v.* Chicago, R. I. & P. R. Co. (6 Blatchf. (U. S.) 105), Citizens., 2.
Hatch *v.* Cincinnati & I. R. Co. (18 Ohio St. 92), Em. Dom., 662, 702, 714, 716, 981.
Hatch *v.* Minnesota R. Constr. Co. (26 Minn. 451, 5 N. W. Rep. 97), Constr. Rys., 24.
Hatch *v.* Pottawattamie County (43 Iowa 442), Tax., 347.
Hatch *v.* Syracuse, B. & N. Y. R. Co. (50 Hun 64, 24 N. Y. S. R. 36, 4 N. Y. Supp. 509), Sts. & H., 185, 190.
Hatch *v.* Tacoma, O. & G. H. R. Co. (6 Wash. 1, 32 Pac. Rep. 1063), Pl., 170; Sts. & H., 240.
Hatch *v.* Vermont C. R. Co. (25 Vt. 49), Em. Dom., 668, 699.
Hatch *v.* Vermont C. R. Co. (28 Vt. 142), Adv., Poss., 5; Em. Dom., 1005; Evid., 227.
Hatcher *v.* Toledo, W. & W. R. Co. (62 Ill. 477), Consol., 42, 43; Mort., 3.
Hately *v.* Merchants' Despatch Co. (2 Ont. 385), Actions, 3.
Hatfield *v.* Central R. Co. (33 N. J. L. 251), New Tr., 8; Sts. & H., 275.
Hatfield *v.* Chicago, R. I. & P. R. Co. (11 Am. & Eng. R. Cas. 153, 61 Iowa 434, 16 N. W. Rep. 336), Contrib. Neg., 112; Trial, 117; Witn., 65.
Hatfield *v.* St. Paul & D. R. Co. (18 Am. & Eng. R. Cas. 292, 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. Rep. 176), Trial, 44.
Hathaway *v.* East Tenn., V. & G. R. Co. (29 Fed. Rep. 489), Negl., 64; Trial, 183.
Hathaway *v.* Fitchburg R. Co. (49 N. Y. S. R. 466, 66 Hun 628, 20 N. Y. Supp. 917), App., 121.
Hathaway *v.* Michigan C. R. Co. (12 Am. & Eng. R. Cas. 249, 51 Mich. 253, 16 N. W. Rep. 634, 47 Am. Rep. 569), Employés, Inj. to, 30.
Hathaway *v.* Toledo, W. & W. R. Co. (46 Ind. 25, 6 Am. Ry. Rep. 399), Children, Inj. to, 79, 121; Contrib. Neg., 53, 79.
Hathorn *v.* Calef (53 Me. 471), Charters, 130.
Hatten *v.* Railroad Co. (13 Am. & Eng. R. Cas. 53, 39 Ohio St. 375), Tickets & F., 46.
Hatter *v.* Illinois C. R. Co. (69 Miss. 642, 13 So. Rep. 827), Employés, Inj. to, 97, 191, 202.
Haugen *v.* Chicago, M. & St. P. R. Co. (3 S. Dak. 394, 53 N. W. Rep. 769), Fires, 181, 183.
Haugh *v.* Chicago, R. I. & P. R. Co. (31 Am. & Eng. R. Cas. 173, 73 Iowa 66, 35 N. W. Rep. 116), Employés, Inj. to, 441.
Haun *v.* Mulberry & J. Gravel Road Co. (33 Ind. 103), Subscr., 55.
Hauser *v.* Central R. Co. (147 Pa. St. 440, 23 Atl. Rep. 766), Contrib. Neg., 30; Cross., Inj. at, 305; Evid., 299.
Havana, R. & E. R. Co. *v.* Walsh (85 Ill. 58), Sales, 1, 7; Set-off, 5.
Havemeyer *v.* Iowa County Com'rs (3 Wall. (U. S.) 294), Mun. Aid, 316.
Haven *v.* Boston & W. R. Corp. (4 Allen (Mass.) 80), Deeds, 3; Mort., 144.
Haven *v.* Emery (33 N. H. 66), Mort., 148; Sales, 9.
Haven *v.* Grand Junction R. & D. Co. (109 Mass. 88), Coupons, 4, 9.
Havens *v.* Erie R. Co. (41 N. Y. 296; reversing 53 Barb. 328), Cross., Inj. at, 264.
Havens *v.* Hartford & N. H. R. Co. (26 Conn. 220), Pl., 31.

Havens *v.* Hartford & N. H. R. Co. (28 Conn. 69), Eject. Pass., 19, 54; Pl., 20.
Haverly *v.* State Line & S. R. Co. (43 Am. & Eng. R. Cas. 31, 125 Pa. St. 50, 19 Atl. Rep. 1013), Fires, 320, 328.
Haverly *v.* State Line & S. R. Co. (125 Pa. St. 116, 17 Atl. Rep. 224), Fires, 145, 198; Receipts, 3.
Haviland *v.* Manhattan R. Co. (15 N. Y. Supp. 898, 40 N. Y. S. R. 773, 61 Hun 626; affirmed in 131 N. Y. 630, mem., 30 N. E. Rep. 864), New Tr., 59; Witn., 165, 189.
Hawes *v.* Burlington, C. R. & N. R. Co. (19 Am. & Eng. R. Cas. 220, 64 Iowa 315, 20 N. W. Rep. 717), Contrib. Neg., 104; Pl., 118.
Hawes *v.* Kansas City Stock Yards Co. (103 Mo. 60, 15 S. W. Rep. 751), Dam., 100, 102, 105.
Hawes *v.* Oakland (104 U. S. 450), Eq., 27.
Hawes *v.* Southeastern R. Co. (54 L. J. Q. B. 174, 52 L. T. 514, 5 Ry. & C. T. Cas. xi), Car. of M., 139, 449, 779.
Hawk *v.* Chicago, B. & N. R. Co. (147 Ill. 399, 35 N. E. Rep. 139), Contrib. Neg., 2, 104.
Hawk *v.* Pennsylvania R. Co. (Pa.) (31 Am. & Eng. R. Cas. 268, 11 Atl. Rep. 459), Employés, Inj. to, 103, 182.
Hawker *v.* Baltimore & O. R. Co. (15 W. Va. 628), Animals, 51, 331, 383; Evid., 175; Judgm., 8.
Hawkins *v.* Carroll County (50 Miss. 735), Mun. Aid, 19, 73, 128, 130, 146.
Hawkins *v.* Front St. Cable R. Co. (3 Wash. 592, 28 Pac. Rep. 1021), Cable Rys., 8; Car. of P., 601; Dam., 70; Husb. & W., 33.
Hawkins *v.* Glenn (131 U. S. 319, 9 Sup. Ct. Rep. 739), Lim. of Ac., 21; Stockh., 51; Subscr., 58.
Hawkins *v.* Great Western R. Co. (17 Mich. 57), Car. of L. S., 4.
Hawkins *v.* Hoffman (6 Hill (N. Y.) 586), Bagg., 2, 40, 42, 45; Trover, 2.
Hawkins *v.* McVea (14 La. Ann. 338), Mort., 306.
Hawkins *v.* Mississippi & T. R. Co. (35 Miss. 688), Subscr., 121.
Hawkins *v.* Providence & W. R. Co. (119 Mass. 596), Husb. & W., 26.
Hawkins *v.* Small (9 Am. & Eng. R. Cas. 432, 7 Baxt. (Tenn.) 193), Consol., 32.
Hawks *v.* Locke (139 Mass. 205, 1 N. E. Rep. 543), Agency, 33.
Hawley *v.* Chicago, B. & Q. R. Co. (71 Iowa 717, 29 N. W. Rep. 787), Assign., 20; Employés, Inj. to, 329, 393; Fel. Serv., 465; Pl., 43.
Hawley *v.* Fairbanks (108 U. S. 543, 2 Sup. Ct. Rep. 846), Fed. Cts., 18; Mun. Aid, 439, 443.
Hawley *v.* Northern C. R. Co. (2 Am. & Eng. R. Cas. 248, 82 N. Y. 370; affirming 17 Hun 115), Employés, Inj. to, 733.
Hawley *v.* Screven (62 Ga. 347), Bagg., 19.
Hawthorn *v.* Newcastle-upon-Tyne & N. S. R. Co. (3 Q. B. 734, n., 2 Railw. Cas. 288), Constr. Rys., 19, 32.
Hawthorne *v.* Calef (2 Wall. (U. S.) 10), Stockh., 41.
Haxton *v.* Pittsburg, C. & St. L. R. Co. (26 Ohio St. 214, 11 Am. Ry. Rep. 257), Animals, 112.
Hay *v.* Alexandria & W. R. Co. (1 Hughes (U. S.) 168), Eq., 15.
Hay *v.* Alexandria & W. R. Co. (15 Am. & Eng. R. Cas. 647, 20 Fed. Rep. 15), Fed. Cts., 15.
Hay *v.* Great Western R. Co. (37 U. C. Q. B. 456), Trial, 65.
Hay *v.* Washington & A. R. Co. (4 Hughes (U. S.) 327), Judgm., 40.
Haycroft *v.* Lake Shore & M. S. R. Co. (64 N. Y. 636; affirming 2 Hun 489, 5 T. & C. 49), Cross., Inj. at, 329.
Hayden *v.* Brooklyn El. R. Co. (44 N. Y. S. R. 377, 17 N. Y. Supp. 352), Employés, Inj. to, 687.
Hayden *v.* Skillings (29 Am. & Eng. R. Cas. 316, 78 Me. 413, 6 Atl. Rep. 830), Tresp., 25.
Hayes *v.* Bald Eagle Valley R. Co. (Pa.) (6 Atl. Rep. 144), Paym., 8.
Hayes *v.* Campbell (63 Cal. 143), Car. of M., 386.
Hayes *v.* Chicago, M. & St. P. R. Co. (45 Minn. 17, 47 N. W. Rep. 260), Fires, 246, 343.
Hayes *v.* Chicago, M. & St. P. R. Co. (17 Am. & Eng. R. Cas. 110, 64 Iowa 753, 19 N. W. Rep. 245), Em. Dom., 765.
Hayes *v.* Chicago, St. P., M. & O. R. Co. (46 Minn. 349, 49 N. W. Rep. 61), Sts. & H., 228.
Hayes *v.* East Tenn., V. & G. R. Co. (89 Ga. 264, 15 S. E. Rep. 361), Release, 24.
Hayes *v.* Forty-second St. & G. S. F. R. Co. (21 Am. & Eng. R. Cas. 358, 97 N. Y. 259; reversing (?) 26 Hun 534), Evid., 286; St. Rys., 419, 424.
Hayes *v.* Kennedy (2 Pittsb. (Pa.) 262), Bills of L., 102; Car. of M., 451.
Hayes *v.* Mayor, etc., of Holly Springs (114 U. S. 120, 5 Sup. Ct. Rep. 785), Mun. Aid, 23, 383.
Hayes *v.* Michigan C. R. Co. (15 Am. & Eng. R. Cas. 394, 111 U. S. 228, 4 Sup. Ct. Rep. 369), Children, Inj. to, 10; Sts. & H., 93, 312.
Hayes *v.* New York C. & H. R. R. Co. (9 Hun (N. Y.) 63), Bridges, 31, 42.
Hayes *v.* New York C. & H. R. R. Co. (18 Am. & Eng. R. Cas. 363, 34 Hun 627, mem.), Eject. Pass., 21.
Hayes *v.* Ottawa, O. & F. R. V. R. Co. (54 Ill. 373), Em. Dom., 559, 639, 732; Witn., 119.
Hayes *v.* St. Louis R. Co. (15 Mo. App. 583), Dam., 36, 93, 96, 98; Evid., 70; St. Rys., 362; Trial, 130.
Hayes *v.* South Wales R. Co. (L. R. 9 Ir. 474), Car. of L. S., 135; Car. of M., 544.
Hayes *v.* Wells (23 Cal. 185), Exp. Cos., 28.
Hayes *v.* Western R. Corp. (3 Cush. (Mass.) 270), Fel. Serv., 25, 379.
Hayman *v.* Pennsylvania R. Co. (34 Am. & Eng. R. Cas. 478, 118 Pa. St. 508, 10 Cent. Rep. 835, 11 Atl. Rep. 815, 20 W. N. C. 466), Car. of P., 586
Hayman *v.* Philadelphia & R. R. Co. (8 N. Y. S. R. 86, 22 J. & S. 158), Car. of L. S., 25, 146; Words & Ph., 7.

Haynes *v.* Beckman (6 La. Ann. 224), Charters, 109.
Haynes *v.* Buffalo, N. Y. & P. R. Co. (38 Hun (N. Y.) 17), Cov'ts, 16; Cross. Sts. & H., 11; Pl., 33.
Haynes *v.* Burlington (38 Vt. 350), Culverts, 15.
Haynes *v.* East Tenn. & G. R. Co. (3 Coldw. (Tenn.) 222), Employés, Inj. to, 165; Fel. Serv., 73.
Haynes *v.* Kent (8 La. Ann. 132), Subscr., 40, 169.
Haynes *v.* Tacoma, O. & G. H. R. Co. (7 Wash. 211, 34 Pac. Rep. 922), Agency, 114; Att'ys, 7.
Haynes *v.* Wabash R. Co. (54 Mo. App. 582), Lim. of Liab., 30.
Haynie *v.* Baylor (18 Tex. 498), Car. of M., 2, 4.
Haynie *v.* Chicago & A. R. Co. (9 Ill. App. 105), Death, etc., 103.
Haynie *v.* Waring (29 Ala. 213), Car. of Mails, 7.
Hays *v.* Alexandria & W. R. Co. (4 Hughes (U. S.) 331), Fed. Cts., 3.
Hays *v.* Baltimore & O. R. Co. (3 Pennyp. (Pa.) 52), Em. Dom., 764.
Hays *v.* Branham (36 Ind. 219, 5 Am. Ry. Rep. 18), Subscr., 93.
Hays *v.* Briggs (3 Pittsb. (Pa.) 504), Branch & L. Roads, 3, 9, 16; Em. Dom., 598; Words & Ph., 71, 137, 242.
Hays *v.* Briggs (74 Pa. St. 373), Branch & L. Roads, 4, 15, 16; Words & Ph., 116.
Hays *v.* Chicago, B. & Q. R. Co. (64 Iowa 593), App., 138.
Hays *v.* Commonwealth (82 Pa. St. 518), Direct., 5.
Hays *v.* Gainesville St. R. Co. (34 Am. & Eng. R. Cas. 97, 70 Tex. 602, 8 S. W. Rep. 491), Contrib. Neg., 19, 48, 113; Evid., 54; Negl., 90; St. Rys., 466, 472, 486.
Hays *v.* Houston & G. N. R. Co. (46 Tex. 272, 13 Am. Ry. Rep. 281), Agency, 92; Dam., 26; Eject. Pass., 123.
Hays *v.* Kansas City, Ft. S. & G. R. Co. (108 Mo. 544, 18 S. W. Rep. 1115), Stat. & D., 37.
Hays *v.* Mouille (14 Pa. St. 48), Car. of M., 497, 498, 512, 517.
Hays *v.* Ottawa, O. & F. R. V. R. Co. (61 Ill. 422, 12 Am. Ry. Rep. 454), Subscr., 130, 144.
Hays *v.* Pennsylvania Co. (12 Fed. Rep. 309), Discrim., 7.
Hays *v.* Pennsylvania R. Co. (17 Pa. St. 9), Jurisd., 7.
Hays *v.* Pennsylvania R. Co. (42 N. J. L. 446), Employés, Inj. to, 294.
Hays *v.* Pittsburg & S. R. Co. (38 Pa. St. 81), Subscr., 57, 65, 113.
Hays *v.* Risher (32 Pa. St. 169), Branch & L. Roads, 2; Em. Dom., 473, 626.
Hays *v.* Texas & P. R. Co. (23 Am. & Eng. R. Cas. 102, 62 Tex. 397), Tresp. to Try Title, 1, 3, 4.
Hays *v.* Wabash R. Co. (51 Mo. App. 438), Car. of P., 229, 377, 572.
Hayward *v.* Bath (40 N. H. 100), Sts. & H., 23.
Hayward *v.* Grand Trunk R. Co. (32 U. C. Q. B. 392), Car. of M., 389.
Hayward *v.* Manhattan R. Co. (17 Civ. Pro. (N. Y.) 155), Lim. of Ac., 12.
Hayward *v.* Metropolitan R. Co. (10 Jur. N. S. 418, 4 B. & S. 787, 33 L. J. Q. B. 73, 12 W. R. 577, 9 L. T. 680), Em. Dom., 1124, 1125, 1144, 1146.
Haywood *v.* New York C. & H. R. R. Co. (35 N. Y. S. R. 748, 59 Hun 617, 13 N. Y. Supp. 177; affirmed in 128 N. Y. 596, mem., 38 N. Y. S. R. 1011), Cross., Inj. at, 50, 176, 298; Death, etc., 294; Sts. & H., 329.
Hayworth *v.* Junction R. Co. (12 Ind. 348), Subscr., 92, 184.
Hazard *v.* Chicago, B. & Q. R. Co. (1 Biss. (U. S.) 503), Car. of P., 139, 151, 287, 348, 459; Contrib. Neg., 20.
Hazard *v.* Chicago, B. & Q. R. Co. (4 Biss. (U. S.) 453), Judgm., 26.
Hazard *v.* Illinois C. R. Co. (42 Am. & Eng. R. Cas. 455, 67 Miss. 32, 7 So. Rep. 280), Bills of L., 14, 47.
Hazard *v.* Vermont & C. R. Co. (12 Am. & Eng. R. Cas. 388, 17 Fed. Rep. 753), Mort., 23.
Hazel *v.* Chicago, M. & St. P. R. Co. (49 Am. & Eng. R. Cas. 76, 82 Iowa 477, 48 N. W. Rep. 926), Car. of M., 453; Lim. of Liab., 37.
Hazel *v.* People's Pass. R. Co. (43 Am. & Eng. R. Cas. 400, 132 Pa. St. 96, 18 Atl. Rep. 1116), St. Rys., 482.
Hazeltine *v.* Belfast & M. L. R. Co. (30 Am. & Eng. R. Cas. 528, 79 Me. 411, 10 Atl. Rep. 328), Divid., 2, 8; Words & Ph., 140.
Hazen *v.* Boston & M. R. Co. (2 Gray (Mass.) 574), Em. Dom., 1061, 1078, 1080; Location, etc., 16.
Hazlehurst *v.* Freeman (52 Ga. 244), Charters, 136.
Hazlehurst *v.* Savannah, G. & N. A. R. Co. (43 Ga. 13), Charters, 136; Stock, 11; Stockh., 88, 119, 121.
Hazleton Coal Co. *v.* Buck Mountain Coal Co. (57 Pa. St. 301), Contr., 29.
Head *v.* Georgia Pac. R. Co. (79 Ga. 358, 7 S. E. Rep. 217), Eject. Pass., 112; Tickets & F., 70.
Headen *v.* Rust (39 Ill. 186), Animals, 46; Fences, 105.
Healey *v.* Chichester & M. R. Co. (L. R. 9 Eq. 148, 21 L. T. 811, 39 L. J. Ch. 387, 18 W. R. 270), Stockh., 29.
Healey *v.* City Pass. R. Co. (28 Ohio St. 23, 14 Am. Ry. Rep. 63), St. Rys., 519, 525.
Healey *v.* Dry Dock, E. B. & B. R. Co. (14 J. & S. (N. Y.) 473), Contrib. Neg., 13, 48; St. Rys., 375.
Healey *v.* Loveridge (72 Md. 220, 19 Atl. Rep. 921), Stock, 35.
Healey *v.* Thames Valley R. Co. (5 B. & S. 769, 34 L. J. Q. B. 52, 10 Jur. N. S. 1182), Em. Dom., 1133.
Healy *v.* Joliet & C. R. Co. (2 Ill. App. 435), Bridges, 22.
Healy *v.* Joliet & C. R. Co. (116 U. S. 191, 6 Sup. Ct. Rep. 352), Bridges, 59.
Heaney *v.* Long Island R. Co. (37 Am. & Eng. R. Cas. 529, 112 N. Y. 122, 19 N. E. Rep. 422, 20 N. Y. S. R. 296; reversing 9 N. Y. S. R. 707), Cross., Inj. at, 74; Death, etc., 192; Negl., 51.

Heaney *v.* **Long Island R. Co.** (9 N. Y. S. R. 707), Cross., Inj. at, 65; Death, etc., 195.
Heard *v.* Brooklyn (60 N. Y. 242), Aband., 8; Em. Dom., 980.
Heard *v.* Chesapeake & O. R. Co. (26 W. Va. 455), Animals, 69.
Heard *v.* Georgia R. Co. (1 Int. Com. Rep. 719, 1 Int. Com. Com. 428), Col. Pers., 14.
Heard *v.* Georgia R. Co. (2 Int. Com. Rep. 508, 3 Int. Com. Com. 111), Col. Pers., 14.
Hearn *v.* London & S. W. R. Co. (10 Ex. 793, 3 C. L. R. 597, 1 Jur. N. S. 236, 24 L. J. Ex. 180), Car. of. M., 524.
Hearn *v.* St. Charles St. R. Co. (34 La. Ann. 160), Children, Inj. to, 63.
Hearne *v.* Chillicothe & B. R. Co. (53 Mo. 324, 12 Am. Ry. Rep. 349), Liens, 21; Words & Ph., 153.
Hearne *v.* Garton (2 El. & El. 66, 5 Jur. N. S. 648, 28 L. J. M. C. 16, 33 L. T. 256), Car. of M., 198.
Hearne *v.* Southern Pac. R. Co. (50 Cal. 482, 12 Am. Ry. Rep. 181), Contrib. Neg., 21; Cross., Inj. at, 192, 204.
Heaston *v.* Cincinnati & F. W. R. Co. (16 Ind. 275), Corp., 18; Evid., 112; Pl., 9, 42, 47; Subscr., 64, 66, 70, 81, 102; Words & Ph., 135.
Heaston *v.* Wabash, St. L. & P. R. Co. (18 Mo. App. 403), Animals, 142.
Heath *v.* Barmore (50 N. Y. 302; affirming 49 Barb. 496), Dissol., 32.
Heath *v.* Broadway & S. A. R. Co. (25 J. & S. 496, 29 N. Y. S. R. 267, 8 N. Y. Supp. 863), Evid., 28; Witn., 90.
Heath *v.* Broadway & S. A. R. Co. (39 N. Y. S. R. 378, 27 J. & S. 592, mem., 15 N. Y. Supp. 142; affirmed in 133 N. Y. 526, mem., 30 N. E. Rep. 1148, mem., 44 N. Y. S. R. 929, mem.), Negl., 114; Trial, 176.
Heath *v.* Des Moines & St. L. R. Co. (10 Am. & Eng. R. Cas. 313, 61 Iowa 11, 15 N. W. Rep. 573), Sts. & H., 69, 83, 108.
Heath *v.* Erie R. Co. (8 Blatchf. (U. S.) 347), Stockh., 96, 98.
Heath *v.* Missouri, K. & T. R. Co. (83 Mo. 617), Proc., 28, 45.
Heath *v.* Page (48 Pa. St. 130), Usury, 2.
Heath *v.* Texas & P. R. Co. (37 La. Ann. 728), Cat.-Gds., 3; Constr. Rys., 4; Lim. of Ac., 17.
Heath *v.* Whitebreast C. & M. Co. (65 Iowa 737, 23 N. W. Rep. 148), Side Tr., 5.
Heath *v.* Wright (1 How. Pr. (N. Y.) 250), For. Corp., 25.
Heaton *v.* Morgan's L. & T. R. & S. Co. (1 Tex. App. (Civ. Cas.) 425), Car. of M., 14; Words & Ph., 7.
Heazle *v.* Indianapolis, B. & W. R. Co. (76 Ill. 501), Derailm., 2, 6.
Hebert *v.* Delaware & H. Canal Co. (41 N. Y. S. R. 860, 62 Hun 618, 16 N. Y. Supp. 561; affirmed in 136 N. Y. 655, mem., 32 N. E. Rep. 1016, 49 N. Y. S. R. 916), Employés, Inj. to, 662, 664.
Hecht *v.* Ohio & M. R. Co. (54 Am. & Eng. R. Cas. 75, 132 Ind. 507, 32 N. E. Rep. 302), Death, etc., 96.
Heck *v.* East Tenn., V. & G. R. Co. (1 Int. Com. Rep. 775, 1 Int. Com. Com. 495). Int. Com., 21, 71, 164.
Heck *v.* Missouri Pac. R. Co. (51 Mo. App. 532), Car. of M., 174.
Heckman *v.* Louisville & N. R. Co. (85 Ky. 631, 4 S. W. Rep. 342), Death, etc., 103.
Hector, In re (24 N. Y. Supp. 475), Paupers, 1.
Hedderly *v.* Johnson (42 Minn. 443, 44 N. W. Rep. 527), Deeds, 40.
Heddles *v.* Chicago & N. W. R. Co. (39 Am. & Eng. R. Cas. 645, 74 Wis. 239, 42 N. W. Rep. 237), Children, Inj. to, 4, 192; Cross., Inj. at, 73, 164; Dam., 38; Trial, 91, 203; Witn., 34.
Heddles *v.* Chicago & N. W. R. Co. (77 Wis. 228, 46 N. W. Rep. 115), App., 69; Children, Inj. to, 185, 193; Cross., Inj. at, 12, 60; Evid., 28, 234; Witn., 34, 100.
Hedge *v.* Gibson (7 Am. & Eng. R. Cas. 69, 58 Iowa 656, 12 N. W. Rep. 713), Subscr., 81, 103.
Hedges *v.* Dixon County (150 U. S. 182, 14 Sup. Ct. Rep. 71), Mun. Aid, 330.
Hedges *v.* Hudson River R. Co. (49 N. Y. 223, 3 Am. Ry. Rep. 346; reversing 6 Robt. (N. Y.) 119), Car. of M. 85, 241.
Hedges *v.* Metropolitan R. Co. (28 Beav. 109, 3 L. T. 643), Em. Dom., 1128.
Hedges *v.* Wilmington & W. R. Co. (73 N. Car. 558), Car. of P., 563; Derailm., 3.
Hedrick *v.* Ilwaco R. & N. Co. (54 Am. & Eng. R. Cas. 45, 4 Wash. 400, 30 Pac. Rep. 714), Death, etc., 88, 409.
Hedrick *v.* Olathe (30 Kan. 348, 1 Pac. Rep. 118), Sts. & H., 211.
Heenan *v.* New York, W. S. & B. R. Co. (6 Civ. Pro. (N. Y.) 348, 1 How. Pr. N. S. 53; affirmed in 34 Hun 602), Citizens., 4; Jurisd., 7, 10.
Heenrich *v.* Pullman Palace Car Co. (18 Am. & Eng. R. Cas. 379, 20 Fed. Rep. 100, 10 Sawy. (U. S.) 80), Agency, 74; Sleep. Car Cos., 18.
Heer Dry Goods Co. *v.* Citizens' R. Co. (41 Mo. App. 63), St. Rys., 209.
Hefferen *v.* Northern Pac. R. Co. (45 Minn. 471, 48 N. W. Rep. 1,526), App., 95; Employés, Inj. to, 211, 238, 294.
Heffinger *v.* Minneapolis, L. & M. R. Co. (43 Minn. 503, 45 N. W. Rep. 1131), Employés, Inj. to, 316.
Heffron *v.* Detroit City R. Co. (52 Am. & Eng. R. Cas. 588, 92 Mich. 406, 16 L. R. A. 345, 52 N. W. Rep. 802), St. Rys., 529.
Hegan *v.* Eighth Ave. R. Co. (15 N. Y. 380), Sts. & H., 382.
Hegar *v.* Chicago & N. W. R. Co. (26 Wis. 624, 1 Am. Ry. Rep. 35), Sts. & H., 275.
Hegeman *v.* Western R. Corp. (13 N. Y. 9; affirming 16 Barb. 353), Car. of P., 182, 184, 191, 193, 195, 609.
Heil *v.* St. Louis, I. M. & S. R. Co. (16 Mo. App. 363), Bills of L., 64, 65, 84; Car. of M., 473, 691, 765.
Heilbroner *v.* Hancock (33 Tex. 714), Car. of M., 71.
Heilman *v.* Lebanon & A. St. R. Co. (145 Pa. St. 23, 23 Atl. Rep. 389), Elec. Rys., 17.
Heine *v.* Chicago & N. W. R. Co. (58 Wis.

525, 17 N. W. Rep. 420), Fel. Serv., 30, 257.
Heineman *v.* Grand Trunk R. Co. (31 How. Pr. (N. Y.) 430, 1 Sheld. 95), Car. of L. S., 75; Car. of M., 12; Lim. of Liab., 29, 33.
Heinlein *v.* Boston & P. R. Co. (33 Am. & Eng. R. Cas. 500, 147 Mass. 136, 16 N. E. Rep. 698), Stat. & D., 104.
Heirn *v.* M'Caughan (32 Miss. 17), Actions, 9; Car. of M., 246; Car. of P., 638; Husb. & W., 31.
Heise *v.* Pennsylvania R. Co. (62 Pa. St. 67), Em. Dom., 887; Leases, 72.
Heiserman *v.* Burlington, C. R. & N. R. Co. (16 Am. & Eng. R. Cas. 46, 63 Iowa 732, 18 N. W. Rep. 903), Charges, 40, 47; Commerce, 8.
Heiskell *v.* Farmers' & M. Nat. Bank (89 Pa. St. 155), Bills of L., 60.
Heiss *v.* Milwaukee & L. W. R. Co. (69 Wis. 555, 34 N. W. Rep. 916), Em. Dom., 175.
Heiter *v.* East St. Louis Connecting R. Co. (53 Mo. App. 331), Just. P., 1; Tresp., Inj. to, 9, 29.
Helbig *v.* Michigan C. R. Co. (85 Mich. 359, 48 N. W. Rep. 589), Employés, Inj. to, 574, 645.
Helena Lumber Co. *v.* Montana C. R. Co. (10 Mont. 81, 24 Pac. Rep. 702), Liens, 40.
Helfrich *v.* Ogden City R. Co. (7 Utah 186, 26 Pac. Rep. 295), App., 145; Death, etc., 216.
Hellen *v.* Metropolitan R. Co. (4 Mackey (D. C.) 519), Int., 5.
Heller *v.* Abbot (79 Wis. 409, 48 N. W. Rep. 598), Animals, 126.
Heller *v.* Atchison, T. & S. F. R. Co. (7 Am. & Eng. R. Cas. 636, 28 Kan. 625), Sts. & H., 35.
Heller *v.* North & W. Branch R. Co. (148 Pa. St. 563, 24 Atl. Rep. 114), Tresp., 11.
Helliwell *v.* Grand Trunk R. Co. (10 Biss. (U. S.) 170, 7 Fed. Rep. 68), Bills of L., 40, 91; Car. of M., 141.
Hellman *v.* Forty-second St. & G. S. F. R. Co. (74 Hun 529, 26 N. Y. Supp. 553, 57 N. Y. S. R. 223), Officers, 15.
Hellman *v.* Holladay (Woolw. (U. S.) 365), Bagg., 88.
Hellmuth *v.* Katschke (35 Ill. App. 21), Evid., 175.
Helm *v.* Port Hope (22 Grant's Ch. (U. C.) 273), Mun. Aid, 162.
Helmke *v.* New Jersey & N. Y. R. Co. (49 N. Y. S. R. 361, 66 Hun 632, mem., 21 N. Y. Supp. 345; affirmed in 143 N. Y. 648, mem., 60 N. Y. S. R. 874, mem., 37 N. E. Rep. 824), Spec. Perf., 8.
Helphrey *v.* Chicago & R. I. R. Co. (29 Iowa 480), Tender, 4.
Helton *v.* Alabama Midland R. Co. (97 Ala. 275, 12 So. Rep. 276), Dam., 91; Employés, Inj. to, 321, 560; Evid., 61, 244; Jurisd., 6; Trial, 184; Witn., 34, 94.
Helton *v.* St. Louis, K & N. W. R. Co. (25 Mo. App. 322), Mort., 259; Right of W., 5.
Heltzel *v.* Kansas City, St. L. & C. R. Co. (77 Mo. 482), Liens, 51.
Heltzell *v.* Chicago & A. R. Co. (20 Mo. App. 435), Liens, 19.
Heltzell *v.* Chicago & A. R. Co. (16 Am. & Eng. R. Cas. 619, 77 Mo. 315), Liens, 19, 28; Proc., 23.
Hemmingway *v.* Chicago, M. & St. P. R. Co. (28 Am. & Eng. R. Cas. 216, 67 Wis. 668, 31 N. W. Rep. 268), Car. of P., 261.
Hemmingway *v.* Chicago, M. & St. P. R. Co. (33 Am. & Eng. R. Cas. 511, 72 Wis. 42, 7 Am. St. Rep. 823, 37 N. W. Rep. 804), Car. of P., 432; Evid., 172; Trial, 124.
Hemmingway *v.* Vicksburg & N. R. Co. (52 Miss. 16), State Aid, 25.
Hempfield R. Co. *v.* Thornburg (1 W. Va. 261), Paym., 7.
Hempstead *v.* New York C. R. Co. (28 Barb. (N. Y.) 485), Car. of M., 210, 542, 636.
Hendee *v.* Connecticut & P. R. R. Co. (23 Blatchf. (U. S.) 453, 26 Fed. Rep. 677), Fed. Cts., 8.
Hendee *v.* Pinkertc (14 Allen (Mass.) 381), Contr., 12; Mor.. 9.
Henderson *v.* Central Pass. R. Co. (20 Am. & Eng. R. Cas. 542, 21 Fed. Rep. 358), Aband., 2; Charters, 43.
Henderson *v.* Central R. Co. (73 Ga. 718), Pl., 148.
Henderson *v.* Chicago, R. I. & P. R. Co. (39 Iowa 200), Farm Cross., 13.
Henderson *v.* Chicago, R. I. & P. R. Co. (43 Iowa 620, 14 Am. Ry. Rep. 484), Farm Cross., 13.
Henderson *v.* Chicago, R. I. & P. R. Co. (48 Iowa 216), Farm Cross., 2.
Henderson *v.* Chicago, R. I. & P. R. Co. (83 Iowa 221, 48 N. W. Rep. 1029), Tresp., 17.
Henderson *v.* Coons (31 Ill. App. 75), Employés, Inj. to, 189, 224, 342, 409.
Henderson *v.* Grand Trunk R. Co. (20 U. C. Q. B. 602), Animals, 313.
Henderson *v.* Jackson County (2 McCrary (U. S.) 615, 12 Fed. Rep. 676), Mun. Aid, 40, 272.
Henderson *v.* Kentucky C. R. Co. (86 Ky. 389, 5 S. W. Rep. 875), Death, etc., 41, 48.
Henderson *v.* Lambert (8 Bush (Ky.) 607), Mun. Aid, 414.
Henderson *v.* London & N. W. R. Co. (L. R. 5 Ex. 90, 39 L. J. Ex. 55, 3 Ry. & C. T. Cas. xii), Car. of M., 523.
Henderson *v.* Louisville & N. R. Co. (31 Am. & Eng. R. Cas. 95, 123 U. S. 61, 8 Sup. Ct. Rep. 60; affirming 16 Am. & Eng. R. Cas. 397, 20 Fed. Rep. 430), Bagg., 83.
Henderson *v.* Midland R. Co. (20 W. R. 23, 25 L. T. 881), False Imp., 3; Mal. Pros., 4.
Henderson *v.* New York C. R. Co. (78 N. Y. 423; affirming 17 Hun 344), Em. Dom., 1008; Sts. & H., 272.
Henderson *v.* Ogden City R. Co. (46 Am. & Eng. R. Cas. 95, 7 Utah 199, 26 Pac. Rep. 286), St. Rys., 9, 35, 44.
Henderson *v.* Peruvian R. Co. (16 L. T. 297), Dissol., 29.
Henderson *v.* Philadelphia & R. R. Co. (48 Am. & Eng. R. Cas. 16, 144 Pa. St. 461, 22 Atl. Rep. 851), Fires, 204, 232, 255, 268, 282.

Henderson *v.* St. Louis & H. R. Co. (36 Mo. App. 109), Animals, 117.
Henderson *v.* St. Louis, K. C. & N. R. Co. (36 Iowa 387), Animals, 312.
Henderson *v.* St. Paul & D. R. Co. (52 Minn. 479, 55 N. W. Rep. 53), Cross., Inj. at, 311, 344; New Tr., 87.
Henderson *v.* San Antonio & M. G. R. Co. (17 Tex. 560), Agency, 37; Constr. Rys., 16; Subscr., 211.
Henderson *v.* 300 Tons Iron Ore (38 Fed. Rep. 36), Car. of M., 290.
Henderson *v.* Wabash, St. L. & P. R. Co. (81 Mo. 605), Animals, 603.
Henderson *v.* Walker (55 Ga. 481), Fel. Serv., 171; Receiv., 82.
Henderson & N. R. Co. *v.* Dickerson (16 B. Mon. (Ky.) 297), Em. Dom., 887.
Henderson & N. R. Co. *v.* Dickerson (17 B. Mon. (Ky.) 173), Em. Dom., 448, 736.
Henderson & N. R. Co. *v.* Leavell (16 B. Mon. (Ky.) 358), Subscr., 93.
Henderson & N. R. Co. *v.* Moss (2 Duv. (Ky.) 242), Subscr., 196.
Henderson Bridge Co. *v.* Henderson (90 Ky. 498, 14 S. W. Rep. 493), Mun. Corp., 36; Tax., 13, 78.
Henderson Bridge Co. *v.* McGrath (134 U. S. 260, 10 Sup. Ct. Rep. 730), Constr. Rys., 115.
Henderson Bridge Co. *v.* O'Connor (88 Ky. 303, 11 S. W. Rep. 957), Constr. Rys., 34, 58.
Hendrick *v.* Carolina C. R. Co. (98 N. Car. 431, 4 S. E. Rep. 184), Em. Dom., 885.
Hendrick *v.* Carolina C. R. Co. (101 N. Car. 617, 8 S. E. Rep. 236), Em. Dom., 453, 465; Sales of Rds., 12.
Hendricks *v.* Sixth Ave. R. Co. (12 J. & S. (N. Y.) 8), Evid., 162; St. Rys., 363.
Hendricks *v.* Western & A. R. Co. (52 Ga. 467), Death, etc., 157.
Hendricks *v.* Wilson (53 Tex. 463), Pub. Lds., 36.
Hendrickson *v.* Chicago, R. I. & P. R. Co. (22 Fed. Rep. 569), Appear., 7.
Hendrickson *v.* Great Northern R. Co. (49 Minn. 245, 51 N. W. Rep. 1044), Cross., Inj. at, 1, 121; Death, etc., 237.
Hendrickson *v.* Great Northern R. Co. (52 Minn. 340, 54 N. W. Rep. 189), Death, etc., 294.
Hendrickson *v.* Pennsylvania R. Co. (8 Am. & Eng. R. Cas. 368, 43 N. J. L. 464), Pl., 63.
Hendrie *v.* Canadian Bank (11 Am. & Eng. R. Cas. 610, 49 Mich. 401, 13 N. W. Rep. 792), Constr. Rys., 32, 86.
Hendrie *v.* Grand Trunk R. Co. (13 Am. & Eng. R. Cas. 62, 2 Ont. 441), Bonds, 43.
Hendrie *v.* Kalthoff (48 Mich. 306, 12 N. W. Rep. 191), Tax., 173.
Hendrix *v.* St. Joseph & St. L. R. Co. (38 Mo. App. 520), Animals, 153.
Hendry *v.* Trinity & S. R. Co. (Tex.) (24 Am. & Eng. R. Cas. 286), Em. Dom., 656.
Hendryx *v.* Kansas City, Ft. S. & G. R. Co. (45 Kan. 377, 25 Pac. Rep. 893), Tresp., Inj. to, 13, 82; Trial, 60.
Henen *v.* Baltimore & O. R. Co. (9 Am. & Eng. R. Cas. 496, 17 W. Va. 881), Rem. of C., 34.
Hennepin County *v.* St. Paul, M. & M. R. Co. (33 Minn. 534, 24 N. W. Rep. 196), Tax., 149.
Hennepin County *v.* St. Paul, M. & M. R. Co. (41 Am. & Eng. R. Cas. 625, 42 Minn. 238, 44 N. W. Rep. 63), Tax., 171.
Hennessey *v.* Farrell (4 Cush. (Mass.) 267), Constr. Rys., 19.
Hennessy *v.* Brooklyn City R. Co. (73 Hun 569, 26 N. Y. Supp. 321, 56 N. Y. S. R. 151), Imp. Neg., 26; St. Rys., 231, 233; Sts. & H., 382.
Hennessy *v.* St. Paul, M. & M. R. Co. (10 Am. & Eng. R. Cas. 112, 30 Minn. 55, 14 N. W. Rep. 269), Ejectm., 25.
Henney *v.* Brooklyn El. R. Co. (75 Hun 543, 27 N. Y. Supp. 1112), Elev. Rys., 182.
Henniker *v.* Contoocook R. Co. (29 N. H. 146), Actions, 12.
Henning *v.* Caldwell (45 N. Y. S. R. 373, 18 N. Y. Supp. 339), Cross., Inj. at, 298.
Henning *v.* New York & N. H. R. Co. (9 Bosw. (N. Y.) 283), Stock, 83.
Hennington *v.* State (57 Am. & Eng. R. Cas. 42, 90 Ga. 396, 17 S. E. Rep. 1009), Crim. L., 50; Int. Com., 223.
Henry *v.* Bond (34 Fed. Rep. 101), Employés, Inj. to, 202.
Henry *v.* Canadian Pac. R. Co. (1 Man. 210), Car. of M., 466.
Henry *v.* Centralia & C. R. Co. (30 Am. & Eng. R. Cas. 273, 121 Ill. 264, 12 N. E. Rep. 744, 10 West. Rep. 598), Em. Dom., 352, 302, 904.
Henry *v.* Central R. & B. Co. (89 Ga. 815, 15 S. E. Rep. 757), Car. of M., 695, 764; Pl., 146.
Henry *v.* Dubuque & P. R. Co. (2 Iowa 288), Em. Dom., 128, 132, 142, 372, 645, 692; Fences, 13; Witn., 54.
Henry *v.* Dubuque & P. R. Co. (5 Iowa 576), Em. Dom., 645, 692.
Henry *v.* Dubuque & P. R. Co. (10 Iowa 540), Em. Dom., 412, 415, 1056.
Henry *v.* Fitchburg R. Co. (65 Vt. 436, 26 Atl. Rep. 485), Fel. Serv., 452.
Henry *v.* Grand Ave. R. Co. (113 Mo. 525, 21 S. W. Rep. 214), Cross., Inj. at, 191, 193; Evid., 80; Negl., 18.
Henry *v.* Great Northern R. Co. (3 Jur. N. S. 1133, 27 L. J. Ch. 1), Divid., 8.
Henry *v.* Huff (143 Pa. St. 548, 22 Atl. Rep. 1046), Trial, 92.
Henry *v.* Jeans (48 Ohio St. 443, 28 N. E. Rep. 672), Pl., 40.
Henry *v.* Klopfer (147 Pa. St. 178, 23 Atl. Rep. 337), Husb. & W., 23.
Henry *v.* Lake Shore & M. S. R. Co. (8 Am. & Eng. R. Cas. 110, 49 Mich. 495, 13 N. W. Rep. 832), Employés, inj. to, 45, 145; Fel. Serv., 1, 45, 281; Negl., 79.
Henry *v.* New York, L. E. & W. R. Co. (32 N. Y. S. R. 16, 10 N. Y. Supp. 508, 57 Hun 76, 19 Civ. Pro. 188), Witn., 89.
Henry *v.* Pittsburg & L. E. R. Co. (139 Pa. St. 289, 21 Atl. Rep. 157), Employés, 7; Libel & S., 7.
Henry *v.* Rutland & B. R. Co. (27 Vt. 435), Direct., 30.

Henry *v.* St. Louis, K. C. & N. R. Co. (12 Am. & Eng. R. Cas. 136, 76 Mo. 288, 43 Am. Rep. 762), Car. of P., 266, 267; Negl., 58.
Henry *v.* Sioux City & P. R. Co. (21 Am. & Eng. R. Cas. 644, 66 Iowa 52, 23 N. W. Rep. 260), Employés, Inj. to, 274, 409, 511.
Henry *v.* Sioux City & P. R. Co. (70 Iowa 233, 30 N. W. Rep. 630), New Tr., 4.
Henry *v.* Sioux City & P. R. Co. (75 Iowa 84, 39 N. W. Rep. 193), Employés, Inj. to, 409, 770; Witn., 28, 130.
Henry *v.* Southern Pac. R. Co. (50 Cal. 176, 12 Am. Ry. Rep. 168), Fires, 96, 207, 237, 320.
Henry *v.* Staten Island R. Co. (2 Am. & Eng. R. Cas. 60, 81 N. Y. 373), Fel. Serv., 32, 278, 373, 386.
Henry *v.* Syracuse, G. & C. R. Co. (24 N. Y. S. R. 21, 25 J. & S. 69, 5 N. Y. Supp. 437), Bonds, 41.
Henry *v.* Vermillion & A. R. Co. (17 Ohio 187), Stockh., 31; Subscr., 19.
Henry *v.* Vermont C. R. Co. (30 Vt. 638), Waters & W., 12, 14.
Henry *v.* Wabash Western R. Co. (109 Mo. 488, 19 S. W. Rep. 239), Employés, Inj. to, 40, 83, 99, 182; Fel. Serv., 69.
Henry *v.* Wabash Western R. Co. (44 Mo. App. 100), Cross. Sts. & H., 13, 35, 38; Evid., 150.
Henry County *v.* Allen (50 Mo. 231, 3 Am. Ry. Rep. 146), Mun. Aid, 418.
Henry County *v.* Nicolay (95 U. S. 619), Mun. Aid, 136, 326, 377.
Henshaw *v.* Bank of Bellows Falls (10 Gray (Mass.) 568), Attach., 64; Mort., 54.
Hensley Tp. *v.* People (84 Ill. 544), Mun. Aid, 108, 195, 226, 233.
Henson *v.* St. Louis, I. M. & S. R. Co. (34 Mo. App. 636), Animals, 572, 619.
Hentz *v.* Long Island R. Co. (13 Barb. (N. Y.) 646), Charters, 61; Em. Dom., 157, 426, 1043; Location, etc., 3; Nuis., 3.
Henze *v.* St. Louis, K. C. & N. R. Co. (2 Am. & Eng. R. Cas. 212, 71 Mo. 636), Cross., Inj. at, 264; Death, etc., 194.
Hepfel *v.* St. Paul, M. & M. R. Co. (49 Minn. 263, 51 N. W. Rep. 1049), Children, Inj. to, 70, 105; Tresp., Inj. to, 44.
Hepting *v.* New Orleans Pac. R. Co. (36 La. Ann. 898), St. Rys., 8; Sts. & H., 228.
Hepworth *v.* Union Ferry Co. (62 Hun (N. Y.) 257, 41 N. Y. S. R. 783, 16 N. Y. Supp. 692; appeal dismissed 131 N. Y. 645, 43 N. Y. S. R. 962), Abate., 9.
Herbert *v.* Baltimore & P. R. Co. (Del.) (13 Atl. Rep. 902), Tax., 252.
Herbert *v.* Delaware & H. Canal Co. (16 N. Y. Supp. 561), Employés, Inj. to, 21.
Herbert *v.* Northern Pac. R. Co. (8 Am. & Eng. R. Cas. 85, 3 Dak. 38, 13 N. W. Rep. 349), Contrib. Neg., 82, 118; Employés, Inj. to, 1, 94, 99, 182; Fel. Serv., 1, 60.
Herbert *v.* Pennsylvania R. Co. (43 N. J. Eq. 21, 10 Atl. Rep. 872, 9 Cent. Rep. 322), Injunc., 10.
Hercules Iron Works *v.* Elgin, J. & E. R. Co. (141 Ill. 491, 30 N. E. Rep. 1050), Em. Dom., 235, 252, 301, 527, 534, 536, 603, 724, 926.
Herdman *v.* New York, L. E. & W. R. Co. (42 N. Y. S. R. 293, 62 Hun 621, 17 N. Y. Supp. 198), Death, etc., 188.
Herdt *v.* Rochester City & B. R. Co. (48 N. Y. S. R. 46, 20 N. Y. Supp. 346), St. Rys., 357.
Hereford *v.* Southern Pac. R. Co. (Tex.) (34 Am. & Eng. R. Cas. 133, 7 S. W. Rep. 218), Estop., 33.
Herlisch *v.* Louisville, N. O. & T. R. Co. (44 La. Ann. 280, 10 So. Rep. 628), Cross., Inj. at, 242.
Herman *v.* Chicago, M. & St. P. R. Co. (79 Iowa 161, 44 N. W. Rep. 298), Car. of P., 575.
Herman *v.* New Orleans & C. R. Co. (11 La. Ann. 5), Death, etc., 393.
Hermann *v.* Goodrich (21 Wis. 536), Car. of M., 229, 621.
Hermans *v.* New York C. & H. R. R. Co. (17 N. Y. Supp. 319, 63 Hun 625, 43 N. Y. S. R. 900; affirmed in 137 N. Y. 558, mem., 33 N. E. Rep. 337, 50 N. Y. S. R. 932), Cross., Inj. at, 97, 158; Death, etc., 195.
Hermes *v.* Chicago & N. W. R. Co. (80 Wis. 590, 50 N. W. Rep. 584), Children, Inj. to, 162, 170.
Herndon *v.* Kansas, N. & D. R. Co. (46 Kan. 560, 26 Pac. Rep. 950), Sts. & H., 215.
Hernett *v.* Bleecker St. & F. F. R. Co. (17 J. & S. (N. Y.) 185), St. Rys., 487.
Herold *v.* Metropolitan El. R. Co. (37 N. Y. S. R. 896, 13 N. Y. Supp. 610; affirmed in 129 N. Y. 636, mem., 41 N. Y. S. R. 549), Elev. Rys., 164, 178.
Herrick *v.* Belknap (27 Vt. 673), Constr. Rys., 59, 64, 66.
Herrick *v.* Gallagher (60 Barb. (N. Y.) 566), Exp. Cos., 54.
Herrick *v.* Minneapolis & St. L. R. Co. (11 Am. & Eng. R. Cas. 256, 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. Rep. 413), Employés, Inj. to, 499; Fel. Serv., 163.
Herrick *v.* Sullivan (120 Mass. 576), Cross., Inj. at, 284.
Herriman *v.* Burlington, C. R. & N. R. Co. (9 Am. & Eng. R. Cas. 339, 57 Iowa 187, 9 N. W. Rep. 378, 10 N. W. Rep. 340), Charges, 53; Lim. of Ac., 37.
Herriman *v.* Chicago & A. R. Co. (27 Mo. App. 435), Employés, Inj. to, 435.
Herring *v.* Napanee, T. & Q. R. Co. (5 Ont. 349), Em. Dom., 1256, 1265.
Herring *v.* New York, L. E. & W. R. Co. (35 Am. & Eng. R. Cas. 54, 105 N. Y. 340, 19 Abb. N. Cas. 340, 12 N. E. Rep. 763, 7 N. Y. S. R. 547; affirming 34 Hun 634, mem., 63 How. Pr. 497), Dissol., 26; Judgm., 4, 18, 32; Mort., 184, 215; Receiv., 36.
Herring *v.* Wilmington & R. R. Co. (10 Ired. (N. Car.) 402), Negl., 51, 101; Tresp., Inj. to, 73, 74.
Hersfield *v.* Adams (19 Barb. (N. Y.) 577), Exp. Cos., 23, 66.
Hersh *v.* Northern C. R. Co. (74 Pa. St. 181, 6 Am. Ry. Rep. 531), Charges, 5.
Herstine *v.* Lehigh Valley R. Co. (151 Pa. St. 244, 25 Atl. Rep. 104), Car. of P., 583, 585, 592; Dam., 105; Witn., 26.
Hervey *v.* Illinois Midland R. Co. (28 Fed.

Rep. 169), Estop., 20; Mort., 61; Receiv., 16, 105; Sales of Rds., 15.
Hervey *v.* Illinois Midland R. Co. (7 Biss. (U. S.) 103), Rem. of C., 27, 29, 39.
Heryford *v.* Davis (2 Am. & Eng. R. Cas. 386, 102 U. S. 235), Mort., 59.
Herzog *v.* New York El. R. Co. (27 N. Y. Supp. 1034; affirming 14 N. Y. Supp. 296, 37 N. Y. S. R. 567), Elev. Rys., 17.
Heskett *v.* Wabash, St. L. & P. R. Co. (13 Am. & Eng. R. Cas. 549, 61 Iowa 467, 16 N. W. Rep. 525), Cat.-Gds., 6, 9, 16.
Hess *v.* Buffalo & N. F. R. Co. (29 Barb. (N. Y.) 391), Priv. Ways, 15.
Hess *v.* Missouri Pac. R. Co. (40 Mo. App. 202), Car. of L. S., 83, 145.
Hesse *v.* St. Louis, I. M. & S. R. Co. (36 Mo. App. 163), Animals, 73.
Hester *v.* Memphis & C. R. Co. (32 Miss. 378), Subscr., 124.
Hestonville, M. & F. Pass. R. Co. *v.* Biddle (Pa.) (16 Atl. Rep. 488), Children, Inj. to, 53.
Hestonville, M. & F. Pass. R. Co. *v.* Kelly (11 Am. & Eng. R. Cas. 123, 102 Pa. St. 115), Children, Inj. to, 50.
Hestonville, M. & F. Pass. R. Co. *v.* Philadelphia (89 Pa. St. 210), Consol., 7; Franch., 3; St. Rys., 74; Words & Ph., 180.
Hestonville, M. & F. R. Co. *v.* Schuylkill River Pass. R. Co. (6 Phila. (Pa.) 141), St. Rys., 85.
Hestonville Pass. R. Co. *v.* Boyle (1 Pa. Dist. 230), App., 130.
Hestonville Pass. R. Co. *v.* Connell (88 Pa. St. 520), Children, Inj. to, 86; Tresp., Inj. to, 69a.
Hetfield *v.* Central R. Co. (29 N. J. L. 571; reversing 29 N. J. L. 206), Em. Dom., 224; License, 12; Location, etc., 6; Tresp., 14.
Hetherington *v.* Hayden (11 Iowa 335), Bonds, 50; Exec., 11.
Hetherington *v.* Northeastern R. Co. (6 Am. & Eng. R. Cas. 490, 9 Q. B. D. 160, 51 L. J. Q. B. 495, 30 W. R. 797, 4 Ry. & C. T. Cas. xv), Death, etc., 11, 274, 275.
Hetzel *v.* Baltimore & O. R. Co. (6 Mackey (D. C.) 1), Nuis., 38.
Heucke *v.* Milwaukee C. R. Co. (69 Wis. 401, 34 N. W. Rep. 243), Car. of P., 646; Negl., 11; St. Rys., 358, 453; Trial, 33.
Heugh *v.* London & N. W. R. Co. (39 L. J. Ex. 48, L. R. 5 Ex. 51, 21 L. T. 676), Car. of M., 344.
Heusner *v.* Houston, W. S. & P. F. R. Co. (27 N. Y. Supp. 365, 57 N. Y. S. R. 528, 7 Misc. 48), Death, etc., 403; New Tr., 22.
Hewes *v.* Philadelphia, W. & B. R. Co. (76 Md. 154, 24 Atl. Rep. 325), Car. of P., 581.
Hewett *v.* Central R. Co. (3 Lans. (N. Y.) 83), Cross., Inj. at, 360.
Hewett *v.* Chicago, B. & Q. R. Co. (18 Am. & Eng. R. Cas. 568, 63 Iowa 611, 19 N. W. Rep. 790), Bills of L., 40; Car. of M., 45, 618; Evid., 187, 220.
Hewett *v.* Knox County Com'rs (85 Me. 308, 27 Atl. Rep. 179), Em. Dom., 508.
Hewett *v.* New Orleans & C. R. Co. (28 La. Ann. 685), Libel & S., 6.
Hewett *v.* Swift (3 Allen (Mass.) 420), Parties, 8; Pres., 12.
Hewitt, In re (25 N. J. Eq. 210), Subrog., 2.
Hewitt *v.* Flint & P. M. R. Co. (31 Am. & Eng. R. Cas. 249, 67 Mich. 61, 11 West. Rep. 148, 34 N. W. Rep. 659), Employés, Inj. to, 2, 69, 99, 108, 129, 224, 244, 260, 308; Evid., 79; Negl., 100; Side Tr., 6.
Hewitt *v.* Howell (8 How. Pr. (N. Y.) 346), Car. of M., 694.
Hewitt *v.* New York & O. M. R. Co. (12 Blatchf. (U. S.) 452), Tax., 219.
Hewitt *v.* Ontario, S. & H. R. U. Co. (11 U. C. Q. B. 604), Fires, 23, 247.
Hewitt *v.* St. Paul, M. & M. R. Co. (27 Am. & Eng. R. Cas. 342, 35 Minn. 226, 28 N. W. Rep. 255), Charters, 171.
Hewlett *v.* Cincinnati, N. O. & T. R. Co. (65 Miss. 463, 4 So. Rep. 547), Contr., 57.
Hewson *v.* London & S. W. R. Co. (8 W. R. 467), Em. Dom., 1103.
Heyl *v.* Inman Steamship Co. (14 Hun (N. Y.) 564), Car. of M., 105.
Heyl *v.* Philadelphia, W. & B. R. Co. (51 Pa. St. 469), License, 2; Side Tr., 5.
Heyl *v.* Philadelphia, W. & B. R. Co. (6 Phila. (Pa.) 42), License, 8.
Heyman *v.* Philadelphia & R. R. Co. (22 J. & S. (N. Y.) 158, 8 N. Y. S. R. 86), Car. of L. S., 143.
Heywood *v.* Maine Mut. Acc. Assoc. (85 Me. 289, 27 Atl. Rep. 154), Acc. Ins., 8.
Hezel Milling Co. *v.* St. Louis, A. & T. H. R. Co. (3 Int. Com. Rep. 701, 5 Int. Com. Com. 57), Int. Com., 57, 59.
Hibbard *v.* New York & E. R. Co. (15 N. Y. 455), Agency, 81; Eject. Pass., 19, 48; Tickets & F., 33.
Hibblethwaite *v.* Leeds & T. R. Co. (15 Jur. 1015, 21 L. J. Ex. 37), Name, 1.
Hibblewhite *v.* M'Morine (6 M. & W. 200, 2 Railw. Cas. 51), Stock, 38.
Hibbs *v.* Chicago & S. W. R. Co. (39 Iowa 340, 9 Am. Ry. Rep. 180), Em. Dom., 254, 859, 1061; Leases, 57; Right of W., 7.
Hibernia Underground R. Co. *v.* De Camp (24 Am. & Eng. R. Cas. 273, 47 N. J. L. 518, 4 Atl. Rep. 318; affirming 47 N. J. L. 43), Em. Dom., 128, 130.
Hickenbottom *v.* Delaware, L. & W. R. Co. (122 N. Y. 91, 25 N. E. Rep. 279, 33 N. Y. S. R. 312; affirming 15 N. Y. S. R. 11), Car. of P., 607, 618.
Hickett *v.* New York & S. B. R. Co. (10 N. Y. S. R. 398, 45 Hun 591), Death, etc., 204.
Hickey *v.* Boston & L. R. Co. (14 Allen (Mass.) 429), Car. of P., 355; Contrib. Neg., 38.
Hickey *v.* Chicago & W. I. R. Co. (6 Ill. App. 172), Sts. & H., 43, 61, 84, 144, 300.
Hickey *v.* Chicago, M. & St. P. R. Co. (64 Wis. 649, 26 N. W. Rep. 112), App., 55.
Hickey *v.* Dallmeyer (44 Mo. 237), Death. etc., 25.
Hickey *v.* Michigan C. R. Co. (96 Mich. 498, 55 N. W. Rep. 989), Nuis., 2.
Hickey *v.* Taaffe (105 N. Y. 26; affirming 39 Hun 656, mem., which reversed 6 N. Y. S. R. 426), Employés, Inj. to, 97, 211.
Hickman *v.* Baltimore & O. R. Co. (30 W. Va. 296, 4 S. E. Rep. 654), Judgm., 3; Just. P., 17.
Hickman *v.* Kansas City, M. & B. R. Co.

(66 Miss. 154, 5 So. Rep. 225), Death, etc., 146.
Hickman *v.* Missouri Pac. R. Co. (91 Mo. 433, 4 S. W. Rep. 127), Car. of P., 234, 417.
Hickman *v.* Missouri Pac. R. Co. (22 Mo. App. 434), Death, etc., 368, 434; Employés, Inj. to, 93.
Hickman *v.* Union Depot R. Co. (47 Mo. App. 65), Cross., Inj. at, 206; Elec. Rys., 37.
Hickory Farm Oil Co. *v.* Buffalo, N. Y. & P. R. Co. (32 Fed. Rep. 22), For. Corp., 8.
Hickox *v.* Chicago & C. S. R. Co. (43 Am. & Eng. R. Cas. 613, 78 Mich. 615, 44 N. W. Rep. 143), Right of W., 4.
Hickox *v.* Chicago & C. S. R. Co. (94 Mich. 237, 53 N. W. Rep. 1105), Aband., 6; Right of W., 4.
Hickox *v.* Holladay (12 Sawy. (U. S.) 204), Receiv., 42, 45.
Hickox *v.* Naugatuck R. Co. (31 Conn. 281), Bagg., 40, 54, 55.
Hicks *v.* Burns (38 N. H. 141), Stockh., 30.
Hicks *v.* Hannibal & St. J. R. Co. (68 Mo. 329), Eject. Pass., 94, 116; Trial, 10.
Hicks *v.* International & G. N. R. Co. (62 Tex. 38), Receiv., 180, 186.
Hicks *v.* Missouri Pac. R. Co. (46 Mo. App. 304), Contrib. Neg., 99; Licensees, Inj. to, 26; Negl., 43.
Hicks *v.* Newport, A. & H. R. Co. (4 B. & S. 403, n.), Death, etc., 379.
Hicks *v.* Pacific R. Co. (64 Mo. 430, 17 Am. Ry. Rep. 273; affirmed on rehearing in 65 Mo. 34), Children, Inj. to, 93; Cross., Inj. at, 1.
Hicks *v.* Zion (58 Ind. 548), Pl., 19.
Hicksville & C. S. B. R. Co. *v.* Long Island R. Co. (48 Barb. (N. Y.) 355), Leases, 3.
Hier *v.* New York, W. S. & B. R. Co. (40 Hun (N. Y.) 310; affirmed in 109 N. Y. 659, mem., 17 N. E. Rep. 867), Sts. & H., 215.
Higbee *v.* Camden & A. R. Co. (19 N. J. Eq. 276), Em. Dom., 166; Sts. & H., 232.
Higbee *v.* Camden & A. R. & T. Co. (20 N. J. Eq. 435), Estop., 21; Injunc., 9.
Higby *v.* New York & H. R. Co. (3 Bosw. (N. Y.) 497, 7 Abb. Pr. 259), Paym., 3.
Higginbotham *v.* Great Northern R. Co. (2 F. & F. 796, 10 W. R. 358), Car. of M., 772.
Higginbottom *v.* St. Louis, K. C. & N. R. Co. (4 Mo. App. 596), Animals, 487.
Higgins, In re (27 Fed. Rep. 443), Contempt, 2; Strikes, 5.
Higgins *v.* Central N. Eng. & W. ... Co. (48 Am. & Eng. R. Cas. 512, 155 Mass. 176, 29 N. E. Rep. 534), Death, etc., 111.
Higgins *v.* Cherokee R. Co. (27 Am. & Eng. R. Cas. 218, 73 Ga. 149), Car. of P., 158, 460; Evid., 64, 68; Witn., 176.
Higgins *v.* Hannibal & St. J. R. Co. (36 Mo. 418), Death, etc., 25, 173.
Higgins *v.* Harding (L. R. 8 Q. B. 7, 42 L. J. M. C. 31, 27 L. T. 483, 21 W. R. 191), Sts. & H., 359.
Higgins *v.* Jeffersonville, M. & I. R. Co. (52 Ind. 110), Children, Inj. to, 157.
Higgins *v.* Louisville, N. O. & T. R. Co. (64 Miss. 80, 8 So. Rep. 176), Car. of P., 641.
Higgins *v.* Missouri Pac. R. Co. (43 Mo. App. 547), Employés, Inj. to, 96, 100, 435, 546; Fel. Serv., 337.
Higgins *v.* Missouri Pac. R. Co. (104 Mo. 413, 16 S. W. Rep. 409), Fel. Serv., 1, 151, 199, 278.
Higgins *v.* New Orleans, M. & C. R. Co. (28 La. Ann. 133), Lim. of Liab., 34.
Higgins *v.* Newtown & F. R. Co. (66 N. Y. 604; affirming 3 Hun 611), Pl., 14.
Higgins *v.* New York & H. R. Co. (2 Bosw. (N. Y.) 132), Car. of P., 479.
Higgins *v.* Watervliet T. & R. Co. (46 N. Y. 23), St. Rys., 524.
Higgins *v.* Whitby (20 U. C. Q. B. 296), Mun. Aid, 203.
Higgins & H. Contract, In re (L. R. 21 Ch. D. 95, 51 L. J. Ch. 772, 30 W. R. 700), Em. Dom., 1120.
High *v.* Carolina C. R. Co. (112 N. Car. 385, 17 S. E. Rep. 79), Tresp., Inj. to, 94.
Highland Ave. & B. R. Co. *v.* Birmingham Union R. Co. (50 Am. & Eng. R. Cas. 422, 93 Ala. 505, 9 So. Rep. 568), Cross. Rys., 87.
Highland Ave. & B. R. Co. *v.* Burt (48 Am. & Eng. R. Cas. 56, 92 Ala. 291, 9 So. Rep. 410), Car. of P., 246, 603.
Highland Ave. & B. R. Co. *v.* Donovan (52 Am. & Eng. R. Cas. 568, 94 Ala. 299, 10 So. Rep. 139), Negl., 18; St. Rys., 411.
Highland Ave. & B. R. Co. *v.* Dusenberry (94 Ala. 413, 10 So. Rep. 274), Death, etc., 149.
Highland Ave. & B. R. Co. *v.* Dusenberry (98 Ala. 239, 13 So. Rep. 308), Employés, Inj. to, 540.
Highland Ave. & B. R. Co. *v.* Matthews (Ala.) (50 Am. & Eng. R. Cas. 220, 10 So. Rep. 267), Embankm., 2, 3.
Highland Ave. & B. R. Co. *v.* Sampson (91 Ala. 560, 8 So. Rep. 778), Cross., Inj. at, 268.
Highland Ave. & B. R. Co. *v.* Walters (91 Ala. 435, 8 So. Rep. 357), Employés, Inj. to, 297, 300, 552; Evid., 108.
Highland Ave. & B. R. Co. *v.* Winn (93 Ala. 306, 9 So. Rep. 509), Car. of P., 420, 431; Contrib. Neg., 50.
Highland R. Co. *v.* Great North of Scotland R. Co. (7 Ry. & C. T. Cas. 90), Connect. L., 3.
Highway Com'rs, In re (25 N. Y. Supp. 231, 72 Hun 575), Cross., Inj. at, 83; Cross. Sts. & H., 21.
Highway Com'rs, In re (74 Hun 44, 26 N. Y. Supp. 384, 56 N. Y. S. R. 146), Cross. Sts. & H., 21.
Highway Com'rs *v.* Chicago & N. W. R. Co. (34 Ill. App. 32), Injunc., 19.
Highway Com'rs of Brookhaven, In re (74 Hun (N. Y.) 46, 26 N. Y. Supp. 293, Cross., Inj. at, 152; Cross. Sts. & H., 21.
Highway Com'rs of Islip, In re (74 Hun (N. Y.) 48, 26 N. Y. Supp. 385, 56 N. Y. S. R. 148), Cross., Inj. at, 111.
Higley *v.* Gilmer (3 Mont. 90), Car. of P., 95; Contrib. Neg., 60; Tresp., Inj. to, 24.
Hildebrand *v.* Toledo, W. & W. R. Co. (47 Ind. 399), Death, etc., 125, 146.

Hiles *v.* Case (9 Biss. (U. S.) 549, 14 Fed. Rep. 141), Fires, 162; Receiv., 90.
Hill *v.* Birmingham (73 Ala. 74), Crim. L., 39.
Hill *v.* Boston, H. T. & W. R. Co. (28 Am. & Eng. R. Cas. 87, 144 Mass. 284, 10 N. E. Rep. 836), Car. of L. S., 86.
Hill *v.* Buffalo & L. H. R. Co. (10 Grant's Ch. (U. C.) 506), Em. Dom., 1213.
Hill *v.* Burlington, C. R. & N. R. Co. (9 Am. & Eng. R. Cas. 21, 60 Iowa 196, 14 N. W. Rep. 249), Agency, 55; Charges, 48, 60.
Hill *v.* Chicago & E. R. Co. (140 U. S. 52, 11 Sup. Ct. Rep. 690), App., 7.
Hill *v.* Chicago, St. L. & N. O. R. Co. (38 La. Ann. 599), St. Rys., 8; Sts. & H., 223.
Hill *v.* Cincinnati, W. & M. R. Co. (29 Am. & Eng. R. Cas. 502, 109 Ind. 511, 10 N. E. Rep. 410), Flood. Lds., 37.
Hill *v.* Forsythe County Com'rs (67 N. Car. 367), Mun. Aid, 45.
Hill *v.* Glasgow R. Co. (Ky.) (41 Fed. Rep. 610), Charters, 41; Dissol., 25.
Hill *v.* Glendon & G. M. & M. Co. (113 N. Car. 259, 18 S. E. Rep. 171), Em. Dom., 193, 259, 313, 324.
Hill *v.* Great Western R. Co. (10 C. B. N. S. 148), Discov., 3.
Hill *v.* Gulf, C. & S. F. R. Co. (80 Tex. 431, 15 S. W. Rep. 1099), App., 86, 139.
Hill *v.* Gust (55 Ind. 45), Employés, Inj. to, 462, 474.
Hill *v.* Humphreys (5 Watts & S. (Pa.) 123), Car. of M., 246.
Hill *v.* La Crosse & M. R. Co. (11 Wis. 214), Liens, 25, 42.
Hill *v.* London & N. W. R. Co. (42 L. T. 513), Car. of L. S., 91.
Hill *v.* Louisville & N. R. Co. (9 Heisk. (Tenn.) 823, 19 Am. Ry. Rep. 400), Tresp., Inj. to, 42.
Hill *v.* Memphis (23 Fed. Rep. 872; affirmed in 134 U. S. 198, 10 Sup. Ct. Rep. 562), Mun. Aid, 40, 114.
Hill *v.* Memphis (134 U. S. 198, 10 Sup. Ct. Rep. 562), Mun. Aid, 128, 273.
Hill *v.* Midland R. Co. (10 Am. & Eng. R. Cas. 79, L. R. 21 Ch. D. 143, 51 L. J. Ch. D. 774, 47 L. T. 225, 30 W. R. 774), Em. Dom., 1095.
Hill *v.* Missouri Pac. R. Co. (46 Mo. App. 517), Car. of M., 676.
Hill *v.* Missouri Pac. R. Co. (49 Mo. App. 520), Animals, 62, 301, 327, 333, 384; Negl., 89.
Hill *v.* Mitchell (25 Ga. 704), Exp. Cos., 5.
Hill *v.* Mohawk & H. R. R. Co. (5 Den. (N. Y.) 206), Em. Dom., 483.
Hill *v.* Mohawk & H. R. R. Co. (7 N. Y. 152; affirming 5 Den. 206), Em. Dom., 483.
Hill *v.* New Haven (37 Vt. 501), Contrib. Neg., 85.
Hill *v.* New Orleans, O. & G. W. R. Co. (11 La. Ann. 292), Car. of P., 635; Contrib. Neg., 100.
Hill *v.* Ninth Ave. R. Co. (34 Am. & Eng. R. Cas. 522, 109 N. Y. 239, 16 N. E. Rep. 61, 14 N. Y. S. R. 844, 11 Cent. Rep. 921), Evid., 125.
Hill *v.* Nisbet (100 Ind. 341), Consol., 1, 16; Stock, 35; Subscr., 185.
Hill *v.* Ontario, S. & H. R. U. Co. (13 U. C. Q. B. 503), Fires, 57.
Hill *v.* Portland & R. R. Co. (55 Me. 438), Custom, 1; Evid., 62; Fright. Teams, 3.
Hill *v.* Port Royal & W. C. R. Co. (39 Am. & Eng. R. Cas. 607, 31 So. Car. 393, 5 L. R. A. 349, 10 S. E. Rep. 91), Cross., Inj. at, 26, 33, 41.
Hill *v.* Probst (120 Ind. 528, 22 N. E. Rep. 664), Mun. Aid, 411; Tax., 360.
Hill *v.* St. Louis O. & S. Co. (90 Mo. 103, 2 S. W. Rep. 289), Proc., 45.
Hill *v.* Salem & P. F. Turnpike Co. (1 Rob. (Va.) 278), Em. Dom., 868.
Hill *v.* Scotland County (34 Fed. Rep. 208), Mun. Aid, 365, 374.
Hill *v.* South Staffordshire R. Co. (11 Jur. N. S. 192, 12 L. T. 63), Constr. Rys., 52.
Hill *v.* Syracuse, B. & N. Y. R. Co. (63 N. Y. 101; affirming (?) 2 Hun 114, 4 T. & C. 685), Eject. Pass., 35, 90; Tickets & F., 85.
Hill *v.* Syracuse, B. & N. Y. R. Co. (73 N. Y. 351; reversing 8 Hun 296), Bills of L., 26.
Hill *v.* West End St. R. Co. (158 Mass. 458, 33 N. E. Rep. 582), St. Rys., 433.
Hill *v.* Western Vt. R. Co. (32 Vt. 68), Em. Dom., 205.
Hiller *v.* Burlington & M. R. R. Co. (70 N. Y. 223, 18 Am. Ry. Rep. 557), Proc., 40.
Hilliard *v.* Chicago & N. W. R. Co. (37 Iowa 442), Animals, 142, 145; Fences, 67, 75.
Hilliard *v.* Goold (34 N. H. 230), Eject. Pass., 5; Pres., 9; Tickets & F., 122; Trial, 102.
Hilliard *v.* Wilmington & W. R. Co. (6 Jones (N. Car.) 343), Car. of M., 221, 351.
Hilliard F. & L. Co. *v.* Woods (1 Wyom. 396), Trover, 18.
Hillis *v.* Chicago, R. I. & P. R. Co. (31 Am. & Eng. R. Cas. 108, 72 Iowa 228, 33 N. W. Rep. 643), Sleep. Car Cos. 30, 34.
Hill Mfg. Co. *v.* Boston & L. R. Co. (104 Mass. 122), Car. of M., 149, 593.
Hills *v.* Boston & M. R. Co. (18 N. H. 179), Deeds, 10; Pl., 21, 94.
Hills *v.* Parker (111 Mass. 508), Receiv., 123.
Hills *v.* Peekskill Sav. Bank (101 N. Y. 490, 5 N. E. Rep. 327; reversing 26 Hun 161), Mun. Aid, 333.
Hills *v.* Richmond & D. R. Co. (37 Am. & Eng. R. Cas. 44, 37 Fed. Rep. 660), Jurisd., 6; Proc., 40.
Hillyard *v.* Grand Trunk R. Co. (23 Am. & Eng. R. Cas. 154, 8 Ont. 583), Animals, 56, 80.
Hilton *v.* Mason (92 Ind. 157), Mun. Aid, 411; Witn., 131.
Hilton *v.* Thirty-fourth St. R. Co. (1 How. Pr. N. S. (N. Y.) 453), St. Rys., 108, 112.
Hilts *v.* Chicago & G. T. R. Co. (17 Am. & Eng. R. Cas. 628, 55 Mich. 437, 21 N. W. Rep. 878), Fel. Serv., 152.
Hilz *v.* Missouri Pac. R. Co. (101 Mo. 36, 13 S. W. Rep. 946), Cross., Inj. at, 3, 204; Pl., 177; Trial, 56.
Himrod Furnace Co. *v.* Cleveland & M. R. Co. (22 Ohio St. 451), Contr., 50.
Hinchman *v.* Paterson Horse R. Co. (17 N. J. Eq. 75), Em. Dom., 412; Nuis., 1, 3; St. Rys., 58, 195.

Hinchy *v.* Manhattan R. Co. (17 J. & S. (N. Y.) 406), Fires, 99, 164.
Hinckley *v.* Cape Cod R. Co. (120 Mass. 257), Death, etc., 269.
Hinckley *v.* Chicago, M. & St. P. R. Co. (38 Wis. 194), Eject. Pass., 115.
Hinckley *v.* Gilman, C. & S. R. Co. (94 U. S. 467, 16 Am. Ry. Rep. 217), Receiv., 156.
Hinckley *v.* Gilman, C. & S. R. Co. (100 U. S. 153), Receiv., 147, 152, 160, 163.
Hinckley *v.* New York C. & H. R. R. Co. (56 N. Y. 429), Car. of M., 167.
Hinckley *v.* Pfister (83 Wis. 64, 53 N. W. Rep. 21), Bonds, 62; Cred. Bill, 6; Dissol., 13; Stockh., 104.
Hindman *v.* Oregon R. & N. Co. (38 Am. & Eng. R. Cas. 310, 17 Oreg. 614, 22 Pac. Rep. 116), Animals, 86, 126, 255, 373.
Hinds *v.* Barton (25 N. Y. 544), Fires, 47, 238.
Hinds *v.* Canandaigua & N. F. R. Co. (10 How. Pr. (N. Y.) 487), Exec., 30.
Hine *v.* Keokuk & D. M. R. Co. (42 Iowa 636), Sts. & H., 62.
Hine *v.* Manhattan R. Co. (132 N. Y. 477, 28 Abb. N. Cas. 251, 30 N. E. Rep. 985, 44 N. Y. S. R. 633; reversing 26 J. & S. 377, 33 N. Y. S. R. 758, 11 N. Y. Supp. 586), Elev. Rys., 115.
Hine *v.* New York El. R. Co. (23 N. Y. Supp. 187, 52 N. Y. S. R. 511, 3 Misc. 462), Elev. Rys., 37, 189.
Hine *v.* New York El. R. Co. (36 Hun (N. Y.) 293), Elev. Rys., 119, 127.
Hine *v.* New York El. R. Co. (27 N. Y. S. R. 303, 54 Hun 425, 7 N. Y. Supp. 464), Elev. Rys., 51.
Hine *v.* New York El. R. Co. (128 N. Y. 571, 29 N. E. Rep. 69, 41 N. Y. S. R. 117; affirming 59 Hun 625, 37 N. Y. S. R. 606, 13 N. Y. Supp. 510), Elev. Rys., 93.
Hines *v.* Missouri Pac. R. Co. (28 Am. & Eng. R. Cas. 382, 86 Mo. 629), Animals, 10.
Hines *v.* Wilmington & W. R. Co. (95 N. Car. 434), Charters, 19, 20, 22; Discrim., 9, 37, 77; For. Corp., 3; Words & Ph., 73.
Hinkle *v.* Minneapolis & St. L. R. Co. (16 Am. & Eng. R. Cas. 391, 31 Minn. 434, 18 N. W. Rep. 275), Acc. & Sat., 1.
Hinkle *v.* Richmond & D. R. Co. (109 N. Car. 472, 13 S. E. Rep. 884), Cross., Inj. at, 95, 96, 97, 204, 211, 256, 258; Negl., 66; Sts. & H., 353.
Hinkle *v.* San Francisco & N. P. R. Co. (55 Cal. 627), App., 114; Constr. Rys., 112.
Hinkley *v.* New York C. & H. R. R. Co. (3 T. & C. (N. Y.) 281; affirmed in 60 N. Y. 644, mem.), Car. of M., 669.
Hinman *v.* Chicago, R. I. & P. R. Co. (28 Iowa 491), Animals, 158.
Hinton *v.* Cream City R. Co. (65 Wis. 323, 27 N. W. Rep. 147), App., 86; Evid., 291; New Tr., 60; St. Rys., 367.
Hinton *v.* Dibbin (2 Q. B. 646, 6 Jur. 601), Car. of M., 203.
Hipsley *v.* Kansas City, St. J. & C. B. R. Co. (27 Am. & Eng. R. Cas. 287, 88 Mo. 348), Car. of P., 587; Derailm., 4, 5; Evid., 86; Trial, 70, 184.
Hirsch *v.* New York & G. L. R. Co. (25 N. Y. S. R. 156, 53 Hun 633, mem., 6 N. Y. Supp. 162; affirmed in 125 N. Y. 701, mem., 34 N. Y. S. R. 1012), Car. of P., 281.
Hirschfield *v.* London, B. & S. C. R. Co. (46 L. J. Q. B. D. 94, L. R. 2 Q. B. D. 1, 35 L. T. 473), Release, 11, 18.
Hirschmann *v.* Iron Range & H. B. R. Co. (97 Mich. 384), Agency, 8, 11, 50, 112.
Hirshberg *v.* Dinsmore (12 Daly (N. Y.) 429, 67 How. Pr. 103), Lim. of Liab., 22.
Hirshfield *v.* Central Pac. R. Co. (7 Am. & Eng. R. Cas. 398, 56 Cal. 484), Car. of M., 336.
Hirshfield *v.* Dallas (4 Tex. App. (Civ. Cas.) 259, 15 S. W. Rep. 124), Tickets & F., 150.
Hiss *v.* Baltimore & H. Pass. R. Co. (4 Am. & Eng. R. Cas. 201, 52 Md. 242, 36 Am. Rep. 371), St. Rys., 8, 191, 223; Sts. & H., 47.
Hissong *v.* Richmond & D. R. Co. (48 Am. & Eng. R. Cas. 517, n., 91 Ala. 514, 8 So. Rep. 776), Employés, Inj. to, 179, 403, 421, 582.
Historical Pub. Co. *v.* Adams Exp. Co. (44 Mo. App. 421), Car. of M., 590.
Hitchcock *v.* Brooklyn City R. Co. (21 N. Y. S. R. 945, 50 Hun 606, 3 N. Y. Supp. 218), St. Rys., 346.
Hitchcock *v.* Brooklyn City R. Co. (8 N. Y. S. R. 848, 44 Hun 627), Evid., 125.
Hitchcock *v.* Burgett (38 Mich. 501), Witn., 165.
Hitchcock *v.* Chicago, St. P. & K. C. R. Co. (88 Iowa 242, 55 N. W. Rep. 337), Embankm., 2; Sts. & H., 239.
Hitchcock *v.* Danbury & N. R. Co. (25 Conn. 516), Em. Dom., 1074.
Hitchcock *v.* Midland R. Co. (1 Am. & Eng. R. Cas. 220, 33 N. J. Eq. 86; affirmed in 34 N. J. Eq. 278), Reorg., 7.
Hitchens *v.* Kilkenny R. Co. (9 C. B. 536), Att'ys, 21.
Hitchings *v.* Brooklyn El. R. Co. (6 Misc. 430, 27 N. Y. Supp. 132, 58 N. Y. S. R. 583), Elev. Rys., 107.
Hitchings *v.* St. Louis, N. O. & O. C. & T. Co. (52 N. Y. S. R. 247, 22 N. Y. Supp. 719, 68 Hun 33), Bills & N., 14.
Hitchins *v.* Kilkenny & G. S. & W. R. Co. (10 C. B. 160, 1 L., M. & P. 712, 15 Jur. 336, 20 L. J. C. P. 31), Stockh., 29.
Hitchins *v.* Kilkenny & G. S. & W. R. Co. (15 C. B. 459), Stockh., 29.
Hitte *v.* Republican Valley R. Co. (29 Am. & Eng. R. Cas. 586, 19 Neb. 620, 28 N. W. Rep. 284), Indep. Contr., 18.
Hives *v.* Brooklyn City R. Co. (5 N. Y. S. R. 877), Death, etc., 183.
Hixson *v.* St. Louis, H. & K. R. Co. (80 Mo. 335), Cross., Inj. at, 289, 295.
Hoadley *v.* Northern Transp. Co. (115 Mass. 304), Bills of L., 31; Car. of M., 129, 404; Lim. of Liab., 18.
Hoag *v.* Greenwich (133 N. Y. 152, 30 N. E. Rep. 842, 44 N. Y. S. R. 519), Mun. Aid, 71, 322.
Hoag *v.* Lake Shore & M. S. R. Co. (85 Pa. St. 293), Negl., 46, 72.
Hoag *v.* New York C. & H. R. R. Co. (37 Am. & Eng. R. Cas. 479, 111 N. Y. 199, 18 N. E. Rep. 648, 19 N. Y. S. R. 80; reversing 36 Hun 646, mem.), Imp. Neg., 26.

Hoagland *v.* Cincinnati & Ft. W. R. Co. (18 Ind. 452), Subscr., 51, 165.
Hoagland *v.* Hannibal & St. J. R. Co. (39 Mo. 451), Contr., 5; Pl., 34.
Hoagland *v.* New York, C. & St. L. R. Co. (30 Am. & Eng. R. Cas. 186, 111 Ind. 443, 12 N. E. Rep. 83, 9 West. Rep. 252), Canals, 5.
Hoar *v.* Maine C. R. Co. (70 Me. 65), Agency, 64; Car. of P., 15, 300.
Hoard *v.* Casey (4 Sneed (Tenn.) 178), State Aid, 35.
Hoard *v.* Chesapeake & O. R. Co. (123 U. S. 222, 8 Sup. Ct. Rep. 74), Mort., 260; Spec. Perf., 16.
Hoare *v.* Great Western R. Co. (37 L. T. 186, 25 W. R. 63), Lim. of Liab., 35.
Hobart *v.* Beers (26 Kan. 329), Estop., 12; Sales, 4, 7.
Hobart *v.* Milwaukee City R. Co. (27 Wis. 194, 2 Am. Ry. Rep. 35), St. Rys., 191, 210.
Hobart *v.* Milwaukee City R. Co. (27 Wis. 200), St. Rys., 196.
Hobbold *v.* Chicago Sugar Refining Co. (44 Ill. App. 418), Contrib. Neg., 28, 82; Fel. Serv., 511.
Hobbs *v.* Atlantic & N. C. R. Co. (44 Am. & Eng. R. Cas. 592, 107 N. Car. 1, 12 S. E. Rep. 124), Fel. Serv., 1, 60, 102, 151, 268, 281, 455.
Hobbs *v.* Eastern R. Co. (66 Me. 572, 19 Am. Ry. Rep. 210), Car. of P., 363, 568; Contrib. Neg., 85; Death, etc., 432.
Hobbs *v.* London & S. W. R. Co. (L. R. 10 Q. B. 111, 44 L. J. Q. B. 49, 32 L. T. 352, 23 W. R. 520, 3 Ry. & C. T. Cas. xxiii), Car. of P., 613.
Hobbs *v.* Memphis & C. R. Co. (9 Heisk. (Tenn.) 873), Evid., 115.
Hobbs *v.* Memphis & C. R. Co. (12 Heisk. (Tenn.) 526), Death, etc., 126.
Hobbs *v.* Midland R. Co. (10 Am. & Eng. R. Cas. 53, L. R. 20 Ch. D. 418, 51 L. J. Ch. D. 320, 46 L. T. 270, 30 W. R. 516), Corp., 10; Em. Dom., 1111, 1114, 1117.
Hobbs *v.* Texas & P. R. Co. (34 Am. & Eng. R. Cas. 268, 49 Ark. 357, 5 S. W. Rep. 586), Eject. Poss., 2, 68.
Hoben *v.* Burlington & M. R. R. Co. (20 Iowa 562), Fel. Serv., 100, 371, 462.
Hoboken *v.* Pennsylvania R. Co. (124 U. S. 656, 8 Sup. Ct. Rep. 643), Land Grants, 123.
Hoboken *v.* Pennsylvania R. Co. (16 Fed. Rep. 816), Rip. Rts., 11.
Hobson *v.* New Mexico & A. R. Co. (Ariz.) (28 Am. & Eng. R. Cas. 360, 11 Pac. Rep. 545), Contrib. Neg., 87, 105; Costs, 6; Employés, Inj. to, 775; Evid., 170; Fel. Serv., 124, 294; Pl., 63.
Hoch *v.* Manhattan R. Co. (37 N. Y. S. R. 200, 59 Hun 541, 13 N. Y. Supp. 633), Elev. Rys., 87.
Hochhalter *v.* Manhattan R. Co. (31 N. Y. S. R. 112, 56 Hun 642, mem., 9 N. Y. Supp. 341), Sts. & H., 142.
Hodder *v.* Kentucky & G. E. R. Co. (7 Fed. Rep. 793), Direct., 59; Mort., 62, 189.
Hodford *v.* New York C. & H. R. R. Co. (47 Vt. 533), Proc., 6.
Hodgdon *v.* Southern Pac. R. Co. (75 Cal. 642, 17 Pac. Rep. 928), Guard. & W., 2.
Hodge *v.* Hudson River R. Co. (6 Blatchf. (U. S.) 85), Pat. for Inv., 13.
Hodge *v.* Lehigh Valley R. Co. (39 Fed. Rep. 449), Constr. Rys., 9; Em. Dom., 210, 220.
Hodge *v.* Lehigh Valley R. Co. (56 Fed. Rep. 195), Flood. Lds., 76.
Hodge *v.* New York C. & H. R. R. Co. (27 Hun (N. Y.) 394), Animals, 142; Dam., 109.
Hodge *v.* State (38 Am. & Eng. R. Cas. 520, 82 Ga. 643, 9 S. E. Rep. 676), Crim. L., 43.
Hodges *v.* Atlantic & G. R. Co. (51 Ga. 244), Animals, 296.
Hodges *v.* Baltimore U. Pass. R. Co. (10 Am. & Eng. R. Cas. 270, 58 Md. 603), Charters, 29; Sts. & H., 47, 298; St. Rys., 15, 82, 110, 191.
Hodges *v.* New Hanover Transit Co. (107 N. Car. 576, 12 S. E. Rep. 597), Car. of P., 373.
Hodges *v.* Rutland & B. R. Co. (29 Vt. 220), Direct., 27, 29.
Hodges *v.* St. Louis, K. C. & N. R. Co. (2 Am. & Eng. R. Cas. 190, 71 Mo. 50), Stat. & D., 62.
Hodges *v.* Seaboard & R. R. Co. (88 Va. 653, 14 S. E. Rep. 380), Em. Dom., 1033; Sts. & H., 142, 230.
Hodges *v.* Shuler (22 N. Y. 114; affirming 24 Barb. 68), Bills & N., 2.
Hodges *v.* Wilmington & W. R. Co. (105 N. Car. 170, 10 S. E. Rep. 917), Actions, 11.
Hodgins *v.* Minneapolis, St. P. & S. St. M. R. Co. (N. Dak.) (56 Am. & Eng. R. Cas. 137, 56 N. W. Rep. 739), Animals, 492.
Hodgkins *v.* Eastern R. Co. (119 Mass. 419, 9 Am. Ry. Rep. 271), Fel. Serv., 28, 417.
Hodgkinson *v.* Long Island R. Co. (4 Edw. Ch. (N. Y.) 411), Sts. & H., 223.
Hodgman *v.* Chicago & St. P. R. Co. (20 Minn. 48 (Gil. 36), Mun. Aid, 78, 109, 233, 299.
Hodgman *v.* St. Paul & C. R. Co. (23 Minn. 153), Mun. Aid, 240.
Hodgman *v.* Western R. Corp. (7 How. Pr. (N. Y.) 492), Assign., 3.
Hodgman *v.* West Midland R. Co. (5 B. & S. 173, 10 Jur. N. S. 673, 33 L. J. Q. B. 233, 12 W. R. 1054, 10 L. T. 609; affirmed in 13 W. R. 758, 35 L. J. Q. B. 85), Car. of L. S., 21.
Hodkinson *v.* London & N. W. R. Co. (L. R. 15 Q. B. D. 228, 32 W. R. 662, 5 Ry. & C. T. Cas. ix), Bagg., 63.
Hodnett *v.* Boston & A. R. Co. (156 Mass. 86, 30 N. E. Rep. 224), Death, etc., 43, 83.
Hodnett *v.* Central R. & B. Co. (68 Ala. 562), App., 144.
Hoeger *v.* Chicago, M. & St. P. R. Co. (21 Am. & Eng. R. Cas. 308, 63 Wis. 100, 23 N. W. Rep. 435, 53 Am. Rep. 271), Bagg., 42, 69
Hoen *v.* Atlantic & P. R. Co. (64 Mo. 561), Proc., 45.
Hoey *v.* Dublin & B. J. R. Co. (5 Ir. R., C. L. 206), Fel. Serv., 157.
Hoey *v.* Gilroy (14 N. Y. Supp. 159, 37 N. Y. S. R. 754; reversed in 129 N. Y. 132, 41 N. Y. S. R. 181, 29 N. E. Rep. 85), Sts. & H., 405.

Hoff *v.* Jasper County (15 Am. & Eng. R. Cas. 592, 110 U. S. 53, 3 Sup. Ct. Rep. 476), Mun. Aid, 40.
Hoff *v.* West Jersey R. Co. (13 Am. & Eng. R. Cas. 476, 45 N. J. L. 201), Fires, 45.
Hoffbauer *v.* Davenport & N. W. R. Co. (52 Iowa 342, 3 N. W. Rep. 121), Car. of P., 62; Eject. Pass., 8, 48.
Hoffeditz *v.* Southern Pa. R. & M. Co. (38 Am. & Eng. R. Cas. 654, 129 Pa. St. 264, 18 Atl. Rep. 125), Release, 29.
Hoffer *v.* Pennsylvania Canal Co. (87 Pa. St. 221), Em. Dom., 667.
Hoffkins *v.* Manhattan R. Co. (25 N. Y. S. R. 160, 2 Silv. Sup. Ct. 588, 6 N. Y. Supp. 953), New Tr., 35.
Hoffman's Appeal (118 Pa. St. 512, 12 Atl. Rep. 57), Em. Dom., 858.
Hoffman *v.* Bloomsburg & S. R. Co. (143 Pa. St. 503, 22 Atl. Rep. 823), App., 69; Em. Dom., 583, 586.
Hoffman *v.* Bloomsburg & S. R. Co. (157 Pa. St. 174, 27 Atl. Rep. 564), Em. Dom., 196, 198, 232, 452, 465, 610, 637, 821; Evid., 179.
Hoffman *v.* Chicago, M. & St. P. R. Co. (40 Minn. 60, 41 N. W. Rep. 301), Evid., 232.
Hoffman *v.* Chicago, M. & St. P. R. Co. (43 Minn. 334, 45 N. W. Rep. 608), Fires, 322.
Hoffman *v.* Manhattan El. R. Co. (1 Misc. 155, 48 N. Y. S. R. 711, 20 N. Y. Supp. 625), Elev. Rys., 72.
Hoffman *v.* Metropolitan St. R. Co. (51 Mo. App. 273), Cross., Inj. at, 363; Witn., 55, 129, 152.
Hoffman *v.* Missouri Pac. R. Co. (24 Mo. App. 546), Animals, 49.
Hoffman *v.* New York C. & H. R. R. Co. (12 J. & S. (N. Y.) 1), Agency, 102; Evid., 129; Trial, 102.
Hoffman *v.* New York C. & H. R. R. Co. (75 N. Y. 605; affirming 13 Hun 589), Car. of P., 274; Stat. & D., 61.
Hoffman *v.* New York C. & H. R. R. Co. (4 Am. & Eng. R. Cas. 537, 87 N. Y. 25, 41 Am. Rep. 337; affirming 14 J. & S. 526), Agency, 104; Evid., 223; Tresp., Inj. to, 85; Trial, 120; Witn., 72.
Hoffman *v.* Northern Pac. R. Co. (45 Minn. 53, 47 N. W. Rep. 312), Car. of P., 613; Dam., 30; Eject. Pass., 78; Tickets & F., 73.
Hoffmann *v.* Fitchburg R. Co. (67 Hun 581, 51 N. Y. S. R. 245, 22 N. Y. Supp. 463), Cross., Inj. at, 294; Evid., 293.
Hofnagle *v.* New York C. & H. R. R. Co. (55 N. Y. 608, 6 Am. Ry. Rep. 233; reversing 1 T. & C. 346), Employés, Inj. to, 17; Fel. Serv., 103, 198, 201.
Hogan *v.* Central Pac. R. Co. (49 Cal. 128), Fel. Serv., 1, 142.
Hogan *v.* Central Pac. R. Co. (71 Cal. 83, 11 Pac. Rep. 876), Sts. & H., 216.
Hogan *v.* Central Park, N. & E. R. R. Co. (33 N. Y. S. R. 702, 11 N. Y. Supp. 588, 26 J. & S. 322; reversed in 124 N. Y. 647, mem., 36 N. Y. S. R. 352), Agency, 102; Children, Inj. to, 87.
Hogan *v.* Central Park, N. & E. R. R. Co. (36 N. Y. S. R. 352, 124 N. Y. 647; reversing 26 J. & S. 322, 33 N. Y. S. R. 702, 11 N. Y. Supp. 588), Children, Inj. to, 99.
Hogan *v.* Chicago, M. & St. P. R. Co. (15 Am. & Eng. R. Cas. 439, 59 Wis. 139, 17 N. W. Rep. 632), Licensees, Inj. to, 10, 22; Negl., 75; Trial, 216.
Hogan *v.* Kentucky Union R. Co. (Ky.) (21 S. W. Rep. 242), Constr. Rys., 13.
Hogan *v.* Manhattan R. Co. (6 Misc. 295, 26 N. Y. Supp. 792, 58 N. Y. S. R. 149), Elev. Rys., 216.
Hogan *v.* Northern Pac. R. Co. (53 Am. & Eng. R. Cas. 384, 53 Fed. Rep. 519), Employés, Inj. to, 414.
Hogan *v.* Southeastern R. Co. (28 L. T. 271), Car. of P., 265.
Hoge *v.* Ohio River R. Co. (35 W. Va. 562, 14 S. E. Rep. 152), Animals, 535, 536, 577.
Hoge *v.* Richmond & D. R. Co. (93 U. S. 1), Fed. Cts., 26.
Hoge *v.* Richmond & D. R. Co. (99 U. S. 348), Tax., 146, 148.
Hogele *v.* Wilson (5 Wash. 160, 31 Pac. Rep. 469), Employés, Inj. to, 211.
Hogencamp *v.* Paterson Horse R. Co. (17 N. J. Eq. 83), St. Rys., 200.
Hogenson *v.* St. Paul, M. & M. R. Co. (14 Am. & Eng. R. Cas. 291, 31 Minn. 224, 17 N. W. Rep. 374), Flood. Lds., 46.
Hogg's Appeal (88 Pa. St. 195), Exec., 26.
Hogg *v.* Mackay (23 Oreg. 339, 31 Pac. Rep. 779, 19 L. R. A. 77), Charters, 76.
Hoggan *v.* Esquimalt & N. R. Co. (20 Can. Sup. Ct. 235), Land Grants, 138.
Hoggatt *v.* Evansville & T. H. R Co. (3 Ind. App. 437, 29 N. E. Rep. 941), Contrib. Neg., 82; Cross., Inj. at, 301; Sts. & H., 369.
Hoggatt *v.* Vicksburg, S. & P. R. Co. (34 La. Ann. 624), Em. Dom., 989.
Hogle *v.* New York C. & H. R. R. Co. (12 N. Y. S. R. 415, 46 Hun 679), App., 65.
Hogle *v.* New York C. & H. R. R. Co. (28 Hun (N. Y.) 363), Fires, 110.
Hogue *v.* Chicago & A. R. Co. (32 Fed. Rep. 365), Contrib. Neg., 12; Cross., Inj. at, 32; Death, etc., 373.
Hoirt *v.* London & N. W. R. Co. (L. R. 4 Ex. D. 188, 48 L. J. Ex. D. 545, 40 L. T. 674, 27 W. R. 778; reversing 38 L. T. 424), Car. of M., 303.
Hoke *v.* Georgia R. & B. Co. (89 Ga. 215, 15 S. E. Rep. 124), Em. Dom., 110; Injunc., 2.
Hoke *v.* St. Louis, K. & N. R. Co. (25 Am. & Eng. R. Cas. 463, 88 Mo. 360), Fel. Serv., 409, 410.
Holbert *v.* St. Louis, K. C. & N. R. Co. (38 Iowa 315), Em. Dom., 1043; Pl., 70.
Holbert *v.* St. Louis, K. C. & N. R. Co. (45 Iowa 23), Em. Dom., 77, 1032.
Holbrook *v.* St. Paul, M. & M. R. Co. (1 Int. Com. Rep. 323), Int. Com., 11, 19, 151, 170.
Holbrook *v.* Utica & S. R. Co. (12 N. Y. 236; affirming 16 Barb. 113), Car. of P., 592, 594.
Holcombe *v.* Richmond & D. R. Co. (78 Ga. 776, 3 S. E. Rep. 755), Acc. Ins., 14; Fire Ins., 11; Trial, 71.
Holden *v.* Fitchburg R. Co. (2 Am. & Eng. R. Cas. 94, 129 Mass. 268, 37 Am. Rep. 343), Employés, Inj. to, 86, 99; Fel. Serv., 1, 13, 21, 102, 137, 383.

Holden *v.* New York C. R. Co. (54 N. Y. 662), Car. of M., 146.
Holden *v.* Rutland & B. R. Co. (30 Vt. 297), Animals, 368, 536, 548, 569.
Holder *v.* Chicago, St. L. & N. O. R. Co. (13 Am. & Eng. R. Cas. 507, 11 Lea (Tenn.) 176), Animals, 78.
Holder *v.* Lafayette, B. & M. R. Co. (71 Ill. 106), Direct., 27.
Holder *v.* Nashville, C. & St. L. R. Co. (92 Tenn. 141, 20 S. W. Rep. 537), Comprom., 6.
Holdridge *v.* Utica & B. R. R. Co. (56 Barb. (N. Y.) 191), Bagg., 67.
Hole *v.* Digby (27 W. R. 884, 3 Ry & C. T. Cas. xvii), Hacks, etc., 3; Ry. Com'rs, 12.
Hole *v.* Sittingbourne & S. R. Co. (6 H. & N. 488, 30 L. J. Ex. 81, 9 W. R. 274, 3 L. T. 750), Bridges, 76.
Holford *v.* Adams (2 Duer (N. Y.) 471), Exp. Cos. 55.
Holgate *v.* Oregon Pac. R. Co. (16 Oreg. 123, 17 Pac. Rep. 859), Proc., 2; Trial, 10.
Holladay *v.* Elliott (8 Oreg. 85), Subscr., 35.
Holladay *v.* Kennard (12 Wall. (U. S.) 254), Exp. Cos., 31.
Holladay *v.* Patterson (5 Oreg. 177, 18 Am. Ry. Rep. 260), Corp., 2; Right of W., 8; Stat. & D., 38.
Holland *v.* Brown (13 Sawy. (U. S.) 284), Death, etc., 414.
Holland *v.* Cheshire R. Co. (151 Mass. 231, 24 N. E. Rep. 206), Stock, 5.
Holland *v.* Chicago, M. & St. P. R. Co. (5 McCrary (U. S.) 549, 18 Fed. Rep. 243), Employés, Inj. to, 326.
Holland *v.* Festiniog R. Co. (2 Ry. & C. T. Cas. 278), Discrim., 15, 23.
Holland *v.* Lee (40 Am. & Eng. R. Cas. 379, 71 Md. 338, 18 Atl. Rep. 661), Bonds, 23; Mort., 251.
Holland *v.* Lynn & B. R. Co. (30 Am. & Eng. R. Cas. 648, 144 Mass. 425, 4 N. Eng. Rep. 320, 11 N. E. Rep. 674), Death, etc., 1.
Holland *v.* Mobile & O. R. Co. (16 Lea (Tenn.) 414), Attach., 13; For. Corp., 3.
Holland *v.* Southern Pac. R. Co. (100 Cal. 240, 34 Pac. Rep. 666), Fel. Serv., 147, 148, 150, 288, 483.
Holland *v.* State (15 Fla. 455), Mun. Aid, 215; State Aid, 16.
Holland *v.* Tennessee, C., I. & R. Co. (91 Ala. 444, 8 So. Rep. 524), Death, etc., 176, 316; Employés, Inj. to, 31, 96, 569; Fel. Serv., 140, 166, 477.
Holland *v.* West End N. G. R. Co. (13 Mo. App. 585), Fires, 311.
Holland *v.* West End N. G. R. Co. (16 Mo. App. 172), Animals, 28, 1[illegible] 353, 386.
Holland *v.* West End St. R. Co. (155 Mass. 387, 29 N. E. Rep. 622), St. Rys., 379.
Hollenbeck *v.* Berkshire R. Co. (9 Cush. 478), Death, etc., 82.
Hollender *v.* New York C. & H. R. R. Co. (14 Daly (N. Y.) 219, 6 N. Y. S. R. 352, 19 Abb. N. Cas. 18), Animals, 454, 573.
Hollinger *v.* Canadian Pac. R. Co. (55 Am. & Eng. R. Cas. 269, 20 Ont. App. 244; dismissing appeal from 55 Am. & Eng. R. Cas. 192, 21 Ont. 705), Cross, Inj. at, 109, 167.
Hollinger *v.* Canadian Pac. R. Co. (21 Ont. 705), Cross., Inj. at, 167, 235.
Hollingsworth *v.* Des Moines & St. L. R. Co. (17 Am. & Eng. R. Cas. 113, 63 Iowa 443, 19 N. W. Rep. 325), Em. Dom., 621, 767; Estop., 1; Sts. & H., 273.
Hollins *v.* St. Paul, M. & M. R. Co. (29 N. Y. S. R. 208, 9 N. Y. Supp. 909), Reorg., 4; Ult. Vir., 5.
Hollister *v.* Benedict & B. Mfg. Co. (113 U. S. 59, 5 Sup. Ct. Rep. 717), Pat. for Inv., 2.
Hollister *v.* Nowlen (19 Wend. (N. Y.) 234), Bagg., 100.
Hollister *v.* Stewart (38 Am. & Eng. R. Cas. 599, 111 N. Y. 644, 19 N. E. Rep. 782), Abate., 2; Coupons, 11, 12; Mort., 136, 268; Pl., 43; Reorg., 9.
Hollman *v.* Houston & T. C. R. Co. (2 Tex. Unrep. Cas. 557), Car. of P., 367.
Holloman *v.* St. Louis, I. M. & S. R. Co. (92 Mo. 284, 5 S. W. Rep. 1), Just. P., 24.
Holloway *v.* Louisville, St. L. & T. R. Co. (92 Ky. 244, 17 S. W. Rep. 572), Estop., 26.
Holloway *v.* Memphis, E. P. & P. R. Co. (23 Tex. 465), Corp., 20; Evid., 191.
Holloway *v.* University R. Co. (10 Am. & Eng. R. Cas. 36, 85 N. Car. 452), Em. Dom., 1060.
Holly *v.* Atlanta St. R. Co. (61 Ga. 215), St. Rys., 363.
Hollyman *v.* Hannibal & St. J. R. Co. (58 Mo. 480), Animals, 602.
Holman *v.* Chicago, R. I. & P. R. Co. (62 Mo. 562), Animals, 194, 449.
Holman *v.* State (24 Am. & Eng. R. Cas. 6, 105 Ind. 569, 5 N. E. Rep. 702), Incorp., 8; Quo War., 12.
Holmes *v.* Allegheny Traction Co. (153 Pa. St. 152, 25 Atl. Rep. 640), St. Rys., 366.
Holmes *v.* Atchison, T. & S. F. R. Co. (48 Mo. App. 79), Negl., 1; Trial, 198.
Holmes *v.* Atlantic Ave. R. Co. (16 N. Y. S. R. 743), Children, Inj. to, 70.
Holmes *v.* Carolina C. R. Co. (26 Am. & Eng. R. Cas. 190, 94 N. Car. 318), Car. of P., 633, 635.
Holmes *v.* Central R. & B. Co. (37 Ga. 593), Negl., 8; Tresp., Inj. to, 126.
Holmes *v.* Grand Trunk R. Co. (27 U. C. Q. B. 595), Fences, 36.
Holmes *v.* Hannibal & St. J. R. Co. (69 Mo. 536), Employés, Inj. to, 761.
Holmes *v.* Midland R. Co. (35 U. C. Q. B. 253), Fires, 122.
Holmes *v.* Northeastern R. Co. (L. R. 6 Ex. 123, 40 L. J. Ex. 121, 24 L. T. 69; affirming L. R. 4 Ex. 254, 38 L. J. Ex. 161, 20 L. T. 616, 17 W. R. 800), Stat. & D., 73.
Holmes *v.* Old Colony R. Co. (5 Gray (Mass.) 58), Partn., 1.
Holmes *v.* Oregon & C. R. Co. (6 Sawy. (U. S.) 262, 5 Fed. Rep. 75), Adm., 3; Car. of P., 353; Contrib. Neg., 99, 105; Death, etc., 2, 97, 375, 381; Ferries, 11; States, 4.
Holmes *v.* Oregon & C. R. Co. (5 Fed. Rep. 523, 6 Sawy. (U. S.) 276), Contrib. Neg., 99, 105.
Holmes *v.* Oregon & C. R. Co. (7 Sawy. (U. S.) 380), Ex. & Ad., 3.

Holmes *v.* South Pac. Coast R. Co. (97 Cal. 161, 31 Pac. Rep. 834), Contrib. Neg., 47; Death, etc., 182, 226.
Holmes *v.* Wakefield (12 Allen (Mass.) 580), Eject. Pass., 60.
Holohan *v.* Washington & G. R. Co. (8 Mackey (D. C.) 316), Contrib. Neg., 24, 48; St. Rys., 393.
Holsapple *v.* Rome, W. & O. R. Co. (3 Am. & Eng. R. Cas. 487, 86 N. Y. 275), Car. of L. S., 76, 136; Lim. of Liab., 43; Witn., 110.
Holstine *v.* Oregon & C. R. Co. (8 Oreg. 164), Animals, 423; Comp. Neg., 23.
Holt *v.* Ross (54 N. Y. 472), Exp. Cos., 20.
Holt *v.* Whatley (51 Ala. 569), Contrib. Neg., 56.
Holten *v.* Lake County Com'rs (55 Ind. 194), Witn., 118.
Holton *v.* London & S. W. R. Co. (1 C. & E. 542), Car. of P., 182, 594.
Holtz *v.* Minneapolis & St. L. R. Co. (29 Minn. 384, 13 N. W. Rep. 147), Animals, 463.
Holum *v.* Chicago, M. & St. P. R. Co. (80 Wis. 299, 50 N. W. Rep. 99), Employés, Inj. to, 63, 64.
Holyhead Local Board *v.* London & N. W. R. Co. (4 Ry. & C. T. Cas. 37), Ry. Com'rs, 18.
Holyoke *v.* Grand Trunk R. Co. (48 N. H. 541), Dam., 64, 67, 70, 71; Evid., 90.
Holy Trinity Cathedral *v.* West Ontario Pac. R. Co. (30 Am. & Eng. R. Cas. 422, 14 Ont. 246), Em. Dom., 1215, 1277.
Holywell-cum-Needingworth, Ex parte (27 W. R 707), Em. Dom., 1153.
Holzab *v.* New Orleans & C. R. Co. (38 La. Ann. 185), Husb. & W., 15; Imp. Neg., 9; St. Rys., 375.
Home Ins. Co. *v.* Pennsylvania R. Co. (11 Hun (N. Y.) 182), Actions, 7; Dam., 109; Fire Ins., 16; Fires, 232; Pl., 53.
Home L. Ins. Co. *v.* Dunn (19 Wall. (U. S.) 214), Rem. of C., 54.
Home Mut. Ins. Co. *v.* Oregon R. & N. Co. (20 Oreg. 569, 26 Pac. Rep. 857), Fire Ins., 12.
Homesly *v.* Elias (66 N. Car. 330), Car. of M., 263.
Homiston *v.* Long Island R. Co. (52 N. Y. S. R. 1, 22 N. Y. Supp. 738, 3 Misc. 342), Eject. Pass., 14.
Honegsberger *v.* Second Ave. R. Co. (1 Keyes (N. Y.) 570, 2 Abb. App. Dec. 378, 33 How. Pr. 193; reversing 1 Daly 80), Children, Inj. to, 75, 78, 125.
Honeycutt *v.* St. Louis, I. M. & S. R. Co. (40 Mo. App. 674), New Tr., 50.
Honeyman *v.* Oregon & C. R. Co. (25 Am. & Eng. R. Cas. 380, 13 Oreg. 352, 10 Pac. Rep. 628, 57 Am. Rep. 20), Bagg., 32.
Honlahan *v.* Sackett's Harbor & S. R. Co. (24 How. Pr. (N. Y.) 155), Constr. Rys., 93.
Honner *v.* Illinois C. R. Co. (15 Ill. 550), Fel. Serv., 443.
Hood *v.* Grand Trunk R. Co. (20 U. C. C. P. 361), Car. of L. S., 70.
Hood *v.* New York & N. H. R. Co. (22 Conn. 1), Car. of P., 504.
Hood *v.* New York & N. H. R. Co. (22 Conn. 502), Car. of P., 504.
Hood *v.* Northeastern R. Co. (19 W. R. 523, 1 Ry. & C. T. Cas. 19), Car. of P., 214; Words & Ph., 89.
Hood *v.* Northeastern R. Co. (L. R. 11 Eq. 116, 40 L. J. Ch. 17, 23 L. T. 433, 19 W. R. 266), Constr. Rys., 1; Jurisd., 9.
Hood *v.* Northeastern R. Co. (L. R. 5 Ch. 525, 18 W. R. 473, 23 L. T. 206), Stat. & D., 41.
Hood *v.* Pioneer Min. & Mfg. Co. (95 Ala. 461, 11 So. Rep. 10), Death, etc., 152; Evid., 171.
Hooghkirk *v.* Delaware & H. Canal Co. (63 How. Pr. (N. Y.) 328, 11 Abb. N. Cas. 72), Death, etc., 374, 434.
Hook *v.* Worcester & N. R. Co. (58 N. H. 251), Animals, 221.
Hooker *v.* Chicago, M. & St. P. R. Co. (41 Am. & Eng. R. Cas. 498, 76 Wis. 542, 44 N. W. Rep. 1085), Children, Inj. to, 129; Death, etc., 261; Evid., 174; New Tr., 95; Sts. & H., 322; Tresp., Inj. to, 6.
Hooker *v.* Kilgour (2 Cin. Super. Ct. 350), Stockh., 30.
Hooker *v.* Montpelier & W. R. R. Co. (62 Vt. 47, 19 Atl. Rep. 775), Em. Dom., 507, 920.
Hooker *v.* New Haven & N. Co. (14 Conn. 146), Flood. Lds., 57.
Hooksett *v.* Concord R. Co. (38 N. H. 242), Fires, 13, 33, 94; Stat., 29.
Hooper *v.* Baltimore & Y. Turnpike Road (34 Md. 521), Turnp., 5.
Hooper *v.* Boston & M. R. Co. (81 Me. 260, 17 Atl. Rep. 64), Cross., Inj. at, 177, 214; Cross., St. & H., 40; New Tr., 29.
Hooper *v.* Bourne (L. R. 2 Q. B. D. 339, 25 W. R. 672, 46 L. J. Q. B. D. 509; affirmed in 37 L. T. 594), Em. Dom., 1110.
Hooper *v.* Bourne (L. R. 5 App. Cas. 1, 49 L. J. Q. B. 370, 42 L. T. 97, 28 W. R. 493; affirming L. R. 3 Q. B. D. 258, 47 L. J. Q. B. D. 437, 26 W. R. 295; which affirmed L. R. 2 Q. B. D. 339, 25 W. R. 672), Em. Dom., 1109, 1114, 1115, 1117.
Hooper *v.* Bristol Port R. & P. Co. (35 L. J. C. P. 299), Em. Dom., 1205.
Hooper *v.* Chicago & N. W. R. Co. (27 Wis. 81, 5 Am. Ry. Rep. 302), Bills of L., 59; Car. of M., 8, 87, 561, 708.
Hooper *v.* Chicago, St. P., M. & O. R. Co. (37 Minn. 52, 33 N. W. Rep. 314), Animals, 65, 107; Costs, 12.
Hooper *v.* Columbia & G. R. Co. (28 Am. & Eng. R. Cas. 433, 21 So. Car. 541, 53 Am. Rep. 691), Employés, Inj. to, 238, 380.
Hooper *v.* Columbia & G. R. Co. (21 So. Car. 549), Trial, 64.
Hooper *v.* Columbus & W. R. Co. (29 Am. & Eng. R. Cas. 540, 78 Ala. 213), Ejectm., 16; Em. Dom., 203.
Hooper *v.* Johnston, G. & K. H. R. Co. (35 N. Y. S. R. 503, 13 N. Y. Supp. 151, 59 Hun 121; affirmed in 128 N. Y. 613, mem., 28 N. E. Rep. 252, mem., 38 N. Y. S. R. 1013), Children, Inj. to, 94; Death, etc., 269; St. Rys., 131; Tresp., Inj. to, 80.
Hooper *v.* London & N. W. R. Co. (50 L.

J. Q. B. D. 103, 43 L. T. N. S. 570, 29 W. R. 241), Bagg., 22.
Hooper *v.* Rathbone (1 Taney (U. S.) 519), Car. of M., 29; Words & Ph., 161.
Hooper *v.* Savannah & M. R. Co. (14 Am. & Eng. R. Cas. 256, 69 Ala. 529), Dam., 40; Em. Dom., 232, 713.
Hooper *v.* Wells (27 Cal. 11), Car. of M., 12, 32, 450; Exp. Cos., 61; Lim. of Liab., 30; Words & Ph., 7.
Hoopes *v.* Corbin (1 N. Y. S. R. 212), Reorg., 9.
Hoosier Stone Co. *v.* Louisville, N. A. & C. R. Co. (131 Ind. 575, 31 N. E. Rep. 365), Car. of M., 722; Death, etc., 4.
Hoosier Stone Co. *v.* McCain (133 Ind. 231, 31 N. E. Rep. 956), Death, etc., 137; Employés, Inj. to, 40, 182, 184, 625; Parties, 14.
Hoover *v.* Beech Creek R. Co. (154 Pa. St. 362, 26 Atl. Rep. 315), Fel. Serv., 236.
Hoover *v.* Missouri Pac. R. Co. (Mo.) (16 S. W. Rep. 480), Fires, 241, 264, 277, 288, 322; Partn., 4.
Hoover *v.* Montclair & G. L. R. Co. (29 N. J. Eq. 4), Mort., 228.
Hoover *v.* Pennsylvania R. Co. (156 Pa. St. 220, 27 Atl. Rep. 282), Discrim., 4, 28, 31, 64, 77.
Hoover *v.* Texas & P. R. Co. (61 Tex. 503), Cross., Inj. at, 325.
Hope *v.* Croydon & N. Tramways Co. (L. R. 34 Ch. D. 730), Receiv., 16.
Hope *v.* Mayor, etc., of Gainesville (72 Ga. 246), Mun. Aid, 28, 57.
Hope *v.* Norfolk & W. R. Co. (22 Am. & Eng. R. Cas. 171, 79 Va. 283), Forc. Ent., 1.
Hope *v* Troy & L. R. Co. (40 Hun (N. Y.) 438; affirmed in 110 N. Y. 643, mem., 17 N. E. Rep. 873), Car. of P., 595; Witn., 93.
Hopkins *v.* Atlantic & St. L. R. Co. (36 N. H. 9), Dam., 27; Husb. & W., 23.
Hopkins *v.* Baltimore & P. R. Co. (6 Mackey (D. C.) 311), Balt. & P. R. Co., 1; Nuis., 28.
Hopkins *v.* Connel (2 Tenn. Ch. 323), Receiv., 70, 139, 151; Words & Ph., 64.
Hopkins *v.* Cumberland Valley R. Co. (3 Watts & S. (Pa.) 410), Bills & N., 23.
Hopkins *v.* Great Northern R. Co. (L. R. 2 Q. B. D. 224, 46 L. J. Q. B. D. 265, 36 L. T. 898), Em. Dom., 1192; Ferries, 5.
Hopkins *v.* Indianapolis & St. L. R. Co. (78 Ill. 32), Witn., 141.
Hopkins *v.* Kansas City, St. J. & C. B. R. Co. (79 Mo. 98), Cross., St. & H., 61; Em. Dom., 344; Evid., 103.
Hopkins *v.* Kansas Pac. R. Co. (18 Kan. 462, 16 Am. Ry. Rep. 41), Animals, 31.
Hopkins *v.* St. Louis & S. F. R. Co. (16 Am. & Eng. R. Cas. 126, 29 Kan. 544), Evid., 180.
Hopkins *v.* St. Paul & P. R. Co. (2 Dill. (U. S.) 396), St. Paul & P. R. Co., 1.
Hopkins *v.* Taylor (87 Ill. 436), Receiv., 63.
Hopkins *v.* Utah Northern R. Co. (2 Idaho 277, 13 Pac. Rep. 343), Contrib. Neg., 105.
Hopkins *v.* Westcott (6 Blatchf. (U. S.) 64), Bagg., 45, 99; Exp. Cos., 72; Words & Ph., 19.
Hopkins *v.* Western Pac. R. Co. (50 Cal. 190, 12 Am. Ry. Rep. 176), Agency, 76; Nuis., 34, 40.
Hoppe *v.* Chicago, M. & St. P. R. Co. (19 Am. & Eng. R. Cas. 74, 61 Wis. 357, 21 N. W. Rep. 227), Children, Inj. to, 141, 145, 193; Death, etc., 300; Evid., 54; Trial, 191; Witn., 128.
Hopper *v.* Covington (4 Am. & Eng. R. Cas. 251, 8 Fed. Rep. 777, 10 Biss. (U. S.) 488), Mun. Aid, 276, 378.
Hopple *v.* Brown Tp. (13 Ohio St. 311), Mun. Aid, 329.
Horan *v.* Taylor, B. & H. R. Co. (3 Tex. App. (Civ. Cas.) 515), Cat.-Gds., 9, 16.
Hord *v.* Nashville & C. R. Co. (2 Swan (Tenn.) 497), Em. Dom., 564.
Hord *v.* Rogersville & J. R. Co. (3 Head (Tenn.) 208), Mun. Aid, 117, 149.
Horn *v.* Atlantic & St. L. R. Co. (35 N. H. 169), Animals, 174; Cat.-Gds., 4.
Horn *v.* Baltimore & O. R. Co. (54 Fed. Rep. 301, 6 U. S. App. 381, 4 C. C. A. 346), Contrib. Neg., 105; Cross., Inj. at, 141, 264, 290; Death, etc., 330; Evid., 291.
Horn *v.* Chicago & N. W. R. Co. (38 Wis. 463), Crim. L., 47; Evid., 112; Sts. & H., 317, 327.
Horn *v.* St. Paul & N. P. R. Co. (37 Minn. 375, 34 N. W. Rep. 593), Ac'ts, 3.
Hornaday *v.* Indiana & I. C. R. Co. (9 Ind. 263), Subscr., 98.
Hornback *v.* Cincinnati & Z. R. Co. (20 Ohio St. 81), Em. Dom., 216.
Hornblower *v.* Duden (35 Cal. 664), Direct., 13.
Horne *v.* Atlantic & St. L. R. Co. (36 N. H. 440), Farm Cross., 3.
Horne *v.* Boston & M. R. Co. (12 Am. & Eng. R. Cas. 287, 18 Fed. Rep. 50), Citizens., 1.
Horne *v.* Boston & M. R. Co. (62 N. H. 454), Rem. of C., 34.
Horne *v.* Lymington R. Co. (31 L. T. 167), Em. Dom., 1114.
Horne *v.* Memphis & O. R. Co. (1 Coldw. (Tenn.) 72), Evid., 140; Witn., 14, 18.
Horne *v.* Midland R. Co. (42 L. J. C. P. 59, L. R. 8 C. P. 131, 21 W. R. 481, 28 L. T. 312, and see L. R. 7 C. P. 583, 41 L. J. C. P. 264, 27 L. T. 38), Car. of M., 784.
Horner *v.* Chicago, M. & St. P. R. Co. (38 Wis. 165), Deeds, 31.
Horner *v.* Williams (35 Am. & Eng. R. Cas. 155, 100 N. Car. 230, 5 S. E. Rep. 734), Animals, 238; Contrib. Neg., 11.
Horner & R. Lateral R. Co., Ex parte (37 Pa. St. 333), Em. Dom., 519, 550.
Hornsby *v.* Eddy (56 Fed. Rep. 461), Fel. Serv., 182.
Hornsby *v.* South Carolina R. Co. (26 So. Car. 187, 1 S. E. Rep. 594), Trial, 77.
Hornstein *v.* Atlantic & G. W. R. Co. (51 Pa. St. 87), Em. Dom., 645.
Horricks *v.* Philadelphia & T. R. Co. (1 Phila. (Pa.) 28), Animals, 275.
Horrocks *v.* Metropolitan R. Co. (19 C. B. N. S. 139), Em. Dom., 1182.
Horrocks *v.* Metropolitan R. Co. (4 B. & S. 315, 10 Jur. N. S. 204, 32 L. J. Q. B. 367, 11 W. R. 910, 8 L. T. 663), Em. Dom., 1185.

Horseman *v.* Grand Trunk R. Co. (31 U. C. Q. B. 535), Car. of M., 405.
Horsman *v.* Grand Trunk R. Co. (30 U. C. Q. B. 130), Bills of L., 17.
Horton, In re (45 U. C. Q. B. 141), Em. Dom., 1265.
Horton *v.* St. Louis, I. M. & S. R. Co. (83 Mo. 541), Animals, 593.
Horton *v.* St. Louis, K. C. & N. R. Co. (84 Mo. 602), Liens, 21.
Horton *v.* Thompson (71 N. Y. 513; reversing 7 Hun 452), Mun. Aid, 100, 103.
Hortsman *v.* Covington & L. R. Co. (18 B. Mon. (Ky.) 218), Constr. Rys., 5.
Hosher *v.* Kansas City, St. J. & C. B. R. Co. (60 Mo. 303), Em. Dom., 742.
Hosher *v.* Kansas City, St. J. & C. B. R. Co. (60 Mo. 329, 9 Am. Ry. Rep. 230), Em. Dom., 1074; Flood. Lds., 30.
Hosic *v.* Chicago, R. I. & P. R. Co. (75 Iowa 683, 37 N. W. Rep. 963), Employés, Inj. to, 171, 225.
Hosie *v.* Edinburgh & G. R. Co. (19 Sc. Sess. Cas. 2d Ser. 65, 2 Ry. & C. T. Cas. 16), Pl., 12.
Hoskin *v.* Toronto General Trusts Co. (12 Ont. 480), Em. Dom., 1278.
Hoskins *v.* Missouri Pac. R. Co. (19 Mo. App. 315), Evid., 223, 254.
Hosmer *v.* Old Colony R. Co. (156 Mass. 506, 31 N. E. Rep. 652), Car. of P., 340; Exp. Cos., 13.
Hospes *v.* Chicago, M. & St. P. R. Co. (29 Fed. Rep. 763), Passes, 10, 12.
Hostetter *v.* Baltimore & O. R. Co. (Pa.) (32 Am. & Eng. R. Cas. 549, 11 Atl. Rep. 609), Car. of M., 418.
Hotard *v.* Texas & P. R. Co. (36 La. Ann. 450), Evid., 158; Flood. Lds., 17; Lim. of Ac., 17.
Hotchkiss *v.* Artisans' Bank (2 Abb. App. Dec. (N. Y.) 403; affirming 42 Barb. 517), Car. of M., 250.
Hotchkiss *v.* Auburn & R. R. Co. (36 Barb. (N. Y.) 600), Ejectm., 15, 34; Em. Dom., 264.
Hotchkiss *v.* National Banks (21 Wall. (U. S.) 354; affirming 10 Blatchf. 384), Bonds, 48.
Hoth *v.* Peters (55 Wis. 405, 13 N. W. Rep. 219), Contrib. Neg., 85; Trial, 65.
Hotis *v.* New York C. & H. R. R. Co. (25 N. Y. S. R. 525, 53 Hun 634, 2 Silv. Sup. Ct. 598, 6 N. Y. Supp. 605), Employés, Inj. to, 96, 143, 611; Evid., 282.
Hot Springs R. Co. *v.* Hudgins (18 Am. & Eng. R. Cas. 643, 42 Ark. 485), Car. of M., 734.
Hot Springs R. Co. *v.* Maher (48 Ark. 522, 3 S. W. Rep. 639), Constr. Rys., 70.
Hot Springs R. Co. *v.* Newman (36 Ark. 607), Animals, 66; Negl., 1, 102.
Hot Springs R. Co. *v.* Trippe (18 Am. & Eng. R. Cas 562, 42 Ark. 465, 48 Am. Rep. 65), Car. of M., 547; Partn., 1.
Hot Springs R. Co. *v.* Tyler (10 Am. & Eng. R. Cas. 145, 36 Ark. 205), Em. Dom., 712, 1003; Pub. Lds., 3.
Hot Springs R. Co. *v.* Williamson (45 Ark. 429), Sts. & H., 143.
Hot Springs R. Co. *v.* Williamson (46 Am. & Eng. R. Cas. 59, 136 U. S. 121, 10 Sup. Ct. Rep. 955), Sts. & H., 250.
Houck *v.* Southern Pac. R. Co. (38 Fed. Rep. 226), Col. Pers., 8.
Hougan *v.* Milwaukee & St. P. R. Co. (35 Iowa 558, 2 Am. Ry. Rep. 43), Right of W., 17.
Hough *v.* Buchanan (27 Fed. Rep. 328), Land Grants, 23.
Hough *v.* Texas & P. R. Co. (100 U. S. 213), Contrib. Neg., 105; Employés, Inj. to, 295, 749; Fel. Serv., 95, 335, 402.
Houghkirk *v.* Delaware & H. Canal Co. (92 N. Y. 219, 44 Am. Rep. 370; reversing 28 Hun 407), Cross., Inj. at, 76; Death, etc., 387, 427.
Houghton *v.* Chicago, D. & M. R. Co. (47 Iowa 370), Rip. Rts., 3.
Hourney *v.* Brooklyn City R. Co. (27 N. Y. S. R. 49, 7 N. Y. Supp. 602; affirmed in 130 N. Y. 641, mem., 29 N. E. Rep. 1033, 41 N. Y. S. R. 950), New Tr., 23; St. Rys., 357, 410.
Housatonic R. Co. *v.* Knowles (30 Conn. 313), New Tr., 20.
Housatonic R. Co. *v.* Lee & H. R. Co. (118 Mass. 391), Location, etc., 14, 30.
Housatonic R. Co. *v.* Waterbury (23 Conn. 101), Animals, 45, 341.
House *v.* Baltimore & O. R. Co. (48 Md. 130), Attach., 36.
House *v.* Lowell (45 Mo. 381), Pl., 177.
Houser *v.* Chicago, R. I. & P. R. Co. (8 Am. & Eng. R. Cas. 500, 60 Iowa 230, 46 Am. Rep. 65, 14 N. W. Rep. 778), Fel. Serv., 175.
Houston *v.* Gate City St. R. Co. (89 Ga. 272, 15 S. E. Rep. 323), St. Rys., 368.
Houston *v.* People (55 Ill. 398, 1 Am. Ry. Rep. 104), Mun. Aid, 294.
Houston *v.* Vicksburg, S. & P. R. Co. (34 Am. & Eng. R. Cas. 76, 39 La. Ann. 796, 2 So. Rep. 562), Car. of P., 198; Children, Inj. to, 129; Death, etc., 105, 174; Negl., 41.
Houston & E. T. R. Co. *v.* Adams (58 Tex. 476), Em. Dom., 989.
Houston & G. Nav. Co. *v.* Dwyer (29 Tex. 376), Car. of M., 13, 15; Words & Ph., 7.
Houston & G. N. R. Co. *v.* Jones (46 Tex. 133, 13 Am. Ry. Rep. 294), Witn., 3.
Houston & G. N. R. Co. *v.* Kuechler (36 Tex. 382), Charters, 122; Lands Grants, 126; Mand., 23.
Houston & G. N. R. Co. *v.* Meador (50 Tex 77), Cat.-Gds., 9; Em. Dom., 87; Negl., 81, 84.
Houston & G. N. R. Co. *v.* Miller (49 Tex. 322), Children, Inj. to, 182, 183, 184.
Houston & G. N. R. Co. *v.* Miller (51 Tex. 270), Employés, Inj. to, 459, 470; Fel. Serv., 1, 9; Negl., 63.
Houston & G. N. R. Co. *v.* Parker (50 Tex. 330), Culverts, 13, 14; Flood. Lds., 55, 77; Negl., 6, 63.
Houston & G. N. R. Co. *v.* Randall (50 Tex. 254), Negl., 74; New Tr., 28.
Houston & G. N. R. Co. *v.* Van Bayless (1 Tex. App. (Civ. Cas.) 247), Animals, 643; Constr. Rys., 116; Indep. Contr., 13.
Houston & T. C. R. Co. *v.* Adams (49 Tex. 748), Car. of M., 273; Lim. of Ac., 26.

Houston & T. C. R. Co. *v.* Baker (11 Am. & Eng. R. Cas. 667, 57 Tex. 419), Dam., 34; Death, etc., 88, 234, 421.
Houston & T. C. R. Co. *v.* Barrager (Tex.) (14 S. W. Rep. 242), Employés, Inj. to, 275.
Houston & T. C. R. Co. *v.* Boehm (9 Am. & Eng. R. Cas. 366, 57 Tex. 152), App., 125; Car. of P., 627, 645; Trial, 165, 170.
Houston & T. C. R. Co. *v.* Boozer (2 Tex. Unrep. Cas. 452), Children, Inj. to, 40; Fences, 58; Tresp., Inj. to, 1, 92.
Houston & T. C. R. Co. *v.* Boozer (34 Am. & Eng. R. Cas. 63, 70 Tex. 530, 8 S. W. Rep. 119), Children, Inj. to, 74, 75, 107, 189; Farm Cross., 12; Negl., 5.
Houston & T. C. R. Co. *v.* Bowie (2 Tex. Civ. App. 437, 21 S. W. Rep. 304), Evid., 229.
Houston & T. C. R. Co. *v.* Bradley (45 Tex. 171, 13 Am. Ry. Rep. 213), Death, etc., 93.
Houston & T. C. R. Co. *v.* Bremond (66 Tex. 159, 18 S. W. Rep. 448), Liens, 1, 2; Stock, 18.
Houston & T. C. R. Co. *v.* Brin (77 Tex. 174, 13 S. W. Rep. 886), Contrib. Neg., 120; Cross., Inj. at, 118; Cross. Rys., 79.
Houston & T. C. R. Co. *v.* Burke (9 Am. & Eng. R. Cas. 59, 55 Tex. 323, 40 Am. Rep. 308), Bills of L., 64; Car. of M., 797; Evid., 168; Judgm., 44; Proc., 31; Witn., 81, 125.
Houston & T. C. R. Co. *v.* Burke (Tex.) (9 Am. & Eng. R. Cas. 369), Dam., 105.
Houston & T. C. R. Co. *v.* Carson (66 Tex. 345, 1 S. W. Rep. 107), Cross., Inj. at, 206; Sts. & H., 38.
Houston & T. C. R. Co. *v.* Chaffin (14 Am. & Eng. R. Cas. 437, 60 Tex. 553), Em. Dom., 435; Lim. of Ac., 4, 49.
Houston & T. C. R. Co. *v.* Chandler (51 Tex. 416), Subscr., 107.
Houston & T. C. R. Co. *v.* Clemmons (8 Am. & Eng. R. Cas. 396, 55 Tex. 88), Car. of P., 494.
Houston & T. C. R. Co. *v.* Conrad (62 Tex. 627), Employés, Inj. to, 182, 299, 342.
Houston & T. C. R. Co. *v.* Cowser (57 Tex. 293), Agency, 79; Children, Inj. to, 190; Contrib. Neg., 66; Dam., 32; Death, etc., 154; Evid., 36.
Houston & T. C. R. Co. *v.* Devainy (63 Tex. 172), Eject. Pass., 81; New Tr., 91.
Houston & T. C. R. Co. *v.* Dunham (49 Tex. 181), Employés, Inj. to, 46.
Houston & T. C. R. Co. *v.* Ford (2 Am. & Eng. R. Cas. 514, 53 Tex. 364), Eject. Pass., 38; Trial, 5.
Houston & T. C. R. Co. *v.* Forsyth (49 Tex. 171), New Tr., 90, 94, 95.
Houston & T. C. R. Co. *v.* Fowler (8 Am. & Eng. R. Cas. 504, 56 Tex. 452), Employés, Inj. to, 260, 280.
Houston & T. C. R. Co. *v.* Gilmore (62 Tex. 391), Fel. Serv., 1, 56; Trial, 139.
Houston & T. C. R. Co. *v.* Gorbett (49 Tex. 573), Agency, 83; Comp. Neg., 32; Contrib. Neg., 122.
Houston & T. C. R. Co. *v.* Graves (50 Tex. 181), Pl., 41; Trial, 6.
Houston & T. C. R. Co. *v* Hampton (22 Am. & Eng. R. Cas. 291, 64 Tex. 427), Car. of Mails, 18; Car. of P., 54; Death, etc., 316.
Houston & T. C. R. Co. *v.* Harn (44 Tex. 628), Car. of M., 481, 735.
Houston & T. C. R. Co. *v.* Harris (3 Tex. App. (Civ. Cas.) 270), Animals, 73.
Houston & T. C. R. Co. *v.* Harry (18 Am. & Eng. R. Cas. 502, 63 Tex. 256), Car. of M., 213, 293; Stat., 6.
Houston & T. C. R. Co. *v.* Hester (Tex.) (7 S. W. Rep. 776), Car. of L. S., 155.
Houston & T. C. R. Co. *v.* Hester (2 Tex. Unrep. Cas. 296), Car. of L. S., 80.
Houston & T. C. R. Co. *v.* Hicks (2 Tex. Unrep. Cas. 437), Evid., 175.
Houston & T. C. R. Co. *v.* Hill (34 Am. & Eng. R. Cas. 363, 70 Tex. 51, 7 S. W. Rep. 659), Contr., 91, 93, 97, 101; Parties, 6.
Houston & T. C. R. Co. *v.* Hill (21 Am. & Eng. R. Cas. 263, 63 Tex. 381), Agency, 51; Car. of P., 505; Dam., 49; Trial, 7.
Houston & T. C. R. Co. *v.* Hodde (42 Tex. 467), Car. of M., 62, 698.
Houston & T. C. R. Co. *v.* Hogg (2 Tex. Unrep. Cas. 544), Car. of M., 68, 800.
Houston & T. C. R. Co. *v.* Hollingsworth (2 Tex. App. (Civ. Cas.) 149), Fires, 144.
Houston & T. C. R. Co. *v.* Hollis (2 Tex. App. (Civ. Cas.) 169), Dam., 71, 98.
Houston & T. C. R. Co. *v.* Hook (60 Tex. 403), Death, etc., 70.
Houston & T. C. R. Co. *v.* Jackson (21 Am. & Eng. R. Cas. 126, 62 Tex. 209), Car. of M., 773.
Houston & T. C. R. Co. *v.* Knapp (51 Tex. 569), Evid., 99; Tresp., 23.
Houston & T. C. R. Co. *v.* Knapp (51 Tex. 592), Flood. Lds., 48; Homest., 2; Witn., 109.
Houston & T. C. R. Co. *v.* Larkin (64 Tex. 454), App., 62, 75; New Tr., 20.
Houston & T. C. R. Co. *v.* Lee (34 Am. & Eng. R. Cas. 452, 69 Tex. 556, 7 S. W. Rep. 324), Car. of P., 646; Derailm., 1.
Houston & T. C. R. Co. *v.* Leslie (9 Am. & Eng. R. Cas. 407, 57 Tex. 83), Car. of P., 423; Dam., 9.
Houston & T. C. R. Co. *v.* Loughbridge (1 Tex. App. (Civ. Cas.) 754), Animals, 25, 342, 587.
Houston & T. C. R. Co. *v.* Lowe (Tex.) (11 S. W. Rep. 1065), Employés, Inj. to, 529; New Tr., 63.
Houston & T. C. R. Co. *v.* McDonough (1 Tex. App. (Civ. Cas.) 354), Fires, 19, 37, 40, 45, 47, 81, 124, 125, 248, 289; Negl., 44, 47.
Houston & T. C. R. Co. *v.* McGehee (49 Tex. 481), Location, etc., 13, 31.
Houston & T. C. R. Co. *v.* McGlosson (1 Tex. App. (Civ. Cas.) 89), Car. of M., 741.
Houston & T. C. R. Co. *v.* McKinney (8 Am. & Eng. R. Cas. 723, 55 Tex. 176), Agency, 47, 99; Em. Dom., 219, 220.
Houston & T. C. R. Co. *v.* McNamara (59 Tex. 255), Employés, Inj. to, 48, 134, 208.
Houston & T. C. R. Co. *v.* Maddox (Tex.) (21 Am. & Eng. R. Cas. 625, 2 Tex. Unrep. Cas. 312), Employés, Inj. to, 112, 660; New Tr., 82.
Houston & T. C. R. Co. *v.* Marcelles (12 Am. & Eng. R. Cas. 231, 59 Tex. 334),

Employés, Inj. to, 94, 145; Fel. Serv., 196, 216, 394.
Houston & T. C. R. Co. *v.* Mitchell (38 Tex. 85), Contr., 38.
Houston & T. C. R. Co. *v.* Molloy (25 Am. & Eng. R. Cas. 244, 64 Tex. 607), Dam., 95; Stat. & D., 49.
Houston & T. C. R. Co. *v.* Moore (49 Tex. 31), Car. of P., 60, 81, 351, 591; Death, etc., 34, 130, 185.
Houston & T. C. R. Co. *v.* Muldrow (54 Tex. 233), Animals, 591.
Houston & T. C. R. Co. *v.* Myers (8 Am. & Eng. R. Cas. 114, 55 Tex. 110), Employés, Inj. to, 238; Fel. Serv., 143.
Houston & T. C. R. Co. *v.* Newman (2 Tex. App. (Civ. Cas.) 303), Arb., 28.
Houston & T. C. R. Co. *v.* Nichols (Tex.) (9 Am. & Eng. R. Cas. 361), App., 39.
Houston & T. C. R. Co. *v.* Nixon (52 Tex. 19), Cross., Inj. at, 101, 107; Dam., 103.
Houston & T. C. R. Co. *v.* Odum (2 Am. & Eng. R. Cas. 503, 53 Tex. 343), Charters, 65; Mun. Corp., 10; Stat., 34; Sts. & H., 121, 215.
Houston & T. C. R. Co. *v.* O'Hare (64 Tex. 600), Employés, Inj. to, 99, 290, 301, 633, 716; Negl., 17.
Houston & T. C. R. Co. *v.* Oram (49 Tex. 341), Employés, Inj. to, 45; Negl., 6.
Houston & T. C. R. Co. *v.* Park (1 Tex. App. (Civ. Cas.) 142), Car. of M., 541, 573, 593; Lim. of Liab., 27.
Houston & T. C. R. Co. *v.* Patton (Tex.) (9 S. W. Rep. 175), Evid., 36, 289; Witn., 69, 180.
Houston & T. C. R. Co. *v.* Perkins (2 Tex. App. (Civ. Cas.) 467), Evid., 263; Judgm., 20.
Houston & T. C. R. Co. *v.* Pinto (15 Am. & Eng. R. Cas. 286, 60 Tex. 516), Employés, Inj. to, 49, 768.
Houston & T. C. R. Co. *v.* Poole (63 Tex. 246), Car. of M., 492.
Houston & T. C. R. Co. *v.* Presidio County (53 Tex. 518), Tax., 359.
Houston & T. C. R. Co. *v.* Pressley (2 Tex. App. (Civ. Cas.) 451), App., 2.
Houston & T. C. R. Co. *v.* Rand (9 Am. & Eng. R. Cas. 399), Agency, 83; Car. of P., 571.
Houston & T. C. R. Co. *v.* Rand (9 Am. & Eng. R. Cas. 339, 1 Tex. App. (Civ. Cas.) 100), Dam., 63, 71.
Houston & T. C. R. Co. *v.* Reason (61 Tex. 613), Stat. & D., 83, 127; Trial, 154.
Houston & T. C. R. Co. *v.* Richards (12 Am. & Eng. R. Cas. 70, 59 Tex. 373), Tresp., Inj. to, 106.
Houston & T. C. R. Co. *v.* Rider (62 Tex. 267), Fel. Serv., 11, 113.
Houston & T. C. R. Co. *v.* Roberts (Tex.) (19 S. W. Rep. 512), Receiv., 73.
Houston & T. C. R. Co. *v.* Russell (49 Tex. 748), Car. of M., 336.
Houston & T. C. R. Co. *v.* Rust (9 Am. & Eng. R. Cas. 123, 58 Tex. 98), Discrim., 3, 8.
Houston & T. C. R. Co. *v.* Ryan (44 Tex. 426), Trial, 14.
Houston & T. C. R. Co. *v.* Schmidt (21 Am. & Eng. R. Cas. 345, 61 Tex. 282), Car. of P., 372; New Tr., 21.
Houston & T. C. R. Co. *v.* Shafer (6 Am. & Eng. R. Cas. 421, 54 Tex. 641), Evid., 177; New Tr., 45; Pl., 160.
Houston & T. C. R. Co. *v.* Shaw (2 Tex. Unrep. Cas. 553), Death, etc., 90, 374.
Houston & T. C. R. Co. *v.* Shirley (4 Am. & Eng. R. Cas. 443, 54 Tex. 125), Consol., 43; Dam., 26; Mort., 1.
Houston & T. C. R. Co. *v.* Simon (2 Tex. App. (Civ. Cas.) 80), Cert., 2.
Houston & T. C. R. Co. *v.* Simpson (60 Tex. 103), Children, Inj. to, 67, 91, 105, 176, 193.
Houston & T. C. R. Co. *v.* Simpson (2 Tex. App. (Civ. Cas.) 591), Animals, 95.
Houston & T. C. R. Co. *v.* Smith (52 Tex. 178), Contrib. Neg., 1, 13, 20; Negl., 26; Tresp., Inj. to, 54, 123; Witn., 94.
Houston & T. C. R. Co. *v.* Smith (22 Am. & Eng. R. Cas. 421, 63 Tex. 322 Car. of M., 47, 57; Discrim., 3, 14, 27.
Houston & T. C. R. Co. *v.* Smith (77 Tex. 179, 13 S. W. Rep. 972), Children, Inj. to, 3, 96, 101; Tresp., Inj. to, 51.
Houston & T. C. R. Co. *v.* State (39 Tex. 148), Tax., 300.
Houston & T. C. R. Co. *v.* State (61 Tex. 342), Penalty, 13.
Houston & T. C. R. Co. *v.* Stewart (1 Tex. App. (Civ. Cas.) 718), Car. of M., 716; Discrim., 3.
Houston & T. C. R. Co. *v.* Stewart (Tex.) (17 S. W. Rep. 33), Cross., Inj. at, 19; Negl., 39.
Houston & T. C. R. Co. *v.* Sympkins (6 Am. & Eng. R. Cas. 11, 54 Tex. 615), Contrib. Neg., 28; Negl., 49; Tresp., Inj. to, 23, 29, 45, 111.
Houston & T. C. R. Co. *v.* Terrell (69 Tex. 650, 7 S. W. Rep. 670), Trial, 29, 35.
Houston & T. C. R. Co. *v.* Terry (42 Tex. 451), Animals, 71; App., 41.
Houston & T. C. R. Co. *v.* Texas [illegible] Co. (70 Tex. 649, 8 S. W. Rep. [illegible]), Charters, 18; Land Grants, 103.
Houston & T. C. R. Co. *v.* Tierney (72 [illegible] 312, 12 S. W. Rep. 586), Trial, 39.
Houston & T. C. R. Co. *v.* Travis County (62 Tex. 16), Lim. of Ac., 7.
Houston & T. C. R. Co. *v.* Van Alstyne (9 Am. & Eng. R. Cas. 686, 56 Tex. 439), Stock, 77, 79.
Houston & T. C. R. Co. *v.* Waller (8 Am. & Eng. R. Cas. 431, 56 Tex. 331), Cross., Inj. at, 270; Death, etc., 230, 250; Trial, 28.
Houston & T. C. R. Co. *v.* Watkins (1 Tex. App. (Civ. Cas.) 147), Med. Serv., 3, 10.
Houston & T. C. R. Co. *v.* White (1 Tex. App. (Civ. Cas.) 64), Judgm., 3.
Houston & T. C. R. Co. *v.* Willie (5 Am. & Eng. R. Cas. 541, 53 Tex. 318, 37 Am. Rep. 756), Dam., 68; Fel. Serv., 1, 142, 487; Proc., 14.
Houston & T. C. R. Co. *v.* Wilson (60 Tex. 142), Cross., Inj. at, 150, 238.
Houston City R. Co. *v.* Dawson (2 Tex. Unrep. Cas. 223), St. Rys., 460.
Houston City St. R. Co. *v.* Delesdernier (84 Tex. 82, 19 S. W. Rep. 366), St. Rys., 176, 183, 468.

Houston City St. R. Co. *v.* Dillon (3 Tex. Civ. App. 303, 22 S. W. Rep. 1066), Children, Inj. to, 115, 141.
Houston City St. R. Co. *v.* Sciacca (80 Tex. 350, 16 S. W. Rep. 31), Children, Inj. to, 193; Death, etc., 403, 412; New Tr., 95; Witn., 104.
Houston County *v.* Central R. Co. (72 Ga. 211), Tax., 12.
Houston, E. & W. T. R. Co. *v.* Adams (20 Am. & Eng. R. Cas. 246, 63 Tex. 200), Cat.-Gds., 27, 33; Em. Dom., 1005; Fixt., 2; Tresp., 17.
Houston, E. & W. T. R. Co. *v.* Blagge (73 Tex. 24, 12 S. W. Rep. 616), Pl., 131.
Houston, E. & W. T. R. Co. *v.* Hardy (61 Tex. 230), App., 86, 94.
Houston, E. & W. T. R. Co. *v.* Snelling (59 Tex. 116), Assump., 6.
Houston, E. & W. T. R. Co. *v.* Trentem (63 Tex. 442), Constr. Rys., 30.
Houston Tap & B. R. Co. *v.* Milburn (34 Tex. 224), Em. Dom., 44.
Houston Tap & B. R. Co. *v.* Randolph (24 Tex. 317), Mand., 23, 26; Mun. Aid, 173.
Hovelman *v.* Kansas City Horse R. Co. (20 Am. & Eng. R. Cas. 17, 79 Mo. 632), Mort., 15; St. Rys., 27, 82, 199.
Hover *v.* Pennsylvania Co. (25 Ohio St. 667), Death, etc., 112.
Hovorka *v.* Minneapolis & St. L. R. Co. (13 Am. & Eng. R. Cas. 605, 31 Minn. 221, 17 N. W. Rep. 376), Fences, 75.
Hovorka *v.* Minneapolis & St. L. R. Co. (34 Minn. 281, 25 N. W. Rep. 595), Fences, 89.
How *v.* London & N. W. R. Co. ([1892] 1 Q. B. 391), App., 23.
Howard *v.* Allegheny Valley R. Co. (69 Pa. St. 489), Constr. Rys., 67.
Howard *v.* Chicago, St. L. & N. O. R. Co. (18 Am. & Eng. R. Cas. 313, 61 Miss. 194), Tickets & F., 71, 76.
Howard *v.* Crawford County (1 Pittsb. (Pa.) 531), Mun. Aid, 153, 315.
Howard *v.* Delaware & H. Canal Co. (41 Am. & Eng. R. Cas. 473, 40 Fed. Rep. 195), Death, etc., 130, 426; Employés, Inj. to, 162; Fel. Serv., 124, 439.
Howard *v.* Denver & R. G. R. Co. (24 Am. & Eng. R. Cas. 448, 26 Fed. Rep. 837), Fel. Serv., 34, 281.
Howard *v.* East Tenn., V. & G. R. Co. (91 Ala. 268, 8 So. Rep. 868), Contr., 49.
Howard *v.* Kansas City, Ft. S. & G. R. Co. (37 Am. & Eng. R. Cas. 552, 41 Kan. 403, 21 Pac. Rep. 267), Cross., Inj. at, 309.
Howard *v.* La Crosse & M. R. Co. (Woolw. (U. S.) 49), Judgm., 14; Receiv., 175.
Howard *v.* Louisville, N. O. & T. R. Co. (67 Miss. 247, 7 So. Rep. 216), Animals, 62.
Howard *v.* Midland R. Co. (3 Ry. & C. T. Cas. 253), Charges, 114, 117; Discrim., 18.
Howard *v.* Milwaukee & St. P. R. Co. (101 U. S. 837), Judgm., 48.
Howard *v.* Moore (20 Fla. 163), Liens, 46.
Howard *v.* Northern C. R. Co. (17 N. Y. S. R. 190, 49 Hun 605, 1 N. Y. Supp. 528), Cross., Inj. at, 256.
Howard *v.* St. Paul, M. & M. R. Co. (19 Am. & Eng. R. Cas. 283, 32 Minn. 214, 20 N. W. Rep. 93), Fly. Switch, 3.
Howard *v.* Savannah, F. & W. R. Co. (84 Ga. 711, 11 S. E. Rep. 452), Employés, Inj. to, 588, 659; Evid., 162, 230.
Howard *v.* Union Freight R. Co. (156 Mass. 159, 30 N. E. Rep. 479), St. Rys., 482; Sts. & H., 48.
Howard *v.* Wilmington & S. R. Co. (1 Gill (Md.) 311), Constr. Rys., 110; Contr., 79.
Howard County *v.* Central Nat. Bank (108 U. S. 314, 2 Sup. Ct. Rep. 689), Branch & L. Roads, 1.
Howard County *v.* Paddock (15 Am. & Eng. R. Cas. 621, 110 U. S. 384, 4 Sup. Ct. Rep. 24), Mun. Aid, 153.
Howard County Com'rs *v.* Legg (110 Ind. 479, 9 West. Rep. 212, 11 N. E. Rep. 612), Death, etc., 430.
Howard Exp. Co. *v.* Wile (64 Pa. St. 201), Exp. Cos., 37, 40.
Howard Oil Co. *v.* Davis (76 Tex. 630, 13 S. W. Rep. 665), Dam., 45.
Howd *v.* Mississippi C. R. Co. (50 Miss. 178), Employés, Inj. to, 45, 182, 293.
Howe *v.* Buffalo, N. Y. & E. R. Co. (37 N. Y. 297; affirming 38 Barb. 124), Conduct., 13.
Howe *v.* Finch (L. R. 17 Q. B. D. 187), Employés, Inj. to, 782.
Howe *v.* Freeman (14 Gray (Mass.) 566), Mort., 55.
Howe *v.* Gibson (3 Tex. Civ. App. 263, 22 S. W. Rep. 826), Car. of P., 642.
Howe *v.* Harding (42 Am. & Eng. R. Cas. 1, 76 Tex. 17, 13 S. W. Rep. 41), Receiv., 60, 88; Right of W., 9; Vend. & P., 5.
Howe *v.* Harding (84 Tex. 74, 19 S. W. Rep. 363), Em. Dom., 232.
Howe *v.* Oliver (Tex. Civ. App.) (22 S. W. Rep. 828), New Tr., 36.
Howe *v.* Oswego & S. R. Co. (56 Barb. (N. Y.) 121), Car. of M., 12, 113, 237; Words & Ph., 7.
Howe *v.* Plainfield (41 N. H. 135), Evid., 210.
Howell *v.* Chicago & N. W. R. Co. (51 Barb. (N. Y.) 378), Direct., 37; Divid., 9; For. Corp., 20; Jurisd., 6; Stock, 29.
Howell *v.* Long Island R. Co. (37 Hun (N. Y.) 381; affirmed (?) 107 N. Y. 684, mem., 12 N. Y. S. R. 865, mem.), Dam., 39; Deeds, 34.
Howell *v.* Metropolitan D. R. Co. (L. R. 19 Ch. D. 508, 51 L. J. Ch. D. 158, 45 L. T. 707, 30 W. R. 100), Attach., 27.
Howell *v.* New York, L. E. & W. R. Co. (2 Int. Com. Rep. 162, 2 Int. Com. Com. 272), Int. Com., 32, 49.
Howell *v.* St. Charles St. R. Co. (22 La. Ann. 603), App., 125.
Howell *v.* Western R. Co. (94 U. S. 463), Mort., 80.
Howenstein *v.* Pacific R. Co. (55 Mo. 33), Animals, 193.
Howitt *v.* Gzowski (5 Grant's Ch. (U. C.) 555), Liens, 17.
Howland *v.* McNab (8 Grant's Ch. (U. C.) 47), Subscr., 19.
Howland *v.* Milwaukee, L. S. & W. R. Co. (5 Am. & Eng. R. Cas. 578, 54 Wis. 226, 11 N. W. Rep. 529), Fel. Serv., 38, 251.
Howland *v.* Union St. R. Co. (150 Mass. 86, 22 N. E. Rep. 434), St. Rys., 503.

Howland *v.* Wallace (81 Ala. 238, 2 So. Rep. 96), Car. of M., 723.
Howlett *v.* New York, W. S. & B. R. Co. (14 Abb. N. Cas. (N. Y.) 328), Cross. Rys., 71; Receiv., 57.
Hoye *v.* Chicago & N. W. R. Co. (19 Am. & Eng. R. Cas. 347, 62 Wis. 666, 23 N. W. Rep. 14), Cross., Inj. at, 131, 350.
Hoye *v.* Chicago & N. W. R. Co. (67 Wis. 1, 29 N. W. Rep. 646), Cross., Inj. at, 73, 218.
Hoye *v.* Chicago, M. & St. P. R. Co. (46 Minn. 269, 48 N. W. Rep. 1117), Fires, 40, 295, 296, 316, 343; Witn., 37.
Hoyle *v.* New Orleans City R. Co. (23 La. Ann. 535), St. Rys., 199.
Hoyle *v.* New York & N. E. R. Co. (60 Conn. 28, 22 Atl. Rep. 446), Deeds, 43.
Hoyle *v.* Plattsburgh & M. R. Co. (54 N. Y. 315; reversing 51 Barb. 45, 47 Barb. 104), Direct., 50; Mort., 47, 51.
Hoyleman *v.* Kanawha & O. R. Co. (33 W. Va. 489, 10 S. E. Rep. 816), Fences, 41, 90.
Hoyt *v.* Allen (2 Hill (N. Y.) 322), Pl., 45.
Hoyt *v.* Braden (27 Minn. 490, 8 N. W. Rep. 591), Mun. Aid, 322.
Hoyt *v.* Chicago, B. & Q. R. Co. (93 Ill. 601), Car. of M., 209; Connect. L., 2.
Hoyt *v.* Long Island R. Co. (57 N. Y. 678), Witn., 146.
Hoyt *v.* Nevada County N. G. R. Co. (68 Cal. 644, 10 Pac. Rep. 187), App., 88.
Hoyt *v.* New York, L. E. & W. R. Co. (118 N. Y. 399, 23 N. E. Rep. 565, 29 N. Y. S. R. 48; reversing 42 Hun 657, 6 N. Y. S. R. 7), Cross., Inj. at, 193, 224.
Hoyt *v.* Sixth Ave. R. Co. (1 Daly (N. Y.) 528), St. Rys., 289; Tickets & F., 115.
Hoyt *v.* Story (3 Barb. (N. Y.) 262), Assign., 26.
Hoyt *v.* Thompson (5 N. Y. 320; reversing 3 Sandf. 416), Pres., 4; Receiv., 48.
Hozier *v.* Caledonian R. Co. (1 Ry. & C. T. Cas. 27), Tickets & F., 139.
Hozsey *v.* New Jersey Midland R. Co. (33 N. J. Eq. 119), Consol., 12.
Hubbard *v.* Androscoggin & K. R. Co. (39 Me. 506), Evid., 67.
Hubbard *v.* Boston & A. R. Co. (159 Mass. 320, 34 N. E. Rep. 459), Death, etc., 234.
Hubbard *v.* Harnden Exp. Co. (10 R. I. 244), Exp. Cos., 31, 87.
Hubbard *v.* Kansas City, St. J. & C. B. R. Co. (63 Mo. 68, 20 Am. Ry. Rep. 446), Dam., 54; Deeds, 36.
Hubbard *v.* New York & H. R. Co. (36 Barb. (N. Y.) 286, 14 Abb. Pr. 275), Bonds, 22, 28.
Hubbard *v.* Northern R. Co. (3 Blatchf. (U. S.) 84), Rem. of C., 27.
Hubbell *v.* Drexel (15 Phila. (Pa.) 478), Stock., 1, 47.
Hubbersty *v.* Manchester, S. & L. R. Co. (7 B. & S. 54, L. R. 2 Q. B. 59, 36 L. J. Q. B. 33, 15 W. R. 254; affirmed in 8 B. & S. 420, 36 L. J. Q. B. 198, L. R. 2 Q. B. 471, 16 L. T. 425, 15 W. R. 793), Stock, 62.
Hubener *v.* New Orleans & C. R. Co. (23 La. Ann. 492), Children, Inj. to, 85.
Huber *v.* Chicago, M. & St. P. R. Co. (40 Am. & Eng. R. Cas. 188, 6 Dak. 392, 43 N. W. Rep. 819), Animals, 577.
Hubgh *v.* New Orleans & C. R. Co. (6 La. Ann. 495), Death, etc., 2; Employés, Inj. to, 443; Fel. Serv., 1, 156.
Huck *v.* Chicago & A. R. Co. (86 Ill. 352, 17 Am. Ry Rep. 419), Tax., 13, 68, 257, 348.
Huckshold *v.* St. Louis, I. M. & S. R. Co. (28 Am. & Eng. R. Cas. 659, 90 Mo. 548, 2 S. W. Rep. 794), Contrib. Neg., 105; Cross., Inj. at, 134; Death, etc., 200.
Huddersfield *v.* Great Northern R. Co. (4 Ry. & C. T. Cas. 44), Leases, 129.
Huddersfield Corporation *v.* Great Northern R. Co. (50 L. J. Q. B. D. 587, 3 Ry. & C. T. Cas. 564), Leases, 138.
Hudgens *v.* Hannibal & St. J. R. Co. (79 Mo. 418), Animals, 356.
Hudson *v.* Charleston, C. & C. R. Co. (55 Fed. Rep. 248), Employés, Inj. to, 134, 343, 398; Fel. Serv., 30, 386.
Hudson *v.* Charleston, C. & C. R. Co. (41 Am. & Eng. R. Cas. 348, 104 N. Car. 491, 10 S. E. Rep. 669), Employés, Inj. to, 546, 600, 602; Evid., 134.
Hudson *v.* Chicago & N. W. R. Co. (8 Am. & Eng. R. Cas. 464, 59 Iowa 581, 13 N. W. Rep. 735), Evid., 67, 87.
Hudson *v.* Georgia Pac. R. Co. (85 Ga. 203, 11 S. E. Rep. 605), Employés, Inj. to, 657; Witn., 98.
Hudson *v.* Kansas Pac. R. Co. (3 McCrary (U. S.) 249, 9 Fed. Rep. 879), Tickets & F., 107.
Hudson *v.* Leeds & B. R. Co. (16 Q. B. 796, 15 Jur. 946, 21 L. J. Q. B. 486), Em. Dom., 1206.
Hudson *v.* Louisville & N. R. Co. (14 Bush (Ky.) 303), Fright. Teams, 1, 2, 6.
Hudson *v.* Missouri, K. & T. R. Co. (16 Kan. 470), Agency, 75; Assault, 7; Pl., 125.
Hudson *v.* Ocean Steamship Co. (2 Silv. App. 75, 110 N. Y. 625, mem., 17 N. E. Rep. 342; affirming 38 Hun 644, mem.), Employés, Inj. to, 293.
Hudson *v.* Rome, W. & O. R. Co. (73 Hun 467, 26 N. Y. Supp. 386, 56 N. Y. S. R. 39), Death, etc., 293.
Hudson *v.* St. Louis, K. C. & N. R. Co. (53 Mo. 525), Animals, 607; Appear., 6; Fences, 92; Proc., 32; Trial, 31.
Hudson *v.* Wabash & W. R. Co. (32 Mo. App. 667; transferred to supreme court 101 Mo. 13), Contrib. Neg., 105; Sts. & H., 407.
Hudson *v.* Wabash Western R. Co. (101 Mo. 13, 14 S. W. Rep. 15), Contrib. Neg., 59, 75, 76, 87; Cross., Inj. at, 310; Estop., 7.
Hudson & D. Canal Co. *v.* New York & E. R. Co. (9 Paige (N. Y.) 323), Injunc., 24; Location, etc., 20.
Hudson County Chosen Freeholders *v.* State (24 N. J. L. 718; affirming 23 N. J. L. 206), Stat., 25.
Hudson River R. & T. Co. *v.* Day (54 Fed. Rep. 545), Rem. of C., 45, 50.
Hudson River R. Co. *v.* Lounsberry (25 Barb. (N. Y.) 597), Trover, 1.
Hudson River R. Co. *v.* Outwater (3 Sandf. (N. Y.) 689), Em. Dom., 498.

Hudson River Telep. Co. *v.* Watervliet T. & R. Co. (39 N. Y. S. R. 966, 61 Hun 161, 21 Civ. Pro. 204, 15 N. Y. Supp. 763). Injunc., 18.
Hudson River Telep. Co. *v.* Watervliet T. & R. Co. (135 N. Y. 393, 32 N. E. Rep. 148, 48 N. Y. S. R. 417; reversing 61 Hun 140, 39 N. Y. S. R. 952, 966, 15 N. Y. Supp. 752), Corp., 15; Costs, 4; Elec. Rys., 2, 8, 13.
Hudson River Telep. Co. *v.* Watervliet T. & R. Co. (29 N. Y. S. R. 22, 8 N. Y. Supp. 497), Elec. Rys., 13; Tel. & T. Lines, 12.
Hudson River Telep. Co. *v.* Watervliet T. & R. Co. (9 N. Y. Supp. 177, 29 N. Y. S. R. 694, 56 Hun 67; modifying 8 N. Y. Supp. 497, 29 N. Y. S. R. 22; appeal dismissed in 121 N. Y. 397, 31 N. Y. S. R. 524, 24 N. E. Rep. 832), Charters, 50; Elec. Rys., 6, 13.
Hudson Tunnel Co. *v.* Attorney-General (27 N. J. Eq. 573), Em. Dom., 95.
Hudston *v.* Midland R. Co. (L. R. 4 Q. B. 366, 10 B. & S. 504, 38 L. J. Q. B. 213, 17 W. R. 705, 20 L. T. N. S. 526), Bagg., 45.
Huelsenkamp *v.* Citizens' R. Co. (34 Mo. 45), Death, etc., 184, 341; Negl., 63.
Huelsenkamp *v.* Citizens' R. Co. (37 Mo. 537), Car. of P., 137, 140.
Huenermund *v.* Erie R. Co. (48 How. Pr. (N. Y.) 55), Fires, 136; Tresp., 7.
Huerzeler *v.* Central C. T. R. Co. (48 N. Y. S. R. 649, 20 N. Y. Supp. 676, 1 Misc. 136), Children, Inj. to, 59, 131; Death, etc., 433.
Huerzeler *v.* Central C. T. R. Co. (139 N. Y. 490, 54 N. Y. S. R. 836; affirming 48 N. Y. S. R. 649, 1 Misc. 136, 20 N. Y. Supp. 676), Children, Inj. to, 79, 101, 143.
Hueston *v.* Eaton & H. R. Co. (4 Ohio St. 685), Em. Dom., 984.
Huey *v.* Indianapolis & V. R. Co. (45 Ind. 320), Animals, 643.
Huff *v.* Ames (16 Neb. 139, 19 N. W. Rep. 623), Children, Inj. to, 127.
Huff *v.* Missouri Pac. R. Co. (17 Mo. App. 356), Fires, 259, 277, 347.
Huff *v.* Winona & St. P. R. Co. (11 Minn. 180 (Gil. 114), Winona & St. P. R. Co., 2.
Huffman *v.* Chicago, R. I. & P. R. Co. (17 Am. & Eng. R. Cas. 625, 78 Mo. 50), Fel. Serv., 153.
Hufford *v.* Grand Rapids & I. R. Co. (18 Am. & Eng. R. Cas. 336, 53 Mich. 118, 18 N. W. Rep. 580), Eject. Pass., 62; Witn., 139.
Hufford *v.* Grand Rapids & I. R. Co. (64 Mich. 631, 31 N. W. Rep. 544), Car. of P., 66; Tickets & F., 6.
Huggins *v.* Manhattan R. Co. (1 Misc. 110, 48 N. Y. S. R. 679, 20 N. Y. Supp. 648), Elev. Rys., 164.
Hughes *v.* Chester & H. R. Co. (3 DeG. F. & J. 352, 8 Jur. N. S. 221, 21 L. J. Ch. 97), Branch & L. Roads, 9.
Hughes *v.* Chicago, M. & St. P. R. Co. (79 Wis. 264, 48 N. W. Rep. 259), Employés, Inj. to, 665.
Hughes *v.* Chicago, St. P. & K. C. R. Co. (Iowa) (55 N. W. Rep. 470), App., 121; Cross., Inj. at, 131.
Hughes *v.* Cincinnati & S. R. Co. (15 Am. & Eng. R. Cas. 100, 39 Ohio St. 461), Agency, 72; Indep Contr., 7, 11, 14.
Hughes *v.* Cincinnati Southern R. Co. (91 Ky. 526, 16 S. W. Rep. 275), Negl., 102.
Hughes *v.* Craven County Com'rs (107 N. Car. 598, 12 S. E. Rep. 465), Pl., 13.
Hughes *v.* Detroit, G. H. & M. R. Co. (65 Mich. 10, 31 N. W. Rep. 603), Children, Inj. to, 176.
Hughes *v.* Detroit, G. H. & M. R. Co. (78 Mich. 399, 44 N. W. Rep. 396), Children, Inj. to, 18.
Hughes *v.* Galveston, H. & S. A. R. Co. (34 Am. & Eng. R. Cas. 66, 67 Tex. 595, 4 S. W. Rep. 219), App., 61; Cross., Inj. at, 254; Negl., 13.
Hughes *v.* Great Western R. Co. (14 C. B. 637, 2 C. L. R. 1360, 18 Jur. 1001, 23 L. J. C. P. 153), Trial, 63.
Hughes *v.* Hannibal & St. J. R. Co. (66 Mo. 325), Animals, 76.
Hughes *v.* Lake Erie & P. R. Co. (21 Ind. 175), Em. Dom., 246.
Hughes *v.* Metropolitan El. R. Co. (130 N. Y. 14, 28 N. E. Rep. 765, 40 N. Y. S. R. 587; affirming 25 J. & S. 379, 29 N. Y. S. R. 516, 8 N. Y. Supp. 535), Elev. Rys., 28, 50, 54 59, 85, 110; Words & Ph., 3.
Hughes *v.* Mine Hill & S. H. R. Co. (30 Pa. St. 517), Trial, 18.
Hughes *v.* New York & N. H. R. Co. (4 J. & S. (N. Y.) 222), Agency, 103; Evid., 129.
Hughes *v.* New York El. R. Co. (50 N. Y. S. R. 739, 67 Hun 648, 21 N. Y. Supp. 693), Elev. Rys., 144.
Hughes *v.* Northern Pac. R. Co. (13 Am. & Eng. R. Cas. 157, 9 Sawy. (U. S.) 313, 18 Fed. Rep. 106), Dissol., 4; Fed. Cts., 9; Northern Pac. R. Co., 3.
Hughes *v.* Oregonian R. Co. (11 Oreg. 158, 2 Pac. Rep. 94), Exec., 30.
Hughes *v.* Parker (19 N. H. 181), Direct., 7, 11.
Hughes *v.* Parker (20 N. H. 58), Direct., 11, 12; Incorp., 6.
Hughes *v.* Providence & W. R. Co. (2 R. I. 493), Charters, 165; Cross. Sts. & H., 27.
Hughes *v.* Providence & W. R. Co. (2 R. I. 508), Deeds, 19.
Hughes *v.* State (103 Ind. 344, 2 N. E. Rep. 956), Crim. L., 28.
Hughes *v.* Western R. Co. (61 Ga. 131), Car. of P., 642.
Hughes *v.* Winona & St. P. R. Co. (27 Minn. 137, 6 N. W. Rep. 553), Employés, Inj. to, 296.
Hughlett *v.* Louisville & N. R. Co. (Ky.) (22 S. W. Rep. 551), Trial, 66.
Hugo *v.* Great Western R. Co. (16 U. C. Q. B. 506), Farm Cross., 15.
Huhn *v.* Missouri Pac. R. Co. (31 Am. & Eng. R. Cas. 221, 92 Mo. 440, 10 West. Rep. 405, 4 S. W. Rep. 937), Employés, Inj. to, 97, 352, 673; Negl., 67.
Huidekoper *v.* Buchanan County (3 Dill. (U. S.) 175), Mun. Aid, 379.
Huidekoper *v.* Dallas County (3 Dill. (U. S.) 171), Mun. Aid, 136.
Huidekoper *v.* Hinckley Locomotive Works (99 U. S. 258), Mort., 56.

Huist *v.* Buffalo & L. H. R. Co. (16 U. C. Q. B. 299), Animals, 165.
Hulbert *v.* New York C. R. Co. (40 N. Y. 145), Car. of P., 276; Stat. & D., 25, 61.
Hulehan *v.* Green Bay, W. & St. P. R. Co. (12 Am. & Eng. R. Cas. 208, 58 Wis. 319, 17 N. W. Rep. 17), Contrib. Neg., 74; Employés, Inj. to, 80.
Hulehan *v.* Green Bay, W. & St. P. R. Co. (31 Am. & Eng. R. Cas. 322, 68 Wis. 520, 32 N. W. Rep. 520), Dam., 73; Employés, Inj. to, 602, 620; Fel. Serv., 116, 351.
Hulett *v.* St. Louis, K. C. & N. R. Co. (67 Mo. 239), Employés, Inj. to, 405.
Huling *v.* Kaw Valley R. & I. Co. (39 Am. & Eng. R. Cas. 52, 130 U. S. 559, 9 Sup. Ct. Rep. 603), Em. Dom., 207, 865.
Hull *v.* Chicago, B. & P. R. Co. (20 Am. & Eng. R. Cas. 341, 65 Iowa 713, 22 N. W. Rep. 940), Dam., 59; Em. Dom., 217; Judgm., 37.
Hull *v.* Chicago, B. & Q. R. Co. (21 Neb. 371, 32 N. W. Rep. 162), Ejectm., 2; Em. Dom., 297, 298, 972, 1010; Lim. of Ac., 11.
Hull *v.* Chicago, St. P., M. & O. R. Co. (40 Am. & Eng. R. Cas. 104, 41 Minn. 510, 5 L. R. A. 587, 43 N. W. Rep. 391), Car. of M., 471.
Hull *v.* East Line & R. R. R. Co. (28 Am. & Eng. R. Cas. 221, 66 Tex. 619, 2 S. W. Rep. 831), Agency, 21; Car. of P., 245.
Hull *v.* Equitable Acc. Assoc. (Minn.) (42 N. W. Rep. 936), Acc. Ins., 2.
Hull *v.* Sacramento Valley R. Co. (14 Cal. 387), Fires, 248.
Hull & H. R. Co., In re (L. R. 2 Eq. 262, 35 L. J. Ch. 838, 14 W. R. 758, 14 L. T. 855), Exec., 17.
Hull, B. & W. R. J. R. Co., In re (40 Ch. D. 119), Cred. Bill, 10.
Hull, B. & W. R. J. R. & D. Co. *v.* Yorkshire & D. C. & I. Co. (30 Am. & Eng. R. Cas. 84, 18 Q. B. D. 761, 5 Ry. & C. T. Cas. xi), Charges, 10; Discrim., 5.
Hulse *v.* New York, O. & W. R. Co. (71 Hun (N. Y.) 40), Death, etc., 76; Employés, 5.
Humbert *v.* Brooklyn Cable Co. (12 N. Y. S. R. 172), Cable Rys., 18.
Humbird *v.* Union St. R. Co. (110 Mo. 76, 19 S. W. Rep. 69), Trial, 161.
Humboldt Tp. *v.* Long (92 U. S. 642), Mun. Aid, 114, 344.
Hume *v.* Pittsburg, C. & St. L. R. Co. (8 Biss. (U. S.) 31), Proc., 2, 17.
Humes *v.* Missouri Pac. R. Co. (82 Mo. 221), Animals, 10.
Humes *v.* Missouri Pac. R. Co. (9 Mo. App. 588), Animals, 109.
Humeston & S. R. Co. *v.* Chicago, St. P. & K. C. R. Co. (35 Am. & Eng. R. Cas. 263, 74 Iowa 554, 38 N. W. Rep. 413), Cross. Rys., 66.
Humphrey *v.* Queen (2 Can. Exch. 386), Estop., 2.
Humphrev *v.* Pegues (16 Wall. (U. S.) 244, 3 Am. Ry. Rep. 218), Tax., 157.
Humphreys *v.* Allen (100 Ill. 511), Deeds of Tr., 11; Mort., 279.
Humphreys *v.* Allen (4 Am. & Eng. R. Cas. 14, 101 Ill. 490), Receiv., 103.
Humphreys *v.* Hopkins (81 Cal. 551, 22 Pac. Rep. 892), Attach., 20; Receiv., 119.
Humphreys *v.* McKissock (46 Am. & Eng. R. Cas. 261, 140 U. S. 304, 11 Sup. Ct. Rep. 779), Mort., 28.
Humphreys *v.* Morton (100 Ill. 592), Deeds of Tr., 11; Int., 3.
Humphreys *v.* Newport News & M. V. Co. (39 Am. & Eng. R. Cas. 363, 33 W. Va. 135, 10 S. E. Rep. 39), Employés, Inj. to, 101, 136, 335, 592; For. Corp., 20, 22.
Humphreys *v.* New York, L. E. & W. R. Co. (21 N. Y. S. R. 750, 51 Hun (N. Y.) 641, 3 N. Y. Supp. 913; affirmed in 31 N. Y. S. R. 299), Contr., 106.
Humphreys *v.* New York, L. E. & W. R. Co. (43 Am. & Eng. R. Cas. 700, 121 N. Y. 435, 24 N. E. Rep. 695, 31 N. Y. S. R. 299), Car-Trust Assoc., 2; Evid., 178.
Humphreys *v.* Perry (54 Am. & Eng. R. Cas. 29, 148 U. S. 627, 13 Sup. Ct. Rep. 711; reversing 40 Am. & Eng. R. Cas. 636), Bagg., 89.
Humphreys *v.* Richmond & M. R. Co. (51 Am. & Eng. R. Cas. 397, 88 Va. 431, 13 S. E. Rep. 985, 15 Va. L. J. 757), Em. Dom., 228.
Humphreys *v.* St. Louis, I. M. & S. R. Co. (37 Fed. Rep. 307), Contr., 106.
Humphreys County *v.* McAdoo (7 Heisk. (Tenn.) 585), Mun. Aid, 203.
Humphries *v.* Illinois C. R. Co. (70 Miss. 453, 12 So. Rep. 155), Car. of P., 257, 608.
Hungerford *v.* Chicago, M. & St. P. R. Co. (41 Am. & Eng. R. Cas. 269, 41 Minn. 444, 43 N. W. Rep. 324), Employés, Inj. to, 29, 183, 278, 343.
Hungerford *v.* Syracuse, B. & N. Y. R. Co. (46 Hun 339, 12 N. Y. S. R. 204), Farm Cross., 13.
Hungerford *v.* Syracuse, B. & N. Y. R. Co. (19 N. Y. S. R. 47, 50 Hun 602, 4 N. Y. Supp. 643), App., 117.
Hungerford *v.* Winnebago T. B. & T. Co. (33 Wis. 303), Car. of M., 251.
Hungerford's Bank *v.* Potsdam & W. R. Co. (10 Abb. Pr. (N. Y.) 24, 30 Barb. 626, 19 How. Pr. 39; reversing 9 Abb. Pr. 124), Usury, 2.
Hunkins *v.* Milwaukee & St. P. R. Co. (30 Wis. 559), New Tr., 5.
Hunn *v.* Michigan C. R. Co. (41 Am. & Eng. R. Cas. 452, 78 Mich. 513, 7 L. R. A. 500, 44 N. W. Rep. 502), App., 124; Contrib. Neg., 18; Death, etc., 282; Evid., 31, 247; Fel. Serv., 1, 57, 202, 218, 427.
Hunnewell *v.* Burlington & M. R. R. Co. (3 Dill. (U. S.) 313; affirmed in 22 Wall. (U. S.) 464), Land Grants, 98.
Hunnewell *v.* Cass County (22 Wall. (U. S.) 464), Land Grants, 5; Tax., 342.
Hunnicutt *v.* Georgia Pac. R. Co. (85 Ga. 195, 11 S. E. Rep. 580), Employés, Inj. to, 473.
Hunt *v.* Bay State Iron Co. (97 Mass. 279), Fixt., 11.
Hunt *v.* Bullock (23 Ill. 320), Deeds of Tr., 2; Mort., 8.
Hunt *v.* Chicago & D. R. Co. (20 Ill. App. 282; affirmed in part and reversed in part in 121 Ill. 638), Att'y-Gen., 1.
Hunt *v.* Chicago & N. W. R. Co. (26 Iowa

363), Dam., 36; Employés, Inj. to, 10, 765; Fel. Serv., 1, 173.
Hunt *v.* Chicago H. & D. R. Co. (121 Ill. 638, 13 N. E. Rep. 176, 11 West. Rep. 45; affirming in part 20 Ill. App. 202), St. Rys., 5, 22, 106.
Hunt *v.* Great Northern R. Co. ([1891] 1 Q. B. 601), Employés, Inj to, 783.
Hunt *v.* Great Northern R. Co. (48 Am. & Eng. R. Cas. 113, [1891] 2 Q. B. 189), Libel & S., 3.
Hunt *v.* Great Northern R. Co. (10 C. B. 900, 2 L., M. & P. 268, 15 Jur. 400, 20 L. J. Q. B. 349), Jurisd., 16.
Hunt *v.* Iowa C. R. Co. (86 Iowa 15, 52 N. W. Rep. 668), Constr. Rys., 12; Flood. Lds., 51.
Hunt *v.* Lake Shore & M. S. R. Co. (35 Am. & Eng. R. Cas. 176, 112 Ind. 69, 11 West. Rep. 107, 13 N. E. Rep. 263), Animals, 179; Fences, 4.
Hunt *v.* Michigan S. & N. I. R. Co. (37 N. Y. 162, 35 How. Pr. 287), Evid., 278.
Hunt *v.* Mississippi C. R. Co. (29 La. Ann. 440), Bills of L., 2, 3, 16, 20, 115, 125.
Hunt *v.* Missouri Pac. R. Co. (76 Mo. 115), Fixt., 6.
Hunt *v.* Missouri R. Co. (14 Mo. App. 160; reversed on other grounds in 89 Mo. 607), Negl., 64; St. Rys., 417; Trial, 36.
Hunt *v.* New York & E. R. Co. (1 Hilt. (N. Y.) 278), Car. of M., 573, 645.
Hunt *v.* New York, C. & St. L. R. Co. (20 Am. & Eng. R. Cas. 436, 99 Ind. 593), Em. Dom., 328, 929.
Hunt *v.* Oregon Pac. R. Co. (13 Sawy. (U. S.) 516, 36 Fed. Rep. 481, 1 L. R. A. 842), Constr. Rys., 109; Dam., 50.
Hunt *v.* Pennsylvania R. Co. (51 Pa. St. 475), Constr. Rys., 23; Indep. Contr., 27.
Hunt *v.* Smith (9 Kan. 137), Em. Dom., 30, 297, 336, 735, 789, 791, 792, 811.
Hunt *v.* Southeastern R. Co. (45 L. J. C. P. D. 87), Constr. Rys., 32; Contr., 79.
Hunt *v.* Steese (75 Cal. 620, 17 Pac. Rep. 920), Land Grants, 66.
Hunter *v.* Borst (13 U. C. Q. B. 141), Car. of M., 193.
Hunter *v.* Burlington, C. R. & N. R. Co. (76 Iowa 490, 41 N. W. Rep. 305), Farm Cross., 10; Judgm., 16; Mort., 259.
Hunter *v.* Burlington, C. R. & N. R. Co. (84 Iowa 605, 51 N. W. Rep. 64), Em. Dom., 216; Lim. of Ac., 61; Trial, 135; Witn., 114.
Hunter *v.* Cooperstown & S. V. R. Co. (37 Am. & Eng. R. Cas. 74, 112 N. Y. 371, 19 N. E. Rep. 820, 21 N. Y. S. R. 1; reversing 44 Hun 626, mem.), Car. of P., 383.
Hunter *v.* Cooperstown & S. V. R. Co. (47 Am. & Eng. R. Cas. 534, 126 N. Y. 18, 26 N. E. Rep. 958; former appeal 112 N. Y. 371, 26 N. E. Rep. 958, 36 N. Y. S. R. 367; reversing 58 Hun 606, 34 N. Y. S. R. 1016, 13 N. Y Supp. 953), Car. of P., 381; Death, etc., 182.
Hunter *v.* Erie & W. Transp. Co. (1 Pa. Dist. 538), Pl., 169.
Hunter *v.* Grand Trunk R. Co. (6 Ont. Pr. 67), Pl., 31.
Hunter *v.* Manhattan R. Co. (141 N. Y. 281, 36 N. E. Rep. 400, 57 N. Y. S. R. 400; affirming 19 N. Y. Supp. 703, 46 N. Y. S. R. 906), Elev. Rys., 117, 171, 187.
Hunter *v.* New York, O. & W. R. Co. (41 Am. & Eng. R. Cas. 248, 116 N. Y. 615, 23 N. E. Rep. 9, 27 N. Y. S. R. 729; reversing 42 Hun 657, 5 N. Y. S. R. 64), App., 143; Employés, Inj. to, 62; Evid., 108, 273.
Hunter *v.* New York, O. & W. R. Co. (32 N. Y. S. R. 713, 57 Hun 591, 10 N. Y. Supp. 795; affirmed in 130 N. Y. 669, mem., 29 N. E. Rep. 1034, 41 N. Y. S. R. 951), App., 115; Employés, Inj. to, 62.
Hunter *v.* Southern Pac. R. Co. (42 Am. & Eng. R. Cas. 501, 76 Tex. 195, 13 S. W. Rep. 190), Car. of M., 575, 604.
Huntingdon & B. T. M. R. & C. Co. *v.* Decker (82 Pa. St. 119, 15 Am. Ry. Rep. 425), Evid., 204, 219; Fel. Serv., 146; Subscr., 158.
Huntingdon & B. T. R. & C. Co. *v.* Decker (84 Pa. St. 419), Death, etc., 90, 380; Fel. Serv., 152.
Huntingdon & B. T. R. & C. Co. *v.* English (86 Pa. St. 247), Stock, 59.
Huntingdon & B. T. R. Co.'s Appeal (Pa.) (6 Atl. Rep. 383), Assign., 18.
Huntingdon & B. T. R. Co. *v.* McGovern (29 Pa. St. 78), Constr. Rys., 111.
Huntington *v.* Central Pac. R. Co. (2 Sawy. (U. S.) 503), Tax., 69, 193, 245, 249.
Huntington *v.* Dinsmore (4 Hun (N. Y.) 66, 6 T. & C. 195), Exp. Cos., 61.
Huntington *v.* Little Rock & Ft. S. R. Co. (3 McCrary (U. S.) 581, 16 Fed. Rep. 906), Mort., 214.
Huntington *v.* Ogdensburg & L. C. R. Co. (33 How. Pr. (N. Y.) 416), Employés, 17, 18.
Huntington *v.* Palmer (104 U. S. 482), Eq., 27; Stockh., 78.
Huntington *v.* Palmer (7 Sawy. (U. S.) 355, 8 Fed. Rep. 349), Tax., 344.
Huntington *v.* Worthen (29 Am. & Eng. R. Cas. 230, 120 U. S. 97, 7 Sup. Ct. Rep. 469), Tax., 20.
Huntington County Com'rs *v.* State (109 Ind. 596, 10 N. E. Rep. 625), Mun. Aid, 411, 444.
Huntley *v.* Dows (55 Barb. (N. Y.) 310), Car. of M., 244; Evid., 240; Words & Ph., 44.
Huntsman *v.* Great Western R. Co. (20 U. C. Q. B. 24), Eject. Pass., 128.
Huntsville, B. L. & M. S. R. Co. *v.* Corpening (97 Ala. 681, 12 So. Rep. 295), Constr. Rys., 99, 111, 114, 116; Evid., 204, 207; Witn., 94.
Huntzinger *v.* Philadelphia Coal Co. (11 Phila. (Pa.) 609), Stock, 2.
Hurd *v.* Grand Trunk R. Co. (35 Am. & Eng. R. Cas. 450, 15 Ont. App. 58), Animals, 66.
Hurd *v.* Hartford & N. Y. Steamboat Co. (40 Conn. 48), Car. of M., 331.
Hurd *v.* Pendrigh (2 Hill (N. Y.) 502), Car. of M., 745.
Hurd *v.* Rutland & B. R. Co. (25 Vt. 116), Animals, 122; Em. Dom., 149; Farm Cross., 13; Fences, 13.
Hurd *v.* Union Pac. R. Co. (8 Utah 241, 30

Pac. Rep. 982), App., 117; Employés, Inj. to, 610; Evid., 67.
Hurdman *v.* Northeastern R. Co. (L. R. 3 C. P. D. 168, 38 L. T. 339, 26 W. R. 489), Waters & W., 28.
Hurlburt *v.* Lake Shore & M. S. R. Co. (2 Int. Com. Rep. 81, 2 Int. Com. Com. 122), Int. Com., 50, 137, 165.
Hursh *v.* First Div. St. P. & P. R. Co. (17 Minn. 439 (Gil. 417), 4 Am. Ry. Rep. 204), Em. Dom., 646, 1058, 1071.
Hurst *v.* Chicago, R. I. & P. R. Co. (49 Iowa 76), Fel. Serv., 104; Witn., 192.
Hurst *v.* Detroit City R. Co. (84 Mich. 539, 48 N. W. Rep. 44), Death, etc., 24, 380, 405.
Hurst *v.* Great Western R. Co. (19 C. B. N. S. 310, 11 Jur. N. S. 730, 34 L. J. C. P. 264, 13 W. R. 950, 12 L. T. 634), Car. of P., 110.
Hurt *v.* St. Louis, I. M. & S. R. Co. (34 Am. & Eng. R. Cas. 422, 94 Mo. 255, 13 West. Rep. 233, 7 S. W. Rep. 1), Car. of P., 232, 234, 246; Comp. Neg., 29; Contrib. Neg., 10, 11; Dam., 18; New Tr., 58; Witn., 121.
Hurt *v.* St. Paul, M. & M. R. Co. (39 Minn. 485, 40 N. W. Rep. 613), Fences, 60.
Hurt *v.* Southern R. Co. (40 Miss. 391), Car. of P., 25; Pl., 65; Tickets & F., 22.
Huse *v.* Glover (119 U. S. 543, 7 Sup. Ct. Rep. 313), Int. Com., 3.
Huss *v.* Central R. & B. Co. (66 Ala. 472), Lim. of Ac., 61.
Hussey *v.* Norfolk Southern R. Co. (98 N. Car. 34, 2 Am. St. Rep. 312, 3 S. E. Rep. 923), Agency, 73; Parties, 8; Trial, 102.
Hussey *v.* Saragossa (3 Woods (U. S.) 380), Car. of L. S., 39.
Hussner *v.* Brooklyn City R. Co. (20 Am. & Eng. R. Cas. 265, 96 N. Y. 18; affirming 30 Hun 409), Trial, 86.
Hussner *v.* Brooklyn City R. Co. (43 Am. & Eng. R. Cas. 219, 114 N. Y. 433, 21 N. E. Rep. 1002, 23 N. Y. S. R. 856; affirming 41 Hun 643, 1 N. Y. S. R. 772, mem.), St. Rys., 204.
Hustisford F. M. Ins. Co. *v.* Chicago, M. & St. P. R. Co. (66 Wis. 58, 28 N. W. Rep. 64), Fire Ins., 18.
Huston *v.* Cincinnati & Z. R. Co. (21 Ohio St. 235), Fences, 41.
Huston *v.* Peters (1 Metc. (Ky.) 558), Car. of M., 253, 772.
Hutchings *v.* Ladd (16 Mich. 493), Car. of M., 33.
Hutchings *v.* Western & A. R. Co. (25 Ga. 61), Bagg., 29, 40.
Hutchins *v.* Brackett (22 N. H. 252), Car. of Mails, 8.
Hutchins *v.* St. Paul, M. & M. R. Co. (44 Minn. 5, 46 N. W. Rep. 79), Death, etc., 108, 381, 420; New Tr., 82.
Hutchinson *v.* Canadian Pac. R. Co. (17 Ont. 347), Car. of L. S., 131.
Hutchinson *v.* Chicago & N. W. R. Co. (37 Wis. 582), Dam., 51; Right of W., 9.
Hutchinson *v.* Chicago & N. W. R. Co. (41 Wis. 541; former appeal 37 Wis. 582), Dam., 82; Right of W., 9; Trial, 196; Witn., 42.
Hutchinson *v.* Chicago, St. P., M. & O. R. Co. (37 Minn. 524, 35 N. W. Rep. 433), Car. of L. S., 46; Lim. of Liab., 2.
Hutchinson *v.* Grand Trunk R. Co. (59 N. H. 487), Sales, 6.
Hutchinson *v.* McLaughlin (15 Colo. 492, 25 Pac. Rep. 317), Em. Dom., 670, 896, 962.
Hutchinson *v.* Manchester, B. & R. R. Co. (15 M. & W. 314, 3 Railw. Cas. 748, 10 Jur. 361, 15 L. J. Ex. 293), Em. Dom., 1152.
Hutchinson *v.* New Sharon, C. V. & E. R. Co. (16 Am. & Eng. R. Cas. 617, 63 Iowa 727, 18 N. W. Rep. 915), Constr. Rys., 32.
Hutchinson *v.* St. Paul, M. & M. R. Co. (19 Am. & Eng. R. Cas. 280, 32 Minn. 398, 21 N. W. Rep. 212), Cross., Inj. at, 258.
Hutchinson *v.* Western & A. R. Co. (6 Heisk. (Tenn.) 634, 12 Am. Ry. Rep. 16), Actions, 1; Negl., 84.
Hutchinson *v.* York, N. & B. R. Co. (6 Railw. Cas. 580, 5 Ex. 343, 19 L. J. Ex. 296), Employés, Inj. to, 182, 204; Fel. Serv., 1, 142, 433; Pl., 50.
Hutchinson & S. R. Co. *v.* Kingman County Com'rs (48 Kan. 70, 28 Pac. Rep. 1078), Mun. Aid, 294.
Hutson *v.* Missouri Pac. R. Co. (50 Mo. App. 300), Fel. Serv., 346, 347.
Hutton *v.* London & S. W. R. Co. (7 Hare 259, 18 Jur. 486, 18 L. J. Ch. 345), Em. Dom., 1150.
Hutton *v.* West Cork R. Co. (L. R. 23 Ch. D. 654, 52 L. J. Ch. D. 689, 49 L. T. 420, 31 W. R. 827; reversing in part 52 L. J. Ch. D. 377, 48 L. T. 626, 31 W. R. 542), Direct., 28; Dissol., 27.
Huyett *v.* Philadelphia & R. R. Co. (23 Pa. St. 373), Fires, 314.
Hyatt *v.* Burlington, C. R. & N. R. Co. (68 Iowa 662, 27 N. W. Rep. 815), Estop., 36.
Hyatt *v.* Hannibal & St. J. R. Co. (19 Mo. App. 287), Contrib. Neg., 108; Dam., 71; Employés, Inj. to, 14, 134, 256.
Hyatt *v.* New York C. & H. R. R. Co. (6 Hun (N. Y.) 306), Assault, 16; Dam., 37.
Hyatt *v.* New York, L. E. & W. R. Co. (46 N. Y. S. R. 7, 64 Hun 542, 19 N. Y. Supp. 461), Animals, 77.
Hyde *v.* Missouri Pac. R. Co. (54 Am. & Eng. R. Cas. 157, 110 Mo. 272, 19 S. W. Rep. 483), Licensees, Inj. to, 5; Tresp., Inj. to, 3; Trial, 63.
Hyde *v.* New York & N. O. Steamship Co. (17 La. Ann. 29), Car. of M., 203.
Hyde *v.* Union Pac. R. Co. (7 Utah 356, 26 Pac. Rep. 979), Children, Inj. to, 34, 97; Death, etc., 271, 324.
Hyde *v.* Wabash, St. L. & P. R. Co. (15 Am. & Eng. R. Cas. 503, 61 Iowa 441, 47 Am. Rep. 820, 16 N. W. Rep. 351), Death, etc., 109.
Hyde Park *v.* Gay (120 Mass. 589), Sunday, 9.
Hyland *v.* Short R. R. Transfer Co. (Ky.) (11 S. W. Rep. 79), Sts. & H., 223.
Hyland *v.* Yonkers R. Co. (15 N. Y. S. R. 824, 48 Hun 617, 1 N. Y. Supp. 363), St. Rys., 466.
Hyland *v.* Yonkers R. Co. (22 N. Y. S. R. 100, 51 Hun 643, mem., 4 N. Y. Supp. 305; affirmed in 119 N. Y. 612, mem., 23 N. E. Rep. 1143, 28 N. Y. S. R. 977, mem.),

Children, Inj. to, 63, 72, 79; New Tr., 54; Witn., 79.
Hyman *v.* Central Vt. R. Co. (49 N. Y. S. R. 313, 66 Hun (N. Y.) 202, 21 N. Y. Supp. 119), Bagg., 20.
Hymer *v.* Ijams (56 Md. 470), Parties, 2.
Hynes *v.* Sabula, A. & D. R. Co. (38 Iowa 258), Em. Dom., 999; Pl., 41.
Hynes *v.* San Francisco & N. P. R. Co. (20 Am. & Eng. R. Cas. 486, 65 Cal. 316, 4 Pac. Rep. 28), Animals, 288; App., 45.

Iasigi *v.* Chicago, B. & Q. R. Co. (129 Mass. 46), Stock, 71.
Iba *v.* Hannibal & St. J. R. Co. (45 Mo. 469), Actions, 12; Animals, 212, 608.
Ide *v.* Passumpsic & C. R. R. Co. (32 Vt. 297), Bonds, 56.
Igo *v.* Chicago & A. R. Co. (38 Mo. App. 377), Animals, 195; Witn., 146.
Ihl *v.* Forty-second St. & G. S. F. R. Co. (47 N. Y. 317, 2 Am. Ry. Rep. 409), Children, Inj. to, 125, 131, 141; Death, etc., 273; Words & Ph., 160.
Ilfracombe Public Conveyance Co. *v.* London & S. W. R. Co. (L. R. 4 C. P. 151), Car. of M., 531; Hacks, etc., 1.
Ilfracombe R. Co. *v.* Devon & S. R. Co. (L. R. 2 C. P. 15), Stockh., 29.
Ilfrey *v.* Sabine & E. T. R. Co. (76 Tex. 63, 13 S. W. Rep. 165), App., 115; Witn., 136.
Illick *v.* Flint & P. M. R. Co. (67 Mich. 632, 12 West. Rep. 443, 35 N. W. Rep. 708), Bridges, 20; Employés, Inj. to, 45, 56, 182, 238, 357.
Illinois *v.* Chicago & A. R. Co. (6 Biss. (U. S.) 107), Cert., 7.
Illinois *v.* Illinois C. R. Co. (16 Fed. Rep. 881), Rem. of C., 39.
Illinois *v.* Illinois C. R. Co. (33 Fed. Rep. 721), Rem. of C., 19, 24.
Illinois *v.* Illinois C. R. Co. (33 Fed. Rep. 730; modified and affirmed in 146 U. S. 387, 13 Sup. Ct. Rep. 110), Land Grants, 115; Mun. Corp., 28; Tender, 5; Wharves, 1.
Illinois *v.* United States (20 Ct. of Cl. 342), Land Grants, 128.
Illinois & M. Canal *v.* Chicago & R. I. R. Co. (14 Ill. 314), Em. Dom., 120.
Illinois & St. L. R. & C. Co. *v.* Cobb (82 Ill. 183), Em. Dom., 1057.
Illinois & St. L. R. & C. Co. *v.* Decker (3 Ill. App. 135), Dam., 49.
Illinois & St. L. R. & C. Co. *v.* Fehringer (82 Ill. 129), Pl., 100.
Illinois & St. L. R. & C. Co. *v.* People (19 Ill. App. 141), Car. of M., 56.
Illinois & St. L. R. & C. Co. *v.* St. Louis (2 Dill. (U. S.) 70), Elevators, 2.
Illinois & St. L. R. & C. Co. *v.* Switzer (117 Ill. 399, 7 N. E. Rep. 664, 57 Am. Rep. 875), Em. Dom., 606, 637.
Illinois & St. L. R. Co. *v.* Beaird (24 Ill. App. 322), Charges, 20.
Illinois & St. L. R. Co. *v.* Caldwell (17 Ill. App. 409), Tresp., 9.
Illinois & St. L. R. Co. *v.* Dawson (3 Ill. App. 292), Agency, 26.
Illinois & St. L. R. Co. *v.* McClintock (68 Ill. 296), Em. Dom., 765.
Illinois & St. L. R. Co. *v.* Stookey (31 Am. & Eng. R. Cas. 479, 122 Ill. 358, 13 N. E. Rep. 516, 11 West. Rep. 614), Tax., 257.
Illinois & St. L. R. Co. *v.* Whalen (19 Ill. App. 116), Death, etc., 375; Employés, Inj. to, 45.
Illinois & W. R. Co. *v.* Von Horn (18 Ill. 257), Em. Dom., 926; Witn., 117.
Illinois C. R. Co. *v.* Able (59 Ill. 131, 11 Am. Ry. Rep. 154), Car. of P., 428; Trial, 188.
Illinois C. R. Co. *v.* Adams (42 Ill. 474), Bills of L., 63; Car. of L. S., 42.
Illinois C. R. Co. *v.* Alexander (20 Ill. 23), Car. of M., 334, 372.
Illinois C. R. Co. *v.* Alexander (46 Ill. App. 505), Witn., 45.
Illinois C. R. Co. *v.* Allen (39 Ill. 205), Flood. Lds., 61, 63.
Illinois C. R. Co. *v.* Andrews (61 Miss. 474), Just. P., 19.
Illinois C. R. Co. *v.* Arnold (47 Ill. 173), Animals, 184.
Illinois C. R. Co. *v.* Ashmead (58 Ill. 487, 11 Am. Ry. Rep. 59), War., 4.
Illinois C. R. Co. *v.* Axley (47 Ill. App. 307), Car. of P., 213, 288, 289, 291, 559.
Illinois C. R. Co. *v.* Baches (55 Ill. 379, 1 Am. Ry. Rep. 585), Comp. Neg., 3, 8; Death, etc., 383; Fly. Switch, 1.
Illinois C. R. Co. *v.* Baker (47 Ill. 295), Animals, 116.
Illinois C. R. Co. *v.* Baltimore & O. & C. R. Co. (23 Ill. App. 531), Contr., 78.
Illinois C. R. Co. *v.* Barron (5 Wall. (U. S.) 90), Car. of P., 523; Death, etc., 366.
Illinois C. R. Co. *v.* Beard (49 Ill. App. 232), Comp. Neg., 2; Contrib. Neg., 50; Cross., Inj. at, 5; Negl., 3, 4, 18; Tresp., Inj. to, 7, 34, 96.
Illinois C. R. Co. *v.* Bentley (64 Ill. 438), Cross. Sts. & H., 86.
Illinois C. R. Co. *v.* Benton (69 Ill. 174), Cross., Inj. at, 13, 111, 136, 141.
Illinois C. R. Co. *v.* Bethel (11 Ill. App. 17), Culverts, 3, 10, 12, 13, 14; Flood. Lds., 22, 23.
Illinois C. R. Co. *v.* Bloomington (76 Ill. 447), Cross. Sts. & H., 75; Sts. & H., 93.
Illinois C. R. Co. *v.* Blye (43 Ill. App. 612), Witn., 53.
Illinois C. R. Co. *v.* Brelsford (13 Ill. App. 251), Car. of L. S., 23.
Illinois C. R. Co. *v.* Brookshire (3 Ill. App. 225), Comp. Neg., 4; Employés, Inj. to, 336; Negl., 73; Stat. & D., 114.
Illinois C. R. Co. *v.* Bryant (70 Miss. 665, 12 So. Rep. 592), Agency, 40; Attach., 55.
Illinois C. R. Co. *v.* Bochms (70 Miss. 11, 12 So. Rep. 23), Trial, 184.
Illinois C. R. Co. *v.* Buckner (28 Ill. 299), Cross., Inj. at, 272.
Illinois C. R. Co. *v.* Bull (72 Ill. 537), Animals, 204.
Illinois C. R. Co. *v.* Burns (32 Ill. App. 196), Animals, 422; Negl., 105.
Illinois C. R. Co. *v.* Carraher (47 Ill. 333), Animals, 76.
Illinois C. R. Co. *v.* Cathey (70 Miss. 332, 12 So. Rep. 253), App., 96; Employés, Inj. to, 1.
Illinois C. R. Co. *v.* Chicago (138 Ill. 453,

28 N. E. Rep. 740), Cross. Sts. & H., 43; Em. Dom., 63, 84, 1039; Sts. & H., 18.
Illinois C. R. Co. *v.* Chicago (141 Ill. 509, 30 N. E. Rep. 1036), Em. Dom., 653, 732; Right of W., 21.
Illinois C. R. Co. *v.* Chicago (51 Am. & Eng. R. Cas. 528, 141 Ill. 586, 30 N. E. Rep. 1044), Cross., St. & H., 1, 43, 50, 54, 64, 66, 74, 86; Em. Dom., 3; Sts. & H., 18.
Illinois C. R. Co. *v.* Chicago, B. & N. R. Co. (30 Am. & Eng. R. Cas. 287, 122 Ill. 473, 13 N. E. Rep. 140, 11 West. Rep. 133), Cross. Rys., 8; Em. Dom., 105, 113; Rem. of C., 16.
Illinois C. R. Co. *v.* Cobb (48 Ill. 402), Attach., 25.
Illinois C. R. Co. *v.* Cobb (64 Ill. 128), Car. of M., 41, 132, 141, 240, 719, 785; Lim. of Ac., 13.
Illinois C. R. Co. *v.* Cobb (64 Ill. 143), Car. of M., 745, 763, 784.
Illinois C. R. Co. *v.* Cobb (64 Ill. 148), Car. of M., 747.
Illinois C. R. Co. *v.* Cobb (72 Ill. 148), Bills of L., 21; Car. of M., 146, 147, 148, 791.
Illinois C. R. Co. *v.* Copeland (24 Ill. 332), Bagg., 40, 109, 114; Car. of P., 506; Tickets & F., 102.
Illinois C. R. Co. *v.* Cowles (32 Ill. 116), Bills of L., 20, 23.
Illinois C. R. Co. *v.* Cox (21 Ill. 20), Fel. Serv., 3, 113.
Illinois C. R. Co. *v.* Cragin (71 Ill. 177), Comp. Neg., 15; Contrib. Neg., 28; Cross., Inj. at, 212; Death, etc., 112, 257; Ex. & Ad., 3.
Illinois C. R. Co. *v.* Crider (56 Am. & Eng. R. Cas. 157, 91 Tenn. 489, 19 S. W. Rep. 618), Animals, 2, 3, 5, 6, 8, 9, 17; Stat., 29, 30, 34.
Illinois C. R. Co. *v.* Crudup (63 Miss. 291), Death, etc., 33, 110, 284, 286, 419, 421; Passes, 30.
Illinois C. R. Co. *v.* Cunningham (67 Ill. 316), Eject. Pass., 133.
Illinois C. R. Co. *v.* Decatur (37 Am. & Eng. R. Cas. 295, 126 Ill. 92, 1 L. R. A. 13, 18 N. E. Rep. 315; affirmed in 54 Am. & Eng. R. Cas. 282, 147 U. S. 190, 13 Sup. Ct. Rep. 293), Tax., 199.
Illinois C. R. Co. *v.* Decatur (54 Am. & Eng. R. Cas. 282, 147 U. S. 190, 13 Sup. Ct. Rep. 293; affirming 37 Am. & Eng. R. Cas. 395, 126 Ill. 92, 18 N. E. Rep. 315, 1 L. R. A. 613), Tax., 147, 199.
Illinois C. R. Co. *v.* Demars (44 Ill. 292), Dam., 50; Pl., 98.
Illinois C. R. Co. *v.* Dick (91 Ky. 434, 15 S. W. Rep. 665), Contrib. Neg., 30, 51; Cross., Inj. at, 3; Death, etc., 180; Licensees, Inj. to, 6; Sunday, 4, 5; Tresp., Inj. to, 2, 36.
Illinois C. R. Co. *v.* Dickerson (27 Ill. 55), Fences, 86.
Illinois C. R. Co. *v.* Downey (18 Ill. 259), Actions, 2.
Illinois C. R. Co. *v.* East Lake F. S. Drainage Dist. (129 Ill. 417, 21 N. E. Rep. 925), Drains, 1, 7.
Illinois C. R. Co. *v.* Ebert (74 Ill. 399), Cross., Inj. at, 67; New Tr., 72.
Illinois C. R. Co. *v.* Finney (42 Ill. App. 390), Animals, 127.
Illinois C. R. Co. *v.* Finnigan (21 Ill. 646), Animals, 445, 590.
Illinois C. R. Co. *v.* Fishell (32 Ill. App. 41), Animals, 468; Cross., Inj. at, 238.
Illinois C. R. Co. *v.* Foley (56 Am. & Eng. R. Cas. 273, 53 Fed. Rep. 459, 10 U. S. App. 537, 3 C. C. A. 589), Car. of L. S., 133; Stat. & D., 8.
Illinois C. R. Co. *v.* Frankenberg (54 Ill. 88), Car. of M., 438, 574, 610.
Illinois C. R. Co. *v.* Frazier (47 Ill. 505), Fires, 61.
Illinois C. R. Co. *v.* Frazier (64 Ill. 28), Fires, 66.
Illinois C. R. Co. *v.* Frelka (9 Ill. App. 605), Tresp., Inj. to, 44; Trial, 139.
Illinois C. R. Co. *v.* Frelka (18 Am. & Eng. R. Cas. 7, 110 Ill. 498), Employés, Inj. to, 496, 497.
Illinois C. R. Co. *v.* Friend (64 Ill. 303), Car. of M., 338.
Illinois C. R. Co. *v.* Galena (40 Ill. 344), Sts. & H., 309.
Illinois C. R. Co. *v.* Gilchrist (9 Ill. App. 135), App., 136.
Illinois C. R. Co. *v.* Gillis (68 Ill. 317), Animals, 193, 288.
Illinois C. R. Co. *v.* Goddard (72 Ill. 567), Comp. Neg., 4; Cross., Inj. at, 269.
Illinois C. R. Co. *v.* Godfrey (71 Ill. 500), Pl., 112; Tresp., Inj. to, 3.
Illinois C. R. Co. *v.* Goodwin (30 Ill. 117), Animals, 284.
Illinois C. R. Co. *v.* Goodwin (94 Ill. 262), Tax., 164, 199.
Illinois C. R. Co. *v.* Grabill (50 Ill. 241), Nuis., 7, 33, 37, 38.
Illinois C. R. Co. *v.* Grable (46 Ill. 445), Husb. & W., 31.
Illinois C. R. Co. *v.* Green (81 Ill. 19), Car. of P., 413.
Illinois C. R. Co. *v.* Hall (58 Ill. 409, 11 Am. Ry. Rep. 95), Car. of L. S., 9, 158.
Illinois C. R. Co. *v.* Hall (72 Ill. 222), Tresp., Inj. to, 96.
Illinois C. R. Co. *v.* Hamilton County (73 Iowa 313, 35 N. W. Rep. 238), Tax., 259.
Illinois C. R. Co. *v.* Hammer (72 Ill. 347), Comp. Neg., 20; Dam., 32; Stat. & D., 61.
Illinois C. R. Co. *v.* Hammer (85 Ill. 526), Comp. Neg., 16.
Illinois C. R. Co. *v.* Handy (63 Miss. 609), Car. of P., 321; Sleep. Car Cos., 32, 35.
Illinois C. R. Co. *v.* Haskins (22 Am. & Eng. R. Cas. 343, 115 Ill. 300, 2 N. E. Rep. 654), App., 118; Comp. Neg., 12; Contrib. Neg., 83; Witn., 29.
Illinois C. R. Co. *v.* Hawkins (31 Am. & Eng. R. Cas. 561, 65 Miss. 200, 3 So. Rep. 410), Animals, 386.
Illinois C. R. Co. *v.* Haynes (63 Miss. 485), Car. of L. S., 4; Evid., 202.
Illinois C. R. Co. *v.* Haynes (30 Am. & Eng. R. Cas. 38, 64 Miss. 604, 1 So. Rep. 765), Car. of L. S., 161; Car. of M., 698.
Illinois C. R. Co. *v.* Hays (19 Ill. 166), New Tr., 31.
Illinois C. R. Co. *v.* Heisner (45 Ill. App. 143), Flood. Lds., 41, 87.

Illinois C. R. Co. *v.* Herr (54 Ill. 356), Cross., Inj. at, 156.
Illinois C. R. Co. *v.* Hetherington (83 Ill. 510), Negl., 41; Tresp., Inj. to, 10, 91; Trial, 154.
Illinois C. R. Co. *v.* Hoffman (67 Ill. 287), Comp. Neg., 9.
Illinois C. R. Co. *v.* Hornberger (77 Ill. 457), Car. of M., 41.
Illinois C. R. Co. *v.* Hosler (45 Ill. App. 205), Fel. Serv., 34, 281.
Illinois C. R. Co. *v.* Houck (72 Ill. 285), Death, etc., 216.
Illinois C. R. Co. *v.* Houghton (126 Ill. 233, 18 N. E. Rep. 301, 1 L. R. A. 213, 21 Ohio L. J. 310), Deeds, 26.
Illinois C. R. Co. *v.* Hunter (70 Miss. 471, 12 So. Rep. 482), Death, etc., 95; Fel. Serv., 190, 424.
Illinois C. R. Co. *v.* Hutchinson (47 Ill. 408), Contrib. Neg., 27; Death, etc., 208; Tresp., Inj. to, 73.
Illinois C. R. Co. *v.* Illinois (146 U. S. 387, 13 Sup. Ct. Rep. 110; affirming 33 Fed. Rep. 730), Em. Dom., 143; Rip. Rts., 13.
Illinois C. R. Co. *v.* Indiana & I. C. R. Co. (85 Ill. 211), Adv. Poss., 6; Deeds, 40; Em. Dom., 983.
Illinois C. R. Co. *v.* Irvin (72 Ill. 452), Tax., 183, 199.
Illinois C. R. Co. *v.* Jewell (46 Ill. 99), Employés, Inj. to, 350.
Illinois C. R. Co. *v.* Johnson (34 Ill. 389), Car. of M., 605, 734; Lim. of Ac., 36.
Illinois C. R. Co. *v.* Johnson (40 Ill. 35), Contr., 12; Evid., 98.
Illinois C. R. Co. *v.* Johnson (67 Ill. 312), Car. of P., 81, 116; Eject. Pass., 133; Tickets & F., 28.
Illinois C. R. Co. *v.* Jones (11 Ill. App. 324), Employés, Inj. to, 96, 223.
Illinois C. R. Co. *v.* Jonte (13 Ill. App. 424), Agency, 13; Car. of M., 455, 597; Contr., 11.
Illinois C. R. Co. *v.* Jordan (63 Miss. 458), Animals, 211; Sts. & H., 322.
Illinois C. R. Co. *v.* Kanouse (39 Ill. 272), Animals, 644, 645.
Illinois C. R. Co. *v.* Keen (72 Ill. 512), Fel. Serv., 268.
Illinois C. R. Co. *v.* Kerr (68 Miss. 14, 8 So. Rep. 330), Car. of M., 575.
Illinois C. R. Co. *v.* King (69 Miss. 852, 13 So. Rep. 824), False Imp., 3, 5.
Illinois C. R. Co. *v.* Larsen (42 Ill. App. 264), Contrib. Neg., 98; Cross., Inj. at, 338.
Illinois C. R. Co. *v.* Latimer (128 Ill. 163, 21 N. E. Rep. 7; affirming 28 Ill. App. 552), Eject. Pass., 64, 65; Pl., 33; Witn., 165.
Illinois C. R. Co. *v.* Leidig (64 Ill. 151), Sales, 12.
Illinois C. R. Co. *v.* Lutz (84 Ill. 598), Car. of P., 426.
Illinois C. R. Co. *v.* McClellan (54 Ill. 58), Car. of M., 41, 110, 132, 140, 146, 289, 446.
Illinois C. R. Co. *v.* McClelland (42 Ill. 355), Fires, 110, 174, 232.
Illinois C. R. Co. *v.* McKay (69 Miss. 139, 12 So. Rep. 447), Fires, 110.
Illinois C. R. Co. *v.* McKee (43 Ill. 119), Animals, 177, 181, 383.
Illinois C. R. Co. *v.* McLean County (17 Ill. 291), Tax., 24.
Illinois C. R. Co. *v.* Maffit (67 Ill. 431), Comp. Neg., 16; Cross, Inj. at, 359.
Illinois C. R. Co. *v.* Mattoon (141 Ill. 32, 30 N. E. Rep. 773), Tax., 199.
Illinois C. R. Co. *v.* Meacham (91 Tenn. 428, 19 S. W. Rep. 232), Car. of P., 92; Tresp., Inj. to, 15, 81.
Illinois C. R. Co. *v.* Middlesworth (43 Ill. 64), Comp. Neg., 10.
Illinois C. R. Co. *v.* Middlesworth (46 Ill. 494), Animals, 284.
Illinois C. R. Co. *v.* Miller (32 Ill. App. 259), Bills of L., 57; Car. of M., 602, 720.
Illinois C. R. Co. *v.* Miller (68 Miss. 760, 10 So. Rep. 61), Flood. Lds., 40, 46, 91.
Illinois C. R. Co. *v.* Mills (42 Ill. 407), Fires, 61, 244, 268, 277, 318.
Illinois C. R. Co. *v.* Minor (52 Am. & Eng. R. Cas. 441, 69 Miss. 710, 16 L. R. A. 627, 11 So. Rep. 101), Car. of P., 317; Dam., 103; Trial, 149.
Illinois C. R. Co. *v.* Mitchell (68 Ill. 471), Car. of M., 374.
Illinois C. R. Co. *v.* Modglin (85 Ill. 481), Employés, Inj. to, 393.
Illinois C. R. Co. *v.* Morrison (19 Ill. 136), Car. of L. S., 15, 94.
Illinois C. R. Co. *v.* Morrissey (45 Ill. App. 127), Employés, Inj. to, 223; Fel. Serv., 479, 503.
Illinois C. R. Co. *v.* Neer (26 Ill. App. 356), Comp. Neg., 2; Employés, Inj. to, 223, 431, 440.
Illinois C. R. Co. *v.* Neer (31 Ill. App. 126), Employés, Inj. to, 247, 431; Trial, 101.
Illinois C. R. Co. *v.* Nelson (59 Ill. 110, 11 Am. Ry. Rep. 148), Car. of P., 292; Eject. Pass., 23, 65; Tickets & F., 23.
Illinois C. R. Co. *v.* Noble (56 Am. & Eng. R. Cas. 186, 142 Ill. 578, 32 N. E. Rep. 684; reversing 42 Ill. App. 509), Animals, 115, 120.
Illinois C. R. Co. *v.* Nowicki (148 Ill. 29, 35 N. E. Rep. 358), Death, etc., 230, 235, 236.
Illinois C. R. Co. *v.* Nowicki (46 Ill. App. 566), Contrib. Neg., 39, 87, 99; Death, etc., 176.
Illinois C. R. Co. *v.* Nunn (51 Ill. 78), Fires, 329.
Illinois C. R. Co. *v.* Owens (53 Ill. 391), Car. of L. S., 97; Partn, 4.
Illinois C. R. Co. *v.* Parks (54 Ill. 294), Trover, 1.
Illinois C. R. Co. *v.* Parks (88 Ill. 373), 21 Am. Ry. Rep. 313), Car. of P., 646.
Illinois C. R. Co. *v.* Patterson (69 Ill. 650), Employés, Inj. to, 363.
Illinois C. R. Co. *v.* Patterson (93 Ill. 290), Employés, Inj. to, 452.
Illinois C. R. Co. *v.* Pendergrass (69 Miss. 425, 12 So. Rep. 954), Death, etc., 82, 84.
Illinois C. R. Co. *v.* People (1 Am & Eng. R. Cas. 188, 95 Ill. 313), Charges, 8.
Illinois C. R. Co. *v.* People (119 Ill. 137, 6 N. E. Rep. 451), Tax., 170, 199.
Illinois C. R. Co. *v.* People (32 Am. & Eng. R. Cas. 417, 121 Ill. 304, 12 N. E. Rep

670, 10 West. Rep. 582), Discrim., 37, 43, 45, 79, 82.
Illinois C. R. Co. *v.* People (143 Ill. 434, 33 N. E. Rep. 173), Car. of P., 215; Charters, 63; Fences, 4; Int. Com., 216; Location, etc., 20; Mand., 15; Stat., 23; Witn., 98, 145.
Illinois C. R. Co. *v.* People (49 Ill. App. 538), Sts. & H., 8, 404.
Illinois C. R. Co. *v.* People (49 Ill. App. 540), Sts. & H., 404.
Illinois C. R. Co. *v.* Person (65 Miss. 319, 3 So. Rep. 375), Animals, 198, 402.
Illinois C. R. Co. *v.* Peterson (49 Am. & Eng. R. Cas. 171, 68 Miss. 454, 10 So. Rep. 43), Car. of L. S., 28.
Illinois C. R. Co. *v.* Phelps (4 Ill. App. 238), Actions, 10; Car. of M., 41, 736.
Illinois C. R. Co. *v.* Phelps (29 Ill. 447), Animals, 194, 284.
Illinois C. R. Co. *v.* Phillips (49 Ill. 234), Explosions, 3; Negl., 17.
Illinois C. R. Co. *v.* Phillips (55 Ill. 194, 2 Am. Ry. Rep. 374), Explosions, 3.
Illinois C. R. Co. *v.* Pirtle (47 Ill. App. 498), Employés, Inj. to, 141; Fel. Serv., 73, 84, 270.
Illinois C. R. Co. *v.* Read (37 Ill. 484, 87 Am. Dec. 260), Passes, 34; Release, 12.
Illinois C. R. Co. *v.* Reedy (17 Ill. 580), Animals, 480, 495.
Illinois C. R. Co. *v.* Ross (31 Ill. App. 170), Assault, 6.
Illinois C. R. Co. *v.* Rucker (14 Ill. 353), Em. Dom., 502; Sts. & H., 108.
Illinois C. R. Co. *v.* Ruffin (Miss.) (3 So. Rep. 578), Evid., 162.
Illinois C. R. Co. *v.* Schwartz (11 Ill. App. 482), Car. of M., 711.
Illinois C. R. Co. *v.* Schwartz (13 Ill. App. 490), Car. of M., 431; Parties, 5.
Illinois C. R. Co. *v.* Scruggs (69 Miss. 418, 13 So. Rep. 698), Car. of L. S., 69.
Illinois C. R. Co. *v.* Sheehan (29 Ill. App. 90), Assault, 8; Car. of P., 312.
Illinois C. R. Co. *v.* Shultz (64 Ill. 172), Comp. Neg., 18; Employés, Inj. to, 159.
Illinois C. R. Co. *v.* Simmons (38 Ill. 242), Car. of P., 361, 646; Pl., 180.
Illinois C. R. Co. *v.* Simmons (49 Ill. App. 443), Car. of L. S., 159.
Illinois C. R. Co. *v.* Simpson (17 Ill. App. 325), Car. of M., 257.
Illinois C. R. Co. *v.* Slater (129 Ill. 91, 21 N. E. Rep. 575; affirming 28 Ill. App. 73), Children, Inj. to, 74; Cross., Inj. at, 100, 103, 163; Death, etc., 227, 286.
Illinois C. R. Co. *v.* Slater (139 Ill. 190, 28 N. E. Rep. 830; affirming 39 Ill. App. 69), Cross., Inj. at, 348; Death, etc., 335, 356; Judgm., 18; Negl., 63.
Illinois C. R. Co. *v.* Slatton (54 Ill. 133), Death, etc., 188.
Illinois C. R. Co. *v.* Smith (70 Miss. 344, 12 So. Rep. 461), Attach., 37.
Illinois C. R. Co. *v.* Smyser (38 Ill. 354), Car. of M., 72, 76; Lim. of Liab., 16.
Illinois C. R. Co. *v.* Southern Bank (41 Ill. App. 287), Bills of L., 47, 60, 127; Car. of M., 496.
Illinois C. R. Co. *v.* Stone (18 Am. & Eng. R. Cas. 416, 20 Fed. Rep. 468), Charges, 4; Charters, 22; Int. Com., 216.
Illinois C. R. Co. *v.* Sutton (42 Ill. 438), Eject. Pass., 65, 67; Evid., 210.
Illinois C. R. Co. *v.* Sutton (53 Ill. 397), Car. of P., 553; Eject. Pass., 65, 90, 106.
Illinois C. R. Co. *v.* Swearingen (33 Ill. 289), Animals, 294; Fences, 87, 90.
Illinois C. R. Co. *v.* Swearingen (47 Ill. 206), Animals, 142, 145, 146.
Illinois C. R. Co. *v.* Tait (50 Ill. 48), Cross., Inj. at, 156.
Illinois C. R. Co. *v.* Taylor (24 Ill. 323), Bagg., 114.
Illinois C. R. Co. *v.* Taylor (46 Ill. App. 141), Car. of P., 234.
Illinois C. R. Co. *v.* Thompson (116 Ill. 159, 5 N. E. Rep. 117), Agency, 39.
Illinois C. R. Co. *v.* Tronstine (31 Am. & Eng. R. Cas. 99, 64 Miss. 834, 2 So. Rep. 255), Bagg., 54; Evid., 174.
Illinois C. R. Co. *v.* Trowbridge (31 Ill. App. 190), Fences, 63.
Illinois C. R. Co. *v.* Turrill (94 U. S. 695, 15 Am. Ry. Rep. 387; reversing 3 Biss. 72, 5 Biss. 344), Pat. for Inv., 43.
Illinois C. R. Co. *v.* Union County (94 Ill. 70), Land Grants, 21.
Illinois C. R. Co. *v.* United States (16 Ct. of Cl. 312), Claims Against U. S., 8; War, 4.
Illinois C. R. Co. *v.* United States (18 Ct. of Cl. 118), Car. of Mails, 10.
Illinois C. R. Co. *v.* Wade (46 Ill. 115), Animals, 353.
Illinois C. R. Co. *v.* Walker (63 Miss. 13), Animals, 116.
Illinois C. R. Co. *v.* Waters, (41 Ill. 73), Car. of L. S., 11, 18, 144, 159.
Illinois C. R. Co. *v.* Wathen (17 Ill. App. 582), Em. Dom., 208.
Illinois C. R. Co. *v.* Weatherby (63 Miss. 581), Animals, 498.
Illinois C. R. Co. *v.* Welch (52 Ill. 183), Employés, Inj. to, 84, 228, 773; Release, 22.
Illinois C. R. Co. *v.* Weldon (52 Ill. 290), Death, etc., 345, 430; Witn., 14.
Illinois C. R. Co. *v.* Whalen (42 Ill. 396), Animals, 456, 480; Fences, 68.
Illinois C. R. Co. *v.* White (18 Ill. 164), Sts. & H., 416.
Illinois C. R. Co. *v.* Whittemore (43 Ill. 420), Car. of P., 62; Eject. Pass., 65; Tickets & F., 37.
Illinois C. R. Co. *v.* Willenborg (26 Am. & Eng. R. Cas. 358, 117 Ill. 203, 7 N. E. Rep. 698, 57 Am. Rep. 862), Em. Dom., 217; Farm Cross., 3, 9; Stat., 62.
Illinois C. R. Co. *v.* Williams (27 Ill. 48), Fences, 54, 96.
Illinois C. R. Co. *v.* Wren (43 Ill. 77), Animals, 69.
Illinois C. R. Co. *v.* Zang (10 Ill. App. 594), Evid., 68; Trial, 142.
Illinois G. T. R. Co. *v.* Cook (29 Ill. 237), Mun. Aid, 337; Subscr., 114, 118.
Illinois G. T. R. Co. *v.* Wade (140 U. S. 65, 11 Sup. Ct. Rep. 709), Mun. Aid, 430.
Illinois Midland R. Co. *v.* Barnett Sup'rs (85 Ill. 313), Mun. Aid, 93, 207, 225, 238, 286, 289, 294; Name, 1.
Illinois Midland R. Co. *v.* People (84 Ill. 426), Leases, 12.

Illinois River R. Co. *v.* Beers (27 Ill. 185), Subscr., 120.
Illinois River R. Co. *v.* Zimmer (20 Ill. 654), Charters, 35; Subscr., 89.
Illinois T. & S. Bank *v.* Pacific R. Co. (99 Cal. 407, 33 Pac. Rep. 1132), App., 12.
Illinois W. Ext. R. Co. *v.* Gay (7 Ill. App. 404), App., 122.
Illinois W. Ext. R. Co. *v.* Mayrand (93 Ill. 591), Em. Dom., 357, 824.
Illsley *v.* Portland & R. R. Co. (56 Me. 531), Injunc., 14.
Iltis *v.* Chicago, M. & St. P. R. Co. (37 Am. & Eng. R. Cas. 299, 40 Minn. 273, 41 N. W. Rep. 1040), Death, etc., 155, 175.
Ilwaco R. & N. Co. *v.* Hedrick (1 Wash. 446, 25 Pac. Rep. 335), Children, Inj. to, 26, 31; Witn., 172.
Ilwaco R. & N. Co. *v.* Oregon S. L. & U. N. R. Co. (56 Am. & Eng. R. Cas. 1, 57 Fed. Rep. 673; reversing 51 Fed. Rep. 611), Int. Com., 64, 103.
Imhoff *v.* Chicago & M. R. Co. (20 Wis. 344), App., 46; Car. of P., 30.
Imhoff *v.* Chicago & M. R. Co. (22 Wis. 681), Car. of P., 265, 281.
Imlay *v.* Norwich & W. R. Co. (4 Blatchf. (U. S.) 227), Pat. for Inv., 32.
Imlay *v.* Union Branch R. Co. (26 Conn. 249), Em. Dom., 163, 453.
Imperial Coal Co. *v.* Pittsburg & L. E. R. Co. (2 Int. Com. Rep. 436, 2 Int. Com. Com. 618), Int. Com., 49, 68, 125.
Imperial F. Ins. Co. *v.* American Merchants' Union Exp. Co. (95 U. S. 227), Fire Ins., 6.
Independence Mills Co. *v.* Burlington, C. R. & N. R. Co. (32 Am. & Eng. R. Cas. 456, 72 Iowa 535, 34 N. W. Rep. 320), Car. of M., 357, 544, 698, 723; Pl., 177.
Independent Refiners' Assoc. *v.* Western N. Y. & P. R. Co. (5 Int. Com. Com. 415, 4 Int. Com. Rep. 162), Int. Com., 79, 145.
Indiana *v.* Pullman Palace Car Co. (13 Am. & Eng. R. Cas. 307, 11 Biss. (U. S.) 561, 16 Fed. Rep. 193), Int. Com., 190, 196; Tax., 5.
Indiana & I. C. R. Co. *v.* Davis (20 Ind. 6), Bills & N., 1, 18.
Indiana & I. C. R. Co. *v.* Scearce (23 Ind. 223; former appeal 17 Ind. 193), Contr., 79.
Indiana & I. C. R. Co. *v.* Sprague (2 Am. & Eng. R. Cas. 532, 103 U. S. 756), Mort., 80; Mun. Aid, 353.
Indiana & I. S. R. Co. *v.* Sampson (31 Ill. App. 513), Fences, 21.
Indiana, B. & W. R. Co. *v.* Adams (112 Ind. 302, 11 West. Rep. 668, 14 N. E. Rep. 80), Comprom., 2.
Indiana, B. & W. R. Co. *v.* Adamson (13 Am. & Eng. R. Cas. 456, 90 Ind. 60), Fires, 183.
Indiana, B. & W. R. Co. *v.* Adamson (34 Am. & Eng. R. Cas. 127, 114 Ind. 282, 12 West. Rep. 708, 15 N. E. Rep. 5), Contr., 77; Culverts, 8; Dam., 4; Evid., 23.
Indiana, B. & W. R. Co. *v.* Allen (100 Ind. 409), Em. Dom., 300, 435, 577, 646; Guard. & W., 1.
Indiana, B. & W. R. Co. *v.* Allen (113 Ind. 308, 12 West. Rep. 910, 15 N. E. Rep. 451), Cloud on T., 8; Em. Dom., 435, 670; Judgm., 19, 32.
Indiana, B. & W. R. Co. *v.* Allen (113 Ind. 581, 12 West. Rep. 887, 15 N. E. Rep. 446), Em. Dom., 957, 1017, 1033; Lim. of Ac., 66.
Indiana, B. & W. R. Co. *v.* Barnhart (115 Ind. 399, 13 West. Rep. 425, 16 N. E. Rep. 121), Cross. Rys., 76; Employés, Inj. to, 482; Licensees, Inj. to, 11, 14; Negl., 1.
Indiana, B. & W. R. Co. *v.* Brittingham (98 Ind. 294), Guard. & W., 1.
Indiana, B. & W. R. Co. *v.* Burdge (18 Am. & Eng. R. Cas. 192, 94 Ind. 46), Agency, 80; Car. of P., 550; Contrib. Neg., 70.
Indiana, B. & W. R. Co. *v.* Cook (102 Ind. 133, 26 N. E. Rep. 203), Em. Dom., 574.
Indiana, B. & W. R. Co. *v.* Craig (14 Ill. App. 407), Fires, 277.
Indiana, B. & W. R. Co. *v.* Dailey (110 Ind. 75, 10 N. E. Rep. 631), Employés, Inj. to, 530; Fel. Serv., 452.
Indiana, B. & W. R. Co. *v.* Drum (21 Ill. App. 331), Cat.-Gds., 18, 30.
Indiana, B. & W. R. Co. *v.* Eberle (32 Am. & Eng. R. Cas. 220, 110 Ind. 542, 9 West. Rep. 206, 11 N. E. Rep. 467), Em. Dom., 668, 1083; Sts. & H., 259.
Indiana, B. & W. R. Co. *v.* Finnell (116 Ind. 414, 19 N. E. Rep. 204), Contr., 79; Estop., 14.
Indiana, B. & W. R. Co. *v.* Foster (107 Ind. 430, 8 N. E. Rep. 264), Fires, 136; Trial, 8.
Indiana, B. & W. R. Co. *v.* Greene (25 Am. & Eng. R. Cas. 322, 106 Ind. 270, 55 Am. Rep. 736, 6 N. E. Rep. 603), Cross., Inj. at, 194; Death, etc., 235.
Indiana, B. & W. R. Co. *v.* Hale (19 Am. & Eng. R. Cas. 562, 93 Ind. 79), Fences, 68; Witn., 98.
Indiana, B. & W. R. Co. *v.* Hammock (32 Am. & Eng. R. Cas. 127, 113 Ind. 1, 14 N. E. Rep. 737, 12 West. Rep. 297), Cross., Inj. at, 195, 264, 294, 313.
Indiana, B. & W. R. Co. *v.* Hinshaw (21 Ill. App. 335), App., 117.
Indiana, B. & W. R. Co. *v.* James (18 Ill. App. 655), Car. of L. S., 146.
Indiana, B. & W. R. Co. *v.* Koons (24 Am. & Eng. R. Cas. 376, 105 Ind. 507, 5 N. E. Rep. 549), Contr., 90; Judgm., 16.
Indiana, B. & W. R. Co. *v.* Leak (13 Am. & Eng. R. Cas. 521, 89 Ind. 596), Animals, 117.
Indiana, B. & W. R. Co. *v.* McBroom (13 Am. & Eng. R. Cas. 458, 91 Ind. 111), Fires, 183.
Indiana, B. & W. R. Co. *v.* McBroom (33 Am. & Eng. R. Cas. 90, 114 Ind. 198, 15 N. E. Rep. 831), Ejectm., 5; Vend. & P., 4.
Indiana, B. & W. R. Co. *v.* Nicewander (21 Ill. App. 305), Fires, 3, 59.
Indiana, B. & W. R. Co. *v.* Overman (29 Am. & Eng. R. Cas. 161, 110 Ind. 538, 10 N. E. Rep. 575), Fires, 62, 66, 84, 184, 223.
Indiana, B. & W. R. Co. *v.* Overton (117 Ind. 253, 20 N. E. Rep. 147), Animals, 345, 383.
Indiana, B. & W. R. Co. *v.* Quick (109 Ind. 295, 9 N. E. Rep. 788, 925), Animals, 107, 127; Fences, 58.

Indiana, B. & W. R. Co. *v.* Sawyer (109 Ind. 342, 10 N. E. Rep. 105), Animals, 107.
Indiana, B. & W. R. Co. *v.* Schertz (12 Ill. App. 304), Animals, 136.
Indiana, B. & W. R. Co. *v.* Wheeler (115 Ind. 253, 15 West. Rep. 133, 17 N. E. Rep. 563), Cross., Inj. at, 12.
Indiana Car Co. *v.* Parker (100 Ind. 181), Contrib. Neg., 85; Dam., 67, 70, 73; Employés, Inj. to, 99, 144; Fel. Serv., 1, 94, 199, 202, 214; Trial, 44
Indiana C. R. Co. *v.* Atkinson (6 Ind. 149), Em. Dom., 775.
Indiana C. R. Co. *v.* Boden (10 Ind. 96), Em. Dom., 984.
Indiana C. R. Co. *v.* Gapen (10 Ind. 292), Animals, 185, 598.
Indiana C. R. Co. *v.* Gulick (19 Ind. 83), Bagg., 114.
Indiana C. R. Co. *v.* Hudelson (13 Ind. 325), Stat. & D., 73.
Indiana C. R. Co. *v.* Hunter (8 Ind. 74), Em. Dom., 465, 733, 1004.
Indiana C. R. Co. *v.* Leamon (18 Ind. 173), Animals, 172.
Indiana C. R. Co. *v.* Moore (23 Ind. 14), Cat.-Gds., 32.
Indiana C. R. Co. *v.* Mundy (21 Ind. 48), Passes, 28.
Indiana C. R. Co. *v.* Oakes (20 Ind. 9), Em. Dom., 276, 984; Lim. of Ac., 67.
Indiana C. R. Co. *v.* Potts (7 Ind. 681), Stat., 34; Sts. & H., 425.
Indiana C. R. Co. *v.* State (3 Ind. 421), Em. Dom., 95, 377.
Indiana, I. & I. R. Co. *v.* Dooling (42 Ill. App. 63), Animals, 460, 594.
Indiana, I. & I. R. Co. *v.* Larrew (130 Ind. 368, 30 N. E. Rep. 517), Liens, 50.
Indiana, I. & I. R. Co. *v.* Snyder (Ind.) (53 Am. & Eng. R. Cas. 225, 32 N. E. Rep. 1129), Employés, Inj. to, 127, 139.
Indiana N. & S. R. Co. *v.* Attica (56 Ind. 476), Mun. Aid, 254; Words & Ph., 77.
Indiana Oolitic Limestone Co. *v.* Louisville, N. A. & C. R. Co. (107 Ind. 301, 7 N. E. Rep. 244), Em. Dom., 865.
Indianapolis *v.* Lawyer (38 Ind. 348), Sts. & H., 166.
Indianapolis & C. Gravel Road Co. *v.* Belt R. Co. (32 Am. & Eng. R. Cas. 173, 110 Ind. 5, 10 N. E. Rep. 923), Cross., St. & H., 8.
Indianapolis & C. R. Co. *v.* Adkins (23 Ind. 340), Animals, 184, 352.
Indianapolis & C. R. Co. *v.* Brower (12 Ind. 374), Em. Dom., 389.
Indianapolis & C. R. Co. *v.* Caldwell (9 Ind. 397), Animals, 117, 407.
Indianapolis & C. R. Co. *v.* Case (15 Ind. 42), Evidence., 101.
Indianapolis & C. R. Co. *v.* Cox (29 Ind. 360), Bagg., 95.
Indianapolis & C. R. Co. *v.* Elliott (20 Ind. 430), Animals, 15, 293, 303.
Indianapolis & C. R. Co. *v.* Guard (24 Ind. 222), Animals, 155.
Indianapolis & C. R. Co. *v.* Jewett (16 Ind. 273), Evid., 152, 156, 193.
Indianapolis & C. R. Co. *v.* Kercheval (16 Ind. 84), Animals, 15; Charters, 75, 127.
Indianapolis & C. R. Co. *v.* Kercheval (24 Ind. 139), Animals, 293, 336.
Indianapolis & C. R. Co. *v.* Kibby (28 Ind. 479), Proc., 8.
Indianapolis & C. R. Co. *v.* Kinney (8 Ind. 402), Animals, 117, 475; Fences, 12, 61.
Indianapolis & C. R. Co. *v.* Klein (11 Ind. 38), Employés, Inj. to, 543.
Indianapolis & C. R. Co. *v.* Lawrenceburg (34 Ind. 304), Sts. & H., 156.
Indianapolis & C. R. Co. *v.* Logan (19 Ind. 294), Animals, 146.
Indianapolis & C. R. Co. *v.* Love (10 Ind. 554), Cross., Inj. at, 43; Employés, Inj. to, 96, 299, 517.
Indianapolis & C. R. Co. *v.* Lowe (29 Ind. 545), Animals, 172.
Indianapolis & C. R. Co. *v.* McClure (26 Ind. 370), Animals, 50; Contrib. Neg., 50.
Indianapolis & C. R. Co. *v.* McKinney (24 Ind. 283), Animals, 185, 281, 329, 350; Fences, 63.
Indianapolis & C. R. Co. *v.* Means (14 Ind. 30), Animals, 126, 480.
Indianapolis & C. R. Co. *v.* Moore (16 Ind. 43), Animals, 407.
Indianapolis & C. R. Co. *v.* Oestel (20 Ind. 231), Animals, 107.
Indianapolis & C. R. Co. *v.* Paramore (31 Ind. 143), Contrib. Neg., 53; Evid., 127; Fires, 20, 22, 25, 31, 75, 264.
Indianapolis & C. R. Co. *v.* Parker (29 Ind. 471), Animals, 6, 108; Fences, 55.
Indianapolis & C. R. Co. *v.* Remmy (13 Ind. 518), Car. of M., 729.
Indianapolis & C. R. Co. *v.* Renner (17 Ind. 135), Animals, 499.
Indianapolis & C. R. Co. *v.* Rutherford (29 Ind. 82), Car. of P., 157, 487; Contrib. Neg., 12, 79; Pl., 169.
Indianapolis & C. R. Co. *v.* Snelling (16 Ind. 435), Animals, 579; App., 115.
Indianapolis & C. R. Co. *v.* State (37 Ind. 489, 5 Am. Ry. Rep. 170), Mand., 13; Sts. & H., 360.
Indianapolis & C. R. Co. *v.* Stephens (28 Ind. 429), Evid., 105.
Indianapolis & C. R. Co. *v.* Toon (20 Ind. 230), Animals, 612.
Indianapolis & C. R. Co. *v.* Townsend (10 Ind. 38), Animals, 126, 217.
Indianapolis & C. R. Co. *v.* Wharton (13 Ind. 509), Animals, 441.
Indianapolis & C. R. Co. *v.* Williams (14 Ind. 521), App., 122.
Indianapolis & C. R. Co. *v.* Wilsey (20 Ind. 229), Animals, 617.
Indianapolis & C. R. Co. *v.* Wright (13 Ind. 213), Animals, 222.
Indianapolis & C. R. Co. *v.* Wright (22 Ind. 376), Contrib. Neg., 11.
Indianapolis & M. R. Co. *v.* Solomon (23 Ind. 534), Animals, 644.
Indianapolis & St. L. R. Co. *v.* Adams (36 Ill. App. 629), Car. of L. S., 78.
Indianapolis & St. L. R. Co. *v.* Blackman (63 Ill. 117, 7 Am. Ry. Rep. 56), Cross., Inj. at, 142; Stat., 64.
Indianapolis & St. L. R. Co. *v.* Calvert (32 Am. & Eng. R. Cas. 170, 110 Ind. 555, 9 West. Rep. 238, 11 N. E. Rep. 476), Sts. & H., 151.

Indianapolis & St. L. R. Co. *v.* Christy (43 Ind. 143), Animals, 107.
Indianapolis & St. L. R. Co. *v.* Estes (96 Ill. 470), Employés, Inj. to, 133.
Indianapolis & St. L. R. Co. *v.* Evans (88 Ill. 63, 21 Am. Ry. Rep. 284), Comp. Neg., 4, 16, 104.
Indianapolis & St. L. R. Co. *v.* Galbreath (63 Ill. 436, 7 Am. Ry. Rep. 128), Negl., 27.
Indianapolis & St. L. R. Co. *v.* Hackethal (72 Ill. 612), Fires, 245.
Indianapolis & St. L. R. Co. *v.* Hall (88 Ill 368), Animals, 142, 145, 146.
Indianapolis & St. L. R. Co. *v.* Herndon (81 Ill. 143), Car. of M., 303.
Indianapolis & St. L. R. Co. *v.* Horst (93 U. S. 291), Car. of P., 288; Contrib. Neg., 105; Trial, 202.
Indianapolis & St. L. R. Co. *v.* Howerton (127 Ind. 236, 26 N. E. Rep. 792), Eject. Pass., 132.
Indianapolis & St. L. R. Co. *v.* Johnson (102 Ind. 352, 26 N. E. Rep. 200), Employés, Inj. to, 503; Fel. Serv., 1, 142, 202, 449.
Indianapolis & St. L. R. Co. *v.* Juntgen (10 Ill. App. 295), Strikes, 1.
Indianapolis & St. L. R. Co. *v.* Jurey (8 Ill. App. 160), Car. of L. S., 24.
Indianapolis & St. L. R. Co. *v.* Kennedy (3 Am. & Eng. R. Cas. 467, 77 Ind. 507), Eject. Pass., 23, 82.
Indianapolis & St. L. R. Co. *v.* Miller (71 Ill. 463), Constr. Rys., 74, 76.
Indianapolis & St. L. R. Co. *v.* Morganstern (9 Am. & Eng. R. Cas. 469, 103 Ill. 149), App., 133.
Indianapolis & St. L. R. Co. *v.* Morgenstern (12 Am. & Eng. R. Cas. 228, 106 Ill. 216), App., 116; Fel. Serv., 367, 511.
Indianapolis & St. L. R. Co. *v.* Morris (67 Ill. 295), Agency, 111.
Indianapolis & St. L. R. Co. *v.* People (32 Ill. App. 286), Sts. & H., 425.
Indianapolis & St. L. R. Co. *v.* People (91 Ill. 452), Cross. Rys., 83; Just. P., 1.
Indianapolis & St. L. R. Co. *v.* People (41 Am. & Eng. R. Cas. 634, 130 Ill. 62, 22 N. E. Rep. 854). Tax., 257.
Indianapolis & St. L. R. Co. *v.* Peyton (76 Ill. 340), Comp. Neg., 10.
Indianapolis & St. L. R. Co. *v.* Smith (78 Ill. 112), Cross., Inj. at, 29.
Indianapolis & St. L. R. Co. *v.* Smythe (45 Ind. 322), Em. Dom., 845.
Indianapolis & St. L. R. Co. *v.* Stables (62 Ill. 313, 7 Am. Ry. Rep. 365), Cross., Inj. at, 151, 302; Dam., 71.
Indianapolis & St. L. R. Co. *v.* Stout (53 Ind. 143), Abate., 2; Death, etc., 126, 176, 251; New Tr., 17.
Indianapolis & St. L. R. Co. *v.* Vance (96 U. S. 450), Tax., 257.
Indianapolis & St. L. R. Co. *v.* Vandusen (81 Ill. 143), Car. of M., 273.
Indianapolis & St. L. R. Co. *v.* Watson (33 Am. & Eng. R. Cas. 334, 114 Ind. 20, 12 West. Rep. 285, 14 N. E. Rep. 721, 15 N. E. Rep. 824), Employés, Inj. to, 38, 99, 223, 244, 252.
Indianapolis & St. L. R. Co. *v.* Willisch (8 Ill. App. 242), Dam., 32.
Indianapolis & V. R. Co. *v.* Backus (133 Ind. 609, 33 N. E. Rep. 443), Tax., 258.
Indianapolis & V. R. Co. *v.* Lewis (119 Ind. 218, 21 N. E. Rep. 660), Evid., 183.
Indianapolis & V. R. Co. *v.* McClaren (62 Ind. 566), Tresp., Inj. to, 54.
Indianapolis & V. R. Co. *v.* McLin (8 Am. & Eng. R. Cas. 237, 82 Ind. 435), Cross., Inj. at, 8, 10, 132, 286; New Tr., 29.
Indianapolis & V. R. Co. *v.* Newsom (54 Ind. 121), Em. Dom., 316, 320.
Indianapolis & V. R. Co. *v.* Reynolds (116 Ind. 356, 19 N. E. Rep. 141), Em. Dom., 222; Evid., 183; Right of W., 1.
Indianapolis & V. R. Co. *v.* Sims (92 Ind. 496), Animals, 621.
Indianapolis, B. & W. R. Co. *v.* Beaver (41 Ind. 493), Car. of L. S., 125; Car. of P., 288; Trial, 122, 133.
Indianapolis, B. & W. R. Co. *v.* Birney (71 Ill. 391), Car. of P., 613.
Indianapolis, B. & W. R. Co. *v.* Buckles (21 Ill. App. 181), Animals, 584.
Indianapolis, B. & W. R. Co. *v.* Carr (35 Ind. 510, 4 Am. Ry. Rep. 405), Death, etc., 219.
Indianapolis, B. & W. R. Co. *v.* Flanigan (77 Ill. 365), Comp. Neg., 16; Employés, Inj. to, 275.
Indianapolis, B. & W. R. Co. *v.* Hall (12 Am. & Eng. R. Cas. 146, 106 Ill. 371), Negl., 42, 110.
Indianapolis, B. & W. R. Co. *v.* Hartley (67 Ill. 439, 2 Am. Ry. Rep. 59), Sts. & H., 139, 162.
Indianapolis, B. & W. R. Co. *v.* Lyon (48 Ind. 119), Animals, 330; Evid., 101.
Indianapolis, B. & W. R. Co. *v.* McBrown (46 Ind. 229, 6 Am. Ry. Rep. 415), Animals, 66, 73.
Indianapolis, B. & W. R. Co. *v.* McLaughlin (77 Ill. 275), Constr. Rys., 12.
Indianapolis, B. & W. R. Co. *v.* Milligan (50 Ind. 392), Eject. Pass., 134.
Indianapolis, B. & W. R. Co. *v.* Murray (72 Ill. 128), Car. of M., 557.
Indianapolis, B. & W. R. Co. *v.* O'Reily (38 Ind. 140), Constr. Rys., 88.
Indianapolis, B. & W. R. Co. *v.* Penry (48 Ind. 128), Animals, 505.
Indianapolis, B. & W. R. Co. *v.* Reed (52 Ind. 357), Em. Dom., 254.
Indianapolis, B. & W. R. Co. *v.* Rhodes (76 Ill. 285), Pl., 118.
Indianapolis, B. & W. R. Co. *v.* Risley (50 Ind. 60), Rem. of C., 54.
Indianapolis, B. & W. R. Co. *v.* Smith (52 Ind. 428), Sts. & H., 165.
Indianapolis, B. & W. R. Co. *v.* Strain (81 Ill. 504), Car. of L. S., 6, 160.
Indianapolis, B. & W. R. Co. *v.* Toy (91 Ill. 474), Employés, Inj. to, 131.
Indianapolis Cable St. R. Co. *v.* Citizens' St. R. Co. (43 Am. & Eng. R. Cas. 234, 127 Ind. 369, 24 N. E. Rep. 1054, 26 N. E. Rep. 893), St. Rys., 52, 76.
Indianapolis, C. & L. R. Co., In re (5 Biss. (U. S.) 287), Bank'cy, 9.
Indianapolis, C. & L. R. Co. *v.* Bonnell (42 Ind. 539), Animals, 122.
Indianapolis, C. & L. R. Co. *v.* Hamilton

(44 Ind. 76), Animals, 345; Cross., Inj. at, 92.
Indianapolis, C. & L. R. Co. *v.* Harter (38 Ind. 557), Animals, 266.
Indianapolis, C. & L. R. Co. *v.* Jones (29 Ind. 465), Consol., 42; Pl., 129.
Indianapolis, C. & L. R. Co. *v.* Kilner (1 Am. & Eng. R. Cas. 413, 69 Ind. 71), Tax., 258.
Indianapolis, C. & L. R. Co. *v.* Ray (51 Ind. 269), Animals, 648.
Indianapolis, C. & L. R. Co. *v.* Robinson (35 Ind. 380, 4 Am. Ry. Rep. 544), Animals, 350, 364.
Indianapolis, C. & L. R. Co. *v.* Warner (35 Ind. 515, 4 Am. Ry. Rep. 537), Animals, 47, 331, 339.
Indianapolis, D. & C. R. Co. *v.* Holmes (101 Ind. 348), Contr., 45.
Indianapolis, D. & S. R. Co. *v.* Davis (32 Ill. App. 67), Discrim., 65.
Indianapolis, D. & S. R. Co. *v.* Erwin (27 Am. & Eng. R. Cas. 8, 118 Ill. 250, 8 N. E. Rep. 862), Discrim., 65.
Indianapolis, D. & S. R. Co. *v.* Pugh (10 Am. & Eng. R. Cas. 196, 85 Ind. 279), Em. Dom., 629; Witn., 109.
Indianapolis, D. & W. R. Co. *v.* Clay (4 Ind. App. 282, 28 N. E. Rep. 567, 30 N. E. Rep. 916), Animals, 519; Cat.-Gds., 8; Fences, 52, 96.
Indianapolis, D. & W. R. Co. *v.* Crockett (2 Ind. App. 136, 28 N. E. Rep. 222), App., 7.
Indianapolis, D. & W. R. Co. *v.* Forsythe (4 Ind. App. 326, 29 N. E. Rep. 1138), Bills of L., 80; Car. of M., 465.
Indianapolis, E. R. & S. W. R. Co. *v.* Hyde (122 Ind. 188, 23 N. E. Rep. 706), Pres., 13.
Indianapolis M. & C. Union *v.* Cleveland, C., C. & I. R. Co. (45 Ind. 281), Ejectm., 25; Leases, 82, 85.
Indianapolis, P. & C. R. Co. *v.* Allen (31 Ind. 394), Car. of L. S., 71; Car. of M., 453.
Indianapolis, P. & C. R. Co. *v.* Anthony (43 Ind. 183), Agency, 80; Eject. Pass., 65; Evid., 191; Witn., 40.
Indianapolis, P. & C. R. Co. *v.* Bishop (29 Ind. 292), Animals, 330.
Indianapolis, P. & C. R. Co. *v.* Brownen[illegible] (32 Ind. 199), Animals, 222; Contr., [illegible]
Indianapolis, P. & C. R. Co. *v.* Brucey (21 Ind. 215), Animals, 369.
Indianapolis, P. & C. R. Co. *v.* Bush (101 Ind. 582), Dam., 98; New Tr., 26.
Indianapolis, P. & C. R. Co. *v.* Caudle (60 Ind. 112), Animals, 117, 364.
Indianapolis, P. & C. R. Co. *v.* Collingwood (71 Ind. 476), App., 115.
Indianapolis, P. & C. R. Co. *v.* Crandall (58 Ind. 365), Animals, 103.
Indianapolis, P. & C. R. Co. *v.* Fisher (15 Ind. 203), Animals, 22, 289.
Indianapolis, P. & C. R. Co. *v.* Goar (62 Ind. 411), Trial, 58.
Indianapolis, P. & C. R. Co. *v.* Hood (66 Ind. 580), Deeds, 35.
Indianapolis, P. & C. R. Co. *v.* Irish (26 Ind. 268), Animals, 163; Cat.-Gds., 4.
Indianapolis, P. & C. R. Co. *v.* Irish (40 Ind. 277), App., 114.
Indianapolis, P. & C. R. Co. *v.* Keely (23 Ind. 133), Death, etc., 130, 139.
Indianapolis, P. & C. R. Co. *v.* Lindley (11 Am. & Eng. R. Cas 495, 75 Ind. 426), Animals, 212, 505.
Indianapolis, P. & C. R. Co. *v.* Marshall (27 Ind. 300), Fences, 9, 82.
Indianapolis, P. & C. R. Co. *v.* Mustard (34 Ind. 50), Animals, 590.
Indianapolis, P. & C. R. Co. *v.* Petty (25 Ind. 413), Animals, 139, 322.
Indianapolis, P. & C. R. Co. *v.* Petty (30 Ind. 261), Animals, 364, 368.
Indianapolis, P. & C. R. Co. *v.* Pitzer (25 Am. & Eng. R. Cas. 313, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. Rep. 310, 10 N. E. Rep. 70), Children, Inj. to, 2, 3, 14, 17, 37; Dam., 12; Death, etc., 403.
Indianapolis, P. & C. R. Co. *v.* Rayl (3 Am. & Eng. R. Cas. 182, 69 Ind. 424), Em. Dom., 129, 202; Estop., 13; Sts. & H., 150.
Indianapolis, P. & C. R. Co. *v.* Rinard (46 Ind. 293, 6 Am. Ry. Rep. 328), Tickets & F., 26, 122.
Indianapolis, P. & C. R. Co. *v.* Ross (47 Ind. 25), Adv. Poss., 3; Sts. & H., 344.
Indianapolis, P. & C. R. Co. *v.* Shimer (17 Ind. 295), Animals, 221.
Indianapolis, P. & C. R. Co. *v.* Sparr (15 Ind. 440), Animals, 342, 359.
Indianapolis, P. & C. R. Co. *v.* Taffe (11 Ind. 458), Animals, 378; App., 111.
Indianapolis, P. & C. R. Co. *v.* Thomas (11 Am. & Eng. R. Cas. 491, 84 Ind. 194), Animals, 104, 139.
Indianapolis, P. & C. R. Co. *v.* Tipton County Com'rs (70 Ind. 385; further appeal 12 Am. & Eng. R. Cas. 636, 89 Ind. 101), Mun. Aid, 411.
Indianapolis, P. & C. R. Co. *v.* Truitt (24 Ind. 162), Animals, 142, 145, 349.
Indianapolis, P. & C. R. Co. *v.* Williams (15 Ind. 486), Animals, 342, 359.
Indianapolis, P. & C. R. Co. *v.* Wolf (47 Ind. 250), Animals, 281.
Indianapolis Rolling Mill Co. *v.* St. Louis, Ft. S. & W. R. Co. (120 U. S. 256, 7 Sup. Ct. Rep. 542), Contr., 4.
Indianapolis Union R. Co. *v.* Boettcher (131 Ind. 82, 28 N. E. Rep. 551), Contrib. Neg., 2, 10, 50; Evid., 62, 76; Fright. Teams, 1; Negl., 13.
Indianapolis Union R. Co. *v.* Cooper (6 Ind. App. 202), Union D. Cos., 9.
Indiana Southern R. Co. *v.* Liverpool, L. & G. Ins. Co. (14 Am. & Eng. R. Cas. 606, 109 U. S. 168, 3 Sup. Ct. Rep. 108), Mort., 297, 301.
Indianola *v.* Gulf, W. T. & P. R. Co. (11 Am. & Eng. R. Cas. 314, 56 Tex. 594), Dam., 39; Sts. & H., 78.
Indianola *v.* Indianola R. Co. (2 Tex. Unrep. Cas. 337), Consol., 42; Dam., 39; Sts. & H., 78.
Indianola R. Co. *v.* Fryer (11 Am. & Eng. R. Cas. 324, 56 Tex. 609), Consol., 40.
Indian River Steamboat Co. *v.* East Coast Transp. Co. (49 Am. & Eng. R. Cas. 212, 28 Fla. 387, 10 So. Rep. 480), Leases, 37.

Indian Supplies, In re (1 Int. Com. Rep. 22, 1 Int. Com. Com. 15), Int. Com., 180.
Ingalls *v.* Adams Exp. Co. (44 Minn. 128, 46 N. W. Rep. 325), Negl., 8.
Ingalls *v.* Bills (9 Metc. (Mass.) 1), Car. of P., 99, 435.
Ingalls *v.* Byers (20 Am. & Eng. R. Cas. 345, 94 Ind. 134), Em. Dom., 434; Ex. & Ad., 13.
Inge *v.* Birmingham, W. & S. V. R. Co. (1 Sm. & G. 347; affirmed in 3 De G., M. & G. 658), Em. Dom., 1130.
Ingersoll *v.* New York C. & H. R. R. Co. (6 T. & C. (N. Y.) 416, 4 Hun 277, mem.; affirmed (?) 66 N. Y. 612, mem.), Death, etc., 195.
Ingersoll *v.* Stockbridge & P. R. Co. (8 Allen (Mass.) 438), Fires, 159.
Ingledew *v.* Northern R. Co. (7 Gray (Mass.) 86), Car. of M., 111, 778, 786; Evid., 15; New Tr., 2; Witn., 155.
Inglis *v.* Great Northern R. Co. (1 Macq. H. L. Cas. 112, 16 Jur. 895), Subscr., 186.
Ingraham *v.* Chicago, D. & M. R. Co. (34 Iowa 249, 5 Am. Ry. Rep. 99), Mun. Corp., 33; Sts. & H., 74.
Ingram *v.* Chicago, D. & M. R. Co. (38 Iowa 669), Injunc., 14; St. Rys., 28; Sts. & H., 44, 62, 78; Trial, 137.
Ingram *v.* Lehigh C. & N. Co. (148 Pa. St. 177, 23 Atl. Rep. 1001), Contrib. Neg., 35.
Inman *v.* Buffalo & L. H. R. Co. (7 U. C. C. P. 325), Car. of M., 81.
Inman *v.* Chicago, M. & St. P. R. Co. (60 Iowa 459), Animals, 56, 158, 248.
Inman *v.* Elberton Air Line R. Co. (90 Ga. 663, 16 S. E. Rep. 958), Fires, 232, 233, 305.
Inman *v.* South Carolina R. Co. (37 Am. & Eng. R. Cas. 663, 129 U. S. 128, 9 Sup. Ct. Rep. 249), Fire Ins., 14; Lim. of Liab., 40.
Innes *v.* London, B. & S. C. R. Co. (2 Ry. & C. T. Cas. 155), Charges, 97; Ry. Com'rs, 7, 12.
Innis *v.* Cedar Rapids, I. F. & N. W. R. Co. (76 Iowa 165, 2 L. R. A. 282, 40 N. W. Rep. 701), Nuis., 15.
Inquiry under Cheap Trains Act 1883, In re (6 Ry. & C. T. Cas. 19), Car. of P., 521; Tickets & F., 69.
Insurance Cos. *v.* Carrier Cos. (91 Tenn. 537, 19 S. W. Rep. 755), Discrim., 81; Rem. of C., 40.
Insurance Co. of N. A. *v.* Easton (37 Am. & Eng. R. Cas. 671, 73 Tex. 167, 11 S. W. Rep. 180), Car. of M., 411; Fire Ins., 13, 15.
Internal Imp. Fund *v.* Greenough (12 Am. & Eng. R. Cas. 345, 105 U. S. 527), Costs, 8.
Internal Imp. Fund Trustees *v.* St. Johns R. Co. (16 Fla. 531), Land Grants, 130.
International & G. N. R. Co. *v.* Anderson (53 Am. & Eng. R. Cas. 59, 82 Tex. 516, 17 S. W. Rep. 1039), Agency, 75, 103; Conduct., 1.
International & G. N. R. Co. *v.* Anderson (3 Tex. Civ. App. 8, 21 S. W. Rep. 691), Car. of M., 140, 545, 690, 778.
International & G. N. R. Co. *v.* Anderson County (59 Tex. 654), Mun. Aid, 427.
International & G. N. R. Co. *v.* Bell (75 Tex. 50, 12 S. W. Rep. 321), Employés, Inj. to, 99; Words & Ph., 150.
International & G. N. R. Co. *v.* Benitos (10 Am. & Eng. R. Cas. 122, 59 Tex. 326), Dam., 13; Em. Dom., 988, 1001, 1006.
International & G. N. R. Co. *v.* Blanton (22 Am. & Eng. R. Cas. 428, 63 Tex. 109), Car. of M., 107; Witn., 82.
International & G. N. R. Co. *v.* Bost (2 Tex. App. (Civ. Cas.) 334), Farm Cross., 3.
International & G. N. R. Co. *v.* Brazzil (44 Am. & Eng. R. Cas. 437, 78 Tex. 314, 14 S. W. Rep. 609), Car. of P., 646, 651; Release, 19.
International & G. N. R. Co. *v.* Bremond (4 Am. & Eng. R. Cas. 308, 53 Tex. 96), Consol., 12; Stockh., 86, 103, 120.
International & G. N. R. Co. *v.* Brett (61 Tex. 483), Cross., Inj. at, 365; Evid., 76; Witn., 54.
International & G. N. R. Co. *v.* Campbell (1 Tex. Civ. App. 509, 20 S. W. Rep. 845), Car. of L. S., 121; Car. of M., 674.
International & G. N. R. Co. *v.* Clark (48 Am. & Eng. R. Cas. 81, 81 Tex. 48, 16 S. W. Rep. 631), Att'ys, 3, 21.
International & G. N. R. Co. *v.* Cock (68 Tex. 713, 5 S. W. Rep. 635), Agency, 64; App., 46; Passes, 12.
International & G. N. R. Co. *v.* Cocke (23 Am. & Eng. R. Cas. 226, 64 Tex. 151), Animals, 206, 284, 582; Fences, 52, 93.
International & G. N. R. Co. *v.* Copeland (60 Tex. 325), Car. of P., 153, 464.
International & G. N. R. Co. *v.* Dawson (62 Tex. 260), New Tr., 18; Stat. & D., 33, 48.
International & G. N. R. Co. *v.* Donalson (2 Tex. App. (Civ. Cas.) 183), Actions, 11; Evid., 154; Lim. of Ac., 14.
International & G. N. R. Co. *v.* Doyle (49 Tex. 190), Employés, Inj. to, 99, 127, 206.
International & G. N. R. Co. *v.* Dunham (31 Am. & Eng. R. Cas. 530, 68 Tex. 231, 4 S. W. Rep. 472), Animals, 60, 200, 203; Leases, 91.
International & G. N. R. Co. *v.* Dyer (76 Tex. 156, 13 S. W. Rep. 377), Cross., Inj. at, 193, 213; Pl., 24, 107, 115, 122.
International & G. N. R. Co. *v.* Eckford (71 Tex. 274, 8 S. W. Rep. 679), Car. of P., 609; Leases, 39; Negl., 63.
International & G. N. R. Co. *v.* Folliard (27 Am. & Eng. R. Cas. 280, 66 Tex. 603, 1 S. W. Rep. 624), Bagg., 53; Car. of P., 285, 456.
International & G. N. R. Co. *v.* Foltz (3 Tex. Civ. App. 644, 22 S. W. Rep. 541), Bagg., 109; Car. of M., 481; Tickets & F., 21.
International & G. N. R. Co. *v.* Garcia (70 Tex. 207, 7 S. W. Rep. 802), Dam., 27, 30, 34.
International & G. N. R. Co. *v.* Garcia (75 Tex. 583, 13 S. W. Rep. 223), Contrib. Neg., 1, 5, 10, 11, 20; Cross., Inj. at, 272; Tresp., Inj. to, 54.
International & G. N. R. Co. *v.* Gilbert (22 Am. & Eng. R. Cas. 405, 64 Tex. 536), Car. of P., 17; Dam., 102; Eject. Pass., 64.

International & G. N. R. Co. *v.* Goldstein (2 Tex. App. (Civ. Cas.) 206), Car. of P., 77; Eject. Pass., 23; Tickets & F., 36.
International & G. N. R. Co. *v.* Gordon (72 Tex. 44, 11 S. W. Rep. 1033), Dam., 80.
International & G. N. R. Co. *v.* Gorman (2 Tex. App. (Civ. Cas.) 679), Car. of P., 377.
International & G. N. R. Co. *v.* Graves (59 Tex. 330), Cross., Inj. at, 169, 204, 215.
International & G. N. R. Co. *v.* Gray (27 Am. & Eng. R. Cas. 318, 65 Tex. 32), Collis., 3; Cross., Inj. at, 102; Employés, Inj. to, 423; Licensees, Inj. to, 10; Negl., 27.
International & G. N. R. Co. *v.* Greenwood (2 Tex. Civ. App. 76, 21 S. W. Rep. 559), Boycotting, 1; Employés, 1, 8.
International & G. N. R. Co. *v.* Hall (78 Tex. 657, 15 S. W. Rep. 108), Employés, Inj. to, 18, 664.
International & G. N. R. Co. *v.* Hall (1 Tex. Civ. App. 221, 21 S. W. Rep. 1024), Employés, Inj. to, 25; Evid., 88; Fel. Serv., 160.
International & G. N. R. Co. *v.* Halloren (3 Am. & Eng. R. Cas. 343, 53 Tex. 46, 37 Am. Rep. 744), Car. of P., 131, 141, 142, 151, 161, 166, 175, 176, 182, 191, 194, 197; Culverts, 13, 14.
International & G. N. R. Co. *v.* Hassell (21 Am. & Eng. R. Cas. 315, 62 Tex. 256), Car. of P., 431; Eject. Pass., 31, 52; Evid., 164.
International & G. N. R. Co. *v.* Hester (21 Am. & Eng. R. Cas. 535, 64 Tex. 401), Employés, Inj. to, 183, 184.
International & G. N. R. Co. *v.* Hester (72 Tex. 40, 11 S. W. Rep. 1041), Employés, Inj. to, 390, 590, 595.
International & G. N. R. Co. *v.* Hinzie (82 Tex. 623, 18 S. W. Rep. 681), Employés, Inj. to, 18, 25, 425, 469, 472, 513, 774; Fel. Serv., 217, 329.
International & G. N. R. Co. *v.* Hughes (31 Am. & Eng. R. Cas. 569, 68 Tex. 290, 4 S. W. Rep. 492), Animals, 78.
International & G. N. R. Co. *v.* Hughes (81 Tex. 184, 16 S. W. Rep. 875), Animals, 405.
International & G. N. R. Co. *v.* Hynes (3 Tex. Civ. App. 20, 21 S. W. Rep. 622), Car. of L. S., 13, 153; Words & Ph., 7.
International & G. N. R. Co. *v.* Irvine (Tex.) (18 Am. & Eng. R. Cas. 294), Car. of P., 619; Witn., 164.
International & G. N. R. Co. *v.* Irvine (23 Am. & Eng. R. Cas. 518, 64 Tex. 529), Car. of P., 47; Dam., 78; Pl., 149.
International & G. N. R. Co. *v.* Johnson (1 Tex. App. (Civ. Cas.) 150), Agency, 51.
International & G. N. R. Co. *v.* Jordan (10 Am. & Eng. R. Cas. 301, 1 Tex. App. (Civ. Cas.) 494), Cross., Inj. at, 62, 198, 264; New Tr., 19; Sts. & H., 335; Tresp., Inj. to, 91.
International & G. N. R. Co. *v.* Kentle (16 Am. & Eng. R. Cas. 337, 2 Tex. App. (Civ. Cas.) 262), Assault, 2; Car. of P., 627, 630; Eject. Pass., 82, 130; Pl., 59.
International & G. N. R. Co. *v.* Kernan (44 Am. & Eng. R. Cas. 607, 78 Tex. 294, 14 S. W. Rep. 668), Employés, Inj. to, 94, 101, 154.
International & G. N. R. Co. *v.* Kindred (11 Am. & Eng. R. Cas. 649, 57 Tex. 491), Death, etc., 85, 131, 411; Employés, Inj. to, 712; Evid., 260.
International & G. N. R. Co. *v.* Klaus (29 Am. & Eng. R. Cas. 500, 64 Tex. 293), Witn., 99.
International & G. N. R. Co. *v.* Kuehn (35 Am. & Eng. R. Cas. 421, 70 Tex. 582, 8 S. W. Rep. 484), Contrib. Neg., 83; Cross., Inj. at, 29, 317; Death, etc., 48, 93, 163; Negl., 63; Tresp., Inj. to, 64.
International & G. N. R. Co. *v.* Kuehn (2 Tex. Civ. App. 210, 21 S. W. Rep. 58), Cross., Inj. at, 161, 302, 314; Death, etc., 282, 388; Evid., 35, 177, 247; Witn., 95.
International & G. N. R. Co. *v.* Leak (64 Tex. 654), App., 75.
International & G. N. R. Co. *v.* Leuders (1 Tex. App. (Civ. Cas.) 133), Animals, 108, 130.
International & G. N. R. Co. *v.* Lock (Tex. Civ. App.) (20 S. W. Rep. 855), App., 44.
International & G. N. R. Co. *v.* McCarthy (64 Tex. 632), Employés, Inj. to, 206, 238.
International & G. N. R. Co. *v.* McCown (2 Tex. App. (Civ. Cas.) 624), Bagg., 40.
International & G. N. R. Co. *v.* McDonald (42 Am. & Eng. R. Cas. 211, 75 Tex. 41, 12 S. W. Rep. 860), Agency, 113; Cross., Inj. at, 352; Death, etc., 361, 418, 420.
International & G. N. R. Co. *v.* McRae (82 Tex. 614, 18 S. W. Rep. 672), Car. of L. S., 30; Evid., 224.
International & G. N. R. Co. *v.* Mahula (1 Tex. Civ. App. 182, 20 S. W. Rep. 1002), Car. of L. S., 104.
International & G. N. R. Co. *v.* Malome (1 Tex. App. (Civ. Cas.) 92), Culverts, 4; Em. Dom., 706; Witn., 136.
International & G. N. R. Co. *v.* Moody (35 Am. & Eng. R. Cas. 607, 71 Tex. 614, 9 S. W. Rep. 465), Bills of L., 36; Car. of M., 688; Leases, 16, 45.
International & G. N. R. Co. *v.* Nicholson (21 Am. & Eng. R. Cas. 122, 61 Tex. 550), Car. of M., 795; Jurisd., 10; Witn., 149.
International & G. N. R. Co. *v.* Ormond (62 Tex. 274), Trial, 158.
International & G. N. R. Co. *v.* Ormond (27 Am. & Eng. R. Cas. 139, 64 Tex. 485), Death, etc., 294, 430; Negl., 45, 84.
International & G. N. R. Co. *v.* Pape (62 Tex. 313), Dam., 77; Em. Dom., 135, 714.
International & G. N. R. Co. *v.* Pape (73 Tex. 501, 11 S. W. Rep. 526), Flood. Lds., 70, 73; Pl., 149.
International & G. N. R. Co. *v.* Philips (63 Tex. 590), Bagg., 113; Car. of M., 778.
International & G. N. R. Co. *v.* Pichard (1 Tex. App. (Civ. Cas.) 189), Evid., 225.
International & G. N. R. Co. *v.* Prince (44 Am. & Eng. R. Cas. 294, 77 Tex. 560, 14 S. W. Rep. 171), Agency, 64; Car. of P., 300; Evid., 153; Negl., 97.
International & G. N. R. Co. *v.* Ragsdale (67 Tex. 24, 2 S. W. Rep. 515), Agency, 7; Comprom., 7; Evid., 206.

International & G. N. R. Co. *v.* Roth (2 Tex. Unrep. Cas. 245), Fel. Serv., 150.
International & G. N. R. Co. *v.* Ryan (82 Tex. 565, 18 S. W. Rep. 219), Employés, 4; Fel. Serv., 34, 275, 460, 503.
International & G. N. R. Co. *v.* Sauls (2 Tex. App. (Civ. Cas.) 186), Proc., 9.
International & G. N. R. Co. *v.* Server (3 Tex. App. (Civ. Cas.) 534), Car. of M., 18, 139.
International & G. N. R. Co. *v.* Simcock (81 Tex. 503, 17 S. W. Rep. 47), Trial, 135, 157.
International & G. N. R. Co. *v.* Smith (1 Tex. App. (Civ. Cas.) 484), Car. of L. S., 39; Fences, 53.
International & G. N. R. Co. *v.* Smith (19 Am. & Eng. R. Cas. 21, 62 Tex. 252), Contrib. Neg., 10; Dam., 38; Trcsp., Inj. to, 70.
International & G. N. R. Co. *v.* Smith (Tex.) (27 Am. & Eng. R. Cas. 148, 1 S. W. Rep. 565), Eject. Pass., 81, 98, 133; Trial, 117.
International & G. N. R. Co. *v.* Smith (Tex.) (44 Am. & Eng. R. Cas. 324, 14 S. W. Rep. 642), Car. of P., 243; Evid., 174.
International & G. N. R. Co. *v.* Smith County (7 Am. & Eng. R. Cas. 263, 54 Tex. 1), Tax., 283.
International & G. N. R. Co. *v.* Smith County (58 Tex. 74), App., 8.
International & G. N. R. Co. *v.* Smith County (65 Tex. 21), Tax., 156.
International & G. N. R. Co. *v.* State (41 Am. & Eng. R. Cas. 611, 75 Tex. 356, 7 R. R. & Corp. L. J. 305, 12 S. W. Rep. 685), App., 130; Quo War., 3.
International & G. N. R. Co. *v.* Stewart (57 Tex. 166), Dam., 102.
International & G. N. R. Co. *v.* Tarver (72 Tex. 308, 11 S. W. Rep. 1043), Fel. Serv., 411.
International & G. N. R. Co. *v.* Telephone & T. Co. (69 Tex. 277, 5 S. W. Rep. 517), Dam., 26; Evid., 202; New Tr., 30.
International & G. N. R. Co. *v.* Terry (21 Am. & Eng. R. Cas. 323, 62 Tex. 380), Car. of P., 624; Evid., 146.
International & G. N. R. Co. *v.* Thornton (3 Tex. Civ. App. 197, 22 S. W. Rep. 67), Car. of L. S., 104.
International & G. N. R. Co. *v.* Timmermann (61 Tex. 660), Fires, 21, 152, 288.
International & G. N. R. Co. *v.* Tisdale (74 Tex. 8, 11 S. W. Rep. 900), Car. of M., 628; Pl., 119; Strikes, 1.
International & G. N. R. Co. *v.* Turner (3 Tex. Civ. App. 487, 23 S. W. Rep. 146), Employés, Inj. to, 238, 258, 266.
International & G. N. R. Co. *v.* Underwood (21 Am. & Eng. R. Cas. 143, 62 Tex. 21), Car. of M., 423.
International & G. N. R. Co. *v.* Underwood (27 Am. & Eng. R. Cas. 240, 64 Tex. 463), Car. of P., 598, 643; Dam., 38; Phys. Exam., 2; Trial, 117.
International & G. N. R. Co. *v.* Underwood (34 Am. & Eng. R. Cas. 570, 67 Tex. 589, 4 S. W. Rep. 216), Car. of P., 541; Leases, 41.
International & G. N. R. Co. *v.* Watt (2 Tex. App. (Civ. Cas.) 686), Car. of L. S., 68, 95.
International & G. N. R. Co. *v.* Welch (58 Am. & Eng. R. Cas. 70, 86 Tex. 204, 24 S. W. Rep. 390), Car. of P., 139.
International & G. N. R. Co. *v.* Wilkes (34 Am. & Eng. R. Cas. 331, 68 Tex. 617, 5 S. W. Rep. 491), Eject. Pass., 21, 133; New Tr., 82; Tickets & F., 35.
International & G. N. R. Co. *v.* Williams (82 Tex. 342, 18 S. W. Rep. 700), Employés, Inj. to, 97, 258.
International & G. N. R. Co. *v.* Wright (2 Tex. Civ. App. 198, 21 S. W. Rep. 56), Car. of L. S., 114.
International Bridge Co. *v.* Canada Southern R. Co. (7 Ont. App. 226; affirming 28 Grant Ch. 114), Bridges, 99.
International Coal Co. *v.* Cape Breton County (24 Nov. Sc. 496), Tax., 385.
International Exp. Co. *v.* Grand Trunk R. Co. (37 Am. & Eng. R. Cas. 622, 81 Me. 92, 16 Atl. Rep. 370), Exp. Cos., 8, 9.
International Nav. Co. *v.* Com. (104 Pa. St. 38), Tax., 144.
International R. Co. *v.* Comptroller (36 Tex. 641), Mand., 25.
International S. & R. Supply Co. *v.* United States (13 Ct. of Cl. 209), Agency, 116; Claims Against U. S., 2, 3.
Interstate Commerce Commission, In re (53 Am. & Eng. R. Cas. 1, 53 Fed. Rep. 476, 4 Int. Com. Rep. 315; reversed in 154 U. S. 447, 14 Sup. Ct. Rep. 1125), Int. Com., 157.
Interstate Commerce Commission *v.* Atchison, T. & S. F. R. Co. (50 Am. & Eng. R. Cas. 93, 50 Fed. Rep. 295, 4 Int. Com. Rep. 323; appeal dismissed in 149 U. S. 264, 13 Sup. Ct. Rep. 837), Int. Com., 112, 115, 147.
Interstate Commerce Commission *v.* Atchison, T. & S. F. R. Co. (149 U. S. 264, 13 Sup. Ct. Rep. 837), Fed. Cts., 20.
Interstate Commerce Commission *v.* Baltimore & O. R. Co. (43 Fed. Rep. 37; affirmed in 145 U. S. 263, 12 Sup. Ct. Rep. 844), Int. Com., 13.
Interstate Commerce Commission *v.* Baltimore & O. R. Co. (145 U. S. 263, 12 Sup. Ct. Rep. 844; affirming 43 Fed. Rep. 37), Int. Com., 30, 63, 87, 177, 184; Words & Ph., 50.
Interstate Commerce Commission *v.* Brimson (154 U. S. 447, 14 Sup. Ct. Rep. 1125; reversing 53 Am. & Eng. R. Cas. 1, 53 Fed. Rep. 476, 4 Int. Com. Rep. 315), Witn., 2.
Interstate Commerce Commission *v.* Cincinnati, N. O. & T. P. R. Co. (54 Am. & Eng. R. Cas. 365, 56 Fed. Rep. 925, 4 Int. Com. Rep. 332; reversed on the merits, 4 Int. Com. Rep. 582, 13 U. S. App. 730, mem., and appealed to U. S. Supreme Court), Int. Com., 22, 126, 160.
Interstate Commerce Commission *v.* Detroit, G. H. & M. R. Co. (57 Fed. Rep. 1005, 4 Int. Com. Rep. 722), Discrim., 39; Int. Com., 149.
Interstate Commerce Commission *v.* Lehigh

Valley R. Co. (49 Fed. Rep. 177, 3 Int. Com. Rep. 796), Int. Com., 147, 149.
Interstate Commerce Commission *v.* Texas & P. R. Co. (51 Am. & Eng. R. Cas. 33, 52 Fed. Rep. 187, 4 Int. Com. Rep. 114; affirmed in 57 Fed. Rep. 948, 4 Int. Com. Rep. 408), Discrim., 39; Int. Com., 161.
Interstate Commerce Commission *v.* Texas & P. R. Co. (57 Fed. Rep. 948, 4 Int. Com. Rep. 408; affirming 51 Am. & Eng. R. Cas. 33, 4 Int. Com. Rep. 114, 52 Fed. Rep. 187), Fed. Cts., 8; Int. Com., 64, 149.
Inter-State Con. R. T. R. Co. *v.* Early (46 Kan. 197, 26 Pac. Rep. 422), St. Rys., 216.
Inter-State Con. R. T. R. Co. *v.* Fox (39 Am. & Eng. R. Cas. 318, 41 Kan. 715, 21 Pac. Rep. 797), Employés, Inj. to, 156; New Tr., 24.
Inter-State Con. R. T. Co. *v.* Simpson (45 Kan. 714, 26 Pac. Rep. 393), Em. Dom., 735.
Investment Co. *v.* Ohio & N. W. R. Co. (46 Fed. Rep. 696), Mort., 158.
Investment Co. of Phila. *v.* Ohio & N. W. R. Co. (36 Fed. Rep. 48), Receiv., 100.
Investment Co. of Phila. *v.* Ohio & N. W. R. Co. (41 Fed. Rep. 378), Car. of M., 554; Deeds, 17.
Iola *v.* Merriman (46 Kan. 49, 26 Pac. Rep. 485), Mun. Aid, 77.
Iowa *v.* Chicago, B. & Q. R. Co. (37 Am. & Eng. R. Cas. 721, 37 Fed. Rep. 497), Rem. of C., 21.
Iowa *v.* Chicago, M. & St. P. R. Co. (33 Fed. Rep. 391), Discrim., 60.
Iowa & M. R. Co. *v.* Perkins (28 Iowa 281), Subscr., 51, 112.
Iowa Barb Steel Wire Co., In re (1 Int. Com. Rep. 605, 1 Int. Com. Com. 17), Int. Com., 11.
Iowa C. R. Co. *v.* Gushee (49 Ill. App. 609), Fences, 59, 63.
Iowa County *v.* Mineral Point R. Co. (24 Wis. 93), Judgm., 16.
Iowa Falls & S. C. R. Co. *v.* Beck (67 Iowa 421, 25 N. W. Rep. 686), Land Grants, 116.
Iowa Falls & S. C. R. Co. *v.* Cherokee County (37 Iowa 483), Tax., 117.
Iowa Falls & S. C. R. Co. *v.* Plymouth County (40 Iowa 609), Land Grants, 116.
Iowa Falls & S. C. R. Co. *v.* Storm Lake Bank (55 Iowa 696, 8 N. W. Rep. 640), Tax., 330.
Iowa Falls & S. C. R. Co. *v.* Woodbury County (38 Iowa 498), Tax., 117.
Iowa Homestead Co. *v.* Des Moines N. & R. Co. (17 Wall. (U. S.) 153), Tax., 338.
Iowa Homestead Co. *v.* Webster County (21 Iowa 221), Land Grants, 116; Tax., 117, 137, 259.
Iowa, M. & N. P. R. Co. *v.* Schenck (7 Am. & Eng. R. Cas. 324, 56 Iowa 628, 10 N. W. Rep. 215), Mun. Aid, 412.
Iowa Northern C. R. Co. *v.* Bliobenes (41 Iowa 267), Subscr., 213.
Iowa R. Land Co. *v.* Antoine (52 Iowa 429, 3 N. W. Rep. 468), Land Grants, 131.
Iowa R. Land Co. *v.* Fitchpatrick (52 Iowa 244, 3 N. W. Rep. 40), Tax., 117.
Iowa R. Land Co. *v.* Mickel (41 Iowa 402), Contr., 72.
Iowa R. Land Co. *v.* Sac County (39 Iowa 124, 9 Am. Ry. Rep. 46), Tax., 11.
Iowa R. Land Co. *v.* Soper (39 Iowa 112, 9 Am. Ry. Rep. 29), Tax. 26.
Iowa R. Land Co. *v.* Story County (36 Iowa 48), Tax., 83.
Iowa R. Land Co. *v.* Woodbury County (39 Iowa 172), Tax., 26.
Ireland *v.* Atchison, T. & S. F. R. Co. (20 Am. & Eng. R. Cas. 493, 79 Mo. 572), Liens, 23, 40.
Ireland *v.* Cincinnati, W. & M. R. Co. (79 Mich. 163, 44 N. W. Rep. 426), Fires, 219, 220, 237; Witn., 98.
Ireland *v.* Gardner (4 Silv. Sup. Ct. 119, 26 N. Y. S. R. 895, 7 N. Y. Supp. 609), Negl., 74.
Ireland *v.* Metropolitan El. R. Co. (20 J. & S. (N. Y.) 450), Elev. Rys., 148, 161.
Ireland *v.* Taylor (68 Tex. 158, 4 S. W. Rep. 65), Sales of Rds., 12.
Irey *v.* Pennsylvania R. Co. (132 Pa. St. 563, 19 Atl. Rep. 341), Death, etc., 194.
Irish *v.* Burlington & S. W. R. Co. (44 Iowa 380), Em. Dom., 1035.
Irish *v.* Milwaukee & St. P. R. Co. (19 Minn. 376 (Gil. 323), 19 Am. Ry. Rep. 89), Car. of M., 561, 636.
Irish *v.* Northern Pac. R. Co. (4 Wash. 48, 29 Pac. Rep. 845), Car. of P., 370.
Irondequoit, In re (68 N. Y. 376), Bridges, 9.
Iron Mountain & H. R. Co. *v.* Johnson (119 U. S. 608, 7 Sup. Ct. Rep. 339), Forc. Ent., 1.
Iron Mountain & H. R. Co. *v.* Stansell (43 Ark. 275), Constr. Rys., 76; Evid., 14.
Iron Mountain R. Co. *v.* Bingham (38 Am. & Eng. R. Cas. 444, 87 Tenn. 522, 4 L. R. A. 622, 11 S. W. Rep. 705), Sts. & H., 69, 141, 143, 158, 220, 228, 295.
Iron R. Co. *v.* Fink (22 Am. & Eng. R. Cas. 20, 41 Ohio St. 321), Stock, 74.
Iron R. Co. *v.* Ironton (19 Ohio St. 299), Em. Dom., 189.
Iron R. Co. *v.* Lawrence Furnace Co. (29 Ohio St. 208), Charges, 4.
Iron R. Co. *v.* Lawrence Furnace Co. (54 Am. & Eng. R. Cas. 475, 49 Ohio St. 102, 30 N. E. Rep. 616), Charges, 7, 10, 47.
Iron R. Co. *v.* Mowery (3 Am. & Eng. R. Cas. 361, 36 Ohio St. 418, 38 Am. Rep. 597), Car. of P., 436; Collis., 12.
Irvin *v.* Nashville, C. & St. L. R. Co. (92 Ill. 103), Car. of M., 547.
Irvin *v.* New Orleans, St. L. & C. R. Co. (94 Ill. 105), Tax., 68.
Irvine *v.* Flint & P. M. R. Co. (53 Am. & Eng. R. Cas. 210, 89 Mich. 416, 50 N. W. Rep. 1008), Employés, Inj. to, 173, 182, 264, 312, 622.
Irvine *v.* Midland G. W. R. Co. (6 Ir. L. R. 55), Car. of M., 793.
Irwin *v.* Alley (158 Mass. 249, 33 N. E. Rep. 517), Death, etc., 258.
Irwin *v.* Bailey (8 Biss. (U. S.) 523), Bills & N., 14.
Irwin *v.* Lowe (89 Ind. 540), Mun. Aid, 72, 168, 233, 431.
Irwin *v.* New York C. R. Co. (1 T. & C. (N. Y.) 473; affirmed in 59 N. Y. 653, mem.), Car. of M., 675.

Irwin *v.* Ontario (3 Fed. Rep. 49, 18 Blatchf. (U. S.) 259), Mun. Aid, 352.
Irwin *v.* Smith (72 Ind. 482), Constr. Rys., 24.
Isaac *v.* Denver & R. G. R. Co. (12 Daly (N. Y.) 340; affirmed in 102 N. Y. 718, mem.), Death, etc., 27.
Isaacs *v.* Southern Pac. Co. (49 Fed. Rep. 797), Evid., 84.
Isaacs *v.* Third Ave. R. Co. (47 N. Y. 122), Agency, 81; St. Rys., 315.
Isaacson *v.* New York C. & H. R. R. Co. (16 Am. & Eng. R. Cas. 188, 94 N. Y. 278, 46 Am. Rep. 142; reversing 25 Hun 350), Bagg., 1, 5, 49, 55; Evid., 113.
Isabel *v.* Hannibal & St. J. R. Co. (60 Mo. 475, 9 Am. Ry. Rep. 261), Children, Inj. to, 2, 117, 127; Cross., Inj. at, 4; Death, etc., 221; Em. Dom., 134; Tresp., Inj. to, 28.
Isbell *v.* New York & N. H. R. Co. (27 Conn. 393), Animals, 280; Contrib. Neg., 11.
Isbester *v.* Queen (7 Can. Sup. Ct. 696, 1 Can. Exch. 358), Contr., 45, 76; Stat., 63.
Ischer *v.* St. Louis Bridge Co. (95 Mo. 261, 8 S. W. Rep. 367), Fel. Serv., 218, 312; Pl., 142.
Isenberg *v.* St. Louis & V. Anchor Line (13 Mo. App. 415), Car. of M., 292.
Isitt *v.* Railway Pass. A. Co. (22 Q. B. D. 504), Acc. Ins., 3.
Isle of Wight R. Co. (Newport Junction) *v.* Isle of Wight R. Co. (4 Ry. & C. T. Cas. 128), Charges, 117, 119.
Isle of Wight R. Co. *v.* Isle of Wight C. R. Co. (6 Ry. & C. T. Cas. 35), Charges, 99.
Isle of Wight R. Co. *v.* Ryde & N. R. Co. (2 Ry. & C. T. Cas. 251), Arb., 25.
Isle of Wight R. Co. *v.* Tahourdin (L. R. 25 Ch. D. 320, 53 L. J. Ch. D. 353, 50 L. T. 132, 32 W. R. 297), Stockh., 13.
Isom *v.* Mississippi C. R. Co. (36 Miss. 300), Em. Dom., 522, 741.
Ivens *v.* Cincinnati, W. & M. R. Co. (23 Am. & Eng. R. Cas. 258, 103 Ind. 27, 2 N. E. Rep. 134), Contrib. Neg., 50; Cross., Inj. at, 254, 264; Tresp., Inj. to, 40.
Ives *v.* Smith (3 N. Y. Supp. 645; affirmed in 8 N. Y. Supp. 46), For. Corp., 23.
Ives *v.* Smith (8 N. Y. Supp. 46, 28 N. Y. S. R. 917, 55 Hun 606; affirming 3 N. Y. Supp. 645), Injunc., 24; Int. Com., 146; Leases, 101; Par. & Comp. L., 5; Stockh., 122.
Ivy *v.* East Tenn., V. & G. R. Co. (88 Ga. 71, 13 S. E. Rep. 947), Cross., Inj. at, 208.

Jack *v.* Des Moines & Ft. D. R. Co. (53 Iowa 399, 5 N. W. Rep. 537), Sales, 14.
Jack *v.* Naber (15 Iowa 450), Subscr., 144.
Jack *v.* Ontario, S. & H. R. Co. (14 U. C. Q. B. 328), Animals, 55, 555.
Jackman *v.* Missouri Pac. R. Co. (17 Am. & Eng. R. Cas. 72, 15 Neb. 524, 19 N. W. Rep. 497), Em. Dom., 699.
Jackman *v.* State (71 Ind. 149), Crim. L., 30.
Jacks *v.* Helena (41 Ark. 213), Mun. Aid, 226, 230; Subscr., 116.
Jackson *v.* Barry R. Co. ([1893] 1 Ch. 238), Arb., 13.
Jackson *v.* Burlington & L. R. Co. (29 Fed. Rep. 474, 24 Blatchf. (U. S.) 194), Mort. 180.
Jackson *v.* Centerville, M. & A. R. Co. (17 Am. & Eng. R. Cas. 181, 64 Iowa 292, 20 N. W. Rep. 442), Em. Dom., 1010; Mort., 183.
Jackson *v.* Chicago & N. W. R. Co. (31 Iowa 176), Fires, 35, 47.
Jackson *v.* Chicago & N. W. R. Co. (36 Iowa 451), Animals, 536.
Jackson *v.* Chicago, S. F. & C. R. Co. (43 Am. & Eng. R. Cas. 145, 41 Fed. Rep. 656), Embankm., 3; Sts. & H., 50, 216.
Jackson *v.* Cleveland (15 Wis. 107), Constr. Rys., 106.
Jackson *v.* Cleveland (19 Wis. 400; former appeal 15 Wis. 107), Constr. Rys., 27, 99.
Jackson *v.* Crilly (16 Colo. 103, 26 Pac. Rep. 331), Car. of P., 459; Contrib. Neg., 32, 87; Death, etc., 252.
Jackson *v.* Dines (13 Colo. 90, 21 Pac. Rep. 918), Pub. Lds., 38; Tresp., 12.
Jackson *v.* Hamm (14 Colo. 58, 23 Pac. Rep. 88), Assign., 20.
Jackson *v.* Indianapolis & St. L. R. Co. (47 Ind. 454), Contrib. Neg., 53.
Jackson *v.* Kansas City, L. & S. K. R. Co. (15 Am. & Eng. R. Cas. 178, 31 Kan. 761, 3 Pac. Rep. 501), Employés, Inj. to, 239; Negl., 32.
Jackson *v.* Kiel (40 Am. & Eng. R. Cas. 297, 13 Colo. 378, 22 Pac. Rep. 504), Sts. & H., 135, 277.
Jackson *v.* La Moure County (46 Am. & Eng. R. Cas. 449, 1 N. Dak. 238), Land Grants, 51.
Jackson *v.* Ludeling (21 Wall. (U. S.) 616, 6 Am. Ry. Rep. 457), Judic[illegible], 5, 6; Sales of Rds., 10.
Jackson *v.* Ludeling (99 U. S. [illegible]), Mort., 265.
Jackson *v.* McLean (100 Mo. 130, 13 S. W. Rep. 393), Direct., 45; Eq., 3.
Jackson *v.* Metropolitan R. Co. (26 W. R. 175; reversing L. R. 2 C. P. D. 125, 46 L. J. C. P. D. 376, 25 W. R. 661, 36 L. T. 485, L. R. 10 C. P. 49, 44 L. J. C. P. 83, 31 L. T. 475, 23 W. R. 78), Car. of P., 206.
Jackson *v.* Missouri Pac. R. Co. (Mo.) (14 S. W. Rep. 54), Employés, Inj. to, 198.
Jackson *v.* Missouri Pac. R. Co. (104 Mo. 448, 16 S. W. Rep. 413), Employés, Inj. to, 198.
Jackson *v.* Nashville, C. & St. L. R. Co. (19 Am. & Eng. R. Cas. 433, 13 Lea (Tenn.) 491, 49 Am. Rep. 663), Cross., Inj. at, 324; Negl., 49.
Jackson *v.* New York C. R. Co. (2 T. & C. (N. Y.) 653; affirmed in 58 N. Y. 623, mem.), Direct., 30, 32; Int., 11.
Jackson *v.* Northeastern R. Co. (L. R. 7 Ch. D. 573, 47 L. J. Ch. D. 303, 38 L. T. 664, 26 W. R. 513), Cov'ts, 1; Direct., 46.
Jackson *v.* Northern C. R. Co. (Chase Dec. (U. S.) 268), Tax., 99.
Jackson *v.* Philadelphia, W. & B. R. Co. (4 Del. Ch. 180), License, 16.
Jackson *v.* Rutland & B. R. Co. (25 Vt. 150), Animals, 49, 153; Fences, 69.
Jackson *v.* Sacramento Valley R. Co. (23 Cal. 269), Car. of M., 12, 323, 330; New Tr., 25.

Jackson *v.* St. Louis, A. & T. R. Co. (1 Int. Com. Rep. 599, 1 Int. Com. Com. 184), Int. Com., 164.
Jackson *v.* St. Louis, I. M. & S. R. Co. (29 Mo. App. 495), Car. of P., 418, 571.
Jackson *v.* St. Louis, I. M. & S. R. Co. (36 Mo. App. 170), Animals, 536; App., 104.
Jackson *v.* St. Louis, I. M. & S. R. Co. (43 Mo. App. 324), Animals, 603; Fences, 66.
Jackson *v.* St. Louis, I. M. & S. R. Co. (74 Mo. 526), Animals, 588.
Jackson *v.* St. Louis, I. M. & S. R. Co. (80 Mo. 147), Animals, 356.
Jackson *v.* St. Louis, I. M. & S. R. Co. (25 Am. & Eng. R. Cas. 327, 87 Mo. 422), Agency, 90; Death, etc., 25.
Jackson *v.* Second Ave. R. Co. (47 N. Y. 274, 7 Am. Rep. 448), Eject. Pass., 57, 58.
Jackson *v.* State (54 Am. & Eng. R. Cas. 325, 88 Ga. 787, 15 S. E. Rep. 905), Crim. L., 50.
Jackson *v.* Stockbridge (29 Tex. 394), Subscr., 145, 212.
Jackson *v.* Vicksburg, S. & T. R. Co. (2 Woods (U. S.) 141), Bonds, 28.
Jackson *v.* York & C. R. Co. (48 Me. 147), Coupons, 16.
Jackson & S. Co. *v.* Burlington & L. R. Co. (24 Blatchf. (U. S.) 194, 29 Fed. Rep. 474), Int., 16; Mort., 314.
Jackson Co. *v.* Boylston Mut. Ins. Co. (21 Am. & Eng. R. Cas. 117, 139 Mass. 508, 2 N. E. Rep. 103), Fire Ins., 11.
Jackson County Horse R. Co. *v.* Interstate R. T. R. Co. (24 Fed. Rep. 306), St. Rys., 44.
Jackson, L. & S. R. Co. *v.* Davison (65 Mich. 416, 14 West. Rep. 65, 32 N. W. Rep. 726), Land Grants, 3, 32.
Jacksonville *v.* Jacksonville R. Co. (67 Ill. 540), Sts. & H., 231.
Jacksonville, A. & St. L. R. Co. *v.* Caldwell (21 Ill. 75), Witn., 159.
Jacksonville & S. R. Co. *v.* Kidder (21 Ill. 131), Em. Dom., 563, 606.
Jacksonville & S. E. R. Co. *v.* Walsh (14 Am. & Eng. R. Cas. 245, 106 Ill. 253), Em. Dom., 584, 595, 609, 681.
Jacksonville, L. & St. L. R. Co. *v.* Louisville & N. R. Co. (47 Ill. App. 414), Leases, 7, 84.
Jacksonville, N. W. & S. E. R. Co. *v.* Brown (67 Ill. 201), Subscr., 113.
Jacksonville, N. W. & S. E. R. Co. *v.* Cox (91 Ill. 500), Flood. Lds., 48.
Jacksonville, N. W. & S. E. R. Co. *v.* Hall (2 Ill. App. 618), Car. of L. S., 136, 144.
Jacksonville, N. W. & S. E. R. Co. *v.* Virden (104 Ill. 339), Mun. Aid, 117.
Jacksonville, P. & M. R. Co. *v.* United States (21 Ct. of Cl. 155), Car. of Mails, 10, 15; Land Grant Rds., 5.
Jacksonville, P. & M. R. Co. *v.* United States (28 Am. & Eng. R. Cas. 82, 118 U. S. 626, 7 Sup. Ct. Rep. 48), Car. of Mails, 15.
Jacksonville, St. A. & H. R. R. Co. *v.* Mitchell (32 Fla. 77, 13 So. Rep. 673), Husb. & W., 11.
Jacksonville S. E. R. Co. *v.* Carlsen (29 Ill. App. 230), App., 123.
Jacksonville S. E. R. Co. *v.* Rabbit (29 Ill. App. 288), Discrim., 65.
Jacksonville S. E. R. Co. *v.* Southworth (135 Ill. 250, 25 N. E. Rep. 1093; affirming 32 Ill. App. 307), Car. of P., 605; Derailm., 6; Evid., 75, 90; Trial, 202.
Jacksonville St. R. Co. *v.* Chappell (28 Am. & Eng. R. Cas. 227, 21 Fla. 175), Abate., 4; Negl., 1; New Tr., 5, 17.
Jacksonville St. R. Co. *v.* Chappell (22 Fla. 616, 1 So. Rep. 10), Abate., 4.
Jacksonville, T. & K. W. R. Co. *v.* Adams (47 Am. & Eng. R. Cas. 206, 27 Fla. 443, 9 So. Rep. 2), Ejectm., 2; Em. Dom., 283.
Jacksonville, T. & K. W. R. Co. *v.* Adams (51 Am. & Eng. R. Cas. 544, 28 Fla. 631, 10 So. Rep. 465), Em. Dom., 657, 1030, 1031.
Jacksonville, T. & K. W. R. Co. *v.* Adams (29 Fla. 260, 11 So. Rep. 169; former appeal 28 Fla. 631), Em. Dom., 250, 889.
Jacksonville, T. & K. W. R. Co. *v.* American Constr. Co. (57 Fed. Rep. 66), Costs, 5.
Jacksonville, T. & K. W. R. Co. *v.* Galvin (53 Am. & Eng. R. Cas. 341, 29 Fla. 636, 11 So. Rep. 231), Employés, Inj. to, 183, 526.
Jacksonville, T. & K. W. R. Co. *v.* Garrison (30 Fla. 431, 11 So. Rep. 932), Animals, 593.
Jacksonville, T. & K. W. R. Co. *v.* Garrison (30 Fla. 557, 11 So. Rep. 929), Animals, 20, 323, 342, 456; App., 125.
Jacksonville, T. & K. W. R. Co. *v.* Garrison (30 Fla. 567, 11 So. Rep. 926), Animals, 480; App., 125.
Jacksonville, T. & K. W. R. Co. *v.* Hunter (26 Fla. 308, 8 So. Rep. 450), App., 117.
Jacksonville, T. & K. W. R. Co. *v.* Peninsular L., T. & M. Co. (49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661), Agency, 39; App., 65; Contrib. Neg., 109; Dam., 110; Evid., 133, 160; Fires, 27, 41, 102, 109, 114, 237, 266, 288, 305, 320, 321, 339, 353, 354; Leases, 59; Negl., 6, 43, 47, 49, 97.
Jacksonville, T. & K. W. R. Co. *v.* Roberts (22 Fla. 324), App., 121.
Jacksonville, T. & K. W. R. Co. *v.* Wellman (26 Fla. 344, 7 So. Rep. 845), Animals, 329, 439, 440; App., 117; Witn., 71.
Jacobs *v.* Hooker (1 Edm. Sel. Cas. (N. Y.) 472), Car. of M., 616; Pl., 150.
Jacobs *v.* Lake Shore & M. S. R. Co. (84 Mich. 299, 47 N. W. Rep. 669), Employés, Inj. to, 197.
Jacobs *v.* Louisville & N. R. Co. (10 Bush (Ky.) 263), Dam., 27, 29; Death, etc., 148, 178; Ex. & Ad., 3.
Jacobs *v.* Peterborough & S. R. Co. (8 Cush. (Mass.) 223), Spec. Perf., 5.
Jacobs *v.* Tutt (33 Fed. Rep. 412), Bagg., 42, 67; Union D. Cos., 8.
Jacobson *v.* Cornelius (24 N. Y. S. R. 360, 5 N. Y. Supp. 306), Employés, Inj. to, 97.
Jacobson *v.* St. Paul & D. R. Co. (41 Minn. 206, 42 N. W. Rep. 932), Death, etc., 76.
Jacobus *v.* St. Paul & C. R. Co. (20 Minn.

125 (Gil. 110), Car. of P., 334, 494; Passes, 10, 34.
Jacques *v.* Bridgeport Horse R. Co. (41 Conn. 61, 6 Am. Ry. Rep. 1), Dam., 97; Evid., 84.
Jacques *v.* Fackney (64 Ill. 87), Subrog., 3.
Jaeger *v.* Chicago, M. & St. P. R. Co. (40 Am. & Eng. R. Cas. 194, 75 Wis. 130, 43 N. W. Rep. 732), Fences, 59; Words & Ph., 73.
Jaffrey *v.* Toronto, G. & B. R. Co. (23 U. C. C. P. 553), Fires, 62, 122.
Jaffrey *v.* Toronto, G. & B. R. Co. (24 U. C. C. P. 271), Fires, 18, 71.
Jager *v.* Dey (80 Iowa 23, 45 N. W. Rep. 391), Em. Dom., 186.
Jager *v.* Doherty (61 Ind. 528), Mun. Aid, 411.
Jahant *v.* Central Pac. R. Co. (74 Cal. 9, 15 Pac. Rep. 362), Animals, 382.
Jamaica *v.* Long Island R. Co. (49 N. Y. S. R. 365, 66 Hun 631, mem., 21 N. Y. Supp. 327), Cross., Sts. & H., 64.
Jamaica *v.* Long Island R. Co. (37 How. Pr. (N. Y.) 379), Incorp., 12; Mun. Corp., 39.
Jamaica & B. Plankroad Co. *v.* New York & M. B. R. Co. (25 Hun (N. Y.) 585), Em. Dom., 412.
James *v.* Atlanta St. R. Co. (90 Ga. 695, 16 S. E. Rep. 642), Pl., 25.
James *v.* Canadian Pac. R. Co. (5 Int. Com. Com. 612, 4 Int. Com. Rep. 274), Int. Com., 32, 35, 41, 51, 150.
James *v.* Cincinnati, H. & D. R. Co. (2 Disney (Ohio) 261), Charters, 54; Subscr., 7, 81, 93, 157.
James *v.* Cowing (2 Am. & Eng. R. Cas. 336, 82 N. Y. 449; reversing 17 Hun 256), Mort., 155.
James *v.* Darlington (71 Wis. 173, 36 N. W. Rep. 834), Sts. & H., 31.
James *v.* East Tenn., V. & G. R. Co. (2 Int. Com. Rep. 609, 3 Int. Com. Com. 225), Int. Com., 113, 116.
James *v.* Fitchburg R. Co. (20 N. Y. S. R. 168, 50 Hun 310, 3 N. Y. Supp. 165), Consol., 43.
James *v.* Indianapolis & St. L. R. Co. (91 Ill. 554), Lim. of Ac., 11, 52; Officers, 4.
James *v.* James (22 Q. B. D. 669), Arb., 6.
James *v.* Miles (54 Ark. 460, 16 S. W. Rep. 195), Land. & T., 2.
James *v.* Milwaukee (16 Wall. (U. S.) 159), Mun. Aid, 217.
James *v.* Milwaukee & M. R. Co. (6 Wall. (U. S.) 752), Mort., 286.
James *v.* Missouri Pac. R. Co. (107 Mo. 480, 18 S. W. Rep. 31), Stat. & D., 137, 141.
James *v.* Northern Pac. R. Co. (46 Minn. 168, 48 N. W. Rep. 783), Employés, Inj. to, 371; Evid., 73, 79.
James *v.* Ontario & Q. R. Co. (15 Ont. App. 1), Em. Dom., 1247.
James *v.* Richmond & D. R. Co. (48 Am. & Eng. R. Cas. 522, 92 Ala. 231, 9 So. Rep. 335), Death, etc., 425.
James *v.* St. Louis & S. F. R. Co. (46 Fed. Rep. 47), For. Corp., 5.
James *v.* Taff Vale R. Co. (3 Ry. & C. T. Cas. 540), Car. of P., 522.
James & M. Buggy Co. *v.* Cincinnati, N. O. & T. P. R. Co. (3 Int. Com. Rep. 682, 4 Int. Com. Com. 744), Int. Com., 21, 112, 113, 116, 125.
Jameson *v.* Androscoggin R. Co. (52 Me. 412), Em. Dom., 833.
Jameson *v.* Midland R. Co. (50 L. T. 426), Car. of M., 806.
James River & K. Co. *v.* Anderson (12 Leigh (Va.) 278), Injunc., 2; Sts. & H., 57, 114.
James River & K. Co. *v.* Turner (9 Leigh (Va.) 313), Em. Dom., 755.
Jamestown *v.* Chicago, B. & N. R. Co. (32 Am. & Eng. R. Cas. 263, 69 Wis. 648, 34 N. W. Rep. 728), Sts. & H., 176, 191.
Jamestown & F. R. Co. *v.* Egbert (152 Pa. St. 53, 25 Atl. Rep. 151), Att'ys, 11.
Jamieson *v.* Kings County El. R. Co. (26 N. Y. Supp. 127, 56 N. Y. S. R. 187, 74 Hun 637, mem.), Elev. Rys., 107, 176.
Jamison *v.* Burlington & W. R. Co. (27 Am. & Eng. R. Cas. 413, 69 Iowa 670, 29 N. W. Rep. 774), App., 130; Em. Dom., 940; Evid., 241.
Jamison *v.* Burlington & W. R. Co. (78 Iowa 562, 43 N. W. Rep. 529), Em. Dom., 763.
Jamison *v.* Burlington & W. R. Co. (87 Iowa 265, 54 N. W. Rep. 242), Em. Dom., 763.
Jamison *v.* Illinois C. R. Co. (63 Miss. 33), Children, Inj. to, 101; Witn., 34.
Jamison *v.* San Jose & S. C. R. Co. (3 Am. & Eng. R. Cas. 350, 55 Cal. 593), Car. of P., 140, 153; Contrib. Neg., 11, 28, 82; Negl., 1.
Janesville *v.* Milwaukee & M. R. Co. (7 (Wis. 484), Jurisd., 13; Sts. & H., 403.
Janesville Bridge Co. *v.* Stoughton (1 Pinn. (Wis.) 667), Bridges, 90.
Jannette *v.* Great Western R. Co. (4 U. C. C. P. 488), Em. Dom., 1279.
Jantzen *v.* Wabash, St. L. & P. R. Co. (83 Mo. 171), Animals, 474, 620.
January *v.* Johnson County (3 Dill. (U. S.) 392), Mun. Aid, 314.
January *v.* Johnson County (3 Dill. (U. S.) 402), Mun. Aid, 338.
Jaquinto *v.* Broadway & S. A. R. Co. (49 N. Y. S. R. 627, 21 N. Y. Supp. 639, 2 Misc. 174), Children, Inj. to, 57.
Jaquith *v.* American Exp. Co. (60 N. H. 61), Liens, 7.
Jarden *v.* Philadelphia, W. & B. R. Co. (3 Whart. (Pa.) 502), Sts. & H., 225.
Jardine *v.* Cornell (34 Am. & Eng. R. Cas. 307, 50 N. J. L. 485, 14 Atl. Rep. 590), Arrest, 3; Eject. Pass., 9, 58.
Jarrett *v.* Atlanta & W. P. R. Co. (83 Ga. 347, 9 S. E. Rep. 681), Car. of P., 424; Trial, 84.
Jarrott *v.* Moberly (5 Dill. (U. S.) 253), Mun. Aid, 319.
Jarrolt *v.* Moberly (103 U. S. 580; affirming 5 Dill. 253), Mun. Aid, 40, 54.
Jarvis *v.* Brooklyn El. R. Co. (40 N. Y. S. R. 825, 16 N. Y. Supp. 96; affirmed in 133 N. Y. 623, mem., 30 N. E. Rep. 1150, 44 N. Y. S. R. 932), Elev. Rys., 205; Stat. & D., 141.
Jarvis *v.* Great Western R. Co. (8 U. C. C. P. 115), Sts. & H., 216.

Jarvis *v.* Manhattan Beach Co. (53 Hun 362, 25 N. Y. S. R. 1, 6 N. Y. Supp. 703), Stock, 17.
Jarvis *v.* St. Louis, I. M. & S. R. Co. (26 Mo. App. 253), Nuis., 6.
Jarvis *v.* Santa Clara Valley R. Co. (52 Cal. 438), Nuis., 15.
Jasper County *v.* Ballou (3 Am. & Eng. R. Cas. 47, 103 U. S. 745), Mun. Aid, 165.
Jathc *v.* Green & C. St. Pass. R. Co. (4 Phila. (Pa.) 24), Bailm., 6; St. Rys., 509, 513; Witn., 52.
Jatunn *v.* Smith (95 Cal. 154, 30 Pac. Rep. 200), Evid., 264; Land Grants, 63.
Jay *v.* Long Island R. Co. (2 Daly (N. Y.) 401), Jurisd., 5.
Jeaume *v.* New York, L. & W. R. Co. (35 N. Y. S. R. 674, 13 N. Y. Supp. 249; affirmed (?) 128 N. Y. 623, mem., 40 N. Y. S. R. 401), Em. Dom., 165.
Jebb *v.* Chicago & G. T. R. Co. (31 Am. & Eng. R. Cas. 532, 67 Mich. 160, 10 West. Rep. 905, 34 N. W. Rep. 538), Animals, 394, 576, 591, 608; Trial, 117.
Jefferies *v.* Philadelphia, W. & B. R. Co. (3 Houst. (Del.) 447), Fires, 23, 116, 280, 360.
Jefferson, The (31 Fed. Rep. 489), Car. of M., 106.
Jefferson *v.* Hewitt (95 Cal. 535, 30 Pac. Rep. 772), Subscr., 116, 145.
Jefferson *v.* Kaiser (17 La. Ann. 176), Pl., 90.
Jefferson *v.* New York El. R. Co. (132 N. Y. 483, 30 N. E. Rep. 981, 44 N. Y. S. R. 629; reversing 58 Hun 603, 33 N. Y. S. R. 916, 11 N. Y. Supp. 488), Elev. Rys., 121.
Jefferson & L. P. R. Co. *v.* New Orleans (30 La. Ann. 970), Injunc., 53, 63.
Jefferson & P. R. Co. *v.* Hazuer (7 La. Ann. 182), Em. Dom., 346.
Jefferson & P. R Co. *v.* Thomas (7 La. Ann. 182), Em. Dom., 47, 61.
Jefferson County *v.* Burlington & M. R. R. Co. (66 Iowa 385, 16 N. W. Rep. 561, 23 N. W. Rep. 899), Mun. Aid, 346.
Jeffersonville, M. & I. R. Co. *v.* Adams (43 Ind. 402), Animals, 266.
Jeffersonville, M. & I. R. Co. *v.* Avery (31 Ind. 277), Animals, 127.
Jeffersonville, M. & I. R. Co. *v.* Barbour (14 Am. & Eng. R. Cas. 466, 89 Ind. 375), Deeds, 33.
Jeffersonville, M. & I. R. Co. *v.* Beatty (36 Ind. 15, 5 Am. Ry. Rep. 543), Animals, 97; Fences, 58.
Jeffersonville, M. & I. R. Co. *v.* Bowen (40 Ind. 545), App., 114; Children, Inj. to, 121, 134.
Jeffersonville, M. & I. R. Co. *v.* Bowen (49 Ind. 154), Children, Inj. to, 130.
Jeffersonville, M. & I. R. Co. *v.* Brevoort (30 Ind. 324), Animals, 117, 293, 336, 355, 382.
Jeffersonville, M. & I. R. Co. *v.* Chenoweth (30 Ind. 366), Animals, 352.
Jeffersonville, M. & I. R. Co. *v.* Daugherty (40 Ind. 33), Em. Dom., 414.
Jeffersonville, M. & I. R. Co. *v.* Downey (61 Ind. 287), Animals, 73, 645.
Jeffersonville, M. & I. R. Co. *v.* Dunlap (29 Ind. 426), Animals, 12, 126, 374; Proc., 36.
Jeffersonville, M. & I. R. Co. *v.* Dunlap (31 Am. & Eng. R. Cas. 512, 112 Ind. 93, 13 N. E. Rep. 403), Animals, 28, 73, 127, 181, 212.
Jeffersonville, M. & I. R. Co. *v.* Esterle (13 Bush (Ky.) 667, 17 Am. Ry. Rep. 111), Actions, 2; Evid., 67; Sts. & H., 142, 143, 217, 274, 287, 292.
Jeffersonville, M. & I. R. Co. *v.* Foster (63 Ind. 423), Animals, 567.
Jeffersonville, M. & I. R. Co. *v.* Gent (35 Ind. 39), Car. of M., 728.
Jeffersonville, M. & I. R. Co. *v.* Goldsmith (47 Ind. 43, 8 Am. Ry. Rep. 315), Contrib. Neg., 72; Tresp., Inj. to, 5, 22.
Jeffersonville, M. & I. R. Co. *v.* Hendricks (41 Ind. 48), Death, etc., 98, 130, 146, 151.
Jeffersonville, M. & I. R. Co. *v.* Huber (42 Ind. 173), Animals, 187.
Jeffersonville, M. & I. R. Co. *v.* Irvin (46 Ind. 180), App., 109; Bills of L., 48, 113; Pl., 15.
Jeffersonville, M. & I. R. Co. *v.* Lyon (55 Ind. 477), Animals, 336, 353, 364, 365, 370, 572.
Jeffersonville, M. & I. R. Co. *v.* Lyon (72 Ind. 107), Animals, 127, 353, 364.
Jeffersonville, M. & I. R. Co. *v.* McQueen (49 Ind. 64), Tax., 258.
Jeffersonville, M. & I. R. Co. *v.* Nichols (30 Ind. 321), Animals, 12.
Jeffersonville, M. & I. R. Co. *v.* O'Connor (37 Ind. 95, 5 Am. Ry. Rep. 566), Animals, 122, 520; Fences, 63.
Jeffersonville, M. & I. R. Co. *v.* Oyler (60 Ind. 383), Vend. & P., 4.
Jeffersonville, M. & I. R. Co. *v.* Oyler (5 Am. & Eng. R. Cas. 397, 82 Ind. 394), Adv. Poss., 3, 7.
Jeffersonville, M. & I. R. Co. *v.* Parkhurst (34 Ind. 501), Animals, 212, 565.
Jeffersonville, M. & I. R. Co. *v.* Parmalee (51 Ind. 42), Car. of P., 30.
Jeffersonville, M. & I. R. Co. *v.* Peters (1 Ind. App. 69, 27 N. E. Rep. 299), Animals, 99, 519; Fences, 11, 68.
Jeffersonville, M. & I. R. Co. *v.* Riley (39 Ind. 568, 10 Am. Ry. Rep. 325), Car. of P., 39; Death, etc., 353, 429; Evid., 255.
Jeffersonville, M. & I. R. Co. *v.* Ross (37 Ind. 545), Animals, 126.
Jeffersonville, M. & I. R. Co. *v.* Sullivan (38 Ind. 262, 10 Am. Ry. Rep. 279), Animals, 145, 372; Fences, 87.
Jeffersonville, M. & I. R. Co. *v.* Sweeney (32 Ind. 430), Fences, 63.
Jeffersonville, M. & I. R. Co. *v.* Tull (37 Ind. 341), Animals, 579.
Jeffersonville, M. & I. R. Co. *v.* Underhill (40 Ind. 229), Animals, 330, 364.
Jeffersonville, M. & I. R. Co. *v.* Underhill (48 Ind. 389), Animals, 266.
Jeffersonville, M. & I. R. Co. *v.* Vancant (40 Ind. 233), Animals, 354.
Jeffersonville, M. & I. R. Co. *v.* Worland (50 Ind. 339), Pl., 106.
Jeffersonville R. Co. *v.* Cleveland (2 Bush (Ky.) 468), Car. of M., 82, 84, 206.
Jeffersonville R. Co. *v.* Cotton (29 Ind. 498), Car. of M., 91.

Jeffersonville R. Co. *v.* Gabbert (25 Ind. 431), Charters, 128; Lim. of Ac., 61.
Jeffersonville R. Co. *v.* Hendricks (26 Ind. 228), Car. of P., 126, 137, 140, 151, 247, 348, 426, 428, 550; Contrib. Neg., 53.
Jeffersonville R. Co. *v.* Lanham (27 Ind. 171), Witn., 150.
Jeffersonville R. Co. *v.* Martin (10 Ind. 416), Animals, 22, 289, 344.
Jeffersonville R. Co. *v.* Mounts (7 Ind. 669), Arb., 12, 17, 20, 29.
Jeffersonville R. Co. *v.* Rogers (28 Ind. 1), Dam., 26; Eject. Pass., 67, 105; Tickets & F., 111, 122.
Jeffersonville R. Co. *v.* Rogers (38 Ind. 116), Agency, 80; Eject. Pass., 70, 113.
Jeffersonville R. Co. *v.* Swayne (26 Ind. 477), Death, etc., 58, 96; Ex. & Ad., 6.
Jeffersonville R. Co. *v.* Swift (26 Ind. 459), Car. of P., 426, 431.
Jeffersonville R. Co. *v.* White (6 Bush (Ky.) 251), Car. of M., 33, 286.
Jeffrey *v.* Keokuk & D. M. R. Co. (51 Iowa 439), App., 37; New Tr., 22.
Jeffrey *v.* Keokuk & D. M. R. Co. (5 Am. & Eng. R. Cas. 568, 56 Iowa 546, 9 N. W. Rep. 884), Contrib. Neg., 32; Employés, Inj. to, 168, 583; Witn., 97.
Jellett *v.* St. Paul, M. & M. R. Co. (16 Am. & Eng. R. Cas. 246, 30 Minn. 265, 15 N. W. Rep. 237), Trover, 19.
Jemison *v.* Southwestern R. Co. (75 Ga. 444, 58 Am. Rep. 476), Animals, 84.
Jemmison *v.* Gray (29 Iowa 537), Constr. Rys., 68; Dam., 40; Sales, 12.
Jenkins *v.* Burlington & M. R. R. Co. (29 Iowa 255), Stat. & D., 41.
Jenkins *v.* Central Ontario R. Co. (17 Am. & Eng. R. Cas. 116, 4 Ont. 593), Em. Dom., 1277.
Jenkins *v.* Central R. & B. Co. (89 Ga. 756, 15 S. E. Rep. 655), Trial, 67.
Jenkins *v.* Chicago & A. R. Co. (27 Mo. App. 578), Fences, 56, 57.
Jenkins *v.* Chicago & A. R. Co. (32 Mo. App. 552), Animals, 621.
Jenkins *v.* Chicago & N. W. R. Co. (6 Ill. App. 192), Lim. of Ac., 45.
Jenkins *v.* Chicago, M. & St. P. R. Co. (41 Wis. 112), Car. of L. S., 126.
Jenkins *v.* Little Miami R. Co. (2 Disney (Ohio) 49), Negl., 63, 75.
Jenkins *v.* New Orleans, O. & G. W. R. Co. (15 La. Ann. 118), Inj. to Cars by Cattle, 2.
Jenkins *v.* Picket (9 Yerg. (Tenn.) 480), Ca . of M., 749.
Jenkins *v.* Wilcock (11 U. C. C. P. 505), Stockh., 26, 31.
Jenkins *v.* Wilmington & W. R. Co. (110 N. Car. 438, 15 S. E. Rep. 193), Trial, 45; Waters & W., 26.
Jenks *v.* Philadelphia, G. & C. H. R. Co. (17 Phila. (Pa.) 65), Em. Dom., 645.
Jennings *v.* Fitchburg R. Co. (146 Mass. 621, 6 N. Eng. Rep. 269, 16 N. E. Rep. 468), Bridges, 76; Pl., 28.
Jennings *v.* Grand Trunk R. Co. (15 Ont. App. 477), Car. of P., 53; Death, etc., 379; Exp. Cos., 13.
Jennings *v.* Grand Trunk R. Co. (49 Am. & Eng. R. Cas. 98, 127 N. Y. 438, 28 N. E. Rep. 394, 40 N. Y. S. R. 318; affirming 52 Hun 227, 23 N. Y. S. R. 15, 5 N. Y. Supp. 140), Car. of M., 443, 486, 487, 615, 689; Lim. of Liab., 19, 41.
Jennings *v.* Great Northern R. Co. (35 L. J. Q. B. 15, 12 Jur. N. S. 331, L. R. 1 Q. B. 7, 44 W. R. 28, 13 L. T. 231, 1 Ry. & C. T. Cas. 15), Car. of P., 70; Tickets & F., 33, 34.
Jennings *v.* Pennsylvania R. Co. (93 Pa. St. 337), Fires, 307, 316.
Jennings *v.* Philadelphia & R. R. Co. (23 Fed. Rep. 569), Receiv., 4.
Jennings *v.* St. Joseph & St. L. R. Co. (37 Mo. App. 651), Animals, 117.
Jennings *v.* St. Louis, I. M. & S. R. Co. (99 Mo. 394, 11 S. W. Rep. 999), Contrib. Neg., 49; Cross., Inj. at, 56; Trial, 145.
Jennings *v.* St. Louis, I. M. & S. R. Co. (112 Mo. 268, 20 S. W. Rep. 490), Cross., Inj. at, 191, 263.
Jennings *v.* Tacoma R. & M. Co. (7 Wash. 275, 34 Pac. Rep. 937), Employés, Inj. to, 343.
Jensen *v.* Union Pac. R. Co. (6 Utah 253, 21 Pac. Rep. 994), Animals, 6, 334.
Jepherson *v.* Hunt (2 Allen (Mass.) 417), Contr., 15; Em. Dom., 214.
Jerald *v.* Elly (51 Iowa 321), Deeds, 12.
Jermain *v.* Lake Shore & M. S. R. Co. (91 N. Y. 483; affirming 26 Hun 474), Divid., 9.
Jermain *v.* Lake Shore & M. S. R. Co. (31 Hun (N. Y.) 558), Dam., 111.
Jerman *v.* Benton (79 Mo. 148), Stockn., 43, 47, 72.
Jerome *v.* Smith (48 Vt. 230), Eject. Pass., 26.
Jersey City *v.* Jersey City & B. R. Co. (20 N. J. Eq. 360), Sts. & H., 52.
Jersey City & B. R. Co. *v.* Jersey City & H. H. R. Co. (20 N. J. Eq. 61; reversed in 21 N. J. Eq. 550), Arb., 18; Em. Dom., 418; St. Rys., 16, 195, 233, 238, 241; Sts. & H., 249.
Jersey City & B. R. Co. *v.* Morgan (40 Am. & Eng. R. Cas. 675, 52 N. J. L. 60, 18 Atl. Rep. 904; affirmed in 52 N. J. L. 558, 21 Atl. Rep. 783), St. Rys., 519.
Jersey City & H. H. R. Co. *v.* Jersey City & B. R. Co. (21 N. J. Eq. 550; reversing 20 N. J. Eq. 61), St. Rys., 97.
Jersey City, N. & W. R. Co. *v.* Central R. Co. (49 Am. & Eng. R. Cas. 256, 48 N. J. Eq. 379, 22 Atl. Rep. 728), Cross. Rys., 62; Em. Dom., 925, 955.
Jessup *v.* Atlantic & G. R. Co. (3 Woods (U. S.) 441), Mort., 91, 107.
Jessup *v.* Bridge (11 Iowa 572), Mort., 31.
Jessup *v.* Chicago & N. W. R. Co. (82 Iowa 243, 48 N. W. Rep. 77), Employés, 1.
Jessup *v.* Grand Trunk R. Co. (7 Ont. App. 128; reversing 28 Grant Ch. 583), Aband., 5, 8.
Jessup *v.* Illinois C. R. Co. (36 Fed. Rep. 735), Leases, 104; Parties, 21.
Jessup *v.* Stone (13 Wis. 466), Mort., 126.
Jesup *v.* City Bank (14 Wis. 331), Bonds, 10; Pledge, etc., 3; Pres., 4.
Jesup *v.* Illinois C. R. Co. (43 Fed. Rep. 483), Direct., 48; Leases, 25, 89.

Jesup *v.* Wabash, St. L. & P. R. Co. (44 Fed. Rep. 663), Receiv., 113.
Jetter *v.* New York & H. R. Co. (2 Abb. App. Dec. 458, 2 Keyes 154), Children, Inj. to, 141; Negl., 20; St. Rys., 470.
Jewell *v.* Chicago, St. P. & M. R. Co. (6 Am. & Eng. R. Cas. 379, 54 Wis. 610, 12 N. W. Rep. 83, 41 Am. Rep. 63), Car. of P., 428.
Jewell *v.* Grand Trunk R. Co. (55 N. H. 84, 11 Am. Ry. Rep. 496), Agency, 26; Car. of M., 79, 262.
Jewell *v.* Union Pass. R. Co. (16 Phila. (Pa.) 64), Dam., 43.
Jewett *v.* Bowman (27 N. J. Eq. 171), Injunc., 55.
Jewett *v.* Chicago, M. & St. P. R. Co. (45 Mo. App. 58), Em. Dom., 225.
Jewett *v.* Kansas City, C. & S. R. Co. (38 Mo. App. 48), Animals, 49, 617.
Jewett *v.* Kansas City, C. & S. R. Co. (50 Mo. App. 547), Animals, 43; Evid., 128.
Jewett *v.* Klein (27 N. J. Eq. 550; affirming 26 N. J. Eq. 474), Stat. & D., 114.
Jewett *v.* Lawrenceburgh & U. M. R. Co. (10 Ind. 539), Charters, 64; Subscr., 110, 195, 223.
Jewett *v.* Olsen (42 Am. & Eng. R. Cas. 435, 18 Oreg. 419, 23 Pac. Rep. 262), Car. of M., 295, 297.
Jewett *v.* Union El. R. Co. (15 N. Y. S. R. 878, 48 Hun 618, 1 N. Y. Supp. 123), Elev. Rys., 54, 74.
Jewett *v.* Valley R. Co. (34 Ohio St. 601, 21 Am. Ry. Rep. 21), Subscr., 51, 118, 125, 151.
Johanson *v.* Boston & M. R. Co. (153 Mass. 57, 26 N. E. Rep. 426), Children, Inj. to, 20.
John *v.* Cincinnati, R. & Ft. W. R. Co. (35 Ind. 539, 5 Am. Ry. Rep. 41), Mun. Aid, 30.
John *v.* Louisville & N. R. Co. (Ky.) (10 S. W. Rep. 417), Evid., 282; Tresp., Inj. to, 27; Trial, 135.
Johnassohn *v.* Great Northern R. Co. (10 Ex. 434. 24 L. J. Ex. 31), Car. of M., 573; Contr., 45.
Johns *v.* Charlotte, C. & A. R. Co. (58 Am. & Eng. R. Cas. 175, 39 So. Car. 162, 17 S. E. Rep. 698), Car. of P., 271; Dam., 86; Witn., 4.
Johns *v.* Johns (1 Ohio St. 350), Stock., 2.
Johnson, Ex parte (19 So. Car. 492), Receiv., 72.
Johnson, In re (8 Prac. (Ont.) 535), Bonds, 43.
Johnson *v.* Alabama & V. R. Co. (69 Miss. 191, 11 So. Rep. 104), Car. of L. S., 43; Car. of M., 456; Employés, Inj. to, 30; Lim. of Liab., 38.
Johnson *v.* Albany & S. R. Co. (40 How. Pr. (N. Y.) 193; reversed in 5 Lans. 222, which is affirmed in 54 N. Y. 416), Subscr., 179.
Johnson *v.* Albany & S. R. Co. (54 N. Y. 416, 6 Am. Ry. Rep. 331), Judgm., 10; Lim. of Ac., 6; Subscr., 170.
Johnson *v.* Atlantic & N. P. R. Co. (18 Phila. (Pa.) 656), Witn., 3.
Johnson *v.* Atlantic & St. L. R. Co. (35 N. H. 569), Culverts, 5, 12; Flood. Lds., 72.
Johnson *v.* Atlantic & St. L. R. Co. (43 N. H. 410), Dam., 106.
Johnson *v.* Atlantic Ave. R. Co. (139 N. Y. 449, 34 N. E. Rep. 925, 54 N. Y. S. R. 705; reversing 51 N. Y. S. R. 188, 21 N. Y. Supp. 1056, 67 Hun 649, mem.), Refer., 1.
Johnson *v.* Ballou (28 Mich. 379), Land Grants, 32.
Johnson *v.* Baltimore & N. Y. R. Co. (39 Am. & Eng. R. Cas. 101, 45 N. J. Eq. 454, 17 Atl. Rep. 574), Em. Dom., 385, 388, 415, 520.
Johnson *v.* Baltimore & O. R. Co. (25 W. Va. 570), Animals, 44, 423, 484, 487, 536; Neg., 53, 75.
Johnson *v.* Baltimore & P. R. Co. (6 Mackey (D. C.) 232), Contrib. Neg., 48; Cross., Inj. at, 122; Husb. & W., 37.
Johnson *v.* Boston & M. R. Co. (125 Mass. 75), Tresp., Inj. to, 29.
Johnson *v.* Broadway & S. A. R. Co. (2 Silv. Sup. Ct. 532), App., 83.
Johnson *v.* Broadway & S. A. R. Co. (6 N. Y. Supp. 113, 53 Hun 633, mem., 25 N. Y. S. R. 162; affirmed in 125 N. Y. 702, mem., 26 N. E. Rep. 752, mem.), Witn., 51, 139, 164, 167.
Johnson *v.* Brooklyn & C. R. Co. (40 Fed. Rep. 892), Pat. for Inv., 38.
Johnson *v.* Canal & C. R. Co. (27 La. Ann. 53), Contrib. Neg., 9; Pl., 138.
Johnson *v.* Cayuga & S. R. Co. (11 Barb. (N. Y.) 621), Charges, 64; Just. P., 5.
Johnson *v.* Central R. Co. (74 Ga. 397), Name, 4.
Johnson *v.* Central Vt. R. Co. (19 Am. & Eng. R. Cas. 169, 56 Vt. 707), Agency, 23; Witn., 166.
Johnson *v.* Chesapeake & O. R. Co. (36 W. Va. 73, 14 S. E. Rep. 432), Employés, Inj. to, 136, 593, 594, 627; Fel. Serv., 95, 222.
Johnson *v.* Chesapeake & O. R. Co. (38 W. Va. 206, 18 S. E. Rep. 573), Employés, Inj. to, 296, 418, 429.
Johnson *v.* Chicago & N. W. R. Co. (35 Am. & Eng. R. Cas. 131, 75 Iowa 157, 39 N. W. Rep. 242), Animals, 199.
Johnson *v.* Chicago & N. W. R. Co. (77 Iowa 666, 42 N. W. Rep. 512), Fires, 103, 243, 247, 254, 347.
Johnson *v.* Chicago & N. W. R. Co. (1 Am. & Eng. R. Cas. 155, 49 Wis. 529, 5 N. W. Rep. 886), Death, etc., 292; Negl., 1; Trial, 83.
Johnson *v.* Chicago & N. W. R. Co. (8 Am. & Eng. R. Cas. 471, 56 Wis. 274, 14 N. W. Rep. 181), Children, Inj. to, 103, 125; Negl., 74; Trial, 79.
Johnson *v.* Chicago & N. W. R. Co. (25 Am. & Eng. R. Cas. 338, 64 Wis. 425, 25 N. W. Rep. 223), Death, etc., 274, 433.
Johnson *v.* Chicago, B. & K. C. R. Co. (27 Mo. App. 379), Animals, 128; Fences, 58.
Johnson *v.* Chicago, B. & N. R. Co. (37 Minn. 519, 35 N. W. Rep. 438), Em. Dom., 701; Witn., 119.
Johnson *v.* Chicago, M. & St. P. R. Co. (29 Minn. 425, 13 N. W. Rep. 673), Animals, 288; Costs, 4.
Johnson *v.* Chicago, M. & St. P. R. Co. (13 Am. & Eng. R. Cas. 460, 31 Minn. 57, 16 N. W. Rep. 488), Fires, 96, 248.

Johnson *v.* Chicago, R. I. & P. R. Co. (51 Iowa 25), Dam., 80; Stat. & D., 106.
Johnson *v.* Chicago, R. I. & P. R. Co. (55 Iowa 707, 8 N. W. Rep. 664), Animals, 488, 504.
Johnson *v.* Chicago, R. I. & P. R. Co. (8 Am. & Eng. R. Cas. 206, 58 Iowa 348, 12 N. W. Rep. 329), Agency, 73; Car. of P., 305; Stat. Agts., 9; Stat. & D., 136.
Johnson *v.* Chicago, R. I. & P. R. Co. (77 Mo. 546), Cross., Inj. at, 131, 291.
Johnson *v.* Chicago, St. P., M. & O. R. Co. (80 Wis. 641, 50 N. W. Rep. 771), Flood. Lds., 24.
Johnson *v.* Colam (L. R. 10 Q. B. 544, 44 L. J. M. C. 185, 23 W. R. 697, 32 L. T. 725), Crim. L., 14.
Johnson *v.* Concord R. Corp. (46 N. H. 213), Car. of P., 60, 66; Eject. Pass., 88; Evid., 37; Tickets & F., 5, 7, 47, 85.
Johnson *v.* Crawfordsville, F., K. & F. W. R. Co. (11 Ind. 280), Evid., 158, 178; Incorp., 9; Subscr., 82, 148, 165.
Johnson *v.* East Tenn., V. & G. R. Co. (55 Am. & Eng. R. Cas. 446, 90 Ga. 810, 17 S. E. Rep. 121), Car. of M., 3, 136, 628, 659; Evid., 194, 204, 230, 249; Judgm., 30.
Johnson *v.* Edgware, H. & L. R. Co. (35 L. J. Ch. 322), Land. & T., 5.
Johnson *v.* Edgware, H. & L. R. Co. (14 W. R. 416, 14 L. T. 77), Em. Dom., 1128.
Johnson *v.* Erskine (9 Tex. 1), Ferries, 10.
Johnson *v.* Forty-second St., M. & St. N. A. R. Co. (33 Fed. Rep. 499), Pat. for Inv., 38.
Johnson *v.* Freeport & M. R. R. Co. (25 Am. & Eng. R. Cas. 192, 111 Ill. 413), Em. Dom., 310, 352, 359, 624, 652; Witn., 118.
Johnson *v.* Freeport & M. R. R. Co. (24 Am. & Eng. R. Cas. 266, 116 Ill. 521, 6 N. E. Rep. 211), Em. Dom., 359, 884, 932.
Johnson *v.* Georgia Midland & G. R. Co. (39 Am. & Eng. R. Cas. 236, 81 Ga. 725, 8 S. E. Rep. 531), Subscr., 191.
Johnson *v.* Grand Trunk R. Co. (44 N. H. 626), Car. of M., 161.
Johnson *v.* Great Southern & W. R. Co. (9 Ir. C. L. 708, 3 Ry. & Ct. Cas. xiv), Tickets & F., 15.
Johnson *v.* Gulf, C. & S. F. R. Co. (2 Tex. Civ. App. 139, 21 S. W. Rep. 274), Cross., Inj. at, 322; Imp. Neg., 28; Negl., 23, 46.
Johnson *v.* Hudson River R. Co. (5 Duer (N. Y.) 21), Contrib. Neg., 92, 104.
Johnson *v.* Hudson River R. Co. (20 N. Y. 65; affirming 6 Duer 633), Contrib. Neg., 104; St. Rys., 275, 471.
Johnson *v.* Hudson River R. Co. (49 N. Y. 455, 2 Am. Ry. Rep. 285; reversing 2 Sweeny 298), Tickets & F., 115.
Johnson *v.* Joliet & C. R. Co. (23 Ill. 202), Em. Dom., 2, 282, 414, 517; Incorp., 3.
Johnson *v.* Kessler (76 Iowa 411, 41 N. W. Rep. 57), Mun. Aid, 117, 412.
Johnson *v.* Lightsey (34 Ala. 169), Car. of M., 144; Witn., 15.
Johnson *v.* Louisville & N. R. Co. (13 Am. & Eng. R. Cas. 623, 91 Ky. 651, 25 S. W. Rep. 754), Contrib. Neg., 10, 13; Cross., Inj. at, 115, 281, 372; Negl., 19.
Johnson *v.* Louisville City R. Co. (10 Bush (Ky.) 231), Stat., 42.
Johnson *v.* Lullman (15 Mo. App. 55; affirmed in 88 Mo. 567), Stock, 74; Stockh., 55.
Johnson *v.* Manhattan R. Co. (52 Hun 111, 23 N. Y. S. R. 388, 4 N. Y. Supp. 848), Dam., 43; Evid., 59, 67; Stat. & D., 101.
Johnson *v.* Midland R. Co. (6 Railw. Cas. 61, 4 Ex. 367, 18 L. J. Ex. 366, 1 Ry. & C. T. Cas. 16), Car. of M., 24, 35.
Johnson *v.* Milwaukee & St. P. R. Co. (19 Wis. 137), Animals, 15.
Johnson *v.* Minneapolis & St. L. R. Co. (43 Minn. 207, 45 N. W. Rep. 152), Animals, 29, 56.
Johnson *v.* Mississippi & T. R. Co. (31 Fed. Rep. 551), Costs, 1.
Johnson *v.* Missouri Pac. R. Co. (23 Am. & Eng. R. Cas. 180, 80 Mo. 620), Animals, 604, 621.
Johnson *v.* Missouri Pac. R. Co. (96 Mo. 340, 9 S. W. Rep. 790), Agency, 42; Employés, Inj. to, 524, 537; New Tr., 60; Pl., 180; Trial, 61, 159.
Johnson *v.* Missouri Pac. R. Co. (23 Am. & Eng. R. Cas. 429, 18 Neb. 690, 26 N. W. Rep. 347), Death, etc., 374; Employés, Inj. to, 558; Negl., 67; Sunday, 7.
Johnson *v.* Montreal & O. J. R. Co. (22 Grant's Ch. (U. C.) 290), Constr. Rys., 102.
Johnson *v.* Montreal & O. R. W. Co. (6 Prac. (Ont.) 230), Arb., 4.
Johnson *v.* Morgan (68 N. Y. 494), Reorg., 7.
Johnson *v.* New York & N. E. R. Co. (56 Conn. 172, 14 Atl. Rep. 773), Abate., 17.
Johnson *v.* New York C. R. Co. (39 How. Pr. (N. Y.) 127), Car. of M., 119, 558, 565; Evid., 297.
Johnson *v.* New York C. R. Co. (33 N. Y. 610, 29 How. Pr. 574 n., 39 How. Pr. 135; reaffirmed on another appeal 39 How. Pr. 127; reversing 31 Barb. 196), Car. of M., 165.
Johnson *v.* New York El. R. Co. (43 N. Y. S. R. 816, 17 N. Y. Supp. 944), Elev. Rys., 174.
Johnson *v.* New York, O. & W. R. Co. (30 Hun (N. Y.) 166; affirmed in 97 N. Y. 624, mem.), Trial, 62.
Johnson *v.* Northern Pac. R. Co. (45 Am. & Eng. R. Cas. 554, 1 N. Dak. 354, 48 N. W. Rep. 227), Fires, 264, 277, 348.
Johnson *v.* Northern Pac. R. Co. (47 Minn. 430, 50 N. W. Rep. 473), Car. of P., 614; Witn., 173.
Johnson *v.* Northern Pac. R. Co. (46 Fed. Rep. 347), Eject. Pass., 29; New Tr., 44; Trial, 188.
Johnson *v.* Northwestern Tel. Exch. Co. (48 Minn. 433, 51 N. W. Rep. 225), Negl., 47.
Johnson *v.* Ontario, S. & H. R. Co. (11 U. C. Q. B. 246), Em. Dom., 1233.
Johnson *v.* Pensacola & G. R. Co. (9 Fla. 299), Charters, 160; Evid., 178.
Johnson *v.* Pensacola & P. R. Co. (16 Fla. 623), Charges, 20.
Johnson *v.* Philadelphia (60 Pa. St. 445), St. Rys., 33, 287, 290.

Johnson *v.* Philadelphia & R. R. Co. (2 Pa. Dist. 229), Relief Assoc., 5.
Johnson *v.* Philadelphia, W. & B. R. Co. (18 Am. & Eng. R. Cas. 304, 63 Md. 106), Eject. Pass., 35; Tickets & F., 31, 74.
Johnson *v.* Philadelphia, W. & B. R. Co. (9 Fed. Rep. 6), Rem. of C., 8, 34.
Johnson *v.* Richmond & A. R. Co. (84 Va. 713, 5 S. E. Rep. 707), Death, etc., 326; Fel. Serv., 9, 238.
Johnson *v.* Richmond & D. R. Co. (81 N. Car. 453), Employés, Inj. to, 153.
Johnson *v.* Richmond & D. R. Co. (86 Va. 975, 11 S. E. Rep. 829), Lim. of Liab., 27.
Johnson *v.* Rio Grande Western R. Co. (7 Utah 346, 26 Pac. Rep. 926), Animals, 536; Witn., 42, 98.
Johnson *v.* Rochester (13 Hun (N. Y.) 285), Injunc., 3.
Johnson *v.* St. Louis, I. M. & S. R. Co. (32 Ark. 758), Em. Dom., 984.
Johnson *v.* St. Louis, I. M. & S. R. Co. (141 U. S. 602, 12 Sup. Ct. Rep. 124), Injunc., 41.
Johnson *v.* St. Louis, K. C. & N. R. Co. (76 Mo. 553), Animals, 356.
Johnson *v.* St. Paul & D. R. Co. (15 Am. & Eng. R. Cas. 467, 31 Minn. 283, 17 N. W. Rep. 622), Death, etc., 138.
Johnson *v.* St. Paul & D. R. Co. (43 Minn. 222, 45 N. W. Rep. 156), Fel. Serv., 14, 187, 381.
Johnson *v.* St. Paul, M. & M. R. Co. (41 Am. & Eng. R. Cas. 293, 43 Minn. 53, 44 N. W. Rep. 884), Death, etc., 219; Employés, Inj. to, 87, 190.
Johnson *v.* Small (5 B. Mon. (Ky.) 25), Car. of P., 100.
Johnson *v.* Stark County (24 Ill. 75), Coupons, 3, 16; Mun. Aid, 29, 341.
Johnson *v.* State (73 Ala. 483), Crim. L., 10.
Johnson *v.* State (41 Am. & Eng. R. Cas. 275, 88 Ala. 176, 7 So. Rep. 253), Charters, 16, 60.
Johnson *v.* State (53 Am. & Eng. R. Cas. 37, 91 Ala. 70, 9 So. Rep. 71), Crim. L., 39.
Johnson *v.* State (98 Ala. 57, 13 So. Rep. 503), Crim. L., 6, 10.
Johnson *v.* Steam Gauge & L. Co. (25 N. Y. Supp. 689, 55 N. Y. S. R. 133, 72 Hun 535), Witn., 171.
Johnson *v.* Stoddard (100 Mass. 306), Bills of L., 9, 11.
Johnson *v.* Thornton (54 Iowa 144, 6 N. W. Rep. 165), Land Grants, 46, 116.
Johnson *v.* Truesdale (46 Minn. 345, 48 N. W. Rep. 1136), Tresp., Inj. to, 105, 120.
Johnson *v.* Wabash, St. L. & P. R. Co. (22 Mo. App. 597), Trover, 14.
Johnson *v.* Wells (6 Nev. 224), Car. of P., 617, 618, 619, 630.
Johnson *v.* West Chester & P. R. Co. (70 Pa. St. 357), Car. of P., 514.
Johnson *v.* Western & A. R. Co. (55 Ga. 133), Employés, Inj. to, 243.
Johnson *v.* Winona & St. P. R. Co. (11 Minn. 296 (Gil. 204), Car. of P., 399.
Johnson Co. *v.* Pacific Rolling Mills Co. (51 Fed. Rep. 762, 7 U. S. App. 214, 2 C. C. A. 506; affirming 47 Fed. Rep. 586), Pat. for Inv., 33.
Johnson County Com'rs *v.* January (94 U. S. 202), Mun. Aid, 377.
Johnson County Com'rs *v.* Ogg (13 Kan. 198), Tax., 304.
Johnson County Com'rs *v.* Thayer (94 U. S. 631), Bonds, 49; Mun. Aid, 20, 135, 234, 398.
Johnson S. S. R. Co. *v.* North Branch Steel Co. (48 Fed. Rep. 191), Pat. for Inv., 20.
Johnston *v.* Canadian Pac. R. Co. (50 Fed. Rep. 886), Employés, Inj. to, 168, 541; Lim. of Ac., 8.
Johnston *v.* Chicago, M. & St. P. R. Co. (58 Iowa 537, 12 N. W. Rep. 576), Em. Dom., 51; Injunc., 33, 48.
Johnston *v.* Cleveland & T. R. Co. (7 Ohio St. 336), Death, etc., 96.
Johnston *v.* Manhattan R. Co. (39 N. Y. S. R. 227, 60 Hun 583, 14 N. Y. Supp. 897), Elev. Rys., 93; Witn., 46, 118.
Johnston *v.* Manhattan R. Co. (41 N. Y. S. R. 682, 61 Hun 627, 16 N. Y. Supp. 434), Elev. Rys., 117, 173.
Johnston *v.* Missouri Pac. R. Co. (96 Mo. 340, 9 S. W. Rep. 790), Witn., 176.
Johnston *v.* Northern R. Co. (34 U. C. Q. B. 432), Cross., Inj. at, 245.
Johnston *v.* Oregon S. L. R. Co. (23 Oreg. 94, 31 Pac. Rep. 283), Contrib. Neg., 64, 75; Employés, Inj. to, 41, 83, 206, 208, 360; Evid., 174; Witn., 98.
Johnston *v.* Pittsburg & W. R. Co. (114 Pa. St. 443, 7 Atl. Rep. 184), Fel. Serv., 1, 148.
Johnston *v.* Providence & S. R. Co. (10 R. I. 365, 6 Am. Ry. Rep. 139), Cross., Sts. & H., 93.
Johnstone *v.* Richmond & D. R. Co. (55 Am. & Eng. R. Cas. 346, 39 So. Car. 55, 17 S. E. Rep. 512), Car. of L. S., 72, 90.
Joint Tariffs and Schedules, In re (1 Int. Com. Com. 225), Int. Com., 132.
Joint Water & Rail Lines, In re (2 Int. Com. Rep. 486, 2 Int. Com. Com. 645), Int. Com., 18.
Joliet & C. R. Co. *v.* Barrows (24 Ill. 562), Em. Dom., 958.
Joliet & C. R. Co. *v.* Healy (94 Ill. 416), Bridges, 70; Nuis., 11.
Joliet & N. I. R. Co. *v.* Jones (20 Ill. 221), Animals, 278.
Joliet, A. & N. R. Co. *v.* Velie (Ill.) (26 N. E. Rep. 1086), Employés, Inj to, 250.
Joliet, A. & N. R. Co. *v.* Velie (140 Ill. 59, 29 N. E. Rep. 706; affirming 36 Ill. App. 450), Negl., 108.
Joliet I. & S. Co. *v.* Chicago, C. & W. R. Co. (51 Iowa 300), Mort., 187.
Joliet Steel Co. *v.* Shields (134 Ill. 209, 25 N. E. Rep. 569), Employés, Inj. to, 540.
Joliet Steel Co. *v.* Shields (32 Ill. App. 598), Fel. Serv., 511.
Joliet Steel Co. *v.* Shields (146 Ill. 603, 34 N. E. Rep. 1108), Employés, Inj. to, 626; Fel. Serv., 112.
Joliet St. R. Co. *v.* Call (42 Ill. App. 41; affirmed in 143 Ill. 177, 32 N. E. Rep. 389), Evid., 36, 53; Phys. Exam., 3.
Joliet St. R. Co. *v.* Call (143 Ill. 177, 32 N. E. Rep. 389), Evid., 53; Phys. Exam., 2.
Joliet St. R. Co. *v.* Duggan (45 Ill. App. 450), Contrib. Neg., 44; Elec. Rys., 25; St. Rys., 366.

Joliet St. R. Co. *v.* McCarthy (42 Ill. App. 49), Contrib. Neg., 98; St. Rys., 385.
Jolly *v.* Detroit, L. & N. R. Co. (93 Mich. 370, 53 N. W. Rep. 526), Employés, Inj. to, 394.
Joly *v.* Wimbledon & D. R. Co. (1 B. & S. 807, 31 L. J. Q. B. 95, 10 W. R. 253, 5 L. T. 615), Ejectm., 7.
Jones, In re (25 U. C. C. P. 559), Em. Dom., 1255.
Jones *v.* Americus, P. & L. R. Co. (80 Ga. 803, 7 S. E. Rep. 117), Animals, 597, 628.
Jones *v.* Baltimore & P. R. Co. (4 Mackey (D. C.) 106), Bridges, 77.
Jones *v.* Baltimore & P. R. Co. (5 Mackey (D. C.) 8), Trial, 184.
Jones *v.* Bond (40 Am. & Eng. R. Cas. 191, 40 Fed. Rep. 281), Animals, 83; Evid., 125.
Jones *v.* Boston & A. R. Co. (63 Me. 188), Charges, 48.
Jones *v.* Boston & A. R. Co. (157 Mass. 51, 31 N. E. Rep. 727), Death, etc., 23.
Jones *v.* Brooklyn, B. & W. E. R. Co. (21 N. Y. S. R. 169, 3 N. Y. Supp. 253; affirmed in 121 N. Y. 683, mem., 24 N. E. Rep. 1098), Car. of P., 376, 595; Witn., 88, 93.
Jones *v.* Canada C. R. Co. (46 U. C. Q. B. 250), Mun. Aid, 5; Stat., 49.
Jones *v.* Central R. & B. Co. (18 Ga. 247), Proc., 3.
Jones *v.* Central R. & B. Co. (21 Ga. 104), Animals, 27.
Jones *v.* Chicago & A. R. Co. (28 Mo. App. 28), Dam., 104; Negl., 64.
Jones *v.* Chicago & I. R. Co. (68 Ill. 380), Em. Dom., 357, 671, 676, 701, 907.
Jones *v.* Chicago & N. W. R. Co. (36 Iowa 68), Trial, 17.
Jones *v.* Chicago & N. W. R. Co. (1 Am. & Eng. R. Cas. 61, 49 Wis. 352, 5 N. W. Rep. 854), Evid., 73.
Jones *v.* Chicago, B. & K. C. R. Co. (52 Mo. App. 381), Animals, 617, 621.
Jones *v.* Chicago, M. & St. P. R. Co. (77 Wis. 585, 46 N. W. Rep. 884), Animals, 453.
Jones *v.* Chicago, M. & St. P. R. Co. (41 Am. & Eng. R. Cas. 169, 42 Minn. 183, 43 N. W. Rep. 1114), Car. of P., 243, 431.
Jones *v.* Chicago, St. P., M. & O. R. Co. (44 Am. & Eng. R. Cas. 357, 43 Minn. 279, 45 N. W. Rep. 444), Car. of P., 494, 495; Witn., 173, 193.
Jones *v.* Cincinnati, S. & M. R. Co. (45 Am. & Eng. R. Cas. 321, 89 Ala. 376, 8 So. Rep. 61), Bills of L., 27; Car. of M., 674.
Jones *v.* Columbia & G. R. Co. (19 Am. & Eng. R. Cas. 459, 20 So. Car. 249), Animals, 47, 480, 576; Contrib. Neg., 109.
Jones *v.* Delaware & H. Canal Co. (10 Phila. (Pa.) 570), Cert., 6; Just. P., 11.
Jones *v.* Dow (26 Am. & Eng. R. Cas. 98, 142 Mass. 130, 7 N. E. Rep. 839), Bills & N., 21; Guar., 4.
Jones *v.* Earl (37 Cal. 630), Car. of M., 309.
Jones *v.* Eastern Counties R. Co. (3 C. B. N. S. 718, 1 Ry. & C. T. Cas. 45), Tickets & F., 57.
Jones *v.* East Tenn., V. & G. R. Co. (128 U. S. 443, 9 Sup. Ct. Rep. 118), Car. of P., 281.
Jones *v.* Erie & W. V. R. Co. (144 Pa. St. 629, 23 Atl. Rep. 251), Em. Dom., 51, 363; Sts. & H., 125.
Jones *v.* Erie & W. V. R. Co. (56 Am. & Eng. R. Cas. 664, 151 Pa. St. 30, 25 Atl. Rep. 134), Elev. Rys., 101; Sts. & H., 139, 257, 284, 287; Witn., 109, 118.
Jones *v.* Festiniog R. Co. (9 B. & S. 835, 37 L. J. Q. B. 214, L. R. 3 Q. B. 733, 17 W. R. 28, 18 L. T. 902), Fires, 32.
Jones *v.* Florida, C. & P. R. Co. (41 Fed. Rep. 70), Injunc., 1.
Jones *v.* Galena & C. U. R. Co. (16 Iowa 6), Animals, 10.
Jones *v.* Georgia Southern R. Co. (66 Ga. 558), Proc., 32; Trial, 67.
Jones *v.* Grand Trunk R. Co. (16 Am. & Eng. R. Cas. 265, 74 Me. 356), Lim. of Ac., 36.
Jones *v.* Grand Trunk R. Co. (45 U. C. Q. B. 193), Explosions, 2.
Jones *v.* Grand Trunk R. Co. (18 Can. Sup. Ct. 696; affirming 16 Ont. App. 37), Death, etc., 192; Licensees, Inj. to, 16.
Jones *v.* Housatonic R. Co. (107 Mass. 261), Fright. Teams, 2.
Jones *v.* Hunt (74 Tex. 657, 12 S. W. Rep. 832), Set-off, 3.
Jones *v.* Hurlburt (13 Neb. 125, 13 N. W. Rep. 5), Mun. Aid, 148, 244, 306.
Jones *v.* Lake Shore & M. S. R. Co. (8 Am. & Eng. R. Cas. 221, 49 Mich. 573, 14 N. W. Rep. 551), Employés, Inj. to, 276, 439, 578; Witn., 179.
Jones *v.* Louisville & N. R. Co. (82 Ky. 610), Death, etc., 174.
Jones *v.* Macon & B. R. Co. (39 Ga. 138), State Aid, 17.
Jones *v.* Metropolitan El. R. Co. (27 J. & S. 437, 14 N. Y. Supp. 632, 39 N. Y. S. R. 177), Elev. Rys., 96; New Tr., 88.
Jones *v.* Michigan C. R. Co. (25 Am. & Eng. R. Cas. 482, 59 Mich. 437, 26 N. W. Rep. 662), Fires, 58, 62, 213, 288, 318.
Jones *v.* Missouri Pac. R. Co. (31 Mo. App. 614), Car. of P., 293; Contrib. Neg., 100.
Jones *v.* New Orleans & S. R. Co. (14 Am. & Eng. R. Cas. 217, 70 Ala. 227), Em. Dom., 373, 983, 1081.
Jones *v.* New York & E. R. Co. (1 Grant Cas. (Pa.) 457), Attach., 26.
Jones *v.* New York & E. R. Co. (29 Barb. (N. Y.) 633), Car. of M., 781.
Jones *v.* New York C. & H. R. R. Co. (22 Hun (N. Y.) 284), Employés, Inj. to, 96, 124.
Jones *v.* New York C. & H. R. R. Co. (28 Hun (N. Y.) 364, 62 How. Pr. 450, 10 Abb. N. Cas. 200; affirmed in 92 N. Y. 628, mem.), Employés, Inj. to, 611.
Jones *v.* New York El. R. Co. (44 N. Y. S. R. 878, 18 N. Y. Supp. 134), Elev. Rys., 125.
Jones *v.* New York El. R. Co. (45 N. Y. S. R. 667, 18 N. Y. Supp. 952), Elev. Rys., 144.
Jones *v.* North Carolina R. Co. (67 N. Car. 122), Animals, 510, 514.
Jones *v.* North Carolina R. Co. (70 N. Car. 626), Animals, 65.

Jones *v.* Northeastern R. Co. (2 Ry. & C. T. Cas. 208), Charges, 109, 110.
Jones *v.* Pennsylvania R. Co. (143 Pa. St. 374, 22 Atl. Rep. 883), Em. Dom., 999.
Jones *v.* Pennsylvania R. Co. (8 Mackey (D. C.) 178), Evid., 285; Leases, 115; Mort., 153; Receiv., 32.
Jones *v.* Person County Com'rs (107 N. Car. 248, 12 S. E. Rep. 69), Mun. Aid, 9, 170.
Jones *v.* Pittsburg & L. E. R. Co. (Pa.) (11 Atl. Rep. 608), Em. Dom., 688.
Jones *v.* Portsmouth & C. R. Co. (32 N. H. 544), Constr. Rys., 25.
Jones *v.* Priester (1 Tex. App. (Civ. Cas.) 326), Bagg., 29, 30, 40, 45.
Jones *v.* Queen (7 Can. Sup. Ct. 570, 1 Can. Exch. 360), Constr. Rys., 30, 59; Govt. Rds., 10.
Jones *v.* Roach (9 J. & S. (N. Y.) 248), Employés, Inj. to, 307.
Jones *v.* Rosedale St. R. Co. (75 Tex. 382, 12 S. W. Rep. 998), Costs, 5.
Jones *v.* St. Louis, I. M. & S. R. Co. (44 Mo. App. 15), Animals, 548, 619.
Jones *v.* St. Louis, I. M. & S. R. Co. (29 Am. & Eng. R. Cas. 523, 84 Mo. 151), Embankm., 4.
Jones *v.* St. Louis, I. M. & S. R. Co. (42 Am. & Eng. R. Cas. 596, 53 Ark. 27, 13 S. W. Rep. 416), Evid., 22.
Jones *v.* St. Louis, K. C. & N. R. Co. (20 Am. & Eng. R. Cas. 371, 79 Mo. 92), Pl., 17.
Jones *v.* Seligman (3 Am. & Eng. R. Cas. 236, 81 N. Y. 190; affirming 16 Hun 230), Farm Cross., 8, 9.
Jones *v.* Sheboygan & F. du L. R. Co. (42 Wis. 306), Animals, 213, 288.
Jones *v.* South Staffordshire R. Co. (19 L. T. 603), Em. Dom., 1122.
Jones *v.* Stanstead, S. & C. R. Co. (41 L. J. P. C. 19, 20 W. R. 417, 8 Moore P. C. C. N. S. 312, L. R. 4 P. C. 98, 26 L. T. 456), Bridges, 92.
Jones *v.* Taylor (1 El. & El. 20), Crim. L., 45.
Jones *v.* Terre Haute & R. R. Co. (29 Barb. (N. Y.) 353), Divid., 4.
Jones *v.* Terre Haute & R. R. Co. (57 N. Y. 196, 17 How. Pr. 529, 7 Am. Ry. Rep. 221), Divid., 4.
Jones *v.* Utica & B. R. R. Co. (36 Hun (N. Y.) 115), Children, Inj. to, 104; Cross., Inj. at, 351.
Jones *v.* Utica & B. R. R. Co. (40 Hun (N. Y.) 349), Husb. & W., 17; Witn., 168.
Jones *v.* Voorhees (10 Ohio 145), Bagg., 44.
Jones *v.* Wabash, St. L. & P. R. Co. (17 Mo. App. 158), Car. of P., 287; Eject. Pass., 23.
Jones *v.* Wabash, St. L. & P. R. Co. (18 Mo. App. 251), Waters & W., 9.
Jones *v.* Waltham (4 Cush. (Mass.) 299), Sts. & H., 366.
Jones *v.* Wells (28 Cal. 259), Exp. Cos., 17.
Jones *v.* Western N. C. R. Co. (95 N. Car. 328), Animals, 75; Em. Dom., 691.
Jones *v.* Western Vt. R. Co. (27 Vt. 399), Agency, 66, 73.
Jones *v.* Wills Valley R. Co. (30 Ga. 43), Em. Dom., 731.
Jonesboro *v.* Cairo & St. L. R. Co. (15 Am. & Eng. R. Cas. 615, 110 U. S. 192, 4 Sup. Ct. Rep. 67), Mun. Aid, 4, 22, 29, 271.
Joplin & W. R. Co. *v.* McGregor (53 Mo. App. 366), Em. Dom., 893.
Jordan *v.* Alabama G. S. R. Co. (20 Am. & Eng. R. Cas. 628, 74 Ala. 85, 49 Am. Rep. 800), Mal. Pros., 3.
Jordan *v.* Alabama G. S. R. Co. (81 Ala. 220, 8 So. Rep. 191), Mal. Pros., 1.
Jordan *v.* Asheville (112 N. Car. 743, 16 S. E. Rep. 760), Contrib. Neg., 105; Trial, 154.
Jordan *v.* Cass County (3 Dill. (U. S.) 245), Mun. Aid, 377, 449.
Jordan *v.* Cincinnati, N. O. & T. P. R. Co. (89 Ky. 40, 11 S. W. Rep. 1013), Death, etc., 61; Pl., 71.
Jordan *v.* Fall River R. Co. (5 Cush. (Mass.) 69), Bagg., 40, 49.
Jordan *v.* Hazard (10 Ala. 221), Car. of M., 732.
Jordan *v.* Metropolitan El. R. Co. (28 J. & S. 385, 18 N. Y. Supp. 205), Elev. Rys., 157, 183.
Jordan *v.* Middlesex R. Co. (138 Mass. 425), Husb. & W., 30.
Jordan *v.* Missouri, K. & T. R. Co. (61 Mo. 52), Proc., 13.
Jordan *v.* New York & H. R. Co. (16 Daly 130, 9 N. Y. Supp. 506, 30 N. Y. S. R. 670), New Tr., 73.
Jordan *v.* New York, L. E. & W. R. Co. (46 N. J. L. 206), Contrib. Neg., 88.
Jordan *v.* Pennsylvania Co. (Ind.) (18 Am. & Eng. R. Cas. 647), Bills of L., 58, 61.
Jordan *v.* St. Paul, M. & M. R. Co. (41 Am. & Eng. R. Cas. 1, 42 Minn. 172, 6 L. R. A. 573, 43 N. W. Rep. 849), Culverts, 21; Waters & W., 28.
Joseph *v.* Georgia R. & B. Co. (88 Ga. 426, 14 S. E. Rep. 591), Trial, 61.
Josey *v.* Wilmington & M. R. Co. (11 Rich. (So. Car.) 399), Car. of Slaves, 11, 12.
Josey *v.* Wilmington & M. R. Co. (12 Rich. (So. Car.) 134), Evid., 223.
Joslin *v.* Northern Pac. R. Co. (55 Fed. Rep. 66), Pat. for Inv., 30.
Joslyn *v.* Dow (19 Hun (N. Y.) 494), Mun. Aid, 179.
Joslyn *v.* Grand Trunk R. Co. (51 Vt. 92), Car. of M., 276.
Joslyn *v.* Merrow (25 Vt. 185), Constr. Rys., 95.
Jourdan *v.* Long Island R. Co. (115 N. Y. 380, 22 N. E. Rep. 153, 26 N. Y. S. R. 138; affirming 42 Hun 657, 6 N. Y. S. R. 89), Contr., 12; Estop., 33.
Joy *v.* Grindstone-Neck Water Co. (85 Me. 109, 26 Atl. Rep. 1052), Em. Dom., 471.
Joy *v.* St. Louis (45 Am. & Eng. R. Cas. 655, 138 U. S. 1, 11 Sup. Ct. Rep. 243), Right of W., 25, 26.
Joyce *v.* East St. Louis Elec. St. R. Co. (43 Ill. App. 157), Elec. Rys., 17.
Joyce *v.* Halifax St. R. Co. (24 Nov. Sc. 113; affirming 21 Nov. Sc. 531), St. Rys., 183.
Joyner *v.* South Carolina R. Co. (29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52), Animals, 29, 51, 59, 480; Contrib. Neg., 105; Evid., 117; Negl., 97; Right of W., 11; Stat., 55.

Jubb *v.* Hull Dock Co. (9 Q. B. 443, 3 Railw. Cas. 795, 11 Jur. 15, 15 L. J. Q. B. 403), Em. Dom., 1194.
Jucker *v.* Chicago & N. W. R. Co. (2 Am. & Eng. R. Cas. 41, 52 Wis. 150, 8 N. W. Rep. 862), Death, etc., 259; Words & Ph., 172.
Judd *v.* Littlejohn (11 Wis. 176), Charges, 73, 85.
Judd *v.* Wabash, St. L. & P. R. Co. (23 Mo. App. 56), Animals, 51, 52; Evid., 234.
Judge *v.* New York C. & H. R. R. Co. (56 Hun 60, 29 N. Y. S. R. 475, 9 N. Y. Supp 158), Ejectm., 27; Em. Dom., 1030.
Judkins *v.* Maine C. R. Co. (80 Me. 417, 6 N. Eng. Rep. 715, 14 Atl. Rep. 735), Employés, Inj. to, 18, 611.
Judson *v.* Gage (91 Cal. 304, 27 Pac. Rep. 676), Subscr., 87, 105.
Judson *v.* New York & N. H. R. Co. (29 Conn. 434), Culverts, 18.
Judson *v.* Plattsburg (3 Dill. (U. S.) 181), Mun. Aid, 393.
Judson *v.* Western R. Co. (4 Allen (Mass.) 520), Car. of M., 75, 632.
Judson *v.* Western R. Corp. (6 Allen (Mass.) 486), Car. of M., 687.
Jukes *v.* Winnipeg & H. B. R. Co. (5 Man. 14), Exec., 30.
Julien *v.* Woodsmall (82 Ind. 568), Right of W., 16.
Junction & B. R. Co. *v.* Davis (5 Houst. (Del.) 90), State Aid, 15.
Junction City & Ft. K. R. Co. *v.* Silver (14 Am. & Eng. R. Cas. 324, 27 Kan. 741), Em. Dom., 253.
Junction Pass. R. Co. *v.* Williamsport Pass. R. Co. (56 Am. & Eng. R. Cas. 462, 154 Pa. St. 116, 26 Atl. Rep. 295), St. Rys., 13, 72, 78.
Junction R. Co. *v.* Ashland Bank (12 Wall. (U. S.) 226), Bonds, 9; Usury, 3.
Junction R. Co. *v.* Boyd (8 Phila. (Pa.) 224), Em. Dom., 134.
Junction R. Co. *v.* Philadelphia (88 Pa. St. 424), Sts. & H., 355.
Junction R. Co. *v.* Reeve (15 Ind. 236), Subscr., 9.
Junction R. Co. *v.* Ruggles (7 Ohio St. 1), Em. Dom., 205; Sales of Rds., 8.
Junction R. Co. *v.* Sayers (28 Ind. 318), Vend. & P., 4.
June *v.* Boston & A. R. Co. (153 Mass. 79, 26 N. E. Rep. 238), Car. of P., 24; Licensees, Inj. to, 1.
Jurisdiction of Commission (1 Int. Com. Rep. 73), Int. Com., 12.
Jussen *v.* Lake County Com'rs (95 Ind. 567), Mun. Aid, 80, 91, 92.
Justice *v.* Nesquehoning Valley R. Co. (87 Pa. St. 28), Em. Dom., 657.
Justice *v.* Pennsylvania Co. (53 Am. & Eng. R. Cas. 604, 130 Ind. 321, 30 N. E. Rep. 303), Fel. Serv., 1, 198, 201, 213, 214, 348, 349.

Kaeiser *v.* Illinois C. R. Co. (2 McCrary (U. S.) 187, 6 Fed. Rep. 1), Rem. of C., 49.
Kaeiser *v.* Illnois C. R. Co. (16 Am. & Eng. R. Cas. 40, 5 McCrary (U. S.) 496, 18 Fed. Rep. 151), Int. Com., 215, 216.
Kaes *v.* Missouri Pac. R. Co. (6 Mo. App. 397), Animals, 10, 159.
Kahl *v.* Memphis & C. R. Co. (95 Ala. 337, 10 So. Rep. 661), Death, etc., 1, 116; Jurisd., 6; Memphis & C. R. Co., 1.
Kahn *v.* New York El. R. Co. (27 N. Y. Supp. 339, 57 N. Y. S. R. 509, 7 Misc. 53), Elev. Rys., 175.
Kahn *v.* New York El. R. Co. (52 N. Y. S. R. 255, 22 N. Y. Supp. 793, 3 Misc. 611; reargument granted in 52 N. Y. S. R. 939), Elev. Rys., 155, 175.
Kaillen *v.* Northwestern Bedding Co. (46 Minn. 187), 48 N. W. Rep 779), Employés, Inj. to, 575.
Kain *v.* Kansas City, St. J. & C. B. R. Co. (29 Mo. App. 53), Car. of M., 724.
Kain *v.* New York & N. E. R. Co. (20 N. Y. S. R. 891, 50 Hun 606, 3 N. Y. Supp. 311), Cross., Inj. at, 193, 260.
Kain *v.* Smith (89 N. Y. 375; affirming 25 Hun 146), Employés, Inj. to, 100.
Kain *v.* Smith (2 Am. & Eng. R. Cas. 545, 80 N. Y. 458; reversing 11 Hun 552), Employés, Inj. to, 101, 498; Receiv., 74, 142.
Kaiser *v.* Hoey (16 N. Y. S. R. 803, 1 N. Y. Supp. 429), Bills of L., 97.
Kaiser *v.* Seaton (14 Am. & Eng. R. Cas. 405, 62 Iowa 463, 17 N. W. Rep. 664), Exec., 6.
Kaiser *v.* St. Paul, S. & T. F. R. Co. (22 Minn. 149, 19 Am. Ry. Rep, 317), Em. Dom., 99, 130.
Kalamazoo H. & B. Co. *v.* Sootsma (47 Am. & Eng. R. Cas. 445, 84 Mich. 194, 47 N. W. Rep. 667), Hacks, etc., 3.
Kalbach *v.* New York, L. E. & W. R. Co. (15 Phila. (Pa.) 168), Proc., 45, 46.
Kalbfleisch *v.* Long Island R. Co. (29 Am. & Eng. R. Cas. 179, 102 N. Y. 520, 7 N. E. Rep. 557, 2 N. Y. S. R. 473, 55 Am. Rep. 832), Fires, 121.
Kalbus *v.* Abbot (77 Wis. 621, 46 N. W. Rep. 810), Cross., Inj. at, 77; Fright. Teams, 5; Witn., 106.
Kalenbach *v.* Michigan C. R. Co. (50 Am. & Eng. R. Cas. 15, 87 Mich. 509, 49 N. W. Rep. 1082), App., 86; Dam., 76; Fright. Teams, 5.
Kaliski *v.* Pelham Park R. Co. (20 Civ. Pro. (N. Y.) 315, 15 N. Y. Supp. 519), Costs, 1; Just. P., 1.
Kallman *v.* United States Exp. Co. (3 Kan. 205), Car. of M., 456; Exp. Cos., 72.
Kaminitsky *v.* Northeastern R. Co. (25 So. Car. 53), Contrib. Neg., 105; Cross., Inj. at, 99, 145, 220.
Kanaga *v.* St. Louis, L. & W. R. Co. (76 Mo. 207), Ejectm., 4; Husb. & W., 1.
Kanawha & O. R. Co. *v.* Ryan (31 W. Va. 364, 6 S. E. Rep. 924), Just. P., 5.
Kane *v.* Kansas City, Ft. S. & M. R. Co. (112 Mo. 34, 20 S. W. Rep. 532), Ejectm., 17.
Kane *v.* Manhattan R. Co. (3 N. Y. S. R. 145), Assault, 17.
Kane *v.* Manhattan R. Co. (42 N. Y. S. R. 415, 62 Hun 622, 17 N. Y. Supp. 109), Elev. Rys., 134, 136, 147, 179.
Kane *v.* New York & N. E. R. Co. (11 Am. & Eng. R. Cas. 467, 49 Conn. 139), Fences, 20.

Kane *v.* New York El. R. Co. (46 Am. & Eng. R. Cas. 137), 125 N. Y. 164, 26 N. E. Rep. 278, 34 N. Y. S. R. 876; affirming 25 N. Y. S. R. 587, 15 Daly 294, 6 N. Y. Supp. 526), Dam., 13; Elev. Rys., 51, 57, 58, 162; Sts. & H., 138.
Kane *v.* New York, N. H. & H. R. Co. (132 N. Y. 160, 30 N. E. Rep. 256, 43 N. Y. S. R. 494; affirming 56 Hun 648, 31 N. Y. S. R. 741, 9 N. Y. Supp. 879), Cross., Inj. at, 55, 319; Dam., 44; Trial, 164.
Kane *v.* Northern C. R. Co. (128 U. S. 91, 16 Wash. L. Rep. 715, 9 Sup. Ct. Rep. 16), Employés, Inj. to, 353, 751.
Kane *v.* Savannah, F. & W. R. Co. (85 Ga. 858, 11 S. E. Rep. 493), Employés, Inj. to, 276, 415; New Tr., 17.
Kane *v.* Troy (16 N. Y. S. R. 341, 1 N. Y. Supp. 536), Evid., 211.
Kane *v.* Union Pac. R. Co. (5 Neb. 105), Appear., 3.
Kankakee & I. R. R. Co. *v.* Chester (62 Ill. 235, 6 Am. Ry. Rep. 481), Em. Dom., 916.
Kankakee & S. R. Co. *v.* Horan (17 Ill. App. 650), Flood. Lds., 93.
Kankakee & S. R. Co. *v.* Horan (23 Ill. App. 259), Flood. Lds., 2, 22, 60, 65, 76, 84.
Kankakee & S. R. Co. *v.* Horan (41 Am. & Eng. R. Cas. 13, 131 Ill. 288, 23 N. E. Rep. 621; affirming 30 Ill. App. 552), Evid., 231, 254; Flood. Lds., 69; Nuis., 38, 40; Waters & W., 18.
Kankakee & S. R. Co. *v.* Straut (101 Ill. 653), Em. Dom., 893.
Kankakee & S. R. Co. *v.* Straut (10 Am. & Eng. R. Cas. 440, 102 Ill. 666), Em. Dom., 564.
Kankakee & S. W. R. Co. *v.* Alfred (3 Ill. App. 511), Em. Dom., 489.
Kankakee & S. W. R. Co. *v.* Fitzgerald (17 Ill. App. 525), Dam., 7; Fences, 37.
Kankakee Coal Co. *v.* Illinois C. R. Co. (17 Ill. App. 614), Discrim., 79.
Kankakee County *v.* Aetna Life Ins. Co. (106 U. S. 668), Mun. Aid, 282, 305, 329.
Kankakee Elec. R. Co. *v.* Whittemore (45 Ill. App. 484), Elec. Rys., 23, 36.
Kanne *v.* Minneapolis & St. L. R. Co. (14 Am. & Eng. R. Cas. 308, 30 Minn. 423, 15 N. W. Rep. 871), Em. Dom., 393.
Kanne *v.* Minneapolis & St. L. R. Co. (23 Am. & Eng. R. Cas. 127, 33 Minn. 419, 23 N. W. Rep. 854), Em. Dom., 866.
Kansas *v.* Southern Kan. R. Co. (22 Am. & Eng. R. Cas. 198, 24 Fed. Rep. 179), Mand., 10.
Kansas & A. V. R. Co. *v.* Payne (51 Am. & Eng. R. Cas. 518, 49 Fed. Rep. 114, 4 U. S. App. 77, 1 C. C. A. 183), Ferries, 6.
Kansas & E. R. Constr. Co. *v.* Topeka, S. & W. R. Co. (16 Am. & Eng. R. Cas. 495, 135 Mass. 34, 46 Am. Rep. 439), Eq., 27; For. Corp., 24.
Kansas & G. S. L. R. Co. *v.* Dorough (72 Tex. 108, 10 S. W. Rep. 711), Car. of P., 378; Receiv., 181.
Kansas & G. S. L. R. Co. *v.* Scott (1 Tex. Civ. App. 1, 20 S. W. Rep. 725), Witn., 104.
Kansas C. R. Co. *v.* Allen (22 Kan. 285), Em. Dom., 134, 142.
Kansas C. R. Co. *v.* Allen (5 Am. & Eng. R. Cas. 362, 24 Kan. 33; former appeal 22 Kan. 285), Witn., 123.
Kansas C. R. Co. *v.* Fitzsimmons (18 Kan. 34, 15 Am. Ry. Rep. 220), Indep. Contr., 18.
Kansas C. R. Co. *v.* Fitzsimmons (22 Kan. 686), Children, Inj. to, 29.
Kansas C. R. Co. *v.* Jackson County Com'rs (46 Am. & Eng. R. Cas. 26, 45 Kan. 716, 26 Pac. Rep. 394), Cross., Sts. & H., 80.
Kansas City *v.* Corrigan (18 Mo. App. 206), St. Rys., 286.
Kansas City *v.* Corrigan (86 Mo. 67), St. Rys., 133, 137.
Kansas City *v.* Hannibal & St. J. R. Co. (22 Am. & Eng. R. Cas. 239, 81 Mo. 285), Tax., 91, 269, 299, 314, 320.
Kansas City *v.* Kansas City Belt R. Co. (47 Am. & Eng. R. Cas. 157, 102 Mo. 633, 14 S. W. Rep. 808), Cross., Sts. & H., 19, 24, 80; Sts. & H., 282.
Kansas City & E. R. Co. *v.* Kregelo (20 Am. & Eng. R. Cas. 241, 32 Kan. 608, 5 Pac. Rep. 15), Em. Dom., 671, 703, 735; Farm. Cross., 2.
Kansas City & E. R. Co. *v.* Riley (20 Am. & Eng. R. Cas. 116, 33 Kan. 374, 6 Pac. Rep. 581), Flood. Lds., 35.
Kansas City & O. R. Co. *v.* Frey (30 Neb. 790, 47 N. W. Rep. 87), Stat., 34.
Kansas City & O. R. Co. *v.* Hicks (14 Am. & Eng. R. Cas. 100, 30 Kan. 288, 1 Pac. Rep. 396), Acc. & Sat., 5.
Kansas City & P. R. Co. *v.* Rich Tp. (45 Kan. 275, 25 Pac. Rep. 595), Mun. Aid, 109, 116, 340.
Kansas City & S. W. R. Co. *v.* Baird (41 Kan. 69, 21 Pac. Rep. 227), Em. Dom., 676; Witn., 160.
Kansas City & S. W. R. Co. *v.* Ehret (41 Kan. 22, 20 Pac. Rep. 538), Witn., 118.
Kansas City & S. W. R. Co. *v.* Hurst (42 Kan. 462, 22 Pac. Rep. 618), Em. Dom., 937, 942.
Kansas City & T. R. Co. *v.* Interstate Lumber Co. (36 Fed. Rep. 9), Em. Dom., 493.
Kansas City & T. R. Co. *v.* Interstate Lumber Co. (37 Fed. Rep. 3), Rem. of C., 15.
Kansas City & T. R. Co. *v.* Splitlog (45 Kan. 68, 25 Pac. Rep. 202), Em. Dom., 634.
Kansas City & T. R. Co. *v.* Vickroy (46 Kan. 248, 26 Pac. Rep. 698), Em. Dom., 633.
Kansas City, C. & S. R. Co. *v.* Carlisle (94 Mo. 166, 13 West. Rep. 251, 7 S. W. Rep. 102), Em. Dom., 921.
Kansas City, C. & S. R. Co. *v.* Story (36 Am. & Eng. R. Cas. 584, 96 Mo. 611, 10 S. W. Rep. 203), Em. Dom., 451, 453, 517, 524, 682, 789.
Kansas City, E. & S. R. Co. *v.* Merrill (2 Am. & Eng. R. Cas. 485, 25 Kan. 421), Em. Dom., 454.
Kansas City Elevator Co. *v.* Union Pac. R. Co. (3 McCrary (U. S.) 463, 17 Fed. Rep. 200), Receiv., 32.
Kansas City, Ft. S. & G. R. Co. *v.* Burge (40 Am. & Eng. R. Cas. 181, 40 Kan. 736, 21 Pac. Rep. 589), Animals, 127, 329, 363; Evid., 103.
Kansas City, Ft. S. & G. R. Co. *v.* Ewing (23 Kan. 273), Animals, 647.

Kansas City, Ft. S. & G. R. Co. *v.* Foster (39 Kan. 329, 18 Pac. Rep. 285), Trial, 61.
Kansas City, Ft. S. & G. R. Co. *v.* Hay (13 Am. & Eng. R. Cas. 600, 31 Kan. 177, 1 Pac. Rep. 766), App., 74.
Kansas City, Ft. S. & G. R. Co. *v.* Hays (13 Am. & Eng. R. Cas. 597, 29 Kan. 193), Bills of Partic., 5.
Kansas City, Ft. S. & G. R. Co. *v.* Hines (19 Am. & Eng. R. Cas. 495, 32 Kan. 619, 5 Pac. Rep. 172; former appeal 29 Kan. 695), Animals, 450.
Kansas City, Ft. S. & G. R. Co. *v.* Kelly (34 Am. & Eng. R. Cas. 281, 36 Kan. 655, 14 Pac. Rep. 172), Agency, 102; Children, Inj. to, 16; Tresp., Inj. to, 82.
Kansas City, Ft. S. & G. R. Co. *v.* Kier (38 Am. & Eng. R. Cas. 119, 41 Kan. 661, 671, 21 Pac. Rep. 770), Contrib. Neg., 82; Dam., 18, 26; Employés, Inj. to, 430, 455; Fel. Serv., 88, 93, 181.
Kansas City Ft. S. & G. R. Co. *v.* Lane (23 Am. & Eng. R. Cas. 237, 33 Kan. 702, 7 Pac. Rep. 587), Animals, 563; Evid., 291; Trial, 172.
Kansas City, Ft. S. & G. R. Co. *v.* McHenry (24 Kan. 501), Animals, 268; App., 117.
Kansas City, Ft. S. & G. R. Co. *v.* Morrison (34 Kan. 502, 55 Am. Rep. 252, 9 Pac. Rep. 225), Bagg., 43.
Kansas City, Ft. S. & G. R. Co. *v.* Owen (25 Kan. 419), Contrib. Neg., 82; Fires, 303.
Kansas City, Ft. S. & M. R. Co. *v.* Cook (58 Am. & Eng. R. Cas. 654, 57 Ark. 387, 21 S. W. Rep. 1066), Culverts, 12, 13; Embankm., 4; Flood. Lds., 92, 95; Waters & W., 25; Witn., 99, 136.
Kansas City, Ft. S. & M. R. Co. *v.* Daughtry (138 U. S. 298, 11 Sup. Ct. Rep. 306; affirming 88 Tenn. 721, 13 S. W. Rep. 698), Proc., 25.
Kansas City, Ft. S. & M. R. Co. *v.* Daughtry (45 Am. & Eng. R. Cas. 69, 88 Tenn. 721, 13 S. W. Rep. 698), Death, etc., 418.
Kansas City, Ft. S. & M. R. Co. *v.* Grimes (50 Kan. 655, 32 Pac. Rep. 376), App., 119.
Kansas City, Ft. S. & M. R. Co. *v.* McDonald (51 Fed. Rep. 178, 4 U. S. App. 563, 2 C. C. A. 153), Collis., 36; Cross. Rys., 80; Trial, 36.
Kansas City, Ft. S. & M. R. Co. *v.* Shaver (Ark.) (14 S. W. Rep. 864), Animals, 49.
Kansas City, Ft. S. & M. R. Co. *v.* Stoner (49 Fed. Rep. 209, 4 U. S. App. 109, 1 C. C. A. 231), App., 79; Collis., 6, 12; Dam., 43.
Kansas City, Ft. S. & M. R. Co. *v.* Stoner (52 Am. & Eng. R. Cas. 462, 51 Fed. Rep. 649, 4 U. S. App. 109, 2 C. C. A. 437), App., 61, 83; Collis., 4, 6; Evid., 255.
Kansas City, Ft. S. & S. R. Co. *v.* Cox (41 Mo. App. 499), Em. Dom., 516, 524.
Kansas City, L. & S. K. R. Co. *v.* Attorney-General (29 Am. & Eng. R. Cas. 467, 118 U. S. 682, 7 Sup. Ct. Rep. 66; reversing 25 Fed. Rep. 243, 27 Kan. 1), Land Grants, 27.
Kansas City, L. & S. K. R. Co. *v.* Bolson (35 Am. & Eng. R. Cas. 144, 36 Kan. 534, 14 Pac. Rep. 5), Animals, 444, 447.
Kansas City, L. & S. R. Co. *v.* Neville (25 Kan. 632), Animals, 459, 626.
Kansas City, L. & S. R. Co. *v.* Phillibert (25 Kan. 582), Animals, 443; Contrib. Neg., 99, 105.
Kansas City, M. & B. R. Co. *v.* Burton (53 Am. & Eng. R. Cas. 115, 97 Ala. 240, 12 So. Rep. 88), App., 35; Employés, Inj. to, 83, 91, 303, 308, 356, 359, 506, 510, 523, 653, 711; Evid., 47; Fel. Serv., 166, 167, 218, 447, 451; Pl., 137; Trial, 168.
Kansas City, M. & B. R. Co. *v.* Cantrell (70 Miss. 329, 12 So. Rep. 344), Animals, 321.
Kansas City, M. & B. R. Co. *v.* Crocker (95 Ala. 412, 11 So. Rep. 262), Contrib. Neg., 70, 75, 124; Employés, Inj. to, 168; Evid., 79; Fel. Serv., 167; Witn., 45.
Kansas City, M. & B. R. Co. *v.* Deaton (Miss.) (9 So. Rep. 828), Animals, 466.
Kansas City, M. & B. R. Co. *v.* Doggett (67 Miss. 250, 7 So. Rep. 278), Animals, 480.
Kansas City, M. & B. R. Co. *v.* Fite (67 Miss. 373, 7 So. Rep. 223), Car. of P., 615; Dam., 16.
Kansas City, M. & B. R. Co. *v.* Higdon (52 Am. & Eng. R. Cas. 495, 94 Ala. 286, 10 So. Rep. 282), Car. of L. S., 116.
Kansas City, M. & B. R. Co. *v.* Holland (68 Miss. 351, 8 So. Rep. 516), Car. of L. S., 61, 71.
Kansas City, M. & B. R. Co. *v.* Lilly (Miss.) (45 Am. & Eng. R. Cas. 379, 8 So. Rep. 644), Car. of M., 64, 97; Trial, 163.
Kansas City, M. & B. R. Co. *v.* Myers (Miss.) (7 So. Rep. 321), Animals, 577.
Kansas City, M. & B. R. Co. *v.* Phillips (98 Ala. 159, 13 So. Rep. 65), Dam., 16, 37; Employés, 1; Trial, 173.
Kansas City, M. & B. R. Co. *v.* Riley (47 Am. & Eng. R. Cas. 476, 68 Miss. 765, 9 So. Rep. 442), Eject. Pass., 39; Tickets & F., 73.
Kansas City, M. & B. R. Co. *v.* Sanders (58 Am. & Eng. R. Cas. 140, 98 Ala. 293, 13 So. Rep. 57), Car. of P., 129, 197, 609; Dam., 101; Death, etc., 139, 221, 350, 368; Negl., 2; Trial, 141.
Kansas City, M. & B. R. Co. *v.* Smith (90 Ala. 25, 8 So. Rep. 43), Evid., 236; Witn., 106.
Kansas City, M. & B. R. Co. *v.* Watson (91 Ala. 483, 8 So. Rep. 793), Animals, 52, 567.
Kansas City, M. & B. R. Co. *v.* Webb (97 Ala. 157, 11 So. Rep. 888), Evid., 91; Trial, 165, 168; Witn., 30, 128, 190.
Kansas City, N. & Ft. S. R. Co. *v.* Dawley (50 Mo. App. 480), Em. Dom., 480, 587, 724; Witn., 117, 118.
Kansas City, N. & Ft. S. R. Co. *v.* Erwin (50 Mo. App. 552), Em. Dom., 778.
Kansas City, St. J. & C. B. R. Co. *v.* Alderman (47 Mo. 349), Subscr., 117.
Kansas City, St. J. & C. B. R. Co. *v.* Campbell (62 Mo. 585), Em. Dom., 243, 246, 280, 806; Proc., 2.
Kansas City, St. J. & C. B. R. Co. *v.* Gough (35 Kan. 1, 10 Pac. Rep. 89), Attach., 35.
Kansas City, St. J. & C. B. R. Co. *v.* Morley (45 Mo. App. 304), Sts. & H., 300.
Kansas City, St. J. & C. B. R. Co. *v.* Rodebaugh (34 Am. & Eng. R. Cas. 219, 38 Kan. 45, 15 Pac. Rep. 899), Bagg., 98; Tickets & F., 1, 17.

Kansas City, St. J. & C. B. R. Co. *v.* St. Joseph Terminal R. Co. (97 Mo. 457, 3 L. R. A. 240, 10 S. W. Rep. 826), Em. Dom., 1034; Judgm., 9; Sts. & H., 99, 257.
Kansas City, St. J. & C. B. R. Co. *v.* Simpson (16 Am. & Eng. R. Cas. 158, 2 Pac. Rep. 821, 30 Kan. 645, 46 Am. Rep. 104), Car. of L. S., 87; Lim. of Liab., 28.
Kansas City, St. L. & C. R. Co. *v.* Farrell (76 Mo. 183), Em. Dom., 674; Sts. & H., 136.
Kansas City, S. & M. R. Co. *v.* Kirksey (48 Ark. 366, 3 S. W. Rep. 190), Animals, 62.
Kansas City, S. & M. R. Co. *v.* Summers (45 Ark. 295), Animals, 494, 500, 514.
Kansas City, S. & M. R. Co. *v.* Weaver (28 Am. & Eng. R. Cas. 247, 86 Mo. 473), Em. Dom., 431; Exec., 6.
Kansas City S. B. R. Co. *v.* Kansas City, St. L. & C. R. Co. (57 Am. & Eng. R. Cas. 624, 118 Mo. 599, 24 S. W. Rep. 478), Cross. Rys., 11, 21, 24, 34, 35, 57.
Kansas City Transfer Co. *v.* Neiswanger (18 Mo. App. 103), Car. of M., 658.
Kansas City, W. & N. W. R. Co. *v.* Fisher (49 Kan. 17, 30 Pac. Rep. 111), Em. Dom., 648.
Kansas City, W. & N. W. R. Co. *v.* Kennedy (49 Kan. 19, 30 Pac. Rep. 126), Em. Dom., 844, 891.
Kansas City, W. & N. W. R. Co. *v.* Ryan (49 Kan. 1, 30 Pac. Rep. 108), Dam., 101; Em. Dom., 900; Witn., 197.
Kansas City, W. & N. W. R. Co. *v.* Walker (50 Kan. 739, 32 Pac. Rep. 365), Trial, 85.
Kansas Gulf S. L. R. Co. *v.* Scott (1 Tex. Civ. App. 1, 20 S. W. Rep. 725), Evid., 7.
Kansas, N. & D. R. Co. *v.* Cuykendall (42 Kan. 234, 21 Pac. Rep. 1051), Sts. & H., 135.
Kansas, N. & D. R. Co. *v.* McAfee (42 Kan. 239, 21 Pac. Rep. 1053), Sts. & H., 151.
Kansas, N. & D. R. Co. *v.* Mahler (45 Kan. 565, 26 Pac. Rep. 22), Sts. & H., 250.
Kansas, O. & T. R. Co. *v.* Smith (40 Kan. 192, 19 Pac. Rep. 636), Consol., 29.
Kansas Pac. R. Co. *v.* Amrine (10 Kan. 318), Tax., 302.
Kansas Pac. R. Co. *v.* Anderson (23 Kan. 44), Ac'ts, 2.
Kansas Pac. R. Co. *v.* Atchison, T. & S. F. R. Co. (26 Am. & Eng. R. Cas. 506, 112 U. S. 414, 5 Sup. Ct. Rep. 208), Land Grants, 28.
Kansas Pac. R. Co. *v.* Ball (19 Kan. 535), Animals, 307.
Kansas Pac. R. Co. *v.* Brady (17 Kan. 380), App., 119; Fires, 112, 327.
Kansas Pac. R. Co. *v.* Butts (7 Kan. 308, 2 Am. Ry. Rep. 477), Fires, 23, 30, 31, 66, 68; Negl., 53.
Kansas Pac. R. Co. *v.* Couse (17 Kan. 571), Trial, 61.
Kansas Pac. R. Co. *v.* Crammer (4 Colo. 524), Animals, 200.
Kansas Pac. R. Co. *v.* Culp (9 Kan. 38), Tax., 118.
Kansas Pac. R. Co. *v.* Cutter (16 Kan. 568), Death, etc., 98.
Kansas Pac. R. Co. *v.* Cutter (19 Kan. 83, 17 Am. Ry. Rep. 471), Death, etc., 358, 373, 381, 420.
Kansas Pac. R. Co. *v.* Dunmeyer (5 Am. & Eng. R. Cas. 417, 24 Kan. 725; former appeal 19 Kan. 539), Cov'ts, 18; Pub. Lds., 6.
Kansas Pac. R. Co. *v.* Dunmeyer (113 U. S. 629, 5 Sp. Ct. Rep. 566), Land Grants, 8.
Kansas Pac. R. Co. *v.* Ellis County Com'rs (19 Kan. 584), Tax., 260.
Kansas Pac. R. Co. *v.* Hopkins (18 Kan. 494, 15 Am. Ry. Rep. 287), Em. Dom., 985; Pl., 13.
Kansas Pac. R. Co. *v.* Kessler (18 Kan. 523, 15 Am. Ry. Rep. 338), Dam., 27; Eject. Pass., 126; Negl., 3.
Kansas Pac. R. Co. *v.* Kunkel (17 Kan. 145), Pl., 144.
Kansas Pac. R. Co. *v.* Landis (24 Kan. 406), Animals, 268.
Kansas Pac. R. Co. *v.* Little (19 Kan. 267, 17 Am. Ry. Rep. 455), Fel. Serv., 92, 95, 217, 357, 360.
Kansas Pac. R. Co. *v.* Lundin (3 Colo. 94), Car. of P., 170; Constr. Rys., 4; Dam., 19, 28; Death, etc., 271, 284; Embankm., 6.
Kansas Pac. R. Co. *v.* McCann (2 Wyom. 3), Car. of M., 244.
Kansas Pac. R. Co. *v.* Miller (2 Colo. 442, 20 Am. Ry. Rep. 245), Bridges, 23, 34, 57; Car. of P., 158, 162, 171, 586, 609; Dam., 21, 28; Death, etc., 40, 96, 253, 373, 381; Evid., 56, 118, 146, 201, 227; Trial, 50; Witn., 96.
Kansas Pac. R. Co. *v.* Missouri, K. & T. R. Co. (15 Kan. 15), Land Grants, 105.
Kansas Pac. R. Co. *v.* Montelle (10 Kan. 119), Bagg., 58.
Kansas Pac. R. Co. *v.* Mower (16 Kan. 573, 9 Am. Ry. Rep. 400), Animals, 1; Charters, 25; Fences, 2; Stat., 30; Words & Ph., 167.
Kansas Pac. R. Co. *v.* Nichols (9 Kan. 235, 5 Am. Ry. Rep. 275), Car. of L. S., 21, 152.
Kansas Pac. R. Co. *v.* Peavey (11 Am. & Eng. R. Cas. 260, 29 Kan. 169, 44 Am. Rep. 630), Comp. Neg., 22; Contrib. Neg., 116; Employés, Inj. to, 179, 777; Fel. Serv., 165; Witn., 180; Words & Ph., 212.
Kansas Pac. R. Co. *v.* Peavey (34 Kan. 472, 8 Pac. Rep. 780), Contrib. Neg., 82; Fel. Serv., 160, 178, 504, 509; New Tr., 64; Trial, 208, 209.
Kansas Pac. R. Co. *v.* Pointer (9 Kan. 620), Cross., Inj. at, 362; Evid., 160; Sts. & H., 372; Witn., 168.
Kansas Pac. R. Co. *v.* Pointer (14 Kan. 37), Contrib. Neg., 2, 21, 105; Cross., Inj. at, 166; Negl., 1, 67; Trial, 193, 194.
Kansas Pac. R. Co. *v.* Pointer (14 Kan. 38), Comp. Neg., 22, 50.
Kansas Pac. R. Co. *v.* Prescott (16 Wall. (U. S.) 603, 4 Am. Ry. Rep. 166), Tax., 113.
Kansas Pac. R. Co. *v.* Reynolds (8 Kan. 623, 5 Am. Ry. Rep. 260), Car. of L. S., 21; Car. of M., 778; Evid., 137; Lim. of Liab., 40.
Kansas Pac. R. Co. *v.* Reynolds (17 Kan. 251), Car. of L. S., 94.
Kansas Pac. R. Co. *v.* Richardson (6 Am. & Eng. R. Cas. 96, 25 Kan. 391), Negl., 64; Pl., 115.
Kansas Pac. R. Co. *v.* Riley County Com'rs (20 Kan. 141), Tax., 260.

Kansas Pac. R. Co. *v.* Roberson (3 Colo. 142), Employés, 2.
Kansas Pac. R. Co. *v.* Russell (8 Kan. 558, 5 Am. Ry. Rep. 232), Tax., 260, 342.
Kansas Pac. R. Co. *v.* Salmon (11 Kan. 83), Car. of P., 57; Fel. Serv., 1.
Kansas Pac. R. Co. *v.* Salmon (14 Kan. 512), Death, etc., 151, 221, 362.
Kansas Pac. R. Co. *v.* Searle (35 Am. & Eng. R. Cas. 6, 11 Colo. 1, 16 Pac. Rep. 328), Car. of M., 740; Receiv., 17.
Kansas Pac. R. Co. *v.* Streeter (8 Kan. 133, 5 Am. Ry. Rep. 109), Em. Dom., 254.
Kansas Pac. R. Co. *v.* Taylor (17 Kan. 566), Animals, 349; Bills of Partic., 3.
Kansas Pac. R. Co. *v.* Thacher (17 Kan. 92), Att'ys, 18.
Kansas Pac. R. Co. *v.* Twombly (3 Colo. 125, 21 Am. Ry. Rep. 447), Contrib. Neg., 20, 39, 105; Cross., Inj. at, 259.
Kansas Pac. R. Co. *v.* Twombly (100 U. S. 78), Stat., 68.
Kansas Pac. R. Co. *v.* Ward (4 Colo. 30), Contrib. Neg., 83; Negl., 70; Tresp., Inj. to, 21, 99.
Kansas Pac. R. Co. *v.* Whipple (37 Am. & Eng. R. Cas. 320, 39 Kan. 531, 18 Pac. Rep. 730), Children, Inj. to, 38, 73, 75, 170; Contrib. Neg., 50; Witn., 183.
Kansas Pac. R. Co. *v.* Wiggins (24 Kan. 588), Animals, 158.
Kansas Pac. R Co. *v.* Wood (24 Kan. 619), Animals, 584, 648.
Kansas Pac. R. Co. *v.* Wyandotte County Com'rs (16 Kan. 587), Paym., 5; Stat., 40; Tax., 260, 339.
Kansas Pac. R. Co. *v.* Yanz (16 Kan. 583), Animals, 627.
Kappner *v.* St. Louis & St. J. R. Assoc. (3 Dill. (U. S.) 228), Mort., 71.
Karasich *v.* Hasbrouck (28 Wis. 569), New Tr., 61.
Karle *v.* Kansas City, St. J. & C. B. R. Co. (55 Mo. 476), Contrib. Neg., 48; Death, etc., 174; Negl., 28, 43.
Karn *v.* Rorer Iron Co. (86 Va. 754, 14 Va. L. J. 217, 11 S. E. Rep. 431), Receiv., 94.
Karnes *v.* Rochester & G. V. R. Co. (4 Abb. Pr. N. S. (N. Y.) 107), Divid., 11; Stockh., 95.
Karr *v.* Chicago, R. I. & P. R. Co. (Iowa) (54 N. W. Rep. 144), Animals, 409, 578.
Karrer *v.* Detroit, G. H. & M. R. Co. (41 Am. & Eng. R. Cas. 265, 76 Mich. 400, 43 N. W. Rep. 370), Employés, Inj. to, 399; Trial, 63.
Karsen *v.* Milwaukee & St. P. R. Co. (7 Am. & Eng. R. Cas. 501, 29 Minn. 12, 11 N. W. Rep. 122), Fires, 112, 254, 261, 289.
Karst *v.* St. Paul, S. & T. F. R. Co. (22 Minn. 118), Dam., 4; St. Rys., 124; Sts. & H., 154; Tresp., 16.
Karst *v.* St. Paul, S. & T. F. R. Co. (23 Minn. 401), Sts. & H., 172.
Katzenberger *v.* Aberdeen (16 Fed. Rep. 745), Mun. Aid, 269.
Katzenberger *v.* Aberdeen (121 U. S. 172, 7 Sup. Ct. Rep. 947), Mun. Aid, 27, 154.
Katzenberger *v.* Lawo (50 Am. & Eng. R. Cas. 443, 90 Tenn. 235, 16 S. W. Rep. 611), Cross., Inj. at, 103, 114; Sts. & H., 333.
Katzenstein *v.* Raleigh & G. R. Co. (78 N. Car. 286), Proc., 31.
Katzenstein *v.* Raleigh & G. R. Co. (6 Am. & Eng. R. Cas. 464, 84 N. Car. 688), Agency, 5; Just. P., 3; Penalty, 15.
Kauffman *v.* Harstock (31 Iowa 472), Evid., 178.
Kauffman Milling Co. *v.* Missouri Pac. R. Co. (3 Int. Com. Rep. 400, 4 Int. Com. Com. 417), Int. Com., 1, 11, 76.
Kavanagh *v.* Mobile & G. R. Co. (32 Am. & Eng. R. Cas. 267, 78 Ga. 271, 2 S. E. Rep. 636), Mun. Corp., 29; Sts. & H., 150.
Kavanagh *v.* Mobile & G. R. Co. (78 Ga. 803, 4 S. E. Rep. 113), Nuis., 24.
Kay *v.* Pennsylvania R. Co. (65 Pa. St. 269), Children, Inj. to, 68, 127, 128; Dam., 6; Licensees, Inj. to, 16.
Kean *v.* Baltimore & O. R. Co. (19 Am. & Eng. R. Cas. 321, 61 Md. 154), Cross., Inj. at, 212.
Kean *v.* Davis (21 N. J. L. 683), Bills & N., 24.
Kean *v.* Johnson (9 N. J. Eq. 401), Charters, 56; Sales of Rds., 5; Stockh., 115.
Kearney *v.* Boston & W. R. Corp. (9 Cush. (Mass.) 108), Death, etc., 81.
Kearney *v.* Chicago, M. & St. P. R. Co. (47 Wis. 144, 2 N. W. Rep. 82, 21 Am. Ry. Rep. 43), Death, etc., 360.
Kearney *v.* Lindell R. Co. (15 Mo. App. 576), Contrib. Neg., 21.
Kearney *v.* Lehigh Valley R. Co. (32 Fed. Rep. 320), Pat. for Inv., 4, 15, 47.
Kearney *v.* London, B. & S. C. R. Co. (L. R. 5 Q. B. 411, 30 L. J. Q. B. 200, 18 W. R. 1000, 22 L. T. 886; affirmed 40 L. J. Q. B. 285, L. R. 6 Q. B. 759, 24 L. T. 913, 20 W. R. 24), Bridges, 57.
Kearney *v.* Metropolitan El. R. Co. (14 N. Y. S. R. 854), Elev. Rys., 152.
Kearney *v.* Metropolitan El. R. Co. (129 N. Y. 76, 29 N. E. Rep. 70, 41 N. Y. S. R. 119; affirming 27 J. & S. 563, 37 N. Y. S. R. 892, 13 N. Y. Supp. 608), Elev. Rys., 95.
Kearney *v.* Oakes (20 Nov. Sc. 30), Lim. of Ac., 49.
Kearney *v.* Oakes (18 Can. Sup. Ct. 148; reversing 20 Nov. Sc. 30), Em. Dom., 1210; Govt. Rds., 14.
Kearney *v.* Queen (2 Can. Exch. 21), Em. Dom., 1240, 1243.
Kearney County *v.* Stein (26 Neb. 132, 41 N. W. Rep. 1071), Mun. Aid, 117.
Kearns *v.* Chicago, M. & St. P. R. Co. (22 Am. & Eng. R. Cas. 287, 66 Iowa 599, 24 N. W. Rep. 231), Employés, Inj. to, 86.
Kearns *v.* Coney Island & B. R. Co. (17 N. Y. S. R. 692, 49 Hun 608, 1 N. Y. Supp. 906), Bills of Partic., 1.
Keates *v.* Holywell R. Co. (28 L. T. 183), Em. Dom., 1207.
Keating *v.* Michigan C. R. Co. (94 Mich. 219, 53 N. W. Rep. 1053), Lim. of Ac., 67.
Keating *v.* Michigan C. R. Co. (97 Mich. 154), Agency, 76.
Keating *v.* New York C. & H. R. R. Co. (3 Lans. (N. Y.) 469; affirmed in 49 N. Y. 673, mem.), Car. of P., 376.
Keating *v.* New York C. & H. R. R. Co.

(49 N. Y. 673; affirming 3 Lans. 469), Car. of P., 221, 223, 371.
Keech *v.* Baltimore & W. R. Co. (17 Md. 32), Animals, 23, 30, 51, 480, 495; Proc., 6.
Keech *v.* Rome, W. & O. R. Co. (35 N. Y. S. R. 902, 59 Hun 617, 13 N. Y. Supp. 149), Cross., Inj. at, 16.
Keefe *v.* Boston & A. R. Co. (27 Am. & Eng. R. Cas. 137, 142 Mass. 251, 7 N. E. Rep. 874), Car. of P., 265, 277.
Keefe *v.* Sullivan County R. Co. (23 Am. & Eng. R. Cas. 301, 63 N. H. 271), Farm Cross., 3.
Keegan *v.* Western R. Co. (8 N. Y. 175), Employés, Inj. to, 130, 629; Fel. Serv., 56, 142.
Keeler *v.* Brooklyn El. R. Co. (9 Abb. N. Cas. (N. Y.) 166), Abate., 2; Pres., 8; Receiv., 168.
Keeley *v.* Boston & M. R. Co. (67 Me. 163, 16 Am. Ry. Rep. 339), Tickets & F., 5.
Keeley *v.* Erie R. Co. (47 How. Pr. (N. Y.) 256), Death, etc., 172.
Keeling *v.* Griffin (56 Pa. St. 305), Branch & L. Roads, 4.
Keeling's Road (59 Pa. St. 358), Branch & L. Roads, 15.
Keenan *v.* New York, L. E. & W. R. Co. (49 N. Y. S. R. 513, 21 N. Y. Supp. 445, 2 Misc. 34), Employés, Inj. to, 43, 260, 266, 284, 428, 430.
Keener *v.* Union Pac. R. Co. (31 Fed. Rep. 126; new trial granted in 34 Fed. Rep. 871), Em. Dom., 283; Tax., 60.
Keeney *v.* Grand Trunk R. Co. (59 Barb. (N. Y.) 104; affirmed in 47 N. Y. 525), Discrim., 17; Lim. of Liab., 33, 43; Words & Ph., 203, 220.
Keeney *v.* Grand Trunk R. Co. (47 N. Y. 525, 1 Am. Ry. Rep. 466; affirming 59 Barb. 104), Car. of L. S., 76.
Keeney *v.* Oregon R. & N. Co. (42 Am. & Eng. R. Cas. 619, 24 Pac. Rep. 233, 19 Oreg. 291), Animals, 56, 255, 278.
Keenig *v.* Missouri Pac. R. Co. (19 Mo. App. 327), Animals, 575.
Keep *v.* Indianapolis & St. L. R. Co. (3 McCrary (U. S.) 208, 9 Fed. Rep. 625), Car. of P., 150, 512; Dam., 17; Judgm., 2.
Keep *v.* Indianapolis & St. L. R. Co. (3 McCrary (U. S.) 302, 10 Fed. Rep. 454), Car. of P., 129.
Keese *v.* New York, N. H. & H. R. Co. (67 Barb. (N. Y.) 205, 4 Hun 673), Contrib. Neg., 9, 85; Cross., Inj. at, 270.
Keeter *v.* Wilmington & W. R. Co. (9 Am. & Eng. R. Cas. 165, 86 N. Car. 346), Car. of M., 40, 57.
Keffe *v.* Milwaukee & St. P. R. Co. (21 Minn. 207, 19 Am. Ry. Rep. 231), Children, Inj. to, 24.
Kehler *v.* Schwenk (144 Pa. St. 348, 22 Atl. Rep. 910), Children, Inj. to, 70, 74; Employés, Inj. to, 330, 477, 651.
Kehler *v.* Schwenk (151 Pa. St. 505, 25 Atl. Rep. 130), Employés, Inj. to, 14, 94, 460; Evid., 93.
Keilt *v.* Staten Island R. T. R. Co. (75 Hun 579, 27 N. Y. Supp. 847), Cross., Inj. at, 226.
Keim *v.* Union R. & T. Co. (90 Mo. 314, 2 S. W. Rep. 427), Contrib. Neg., 120; Cross., Inj. at, 183; Death, etc., 294, 312; Negl., 29.
Keim *v.* Union R. & T. Co. (15 Mo. App. 593), Contrib. Neg., 48; Witn., 45.
Keitel *v.* St. Louis C. & W. R. Co. (28 Mo. App. 657), Cable R'ys, 18; Contrib. Neg., 75, 113; Sts. & H., 389.
Keith *v.* Amende (1 Bush (Ky.) 455), Bills of L., 22.
Keith *v.* Cheshire R. Co. (1 Gray (Mass.) 614), Constr. Rys., 12.
Keith *v.* Intercolonial C. Min. Co. (18 Nov. Sc. 226), Cross., Inj. at, 116.
Keith *v.* Kentucky C. R. Co. (1 Int. Com. Rep. 601, 1 Int. Com. Com. 189), Int. Com., 106.
Keith *v.* New Haven & N. Co. (23 Am. & Eng. R. Cas. 421, 140 Mass. 175, 3 N. E. Rep. 28), Employés, Inj. to, 154, 622.
Keith *v.* State (91 Ala. 2, 8 So. Rep. 353, 10 L. R. A. 430), Int. Com., 224.
Keithsburg *v.* Frick (34 Ill. 405), Mun. Aid, 153, 342.
Keithsburg & E. R. Co. *v.* Henry (79 Ill. 290), Em. Dom., 646, 724; Witn., 122.
Keithsburg & E. R. Co. *v.* Henry (90 Ill. 255), App., 133.
Kelliher *v.* Connecticut River R. Co. (107 Mass. 411), Animals, 79.
Kelland *v.* Fulford (L. R. 6 Ch. D. 491, 25 W. R. 606), Em. Dom., 1153.
Kelleher *v.* Milwaukee & N. R. Co. (80 Wis. 584, 50 N. W. Rep. 942), Death, etc., 358; Employés, Inj. to, 679.
Keller *v.* Harrisburg & P. R. Co. (151 Pa. St. 67, 25 Atl. Rep. 84), Em. Dom., 237.
Keller *v.* Hestonville, M. & F. Pass. R. Co. (149 Pa. St. 65, 24 Atl. Rep. 159; affirming 1 Pa. Dist. 197), Car. of P., 366, 582; St. Rys., 329.
Keller *v.* Johnson (11 Ind. 337), Bills & N., 23.
Keller *v.* Manhattan El. R. Co. (39 N. Y. S. R. 143, 27 J. & S. 589, 15 N. Y. Supp. 88; reversed in 129 N. Y. 667, mem., 42 N. Y. S. R. 946), Elev. Rys., 174.
Keller *v.* New York C. R. Co. (2 Abb. App. Dec. (N. Y.) 480, 24 How. Pr., 172; affirming 17 How. Pr. 102), Death, etc., 28; Negl., 64; Witn., 141.
Keller *v.* Sioux City & St. P. R. Co. (37 Minn. 178, 6 N. W. Rep. 486), Car. of P. 234; Evid., 213.
Kellett *v.* Chicago & A. R. Co. (22 Mo. App. 356), Eject. Pass., 31, 54, 114, 119.
Kelley *v.* Boston & M. R. Co. (135 Mass. 448), Death, etc., 23.
Kelley *v.* Central R. Co. (5 McCrary (U. S.) 653), Death, etc., 282.
Kelley *v.* Central R. Co. (48 Fed. Rep. 663), Death, etc., 377, 382.
Kelley *v.* Chicago, M. & St. P. R. Co. (2 Am. & Eng. R. Cas. 65, 50 Wis. 381, 7 N. W. Rep. 291), Death, etc., 133, 146.
Kelley *v.* Chicago, M. & St. P. R. Co. (5 Am. & Eng. R. Cas. 469, 53 Wis. 74, 9 N. W. Rep. 816), App., 32; Employés, Inj. to, 204, 696; Trial, 214, 215.
Kelley *v.* Chicago, St. P., M. & O. R. Co. (35 Minn. 490, 29 N. W. Rep. 173), Employés, Inj. to, 294.

Kelley *v.* Detroit, L. & N. R. Co. (80 Mich. 237, 45 N. W. Rep. 90), Evid., 166; Trial, 39; Witn., 98.
Kelley *v.* Hannibal & St. J. R. Co. (13 Am. & Eng. R. Cas. 638, 75 Mo. 138), Cross., Inj. at, 283, 320; Sts. & H., 374.
Kelley *v.* Louisville & N. R. Co. (49 Ill. App. 304), Employés, 18.
Kelley *v.* Michigan C. R. Co. (2 Am. & Eng. R. Cas. 633, 65 Mich. 186, 31 N. W. Rep. 904), Negl., 1.
Kelley *v.* Milan (127 U. S. 139, 8 Sup. Ct. Rep. 1101), Judgm., 28; Mun. Aid, 73, 273, 283.
Kelley *v.* Mississippi C. R. Co. (2 Flipp (U. S.) 581, 1 Fed. Rep. 564), Pl., 41.
Kelley *v.* Newburyport & A. Horse R. Co. (24 Am. & Eng. R. Cas. 27, 141 Mass. 496, 6 N. E. Rep. 745), Direct., 45, 54; St. Rys., 121.
Kelley *v.* Pennsylvania R. Co. (33 Fed. Rep. 856), Trial, 199.
Kelley *v.* Union Pac. R. Co. (16 Colo. 455, 27 Pac. Rep. 1058), Abate., 4; Death, etc., 4.
Kellinger *v.* Forty-second St. & G. S. F. R. Co. (50 N. Y. 206, 3 Am. Ry. Rep. 77), St. Rys., 208; Sts. & H., 247.
Kelly *v.* Missouri Pac. R. Co. (43 Am. & Eng. R. Cas. 186, 101 Mo. 67, 13 S. W. Rep. 806), Contrib. Neg., 5, 48, 50; Cross., Inj. at, 261, 262; Negl., 29.
Kellogg *v.* Chicago & N. W. R. Co. (26 Wis. 223, 2 Am. Ry. Rep. 483), Fires, 82, 98, 105, 112, 125, 318; Words & Ph., 42, 192.
Kellogg *v.* Malin (50 Mo. 496), Cov'ts, 11; Em. Dom., 130.
Kellogg *v.* Malin (62 Mo. 429), Cov'ts, 18.
Kellogg *v.* Milwaukee & St. P. R. Co. (5 Dill. (U. S.) 537), Fires, 30, 320.
Kellogg *v.* New York C. & H. R. R. Co. (79 N. Y. 72), Cross., Inj. at, 240; Death, etc., 202, 288.
Kellogg *v.* Suffolk & C. R. Co. (35 Am. & Eng. R. Cas. 529, 100 N. Car. 158, 5 S. E. Rep. 379), Agency, 4.
Kellow *v.* Central Iowa R. Co. (21 Am. & Eng. R. Cas. 485, 68 Iowa 470, 23 N. W. Rep. 740, 27 N. W. Rep. 466), Car. of P., 139, 141, 212; Collis., 4; Cross. Rys., 79; Death, etc., 82.
Kellow *v.* Long Island R. Co. (42 N. Y. S. R. 813, 62 Hun 620, 16 N. Y. Supp. 676), New Tr., 60.
Kelly, Appeal of (Pa.) (12 Atl. Rep. 256), Assign., 23.
Kelly *v.* Abbot (21 Am. & Eng. R. Cas. 633, 63 Wis. 307, 23 N. W. Rep. 890, 53 Am. Rep. 292), Employés, Inj. to, 202, 397, 399.
Kelly *v.* Alabama & C. R. Co. (58 Ala. 489, 21 Am. Ry. Rep. 438), Deeds of Tr., 6; Evid., 111; Mort., 1; Receiv., 19; State Aid, 1, 4, 9.
Kelly *v.* Baltimore & O. R. Co. (Pa.) (11 Atl. Rep. 659), Employés, Inj. to, 190.
Kelly *v.* Boylan (32 N. J. Eq. 581), Mort., 68, 124.
Kelly *v.* Calhoun (95 U. S. 710), Deeds, 6.
Kelly *v.* Chicago & A. R. Co. (88 Mo. 534), Cross., Inj. at, 288; Evid., 80, 202.
Kelly *v.* Chicago & N. W. R. Co. (60 Wis. 480, 19 N. W. Rep. 521), Contrib. Neg., 105; Discov., 9; Trial, 202.
Kelly *v.* Chicago & N. W. R. Co. (70 Wis. 335, 35 N. W. Rep. 538), Trial, 219.
Kelly *v.* Chicago, R. I. & P. R. Co. (86 Mo. 681), Animals, 611.
Kelly *v.* Duluth, S. S. & A. R. Co. (92 Mich. 19, 52 N. W. Rep. 81), Collis., 35; Cross., Inj. at, 165.
Kelly *v.* Forty-second St., M. & St. N. A. R. Co. (33 N. Y. S. R. 816, 58 Hun 93, 11 N. Y. Supp. 344), Employés, Inj. to, 7, 184, 609.
Kelly *v.* Gould (6 N. Y. Supp. 845; affirming 2 N. Y. Supp. 600), Bills & N., 15.
Kelly *v.* Green Bay & M. R. Co. (10 Biss. (U. S.) 151, 5 Fed. Rep. 846), Mort., 108.
Kelly *v.* Green Bay, W. & St. P. R. Co. (80 Wis. 328, 50 N. W. Rep. 187), Deeds, 24.
Kelly *v.* Hannibal & St. J. R. Co. (70 Mo. 604), Car. of P., 415; Death, etc., 253.
Kelly *v.* Hendrie (26 Mich. 255, 5 Am. Ry. Rep. 440), Death, etc., 238.
Kelly *v.* Lehigh Valley Coal Co. (8 Daly (N. Y.) 291), Agency, 9.
Kelly *v.* Lynchburg & D. R. Co. (110 N. Car. 431, 15 S. E. Rep. 200), Arb., 15.
Kelly *v.* Manayunk & R. I. P. & R. Co. (Pa.) (12 Atl. Rep. 598), Sts. & H., 385.
Kelly *v.* Manhattan R. Co. (37 Am. & Eng. R. Cas. 60, 112 N. Y. 443, 20 N. E. Rep. 383, 21 N. Y. S. R. 507; reversing 22 J. & S. 562, 8 N. Y. S. R. 123), Elev. Rys., 202, 212.
Kelly *v.* Michigan C. R. Co. (28 Am. & Eng. R. Cas. 633, 65 Mich. 186, 31 N. W. Rep. 904), Cross., Inj. at, 9, 11; Sts. & H., 411; Tresp., Inj. to, 9.
Kelly *v.* Midland G. W. R. Co. (7 Ir. R. C. L. 8), False Imp., 3; Mal. Pros., 9, 14.
Kelly *v.* Milan (21 Fed. Rep. 842), Mun. Aid, 383.
Kelly *v.* New York & M. B. R. Co. (81 N. Y. 233; affirming 19 Hun 363), Costs, 1.
Kelly *v.* New York & S. B. R. Co. (109 N. Y. 44, 15 N. E. Rep. 879, 14 N. Y. S. R. 36, 11 Cent. Rep. 874; reversing 39 Hun 486), Car. of P., 187.
Kelly *v.* New York C. & H. R. R. Co. (29 N. Y. S. R. 646, 9 N. Y. Supp. 90, 56 Hun 639), Bridges, 50.
Kelly *v.* Ottawa St. R. Co. (3 Ont. App. 616), Lim. of Ac., 60.
Kelly *v.* Pelham Hod El. R. Co. (51 N. Y. S. R. 549, 21 N. Y. Supp. 1107, 67 Hun 650, mem.), Trial, 79.
Kelly *v.* Pennsylvania R. Co. (Pa.) (8 Atl. Rep. 856), Cross., Inj. at, 252.
Kelly *v.* People's Transp. Co. (3 Oreg. 189), Deeds, 49; Franch., 10.
Kelly *v.* St. Paul, M. & M. R. Co. (6 Am. & Eng. R. Cas. 93, 29 Minn. 1, 11 N. W. Rep. 67), Cross., Inj. at, 308, 344.
Kelly *v.* Shelby R. Co. (Ky.) (22 S. W. Rep. 445), Employés, Inj. to, 27.
Kelly *v.* Southern Minn. R. Co. (6 Am. & Eng. R. Cas. 264, 28 Minn. 98, 9 N. W. Rep. 588), Cross., Inj. at, 226; Cross., Sts. & H., 33; Evid., 86.
Kelly *v.* Twenty-third St. R. Co. (14 Daly 418, 14 N. Y. S. R. 699), Death, etc., 429.

Kelly *v.* Union R. & T. Co. (35 Am. & Eng. R. Cas. 396, 95 Mo. 279, 14 West. Rep. 721, 8 S. W. Rep. 420), Contrib., Neg., 48, 112; Employes, Inj. to, 159; Evid., 234; Sts. & H., 388; Trial, 61.
Kelly *v.* Union R. & T. Co. (11 Mo. App. 1), Employés, Inj. to, 318.
Kelsey *v.* Chicago & N. W. R. Co. (43 Am. & Eng. R. Cas. 43, 1 S. Dak. 80, 45 N. W. Rep. 204), Fires, 66, 267, 268, 269, 289, 318; Pl., 165.
Kelsey *v.* Jewett (28 Hun (N. Y.) 51), Negl., 43.
Kelsey *v.* Jewett (34 Hun (N. Y.) 11), Abate., 5.
Kelsey *v.* Michigan C. R. Co. (28 Hun (N. Y.) 460), Tickets & F., 48.
Kelsey *v.* Pennsylvania R. Co. (14 Blatchf. (U. S.) 89), Appear., 5.
Keltenbaugh *v.* St. Louis, A. & T. R. Co. (34 Mo. App. 147), Animals, 446, 456.
Kelver *v.* New York, C. & St. L. R. Co. (49 Am. & Eng. R. Cas. 551, 126 N. Y. 365, 27 N. E. Rep. 553, 37 N. Y. S. R. 485; affirming 35 N. Y. S. R. 673, 12 N. Y. Supp. 723), Animals, 106; Fences, 67.
Kember *v.* Southern Exp. Co. (22 La. Ann. 158), Exp. Cos., 73.
Kemble *v.* Philadelphia, G. & N. R. Co. (140 Pa. St. 14, 21 Atl. Rep. 225), Sts. & H., 246.
Kemble *v.* Wilmington & N. R. Co. (13 Phila. (Pa.) 469), Bonds, 23.
Kemp *v.* Pennsylvania R. Co. (156 Pa. St. 430, 26 Atl. Rep. 1074), Em. Dom., 206, 220; Release, 29.
Kemp *v.* Southeastern R. Co. (L. R. 7 Ch. 364, 41 L. J. Ch. 404, 20 W. R. 306, 26 L. T. 110), Em. Dom., 1094; Vend. & P., 3.
Kemp *v.* West End of London & C. P. R. Co. (1 Kay & J. 681, 1 Jur. N. S. 1012), Em. Dom., 1142.
Kempinger *v.* St. Louis & I. M. R. Co. (3 Mo. App. 581), Children, Inj. to, 75; Contrib. Neg., 48; Sts. & H., 318.
Kempson *v.* Great Western R. Co. (4 Ry. & C. T. Cas. 426), Charges, 65, 115, 117; Discrim., 18, 66; Words & Ph., 123.
Kendall *v.* London & S. W. R. Co. (41 L. J. Ex. 184, L. R. 7 Ex. 373, 20 W. R. 886, 26 L. T. 735), Car. of L. S., 26.
Kendall *v.* Missisquoi & C. R. R. Co. (14 Am. & Eng. R. Cas. 423, 55 Vt. 438), Em. Dom., 1034.
Kendig *v.* Chicago, R. I. & P. R. Co. (19 Am. & Eng. R. Cas. 493, 79 Mo. 207), Animals, 48, 196, 615.
Kendrick *v.* Boston & N. Y. C. R. Co. (3 R. I. 235), Attach., 20.
Kendrick *v.* Central R. & B. Co. (89 Ga. 782, 15 S. E. Rep. 685), Death, etc., 254; Witn., 94.
Kendrick *v.* Chicago & A. R. Co. (81 Mo. 521), Actions, 11; Animals, 547; App., 143.
Kendrick *v.* Towle (60 Mich. 363, 1 Am. St. Rep. 526, 27 N. W. Rep. 567), Dam., 108; Fires, 24, 127; Words & Ph., 138.
Kenicott *v.* Wayne County Sup'rs (16 Wall. (U. S.) 452, 4 Am. Ry. Rep. 93), Mort., 190; Mun. Aid, 211, 225, 353.
Kenkele *v.* Manhattan R. Co. (55 Hun 398, 29 N. Y. S. R. 95, 8 N. Y. Supp. 707), Elev. Rys., 145.
Kennard *v.* New Jersey R. & T. Co. (1 Phila. (Pa.) 41), Proc., 45, 46.
Kennayde *v.* Pacific R. Co. (45 Mo. 255), Death, etc., 125, 179, 292; Sts. & H., 332, 367.
Kennebec & P. R. Co. *v.* Jarvis (34 Me. 360), Subscr., 15, 78, 111, 205.
Kennebec & P. R. Co. *v.* Palmer (34 Me. 366), Subscr., 15.
Kennebec & P. R. Co. *v.* Portland & K. R. Co. (14 Wall. (U. S.) 23), Fed. Cts., 25.
Kennebec & P. R. Co. *v.* Portland & K. R. Co. (54 Me. 173), Mort., 315, 316; Parties, 20.
Kennebec & P. R. Co. *v.* Portland & K. R. Co. (59 Me. 9), Mort., 159, 189.
Kennedy *v.* Chicago & N. W. R. Co. (68 Iowa 559, 27 N. W. Rep. 743), Cross., Inj. at, 325.
Kennedy *v.* Chicago, R. I. & P. R. Co. (14 Abb. N. Cas. (N. Y.) 326), Stockh., 6.
Kennedy *v.* Denver, S. P. & P. R. Co. (34 Am. & Eng. R. Cas. 40, 10 Colo. 493, 16 Pac. Rep. 210), Contrib. Neg., 10, 50; Tresp., Inj. to, 107.
Kennedy *v.* Dubuque & P. R. Co. (2 Iowa 521), Em. Dom., 692.
Kennedy *v.* Indianapolis, C. & L. R. Co. (2 Flipp. (U. S.) 704, 3 Fed. Rep. 97), Mort., 187; Receiv., 122, 127, 128, 129.
Kennedy *v.* Kennedy (70 Hun 257, 24 N. Y. Supp. 424), Reorg., 7.
Kennedy *v.* Manhattan R. Co. (33 Hun (N. Y.) 457; affirmed (?) 102 N. Y. 742, mem.), Employés, Inj. to, 209.
Kennedy *v.* Milwaukee & St. P. R. Co. (22 Wis. 581), Em. Dom., 45, 141.
Kennedy *v.* Mobile & G. R. Co. (21 Am. & Eng. R. Cas. 145, 74 Ala. 430), Car. of M., 340, 355.
Kennedy *v.* New York C. & H. R. R. Co. (35 Hun (N. Y.) 186), Death, etc., 89, 413.
Kennedy *v.* North Mo. R. Co. (36 Mo. 351), Dam., 27, 30; Negl., 1, 61; New Tr., 5, 30.
Kennedy *v.* Oswego & S. R. Co. (67 Barb. (N. Y.) 169), Words & Ph., 61.
Kennedy *v.* Pennsylvania R. Co. (Pa.) (17 Atl. Rep. 7), Employés, Inj. to, 291.
Kennedy *v.* Rochester City & B. R. Co. (130 N. Y. 654, mem., 3 Silv. App. 591, 29 N. E. Rep. 141, 41 N. Y. S. R. 329; reversing 54 Hun 183, 26 N. Y. S. R. 871, 7 N. Y. Supp. 221), Evid., 175, 177.
Kennedy *v.* St. Louis R. Co. (43 Mo. App. 1), Children, Inj. to, 61.
Kennedy *v.* St. Louis, V. & T. H. R. Co. (62 Ill. 395, 7 Am. Ry. Rep. 346), Tax., 92, 94.
Kennedy *v.* St. Paul & P. R. Co. (2 Dill. (U. S.) 448), Receiv., 11.
Kennedy *v.* St. Paul & P. R. Co. (5 Dill. (U. S.) 519), Mort., 122, 222.
Kennedy *v.* Standard Sugar Refinery (125 Mass. 90), Death, etc., 377.
Kenner *v.* American Contract Co. (9 Bush (Ky.) 202), Deeds, 37; Em. Dom., 215.
Kennet & A. Canal Navigation *v.* Great Western R. Co. (7 Q. B. 824, 4 Railw. Cas. 90, 9 Jur. 788, 14 L. J. Q. B. 325), Actions, 5; Lim. of Ac., 23.

Kenneth *v.* South Carolina R. Co. (15 Rich. (So. Car.) 284), Assump., 4.
Kennett *v.* Plummer (28 Mo. 142), Land Grants, 40.
Kenney *v.* Central R. Co. (61 Ga. 590), Fel. Serv., 411
Kenney *v.* Hannibal & St. J. R. Co. (63 Mo. 99, 20 Am. Ry. Rep. 275), Fires, 78, 349.
Kenney *v.* Hannibal & St. J. R. Co. (70 Mo. 243), Fires, 203, 223, 308.
Kenney *v.* Hannibal & St. J. R. Co. (70 Mo. 252), Fires, 77, 266, 275.
Kenney *v.* Hannibal & St. J. R. Co. (80 Mo. 573), Fires, 23, 322.
Kenney *v.* Hannibal & St. J. R. Co. (105 Mo. 270, 15 S. W. Rep. 983, 16 S. W. Rep. 837), App., 115; Cross., Inj. at, 125, 149, 218, 239, 259, 291, 337; Death, etc., 368; Negl., 1; Trial, 176.
Kenney *v.* New York C. & H. R. R. Co. (49 Hun 535, 18 N. Y. S. R. 441), Death, etc., 129.
Kenney *v.* New York C. & H. R. R. Co. (52 Am. & Eng. R. Cas. 235, 125 N. Y. 422, 26 N. E. Rep. 626, 35 N. Y. S. R. 447; affirming 54 Hun 143, 26 N. Y. S. R. 636, 7 N. Y. Supp. 255), Exp. Cos., 13; Lim. of Liab., 43.
Kenney *v.* Ocean Steamship Co. (11 N. Y. Supp. 412), App., 121.
Kenney *v.* Wallace (24 Hun (N. Y.) 478), Deeds, 26.
Kennicott *v.* Wayne County Sup'rs (6 Biss. (U. S.) 138), Bonds, 49; Mun. Aid, 367, 368.
Kennon *v.* Gilmer (5 Mont. 257, 5 Pac. Rep. 847), App., 126; New Tr., 28.
Kenosha *v.* Lamson (9 Wall. (U. S.) 477), Coupons, 14; Lim. of Ac., 41; Mun. Aid, 22, 318.
Kenosha & R. R. Co. *v.* Sperry (3 Biss. (U. S.) 309), Mort., 62.
Kenosha, R. & R. I. R. Co. *v.* Marsh (17 Wis. 13), Subscr., 119, 126.
Kensington Station Act, In re (L. R. 20 Eq. 197, 23 W. R. 463, 32 L. T. N. S. 183), Aband., 10; Incorp., 6.
Kent *v.* Baltimore & O. R. Co. (31 Am. & Eng. R. Cas. 125, 45 Ohio St. 284, 10 West. Rep. 457, 12 N. E. Rep. 798), Eject. Pass., 37; Tickets & F., 17, 98.
Kent *v.* Great Western R. Co. (3 C. B. 714, 16 L. J. C. P. 72, 4 Railw. Cas. 699, 4 D. & L. 481), Actions, 5; Costs, 11.
Kent *v.* Hudson River R. Co. (22 Barb. (N. Y.) 278), Car. of L. S., 158.
Kent *v.* Lake Superior Ship C. R. & I. Co. (144 U. S. 75, 12 Sup. Ct. Rep. 650), Mort., 290.
Kent *v.* Midland R. Co. (L. R. 10 Q. B. 1, 44 L. J. Q. B. 18, 31 L. T. N. S. 430, 23 W. R. 25), Bagg., 100.
Kent *v.* New Orleans & T. R. Co. (67 Miss. 608, 7 So. Rep. 391), Animals, 536.
Kent *v.* New York C. R. Co. (12 N. Y. 628), Constr. Rys., 93.
Kent *v.* Pennsylvania R. Co. (6 Mackey (D. C.) 335), Ex. & Ad., 6.
Kent County R. Co. *v.* Wilson (5 Houst. (Del.) 49), Subscr., 143, 170.
Kenton County Court *v.* Bank Lick Turnpike Co. (10 Bush (Ky.) 529), Charters, 35.
Kentucky *v.* Louisville Bridge Co. (42 Fed. Rep. 241), Rem. of C., 25.
Kentucky & I. Bridge Co. *v.* Hall (125 Ind. 220, 25 N. E. Rep. 219), Contrib. Neg., 73; Release, 27.
Kentucky & I. Bridge Co. *v.* Krieger (91 Ky. 625, 16 S. W. Rep. 824), Injunc., 55, 60.
Kentucky & I. Bridge Co. *v.* Krieger (93 Ky. 243, 19 S. W. Rep. 738), Sts. & H., 221.
Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co. (37 Fed. Rep. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351), Connect. L., 2; Discrim., 7, 56, 59; Int. Com., 14, 18, 27, 94, 105, 106, 147, 156.
Kentucky & I. Bridge Co. *v.* Louisville & N. R. Co. (2 Int. Com. Rep. 102, 2 Int. Com. Com. 162), Int. Com., 20, 52, 100.
Kentucky & I. Bridge Co. *v.* Quinkert (2 Ind. App. 244, 28 N. E. Rep. 338), App., 115; Car. of P., 137, 140, 205, 348, 470, 474, 480, 545, 588; Contrib. Neg., 72.
Kentucky & I. Cement Co. *v.* Cleveland (4 Ind. App. 171, 30 N. E. Rep. 802), Dam., 91; Evid., 238; Release, 12.
Kentucky C. R. Co. *v.* Ackley (87 Ky. 278, 12 Am. St. Rep. 480, 8 S. W. Rep. 691, 10 Ky. L. Rep. 170), Dam., 24, 38; Fel. Serv., 107, 505.
Kentucky C. R. Co. *v.* Barrow (89 Ky. 638, 20 S. W. Rep. 165), Fires, 22, 39, 240, 246.
Kentucky C. R. Co. *v.* Bourbon County (82 Ky. 497), Tax., 28, 60, 146.
Kentucky C. R. Co. *v.* Com. (87 Ky. 661, 10 S. W. Rep. 269), Tax., 261.
Kentucky C. R. Co. *v.* Com. (49 Am. & Eng. R. Cas. 312, 92 Ky. 64, 17 S. W. Rep. 196), Stat., 9; Tax., 310.
Kentucky C. R. Co. *v.* Com. (Ky.) (18 S. W. Rep. 368), Cross., Inj. at, 86.
Kentucky C. R. Co. *v.* Dills (4 Bush (Ky.) 593), Car. of P., 343, 347, 638.
Kentucky C. R. Co. *v.* Gastineau (83 Ky. 119), App., 49; Children, Inj. to, 36, 105; Employés, 5; Negl., 4; Tresp., Inj. to, 29.
Kentucky C. R. Co. *v.* Jameson (Ky.) (20 S. W. Rep. 258), Employés, Inj. to, 615.
Kentucky C. R. Co. *v.* Kenney (20 Am. & Eng. R. Cas. 458, 82 Ky. 154), Cov'ts, 4.
Kentucky C. R. Co. *v.* Kinney (Ky.) (35 Am. & Eng. R. Cas. 199, 8 S. W. Rep. 201), Lim. of Ac., 61.
Kentucky C. R. Co. *v.* Lebus (14 Bush (Ky.) 518), Animals, 47, 48, 62, 527; Contrib. Neg., 13.
Kentucky C. R. Co. *v.* McGinty (Ky.) (14 S. W. Rep. 601), Death, etc., 88.
Kentucky C. R. Co. *v.* Pendleton County (Ky.) (2 S. W. Rep. 176), Charters, 76; Tax., 261, 301, 313.
Kentucky C. R. Co. *v.* Ryle (Ky.) (18 S. W. Rep. 938), Employés, Inj. to, 92; New Tr., 75.
Kentucky C. R. Co. *v.* Smith (93 Ky. 449, 20 S. W. Rep. 392), Children, Inj. to, 81, 93, 178; Evid., 160; Fly. Switch, 4; Trial, 46.
Kentucky C. R. Co. *v.* Talbot (7 Am. & Eng. R. Cas. 585, 78 Ky. 621), Animals, 492.
Kentucky C. R. Co. *v.* Thomas (79 Ky. 160),

Car. of P., 498; Contrib. Neg., 12, 13; Death, etc., 341; Negl., 19.
Kentucky C. R. Co. *v.* Wainwright (Ky.) (13 S. W. Rep. 438), Death, etc., 41.
Kentucky Imp. Co. *v.* Slack (100 U. S. 648), Tax., 99.
Kentucky M. & F. Ins. Co. *v.* Western & A. R. Co. (8 Baxt. (Tenn.) 268), Car. of M., 618; Subrog., 4.
Kentucky Union R. Co. *v.* Bourbon County (85 Ky. 98, 2 S. W. Rep. 687), Mun. Aid, 33, 146, 405, 414.
Kenyon *v.* New York C. & H. R. R. Co. (5 Hun (N. Y.) 479; affirmed in 76 N. Y. 607), Children, Inj. to, 93.
Keokuk & N. W. R. Co. *v.* Donnell (38 Am. & Eng. R. Cas. 650, 77 Iowa 221, 42 N. W. Rep. 176), Em. Dom., 254, 349.
Keokuk & W. R. Co. *v.* Missouri (152 U. S. 301, 14 Sup. Ct. Rep. 592), Consol., 28; Reorg., 17.
Keokuk & W. R. Co. *v.* Scotland County Court (41 Fed. Rep. 305), Tax., 158.
Keokuk & W. R. Co. *v.* Scotland County (152 U. S. 318, 14 Sup. Ct. Rep. 605), Estop., 9; Tax., 358.
Keokuk N. L. Packet Co. *v.* Davidson (95 Mo. 467, 8 S. W. Rep. 545), Pres., 7.
Keppel *v.* Petersburg R. Co. (Chase (U. S.) 167), Car. of M., 17; Divid., 11; Evid., 108; War, 1, 5.
Kerch *v.* Rome, W. & O. R. Co. (14 N. Y. S. R. 446, 14 Civ. Pro. 167), Bills of Partic., 1.
Kerlin *v.* Chicago, P. & St. L. R. Co. (53 Am. & Eng. R. Cas. 530, 50 Fed. Rep. 185), Death, etc., 142; Fel. Serv., 234.
Kernochan *v.* New York El. R. Co. (29 N. Y. S. R. 523), App., 65.
Kernochan *v.* New York El. R. Co. (50 Am. & Eng. R. Cas. 317, 128 N. Y. 559, 29 N. E. Rep. 65, 41 N. Y. S. R. 110; affirming 27 J. & S. 561, 36 N. Y. S. R. 434, 13 N. Y. Supp. 624), Elev. Rys., 84, 92, 93, 121.
Kernochan *v.* New York El. R. Co. (41 N. Y. S. R. 266, 130 N. Y. 651, 29 N. E. Rep. 245, 3 Silv. App. 581; reversing 25 J. & S. 434, 29 N. Y. S. R. 523, 8 N. Y. Supp. 770), Elev. Rys., 121, 124.
Kerr, In re (42 Barb. (N. Y.) 119), Cross. Rys., 7.
Kerr *v.* Grand Trunk R. Co. (24 U. C. C. P. 209), Bagg., 48.
Kerr *v.* Little (39 N. J. Eq. 83), Receiv., 62.
Kerr *v.* Little (42 N. J. Eq. 528, 7 Cent. Rep. 125, 9 Atl. Rep. 110), Receiv., 62.
Kerr *v.* West Shore R. Co. (18 N. Y. S. R. 63, 2 N. Y. Supp. 686), Commerce, 10; Em. Dom., 133, 507; Farm Cross., 3; Injunc., 10; Sts. & H., 177.
Kerr *v.* West Shore R. Co. (127 N. Y. 269, 27 N. E. Rep. 833, 37 N. Y. S. R. 913; affirming 53 Hun 634, 25 N. Y. S. R. 1036, 6 N. Y. Supp. 958), Em. Dom., 96; Nuis., 11; Rip. Rts., 10.
Kerrigan *v.* Southern Pac. R. Co. (41 Am. & Eng. R. Cas. 28, 81 Cal. 248, 22 Pac. Rep. 677), Car. of P., 499, 508; Tickets & F., 19, 72.
Kerrigan *v.* West End St. R. Co. (158 Mass. 305, 33 N. E. Rep. 523), St. Rys., 485.
Kersey *v.* Kansas City, St. J. & C. B. R. Co. (17 Am. & Eng. R. Cas. 638, 79 Mo. 362), Fel. Serv., 148, 387.
Kersey *v.* Schuylkill River E. S. R. Co. (133 Pa. St. 234, 19 Atl. Rep. 553), Em. Dom., 708.
Kersey Oil Co. *v.* Oil Creek & A. R. Co. (12 Phila. (Pa.) 374), Leases, 25.
Kerwhacker *v.* Cleveland, C. & C. R. Co. (3 Ohio St. 172), Animals, 38, 46, 49, 254; Contrib. Neg., 10, 16, 19, 24, 48; Em. Dom., 134.
Kesee *v.* Chicago & N. W. R. Co. (30 Iowa 78), App., 22; Fires, 66, 68, 112.
Kesler *v.* Smith (66 N. Car. 154), Death, etc., 276, 279, 385.
Kessler *v.* New York C. & H. R. R. Co. (61 N. Y. 538, 12 Am. Ry. Rep. 134; affirming 7 Lans. 62), Bagg., 24.
Kestner *v.* Pittsburg & B. Traction Co. (158 Pa. St. 422, 27 Atl. Rep. 1048), St. Rys., 451, 473.
Ketcham *v.* Madison, I. & P. R. Co. (20 Ind. 260), Consol., 29.
Ketchum *v.* American Merchants' Union Exp. Co. (52 Mo. 390), Car. of M., 471.
Ketchum *v.* Duncan (96 U. S. 659), Coupons, 9, 11; Mort., 263.
Ketchum *v.* Mobile & O. R. Co. (2 Woods (U. S.) 532), Trusts, 15.
Ketchum *v.* Pacific R. Co. (4 Dill. (U. S.) 78), State Aid, 26.
Ketchum *v.* Pacific R. Co. (4 Dill. (U. S.) 41, n.), Tax., 269, 301, 311, 320, 322.
Ketchum *v.* St. Louis (101 U. S. 306), Mun. Aid, 177.
Ketchum *v.* Texas & P. R. Co. (38 La. Ann. 777), Children, Inj. to, 192; Cross., Inj. at, 93.
Keteltas, In re (6 N. Y. Supp. 668, 24 N. Y. S. R. 329), Trusts, 10.
Kettle River R. Co. *v.* Eastern R. Co. (40 Am. & Eng. R. Cas. 449, 41 Minn. 461, 43 N. W. Rep. 469, 6 L. R. A. 111), Contr., 58; Cov'ts, 10; Em. Dom., 182, 344; Vend. & P., 4.
Key *v.* St. Louis, I. M. & S. R. Co. (7 Am. & Eng. R. Cas. 565, 73 Mo. 475), Just. P., 8.
Keyes *v.* Houston & G. N. R. Co. (50 Tex. 169), Tresp. to Try Title, 2; Trial, 26.
Keyes *v.* Milwaukee & St. P. R. Co. (25 Wis. 691), Set-off, 1.
Keyes *v.* Minneapolis & St. L. R. Co. (36 Minn. 290, 30 N. W. Rep. 888), Animals, 581; App., 66; Dam., 71.
Keyes *v.* Pennsylvania Co. (Pa.) (3 Atl. Rep. 15), Employés, Inj. to, 315; Fel. Serv., 306.
Keyport & M. P. Steamboat Co. *v.* Farmers' Transp. Co. (18 N. J. Eq. 13), Em. Dom., 87.
Keys *v.* Belfast R. Co. (8 Ir. R., C. L. 167), Evid., 277.
Keyser *v.* Chicago & G. T. R. Co. (19 Am. & Eng. R. Cas. 91, 56 Mich. 559, 23 N. W. Rep. 311, 56 Am. Rep. 405), Children, Inj. to, 10, 69, 93; Negl., 27.
Keyser *v.* Chicago & G. T. R. Co. (31 Am.

& Eng. R. Cas. 399, 66 Mich. 390, 10 West. Rep. 646, 33 N. W. Rep. 867; former appeal 56 Mich. 559), Children, Inj. to, 3, 173; Dam., 78; Evid., 174, 202; Fences, 71; Witn., 100, 101, 167.
Keyser *v.* Kansas City, St. J. & C. B. R. Co. (56 Iowa 440, 9 N. W. Rep. 338), Animals, 308; Witn., 68.
Keyser *v.* Kansas City, St. J. & C. B. R. Co. (61 Iowa 175, 16 N. W. Rep. 68), App., 66.
Kidwell *v.* Baltimore & O. R. Co. (11 Gratt. (Va.) 676), Constr. Rys., 36, 55, 58, 64.
Kidwell *v.* Houston & G. N. R. Co. (3 Woods (U. S.) 313), Employés, Inj. to, 139, 526; Fel. Serv., 155, 156, 232, 397, 398.
Kielley *v.* Belcher Silver Min. Co. (3 Sawy. (U. S.) 500), Employés, Inj. to, 268, 294; Fel. Serv., 106.
Kiely *v.* Kiely (3 Ont. App. 438; reversing 25 Grant's Ch. 463), Direct., 3.
Kiely *v.* Smyth (27 Grant's Ch. (U. C.) 220), Stock, 35, 38.
Kiep *v.* Manhattan R. Co. (44 N. Y. S. R. 699, 63 Hun 630, 17 N. Y. Supp. 804), Elev. Rys., 143, 174.
Kiernan *v.* Chicago, S. F. & C. R. Co. (123 Ill. 188, 14 N. E. Rep. 18, 11 West. Rep. 632), Em. Dom., 535, 568, 592, 637, 648, 651, 671, 904.
Kiersted *v.* Orange & A. R. Co. (69 N. Y. 343; reversing 54 How. Pr. 29), Assump., 7; Leases, 53.
Kierzkowski *v.* Grand Trunk R. Co. (8 Low. Can. 3), Corp., 8.
Kierzkowski *v.* La Compagnie, etc. (10 Low. Can. 47), Consol., 38; Corp., 8.
Kiesel *v.* Union Pac. R. Co. (6 Utah 128, 21 Pac. Rep. 499), Attach., 48.
Kiff *v.* Atchison, T. & S. F. R. Co. (18 Am. & Eng. R. Cas. 618, 32 Kan. 263, 4 Pac. Rep. 401), Car. of M., 671, 672.
Kiff *v.* Old Colony & N. R. Co. (117 Mass. 591), Car. of M., 299.
Kilbourne *v.* St. John (59 N. Y. 21), Mun. Aid, 421.
Kilbourne *v.* Sullivan County Sup'rs (41 N. Y. S. R. 838, 62 Hun 210, 16 N. Y. Supp. 507; affirmed in 137 N. Y. 170, 33 N. E. Rep. 159, 50 N. Y. S. R. 376), Mun. Aid, 421.
Kilbourne *v.* Sullivan County Sup'rs (137 N. Y. 170, 33 N. E. Rep. 159), Mun. Aid, 421.
Kilkenny & G. S. & W. R. Co. *v.* Fielden (6 Railw. Cas. 785, 6 Ex. 81, 2 L. M. & P. 124, 15 Jur. 191, 20 L. J. Ex. 141), Costs, 6.
Killian *v.* Augusta & K. R. Co. (78 Ga. 749, 3 S. E. Rep. 621), Death, etc., 166; Witn., 104.
Killian *v.* Augusta & K. R. Co. (79 Ga. 234, 4 S. E. Rep. 165), Car. of L. S., 126; Death, etc., 134, 181, 276; Employés, Inj. to, 479; Negl., 51.
Killmer *v.* Hobart (58 How. Pr. (N. Y.) 452), Receiv., 125.
Killmer *v.* New York C. & H. R. R. Co. (23 Am. & Eng. R. Cas. 659, 100 N. Y. 395, 53 Am. Rep. 194, 3 N. E. Rep. 293; affirming 30 Hun 86), Charges, 42.
Kilmer *v.* Great Western R. Co. (35 U. C. Q. B. 595), Animals, 148.
Kilpatrick *v.* Kansas City & B. R. Co. (57 Am. & Eng. R. Cas. 398, 38 Neb. 620, 57 N. W. Rep. 664), Evid., 104; Liens, 30; Mort., 91.
Kilpatrick *v.* Pennsylvania R. Co. (140 Pa. St. 502, 21 Atl. Rep. 408), Car. of P., 395, 433.
Kilroy *v.* Delaware & H. Canal Co. (121 N. Y. 22, 24 N. E. Rep. 192, 30 N. Y. S. R. 724; affirming 24 J. & S. 138, 16 N. Y. S. R. 873, 1 N. Y. Supp. 779), Car. of M., 217.
Kimball *v.* Atchison, T. & S. F. R. Co. (46 Fed. Rep. 888), Par. & Comp. L., 1.
Kimball *v.* Boston, C. & M. R. Co. (13 Am. & Eng. R. Cas. 55, 55 Vt. 95), Pl., 45.
Kimball *v.* Kennebec & P. R. Co. (35 Me. 255), Em. Dom., 521.
Kimball *v.* Ladd (42 Vt. 747), Adv. Poss., 10.
Kimball *v.* Lakeland (41 Fed. Rep. 289), Mun. Aid, 378.
Kimball *v.* Milford (54 N. H. 406), Tax., 149.
Kimball *v.* Rutland & B. R. Co. (26 Vt. 247), Car. of L. S., 21, 135, 137; Lim. of Liab., 23.
Kimball *v.* St. Louis & S. F. R. Co. (157 Mass. 7, 31 N. E. Rep. 697), Jurisd., 9.
Kimball *v.* Western R. Co. (6 Gray (Mass.) 542), Car. of M., 172.
Kimble *v.* Boston & M. R. Co. (21 Am. & Eng. R. Cas. 213, 139 Mass. 542, 2 N. E. Rep. 97), Car. of P., 28.
Kimes *v.* St. Louis, I. M. & S. R. Co. (85 Mo. 611), Animals, 189; Cross., Inj. at, 255; Dam., 107.
Kimmarle *v.* Houston & T. C. R. Co. (76 Tex. 686, 12 S. W. Rep. 698), Evid., 229.
Kincaid *v.* Oregon S. L. & U. N. R. Co. (53 Am. & Eng. R. Cas. 218, 22 Oreg. 35, 29 Pac. Rep. 3), Employés, Inj. to, 624.
Kinealy *v.* St. Louis, K. C. & N. R. Co. (69 Mo. 658), Charters, 68; Stat. & D., 49.
King, In re (L. R. 16 Eq. 521, 21 W. R. 881, 29 L. T. 288), Em. Dom., 1157.
King *v.* Alford (24 Am. & Eng. R. Cas. 331, 9 Ont. 643), Liens, 16, 25.
King *v.* American Transp. Co. (1 Flipp. (U. S.) 1), Negl., 73.
King *v.* Boston & W. R. Corp. (9 Cush. (Mass.) 112), Employés, Inj. to, 8; Fel. Serv., 1, 9.
King *v.* Chicago, B. & Q. R. Co. (26 Am. & Eng. R. Cas. 600, 71 Iowa 696, 29 N. W. Rep. 406), Flood. Lds., 12.
King *v.* Chicago, R. I. & P. R. Co. (79 Mo. 328), Animals, 629; Fences, 75.
King *v.* Chicago, R. I. & P. R. Co. (90 Mo. 520, 3 S. W. Rep. 217), Animals, 608; Fences, 87.
King *v.* Chicago, R. I. & P. R. Co. (Iowa) (54 N. W. Rep. 204), Animals, 463, 464.
King *v.* Elliott (13 Miss. 428), Subscr., 19.
King *v.* Housatonic R. Co. (45 Conn. 226), Leases, 97.
King *v.* Illinois C. R. Co. (69 Miss. 245, 10 So. Rep. 42), False Imp., 5; Stat. Agts., 8.

King *v.* Iowa Midland R. Co. (34 Iowa 458, 4 Am. Ry. Rep. 199), Em. Dom., 566, 626, 668, 690.
King *v.* Lamoille Valley R. Co. (51 Vt. 369), Constr. Rys., 24.
King *v.* Macon & W. R. Co. (62 Barb. (N. Y.) 100), Car. of M., 574, 612, 683.
King *v.* Minneapolis Union R. Co. (17 Am. & Eng. R. Cas. 93, 32 Minn. 224, 20 N. W. Rep. 135), Em. Dom., 650, 652.
King *v.* Missouri Pac. R. Co. (98 Mo. 235, 11 S. W. Rep. 563), Death, etc., 237, 308; Witn., 98.
King *v.* Morris & E. R. Co. (18 N. J. Eq. 397), Fires, 47, 52; Nuis., 23.
King *v.* New York C. & H. R. R. Co. (66 N. Y. 181, 23 Am. Rep. 37; reversing 4 Hun 769), Indep. Contr., 19.
King *v.* New York C. & H. R. R. Co. (72 N. Y. 607), Evid., 89.
King *v.* New York, L. E. & W. R. Co. (50 N. Y. S. R. 103, 66 Hun 636, 21 N. Y. Supp. 829), New Tr., 24.
King *v.* New York, N. H. & H. R. Co. (3 Int. Com. Rep. 272, 4 Int. Com. Com. 251), Int. Com., 64.
King *v.* Ohio & M. R. Co. (25 Fed. Rep. 799), Negl., 48.
King *v.* Ohio & M. R. Co. (9 Biss. (U. S.) 278), Reorg., 4; Stockh., 21.
King *v.* Ohio & M. R. Co. (8 Am. & Eng. R. Cas. 119, 11 Biss. (U. S.) 362, 14 Fed. Rep. 277), Agency, 83; Employés, Inj. to, 145, 403; Fel. Serv., 95, 106, 222, 226.
King *v.* Ohio & M. R. Co. (18 Am. & Eng. R. Cas. 386, 22 Fed. Rep. 413), Car. of P., 318.
King *v.* Paterson & H. R. R. Co. (29 N. J. L. 82; affirmed in 29 N. J. L. 504), Divid., 2, 5.
King *v.* Paterson & H. R. R. Co. (29 N. J. L. 504; affirming 29 N. J. L. 82), Divid., 11.
King *v.* Second Ave. R. Co. (75 Hun 17, 26 N. Y. Supp. 973), St. Rys., 437; Witn., 95, 168.
King *v.* Utah C. R. Co. (6 Utah 281, 22 Pac. Rep. 158), Tax., 58.
King *v.* Wilson (1 Dill. (U. S.) 555), Mun. Aid, 252.
King *v.* Woodbridge (34 Vt. 565), Car. of L. S., 98, 158.
King *v.* Wycombe R. Co. (28 Beav. 104, 6 Jur. N. S. 239, 29 L. J. Ch. 462), Em. Dom., 1101, 1102, 1103.
Kingman *v.* Rome, W. & O. R. Co. (30 Hun (N. Y.) 73), Eq., 4.
Kingman County Com'rs *v.* Cornell University (57 Fed. Rep. 149), Mun. Aid, 61, 378, 393.
Kingsbury *v.* Chatham R. Co. (66 N. Car. 284), Jurisd., 7.
Kings County El. R. Co., In re (35 N. Y. S. R. 367, 58 Hun 608, 12 N. Y. Supp. 198; affirmed in 15 N. Y. Supp. 517), Em. Dom., 747.
Kings County El. R. Co., In re (105 N. Y. 97, 13 N. E. Rep. 18, 7 N. Y. S. R. 186, 7 Cent. Rep. 232; reversing 41 Hun 425, 1 N. Y. S. R. 512), Elev. Rys., 10, 14; Franch., 10; Incorp., 3.
Kings County El. R. Co., In re (38 Am. & Eng. R. Cas. 384, 112 N. Y. 47, 19 N. E. Rep. 654, 20 N. Y. S. R. 336), Elev. Rys., 13.
Kings County El. R. Co., In re (20 Hun (N. Y.) 217; appeal dismissed in 82 N. Y. 95), Elev. Rys., 24.
Kings County El. R. Co., In re (2 Am. & Eng. R. Cas. 431, 82 N. Y. 95; dismissing appeal from 20 Hun 217), Elev. Rys., 25; St. Rys., 112.
Kings County El. R. Co. *v.* Cocks (50 N. Y. S. R. 736, 22 N. Y. Supp. 1017), Elev. Rys., 10.
Kings County R. Co., In re (39 N. Y. S. R. 870, 60 Hun 586, 15 N. Y. Supp. 516), Em. Dom., 612, 808.
Kings County Sup'rs *v.* Sea View R. Co. (23 Hun (N. Y.) 180), Elev. Rys., 63.
Kingston, In re (40 How. Pr. (N. Y.) 444), Incorp., 3.
Kingston *v.* Cowbridge R. Co. (41 L. J. Ch. 152), Exec., 31.
Kingston *v.* Grand Trunk R. Co. (8 Grant's Ch. (U. C.) 535), Sts. & H., 297.
Kingston & P. R. Co., In re (11 Ont. Pr. 304), Em. Dom., 1222.
Kingston & P. R. Co. *v.* Murphy (17 Can. Sup. Ct. 582; affirming 11 Ont. 302), Em. Dom., 1221.
Kingston St. R. Co. *v.* Foster (44 U. C. Q. B. 552), Subscr., 19.
Kingston Tp. Road (134 Pa. St. 409, 19 Atl. Rep. 750), Sts. & H., 28.
Kinion *v.* Kansas City, Ft. S. & M. R. Co. (39 Mo. App. 382), Animals, 474; Consol., 20, 29; Fences, 69.
Kinion *v.* Kansas City, Ft. S. & M. R. Co. (39 Mo. App. 574), Animals, 129; Consol., 25; Fences, 69.
Kinion *v.* Kansas City, S. & M. R. Co. (30 Mo. App. 573), Animals, 617.
Kinnan *v.* Forty-second St., M. & St. N. A. R. Co. (140 N. Y. 183, 55 N. Y. S. R. 584, 35 N. E. Rep. 498; affirming 49 N. Y. S. R. 608, 1 Misc. 457, 21 N. Y. Supp. 789), Stock, 15.
Kinney *v.* Baltimore & O. Relief Assoc. (53 Am. & Eng. R. Cas. 34, 35 W. Va. 385, 13 S. E. Rep. 1009), Relief Assoc., 1.
Kinney *v.* Central R. Co. (34 N. J. L. 513; affirming 32 N. J. L. 407), Passes, 25, 35.
Kinney *v.* Corbin (132 Pa. St. 341, 19 Atl. Rep. 141), Employés, Inj. to, 330; Fel. Serv., 309, 343.
Kinney *v.* Crocker (18 Wis. 74), Cross., Inj. at, 67, 362; Receiv., 125.
Kinney *v.* Hannibal & St. J. R. Co. (27 Mo. App. 610), Animals, 353.
Kinney *v.* South & N. Ala. R. Co. (82 Ala. 368, 3 So. Rep. 113), Custom, 6; Sales, 8; Trover, 2.
Kinnick *v.* Chicago, R. I. & P. R. Co. (27 Am. & Eng. R. Cas. 55, 69 Iowa 665, 29 N. W. Rep. 772), Car. of L. S., 20, 24, 55.
Kinsley *v.* Brooklyn Crosstown R. Co. (1 N. Y. S. R. 560, 41 Hun 643), St. Rys., 367.
Kinsley *v.* Buffalo, N. Y. & P. R. Co. (37 Fed. Rep. 181), Discrim., 13.
Kinsley *v.* Lake Shore & M. S. R. Co. (125 Mass. 54), Bagg., 82; Sleep. Car Cos., 37.

Kinsman St. R. Co. *v.* Broadway & N. St. R. Co. (5 Am. & Eng. R. Cas. 327, 36 Ohio St. 239), St. Rys., 240.
Kip *v.* New York & H. R. Co. (67 N. Y. 227, 15 Am. Ky. Rep. 98; affirming 6 Hun 24), Em. Dom., 79, 972.
Kipling *v.* Todd (L. R. 3 C. P. D. 350, 47 L. J. C. P. D. 617, 39 L. T. 188, 27 W. R. 84), Stockh., 36, 55.
Kipp *v.* Coenen (55 Iowa 63, 7 N. W. Rep. 417), License, 5.
Kipp *v.* Munroe (18 How. Pr. (N. Y.) 383), Stock, 5.
Kirby *v.* Adams Exp. Co. (2 Mo. App. 369), Car. of M., 1; Exp. Cos., 65, 73; Lim. of Liab., 2, 6, 15.
Kirby *v.* Citizens' R. Co. (48 Md. 168), St. Rys., 38.
Kirby *v.* Great Western R. Co. (18 L. T. N. S. 658), Agency, 38, 56; Lim. of Liab., 4, 19.
Kirby *v.* Lake Shore & M. S. R. Co. (14 Fed. Rep. 261), Lim. of Ac., 73.
Kirby *v.* Lake Shore & M. S. R. Co. (120 U. S. 130, 7 Sup. Ct. Rep. 430), Ac'ts, 3; Lim. of Ac., 9.
Kirby *v.* Pennsylvania R. Co. (76 Pa. St. 506), Employés, Inj. to, 1.
Kirby *v.* Wabash, St. L. & P. R. Co. (109 Ill. 412), Ejectm., 14; Location, etc., 5.
Kirchner *v.* Detroit City R. Co. (91 Mich. 400, 51 N. W. Rep. 1059), App., 97.
Kirk *v.* Atlanta & C. A. L. R. Co. (25 Am. & Eng. R. Cas. 507, 94 N. Car. 625, 55 Am. Rep. 621), Fel. Serv., 1, 105, 199, 233, 311.
Kirk *v.* Atlanta & C. A. L. R. Co. (97 N. Car. 82, 2 S. E. Rep. 536), Trial, 202.
Kirkbride *v.* Lafayette County (108 U. S. 208, 2 Sup. Ct. Rep. 501), Mun. Aid, 283.
Kirkland *v.* Dinsmore (62 N. Y. 171, 20 Am. Rep. 475; reversing 2 Hun 46, 4 T. & C. 304), Exp. Cos., 62.
Kirkland *v.* Missouri Pac. R. Co. (82 Mo. 466), Fences, 55.
Kirkpatrick *v.* Kansas City, St. J. & C. B. R. Co. (27 Am. & Eng. R. Cas. 51, 86 Mo. 341), Car. of M., 712.
Kirkpatrick *v.* New York C. & H. R. R. Co. (79 N. Y. 240), Death, etc., 298; Employés, Inj. to, 130.
Kirksmeaton, Ex parte (10 Am. & Eng. R. Cas. 68, L. R. 20 Ch. D. 203), Em. Dom., 1154.
Kirkstall Brewery Co. *v.* Furness R. Co. (L. R. 9 Q. B. 468, 30 L. T. 783, 42 L. J. Q. B. 142), Agency, 90; Evid., 201.
Kirst *v.* Milwaukee, L. S. & W. R. Co. (46 Wis. 489, 21 Am. Ry. Rep. 394), Car. of M., 178.
Kirtland *v.* Montgomery (1 Swan (Tenn.) 452), Bailm., 3; Car. of M., 6.
Kissenger *v.* New York & H. R. Co. (56 N. Y. 538, 6 Am. Ry. Rep. 154; affirming 4 J. & S. 572), Cross., Inj. at, 77, 351.
Kisterbock's Appeal (127 Pa. St. 601, 18 Atl. Rep. 381), Stock, 45, 74.
Kistler *v.* Indianapolis & St. L. R. Co. (12 Am. & Eng. R. Cas. 314, 88 Ind. 460), Constr. Rys., 64, 67.
Kistner *v.* Indianapolis (100 Ind. 210), Negl., 43; Sts. & H., 362.
Kitchen *v.* Bedford (13 Wall. (U. S.) 413), Trover, 7.
Kitchen *v.* Cape Girardeau & S. L. R. Co. (59 Mo. 514, 8 Am. Ry Rep. 481), Agency, 1; Assump., 5.
Kitchen *v.* Chatham B. R. Co. (17 New Brun. 215), Attach., 8, 51.
Kitchen *v.* Missouri Pac. R. Co. (82 Mo. 686), Animals, 629.
Kitchen *v.* St. Louis, K. C. & N. R. Co. (69 Mo. 224), Stockh., 119.
Kitchen *v.* Spear (30 Vt. 545), Car. of M., 515.
Kittell *v.* Missisquoi R. Co. (20 Am. & Eng. R. Cas. 165, 56 Vt. 96), Em. Dom., 724, 859.
Kitteringham *v.* Sioux City & P. R. Co. (18 Am. & Eng. R. Cas. 14, 62 Iowa 285, 17 N. W. Rep. 585), Employés, Inj. to, 138, 309; Evid., 89; Negl., 48; Witn., 152.
Kitterman *v.* Chicago, M. & St. P. R. Co. (27 Am. & Eng. R. Cas. 432, 69 Iowa 440, 30 N. W. Rep. 174), New Tr., 37.
Kittner *v.* Milwaukee & N. R. Co. (77 Wis. 1, 45 N. W. Rep. 815), App., 23.
Kittredge *v.* North Brookfield (138 Mass. 286), Mun. Aid, 115, 217.
Kittredge *v.* Peaslee (3 Allen (Mass.) 235), Assump., 8; Parties, 7.
Kiufeke *v.* Merchants' Dispatch Transp. Co. (3 McCrary (U. S.) 547), Proc., 45.
Klages *v.* Philadelphia & R. Terminal Co. (57 Am. & Eng. R. Cas. 485, 160 Pa. St. 386, 28 Atl. Rep. 862), Em. Dom., 760.
Klanowski *v.* Grand Trunk R. Co. (21 Am. & Eng. R. Cas. 648, 57 Mich. 525, 24 N. W. Rep. 801), Cross., Inj. at, 302; Death, etc., 284; Negl., 29, 31.
Klanowski *v.* Grand Trunk R. Co. (64 Mich. 279, 31 N. W. Rep. 275), Cross., Inj. at, 172, 185, 331; Pl., 139; Witn., 98.
Klauber *v.* American Exp. Co. (21 Wis. 21), Exp. Cos., 24, 30, 35; Words & Ph., 7.
Klauber *v.* San Diego Street Car Co. (95 Cal. 353, 30 Pac. Rep. 555), Receiv., 45, 183.
Kleiber *v.* People's R. Co. (52 Am. & Eng. R. Cas. 531, 107 Mo. 240, 17 S. W. Rep. 946), Car. of P., 567; Contrib. Neg., 44.
Kleimenhagen *v.* Chicago, M. & St. P. R. Co. (26 Am. & Eng. R. Cas. 179, 65 Wis. 66, 26 N. W. Rep. 264), Car. of L. S., 129.
Klein *v.* Alton & S. R. Co. (13 Ill. 514), Subscr., 133, 181.
Klein *v.* Crescent City R. Co. (23 La. Ann. 729), Children, Inj. to, 57.
Klein *v.* Hamburg-American Packet Co. (3 Daly (N. Y.) 390), Bagg., 62.
Klein *v.* Jewett (26 N. J. Eq. 474; affirmed in 27 N. J. Eq. 550), Car. of P., 141, 281; Cross., Inj. at, 237; Dam., 42, 70; Husb. & W., 30; Receiv., 69, 71, 128.
Klein *v.* St. Paul, M. & M. R. Co. (30 Minn. 451, 16 N. W. Rep. 265), Em. Dom., 869.
Klein *v.* Second Ave. R. Co. (22 J. & S. (N. Y.) 164), Dam., 93; Trial, 161; Witn., 196.

Kleise *v.* Galusha (78 Iowa 310, 43 N. W. Rep. 217), Mun. Aid, 117.
Kline *v.* Central Pac. R. Co. (37 Cal. 400), Children, Inj. to, 112; Conduct., 12; Contrib. Neg., 11; Eject. Pass., 57; Tresp., Inj. to, 85.
Kline *v.* Central Pac. R. Co. (39 Cal. 587), Eject. Pass., 60.
Kline *v.* Kansas City, St. J. & C. B. R. Co. (50 Iowa 656), Employés, Inj. to, 763, 768; Witn., 145.
Kling *v.* Railway Constr. Co. (4 Mo. App. 574), Liens, 39.
Kling *v.* Railway Constr. Co. (7 Mo. App. 410), Liens, 36, 50.
Klock *v.* New York C. & H. R. R. Co. (42 N. Y. S. R. 200, 62 Hun 291, 17 N. Y. Supp. 120), Fences, 64
Klutts *v.* St. Louis, I. M. & S. R. Co. (11 Am. & Eng. R. Cas. 639, 75 Mo. 642), Car. of P., 596, 644; Trial, 119.
Knahtla *v.* Oregon S. L. & U. N. R. Co. (21 Oreg. 136, 27 Pac. Rep. 91), Bridges, 23; Employés, Inj. to, 4, 99, 524; Fel. Serv., 59, 79, 211, 213, 256; Pl., 110.
Knapp *v.* Grant (27 Wis. 147), Mun. Aid, 337, 339.
Knapp *v.* Great Western R. Co. (6 U. C. C. P. 187), Flood. Lds., 49.
Knapp *v.* Levanway (27 Vt. 298), Contr., 71.
Knapp *v.* London, C. & D. R. Co. (2 H. & C. 212, 32 L. J. Ex. 236, 9 Jur. N. S. 671, 11 W. R. 890, 8 L. T. 541), Em. Dom., 1142, 1167, 1205.
Knapp *v.* McAuley (39 Vt. 275), Em. Dom., 423.
Knapp *v.* New York & H. R. Co. (2 Bosw. (N. Y.) 297), Constr. Rys., 24.
Knapp *v.* New York El. R. Co. (53 N. Y. S. R. 571, 4 Misc. 408, 24 N. Y. Supp. 324), Elev. Rys., 82, 148, 169.
Knapp *v.* St. Louis, K. C. & N. R. Co. (6 Mo. App. 205; affirmed on another point in 74 Mo. 374), Liens, 19.
Knapp *v.* St. Louis, K. C. & N. R. Co. (7 Am. & Eng. R. Cas. 394, 74 Mo. 374), Liens, 42.
Knapp *v.* Sioux City & P. R. Co. (18 Am. & Eng. R. Cas. 60, 65 Iowa 91, 50 Am. Rep. 569, n., 21 N. W. Rep. 198), Employés, Inj. to, 16.
Knapp *v.* Sioux City & P. R. Co. (71 Iowa 41, 32 N. W. Rep. 18), Employés, Inj. to, 16, 143, 183, 772; Evid., 86, 247; Pl., 113.
Knapp *v.* Sturges (36 Vt. 721), Injunc., 67.
Knapp *v.* Troy & B. R. Co. (20 Wall. (U. S.) 117, 10 Am. Ry. Rep. 95), Rem. of C., 29.
Knapp *v.* United States & C. Exp. Co. (55 N. H. 348), Estop., 30; Exp. Cos., 17, 21.
Knauft *v.* St. Paul, S. & T. F. R. Co. (22 Minn. 173, 19 Am. Ry. Rep. 307), Em. Dom., 545, 562, 916, 951.
Kneeland *v.* American L. & T. Co. (43 Am. & Eng. R. Cas. 519, 136 U. S. 89, 10 Sup. Ct. Rep. 850), Mort., 57, 250; Receiv., 61.
Kneeland *v.* American L. & T. Co. (138 U. S. 509, 11 Sup. Ct. Rep. 426), App., 146.
Kneeland *v.* Brass Foundry & Mach. Works (48 Am. & Eng. R. Cas. 675, 140 U. S. 592, 11 Sup. Ct. Rep. 857), App., 29; Mort., 281.
Kneeland *v.* Lawrence (46 Am. & Eng. R. Cas. 319, 140 U. S. 209, 11 Sup. Ct. Rep. 786), Bonds, 47; Mort., 269.
Kneeland *v.* Luce (50 Am. & Eng. R. Cas. 668, 141 U. S. 491, 12 Sup. Ct. Rep. 32), Receiv., 99.
Knell *v.* United States & B. Steamship Co. (1 J. & S. (N. Y.) 423), Bills of L., 62; Car. of M., 475; Lim. of Liab., 38.
Knevals *v.* Hyde (1 McCrary (U. S.) 402), Land Grants, 29.
Knevals *v.* Hyde (5 Dill. (U. S.) 469), Land Grants, 109.
Knickerbocker Ice Co. *v.* Forty-second St. & G. S. F. R. Co. (16 J. & S. (N. Y.) 489, 65 How. Pr. 210), Injunc., 2.
Knickerbocker Ice Co. *v.* Philadelphia & R. R. Co. (15 Phila. (Pa.) 48), Sts. & H., 146.
Knight *v.* Albemarle & R. R. Co. (110 N. Car. 58, 14 S. E. Rep. 650), Negl., 63.
Knight *v.* Albemarle & R. R. Co. (111 N. Car. 80, 15 S. E. Rep. 929), Culverts, 7; Flood. Lds., 60; Lim. of Ac., 75.
Knight *v.* Aroostook River R. Co. (67 Me. 291, 16 Am. Ry. Rep. 354), Em. Dom., 53.
Knight *v.* Carrollton R. Co. (9 La. Ann. 284), Side Tr., 1.
Knight *v.* Chicago, R. I. & P. R. Co. (81 Iowa 310, 46 N. W. Rep. 1112), Fires, 208, 247.
Knight *v.* Cooper (36 W. Va. 232, 14 S. E. Rep. 999), Employés, Inj. to, 296, 438; Trial, 183.
Knight *v.* Grand Trunk R. Co. (13 Ont. Pr. 386), Discov., 10.
Knight *v.* Kansas City, St. J. & C. B. R. Co. (70 Mo. 231), Sts. & H., 95.
Knight *v.* New Orleans, O. & G. W. R. Co. (15 La. Ann. 105), Animals, 50, 85; Fences, 13.
Knight *v.* New York, L. E. & W. R. Co. (23 Am. & Eng. R. Cas. 188, 99 N. Y. 25, 1 N. E. Rep. 108; reversing 30 Hun 415), Animals, 77, 135; Fences, 93.
Knight *v.* Pontchartrain R. Co. (23 La. Ann. 462), Death, etc., 183.
Knight *v.* Portland, S. & P. R. Co. (56 Me. 234), Car. of P., 29, 42, 137, 265; Tickets & F., 103.
Knight *v.* Providence & W. R. Co. (9 Am. & Eng. R. Cas. 90, 13 R. I. 572, 43 Am. Rep. 46), Car. of M., 552, 575, 639, 650; Set-off, 10.
Knight *v.* St. Louis, I. M. & S. R. Co. (141 Ill. 110, 30 N. E. Rep. 543; affirming 40 Ill. App. 471), Bills of L., 118; Car. of M., 720.
Knight *v.* Southern Pac. R. Co. (41 Tex. 406), Charges, 27; South. Pac. R. Co., 5.
Knight *v.* Toledo & W. R. Co. (24 Ind. 402), Animals, 218.
Knight *v.* West Jersey R. Co. (26 Am. & Eng. R. Cas. 485, 108 Pa. St. 250), Death, etc., 122.
Knobloch *v.* Chicago, M. & St. P. R. Co. (14 Am. & Eng. R. Cas. 625, 31 Minn. 402, 18 N. W. Rep. 106), Sts. & H., 323, 328.
Knoche *v.* Chicago, M. & St. P. R. Co. (34 Fed. Rep. 471), Em. Dom., 487.

Knock *v.* Metropolitan R. Co. (17 W. R. 10, 19 L. T. 239, 38 L. J. C. P. 78, L. R. 4 C. P. 131), Em. Dom., 1150, 1172.
Knoll *v.* New York, C. & St. L. R. Co. (36 Am. & Eng. R. Cas. 250, 615, 121 Pa. St. 467, 15 Atl. Rep. 571), Em. Dom., 668, 1003.
Knopf *v.* Richmond, F. & P. R. Co. (37 Am. & Eng. R. Cas. 140, 85 Vt. 769, 8 S. E. Rep. 787), Passes, 1, 8.
Knorr *v.* Philadelphia, G. & N. R. Co. (5 Whart. (Pa.) 256), Charters, 33.
Knott *v.* Dubuque & S. C. R. Co. (84 Iowa 462, 51 N. W. Rep. 57), App., 60; Employés, Inj. to, 155, 647; Jurisd., 7.
Knott *v.* Raleigh & G. R. Co. (32 Am. & Eng. R. Cas. 481, 98 N. Car. 73, 2 Am. St. Rep. 321, 3 S. E. Rep. 735), Car. of M., 575; Evid., 17, 242.
Knottnerus *v.* North Park St. R. Co. (93 Mich. 348, 53 N. W. Rep. 529), Negl., 97; St. Rys., 365.
Knowles *v.* Atlantic & St. L. R. Co. (38 Me. 55), Bailm., 3.
Knowles *v.* Norfolk S. R. Co. (102 N. Car. 59, 9 S. E. Rep. 7), App., 60; Dam., 30; Eject. Pass., 83.
Knowles *v.* Pittsburg, Ft. W. & C. R. Co. (4 Biss. (U. S.) 466), Car. of M., 628.
Knowlton *v.* Erie R. Co. (19 Ohio St. 260, 2 Am. Rep. 395), Car. of P., 335; Passes, 28.
Knowlton *v.* Milwaukee City R. Co. (16 Am. & Eng. R. Cas. 330, 59 Wis. 278, 18 N. W. Rep. 17), Contrib. Neg., 41; St. Rys., 445; Sunday, 5.
Knowlton *v.* New York & N. E. R. Co. (40 Am. & Eng. R. Cas. 237, 147 Mass. 606, 18 N. E. Rep. 580), Fires, 141.
Knox *v.* Baton Rouge (36 La. Ann. 427), Mun. Aid, 323.
Knox *v.* Lee (12 Wall. (U. S.) 457), Stat., 16.
Knox *v.* Metropolitan El. R. Co. (36 N. Y. S. R. 2, 58 Hun 517, 12 N. Y. Supp. 848; affirmed in 128 N. Y. 625, mem., 40 N. Y. S. R. 157), Elev. Rys., 56, 63, 64, 67, 74, 83, 169; Nuis., 13.
Knox *v.* New York, L. E. & W. R. Co. (23 N. Y. Supp. 198, 69 Hun 93, 52 N. Y. S. R. 730), Employés, Inj. to, 14; Negl., 100.
Knox *v.* South Carolina R. Co. (5 So. Car. 22), Charges, 38.
Knox County *v.* Ninth Nat. Bank (147 U. S. 91, 13 Sup. Ct. Rep. 267), Evid., 9; Mun. Aid, 220, 418.
Knox County Com'rs *v.* Aspinwall (21 How. (U. S.) 539), Mun. Aid, 379.
Knox County Com'rs *v.* Aspinwall (24 How. (U. S.) 376), Mand., 25; Mun. Aid, 439.
Knox County Com'rs *v.* McComb (19 Ohio St. 320), Mun. Aid, 173, 190.
Knox County Com'rs *v.* Montgomery (106 Ind. 517, 6 N. E. Rep. 915), Mun. Aid, 444.
Knox County Com'rs *v.* Nichols (14 Ohio St. 260), Mun. Aid, 4, 193, 279.
Knoxville *v.* Chicago, B. & Q. R. Co. (83 Iowa 636, 50 N. W. Rep. 61), Mun. Corp., 18.
Knoxville *v.* Knoxville & O. R. Co. (22 Fed. Rep. 758), Franch., 4.
Knoxville & O. R. Co. *v.* Hicks (9 Baxt. (Tenn.) 442), Tax., 137, 203.
Knoxville, C. G. & L. R. Co. *v.* Acuff (92 Tenn. 26, 20 S. W. Rep. 348), Death, etc., 48, 312; Pl., 74.
Knoxville, C. G. & L. R. Co. *v.* Beeler (90 Tenn. 548, 18 S. W. Rep. 391), Em. Dom., 214.
Kobe *v.* Northern Pac. R. Co. (31 Am. & Eng. R. Cas. 528, 36 Minn. 518, 32 N. W. Rep. 783), Fences, 59.
Koch *v.* Delaware, L. & W. R. Co. (53 N. J. L. 256, 21 Atl. Rep. 284), Flood. Lds., 32.
Koch *v.* Delaware, L. & W. R. Co. (54 N. J. L. 401, 24 Atl. Rep. 442), Flood. Lds., 69.
Koch *v.* North Ave. R. Co. (50 Am. & Eng. R. Cas. 401, 75 Md. 222, 23 Atl. Rep. 463), Elec. Rys., 7, 18; Elev. Rys., 3.
Koch *v.* St. Paul City R. Co. (45 Minn. 407, 48 N. W. Rep. 191), App., 125.
Koehler, Ex parte (21 Am. & Eng. R. Cas. 52, 23 Fed. Rep. 529, 11 Sawy. (U. S.) 191), Charges, 4, 6; Discrim., 42.
Koehler, Ex parte (21 Am. & Eng. R. Cas. 58, 25 Fed. Rep. 73), Charges, 14, 34.
Koehler, Ex parte (29 Am. & Eng. R. Cas. 44, 1 Int. Com. Rep. 317), Passes, 5.
Koehler, Ex parte (30 Am. & Eng. R. Cas. 71, 12 Sawy. 341, 30 Fed. Rep. 867), Int. Com., 5, 22.
Koehler, Ex parte (12 Sawy. (U. S.) 446, 31 Fed. Rep. 315, 1 Int. Com. Rep. 317), Int. Com., 114, 177, 183.
Koehler *v.* Rochester & L. O. R. Co. (55 Hun 566, 50 N. Y. S. R. 619, 21 N. Y. Supp. 844), Cross., Inj. at, 275.
Koelle *v.* Knecht (99 Ill. 396), Deeds, 39; Right of W., 5; Side Tr., 5.
Koelmel *v.* New Orleans, M. & C. R. Co. (27 La. Ann. 442), Constr. Rys., 12.
Koenig *v.* Chicago, B. & Q. R. Co. (27 Neb. 699, 43 N. W. Rep. 423), App., 132; For. Corp., 10.
Koenig *v.* Omaha & N. W. R. Co. (3 Neb. 373), Land Grants, 2, 122.
Koerper *v.* St. Paul & N. P. R. Co. (40 Minn. 132, 41 N. W. Rep. 656), Pl., 54.
Koerper *v.* St. Paul & N. P. R. Co. (42 Minn. 340, 44 N. W. Rep. 195), Em. Dom., 456.
Koestenbader *v.* Pierce (41 Iowa 204), Em. Dom., 734.
Koetter *v.* Manhattan El. R. Co. (36 N. Y. S. R. 611, 59 Hun 623, 13 N. Y. Supp. 458; affirmed in 129 N. Y. 668, mem., 42 N. Y. S. R. 946), Dam., 44; Elev. Rys., 199; Evid., 174; New Tr., 72; Trial, 130.
Kohler *v.* Pennsylvania R. Co. (135 Pa. St. 346, 19 Atl. Rep. 1049), Contrib. Neg., 88; Stat. & D., 122.
Kohn *v.* McNulta (147 U. S. 238, 13 Sup. Ct. Rep. 298), Employés, Inj. to, 215.
Kohn *v.* Richmond & D. R. Co. (55 Am. & Eng. R. Cas. 675, 37 So. Car. 1, 16 S. E. Rep. 376), Car. of M., 301; Estop., 29; Trover, 4.
Kolsti *v.* Minneapolis & St. L. R. Co. (19 Am. & Eng. R. Cas. 140, 32 Minn. 133,

19 N. W. Rep. 655), Children, Inj. to, 30; Trial, 163; Witn., 150, 179.
Kolzem *v.* Broadway & S. A. R. Co. (1 Misc. 148, 48 N. Y. S. R. 656, 20 N. Y. Supp. 700), False Imp., 1.
Koons *v.* Chicago & N. W. R. Co. (23 Iowa 493), Lim. of Ac., 28; Pl., 45.
Koons *v.* Lucas (52 Iowa 177, 3 N. W. Rep. 84), St. Rys., 299.
Koons *v.* St. Louis & I. M. R. Co. (65 Mo. 592), Children, Inj. to, 31, 177; Witn., 99.
Koontz *v.* Chicago, R. I. & P. R. Co. (18 Am. & Eng. R. Cas. 85, 65 Iowa 224, 54 Am. Rep. 5, 21 N. W. Rep. 577), Bridges, 52; Employés, Inj. to, 55.
Koontz *v.* Oregon R. & N. Co. (43 Am. & Eng. R. Cas. 11, 20 Oreg. 3, 23 Pac. Rep. 820), Fires, 171, 229, 236, 268, 269, 286, 288.
Koosorowska *v.* Glasser (8 N. Y. Supp. 197), Death, etc., 282.
Kopp *v.* Northern Pac. R. Co. (41 Minn. 310, 43 N. W. Rep. 73), Excava., 4.
Kopper *v.* Dyer (59 Vt. 477, 4 N. Eng. Rep. 369, 9 Atl. Rep. 4), Words & Ph., 4.
Korn *v.* Metropolitan El. R. Co. (13 N. Y. Supp. 518, 37 N. Y. S. R. 597, 59 Hun 505; affirmed in 129 N. Y. 648, mem., 41 N. Y. S. R. 949, 29 N. E. Rep. 1032), Elev. Rys., 77, 93, 118.
Korn *v.* New York El. R. Co. (37 N. Y. S. R. 630, 59 Hun 625, 13 N. Y. Supp. 514), App., 66; Elev Rys., 77, 104, 183.
Korn *v.* New York El. R. Co. (39 N. Y. S. R. 322, 60 Hun 583, 15 N. Y. Supp. 10), Elev. Rys., 86, 93, 152.
Kornetzski *v.* Detroit City R. Co. (94 Mich. 341, 53 N. W. Rep. 1106), St. Rys., 235.
Korrady *v.* Lake Shore & M. S. R. Co. (131 Ind. 261, 29 N. E. Rep. 1069), Contrib. Negl., 4, 10, 50, 87; Cross., Inj. at, 313, 320; Death, etc., 135; Trial, 216.
Koshkonong *v.* Burton (7 Am. & Eng. R. Cas. 203, 104 U. S. 668), Coupons, 12; Lim. of Ac., 16, 19.
Kostendader *v.* Pierce (37 Iowa 645), Cov'ts, 19; Evid., 124; Trial, 89.
Kountz *v.* Brown (16 B. Mon. (Ky.) 577), Dam., 32.
Koutz *v.* Toledo, W. & W. R. Co. (54 Ind. 515), Animals, 219.
Kowalewska *v.* New York, L. E. & W. R. Co. (25 N. Y. Supp. 184, 55 N. Y. S. R. 167, 72 Hun 611), Employés, Inj. to, 689.
Kramer *v.* Cleveland & P. R. Co. (5 Ohio St. 140), Em. Dom., 18, 493.
Kramer *v.* San Francisco M. St. R. Co. (25 Cal. 434), Death, etc., 1, 95.
Kranshaar *v.* New Haven Steamboat Co. (7 Robt. (N. Y.) 356), Citizens, 1, 2.
Kranz *v.* Long Island R. Co. (123 N. Y. 1, 25 N. E. Rep. 206; reversing 49 Hun 608, 17 N. Y. S. R. 684, 1 N. Y. Supp. 751), Employés, Inj. to, 42.
Kranz *v.* Long Island R. Co. (33 N. Y. S. R. 46), Employés, Inj. to, 12, 187.
Kranz *v.* White (8 Ill. App. 584), Employés, Inj. to, 99, 136, 617; Fel. Serv., 1, 36, 202.
Kraus *v.* Burlington, C. R. & N. R. Co. (55 Iowa 338, 7 N. W. Rep. 598), Animals, 74.
Kraus *v.* Pennsylvania R. Co. (139 Pa. St. 272, 20 Atl. Rep. 993), Cross., Inj. at, 296.
Krause *v.* Pennsylvania R. Co. (19 Phila. (Pa.) 436), Negl., 87.
Krauss *v.* Wallkill Valley R. Co. (52 N. Y. S. R. 838, 23 N. Y. Supp. 432, 69 Hun 482), Death, etc., 194; Cross., Inj. at, 198; Death, etc., 235.
Krebs *v.* Minneapolis & St. L. R. Co. (20 Am. & Eng. R. Cas. 478, 64 Iowa 670, 21 N. W. Rep. 131), Animals, 153, 386.
Krech *v.* Pacific R. Co. (64 Mo. 172), Contr., 97.
Kreiger *v.* Shelby R. Co. (84 Ky. 66; dismissed in 125 U. S. 39, 8 Sup. Ct. Rep. 752), Mun. Aid, 188; Stat., 34.
Kremer *v.* Chicago, M. & St. P. R. Co. (51 Am. & Eng. R. Cas. 382, 51 Minn. 15, 52 N. W. Rep. 977), Em. Dom., 453, 891; License, 3, 18.
Kremer *v.* Chicago, M. & St. P. R. Co. (54 Minn. 157, 55 N. W. Rep. 928), Ejectm., 32.
Kremer *v.* Southern Exp. Co. (6 Coldw. (Tenn.) 356), Car. of M., 242, 348.
Krender *v.* Woolcott (1 Hilt. (N. Y.) 223), Car. of M., 34, 192.
Kresanowski *v.* Northern Pac. R. Co. (5 McCrary (U. S.) 528, 18 Fed. Rep. 229), Employés, Inj. to, 373.
Kretz *v.* Texas & P. R. Co. (Tex. App.) (14 S. W. Rep. 1067), Receiv., 31, 185.
Kreuzen *v.* Forty-second St., M. & St. N. A. R. Co. (38 N. Y. S. R. 461, 13 N. Y. Supp. 588), Release, 16; St. Rys., 339.
Kreuziger *v.* Chicago & N. W. R. Co. (73 Wis. 158, 40 N. W. Rep. 657), Dam., 96; Trial, 161; Witn., 147, 173.
Kroener *v.* Chicago, M. & St. P. R. Co. (88 Iowa 16, 55 N. W. Rep. 28), Employés. Inj. to, 742; New Tr., 74.
Krogg *v.* Atlanta & W. P. R. Co. (77 Ga. 202, 4 Am. St. Rep. 79), Agency, 42; Employés, Inj. to, 152; Evid., 173; Fel. Serv., 196.
Krogstad *v.* Northern Pac. R. Co. (46 Minn. 18, 48 N. W. Rep. 409), Employés, Inj. to, 102.
Krone *v.* Kings County El. R. Co. (50 Hun 431, 20 N. Y. S. R. 780, 3 N. Y. Supp. 149), Elev. Rys., 73.
Kronshage *v.* Chicago, M. & St. P. R. Co. (45 Wis. 500), Judgm., 20; Wareh., 10.
Kronski *v.* Missouri Pac. R. Co. (77 Mo. 362), Animals, 621; Appear., 5.
Kropholler *v.* St. Paul, M. & M. R. Co. (1 McCrary (U. S.) 299, 2 Fed. Rep. 302), Mort., 285.
Kroy *v.* Chicago, R. I. & P. R. Co. (32 Iowa 357, 10 Am. Ry. Rep. 48), Employés, Inj. to, 274, 295.
Krueger *v.* Grand Rapids & I. R. Co. (14 Am. & Eng. R. Cas. 98, 51 Mich. 142, 16 N. W. Rep. 313), Lim. of Ac., 50.
Krueger *v.* Louisville, N. A. & C. R. Co. (31 Am. & Eng. R. Cas. 329, 111 Ind. 51, 9 West. Rep. 247, 11 N. E. Rep. 957), Employés, Inj. to, 40, 99, 130; Fel. Serv., 103, 198, 201.
Krulevitz *v.* Eastern R. Co. (26 Am. & Eng. R. Cas. 118, 140 Mass. 573, 5 N. E. Rep. 500), False Imp., 14; Mal. Pros., 8.

Krulevitz *v.* Eastern R. Co. (28 Am. & Eng. R. Cas. 138, 143 Mass. 228, 9 N. E. Rep. 613), False Imp., 4, 14.
Kruse *v.* Chicago, M. & St. P. R. Co. (81 Wis. 568, 52 N. W. Rep. 755), App., 54.
Kucheman *v.* Chicago, C. & D. R. Co. (46 Iowa 366, 16 Am. Ry. Rep. 16), Em. Dom., 665; Sts. & H., 142.
Kuechler *v.* Wright (40 Tex. 600), Land Grants, 126.
Kuh *v.* Metropolitan El. R. Co. (26 J. & S. 138, 31 N. Y. S. R. 406, 9 N. Y. Supp. 710), Elev. Rys., 107, 139.
Kuhn *v.* Chicago, M. & St. P. R. Co. (74 Iowa 137, 37 N. W. Rep. 116), Eject. Pass., 98, 112.
Kuhn *v.* Chicago, R. I. & P. R. Co. (42 Iowa 420), Animals, 189, 248, 561.
Kuhn *v.* Jewett (32 N. J. Eq. 647), Dam., 7; Fires, 81, 90, 95.
Kuhns *v.* Chicago, M. & St. P. R. Co. (65 Iowa 528, 22 N. W. Rep. 661), Evid., 245; Tender, 2.
Kuhns *v.* Wisconsin, I. & N. R. Co. (70 Iowa 561, 31 N. W. Rep. 868), Death, etc., 224, 227; Employés, Inj. to, 246; Evid., 125; Witn., 156, 189.
Kuhns *v.* Wisconsin, I. & N. R. Co. (76 Iowa 67, 40 N. W. Rep. 92), Evid., 87, 170; Pl., 149.
Kumler *v.* Junction R. Co. (33 Ohio St. 150), Fel. Serv., 26, 304.
Kumli *v.* Southern Pac. R. Co. (21 Oreg. 505, 28 Pac. Rep. 637), App., 125.
Kummer *v.* Christopher & T. St. R. Co. (46 N. Y. S. R. 386, 20 N. Y. Supp. 116), Evid., 50; Witn., 139.
Kunzmann *v.* New York & R. B. R. Co. (6 Misc. (N. Y.) 440, 27 N. Y. Supp. 132, 58 N. Y. S. R. 584), Car. of P., 572.
Kurtz & H. Ice Co. *v.* Milwaukee & N. R. Co. (56 Am. & Eng. R. Cas. 94, 84 Wis. 171, 53 N. W. Rep. 850), App., 42; Fires, 60, 61, 316.
Kuter *v.* Michigan C. R. Co. (1 Biss. (U. S.) 35), Bagg., 89; Car. of M., 6, 201, 458.
Kuttner *v.* Lindell R. Co. (29 Mo. App. 502), Collis., 27; St. Rys., 381.
Kwiotkowski *v.* Grand Trunk R. Co. (70 Mich. 549, 38 N. W. Rep. 463), Cross., Inj. at, 236.
Kyle *v.* Auburn & R. R. Co. (2 Barb. Ch. (N. Y.) 489), Em. Dom., 1038.
Kyle *v.* Buffalo & L. H. R. Co. (16 U. C. C. P. 76), Bills of L., 57; Car. of M., 486, 720, 744.
Kyle *v.* Laurens R. Co. (10 Rich. (So. Car.) 382), Car. of M., 579, 773, 766.
Kyle *v.* Texas & N. O. R. Co. (3 Tex. App. (Civ. Cas.) 518), Ejectm., 8; Em. Dom., 184.
Kyne *v.* Wilmington & N. R. Co. (8 Houst. (Del.) 185, 14 Atl. Rep. 922), Bridges, 40; Children, Inj. to, 120; Cross., Sts. & H., 22, 29; Fright. Teams, 2; Sts. & H., 176.
Kyser *v.* Kansas City, St. J. & C. B. R. Co. (56 Iowa 207, 9 N. W. Rep. 133), Animals, 199, 507; Evid., 223; Fences, 58.

Labette County Com'rs *v.* United States (112 U. S. 217, 5 Sup. Ct. Rep. 108), Mun. Aid, 439, 446.
Lacas *v.* Detroit City R. Co. (92 Mich. 412, 52 N. W. Rep. 745), Dam., 73; Evid., 211; St. Rys., 393; Witn., 165.
Lackawanna & B. R. Co. *v.* Chenewith (52 Pa. St. 382), Car. of P., 344, 482, 609; Priv. Cars, 1.
Lackawanna & P. R. Co. *v.* Doak (52 Pa. St. 379), Fires, 24, 314.
Lackawanna County *v.* Com. (156 Pa. St. 477, 26 Atl. Rep. 1119), Tax., 280.
Lackin *v.* Delaware & H. C. Co. (22 Hun (N. Y.) 309), Animals, 591.
Lackland *v.* North Mo. R. Co. (31 Mo. 180), Sts. & H., 142, 403, 409.
La Compagnie, etc., *v.* Severe Ste.-Marie (4 Montr. L. R. (Q. B.) 283), Animals, 371.
La Crosse & M. R. Co. *v.* Seeger (4 Wis. 268), Em. Dom., 487; Estop., 8.
La Crosse & M. R. Co. *v.* Vanderpool (11 Wis. 119), Liens, 24.
La Crosse M. & J. Union *v.* Chicago, M. & St. P. R. Co. (2 Int. Com. Rep. 9, 1 Int. Com. Com. 629), Int. Com., 41.
La Crosse Railroad Bridge (2 Dill. (U. S.) 465), Constr. Rys., 24.
La Croy *v.* New York, L. E. & W. R. Co. (53 Am. & Eng. R. Cas. 405, 132 N. Y. 570, mem., 30 N. E. Rep. 391, 4 Silv. App. 173, 13 N. Y. S. R. 711; reversing 57 Hun 67, 31 N. Y. S. R. 753, 10 N. Y. Supp. 382), Employés, Inj. to, 425, 429, 454.
Ladd *v.* Foster (12 Sawy. (U. S.) 547, 31 Fed. Rep. 827), Car. of P., 139, 151, 345; Contrib. Neg., 42; Death, etc., 68; Words & Ph., 109.
Ladd *v.* New Bedford R. Co. (119 Mass. 412, 9 Am. Ry. Rep. 273), Employés, Inj. to 142.
Ladouceur *v.* Northern Pac. R. Co. (4 Wash. 38, 29 Pac. Rep. 942), Trial, 78.
Ladouceur *v.* Northern Pac. R. Co. (6 Wash. 280, 33 Pac. Rep. 556, 1080), Cross., Inj. at, 302.
Ladue *v.* Griffith (25 N. Y. 364), Car. of M., 629.
Lafarier *v.* Grand Trunk R. Co. (52 Am. & Eng. R. Cas. 226, 84 Me. 286, 24 Atl. Rep. 848), Commerce, 5.
Lafayette *v.* Nagle (113 Ind. 425, 15 N. E. Rep. 1, 12 West. Rep. 637), Actions, 13; Witn., 118.
Lafayette & I. R. Co. *v.* Adams (26 Ind. 76), Tresp., Inj. to, 112.
Lafayette & I. R. Co. *v.* Ehman (30 Ind. 83), Animals, 303; Evid., 207.
Lafayette & I. R. Co. *v.* Huffman (28 Ind. 287), Children, Inj. to, 2, 121, 157.
Lafayette & I. R. Co. *v.* Pattison (41 Ind. 312), Charges, 41.
Lafayette & I. R. Co. *v.* Shriner (6 Ind. 141), Animals, 31, 50, 203, 536; Sts. & H., 317.
Lafayette & I. R. Co. *v.* Sims (27 Ind. 59), Collis., 8.
Lafayette & I. R. Co. *v.* Smith (6 Ind. 249), Em. Dom., 49.
Lafayette, B. & M. R. Co. *v.* Cheeney (87 Ill. 446), Direct., 31.
Lafayette, B. & M. R. Co. *v.* Winslow (66 Ill. 219), Em. Dom., 560, 590, 681; Witn., 117.
Lafayette Co. *v.* Neely (17 Am. & Eng. R.

Cas. 242, 21 Fed. Rep. 738), Mort., 257; Receiv., 154; Stockh., 23.
Lafayette, M. & B. R. Co. *v.* Geiger (34 Ind. 185), Mun. Aid, 8; Words & Ph., 108.
Lafayette, M. & B. R. Co. *v.* Murdock (68 Ind. 137), Em. Dom., 371, 459, 638, 724.
Lafayette Plankroad Co. *v.* New Albany & S. R. Co. (13 Ind. 90), Em. Dom., 471.
Lafferty *v.* Chicago & W. M. R. Co. (71 Mich. 35, 15 West. Rep. 108, 38 N. W. Rep. 660), Animals, 9, 458; Stat., 30.
Lafferty *v.* Hannibal & St. J. R. Co. (44 Mo. 291), Animals, 603.
Lafferty *v.* Schuylkill River E. S. R. Co. (36 Am. & Eng. R. Cas. 575, 124 Pa. St. 297, 16 Atl. Rep. 869), Em. Dom., 147, 433.
Lafflin *v.* Buffalo & S. W. R. Co. (30 Am. & Eng. R. Cas. 596, 106 N. Y. 136, 7 Cent. Rep. 793, 12 N. E. Rep. 599, 8 N. Y. S. R. 596; reversing 36 Hun 638, mem.), Car. of P., 240, 268; Negl., 32.
Laffrey *v.* Grummond (37 Am. & Eng. R. Cas. 235, 74 Mich. 186, 41 N. W. Rep. 894), Bagg., 68.
Lafitte *v.* New Orleans, C. & L. R. Co. (47 Am. & Eng. R. Cas. 645, 43 La. Ann. 34, 8 So. Rep. 701), St. Rys., 314.
Laflin *v.* Chicago, W. & N. R. Co. (33 Fed. Rep. 415), Em. Dom., 453, 569, 709, 725, 758; Evid., 2, 83; Witn., 197.
Laflin *v.* Chicago, W. & N. R. Co. (34 Fed. Rep. 859), Abate., 2; Em. Dom., 609.
La Friend *v.* New York C. & H. R. R. Co. (46 N. Y. S. R. 686, 19 N. Y. Supp. 664), Evid., 230.
La Grange & M. R. Co. *v.* Rainey (7 Coldw. (Tenn.) 420), Charters, 131; Dissol., 1, 2, 9.
Lagrone *v.* Mobile & O. R. Co. (67 Miss. 592, 7 So. Rep. 432), Fel. Serv., 343, 345.
Lahey *v.* Central Park, N. & E. R. R. Co. (51 N. Y. S. R. 589, 22 N. Y. Supp. 380), Employés, Inj. to, 667; St. Rys., 495.
Lahey *v.* Ottmann (25 N. Y. Supp. 897, 56 N. Y. S. R. 109, 73 Hun 63), Evid., 175, 218.
Lahr *v.* Metropolitan El. R. Co. (104 N. Y. 268, 10 N. E. Rep. 528, 4 N. Y. S. R. 340), Elev. Rys., 50, 51, 54, 58, 59, 157.
Laicher *v.* New Orleans, J. & G. N. R. Co. (28 La. Ann. 320), Tresp., Inj. to, 107.
Laidlou *v.* Hatch (75 Ill. 11), Constr. Rys., 17; Contr., 14.
Lail *v.* Mt. Sterling Coal Road Co. (13 Bush (Ky.) 32), Subscr., 24, 93.
Laing *v.* Colder (8 Pa. St. 479), Bagg., 95; Car. of P., 139, 486, 582; Dam., 76.
Laing *v.* United N. J. R. & C. Co. (54 N. J. L. 576, 25 Atl. Rep. 409), Evid., 2; Witn., 146.
Lainiger *v.* Kansas City, St. J. & C. B. R. Co. (41 Mo. App. 165), Animals, 326, 353, 578.
Laird *v.* Connecticut & P. R. R. Co. (55 N. H. 375), Rem. of C., 26.
Laird *v.* Connecticut & P. R. R. Co. (43 Am. & Eng. R. Cas. 63, 62 N. H. 254, 13 Am. St. Rep. 564), Fires, 103; Fixt., 6; Jurisd., 6.
Lake *v.* Virginia & T. R. Co. (7 Nev. 294), Bridges, 92.
Lake Erie & W. R. Co. *v.* Acres (28 Am. & Eng. R. Cas. 112, 108 Ind. 548, 9 N. E. Rep. 453), Car. of P., 118.
Lake Erie & W. R. Co. *v.* Carson (4 Ind. App. 185, 30 N. E. Rep. 432), Cross., Inj. at, 260, 336.
Lake Erie & W. R. Co. *v.* Christison (39 Ill. App. 495), Dam., 32; Eject. Pass., 134.
Lake Erie & W. R. Co. *v.* Close (5 Ind. App. 444, 32 N. E. Rep. 588), Eject. Pass., 109; Tickets & F., 124; Trial, 92.
Lake Erie & W. R. Co. *v.* Cruzen (29 Ill. App. 212), Fires, 62.
Lake Erie & W. R. Co. *v.* Everett (11 Am. & Eng. R. Cas. 221, 86 Ind. 229), App., 117.
Lake Erie & W. R. Co. *v.* Faught (31 Ill. App. 110), Constr. Rys., 51.
Lake Erie & W. R. Co. *v.* Fishback (5 Ind. App. 403, 32 N. E. Rep. 346), Animals, 140, 354, 355.
Lake Erie & W. R. Co. *v.* Fix (11 Am. & Eng. R. Cas. 109, 88 Ind. 381, 45 Am. Rep. 464), Car. of P., 135; Eject. Pass., 39, 106.
Lake Erie & W. R. Co. *v.* Griffin (17 Am. & Eng. R. Cas. 235, 92 Ind. 487; further appeal 27 Am. & Eng. R. Cas. 394, 107 Ind. 464, 8 N. E. Rep. 451), Reorg., 16.
Lake Erie & W. R. Co. *v.* Griffin (27 Am. & Eng. R. Cas. 394, 107 Ind. 464, 8 N. E. Rep. 451), Em. Dom., 383; Reorg., 16.
Lake Erie & W. R. Co. *v.* Helmericks (38 Ill. App. 141), Cat.-Gds., 28; Witn., 134.
Lake Erie & W. R. Co. *v.* Helmrick (29 Ill. App. 270), Fires, 213.
Lake Erie & W. R. Co. *v.* Kennedy (132 Ind. 274, 31 N. E. Rep. 943), License, 15.
Lake Erie & W. R. Co. *v.* Kinsey (14 Am. & Eng. R. Cas. 309, 87 Ind. 514), Em. Dom., 371, 954, 1015.
Lake Erie & W. R. Co. *v.* Kirts (29 Ill. App. 175), Fires, 109.
Lake Erie & W. R. Co. *v.* Kneadle (19 Am. & Eng. R. Cas. 568, 94 Ind. 454), Animals, 506; Cat.-Gds., 8; Fences, 60.
Lake Erie & W. R. Co. *v.* Kokomo (130 Ind. 224, 29 N. E. Rep. 780), Cross., Sts. & H., 44.
Lake Erie & W. R. Co. *v.* Lannert (1 Ind. App. 102, 27 N. E. Rep. 324), Fences, 50.
Lake Erie & W. R. Co. *v.* Mattix (4 Ind. App. 176, 30 N. E. Rep. 811), App., 118.
Lake Erie & W. R. Co. *v.* Mays (4 Ind. App. 413, 30 N. E. Rep. 1106), Car. of P., 23; Eject. Pass., 7; Tickets & F., 124; Tresp., Inj. to, 17.
Lake Erie & W. R. Co. *v.* Michener (117 Ind. 465, 20 N. E. Rep. 254), Em. Dom., 222, 1033; Estop., 24.
Lake Erie & W. R. Co. *v.* Middleton (142 Ill. 550, 32 N. E. Rep. 453), Fel. Serv., 511, 513; Trial, 92.
Lake Erie & W. R. Co. *v.* Middleton (46 Ill. App. 218), Death, etc., 255; Fel. Serv., 205, 206, 496, 513.
Lake Erie & W. R. Co. *v.* Morain (36 Ill. App. 632), Contrib. Neg., 110.
Lake Erie & W. R. Co. *v.* Morain (140 Ill. 117, 29 N. E. Rep. 869; affirming 36 Ill. App. 632), App., 47, 79; Car. of P., 569.
Lake Erie & W. R. Co. *v.* Mugg (132 Ind. 168, 31 N. E. Rep. 564), Death, etc., 274,

378; Employés, Inj. to, 521, 553, 589; Evid., 77; Trial, 49.
Lake Erie & W. R. Co. *v.* Oakes (11 Ill. App. 489), Car. of M., 638, 654.
Lake Erie & W. R. Co. *v.* People (42 Ill. App. 387), Car. of P., 214, 215; Stat., 46.
Lake Erie & W. R. Co. *v.* Pike (31 Ill. App. 90), Children, Inj. to, 117, 129, 136.
Lake Erie & W. R. Co. *v.* Priest (131 Ind. 413, 31 N. E. Rep. 77), Cov'ts, 4; Husb. & W., 33.
Lake Erie & W. R. Co. *v.* Quisenberry (48 Ill. App. 338), Tickets & F., 122.
Lake Erie & W. R. Co. *v.* Rosenberg (31 Ill. App. 47), Car. of L. S., 54; Stat. Agts., 5.
Lake Erie & W. R. Co. *v.* Scott (132 Ill. 429, 24 N. E. Rep. 78; affirming 32 Ill. App. 292), Em. Dom., 373, 465, 718.
Lake Erie & W. R. Co. *v.* Seneca County Com'rs (57 Fed. Rep. 945), Em. Dom., 108.
Lake Erie & W. R. Co. *v.* Wills (140 Ill. 614, 31 N. E. Rep. 122; affirming 39 Ill. App. 649), App., 121; Trial, 131.
Lake Erie & W. R. Co. *v.* Young (58 Am. & Eng. R. Cas. 665, 135 Ind. 426, 35 N. E. Rep. 177), Em. Dom., 1037.
Lake Erie & W. R. Co. *v.* Zoffinger (15 Am. & Eng. R. Cas. 371, 107 Ill. 199), App., 116; Cross., Inj. at, 338; Evid., 220.
Lake Erie & W. R. Co. *v.* Zoffinger (10 Ill. App. 252), Cross., Inj. at, 351; Tresp., 30; Tresp., Inj. to, 26; Trial, 123.
Lake Erie, W. & St. L. R. Co. *v.* Eckler (13 Ind. 67), Constr. Rys., 74.
Lake Erie, W. & St. L. R. Co. *v.* Heath (9 Ind. 558), Em. Dom., 528.
Lakeman *v.* Grinnell (5 Bosw. (N. Y.) 625), Car. of M., 774.
Lakenan *v.* Hannibal & St. J. R. Co. (24 Mo. 505), Agency, 35.
Lakenan *v.* Hannibal & St. J. R. Co. (36 Mo. App. 363), Farm Cross., 2, 10.
Lake Ontario, A. & N. Y. R. Co. *v.* Mason (16 N. Y. 451), Incorp., 8, 9; Subscr., 1, 15, 66.
Lake Ontario Shore R. Co. *v.* Curtiss (1 Am. & Eng. R. Cas. 362, 80 N. Y. 219), Subscr., 3.
Lake Roland El. R. Co. *v.* Mayor, etc., of Baltimore (54 Am. & Eng. R. Cas. 11, 77 Md. 352, 26 Atl. Rep. 510), St. Rys., 26.
Lake Shore & M. S. R. Co., In re (89 N. Y. 442; affirming 25 Hun 316), Cross. Rys., 24.
Lake Shore & M. S. R. Co., In re (48 N. Y. S. R. 360, 65 Hun 538, 20 N. Y. Supp. 573), Em. Dom., 772.
Lake Shore & M. S. R. Co. *v.* Bangs (3 Am. & Eng. R. Cas. 426, 47 Mich. 470, 11 N. W. 276), Car. of P., 426; Contrib. Neg., 4, 41.
Lake Shore & M. S. R. Co. *v.* Beam (11 Ill. App. 215), Pl., 125; Trial, 136.
Lake Shore & M. S. R. Co. *v.* Bennett (6 Am. & Eng. R. Cas. 391, 89 Ind. 457), Car. of L. S., 68; Pl., 127; Strikes, 1; Words & Ph., 246.
Lake Shore & M. S. R. Co. *v.* Berlink (2 Ill. App. 427), Comp. Neg., 4.
Lake Shore & M. S. R. Co. *v.* Blanchard (15 Ill. App. 582), Tresp., Inj. to, 92, 105.
Lake Shore & M. S. R. Co. *v.* Bodemer (54 Am. & Eng. R. Cas. 177, 139 Ill. 596, 29 N. E. Rep. 692; affirming 33 Ill. App. 479), Contrib. Neg., 50; Cross., Inj. at, 173; Death, etc., 226, 243, 261; Licensees, Inj. to, 3; Negl., 3; Sts. & H., 316; Tresp., Inj. to, 29, 111.
Lake Shore & M. S. R. Co. *v.* Brown (31 Am. & Eng. R. Cas. 61, 123 Ill. 162, 14 N. E. Rep. 197), Agency, 74; App., 116; Car. of L. S., 125, 132, 133; Car. of P., 47, 364, 470; Comp. Neg., 7; Death, etc., 174, 184, 226; Evid., 52; Licensees, Inj. to, 15; Trial, 154.
Lake Shore & M. S. R. Co. *v.* Chicago (148 Ill. 509, 37 N. E. Rep. 88), Sts. & H., 18.
Lake Shore & M. S. R. Co. *v.* Chicago & W. I. R. Co. (2 Am. & Eng. R. Cas. 437, 96 Ill. 125), Cross. Rys., 33.
Lake Shore & M. S. R. Co. *v.* Chicago & W. I. R. Co. (2 Am. & Eng. R. Cas. 440, 97 Ill. 506), Cross. Rys., 8; Em. Dom., 103, 107.
Lake Shore & M. S. R. Co. *v.* Chicago & W. I. R. Co. (100 Ill. 21), Cross. Rys., 46; Em. Dom., 112, 600, 920.
Lake Shore & M. S. R. Co. *v.* Cincinnati, S. & C. R. Co. (30 Ohio St. 604, 16 Am. Ry. Rep. 291), Collis., 1; Cross. Rys., 1, 16, 48, 76; Stat., 18.
Lake Shore & M. S. R. Co. *v.* Cincinnati, W. & M. R. Co. (37 Am. & Eng. R. Cas. 430, 116 Ind. 578, 19 N. E. Rep. 440), Cross. Rys., 27, 30; Em. Dom., 274, 311.
Lake Shore & M. S. R. Co. *v.* Clark (41 Ill. App. 343), Children, Inj. to, 36; Evid., 130.
Lake Shore & M. S. R. Co. *v.* Clemens (5 Ill. App. 77), Cross., Inj. at, 193.
Lake Shore & M. S. R. Co. *v.* Davis (16 Ill. App. 425), Bills of L., 26, 31, 32; Lim. of Liab., 13.
Lake Shore & M. S. R. Co. *v.* Dunkirk (48 N. Y. S. R. 208, 65 Hun 494, 20 N. Y. Supp. 596), Mun. Corp., 8; Sts. & H., 352.
Lake Shore & M. S. R. Co. *v.* Ellsey (85 Pa. St. 283, 18 Am. Ry. Rep. 413), Car. of M., 389.
Lake Shore & M. S. R. Co. *v.* Elson (15 Ill. App. 80), App., 56; Cross., Inj. at, 352; Negl., 109.
Lake Shore & M. S. R. Co. *v.* Erie County Sup'rs (2 N. Y. S. R. 317, 41 Hun 637, mem.), Counties, 3; Evid., 164, 172; Strikes, 8; Witn., 94.
Lake Shore & M. S. R. Co. *v.* Fitzpatrick (31 Ohio St. 479), Employés, Inj. to, 53, 686.
Lake Shore & M. S. R. Co. *v.* Foster (104 Ind. 293, 4 N. E. Rep. 20, 54 Am. Rep. 319), Agency, 23; Bagg., 49.
Lake Shore & M. S. R. Co. *v.* Frantz (39 Am. & Eng. R. Cas. 628, 127 Pa. St. 297, 18 Atl. Rep. 22), Cross., Inj. at, 214, 267, 298; Dam., 70.
Lake Shore & M. S. R. Co. *v.* Greenwood (79 Pa. St. 373), Car. of P., 83; Eject. Pass., 67.
Lake Shore & M. S. R. Co. *v.* Hart (87 Ill. 529, 19 Am. Ry. Rep. 249), Tresp., Inj. to, 105.

Lake Shore & M. S. R. Co. *v.* Herrick (50 Am. & Eng. R. Cas. 25, 49 Ohio St. 25, 29 N. E. Rep. 1052), Stat. & D., 133.
Lake Shore & M. S. R. Co. *v.* Hodapp (83 Pa. St. 22, 16 Am. Ry. Rep. 167), Car. of M., 190.
Lake Shore & M. S. R. Co. *v.* Hoffert (40 Ill. App. 631), Side Tr., 2.
Lake Shore & M. S. R. Co. *v.* Hundt (140 Ill. 525, 30 N. E. Rep. 458; affirming 41 Ill. App. 220), App., 121; Collis., 31, 32, 33; Trial, 131.
Lake Shore & M. S. R. Co. *v.* Hunt (39 Mich. 469), Attach., 46; Proc., 28.
Lake Shore & M. S. R. Co. *v.* Hunt (18 Ill. App. 288), Employés, Inj. to, 343.
Lake Shore & M. S. R. Co. *v.* Hutchins (32 Ohio St. 571), Tresp., 27.
Lake Shore & M. S. R. Co. *v.* Hutchins (4 Am. & Eng. R. Cas. 219, 37 Ohio St. 282), Trover, 14, 18.
Lake Shore & M. S. R. Co. *v.* Johnsen (135 Ill. 641, 26 N. E. Rep. 510; affirming 35 Ill. App. 430), Comp. Neg., 13, 19, 82; Cross., Inj. at, 63, 109, 122, 259; Dam., 44; Negl., 67; Trial, 206, 217.
Lake Shore & M. S. R. Co. *v.* Kaste (11 Ill App. 536), Cross., Sts. & H., 21; Sts. & H., 410.
Lake Shore & M. S. R. Co. *v.* Knittal (33 Ohio St. 468), Employés, Inj. to, 247, 295; Fel. Serv., 45.
Lake Shore & M. S. R. Co. *v.* Kuhlman (18 Ill. App. 222), Trial, 197.
Lake Shore & M. S. R. Co. *v.* Lassen (12 Ill. App. 659), Witn., 50.
Lake Shore & M. S. R. Co. *v.* Lavalley (5 Am. & Eng. R. Cas. 549, 36 Ohio St. 221), Fel. Serv., 86, 98, 333; Pl., 117.
Lake Shore & M. S. R. Co. *v.* McCormick (5 Am. & Eng. R. Cas. 474, 74 Ind. 440), Employés, Inj. to, 66, 95, 97, 98, 182, 223, 263.
Lake Shore & M. S. R. Co. *v.* May (33 Ill. App. 366), Trial, 157.
Lake Shore & M. S. R. Co. *v.* Miller (25 Mich. 274, 5 Am. Ry. Rep. 478), Contrib. Neg., 9, 11, 20; Cross., Inj. at, 216, 229, 242, 295; Evid., 98, 106; Negl., 75.
Lake Shore & M. S. R. Co. *v.* National Car-Brake Shoe Co. (110 U. S. 229, 4 Sup. Ct. Rep. 33), Pat. for Inv., 29.
Lake Shore & M. S. R. Co. *v.* New York, C. & St. L. R. Co. (8 Fed. Rep. 858), Em. Dom., 111.
Lake Shore & M. S. R. Co. *v.* O'Conner (115 Ill. 254, 3 N. E. Rep. 501), Death, etc., 126, 348, 350; Employés, Inj. to, 721; Fel. Serv., 463.
Lake Shore & M. S. R. Co. *v.* Parker (41 Am. & Eng. R. Cas. 339, 131 Ill. 557, 23 N. E. Rep. 237; affirming 33 Ill. App. 405), Death, etc., 297, 326, 355; Employés, Inj. to, 301; Negl., 43; Trial, 129.
Lake Shore & M. S. R. Co. *v.* Pauly (20 Ill. App. 658), Cross., Inj. at, 77.
Lake Shore & M. S. R. Co. *v.* Pauly (37 Ill. App. 203), Trial, 110, 129.
Lake Shore & M. S. R. Co. *v.* People (46 Mich. 193, 9 N. W. Rep. 249), Consol., 6; Int., 9; Tax., 266.
Lake Shore & M. S. R. Co. *v.* Perkins (25 Mich. 329, 5 Am. Ry. Rep. 249), Car. of L. S., 1, 137; Car. of M., 449; Lim. of Liab., 23.
Lake Shore & M. S. R. Co. *v.* Pierce (3 Am. & Eng. R. Cas. 340, 47 Mich. 277, 11 N. W. Rep. 157), Car. of P., 69, 83, 242, 528; Eject. Pass., 58.
Lake Shore & M. S. R. Co. *v.* Pinchin (31 Am. & Eng. R. Cas. 428, 112 Ind. 592, 11 West. Rep. 247, 13 N. E. Rep. 677), Contrib. Neg., 37; Cross., Inj. at, 309; Negl., 53.
Lake Shore & M. S. R. Co. *v.* Pittsburg, Ft. W. & C. R. Co. (71 Ill. 38), Deeds, 15; Lim. of Ac., 52.
Lake Shore & M. S. R. Co. *v.* Prentice (58 Am. & Eng. R. Cas. 436, 147 U. S. 101, 13 Sup. Ct. Rep. 261), Car. of P., 639; Dam., 32.
Lake Shore & M. S. R. Co. *v.* Probeck (33 Ill. App. 145), Sts. & H., 321.
Lake Shore & M. S. R. Co. *v.* Richards (40 Ill. App. 560), Constr. Rys., 41; Contr., 95.
Lake Shore & M. S. R. Co. *v.* Richards (126 Ill. 448, 18 N. E. Rep. 794), Contr., 101, 107.
Lake Shore & M. S. R. Co. *v.* Roach (1 Am. & Eng. R. Cas. 184, 80 N. Y. 339), Tax., 335.
Lake Shore & M. S. R. Co. *v.* Rose (95 U. S. 78), Rev., 5.
Lake Shore & M. S. R. Co. *v.* Rosenweig (26 Am. & Eng. R. Cas. 489, 113 Pa. St. 519, 6 Atl. Rep. 545), Car. of P., 67; Dam., 28, 31; Eject. Pass., 41, 64, 77; Evid., 209; Tickets & F., 1; Tresp., Inj. to, 12.
Lake Shore & M. S. R. Co. *v.* Roy (5 Ill. App. 82), Employés, Inj. to, 182, 238, 297, 383.
Lake Shore & M. S. R. Co. *v.* Sharpe (7 Am. & Eng. R. Cas. 543, 38 Ohio St. 150), Cat.-Gds., 19.
Lake Shore & M. S. R. Co. *v.* Smith (1[illegible] Ind. 512, 31 N. E. Rep. 196), M[illegible] 411.
Lake Shore & M. S. R. Co. *v.* S[illegible]er (28 Am. & Eng. R. Cas. 319, 44 O[illegible] St. 471, 8 N. E. Rep. 467), Employés, In[illegible] to, 179; Fel. Serv., 74, 238, 460.
Lake Shore & M. S. R. Co. *v.* Stupa[illegible] (28 Am. & Eng. R. Cas. 323, 108 Ind. 1, 8 N. E. Rep. 630), Fel. Serv., 453.
Lake Shore & M. S. R. Co. *v.* Stupak (41 Am. & Eng. R. Cas. 382, 123 Ind. 210, 23 N. E. Rep. 246), App., 32; Employés, Inj. to, 539; Evid., 29; Fel. Serv., 149, 150, 304.
Lake Shore & M. S. R. Co. *v.* Sunderland (3 Ill. App. 307), Cross., Inj. at, 321.
Lake Shore & M. S. R. Co. *v.* Taylor (46 Ill. App. 506), Death, etc., 247.
Lake Shore & M. S. R. Co. *v.* Van Auken (1 Ind. App. 492, 27 N. E. Rep. 119), Animals, 194, 380, 557.
Lake Shore & M. S. R. Co. *v.* Ward (135 Ill. 511, 26 N. E. Rep. 520; affirming 35 Ill. App. 423), Evid., 79; Pl., 110, 139; Trial, 54, 159.
Lake Shore & M. S. R. Co. *v.* Warren (21 Am. & Eng. R. Cas. 302, 3 Wyom. 134, 6 Pac. Rep. 724), Bagg., 8, 123; Pl., 59.

Lake Shore Nitro-Glycerine Co. *v.* Illinois C. R. Co. (75 Ill. 394), Car. of M., 695.
Lake Superior & M. R. Co. *v.* Greve (17 Minn. 322, (Gil. 299), 4 Am. Ry. Rep. 173, 8 Am. Ry. Rep. 217), Em. Dom., 712, 916; Flood. Lds., 10.
Lake Superior & M. R. Co. *v.* United States (93 U. S. 442; affirming 12 Ct. of Cl. 35), Land Grant Rds., 7.
Lake Superior & M. R. Co. *v.* United States (12 Ct. of Cl. 35), Land Grant Rds., 1.
Lake View *v.* Tate (39 Am. & Eng. R. Cas. 703, 130 Ill. 247, 6 L. R. A. 268, 22 N. E. Rep. 791; affirming 33 Ill. App. 78), Negl., 41; Sts. & H., 323.
Lake View *v.* Tate (33 Ill. App. 78), Sts. & H., 318.
Lakin *v.* Oregon & P. R. Co. (34 Am. & Eng. R. Cas. 500, 15 Oreg. 220, 15 Pac. Rep. 641), App., 73; Car. of P., 129, 373; Evid., 76; Pl., 116; Witn., 44.
Lakin *v.* Willamette V. & C. R. Co. (26 Am. & Eng. R. Cas. 611, 13 Oreg. 436, 11 Pac. Rep. 68, 57 Am. Rep. 25), Car. of P., 130; Charters, 51; Indep. Contr., 25; Leases, 41.
Lakkie *v.* Chicago, St. P., M. & O. R. Co. (44 Minn. 438, 46 N. W. Rep. 912), Sts. & H., 247.
Lallande *v.* His Creditors (45 Am. & Eng. R. Cas. 301, 42 La. Ann. 705, 7 So. Rep. 895), Bills of L., 40.
Lalor *v.* Chicago, B. & Q. R. Co. (52 Ill. 401), Employés, Inj. to, 284.
Lamar *v.* Charlotte & S. C. R. Co. (10 So. Car. 476), Dam., 107.
Lamb *v.* Anderson (54 Iowa 199, 3 N W. Rep. 416, 6 N. W. Rep. 268), Mun. Aid, 412.
Lamb *v.* Burlington, C. R. & M. R. Co. (39 Iowa 333), Mun. Aid, 412.
Lamb *v.* Camden & A. R. & T. Co. (2 Daly (N. Y.) 454), Car. of M., 21, 49, 84, 170, 185, 607, 610, 616, 628, 671; Words & Ph., 157.
Lamb *v.* Camden & A. R. & T. Co. (46 N. Y. 271, 7 Am. Ry. Rep. 327; reversing 2 Daly 454), Car. of M., 152.
Lamb *v.* Camden & A. R. Co. (4 Daly (N. Y.) 483), Car. of M., 440.
Lamb *v.* Great Northern R. Co. ([1891] 2 Q. B. 281), Relief Assoc., 8.
Lamb *v.* North London R. Co. (L. R. 4 Ch. 522, 21 L. T. 98, 17 W. R. 746), Em. Dom., 1086, 1207.
Lamb *v.* Old Colony R. Co. (140 Mass. 79, 54 Am. Rep. 449, 2 N. E. Rep. 932), Fright. Teams, 2.
Lamb *v.* Reclamation Dist. No. 108 (73 Cal. 125), Embankm., 4.
Lamb *v.* St. Louis C. & W. R. Co. (33 Mo. App. 489), Cable Rys., 6; Pl., 35.
Lamb *v.* Western R. Co. (7 Allen (Mass.) 98), Car. of M., 329.
Lambe *v.* Montreal St. R. Co. (3 Montr. Super. 162), St. Rys., 283.
Lambert *v.* Heath, 15 M. & W. 486 (4 Railw. Cas. 302, 10 Jur. 481, 15 L. J. Ex. 297), Stock, 75.
Lambeth *v.* North Carolina R. Co. (66 N. Car. 494), Car. of P., 137, 225, 241, 417, 425.
Lamborn *v.* Bell (18 Colo. 346, 32 Pac. Rep. 989), Em. Dom., 7, 463.
Lambreth *v.* Clarke (10 Heisk. (Tenn.) 32), Proc., 40.
Lamline *v.* Houston, W. S. & P. F. R. Co. (14 Daly (N. Y.) 144, 6 N. Y. S. R. 248), Negl., 6; St. Rys., 326, 359, 366.
Lamm *v.* Chicago, St. P., M. & O. R. Co. (46 Am. & Eng. R. Cas. 42, 45 Minn. 71, 47 N. W. Rep. 455), Deeds, 10; Sts. & H., 133, 134, 142, 167, 284.
Lammert *v.* Chicago & A. R. Co. (9 Ill. App. 388), Car. of P., 540; Estop., 23, 30.
Lamming *v.* Galusha (135 N. Y. 239, 31 N. E. Rep. 1024, 47 N. Y. S. R. 831; reversing 63 Hun 32, 22 Civ. Pro. 16, 43 N. Y. S. R. 592, 17 N. Y. Supp. 328), Injunc., 16; Nuis., 9; Pl., 31.
Lamoille Valley R. Co. *v.* Bixby (16 Am. & Eng. R. Cas. 474, 55 Vt. 235), Exec., 16.
Lamoille Valley R. Co. *v.* Bixby (57 Vt. 548), App., 146; Witn., 118.
Lamoille Valley R. Co. *v.* Fairfield (51 Vt. 257), Mun. Aid, 100.
Lamoille Valley R. Co. *v.* Marsh (49 Vt. 37, 17 Am. Ry. Rep. 136), Stat. & D., 44.
Lamont *v.* Nashville & C. R. Co. (9 Heisk. (Tenn.) 58, 19 Am. Ry. Rep. 284), Car. of M., 20, 21, 129, 184; Words & Ph., 7.
La Mont *v.* St. Louis, D. M. & N. R. Co. (14 Am. & Eng. R. Cas. 192, 62 Iowa 193, 17 N. W. Rep. 465), Em. Dom., 602.
Lamont *v.* Washington & G. R. Co. (15 Am. & Eng. R. Cas. 383, 2 Mackey (D. C.) 502), Att'ys, 20.
Lamphear *v.* Buckingham (33 Conn. 237), Death, etc., 364; Mort., 153.
Lamphier *v.* Worcester & N. R. Co. (33 N. H. 495), Actions, 5; Crim. L., 34; Nuis., 31; Priv. Ways, 15.
Lampkins *v.* Vicksburg, S. & P. R. Co. (47 Am. & Eng. R. Cas. 622, 42 La. Ann. 997, 8 So. Rep. 530), Evid., 129.
Lanark *v.* Cameron (9 U. C. C. P. 109), Exec., 7; Mort., 36.
Lancashire & Y. R. Co. *v.* Assessment Com. of Bolton Union (L. R. 15 App. Cas. 323; affirming L. R. 23 Q. B. D. 555), Tax., 381.
Lancashire & Y. R. Co. *v.* East Lancashire R. Co. (5 H. L. Cas. 792, 2 Jur. N. S. 767, 25 L. J. Ex. 278, 9 Ex. 591, 23 L. J. Ex. 157), Leases, 125.
Lancashire & Y. R. Co. *v.* Evans (15 Beav 322, 1 El. & Bl. 754, 17 Jur. 878, 22 L. J. Q. B. 254), Em. Dom., 1156, 1169, 1198.
Lancashire & Y. R. Co. *v.* Gidlow (42 L. J. Ex. 129, 21 W. R. 649, 3 Ry. & C. T. Cas. xxv), Charges, 26, 65, 87, 116, 120.
Lancashire & Y. R. Co. *v.* Gidlow (No. 2) (L. R. 7 H. L. Cas. 517, 32 L. T. 573, 24 W. R. 144, 45 L. J. Ex. 625, 3 Ry. & C. T. Cas. xiii), Charges, 40, 66, 116, 118; Discrim., 11.
Lancashire & Y. R. Co. *v.* Greenwood (35 Am. & Eng. R. Cas. 537, 21 Q. B. D. 215, 58 L. J. Q. B. 16, 6 Ry. & C. T. Cas. lxxi), Charges, 85, 92.
Lancashire & Y. R. Co. *v.* Mayor, etc., of Bury (14 App. Cass. 417; affirming 20 Q. B. D. 485), Cross., St. & H., 30.

Lancaster *v.* Worcester County Com'rs (113 Mass. 100), Cross., Sts. & H., 99.
Lancaster & C. R. Co. *v.* Northwestern R. Co. (2 Kay & J. 293, 1 Ry. & C. T. Cas. 24), Contr., 64.
Lancaster County *v.* Cheraw & C. R. Co. (28 So. Car. 134, 5 S. E. Rep. 338), Mun. Aid, 185, 196.
Lancaster Mills *v.* Merchants' Cotton-Press Co. (45 Am. & Eng. R. Cas. 423, 89 Tenn. 1, 14 S. W. Rep. 317), Bills of L., 73, 76; Car. of M., 150; Fire Ins., 1, 4, 5, 7; Wareh., 5.
Lance's Appeal (55 Pa. St. 16), Em. Dom., 139; Priv. Rds., 1.
Lance *v.* Chicago, M. & St. P. R. Co. (5 Am. & Eng. R. Cas. 617, 57 Iowa 636, 11 N. W. Rep. 612), Em. Dom., 645, 702, 706, 931.
Land *v.* Coffman (50 Mo. 243, 3 Am. Ry. Rep. 1), Corp., 8; Deeds, 49.
Land *v.* Wilmington & W. R. Co. (40 Am. & Eng. R. Cas. 18, 104 N. Car. 48, 10 S. E. Rep. 80), Stat. & D., 4; Words & Ph., 192.
Land *v.* Wilmington & W. R. Co. (47 Am. & Eng. R. Cas. 161, 107 N. Car. 72, 12 S. E. Rep. 125), Em. Dom., 984; Lim. of Ac., 47.
Lander *v.* Bath (85 Me. 141, 26 Atl. Rep. 1091), Sts. & H., 166.
Landers *v.* Staten Island R. Co. (13 Abb. Pr. N. S. (N. Y.) 338; reversed in 53 N. Y. 450, 14 Abb. Pr. N. S. 346), Sunday, 5.
Landers *v.* Staten Island R. Co. (53 N. Y. 450, 14 Abb. Pr. N. S. 346; reversing 13 Abb. Pr. N. S. 338), Jurisd., 5.
Landes *v.* Pacific R. Co. (50 Mo. 346, 3 Am. Ry. Rep. 288), Car. of M., 61.
Land Grant R. & T. Co. *v.* Coffey County Com'rs (6 Kan. 245), Citizens., 5; For. Corp., 7.
Land Grant R. & T. Co. *v.* Davis County Com'rs (6 Kan. 256), Mun. Aid, 197.
Landis *v.* Western Pa. R. Co. (133 Pa. St. 579, 26 W. N. C. 64, 19 Atl. Rep. 556), Bonds, 40.
Landman *v.* Entwistle (7 Ex. 632, 21 L. J. Ex. 208), Incorp., 6.
Landrigan *v.* State (31 Ark. 50, 18 Am. Ry. Rep. 14), Stat. & D., 55, 56.
Landsberg *v.* Dinsmore (4 Daly (N. Y.) 490), Exp. Cos., 58.
Lane *v.* Baughman (17 Ohio St. 642), Exec., 23.
Lane *v.* Boston & A. R. Co. (112 Mass. 455), Car. of M., 736, 752; Evid., 19, 204; Pl., 106.
Lane *v.* Brainers (30 Conn. 565), Evid., 233; Subscr., 191.
Lane *v.* Central Iowa R. Co. (69 Iowa 443, 29 N. W. Rep. 419), Death, etc., 215.
Lane *v.* Chadwick (32 Am. & Eng. R. Cas. 548, 146 Mass. 68, 5 N. Eng. Rep. 562, 15 N. E. Rep. 121), Replev., 1.
Lane *v.* Chicago, R. I. & P. R. Co. (18 Mo. App. 555), Fences, 54.
Lane *v.* Chicago, R. I. & P. R. Co. (35 Mo. App. 567), App., 72.
Lane *v.* East Tenn., V. & G. R. Co. (2 Am. & Eng. R. Cas. 278, 5 Lea (Tenn.) 124), Eject. Pass., 23.
Lane *v.* East Tenn., V. & G. R. Co. (13 Lea (Tenn.) 547), State Aid, 35.
Lane *v.* Embden (72 Me. 354), Mun. Aid, 377.
Lane *v.* Illinois C. R. Co. (43 La. Ann. 833, 9 So. Rep. 560), Derailm., 9.
Lane *v.* Kansas City, Ft. S. & G. R. Co. (15 Am. & Eng. R. Cas. 526, 31 Kan. 525, 3 Pac. Rep. 341), Animals, 186.
Lane *v.* Old Colony & F. R. R. Co. (14 Gray (Mass.) 143), Car. of M., 392.
Lane *v.* Seaboard & R. R. Co. (5 Jones (N. Car.) 25), Name, 4.
Lane County *v.* Oregon (7 Wall. (U. S.) 71), Tax., 292.
Laney *v.* Kansas City, St. J. & C. B. R. Co. (83 Mo. 466), Animals, 142, 143, 145, 462.
Lang *v.* Holiday Creek R. & C. M. Co. (49 Iowa 469), Cross., Inj. at, 199, 254.
Lang *v.* Houston, W. St. & P. F. R. Co. (75 Hun 151, 27 N. Y. Supp. 90), Death, etc., 99; St. Rys., 492.
Lang *v.* New York, L. E. & W. R. Co. (51 Hun (N. Y.) 603, 22 N. Y. S. R. 110, 4 N. Y. Supp. 565; affirmed in 123 N. Y. 656, mem., 25 N. E. Rep. 955, 33 N. Y. S. R. 1030), Agency, 102, 104; Children, Inj. to, 11, 184; Dam., 101; New Tr., 34; Tresp., Inj. to, 86.
Lang *v.* Pennsylvania R. Co. (2 Pa. Dist. 125), Car. of M., 20.
Lang *v.* Pennsylvania R. Co. (154 Pa. St. 342, 26 Atl. Rep. 370), Bills of L., 64.
Lang *v.* Sanger (76 Wis. 71, 44 N. W. Rep. 1095), Employés, Inj. to, 571.
Langabier *v.* Fairbury, P. & N. W. R. Co. (64 Ill. 243), Sunday, 3.
Langan *v.* Great Western R. Co. (30 L. T. N. S. 173; affirming 26 L. T. N. S. 577), Agency, 10.
Langan *v.* Iowa & M. Constr. Co. (49 Iowa 317), Constr. Rys., 123.
Langan *v.* St. Louis, I. M. & S. R. Co. (3 Am. & Eng. R. Cas. 355, 72 Mo. 392; reversing 5 Mo. App. 311), Contrib. Neg., 29, 30.
Langdon *v.* Branch (37 Fed. Rep. 449, 2 L. R. A. 120), Trusts, 2.
Langdon *v.* Chicago, B. & Q. R. Co. (48 Iowa 437), Flood. Lds., 55.
Langdon *v.* Howells (L. R. 4 Q. B. D. 337, 48 L. J. M. C. 113, 40 L. T. 880, 27 W. R. 657, 3 Ry. & C. T. Cas. xxii), Tickets & F., 147.
Langdon *v.* New York, L. E. & W. R. Co. (33 N. Y. S. R. 907, 58 Hun 122, 11 N. Y. Supp. 514), Discrim., 76.
Langdon *v.* New York, L. E. & W. R. Co. (39 N. Y. S. R. 471, 60 Hun 584, 15 N. Y. Supp. 255, 27 Abb. N. Cas. 166), Bills of Partic., 1; Discrim., 80; Pl., 173.
Langdon *v.* Northfield (42 Minn. 464, 44 N. W. Rep. 984), Constr. Rys., 24, 70.
Langdon *v.* Vermont & C. R. Co. (4 Am. & Eng. R. Cas. 33, 53 Vt. 228), Bonds, 31; Receiv., 103, 105, 175.
Langdon *v.* Vermont & C. R. Co. (11 Am. & Eng. R. Cas. 688, 54 Vt. 593), Mort., 86.
Langdon & A. J. R. Co., In re (45 U. C. Q. B. 47), Mun. Aid, 260.

Langfitt *v.* Brown (5 La. Ann. 251), Mort., 88.
Langford, In re (57 Fed. Rep. 570, 4 Int. Com. Rep. 437), Intox'ing L., 3; States, 4.
Langford *v.* Boston & A. R. Co. (30 Am. & Eng. R. Cas. 653, 144 Mass. 431, 4 N. Eng. Rep. 209, 11 N. E. Rep. 697), Assault, 1; False Imp., 2; Mal. Pros., 5; Tresp., 30.
Langford *v.* Sanger (35 Mo. 133), Evid., 227.
Langhoff *v.* Milwaukee & P. du C. R. Co. (19 Wis. 489), Cross., Inj. at, 186; Negl., 76; Trial, 79.
Langhoff *v.* Milwaukee & P. du C. R. Co. (23 Wis. 43), Death, etc., 192.
Langley *v.* Boston & M. R. Co. (10 Gray (Mass.) 103), Leases, 45.
Langley *v.* Sixth Ave. R. Co. (16 J. & S. (N. Y.) 542, mem.; affirmed (?) 99 N. Y. 662, mem.), New Tr., 63.
Langlois *v.* Buffalo & R. R. Co. (19 Barb. (N. Y.) 364; affirmed in 19 Barb. 370, n.), Fences, 13, 72.
Langlois *v.* Maine C. R. Co. (84 Me. 161, 24 Atl. Rep. 804), Employés, Inj. to, 304; Fel. Serv., 138.
Langstaff *v.* Stix (28 Am. & Eng. R. Cas. 85, 64 Miss. 171, 1 So. Rep. 97), Car. of M., 511.
Langston *v.* South Carolina R. Co. (2 So. Car. 248), Bonds, 17; Coupons, 12.
Langworthy *v.* New York & H. R. Co. (2 E. D. Smith (N. Y.) 195), Car. of M., 5; Charges, 69.
Laning *v.* New York C. R. Co. (49 N. Y. 521), Employés, Inj. to, 261; Fel. Serv., 145, 480.
Lanning *v.* Chicago, B. & Q. R. Co. (25 Am. & Eng. R. Cas. 493, 68 Iowa 502, 27 N. W. Rep. 478), Contrib. Neg., 109; Fires, 217, 247, 352, 354.
Lansing *v.* Chicago, M. & St. P. R. Co. (85 Iowa 215, 52 N. W. Rep. 195), App., 106; Sts. & H., 340.
Lansing *v.* Lytle (38 Fed. Rep. 204), Mun. Aid, 371.
Lanterman *v.* Blairstown R. Co. (28 N. J. Eq. 1, 14 Am. Ry. Rep. 1), Em. Dom., 1043.
Lantry *v.* Silverman (1 Colo. App. 404, 29 Pac. Rep. 180), Employés, Inj. to, 716; Fel. Serv., 218.
Lantz *v.* St. Louis, K. C. & N. R. Co. (54 Mo. 228), Animals, 487.
La Paul *v.* Truesdale (45 Am. & Eng. R. Cas. 468, 44 Minn. 275, 46 N. W. Rep. 363), Fences, 55.
Lapine *v.* New Orleans, O. & G. W. R. Co. (20 La. Ann. 158), Animals, 515, 586.
Lapleine *v.* Morgan's L. & T. R. & S. Co. (37 Am. & Eng. R. Cas. 348, 40 La. Ann. 661, 1 L. R. A. 378, 4 So. Rep. 875), Children, Inj. to, 188; Negl., 14, 47; Witn., 21.
La Pointe *v.* Grand Trunk R. Co. (26 U. C. Q. B. 479), Car. of M., 675.
Lapointe *v.* Middlesex R. Co. (28 Am. & Eng. R. Cas. 198, 144 Mass. 18, 10 N. E. Rep. 497), St. Rys., 377.
Lapsley *v.* Union Pac. R. Co. (50 Fed. Rep. 172; affirmed in 51 Fed. Rep. 171), Cross., Inj. at, 75, 130, 168.
Largan *v.* Central R. Co. (40 Cal. 272), Children, Inj. to, 162.
Larimer & L. St. R. Co. *v.* Larimer St. R. Co. (137 Pa. St. 533, 20 Atl. Rep. 570), St. Rys., 29, 86, 200.
Larkin *v.* Burlington, C. R. & N. R. Co. (85 Iowa 492, 52 N. W. Rep. 480), Evid., 234; Imp. Neg., 7, 25; Mun. Corp., 11; Sts. & H., 324.
Larkin *v.* New York & N. R. Co. (46 N. Y. S. R. 658, 19 N. Y. Supp. 479; affirmed in 138 N. Y. 634, mem., 51 N. Y. S. R. 935, mem., 33 N. E. Rep. 1084), Cross., Inj. at, 300; New Tr., 55; Tresp., Inj. to, 2.
Larkin *v.* People (61 Barb. (N. Y.) 226), Crim. L., 4, 17.
Larock *v.* Ogdensburg & L. C. R. Co. (26 Hun (N. Y.) 382), Indep. Contr., 3.
Larow *v.* New York, L. E. & W. R. Co. (40 N. Y. S. R. 26, 61 Hun 11, 15 N. Y. Supp. 384), Employés, Inj. to, 662, 664.
Larrison *v.* Chicago & G. T. R. Co. (1 Int. Com. Rep. 369, 1 Int. Com. Com. 147), Int. Com., 88, 139, 140, 177.
Larrison *v.* Peoria, A. & D. R. Co. (77 Ill. 11), Stat., 2, 3.
Larrowe *v.* Lewis (128 N. Y. 593, 3 Silv. App. 503, 27 N. E. Rep. 1075, 38 N. Y. S. R. 848), Contr., 35.
Larseen *v.* Monmouthshire R. & C. Co. (16 L. T. 289), Costs, 6.
Larsen *v.* Oregon R. & N. Co. (44 Am. & Eng. R. Cas. 92, 19 Oreg. 240, 23 Pac. Rep. 974), Em. Dom., 647; Pub. Lds., 10, 43.
Larson *v.* Lake Superior, T. & T. R. Co. (79 Wis. 201, 48 N. W. Rep. 421), App., 142.
Larson *v.* Metropolitan St. R. Co. (110 Mo. 234, 19 S. W. Rep. 416), Evid., 173; Excava., 4; Indep. Contr., 11.
Larson *v.* Northern Pac. R. Co. (33 Minn. 20, 21 N. W. Rep. 836), App., 11.
Larson *v.* St. Paul & D. R. Co. (43 Minn. 488, 45 N. W. Rep. 1096), Negl., 43.
Larson *v.* St. Paul, M. & M. R. Co. (44 Am. & Eng. R. Cas. 529, 43 Minn. 423, 45 N. W. Rep. 722), Employés, Inj. to, 247; Evid., 191; Negl., 95.
Larson *v.* Superior Short Line R. Co. (22 Am. & Eng. R. Cas. 165, 64 Wis. 59, 24 N. W. Rep. 487), Em. Dom., 939.
Lary *v.* Cleveland, C., C. & I. R. Co. (3 Am. & Eng. R. Cas. 498, 78 Ind. 323, 41 Am. Rep. 572), Tresp., Inj. to, 9, 77.
La Salle & P. H. & D. R. Co. *v.* Donoghue (127 Ill. 27, 18 N. E. Rep. 827), Tax., 257.
Lasky *v.* Canadian Pac. R. Co. (83 Me. 461, 22 Atl. Rep. 367), Employés, Inj. to, 434; Fel. Serv., 427; Trial, 96.
Lassone *v.* Boston & L. R. Co. (N. H.) (24 Atl. Rep. 902), Evid., 226.
Latch *v.* Rumner R. Co. (27 L. J. Ex. 155), Evid., 125.
Latham *v.* Boston, H. T. & W. R. Co. (38 Hun (N. Y.) 265), Consol., 46.
Latham *v.* Brown (48 Kan. 190, 29 Pac. Rep. 400), Trial, 36; Witn., 149.
Lathrop *v.* Central Iowa R. Co. (69 Iowa 105, 28 N. W. Rep. 465), Animals, 408; Fences, 53.
Lathrop *v.* Junction R. Co. (4 Fed. Rep. 41), Connect. L., 4.

Lathrop *v.* Junction R. Co. (14 Phila. (Pa.) 438), Connect. L., 3.
Lathrop *v.* Union Pac. R. Co. (7 D. C. 111), Jurisd., 6; Union Pac. R. Co., 9.
Lathrop *v.* Union Pac. R. Co. (1 MacArth. (D. C.) 234), Citizens., 3; Jurisd., 6; Union Pac. R. Co., 9.
Latimer *v.* Aylesbury & B. R. Co. (L. R. 9 Ch. D. 385, 27 W. R. 141, 39 L. T. 460), Em. Dom., 1209.
Latimer *v.* Richmond & D. R. Co. (54 Am. & Eng. R. Cas. 189, 39 So. Car. 44, 17 S. E. Rep. 258), Stockh., 126.
Latimer *v.* Union Pac. R. Co. (43 Mo. 105), Proc., 20.
Latremouille *v.* Bennington & R. R. Co. (48 Am. & Eng. R. Cas. 265, 63 Vt. 336, 22 Atl. Rep. 656), Employés, Inj. to, 206, 286, 294; Negl., 75; Witn., 94.
Latty *v.* Burlington, C. R. & M. R. Co. (38 Iowa 250), Fences, 59; Stat. & D., 64.
Laubheim *v.* Netherland Steamship Co. (11 N. Y. S. R. 469), Med. Serv., 1.
Laude *v.* Chicago & N. W. R. Co. (33 Wis. 640), Animals, 143.
Lauderbrun *v.* Duffy (2 Pa. St. 398), Constr. Rys., 10.
Lauderdale County *v.* Fargason (7 Lea (Tenn.) 153), Mun. Aid, 49.
Laugharne R. Co., In re (L. R. 12 Eq. 454, 19 W. R. 1108), Aband., 10.
Laughlin *v.* Chicago & N. W. R. Co. (28 Wis. 204, 5 Am. Ry. Rep. 323), Car. of M., 653.
Laughlin *v.* Grand Rapids St. R. Co. (26 Am. & Eng. R. Cas. 377, 62 Mich. 220, 28 N. W. Rep. 873), Evid., 90; Phys. Exam., 5; Pl., 24; St. Rys., 317, 507; Witn., 96, 105, 198.
Laughlin *v.* Grand Rapids St. R. Co. (80 Mich. 154, 44 N. W. Rep. 1049), Evid., 211; Trial, 93.
Lauman *v.* Lebanon Valley R. Co. (30 Pa. St. 42), Stockh., 104, 115.
Lauman *v.* Young 31 Pa. St. 306),Constr. Rys., 32, 40, 68.
Launceston, In re (3 Ry. & C. T. Cas. 137), Constr. Rys., 2.
Laurel Fork & S. H. R. Co. *v.* West Virginia Transp. Co. (25 W. Va. 324), Charges, 6, 8; Charters, 46; Stat., 6; Words & Ph., 210.
Lavallee *v.* St. Paul, M. & M. R. Co. (38 Am. & Eng. R. Cas. 115, 40 Minn. 249, 41 N. W. Rep. 974), Fel. Serv., 187.
Laverenz *v.* Chicago, R. I. & P. R. Co. (53 Iowa 321, 5 N. W. Rep. 156), Trial, 185.
Laverenz *v.* Chicago, R. I. & P. R. Co. (6 Am. & Eng. R. Cas. 274, 56 Iowa 680, 10 N. W. Rep. 268), Cross., Inj. at, 238, 307.
Lavier *v.* Central R. Co. (71 Ga. 222), Death, etc., 292.
Laviosa *v.* Chicago, St. L. & N. O. R. Co. (4 Am. & Eng. R. Cas. 128, McGloin (La.) 299), Evid., 109; Nuis., 1; Sts. & H., 137, 174, 175.
Lavoie *v.* Queen (3 Can. Exch. 96), Car. of L. S., 126; Govt. Rds., 13.
Law *v.* Hatcher (4 Blackf. (Ind.) 364), Car. of M., 705.
Law *v.* Illinois C. R. Co. (32 Iowa 534), Eject. Pass., 60.
Law *v.* People (87 [illegible] 385), Tax., 257.
Lawler *v.* Androscoggin R. Co. (62 Me. 463), Employés, Inj. to, 93; Fel. Serv., 102, 454.
Lawless *v.* Connecticut River R. Co. (18 Am. & Eng. R. Cas. 96, 136 Mass. 1), Employés, Inj. to, 690, 737; Fel. Serv., 94, 236, 408, 498.
Lawrence's Appeal (78 Pa. St. 365), Em. Dom., 222.
Lawrence *v.* Great Northern R. Co. (6 Railw. Cas. 656, 16 Q. B. 643, 15 Jur. 652, 20 L. J. Q. B. 293), Em. Dom., 1198; Flood. Lds., 13.
Lawrence *v.* Housatonic R. Co. (29 Conn. 390), Trial, 131.
Lawrence *v.* Metropolitan El. R. Co. (15 Daly 502, 24 Abb. N. Cas. 70, 8 N. Y. Supp. 326, 29 N. Y. S. R. 138; reargument granted in 16 Daly 501, 32 N. Y. S. R. 75, 10 N. Y. Supp. 743), Elev. Rys., 112.
Lawrence *v.* Metropolitan El. R. Co. (16 Daly 501, 10 N. Y. Supp. 743, 32 N. Y. S. R. 75), Elev. Rys., 185, 190.
Lawrence *v.* Metropolitan El. R. Co. (126 N. Y. 483, 27 N. E. Rep. 765, 37 N. Y. S. R. 834; affirming 35 N. Y. S. R. 39, 12 N. Y. Supp. 546), Elev. Rys., 154.
Lawrence *v.* Milwaukee, L. S. & W. R. Co. (42 Wis. 322, 15 Am. Ry. Rep. 366), Animals, 136.
Lawrence *v.* Milwaukee, L. S. & W. R. Co. (84 Wis. 427, 54 N. W. Rep. 797), Car. of L. S., 10, 143; Car. of M., 414; Contr., 8; Pl., 127.
Lawrence *v.* Morgan's L. & T. R. & S. Co. (30 Am. & Eng. R. Cas. 309, 39 La. Ann. 427, 2 So. Rep. 69), Em. Dom., 190, 998; Mort., 242.
Lawrence *v.* New York, P. & B. R. Co. (36 Conn. 63), Bills of L., 26.
Lawrence *v.* Pendleton St. R. Co. (1 Cin. Super. Ct. 180), St. Rys., 467.
Lawrence *v.* Pullman Palace Car Co. (28 Am. & Eng. R. Cas. 151, 144 Mass. 1, 10 N. E. Rep. 723), Sleep. Car Cos., 13.
Lawrence *v.* Saratoga Lake R. Co. (3 N. Y. S. R. 743; former appeal 36 Hun 467), Em. Dom., 214; Spec. Perf. 10; Stat. & D., 43.
Lawrence *v.* Saratoga Lake R. Co. (36 Hun (N. Y.) 467; adhered to in 3 N. Y. S. R. 743), Spec. Perf., 3, 12.
Lawrence *v.* Smith (9 Am. & Eng. R. Cas. 604, 57 Iowa 701, 11 N. W. Rep. 674), Subscr., 225.
Lawrence *v.* Winona & St. P. R. Co. (15 Minn. 390) (Gil. 313), Car. of M., 99.
Lawrence & T. R. Co. *v.* Moore (24 Kan. 323), Em. Dom., 844.
Lawrenceburgh & U. M. R. Co. *v.* Montgomery (7 Ind. 474), Car. of P., 209, 344.
Lawrenceburgh & U. M. R. Co. *v.* Smith (3 Ind. 253), Em. Dom., 962.
Lawrence County's Appeal (67 Pa. St. 87), Mun. Aid, 202, 203.
Lawrence County *v.* Chattaroi R. Co. (81 Ky. 225), Counties, 4.
Lawrence County *v.* Northwestern R. Co. (32 Pa. St. 144), Mun. Aid, 198, 202.
Lawrence County Com'rs *v.* Hall (70 Ind. 469), Judgm., 33; Mun. Aid, 99; Quo War., 3.

Lawrence R. Co. *v.* Cobb (35 Ohio St. 94), Dam., 108; Evid., 280; Lim. of Ac., 49.
Lawrence R. Co. *v.* Mahoning County Com'rs (35 Ohio St. 1), Lim. of Ac., 50; Sts. & H., 404, 419, 424.
Lawrence R. Co. *v.* O'Harra (48 Ohio St. 343, 28 N. E. Rep. 175), Em. Dom., 522; Lim. of Ac., 50.
Lawrence R. Co. *v.* Williams (35 Ohio St. 168), Sts. & H., 109.
Lawrenson *v.* Dublin M. J. R. Co. (37 L. T. 32), Proc., 27.
Laws *v.* North Carolina R. Co. (7 Jones (N. Car.) 468), Animals, 53.
Lawson *v.* Chicago, R. I. & P. R. Co. (57 Iowa 672, 11 N. W. Rep. 633), Animals, 450; Trial, 211.
Lawson *v.* Chicago, St. P., M. & O. R. Co. (21 Am. & Eng. R. Cas. 249, 64 Wis. 447, 54 Am. Rep. 634, 24 N. W. Rep. 618), Car. of L. S., 125; Car. of P., 335; Conduct., 2; Contrib. Neg., 82, 113; Death, etc., 393; Lim. of Liab., 29; Tresp., Inj. to, 13; Witn., 97.
Lawson *v.* Milwaukee & N. R. Co. (30 Wis. 597, 7 Am. Ry. Rep. 270), Mun. Aid, 224.
Lawson *v.* Schnellen (33 Wis. 288), Mun. Aid, 301.
Lawson *v.* Richmond & D. R. Co. (112 N. Car. 390, 17 S. E. Rep. 169), Rem. of C., 43, 54.
Lawton *v.* Fitchburg R. Co. (8 Cush. (Mass.) 230), Dam., 59.
Lax *v.* Forty-second & G. S. F. R. Co. (14 J. & S. (N. Y.) 448), Death, etc., 240; St. Rys., 413, 419.
Lay *v.* Midland R. Co. (34 L. T. 30; reversing 30 L. T. 529), Bridges, 31, 55.
Lay *v.* Richmond & D. R. Co. (42 Am. & Eng. R. Cas. 110, 106 N. Car. 404, 11 S. E. Rep. 412), Animals, 574; Contrib. Neg., 108; Tresp., Inj. to, 28, 114.
Layne *v.* Ohio River R. Co (35 W. Va. 438, 14 S. E. Rep. 123), Animals, 62, 85; Fences, 13.
Layng *v.* Stewart (1 Watts & S. (Pa.) 222), Bills of L., 34.
Lazarus *v.* Metropolitan El. R. Co. (53 N. Y. S. R. 31, 23 N. Y. Supp. 515, 69 Hun 190), Elev. Rys., 101, 104, 117, 125, 128, 148, 175.
Lazarus *v.* Shearer (2 Ala. 718), Agency, 24; Pres., 1.
Lea, In re (8 Ont. 222), Em. Dom., 1273.
Leach *v.* Fayetteville Com'rs (84 N. Car. 829), Mun. Aid, 388.
Leach *v.* Grand Trunk R. Co. (13 Ont. Pr. 467; see 13 Ont. Pr. 388), Discov., 10.
Leach *v.* Grand Trunk R. Co. (13 Ont. Pr. 388), Discov., 10.
Leach *v.* Hannibal & St. J. R. Co. (86 Mo. 27), Employés, 18; Evid., 240.
Leach *v.* Southeastern R. Co. (34 L. T. 134), Bagg., 50.
Leader *v.* Northern R. Co. (16 Am. & Eng. R. Cas. 287, 3 Ont. 92), Car. of M., 266.
Leahey *v.* Cass Ave. & F. G. R. Co. (97 Mo. 165, 10 S. W. Rep. 58), Evid., 176, 218.
Leahy *v.* Southern Pac. R. Co. (15 Am. & Eng. R. Cas. 230, 65 Cal. 150, 3 Pac. Rep. 622), Death, etc., 212, 221, 293, 297.
Leak *v.* Bear (80 N. Car. 271), Bills & N., 11.
Leak *v.* Georgia Pac. R. Co. (90 Ala. 161, 8 So. Rep. 245), Death, etc., 194.
Leak *v.* Rio Grande W. R. Co. (9 Utah 246, 33 Pac. Rep. 1045), App., 98; Cross., Inj. at, 218, 359; Trial, 160.
Leak *v.* Selma, R. & D. R. Co. (47 Ga. 345), Em. Dom., 775.
Leake *v.* Philadelphia (150 Pa. St. 643, 24 Atl. Rep. 351), St. Rys., 134, 146, 149, 152.
Leale *v.* Metropolitan El. R. Co. (41 N. Y. S. R. 904, 61 Hun 613, 16 N. Y. Supp. 419), Elev. Rys., 112, 148.
Leary *v.* Boston & A. R. Co. (23 Am. & Eng. R. Cas. 383, 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. Rep. 115), Employés, Inj. to, 269, 277.
Leas *v.* Pacific Exp. Co. (45 Mo. App. 598), Just. P., 8.
Leavenworth & D. M. R. Co. *v.* Platte County Court (42 Mo. 171), Mun. Aid, 143; Words & Ph., 133.
Leavenworth County *v.* Barnes (94 U. S. 70), Mun. Aid, 140, 393.
Leavenworth County *v.* Chicago, R. I. & P. R. Co. (22 Am. & Eng. R. Cas. 61, 25 Fed. Rep. 219), Mort., 287.
Leavenworth County Com'rs *v.* Chicago, R. I. & P. R. Co. (43 Am. & Eng. R. Cas. 485, 134 U. S. 688, 10 Sup. Ct. Rep. 708), Consol., 18, 20; Deeds of Tr., 20.
Leavenworth County Com'rs *v.* Hamlin (31 Kan. 105, 1 Pac. Rep. 237), Estop., 24.
Leavenworth County Com'rs *v.* Miller (7 Kan. 479, 1 Am. Ry. Rep. 259), Charges, 9; Counties, 2; Mun. Aid, 2, 5, 6, 8, 32, 413.
Leavenworth County Com'rs *v.* Sellew (99 U. S. 624), Mand., 32.
Leavenworth, L. & G. R. Co. *v.* Clemmans (14 Kan. 82), Tax., 347, 362.
Leavenworth, L. & G. R. Co. *v.* Cook (18 Kan. 261, 15 Am. Ry. Rep. 350), Fires, 31.
Leavenworth, L. & G. R. Co. *v.* Douglas County Com'rs (18 Kan. 169, 15 Am. Ry. Rep. 256), Mun. Aid, 269, 315, 342; Pl., 173.
Leavenworth, L. & G. R. Co. *v.* Maris (16 Kan. 333), Car. of M., 83, 207, 223, 224.
Leavenworth, L. & G. R. Co. *v.* Rice (10 Kan. 426), Cross., Inj. at, 135, 196; Dam., 27.
Leavenworth, L. & G. R. Co. *v.* United States (92 U. S. 733; affirming 1 McCrary (U. S.) 610), Land Grants, 10, 12.
Leavenworth, L. & G. R. Co. *v.* Van Riper (19 Kan. 317), Pl., 163.
Leavenworth, N. & S. R. Co. *v.* Curtan (56 Am. & Eng. R. Cas. 636, 51 Kan. 432, 33 Pac. Rep. 297), App., 35; Sts. & H., 136, 168, 214, 250, 284.
Leavenworth, N. & S. R. Co. *v.* Herley (45 Kan. 535, 26 Pac. Rep. 23), Em. Dom., 721.
Leavenworth, N. & S. R. Co. *v.* Meyer (50 Kan. 25, 31 Pac. Rep. 700), Em. Dom., 514, 786.
Leavenworth, N. & S. R. Co. *v.* Usher (42 Kan. 637, 22 Pac. Rep. 734), Em. Dom., 721, 897.
Leavenworth, N. & S. R. Co. *v.* Whitaker

(42 Kan. 634, 22 Pac. Rep. 733), Em. Dom., 390, 968.
Leavenworth, N. & S. R. Co. *v.* Wilkins (45 Kan. 674, 26 Pac. Rep. 16), Em. Dom., 457, 548.
Leavenworth, T. & S. W. R. Co. *v.* Forbes (31 Am. & Eng. R. Cas. 522, 37 Kan. 445, 15 Pac. Rep. 595), Animals, 50, 567.
Leavenworth, T. & S. W. R. Co. *v.* Jacobs (39 Kan. 204, 17 Pac. Rep. 791), Trial, 208.
Leavenworth, T. & S. W. R. Co. *v.* Paul (10 Am. & Eng. R. Cas. 490, 28 Kan. 816), Em. Dom., 591, 691, 827, 904; Witn., 28.
Leavitt *v.* Chicago & N. W. R. Co. (64 Wis. 228, 25 N. W. Rep. 4), Death, etc., 292.
Leavitt *v.* Terre Haute & I. R. Co. (5 Ind. App. 513, 31 N. E. Rep. 860, 32 N. E. Rep. 866), Animals, 35; Fright Teams, 1; Trial, 61.
Lebanon *v.* Lebanon & A. St. R. Co. (1 Pa. Dist. 563), Mun. Corp., 20.
Lebanon *v.* Ohio & M. R. Co. (77 Ill. 539), Tax., 257.
Lebanon & M. St. R. Co. *v.* Philadelphia & R. R. Co. (2 Pa. Dist. 835), Injunc., 5.
Leber *v.* Minneapolis & N. W. R. Co. (29 Minn. 256, 13 N. W. Rep. 31), Em. Dom., 464, 1075; Indep. Contr., 16; Witn., 124.
Le Blanc, In re (4 Abb. N. Cas. (N. Y.) 221, 14 Hun 8; affirmed in 75 N. Y. 598, mem.), Divid., 11.
Le Blanche *v.* London & N. W. R. Co. (L. R. 1 C. P. D. 286, 45 L. J. C. P. D. 521, 3 Ry. & C. T. Cas. xxiii), Car. of P., 123, 125.
Le Clair *v.* First Div. St. P. & P. R. Co. (20 Minn. 9, (Gil. 1), Employés, Inj. to, 101.
Le Conteur *v.* London & S. W. R. Co. (6 B. & S. 961, 35 L. J. Q. B. 40, 12 Jur. N. S. 266, L. R. 1 Q. B. 54, 14 W. R. 80, 13 L. T. 325), Bagg., 80; Car. of P., 520.
Ledoux *v.* Grand Trunk R. Co. (61 N. Y. 613), App., 102.
Ledsinger *v.* Central Line Steamers (75 Ga. 567), Parties, 6.
Leduke *v.* St. Louis & I. M. R. Co. (4 Mo. App. 485), Contrib. Neg., 100; Cross., Inj. at, 321; Negl., 102; Pl., 150.
Ledwich *v.* McKim (53 N. Y. 307; affirming 3 J. & S. 304), Bonds, 28.
Ledyard *v.* West St. & N. E. Elec. R. Co. (5 Wash. 64, 31 Pac. Rep. 417), Car. of P., 603.
Lee *v.* Barkhamsted (46 Conn. 213), Words & Ph., 219.
Lee *v.* Barrow Steamship Co. (6 N. Y. S. R. 285; appeal dismissed in 113 N. Y. 659, mem., 21 N. E. Rep. 415, 22 N. Y. S. R. 1000), Employés, Inj. to, 99.
Lee *v.* Brown (5 Biss. (U. S.) 154), Bills of L., 127.
Lee *v.* Bude & T. J. R. Co. (L. R. 6 C. P. 576, 40 L. J. C. P. 285, 24 L. T. 827, 19 W. R. 954), Stockh., 29.
Lee *v.* Burgess (9 Bush (Ky.) 652), Car. of M., 6; Words & Ph., 49.
Lee *v.* Central R. & B. Co. (86 Ga. 231, 12 S. E. Rep. 307), Employés, Inj. to, 189.
Lee *v.* Chicago, R. I. & P. R. Co. (45 Am. & Eng. R. Cas. 157, 80 Iowa 172, 45 N. W. Rep. 739), Cross., Inj. at, 137, 247, 276, 307.
Lee *v.* Credit Valley R. Co. (29 Grant's Ch. (U. C.) 480), Receiv., 177.
Lee *v.* Grand Trunk R. Co. (36 U. C. Q. B. 350), Bagg., 37.
Lee *v.* Jefferson County Sup'rs (62 How. Pr. (N. Y.) 201), Mun. Aid, 421.
Lee *v.* Lancashire & Y. R. Co. (L. R. 6 Ch. 527, 19 W. R. 729, 25 L. T. N. S. 77), Acc. & Sat., 6.
Lee *v.* Manhattan R. Co. (21 J. & S. (N. Y.) 260), Dam., 67, 74; Elev. Rys., 208.
Lee *v.* Marsh (28 How. Pr. (N. Y.) 275, 43 Barb. 102), Car. of L. S., 50; Lim. of Liab., 33.
Lee *v.* Michigan C. R. Co. (48 Am. & Eng. R. Cas. 356, 87 Mich. 574, 49 N. W. Rep. 909), Fel. Serv., 142, 143, 153, 487.
Lee *v.* Minneapolis & St. L. R. Co. (34 Minn. 225, 25 N. W. Rep. 399), Pl., 174.
Lee *v.* Minneapolis & St. L. R. Co. (20 Am. & Eng. R. Cas. 476, 66 Iowa 131, 23 N. W. Rep. 299), Animals, 90, 130, 248.
Lee *v.* Northwestern Union R. Co. (33 Wis. 222), Em. Dom., 872.
Lee *v.* Raleigh & G. R. Co. (72 N. Car. 236), Car. of L. S., 46.
Lee *v.* Sturges (46 Ohio St. 153, 19 N. E. Rep. 560), Tax., 103.
Lee *v.* Tebo & N. R. Co. (53 Mo. 178, 12 Am. Ry. Rep. 441), Em. Dom., 742, 889, 920.
Lee *v.* Troy Citizens' Gas-Light Co. (98 N. Y. 115), Contrib. Neg., 62.
Lee *v.* Union R. Co. (12 R. I. 383), St. Rys., 356.
Lee *v.* Victoria R. Co. (29 Grant's Ch. (U. C.) 110), Receiv., 52.
Leebrick *v.* Republican V. & S. W. R. Co. (41 Kan. 756, 21 Pac. Rep. 796), Animals, 90.
Leech *v.* Baldwin (5 Watts (Pa.) 446), Charges, 86.
Leech *v.* North Staffordshire R. Co. (29 L. J. M. C. 150, 8 W. R. 216), Bridges, 33, 42.
Lee County *v.* Rogers (7 Wall. (U. S.) 181), Mun. Aid, 318.
Leedom *v.* Plymouth R. Co. (5 Watts & S. (Pa.) 265), Receiv., 87.
Leeds *v.* Camden & A. R. Co. (53 N. J. L. 229, 23 Atl. Rep. 168), Em. Dom., 462.
Leeds *v.* Metropolitan Gas-Light Co. (90 N. Y. 26), Dam., 74.
Leeds & T. R. Co. *v.* Fearnley (4 Ex. 26, 5 Railw. Cas. 644, 7 D. & L. 68, 18 L. J. Ex. 330), Subscr., 97, 161.
Leeds, B. & H. R. Co. *v.* Armley (25 J. P. 711, 2 Ry. & C. T. Cas. 19), Tax., 364.
Leep *v.* St. Louis, I. M. & S. R. Co. (57 Am. & Eng. R. Cas. 1, 58 Ark. 407, 25 S. W. Rep. 75), Employés, 18.
Lee, R. E., The (2 Abb. (U. S.) 49), Bagg., 81.
Lees *v.* Lancashire & Y. R. Co. (1 Ry. & C. T. Cas. 352), Discrim., 6, 15.
Lees *v.* Philadelphia & R. R. Co. (154 Pa. St. 46, 25 Atl. Rep. 1041), Death, etc., 194.
Leeson *v.* Holt (1 Stark. 186), Lim. of Liab., 13.
Lefurgy *v.* New York & N. R. Co. (21 N. Y. S. R. 113, 50 Hun 606, mem., 3 N. Y. Supp. 302), Mand., 14.

Legendre *v.* Grand Trunk R. Co. (6 Low. Can. 105), Proc., 40.
Leggett *v.* Rome, W. & O. R. Co. (41 Hun 80, 2 N. Y. S. R. 312), Fences, 104.
Leggett *v.* Western N. Y. & P. R. Co. (143 Pa. St. 39, 21 Atl. Rep. 996), Car. of P., 420.
Leggott *v.* Great Northern R. Co. (45 L. J. Q. B. D. 557, 24 W. R. 784, L. R. 1 Q. B. D. 599, 35 L. T. 334), Death, etc., 11, 164.
Lehey *v.* Hudson River R. Co. (4 Robt. (N. Y.) 204), Death, etc., 78; Fences, 58.
Lehigh & W. B. Coal Co. *v.* Delaware & H. Canal Co. (1 Pa. Dist. 737), Injunc., 9.
Lehigh & W. B. Coal Co. *v.* Lear (Pa.) (32 Am. & Eng. R. Cas. 74, 9 Atl. Rep. 267), Cross., Inj. at, 277, 295; Fly. Switch, 3; Trial, 186.
Lehigh C. & N. Co. *v.* Central R. Co. (29 N. J. Eq. 252, 18 Am. Ry. Rep. 207), Insolv., 7.
Lehigh C. & N. Co. *v.* Central R. Co. (34 N. J. Eq. 88), Mort., 228.
Lehigh C. & N. Co. *v.* Central R. Co. (9 Am. & Eng. R. Cas. 512, 35 N. J. Eq. 349), Direct., 6.
Lehigh C. & N. Co. *v.* Central R. Co. (12 Am. & Eng. R. Cas. 416, 35 N. J. Eq. 379), Em. Dom., 437.
Lehigh C. & N. Co. *v.* Central R. Co. (9 Am. & Eng. R. Cas. 479, 35 N. J. Eq. 426), Receiv., 50.
Lehigh C. & N. Co. *v.* Central R. Co. (38 N. J. Eq. 175), Receiv., 127.
Lehigh C. & N. Co. *v.* Central R. Co. (41 N. J. Eq. 167, 3 Atl. Rep. 134; affirmed in 43 N. J. Eq. 669, 12 Atl. Rep. 188), Receiv., 51, 62.
Lehigh C. & N. Co. *v.* Central R. Co. (35 Am. & Eng. R. Cas. 2, 42 N. J. Eq. 591, 8 Atl. Rep. 648), Injunc., 39.
Lehigh C. & N. Co. *v.* Central R. Co. (43 Hun 546, 7 N. Y. S. R. 270), Receiv., 1.
Lehigh Iron Co. *v.* Rupp (7 Am. & Eng. R. Cas. 25, 100 Pa. St. 95, 12 W. N. C. 47), Death, etc., 48, 87, 404.
Lehigh Valley R. Co. *v.* Brandtmaier (113 Pa. St. 610, 6 Atl. Rep. 238), Cross., Inj. at, 119.
Lehigh Valley R. Co. *v.* Greiner (28 Am. & Eng. R. Cas. 397, 113 Pa. St. 600, 6 Atl. Rep. 246), Employés, Inj. to, 374.
Lehigh Valley R. Co. *v.* Hall (61 Pa. St. 361), Cross., Inj. at, 247, 258.
Lehigh Valley R. Co. *v.* Lazarus (28 Pa. St. 203), Em. Dom., 702.
Lehigh Valley R. Co. *v.* McFarlan (11 Am. & Eng. R. Cas. 509, 43 N. J. L. 605), Adv. Poss., 10; Em. Dom., 416, 984.
Lehigh Valley R. Co. *v.* McFarlan (30 N. J. Eq. 180; reversed on other points in 31 N. J. Eq. 706), Easem., 8; Injunc., 3.
Lehigh Valley R. Co. *v.* McFarlan (31 N. J. Eq. 706), Morris C. & B. Co., 1, 2, 3.
Lehigh Valley R. Co *v.* McKeen (90 Pa. St. 122), Fires, 320 321.
Lehigh Valley R. Co. *v.* Mellon (104 U. S. 112), Pat. for Inv., 9, 16.
Lehigh Valley R. Co. *v.* Orange Water Co. (42 N. J. Eq. 205, 7 Atl. Rep. 659), Cross., St. & H., 1, 85.
Lehigh Valley R. Co. *v.* Pennsylvania (53 Am. & Eng. R. Cas. 679, 145 U. S. 192, 12 Sup. Ct. Rep. 806), Int. Com., 10.
Lehigh Valley R. Co. *v.* Society, etc. (30 N. J. Eq. 145; affirmed in 32 N. J. Eq. 329), Injunc., 1.
Lehigh Valley R. Co. *v.* Trone (28 Pa. St. 206), Em. Dom., 711.
Lehigh Valley R. Co. *v.* Woodring (116 Pa. St. 513, 9 Atl. Rep. 58), Assign., 4.
Lehman *v.* Brooklyn City R. Co. (14 N. Y. S. R. 575, 47 Hun 355), Actions, 1.
Lehman *v.* Central R. & B. Co. (4 Woods (U. S.) 560, 12 Fed. Rep. 595), Bills of L., 2, 108.
Lehman *v.* Louisiana Western R. Co. (37 La. Ann. 705), Car. of P., 230, 234, 236, 247; Children, Inj. to, 85.
Lehmann *v.* Southern Pac. Co. (3 Int. Com. Rep. 80, 4 Int. Com. Com. 1), Int. Com., 112, 116.
Lehmann *v.* Texas & P. R. Co. (3 Int. Com. Rep. 706, 5 Int. Com. Com. 44), Int. Com., 36, 71, 132.
Lehmicke *v.* St. Paul, S. & T. F. R. Co. (19 Minn. 464 (Gil. 406), 10 Am. Ry. Rep. 296), Em. Dom., 546, 625, 890; Witn., 118.
Lehnertz *v.* Minneapolis & St. L. R. Co. (15 Am. & Eng. R. Cas. 370, 31 Minn. 219, 17 N. W. Rep. 376), Cross., Inj. at, 332.
Lehr *v.* Steinway & H. P. R. Co. (118 N. Y. 556, 23 N. E. Rep. 889, 30 N. Y. S. R. 1; affirming 44 Hun 627, 8 N. Y. S. R. 813), Car. of P., 127; St. Rys., 377, 430.
Leib *v.* Electric Merchandise Co. (48 Fed. Rep. 722; affirmed in 54 Fed. Rep. 385, 9 U. S. App. 509, 4 C. C. A. 381), Pat. for Inv., 36.
Leibengut *v.* Louisville, N. A. & St. L. R. Co. (14 Am. & Eng. R. Cas. 349, 103 Ill. 431), Em. Dom., 302.
Leiber *v.* Chicago, M. & St. P. R. Co. (84 Iowa 97, 50 N. W. Rep. 547), Fires, 356; Witn., 31.
Leiber *v.* Union Pac. R. Co. (49 Iowa 688), Attach., 35.
Leigh *v.* Mobile & O. R. Co. (58 Ala. 165), Car. of M., 391; Sales, 8.
Leigh *v.* Omaha St. R. Co. (36 Neb. 131, 54 N. W. Rep. 134), Employés, Inj. to, 101, 661.
Leishmann *v.* London, B. & S. C. R. Co. (23 L. T. 712, 19 W. R. 106), Negl., 69.
Leisse *v.* St. Louis & I. M. R. Co. (72 Mo. 561; affirming 2 Mo. App. 105, 5 Mo. App. 585), Em. Dom., 70, 780, 977, 988.
Leisy *v.* Hardin (135 U. S. 100, 10 Sup. Ct. Rep. 681), Int. Com., 224.
Leitch *v.* Grand Trunk R. Co. (13 Ont. Pr. 369, 12 Ont. Pr. 671), Discov., 10; Evid., 262.
Lejee *v.* Continental Pass. R. Co. (10 Phila. (Pa.) 362), Charters, 84; Franch., 10.
Leland *v.* Chicago, M. & St. P. R. Co. (Iowa) (21 Am. & Eng. R. Cas. 108, 23 N. W. Rep. 390), Car. of M., 367; Evid., 160; Warch., 10.
Leloup *v.* Port of Mobile (127 U. S. 640, 8 Sup. Ct. Rep. 1380), Int. Com., 213; Mun. Corp., 6.
Le Mars *v.* Iowa Falls & S. C. R. Co. (4 McCrary (U. S.) 218), Rem. of C., 40.
Le May *v.* Canadian Pac. R. Co. (44 Am. &

Eng. R. Cas. 627, 17 Ont. App. 293; affirming 18 Ont. 314), Employés, Inj. to, 64.
Le May *v.* Missouri Pac. R. Co. (105 Mo. 361, 16 S. W. Rep. 1049), Death, etc., 139, 368; Tresp., Inj. to, 11.
Lemke *v.* Chicago, M. & St. P. R. Co. (39 Wis. 449, 13 Am. Ry. Rep. 406), Car. of M., 83, 84, 86.
Lemmon *v.* Chicago & N. W. R. Co. (32 Iowa 151, 10 Am. Ry. Rep. 32), Animals, 141; Fences, 86.
Lemon *v.* Chanslor (68 Mo. 340), Car. of P., 98; Passes, 11.
Lemon *v.* Chicago & G. T. R. Co. (59 Mich. 618, 26 N. W. Rep. 791), Animals, 180.
Lemon *v.* Pullman Palace Car Co. (52 Fed. Rep. 262), Sleep. Car Cos., 5, 12.
Lemont *v.* New York, L. E. & W. R. Co. (28 Fed. Rep. 920), Car. of M., 297.
Lemont *v.* Washington & G. R. Co. (1 Am. & Eng. R. Cas. 263, 1 Mackey (D. C.) 180), St. Rys., 522, 530.
Lendberg *v.* Brotherton Iron Min. Co. (75 Mich. 84, 42 N. W. Rep. 675), Evid., 170.
L'Engle *v.* Florida C. & W. R. Co. (21 Fla. 353), Judgm., 2.
L'Engle *v.* Florida C. R. Co. (14 Fla. 266), Receiv., 173.
Lenix *v.* Missouri Pac. R. Co. (76 Mo. 86), Contrib. Neg., 87; Cross., Inj. at, 264; Employés, Inj. to, 326.
Lennon *v.* New York C. & H. R. R. Co. (48 N. Y. S. R. 806, 65 Hun 578, 20 N. Y. Supp. 557), Cross., Inj. at, 351; Witn., 34.
Lennox *v.* Knox & L. R. Co. (62 Me. 322), Em. Dom., 840.
Lent *v.* Burlington & M. R. R. Co. (11 Neb. 201, 8 N. W. Rep. 431), Vend. & P., 6.
Lent *v.* New York & M. R. Co. (130 N. Y. 504, 28 Abb. N. Cas. 478, 29 N. E. Rep. 988, 42 N. Y. S. R. 592; reversing 55 Hun 180, 28 N. Y. S. R. 82, 7 N. Y. Supp. 729), Em. Dom., 856.
Lent *v.* New York C. & H. R. R. Co. (44 Am. & Eng. R. Cas. 373, 120 N. Y. 467, 24 N. E. Rep. 653, 31 N. Y. S. R. 538; affirming 22 J. & S. 317, 8 N. Y. S. R. 93), Car. of P., 222, 352; Contrib. Neg., 19.
Leo *v.* St. Paul, M. & M. R. Co. (12 Am. & Eng. R. Cas. 35, 30 Minn. 438, 15 N. W. Rep. 872), Car. of M., 653.
Leo *v.* Union Pac. R. Co. (17 Fed. Rep. 273), Corp., 11.
Leo *v.* Union Pac. R. Co. (16 Am. & Eng. R. Cas. 452, 19 Fed. Rep. 283), Stockh., 110, 125.
Leo *v.* Union Pac. R. Co. (22 Blatchf. (U. S.) 22), Injunc., 16.
Leominster *v.* Fitchburg & W. R. Co. (7 Allen (Mass.) 38), Arb., 7.
Leonard *v.* American Exp. Co. (26 U. C. Q. B. 533), Car. of M., 484.
Leonard *v.* Canadian Pac. R. Co. (15 Quebec L. R. 93), Fires, 32.
Leonard *v.* Chicago & A. R. Co. (2 Int. Com. Rep. 599, 3 Int. Com. Com. 241), Int. Com., 1, 45.
Leonard *v.* Chicago & A. R. Co. (54 Mo. App. 203), Car. of L. S., 14, 21, 60, 83; Contr., 22; Lim. of Liab., 27.
Leonard *v.* Collins (70 N. Y. 90), Employés, Inj. to, 9.
Leonard *v.* Columbia Steam Nav. Co. (84 N. Y. 48), Death, etc., 110, 111, 115.
Leonard *v.* Fitchburg R. Co. (28 Am. & Eng. R. Cas. 105, 143 Mass. 307, 9 N. E. Rep. 667), Car. of L. S., 143, 160.
Leonard *v.* New York C. & H. R. R. Co. (10 J. & S. (N. Y.) 225), Cross., Inj. at, 326; Negl., 81.
Leonard *v.* New York C. & H. R. R. Co. (12 J. & S. (N. Y.) 575, mem.; affirmed in 80 N. Y. 659, mem.), Evid., 243.
Leonard *v.* Southern Pac. R. Co. (21 Oreg. 555, 28 Pac. Rep. 887), App., 16; Evid., 56.
Leonard *v.* Union Pac. R. Co. (1 Int. Com. Rep. 627, 1 Int. Com. Com. 185), Int. Com., 151.
Leopold *v.* Delaware & H. Canal Co. (49 N. Y. S. R. 459, 66 Hun 628, 21 N. Y. Supp. 100), New Tr., 24; Trial, 70.
Lepp *v.* St. Louis, I. M. & S. R. Co. (29 Am. & Eng. R. Cas. 242, 87 Mo. 139), Animals, 128, 487.
Le Roy *v.* East Saginaw City R. Co. (18 Mich. 233), Tax., 149.
Leroy & C. V. A. L. R. Co. *v.* Small (46 Am. & Eng. R. Cas. 554, 46 Kan. 300, 26 Pac. Rep. 695), Em. Dom., 228.
Le Roy & W. R. Co. *v.* Anderson (41 Kan. 528, 21 Pac. Rep. 588), New Tr., 101.
Le Roy & W. R. Co. *v.* Butts (36 Am. & Eng. R. Cas. 671, 40 Kan. 159, 19 Pac. Rep. 625), Em. Dom., 607; Evid., 173.
Le Roy & W. R. Co. *v.* Hawk (36 Am. & Eng. R. Cas. 665, 39 Kan. 638, 18 Pac. Rep. 943), Em. Dom., 593; Witn., 160.
Le Roy & W. R. Co. *v.* Hollis (39 Kan. 646, 18 Pac. Rep. 947), Em. Dom., 593, 906.
Le Roy & W. R. Co. *v.* Ross (36 Am. & Eng. R. Cas. 653, 40 Kan. 598, 2 L. R. A. 217, 20 Pac. Rep. 197), Em. Dom., 587, 613, 696, 701, 702, 735; Fires, 263; Witn., 160.
Le Sage *v.* Great Western R. Co. (1 Daly (N. Y.) 306), Car. of M., 630.
Lesan *v.* Maine C. R. Co. (23 Am. & Eng. R. Cas. 245, 77 Me. 85), Cross., Inj. at, 12, 75, 84, 253, 337.
Leseman *v.* South Carolina R. Co. (4 Rich. (So. Car.) 413), Animals, 202.
Lesher *v.* Karshner (47 Ohio St. 302, 24 N. E. Rep. 882), Subscr., 15, 210.
Lesher *v.* Sherwin (86 Ill. 420), Forc. Ent., 1.
Lesinsky *v.* Great Western Despatch (10 Mo. App. 134), Car. of M., 565, 705.
Lesinsky *v.* Great Western Dispatch (13 Mo. App. 575), Car. of M., 239, 565, 566, 778; Negl., 73.
Leslie *v.* Canada C. R. Co. (44 U. C. Q. B. 21), Trover, 9, 18.
Leslie *v.* Lorillard (110 N. Y. 519, 18 N. E. Rep. 363), Stockh., 95.
Leslie *v.* Wabash, St. L. & P. R. Co. (26 Am. & Eng. R. Cas. 229, 88 Mo. 50), Car. of P., 106, 151, 423; Pl., 140.
L'Esperance *v.* Great Western R. Co. (14 U. C. Q. B. 173), Flood. Lds., 49.
Lessard *v.* Northern Pac. R. Co. (81 Wis. 189, 51 N. W. Rep. 321), Employés, Inj. to, 523.
Lester *v.* Delaware, L. & W. R. Co. (55 N.

Y. S. R. 923, 73 Hun 398, 26 N. Y. Supp. 206), Trover, 10.
Lester *v.* Georgia, C. & N. R. Co. (90 Ga. 802, 17 S. E. Rep. 113), Consol., 36; Estop., 5.
Lester *v.* Kansas City, St. J. & C. B. R. Co. (60 Mo. 265, 9 Am. Ry. Rep. 219), Fires, 174, 217, 237.
Le Tailleur *v.* Southeastern R. Co. (L. R. 3 C. P. D. 18), Jurisd., 5.
Lett *v.* St. Lawrence & O. R. Co. (21 Am. & Eng. R. Cas. 165, 11 Ont. App. 1), Death, etc., 11.
Letterkenny R. Co., In re (4 Ir. R. Eq. 538), Reorg., 19.
Leuffer *v.* Pennsylvania & D. R. Co. (11 Phila. (Pa.) 548), Employés, Inj. to, 1.
Levee Com'rs *v.* Johnson (66 Miss. 248, 6 So. Rep. 199), Em. Dom., 433.
Levene *v.* Great Western R. Co. (18 L. T. 295), Car. of M., 700.
Levering *v.* Philadelphia, G. & N. R. Co. (8 Watts & S. (Pa.) 459), Em. Dom., 414, 852; Words & Ph., 148.
Levering *v.* Union T. & I. Co. (42 Mo. 88), Bills of L., 79, 80; Car. of M., 458, 471; Lim. of Liab., 30.
Levesque *v.* New Brunswick R. Co. (29 New Brun. 588), Fences, 36.
Levey *v.* New York C. & H. R. R. Co. (53 N. Y. S. R. 579, 4 Misc. 415; affirmed in 144 N. Y. 649, 39 N. E. Rep. 493), Agency, 16; Contr., 21; Officers, 13.
Levi *v.* Lynn & B. R. Co. (11 Allen (Mass.) 300), App., 107; St. Rys., 310.
Levick *v.* Epsom & L. R. Co. (1 L. T. 60), Em. Dom., 1178.
Levisee *v.* Shreveport City R. Co. (27 La. Ann. 641), Pres., 13.
Leviston *v.* Junction R. Co. (7 Ind. 597), Em. Dom., 984.
Levoy *v.* Midland R. Co. (15 Am. & Eng. R. Cas. 478, 3 Ont. 623), Negl., 74; Sts. & H., 339.
Levy *v.* Campbell (Tex.) (19 S. W. Rep. 438), Car. of P., 142; Derailm., 6; Evid., 46.
Levy *v.* Dry Dock, E. B. & B. R. Co. (35 N. Y. S. R. 769, 58 Hun 610, 12 N. Y. Supp. 485), Children, Inj. to, 63, 116.
Levy *v.* Louisville & N. R. Co. (35 La. Ann. 615), Car. of M., 166.
Levy *v.* Pontchartrain R. Co. (23 La. Ann. 477), Car. of M., 454.
Levy *v.* Southern Exp. Co. (4 So. Car. 234), Exp. Cos., 28, 70, 72, 73.
Lewey's Island R. Co. *v.* Bolton (48 Me. 451), Stock, 5; Subscr., 50, 62, 179.
Lewis *v.* Albemarle & R. R. Co. (95 N. Car. 179), Employés, 13; Officers, 10.
Lewis *v.* Andrews (6 N. Y. Supp. 247, 24 N. Y. S. R. 1001; affirmed in 127 N. Y. 673, 3 Silv. App. 481, 38 N. Y. S. R. 808, 27 N. E. Rep. 1044), Tender, 3.
Lewis *v.* Baltimore & O. R. Co. (38 Md. 588, 10 Am. Ry. Rep. 521), Contrib. Neg., 4, 24, 48; Cross., Inj. at, 310; Negl., 57.
Lewis *v.* Barbour County Com'rs (1 McCrary (U. S.) 458), Mun. Aid, 369.
Lewis *v.* Barbour County Com'rs (12 Am. & Eng. R. Cas. 615, 105 U. S. 739), Mun. Aid, 378.
Lewis *v.* Bourbon County Com'rs (12 Kan. 186), Mun. Aid, 74, 108, 133, 143, 148, 184, 215, 356.
Lewis *v.* Brooklyn El. R. Co. (27 N. Y. Supp. 889, 7 Misc. 286), Witn., 167.
Lewis *v.* Chicago, M. & St. P. R. Co. (57 Iowa 127, 10 N. W. Rep. 336), Fires, 202.
Lewis *v.* Chicago, St. P. & K. C. R. Co. (35 Fed. Rep. 639), Pl., 62.
Lewis *v.* Chicago, S. F. & C. R. Co. (49 Fed. Rep. 708), Constr. Rys., 23, 58, 64, 65.
Lewis *v.* Clarendon (5 Dill. (U. S.) 329), Consol., 32, 34; Estop., 5; Mun. Aid, 75, 269, 312.
Lewis *v.* Eastern R. Co. (40 N. H. 187), Cross., Inj. at, 16.
Lewis *v.* Eastern R. Co. (60 N. H. 187), Evid., 62.
Lewis *v.* Flint & P. M. R. Co. (18 Am. & Eng. R. Cas. 263, 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. Rep. 744), Car. of P., 128; Dam., 3.
Lewis *v.* Flint & P. M. R. Co. (56 Mich. 638, 23 N. W. Rep. 469), App., 145.
Lewis *v.* Galena & C. U. R. Co. (40 Ill. 281), Car. of M., 309.
Lewis *v.* Galveston, H. & S. A. R. Co. (39 Am. & Eng. R. Cas. 372, 73 Tex. 504, 11 S. W. Rep. 528), Contrib. Neg., 71; Fly. Switch, 1; Pl., 24.
Lewis *v.* Germantown, N. & P. R. Co. (16 Phila. (Pa.) 608), Philadelphia, G. & N. R. Co., 1, 2.
Lewis *v.* Germantown, N. & P. R. Co. (16 Phila. (Pa.) 621), Em. Dom., 105, 110.
Lewis *v.* Great Western R. Co. (29 L. J. Ex. 425, 5 H. & N. 867), Car. of M., 486; Lim. of Liab., 8.
Lewis *v.* Great Western R. Co. (L. R. 3 Q. B. D. 195, 47 L. J. Q. B. D. 131, 37 L. T. 774, 26 W. R. 255, 15 Am. Ry. Rep. 601, 3 Ry. & C. T. Cas. xxviii), Car. of M., 479; Lim. of Liab., 7.
Lewis *v.* Hollahan (103 Pa. St. 425), Death, etc., 371.
Lewis *v.* Lee County (66 Ala. 480), Mun. Aid, 406.
Lewis *v.* London, C. & D. R. Co. (43 L. J. Q. B. 8, L. R. 9 Q. B. 66, 22 W. R. 153, 29 L. T. 397), Car. of P., 230, 261.
Lewis *v.* Ludwick (6 Coldw. (Tenn.) 368), Car. of M., 16, 17; War, 10.
Lewis *v.* McAfee (32 Ga. 465), Car. of Slaves, 3.
Lewis *v.* Meier (4 McCrary (U. S.) 286, 14 Fed. Rep. 311), Cloud on T., 2; Direct., 38; Eq., 3.
Lewis *v.* New York & N. E. R. Co. (158 Mass. 73, 26 N. E. Rep. 431), Employés, Inj. to, 224.
Lewis *v.* New York C. R. Co. (49 Barb. (N. Y.) 330), Tickets & F., 1, 117, 132.
Lewis *v.* New York, L. E. & W. R. Co. (123 N. Y. 496, 26 N. E. Rep. 357, 34 N. Y. S. R. 373; affirming 52 Hun 614, 1 Silv. Sup. Ct. 393, 24 N. Y. S. R. 435, 5 N. Y. Supp. 313), Cross., Inj. at, 111, 158.
Lewis *v.* New York Sleeping Car Co. (28 Am. & Eng. R. Cas. 148, 143 Mass. 267, 56 Am. Rep. 852, n., 9 N. E. Rep. 615), Sleep. Car Cos., 26, 28.
Lewis *v.* Northern R. Co. (139 Mass. 294, 1 N. E. Rep. 546), Proc., 16.

Lewis v. Puget Sound Shore R. Co. (4 Wash. 188, 29 Pac. Rep. 1061), Death, etc., 204.
Lewis v. Richmond & D. R. Co. (25 So. Car. 249), Car. of L. S., 108.
Lewis v. St. Louis & I. M. R. Co. (59 Mo. 495, 8 Am. Ry. Rep. 450), Abate., 5; App., 147; Excava., 3; Fel. Serv., 62, 73, 213, 351; Negl., 21.
Lewis v. St. Paul & S. C. R. Co. (20 Minn. 260), Car. of M., 308.
Lewis v. St. Paul, M. & M. R. Co. (S. Dak.) (57 Am. & Eng. R. Cas. 612, 58 N. W. Rep. 580), Em. Dom., 234, 235, 241, 493, 786, 866, 1019.
Lewis v. Seifert (116 Pa. St. 628, 9 Cent. Rep. 751, 11 Atl. Rep. 514, 20 W. N. C. 145), Fel. Serv., 73, 204, 218, 427; Witn., 179.
Lewis v. Shreveport (12 Am. & Eng. R. Cas. 683, 108 U. S. 282, 2 Sup. Ct. Rep. 634), Mun. Aid, 329.
Lewis v. South Pac. Coast R. Co. (66 Cal. 209, 5 Pac. Rep. 79), Trial, 11.
Lewis v. Turner (40 Ga. 416), Western & A. R. Co., 2.
Lewis v. Vicksburg & M. R. Co. (67 Miss. 82, 6 So. Rep. 773), Tax., 182, 327.
Lewis v. Washington & G. R. Co. (6 Mackey (D. C.) 556), Lim. of Ac., 13.
Lewis v. Western R. Co. (11 Metc. (Mass.) 509), Car. of M., 257.
Lewis v. Wilmington & M. R. Co. (11 Rich. (So. Car.) 91), Em. Dom., 426.
Lewke v. Dry Dock, E. B. & B. R. Co. (46 Hun 283, 11 N. Y. S. R. 510), Evid., 177.
Lewless v. Detroit, G. H. & M. R. Co. (65 Mich. 292, 32 N. W. Rep. 790), Sts. & H., 418.
Lexington v. Butler (14 Wall. (U. S.) 282), Lim. of Ac., 41; Mun. Aid, 344, 354, 368; Rem. of C., 42.
Lexington v. Lewis (10 Bush (Ky.) 677), Death, etc., 148; Negl., 1, 4.
Lexington & B. S. R. Co. v. Ford Plate Glass Co. (84 Ind. 516), Attach., 65.
Lexington & B. S. R. Co. v. Goodman (5 Abb. Pr. (N. Y.) 493, 25 Barb. 469, 15 How. Pr. 85), Parties, 23.
Lexington & O. R. Co. v. Applegate (8 Dana (Ky.) 289), Sts. & H., 107.
Lexington & O. R. Co. v. Bridges (7 B. Mon. (Ky.) 556), Direct., 64; Stockh., 54.
Lexington & O. R. Co. v. Kidd (7 Dana (Ky.) 245), Trover, 3, 4; Witn., 14.
Lexington & O. R. Co. v. Ormsby (7 Dana (Ky.) 276), Em. Dom., 224.
Lexington & St. L. R. Co. v. Mockbee (63 Mo. 348), Em. Dom., 850.
Lexington & W. C. R. Co. v. Chandler (13 Met. (Mass.) 311), By-laws, 3; Subscr., 187.
Lexington & W. C. R. Co. v. Elwell (8 Allen (Mass.) 371), Officers, 16.
Lexington & W. C. R. Co. v. Fitchburg R. Co. (9 Gray (Mass.) 226), Leases, 76.
Lexington & W. C. R. Co. v. Fitchburg R. Co. (14 Gray (Mass.) 266), Charters, 74; Connect. L., 3; Ry. Com'rs, 9.
Lexington & W. C. R. Co. v. Staples (5 Gray (Mass.) 520), Subscr., 185.
Leyden v. New York C. & H. R. R. Co. (55 Hun (N. Y.) 114, 28 N. Y. S. R. 72, 8 N. Y. Supp. 187), Animals, 109; Fences, 81.
Libby v. Maine C. R. Co. (58 Am. & Eng. R. Cas. 81, 85 Me. 34, 26 Atl. Rep. 943), Car. of Mails, 18; Car. of P., 54, 138, 142, 149, 153, 163, 166, 176; Constr. Rys., 4; Culverts, 14; Flood. Lds., 22.
Libby v. Scherman (146 Ill. 540, 34 N. E. Rep. 801), App., 126; Fel. Serv., 218.
Liberty Female College Assoc. v. Watkins (70 Mo. 13), Stockh., 42.
Libmann v. Manhattan R. Co. (59 Hun 428, 36 N. Y. S. R. 639, 26 Abb. N. Cas. 423, 13 N. Y. Supp. 378), Elev. Rys., 173.
License Cases (5 How. (U. S.) 504), Intox'ing L., 1.
Lichtenhein v. Boston & P. R. Co. (11 Cush. (Mass.) 70), Car. of M., 323.
Liddle v. Keokuk, Mt. P. & M. R. Co. (23 Iowa 378), Animals, 645.
Liddy v. St. Louis R. Co. (40 Mo. 506), St. Rys., 268, 451, 481.
Lieberman v. Chicago & S. S. R. T. R. Co. (51 Am. & Eng. R. Cas. 581, 141 Ill. 140, 30 N. E. Rep. 544), Elev. Rys., 1, 43, 46; Em. Dom., 277, 365, 529, 553; Sts. & H., 260.
Liebfritz v. Dubuque St. R. Co. (48 Iowa 709), Agency, 69.
Lienan v. Dinsmore (3 Daly (N. Y.) 365, 10 Abb. Pr. N. S. 209, 41 How. Pr. 97), Exp. Cos., 21, 61.
Liermann v. Chicago, M. & St. P. R. Co. (82 Wis. 286, 52 N. W. Rep. 91), Cross., Inj. at, 205; Death, etc., 396.
Ligare v. Chicago (139 Ill. 46, 28 N. E. Rep. 934), Em. Dom., 47, 178; Mun. Corp., 7, 13; Sts. & H., 75, 98.
Light v. Woodstock & L. E. R. & H. Co. (13 U. C. Q. B. 216), Pl., 91.
Light v. Woodstock & L. E. R. & H. Co. (7 Grant's Ch. (U. C.) 172), Stockh., 128.
Lighthouse v. Chicago, M. & St. P. R. Co. (S. Dak.) (54 N. W. Rep. 320), Animals, 554.
Lightner v. Boston & A. R. Co. (1 Low. (U. S.) 338), Consol., 32.
Lightner v. Brooks (2 Cliff. (U. S.) 287), Contr., 106.
Lightner v. Kimball (1 Low. (U. S.) 211), Pat. for Inv., 17.
Ligon v. Missouri Pac. R. Co. (3 Tex. App. (Civ. Cas.) 17), App., 2; Car. of M., 803.
Lilienthal v. Southern Cal. R. Co. (56 Fed. Rep. 701), Pub. Lds., 38, 42.
Lillis v. St. Louis, K. C. & N. R. Co. (64 Mo. 464), Eject. Pass., 9, 54, 65; Tickets & F., 101.
Lillstrom v. Northern Pac. R. Co. (53 Minn. 464, 55 N. W. Rep. 624), Death, etc., 224.
Lilly v. Charlotte, C. & A. R. Co. (32 So. Car. 142, 10 S. E. Rep. 932), Death, etc., 130.
Lilly v. New York C. & H. R. R. Co. (107 N. Y. 566, 14 N. E. Rep. 503, 12 N. Y. S. R. 468; reversing 37 Hun 644, mem.), Employés, Inj. to, 717.
Lima & H. F. R. Co., In re (52 N. Y. S. R. 186, 22 N. Y. Supp. 967), Costs, 13.
Liman v. Pennsylvania R. Co. (24 N. Y. Supp. 824, 54 N. Y. S. R. 245, 4 Misc. 539), Dam., 58.

Limburger *v.* Westcott (49 Barb. (N. Y.) 283), Bagg., 99.
Limekiller *v.* Hannibal & St. J. R. Co. (19 Am. & Eng. R. Cas. 184, 33 Kan. 83, 5 Pac. Rep. 401), Death, etc., 98.
Limerick & E. R. Co. *v.* Athenry & E. R. Co. (9 Ir. C. L. 131), Em. Dom., 1174.
Limerick & K. R. Co. *v.* Waterford & L. R. Co. (5 Ry. & C. T. Cas. 87), Leases, 136.
Limerick & W. R. Co. *v.* Fraser (4 Bing. 394, 1 M. & P. 23), Costs, 6.
Limestone County Com'rs Court *v.* Rather (48 Ala. 433), Mun. Aid, 406, 440.
Liming *v.* Illinois C. R. Co. (45 Am. & Eng. R. Cas. 581, 81 Iowa 246, 47 N. W. Rep. 66), Fires, 99, 164.
Lin *v.* Terre Haute & I. R. Co. (10 Mo. App. 125), Bagg., 23, 26, 60.
Linch *v.* Pittsburg Traction Co. (153 Pa. St. 102, 25 Atl. Rep. 621), Trial, 108.
Lincoln *v.* Cambria Iron Co. (103 U. S. 412), Mun. Aid, 391.
Lincoln *v.* Rutland & B. R. Co. (24 Vt. 639), Interpl., 2.
Lincoln *v.* St. Louis, I. M. & S. R. Co. (75 Mo. 27), Animals, 629; Cross., St. & H., 10.
Lincoln *v.* Saratoga & S. R. Co. (23 Wend. (N. Y.) 425), Dam., 73, 86, 88; Witn., 121.
Lincoln *v.* Walker (18 Neb. 244, 20 N. W. Rep. 113), Contrib. Neg., 105.
Lincoln Board of Trade *v.* Burlington & M. R. R. Co. (2 Int. Com. Rep. 95, 2 Int. Com. Com. 147), Int. Com., 42, 62.
Lincoln Board of Trade *v.* Missouri Pac. R. Co. (2 Int. Com. Rep. 98, 2 Int. Com. Com. 155), Int. Com., 120.
Lincoln Board of Trade *v.* Union Pac. R. Co. (2 Int. Com. Rep. 101, 2 Int. Com. Com. 229), Int. Com., 170.
Lincoln County Court *v.* Louisville & N. R. Co. (Ky.) (7 Am. & Eng. R. Cas. 320), Tax., 62.
Lincoln Creamery *v.* Union Pac. R. Co. (3 Int. Com. Rep. 794, 5 Int. Com. Com. 156), Int. Com., 51.
Lincoln Nat. Bank *v.* Portland (43 Am. & Eng. R. Cas. 463, 82 Me. 99, 19 Atl. Rep. 102), Reorg., 7.
Lincoln Paper Mills Co. *v.* St. Catharines & N. C. R. Co. (19 Ont. 106), Em. Dom., 1280.
Lincoln Rapid Transit Co. *v.* Nichols (56 Am. & Eng. R. Cas. 584, 37 Neb. 332, 55 N. W. Rep. 872), Contrib. Neg., 44; St. Rys., 313.
Lind *v.* Chicago, K. & W. R. Co. (42 Kan. 352, 22 Pac. Rep. 423), Em. Dom., 590.
Lindall *v.* Bode (72 Cal. 245, 13 Pac. Rep. 660), Evid., 139.
Lindell *v.* Hannibal & St. J. R. Co. (25 Mo. 550), Tresp., 20.
Lindeman *v.* New York C. & H. R. R. Co. (42 Hun 306, 3 N. Y. S. R. 731), Cross., Inj. at, 214.
Lindeman *v.* New York C. & H. R. R. Co. (11 N. Y. S. R. 837, 46 Hun 679), Cross., Inj. at, 46, 47, 145.
Linder *v.* Carpenter (62 Ill. 309), Contr., 58; Right of W., 8.
Lindheim *v.* Manhattan R. Co. (22 N. Y. Supp. 685, 68 Hun 122, 52 N. Y. S. R. 34), Elev. Rys., 60, 82.
Lindley *v.* Richmond & D. R. Co. (9 Am. & Eng. R. Cas. 31, 88 N. Car. 547), Car. of M., 596, 638, 784.
Lindquest *v.* Union Pac. R. Co. (33 Fed. Rep. 372), Em. Dom., 670; Sts. & H., 169.
Lindsay *v.* Central R. & B. Co. (46 Ga. 447, 11 Am. Ry. Rep. 415), Agency, 8.
Lindsay *v.* Direct London & P. R. Co. (1 L. M. & P. 529, 15 Jur. 224, 19 L. J. Q. B. 417), Arb., 24; Em. Dom., 1176, 1177.
Lindsay *v.* Kansas City, Ft. S. & M. R. Co. (36 Mo. App. 51), Animals, 455, 636.
Lindsay *v.* Winona & St. P. R. Co. (7 Am. & Eng. R. Cas. 488, 29 Minn. 411, 43 Am. Rep. 228, 13 N. W. Rep. 191), Fires, 109.
Lindsey *v.* Chicago, R. I. & P. R. Co. (18 Am. & Eng. R. Cas. 179, 64 Iowa 407, 20 N. W. Rep. 737), Car. of P., 480.
Lindsey *v.* Great Northern R. Co. (10 Hare 665, 17 Jur. 522, 22 L. J. Ch. 995), Consol., 40.
Lindsley *v.* Chicago, M. & St. P. R. Co. (31 Am. & Eng. R. Cas. 86, 36 Minn 539, 33 N. W. Rep. 7), Car. of L. S., 24, 100; Witn., 153.
Lindvall *v.* Woods (39 Am. & Eng. R. Cas. 339, 41 Minn. 212, 4 L. R. A. 793, 42 N. W. Rep. 1020), Employés, Inj. to, 4; Fel. Serv., 79, 114, 198, 213, 221, 325.
Lindvall *v.* Woods (44 Fed. Rep. 855), Employés, Inj. to, 40; Fel. Serv., 202, 312, 313; Words & Ph., 150.
Linfield *v.* Old Colony R. Corp. (10 Cush. (Mass.) 562), Cross., Inj. at, 145; Leases, 53.
Ling *v.* St. Paul, M. & M. R. Co. (50 Minn. 160, 52 N. W. Rep. 378), Fel. Serv., 15.
Link *v.* Chicago & N. W. R. Co. (80 Wis. 304, 50 N. W. Rep. 335), Contr., 24.
Link *v.* Union Pac. R. Co. (3 Wyom. 680, 29 Pac. Rep. 741), App., 59.
Lipford *v.* Charlotte & S. C. R. Co. (7 Rich. (So. Car.) 409), Car. of M., 15.
Lippincott *v.* Pana (92 Ill. 24; affirming 2 Ill. App. 466), Mun. Aid, 4, 138, 249.
Lippman *v.* Illinois C. R. Co. (2 Int. Com. Com. 584, 2 Int. Com. Rep. 414), Int. Com., 36, 67, 68, 125.
Lionberger *v.* Rouse (9 Wall. (U. S.) 468), Tax., 138.
Liscomb *v.* New Jersey R. & T. Co. (6 Lans. (N. Y.) 75), Stat. & D., 82.
Lisle *v.* Iowa, M. & N. P. R. Co. (54 Iowa 499, 6 N. W. Rep. 696), Bills & N., 19.
List *v.* Wheeling (7 W. Va. 501), Mun. Aid, 3.
Lister *v.* Newark Plank Road Co. (36 N. J. Eq. 477), Bridges, 78.
Liston *v.* Central Iowa R. Co. (26 Am. & Eng. R. Cas. 593, 70 Iowa 714, 29 N. W. Rep. 445), Animals, 74, 90, 312.
Litchfield *v.* Dubuque & P. R. Co. (7 Wall. (U. S.) 270), App., 146.
Litchfield *v.* Vernon (41 N. Y. 123), Em. Dom., 40; Tax., 40.
Little *v.* Boston & M. R. Co. (66 Me. 239), Car. of M., 173, 180, 199, 200, 201, 758; Lim. of Liab., 27.
Little *v.* Bowers (17 Am. & Eng. R. Cas. 405, 46 N. J. L. 300), Charters, 41.

Little *v.* Chicago (46 Ill. App. 534), St. Rys., 295.
Little *v.* Dusenberry (25 Am. & Eng. R. Cas. 632, 46 N. J. L. 614), Receiv., 132; Tickets & F., 5.
Little *v.* Fargo (43 Hun (N. Y.) 233, 5 N. Y. S. R. 462), Car. of M., 143, 687; Exp. Cos., 26, 44, 64.
Little *v.* Grand Rapids St. R. Co. (78 Mich. 205, 44 N. W. Rep. 137), Contrib. Neg., 123.
Little *v.* Hackett (116 U. S. 366, 6 Sup. Co. Rep. 391), Imp. Neg., 24.
Little *v.* Newport, A. & H. R. Co. (7 Railw. Cas. 280, 12 C. B. 752, 17 Jur. 209, 22 L. J. C. P. 39), Tunnels, 1.
Little *v.* Vanderbilt (N. J.) (26 Atl. Rep. 1025; former appeal 43 N. J. Eq. 669, 12 Atl. Rep. 188), Receiv., 153.
Littlefield *v.* Boston & A. R. Co. (146 Mass. 268, 5 N. Eng. Rep. 833, 15 N. E. Rep. 648), Adv. Poss., 1; Deeds, 3.
Littlefield *v.* Boston & M. R. Co. (65 Me. 248, 10 Am. Ry. Rep. 104), Em. Dom., 261.
Littlefield *v.* Fitchburg R. Co. (158 Mass. 1, 32 N. E. Rep. 859), Charges, 32; Ry. Com'rs, 7, 17.
Littlefield *v.* Internal Imp. Fund (24 Am. & Eng. R. Cas. 208, 117 U. S. 419, 6 Sup. Ct. Rep. 793), State Aid, 16.
Littlejohn *v.* Central R. Co. (74 Ga. 396), Employés, Inj. to, 329.
Littlejohn *v.* Fitchburg R. Co. (37 Am. & Eng. R. Cas. 54, 148 Mass. 478, 20 N. E. Rep. 103, 2 L. R. A. 502), Death, etc., 23; Trial, 70.
Little Miami & C. & X. R. Co. *v.* Dayton (23 Ohio St. 510), Cross., St. & H., 73; Em. Dom., 105; Sts. & H., 26.
Little Miami, C. & X. R. Co. *v.* Dodds (1 Cin. Super. Ct. 47), Bills of L., 16.
Little Miami, C. & X. R. Co. *v.* United States (13 Am. & Eng. R. Cas. 330, 108 U. S. 277, 2 Sup. Ct. Rep. 627), Rev., 7.
Little Miami R. Co. *v.* Collett (6 Ohio St. 182), Em. Dom., 749.
Little Miami R. Co. *v.* Fitzpatrick (17 Am. & Eng. R. Cas. 578, 42 Ohio St. 318), Employés, Inj. to, 118, 119; Fel. Serv., 1, 17, 202, 222, 223.
Little Miami R. Co. *v.* Greene County Com'rs (31 Ohio St. 338, 16 Am. Ry. Rep. 278), Lim. of Ac., 58; Sts. & H., 182.
Little Miami R. Co. *v.* Hambleton (14 Am. & Eng. R. Cas. 126, 40 Ohio St. 496), Leases, 90; Lim. of Ac., 50.
Little Miami R. Co. *v.* Hopkins (19 Ohio St. 279), Em. Dom., 965.
Little Miami R. Co. *v.* Naylor (2 Ohio St. 235), Em. Dom., 996; Location, etc., 21.
Little Miami R. Co. *v.* Perrin (16 Ohio 479), Em. Dom., 892.
Little Miami R. Co. *v.* Stevens (20 Ohio 415), Fel. Serv., 246.
Little Miami R. Co. *v.* Washburn (22 Ohio St. 324), Car. of M., 557.
Little Miami R. Co. *v.* Wetmore (19 Ohio St. 110), Agency, 75, 96.
Little Miami R. Co. *v.* Whitacre (8 Ohio St. 590), Em. Dom., 984.
Little Rock *v.* Citizens' St. R. Co. (50 Am. & Eng. R. Cas. 456, 56 Ark. 28, 19 S. W. Rep. 17), St. Rys., 124.
Little Rock & Ft. S. R. Co. *v.* Atkins (46 Ark. 423), Car. of P., 418; Contrib. Neg., 105.
Little Rock & Ft. S. R. Co. *v.* Barker (33 Ark. 350), Children, Inj. to, 67, 117, 131; Death, etc., 411, 435; Negl., 13.
Little Rock & Ft. S. R. Co. *v.* Barker (19 Am. & Eng. R. Cas. 195, 39 Ark. 491), Children, Inj. to, 3, 4; Death, etc., 280, 427; New Tr., 34, 82.
Little Rock & Ft. S. R. Co. *v.* Bruce (55 Ark. 65, 17 S. W. Rep. 363), Car. of M., 212; Charges, 24; Penalty, 14; Witn., 151.
Little Rock & Ft. S. R. Co. *v.* Cagle (44 Am. & Eng. R. Cas. 536, 53 Ark. 347, 14 S. W. Rep. 89), Employés, Inj. to, 45.
Little Rock & Ft. S. R. Co. *v.* Cavenesse (48 Ark. 106, 2 S. W. Rep. 505), Car. of P., 272, 348, 443; Contrib. Neg., 48, 105, 106.
Little Rock & Ft. S. R. Co. *v.* Chapman (17 Am. & Eng. R. Cas. 51, 39 Ark. 463, 43 Am. Rep. 280), Flood. Lds., 33; Lim. of Ac., 31.
Little Rock & Ft. S. R. Co. *v.* Clifton (38 Ark. 205), Animals, 290.
Little Rock & Ft. S. R. Co. *v.* Cravens (57 Ark. 112, 20 S. W. Rep. 803), Bills of L., 64; Lim. of Liab., 17.
Little Rock & Ft. S. R. Co. *v.* Cullen (54 Ark. 431, 16 S. W. Rep. 169), Cross., Inj. at, 320.
Little Rock & Ft. S. R. Co. *v.* Daniels (32 Am. & Eng. R. Cas. 479, 49 Ark. 352, 5 S. W. Rep. 584), Bills of L., 4, 54, 67, 89; Charges, 48.
Little Rock & Ft. S. R. Co. *v.* Dean (21 Am. & Eng. R. Cas. 279, 43 Ark. 529, 51 Am. Rep. 584), Eject. Pass., 111; Tickets & F., 44, 93.
Little Rock & Ft. S. R. Co. *v.* Dick (42 Am. & Eng. R. Cas. 591, 52 Ark. 402, 12 S. W. Rep. 785), Animals, 40, 480, 514.
Little Rock & Ft. S. R. Co. *v.* Duffy (4 Am. & Eng. R. Cas. 637, 35 Ark. 602), Employés, Inj. to, 8, 96, 135, 182; Fel. Serv., 1, 142; Negl., 77.
Little Rock & Ft. S. R. Co. *v.* Dyer (10 Am. & Eng. R. Cas. 33, 35 Ark. 360), Em. Dom., 1070.
Little Rock & Ft. S. R. Co. *v.* Eubanks (31 Am. & Eng. R. Cas. 176, 48 Ark. 460, 3 S. W. Rep. 808), Employés, Inj. to, 99, 179, 189, 601; Evid., 91.
Little Rock & Ft. S. R. Co. *v.* Finley (11 Am. & Eng. R. Cas. 469, 37 Ark. 562), Animals, 55, 62, 283, 480.
Little Rock & Ft. S. R. Co. *v.* Hall (32 Ark. 669), Bills of L., 14.
Little Rock & Ft. S. R. Co. *v.* Hanniford (49 Ark. 291, 5 S. W. Rep. 294), Car. of M., 212; Commerce, 9; Stat., 24.
Little Rock & Ft. S. R. Co. *v.* Harkey (Ark.) (15 S. W. Rep. 456), Contrib. Neg., 120; Husb. & W., 35; New Tr., 49; Witn., 19.
Little Rock & Ft. S. R. Co. *v.* Henson (19 Am. & Eng. R. Cas. 440, 39 Ark. 413), Animals, 491.
Little Rock & Ft. S. R. Co. *v.* Holland (19 Am. & Eng. R. Cas. 479, 40 Ark. 336), Animals, 49, 52.

Little Rock & Ft. S. R. Co. *v.* Howell (31 Ark. 119), Land Grants, 13, 112.
Little Rock & Ft. S. R. Co. *v.* Hunter (18 Am. & Eng. R. Cas. 527, 42 Ark. 200), Bagg., 71; Car. of M., 317.
Little Rock & Ft. S. R. Co. *v.* Huntington (120 U. S. 160, 7 Sup. Ct. Rep. 517), Deeds of Tr., 12.
Little Rock & Ft. S. R. Co. *v.* Jones (19 Am. & Eng. R. Cas. 443, 41 Ark. 157), Animals, 480.
Little Rock & Ft. S. R. Co. *v.* Lawton (52 Am. & Eng. R. Cas. 260, 55 Ark. 428, 18 S. W. Rep. 543), Car. of P., 91.
Little Rock & Ft. S. R. Co. *v.* McGehee (20 Am. & Eng. R. Cas. 82, 41 Ark. 202), Em. Dom., 450, 650, 651, 991.
Little Rock & Ft. S. R. Co. *v.* Miles (13 Am. & Eng. R. Cas. 10, 40 Ark. 298, 48 Am. Rep. 10), Car. of L. S., 125, 131; Car. of P., 137, 140, 258, 459, 464; Derailm., 4.
Little Rock & Ft. S. R. Co. *v.* Page (7 Am. & Eng. R. Cas. 36, 35 Ark. 304), Direct., 45; Mort., 46; Release, 9.
Little Rock & Ft. S. R. Co. *v.* Parkhurst (5 Am. & Eng. R. Cas. 635, 36 Ark. 371), Contrib. Neg., 10, 13; Death, etc., 208.
Little Rock & Ft. S. R. Co. *v.* Payne (33 Ark. 816), Animals, 480.
Little Rock & Ft. S. R. Co. *v.* Perry (9 Am. & Eng. R. Cas. 610, 37 Ark. 164), Contr., 2.
Little Rock & Ft. S. R. Co. *v.* Tankersley (54 Ark. 25, 14 S. W. Rep. 1099), Car. of P., 417, 426, 427.
Little Rock & Ft. S. R. Co. *v.* Townsend (21 Am. & Eng. R. Cas. 619, 41 Ark. 382), Employés, Inj. to, 184, 202; Death, etc., 95.
Little Rock & Ft. S. R. Co. *v.* Trotter (11 Am. & Eng. R. Cas. 475, 37 Ark. 593), Animals, 66.
Little Rock & Ft. S. R. Co. *v.* Turner (19 Am. & Eng. R. Cas. 491, 41 Ark. 161), Animals, 51.
Little Rock & Ft. S. R. Co. *v.* Voss (Ark.) (18 S. W. Rep. 172), Death, etc., 436; Employés, Inj. to, 81, 83, 355, 363, 596; Evid., 280; Trial, 176; Witn., 34.
Little Rock & Ft. S. R. Co. *v.* Worthen (46 Ark. 312), Tax., 20.
Little Rock & M. R. Co. *v.* Chriscoe (57 Ark. 192, 21 S. W. Rep. 431), Animals, 494.
Little Rock & M. R. Co. *v.* East Tenn., V. & G. R. Co. (49 Am. & Eng. R. Cas. 23, 47 Fed Rep. 771), Int. Com., 54, 160.
Little Rock & M. R. Co. *v.* East Tenn., V. & G. R. Co. (2 Int. Com. Rep. 454, 3 Int. Com. Com. 1), Int. Com., 18.
Little Rock & M. R. Co. *v.* Moseley (56 Fed. Rep. 1009), Employés, Inj. to, 229; Fel. Serv., 95, 222, 230.
Little Rock & M. R. Co. *v.* St. Louis, I. M. & S. R. Co. (42 Am. & Eng. R. Cas. 490, 41 Fed. Rep. 559), Int. Com., 18.
Little Rock & M. R. Co. *v.* Shoecraft (56 Ark. 465, 20 S. W. Rep. 272), Animals, 419.
Little Rock & M. R. Co. *v.* Wilson (90 Tenn. 271, 16 S. W. Rep. 613), App., 89; Cross., Inj. at, 3, 109.
Little Rock & N. R. Co. *v.* Little Rock, M. R. & T. R. Co. (4 Am. & Eng. R. Cas. 392, 36 Ark. 663), Charters, 134; Estop., 3.
Little Rock, M. R. & T. R. Co. *v.* Allen (20 Am. & Eng. R. Cas. 254, 41 Ark. 431), Sts. & H., 278.
Little Rock, M. R. & T. R. Co. *v.* Brooks (17 Am. & Eng. R. Cas. 152, 39 Ark. 403), Bridges, 59; Nuis., 11; Waters & W., 1.
Little Rock, M. R. & T. R. Co. *v.* Corcoran (18 Am. & Eng. R. Cas. 602, 40 Ark. 375), Car. of M., 472.
Little Rock, M. R. & T. R. Co. *v.* Glidewell (18 Am. & Eng. R. Cas. 539, 39 Ark. 487), Car. of M., 10, 273.
Little Rock, M. R. & T. R. Co. *v.* Harper (21 Am. & Eng. R. Cas. 97, 44 Ark. 208), Car. of L. S., 69; Car. of M., 152.
Little Rock, M. R. & T. R. Co. *v.* Haynes (28 Am. & Eng. R. Cas 572, 47 Ark. 497, 1 S. W. Rep. 774), Negl., 111; Tresp., Inj. to, 29, 65.
Little Rock, M. R. & T. R. Co. *v.* Leverett (28 Am. & Eng. R. Cas. 459, 48 Ark. 333, 3 S. W. Rep. 50), Contrib. Neg., 105; Death, etc., 275, 352; Employés, Inj. to, 216, 424; Evid., 174.
Little Rock, M. R. & T. R. Co. *v.* Manees (49 Ark. 248, 4 S. W. Rep. 778), Lim. of Ac., 12.
Little Rock, M. R. & T. R. Co. *v.* Talbot (18 Am. & Eng. R. Cas. 598, 39 Ark. 523), Bills of L., 35, 72, 73, 79, 80, 102; Car. of M., 472; Lim. of Liab., 28.
Little Rock, M. R. & T. R. Co. *v.* Talbot (47 Ark. 97, 14 S. W. Rep. 471), Car. of M., 458; Lim. of Liab., 28.
Little Rock Junction R. Co. *v.* Woodruff (33 Am. & Eng. R. Cas. 169, 49 Ark. 381, 4 Am. St. Rep. 51, 5 S. W. Rep. 792), Em. Dom., 591, 649, 650, 926; Witn., 118.
Little Schuylkill N. R. & C. Co. *v.* Norton (24 Pa. St. 465), Employés, Inj. to, 488.
Littleton Nat. Bank *v.* Portland & O. R. Co. (58 N. H. 104), Attach., 18.
Littmann *v.* Dry Dock, E. B. & B. R. Co. (55 N. Y. S. R. 514, 6 Misc. 34, 25 N. Y. Supp. 1002), St. Rys., 366, 435.
Livermon *v.* Roanoke & T. R. R. Co. (51 Am. & Eng. R. Cas. 562, 109 N. Car. 52, 13 S. E. Rep. 734), Em. Dom., 383, 435.
Liverpool & G. W. Steam Co. *v.* Phenix Ins. Co. (37 Am. & Eng. R. Cas. 681, 129 U. S. 397, 9 Sup. Ct. Rep. 469), Car. of M., 640; Subrog., 4.
Liverpool C. T. Assoc. *v.* London & N. W. R. Co. (7 Ry. & C. T. Cas. 125), Car. of M., 532.
Liverpool C. T. Assoc. *v.* London & N. W. R. Co. (45 Am. & Eng. R. Cas. 216, [1891] 1 Q. B. 120), Discrim., 40, 44, 81.
Liverpool Royal Bank *v.* Grand Junction R. & D. Co. (125 Mass. 490), Eq., 7.
Livingston *v.* Iowa Midland R. Co. (35 Iowa 555), Evid., 193; Right of W., 14.
Livingston *v.* Metropolitan El. R. Co. (28 J. & S. 389, 44 N. Y. S. R. 830, 18 N. Y. Supp. 203), Elev. Rys., 117.
Livingston *v.* Metropolitan El. R. Co. (138 N. Y. 76, 51 N. Y. S. R. 660, 33 N. E. Rep. 732; reversing 44 N. Y. S. R. 831, 832, 18 N. Y. Supp. 203, 204), Elev. Rys., 128, 164, 166, 175, 177.

Livingston *v.* Miller (48 Hun 232, 16 N. Y. S. R. 71), Replev., 1.
Livingston *v.* New York C. & H. R. R. Co. (5 Hun (N. Y.) 562), Car. of M., 127, 791.
Livingston *v.* New York C. & H. R. R. Co. (76 N. Y. 631), Car. of M., 632.
Livingston *v.* New York El. R. Co. (58 Hun 131, 33 N. Y. S. R. 818, 19 Civ. Pro. 258, 11 N. Y. Supp. 359; affirmed in 125 N. Y. 695, mem., 34 N. Y. S. R. 1011, 26 N. E. Rep. 751), Proc., 13.
Livingston *v.* Pittsburg & S. R. Co. (2 Grant's Cas. (Pa.) 219), Partn., 4.
Livingston County *v.* First Nat. Bank (128 U. S. 102, 9 Sup. Ct. Rep. 18), Consol., 9, 33, 34.
Livingston County *v.* Hannibal & St. J. R. Co (60 Mo. 516), Tax., 36, 136, 314.
Livingstone *v.* Massey (23 U. C. Q. B. 156), Car. of M., 257.
Llanelly R. & D. Co. *v.* London & N. W. R. Co. (20 W. R. 898), Arb., 1.
Llanelly R. & D. Co. *v.* London & N. W. R. Co. (L. R. 7 H. L. Cas. 550, 45 L. J. Ch. D. 539, 23 W. R. 927, 32 L. T. 575; see L. R. 8 Ch. 942, 42 L. J. Ch. 884, 29 L. T. 357, 21 W. R. 889), Leases, 118, 121, 122.
Lloyd *v.* European & N. A. R. Co. (18 New Brun. 194), Ferries, 12; Mort., 35, 44; Name, 1.
Lloyd *v.* Northampton & B. J. R. Co. (3 Ry. & C. T. Cas. 259), Charges, 89; Discrim., 47.
Lloyd *v.* Pacific R. Co. (49 Mo. 199), Animals, 200.
Lloyd *v.* Preston (146 U. S. 630, 13 Sup. Ct. Rep. 131), Stockh., 34, 70.
Lloyd *v.* Waterford & L. R. Co. (15 Ir. C. L. 37, 9 L. T. 89), Car. of L. S., 93.
Loague *v.* Memphis & C. R. Co. (52 Am. & Eng. R. Cas. 635, 91 Tenn. 458, 19 S. W. Rep. 430), Abate., 4.
Local Board of Newington *v.* Northeastern R. Co. (3 Ry. & C. T. Cas. 306), Car. of M., 534.
Locke *v.* Concord R. Co. (60 N. H. 552), Charges, 68.
Locke *v.* First Div. St. P. & P. R. Co. (15 Minn. 350 (Gil. 283), Animals, 48, 49, 270, 448, 498; Cross., Inj. at, 115.
Locke *v.* Northeastern R. Co. (3 Ry. & C. T. Cas. 44), Discrim., 20.
Locke *v.* Sioux City & P. R. Co. (46 Iowa 109, 16 Am. Ry. Rep. 138), Contrib. Neg., 112; Employés, Inj. to, 55; Evid., 182, 236.
Lockett *v.* Ft. Worth & R. G. R. Co. (78 Tex. 211, 14 S. W. Rep. 564), Embankm., 5; Nuis., 28.
Lockhart *v.* Craig St. R. Co. (47 Am. & Eng. R. Cas. 57, 139 Pa. St. 419, 21 Atl. Rep. 26), Elec. Rys., 18.
Lockhart *v.* Lichtenthaler (46 Pa. St. 151), Imp. Neg., 21; St. Rys., 185.
Lockhart *v.* Little Rock & M. R. Co. (40 Fed. Rep. 631), Death, etc., 220; Employés, Inj. to, 371, 496; New Tr., 9; Sales of Rds., 13.
Lockhart *v.* Western & A. R. Co. (73 Ga. 472, 54 Am. Rep. 883), Actions, 3.
Lockport & B. R. Co., In re (19 Hun (N. Y.) 38), Cross. Rys., 41, 82.
Lockport & B. R. Co., In re (77 N. Y. 557, 632; reversing 15 Hun 365), Cross. Rys., 27, 28; Em. Dom., 367.
Lock's Creek Canal Co. *v.* McKeithan (89 N. Car. 52), Em. Dom., 797.
Lockwood *v.* Chicago & N. W. R. Co. (6 Am. & Eng. R. Cas. 151, 55 Wis. 50, 12 N. W. Rep. 401), Cross. Rys., 82; Employés, Inj. to, 169, 415, 625; Negl., 70.
Lockwood *v.* New York & N. H. R. Co. (37 Conn. 387), Em. Dom., 199; Rip. Rts., 6.
Lockwood *v.* New York, L. E. & W. R. Co. (98 N. Y. 523), Death, etc., 273.
Lockwood *v.* Twenty-third St. R. Co. (15 Daly (N. Y.) 374, 7 N. Y. Supp. 663, 28 N. Y. S. R. 16), App., 126.
Lockwood *v.* Weston (61 Conn. 211, 23 Atl. Rep. 9), Tax., 103, 105.
Locomotive E. S. Truck Co. *v.* Erie R. Co. (10 Blatchf. (U. S.) 292), Pat. for Inv., 41.
Locomotive Safety Truck Co. *v.* Pennsylvania R. Co. (14 Phila. (Pa.) 432), Pat. for Inv., 23.
Loder *v.* New York, U. & O. R. Co. (4 Hun (N. Y.) 22), Receiv., 29.
Lodge *v.* Frankford & H. R. Co. (9 Phila. (Pa.) 543), Em. Dom., 482, 485.
Lodge *v.* Philadelphia, W. & B. R. Co. (8 Phila. (Pa.) 345), Em. Dom., 92.
Lodge *v.* Railroad Co. (10 Phila. (Pa.) 153), New Tr., 17.
Loeb *v.* Chicago, St. L. & N. O. R. Co. (60 Miss. 933), Parties, 3.
Loeb *v.* Chur (6 N. Y. Supp. 296, 25 N. Y. S. R. 996, 53 Hun 637; affirmed in 125 N. Y. 726, 26 N. E. Rep. 756), Mort., 141; Pl., 105.
Loeffler *v.* Keokuk N. L. Packet Co. (7 Mo. App. 185), Car. of M., 303, 315; Trial, 35.
Loeffler *v.* Missouri Pac. R. Co. (96 Mo. 267, 9 S. W. Rep. 580), Employés, Inj. to, 313.
Loewenberg *v.* Arkansas & L. R. Co. (56 Ark. 439, 19 S. W. Rep. 1051), Car. of M., 212, 657; Charges, 85.
Lofrano *v.* New York & Mt. V. Water Co. (29 N. Y. S. R. 557, 8 N. Y. Supp. 717), Employés, Inj. to, 32, 216, 435.
Loftus *v.* Union Ferry Co. (84 N. Y. 455), Ferries, 11.
Logan *v.* Central R. Co. (74 Ga. 684), Car. of M., 425; Connect. L., 1; Leases, 59.
Logan *v.* Hannibal & St. J. R. Co. (12 Am. & Eng. R. Cas. 141, 77 Mo. 663), Car. of P., 244, 256, 258; Cross. Rys., 82; Eject. Pass., 16, 69, 96, 119; Tickets & F., 1.
Logan *v.* Mobile Trade Co. (46 Ala. 514), Bills of L., 34, 53.
Logan *v.* Stranahan (12 U. C. Q. B. 15), Constr. Rys., 30.
Logan *v.* Vernon, G. & R. R. Co. (14 Am. & Eng. R. Cas. 43, 90 Ind. 552), Em. Dom., 1070.
Logan *v.* Wabash Western R. Co. (43 Mo. App. 71), Fires, 147, 266.
Logan *v.* Western & A. R. Co. (87 Ga. 533, 13 S. E. Rep. 516), Dissol., 2.
Logansport, C. & S. W. R. Co. *v.* Buchanan (52 Ind. 163), Em. Dom., 361, 459.
Logansport, C. & S. W. R. Co. *v.* Byrd (51 Ind. 525), Animals, 438.
Logansport, C. & S. W. R. Co. *v.* Patton (51 Ind. 487), Animals, 524.

Logansport, C. & S. W. R. Co. *v.* Wray (52 Ind. 578), Fences, 92.
Logansport, P. & B. R. Co. *v.* Caldwell (38 Ill. 280), Animals, 185, 441.
Logwood *v.* Memphis & C. R. Co. (21 Am. & Eng. R. Cas. 256, 23 Fed. Rep. 318), Col. Pers., 8.
Lohman *v.* New York & E. R. Co. (2 Sandf. (N. Y.) 39), Stock, 65; Subscr., 8.
Lohman *v.* St. Paul, S. & T. F. R. Co. (18 Minn. 174 (Gil. 157), Em. Dom., 295.
Lohse *v.* Missouri Pac. R. Co. (44 Mo. App. 645), Em. Dom., 390, 977.
Lombard *v.* Chicago, R. I. & P. R. Co. (47 Iowa 494), Employés, Inj. to, 767; Fel. Serv., 175.
Lombard & S. S. Pass. R. Co. *v.* Christian (124 Pa. St. 114, 23 W. N. C. 273, 16 Atl. Rep. 628, 46 Phila. Leg. Int. 210, 19 Pittsb. L. J. (N. S.) 404), Evid., 176; St. Rys., 367; Witn., 139.
Lombardo *v.* Case (45 Barb. (N. Y.) 95), Divid., 7.
Lommeland *v.* St. Paul, M. & M. R. Co. (26 Am. & Eng. R. Cas. 596, 35 Minn. 412, 29 N. W. Rep. 119), Flood. Lds., 74, 98.
London *v.* Sample Lumber Co. (91 Ala. 606, 8 So. Rep. 281), Em. Dom., 82, 316, 576, 846.
London & B. R. Co. *v.* Fairclough (3 Scott N. R. 68, 2 M. & G. 674, 2 Railw. Cas. 544), Int., 2; Subscr., 70, 74, 112.
London & B. R. Co. *v.* Goodwin (6 Railw. Cas. 177, 3 Ex. 736, 18 L. J. Ex. 337. See 3 Ex. 320, 18 L. J. Ex. 174), Consol., 26.
London & B. R. Co. *v.* Limehouse Dist. Board of Works (3 Kay & J. 123, 26 L. J. Ch. 164), Em. Dom., 1089; Stat. & D., 11; Stat., 48.
London & B. R. Co. *v.* Watson (L. R. 4 C. P. D. 118, 48 L. J. C. P. D. 316, 40 L. T. 183, 27 W. R. 614; affirming L. R. 3 C. P. D. 429, 47 L. J. C. P. D. 634, 39 L. T. 199, 26 W. R. 856), Tickets & F., 143, 145, 148.
London & C. B. Co. *v.* London & R. P. Bank (L. R. 20 Q. B. D. 232), Stock, 39.
London & L. F. Ins. Co. *v.* Rome, W. & O. R. Co. (52 N. Y. S. R. 581, 68 Hun 598, 23 N. Y. Supp. 231), Car. of M., 78, 439.
London & N. W. R. Co., In re (26 L. T. 687), Em. Dom., 1153.
London & N. W. R. Co. *v.* Ackroyd (8 Jur. N. S. 911, 31 L. J. Ch. 588, 10 W. R. 367, 6 L. T. 124), Em. Dom., 1107; Mines, etc., 3.
London & N. W. R. Co. *v.* Bartlett (7 H. & N. 400, 8 Jur. N. S. 58, 31 L. J. Ex. 92, 10 W. R. 109, 5 L. T. 399), Car. of M., 263.
London & N. W. R. Co. *v.* Buckmaster (L. R. 10 Q. B. 70, 44 L. J. M. C. 29, 2 Ry. & C. T. Cas. 20), Tax., 364.
London & N. W. R. Co. *v.* Cannock (9 L. T. 325, 2 Ry. & C. T. Cas. 19), Tax., 378.
London & N. W. R. Co. *v.* Evershed (L. R. 3 App. Cas. 1029, 39 L. T. 306; affirming L. R. 3 Q. B. D. 134, 47 L. J. Q. B. D. 284, 37 L. T. 623, 26 W. R. 863; which affirmed L. R. 2 Q. B. D. 254, 46 L. J. Q. B. D. 289, 36 L. T. 12, 26 W. R. 102), Discrim., 14, 32, 67.
London & N. W. R. Co. *v.* Glyn (1 El. & El. 652, 5 Jur. N. S. 1004, 28 L. J. Q. B. 188), Fire Ins., 1, 4, 17.
London & N. W. R. Co. *v.* Great Western R. Co. (5 Ry. & C. T. Cas. 20), Charges, 99, 106.
London & N. W. R. Co. *v.* Guardians of Poor (3 Ry. & C. T. Cas. 240), Tax., 363, 375, 377.
London & N. W. R. Co. *v.* Harborne (34 J. P. 644, 2 Ry. & C. T. Cas. 20), Tax., 374.
London & N. W. R. Co. *v.* Hellawell (26 L. T. 557), Car. of P., 248.
London & N. W. R. Co. *v.* Irthlingborough (35 L. T. 327), Tax., 366.
London & N. W. R. Co. *v.* King's Norton (2 Ry. & C. T. Cas. 19), Tax., 374.
London & N. W. R. Co. *v.* Lindsay (3 Macq. H. L. Cas. 99, 4 Jur. N. S. 343), Jurisd., 4.
London & N. W. R. Co. *v.* Price (13 Am. & Eng. R. Cas. 128, L. R. 11 Q. B. D. 485, 52 L. J. Q. B. D. 754, 4 Ry. & C. T. Cas. xxi), Charges, 64; Ult. Vir., 15.
London & N. W. R. Co. *v.* St. Pancras (17 L. T. 654), Sts. & H., 359.
London & N. W. R. Co. *v.* Skerton (33 L. J. M. C. 158, 5 B. & S. 559, 12 W. R. 1102, 10 L. J. 648), Bridges, 42; Cross., Sts. & H., 39.
London & N. W. R. Co. *v.* West (36 L. J. C. P. 245, L. R. 2 C. P. 553), Em. Dom., 1112.
London & N. W. R. Co. *v.* Wetherall (15 Jur. 247), Sts. & H., 359.
London & S. W. R. Co. *v.* Blackmore (39 L. J. Ch. 713, 23 L. T. 504, 19 W. R. 305, L. R. 4 H. L. Cas. 610), Em. Dom., 1111, 1115, 1117.
London & S. W. R. Co. *v.* Flower (45 L. J. C. P. 54, 33 L. T. 687), Bridges, 33, 35.
London & S. W. R. Co. *v.* Gomm (11 Am. & Eng. R. Cas. 385, L. R. 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. 449, 30 W. R. 620; reversing 51 L. J. Ch. 193, 45 L. T. 505, 30 W. R. 321), Em. Dom., 1119; Spec. Perf., 18.
London & S. W. R. Co. *v.* Myers (39 L. J. C. P. 57, 21 L. T. 460, 18 W. R. 69), Charges, 26, 90.
London & S. W. R. Co. *v.* Southeastern R. Co. (8 Ex. 584, 22 L. J. Ex. 193), Leases, 87.
London & S. W. R. Co. *v.* Staines, W. & W. R. Co. (3 Ry. & C. T. Cas. 48), Leases, 134.
London, B. & S. C. R. Co. *v.* East London R. Co. (3 Ry. & C. T. Cas. 103), Leases, 131.
London, B. & S. C. R. Co. *v.* London & S. W. R. Co. (5 Jur. N. S. 801, 28 L. J. Ch. 321), Leases, 13.
London, B. & S. C. R. Co. *v.* St. Giles, Camberwell (L. R. 4 Ex. D. 239, 48 L. J. M. C. 186), Sts. & H., 359.
London, B. & S. C. R. Co. *v.* Truman (25 Am. & Eng. R. Cas. 116, L. R. 11 App. Cas. 45, 54 L. T. 250, 55 L. J. Ch. 354, 34 W. R. 657; reversing 25 Ch. D. 423), Fright. Teams, 2; Nuis., 7; Stock Yards, 5.
London, C. & D. R. Co. *v.* Southeastern R.

Co. (40 Ch. D. 100, 6 Ry. & C. T. Cas. lxviii), App., 107; Arb., 4.
London, C. & D. R. Co. *v.* Wandsworth Board of Works (42 L. J. M. C. 70, L. R. 8 C. P. 8), Bridges, 33; Cross., Sts. & H., 38.
Londonderry P. & H. Com'rs *v.* Great Northern R. Co. (5 Ry. & C. T. Cas. 282), Charges, 92, 96; Discrim., 40, 54.
London G. J. R. Co. *v.* Freeman (2 Scott N. R. 705, 2 M. & G. 607, 2 Railw. Cas. 408), Subscr., 112.
London G. J. R. Co. *v.* Graham (2 Railw. Cas 870, 1 Q. B. 271), Subscr., 112.
London, H. & B. R. Co., In re (36 U. C. Q. B. 93), Mun. Aid, 207.
London, T. & S. R. Co., In re (L. R. 24 Q. B. D. 40; affirmed in L. R. 24 Q. B. D. 326), Em. Dom., 1195.
London, T. & S. R. Co. *v.* Kirk (51 L. T. 599), Evid., 258.
London Tp. *v.* Great Western R. Co. (16 U. C. Q. B. 500), Tax., 384.
London Tp. *v.* Great Western R. Co. (17 U. C. Q. B. 262), Tax., 384.
London Tramways Co. *v.* Lambeth Assessment Committee (31 L. T. 319), Tax., 366, 383
Londriggan *v.* New York & N. H. R. Co. (12 Abb. N. Cas. (N. Y.) 273), Lim. of Ac., 73.
Lonergan *v.* Illinois C. R. Co. (55 Fed. Rep. 550), Pl., 11.
Lonergan *v.* Illinois C. R. Co. (56 Am. & Eng. R. Cas. 333, 87 Iowa 755, 49 N. W. Rep. 852), Fright. Teams, 3.
Long, Appeal of (87 Pa. St. 114), Em. Dom., 868.
Long *v.* Central Iowa R. Co. (19 Am. & Eng. R. Cas. 541, 64 Iowa 657, 21 N. W. Rep. 122), Animals, 108.
Long *v.* Chicago, K. & W. R. Co. (53 Am. & Eng. R. Cas. 45, 48 Kan. 28, 28 Pac. Rep. 977, 15 L. R. A. 319), Car. of P., 311.
Long *v.* Converse (91 U. S. 105), Fed. Cts., 25.
Long *v.* Coronado R. Co. (96 Cal. 269, 31 Pac. Rep. 170), Contrib. Neg., 4; Employés, Inj. to, 212; Fel. Serv., 1, 27, 277.
Long *v.* Doxey (50 Ind. 385), Death, etc., 332.
Long *v.* Georgia Pac. R. Co. (91 Ala. 519, 8 So. Rep. 706), Ult. Vir., 23.
Long *v.* Harrisburg & P. R. Co. (126 Pa. St. 143, 19 Atl. Rep. 39), Em. Dom., 752.
Long *v.* Louisville & N. R. Co. (89 Ky. 544, 13 S. W. Rep. 3), Deeds, 16.
Long *v.* Louisville & N. R. Co. (Ky.) (14 S. W. Rep. 78), Sts. & H., 87.
Long *v.* Mobile & M. R. Co. (51 Ala. 512), Car. of M., 388.
Long *v.* New London (9 Biss. (U. S.) 539 5 Fed. Rep. 559), Mun. Aid, 53.
Long *v.* New York C. R. Co. (50 N. Y. 76, 3 Am. Ry. Rep. 350), Bills of L., 40, 41.
Long *v.* Pacific R. Co. (65 Mo. 225), Fel. Serv., 95, 222, 224.
Long *v.* Pennsylvania R. Co. (147 Pa. St. 343, 23 Atl. Rep. 459), Bagg., 12; Words & Ph., 7.
Long *v.* St. Louis, K. & N. W. R. Co. (23 Mo. App. 178), Animals, 117, 449.
Longabaugh *v.* Virginia City & T. R. Co. (9 Nev. 271), Contrib. Neg., 11; Fires, 19, 24, 35, 36, 47, 58, 236, 241, 242, 260, 288, 294; Words & Ph., 172.
Long Branch & S. S. R. Co., In re (24 N. J. Eq. 398), Receiv., 49, 175.
Long Branch & S. S. R. Co., In re (24 N. J. Eq. 402; affirmed in 26 N. J. Eq. 539), Receiv., 175.
Long Branch & S. S. R. Co. *v.* Sneden (26 N. J. Eq. 539), Receiv., 37.
Long Branch Com'rs *v.* West End R. Co. (29 N. J. Eq. 566), Connect. L., 2; Injunc., 5; Sts. & H., 37.
Long Dock Co. *v.* Morris & E. R. Co. (N. J.) (30 Am. & Eng. R. Cas. 431, 9 Atl. Rep. 194), Em. Dom., 436; Mort., 145.
Longenecker *v.* Pennsylvania R. Co. (105 Pa. St. 328), Cross., Inj. at, 149; Evid., 292; Trial, 183.
Longhi *v.* Sanson (46 U. C. Q. B. 446), Leases, 34.
Long Island City *v.* Long Island R. Co. (79 N. Y. 561; affirming 8 Hun 58), Sts. & H., 340.
Long Island Ferry Co. *v.* Terbell (48 N. Y. 427), Officers, 7.
Long Island R. Co., In re (19 Wend. (N. Y.) 37), Corp., 6; Direct., 7, 8.
Long Island R. Co., In re (3 Edw. Ch. (N. Y.) 487), Fences, 12.
Long Island R. Co., In re (6 T. & C. (N. Y.) 298, 3 Hun 613), Em. Dom., 656.
Long Island R. Co., In re (45 N. Y. 364), Em. Dom., 238, 495.
Long Island R. Co., In re (50 N. Y. S. R. 257, 66 Hun 631, mem., 21 N. Y. Supp. 489; affirmed in 143 N. Y. 67, 60 N. Y. S. R. 460, 37 N. E. Rep. 636), Em. Dom., 57, 325; Sts. & H., 53.
Long Island R. Co. *v.* Brooklyn (29 N. Y. S. R. 381, 8 N. Y. Supp. 805, 55 Hun 610, 5 Silv. Sup. Ct. 475), Sts. & H., 157.
Long Island R. Co. *v.* Conklin (29 N. Y. 572; affirming 32 Barb. 381), Deeds, 14.
Long Island R. Co. *v.* Silverstone (46 N. Y. S. Y. 141, 64 Hun 634, 19 N. Y. Supp. 140), Cross., Sts. & H., 74.
Longman *v.* Grand Junction Canal Co. (3 F. & F. 736), Fires, 313.
Longmore *v.* Great Western R. Co. (19 C. B. N. S. 183), Stat. & D., 92.
Longwood Valley R. Co. *v.* Baker (27 N. Y. Eq. 166), Injunc., 10; License, 3.
Longworth *v.* Meriden & W. R. Co. (61 Conn. 451, 23 Atl. Rep. 827), Em. Dom., 667.
Lookout Mountain R. Co. *v.* Houston (85 Tenn. 224, 2 S. W. Rep. 36), Contr., 19.
Lookout Mountain R. Co. *v.* Houston (44 Fed. Rep. 449), Contr., 97.
Loomis *v.* Davenport & St. P. R. Co. (3 McCrary (U. S.) 489, 17 Fed. Rep. 301), Mort., 255; Vend. & P., 5.
Loomis *v.* Jewett (35 Hun (N. Y.) 313), Eject. Pass., 65.
Loomis *v.* New York, N. H. & H. R. Co. (159 Mass. 33, 34 N. E. Rep. 82), Evid., 230.

Loomis *v.* Rutland R. Co. (38 Fed. Rep. 280), Costs, 8.
Loomis *v.* Thirty-fourth St. R. Co. (38 Hun (N. Y.) 517), Sts. & H., 230.
Loomis *v.* Wabash, St. L. & P. R. Co. (17 Mo. App. 340), Car. of M., 254; Charges, 40.
Loop *v.* Chamberlain (17 Wis. 504), Em. Dom., 1065, 1067, 1075.
Looram *v.* Second Ave. R. Co. (11 N. Y. S. R. 652), Dam., 16; Trial, 44.
Looram *v.* Third Ave. R. Co. (25 J. & S. 165, 6 N. Y. Supp. 504, 25 N. Y. S. R. 926; affirmed in 117 N. Y. 657, mem., 22 N. E. Rep. 1133, 27 N. Y. S. R. 981), Death, etc., 159; Witn., 172.
Lopez *v.* Central Arizona Mining Co. (1 Ariz. 464), Contrib. Neg., 105.
Lord *v.* Chicago, R. I. & P. R. Co. (82 Mo. 139), Animals, 204; Negl., 41.
Lord *v.* Goodall, N. & P. Steamship Co. (4 Sawy. (U. S.) 292; affirmed in 102 U. S. 541), Int. Com., 6.
Lord *v.* Midland R. Co. (36 L. J. C. P. 170, L. R. 2 C. P. 339, 15 W. R. 405, 16 L. T. 576), Car. of M., 487.
Lord *v.* Pueblo S. & R. Co. (12 Colo. 390, 21 Pac. Rep. 148), Employés, Inj. to, 322; Evid., 192.
Lorie *v.* North Chicago R. Co. (32 Fed. Rep. 270), Em. Dom., 373; Injunc., 7; St. Rys., 196, 199; Sts. & H., 141.
Lorimer *v.* St. Paul City R. Co. (48 Minn. 391, 51 N. W. Rep. 145), Contrib. Neg., 103; Elec. Rys., 20.
Loring *v.* Worcester & N. R. Co. (131 Mass. 469), Fires, 239.
Los Angeles *v.* Southern Pac. R. Co. (61 Cal. 59), Mun. Corp., 42.
Los Angeles *v.* Southern Pac. R. Co. (67 Cal. 433, 7 Pac. Rep. 819), Mun. Corp., 42.
Los Angeles, P. & G. R. Co. *v.* Rumpp (94 Cal. 432, 29 Pac. Rep. 872), Em. Dom., 895, 900, 901.
Losee *v.* Watervliet T. & R. Co. (44 N. Y. S. R. 343, 63 Hun 404, 18 N. Y. Supp. 207), St. Rys., 367.
Lothrop *v.* Fitchburg R. Co. (41 Am. & Eng. R. Cas. 327, 150 Mass. 423, 23 N. E. Rep. 227), Employés, Inj. to, 30, 173, 402.
Lotspeich *v.* Central R. & B. Co. (18 Am. & Eng. R. Cas. 496, 73 Ala. 306), Bills of L., 9; Charges, 45, 61.
Lott *v.* New Orleans City & L. R. Co. (37 La. Ann. 337, 55 Am. Rep. 500), Children, Inj. to, 54.
Loucks *v.* Chicago, M. & St. P. R. Co. (19 Am. & Eng. R. Cas. 305, 31 Minn. 526, 18 N. W. Rep. 651), Contrib. Neg., 19; Cross., Inj. at, 94, 307; Witn., 113, 192.
Loud *v.* South Carolina R. Co. (5 Int. Com. Com. 529), Int. Com., 31, 32, 159.
Lough *v.* Outerbridge (22 N. Y. Supp. 976; see also 49 N. Y. S. R. 504), Discrim., 22.
Loughlin *v.* Atlantic & O. R. Co. (15 Phila. (Pa.) 241), Injunc., 10.
Loughlin *v.* State (105 N. Y. 159, 6 N. Y. S. R. 826, 11 N. E. Rep. 371), Fel. Serv., 73, 76, 202, 213.
Louis *v.* Brown Tp. (15 Am. & Eng. R. Cas. 630, 109 U. S. 162, 3 Sup. Ct. Rep. 92), Judgm., 16; Mun. Aid, 372.
Louisiana *v.* Taylor (105 U. S. 454), Mun. Aid, 136.
Louisiana Mut. Ins. Co. *v.* Tweed (7 Wall. (U. S.) 44), Fires, 98.
Louisiana Western R. Co. *v.* Hopkins (33 La. Ann. 806), Em. Dom., 894.
Louisville *v.* Portsmouth Sav. Bank (12 Am. & Eng. R. Cas. 589, 104 U. S. 469), Mun. Aid, 137.
Louisville & E. Mail Co. *v.* Barbour (88 Ky. 73, 9 S. W. Rep. 516), Tax., 261.
Louisville & F. R. Co. *v.* Ballard (2 Metc. (Ky.) 177), Animals, 50; Car. of P., 148.
Louisville & F. R. Co. *v.* Brown (17 B. Mon. (Ky.) 763), Sts. & H., 293.
Louisville & F. R. Co. *v.* Milton (14 B. Mon. (Ky.) 61), Animals, 222.
Louisville & N. R. Co., In re (5 Int. Com. Com. 466), Int. Com., 51.
Louisville & N. R. Co. *v.* Adams (Ky.) (10 S. W. Rep. 425), App., 119.
Louisville & N. R. Co. *v.* Allen (28 Am. & Eng. R. Cas. 514, 78 Ala. 494), Employés, Inj. to, 96, 98, 151, 220; Explosions, 3; Fel. Serv., 16, 166; Negl., 67.
Louisville & N. R. Co. *v.* Asher (Ky.) (15 S. W. Rep. 517), Em. Dom., 453, 647, 671, 837.
Louisville & N. R. Co. *v.* Atkins (2 Lea (Tenn.) 248), Judgm., 17.
Louisville & N. R. Co. *v.* Baldwin (85 Ala. 619, 5 So. Rep. 311), Employés, 3.
Louisville & N. R. Co. *v.* Ballard (28 Am. & Eng. R. Cas. 135, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. Rep. 530), Car. of P., 129, 197, 308, 635, 638; Dam., 96; Pl., 93.
Louisville & N. R. Co. *v.* Ballard (88 Ky. 159, 10 S. W. Rep. 429), App., 125; Car. of P., 635.
Louisville & N. R. Co. *v.* Barker (96 Ala. 435, 11 So. Rep. 453), Animals, 328, 513.
Louisville & N. R. Co. *v.* Bate (17 Am. & Eng. R. Cas. 494, 12 Lea (Tenn.) 573), Tax., 166, 282.
Louisville & N. R. Co. *v.* Belcher (40 Am. & Eng. R. Cas. 228, 89 Ky. 193, 12 S. W. Rep. 195), Animals, 6, 340, 353, 359.
Louisville & N. R. Co. *v.* Berry (88 Ky. 222, 10 S. W. Rep. 472), Evid., 70.
Louisville & N. R. Co. *v.* Binion (98 Ala. 570, 14 So. Rep. 619), Employés, Inj. to, 108, 591.
Louisville & N. R. Co. *v.* Bisch (41 Am. & Eng. R. Cas. 89, 120 Ind. 549, 22 N. E. Rep. 662), Car. of P., 291, 355, 473, 601.
Louisville & N. R. Co. *v.* Black (45 Am. & Eng. R. Cas. 38, 89 Ala. 313, 8 So. Rep. 246), Tresp., Inj. to, 44, 55.
Louisville & N. R. Co. *v.* Blair (1 Tenn. Ch. 351), Stat. Agts., 11.
Louisville & N. R. Co. *v.* Blair (4 Baxt. (Tenn.) 407; affirming 1 Tenn. Ch. 351), Agency, 32.
Louisville & N. R. Co. *v.* Boland (53 Am. & Eng. R. Cas. 169, 96 Ala. 626, 11 So. Rep. 667), Employés, Inj. to, 30, 110, 215.
Louisville & N. R. Co. *v.* Bonhayo (Ky.) (21 S. W. Rep. 526), Blasting, 4.
Louisville & N. R. Co. *v.* Bowler (9 Heisk.

(Tenn.) 866, 20 Am. Ry. Rep. 63), Fel. Serv., 73, 74, 346, 459; Negl., 2.
Louisville & N. R. Co. v. Boykin (76 Ala. 560), Deeds, 16.
Louisville & N. R. Co. v. Brice (28 Am. & Eng. R. Cas. 542, 84 Ky. 298, 1 S. W. Rep. 483), Contrib. Neg., 50, 51; Employés, Inj. to, 702; Trial, 211.
Louisville & N. R. Co. v. Brooks (83 Ky. 129), Death, etc., 422, 436; Fel. Serv., 82, 270.
Louisville & N. R. Co. v. Brown (13 Bush (Ky.) 475), Animals, 514, 532.
Louisville & N. R. Co. v. Brownlee (14 Bush (Ky.) 590), Bills of L., 31, 75; Car. of M., 455.
Louisville & N. R. Co. v. Bryant (Ky.) (22 S. W. Rep. 606), Employés, Inj. to, 114.
Louisville & N. R. Co. v. Bullitt County (92 Ky. 280, 17 S. W. Rep. 632), Tax., 261.
Louisville & N. R. Co. v. Burke (6 Coldw. (Tenn.) 45), Collis., 1; Contrib. Neg., 51; Cross., Inj. at, 190; Death, etc., 81, 378; Employés, Inj. to, 335; Stat., 19.
Louisville & N. R. Co. v. Campbell (97 Ala. 147, 12 So. Rep. 574), Employés, Inj. to, 222, 639.
Louisville & N. R. Co. v. Campbell (7 Heisk. (Tenn.) 253, 12 Am. Ry. Rep. 490), Car. of M., 208, 305, 564.
Louisville & N. R. Co. v. Carl (91 Ala. 271, 9 So. Rep. 334), Evid., 151, 206.
Louisville & N. R. Co. v. Chaffin (84 Ga. 519, 11 S. E. Rep. 891), Death, etc., 96, 419; Witn., 97.
Louisville & N. R. Co. v. Coleman (31 Am. & Eng. R. Cas. 399, 86 Ky. 556, 6 S. W. Rep. 438, 8 S. W. Rep. 873), Tresp., Inj. to, 59, 62.
Louisville & N. R. Co. v. Collins (2 Duv. (Ky.) 114), Comp. Neg., 22; Contrib. Neg., 48; Fel. Serv., 1, 2, 138, 202; Negl., 66.
Louisville & N. R. Co. v. Com. (1 Bush (Ky.) 250), Tax., 261, 311, 312.
Louisville & N. R. Co. v. Com. (13 Bush (Ky.) 388), Nuis., 2.
Louisville & N. R. Co. v. Com. (85 Ky. 198, 3 S. W. Rep. 139), Tax., 12, 261.
Louisville & N. R. Co. v. Com. (41 Am. & Eng. R. Cas. 595, 89 Ky. 531, 12 S. W. Rep. 1064), Mun. Aid, 414; Tax., 261, 322, 338.
Louisville & N. R. Co. v. Com. (92 Ky. 114, 17 S. W. Rep. 274), Sunday, 9.
Louisville & N. R. Co. v. Coniff (90 Ky. 560, 14 S. W. Rep. 543), Death, etc., 26; Employés, Inj. to, 17.
Louisville & N. R. Co. v. Conley (10 Lea (Tenn.) 531), App., 23.
Louisville & N. R. Co. v. Connelly (Ky.) (7 S. W. Rep. 914), App., 79.
Louisville & N. R. Co. v. Conner (2 Baxt. (Tenn.) 382, 21 Am. Ry. Rep. 194), Death, etc., 285.
Louisville & N. R. Co. v. Connor (9 Heisk. (Tenn.) 19, 19 Am. Ry. Rep. 368), Death, etc., 96, 239; Evid., 145; Negl., 25; Sts. & H., 296.
Louisville & N. R. Co. v. Cooper (Ky.) (6 Am. & Eng. R. Cas. 5), Tresp., Inj. to, 71.
Louisville & N. R. Co. v. Coppage (Ky.) (13 S. W. Rep. 1086), Death, etc., 45.
Louisville & N. R. Co. v. Coulton (86 Ala. 129, 5 So. Rep. 458), Employés, Inj. to, 503; Negl., 94.
Louisville & N. R. Co. v. Covington (2 Bush (Ky.) 526), Easem., 9; Em. Dom., 211.
Louisville & N. R. Co. v. Crawford (89 Ala. 240, 8 So. Rep. 243), Cross., Inj. at, 262; Employés, Inj. to, 533.
Louisville & N. R. Co. v. Crunk (41 Am. & Eng. R. Cas. 158, 119 Ind. 542, 21 N. E. Rep. 31), Car. of P., 91, 418, 420, 424; Pl., 174; Trial, 217.
Louisville & N. R. Co. v. Dancy (97 Ala. 338, 11 So. Rep. 796), Car. of P., 264; Pl., 120.
Louisville & N. R. Co. v. Davidson County Court (1 Sneed (Tenn.) 637), Mun. Aid, 19, 49, 109, 112, 161; Words & Ph., 66.
Louisville & N. R. Co. v. Davis (91 Ala. 487, 8 So. Rep. 552), Employés, Inj. to, 9, 104, 177, 592; Fel. Serv., 509; Fly. Switch, 1; Pl., 117.
Louisville & N. R. Co. v. Dies (91 Tenn. 177, 18 S. W. Rep. 266), Bills of L., 100; Car. of M., 52.
Louisville & N. R. Co. v. Dooley (78 Ala. 524), Attach., 34.
Louisville & N. R. Co. v. Earl (94 Ky. 368, 22 S. W. Rep. 607), App., 27; Death, etc., 178, 327; Employés, Inj. to, 379; Evid., 174; New Tr., 83.
Louisville & N. R. Co. v. East St. Louis (134 Ill. 656, 25 N. E. Rep. 962), Sts. & H., 343.
Louisville & N. R. Co. v. Echols (97 Ala. 556, 12 So. Rep. 304), Car. of M., 65.
Louisville & N. R. Co. v. Eves (1 Ind. App. 224, 27 N. E. Rep. 580), Animals, 229; Contrib. Neg., 5, 19, 104; Negl., 53.
Louisville & N. R. Co. v. Faulkner (2 Head (Tenn.) 65), Tresp., 10.
Louisville & N. R. Co. v. Filbern (6 Bush (Ky.) 574), Employés, Inj. to, 652; Fel. Serv., 53; Negl., 4.
Louisville & N. R. Co. v. Finley (86 Ky. 204, 5 S. W. Rep. 753), Sts. & H., 157.
Louisville & N. R. Co. v. Fleming (18 Am. & Eng. R. Cas. 347, 14 Lea (Tenn.) 128), Car. of P., 145.
Louisville & N. R. Co. v. Foley (94 Ky. 220, 21 S. W. Rep. 866), Employés, Inj. to, 109, 420; New Tr., 60; Pl., 123.
Louisville & N. R. Co. v. Fox (11 Bush (Ky.) 495, 14 Am. Ry. Rep. 374), Evid., 90; New Tr., 30.
Louisville & N. R. Co. v. Fulgham (91 Ala. 555, 8 So. Rep. 803), Bills of L., 40; Discrim., 25.
Louisville & N. R. Co. v. Gaines (2 Flipp. (U. S.) 621, 3 Fed. Rep. 266), Charters, 19; Consol., 28, Fed. Cts., 15; Stat., 37; Tax., 146, 148, 357.
Louisville & N. R. Co. v. Ganote (Ky.) (13 Am. & Eng. R. Cas. 519), Animals, 66.
Louisville & N. R. Co. v. Gardner (1 Lea (Tenn.) 688), Cross., Inj. at, 129; Stat., 39.
Louisville & N. R. Co. v. Garrett (3 Am. & Eng. R. Cas. 416, 8 Lea (Tenn.) 438, 41 Am. Rep. 640), Eject. Pass., 33, 48, 114.
Louisville & N. R. Co. v. Gilbert (42 Am. & Eng. R. Cas. 372, 88 Tenn. 430, 12 S.

W. Rep. 1018, 7 L. R. A. 162), Bills of L., 64, 71; Lim. of Liab., 2, 6, 17.
Louisville & N. R. Co. *v.* Gilmer (42 Am. & Eng. R. Cas. 450, 89 Ala. 534, 7 So. Rep. 654), Car. of M., 260, 758.
Louisville & N. R. Co. *v.* Glazebrook (1 Bush (Ky.) 325), Em. Dom., 736.
Louisville & N. R. Co. *v.* Goodnight (10 Bush (Ky.) 552), Crim. L., 2.
Louisville & N. R. Co. *v.* Gower (31 Am. & Eng. R. Cas. 168, 85 Tenn. 465, 3 S. W. Rep. 824), Employés, Inj. to, 173, 198, 765; Negl., 6.
Louisville & N. R. Co. *v.* Greene (Ky.) (19 Am. & Eng. R. Cas. 95), Tresp., Inj. to, 122.
Louisville & N. R. Co. *v.* Guthrie (10 Lea (Tenn.) 432), Animals, 306; Pl., 33.
Louisville & N. R. Co. *v.* Hairston (97 Ala. 351, 12 So. Rep. 299), Tresp., Inj. to, 4.
Louisville & N. R. Co. *v.* Hall (12 Bush (Ky.) 131), Name, 3.
Louisville & N. R. Co. *v.* Hall (39 Am. & Eng. R. Cas. 298, 87 Ala. 708, 4 L. R. A. 710, 6 So. Rep. 277), Bridges, 25; Dam., 19; Employés, Inj. to, 29, 98, 160, 298, 522, 542; Evid., 164; Pl., 51, 118; Witn., 133; Words & Ph., 128.
Louisville & N. R. Co. *v.* Hall (48 Am. & Eng. R. Cas. 170, 91 Ala. 112, 8 So. Rep. 371), Cross., Inj. at, 118; Employés, Inj. to, 37, 57, 58, 309, 534; Evid., 164, 236; Pl., 169; Witn., 65.
Louisville & N. R. Co. *v.* Hawkins (92 Ala. 241, 9 So. Rep. 271), Employés, Inj. to, 509, 546, 547.
Louisville & N. R. Co. *v.* Hays (14 Am. & Eng. R. Cas. 284, 11 Lea (Tenn.) 382, 47 Am. Rep. 291), Flood. Lds., 25, 28, 37; Nuis., 13.
Louisville & N. R. Co. *v.* Hodge (6 Push (Ky.) 141), Embankm., 4.
Louisville & N. R. Co. *v.* Hollerbach (24 Am. & Eng. R. Cas. 340, 105 Ind. 137, 5 N. E. Rep. 28), Constr. Rys., 44.
Louisville & N. R. Co. *v.* Hopkins County (37 Am. & Eng. R. Cas. 400, 87 Ky. 605, 9 S. W. Rep. 497), Mun. Aid, 414; Tax., 261, 338.
Louisville & N. R. Co. *v.* Howard (19 Am. & Eng. R. Cas. 98, 82 Ky. 212), Licensees, Inj. to, 8; Tresp., Inj. to, 21, 34, 37, 41, 42.
Louisville & N. R. Co. *v.* Howard (90 Tenn. 144, 19 S. W. Rep. 116), App., 73; Cross., Inj. at, 187, 250; Death, etc., 200, 278.
Louisville & N. R. Co. *v.* Hurst (Ky.) (20 S. W. Rep. 817), Death, etc., 268; Employés, Inj. to, 158.
Louisville & N. R. Co. *v.* Hurt (Ky.) (13 S. W. Rep. 275), Children, Inj. to, 83, 161.
Louisville & N. R. Co. *v.* Ide (114 U. S. 52, 5 Sup. Ct. Rep. 735), Rem. of C., 41.
Louisville & N. R. Co. *v.* Ingram (Ky.) (14 S. W. Rep. 534), Em. Dom., 452, 837.
Louisville & N. R. Co. *v.* Johnson (47 Am. & Eng. R. Cas. 611, 92 Ala. 204, 9 So. Rep. 269), Car. of P., 92; Death, etc., 330; Eject. Pass., 9, 54; Tresp., Inj. to, 17.
Louisville & N. R. Co. *v.* Johnson (Ky.) (11 S. W. Rep. 666), Tax., 54.
Louisville & N. R. Co. *v.* Johnston (79 Ala. 436), Car. of P., 245; Pl., 135.
Louisville & N. R. Co. *v.* Jones (34 Am. & Eng. R. Cas. 417, 83 Ala. 376, 3 So. Rep. 902), Car. of P., 193, 560, 582; Derailm., 2; Evid., 272.
Louisville & N. R. Co. *v.* Kellem (Ky.) (21 S. W. Rep. 230), Tresp., Inj. to, 65.
Louisville & N. R. Co. *v.* Kelly (13 Am. & Eng. R. Cas. 1, 92 Ind. 371, 47 Am. Rep. 149), Agency, 97; Car. of P., 224, 306, 352.
Louisville & N. R. Co. *v.* Kelsey (42 Am. & Eng. R. Cas. 584, 89 Ala. 287, 7 So. Rep. 648), Animals, 279, 513; Car. of L. S., 156.
Louisville & N. R. Co. *v.* Kenley (92 Tenn. 207, 21 S. W. Rep. 326), Employés, Inj. to, 16, 137, 259; Fel. Serv., 81, 83, 138, 240, 268.
Louisville & N. R. Co. *v.* Koelle (11 Am. & Eng. R. Cas. 301, 104 Ill. 455), Em. Dom., 199.
Louisville & N. R. Co. *v.* Lahr (86 Tenn. 335, 6 S. W. R p. 663), Fel. Serv., 104, 317.
Louisville & N. R. Co. *v.* Law (Ky.) (21 S. W. Rep. 648), Employés, Inj. to, 147, 224, 754; New Tr., 49.
Louisville & N. R. Co. *v.* Lawson (88 Ky. 496, 11 S. W. Rep. 511), Evid., 195; Trover, 13.
Louisville & N. R. Co. *v.* Lee (97 Ala. 325, 12 So. Rep. 48), Car. of P., 427.
Louisville & N. R. Co. *v.* Lewis (Ky.) (21 S. W. Rep. 341), Pl., 116.
Louisville & N. R. Co. *v.* Liebfried (50 Am. & Eng. R. Cas. 202, 92 Ky. 407, 17 S. W. Rep. 870), Ejectm., 9.
Louisville & N. R. Co. *v.* Logan (88 Ky. 232, 10 S. W. Rep. 655), Eject. Pass., 43, 54, 67.
Louisville & N. R. Co. *v.* Long (Ky.) (22 S. W. Rep. 747), Car. of P., 371; Collis., 3; New Tr., 80.
Louisville & N. R. Co. *v.* McCollister (66 Miss. 106, 5 So. Rep. 695), App., 145.
Louisville & N. R. Co. *v.* McCoy (15 Am. & Eng. R. Cas. 277, 81 Ky. 403), Contrib. Neg., 10, 13, 50; Employés, Inj. to, 310; **Negl., 3, 6.**
Louisville & N. R. Co. *v.* McGuire (79 Ala. 395), Car. of M., 25, 91, 342, 375, 742; Evid., 170; Words & Ph., 7.
Louisville & N. R. Co. *v.* McKenna (7 Lea (Tenn.) 313), Derailm., 1.
Louisville & N. R. Co. *v.* McKenna (18 Am. & Eng. R. Cas. 276, 13 Lea (Tenn.) 280), Car. of P., 71; Evid., 117.
Louisville & N. R. Co. *v.* Manchester Mills (88 Tenn. 653, 14 S. W. Rep. 314), Car. of M., 152, 156; Fire Ins., 11; Lim. of Liab., 6, 7.
Louisville & N. R. Co. *v.* Marriott (Ky.) (19 Am. & Eng. R. Cas. 509), Animals, 66, 481, 490; Witn., 128.
Louisville & N. R. Co. *v.* Martin (87 Tenn. 398, 3 L. R. A. 282, 10 S. W. Rep. 772), Fel. Serv., 25, 268.
Louisville & N. R. Co. *v.* Mason (16 Am. & Eng. R. Cas. 241, 11 Lea (Tenn.) 116), Car. of L. S., 160.
Louisville & N. R. Co. *v.* Maybin (66 Miss. 83, 5 So. Rep. 401), Eject. Pass., 4, 9, 10, 116; Witn., 72.

Louisville & N. R. Co. *v.* Melton (2 Lea (Tenn.) 262), Negl., 106.
Louisville & N. R. Co. *v.* Merriwether (Ky.) (12 S. W. Rep. 935), Death, etc., 41.
Louisville & N. R. Co. *v.* Meyer (27 Am. & Eng. R. Cas. 44, 78 Ala. 597), Bills of L., 30, 31; Car. of M., 603, 679, 681, 701.
Louisville & N. R. Co. *v.* Milam (13 Am. & Eng. R. Cas. 507, 9 Lea (Tenn.) 223), Negl., 70, 110.
Louisville & N. R. Co. *v.* Mississippi & T. R. Co. (92 Tenn. 681, 22 S. W. Rep. 920), For. Corp., 28; Judgm., 6; Spec. Perf., 9; Sts. & H., 101.
Louisville & N. R. Co. *v.* Mitchell (87 Ky. 327, 8 S. W. Rep. 760), App., 118; Dam., 96; Employés, Inj. to, 175, 770; Negl., 90; New Tr., 30.
Louisville & N. R. Co. *v.* Moore (24 Am. & Eng. R. Cas. 443, 83 Ky. 675), Employés, Inj. to, 177; Fel. Serv., 53, 73, 218, 240, 380, 387.
Louisville & N. R. Co. *v.* Morgan (95 Ala. 608, 10 So. Rep. 834), Contr., 71.
Louisville & N. R. Co. *v.* Morris (Ky.) (20 S. W. Rep. 539), Sts. & H., 393.
Louisville & N. R. Co. *v.* Mossman (90 Tenn. 157, 16 S. W. Rep. 64), Adv. Poss., 8; Embankm., 4.
Louisville & N. R. Co. *v.* Mothershed (97 Ala. 261, 12 So. Rep. 714), App., 35; Employés, Inj. to, 505; Evid., 75, 114, 219; Fel. Serv., 96; Witn., 179.
Louisville & N. R. Co. *v.* Neal (11 Lea (Tenn.) 270), Lim. of Ac., 36.
Louisville & N. R. Co. *v.* Northington (53 Am. & Eng. R. Cas. 262, 91 Tenn. 56, 17 S. W. Rep. 880, 16 L. R. A. 268), Death, etc., 309; Employés, Inj. to, 617.
Louisville & N. R. Co. *v.* Oden (80 Ala. 38), Car. of M., 342, 360; Lim. of Liab., 4, 28.
Louisville & N. R. Co. *v.* Orr (91 Ala. 548, 8 So. Rep. 360; Dam., 24; Death, etc., 381; Employés, Inj. to, 18, 100, 179, 182, 330.
Louisville & N. R. Co. *v.* Orr (94 Ala. 602, 10 So. Rep. 167), Death, etc., 125; Evid., 149, 244.
Louisville & N. R. Co. *v.* Orr (8 Am. & Eng. R. Cas. 94, 84 Ind. 50), Employés, Inj. to, 97, 544, 545, 592.
Louisville & N. R. Co. *v.* Orr (91 Ky. 100, 15 S. W. Rep. 8), Lim. of Ac., 24; Sts. & H., 145.
Louisville & N. R. Co. *v.* Owens (Ky.) (19 S. W. Rep. 590), Car. of L. S., 73.
Louisville & N. R. Co. *v.* Palmes (13 Am. & Eng. R. Cas. 380, 109 U. S. 244, 3 Sup. Ct. Rep. 325), Fed. Cts., 28; Tax., 150, 360.
Louisville & N. R. Co. *v.* Parker (12 Heisk. (Tenn.) 49), Animals, 527.
Louisville & N. R. Co. *v.* Pearson (97 Ala. 211, 12 So. Rep. 176), Employés, Inj. to, 330, 507, 743; Evid., 89, 175.
Louisville & N. R. Co. *v.* Perry (87 Ala. 392, 6 So. Rep. 40), Employés, Inj. to, 715.
Louisville & N. R. Co. *v.* Pitt (91 Tenn. 86, 18 S. W. Rep. 118), Death, etc., 129, 349.
Louisville & N. R. Co. *v.* Posey (96 Ala. 262, 11 So. Rep. 423), Animals, 64, 515.
Louisville & N. R. Co. *v.* Potts (92 Ky. 30, 17 S. W. Rep. 185), Death, etc., 79; Employés, Inj. to, 166, 328.
Louisville & N. R. Co. *v.* Quinn (22 Am. & Eng. R. Cas. 111, 14 Lea (Tenn.) 65), Em. Dom., 54.
Louisville & N. R. Co. *v.* Quinn (94 Ky. 310, 22 S. W. Rep. 221), Estop., 20.
Louisville & N. R. Co. *v.* Reese (38 Am. & Eng. R. Cas. 342, 85 Ala. 497, 5 So. Rep. 283, 7 Am. St. Rep. 66), Fires, 268, 269, 289.
Louisville & N. R. Co. *v.* Ricketts (Ky.) (19 S. W. Rep. 182), Car. of P., 404.
Louisville & N. R. Co. *v.* Ritter (28 Am. & Eng. R. Cas. 167, 85 Ky. 368, 3 S. W. Rep. 591), Car. of P., 178; Death, etc., 180; Evid., 125; Witn., 44.
Louisville & N. R. Co. *v.* Roberts (Ky.) (8 S. W. Rep. 459), Cross., Inj. at, 364; Evid., 282.
Louisville & N. R. Co. *v.* Robertson (9 Heisk. (Tenn.) 276, 20 Am. Ry. Rep. 9), Employés, Inj. to, 160.
Louisville & N. R. Co. *v.* Robinson (Ky.) (16 S. W. Rep. 707), Employés, Inj. to, 402; Fel. Serv., 183.
Louisville & N. R. Co. *v.* Robinson (4 Bush (Ky.) 507), Fel. Serv., 53, 269, 466; Negl., 3.
Louisville & N. R. Co. *v.* Roehling (11 Ill. App. 264), Rem. of C., 23, 54.
Louisville & N. R. Co. *v.* St. Rose Literary Soc. (91 Ky. 395, 15 S. W. Rep. 1065), Corp., 5; Subscr., 23.
Louisville & N. R. Co. *v.* Sanders (86 Ky. 259, 5 S. W. Rep. 563), Death, etc., 104.
Louisville & N. R. Co. *v.* Saucier (Miss.) (1 So. Rep. 511), Actions, 7; Animals, 211.
Louisville & N. R. Co. *v.* Schmetzer (Ky.) (22 S. W. Rep. 603), Car. of P., 449; Evid., 67.
Louisville & N. R. Co. *v.* Schmidt (8 Am. & Eng. R. Cas. 248, 81 Ind. 264), Animals, 227, 342, 344.
Louisville & N. R. Co. *v.* Schuster (Ky.) (35 Am. & Eng. R. Cas. 407, 7 S. W. Rep. 874), Cross., Inj. at, 206; Licensees, Inj. to, 19.
Louisville & N. R. Co. *v.* Sharp (91 Ky. 411, 16 S. W. Rep. 86), Int., 5.
Louisville & N. R. Co. *v.* Sheets (Ky.) (41 Am. & Eng. R. Cas. 470, 13 S. W. Rep. 248), Fel. Serv., 106, 302.
Louisville & N. R. Co. *v.* Shelton (43 Ill. App. 220), Animals, 177; Contrib. Neg., 82; Fences, 13, 81.
Louisville & N. R. Co. *v.* Sherrod (35 Am. & Eng. R. Cas. 611, 84 Ala. 178, 4 So. Rep. 29), Lim. of Liab., 31.
Louisville & N. R. Co. *v.* Shivell (Ky.) (18 S. W. Rep. 944), Death, etc., 110, 436; Employés, Inj. to, 56; Fel. Serv., 83.
Louisville & N. R. Co. *v.* Sickings (5 Bush (Ky.) 1), Car. of P., 484, 490; Dam., 21.
Louisville & N. R. Co. *v.* Simmons (85 Ky. 151, 3 S. W. Rep. 10), Animals, 119, 380, 480, 515; Inj. to Cars by Cattle, 2.
Louisville & N. R. Co. *v.* Smith (87 Ky. 501, 10 Ky. L. Rep. 514, 9 S. W. Rep. 493), Death, etc., 20; Lim. of Ac., 12.
Louisville & N. R. Co. *v.* Sowell (49 Am. &

Eng. R. Cas. 166, 90 Tenn. 17, 15 S. W. Rep. 837), Bills of L., 84; Car. of L. S., 90; Car. of M., 452, 453; Pl., 75.
Louisville & N. R. Co. *v.* Spalding (Ky.) (22 Am. & Eng. R. Cas. 418), Attach., 48; Car. of M., 302.
Louisville & N. R. Co. *v.* Stacker (86 Tenn. 343, 6 Am. St. Rep. 840, 6 S. W. Rep. 737), Car. of P., 58, 428; Contrib. Neg., 93; Employés, Inj. to, 10, 386; Evid., 218; New Tr., 74.
Louisville & N. R. Co. *v.* State (3 Head (Tenn.) 523), Crim. L., 1, 32; Sts. & H., 197.
Louisville & N. R. Co. *v.* State (8 Heisk. (Tenn.) 663, 19 Am. Ry. Rep. 107), Judgm., 33; Mun. Aid, 112, 126, 320; Tax., 137, 144, 282.
Louisville & N. R. Co. *v.* State (9 Baxt. (Tenn.) 522), Connect. L., 2.
Louisville & N. R. Co. *v.* Stewart (56 Fed. Rep. 808), Evid., 172.
Louisville & N. R. Co. *v.* Stone (7 Heisk. (Tenn.) 468), Animals, 62; Words & Ph., 13.
Louisville & N. R. Co. *v.* Taylor (92 Ky. 55, 17 S. W. Rep. 198), Fires, 6, 42, 43, 247.
Louisville & N. R. Co. *v.* Tennessee R. Com. (19 Fed. Rep. 679), Commerce, 5; Discrim., 4; Ry. Com'rs, 1.
Louisville & N. R. Co. *v.* Thompson (18 B. Mon. (Ky.) 735), Set-off, 7.
Louisville & N. R. Co. *v.* Touart (55 Am. & Eng. R. Cas. 600, 97 Ala. 514, 11 So. Rep. 756), App., 72; Car. of M., 130, 402, 470.
Louisville & N. R. Co. *v.* Trammell (93 Ala. 350, 9 So. Rep. 870), Death, etc., 127, 153, 211, 386, 398; Pl., 45.
Louisville & N. R. Co. *v.* Trent (16 Am. & Eng. R. Cas. 170, 11 Lea (Tenn.) 82), Car. of L. S., 96, 156.
Louisville & N. R. Co. *v.* Upton (18 Ill. App. 605), Animals, 80, 136, 573.
Louisville & N. R. Co. *v.* Wade (Ky.) (12 S. W. Rep. 270), App., 2.
Louisville & N. R. Co. *v.* Wainscott (3 Bush (Ky.) 149), Animals, 118.
Louisville & N. R. Co. *v.* Wallace (90 Tenn. 53, 15 S. W. Rep. 921), Dam., 97; Employés, Inj. to, 339, 640, 650.
Louisville & N. R. Co. *v.* Wallace (49 Am. & Eng. R. Cas. 490, 91 Tenn. 35, 17 S. W. Rep. 882), Dam., 107.
Louisville & N. R. Co. *v.* Wallingford (Ky.) (22 S. W. Rep. 439), Employés, Inj. to, 633; Fel. Serv., 98, 321.
Louisville & N. R. Co. *v.* Wangelin (132 U. S. 599, 10 Sup. Ct. Rep. 203), Rem. of C., 40.
Louisville & N. R. Co. *v.* Warren County Court (5 Bush (Ky.) 243), Tax., 62, 261, 345.
Louisville & N. R. Co. *v.* Watkins (Ky.) (12 Am. & Eng. R. Cas. 89), Tresp., Inj. to, 104.
Louisville & N. R. Co. *v.* Watson (90 Ala. 68, 8 So. Rep. 249), Employés, Inj. to, 415, 421, 428; Lim. of Ac., 65; Witn., 106.
Louisville & N. R. Co. *v.* Weaver (16 Am. & Eng. R. Cas. 218, 9 Lea (Tenn.) 38), Bagg., 19, 22, 55; Car. of M., 610; Tickets & F., 105.
Louisville & N. R. Co. *v.* Webb (49 Am. & Eng. R. Cas. 427, 90 Ala. 185, 8 So. Rep. 518), Cross., Inj. at, 88, 173, 266; Sts. & H., 316.
Louisville & N. R. Co. *v.* Webb (55 Am. & Eng. R. Cas. 121, 97 Ala. 308, 12 So. Rep. 374), Crossing, Inj. at, 206; Negl., 31.
Louisville & N. R. Co. *v.* Whitman (79 Ala. 328), Eject. Pass., 57, 114.
Louisville & N. R. Co. *v.* Willis (83 Ky. 57), Employés, Inj. to, 464, 478.
Louisville & N. R. Co. *v.* Wilsey (Ky.) (12 S. W. Rep. 275), Eject. Pass., 74; New Tr., 36.
Louisville & N. R. Co. *v.* Wilson (88 Tenn. 316, 12 S. W. Rep. 720), Employés, Inj. to, 445.
Louisville & N. R. Co. *v.* Wolfe (80 Ky. 82), Car. of P., 268; Negl., 89.
Louisville & N. R. Co. *v.* Wynn (45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311), Car. of L. S., 24, 39, 65, 88.
Louisville & N. R. Co. *v.* Yandell (17 B. Mon. (Ky.) 586), Employés, Inj. to, 13.
Louisville & N. R. Co. *v.* Yniestra (29 Am. & Eng. R. Cas. 297, 21 Fla. 700), Contrib. Neg., 21, 75, 76, 87, 105, 106; Death, etc., 204; Negl., 44; Sts. & H., 372.
Louisville & N. R. Co. *v.* Young (1 Bush (Ky.) 401), Car. of Slaves, 9.
Louisville & N. Turnpike Co. *v.* State (3 Heisk. (Tenn.) 129), Turnp., 4.
Louisville & N. A. R. Co. *v.* State (25 Ind. 177), Tax., 92, 258.
Louisville & P. Canal Co. *v.* Murphy (9 Bush (Ky.) 522), Children, Inj. to, 122, 129; Negl., 4, 53, 75.
Louisville & P. Canal Co. *v.* Rowan (4 Dana (Ky.) 606), Dam., 97.
Louisville & P. R. Co. *v.* Louisville C. R. Co. (2 Duv. (Ky.) 175), Charters, 29, 68; Franch., 5; St. Rys., 79.
Louisville & P. R. Co. *v.* Smith (2 Duv. (Ky.) 556), St. Rys., 441, 444.
Louisville & St. L. R. Co. *v.* Southworth (38 Ill. App. 225), Receiv., 15.
Louisville, C. & C. R. Co. *v.* Chappell (1 Rice (So. Car.) 383), Em. Dom., 80.
Louisville, C. & C. R. Co. *v.* Letson (2 How. (U. S.) 497), Fed. Cts., 8.
Louisville, C. & L. R. Co. *v.* Case (9 Bush (Ky.) 728), Death, etc., 139, 151, 375; Imp. Neg., 8; Negl., 90.
Louisville, C. & L. R. Co. *v.* Caven (9 Bush (Ky.) 559), Employés, Inj. to, 165, 186; Fel. Serv., 2, 73, 117, 196, 218; Trial, 187.
Louisville, C. & L. R. Co. *v.* Com. (14 Am. & Eng. R. Cas. 613, 80 Ky. 143, 44 Am. Rep. 468), Cross., Inj. at, 184; Evid., 54.
Louisville, C. & L. R. Co. *v.* Com. (10 Bush (Ky.) 43), Tax., 9, 10, 28, 63.
Louisville, C. & L. R. Co. *v.* Goetz (14 Am. & Eng. R. Cas. 627, 79 Ky. 442, 42 Am. Rep. 227), App., 45; Cross., Inj. at, 125, 196.
Louisville, C. & L. R. Co. *v.* Hedger (9 Bush (Ky.) 645), Car. of L. S., 22, 39, 72; Evid., 137.
Louisville, C. & L. R. Co. *v.* Mahan (8 Bush (Ky.) 184), Bagg., 66, 69, 70, 71.
Louisville, C. & L. R. Co. *v.* Mahony (7

Bush (Ky.) 235), Dam., 36; Death, etc., 180, 279, 284; Negl., 62.
Louisville, C. & L. R. Co. *v.* Sullivan (16 Am. & Eng. R. Cas. 390, 81 Ky. 624), Contrib. Neg., 5, 16; Eject. Pass., 46, 52; Trial, 40.
Louisville City R. Co. *v.* Central Pass. R. Co. (36 Am. & Eng. R. Cas. 463, 87 Ky. 223, 8 S. W. Rep. 329), St. Rys., 240, 251.
Louisville City R. Co. *v.* Louisville (4 Bush (Ky.) 478), St. Rys., 292.
Louisville City R. Co. *v.* Louisville (8 Bush (Ky.) 415), St. Rys., 38, 266.
Louisville City R. Co. *v.* Weams (80 Ky. 420), App., 46; Car. of P., 139, 142.
Louisville, E. & St. L. Con. R. Co. *v.* Allen (47 Ill. App. 465), Employés, Inj. to, 130, 238.
Louisville, E. & St. L. Con. R. Co. *v.* Crown Coal Co. (43 Ill. App. 228), Discrim., 9.
Louisville, E. & St. L. Con. R. Co. *v.* Hanning (53 Am. & Eng. R. Cas. 452, 131 Ind. 528, 31 N. E. Rep. 187), Contrib. Neg., 72; Employés, Inj. to, 182, 206, 279, 456, 508.
Louisville, E. & St. L. Con. R. Co. *v.* Hawthorn (147 Ill. 226, 35 N. E. Rep. 534), Employés, Inj. to, 540; Fel. Serv., 206, 511.
Louisville, E. & St. L. Con. R. Co. *v.* Hawthorn (45 Ill. App. 635), Fel. Serv., 124, 303.
Louisville, E. & St. L. Con. R. Co. *v.* Lee (47 Ill. App. 384), Cross., Inj. at, 106.
Louisville, E. & St. L. Con. R. Co. *v.* Pritchard (131 Ind. 564, 31 N. E. Rep. 358), Children, Inj. to, 77, 167; Cross., Sts. & H., 25.
Louisville, E. & St. L. Con. R. Co. *v.* Scott (34 Ill. App. 635), Fences, 58.
Louisville, E. & St. L. Con. R. Co. *v.* Spencer (47 Ill. App. 503), Fires, 41, 43, 344.
Louisville, E. & St. L. Con. R. Co. *v.* Summers (131 Ind. 241, 30 N. E. Rep. 873), Death, etc., 146; Parties, 15.
Louisville, E. & St. L. Con. R. Co. *v.* Utz (133 Ind. 265, 32 N. E. Rep. 881), Consol., 28; Death, etc., 144, 327; Employés, Inj. to, 144, 305, 454.
Louisville, E. & St. L. Con. R. Co. *v.* Wilson (54 Am. & Eng. R. Cas. 452, 132 Ind. 517, 32 N. E. Rep. 311), Charges, 41, 44; Discrim., 13, 16.
Louisville, E. & St. L. R. Co. *v.* Berry (2 Ind. App. 427, 28 N. E. Rep. 714), Employés, Inj. to, 201, 474, 475.
Louisville, E. & St. L. R. Co. *v.* Caldwell (93 Ind. 248), Bills & N., 5.
Louisville, E. & St. L. R. Co. *v.* Chaberaft (14 Ill. App. 516), Em. Dom., 698; Farm Cross., 3.
Louisville, E. & St. L. R. Co. *v.* Clarke (152 U. S. 230, 14 Sup. Ct. Rep. 579), Death, etc., 101, 282, 328.
Louisville, E. & St. L. R. Co. *v.* Donnegan (34 Am. & Eng. R. Cas. 116, 111 Ind. 179, 9 West. Rep. 641, 12 N. E. Rep. 153), Constr. Rys., 51, 63; Evid., 8; Witn., 105, 149; Words & Ph., 87.
Louisville, E. & St. L. R. Co. *v.* Dulaney (43 Ill. App. 247), Animals, 281.
Louisville, E. & St. L. R. Co. *v.* Hart (2 Ind. App. 130, 28 N. E. Rep. 218), Animals, 28, 279, 332, 353, 372, 406.
Louisville, E. & St. L. R. Co. *v.* Hill (29 Ill. App. 582), Animals, 333.
Louisville, E. & St. L. R. Co. *v.* Lanter (47 Ill. App. 339), Sts. & H., 201, 243.
Louisville, E. & St. L. R. Co. *v.* Lewis (31 Ill. App. 281), App., 117.
Louisville, E. & St. L. R. Co. *v.* McVay (22 Am. & Eng. R. Cas. 382, 98 Ind. 391, 49 Am. Rep. 770), Agency, 19; Direct., 38.
Louisville, E. & St. L. R. Co. *v.* Meyer (30 Law Ed. U. S. Sup. Ct. Rep. 689), Constr. Rys., 108; Pl., 86.
Louisville, E. & St. L. R. Co. *v.* Thomas (106 Ind. 10, 5 N. E. Rep. 198), Animals, 73, 352; Fences, 78.
Louisville, E. & St. L. R. Co. *v.* Wilson (40 Am. & Eng. R. Cas. 85, 119 Ind. 352, 21 A. E. Rep. 341), Bills of L., 12, 13, 40, 41, 44.
Louisville, E. & St. L. R. Co. *v.* Wilson (138 U. S. 501, 11 Sup. Ct. Rep. 405), Liens, 63; Mort., 283, 297.
Louisville, N. & G. S. R. Co. *v.* Fleming (18 Am. & Eng. R. Cas. 347, 14 Lea (Tenn.) 128), Car. of P., 62; Contrib. Neg., 51; Dam., 8, 20, 31; Eject. Pass., 19, 77, 110, 112; Tickets & F., 12, 35, 36.
Louisville, N. & G. S. R. Co. *v.* Guinan (13 Am. & Eng. R. Cas. 37, 11 Lea (Tenn.) 98, 47 Am. Rep. 279), Dam., 17, 29; Eject. Pass., 93, 119; Tickets & F., 128.
Louisville, N. & G. S. R. Co. *v.* Harris (16 Am. & Eng. R. Cas. 374, 9 Lea (Tenn.) 180, 42 Am. Rep. 668), Eject. Pass., 48, 49; Tickets & F., 68.
Louisville, N. & G. S. R. Co. *v.* Katzenberger (16 Lea (Tenn.) 380, 1 S. W. Rep. 44, 57 Am. Rep. 232), Sleep. Car Cos., 20, 37.
Louisville, N. & G. S. R. Co. *v.* Reidmond (13 Am. & Eng. R. Cas. 515, 11 Lea (Tenn.) 205), Animals, 547; Name, 3; Words & Ph., 204.
Louisville, N. A. & C. R. Co. *v.* Ader (110 Ind. 376, 9 West. Rep. 190, 11 N. E. Rep. 437), Contrib. Neg., 4, 10, 50, 70; Pl., 180.
Louisville, N. A. & C. R. Co. *v.* Argenbright (19 Am. & Eng. R. Cas. 604, 98 Ind. 254), Animals, 621.
Louisville, N. A. & C. R. Co. *v.* Balch (105 Ind. 93, 4 N. E. Rep. 288), Trial, 104; Trover, 14.
Louisville, N. A. & C. R. Co. *v.* Beck (119 Ind. 124, 21 N. E. Rep. 471), Em. Dom., 1018; Estop., 26.
Louisville, N. A. & C. R. Co. *v.* Boland (53 Ind. 398), Contrib. Neg., 53.
Louisville, N. A. & C. R. Co. *v.* Boney (30 Am. & Eng. R. Cas. 168, 117 Ind. 501, 20 N. E. Rep. 432, 3 L. R. A. 435), Consol., 42; Corp., 9; Exec., 5, 17; Liens, 38.
Louisville, N. A. & C. R. Co. *v.* Breckenridge (64 Ind., 113), Animals, 443.
Louisville, N. A. & C. R. Co. *v.* Bryan (107 Ind. 51, 7 N. E. Rep. 807), Cross., Inj. at, 227, 335.
Louisville, N. A. & C. R. Co. *v.* Buck (38 Am. & Eng. R. Cas. 152, 116 Ind. 566, 19 N. E. Rep. 453, 2 L. R. A. 520, 28 Am. L. Reg. 148), Death, etc., 133, 135; Employés,

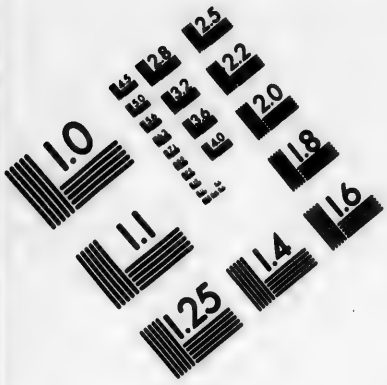
Inj. to, 107, 219, 403, 558; Evid., 174; Sunday, 7; Trial, 192.
Louisville, N. A. & C. R. Co. *v.* Cahill (63 Ind. 340), Animals, 281, 373.
Louisville, N. A. & C. R. Co. *v.* Cauble (46 Ind. 277, 6 Am. Ry. Rep. 349), Animals, 648.
Louisville, N. A. & C. R. Co. *v.* Cherrie (18 Ill. App. 646), Pl., 13.
Louisville, N. A. & C. R. Co. *v.* Clark (19 Am. & Eng. R. Cas. 623, 94 Ind. 111), Animals, 518.
Louisville, N. A. & C. R. Co. *v.* Conrad (52 Am. & Eng. R. Cas. 340, 4 Ind. App. 83, 30 N. E. Rep. 406), Eject. Pass., 39, 69.
Louisville, N. A. & C. R. Co. *v.* Consolidated Tank Line Co. (4 Ind. App. 40, 30 N. E. Rep. 159), Animals, 28, 332; Fences, 7, 57.
Louisville, N. A. & C. R. Co. *v.* Corps (124 Ind. 427, 24 N. E. Rep. 1046), Employés, Inj. to, 182, 204.
Louisville, N. A. & C. R. Co. *v.* Cox (30 Ill. App. 380), Witn., 106.
Louisville, N. A. & C. R. Co. *v.* Creek (49 Am. & Eng. R. Cas. 451, 130 Ind. 139, 29 N. E. Rep. 481). Imp. Neg., 26.
Louisville, N. A. & C. R. Co. *v.* Davis (83 Ind. 89), Animals, 294.
Louisville, N. A. & C. R. Co. *v.* Detrick (91 Ind. 519), Animals, 427, 621.
Louisville, N. A. & C. R. Co. *v.* Diamond State I. Co. (25 Ill. App. 536), App., 121.
Louisville, N. A. & C. R. Co. *v.* Dunkin (15 Am. & Eng. R. Cas. 422, 92 Ind. 601), Tresp., Inj. to, 86.
Louisville, N. A. & C. R. Co. *v.* Ehlert (11 Am. & Eng. R. Cas. 61, 87 Ind. 339), Fires, 183.
Louisville, N. A. & C. R. Co. *v.* Etzler (40 Am. & Eng. R. Cas. 205, 119 Ind. 39, 19 N. E. Rep. 615, 21 N. E. Rep. 466), Animals, 173, 555.
Louisville, N. A. & C. R. Co. *v.* Etzler (3 Ind. App. 562, 30 N. E. Rep. 32), Animals, 127; Cat.-Gds., 11.
Louisville, N. A. & C. R. Co. *v.* Etzler (4 Ind. App. 31, 34 N. E. Rep. 669), Animals, 22.
Louisville, N. A. & C. R. Co. *v.* Falvey (23 Am. & Eng. R. Cas. 522, 104 Ind. 409, 3 N. E. Rep. 389, 4 N. E. Rep. 908), Dam., 4, 22, 67, 70, 71, 73, 74, 86; Evid., 26, 66, 209; Phys. Exam., 5; Witn., 108, 139, 169, 173, 189, 194.
Louisville, N. A. & C. R. Co. *v.* Faylor (126 Ind. 126, 25 N. E. Rep. 860), Car. of P., 19; Collis., 3, 12, 14; Lim. of Liab., 28; Passes, 11, 28; Pl., 75, 93.
Louisville, N. A. & C. R. Co. *v.* Flanagan (32 Am. & Eng. R. Cas. 532, 113 Ind. 488, 12 West. Rep. 100, 14 N. E. Rep. 570), Car. of M., 59, 408; Charges, 2; Ult. Vir., 24.
Louisville, N. A. & C. R. Co. *v.* Francis (58 Ind. 389), Animals, 103; Fences, 63.
Louisville, N. A. & C. R. Co. *v.* Frawley (28 Am. & Eng. R. Cas. 308, 110 Ind. 18, 9 N. E. Rep. 594), Employés, Inj. to, 20, 182, 185, 466, 586, 589, 763; Evid., 27; Sunday, 4.
Louisville, N. A. & C. R. Co. *v.* Godman (104 Ind. 490, 4 N. E. Rep. 163), Car. of L. S., 16, 18, 150.
Louisville, N. A. & C. R. Co. *v.* Goodbar (13 Am. & Eng. R. Cas. 599, 88 Ind. 213), Assign., 3.
Louisville, N. A. & C. R. Co. *v.* Goodbar (102 Ind. 596, 2 N. E. Rep. 337, 3 N. E. Rep. 162), Animals, 127, 179, 319, 368, 507.
Louisville, N. A. & C. R. Co. *v.* Goodykoontz (119 Ind. 111, 42 Am. & Eng. R. Cas. 40, 21 N. E. Rep. 472), Death, etc., 93.
Louisville, N. A. & C. R. Co. *v.* Graham (124 Ind. 89, 24 N. E. Rep. 668), Death, etc., 145, 358; Employés, Inj. to, 8, 40; Fel. Serv., 92, 312, 314.
Louisville, N. A. & C. R. Co. *v.* Green (120 Ind. 367, 22 N. E. Rep. 327), Animals, 194; Trial, 214.
Louisville, N. A. & C. R. Co. *v.* Hall (19 Am. & Eng. R. Cas. 597, 93 Ind. 245), Animals, 354.
Louisville, N. A. & C. R. Co. *v.* Hanmann (87 Ind. 422), Fires, 183.
Louisville, N. A. & C. R. Co. *v.* Harrigan (19 Am. & Eng. R. Cas. 598, 94 Ind. 245), Animals, 353.
Louisville, N. A. & C. R. Co. *v.* Harrington (19 Am. & Eng. R. Cas. 606, 92 Ind. 457), Animals, 368; Pl., 180.
Louisville, N. A. & C. R. Co. *v.* Hart (119 Ind. 273, 21 N. E. Rep. 753), Fires, 66, 124; Trial, 214.
Louisville, N. A. & C. R. Co. *v.* Head (4 Am. & Eng. R. Cas. 619, 80 Ind. 117), Contrib. Neg., 72; Cross., Inj. at, 166, 202.
Louisville, N. A. & C. R. Co. *v.* Hendricks (128 Ind. 462, 28 N. E. Rep. 58), Car. of P., 179, 594; Witn., 128.
Louisville, N. A. & C. R. Co. *v.* Henly (12 Am. & Eng. R. Cas. 301, 88 Ind. 535), Evid., 204.
Louisville, N. A. & C. R. Co. *v.* Hixon (101 Ind. 337), Animals, 328, 456; Evid., 101.
Louisville, N. A. & C. R. Co. *v.* Hobbs (3 Ind. App. 445, 29 N. E. Rep. 934), Death, etc., 126; Employés, Inj. to, 298.
Louisville, N. A. & C. R. Co. *v.* Hughes (2 Ind. App. 68, 28 N. E. Rep. 158), Animals, 28, 180, 354; Farm Cross., 1.
Louisville, N. A. & C. R. Co. *v.* Hurst (98 Ind. 330), Animals, 108.
Louisville, N. A. & C. R. Co. *v.* Johnson (44 Ill. App. 56), Car. of P., 244, 418; Comp. Neg., 2; Cross. Rys., 82.
Louisville, N. A. & C. R. Co. *v.* Johnson (67 Ind. 546), Animals, 293.
Louisville, N. A. & C. R. Co. *v.* Jones (28 Am. & Eng. R. Cas. 170, 108 Ind. 551, 9 N. E. Rep. 476), Dam., 22; Derailm., 4, 6; Negl., 89, 101; Trial, 54; Witn., 128.
Louisville, N. A. & C. R. Co. *v.* Kious (82 Ind. 357), Animals, 329, 353.
Louisville, N. A. & C. R. Co. *v.* Kreaning (87 Ind. 351), Fires, 125, 177.
Louisville, N. A. & C. R. Co. *v.* Lockridge (22 Am. & Eng. R. Cas. 649, 93 Ind. 191), Contrib. Neg., 53; Fires, 101.
Louisville, N. A. & C. R. Co. *v.* Lucas (119 Ind. 583, 21 N. E. Rep. 968), Car. of P.,

236; Negl., 49, 86; Stat. & D., 76, 113, 149; Witn., 73.
Louisville, N. A. & C. R. Co. *v.* McAfee (30 Ind. 291). Waters & W., 26.
Louisville, N. A. & C. R. Co. *v.* Malott, 57 Am. & Eng. R. Cas. 278, 135 Ind. 113, 34 N. E. Rep. 709), Em. Dom., 203, 660.
Louisville, N. A. & C. R. Co. *v.* Meadows (87 Ind. 441), Animals, 446.
Louisville, N. A. & C. R. Co. *v.* Miller (Ind.) 58 Am. & Eng. R. Cas. 304, 37 N. E. Rep. 343), App., 125; Car. of P., 576; Dam., 22; Derailm., 4; Evid., 74, 82; Witn., 46, 119.
Louisville, N. A. & C. R. Co. *v.* Moore (106 Ind. 600, 5 N. E. Rep. 413), Em. Dom., 216.
Louisville, N. A. & C. R. Co. *v.* Nicholai (4 Ind. App. 119, 30 N. E. Rep. 424), Bagg., 3, 103; Car. of M., 25; Car. of P., 335; Lim. of Liab., 2, 27, 31, 43; Tickets & F., 1, 15, 17; Words & Ph., 7.
Louisville, N. A. & C. R. Co. *v.* Nicholson (60 Ind. 158), Appear., 4.
Louisville, N. A. & C. R. Co. *v.* Nitsche (45 Am. & Eng. R. Cas. 532, 126 Ind. 229, 26 N. E. Rep. 51), Fires, 69, 86, 96, 98.
Louisville, N. A. & C. R. Co. *v.* Ohio Valley I. & C. Co. (57 Fed. Rep. 42), Eq., 13; Guar., 10.
Louisville, N. A. & C. R. Co. *v.* Overman (88 Ind. 115), Animals, 352; Pl., 136.
Louisville, N. A. & C. R. Co. *v.* Parks (97 Ind. 307), Fires, 180, 183.
Louisville, N. A. & C. R. Co. *v.* Peck (99 Ind. 68), Animals, 368, 423.
Louisville, N. A. & C. R. Co. *v.* Pedigo (27 Am. & Eng. R. Cas. 310, 108 Ind. 481, 8 N. E. Rep. 627), App., 125; Bridges, 51; Car. of P., 139, 151; Evid., 31.
Louisville, N. A. & C. R. Co. *v.* Phillips (31 Am. & Eng. R. Cas. 432, 112 Ind. 59, 13 N. E. Rep. 132, 11 West. Rep. 119), Cross., Inj. at, 10; Licensees, Inj. to, 6; Sts. & H., 371.
Louisville, N. A. & C. R. Co. *v.* Porter (20 Am. & Eng. R. Cas 446, 97 Ind. 267), Animals, 162; Cat.-Gds., 15.
Louisville, N. A. & C. R. Co. *v.* Power (119 Ind. 269, 21 N. E. Rep. 751), Estop., 14; Fences, 99.
Louisville, N. A. & C. R. Co. *v.* Quade (19 Am. & Eng. R. Cas. 595, 91 Ind. 295), Animals, 352, 476.
Louisville, N. A. & C. R. Co. *v.* Quade (101 Ind. 364), Animals, 303.
Louisville, N. A. & C. R. Co. *v.* Red (47 Ill. App. 662), Children, Inj. to, 21.
Louisville, N. A. & C. R. Co. *v.* Reynolds 118 Ind. 170, 20 N. E. Rep. 711), Att'ys, 12.
Louisville, N. A. & C. R. Co. *v.* Richardson (66 Ind. 43), Evid., 75; Fires, 367; Negl., 66; Witn., 37.
Louisville, N. A. & C. R. Co. *v.* Rush (127 Ind. 545, 26 N. E. Rep. 1010), Death, etc., 255, 404.
Louisville, N. A. & C. R. Co. *v.* Sandford (117 Ind. 265, 19 N. E. Rep. 770), Contrib. Neg., 72; Employés, Inj. to, 236, 261, 543.
Louisville, N. A. & C. R. Co. *v.* Schick (94 Ky. 191, 21 S. W. Rep. 1036), Trial, 46.
Louisville, N. A. & C. R. Co. *v.* Schmidt (106 Ind. 73, 5 N. E. Rep. 684; further appeal 126 Ind. 290), Contrib. Neg., 53.
Louisville, N. A. & C. R. Co. *v.* Schmidt (126 Ind. 290, 25 N. E. Rep. 149, 26 N. E. Rep. 45; former appeal 106 Ind. 73, 5 N. E. Rep. 684), Fly. Switch, 4.
Louisville, N. A. & C. R. Co. *v.* Schmidt (55 Am. & Eng. R. Cas. 128, 134 Ind. 16, 33 N. E. Rep. 774), Cross., Inj. at, 16; Negl., 35; Trial, 217.
Louisville, N. A. & C. R. Co. *v.* Shanklin (19 Am. & Eng. R. Cas. 552, 94 Ind. 297), Animals, 351; Fences, 56, 63.
Louisville, N. A. & C. R. Co. *v.* Shanklin (19 Am. & Eng. R. Cas. 555, 98 Ind. 573), Aband., 6; Fences, 63.
Louisville, N. A. & C. R. Co. *v.* Shanks (19 Am. & Eng. R. Cas. 28, 94 Ind. 398), Contrib. Neg., 22; Dam., 19.
Louisville, N. A. & C. R. Co. *v.* Shanks (132 Ind. 395, 31 N. E. Rep. 1111), Children, Inj. to, 114.
Louisville, N. A. & C. R. Co. *v.* Shires (19 Am. & Eng. R. Cas. 387, 108 Ill. 617), Comp. Neg., 16; Evid., 234; Trial, 172; Witn., 165, 180, 192.
Louisville, N. A. & C. R. Co. *v.* Skelton 19 Am. & Eng. R. Cas. 542, 94 Ind. 222), Animals, 373.
Louisville, N. A. & C. R. Co. *v.* Smith (58 Ind. 575, 19 Am. Ry. Rep. 18), Animals, 73; Contrib. Neg., 72; Pl., 38.
Louisville, N. A. & C. R. Co. *v.* Smith (13 Am. & Eng. R. Cas. 608, 91 Ind. 119), Cross., Sts. & H., 56.
Louisville, N. A. & C. R. Co. *v.* Smith (121 Ind. 353, 22 N. E. Rep. 775, 6 L. R. A. 320), Med. Serv., 6, 15.
Louisville, N. A. & C. R. Co. *v.* Snyder (37 Am. & Eng. R. Cas. 137, 117 Ind. 435, 20 N. E. Rep. 284, 3 L. R. A. 434), Bridges, 32; Car. of P., 137, 142, 171, 350, 457, 594; Dam., 22; Evid., 144; Witn., 173.
Louisville, N. A. & C. R. Co. *v.* Soltweddle (36 Am. & Eng. R. Cas. 577, 116 Ind. 257, 19 N. E. Rep. 111), Em. Dom., 1017.
Louisville, N. A. & C. R. Co. *v.* Spain (61 Ind. 460), Animals, 127, 368, 421.
Louisville, N. A. & C. R. Co. *v.* Spenn (11 Am. & Eng. R. Cas. 60, 87 Ind. 322), Fires, 183.
Louisville, N. A. & C. R. Co. *v.* Stanger (Ind. App.) (32 N. E. Rep. 209), Fright. Teams, 1, 2.
Louisville, N. A. & C. R. Co. *v.* State (122 Ind. 443, 24 N. E. Rep. 350), Drains, 7.
Louisville, N. A. & C. R. Co. *v.* Stevens (87 Ind. 198), Fires, 247.
Louisville, N. A. & C. R. Co. *v.* Stommel (126 Ind. 35, 25 N. E. Rep. 863), Animals, 214; Contrib. Neg., 104; Cross., Inj. at, 194, 231, 264, 356; Negl., 70, 88.
Louisville, N. A. & C. R. Co. *v.* Stover (57 Ind. 559, 18 Am. Ry. Rep. 398), Appear., 4.
Louisville, N. A. & C. R. Co. *v.* Sumner (24 Am. & Eng. R. Cas. 641, 106 Ind. 55, 5 N. E. Rep. 404), Animals, 88; Contr., 59; Em. Dom., 219; Estop., 30; Fences, 99; Stat. & D., 43.
Louisville, N. A. & C. R. Co. *v.* Thomas

(1 Ind. App. 131, 27 N. E. Rep. 302), Animals, 179; New Tr., 25.
Louisville, N. A. & C. R. Co. *v.* Thompson (62 Ind. 87), Proc., 14.
Louisville, N. A. & C. R. Co. *v.* Thompson (27 Am. & Eng. R. Cas. 88, 329, 107 Ind. 442, 8 N. E. Rep. 18, 9 N. E. Rep. 357, 57 Am. Rep. 120), App., 35; Bridges, 34; Car. of P., 19, 20, 581; Death, etc., 140; Evid., 116, 125, 280; Passes, 18; Tickets & F., 59; Witn., 17.
Louisville, N. A. & C. R. Co. *v.* White (20 Am. & Eng. R. Cas. 449, 94 Ind. 257), Fences, 43.
Louisville, N. A. & C. R. Co. *v.* Whitesell (68 Ind. 297), Animals, 281; Trial, 217.
Louisville, N. A. & C. R. Co. *v.* Wilkerson (83 Ind. 153), Animals, 329.
Louisville, N. A. & C. R. Co. *v.* Wolfe (47 Am. & Eng. R. Cas. 630, 128 Ind. 347, 27 N. E. Rep. 606), Dam., 30; Eject. Pass., 43, 62.
Louisville, N. A. & C. R. Co. *v.* Wood (113 Ind. 544, 12 West. Rep. 311, 14 N. E. Rep. 572, 16 N. E. Rep. 197), Car. of P., 248, 560; Conduct., 11; Evid., 74; New Tr., 30; Witn., 100, 164, 168, 173, 191.
Louisville, N. A. & C. R. Co. *v.* Wright (38 Am. & Eng. R. Cas. 41, 115 Ind. 378, 13 West. Rep. 798, 16 N. E. Rep. 145, 17 N. E. Rep. 584), Employés, Inj. to, 12, 59, 188; Evid., 56, 60,, 67; Witn., 168.
Louisville, N. A. & C. R. Co. *v.* Worley (107 Ind. 320, 7 N. E. Rep. 215), Trial, 204.
Louisville, N. A. & C. R. Co. *v.* Wunderlich (10 Am. & Eng. R. Cas. 410, 81 Ind. 105), Em. Dom., 901, 902, 926.
Louisville, N. A. & C. R. Co. *v.* Zink (85 Ind. 219), Animals, 95, 126.
Louisville, N. A. & C. R. Co. *v.* Zink (92 Ind. 406), Animals, 615.
Louisville, N. A. & C. R. Co. *v.* Zink (95 Ind. 345), Animals, 460.
Louisville, N. A. & St. L. A. L. R. Co. *v.* Dryden (39 Ind. 393, 10 Am. Ry. Rep. 350), Em. Dom., 536.
Louisville, N. A. & St. L. A. L. R. Co. *v.* Duvall (40 Ind. 246), Tresp., 5.
Louisville, N. O. & T. R. Co. *v.* Bigger (38 Am. & Eng. R. Cas. 373, 66 Miss. 319, 6 So. Rep. 234), Car. of L. S., 24, 26.
Louisville, N. O. & T. R. Co. *v.* Blythe (69 Miss. 939, 11 So. Rep. 111), Consol., 40; Em. Dom., 195.
Louisville, N. O. & T. R. Co. *v.* Caster (Miss.) (5 So. Rep. 388), Animals, 211, 545.
Louisville, N. O. & T. R. Co. *v.* Cooper (68 Miss. 368, 8 So. Rep. 747), Tresp., Inj. to, 101.
Louisville, N. O. & T. R. Co. *v.* Conroy (63 Miss. 562), Employés, Inj. to, 554; Evid., 141; Fel. Serv., 129, 202.
Louisville, N. O. & T. R. Co. *v.* Crayton (69 Miss. 152, 12 So. Rep. 271), Evid., 244; New Tr., 94.
Louisville, N. O. & T. R. Co. *v.* Day (67 Miss. 227, 7 So. Rep. 349), Estop., 28; Tresp., 9.
Louisville, N. O. & T. R. Co. *v.* Dickson (63 Miss. 380), Em. Dom., 493, 657.
Louisville, N. O. & T. R. Co. *v.* Douglass (69 Miss. 723, 11 So. Rep. 933), Agency, 76, 80, 91.
Louisville, N. O. & T. R. Co. *v.* Durfree (69 Miss. 439, 13 So. Rep. 697), Sts. & H., 408.
Louisville, N. O. & T. R. Co. *v.* French (69 Miss. 121, 12 So. Rep. 338), Cross., Inj. at, 113; Sts. & H., 326, 386.
Louisville, N. O. & T. R. Co. *v.* Hirsch (56 Am. & Eng. R. Cas. 291, 69 Miss. 126, 13 So. Rep. 244), Children, Inj. to, 137; Stat. & D., 73, 75.
Louisville, N. O. & T. R. Co. *v.* Kennedy (90 Tenn. 185, 16 S. W. Rep. 113), Set-off, 6.
Louisville, N. O. & T. R. Co. *v.* Mask (64 Miss. 738, 2 So. Rep. 360), Car. of P., 230, 609; Trial, 29.
Louisville, N. O. & T. R. Co. *v.* Natchez, J. & C. R. Co. (43 Am. & Eng. R. Cas. 54, 67 Miss. 399, 7 So. Rep. 350), Car. of M., 746; Fires, 279, 280.
Louisville, N. O. & T. R. Co. *v.* Patterson (69 Miss. 421, 13 So. Rep. 697), Car. of P., 224, 309; Conduct., 11.
Louisville, N. O. & T. R. Co. *v.* Petty (41 Am. & Eng. R. Cas. 444, 67 Miss. 255, 7 So. Rep. 351), Fel. Serv., 1, 24, 134, 149, 268, 448.
Louisville, N. O. & T. R. Co. *v.* Ryan (64 Miss. 399, 8 So. Rep. 173), Em. Dom., 603, 624, 1055.
Louisville, N. O. & T. R. Co. *v.* Smith (67 Miss. 15, 7 So. Rep. 212), Animals, 51, 513.
Louisville, N. O. & T. R. Co. *v.* State (39 Am. & Eng. R. Cas. 399, 66 Miss. 662, 6 So. Rep. 203; affirmed in 41 Am. & Eng. R. Cas. 36, 133 U. S. 587, 10 Sup. Ct. Rep. 348), Col. Pers., 3; Commerce, 1.
Louisville, N. O. & T. R. Co. *v.* Suddoth (70 Miss. 265, 12 So. Rep. 205), Animals, 567.
Louisville, N. O. & T. R. Co. *v.* Tate (70 Miss. 348, 12 So. Rep. 333), Animals, 577.
Louisville, N. O. & T. R. Co. *v.* Taylor (68 Miss. 361, 8 So. Rep. 675), Tax., 206.
Louisville, N. O. & T. R. Co. *v.* Thompson (30 Am. & Eng. R. Cas. 541, 64 Miss. 584, 1 So. Rep. 840), Car. of P., 280; Stat. & D., 145.
Louisville, N. O. & T. R. Co. *v.* Van Eaton (Miss.) (11 So. Rep. 111), Animals, 455.
Louisville, N. O. & T. R. Co. *v.* Williams (69 Miss. 631, 12 So. Rep. 957), Children, Inj. to, 35, 38.
Louisville S. V. & T. Co. *v.* Louisville & N. R. Co. (Ky.) (48 Am. & Eng. R. Cas. 1, 17 S. W. Rep. 567), Death, etc., 8, 20.
Louisville, St. L. & T. R. Co. *v.* Barrett (47 Am. & Eng. R. Cas. 169, 91 Ky. 487, 16 S. W. Rep. 278), Em. Dom., 453, 506, 691.
Louisville, St. L. & T. R. Co. *v.* Hess (50 Am. & Eng. R. Cas. 202, 92 Ky. 407, 17 S. W. Rep. 870), Estop., 22; Sts. & H., 218.
Louisville, St. L. & T. R. Co. *v.* Neafus (93 Ky. 53, 18 S. W. Rep. 1030), Dam., 54; Evid., 184; Pl., 31, 97.
Louisville Southern R. Co. *v.* Minogue (90 Ky. 369, 14 S. W. Rep. 357), Car. of P.,

142, 643; Collis., 3; Dam., 43; Negl., 68; New Tr., 30.
Loundenslager *v.* Benton (4 Phila. (Pa.) 382, 3 Grant's Cas. 384), Exec., 10, 23.
Lounsbury *v.* Iowa, M. & N. P. R. Co. (49 Iowa 255), Liens, 33.
Loup *v.* California Southern R. Co. (11 Am. & Eng. R. Cas. 589, 63 Cal. 97), Pl., 19.
Love *v.* Philadelphia & R. R. Co. (19 Phila. (Pa.) 304), Coupons, 12, 17.
Lovegrove *v.* London, B. & S. C. R. Co. (16 C. B. N. S. 669, 10 Jur. N. S. 879, 33 L. J. C. P. 329, 12 W. R. 988, 10 L. T. 718), Fel. Serv., 426.
Lovejoy *v.* Atchison, T. & S. F. R. Co. (53 Mo. App. 386), Crim. L., 2.
Lovejoy *v.* Boston & L. R. Corp. (125 Mass. 79), Employés, Inj. to, 210.
Lovejoy *v.* Middlesex R. Co. (128 Mass. 480), Superint., 1.
Loveless *v.* Manhattan R. Co. (25 J. & S. 3, 5 N. Y. Supp. 185, 24 N. Y. S. R. 177), Witn., 154.
Lovell *v.* De Bardelaben C. & I. Co. (90 Ala. 13, 7 So. Rep. 756), Children, Inj. to, 70; Death, etc., 12; Pl., 1.
Lovell *v.* London, C. & D. R. Co. (45 L. J. Q. B. 476, 34 L. T. 127, 24 W. R. 394, 6 Ry. & C. T. Cas. lxix, 3 Ry. & C. T. Cas. xx), Bagg., 50.
Lovett *v.* Salem & S. D. R. Co. (9 Allen (Mass.) 557), Children, Inj. to, 53, 87, 123, 143; Pl., 33.
Lovitt *v.* Wellington & W. R. Co. (26 Kan. 297), App., 133.
Low *v.* California Pac. R. Co. (52 Cal. 53, 21 Am. Ry. Rep. 199), Cent. Pac. R. Co., 6.
Low *v.* Concord R. Co. (25 Am. & Eng. R. Cas. 199, 63 N. H. 557, 3 Atl. Rep. 739), Em. Dom., 451, 466, 927.
Low *v.* Connecticut & P. R. R. Co. (45 N. H. 370), Evid., 8, 203; Witn., 110.
Low *v.* Connecticut & P. R. R. Co. (46 N. H. 284), Charters, 1; Contr., 67; Evid., 214; Reorg., 15.
Low *v.* Galena & C. U. R. Co. (18 Ill. 324), Em. Dom., 477, 479.
Low *v.* Grand Trunk R. Co. (72 Me. 313, 39 Am. Rep. 331), Wharves, 4.
Low *v.* Studabaker (110 Ind. 57, 10 N. E. Rep. 301), Mun. Aid, 240.
Lowe *v.* East Tenn., V. & G. R. Co. (90 Ga. 85, 15 S. E. Rep. 692), Car. of M., 127.
Lowe *v.* Edgefield & K. R. Co. (1 Head (Tenn.) 659), Subscr., 13, 189.
Lowe *v.* London & N. W. R. Co. (18 Q. B. 632, 17 Jur. 375, 21 L. J. Q. B. 361, 7 Railw. Cas. 524), Assump., 7.
Lowe *v.* Minneapolis St. R. Co. (37 Minn. 283, 34 N. W. Rep. 33), New Tr., 49; St. Rys., 468.
Lowell *v.* Boston & L. R. Corp. (23 Pick. (Mass.) 24), Cross., Inj. at, 31; Indep. Contr., 11; Sts. & H., 193, 401.
Lowell & L. R. Co. *v.* Boston & L. R. Corp. (7 Gray (Mass.) 27), Charters, 70.
Lowell Wire Fence Co. *v.* Sargent (8 Allen (Mass.) 189), Exp. Cos., 76.
Lowenburg *v.* Jones (56 Miss. 688), Charges, 86.
Lower *v.* Chicago, B. & Q. R. Co. (10 Am. & Eng. R. Cas. 17, 59 Iowa 563, 13 N. W. Rep. 718), Branch & L. Roads, 15; Em. Dom., 73, 293.
Lowery *v.* Brooklyn City & N. R. Co. (76 N. Y. 28; reversing 4 Abb. N. Cas. 32), St. Rys., 159.
Lowery *v.* Manhattan R. Co. (23 Am. & Eng. R. Cas. 276, 99 N. Y. 158, 1 N. E. Rep. 608, 52 Am. Rep. 12; affirming 12 Daly 431), Elev. Rys., 219.
Lowestoft, Y. & S. Tramways Co., In re (L. R. 6 Ch. D. 484, 46 L. J. Ch. D. 393, 25 W. R. 525, 36 L. T. 578), Tramw., 8.
Lowney *v.* New Brunswick R. Co. (29 Am. & Eng. R. Cas. 116, 78 Me. 479, 7 Atl. Rep. 381), Fires, 7, 22, 246.
Lowry *v.* Chicago, B. & Q. R. Co. (46 Fed. Rep. 83), Rem. of C., 10, 56.
Lowry *v.* St. Louis & H. R. Co. (40 Mo. App. 554), Animals, 73, 74, 78.
Lowther *v.* Caledonian R. Co. ([1891] 3 Ch. 443), Em. Dom., 1172.
Loyd *v.* Hannibal & St. J. R. Co. (53 Mo. 509, 12 Am. Ry. Rep. 474), Car. of P., 428, 550; Contrib. Neg., 59; Phys. Exam., 2; Trial, 89.
Lozier *v.* New York C. R. Co. (42 Barb. (N. Y.) 465), Ejectm., 9.
Luby *v.* Chicago, R. I. & P. R. Co. (52 Iowa 168, 2 N. W. Rep. 1114), Death, etc., 146.
Luby *v.* Hudson River R. Co. (17 N. Y. 131), Evid., 47, 162.
Lucas *v.* Kentucky C. R. Co. (Ky.) (45 Am. & Eng. R. Cas. 520, 14 S. W. Rep. 965), Lim. of Ac., 2.
Lucas *v.* Milwaukee & St. P. R. Co. (33 Wis. 41), Car. of P., 43, 45, 578; Evid., 76.
Lucas *v.* New Bedford & T. R. Co. (6 Gray (Mass.) 64), Car. of P., 91; Contrib. Neg., 13.
Lucas *v.* New York C. R. Co. (21 Barb. (N. Y.) 245), Death, etc., 81, 129.
Lucas *v.* Pennsylvania Co. (120 Ind. 205, 21 N. E. Rep. 972), Stat. & D., 149.
Lucas *v.* Pitney (27 N. J. L. 221), Bills & N., 7; Charters, 104.
Lucas *v.* Richmond & D. R. Co. (40 Fed. Rep. 566), Tresp., Inj. to, 23.
Lucas *v.* State (96 Ala. 51, 11 So. Rep. 216), Crim. L., 27.
Lucas *v.* Sunbury & E. R. Co. (32 Pa. St. 458), Assign. for Cred., 1.
Lucas *v.* Tippecanoe County Com'rs (44 Ind. 524), Mun. Aid, 30.
Lucas *v.* White Line Transfer Co. (70 Iowa 541, 30 N. W. Rep. 771), Ult. Vir., 12.
Lucas Coal Co. *v.* Delaware & H. Canal Co. (148 Pa. St. 227, 23 Atl. Rep. 990), Sales, 12, 15.
Luce *v.* Chicago, St. P., M. & O. R. Co. (67 Iowa 75, 24 N. W. Rep. 600), Fel. Serv., 29.
Luce *v.* Manchester & L. R. Co. (26 Am. & Eng. R. Cas. 74, 63 N. H. 588, 3 Atl. Rep. 618), Ex. & Ad., 5, 10.
Lucesco Oil Co. *v.* Pennsylvania R. Co. (2 Pittsb. (Pa.) 477), Bills of L., 34; Car. of M., 155, 773; Lim. of Liab., 2.
Luckie *v.* Chicago & A. R. Co. (67 Mo. 245), Animals, 356, 604.

Luckie *v.* Chicago & A. R. Co. (76 Mo. 639), Fences, 56.
Ludlow *v.* Cincinnati Southern R. Co. (7 Am. & Eng. R. Cas. 231, 78 Ky. 357), Sts. & H., 346.
Ludlow *v.* Clinton Line R. Co. (1 Flipp. (U. S.) 25), Exec., 18; Judgm., 37; Mort., 66.
Ludlow *v.* Hudson River R. Co. (6 Lans. (N. Y.) 128), Deeds, 13.
Ludlow *v.* Hudson River R. Co. (4 Hun (N. Y.) 239, 6 T. & C. 420), Right of W., 19.
Ludlow *v.* Hurd (1 Disney (Ohio) 552), Mort., 25, 35.
Ludlow *v.* New York & H. R. Co. (12 Barb. (N. Y.) 440), Deeds, 37.
Ludlow *v.* Norfolk (87 Va. 319, 12 S. E. Rep. 612), App., 8.
Ludwig *v.* Meyre (5 Watts & S. (Pa.) 435), Car. of M., 701, 758.
Ludy *v.* Philadelphia Traction Co. (2 Pa. Dist. 848), Witn., 3.
Luebke *v.* Chicago, M. & St. P. R. Co. (15 Am. & Eng. R. Cas. 183, 59 Wis. 127, 17 N. W. Rep. 870, 48 Am. Rep. 483), Employés, Inj. to, 286; Fel. Serv., 92, 331.
Luebke *v.* Chicago, M. & St. P. R. Co. (63 Wis. 91, 23 N. W. Rep. 136, 53 Am. Rep. 266), Fel. Serv., 444.
Luling *v.* Racine (1 Biss. (U. S.) 314), Mun. Aid, 1, 322, 355.
Lumsden *v.* London & S. W. R. Co. (16 L. T. N. S. 600), Agency, 95.
Lundin *v.* Kansas Pac. R Co. (4 Colo. 433), Death, etc., 15.
Lundy *v.* Central Pac. R. Co. (18 Am. & Eng. R. Cas. 309, 66 Cal. 191, 4 Pac. Rep. 1193), Eject. Pass., 70; Tickets & F., 90.
Lundy *v.* Second Ave. R. Co. (1 Misc. 100, 48 N. Y. S. R. 676, 20 N. Y. Supp. 691), St. Rys., 476.
Lung Chung *v.* Northern Pac. R. Co. (16 Am. & Eng. R. Cas. 548, 19 Fed. Rep. 254, 10 Sawy. (U. S.) 17), Death, etc., 113; Proc., 15, 28.
Lunt *v.* London & N. W. R. Co. (L. R. 1 Q. B. 277, 12 Jur. N. S. 409, 35 L. J. Q. B. 105, 14 W. R. 497, 14 L. T. 225), Cross., Inj. at, 48, 57.
Lupe *v.* Atlantic & P. R. Co. (3 Mo. App. 77), Car. of L. S., 21; Lim. of Liab., 40, 41.
Lusby *v.* Atchison, T. & S. F. R. Co. (41 Am. & Eng. R. Cas. 93, 41 Fed. Rep. 181), Car. of P., 363, 609.
Luse *v.* Isthmus Transit R. Co. (6 Oreg. 125), Pres., 4.
Lusted *v.* Chicago & N. W. R. Co. (71 Wis. 391, 36 N. W. Rep. 857), Release, 9.
Lustig *v.* New York, L. E. & W. R. Co. (48 N. Y. S. R. 916, 65 Hun 547, 20 N. Y. Supp. 477), Death, etc., 115.
Luther *v.* Saylor (8 Mo. App. 424), Constr. Rys., 92.
Lutz *v.* Atlantic & P. R. Co. (N. Mex.) (53 Am. & Eng. R. Cas. 478, 30 Pac. Rep. 912), Death, etc., 27; Employés, Inj. to, 258; Fel. Serv., 1, 34, 449.
Lyberg *v.* Northern Pac. R. Co. (39 Minn. 15, 38 N. W. Rep. 632), Fel. Serv., 160.
Lycett *v.* Stafford & U. R. Co. (L. R. 13 Eq. 261, 25 L. T. 870), Em. Dom., 1209.
Lyde *v.* Eastern Bengal R. Co. (36 Beav. 10), Contr., 66; Corp., 4.
Lydick *v.* Baltimore & O. R. Co. (11 Am. & Eng. R. Cas. 336, 17 W. Va. 427), Contr., 9; Cov'ts, 6.
Lyford *v.* North Pac. Coast R. Co. (92 Cal. 93, 28 Pac. Rep. 103), Husb. & W., 6, 14.
Lyle *v.* McKeesport & B. V. R. Co. (44 Am. & Eng. R. Cas. 217, 131 Pa. St. 437, 18 Atl. Rep. 1111), Em. Dom., 94.
Lyle *v.* Manhattan R. Co. (25 N. Y. S. R. 549, 6 N. Y. Supp. 325), Elev. Rys., 199, 214.
Lyles *v.* Texas & N. O. R. Co. (39 Am. & Eng. R. Cas. 59, 73 Tex. 95, 11 S. W. Rep. 782), Lim. of Ac., 24.
Lyman *v.* Boston & M. R. Co. (N. H.) (45 Am. & Eng. R. Cas. 163, 20 Atl. Rep. 976), Cross., Inj. at, 110, 215, 219, 234, 239; Evid., 31.
Lyman *v.* Boston & W. R. Corp. (4 Cush. (Mass.) 288), Fires, 9.
Lyman *v.* Central Vt. R. Co. (30 Am. & Eng. R. Cas. 210, 59 Vt. 167, 4 N. Eng. Rep. 726, 10 Atl Rep. 346), Receiv., 123, 130.
Lynam *v.* Philadelphia, W. & B. R. Co. (4 Houst. (Del.) 583), Cross., Inj. at, 281.
Lynam *v.* Union R. Co. (114 Mass. 83), St. Rys., 489.
Lynch *v.* Boston & A. R. Co. (159 Mass. 536, 34 N. E. Rep. 1072), Employés, Inj. to, 176.
Lynch *v.* Brooklyn City R. Co. (24 N. Y. S. R. 447, 52 Hun 614, 1 Silv. Sup. Ct. 361, 5 N. Y. Supp. 311; affirmed in 123 N. Y. 657, mem., 25 N. E. Rep. 955, mem.), Dam., 93; St. Rys., 483.
Lynch *v.* Eastern, L. F. & M. R. Co. (12 Am. & Eng. R. Cas. 652, 57 Wis. 430, 15 N. W. Rep. 743, 825), Mun. Aid, 214, 220, 299, 302; Subscr., 51, 120, 158.
Lynch *v.* Mayor, etc., of N. Y. (47 Hun (N. Y.) 524, 15 N. Y. S. R. 103), Contrib. Neg., 28.
Lynch *v.* Metropolitan El. R. Co. (50 Am. & Eng. R. Cas. 308, 129 N. Y. 274, 28 Abb. N. Cas. 1, 21 Civ. Pro. 420, 29 N. E. Rep. 315, 41 N. Y. S. R. 541; affirming 27 J. & S. 582, 38 N. Y. S. R. 1024, 13 N. Y. Supp. 956), Elev. Rys., 170, 171.
Lynch *v.* Metropolitan El. R. Co. (12 Am. & Eng. R. Cas. 119, 90 N. Y. 77; affirming 24 Hun 506), False Imp., 7.
Lynch *v.* Metropolitan St. R. Co. (56 Am. & Eng. R. Cas. 571, 112 Mo. 420, 20 S. W. Rep. 642), Children, Inj. to, 143, 171, 176; Death, etc., 368; Negl., 67; St. Rys., 508.
Lynch *v.* New York, L. E. & W. R. Co. (44 N. Y. S. R. 663, 63 Hun 635, 18 N. Y. Supp. 417), Death, etc., 212.
Lynch *v.* Northern Pac. R. Co. (84 Wis. 348, 54 N. W. Rep. 610), Animals, 34, 196.
Lynch *v.* St. Joseph & I. R. Co. (111 Mo. 601, 19 S. W. Rep. 1114), App., 58; Tresp., Inj. to, 4, 49.
Lynch *v.* Third Ave. R. Co. (27 J. & S. 71, 13 N. Y. Supp. 236, 36 N. Y. S. R. 431; affirmed in 128 N. Y. 681, mem., 29 N. E. Rep. 149), Pl., 114.



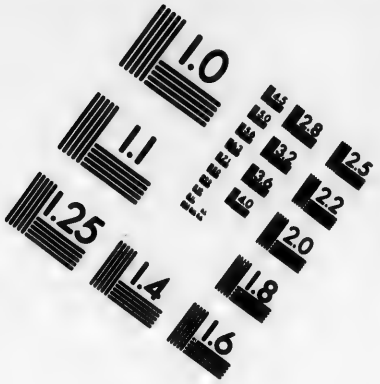
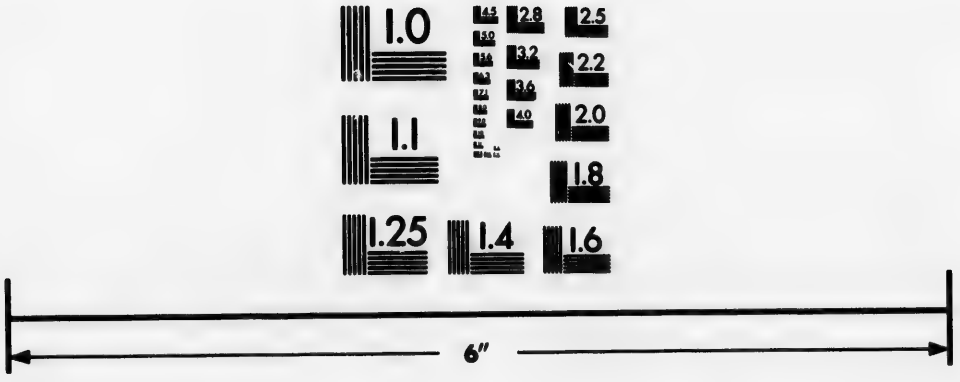
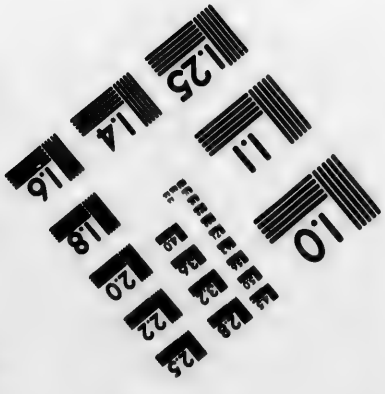


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Lynchburg & D. R. Co. *v.* Person County Com'rs (109 N. Car. 159, 13 S. E. Rep. 783), Mun. Aid, 127, 165.
Lynde *v.* Columbus, C. & I. C. R. Co. (57 Fed. Rep. 993), Mort., 169.
Lynde *v.* Winnebago County (16 Wall. (U. S.) 6), Mun. Aid, 377.
Lyndsay *v.* Connecticut & P. R. R. Co. (27 Vt. 643), Animals, 29.
Lynn *v.* Baltimore & O. R. Co. (60 Md. 404, 45 Am. Rep. 741), Agency, 86.
Lynn *v.* Chicago, R. I. & P. R. Co. (75 Mo. 167), Just. P., 6.
Lynn *v.* Illinois C. R. Co. (63 Miss. 157), Pl., 63.
Lynn *v.* Mount Savage Iron Co. (34 Md. 603), Cov'ts, 5.
Lynn & B. R. Co. *v.* Boston & L. R. Co. (114 Mass. 455), Cross. Rys., 84.
Lyon *v.* Cumberland Valley R. Co. (23 Pa. St. 384), Fel. Serv., 25.
Lyon *v.* Detroit, L. & L. M. R. Co. (31 Mich. 429), Employés, Inj. to, 194, 427.
Lyon *v.* Ewings (17 Wis. 61), Subscr., 22; Usury, 3.
Lyon *v.* Gormley (53 Pa. St. 261), Branch & L. Roads, 17.
Lyon *v.* Green Bay & M. R. Co. (42 Wis. 538, 15 Am. Ry. Rep. 91), Culverts, 6; Em. Dom., 463, 468, 647, 895, 983; Husb. & W., 5, 28.
Lyon *v.* McDonald (47 Am. & Eng. R. Cas. 217, 78 Tex. 71, 14 S. W. Rep. 261), Em. Dom., 131, 144, 977; Pl., 26.
Lyon *v.* Manhattan R. Co. (27 N. Y. Supp. 966, 7 Misc. 401), Phys. Exam., 5.
Lyon *v.* New York & N. E. R. Co. (127 Mass. 101), Liens, 49.
Lyon *v.* New York, S. & W. R. Co. (14 Daly (N. Y.) 489, 15 N. Y. S. R. 348; affirming 13 N. Y. S. R. 732), Coupons, 14.
Lyon *v.* Railway Pass. A. Co. (46 Iowa 631), Acc. Ins., 6, 8.
Lyon *v.* St. Louis, I. M. & S. R. Co. (6 Mo. App. 516), Cross., Inj. at, 35.
Lyon *v.* Travelers' Ins. Co. (55 Mich. 141, 20 N. W. Rep. 829), Acc. Ins., 7.
Lyon *v.* Union Pac. R. Co. (35 Fed. Rep. 111), Employés, Inj. to, 529.
Lyon *v.* Williams (5 Gray (Mass.) 557), Bills of L., 4.
Lyons *v.* Broadway & S. A. R. Co. (32 N. Y. S. R. 232, 10 N. Y. Supp. 237), Agency, 102.
Lyons *v.* Chamberlain (89 N. Y. 578), Agency, 34.
Lyons *v.* Erie R. Co. (57 N. Y. 489, 7 Am. Ry. Rep. 63), Negl., 84.
Lyons *v.* Hill (46 N. H. 49), Car. of M., 272.
Lyons *v.* Munson (99 U. S. 684), Mun. Aid, 351.
Lyons *v.* New York C. & H. R. R. Co. (39 Hun (N. Y.) 385), Fel. Serv., 457.
Lyons *v.* Orange, A. & M. R. Co. (32 Md. 18), Charters, 5, 6, 7, 73; Insolv., 4.
Lyons *v.* People (68 Ill. 271), Crim. L., 10.
Lyons *v.* Terre Haute & I. R. Co. (101 Ind. 419), Animals, 266, 287; Contrib. Neg., 104; Evid., 116.
Lyons *v.* Third Ave. R. Co. (7 Robt. (N. Y.) 605), Abate., 5.
Lyons *v.* Woodward (49 Me. 29), Death, etc., 1.
Lytle *v.* Lansing (147 U. S. 59, 13 Sup. Ct. Rep. 254), Mun. Aid, 355, 370.
Lyttle *v.* Chicago & W. M. R. Co. (84 Mich. 289, 47 N. W. Rep. 571), Fel. Serv., 81, 83, 160, 447; Witn., 9.
Lytton *v.* Great Northern R. Co. (2 Kay & J. 394, 2 Jur. N. S. 436), Side Tr., 2, 3.

Maas *v.* Missouri, K. & T. R. Co. (11 Hun (N. Y.) 8), Bonds, 27.
Maberry *v.* Missouri Pac. R. Co. (83 Mo. 664), Animals, 304, 554.
Mabry *v.* Brown (12 Heisk. (Tenn.) 597), Receiv., 157.
Mabry *v.* Harrison (44 Tex. 286), Receiv., 148.
McAbasher *v.* Richmond & D. R. Co. (108 N. Car. 344, 12 S. E. Rep. 892), Bills of L., 44.
McAboy's Appeal (107 Pa. St. 548), Branch & L. Roads, 1; Sts. & H., 31; Words & Ph., 118.
McAden *v.* Jenkins (64 N. Car. 796), Charters, 57; State Aid, 28.
McAdoo *v.* Richmond & D. R. Co. (41 Am. & Eng. R. Cas. 524, 105 N. Car. 140, 11 S. E. Rep. 316), App., 83; Contrib. Neg., 120, 123; Cross., Inj. at, 251, 255; Licensees, Inj. to, 27; Pl., 24; Tresp., Inj. to, 54, 105; Trial, 193; Words & Ph., 103.
McAdory *v.* Louisville & N. R. Co. (94 Ala. 272, 10 So. Rep. 507), Death, etc., 386, 436.
McAfee *v.* Southern R. Co. (36 Miss. 669), State Aid, 25.
McAlister *v.* Chicago, R. I. & P. R. Co. (7 Am. & Eng. R. Cas. 373, 74 Mo. 351), Car. of L. S., 58, 103, 120, 157; Car. of M., 295.
McAllister *v.* Burlington & N. W. R. Co. (19 Am. & Eng. R. Cas. 108, 64 Iowa 395, 20 N. W. Rep. 488), Cross., Inj. at, 200.
McAllister *v.* Indianapolis & C. R. Co. (15 Ind. 11), Subscr., 111.
McAllister *v.* Kuhn (96 U. S. 87), Trover, 9.
McAllister *v.* Plant (54 Miss. 106, 17 Am. Ry. Rep. 389), Corp., 9; Deeds of Tr., 13; Estop., 17; Mort., 7, 163, 194; Sales of Rds., 6.
McAlpin *v.* Powell (55 How. Pr. (N. Y.) 163), Negl., 1.
McAlpine *v.* Grand Trunk R. Co. (38 U. C. Q. B. 446), Animals, 154; Words & Ph., 40.
McAlpine *v.* Union Pac. R. Co. (20 Am. & Eng. R. Cas. 586, 23 Fed. Rep. 168; affirmed in 129 U. S. 305), Consol., 40.
McAndrew *v.* Lake Shore & M. S. R. Co. (23 N. Y. Supp. 1074, 70 Hun 46, 53 N. Y. S. R. 436), Actions, 14; Pl., 166.
McAndrew *v.* Whitlock (52 N. Y. 40), Car. of M., 240.
McAndrews *v.* Burns (39 N. J. L. 117), Fel. Serv., 1, 134, 147, 150, 202, 442.
McAndrews *v.* Collered (42 N. J. L. 189), Explosions, 4.
McAndrews *v.* Tippett (39 N. J. L. 105), Constr. Rys., 81.

McArdle *v.* Barney (50 How. Pr. (N. Y.) 97), Receiv., 168.
McArthur *v.* Green Bay & M. Canal Co. (34 Wis. 139), Canals, 3, 4.
McArthur *v.* Montclair R. Co. (27 N. J. Eq. 77), Receiv., 160.
McArthur *v.* Northern & P. J. R. Co. (17 Ont. App. 86; dismissing appeal from 15 Ont. 733), Pub. Lds., 19.
McAulay *v.* Western Vt. R. Co. (33 Vt. 311), Em. Dom., 1019, 1022; Evid., 219.
McAuley *v.* Columbus, C. & I. C. R. Co. (83 Ill. 348), Consol., 8; Em. Dom., 75, 460.
McAunich *v.* Mississippi & M. R. Co. (20 Iowa 338), Fel. Serv., 163; Stat., 34.
McBeath *v.* Wabash, St. L. & P. R. Co. (20 Mo. App. 445), Car. of L. S., 84, 149.
Macbeth *v.* Smart (14 Grant's Ch. (U. C.) 298), Stockh., 73.
McBride *v.* Hardin County (7 Am. & Eng. R. Cas. 221, 58 Iowa 219, 12 N. W. Rep. 247), Mun. Aid, 412.
McBride *v.* Indianapolis F. & S. Co. (5 Ind. App. 482, 32 N. E. Rep. 579), Employés, Inj. to, 346; Fel. Serv., 197, 210.
McBride *v.* Kansas City, St. J. & C. B. R. Co. (20 Mo. App. 216), Animals, 452.
McBride *v.* Northern Pac. R. Co. (42 Am. & Eng. R. Cas. 146, 19 Oreg. 64, 23 Pac. Rep. 814), App., 130; Cross., Inj. at, 234, 248, 287.
McBride *v.* Union Pac. R. Co. (3 Wyom. 247, 21 Pac. Rep. 687), Fel. Serv., 390; Trial, 219.
McBrien *v.* Shanly (24 U. C. C. P. 28), Constr. Rys., 82.
McBroom's Appeal (44 Pa. St. 92), Assign. for Cred., 1, 3.
McCabe *v.* Dry Dock, E. B. & B. R. Co. (15 Daly 504, 8 N. Y. Supp. 336, 2[illegible] N. Y. S. R. 879), Evid., 175.
McCabe *v.* Illinois C. R. Co. (4 McCrary (U. S.) 492, 13 Fed. Rep. 827), Lim. of Ac., 73.
McCabe *v.* Manhattan El. R. Co. (25 N. Y. S. R. 631, 53 Hun 636, 3 Silv. Sup. Ct. 324, 6 N. Y. Supp. 418), Negl., 49.
McCafferty *v.* Spuyten Duyvil & P. M. R. Co. (61 N. Y. 178, 12 Am. Ry. Rep. 105, 48 How. Pr. 44), Indep. Contr., 7, 20.
McCaffrey *v.* Canadian Pac. R. Co. (1 Man. 350), Bagg., 35.
McCaffrey *v.* Delaware & H. Canal Co. (16 N. Y. Supp. 495, 41 N. Y. S. R. 221, 62 Hun 618; affirmed in 33 N. E. Rep. 339, 137 N. Y. 568, mem., 50 N. Y. S. R. 934), Cross., Inj. at, 145, 280; Imp. Neg., 19.
McCaffrey *v.* Georgia Southern R. Co. (69 Ga. 622), Car. of M., 591; Receiv., 179.
McCaffrey *v.* Twenty-third St. R. Co. (47 Hun 404, 14 N. Y. S. R. 521), Negl., 55.
McCahill *v.* Detroit City R. Co. (96 Mich. 156, 55 N. W. Rep. 668), Children, Inj. to, 53, 55.
McCaig *v.* Erie R. Co. (8 Hun (N. Y.) 599), Fires, 266, 283, 302, 363.
McCain *v.* Louisville & N. R. Co. (Ky.) (18 S. W. Rep. 537), Fright. Teams, 5, 6.
McCain *v.* Louisville & N. R. Co. (Ky.) (22 S. W. Rep. 325), Judgm., 16.
McCall *v.* California (45 Am. & Eng. R. Cas. 1, 136 U. S. 104, 10 Sup. Ct. Rep. 881, 3 Int. Com. Rep. 181), Int. Com., 211.
McCall *v.* Chamberlain (13 Wis. 637), Animals, 152, 386, 645.
McCall *v.* Hancock (10 Fed. Rep. 8, 20 Blatchf. (U. S.) 344), Mun. Aid, 352, 389.
McCall *v.* New York C. R. Co. (54 N. Y. 642), Cross., Inj. at, 290.
McCallan *v.* Brooklyn City R. Co. (15 N. Y. S. R. 843, 48 Hun 340, 1 N. Y. Supp. 289), Witn., 36, 39.
McCallum *v.* Buffalo & L. H. R. Co. (19 U. C. C. P. 117), Fires, 159.
McCallum *v.* Davidson (95 Mich. 382, 54 N. W. Rep. 952), Negl., 106.
McCallum *v.* Grand Trunk R. Co. (30 U. C. Q. B. 122), Fires, 17, 139.
McCallum *v.* Grand Trunk R. Co. (31 U. C. Q. B. 527), Fires, 182; Lim. of Ac., 57.
McCallum *v.* Long Island R. Co. (38 Hun (N. Y.) 569; affirmed in 103 N. Y. 686, mem., 7 N. Y. S. R. 863, mem.), St. Rys., 381.
McCalmont *v.* Philadelphia & R. R. Co. (14 Phila. (Pa.) 479), Bonds, 3.
McCalmonts *v.* Philadelphia & R. R. Co. (15 Phila. (Pa.) 153), Direct., 8; Philadelphia & R. R. Co., 2.
McCammon *v.* Detroit, L. & N. R. Co. (66 Mich. 442, 10 West. Rep. 192, 33 N. W. Rep. 728), Estop., 13; Evid., 230.
M'Cance *v.* London & N. W. R. Co. (7 H. & N. 477, 31 L. J. Ex. 65), Car. of L. S., 70.
M'Cance *v.* London & N. W. R. Co. (3 H. & C. 343, 34 L. J. Ex. 39, 10 Jur. N. S. 1058, 12 W. R. 1086, 11 L. T. 426; affirming 7 H. & N. 477, 31 L. J. Ex. 65, 7 Jur. N. S. 1304, 10 W. R. 154), Car. of L. S., 90; Car. of M., 519.
McCandless's Appeal (70 Pa. St. 210), Em. Dom., 383; Nuis., 24.
McCandless *v.* Chicago & N. W. R. Co. (45 Wis. 365, 19 Am. Ry. Rep. 374), Animals, 262, 287, 410, 453, 531.
McCandless *v.* Chicago & N. W. R. Co. (71 Wis. 41, 36 N. W. Rep. 620), Sts. & H., 381.
McCandless *v.* Richmond & D. R. Co. (38 So. Car. 103, 16 S. E. Rep. 429), Charters, 43; Em. Dom., 72; Fires, 14; Leases, 55.
McCann *v.* Baltimore & O. R. Co. (20 Md. 202), App., 29; Car. of M., 620; Release, 8.
McCann *v.* Kings County El. R. Co. (46 N. Y. S. R. 327, 19 N. Y. Supp. 608), Indep. Contr., 24.
McCann *v.* Oregon R. & N. Co. (13 Oreg. 455, 11 Pac. Rep. 236), Rip. Rts., 11.
McCann *v.* Sixth Ave. R. Co. (43 Am. & Eng. R. Cas. 297, 117 N. Y. 505, 23 N. E. Rep. 164, 27 N. Y. S. R. 834; reversing 24 J. & S. 282, 21 N. Y. S. R. 482, 3 N. Y. Supp. 418), Children, Inj. to, 55.
McCann *v.* South Nashville St. R. Co. (2 Tenn. Ch. 773), Spec. Perf., 19.
McCarn *v.* International & G. N. R. Co. (55 Am. & Eng. R. Cas. 406, 84 Tex. 352, 19 S. W. Rep. 547), Car. of M., 674.
McCarron *v.* McGreevy (13 Can. Sup. Ct. 378; affirming 14 Rev. Leg. 422, 12 Quebec L. R. 373), Constr. Rys., 24.
McCartan *v.* Northeastern R. Co. (54 L. J. Q. B. D. 441, 5 Ry. & C. T. Cas. ix), Car.

of P., 125; Tickets & F., 20; Time-tables, 3.
McCarthy *v.* Boston & L. R. Corp. (148 Mass. 550, 20 N. E. Rep. 182, 2 L. R. A. 608), Children, Inj. to, 163.
McCarthy *v.* Cass Ave. & F. G. R. Co. (92 Mo. 536, 10 West. Rep. 333, 4 S. W. Rep. 516), Children, Inj. to, 172.
McCarthy *v.* Chicago, R. I. & P. R. Co. (18 Kan. 46), Death, etc., 112.
McCarthy *v.* Chicago, R. I. & P. R. Co. (41 Iowa 432), Eject. Pass., 69.
McCarthy *v.* Chicago, R. I. & P. R. Co. (83 Iowa 485, 50 N. W. Rep. 21), Employés, Inj. to, 605.
McCarthy *v.* Christopher & T. St. R. Co. (10 Daly (N. Y.) 540), New Tr., 22.
McCarthy *v.* Dublin, W. & W. R. Co. (5 Ir. C. L. 244, 18 W. R. 762), Eject. Pass., 47.
McCarthy *v.* Lehigh Valley R. Co. (6 Misc. (N. Y.) 422, 27 N. Y. Supp. 295), Bills of Partic., 1.
McCarthy *v.* Lehigh Valley Transp. Co. (48 Minn. 533, 51 N. W. Rep. 480), Contrib. Neg., 32.
McCarthy *v.* Missouri R. Co. (15 Mo. App. 385), Med. Serv., 12.
McCarthy *v.* New York C. & H. R. R. Co. (24 N. Y. S. R. 924, 6 N. Y. Supp. 560), Car. of P., 543.
McCarthy *v.* Terre Haute & I. R. Co. (9 Mo. App. 159), Car. of M., 564, 575, 577, 608.
McCartney *v.* Chicago & E. R. Co. (29 Am. & Eng. R. Cas. 326, 112 Ill. 611), Bridges, 63; Charters, 64; Incorp., 3, 8; Location, etc., 18; Rip. Rts., 3; St. Rys., 76; Sts. & H., 43, 73, 85.
McCarty *v.* Chicago, B. & Q. R. Co. (34 Ill. App. 273), Witn., 179.
McCarty *v.* Delaware & H. Canal Co. (17 Hun (N. Y.) 74), Death, etc., 204.
McCarty *v.* Fitchburg R. Co. (154 Mass. 17, 27 N. E. Rep. 773), Children, Inj. to, 10.
McCarty *v.* Gulf, C. & S. F. R. Co. (79 Tex. 33, 15 S. W. Rep. 164), Car. of L. S., 5; Car. of M., 486; Lim. of Liab., 2; Stat. Agts., 5; Stat., 64.
McCarty *v.* Lehigh Valley R. Co. (43 Fed. Rep. 384), Pat. for Inv., 2, 5.
McCarty *v.* New York & E. R. Co. (30 Pa. St. 247), Car. of M., 334.
McCarty *v.* St. Paul, M. & M. R. Co. (14 Am. & Eng. R. Cas. 297, 31 Minn. 278, 17 N. W. Rep. 616), Estop., 13.
McCarty *v.* Selinsgrove & N. B. R. Co. (87 Pa. St. 332), Subscr., 66, 108, 200.
McCarty *v.* State (37 Miss. 411), Crim. L., 35.
McCaslin *v.* Lake Shore & M. S. R. Co. (52 Am. & Eng. R. Cas. 290, 93 Mich. 553, 53 N. W. Rep. 724), Car. of P., 428; Pl., 61, 140.
McCauley *v.* Davidson (10 Minn. 418 (Gil. 335), Car. of M., 62, 121.
McCauley *v.* Davidson (13 Minn. 162 (Gil. 150), Bills of L., 64; Car. of M., 713.
McCauley *v.* Keller (40 Am. & Eng. R. Cas. 509, 130 Pa. St. 53, 18 Atl. Rep. 607), Constr. Rys., 58; Evid., 181.
McCauley *v.* Montana C. R. Co. (49 Am. & Eng. R. Cas. 557, 11 Mont. 483, 28 Pac. Rep. 729), Animals, 431.
McCauley *v.* Tennessee C., I. & R. Co. (47 Am. & Eng. R. Cas 580, 93 Ala. 356, 9 So. Rep. 611), Car. of P., 57, 479.
McCawley *v.* Furness R. Co. (L. R. 8 Q. B. 57, 42 L. J. Q. B. 4, 21 W. R. 140, 27 L. T. 485), Car. of P., 338; Passes, 21.
McChesney *v.* Panama R. Co. (66 Hun 627, 49 N. Y. S. R. 148, 21 N. Y. Supp. 207), Fel. Serv., 427.
McChesney *v.* Panama R. Co. (74 Hun 150, 26 N. Y. Supp. 245, 56 N. Y. S. R. 415), Employés, Inj. to, 157.
McClain *v.* Brooklyn City R. Co. (40 Am. & Eng. R. Cas. 254, 116 N. Y. 459, 22 N. E. Rep. 1062, 27 N. Y. S. R. 549; affirming 42 Hun 657, 6 N. Y. S. R. 49), Contrib. Neg., 41; St. Rys., 454, 456, 480, 502; Witn., 168, 189.
McClanathan *v.* New York & O. M. R. Co. (1 T. & C. (N. Y.) 501), Indep. Contr., 17.
McClaren *v.* Indianapolis & V. R. Co. (8 Am. & Eng. R. Cas. 217, 83 Ind. 319), Tresp., Inj. to, 5, 22, 113.
McClarney *v.* Chicago, M. & St. P. R. Co. (48 Am. & Eng. R. Cas. 132, 80 Wis. 277, 49 N. W. Rep. 963), Employés, Inj. to, 82.
McClary *v.* Chicago, M. & St. P. R. Co. (46 Fed. Rep. 343), Cross., Inj. at, 325.
McClary *v.* Sioux City & P. R. Co. (3 Neb. 44), Car. of P., 612, 613; Derailm., 7.
McClaskey *v.* Lake View M. & T. Co. (18 Colo. 65, 31 Pac. Rep. 333), Stock, 2.
McClasky *v.* Grand Rapids & I. R. Co. (16 Ind. 96), Subscr., 89.
McClean *v.* Chicago, I. & D. R. Co. (67 Iowa 568, 25 N. W. Rep. 782), App., 125; Em. Dom., 603; Sts. & H., 254.
McClellan *v.* Memphis & C. R. Co. (11 Lea (Tenn.) 336), Tax., 151.
McClellan *v.* Wyatt (26 Abb. N. Cas. 144, 34 N. Y. S. R. 55, 11 N. Y. Supp. 686), Trover, 16.
McClelland *v.* Louisville, N. A. & C. R. Co. (18 Am. & Eng. R. Cas. 260, 94 Ind. 276), Car. of P., 127, 147, 312; Death, etc., 77.
McClelland *v.* Norfolk S. R. Co. (110 N. Y. 469, 18 N. E. Rep. 237, 18 N. Y. S. R. 344, 1 L. R. A. 299, 6 Am. St. Rep. 397, 38 Alb. L. J. 410; reversing 3 N. Y. S. R. 250), Bonds, 16; Coupons, 1; Mort., 85.
McClenaghan *v.* Brock (5 Rich. (So. Car.) 17), Car. of P., 126; Car. of Slaves, 1.
McCleneghan *v.* Omaha & R. V. R. Co. (37 Am. & Eng. R. Cas. 245, 25 Neb. 523, 41 N. W. Rep. 350), Bridges, 48.
McClinton *v.* Pittsburg, Ft. W. & C. R. Co. (66 Pa. St. 404), Em. Dom., 1015, 1031; Lim. of Ac., 48, 52.
McCloskey *v.* Bell Gap R. Co. (156 Pa. St. 254, 27 Atl. Rep. 246), App., 81; Car. of P., 596.
McCluer *v.* Manchester & L. R. Co. (13 Gray (Mass.) 124), Car. of M., 753; Estop., 16; Leases, 63.
McClung *v.* Dearborne (19 Phila. (Pa.) 500), Agency, 78.
McClure *v.* Missouri River, Ft. S. & G. R. Co. (9 Kan. 373), Contr., 59.
McClure *v.* New York C. & H. R. R. Co.

(5 N. Y. S. R. 140, 42 Hun 654), Contrib. Neg., 39.
McClure *v.* Owen (26 Iowa 243), Mun. Aid, 7.
McClure *v.* People's Freight R. Co. (1 Am. & Eng. R. Cas. 371, 90 Pa. St. 269), Subscr., 30, 109.
McClure *v.* Philadlphia, W. & B. R. Co. (34 Md. 532), Eject. Pass., 54, 67; Tickets & F., 30, 44.
McClure *v.* Hammond (1 Bay (So. Car.) 99), Car. of M., 2.
McCollom *v.* Indianapolis & St. L. R. Co. (94 Ill. 534), Car. of L. S., 151; Pl., 158.
McCollough *v.* Annapolis & E. R. Co. (4 Gill. (Md.) 58), Direct., 21.
McComb *v.* Chicago, St. L. & N. O. R. Co. (19 Blatchf. (U. S.) 69), Discov., 1.
McComb *v.* Credit Mobilier (13 Phila. (Pa.) 468), Subscr., 16.
McComb *v.* Frink (149 U. S. 629, 13 Sup. Ct. Rep. 993), Trusts, 3.
McComb *v.* North Carolina R. Co. (70 N. Car. 178), Evid., 206.
McCombs *v.* North Carolina R. Co. (67 N. Car. 193), Witn., 98.
McCombs *v.* Pittsburg & W. R. Co. (130 Pa. St. 182, 18 Atl. Rep. 613), Employés, Inj. to, 61°, 671.
McConihha *v.* Guthrie (17 Am. & Eng. R. Cas. 1, 21 W. Va. 134), Em. Dom., 1053; Prohib., 1.
McConihay *v.* Wright (121 U. S. 201, 7 Sup. Ct. Rep. 940), Aband., 7; Em. Dom., 981; Fed. Cts., 12.
McConihe *v.* New York & E. R. Co. (20 N. Y. 495), Sales, 2.
McConnell *v.* Norfolk & W. R. Co. (40 Am. & Eng. R. Cas. 155, 86 Va. 248, 9 S. E. Rep. 1006), Car. of M., 582.
McConnell *v.* Pedigo (50 Am. & Eng. R. Cas. 5, 92 Ky. 465, 18 S. W. Rep. 15), Hacks, etc., 3.
McCool *v.* Galena & C. U. R. Co. (17 Iowa 461), Animals, 284.
McCord *v.* Doniphan Branch R. Co. (21 Mo. App. 92), Em. Dom., 210, 1068.
McCord *v.* Ohio & M. R. Co. (13 Ind. 220), Subscr., 160.
McCord *v.* West Feliciana R. Co. (3 La. Ann. 285), Contr., 75; Partn., 6.
McCorkle *v.* Chicago, R. I. & P. R. Co. (18 Am. & Eng. R. Cas. 156, 61 Iowa 555, 16 N. W. Rep. 714), Car. of L. S., 131.
McCormack *v.* Terre Haute & R. R. Co. (9 Ind. 283), Em. Dom., 234.
McCormick *v.* Chicago, R. I. & P. R. Co. (41 Iowa 193), Fences, 87; Fires, 54, 206.
McCormick *v.* Chicago, R. I. & P. R. Co. (47 Iowa 345), Contrib. Neg., 110; Tresp., 9.
McCormick *v.* Hudson River R. Co. (4 E. D. Smith (N. Y.) 181), Bagg., 23, 36.
McCormick *v.* Kansas City, Ft. S. & M. R. Co. (50 Mo. App. 109), Cross., Inj. at, 136, 137, 149, 160.
McCormick *v.* Kansas City, St. J. & C. B R. Co. (57 Mo. 433, 9 Am. Ry. Rep. 133), Flood. Lds., 31, 40.
McCormick *v.* Kansas City, St. J. & C. B. R. Co. (70 Mo. 359, 35 Am. Rep. 431), Flood. Lds., 12, 33.
McCormick *v.* Pennsylvania C. R. Co. (49 N. Y. 303, 4 Am. Ry. Rep. 429), Bagg., 49; For. Corp., 16; Husb. & W., 11.
McCormick *v.* Pennsylvania C. R. Co. (80 N. Y. 353), Bagg., 8.
McCormick *v.* Pennsylvania C. R. Co. (21 Am. & Eng. R. Cas. 296, 99 N. Y. 65, 1 N. E. Rep. 99, 52 Am. Rep. 6; affirming 30 Hun 87, mem.), Bagg., 8.
McCormick *v.* St. Louis, I. M. & S. R. Co. (20 Mo App. 640), Fences, 66.
McCormick H. Mach. Co. *v.* Adele (47 Ill. App. 54 , Pl., 99.
McCosker *v.* Long Island R. Co. (5 Am. & Eng. R. Cas. 564, 84 N. Y. 77; reversing 21 Hun 500, 59 How. Pr. 258), Fel. Serv., 44, 447.
McCotter *v.* Hooker (8 N. Y. 497), Evid., 15, 170, 183.
Maccoun *v.* Indiana & I. C. R. Co. (9 Ind. 262), Subscr., 98.
McCoun *v.* New York C. & H. R. R. Co. (66 Barb. (N. Y.) 338), Fires, 258.
McCoun *v.* New York C. & H. R. R. Co. (7 Lans. (N. Y.) 75; appeal dismissed in 50 N. Y. 176, 3 Am. Ry. Rep. 269), Proc., 10.
McCoy *v.* California Pac. R. Co. (40 Cal. 532), Animals, 126, 238; Fences, 100.
McCoy *v.* Cincinnati, I., St. L. & C. R. Co. (13 Fed. Rep. 3), Injunc., 7; Proc., 18; Stat., 6; Stock Yards, 3.
McCoy *v.* Erie & W. Transp. Co. (42 Md. 498, 14 Am. Ry. Rep. 317), Contr., 30; Lim. of Liab., 2.
McCoy *v.* Kansas City, St. J. & C. B. R. Co. (36 Mo. App. 445), Leases, 52; Witn., 58.
McCoy *v.* Keokuk & D. M. R. Co. (44 Iowa 424), Car. of L. S., 21; Evid., 138.
McCoy *v.* Milwaukee St. R. Co. (82 Wis. 215, 52 N. W. Rep. 93), App., 24.
McCoy *v.* Philadelphia, W. & B. R. Co. (5 Houst. (Del.) 599), Dam., 26; Sts. & H., 307, 410.
McCoy *v.* Southern Pac. R. Co. (Cal.) (26 Pac. Rep. 629), Animals, 94, 234, 349.
McCoy *v.* Southern Pac. R. Co. (56 Am. & Eng. R. Cas. 132, 94 Cal. 568, 29 Pac. Rep. 1110), Agency, 47; Animals, 94, 175, 316.
McCracken *v.* Gumbert (131 Pa. St. 36, 18 Atl. Rep. 1068), Contr., 22.
McCray *v.* Junction R. Co. (9 Ind. 358), Consol., 12; Subscr., 119.
McCrea *v.* New York El. R. Co. (13 Daly (N. Y.) 302), Elev. Rys., 83.
McCrea *v.* Port Royal R. Co. (3 So. Car. 381), Em. Dom., 50.
McCready *v.* South Carolina R. Co. (2 Strobh. (So. Car.) 356), Fires, 313.
McCreary *v.* Boston & M. R. Co. (153 Mass. 300, 26 N. E. Rep. 864), Adv. Poss., 4.
McCreary *v.* Boston & M. R. Co. (156 Mass. 316, 31 N. E. Rep. 126), Tresp., Inj. to, 29.
McCrory *v.* Chicago, M. & St. P. R. Co. (31 Fed. Rep. 531), Death, etc., 192.
McCrosson *v.* Grand Trunk R. Co. (23 U. C. C. P. 107), Car. of M., 352.
McCruden *v.* Rochester R. Co. (25 N. Y. Supp. 114, 5 Misc. 59; affirmed in 77 Hun 609), St. Rys., 109, 193.

McCue *v.* Knoxville (146 Pa. St. 580, 23 Atl. Rep. 439), Witn., 167.
McCulloch *v.* McDonald (91 Ind. 240), Car. of M., 190.
McCulloch *v.* Maryland (4 Wheat. (U. S.) 316), Tax., 5, 138.
McCulloch *v.* Stone (64 Miss. 378, 8 So. Rep. 236), Tax., 182.
McCullough *v.* Annapolis & E. R. R. Co. (4 Gill (Md.) 58), Bonds, 6.
McCullough *v.* St. Paul, M. & M. R. Co. (52 Minn. 12, 53 N. W. Rep. 802), Em. Dom., 155, 929.
McCullough *v.* Wabash W. R. Co. (34 Mo. App. 23), Car. of L. S., 15; Lim. of Liab., 10.
McCully *v.* Pittsburg & C. R. Co. (32 Pa. St. 25), Subscr., 1, 116, 117, 170.
McCummons *v.* Chicago & N. W. R. Co. (33 Iowa 187), Fires, 262.
McCune *v.* Burlington, C. R. & N. R. Co. (52 Iowa 600, 3 N. W. Rep. 615), Car. of L. S., 27, 87.
McCune *v.* Northern Pac. R. Co. (15 Am. & Eng. R. Cas. 172, 9 Sawy. (U. S.) 551, 18 Fed. Rep. 875), New Tr., 97.
McCurdy's Appeal (65 Pa. St. 290), Mort., 63, 64; Stat., 16.
McDade *v.* Georgia R. Co. (60 Ga. 119), Fel. Serv., 171.
McDade *v.* Washington & G. R. Co. (26 Am. & Eng. R. Cas. 325, 5 Mackey (D. C.) 144), Employés, Inj. to, 31, 309; Evid., 285; Fel. Serv., 64, 94; Trial, 184.
McDaniel *v.* Chicago & N. W. R. Co. (24 Iowa 412), Car. of L. S., 6; Car. of M., 403.
McDaniel *v.* Highland Ave. & B. R. Co. (90 Ala. 64, 8 So. Rep. 41), Car. of P., 59, 349; Conduct., 4.
McDaniel *v.* Nashville & C. R. Co. (88 Tenn. 542, 13 S. W. Rep. 76), Trial, 27.
McDaniels *v.* People (118 Ill. 301, 8 N. E. Rep. 687), Crim. L., 27.
McDemott *v.* Kentucky C. R. Co. (Ky.) (54 Am. & Eng. R. Cas. 121, 20 S. W. Rep. 380), Children, Inj. to, 41.
McDermond *v.* Kennedy (Bright. N. P. (Pa.) 332), Mun. Aid, 424.
McDermott, In re (24 U. C. Q. B. 152), Em. Dom., 1229.
McDermott *v.* Chicago & N. W. R. Co. (82 Wis. 246, 52 N. W. Rep. 85), Car. of P., 392, 600.
McDermott *v.* Chicago & N. W. R. Co. (85 Wis. 102, 55 N. W. Rep. 179), App., 26; New Tr., 87, 88, 89.
McDermott *v.* Hannibal & St. J. R. Co. (2 Am. & Eng. R. Cas. 85, 73 Mo. 516, 39 Am. Rep. 526), Evid., 195; Fel. Serv., 155.
McDermott *v.* Hannibal & St. J. R. Co. (28 Am. & Eng. R. Cas. 528, 87 Mo. 285), Employés, Inj. to, 282; Evid., 204, 219; Fel. Serv., 155, 160, 161, 346, 451, 483, 488, 491,; Negl., 85; Trial, 136.
McDermott *v.* Iowa Falls & S. C. R. Co. (Iowa) (47 N. W. Rep. 1037), Death, etc., 429; Employés, Inj. to, 468, 637, 653.
McDermott *v.* Iowa Falls & S. C. R. Co. (85 Iowa 180, 52 N. W. Rep. 181), Death, etc., 249, 339; Employés, Inj. to, 344, 362; Evid., 254; Pl., 74.
McDermott *v.* New York C. & H. R. R. Co. (28 Hun (N. Y.) 325; affirmed in 97 N. Y. 654, mem.), Licensees, Inj. to, 11.
McDermott *v.* New York C. & H. R. R. Co. (38 N. Y. S. R. 33, 59 Hun 619, 13 N. Y. Supp. 435; affirmed in 131 N. Y. 668, mem., 43 N. Y. S. R. 964), Employés, Inj. to, 665.
McDermott *v.* Pacific R. Co. (30 Mo. 115), Fel. Serv., 1, 61, 138, 142, 147.
McDermott *v.* San Francisco & N. P. R. Co. (68 Cal. 33, 8 Pac. Rep. 519), Negl., 66.
McDermott *v.* Third Ave. R. Co. (44 Hun 107, 8 N. Y. S. R. 458; affirmed in 115 N. Y. 670, mem., 26 N. Y. S. R. 977, mem.), Death, etc., 236; Trial, 65; Witn., 104.
McDonal[illegible] *v.* Ashland (78 Wis. 251, 47 N. W. R[illegible] 434), New Tr., 55; Witn., 164.
McDonald *v.* Canadian Pac. R. Co. (7 Man. 423), Discov., 10.
McDonald *v.* Chicago & N. W. R. Co. (13 Am. & Eng. R. Cas. 585, 51 Mich. 628, 17 N. W. Rep. 210), Animals, 541.
McDonald *v.* Chicago & N. W. R. Co. (26 Iowa 124), Car. of P., 371; Husb. & W., 36; Stat. & D., 58, 61, 75, 76.
McDonald *v.* Chicago & N. W. R. Co. (29 Iowa 170), Att'ys, 14; Car. of P., 564, 567.
McDonald *v.* Chicago, M. & St. P. R. Co. (75 Wis. 121, 43 N. W. Rep. 744), Death, etc., 207; Negl., 41.
McDonald *v.* Chicago, St. P., M. & O. R. Co. (41 Minn. 439, 43 N. W. Rep. 380), Employés, Inj. to, 27, 144, 218, 308, 686, 709.
McDonald *v.* Grand Trunk R. Co. (28 U. C. Q. B. 320), Tresp., 1.
McDonald *v.* Great Western R. Co. (21 U. C. Q. B. 223), Bonds, 54.
McDonald *v.* Illinois C. R. Co. (58 Am. & Eng. R. Cas. 263, 88 Iowa 345, 55 N. W. Rep. 102), Car. of P., 241, 405; Witn., 51, 165.
McDonald *v.* International & G. N. R. Co. (Tex. Civ. App.) (21 S. W. Rep. 774), Death, etc., 211.
McDonald *v.* International & G. N. R. Co. (Tex. Civ. App.) (20 S. W. Rep. 847; reversed in 55 Am. & Eng. R. Cas. 280, 86 Tex. 1, 22 S. W. Rep. 939; former appeal 42 Am. & Eng. R. Cas. 211, 75 Tex. 41, 12 S. W. Rep. 860), Cross., Inj. at, 107; Negl., 28.
McDonald *v.* International & G. N. R. Co. (55 Am. & Eng. R. Cas. 280, 86 Tex. 1, 22 S. W. Rep. 939), App., 76; Comp. Neg., 32; Contrib. Neg., 30; Cross., Inj. at, 356; Death, etc., 317, 321, 352; Trial, 159, 174.
McDonald *v.* Long Island R. Co. (116 N. Y. 546, 22 N. E. Rep. 1068, 27 N. Y. S. R. 481; affirming 6 N. Y. S. R. 691, 43 Hun 637), Car. of P., 232, 246, 396.
McDonald *v.* McMillan (17 U. C. Q. B. 377), Agency, 33.
McDonald *v.* Mallory (77 N. Y. 546), Death, etc., 121.
McDonald *v.* Montreal & N. Y. R. Co. (6 Low. Can. 232), Incorp., 5.
McDonald *v.* New York C. & H. R. R. Co. (45 N. Y. S. R. 711, 63 Hun 587; affirmed

in 138 N. Y. 663, mem., 34 N. E. Rep. 514, mem., 53 N. Y. S. R. 932, mem.), Fel. Serv., 17, 285.
McDonald *v.* Payne (114 Ind. 359, 16 N. E. Rep. 795), Sts. & H., 19.
McDonald *v.* Texas & P. R. Co. (1 Tex. Unrep. Cas. 191), Em. Dom., 754.
McDonald *v.* State (33 Am. & Eng. R. Cas. 420, 81 Ala. 279, 2 So. Rep. 829), Employés, 3.
McDonald *v.* Union Pac. R. Co. (35 Fed. Rep. 38), Children, Inj. to, 157.
McDonald *v.* Union Pac. R. Co. (42 Fed. Rep. 579), Children, Inj. to, 193.
McDonald *v.* Western R. Corp. (34 N. Y. 497), Car. of M., 631.
McDonell *v.* Canada Southern R. Co. (33 U. C. Q. B. 313), Constr. Rys., 33.
Macdonell *v.* International & G. N. R. Co. (60 Tex. 590), Ferries, 2, 4.
McDonell *v.* Ontario, S. & H. R. U. Co. (11 U. C. Q. B. 267), Evid., 275.
McDonell *v.* Ontario, S. & H. R. U. Co. (11 U. C. Q. B. 271), Bridges, 47; Subscr., 120.
McDonnell *v.* Cambridge R. Co. (151 Mass. 159, 23 N. E. Rep. 841), Dam., 16; Priv. Ways, 9.
McDonnell *v.* Pittsfield & N. A. R. Co. (115 Mass. 564, 7 Am. Ry. Rep. 465), Animals, 92.
McDonough *v.* Metropolitan R. Co. (21 Am. & Eng. R. Cas. 354, 137 Mass. 210), Children, Inj. to, 104; St. Rys., 335, 407.
McDonough *v.* Milwaukee & N. R. Co. (69 Wis. 358, 34 N. W. Rep. 120), Trial, 81.
McDonough *v.* Milwaukee & N. R. Co. (73 Wis. 223, 40 N. W. Rep. 806), Fences, 59.
McDormant *v.* Louisville, C. & L. R. Co. (11 Bush (Ky.) 386, 14 Am. Ry. Rep. 370), Jurisd., 7.
MacDougall *v.* Central R. Co. (12 Am. & Eng. R. Cas. 143, 63 Cal. 431), Contrib. Neg., 82, 88, 105, 121.
McDougall *v.* Covert (18 U. C. C. P. 119), Agency, 22.
McDougall *v.* Travis (24 Hun (N. Y.) 590), Replev., 2.
McDowell *v.* Asheville (112 N. Car. 747, 17 S. E. Rep. 537), Em. Dom., 1052.
McDowell *v.* Chesapeake, O. & S. W. R. Co. (Ky.) (8 S. W. Rep. 871; reversing 5 S. W. Rep. 413), Employés, Inj. to, 519.
McDowell *v.* Georgia R. Co. (60 Ga. 320), Death, etc., 45.
McDowell *v.* Great Western R. Co. (5 U. C. C. P. 130), Animals, 376.
McDowell *v.* Great Western R. Co. (6 U. C. C. P. 180), Fences, 56.
McDowell *v.* Massachusetts & S. Constr. Co. (96 N. Car. 514, 2 S. E. Rep. 351), Mun. Aid, 120, 298.
McDowell *v.* New York & S. B. R. Co. (12 N. Y. S. R. 877, mem., 46 Hun 680), Officers, 7.
McDowell *v.* New York C R. Co. (37 Barb. (N. Y.) 195), Animals, 122, 143.
McDuffee *v.* Portland & R. R. Co. (52 N. H. 430, 2 Am. Ry. Rep. 261), Car. of M., 58; Jurisd., 6.
McEachern *v.* Boston & M. R. Co. (150 Mass. 515, 23 N. E. Rep. 231), Death, etc., 160.
McElrath, In re (2 Dill. (U. S.) 460), Receiv., 49, 127.
McElrath *v.* Pittsburg & S. R. Co. (15 Phila. (Pa.) 236), Mort., 269.
McElrath *v.* Pittsburg & S. R. Co. (55 Pa. St. 189), Bonds, 47; Mort., 168, 242.
McElrath *v.* Pittsburg & S. R. Co. (68 Pa. St. 37, 1 Am. Ry. Rep. 139), Mort., 184.
McElroy *v.* Brooklyn U. G. R. Co. (12 N. Y. S. R. 586, 46 Hun 681; affirmed in 120 N. Y. 640, mem., 24 N. E. Rep. 1097, 30 N. Y. S. R. 1018), Pl., 91.
McElroy *v.* Continental R. Co. (25 N. Y. S. R. 834, 53 Hun 636, mem., 3 Silv. Sup. Ct. 327, 6 N. Y. Supp. 306), Judgm., 45.
McElroy *v.* Nashua & L. R. Corp. (4 Cush. (Mass.) 400), Car. of P., 162, 197, 533.
McElroy *v.* Railroad Co. (7 Phila. (Pa.) 206), Pl., 74.
McEnanny *v.* Kyle (8 N. Y. S. R. 358), Employés, Inj. to, 8.
McEntee *v.* New Jersey Steamboat Co. (45 N. Y. 34, 6 Am. Rep. 28), Car. of M., 303, 305, 311.
Macer *v.* Third Ave. R. Co. (15 J. & S. (N. Y.) 461), St. Rys., 371; Witn., 167.
McEwen *v.* Jeffersonville, M. & I. R. Co. (33 Ind. 368), Car. of M., 276.
McFadden *v.* Johnson (72 Pa. St. 335, 3 Am. Ry. Rep. 65), Em. Dom., 434.
McFadden *v.* May's Landing & E. H. C. R. Co. (49 N. J. Eq. 176, 22 Atl. Rep. 932), Mort., 80, 163, 177.
McFadden *v.* Missouri Pac. R. Co. (30 Am. & Eng. R. Cas. 17, 92 Mo. 343, 10 West. Rep. 372, 4 S. W. Rep. 689), Car. of L. S., 73; Car. of M., 400, 732, 747; Evid., 184; Lim. of Liab., 3, 27.
McFadden *v.* Santa Ana, O. & T. St. R. Co. (87 Cal. 464, 25 Pac. Rep. 681), Husb. & W., 15, 31; Imp. Neg., 26; Witn., 71, 72, 73.
McFadden *v.* Schill (84 Tex. 77, 19 S. W. Rep. 368), Em. Dom., 1065; Sts. & H., 244, 275.
McFarland *v.* Ligonier Valley R. Co. (18 Phila. (Pa.) 661), Witn., 3.
McFarland *v.* McKnight (6 B. Mon. (Ky.) 500), Car. of Slaves, 8.
McFarland *v.* Orange & N. H. C. R. Co. (13 N. J. Eq. 17), St. Rys., 73.
McFarlane *v.* Gilmour (5 Ont. 302), Fel. Serv., 1, 309.
Macfarlane *v.* North British R. Co. (4 Ry. & C. T. Cas. 206), Charges, 121.
Macfarlane *v.* North British R. Co. (4 Ry. & C. T. Cas. 269), Discrim., 17, 74.
McFee *v.* Vicksburg, S. & P. R. Co. (42 La. Ann. 790, 7 So. Rep. 720), Car. of P., 169; Dam., 30.
McFerran *v.* Alloway (14 Bush (Ky.) 580), Mun. Aid, 414.
McFie *v.* Canadian Pac. R. Co. (2 Man. 6), Animals, 466.
McGanahan *v.* East St. Louis & C. R. Co. (72 Ill. 557), Negl., 87.
McGarry *v.* Missouri Pac. R. Co. (36 Mo. App. 340), Mal. Pros., 13, 15, 16.
McGarry *v.* New York & H. R. Co. (45 N.

Y. S. R. 564, 18 N. Y. Supp. 195; affirmed in 137 N. Y. 627, mem., 51 N. Y. S. R. 931, 33 N. E. Rep. 745), Agency, 42; St. Rys., 517.
McGavisk *v.* State (34 N. J. L. 509), Tax., 61, 149.
McGaw *v.* Adams (14 How. Pr. (N. Y.) 461), Car. of M., 220.
McGay *v.* Manhattan El. R. Co. (40 N. Y. S. R. 668, 16 N. Y. Supp. 155), Elev. Rys., 126.
McGean *v.* Manhattan R. Co. (117 N. Y. 219, 22 N. E. Rep. 957, 27 N. Y. S. R. 337), App., 61; Elev. Rys., 121, 194.
McGean *v.* Metropolitan El. R. Co. (133 N. Y. 9, 30 N. E. Rep. 647, 44 N. Y. S. R. 75; affirming 39 N. Y. S. R. 341, 14 N. Y. Supp. 761, 27 J. & S. 472), Elev. Rys., 89.
McGeary *v.* Eastern R. Co. (135 Mass. 363), Children, Inj. to, 123, 143.
McGee's Appeal (114 Pa. St. 470, 8 Atl. Rep. 237), Injunc., 32; Sts. & H., 257.
McGee *v.* Great Western R. Co. (23 U. C. Q. B. 293), Animals, 276.
McGee *v.* Missouri Pac. R. Co. (31 Am. & Eng. R. Cas. 1, 92 Mo. 208, 10 West. Rep. 282, 4 S. W. Rep. 739), Car. of P., 45, 69, 241, 288, 291, 411, 561; Evid., 37.
McGeehan *v.* Lehigh Valley R. Co. (50 Am. & Eng. R. Cas. 32, 149 Pa. St. 188, 24 Atl. Rep. 205), Car. of P., 447.
McGehee *v.* State (Tex. App.) (5 S. W. Rep. 222), Crim. L., 12.
McGibbon *v.* Northern R. Co. (14 Ont. App. 91; reversing 11 Ont. 307), Fires, 53, 254.
McGibbon *v.* North Simcoe R. Co. (26 Grant's Ch. (U. C.) 226), Em. Dom., 1255.
McGill *v.* Grand Trunk R. Co. (19 Ont. App. 245), Car. of M., 611.
McGill *v.* Monette (37 Ala. 49), Car. of M., 701.
McGill *v.* Pittsburg & W. R. Co. (152 Pa. St. 331, 25 Atl. Rep. 540), Contrib. Neg., 82; Cross., Inj. at, 277.
McGill *v.* Rowand (3 Pa. St. 451), Bagg., 114.
McGillivray *v.* Great Western R. Co. (25 U. C. Q. B. 69), Flood. Lds., 51.
McGinney *v.* Canadian Pac. R. Co. (7 Man. 151), Car. of P., 397.
McGinnis *v.* Canada Southern Bridge Co. (8 Am. & Eng. R. Cas. 135, 49 Mich. 466, 13 N. W. Rep. 819), Employés, Inj. to, 63, 98, 182, 184, 464.
McGinnis *v.* Missouri Pac. R. Co. (21 Mo. App. 399), Dam., 26; Eject. Pass., 52, 70, 82, 96; New Tr., 36; Trial, 131.
McGlone *v.* New Jersey R. & T. Co. (37 N. J. L. 304), Death, etc., 130.
McGlynn *v.* Brooklyn Crosstown R. Co. (6 N. Y. S. R. 51, 42 Hun 656), St. Rys., 342.
McGoldrick *v.* New York C. & H. R. R. Co. (49 N. Y. S. R. 566, 66 Hun 629, 20 N. Y. Supp. 914), Death, etc., 269, 306.
McGourkey *v.* Toledo & O. C. R. Co. (146 U. S. 536, 13 Sup. Ct. Rep. 170), Contr., 106; Direct., 48; Mort., 60.
McGourty *v.* Curran (11 N. Y. Supp. 777), Employés, Inj. to, 685.
McGovern *v.* Bockius (10 Phila. (Pa.) 438), Constr. Rys., 68.
McGovern *v.* Central Vt. R. Co. (123 N. Y. 280, 25 N. E. Rep. 373, 33 N. Y. S. R. 416; reversing 53 Hun 635, 24 N. Y. S. R. 946, 6 N. Y. Supp. 838), Employés, Inj. to, 40, 184, 186; Fel. Serv., 362, 506, 507.
McGovern *v.* New York C. & H. R. R. Co. (67 N. Y. 417, 15 Am. Ry. Rep. 119), Cross., Inj at, 238; Death, etc., 163.
McGovern *v.* Western R. Co. (28 How. Pr. (N. Y.) 493), Employés, 1, 19.
McGowan *v.* Missouri Pac. R. Co. (23 Mo. App. 203), Lim. of Ac., 58; Nuis., 12.
McGowan *v.* St. Louis & I. M. R. Co. (61 Mo. 528), Employés, Inj. to, 139; Fel. Serv., 81, 83, 261, 476, 511.
McGowan *v.* Wilmington & W. R. Co. (27 Am. & Eng. R. Cas. 64, 95 N. Car. 417), Bills of L., 64; Car. of M., 37, 40; Charters, 23; Stat., 6.
McGowen *v.* Morgan's L. & T. R. & S. Co. (39 Am. & Eng. R. Cas. 460, 41 La. Ann. 732, 6 So. Rep. 606, 5 L. R. A. 817), Discrim., 29; Eject. Pass., 7, 52; Tickets & F., 122, 127, 129.
McGown *v.* International & G. N. R. Co. (85 Tex. 289, 20 S. W. Rep. 80), Agency, 113; Death, etc., 381.
McGrann *v.* North Lebanon R. Co. (29 Pa. St. 82), Constr. Rys., 29, 100.
McGrann *v.* Pittsburg & L. E. R. Co. (111 Pa. St. 171, 2 Atl. Rep. 872), Receipts, 2, 3.
McGrath *v.* Detroit, M. & M. R. Co. (22 Am. & Eng. R. Cas. 574, 57 Mich. 555, 24 N. W. Rep. 854), Fences, 58.
McGrath *v.* Hudson River R. Co. (19 How. Pr. (N. Y.) 211, 32 Barb. 144), Contrib. Neg., 104; Cross., Inj. at, 209, 256, 326, 329; Death, etc., 174; Negl., 64.
McGrath *v.* New York & N. E. R. Co. (18 Am. & Eng. R. Cas. 5, 14 R. I. 357; affirmed in 15 R. I. 95), Employés, Inj. to, 247.
McGrath *v.* New York C. & H. R. R. Co. (1 T. & C. (N. Y.) 243), Animals, 647; Cross., Inj. at, 80, 183; Evid., 298.
McGrath *v.* New York C. & H. R. R. Co. (59 N. Y. 468, 17 Am. Rep. 359; reversing 1 Hun 437, 3 T. & C. 776), Cross., Inj. at, 213.
McGrath *v.* New York C. & H. R. R. Co. (63 N. Y. 522), Evid., 80, 234; Leases, 108.
McGraw *v.* Baltimore & O. R. Co. (9 Am. & Eng. R. Cas. 188, 18 W. Va. 361, 41 Am. Rep. 696), Car. of M., 26, 110, 132, 204, 205; Words & Ph., 7.
McGraw *v.* Memphis & O. R. Co. (5 Coldw. (Tenn.) 434), Attach., 16; State Aid, 35.
McGreevy *v.* Queen (19 Can. Sup. Ct. 180; reversing 14 Can. Sup. Ct. 735), Arb., 32.
McGregor *v.* Covington & L. R. Co. (1 Disney (Ohio) 509), For. Corp., 13; Usury, 1.
McGregor *v.* Currie (26 U. C. C. P. 55), Stockh., 64.
Macgregor *v.* Dover & D. R. Co. (18 Q. B. 618, 17 Jur. 21, 22 L. J. Q. B. 69, 7 Railw. Cas. 227), Contr., 66; Ult. Vir., 12.
McGregor *v.* Erie R. Co. (35 N. J. L. 89), Charges, 39, 40; Erie R. Co., 1.

McGregor *v.* Erie R. Co. (35 N. J. L. 115), Charges, 9, 51; Citizens., 1; Consol., 4.
McGregor *v.* Metropolitan R. Co. (14 L. T. 354), Em. Dom., 1101.
McGregor & M. R. Co. *v.* Brown (39 Iowa 655), Evid., 146; Tax., 117.
McGregor & M. R. R. Co. *v.* Sioux City & St. P. R. Co. (49 Iowa 604), Arb., 26; Land Grants, 116.
McGregor & S. C. R. Co. *v.* Birdsall (30 Iowa 255), Mun. Aid, 412, 445.
McGregor & S. C. R. Co. *v.* Foley (38 Iowa 588), Mun. Aid, 237.
McGrew *v.* Missouri Pac. R. Co. (109 Mo. 582, 19 S. W. Rep. 53), App., 107; Car. of M., 51.
McGrew *v.* Missouri Pac. R. Co. (114 Mo. 210, 21 S. W. Rep. 463), Charges, 54.
McGrill *v.* Lake Shore & M. S. R. Co. (1 T. & C. (N. Y.) Add. 18), Cross., Inj. at, 360.
McGuffin *v.* Dinsmore (4 Abb. N. Cas. (N. Y.) 241), Discov., 8.
McGugin *v.* Ohio River R. Co. (33 W. Va. 63, 10 S. E. Rep. 36), Liens, 21.
McGuinn *v.* Forbes (37 Fed. Rep. 639), Col. Pers., 8.
McGuire *v.* Broadway & S. A. R. Co. (42 N. Y. S. R. 824, 62 Hun 623, 16 N. Y. Supp. 922), False Imp., 16.
McGuire *v.* Chicago, M. & St. P. R. Co. (37 Fed. Rep. 54), Children, Inj. to, 108.
McGuire *v.* Hudson River R. Co. (2 Daly (N. Y.) 76), Sts. & H., 387, 409.
McGuire *v.* Missouri Pac. R. Co. (23 Mo. App. 325), Animals, 128; Trial, 206.
McGuire *v.* New York C. & H. R. R. Co. (6 Daly (N. Y.) 70), Abate., 12.
McGuire *v.* Ogdensburg & L. C. R. Co. (44 N. Y. S. R. 348, 63 Hun 632, 18 N. Y. Supp. 313), Animals, 395, 576; Fences, 88.
McGuire *v.* St. Louis, I. M. & S. R. Co. (43 Mo. App. 354), Animals, 353.
McGunigal *v.* Grand Trunk R. Co. (33 U. C. Q. B. 194), New Tr., 103.
McGunnighal *v.* Grand Trunk R. Co. (6 Ont. Pr. 209), Trial, 1.
McGwigan *v.* Wilmington & W. R. Co. (95 N. Car. 428), Discrim., 72; Int. Com., 215.
McHenry, Petition of (9 Abb. N. Cas. (N. Y.) 256), Mort., 184.
McHenry *v.* Jewett (90 N. Y. 58; reversing 26 Hun 453), Injunc., 38.
McHenry *v.* New York, P. & O. R. Co. (22 Am. & Eng. R. Cas. 50, 22 Fed. Rep. 130), Eq., 22.
McHenry *v.* New York, P. & O. R. Co. (25 Fed. Rep. 114), Receiv., 173.
McHenry *v.* Philadelphia, W. & B. R. Co. (4 Harr. (Del.) 448), Car. of M., 216, 323.
McHenry *v.* Union Pass. R. Co. (17 Phila. (Pa.) 195), Dam., 99.
Machu *v.* London & S. W. R. Co. (2 Ex. 415, 5 Railw. Cas. 302, 12 Jur. 501, 17 L. J. Ex. 271), Car. of M., 524.
McHugh *v.* Boston, H. & E. R. Co. (66 Barb. (N. Y.) 612), Injunc., 7.
McHugh *v.* Chicago & N. W. R. Co. (41 Wis. 75), Fires, 336.
McIlhenny *v.* Binz (80 Tex. 1, 13 S. W. Rep. 655), Bills & N., 10; Employés, 11; Evid., 178; Mort., 74, 116, 128, 160, 194; Receiv., 26, 78; Stockh., 69.
McIlheny *v.* Pittsburg, V. & C. R. Co. (147 Pa. St. 1, 23 Atl. Rep. 392), Witn., 78.
McIlrath *v.* Snure (22 Minn. 391), Receiv., 42.
McIlvain *v.* Hestonville & M. R. Co. (5 Phila. (Pa.) 13), Liens, 25.
McIntire *v.* Eastern R. Co. (58 N. H. 137), Pl., 149.
McIntire *v.* Western N. C. R. Co. (67 N. Car. 278, 3 Am. Ry. Rep. 99), Em. Dom., 1060.
McIntire St. R. Co. *v.* Bolton (21 Am. & Eng. R. Cas. 501, 43 Ohio St. 224, 54 Am. Rep. 803, 1 N. E. Rep. 333), St. Rys., 360.
McIntosh *v.* Chicago, M. & St. P. R. Co. (36 Fed. Rep. 661), Cross., Inj. at, 226; Evid., 220.
McIntosh *v.* Ensign (28 N. Y. 169), Parties, 12.
McIntosh *v.* Grand Trunk R. Co. (30 U. C. Q. B. 601), Animals, 94.
McIntosh *v.* Hannibal & St. J. R. Co. (26 Mo. App. 377), Animals, 621; Fences, 52.
Macintosh *v.* Midland Counties R. Co. (14 M. & W. 548, 3 Railw. Cas. 780, 14 L. J. Ex. 338), Constr. Rys., 21.
McIntosh *v.* Missouri Pac. R. Co. (103 Mo. 131, 15 S. W. Rep. 80), Death, etc., 127, 234.
McIntyre *v.* Easton & A. R. Co. (26 N. J. Eq. 425), App., 1; Em. Dom., 273, 441, 508, 879; Pl., 146.
McIntyre *v.* New York C. R. Co. (43 Barb. (N. Y.) 532), Death, etc., 186; Trial, 76.
McIntyre *v.* New York C. R. Co. (37 N. Y. 287, 35 How. Pr. 36; affirming 47 Barb. 515), Car. of P., 363; Death, etc., 376, 382, 387.
McIntyre *v.* Roeschlaub (37 Fed. Rep. 556), Land Grants, 7.
Mack *v.* Lombard & S. St. Pass. R. Co. (20 Phila. (Pa.) 207), Children, Inj. to, 95; Negl., 46.
Mack *v.* St. Louis, K. C. & N. R. Co. (77 Mo. 232), Animals, 381; Negl., 89.
McKaig *v.* Northern Pac. R. Co. (42 Fed. Rep. 288), Fel. Serv., 424.
Mackay *v.* Central R. Co. (14 Blatchf. (U. S.) 65, 4 Fed. Rep. 617), Death, etc., 98.
McKay *v.* Montana Union R. Co. (Mont.) (31 Pac. Rep. 999), App., 113.
McKay *v.* New York C. & H. R. R. Co. (50 Hun (N. Y.) 563, 20 N. Y. S. R. 816, 3 N. Y. Supp. 708), Bills of L., 91; Car. of M., 180.
Mackay *v.* New York C. R. Co. (35 N. Y. 75; affirming 27 Barb. 528), Cross., Inj. at, 295.
McKay *v.* Ohio River R. Co. (44 Am. & Eng. R. Cas. 395, 34 W. Va. 65, 11 S. E. Rep. 737), Eject. Pass., 9, 29, 54.
McKean *v.* Burlington, C. R. & N. R. Co. (55 Iowa 192, 7 N. W. Rep. 505), Employés, Inj. to, 339, 585.
McKee *v.* Chicago, R. I. & P. R. Co. (48 Am. & Eng. R. Cas. 154, 83 Iowa 616, 50 N. W. Rep. 209), Death, etc., 222; Employés, Inj. to, 46, 87, 233.
McKee *v.* Delaware & H. Canal Co. (125 N. Y. 353, 26 N. E. Rep. 305, 35 N. Y. S. R.

12; affirming 52 Hun 52, 22 N. Y. S. R. 224, 4 N. Y. Supp. 753), Flood. Lds., 49, 54.
McKee *v.* Grand Rapids & R. L. St. R. Co. (41 Mich. 274), Exec., 1, 16; St. Rys., 67.
McKee *v.* Owen (15 Mich. 115), Bagg., 4.
McKee *v.* St. Louis, K. & N. W. R. Co. (49 Mo. App. 174), Waters & W., 14.
McKee *v.* Vernon County (3 Dill. (U. S.) 210), Coupons, 19.
McKeesport *v.* McKeesport Pass. R. Co. (158 Pa. St. 447, 27 Atl. Rep. 1006), St. Rys., 147.
McKeever *v.* Market St. R. Co. (19 Am. & Eng. R. Cas. 123, 59 Cal. 294), Death, etc., 296, 344.
McKeever *v.* New York C. & H. R. R. Co. (88 N. Y. 667, mem.), Evid., 291.
McKeigue *v.* Janesville (68 Wis. 50, 31 N. W. Rep. 298), Contrib. Neg., 83; Death, etc., 133, 274, 284; Evid., 211.
McKelvay *v.* South Carolina R. Co. (6 So. Car. 446), Attach., 34.
McKelvey *v.* Chesapeake & O. R Co. (53 Am. & Eng. R. Cas. 230, 35 W. Va. 500, 14 S. E. Rep. 261), Death, etc., 342, 644; Witn., 150.
McKelvey *v.* Twenty-third St. R. Co. (5 Misc. 424, 26 N. Y. Supp. 711), St. Rys., 512.
McKelvy *v.* Burlington, C. R. & N. R. Co. (49 Am. & Eng. R. Cas. 477, 84 Iowa 455, 51 N. W. Rep. 172), Cross., Inj. at, 29, 30.
McKenly *v.* Chicago, R. I. & P. R. Co. (43 Iowa 641, 14 Am. Ry. Rep. 495), Cross., Inj. at, 58.
McKenna *v.* East River Ferry Co. (8 N. Y. S. R. 802, 44 Hun 628; affirmed in 113 N. Y. 636, mem., 21 N. E. Rep. 413, 22 N. Y. S. R. 997), Ferries, 11.
McKenna *v.* Metropolitan R. Co. (112 Mass. 55), St. Rys., 159.
McKenna *v.* Missouri Pac. R. Co. (54 Mo. App. 161), Death, etc., 267; Employés, Inj. to, 323, 642; Fel. Serv., 124, 191; Tresp., Inj. to, 60.
McKenna *v.* New York C. & H. R. R. Co. (8 Daly (N. Y.) 304), Tresp., Inj. to, 64, 117.
McKenna *v.* New York C. & H. R. R. Co. (9 Daly (N. Y.) 262), Negl., 38.
McKenney *v.* Penobscot County Com'rs (40 Me. 136), Em. Dom., 577.
McKensie *v.* Missouri Pac. R. Co. (24 Mo. App. 392), Mal. Pros., 5.
McKenzie *v.* Montreal & C. of O. J. R. Co. (27 U. C. C. P. 224), Coupons, 18.
McKenzie *v.* Montreal & C. of O. J. R. Co. (29 U. C. C. P. 333), Coupons, 19.
McKenzie *v.* Ohio River R. Co. (27 W. Va. 306), Em. Dom., 1004; Husb. & W., 28.
Mackenzie *v.* Sligo & S. R. Co. (9 C. B. 250), Em. Dom., 1176.
Mackenzie *v.* Sligo & S. R. Co. (4 El. & Bl. 119, 24 L. J. Q. B. 17), Stockh., 29.
MacKenzie *v.* Wooley (39 La. Ann. 944, 3 So. Rep. 128), Mun. Aid, 415.
McKeoin *v.* Northern Pac. R. Co. (45 Fed. Rep. 464), Em. Dom., 856; Evid., 111.
McKeon *v.* Citizens' R. Co. (42 Mo. 79), Dam., 20; St. Rys., 345, 409.
McKeon *v.* Citizens' R. Co. (43 Mo. 405), Contrib. Neg., 111.
Mackereth *v.* Glasgow & S. W. R. Co. (42 L. J. Ex. 82, L. R. 8 Ex. 149, 21 W. R. 339, 28 L. T. 167), Proc., 33.
McKernan *v.* Manhattan R. Co. (22 J. & S. (N. Y.) 354), Car. of P., 89; Elev. Rys., 199; Stat. & D., 106.
Mackey *v.* Baltimore & P. R. Co. (8 Mackey (D. C.) 282), Car. of P., 183; Contrib. Neg., 84, 121; Death, etc., 322; Employés, Inj. to, 25, 106, 154; Fel. Serv., 212, 214.
Mackie *v.* Central R. Co. (54 Iowa 540, 6 N. W. Rep. 723), Animals, 10, 177, 308, 404.
McKimble *v.* Boston & M. R. Co. (21 Am. & Eng. R. Cas. 213, 139 Mass. 542, 2 N. E. Rep. 97), Car. of P., 33; Death, etc., 157, 237.
McKimble *v.* Boston & M. R. Co. (24 Am. & Eng. R. Cas. 463, 141 Mass. 463, 5. N. E. Rep. 804), Death, etc., 237, 294.
Mackin *v.* Boston & A. R. Co. (15 Am. & Eng. R. Cas. 196, 135 Mass. 201, 46 Am. Rep. 456), Employés, Inj. to, 126, 154.
Mackin *v.* People's St. R., E. L. & P. Co. (45 Mo. App. 82), Trial, 160, 164.
McKinley *v.* Chicago & N. W. R. Co. (44 Iowa 314), Agency, 97; App., 124; Dam., 24; New Tr., 86.
McKinley *v.* Chicago, R. I. & P. R. Co. (47 Iowa 76), Animals, 174, 378, 525.
McKinley *v.* Chicago, S. F. & C. R. Co. (40 Mo. App. 449), Indep. Contr., 11; Tresp., 10.
McKinney *v.* Grand St., P. P. & F. R. Co. (104 N. Y. 352, 10 N. E. Rep. 544, 4 N. Y. S. R. 349), Witn., 92.
McKinney *v.* Jewett (9 Am. & Eng. R. Cas. 209, 90 N. Y. 267; affirming 24 Hun 19), Bills of L., 63; Car. of M., 11, 207.
McKinney *v.* Long Island R. Co. (25 N. Y. S. R. 685, 53 Hun 633, 2 Silv. Sup. Ct. 543, 6 N. Y. Supp. 168), Evid., 89.
McKinney *v.* Ohio & M. R. Co. (22 Ind. 99), Animals, 126, 648.
Mackintosh *v.* Flint & P. M. R. Co. (36 Am. & Eng. R. Cas. 340, 34 Fed. Rep. 582), Pl., 166; Reorg., 4; Sales of Rds., 2; Stockh., 87.
McKinzie *v.* Baltimore & O. R. Co. (28 Md. 161), Replev., 5.
McKissock *v.* St. Louis, K. C. & N. R. Co. (7 Am. & Eng. R. Cas. 590, 73 Mo. 456), Animals, 575.
McKittrick *v.* Arkansas C. R. Co. (152 U. S. 473, 14 Sup. Ct. Rep. 661), State Aid, 13.
Mackler *v.* Mississippi River & B. T. R. Co. (52 Mo. App. 516), Liens, 59.
Macklin *v.* New Jersey Steamboat Co. (7 Abb. Pr. N. S. (N. Y.) 229), Bagg., 11, 81, 107, 122; Car. of P., 331.
McKnight *v.* Chicago, M. & St. P. R. Co. (44 Minn. 141, 46 N. W. Rep. 294), Employés, Inj. to, 117.
McKnight *v.* Iowa & M. R. Constr. Co. (43 Iowa 406, 14 Am. Ry. Rep. 465), Fel. Serv., 175.
McKone *v.* Michigan C. R. Co. (13 Am. & Eng. R. Cas. 29, 51 Mich. 601, 17 N. W. Rep. 74, 47 Am. Rep. 596), Stat. & D., 74.

McKonkey *v.* Chicago, B. & Q. R. Co. (40 Iowa 205, 8 Am. Ry. Rep. 406), Negl., 41.
Mackovsky *v.* Manhattan R. Co. (11 N. Y. S. R. 649), Int., 11; Words & Ph., 94.
Mackoy *v.* Missouri Pac. R. Co. (5 McCrary (U. S.) 538), Car. of P., 142, 348, 617.
McKune *v.* California Southern R. Co. (17 Am. & Eng. R. Cas. 589, 66 Cal. 302, 5 Pac. Rep. 482), Employés, Inj. to, 390; Fel. Serv., 427, 431.
McLane *v.* Placerville & S. V. R. Co. (26 Am. & Eng. R. Cas. 404, 66 Cal. 606, 6 Pac. Rep. 748), Bonds, 48; Deeds of Tr., 1; Mort., 6, 232, 235; Receiv., 149.
McLaren *v.* Detroit & M. R. Co. (23 Wis. 138), Car. of M., 564.
McLaren *v.* Williston (48 Minn. 299, 51 N. W. Rep. 373) Employés, Inj. to, 275.
McLarin *v.* Atlanta & W. P. R. Co. (85 Ga. 504, 11 S. E. Rep. 840), Car. of P., 423.
McLauchlin *v.* Charlotte & S. C. R. Co. (5 Rich. (So. Car.) 583), Em. Dom., 984; Nuis., 27; Sts. & H., 214, 257.
McLauchlin *v.* Grand Trunk R. Co. (12 Ont. 418), Employés, Inj. to, 57, 365.
McLaughlin *v.* Atlantic Ave. R. Co. (36 N. Y. S. R. 87, 12 N. Y. Supp. 453), St. Rys., 406.
McLaughlin *v.* Clausen (85 Cal. 322, 24 Pac. Rep. 636), Bills & N., 11, 22.
McLaughlin *v.* Detroit & M. R. Co. (8 Mich. 100), Stock, 7.
McLaughlin *v.* Fowler (52 Cal. 203), Land Grants, 65.
McLaughlin *v.* Menotti (89 Cal. 354, 26 Pac. Rep. 880), Land Grants, 50, 63, 67, 69.
McLaughlin *v.* Powell (50 Cal. 64), Evid., 254; Pub. Lds., 34.
McLean *v.* Buffalo & L. H. R. Co. (24 U. C. Q. B. 270), Wareh., 3.
McLean *v.* Burbank (11 Minn. 277 (Gil. 189), Car. of P., 139, 140, 180; Death, etc., 239.
McLean *v.* Charlotte, C. & A. R. Co. (96 N. Car. 1, 4 S. E. Rep. 769), Discrim., 72.
McLean *v.* Chicago, St. P., M. & O. R. Co. (50 Minn. 485, 52 N. W. Rep. 966), Eject. Pass., 125.
McLean *v.* Great Western R. Co. (7 Ont. Pr. 358), Words & Ph., 145.
McLean *v.* Great Western R. Co. (33 U. C. Q. B. 198), Em. Dom., 1276.
McLean *v.* Hamilton St. R. Co. (11 Ont. Pr. 193), Set-off, 8.
McLean *v.* New York & S. B. F. & S. T. Co. (60 Hun 80, 14 N. Y. Supp. 74), Tax., 297.
McLean *v.* St. Paul & C. R. Co. (1 N. Y. S. R. 89, 18 Abb. N. Cas. 423), Appear., 3; Evid., 254.
McLean *v.* State (8 Heisk. (Tenn.) 22), Tax., 295.
McLean County *v.* Deposit Bank (81 Ky. 254), Tax., 294.
McLellan *v.* St. Louis & H. R. Co. (46 Am. & Eng. R. Cas. 501, 103 Mo. 295, 15 S. W. Rep. 546), Ejectm., 4.
McLendon *v.* Atlanta & W. P. R. Co. (54 Ga. 293), Assump., 7; Em. Dom., 426.
McLennan *v.* Grand Trunk R. Co. (8 U. C. C. P. 411), Animals, 93.
Maclennan *v.* Long Island R. Co. (20 J. & S. (N. Y.) 22; affirmed (?) 107 N. Y. 623, mem., 13 N. E. Rep. 939, 11 N. Y. S. R. 882), Car. of P., 446; Dam., 94; Witn., 168.
McLenon *v.* Kansas City, St. J. & C. B. R. Co. (69 Iowa 320, 28 N. W. Rep. 619), Animals, 312.
McLeod *v.* Connecticut & P. R. R. Co. (28 Am. & Eng. R. Cas. 644, 58 Vt. 727, 6 Atl. Rep. 648), Actions, 7.
McLeod *v.* European & N. A. R. Co. (12 New Brun. 584), Flood. Lds., 10.
McLeod *v.* Ginther (8 Am. & Eng. R. Cas. 162, 80 Ky. 399), Death, etc., 48; Employés, Inj. to, 165; Evid., 170, 174; Fel. Serv., 1, 73, 110, 218; Negl., 30.
McLeod *v.* Queen (2 Can. Exch. 106), Em. Dom., 1228, 1235, 1237, 1247.
McLeod *v.* Savannah, A. & G. R. Co. (25 Ga. 445), Bridges, 92.
McLeod *v.* Windsor & A. R. Co. (23 Nov. Sc. 69), Death, etc., 361; Fly. Switch, 1.
Macloon *v.* Chicago & N. W. R. Co. (3 Int. Com. Rep. 711, 5 Int. Com. Com. 84), Int. Com., 60, 174.
McMahan *v.* Morrison (16 Ind. 172), Consol., 23; Dissol., 9.
McMahon *v.* Cincinnati & C. S. L. R. Co. (5 Ind. 413), Em. Dom., 48, 486, 492, 733.
McMahon *v.* Davidson (12 Minn. 357 (Gil. 232), Fel. Serv., 142.
McMahon *v.* Henning (1 McCrary (U. S.) 516, 3 Fed. Rep. 353), Fel. Serv., 64; Receiv., 72.
McMahon *v.* Macy (51 N. Y. 155, 4 Am. Ry. Rep. 393), Stockh., 58.
McMahon *v.* New York & E. R. Co. (20 N. Y. 463), Constr. Rys., 25, 56, 59; Int. 10.
McMahon *v.* Northern C. R. Co. (39 Md 438), Children, Inj. to, 88, 93, 118, 123; Contrib. Neg., 87; Cross., Inj. at, 312; Dam., 67, 70, 71, 87.
McMahon *v.* St. Louis, A. & T. R. Co. (41 La. Ann. 827, 6 So. Rep. 640), Em. Dom., 646, 666, 1051.
McMahon *v.* Second Ave. R. Co. (75 N. Y. 231; affirming 11 Hun 347), St. Rys., 135, 167.
McMahon *v.* Third Ave. R. Co. (15 J. & S. (N. Y.) 282), St. Rys., 526.
McManus *v.* Duluth, C. & N. R. Co. (51 Minn. 30, 52 N. W. Rep. 980), Mun. Aid, 55, 227.
McManus *v.* Lancashire & Y. R. Co. (4 H. & N. 327, 5 Jur. N. S. 651, 28 L. J. Ex. 353, 33 L. T. 259; reversing 27 L. J. Ex. 201, 2 H. & N. 693), Car. of L. S., 93, 94.
McManus *v.* Philadelphia & R. R. Co. (58 Pa. St. 330), Stock, 26.
McMarshall *v.* Chicago, R. I. & P. R. Co. (80 Iowa 757, 45 N. W. Rep, 1065), Death, etc., 303, 321, 322; Employés, Inj. to, 325, 496, 497; Tresp., Inj. to, 19; Trial, 105.
McMaster *v.* Illinois C. R. Co. (41 Am. & Eng. R. Cas. 486, 65 Miss. 264, 7 Am. St. Rep. 653, 4 So. Rep. 59), Death, etc., 113; Fel. Serv., 73, 237.
McMaster *v.* Montana Union R. Co. (49 Am. & Eng. R. Cas. 564, 56 Am. & Eng. R. Cas. 195, 12 Mont. 163, 30 Pac. Rep.

268), Animals, 66, 252, 381, 384, 558, 563; App., 67; Trial, 128.
McMasters *v.* Pennsylvania R. Co. (3 Pittsb. (Pa.) 1), Indep. Contr., 11.
McMasters *v.* Pennsylvania R. Co. (69 Pa. St. 374), Car. of M., 260.
McMichael *v.* Grand Trunk R. Co. (12 Ont. 547), Animals, 178.
McMillan, In re (24 Nov. Sc. 360), Em. Dom., 1273.
McMillan *v.* Boyles (3 Iowa 311), Mun. Aid, 22, 109, 148, 158.
McMillan *v.* Burlington & M. R. R. Co. (46 Iowa 231, 16 Am. Ry. Rep. 239), Children, Inj. to, 74, 75; Tresp., Inj. to, 32.
McMillan *v.* Manitoba & N. W. R. Co. (4 Man. 220), Animals, 43, 455, 456.
McMillan *v.* Maysville & L. R. R. Co. (15 B. Mon. (Ky.) 218), Stockh., 2; Subscr., 36.
McMillan *v.* Michigan S. & N. I. R. Co. (16 Mich. 79), Bills of L., 69; Car. of M., 443, 571; Leases, 55; Lim. of Liab., 2, 16, 42.
McMillan *v.* Saratoga & W. R. Co. (20 Barb. (N. Y.) 449), Employés, Inj. to, 249, 510, 537, 538.
McMillan *v.* Western Classification Committee (3 Int. Com. Rep. 282, 4 Int. Com. Com. 276), Int. Com., 154.
McMillan Marble Co. *v.* Black (89 Tenn. 118, 14 S. W. Rep. 479), Contrib. Neg., 41, 44.
McMillen *v.* Lee County Judge (6 Iowa 391), Mun. Aid, 22, 31, 72.
McMinn *v.* Pittsburg, M. & Y. R. Co. (147 Pa. St. 5, 23 Atl. Rep. 325), Release, 29.
McMinnville & M. R. Co. *v.* Huggins (3 Baxt. (Tenn.) 177), Receiv., 54.
McMorran *v.* Grand Trunk R. Co. (2 Int. Com. Rep. 604, 3 Int. Com. Com. 252), Int. Com., 53, 68, 76.
McMullen *v.* Carnegie (158 Pa. St. 518, 27 Atl. Rep. 1043), Employés, Inj. to, 154.
McMullen *v.* Pennsylvania R. Co. (41 Am. & Eng. R. Cas. 505, 132 Pa. St. 107, 19 Atl. Rep. 27), Children, Inj. to, 34, 96.
McMurray *v.* Grand Trunk R. Co. (3 Chan. Chamb. (U. C.) 133), Trial, 13; Witn., 1.
McMurray *v.* Moran (43 Am. & Eng. R. Cas. 442, 134 U. S. 150, 10 Sup. Ct. Rep. 427), Bonds, 49; Fed. Cts., 18.
McMurray *v.* Northern R. Co. (22 Grant's Ch. (U. C.) 476), Parties, 17; Stockh., 98.
McMurray *v.* Northern R. Co. (23 Grant's Ch. (U. C.) 134), Stockh., 98.
McMurty *v.* Kentucky C. R. Co. (84 Ky. 462, 1 S. W. Rep. 815), Actions, 10; Int., 5.
McMurty *v.* Louisville, N. O. & T. R. Co. (67 Miss. 601, 7 So. Rep. 401), Car. of P., 388; Contrib. Neg., 76, 87; Cross., Inj. at, 197.
McNaier *v.* Manhattan R. Co. (22 N. Y. S. R. 840, 51 Hun 644, 4 N. Y. Supp. 310; affirmed in 123 N. Y. 664, mem., 26 N. E. Rep. 750, mem., 34 N. Y. S. R. 1010), Dam., 90; Elev. Rys., 218, 220; Phys. Exam., 1; Trial, 42; Witn., 164.
McNair *v.* Manhattan R. Co. (46 Hun 502, 12 N. Y. S. R. 562), Elev. Rys., 218.
McNair *v.* Rochester, N. Y. & P. R. Co. (38 N. Y. S. R. 271, 14 N. Y. Supp. 39, 59 Hun 627), Fixt., 11.
McNair *v.* South Carolina R. Co. (10 Rich. (So. Car.) 284), New Tr., 17.
McNally *v.* Lancashire & Y. R. Co. (L. R. 8 Ir. 81, 4 Ry. & C. T. Cas. xix), Car. of L. S., 93; Lim. of Liab., 4.
McNally *v.* Savannah, F. & W. R. Co. (86 Ga. 262, 12 S. E. Rep. 351), Employés, Inj. to, 14.
McNamara *v.* Harrison (81 Iowa 486, 46 N. W. Rep. 976), Constr. Rys., 59.
McNamara *v.* Minneapolis, St. P. & S. Ste. M. R. Co. (95 Mich. 545, 55 N. W. Rep. 410), Sts. & H., 32.
McNamara *v.* Minnesota C. R. Co. (12 Minn. 388 (Gil. 269), Em. Dom., 885.
McNamara *v.* New York C. & H. R. R. Co. (136 N. Y. 650, 32 N. E. Rep. 765, 49 N. Y. S. R. 395; reversing 64 Hun 637, 46 N. Y. S. R. 439, 19 N. Y. Supp. 497), Cross., Inj. at, 300.
McNamara *v.* North Pac. R. Co. (50 Cal. 581, 12 Am. Rv. Rep. 190), Negl., 61.
McNamara *v.* Slavens (76 Mo. 329), Death, etc., 25.
McNarra *v.* Chicago & N. W. R. Co. (41 Wis. 69), App., 113.
McNaught *v.* Chicago & N. W. R. Co. (30 Iowa 336), Animals, 312.
MacNaughton *v.* Osgood (3 N. Y. S. R. 795; reversed on another point in 114 N. Y. 574, 24 N. Y. S. R. 531, 21 N. E. Rep. 1044), Stockh., 130.
McNeal *v.* Pittsburg & W. R. Co. (131 Pa. St. 184, 18 Atl. Rep. 1026), Death, etc., 202.
McNear *v.* Wabash R. Co. (42 Mo. App. 14), Fences, 44.
McNees *v.* Missouri Pac. R. Co. (22 Mo. App. 224), Discrim., 21.
McNeil *v.* Chicago City R. Co. (61 Ill. 150, 12 Am. Ry. Rep. 457), St. Rys., 74.
McNeil *v.* New York, L. E. & W. R. Co. (54 N. Y. S. R. 201, 71 Hun 24), Employés, Inj. to, 67, 97, 182, 189.
McNichol *v.* Pacific Exp. Co. (12 Mo. App. 401), Car. of M., 270.
McNichol *v.* United States M. R. Agency (74 Mo. 457), Proc., 19.
McNulta *v.* Ensch (134 Ill. 46, 24 N. E. Rep. 631; reversing 31 Ill. App. 100), Car. of P., 248, 230, 250, 412; Receiv., 138, 141.
McNulta *v.* Lockridge (32 Ill. App. 86; affirmed in 137 Ill. 270, 27 N. E. Rep. 452), Death, etc., 230; Rem. of C., 49.
McNulta *v.* Lockridge (137 Ill. 270, 27 N. E. Rep. 452), Death, etc., 317; Receiv., 70, 124, 137, 140, 141, 143, 180.
McNulta *v.* Lockridge (141 U. S. 327, 12 Sup. Ct. Rep. 11), Receiv., 124, 144.
Macon & A. R. Co. *v.* Bowen (45 Ga. 531), Em. Dom., 231, 659.
Macon & A. R. Co. *v.* Georgia R. Co. (1 Am. & Eng. R. Cas. 378, 63 Ga. 103), Contr., 25; Guar., 7; Mort., 134, 189.
Macon & A. R. Co. *v.* Goldsmith (62 Ga. 463), Tax., 141, 333.
Macon & A. R. Co. *v.* Macon & D. R. Co. (47 Am. & Eng. R. Cas. 315, 86 Ga. 83, 13 S. E. Rep. 157), Par. & Comp. L., 4.
Macon & A. R. Co. *v.* Mayes (49 Ga. 355), Leases, 111.

Macon & A. R. Co. *v.* Newell (74 Ga. 809), Animals, 480.
Macon & A. R. Co. *v.* Riggs (47 Am. & Eng. R. Cas. 40, 87 Ga. 158, 13 S. E. Rep. 312), Em. Dom., 124, 192.
Macon & A. R. Co. *v.* Vason (57 Ga. 314), Direct., 55; Evid., 226; Subscr., 54, 70, 172, 186.
Macon & A. R. Co. *v.* Vaughn (48 Ga. 464), Animals, 51.
Macon & B. R. Co. *v.* Gibson (43 Am. & Eng. R. Cas. 318, 85 Ga. 1, 11 S. E. Rep. 442), Charters, 45; Stat., 34.
Macon & B. R. Co. *v.* State (50 Ga. 156), Just. P., 2.
Macon & B. R. Co. *v.* Washington (69 Ga. 764), App., 132.
Macon & W. R. Co. *v.* Baber (42 Ga. 300), Animals, 296, 576.
Macon & W. R. Co. *v.* Davis (13 Ga. 68), Animals, 284; Arb., 8.
Macon & W. R. Co. *v.* Davis (18 Ga. 679), Cross., Inj. at, 2.
Macon & W. R. Co. *v.* Davis (27 Ga. 113), Dam., 101; Evid., 176.
Macon & W. R. Co. *v.* Holt (8 Ga. 157), Car. of Slaves, 6.
Macon & W. R. Co. *v.* Johnson (38 Ga. 409), Car. of P., 68, 86, 342, 364, 479, 587, 591; Comp. Neg., 21; Death, etc., 394, 396; Evid., 175; Witn., 150, 179.
Macon & W. R. Co. *v.* Lester (30 Ga. 911), Animals, 69, 284.
Macon & W. R. Co. *v.* McConnell (27 Ga. 481), Fires, 115.
Macon & W. R. Co. *v.* McConnell (31 Ga. 133), Fires, 21, 70.
Macon & W. R. Co. *v.* Meador (6 Am. & Eng. R. Cas. 450, 65 Ga. 705), Car. of M., 512.
Macon & W. R. Co. *v.* Parker (9 Ga. 377), Eq., 9; Mort., 241.
Macon & W. R. Co. *v.* Winn (19 Ga. 440), Cross., Inj. at, 192.
Macon & W. R. Co. *v.* Winn (26 Ga. 250), Contrib. Neg., 44; New Tr., 30.
Macon City Council *v.* Central R. & B. Co. (50 Ga. 620), Tax., 204.
Macon County *v.* Huidekoper (134 U. S. 332, 10 Sup. Ct. Rep. 491), Mun. Aid, 405, 439.
Macon County *v.* Shores (97 U. S. 272), Mun. Aid, 136, 353, 360, 365, 368.
Macoupin County Court *v.* People (58 Ill. 191, 11 Am. Ry. Rep. 98), Mun. Aid, 189; Pl., 10.
McPadden *v.* New York C. R. Co. (44 N. Y. 478; reversing 47 Barb. 247), Car. of P., 158, 570, 592; Derailm., 5.
McPheeters *v.* Hannibal & St. J. R. Co. (45 Mo. 22), Animals, 55, 187, 342; Negl., 61; Words & Ph., 103.
McPherson *v.* Atlantic & P. R. Co. (66 Mo. 103), Leases, 75.
McPherson *v.* Queen (1 Can. Exch. 53), Em. Dom., 1217, 1239, 1252.
McPherson *v.* St. Louis, I. M. & S. R. Co. (97 Mo. 253, 10 S. W. Rep. 846), Culverts, 14, 24; Death, etc., 390; Trial, 39; Witn., 104.
McPhillips *v.* New York, N. H. & H. R. Co. (37 N. Y. S. R. 263, 13 N. Y. Supp. 917), Death, etc., 289.
McPhillips *v.* New York, N. H. & H. R. Co. (14 N. Y. Supp. 928; affirming 13 N. Y. Supp. 917), Evid., 263.
McPhillips *v.* New York, N. H. & H. R. Co. (12 Daly (N. Y.) 365), Children, Inj. to, 95; Cross., Sts. & H., 19; Evid., 80.
McQuade *v.* Chicago & N. W. R. Co. (68 Wis. 616, 32 N. W. Rep. 633), Contrib. Neg., 79.
McQuade *v.* Manhattan R. Co. (21 J. & S. 91; affirmed in 109 N. Y. 636, mem., 16 N. E. Rep. 681, 15 N. Y. S. R. 993), Car. of P., 223; Elev. Rys., 208.
McQuaid *v.* Portland & V. R. Co. (40 Am. & Eng. R. Cas. 308, 18 Oreg. 237, 22 Pac. Rep. 899), Sts. & H., 124, 135, 142, 143, 157.
McQuarrie *v.* Fargo (21 U. C. C. P. 478), Exp. Cos., 19.
McQuay *v.* Richmond & D. R. Co. (109 N. Car. 585, 13 S. E. Rep. 944), Negl., 77.
McQueen *v.* Central Branch U. P. R. Co. (15 Am. & Eng. R. Cas. 226, 30 Kan. 689, 1 Pac. Rep. 139), Car. of P., 56; Employés, Inj. to, 240.
McQueen *v.* Great Western R. Co. (L. R. 10 Q. B. 569, 33 L. T. 759, 44 L. J. Q. B. 130), Agency, 90.
McQuesten *v.* Sanford (40 Me. 117), Bagg., 113.
McQuigan *v.* Delaware, L. & W. R. Co. (122 N. Y. 618, 26 N. E. Rep. 13, 34 N. Y. S. R. 618; reversing 14 N. Y. S. R. 651), Employés, Inj. to, 382.
McQuigan *v.* Delaware, L. & W. R. Co. (48 Am. & Eng. R. Cas. 490, 129 N. Y. 50, 21 Civ. Pro. 396, 29 N. E. Rep. 235, 41 N. Y. S. R. 382; affirming 60 Hun 576, 38 N. Y. S. R. 1021, 15 N. Y. Supp. 973), Phys. Exam., 2.
McQuilken *v.* Central Pac. R. Co. (50 Cal. 7, 12 Am. Ry. Rep. 166), Car. of P., 361.
McQuilken *v.* Central Pac. R. Co. (16 Am. & Eng. R. Cas. 353, 64 Cal. 463, 2 Pac. Rep. 46), Car. of P., 344, 363, 404.
McQuillan, In re (12 Ont. Pr. 294), Em. Dom., 1254.
McRae, In re (12 Ont. Pr. 282), Em. Dom., 1225, 1229.
McRae *v.* Atlantic & N. C. R. Co. (5 Jones Eq. (N. Car.) 395), State Aid, 28.
McRae *v.* Grand Rapids, L. & D. R. Co. (93 Mich. 399, 53 N. W. Rep. 561), Trial, 1, 28.
McRae *v.* Russel (12 Ired. (N. Car.) 224), Subscr., 21.
McRae *v.* Toronto & N. R. Co. (22 U. C. C. P. 1), Govt. Rds., 12.
McRae *v.* Wilmington & W. R. Co. (18 Am. & Eng. R. Cas. 316, 88 N. Car. 526, 43 Am. Rep. 745), Car. of P., 60, 66, 80; Tickets & F., 67.
McRee *v.* Wilmington & R. R. Co. (2 Jones (N. Car.) 186), Bridges, 92.
McReynold's Appeal (66 Pa. St. 102), Constr. Rys., 42.
McReynolds *v.* Burlington & O. R. R. Co. (14 Am. & Eng. R. Cas. 172, 106 Ill. 152), Em. Dom., 573, 698, 718, 732, 926; Witn., 196.

McReynolds *v.* Kansas City, C. & S. R. Co. (34 Mo. App. 581; transferred to Sup. Court, 110 Mo. 484), Estop., 24.
McReynolds *v.* Kansas City, C. & S. R. Co. (110 Mo. 484, 19 S. W. Rep. 824), Em. Dom., 742; Witn., 124.
McRoberts *v.* Southern Minn. R. Co. (18 Minn. 108 (Gil. 91), Ferries, 2; Words & Ph., 81.
Macrow *v.* Great Western R. Co. (L. R. 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix), Bagg., 29, 31.
McSwyny *v.* Broadway & S. A. R. Co. (27 N. Y. S. R. 363, 54 Hun 637, 4 Silv. Sup. Ct. 495, 7 N. Y. Supp. 456), Dam., 42; St. Rys., 325, 366; Witn., 100.
McTyer *v.* Steele (26 Ala. 487), Bills of L., 12, 42.
MacVeagh *v.* Atchison, T. & S. F. R. Co. (18 Am. & Eng. R. Cas. 651, 3 N. Mex. 205, 5 Pac. Rep. 457), Car. of M., 295, 298, 300, 508; Negl., 43.
McVeety *v.* St. Paul, M. & M. R. Co. (47 Am. & Eng. R. Cas. 471, 45 Minn. 268, 47 N. W. Rep. 809), Car. of P., 18.
McVerry *v.* Boyd (89 Cal. 304, 26 Pac. Rep. 885), Sts. & H., 341.
McVey *v.* Green Bay & M. R. Co. (42 Wis. 532, 15 Am. Ry. Rep. 143), Words & Ph., 101.
McWhorter *v.* Pensacola & A. R. Co. (37 Am. & Eng. R. Cas. 566, 24 Fla. 417, 12 Am. St. Rep. 220, 2 L. R. A. 504, 5 So. Rep. 129), Injunc., 18; Ry. Com'rs, 2, 40, 41; States, 3; Stat., 7.
McWhorter *v.* People (65 Ill. 290), Mun. Aid, 127.
McWilliams *v.* Detroit C. Mills Co. (31 Mich. 274), Cross., Inj. at, 325; Priv. Rds., 3.
McWilliams *v.* Philadelphia & R. R. Co. (Pa.) (35 Am. & Eng. R. Cas. 401, 15 Atl. Rep. 654), Trial, 78.
Macy *v.* Metropolitan El. R. Co. (12 N. Y. Supp. 804, 59 Hun 365, 36 N. Y. S. R. 245; affirmed in 128 N. Y. 624, 40 N. Y. S. R. 157, 28 N. E. Rep. 485), Elev. Rys., 78, 94, 174.
Macy *v.* St. Paul & D. R. Co. (35 Minn. 200, 28 N. W. Rep. 249), Employés, Inj. to, 576, 604, 646; Fel. Serv., 68; New Tr., 51.
Madan *v.* Sherard (73 N. Y. 329; affirming 10 J. & S. 353), Bagg., 99.
Madden *v.* Chesapeake & O. R. Co. (28 W. Va. 610, 57 Am. Rep. 695), Death, etc., 129; Employés, Inj. to, 4, 18; Evid., 244; Fel. Serv., 79, 106, 213, 214, 247.
Madden *v.* Cincinnati & M. V. R. Co. (3 Am. & Eng. R. Cas. 232, 36 Ohio St. 46), Culverts, 16.
Madden *v.* Cox (44 U. C. Q. B. 542), Bills & N., 5.
Madden *v.* Louisville, N. O. & T. R. Co. (39 Am. & Eng. R. Cas. 95, 66 Miss. 258, 6 So. Rep. 181), Em. Dom., 500, 1010.
Madden *v.* Minneapolis & St. L. R. Co. (30 Minn. 453), Pl., 173.
Madden *v.* Minneapolis & St. L. R. Co. (18 Am. & Eng. R. Cas. 63, 32 Minn. 303, 20 N. W. Rep. 317), Employés, Inj. to, 99.
Madden *v.* Missouri Pac. R. Co. (50 Mo. App. 666), Car. of P., 232, 464; Dam., 90; Just. P., 8; Witn., 53, 105.
Madden *v.* New York C. & H. R. R. Co. (47 N. Y. 665), Cross., Inj. at, 313.
Madden *v.* Port Royal & W. N. C. R. Co. (52 Am. & Eng. R. Cas. 286, 35 So. Car. 381, 14 S. E. Rep. 713), Car. of P., 548; Pl., 24.
Maddox *v.* Graham (2 Metc. (Ky.) 56), Mun. Aid, 349.
Maddox *v.* London, C. & D. R. Co. (38 L. T. 458), Car. of P., 206.
Madison *v.* Pennsylvania R. Co. (147 Pa. St. 509, 23 Atl. Rep. 764), Mal. Pros., 6.
Madison *v.* Smith (83 Ind. 502), Estop., 10; Mun. Aid, 96, 98, 99, 198.
Madison & I. R. Co. *v.* Bacon (6 Ind. 205), Death, etc., 18; Fel. Serv., 1, 202, 458.
Madison & I. R. Co. *v.* Herod (10 Ind. 2), Animals, 440.
Madison & I. R. Co. *v.* Norwich Sav. Society (24 Ind. 457), Agency, 11; Guar., 10.
Madison & I. R. Co. *v.* Taffe (37 Ind. 361, 5 Am. Ry. Rep. 422), Evid., 234.
Madison & I. R. Co. *v.* Whiteneck (8 Ind. 217), Animals, 1, 4.
Madison County Court *v.* People (58 Ill. 456, 11 Am. Ry. Rep. 66), Mun. Aid, 29, 189.
Madison County Court *v.* Richmond, I. & T. F. R. Co. (80 Ky. 16), Mun. Aid, 112.
Madison County Sup'rs *v.* Brown (29 Am. & Eng. Corp. Cas. 157, 67 Miss. 684, 7 So. Rep. 516), Mun. Aid, 131, 378.
Madison County Sup'rs *v.* Paxton (57 Miss. 701), Mun. Aid, 401.
Madison, I. & P. R. Co. *v.* Whitesel (11 Ind. 55), Car. of M., 713; Evid., 153.
Mad River & L. E. R. Co. *v.* Barber (5 Ohio St. 541), Employés, Inj. to, 96, 177, 347, 542; Fel. Serv., 1, 73, 202, 213.
Mad River & L. E. R. Co. *v.* Fulton (20 Ohio 318), Bagg., 114.
Madry *v.* Cox (73 Tex. 538, 11 S. W. Rep. 541), Mun. Aid, 244, 265.
Magee *v.* Chicago & N. W. R. Co. (82 Iowa 249, 48 N. W. Rep. 92), Employés, Inj. to, 386; Trial, 64.
Magee *v.* London & P. S. R. Co. (6 Grant's Ch. (U. C.) 170), Sts. & H., 232.
Magee *v.* North Pac. Coast R. Co. (78 Cal. 430, 20 Pac. Rep. 709, 21 Pac. Rep. 114), Employés, Inj. to, 148, 210, 543; Evid., 64; Trial, 109.
Magee *v.* Oregon R. & N. Co. (46 Fed. Rep. 734), Eject. Pass., 11, 67, 89.
Magee *v.* West End St. R. Co. (151 Mass. 240, 23 N. E. Rep. 1102), St. Rys., 507.
Maghee *v.* Camden & A. R. Co. (45 N. Y. 514), Car. of M., 167, 672; Stat. & D., 1.
Maginnis *v.* New York C. & H. R. R. Co. (52 N. Y. 215, 4 Am. Ry. Rep. 506), Cross., Inj. at, 325, 358; Death, etc., 355.
Magnin *v.* Dinsmore (53 N. Y. 652, mem.; reversing 3 J. & S. 182), Exp. Cos., 66.
Magnin *v.* Dinsmore (8 J. & S. (N. Y.) 512), Negl., 97, 102.
Magnin *v.* Dinsmore (56 N. Y. 168; reversing 46 How. Pr. 297), Exp. Cos., 66.
Magnin *v.* Dinsmore (62 N. Y. 35, 50 How. Pr. 457; reversing 6 J. & S. 248), Car. of M., 763; Exp. Cos., 66, 72.
Magnin *v.* Dinsmore (70 N. Y. 410; revers-

ing 10 J. & S. 16), Car. of M., 305; Exp. Cos., 66; Lim. of Liab., 33, 40.
Magoffin *v.* Missouri Pac. R. Co. (47 Am. & Eng. R. Cas. 489, 102 Mo. 540, 15 S. W. Rep. 76), Car. of Mails, 18; Car. of P., 54; Death, etc., 4; Trial, 183.
Magoric *v.* Little (23 Blatchf. (U. S.) 399, 25 Fed. Rep. 627), Ferries, 9; Release, 11.
Maguire *v.* Fitchburg R. Co. (34 Am. & Eng. R. Cas. 9, 146 Mass. 379, 6 N. Eng. Rep. 33, 15 N. E. Rep. 904), Death, etc., 269, 305.
Maguire *v.* Middlesex R. Co. (115 Mass. 239), Evid., 70; St. Rys., 412, 510.
Mahady *v.* Bushwick R. Co. (14 Am. & Eng. R. Cas. 142, 91 N. Y. 148, 43 Am. Rep. 661), Side Tr., 4; St. Rys., 218.
Mahan *v.* Clee (87 Mich. 161, 49 N. W. Rep. 556), Fright. Teams, 5.
Mahan *v.* Union Depot S. R. & T. Co. (34 Minn. 29, 24 N. E. Rep. 293), Negl., 30; Sts. & H., 377.
Mahaney *v.* St. Louis & H. R. Co. (108 Mo. 191, 18 S. W. Rep. 895), Dam., 86; Employés, Inj. to, 227; Evid., 86; Negl., 74.
Mahany *v.* Baltimore & O. R. Co. (15 W. Va. 609), Appear., 4.
Mahany *v.* Kephart (15 W. Va. 609), Attach., 67.
Mahar *v.* Grand Trunk R. Co. (19 Hun (N. Y.) 32), Sts. & H., 415.
Mahaska County R. Co. *v.* Des Moines Valley R. Co. (28 Iowa 437), Direct., 34, 40; Estop., 28; Location, etc., 17; Stat. & D., 3.
Maher *v.* Atlantic & P. R. Co. (64 Mo. 267, 17 Am. Ry. Rep. 231), Cross., Inj. at, 204; Negl., 41; Trial, 67, 116.
Maher *v.* Boston & A. R. Co. (158 Mass. 36, 32 N. E. Rep. 950), Death, etc., 83, 269; Employés, Inj. to, 59.
Maher *v.* Central Park, N. & E. R. R. Co. (7 J. & S. (N. Y.) 155), Car. of P., 390; St. Rys., 366, 407.
Maher *v.* Central Park, N. & E. R. R. Co. (67 N. Y. 52, 15 Am. Ry. Rep. 293; affirming 7 J. & S. 155), App., 125; Children, Inj. to, 110.
Maher *v.* Louisville, N. O. & T. R. Co. (40 La. Ann. 64), Car. of P., 640.
Maher *v.* Manhattan R. Co. (53 Hun 506, 26 N. Y. S. R. 742, 6 N. Y. Supp. 309), Elev. Rys., 216; Negl., 13.
Maher *v.* Winona & St. P. R. Co. (13 Am. & Eng. R. Cas. 572, 31 Minn. 401, 18 N. W. Rep. 105), Animals, 547.
Mahlen *v.* Lake Shore & M. S. R. Co. (14 Am. & Eng. R. Cas. 687, 49 Mich. 585, 14 N. W. Rep. 556), Employés, Inj. to, 322.
Mahler *v.* Norwich & N. Y. Transp. Co. (35 N. Y. 352; reversing 45 Barb. 226, 30 How. Pr. 237), Death, etc., 112.
Mahon *v* Blake (125 Mass. 477), Car. of M., 254, 735; Pl., 33.
Mahon *v.* New York C. R. Co. (24 N. Y. 658), Em. Dom., 162, 163.
Mahon *v.* Utica & S. R. Co. (Hill & D. Supp. (N. Y.) 156), Embankm., 1.
Mahone *v.* Manchester & L. R. Corp. (111 Mass. 72), Superint., 1.
Mahoney *v.* Atlantic & St. L. R. Co. (63 Me. 68), Leases, 61.
Mahoney *v.* Detroit St. R. Co. (52 Am. & Eng. R. Cas. 581, 93 Mich. 612, 53 N. W. Rep. 793), St. Rys., 519.
Mahoney *v.* Metropolitan R. Co. (104 Mass. 73), Cross., Inj. at, 218; St. Rys., 502.
Mahoney *v.* New York C. & H. R. R. Co. (39 N. Y. S. R. 911, 60 Hun 586, 15 N. Y. Supp. 501; affirmed in 131 N. Y. 623, mem., 43 N. Y. S. R. 962), Death, etc., 212; Employés, Inj. to, 111, 193, 347, 404, 703.
Mahoney *v.* New York C. & H. R. R. Co. (46 N. Y. S. R. 738, 64 Hun 638, 19 N. Y. Supp. 511), Employés, Inj. to, 117.
Mahoney *v.* Railroad Co. (6 Phila. (Pa.) 242), Children, Inj. to, 137.
Mahoney *v.* St. Paul, M. & M. R. Co. (25 Am. & Eng. R. Cas. 470, 35 Minn. 361, 29 N. W. Rep. 6), Fires, 264, 271.
Maidstone Town Council *v.* Southeastern R. Co. (7 Ry. & C. T. Cas. 99), Car. of P., 522.
Maignan *v.* New Orleans, J. & G. N. R. Co. (24 La. Ann. 333), Car. of M., 224.
Mail *v.* Maxwell (107 Ill. 554), Mun. Aid, 365.
Main *v.* Hannibal & St. J. R. Co. (18 Mo. App. 388), Leases, 52; Negl., 41.
Main *v.* Northeastern R. Co. (12 Rich. (So. Car.) 82), Tresp., 6.
Maine *v.* Grand Trunk R. Co. (48 Am. & Eng. R. Cas. 602, 142 U. S. 217, 12 Sup. Ct. Rep. 121, 163), Int. Com., 209.
Maine C. R. Co. *v.* Maine (96 U. S. 499), Tax., 158.
Major *v.* Cincinnati, H. & D. R. Co. (1 Disney (Ohio) 23), Car. of M., 801.
Malcolm *v.* Metropolitan El. R. Co. (36 N. Y. S. R. 741, 13 N. Y. Supp. 283), Elev. Rys., 112, 115; Witn., 68.
Malcom *v.* Richmond & D. R. Co. (44 Am. & Eng. R. Cas. 379, 106 N. Car. 63, 11 S. E. Rep. 187), Car. of P., 199, 481.
Malden & M. R. Co. *v.* Charleston (8 Allen (Mass.) 245), Bridges, 36.
Malecek *v.* Tower Grove & L. R. Co. (57 Mo. 17, 9 Am. Ry. Rep. 1), Agency, 108; Dam., 26.
Mallard *v.* Ninth Ave. R. Co. (15 Daly (N. Y.) 376, 7 N. Y. Supp. 666, 27 N. Y. S. R. 801), Children, Inj. to, 101, 109.
Mallett *v.* Simpson (94 N. Car. 37), Corp., 8.
Mallory, In re (18 N. Y. S. R. 499, 2 N. Y. Supp. 437), Receiv., 44.
Mallory, In re (30 Fed. Rep. 663, 1 Int. Com. Rep. 294), Int. Com., 104.
Mallory *v.* Burrett (1 E. D. Smith (N. Y.) 234), Car. of M., 555.
Mallory *v.* Tioga R. Co. (3 Abb. App. Dec. (N. Y.) 139, 36 How. Pr. 202, 3 Keyes 354, 5 Abb. Pr. N. S. 420; affirming 39 Barb. 488), Lim. of Ac., 73.
Mallory *v.* West Shore H. R. R. Co. (3 J. & S. (N. Y.) 174), Mort., 176.
Malmsten *v.* Marquette, H. & O. R. Co. (8 Am. & Eng. R. Cas. 291, 49 Mich. 94, 13 N. W. Rep. 373), Sts. & H., 391.
Malone *v.* Boston & A. R. Co. (51 Hun (N. Y.) 532, 21 N. Y. S. R. 656, 4 N. Y. Supp. 590), Children, Inj. to, 36.

Malone *v.* Boston & W. R. Corp. (12 Gray (Mass.) 388), Bagg., 98, 107.
Malone *v.* Burlington, C. R. & N. R. Co. (11 Am. & Eng. R. Cas. 165, 61 Iowa 326, 47 Am. Rep. 813, 16 N. W. Rep. 203), Fel. Serv., 177.
Malone *v.* Hathaway (64 N. Y. 5), Fel. Serv., 73, 105, 311.
Malone *v.* Keener (44 Pa. St. 107), Contr., 19.
Malone *v.* Philadelphia & R. R. Co. (157 Pa. St. 430, 27 Atl. Rep. 756), Constr. Rys., 69, 70.
Malone *v.* Pittsburg & L. E. R. Co. (152 Pa. St. 390, 25 Atl. Rep. 638), Contrib. Neg., 44; Dam., 94; Eject. Pass., 64.
Maloney *v.* Malcolm (31 Mo. 45), Constr. Rys., 86.
Maloy *v.* New York C. R. Co. (58 Barb. (N. Y.) 182, 40 How. Pr. 274), Contrib. Neg., 83; Dam., 97; Negl., 62, 67, 74; New Tr., 51.
Maloy *v.* Wabash, St. L. & P. R. Co. (84 Mo. 270), Death, etc., 204; Tresp., Inj. to, 54, 64.
Malpas *v.* London & S. W. R. Co. (14 W. R. 391, 12 Jur. N. S. 271, 13 L. T. 710, 35 L. J. C. P. 166, 1 H. & R. 227, L. R. 1 C. P. 336), Evid., 183.
Maltby *v.* Chicago & W. M. R. Co. (13 Am. & Eng. R. Cas. 606, 52 Mich. 108, 17 N. W. Rep. 717), Cross., Inj. at, 29.
Maltby *v.* Northwestern Va. R. Co. (16 Md. 422), Partn., 4; Subscr., 156, 165, 178.
Maltby *v.* Reading & C. R. Co. (52 Pa. St. 140), Tax., 44, 100.
Maltman *v.* Chicago, M. & St. P. R. Co. (41 Ill. App. 229), Em. Dom., 990; Sts. & H., 146, 249.
Maltz *v.* American Exp. Co. (1 Flipp. (U. S.) 611), Citizens., 2.
Manahan *v.* Steinway & H. P. R. Co. (30 N. Y. S. R. 362, 55 Hun 610, mem., 8 N. Y. Supp. 935, mem.; reversed in 125 N. Y. 760, mem., 35 N. Y. S. R. 813, 26 N. E. Rep. 736), St. Rys., 476.
Manahan *v.* Steinway & H. P. R. Co. (125 N. Y. 760, 35 N. Y. S. R. 813), Children, Inj. to, 80.
Manchester & K. R. Co. *v.* Keene (62 N. H. 81), Em. Dom., 404, 419; Mun. Aid, 233.
Manchester & L. R. Co., In re (L. R. 2 Ch. D. 360, 24 W. R. 752, 45 L. J. Ch. D., 368), Em. Dom., 1143.
Manchester & L. R. Co. *v.* Concord R. Co. (47 Am. & Eng. R. Cas. 359, 66 N. H. 100, 20 Atl. Rep. 383, 9 L. R. A. 689, 3 Int. Com. Rep. 319), Consol., 26; Contr., 62; Discov., 1; Leases, 30; Par. & Comp. L., 5; Ult. Vir., 25.
Manchester & L. R. Co. *v.* Fisk (33 N. H. 297), Charges, 83, 84.
Manchester & L. R. Co. *v.* Reg. (3 Railw. Cas. 633, 3 G. & D. 269, 3 Q. B. 528), Cross., St. & H., 23, 26.
Manchester & M. R. Co., In re (L. R. 14 Ch. D. 645, 49 L. J. Ch. D. 365, 42 L. T. 714), Receiv., 10, 16, 26.
Manchester & M. R. Co., In re (45 L. T. 129), Dissol., 31.
Manchester & S. R. Co. *v.* Brooks (L. R. 2 Ex. D. 243, 46 L. J. Ex. D. 244, 25 W. R. 413, 36 L. T. 103), Charges, 86.
Manchester Locomotive Works *v.* Truesdale (44 Minn. 115, 9 L. R. A. 140, 46 N. W. Rep. 301), Mort., 56.
Manchester, M. & D. Tramways Co., In re ([1893] 2 Ch. 638), Tramw., 8.
Manchester, S. & L. R. Co. *v.* Brown (16 Am. & Eng. R. Cas. 174, 8 App. Cas. 703, 53 L. J. Q. B. D. 124, 4 Ry. & C. T. Cas. xviii, reversing L. R. 10 Q. B. D. 250; affirming 6 Am. & Eng. R. Cas. 481, L. R. 9 Q. B. D. 230), Car. of M., 479; Charges, 21; Lim. of Liab., 19.
Manchester, S. & L. R. Co. *v.* Denaby Main Colliery Co. (18 Am. & Eng. R. Cas. 482, L. R. 13 Q. B. D. 674, 4 Ry. & C. T. Cas. 437), Charges, 125; Discrim., 5, 25, 34, 48.
Manchester, S. & L. R. Co. *v.* Guardians of Poor (2 Ry. & C. T. Cas. 53), Tax., 372, 377.
Manchester, S. & L. R. Co. *v.* London & N. W. R. Co. (6 Ry. & C. T. Cas. 1), Charges, 103.
Manchester, S. & L. R. Co. *v.* North C. Wagon Co. (13 App. Cas. 554, 6 Ry. & C. T. Cas. lxix; affirming 35 Ch. D. 191, which reversed 32 Ch. D. 477), Car. of M., 380.
Manchester, S. & L. R. Co. *v.* Wallis (7 Railw. Cas. 709, 2 C. L. R. 573, 14 C. B. 213, 18 Jur. 268, 23 L. J. C. P. 85), Fences, 11, 35.
Manchester, S. & L. R. Co. *v.* Wood (6 Jur. N. S. 70, 29 L. J. M. C. 29, 1 L. T. 31, 2 El. & El. 344), Nuis., 5; Penalty, 3.
Manchester, S. & L. R. Co. *v.* Woodcock (25 L. T. N. S. 333), Animals, 202.
Manchester S. J. R. Co. *v.* Fullerton (14 C. B. N. S. 54, 11 W. R. 754), Cross., Inj. at, 16.
Maney *v.* Chicago, B. & Q. R. Co. (49 Ill. App. 105), Cross., Inj. at, 142, 153; Death, etc., 3, 17, 380.
Mangalore, The (9 Sawy. (U. S.) 71, 23 Fed. Rep. 463), Car. of M., 762, 765.
Mangam *v.* Brooklyn City R. Co. (38 N. Y. 455, 98 Am. Dec. 66; affirming 36 Barb. 230), Children, Inj. to, 69, 125, 144.
Mangold *v.* St. Louis, I. M. & S. R. Co. (24 Mo. App. 52), Lim. of Ac., 17; Pl., 23; Waters & W., 17.
Manhattan, A. & B. R. Co. *v.* Keller (32 Kan. 163, 4 Pac. Rep. 143), Fires, 66, 83, 364.
Manhattan, A. & B. R. Co. *v.* Stewart (13 Am. & Eng. R. Cas. 503, 30 Kan. 226, 2 Pac. Rep. 151), Animals, 571; Witn., 149.
Manhattan Life Ins. Co. *v.* Forty-second St. & G. S. F. R. Co. (46 N. Y. S. R. 130, 64 Hun 635, 19 N. Y. Supp. 90; affirmed in 139 N. Y. 146, 34 N. E. Rep. 776, 54 N. Y. S. R. 474), Pres., 5.
Manhattan Oil Co. *v.* Camden & A. R. & T. Co. (54 N. Y. 197, 6 Am. Ry. Rep. 189; affirming 52 Barb. 72, 5 Abb. Pr. N. S. 289), Car. of M., 671.
Manhattan R. Co., In re (52 N. Y. S. R. 44, 22 N. Y. Supp. 602, 68 Hun 90), Elev. Rys., 47.
Manhattan R. Co. *v.* Cornell (54 Hun 292, 27 N. Y. S. R. 300, 7 N. Y. Supp. 557; af-

firmed in 130 N. Y. 637, mem., 29 N. E. Rep. 151, mem., 40 N. Y. S. R. 982, mem.), Constr. Rys., 47; Indem. Bonds, 6.
Manhattan R. Co. *v.* Mayor, etc., of N. Y. (13 Am. & Eng. R. Cas. 261, 18 Fed. Rep. 195), Tax., 40, 346.
Manhattan R. Co. *v.* New York El. R. Co. (29 Hun (N. Y.) 309), Stockh., 93.
Manhattan R. Co. *v.* Stroub (68 Hun 90, 52 N. Y. S. R. 44, 22 N. Y. Supp. 602), Em. Dom., 493, 505.
Manhattan R. Co. *v.* Stroub (70 Hun 363, 53 N. Y. S. R. 811), Em. Dom., 955.
Manhattan R. Co. *v.* Taber (27 N. Y. Supp. 860, 7 Misc. 347), Em. Dom., 930.
Manheim, P. & L. Plank Road Co. *v.* Arndt (31 Pa. St. 317), Subscr., 126.
Manice *v.* Hudson River R. Co. (3 Duer (N. Y.) 426), Stock, 6, 25.
Manion *v.* Louisville, St. L. & T. R. Co. (47 Am. & Eng. R. Cas. 107, 90 Ky. 491, 14 S. W. Rep. 532), Em. Dom., 968.
Manistee & N. E. R. Co. *v.* Fowler (73 Mich. 217, 41 N. W. Rep. 261), Em. Dom., 62, 314, 336, 817.
Manitoba M. & I. Co. *v.* Canadian Pac. R. Co. (1 Man. 285), Em. Dom., 140.
Manley *v.* Boston & M. R. Co. (159 Mass. 493, 34 N. E. Rep. 951), Death, etc., 237.
Manly *v.* Wilmington & W. R. Co. (74 N. Car. 655, 13 Am. Ry. Rep. 105), Contrib. Neg., 5, 6, 16, 24, 48.
Mann *v.* Belt R. & S. Y. Co. (128 Ind. 138, 26 N. E. Rep. 819), Cross., Inj. at, 231, 245, 264, 270.
Mann *v.* Birchard (40 Vt. 326), Car. of M., 145, 178, 611; Lim. of Liab., 11.
Mann *v.* Burt (35 Kan. 10, 10 Pac. Rep. 95), Constr. Rys., 77; Liens, 44.
Mann *v.* Central Vt. R. Co. (14 Am. & Eng. R. Cas. 620, 55 Vt. 484, 45 Am. Rep. 628), Cross., Inj. at, 26.
Mann *v.* Chicago, R. I. & P. R. Co. (86 Mo. 347), Cross., Inj. at, 26; Farm. Cross., 11.
Mann *v.* Cooke (20 Conn. 178), Subscr., 33, 77.
Mann *v.* Corrigan (28 Kan. 194), Constr. Rys., 89.
Mann *v.* Delaware & H. Canal Co. (12 Am. & Eng. R. Cas. 199, 91 N. Y. 495), Fel. Serv., 508.
Mann *v.* Great S. & W. R. Co. (9 Ir. C. L. R. 105), Priv. Ways, 12.
Mann *v.* Macon & W. R. Co. (32 Ga. 345), Car. of Slaves, 3; Employés, Inj. to, 604.
Mann *v.* Pentz (3 N. Y. 415; reversing 2 Sandf. Ch. 257), Cred. Bill, 3; Stockh., 32; Subscr., 45.
Mann *v.* Sioux City & P. R. Co. (46 Iowa 637, 16 Am. Ry. Rep. 146), Death, etc., 222; Evid., 56.
Mann *v.* Winnipeg & H. B. R. Co. (7 Man. 457), Exec., 30.
Mann Boudoir Car Co. *v.* Dupre (58 Am. & Eng. R. Cas. 575, 54 Fed. Rep. 646, 4 C. C. A. 540), Sleep. Car Cos., 10, 16; Evid., 178.
Mann Boudoir Car Co. *v.* Gilbert Car Mfg. Co. (23 N. Y. Supp. 697, 69 Hun 245; affirmed in 141 N. Y. 571, 36 N. E. Rep 345, 57 N. Y. S. R. 867), Pat. for Inv., 12.
Mann Boudoir Car. Co. *v.* Monarch Parlor Sleeping Car Co. (34 Fed. Rep. 130), Pat. for Inv., 48, 51.
Manning *v.* Burlington, C. R. & N. R. Co. (Iowa) (15 Am. & Eng. R. Cas. 171, 17 N. W. Rep. 669), App., 44.
Manning *v.* Burlington, C. R. & N. R. Co. (64 Iowa 240, 20 N. W. Rep. 169), Fel. Serv., 176, 177.
Manning *v.* Eastern Counties R. Co. (12 M. & W. 237, 3 Railw. Cas. 637, 13 L. J. Ex. 265), Em. Dom., 1185; Tresp., 3.
Manning *v.* London, W. & S. W. R. Co. (17 L. T. 68), Incorp., 6.
Manning *v.* Louisville & N. R. Co. (52 Am. & Eng. R. Cas. 213, 95 Ala. 392, 11 So. Rep. 8, 16 L. R. A. 55), Eject. Pass., 51; Tickets & F., 123.
Manning *v.* Mathews (66 Iowa 675, 24 N. W. Rep. 271), Mun. Aid, 412.
Manning *v.* Norfolk Southern R. Co. (29 Fed. Rep. 838), Mort., 165.
Manning *v.* Port Henry Iron Ore Co. (91 N. Y. 664; reversing 27 Hun 219), Death, etc., 438.
Manser *v.* Eastern Counties R. Co. (3 L. T. 585), Car. of P., 192.
Mansfield *v.* New York C. & H. R. R. Co. (114 N. Y. 331, 21 N. E. Rep. 735, 1037, 23 N. Y. S. R. 739, 24 N. Y. S. R. 534, 40 Alb. L. J. 89, 4 L. R. A. 566; modifying and affirming 46 Hun 680, 12 N. Y. S. R. 871), Dam., 109.
Mansfield & S. C. R. Co. *v.* Veeder (17 Ohio 385), Constr. Rys., 23, Eq., 16.
Mansfield, C. & L. M. R. Co. *v.* Brown (26 Ohio St. 223, 13 Am. Ry. Rep. 341), Consol., 18, 33; Subscr., 9, 220.
Mansfield, C. & L. M. R. Co. *v.* Clark (23 Mich. 519, 2 Mich. N. P. [Supp.] 119, 1 Am. Ry. Rep. 1), Em. Dom., 119, 322, 532, 544, 791, 820, 821.
Mansfield, C. & L. M. R. Co. *v.* Drinker (30 Mich. 124), Consol., 9, 13, 18.
Mansfield, C. & L. M. R. Co. *v.* Hall (26 Ohio St. 310, 11 Am. Ry. Rep. 56), Subscr., 94.
Mansfield, C. & L. M. R. Co. *v.* Pettis (26 Ohio St. 259, 13 Am. Ry. Rep. 380), Subscr., 192.
Mansfield, C. & L. M. R. Co. *v.* Stout (26 Ohio St. 241, 13 Am. Ry. Rep. 361), Consol., 33; Subscr., 224.
Mansfield, C. & L. M. R. Co. *v.* Swan (111 U. S. 379, 4 Sup. Ct. Rep. 510), Jurisd., 10.
Manson *v.* Eddy (3 Tex. Civ. App. 148, 22 S. W. Rep. 66), Employés, Inj. to, 199.
Manson *v.* Manhattan R. Co. (23 J. & S. 18, 8 N. Y. S. R. 118), Elev. Rys., 217.
Manson *v.* State (24 Ohio St. 590), Crim. L., 27.
Mantel *v.* Chicago, M. & St. P. R. Co. (19 Am. & Eng. R. Cas. 362, 33 Minn. 62, 21 N. W. Rep. 853), St. Rys., 500; Witn., 141.
Manuel *v.* Chicago, R. I. & P. R. Co. (5 Am. & Eng. R. Cas. 588, 56 Iowa 655, 10 N. W. Rep. 237), Fel. Serv., 496.
Manuel *v.* Missouri Pac. R. Co. (19 Mo. App. 631), Animals, 607, 617, 631.
Manufacturers & J. Union *v.* Minneapolis & St. L. R. Co. (1 Int. Com. Rep. 630, 1 Int. Com. Com. 227), Int. Com., 170.

Manufacturers & J. Union *v.* Minneapolis & St. L. R. Co. (3 Int. Com. Rep. 115, 4 Int. Com. Com. 79), Int. Com., 42, 53, 63.
Manville *v.* Cleveland & T. R. Co. (11 Ohio St. 417), Employés, 4.
Manwell *v.* Burlington, C. R. & N. R. Co. (45 Am. & Eng. R. Cas. 501, 80 Iowa 662, 45 N. W. Rep. 568), Animals, 113, 599.
Manz *v.* St. Louis, I. M. & S. R. Co. (87 Mo. 278), Animals, 619, 629.
Mapes *v.* Chicago, R. I. & P. R. Co. (76 Mo. 367), Animals, 342, 381.
Maple *v.* Cincinnati, H. & D. R. Co. (15 Am. & Eng. R. Cas. 94, 40 Ohio St. 313, 48 Am. Rep. 685), Judgm., 17; Lim. of Ac., 29.
Maples *v.* New York & N. H. R. Co. (38 Conn. 557, 9 Am. Rep. 434), Eject. Pass., 21, 22, 65.
March *v.* Eastern R. Co. (40 N. H. 548), Arb., 4; For. Corp., 16; Stockh., 114.
March *v.* Eastern R. Co. (43 N. H. 515), Injunc., 39; Leases, 2, 33.
March *v.* Portsmouth & C. R. Co. (19 N. H. 372), Culverts, 4; Em. Dom., 540, 606, 620, 763; Farm. Cross., 10; New Tr., 8.
March *v.* Walker (48 Tex. 372), Children, Inj. to, 158; Death, etc., 380, 418.
Marcheterre *v.* Ontario & Q. R. Co. (4 Montr. Super. 397), Employés, Inj. to, 500.
Marcott *v.* Marquette, H. & O. R. Co. (4 Am. & Eng. R. Cas. 548, 47 Mich. 1, 10 N. W. Rep. 53), Children, Inj. to, 160; Fences, 7; Negl., 25, 62, 70.
Marcott *v.* Marquette, H. & O. R. Co. (8 Am. & Eng. R. Cas. 306, 49 Mich. 99, 13 N. W. Rep. 374), Fences, 98; Witn., 94, 104.
Marcy *v.* Oswego Tp. (92 U. S. 637), Coupons, 19; Mun. Aid, 377.
Marden *v.* Boston & A. R. Co. (159 Mass. 393, 34 N. E. Rep. 404), Children, Inj. to, 95.
Mares *v.* Northern Pac. R. Co. (17 Am. & Eng. R. Cas. 620, 3 Dak. 336, 21 N. W. Rep. 5), Contrib. Neg., 105; Employés, Inj. to, 704, 716.
Marfell *v.* South Wales R. Co. (8 C. B. N. S. 525, 7 Jur. N. S. 240, 29 L. J. C. P. 315, 8 W. R. 765, 2 L. T. 629), Animals, 191; Fences, 69.
Maricopa County Delinquents *v.* Territory (Ariz.) (48 Am. & Eng. R. Cas. 620, 26 Pac. Rep. 310), Pub. Lds., 11; Tax., 84.
Marietta & C. R. Co. *v.* Elliott (10 Ohio St. 57), Subscr., 126.
Marietta & C. R. Co. *v.* Mowry (28 Hun (N. Y.) 79), Partn., 5.
Marietta & C. R. Co. *v.* Picksley (24 Ohio St. 654, 7 Am. Ry. Rep. 186), Contrib. Neg., 84; New Tr., 5.
Marietta & C. R. Co. *v.* Stephenson (24 Ohio St. 48, 6 Am. Ry. Rep. 428), Animals, 260; Fences, 33.
Marietta & C. R. Co. *v.* Western Union Tel. Co. (10 Am. & Eng. R. Cas. 387, 38 Ohio St. 24), Spec. Perf., 20; Tel. & T. Lines, 4.
Marigny *v.* Pontchartrain R. Co. (15 La. Ann. 427), Easem., 9.
Marine Ins. Co. *v.* St. Louis, I. M. & S. R. Co. (43 Am. & Eng. R. Cas. 79, 41 Fed. Rep. 643), Car. of M., 103; Fire Ins., 12, 18; For. Corp., 14; Nuis., 9; Proc., 16; Sts. & H., 171.
Marion *v.* Chicago, R. I. & P. R. Co. (8 Am. & Eng. R. Cas. 177, 59 Iowa 428, 13 N. W. Rep. 415), Agency, 103.
Marion *v.* Chicago, R. I. & P. R. Co. (64 Iowa 568, 21 N. W. Rep. 86), Agency, 102; Evid., 173; New Tr., 36; Tresp., Inj. to 117.
Marion & L. R. Co. *v.* Lomax (7 Ind. 648), Bills & N., 21.
Marion & McP. R. Co. *v.* Champlin (37 Kan. 682, 16 Pac. Rep. 222), Tax., 67.
Marion & M. R. Co. *v.* Dillon (7 Ind. 404), Bills & N., 18.
Marion & M. R. Co. *v.* Hodge (9 Ind. 163), Bills & N., 19; Int., 7.
Marion & M. V. R. Co. *v.* Ward (9 Ind. 123), Em. Dom., 305, 312, 315, 356.
Marion County Com'rs *v.* Center Tp. (105 Ind. 422, 2 N. E. Rep. 368, 7 N. E. Rep. 189), Mun. Aid, 256, 262, 264.
Marion County Com'rs *v.* Clark (94 U. S. 278), Mun. Aid, 322, 324, 344.
Marion County Com'rs *v.* Harvey County Com'rs (26 Kan. 181), Mun. Aid, 333.
Maris *v.* Iles (3 Ind. App. 579, 30 N. E. Rep. 152), Deeds, 2.
Maris *v.* Union Pass. R. Co. (10 Phila. (Pa.) 41), Cross. Rys., 14.
Mark *v.* Petersburg R. Co. (49 Am. & Eng. R. Cas. 418, 88 Va. 1, 13 S. E. Rep. 299), Cross., Inj. at, 267, 292.
Mark *v.* St. Paul, M. & M. R. Co. (12 Am. & Eng. R. Cas. 86, 30 Minn. 493, 16 N. W. Rep. 367), Contrib. Neg., 44.
Mark *v.* St. Paul, M. & M. R. Co. (32 Minn. 208, 20 N. W. Rep. 131), Employés, Inj. to, 717.
Markel *v.* Moudy (13 Neb. 322, 14 N. W. Rep. 409), Dam., 53; Evid., 1; Witn., 152.
Market St. Pass. R. Co. *v.* Union Pass. R. Co. (10 Phila. (Pa.) 43), Cross. Rys., 1, 14.
Market St. R. Co. *v.* Central R. Co. (51 Cal. 583, 12 Am. Ry. Rep. 219), St. Rys., 4.
Markham *v.* Great Western R. Co. (25 U. C. Q. B. 572), Animals, 56.
Markham *v.* Houston & T. C. R. Co. (1 Tex. App. (Civ. Cas.) 35), Estop., 3; Sts. & H., 11.
Markham *v.* Houston Direct Nav. Co. (73 Tex. 247, 11 S. W. Rep. 131), Imp. Neg., 22.
Marks, In re (6 N. Y. Supp. 105), Em. Dom., 77.
Marks *v.* Fitchburg R. Co. (155 Mass. 493, 29 N. E. Rep. 1148), Cross., Inj. at, 22.
Marks *v.* Indianapolis, B. & W. R. Co. (38 Ind. 440), Constr. Rys., 88.
Marks *v.* Long Island R. Co. (14 Daly 61, 3 N. Y. S. R. 562), Dam., 93.
Marland *v.* Pittsburg & L. E. R. Co. (123 Pa. St. 487, 16 Atl. Rep. 624), Cross., Inj. at, 316.
Marling *v.* Burlington, C. R. & N. R. Co. (67 Iowa 331, 25 N. W. Rep. 268), Em. Dom., 1078.
Marlor *v.* Texas & P. R. Co. (17 Am. &

Eng. R. Cas. 215, 19 Fed. Rep. 867), Bonds, 52.
Marlor *v.* Texas & P. R. Co. (21 Fed. Rep. 383), Paym., 2.
Maroney *v.* Old Colony & N. R. Co. (106 Mass. 153, 7 Am. Ry. Rep. 427), Eject. Pass., 41; Tickets & F., 14.
Marquette *v.* Chicago & N. W. R. Co. (33 Iowa 562), Car. of P., 324, 609; Eject. Pass., 42, 52, 54, 60; Negl., 61.
Marquette & O. R. Co. *v.* Taft (28 Mich. 289, 12 Am. Ry. Rep. 279), Fel. Serv., 142; Med. Serv., 12, 13.
Marquette, H. & O. R. Co. *v.* Atkinson (44 Mich. 166, 6 N. W. Rep. 230, 21 Am. Rv. Rep. 240), Deeds, 49.
Marquette, H. & O. R. Co. *v.* Handford (39 Mich. 537), Death, etc., 208.
Marquette, H. & O. R. Co. *v.* Harlow (37 Mich. 554), Land. & T., 6.
Marquette, H. & O. R. Co. *v.* Kirkwood (9 Am. & Eng. R. Cas. 85, 45 Mich. 51, 7 N. W. Rep. 209, 40 Am. Rep. 453), Car. of M., 106, 173, 199, 560, 638; Witn., 30.
Marquette, H. & O. R. Co. *v.* Langton (32 Mich. 251), Car. of M., 765; Consol., 47; Evid., 3.
Marquette, H. & O. R. Co. *v.* Marcott (41 Mich. 433), Negl., 89; Trial, 138.
Marquette, H. & O. R. Co. *v.* Marquette (35 Mich. 504, 16 Am. Ry. Rep. 179), Tax., 359.
Marquette, H. & O. R. Co. *v.* Probate Judge (14 Am. & Eng. R. Cas. 355, 53 Mich. 217, 18 N. W. Rep. 788), Em. Dom., 803, 806, 814.
Marquette, H. & O. R. Co. *v.* Spear (7 Am. & Eng. R. Cas. 486, 44 Mich. 169, 6 N. W. Rep. 202), Fires, 107; Words & Ph., 214.
Marquette, H. & O. R. Co. *v.* United States (123 U. S. 722, 8 Sup. Ct. Rep. 319), Tax., 106.
Marrett *v.* Hannibal & St. J. R. Co. (84 Mo. 413), Animals, 353.
Marriott, In re (1 C. B. N. S. 499, 3 Jur. N. S. 493, 26 L. J. C. P. 154, 1 Ry. & C. T. Cas. 47), Hacks, etc., 3.
Marriott *v.* London & S. W. R. Co. (3 Jur. N. S. 493, 26 L. J. C. P. 154), Car. of M., 532.
Mars *v.* Delaware & H. C. Co. (54 Hun (N. Y.) 625, 28 N. Y. S. R. 228, 8 N. Y. Supp. 107), Agency, 100; Collis., 3; Negl., 50.
Marseilles E. R. & L. Co., In re (L. R. 30 Ch. D. 598), Dissol., 24.
Marseilles E. R. & L. Co., In re (20 W. R. 254), Direct., 39, 41.
Marsh *v.* Atlanta & F. R. Co. (53 Fed. Rep. 168), Rem. of C., 41.
Marsh *v.* Chicago, R. I. & P. R. Co. (75 Iowa 361, 39 N. W. Rep. 643), Discrim., 70.
Marsh *v.* Chicago, R. I. & P. R. Co. (79 Iowa 332, 44 N. W. Rep. 562), Agency, 14; Evid., 133.
Marsh *v.* Delaware, L. & W. R. Co. (35 N. Y. S. R. 719, 59 Hun 615, mem., 12 N. Y. Supp. 376), Waters & W., 20.
Marsh *v.* Fairbury, P. & N. W. R. Co. (64 Ill. 414, 2 Am. Ry. Rep. 82), Spec. Perf., 17.
Marsh *v.* Fulton County (10 Wall. (U. S.) 676), Mun. Aid, 223, 339, 357.
Marsh *v.* New York & E. R. Co. (14 Barb. (N. Y.) 364), Animals, 213, 272; Fences, 97.
Marsh *v.* South Carolina R. Co. (56 Ga. 274), Employés, Inj. to, 409; Evid., 129, 176, 195; Negl., 61; Witn., 44.
Marsh *v.* Union Pac. R. Co. (6 Am. & Eng. R. Cas. 359, 3 McCrary (U. S.) 236, 9 Fed. Rep. 873), Car. of M., 384, 390; Trover, 12, 16.
Marshal *v.* St. Louis & I. M. R. Co. (51 Mo. 138), Fences, 44.
Marshall *v.* American Exp. Co. (7 Wis. 1), Exp. Cos., 29, 40, 43, 56; Words & Ph., 7.
Marshall *v.* Baltimore & O. R. Co. (16 How. (U. S.) 314), Contr., 66, 71; Fed. Cts., 8.
Marshall *v.* Baltimore & O. R. Co. (Taney (U. S.) 204), Contr., 66.
Marshall *v.* Boston & A. R. Co. (31 Am. & Eng. R. Cas. 18, 145 Mass. 164, 5 N. Eng. Rep. 172, 13 N. E. Rep. 384), Custom, 4; Eject. Pass., 9; Evid., 37; Tickets & F., 68.
Marshall *v.* Chicago & S. E. R. Co. (48 Ill. 475), Evid., 165.
Marshall *v.* Elgin (3 McCrary (U. S.) 35, 8 Fed. Rep. 783), Fed. Cts., 15; Mun. Aid, 316, 378.
Marshall *v.* Grand Trunk R. Co. (5 Low. Can. 339), Lim. of Ac., 51.
Marshall *v.* New York C. R. Co. (45 Barb. (N. Y.) 502; affirmed in (?) 48 N. Y. 660, mem.), Car. of M., 39, 615, 779, 780.
Marshall *v.* St. Louis, K. C. & N. R. Co. (18 Am. & Eng. R. Cas. 248, 78 Mo. 610), Car. of P., 542, 642.
Marshall *v.* Silliman (61 Ill. 218), Mun. Aid, 29, 118, 148, 397.
Marshall *v.* Wabash R. Co. (46 Fed. Rep. 269), Death, etc., 89, 97.
Marshall *v.* Western N. C. R. Co. (20 Am. & Eng. R. Cas. 578, 92 N. Car. 322), Reorg., 2; Stockh., 4.
Marshall *v.* York, N. & B. R. Co. (11 C. B. 655, 16 Jur. 124, 21 L. J. C. P. 34), Bagg., 107; Parties, 2.
Marshall County Sup'rs *v.* Cook (38 Ill. 44), Mun. Aid, 113, 342.
Marshall County Sup'rs *v.* Schenck (5 Wall. (U. S.) 772), Mun. Aid, 342.
Marshall F. & C. Co. *v.* Pittsburg Traction Co. (138 Pa. St. 266, 22 Atl. Rep. 23), Constr. Rys., 124.
Marson *v.* London, C. & D. R. Co. (37 L. J. Ch. 483, L. R. 6 Eq. 101, 18 L. T. 319), Em. Dom., 1103.
Martensen *v.* Chicago, R. I. & P. R. Co. (11 Am. & Eng. R. Cas. 233, 60 Iowa 705, 15 N. W. Rep. 569), Employés, Inj. to, 375.
Martin *v.* American Exp. Co. (19 Wis. 336), Exp. Cos., 79, 83; Witn., 10.
Martin *v.* Baltimore & O. R. Co. (41 Fed. Rep. 125), Employés, Inj. to, 377; Relief Assoc., 5.
Martin *v.* Baltimore & O. R. Co. (151 U. S. 673, 14 Sup. Ct. Rep. 533), Evid., 99; Rem. of C., 26, 35.
Martin *v.* California C. R. Co. (94 Cal. 326,

29 Pac. Rep. 645), Death, etc., 313, 341; Employés, Inj. to, 109.
Martin *v.* Central Iowa R. Co. (39 Iowa 411, 13 N. W. Rep. 424), Animals, 308; Evid., 238.
Martin *v.* Central Vt. R. Co. (50 Hun (N. Y.) 347, 20 N. Y. S. R. 375, 3 N. Y. Supp. 82), Attach., 43.
Martin *v.* Chicago, B. & Q. R. Co. (2 Int. Com. Rep. 32, 2 Int. Com. Com. 25), Int. Com., 96.
Martin *v.* Chicago, S. F. & C. R. Co. (47 Mo. App. 452), Embankm., 1, 2; Sts. & H., 249.
Martin *v.* Columbia & G. R. Co. (32 So. Car. 592, 10 S. E. Rep. 960), Trial, 64.
Martin *v.* Continental Pass. R. Co. (14 Phila. (Pa.) 10), Direct., 58.
Martin *v.* Ft. Worth & D. C. R. Co. (3 Tex. Civ. App. 556, 22 S. W. Rep. 1007), Car. of M., 96.
Martin *v.* Gainesville, J. & S. R. Co. (78 Ga. 307), Easem., 15; Pl., 145.
Martin *v.* Great Indian Peninsular R. Co. (37 L. J. Exch. 27, L. R. 3 Exch. 9, 17 L. T. N. S. 349), Bagg., 101, 111.
Martin *v.* Great Northern R. Co. (16 C. B. 179, 3 C. L. R. 817, 1 Jur. N. S. 613), Stat. & D., 142.
Martin *v.* London, C. & D. R. Co. (14 W. R. 24, 13 L. T. 355, L. R. 1 Eq. 145; reversed in L. R. 1 Ch. 501, 12 Jur. N. S. 778, 14 L. T. 814, 14 W. R. 880), Em. Dom., 1160.
Martin *v.* McLaughlin (9 Colo. 153, 10 Pac. Rep. 806), Car. of M., 399.
Martin *v.* Maine C. R. Co. (83 Me. 100, 21 Atl. Rep. 740), Estop., 28.
Martin *v.* Manhattan R. Co. (44 N. Y. S. R. 543, 63 Hun 350, 18 N. Y. Supp. 238), Elev. Rys., 150, 168.
Martin *v.* Michigan & O. R. Co. (26 Am. & Eng. R. Cas. 351, 62 Mich. 458, 29 N. W. Rep. 40), Constr., Rys., 91.
Martin *v.* Missouri Pac. R. Co. (3 Tex. Civ. App. 133, 22 S. W. Rep. 195), Car. of M., 725; Fires, 292, 296.
Martin *v.* Mobile & O. R. Co. (7 Bush (Ky.) 116), Attach., 9.
Martin *v.* New York & N. E. R. Co. (56 Am. & Eng. R. Cas. 79, 62 Conn. 331, 25 Atl. Rep. 239), Fires, 2, 81, 89, 91, 102, 246, 337, 355, 366; Evid., 5, 248; Words & Ph., 28.
Martin *v.* New York C. & H. R. R. Co. (1 N. Y. S. R. 738), Eject. Pass., 41.
Martin *v.* New York C. & H. R. R. Co. (27 Hun (N. Y.) 532, mem.; affirmed in 97 N. Y. 628, mem.), Cross., Inj. at, 189.
Martin *v.* New York C. & H. R. R. Co. (50 N. Y. S. R. 553, 66 Hun 636, 21 N. Y. Supp. 919), Cross., Inj. at, 225.
Martin *v.* New York, N. H. & H. R. Co. (103 N. Y. 626, 9 N. E. Rep. 505, 4 N. Y. S. R. 303), Evid., 175.
Martin *v.* New York, O. & W. R. Co. (41 N. Y. S. R. 217, 62 Hun 181, 16 N. Y. Supp. 499), Fires, 87.
Martin *v.* New York, S. & W. R. Co. (12 Am. & Eng. R. Cas. 448, 36 N. J. Eq. 109), Eq., 21; Passes, 6.
Martin *v.* North Star Iron Works (15 Am. & Eng. R. Cas. 156, 31 Minn. 407, 18 N. W. Rep. 109), Employés, Inj. to, 674, 716.
Martin *v.* Ohio River R. Co. (37 W. Va. 349, 16 S. E. Rep. 589), Ejectm., 1; Trial, 195.
Martin *v.* Pensacola & G. R. Co. (8 Fla. 370), Subscr., 108, 118, 226.
Martin *v.* Queen (2 Can. Exch. 328), Children, Inj. to, 16.
Martin *v.* Reg. (2 Can. Exch. 328), Agency, 119.
Martin *v.* St. Louis, I. M. & S. R. Co. (56 Am. & Eng. R. Cas. 112, 55 Ark. 510, 19 S. W. Rep. 314), Bills of L., 16; Car. of M., 95, 97, 103, 698; Fires, 236; Wareh., 10.
Martin *v.* Second & T. St. Pass. R. Co. (3 Phila. (Pa.) 316), Contr., 67; St. Rys., 130.
Martin *v.* Southern Pac. Co. (2 Int. Com. Com. 1, 2 Int. Com. Rep. 1), Int. Com., 34, 115, 125, 130.
Martin *v.* Stewart (38 Am. & Eng. R. Cas. 316, 73 Wis. 553, 41 N. W. Rep. 538), Animals, 213, 220.
Martin *v.* Towle (59 N. H. 31), Evid., 199.
Martin *v.* Union Pac. R. Co. (1 Wyom. 143), Custom, 7; Evid., 232.
Martin *v.* Wallace (40 Ga. 52), War, 1.
Martin *v.* Western Union R. Co. (23 Wis. 437), Fires, 108, 246.
Martin County *v.* Drake (37 Am. & Eng. R. Cas. 389, 40 Minn. 137, 41 N. W. Rep. 942), Tax., 80.
Martindale *v.* Kansas City, St. J. & C. B. R. Co. (60 Mo. 508), Car. of P., 228, 561.
Martin, D. R., The (11 Blatchf. (U. S.) 233), Eject. Pass., 1; Exp. Cos., 8.
Martini *v.* Gzowski (13 U. C. Q. B. 298), Em. Dom., 1219.
Martinsburg & P. R. Co. *v.* March (114 U. S. 549, 5 Sup. Ct. Rep. 1035), Constr. Rys., 58.
Martinsville & F. R. Co. *v.* Bridges (6 Ind. 400), Em. Dom., 323.
Marty *v.* Chicago, St. P., M. & O. R. Co. (32 Am. & Eng. R. Cas. [illegible], 38 Minn. 108, 35 N. W. Rep. 670), Cross., Inj. at, 269, 296.
Marvin *v.* Chicago, M. & St. P. R. Co. (45 Am. & Eng. R. Cas. 540, [illegible] Wis. 140, 47 N. W. Rep. 1123), App., 24, Fires, 24, 97, 172, 213, 251.
Marvin *v.* Manhattan R. Co. (21 J. & S. (N. Y.) 527), Dam., 88.
Marvin *v.* Maysville St. R. & T. Co. (49 Fed. Rep. 436), Death, etc., 53.
Marx *v.* Manhattan R. Co. (56 Hun 575, 18 Civ. Pro. 384, 31 N. Y. S. R. 914, 10 N. Y. Supp. 159), Witn., 93.
Marx *v.* Manhattan R. Co. (10 N. Y. Supp. 222), Trial, 82.
Marx *v.* Travelers' Ins. Co. (39 Fed. Rep. 321), Acc. Ins., 10, 11.
Marye *v.* Baltimore & O. R. Co. (127 U. S. 117, 8 Sup. Ct. Rep. 1037), Tax., 55.
Maryland *v.* Baltimore & O. R. Co. (3 How. (U. S.) 534), State Aid, 23.
Maryland *v.* Baltimore & O. R. Co. (22 Wall. (U. S.) 105; affirming 36 Md. 519), State Aid, 23.
Maryland *v.* Baltimore & P. R. Co. (1 Hughes (U. S.) 337), Death, etc., 22, 411; Fel. Serv., 1, 139.
Maryland Agric'l College *v.* Baltimore &

P. R. Co. (43 Md. 434, 14 Am. Ry. Rep. 266), Agency, 35; Attach., 15.
Maryland & D. R. Co. *v.* Porter (19 Md. 458), Arb., 28; Em. Dom., 489.
Maryland C. R. Co. *v.* Neubeur (19 Am. & Eng. R. Cas. 261, 62 Md. 391), Cross., Inj. at, 66, 206, 210, 236; Trial, 154.
Maryland Coal Co. *v.* Cumberland & P. R. Co. (41 Md. 343, 6 Am. Ry. Rep. 524), Deeds, 13.
Mary Lee C. & R. Co. *v.* Chambliss (53 Am. & Eng. R. Cas. 254, 97 Ala. 171, 11 So. Rep. 897), Contrib. Neg., 56; Employés, Inj. to, 72, 97, 542; Evid., 247; Pl., 23.
Mary Lee C. & R. Co. *v.* Winn (97 Ala. 495, 12 So. Rep. 607), Estop., 17; Right of W., 6.
Mary Washington, The (Chase (U. S.) 125), Car. of M., 221, 223.
Mascheck *v.* St. Louis R. Co. (3 Mo. App. 600), Children, Inj. to, 69; Negl., 114; Witn., 95.
Maschek *v.* St. Louis R. Co. (2 Am. & Eng. R. Cas. 38, 71 Mo. 276), Children, Inj. to, 61.
Mase *v.* Northern Pac. R. Co. (57 Fed. Rep. 283), Fel. Serv., 245.
Maslin *v.* Baltimore & O. R. Co. (14 W. Va. 180), Car. of L. S., 22, 126, 137; Lim. of Liab., 28.
Mason *v.* Atlantic Ave. R. Co. (4 Misc. (N. Y.) 291, 24 N. Y. Supp. 139, 53 N. Y. S. R. 454), Children, Inj. to, 66, 105.
Mason *v.* Brooklyn City & N. R. Co. (35 Barb. (N. Y.) 373), Location, etc., 16, 21; St. Rys., 73.
Mason *v.* Cooper (19 Ga. 543), Western & A. R. Co., 1.
Mason *v.* Grand Trunk R. Co. (37 U. C. Q. B. 163), Bills of L., 96, 97; Car. of M., 374, 567.
Mason *v.* Great Western R. Co. (31 U. C. Q. B. 73), Car. of M., 308.
Mason *v.* Kennebec & P. R. Co. (31 Me. 215), Em. Dom., 49, 714.
Mason *v.* Lake Erie, E. & S. W. R. Co. (9 Biss. (U. S.) 239, 1 Fed. Rep. 712), Canals, 5.
Mason *v.* Missouri Pac. R. Co. (25 Mo. App. 473), Car. of L. S., 3, 16.
Mason *v.* Missouri Pac. R. Co. (6 Am. & Eng. R. Cas. 1, 27 Kan. 83, 41 Am. Rep. 405), Contrib. Neg., 5; Evid., 54; Tresp., Inj. to, 6, 21.
Mason *v.* Nichols (22 Wis. 376), Officers, 5.
Mason *v.* Richmond & D. R. Co. (53 Am. & Eng. R. Cas. 183, 111 N. Car. 482, 16 S. E. Rep. 698), Car. of M., 453; Employés, Inj. to, 26, 111, 134, 179, 339, 734; Fel. Serv., 219, 242.
Mason *v.* Shrewsbury & H. R. Co. (L. R. 6 Q. B. 578, 40 L. J. Q. B. 293, 20 W. R. 14, 25 L. T. 239), Waters & W., 14.
Mason *v.* South Norfolk R. Co. (19 Ont. 132), Tresp., 16.
Mason *v.* Stokes Bay P. & R. Co. (32 L. J. Ch. 110), Em. Dom., 1127.
Mason *v.* Union Pac. R. Co. (44 Am. & Eng. R. Cas. 449, 7 Utah 77, 24 Pac. Rep. 796), Death, etc., 35.
Mason *v.* York & C. R. Co. (52 Me. 82), Bonds, 53; Mort., 72, 79.
Massachusetts & S. Constr. Co. *v.* Cane Creek Tp. (45 Fed. Rep. 336), Mun. Aid, 338.
Massachusetts & S. Constr. Co. *v.* Cherokee Tp. (42 Fed. Rep. 750), Mun. Aid, 338.
Massachusetts & S. Constr. Co. *v.* Gill's Creek Tp. (48 Fed. Rep. 145), Att'ys, 16.
Massachusetts C. R. Co. *v.* Boston, C. & F. R. Co. (121 Mass. 124), Cross. Rys., 45, 48.
Massachusetts L. & T. Co. *v.* Fitchburg R. Co. (143 Mass. 318, 9 N. E. Rep. 669), Car. of M., 762.
Massadillo *v.* Nashville & K. R. Co. (46 Am. & Eng. R. Cas. 666, 89 Tenn. 661, 15 S. W. Rep. 445), New Tr., 85.
Masser *v.* Chicago, R. I. & P. R. Co. (68 Iowa 602, 27 N. W. Rep. 776), Children, Inj. to, 70, 94; Tresp., Inj. to, 3, 23, 44.
Masson *v.* Grand Junction R. Co. (26 Grant's Ch. (U. C.) 286), Fences, 48.
Masson *v.* Robertson (44 U. C. Q. B. 323), Em. Dom., 1274.
Massoth *v.* Delaware & H. Canal Co. (64 N. Y. 524; affirming 6 Hun 314), Cross., Inj. at, 169, 247; Death, etc., 295; Imp. Neg., 25; Negl., 29.
Masterson *v.* Chicago, R. I. & P. R. Co. (49 Mo. App. 6), Cross., Inj. at, 258.
Masterson *v.* Macon City & S. St. R. Co. (88 Ga. 436, 14 S. E. Rep. 591), Car. of P., 432; St. Rys., 400.
Masterson *v.* Missouri Pac. R. Co. (20 Mo. App. 653), Proc., 45.
Masterson *v.* New York C. & H. R. R. Co. (3 Am. & Eng. R. Cas. 408, 84 N. Y. 247, 38 Am. Rep. 510), Imp. Neg., 19; Sts. & H., 188.
Masterson *v.* West End Narrow Gauge R. Co. (4 Am. & Eng. R. Cas. 439, 72 Mo. 342; affirming 5 Mo. App. 64), Estop., 17.
Masterson *v.* West End Narrow Gauge R. Co. (5 Mo. App. 575), Tresp., 9.
Mastin *v.* Pacific R. Co. (83 Mo. 634), Mun. Aid, 8, 62; Trial, 100.
Matchett *v.* Cincinnati, W. & M. R. Co. (53 Am. & Eng. R. Cas. 266, 132 Ind. 334, 31 N. E. Rep. 792), Trial, 218.
Mateer *v.* Missouri Pac. R. Co. (Mo.) (15 S. W. Rep. 970), Employés, Inj. to, 154; Release, 24, 25.
Mateer *v.* Missouri Pac. R. Co. (105 Mo. 320, 16 S. W. Rep. 839), Comprom., 1; Trial, 139.
Mather *v.* American Exp. Co. (9 Biss. (U. S.) 293, 2 Fed. Rep. 49), Car. of M., 484.
Mather *v.* American Exp. Co. (138 Mass. 55, 52 Am. Rep. 258), Exp. Cos., 90.
Mathews *v.* Kelsey (58 Me. 56), Sts. & H., 408.
Mathews *v.* St. Paul & S. C. R. Co. (18 Minn. 434), Animals, 42, 45.
Mathews *v.* Winooski Turnpike Co. (24 Vt. 480), Turnp., 3.
Mathis *v.* Pridham (1 Tex. Civ. App. 58, 20 S. W. Rep. 1015), Cred. Bill, 7; Receiv., 118, 120, 121; Stockh., 25, 30, 38, 56, 57, 61, 66, 67.
Mathis *v.* Tennessee & C. R. R. Co. (83 Ala. 411, 3 So. Rep. 793), Evid., 133; Land Grants, 17.

Matson *v.* Baird (L. R. 3 App. Cas. 1082, 26 W. R. 835, 39 L. T. 304, 3 Ry. & C. T. Cas. xvii), Cross., Inj. at, 45; Cross., Sts. & H., 20.
Matson *v.* Chicago, R. I. & P. R. Co. (68 Iowa 22, 25 N. W. Rep. 911), Fel. Serv., 177.
Matson *v.* Hannibal & St. J. R. Co. (80 Mo. 229), Animals, 608, 634.
Matta *v.* Chicago & W. M. R. Co. (32 Am. & Eng. R. Cas. 71, 69 Mich. 109, 13 West. Rep. 717, 37 N. W. Rep. 54), Comp. Neg., 28; Cross., Inj. at, 198, 231, 265.
Matteson *v.* New York C. & H. R. R. Co. (76 N. Y. 381), Bagg., 63, 69, 117.
Matteson *v.* New York C. R. Co. (35 N. Y. 487), Evid., 209; Witn., 173.
Matteson *v.* New York C. R. Co. (62 Barb. (N. Y.) 364), Dam., 44, 71; Employés, Inj. to, 661; Evid., 204; Negl., 61; Witn., 19, 165.
Matthew *v.* Pennsylvania R. Co. (8 Fed. Rep. 45, 14 Phila. (Pa.) 602), Pat. for Inv., 13.
Matthews *v.* Blount County (3 Lea (Tenn.) 120), Mun. Aid, 280.
Matthews *v.* Central Pac. R. Co. (63 Cal. 450), Husb. & W., 31.
Matthews *v.* Charleston & S. R. Co. (38 So. Car. 429, 17 S. E. Rep. 225), Car. of P., 252; Tickets & F., 108.
Matthews *v.* Delaware & H. Canal Co. (20 Hun (N. Y.) 427), Deeds, 42; Em. Dom., 1049.
Matthews *v.* Missouri Pac. R. Co. (26 Mo. App. 75), Contrib. Neg., 82; Death, etc., 132, 411; New Tr., 30; Sts. & H., 409.
Matthews *v.* Murchison (9 Am. & Eng. R. Cas. 693, 15 Fed. Rep. 691), Bonds, 37; Reorg., 9.
Matthews *v.* Murchison (17 Fed. Rep. 760), Eq., 2.
Matthews *v.* Pennsylvania R. Co. (148 Pa. St. 491, 24 Atl. Rep. 67), Death, etc., 174.
Matthews *v.* Smith's Exp. Co. (1 Misc. (N. Y.) 238), Tresp., 21.
Matthews *v.* Warner (29 Gratt. (Va.) 570), Death, etc., 181, 374.
Mattingly *v.* Pennsylvania Co. (2 Int. Com. Rep. 806, 3 Int. Com. Com. 592), Int. Com., 18, 21, 29.
Mattison *v.* New York C. R. Co. (57 N. Y. 552), Bagg., 63.
Mattlage *v.* New York El. R. Co. (33 N. Y. S. R. 918, 58 Hun 603, mem., 11 N. Y. Supp. 482), Elev. Rys., 67.
Mattlage *v.* New York El. R. Co. (44 N. Y. S. R. 289, 17 N. Y. Supp. 536), Elev. Rys., 108, 155, 197.
Mattlage *v.* New York El. R. Co. (47 N. Y. S. R. 106, 19 N. Y. Supp. 1015), Elev. Rys., 186.
Mattlage *v.* New York El. R. Co. (1 Misc. 339, 48 N. Y. S. R. 683, 20 N. Y. Supp. 624), Elev. Rys., 72.
Matz *v.* St. Paul City R. Co. (52 Minn. 159, 53 N. W. Rep. 1071), St. Rys., 346, 384, 416.
Matze *v.* New York C. & H. R. R. Co. (1 Hun (N. Y.) 417, 3 T. & C. 513), Cross., Inj. at, 108, 202; Licensees, Inj. to, 21.
Mau *v.* Morse (3 Colo. App. 359), Contrib. Neg., 74, 87; Negl., 75.
Mauerman *v.* St. Louis, I. M. & S. R. Co. (41 Mo. App. 348), Children, Inj. to, 182, 184; Cross., Inj. at, 206; Licensees, Inj. to, 28; New Tr., 34.
Mauritz *v.* New York, L. E. & W. R. Co. (21 Am. & Eng. R. Cas. 286, 23 Fed. Rep. 765), Bagg., 18, 19, 30, 98; Tickets & F., 3, 17.
Maury *v.* Chesapeake & O. R. Co. (27 Gratt. (Va.) 698), Trusts, 9.
Maury *v.* Talmadge (2 McLean (U. S.) 157), Car. of P., 98, 100; Custom, 4.
Maus *v.* Logansport, P. & B. R. Co. (27 Ill. 77), Tax., 24, 303.
Maverick, The (Sprague (U. S.) 23), Eastern R. Co., 6.
Maverick *v.* Eighth Ave. R. Co. (36 N. Y. 378), St. Rys., 325, 369; Witn., 22.
Maxcy *v.* Williamson County (72 Ill. 207), Mun. Aid, 134, 320, 353.
Maxcy *v.* Missouri Pac. R. Co. (113 Mo. 1, 20 S. W. Rep. 654), Cross., Inj. at, 115, 256, 264.
Maxfield *v.* Cincinnati, I. & L. R. Co. (41 Ind. 269), Contrib. Neg., 53.
Maxson *v.* Delaware, L. & W. R. Co. (37 Am. & Eng. R. Cas. 162, 112 N. Y. 559, 20 N. E. Rep. 544, 21 N. Y. S. R. 767; reversing 48 Hun 172, 15 N. Y. S. R. 650, 14 Civ. Pro. 248), Lim. of Ac., 60.
Maxwell *v.* Atchison, T. & S. F. R. Co. (34 Am. & Eng. R. Cas. 574, 34 Fed. Rep. 286), Eject. Pass., 75; Fed. Cts., 2; Proc., 28.
Maxwell *v.* Hannibal & St. J. R. Co. (85 Mo. 95), Fel. Serv., 144.
Maxwell *v.* Louisville & N. R. Co. (1 Tenn. Ch. 8), Judgm., 41.
May *v.* Central R. & B. Co. (80 Ga. 363, 4 S. E. Rep. 330), Death, etc., 204.
May *v.* First Div. St. P. & P. R. Co. (26 Minn. 74, 1 N. W. Rep. 584), Ejectm., 25.
May *v.* Memphis Branch R. Co. (48 Ga. 109, 11 Am. Ry. Rep. 395), Subscr., 159.
May *v.* North Hudson County R. Co. (30 Am. & Eng. R. Cas. 644, 49 N. J. L. 445, 9 Atl. Rep. 688, 8 Cent. Rep. 345; reversing 48 N. J. L. 401, 5 Atl. Rep. 276), Trial, 83.
May *v.* Ontario & Q. R. Co. (26 Am. & Eng. R. Cas. 337, 10 Ont. 70), Car. of P., 56; Employés, 4; Lim. of Ac., 51; Stat., 64.
May *v.* Steamship Powhatan (5 Fed. Rep. 375), Lim. of Liab., 27.
Mayall *v.* Boston & M. R. Co. (19 N. H. 122), Agency, 11, 23; Parties, 2.
Mayberry *v.* Chicago, R. I. & P. R. Co. (11 Am. & Eng. R. Cas. 29, 75 Mo. 492), Agency, 62.
Mayberry *v.* Concord R. Co. (47 N. H. 391), Fences, 83.
Mayberry *v.* Second & T. St. R. Co. (15 Phila. (Pa.) 253), Release, 7; Sts. & H., 375.
Maybin *v.* South Carolina R. Co. (8 Rich. (So. Car.) 240), Car. of M., 34.
Mayer *v.* Brown (4 Tex. App. (Civ. Cas.) 189, 16 S. W. Rep. 788), Car. of M., 693; Jurisd., 6.
Mayer *v.* Denver, T. & Ft. W. R. Co. (41 Fed. Rep. 723), Parties, 21.

Mayer *v.* Grand Trunk R. Co. (31 U. C. C. P. 248), Car. of M., 347.
Mayer *v.* New York C. & H. R. R. Co. (29 N. Y. S. R. 183, 8 N. Y. Supp. 461, 55 Hun 608, mem.; affirmed in 132 N. Y. 579, mem., 30 N. E. Rep. 867, mem., 43 N. Y. S. R. 965), Animals, 547; Cross., Inj. at, 113, 155; Sts. & H., 333; Trial, 131.
Mayes *v.* Chicago, R. I. & P. R. Co. (8 Am. & Eng. R. Cas. 527, 63 Iowa 562, 14 N. W. Rep. 340, 19 N. W. Rep. 680), Employés, Inj. to, 209, 542.
Mayes *v.* Reg. (2 Can. Exch. 403), Agency, 117; Constr. Rys., 32.
Mayfield *v.* St. Louis & S. F. R. Co. (91 Mo. 296, 3 S. W. Rep. 201), Animals, 143, 456, 619.
Mayfield *v.* Savannah, G. & N. A. R. Co. (87 Ga. 374, 13 S. E. Rep. 459), Contrib. Neg., 97; Evid., 202; Witn., 9, 98.
Maynard *v.* Bond (67 Mo. 315) Receiv., 36.
Maynard *v.* Boston & M. R. Co. (115 Mass. 458), Animals, 50.
Mayo *v.* Boston & M. R. Co. (104 Mass. 137), Car. of P., 451; Contrib. Neg., 103.
Mayor, etc., of Allegheny *v.* Ohio & P. R. Co. (26 Pa. St. 355), Sts. & H., 79, 89.
Mayor, etc., of Athens *v.* Camak (75 Ga. 429), Mun. Corp., 1.
Mayor, etc., of Athens *v.* Georgia R. Co. (29 Am. & Eng. R. Cas. 477, 72 Ga. 800), Sts. & H., 305.
Mayor, etc., of Atlanta *v.* Central R. & B. Co. (53 Ga. 120), Sts. & H., 17.
Mayor, etc., of Atlanta *v.* Macon & W. R. Co. (59 Ga. 251), Eq., 12.
Mayor, etc., of Baltimore *v.* Baltimore & O. R. Co. (21 Md. 50), Balt. & O. R. Co., 2, 5; Charters, 52, 53, 54.
Mayor, etc., of Baltimore *v.* Baltimore & O. R. Co. (6 Gill (Md.) 288), Tax., 187.
Mayor, etc., of Baltimore *v.* Baltimore City Pass. R. Co. (7 Am. & Eng. R. Cas. 362, 57 Md. 31), St. Rys., 279; Tax., 135, 264.
Mayor, etc., of Baltimore *v.* Gill (31 Md. 375), Mun. Corp., 23.
Mayor, etc., of Baltimore *v.* Rice (73 Md. 307, 21 Atl. Rep. 181), Em. Dom., 433.
Mayor, etc., of Baltimore *v.* Scharp (10 Am. & Eng. R. Cas. 241, 54 Md. 499), St. Rys., 147, 302.
Mayor, etc., of Birmingham *v.* Alabama G. S. R. Co. (98 Ala. 134, 13 So. Rep. 141), Sts. & H., 296, 297.
Mayor, etc., of Bury *v.* Lancashire & Y. R. Co. (42 Am. & Eng. R. Cas. 56, 20 Q. B. D. 485; affirmed in 14 App. Cas. 417), Bridges, 33.
Mayor, etc., of Chattanooga *v.* Nashville, C. & St. L. R. Co. (7 Lea (Tenn.) 561), Tax., 282.
Mayor, etc., of Dover *v.* Southeastern R. Co. (1 Ry. & C. T. Cas. 349), Ry. Com'rs, 6, 12.
Mayor, etc., of Griffin *v.* Inman (57 Ga. 370), Mun. Aid, 4, 123, 272.
Mayor, etc., of Houston *v.* Houston B. & M. P. R. Co. (84 Tex. 581, 19 S. W. Rep. 786), Stat., 42, 61; St. Rys., 82, 122; Trial, 137.
Mayor, etc., of Houston *v.* Houston City St. R. Co. (50 Am. & Eng. R. Cas. 380, 83 Tex. 548, 19 S. W. Rep. 127), St. Rys., 16, 26, 32, 48, 89.
Mayor, etc., of Jefferson *v.* Opel (49 Mo. 190), Tax., 341.
Mayor, etc., of Jersey City *v.* Central R. Co. (23 Am. & Eng. R. Cas. 138, 40 N. J. Eq. 417, 2 Atl. Rep. 262), Sts. & H., 157, 164.
Mayor, etc., of Jersey City *v.* Riker (38 N. J. L. 225), Tax., 336.
Mayor, etc., of Knoxville *v.* Knoxville & O. R. Co. (22 Fed. Rep. 758), Bonds, 49.
Mayor, etc., of Kokomo *v.* State (57 Ind. 152), Mun. Aid, 266.
Mayor, etc., of Macon *v.* East Tenn., V. & G. R. Co. (40 Am. & Eng. R. Cas. 462, 82 Ga. 501, 9 S. E. Rep. 1127), Sts. & H., 42.
Mayor, etc., of Macon *v.* Harris (73 Ga. 428), Sts. & H., 245.
Mayor, etc., of Macon *v.* Harris (75 Ga. 761), Dam., 98; Evid., 47; Injunc., 25; Trial, 170.
Mayor, etc., of Macon *v.* Macon & W. R. Co. (7 Ga. 221), Bridges, 94; Charters, 64; Stat., 45.
Mayor, etc., of Mobile *v.* Royal St. R. Co. (45 Ala. 322), St. Rys., 295.
Mayor, etc., of Newark *v.* Delaware, L. & W. R. Co. (42 N. J. Eq. 196, 7 Atl. Rep. 123), Cross., St. & H., 90.
Mayor, etc., of N. Y., In re (51 Hun 416, 5 N. Y. Supp. 463), Em. Dom., 40, 113, 117.
Mayor, etc., of N. Y., In re (10 Am. & Eng. R. Cas. 125, 90 N. Y. 390), Em. Dom., 446.
Mayor, etc., of N. Y. *v.* Broadway & S. A. R. Co. (12 Hun (N. Y.) 571, 54 How. Pr. 323), Stat., 67.
Mayor, etc., of N. Y. *v.* Broadway & S. A. R. Co. (17 Hun (N. Y.) 242), St. Rys., 291.
Mayor, etc., of N. Y. *v.* Broadway & S. A. R. Co. (97 N. Y. 275; affirming 28 Hun 323, mem.), St. Rys., 285.
Mayor, etc., of N. Y. *v.* Dry Dock, E. B. & B. R. Co. (37 Am. & Eng. R. Cas. 411, 112 N. Y. 137, 19 N. E. Rep. 420, 20 N. Y. S. R. 236; affirming 47 Hun 199, 13 N. Y. S. R. 396), St. Rys., 290.
Mayor, etc., of N. Y. *v.* Dry Dock, E. B. & B. R. Co. (50 Am. & Eng. R. Cas. 438, 133 N. Y. 104, 30 N. E. Rep. 563, 44 N. Y. S. R. 94; reversing 39 N. Y. S. R. 105, 15 N. Y. Supp. 297), St. Rys., 262.
Mayor, etc., of N. Y. *v.* Eighth Ave. R. Co. (118 N. Y. 389, 23 N. E. Rep. 550, 29 N. Y. S. R. 17; affirming 43 Hun 614, 6 N. Y. S. R. 631), St. Rys., 288.
Mayor, etc., of N. Y. *v.* Forty-second & G. St. R. Co. (52 How. Pr. (N. Y.) 106), St. Rys., 288.
Mayor, etc., of N. Y. *v.* Manhattan R. Co. (56 N. Y. S. R. 58, 25 N. Y. Supp. 860), Elev. Rys., 5.
Mayor, etc., of N. Y. *v.* New England Transfer Co. (14 Blatchf. (U. S.) 159), Ferries, 2.
Mayor, etc., of N. Y. *v.* New York & H. R. Co. (46 N. Y. S. R. 349, 19 N. Y. Supp. 67, 64 Hun 635, mem.; affirmed in 139 N. Y. 643, mem., 35 N. E. Rep. 206, mem., 54 N. Y. S. R. 933, mem.), Sts. & H., 352.
Mayor, etc., of N. Y. *v.* New York & S. I. Ferry Co. (8 J. & S. (N. Y.) 232, 49 How.

Pr. 250; affirmed in 64 N. Y. 622, mem.), Ferries, 2.
Mayor, etc., of N. Y. *v.* New York C. & H. R. R. Co. (23 N. Y. Supp. 562, 53 N. Y. S. R. 383, 69 Hun 324), Deeds, 38; Estop., 4.
Mayor, etc., of N. Y. *v.* Second Ave. R. Co. (26 Am. & Eng. R. Cas. 546, 102 N. Y. 572, 7 N. E. Rep. 905, 2 N. Y. S. R. 526, 55 Am. Rep. 839; affirming 31 Hun 241), Dam., 60; Evid., 250; St. Rys., 135.
Mayor, etc., of N. Y. *v.* Second Ave. R. Co. (32 N. Y. 261; affirming 34 Barb. 41, 12 Abb. Pr. 364, 21 How. Pr. 257), St. Rys., 286.
Mayor, etc., of N. Y. *v.* Third Ave. R. Co. (33 N. Y. 42), St. Rys., 285.
Mayor, etc., of N. Y. *v.* Third Ave. R. Co. (3 N. Y. S. R. 181), St. Rys., 289; Words & Ph., 146.
Mayor, etc., of N. Y. *v.* Third Ave. R. Co. (40 Am. & Eng. R. Cas. 278, 117 N. Y. 404, 22 N. E. Rep. 755, 27 N. Y. S. R. 170; affirming 16 N. Y. S. R. 122, 1 N. Y. Supp. 397), St. Rys., 291; Words & Ph., 34.
Mayor, etc., of N. Y. *v.* Twenty-third St. R. Co. (41 Am. & Eng. R. Cas. 640, 113 N. Y. 311, 21 N. E. Rep. 60, 22 N. Y. S. R. 958; affirming 48 Hun 552, 16 N. Y. S. R. 137, 1 N. Y. Supp. 295), Leases, 55; St. Rys., 68.
Mayor, etc., of N. Y. *v.* Twenty-third St. R. Co. (42 N. Y. S. R. 433, 62 Hun 545, 17 N. Y. Supp. 32), St. Rys., 291.
Mayor, etc., of Northampton, In re (55 Am. & Eng. R. Cas. 31, 158 Mass. 299, 33 N. E. Rep. 568), Cross., St. & H., 98; Stat., 11.
Mayor, etc., of Pittsburg *v.* Pennsylvania R. Co. (48 Pa. St. 355), Branch & L. Roads, 4.
Mayor, etc., of Troy *v.* Troy & L. R. Co. (3 Lans. (N. Y.) 270; affirmed in 49 N. Y. 657, mem.), St. Rys., 166.
Mayor, etc., of Troy *v.* Troy & L. R. Co. (49 N. Y. 657, mem.; affirming 3 Lans. 270), St. Rys., 323.
Mayor, etc., of Vicksburg *v.* Lombard (51 Miss. 111), Mun. Aid, 145, 153, 344, 355.
Mayor, etc., of Worcester *v.* Norwich & W. R. Co. (109 Mass. 103), Charters, 43; Leases, 56; Stat. & D., 147.
Mayor, etc., of Worcester *v.* Railroad Com'rs (113 Mass. 161), Ry. Com'rs, 20; Words & Ph., 70, 224.
Maysville & B. S. R. Co. *v.* Pelham (Ky.) (20 S. W. Rep. 384), Em. Dom., 1059.
Maysville & L. R. Co. *v.* Herrick (13 Bush (Ky.) 122, 17 Am. Ry. Rep. 53), Car. of P., 637, 646; Dam., 27; Derailm., 7; Husb. & W., 24.
Maysville & L. R. Co. *v.* Punnett (15 B. Mon. (Ky.) 47), App., 10.
Mayton *v.* Texas & P. R. Co. (63 Tex. 77), Fel. Serv., 209; Pl., 61.
Mazetti *v.* New York & H. R. Co. (3 E. D. Smith (N. Y.) 98), Sts. & H., 385.
Mazouck *v.* Iowa Northern R. Co. (31 Iowa 559), Husb. & W., 9.
Meacham *v.* Fitchburg R. Co. (4 Cush. (Mass.) 291), Em. Dom., 268, 341, 532, 533, 739.
Mead *v.* Burlington & L. R. Co. (7 Am. & Eng. R. Cas. 550, 52 Vt. 278), Animals, 126.
Mead *v.* Etobicoke Tp. (13 Ont. Pr. 341), Sts. & H., 402.
Mead *v.* Etobicoke Tp. (42 Am. & Eng. R. Cas. 81, 18 Ont. 438), Sts. & H., 358.
Mead *v.* New York El. R. Co. (24 N. Y. Supp. 908), Elev. Rys., 38.
Mead *v.* New York, H. & N. R. Co. (45 Conn. 199, 17 Am. Ry. Rep. 367), Consol., 6; Mort., 123, 169.
Mead *v.* Southeastern R. Co. (18 W. R. 735), Parties, 5.
Meade *v.* Kansas City, St. J. & C. B. R. Co. (45 Iowa 699), Animals, 486.
Meade *v.* Norfolk & W. R. Co. (89 Va. 296), Deeds, 53.
Meader *v.* Lowry (45 Iowa 684), Mun. Aid, 204, 313, 412.
Meagher *v.* Cooperstown & C. V. R. Co. (75 Hun 455, 27 N. Y. Supp. 504, 57 N. Y. S. R. 679), Children, Inj. to, 116, 160; Contrib. Neg., 82, 87.
Mealman *v.* Union Pac. R. Co. (37 Fed. Rep. 189, 2 L. R. A. 192), Fel. Serv., 456.
Means *v.* Cincinnati & C. R. Co. (2 Disney (Ohio) 465), Exec., 7.
Mears *v.* Boston & N. Y. C. R. Co. (5 Gray (Mass.) 371), Injunc., 50.
Mechanics' Bank *v.* New York & N. H. R. Co. (13 N. Y. 599; reversing 4 Duer 480), Stock, 66, 76.
Mecum *v.* Peoria & O. R. Co. (21 Ill. 533), Em. Dom., 216.
Medbury *v.* New York & E. R. Co. (26 Barb. (N. Y.) 564), Agency, 52; Car. of M., 778; Dam., 7.
Medford & C. R. Co. *v.* Somerville (111 Mass. 232), Leases, 49; St. Rys., 80.
Medler *v.* Atlantic Ave. R. Co. (36 N. Y. S. R. 89, 12 N. Y. Supp. 930; affirmed in 126 N. Y. 669, mem., 37 N. Y. S. R. 963, 27 N. E. Rep. 854), St. Rys., 343, 367, 422.
Meek *v.* New York C. & H. R. R. Co. (52 N. Y. S. R. 932, mem., 23 N. Y. Supp. 420, 69 Hun 488), Death, etc., 212, 297, 299; Employés, Inj. to, 673; Trial, 109.
Meek *v.* Pennsylvania Co. (13 Am. & Eng. R. Cas. 643, 38 Ohio St. 632), Cross., Inj. at, 173, 349; Negl., 106; Sts. & H., 316.
Meeker *v.* Ashley (56 Iowa 188, 9 N. W. Rep. 124), Mun. Aid, 224, 243.
Meeker *v.* Chicago, M. & St. P. R. Co. (19 Am. & Eng. R. Cas. 477, 64 Iowa 641, 21 N. W. Rep. 120), Animals, 189, 544.
Meeker *v.* Clinton & P. H. R. Co. (2 La. Ann. 971), Mort., 69.
Meeker *v.* Northern Pac. R. Co. (21 Oreg. 513, 28 Pac. Rep. 639), Animals, 74.
Meeker *v.* Sprague (5 Wash. 242, 31 Pac. Rep. 628), Receiv., 127, 128.
Meeks *v.* Southern Pac. R. Co. (52 Cal. 602, 20 Am. Ry. Rep. 115), Children, Inj. to, 115, 117, 119; Contrib. Neg., 9, 11; Cross., Inj. at, 198.
Meeks *v.* Southern Pac. R. Co. (8 Am. & Eng. R. Cas. 314, 56 Cal. 513, 38 Am. Rep. 67), Children, Inj. to, 20, 119; Contrib. Neg., 11, 28.
Meeks *v.* Southern Pac. R. Co. (61 Cal. 149), Lim. of Ac., 13.

Meese *v.* Fond du Lac (48 Wis. 323, 4 N. W. Rep. 406), Husb. & W., 36, 40.
Meesel *v.* Lynn & B. R. Co. (8 Allen (Mass.) 234), St. Rys., 414.
Meeteer *v.* Manhattan R. Co. (63 Hun 533, 45 N. Y. S. R. 704, 18 N. Y. Supp. 561), Dam., 42.
Meetze *v.* Charlotte, C. & A. R. Co. (23 So. Car. 1), License, 14.
Mefford *v.* Louisville & N. R. Co. (Ky.) (20 S. W. Rep. 263), Death, etc., 20.
Mehan *v.* Syracuse, B. & N. Y. R. Corp. (73 N. Y. 585, mem.), Employés, Inj. to, 746.
Mehegan *v.* New York C. & H. R. R. Co. (46 N. Y. S. R. 497, 19 N. Y. Supp. 444), Death, etc., 192.
Mehegan *v.* New York C. & H. R. R. Co. (125 N. Y. 768, mem., 36 N. Y. S. R. 188, 3 Silv. App. 438), Death, etc., 199.
Mehrhof Bros. Brick Mfg. Co. *v.* Delaware, L. & W. R. Co. (51 N. J. L. 56, 16 Atl. Rep. 12), Actions, 9; Nuis., 26, 28; Pl., 22; Waters & W., 4.
Meier *v.* Kansas Pac. R. Co. (5 Dill. (U. S.) 476), Receiv., 8.
Meier *v.* Pennsylvania R. Co. (64 Pa. St. 225), Car. of P., 184, 195, 584.
Meily *v.* Zurmehly (23 Ohio St. 627), Em. Dom., 966.
Meisch *v.* Rochester Elec. R. Co. (25 N. Y. Supp. 244, 55 N. Y. S. R. 146, 72 Hun 604), Elec. Rys., 24; New Tr., 39.
Melbourne *v.* Louisville & N. R. Co. (88 Ala. 443, 6 So. Rep. 762), Car. of M., 210, 623.
Melchert *v.* Smith Brewing Co. (140 Pa. St. 448, 21 Atl. Rep. 755), Employés, Inj. to, 14, 463.
Melc *v.* Delaware & H. Canal Co. (27 J. & S. (N. Y.) 367, 14 N. Y. Supp. 630, 39 N. Y. S. R. 153), Contrib. Neg., 62; Fel. Serv., 113.
Melendy *v.* Barbour (25 Am. & Eng. R. Cas. 622, 78 Va. 544), App., 146; Receiv., 35, 81, 122.
Melhado *v.* Porto Alegre, N. H. & B. R. Co. (43 L. J. C. P. 253, L. R. 9 C. P. 503, 23 W. R. 57, 31 L. T. 57), Incorp., 6.
Mellen *v.* Lansing (19 Blatchf. (U. S.) 512, 11 Fed. Rep. 820), Mun. Aid, 234.
Mellen *v.* Lansing (11 Fed. Rep. 829, 20 Blatchf. (U. S.) 278), Mun. Aid, 234.
Mellen *v.* Western R. Co. (4 Gray (Mass.) 301), Bridges, 48.
Mellier *v.* St. Louis & N. O. Transp. Co. (14 Mo. App. 281), Car. of M., 34, 114.
Mellor *v.* Missouri Pac. R. Co. (47 Am. & Eng. R. Cas. 450, 105 Mo. 455, 16 S. W. Rep. 849), App., 849; Car. of Mails, 18; Car. of P., 54; New Tr., 63; Witn., 93.
Mellwitz *v.* Manhattan R. Co. (43 N. Y. S. R. 354, 62 Hun 622, 17 N. Y. Supp. 112), Elev. Rys., 203; Evid., 160; Husb. & W., 29.
Meloy *v.* Chicago & N. W. R. Co. (Iowa) (33 Am. & Eng. R. Cas. 358, 37 N. W. Rep. 335), Employés, Inj. to, 189, 370; Evid., 31; Negl., 70.
Meloy *v.* Chicago & N. W. R. Co. (38 Am. & Eng. R. Cas. 130, 77 Iowa 743, 42 N. W. Rep. 563), Derailm., 8; Employés, Inj. to, 200, 612, 727.
Melton *v.* Kansas City, Ft. S. & M. R. Co. (39 Mo. App. 194), Attach., 62.
Melville *v.* Baltimore & P. R. Co. (2 Mackey (D. C.) 63), Pl., 7.
Melville *v.* Missouri River, Ft. S. & G. R. Co. (48 Fed. Rep. 820), Employés, Inj. to, 184; Fel. Serv., 132, 156, 368.
Melville *v.* Missouri River, Ft. S. & G. R. Co. (4 McCrary (U. S.) 194), Employés, Inj. to, 293; Fel. Serv., 141, 153.
Melvin *v.* Hoitt (52 N. H. 61, 2 Am. Ry. Rep. 195), Location, etc., 18; Subscr., 1.
Melvin *v.* Lisenby (72 Ill. 63), Mun. Aid, 126, 308.
Melvin *v.* St. Louis & S. F. R. Co. (89 Mo. 106, 1 S. W. Rep. 286), Fires, 186; Pl., 89.
Melzer *v.* Peninsular Car Co. (76 Mich. 94, 42 N. W. Rep. 1078), Contrib. Neg., 123; Employés, Inj. to, 206; Witn., 99.
Membery *v.* Great Western R. Co. (14 App. Cas. 179), Employés, Inj. to, 195.
Memphis *v.* Union & P. Bank (91 Tenn. 546, 19 S. W. Rep. 758), Tax., 140, 145, 177.
Memphis & C. R. Co. *v.* Alabama (13 Am. & Eng. R. Cas. 172, 107 U. S. 581, 2 Sup. Ct. Rep. 432), Rem. of C., 34.
Memphis & C. R. Co. *v.* Askew (90 Ala. 5, 7 So. Rep. 823), Employés, Inj. to, 95, 561; Evid., 36, 244.
Memphis & C. R. Co. *v.* Benson (31 Am. & Eng. R. Cas. 112, 85 Tenn. 627, 4 Am. St. Rep. 776, 4 S. W. Rep. 5), Car. of P., 73; Eject. Pass., 18, 56; Evid., 151.
Memphis & C. R. Co. *v.* Bibb (37 Ala. 699, 1 Ala. Sel. Cas. 630), Animals, 574.
Memphis & C. R. Co. *v.* Birmingham, S. & T. R. R. Co. (57 Am. & Eng. R. Cas. 639, 96 Ala. 571, 11 So. Rep. 642), Cross. Rys., 6, 7, 22.
Memphis & C. R. Co. *v.* Blakeney (43 Miss. 218), Animals, 30, 250.
Memphis & C. R. Co. *v.* Copeland (61 Ala. 376), Contrib. Neg., 4, 6; Death, etc., 189; Stat. & D., 63.
Memphis & C. R. Co. *v.* Chastine (54 Miss. 503), Eject. Pass., 5; Evid., 170.
Memphis & C. R. Co. *v.* Dean (5 Sneed (Tenn.) 291), Animals, 62.
Memphis & C. R. Co. *v.* Gaines (3 Tenn. Ch. 478), Tax., 282.
Memphis & C. R. Co. *v.* Gaines (3 Tenn. Ch. 604), Tax., 46, 175.
Memphis & C. R. Co. *v.* Gaines (97 U. S. 697), Tax., 46, 148, 151.
Memphis & C. R. Co. *v.* Graham (53 Am. & Eng. R. Cas. 396, 94 Ala. 545, 10 So. Rep. 283), Employés, Inj. to, 23, 330, 409, 418, 424; Evid., 79, 185.
Memphis & C. R. Co. *v.* Grayson (43 Am. & Eng. R. Cas. 681, 88 Ala. 572, 7 So. Rep. 122), Estop., 20; Judgm., 25; Leases, 26.
Memphis & C. R. Co. *v.* Green (52 Miss. 779), Car. of P., 638, 641.
Memphis & C. R. Co. *v.* Greer (38 Am. & Eng. R. Cas. 248, 87 Tenn. 698, 11 S. W. Rep. 931), Agency, 31; Conduct., 9; Injunc., 41.
Memphis & C. R. Co. *v.* Hembree (35 Am. & Eng. R. Cas. 128, 84 Ala. 182, 4 So. Rep. 392), Animals, 408, 589; Jurisd., 8.

Memphis & C. R. Co. *v.* Holloway (9 Baxt. (Tenn.) 188), Car. of M., 488, 654.
Memphis & C. R. Co. *v.* Jobe (69 Miss. 452, 10 So. Rep. 672), Contrib. Neg., 36; Cross., Inj. at 221.
Memphis & C. R. Co. *v.* Jones (2 Head (Tenn.) 517), Bailm., 2.
Memphis & C. R. Co. *v.* Lyon (62 Ala. 71), Animals, 71, 79, 402, 545.
Memphis & C. R. Co. *v.* Maples (63 Ala. 601), Evid., 194; Stat. Agts., 11.
Memphis & C. R. Co. *v.* Neighbors (51 Miss. 412), Deeds, 31.
Memphis & C. R. Co. *v.* Orr (43 Miss. 279), Fences, 13.
Memphis & C. R. Co. *v.* Payne (37 Miss. 700), Em. Dom., 412.
Memphis & C. R. Co. *v.* Pillow (9 Heisk. (Tenn.) 248), Evid., 195; Lim. of Ac., 60; Trial, 188.
Memphis & C. R. Co. *v.* Reeves (10 Wall. (U. S.) 176), Car. of M., 21; Words & Ph., 7.
Memphis & C. R. Co. *v.* Scott (87 Tenn. 494, 11 S. W. Rep. 317), Animals, 61, 65.
Memphis & C. R. Co. *v.* Scruggs (50 Miss. 284), Agency, 107; Arb., 2, 8, 31; Spec. Perf., 21.
Memphis & C. R. Co. *v.* Smith (9 Heisk. (Tenn.) 860, 20 Am. Ry. Rep. 801), Animals, 61, 69, 257.
Memphis & C. R. Co. *v.* Stockard (11 Heisk. (Tenn.) 568), Car. of M., 564.
Memphis & C. R. Co. *v.* Tennessee (101 U. S. 337), Stat., 13.
Memphis & C. R. Co. *v.* Thomas (51 Miss. 637), Employés, Inj. to, 363,; Fel. Serv., 1, 15, 136, 153.
Memphis & C. R. Co. *v.* United States (108 U. S. 228, 2 Sup. Ct. Rep. 482), Rev., 7.
Memphis & C. R. Co. *v.* Whitfield (44 Miss. 466), Car. of P., 229, 238, 240, 581, 617; Contrib. Neg., 4; Dam., 27, 28, 30; Negl., 76; New Tr., 29; Stat. & D., 77.
Memphis & C. R. Co. *v.* Whorley (74 Ala. 264), Agency, 115; Attach., 56.
Memphis & C. R. Co. *v.* Womack (37 Am. & Eng. R. Cas. 308, 84 Ala. 149, 4 So. Rep. 618), Evid., 54, 174, 241; Tresp., Inj. to, 58, 96.
Memphis & C. R. Co. *v.* Woods (44 Am. & Eng. R. Cas. 257, 88 Ala. 630, 7 So. Rep. 108), Corp., 12; Stockh., 113.
Memphis & L. R. R. Co. *v.* Berry (41 Ark. 436), Tax., 140, 154.
Memphis & L. R. R. Co. *v.* Carlley (39 Ark. 246), Animals, 595.
Memphis & L. R. R. Co. *v.* Dow (120 U. S. 287, 7 Sup. Ct. Rep. 482; affirming 19 Fed. Rep. 388), Bonds, 2, 24; Mort., 139; Subrog., 3.
Memphis & L. R. R. Co. *v.* Dow (22 Blatchf. (U. S.) 48), Reorg., 1.
Memphis & L. R. R. Co. *v.* Freed (9 Am. & Eng. R. Cas. 212, 38 Ark. 614), Car. of M., 493, 495.
Memphis & L. R. R. Co. *v.* Horsfall (36 Ark. 651), Animals, 10.
Memphis & L. R. R. Co. *v.* Jones (36 Ark. 87), Animals, 514.
Memphis & L. R. R. Co. *v.* Kerr (40 Am. & Eng. R. Cas. 171, 52 Ark. 162, 5 L. R. A. 429, 12 S. W. Rep. 329), Animals, 49, 62, 450.
Memphis & L. R. R. Co. *v.* Nolan (14 Fed. Rep. 532), Commerce, 12.
Memphis & L. R. R. Co. *v.* Railroad Com'rs (112 U. S. 609, 5 Sup. Ct. Rep. 299), Tax., 157.
Memphis & L. R. R. Co. *v.* Salinger (40 Ark. 528), Car. of P., 474.
Memphis & L. R. R. Co. *v.* Sanders (19 Am. & Eng. R. Cas. 497, 43 Ark. 225), Animals, 62, 539.
Memphis & L. R. R. Co. *v.* Shoecraft (53 Ark. 96, 13 S. W. Rep. 422), Animals, 493.
Memphis & L. R. R. Co. *v.* Southern Exp. Co. (23 Am. & Eng. R. Cas. 545, 117 U. S. 1, 6 Sup. Ct. Rep. 542; reversing 2 McCrary (U. S.) 570, 8 Fed. Rep. 799), Exp. Cos., 9.
Memphis & L. R. R. Co. *v.* State (12 Am. & Eng. R. Cas. 322, 37 Ark. 632), State Aid, 13.
Memphis & L. R. R. Co. *v.* State (13 Am. & Eng. R. Cas. 423, 9 Lea (Tenn.) 218, 42 Am. Rep. 673), Tax., 398.
Memphis & L. R. R. Co. *v.* Stringfellow (21 Am. & Eng. R. Cas. 374, 44 Ark. 322, 51 Am. Rep. 598), Car. of P., 411, 646; Receiv., 180.
Memphis & L. R. R. Co. *v.* Walker (2 Head (Tenn.) 467), Dam., 61; Set-off, 1.
Memphis & O. R. Co. *v.* Hicks (5 Sneed (Tenn.) 427), Bridges, 83, 86.
Memphis & O. R. Co. *v.* Tugwell (1 Coldw. (Tenn.) 91), Witn., 14, 18.
Memphis & O. R. Packet Co. *v.* McCool (8 Am. & Eng. R. Cas. 390, 83 Ind. 392, 43 Am. Rep. 71), Car. of P., 588; Witn., 40.
Memphis & St. L. R. Co. *v.* Loftin (13 Am. & Eng. R. Cas. 377, 105 U. S. 258), Tax., 151, 164.
Memphis & V. R. Co. *v.* Cocke (64 Miss. 713, 2 So. Rep. 495), Evid., 206, 207.
Memphis Branch R. Co. *v.* Sullivan (57 Ga. 240), Charters, 36; Subscr., 166, 177.
Memphis, C. & L. R. Co. *v.* Wilcox (48 Pa. St. 161), Constr. Rys., 44, 58.
Memphis City R. Co. *v.* Logue (13 Lea (Tenn.) 32), St. Rys., 275, 452, 471.
Memphis City R. Co. *v.* Mayor, etc., of Memphis (4 Coldw. (Tenn.) 406), St. Rys., 14, 22.
Memphis Freight Co. *v.* Mayor, etc., of Memphis (4 Coldw. (Tenn.) 419), Em. Dom., 61.
Memphis Gas Light Co. *v.* Shelby County Tax. Dist. (109 U. S. 398, 3 Sup. Ct. Rep. 205), Tax., 146.
Memphis G. & E. Co. *v.* Memphis & C. R. Co. (30 Am. & Eng. R. Cas. 522, 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. Rep. 52), Contr., 5; Guar., 3.
Memphis, K. & C. R. Co. *v.* Koch (9 Am. & Eng. R. Cas. 429, 28 Kan. 565), Agency, 40.
Memphis, K. & C. R. Co. *v.* Parsons Town Co. (14 Am. & Eng. R. Cas. 379, 26 Kan. 503), Em. Dom., 287, 514.
Memphis, K. & C. R. Co. *v.* Thompson (1 Am. & Eng. R. Cas. 331, 24 Kan. 170), Mun. Aid, 233.

Memphis, P. P. & B. R. Co. *v.* State (38 Am. & Eng. R. Cas. 429, 87 Tenn. 746, 11 S. W. Rep. 946), Crim. L., 31.
Menard *v.* Boston & M. R. Co. (150 Mass. 386, 23 N. E. Rep. 214), Evid., 67, 294; Trial, 90.
Menard *v.* Hood (68 Ill. 121), Mun. Aid, 298.
Menasha *v.* Hazard (2 Am. & Eng. R. Cas. 571, 102 U. S. 81), Mun. Aid, 208, 378.
Menasha *v.* Milwaukee & N. R. Co. (5 Am. & Eng. R. Cas. 300, 52 Wis. 414, 9 N. W. Rep. 396), Connect. L., 3; Contr., 27; Injunc., 7; Sales of Rds., 14.
Menasha *v.* Wisconsin C. R. Co. (65 Wis. 502, 27 N. W. Rep. 169), Spec. Perf., 1.
Mendell *v.* Chicago & N. W. R. Co. (20 Iowa 9), Animals, 308.
Menike *v.* Manhattan R. Co. (28 J. & S. 116, 17 N. Y. Supp. 954; affirmed in 137 N. Y. 596, mem., 33 N. E. Rep. 743, 51 N. Y. S. R. 929), Evid., 286.
Mensch *v.* Pennsylvania R. Co. (53 Am. & Eng. R. Cas. 108, 150 Pa. St. 598, 25 Atl. Rep. 31, 30 W. N. C. 548), Employés, Inj. to, 137, 184, 611, 617; Fel. Serv., 1, 202.
Mentges *v.* New York & H. R. Co. (1 Hilt. (N. Y.) 425), Animals, 261.
Mentz *v.* Cook (108 N. Y. 504, 15 N. E. Rep. 541, 11 Cent. Rep. 319), Mun. Aid, 87.
Mentz *v.* Second Ave. R. Co. (3 Abb. App. Dec. (N. Y.) 274; affirming 2 Robt. 356), Children, Inj. to, 75; St. Rys., 506.
Menzell *v.* Chicago & N. W. R. Co. (1 Dill. (U. S.) 531), Car. of M., 450.
Menzies *v.* Caledonian R. Co. (5 Ry. & C. T. Cas. 306), Discrim., 19.
Mercantile Marine Ins. Co. *v.* Clark (118 Mass. 288), Subrog., 4.
Mercantile Mut. Ins. Co. *v.* Chase (1 E. D. Smith (N. Y.) 115), Car. of M., 34.
Mercantile T. & D. Co. *v.* Atlantic & N. C. R. Co. (99 N. Car. 139, 5 S. E. Rep. 417), Deeds of Tr., 12.
Mercantile Trust Co. *v.* Kanawha & O. R. Co. (39 Fed. Rep. 337), Mort., 172.
Mercantile Trust Co. *v.* Kanawha & O. R. Co. (50 Fed. Rep. 874), Receiv., 95, 101, 102, 105.
Mercantile Trust Co. *v.* Lamoille Valley R. Co. (16 Blatchf. (U. S.) 324), Fed. Cts., 13; Judgm., 2.
Mercantile Trust Co. *v.* Missouri, K. & T. R. Co. (36 Am. & Eng. R. Cas. 259, 36 Fed. Rep. 221), Mort., 160, 163, 216.
Mercantile Trust Co. *v.* Missouri, K. & T. R. Co. (43 Am. & Eng. R. Cas. 469, 41 Fed. Rep. 8), Actions, 14; Mort., 157, 184, 200, 220, 224, 233.
Mercantile Trust Co. *v.* Missouri, K. & T. R. Co. (48 Fed. Rep. 351), Fed. Cts., 12, 13.
Mercantile Trust Co. *v.* Pittsburg & W. R. Co. (29 Fed. Rep. 732), Receiv., 79, 135.
Mercantile Trust Co. *v.* Portland & O. R. Co. (10 Fed. Rep. 604), Mort., 135, 182.
Mercantile Trust Co. *v.* Texas & P. R. Co. (50 Am. & Eng. R. Cas. 559, 51 Fed. Rep. 529), Charges, 15; Ry. Com'rs, 17, 41.
Mercantile Trust Co. *v.* Zanesville, Mt. V. & M. R. Co. (52 Fed. Rep. 342), Bonds, 49.
Mercer *v.* Pittsburg, Ft. W. & C. R. Co. (36 Pa. St. 99), Sts. & H., 54.
Mercer *v.* Williams (Walk. Ch. (Mich.) 85), Em. Dom., 418, 1041; Incorp., 3.
Mercer & S. R. Co. *v.* Delaware & B. B. R. Co. (26 N. J. Eq. 464), Em. Dom., 957.
Mercer County *v.* Hackett (1 Wall. (U. S.) 83), Mun. Aid, 353.
Mercer County *v.* Pittsburg & E. R. Co. (27 Pa. St. 389), Assign., 13; Mun. Aid, 64, 184.
Mercer County Court *v.* Kentucky River Nav. Co. (8 Bush (Ky.) 300), Mun. Aid, 183, 197.
Mercer County Sup'rs *v.* Hubbard (45 Ill. 139), Mun. Aid, 242, 342.
Merchants' Bank *v.* Peters (1 Man. 372), Attach., 25.
Merchants' Bank *v.* Petersburg R. Co. (12 Phila. (Pa.) 482), Mort., 104.
Merchants' Bank *v.* Union R. & T. Co. (69 N. Y. 373; affirming 8 Hun 249), Bills of L., 113, 118.
Merchants' C. P. & S. Co. *v.* Insurance Co. of N. A. (151 U. S. 368, 14 Sup. Ct. Rep. 367), Int. Com., 61; Rem. of C., 40.
Merchants' D. & T. Co. *v.* Cornforth (3 Colo. 280), Bills of L., 92; Car. of M., 455.
Merchants' D. & T. Co. *v.* Merriam (31 Am. & Eng. R. Cas. 78, 111 Ind. 5, 11 N. E. Rep. 954), Bills of L., 52, 90; Car. of M., 328, 367.
Merchants' D. & T. Co. *v.* Moore (88 Ill. 136, 21 Am. Ry. Rep. 293), Car. of M., 373.
Merchants' Dispatch Co. *v.* Smith (44 Ill. 319), Exp. Cos., 86.
Merchants' Dispatch Co. *v.* Smith (76 Ill. 542), Words & Ph., 7.
Merchants' Dispatch Co. *v.* Topping (89 Ill. 65), Lim. of Ac., 27.
Merchants' Dispatch Transp. Co. *v.* Bloch (35 Am & Eng. R. Cas. 579, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. Rep. 881), Bills of L., 31, 33; Car. of M., 1, 176.
Merchants' Dispatch Transp. Co. *v.* Bolles (80 Ill. 473), Car. of M., 201, 672.
Merchants' Dispatch Transp. Co. *v.* Furthmann (47 Ill. App. 561), Bills of L., 43, 44; Car. of M., 403, 406.
Merchants' Dispatch Transp. Co. *v.* Hallock (64 Ill. 284), Car. of M., 337, 358.
Merchants' Dispatch Transp. Co. *v.* Hately (35 Am. & Eng. R. Cas. 565, 14 Can. Sup. Ct. 572; affirming 12 Ont. App. 201, which affirms 4 Ont. 723), Car. of M., 578, 682.
Merchants' Dispatch Transp. Co. *v.* Joesting (89 Ill. 152), Car. of M., 433.
Merchants' Dispatch Transp. Co. *v.* Kahn (76 Ill. 520), Car. of M., 165.
Merchants' Dispatch Transp. Co. *v.* Leysor (89 Ill. 43), Bills of L., 26, 32; Evid., 194; Name, 4; Witn., 103.
Merchants' Dispatch Transp. Co. *v.* Theilbar (86 Ill. 71), Bills of L., 25, 32; Car. of M., 433.
Merchants' Exp. Co. *v.* Morton (15 Grant's Ch. (U. C.) 274), Injunc., 21.
Merchants' Ins. Co. *v.* Newark (54 N. J. L. 138, 23 Atl. Rep. 305), St. Rys., 283.

Merchants' Mfg. Co. *v.* Grand Trunk R. Co. (21 Blatchf. (U. S.) 109, 63 How. Pr. 459, 13 Fed. Rep. 358, 11 Abb. N. Cas. (N. Y.) 183), Fed. Cts., 10; For. Corp., 28; Proc., 16, 18, 28; Words & Ph., 96.
Merchants' Nat. Bank *v.* Chicago R. Equipment Co. (25 Fed. Rep. 809), Bills & N., 2.
Merchants' Nat. Bank *v.* Eastern R. Co. (124 Mass. 518), Eastern R. Co., 4.
Merchants' Nat. Bank *v.* Little Rock (5 Dill. (U. S.) 299), Mun. Aid, 351.
Merchants' Nat. Bank *v.* McLeod (38 Ohio St. 174), Receiv., 42.
Merchants' Nav. Co. *v.* Amsden (25 Ill. App. 307), Dam., 98.
Merchants' Union *v.* Northern Pac. R. Co. (5 Int. Com. Com. 478, 4 Int. Com. Rep. 183), Int. Com., 35.
Merchants' Union Barb Wire Co. *v.* Chicago, B. & Q. R. Co. (70 Iowa 105, 28 N. W. Rep. 494), Sts. & H., 85, 86, 219.
Merchants' Union Barb Wire Co. *v.* Chicago, R. I. & P. R. Co. (43 Am. & Eng. R. Cas. 121, 79 Iowa 613, 44 N. W. Rep. 900), Estop., 20, 23; Sts. & H., 257; Vend. & P., 4.
Merchants' Wharfboat Assoc. *v.* Heidingsfelder (64 Miss. 678, 2 So. Rep. 242), Wareh., 10.
Merchants' Wharfboat Assoc. *v.* Wood (64 Miss. 661, 2 So. Rep. 76), Car. of M., 621.
Mercier *v.* New Orleans & C. R. Co. (23 La. Ann. 264), St. Rys., 488.
Meredith *v.* Richmond & D. R. Co. (108 N. Car. 616, 13 S. E. Rep. 137), Children, Inj. to, 81.
Meredith *v.* Sayre (32 N. J. Eq. 557), Sts. & H., 3, 35, 229.
Meriam *v.* Brown (128 Mass. 391), Em. Dom., 332.
Meridian F. & E. Assoc. *v.* North Birmingham St. R. Co. (70 Miss. 808, 12 So. Rep. 555), Wareh., 10.
Meriwether *v.* Kansas City Cable R. Co. (45 Mo. App. 528), St. Rys., 326, 366.
Meriwether *v.* Muhlenburg County Court (120 U. S. 354, 7 Sup. Ct. Rep. 563), Mun. Aid, 414.
Merkle *v.* New York, L. E. & W. R. Co. (49 N. J. L. 473, 9 Atl. Rep. 680, 8 Cent. Rep. 346), Cross., Inj. at, 290.
Merriam *v.* Boston, C. & F. R. Co. (117 Mass. 241), Husb. & W., 8.
Merriam *v.* Hartford & N. H. R. Co. (20 Conn. 354), Car. of M., 63, 64.
Merrick *v.* Webster (3 Mich. 268), Car. of M., 165.
Merrigan *v.* Boston & A. R. Co. (154 Mass. 189, 28 N. E. Rep. 149), Cross., Inj. at, 280.
Merrill, In re (11 Am. & Eng. R. Cas. 680, 54 Vt. 200), Leases, 110; Negl., 46.
Merrill *v.* American Exp. Co. (62 N. H. 514), Agency, 42; Exp. Cos., 68; Lim. of Liab., 2; Negl., 73.
Merrill *v.* Beaver (46 Iowa 646), Bills & N., 6.
Merrill *v.* Boston & L. R. Co. (21 Am. & Eng. R. Cas. 48, 63 N. H. 259), Ry. Com'rs, 38.
Merrill *v.* Dixon (15 Nev. 401), Land Grants, 48.
Merrill *v.* Eastern R. Co. (139 Mass. 238, 52 Am. Rep. 705, 1 N. E. Rep. 548), Car. of P., 23; Death, etc., 178; Evid., 33; Negl., 41.
Merrill *v.* Farmers' L. & T. Co. (24 Hun (N. Y.) 297; adhered to in 4 N. Y. S. R. 122), Mort., 155.
Merrill *v.* Gamble (46 Iowa 615, 16 Am. Ry. Rep. 65), Bills & N., 14, 23.
Merrill *v.* Grinnell (30 N. Y. 594), Assign., 2; Bagg., 2, 40; Witn., 118.
Merrill *v.* Ithaca & O. R. Co. (16 Wend (N. Y.) 586), Evid., 226.
Merrill *v.* Marshall County (74 Iowa 24, 36 N. W. Rep. 778), Mun. Aid, 412.
Merrill *v.* Beaver (50 Iowa 404), Bills & N., 6; Subscr., 163, 213.
Merrill *v.* Welsher (50 Iowa 61), Mun. Aid, 412.
Merritt *v.* Earle (29 N. Y. 115), Car. of M., 11, 12, 15; Word & Ph., 7.
Merritt *v.* Maxwell (14 U. C. Q. B. 50), Assump., 5.
Merritt *v.* Northern R. Co. (12 Barb. (N. Y.) 605), Adv. Poss., 3; Deeds, 9; Mort., 107.
Merritt *v.* Old Colony & N. R. Co. (11 Allen (Mass.) 80), Car. of M., 78.
Merriwether *v.* Saline County (5 Dill. (U. S.) 265), Mun. Aid, 345, 348.
Merry *v.* Glasgow & S. W. R. Co. (4 Ry. & C. T. Cas. 383), Charges, 91; Discrim., 41.
Merryman *v.* Chicago, R. I. & P. R. Co. (85 Iowa 634, 52 N. W. Rep. 545), Children, Inj. to, 91.
Mersey R. Co., In re (L. R. 37 Ch. D. 610), Receiv., 20.
Mershon *v.* Hobensack (22 N. J. L. 372), Words & Ph., 49.
Merwin *v.* Manhattan R. Co. (48 Hun 608, 16 N. Y. S. R. 20, 1 N. Y. Supp. 267; affirmed in 113 N. Y. 659, mem., 21 N. E. Rep. 415, 22 N. Y. S. R. 1000), Car. of P., 483; Elev. Rys., 213.
Merz *v.* Missouri Pac. R. Co. (14 Mo. App. 459; affirmed in 88 Mo. 672), Cross., Inj. at, 283.
Merz *v.* Missouri Pac. R. Co. (26 Am. & Eng. R. Cas. 537, 88 Mo. 672), Sts. & H., 318, 319, 323.
Merz *v.* Missouri Pac. R. Co. (13 Mo. App. 589; see 14 Mo. App. 459), Cross., Inj. at, 206; Sts. & H., 318.
Meserole *v.* Brooklyn City R. Co. (32 N. Y. S. R. 708, 10 N. Y. Supp. 813, 57 Hun 591), Death, etc., 189.
Messchaert *v.* Kennedy (4 McCrary (U. S.) 133), Bonds, 53.
Messenger *v.* Manhattan R. Co. (129 N. Y. 502, 29 N. E. Rep. 955, 42 N. Y. S. R. 96; affirming 36 N. Y. S. R. 1024), Elev. Rys., 133, 145, 174, 182.
Messenger *v.* Pate (42 Iowa 443), Contrib. Neg., 71.
Messenger *v.* Pennsylvania R. Co. (37 N. J. L. 531; affirming 36 N. J. L. 407), Discrim., 17, 65; Franch., 6.
Messick *v.* Midland R. Co. (128 Ind. 81, 27 N. E. Rep. 419), Cloud on T., 6; License, 16.

Mestier *v.* New Orleans, O. & G. W. R. Co. (16 La. Ann. 354), Lim. of Ac., 64.
Metallic Compression Casting Co. *v.* Fitchburg R. Co. (109 Mass. 277, 6 Am. Ry. Rep. 264), Fires, 76, 81.
Metcalfe *v.* London, B. & S. C. R. Co. (4 C. B. N. S. 307, 27 L. J. C. P. 205; see also 4 C. B. N. S. 311, 27 L. J. C. P. 333), Pl., 74.
Metcalfe *v.* London, B. & S. C. R. Co. (4 C. B. N. S. 318, 4 Jur. N. S. 487, 27 L. J. C. P. 333), Parties, 6.
Methodist Episcopal Church *v.* Pennsylvania R. Co. (50 Am. & Eng. R. Cas. 217, 48 N. J. Eq. 452, 22 Atl. Rep. 183), Sts. & H., 77, 249.
Metler *v.* Easton & A. R. Co. (37 N. J. L. 222), Em. Dom., 464, 759, 763, 768, 775.
Metropolitan Board of Works *v.* Metropolitan R. Co. (L. R. 4 C. P. 192, 38 L. J. C. P. 172, 17 W. R. 416, 19 L. T. 744), Em. Dom., 1164.
Metropolitan City R. Co. *v.* Chicago (2 Am. & Eng. R. Cas. 291, 96 Ill. 620), St. Rys., 36, 86, 100.
Metropolitan City R. Co. *v.* Chicago W. D. R. Co. (87 Ill. 317, 19 Am. Ry. Rep. 64), Estop., 12; St. Rys., 58, 59.
Metropolitan Dist. R. Co., In re (L. R. 13 Ch. D. 607, 49 L. J. Ch. D. 277, 42 L. T. 73, 28 W. R. 685; affirming 40 L. T. 482), Em. Dom., 1116.
Metropolitan Dist. R. Co., In re (45 L. T. 103), Em. Dom., 1092.
Metropolitan Dist. R. Co. *v.* Metropolitan R. Co. (5 Ry. & C. T. Cas. 126), Charges, 98, 104.
Metropolitan Dist. R. Co. *v.* Sharpe (L. R. 5 App. Cas. 425, 50 L. J. Q. B. D. 14, 43 L. T. N. S. 130, 29 W. R. 617), Arb., 16.
Metropolitan El. R. Co., In re (18 N. Y. S. R. 134, 2 N. Y. Supp. 278), Elev. Rys., 1, 28, 29, 30, 38, 43; Em. Dom., 78, 261, 298, 364; Words & Ph., 115, 185.
Metropolitan El. R. Co., In re (26 N. Y. S. R. 968, 7 N. Y. Supp. 707), Em. Dom., 308, 311.
Metropolitan El. R. Co., In re (57 Hun 130, 32 N. Y. S. R. 828, 11 N. Y. Supp. 191), Em. Dom., 930.
Metropolitan El. R. Co., In re (12 N. Y. Supp. 502), Elev. Rys., 31, 33, 38, 42, 244, 277.
Metropolitan El. R. Co., In re (12 N. Y. Supp. 506; affirmed in 43 N. Y. S. R. 651, 17 N. Y. Supp. 778, 63 Hun 629, mem.), Elev. Rys., 28, 42, 44, 48, 49, 267, 347; Leases, 1; St. Rys., 132.
Metropolitan El. R. Co., In re (35 N. Y. S. R. 792, 12 N. Y. Supp. 859, 58 Hun 563; appeal dismissed in 128 N. Y. 600, 27 N. E. Rep. 1076, 38 N. Y. S. R. 881, 3 Silv. App. 513), Elev. Rys., 39.
Metropolitan El. R. Co., In re (36 N. Y. S. R. 224, 13 N. Y. Supp. 159, 59 Hun 621), Elev. Rys., 35.
Metropolitan El. R. Co., In re (36 N. Y. S. R. 606, 59 Hun 622, 13 N. Y. Supp. 367), Elev. Rys., 35.
Metropolitan El. R. Co., In re (128 N. Y. 600, 27 N. E. Rep. 1076, 38 N. Y. S. R. 881, 3 Silv. App. 513; dismissing appeal from 58 Hun 563, 35 N. Y. S. R. 792, 12 N. Y. Supp. 859), Em. Dom., 887.
Metropolitan El. R. Co., In re (136 N. Y. 500, 32 N. E. Rep. 1043, 49 N. Y. S. R. 648; reversing 49 N. Y. S. R. 374, 66 Hun 626, 20 N. Y. Supp. 818), Elev. Rys., 37.
Metropolitan El. R. Co., In re (51 N. Y. S. R. 460, 67 Hun 652, 22 N. Y. Supp. 128), Em. Dom., 796.
Metropolitan El. R. Co., In re (51 N. Y. S. R. 827, 67 Hun 652), Em. Dom., 885.
Metropolitan El. R. Co., In re (55 N. Y. S. R. 760, 25 N. Y. Supp. 399), Em. Dom., 506.
Metropolitan El. R. Co., In re (27 N. Y. Supp. 756, 59 N. Y. S. R. 94), Em. Dom., 810.
Metropolitan El. R. Co. *v.* Dominick (55 Hun 198, 27 N. Y. S. R. 576, 8 N. Y. Supp. 151), Em. Dom., 315, 325.
Metropolitan El. R. Co. *v.* Kneeland (120 N. Y. 134, 24 N. E. Rep. 381, 30 N. Y. S. R. 782, 8 L. R. A. 253; reversing 45 Hun 590, 9 N. Y. S. R. 845), Direct., 42.
Metropolitan El. R. Co. *v.* Manhattan El. R. Co. (15 Am. & Eng. R. Cas. 1, 11 Daly (N. Y.) 373, 14 Abb. N. Cas. 103), Contr., 51; Direct., 26, 55, 58; Elev. Rys., 1; Eq., 12, 14; Judgm., 28; Leases, 24, 107; Stockh., 120.
Metropolitan El. R. Co. *v.* Manhattan R. Co. (65 How. Pr. (N. Y.) 277), Injunc., 53.
Metropolitan El. R. Co. *v.* Siefke (39 N. Y. S. R. 499, 60 Hun 584, 15 N. Y. Supp. 224), Elev. Rys., 34.
Metropolitan R. Co. *v.* Broadway R. Co. (99 Mass. 238), St. Rys., 252.
Metropolitan R. Co. *v.* Collins (1 App. Cas. (D. C.) 383), Evid., 175.
Metropolitan R. Co. *v.* District of Columbia (132 U. S. 1, 10 Sup. Ct. Rep. 19), Lim. of Ac., 5.
Metropolitan R. Co. *v.* Highland St. R. Co. (118 Mass. 290, 9 Am. Ry. Rep. 285), Charters, 48; St. Rys., 241, 252.
Metropolitan R. Co. *v.* Jackson (L. R. 3 App. Cas. 193, 47 L. J. C. P. 303, 37 L. T. 679, 26 W. R. 175; reversing L. R. 10 C. P. 49, L. R. 2 C. P. D. 125, 46 L. J. C. P. 376, 36 L. T. 485, 25 W. R. 661), Car. of P., 150; Negl., 75.
Metropolitan R. Co. *v.* Jones (1 App. Cas. (D. C.) 200), St. Rys., 367, 437; Witn., 26.
Metropolitan R. Co. *v.* Quincy R. Co. (12 Allen (Mass.) 262), St. Rys., 241, 252.
Metropolitan R. Co. *v.* Slack (1 Holmes (U. S.) 375), Rev., 6.
Metropolitan R. Co. *v.* Turnham (14 C. B. N. S. 212, 32 L. J. M. C. 249, 11 W. R. 695, 8 L. T. 280), Em. Dom., 1144, 1146.
Metropolitan R. Co. *v.* Wilson (40 L. J. C. P. 208, L. R. 6 C. P. 376, 24 L. T. 550, 19 W. R. 775), Husb. & W., 35.
Metropolitan R. Co. *v.* Woodhouse (11 Jur. N. S. 296, 34 L. J. Ch. 297, 13 W. R. 516, 12 L. T. 113), Em. Dom., 1126.
Metropolitan R. Co. *v.* Wright (11 App. Cas. 152), New Tr., 23.
Metropolitan Sav. Bank *v.* New York El. R. Co. (66 Hun 633, 50 N. Y. S. R. 447, 21 N. Y. Supp. 286), Elev. Rys., 101.
Metropolitan St. R. Co. *v.* Johnson (90 Ga.

500, 16 S. E. Rep. 49), Cross., Inj. at, 245; Evid., 234; Husb. & W., 24; Trial, 95; Witn., 167.
Metropolitan St. R. Co. *v.* Moore (41 Am. & Eng. R. Cas. 240, 83 Ga. 453, 10 S. E. Rep. 730), Children, Inj. to, 42, 47; New Tr., 60.
Metropolitan St. R. Co. *v.* Powell (89 Ga. 601, 16 S. E. Rep. 118), Imp. Neg., 4; New Tr., 29.
Metropolitan Transit Co., In re (10 N. Y. S. R. 74, 45 Hun 159), Elev. Rys., 45, 46; Em. Dom., 327.
Metropolitan Transit Co., In re (111 N. Y. 588, 19 N. E. Rep. 645, 20 N. Y. S. R. 516; affirming 48 Hun 620, 15 N. Y. S. R. 977, 1 N. Y. Supp. 114), Rap. T. Acts, 2.
Metropolitan Trust Co. *v.* New York, L. E. & W. R. Co. (45 Hun 84, 9 N. Y. S. R. 415), Mort., 23, 141.
Metropolitan Trust Co. *v.* Pennsylvania, S. & N. E. R. Co. (25 Fed. Rep. 760), Mort., 65.
Metropolitan Trust Co. *v.* Tonawanda Valley & C. R. Co. (103 N. Y. 245, 8 N. E. Rep. 488, 2 N. Y. S. R. 69; reversing 40 Hun 80), Mort., 90, 232.
Metropolitan Trust Co. *v.* Tonawanda Valley & C. R. Co. (7 N. Y. S. R. 90, 43 Hun 521, 18 Abb. N. Cas. 368; affirmed in 106 N. Y. 673, mem., 13 N. E. Rep. 937), Set-off, 7.
Mettler *v.* Easton & A. R. Co. (25 N. J. Eq. 214), Em. Dom., 386, 399.
Mettler *v.* Easton & A. R. Co. (26 N. J. Eq. 65), Eq., 2.
Metlestadt *v.* Ninth Ave. R. Co. (32 How. Pr. (N. Y.) 428, 4 Robt. 377), Car. of P., 420; Children, Inj. to, 110.
Metz *v.* Buffalo, C. & P. R. Co. (58 N. Y. 61, 7 Am. Ry. Rep. 92, 9 Am. Ry. Rep. 480), Bank'cy, 6, 7.
Metz *v.* California Southern R. Co. (44 Am. & Eng. R. Cas. 433, 85 Cal. 329, 24 Pac. Rep. 610), Bagg., 29, 36.
Metzger *v.* Attica & A. R. Co. (79 N. Y. 171), Mun. Aid, 400.
Metzger *v.* Chicago, M. & St. P. R. Co. (76 Iowa 387, 41 N. W. Rep. 49), Evid., 89; Fires, 36, 38, 201, 224.
Mexican C. R. Co. *v.* Pinkney (149 U. S. 194, 13 Sup. Ct. Rep. 859), Proc., 31.
Mexican C. R. Co. *v.* Shean (Tex.) (18 S. W. Rep. 151), Employés, Inj. to, 154, 214.
Mexican National Constr. Co. *v.* Meddlegge (75 Tex. 634, 13 S. W. Rep. 257), Dam., 1; Parties, 12.
Meyer *v.* Atlantic & P. R. Co. (64 Mo. 542, 17 Am. Ry. Rep. 249), Animals, 342, 591.
Meyer *v.* Chicago & N. W. R. Co. (24 Wis. 566), Car. of M., 91.
Meyer *v.* Delaware R. Constr. Co. (100 U. S. 457, 21 Am. Ry. Rep. 465), Liens, 30; Rem. of C., 8, 27, 44, 49, 53.
Meyer *v.* Dupont (16 Am. & Eng. R. Cas. 621, 79 Ky. 416), Liens, 27.
Meyer *v.* Egbert (101 U. S. 728), Liens, 23.
Meyer *v.* Harnden's Exp. Co. (24 How. Pr. (N. Y.) 290), Agency, 13; Exp. Cos., 70; Lim. of Liab., 23.
Meyer *v.* Hornby (101 U. S. 728), Estop., 34.
Meyer *v.* Johnston (53 Ala. 237, 15 Am. Ry. Rep. 467), Abate., 2; Charters, 93; Deeds of Tr., 2, 4, 11; Mort., 13, 36, 53, 87, 99, 208; Receiv., 1, 19, 32, 94, 98; Reorg., 1.
Meyer *v.* Johnston (8 Am. & Eng. R. Cas. 584, 64 Ala. 603), Consol., 23, 24 25; Mort., 26, 39, 54; Receiv., 149; Words & Ph., 14, 57.
Meyer *v.* Lemcke (31 Ind. 208), Bills of L., 47, 98.
Meyer *v.* Lindell R. Co. (6 Mo. App. 27), Contrib. Neg., 5, 17; St. Rys., 480, 487.
Meyer *v.* Midland Pac. R. Co. (2 Neb. 319), Children, Inj. to, 4, 21, 127; Indep. Contr., 18; Negl., 28, 43; Waters & W., 26.
Meyer *v.* Muscatine (1 Wall. (U. S.) 384), Mun. Aid, 194, 324, 328, 393.
Meyer *v.* North Mo. R. Co. (35 Mo. 352), Animals, 108.
Meyer *v.* Pacific R. Co. (40 Mo. 151; further appeal 45 Mo. 137), Eject. Pass., 98.
Meyer *v.* Peck (28 N. Y. 590, 26 How. Pr. 601; affirming 33 Barb. 532), Bills of L., 13, 14, 17, 18, 20.
Meyer *v.* People's R. Co. (43 Mo. 523), Death, etc., 179.
Meyer *v.* St. Louis, I. M. & S. R. Co. (58 Am. & Eng. R. Cas. 111, 54 Fed. Rep. 116, 10 U. S. App. 677, 4 C. C. A. 221), Car. of P., 114, 115, 141, 146, 319, 609; Eject. Pass., 45, 98; Sleep. Car Cos., 5, 21.
Meyer *v.* Second Ave. R. Co. (8 Bosw. (N. Y.) 305), Eject. Pass., 57; St. Rys., 525; Trial, 108.
Meyer *v.* State (125 Ind. 335, 25 N. E. Rep. 351), Em. Dom., 402.
Meyer *v.* Staten Island R. Co. (7 N. Y. S. R. 245, 43 Hun 641), Stockh., 111.
Meyer *v.* Utah & P. V. R. Co. (3 Utah 280, 3 Pac. Rep. 393), Mort., 291.
Meyer *v.* Vicksburg, S. & P. R. Co. (35 La. Ann. 897), Bills & N., 5.
Meyer *v.* Vicksburg, S. & P. R. Co. (41 La. Ann. 639, 6 So. Rep. 218), Car. of M., 319; Fires, 273, 280.
Meyer *v.* Virginia & T. R. Co. (16 Nev. 341), Evid., 205.
Meyer *v.* Western Car Co. (2 Am. & Eng. R. Cas. 375, 102 U. S. 1), Leases, 96.
Meyers *v.* Chicago, R. I. & P. R. Co. (7 Am. & Eng. R. Cas. 406, 57 Iowa 555, 42 Am. Rep. 50, 10 N. W. Rep. 896), Sts. & H., 318, 328.
Meyers *v.* Chicago, R. I. & P. R. Co. (59 Mo. 223, 8 Am. Ry. Rep. 473), Contrib. Neg., 11, 16, 48; Cross., Inj. at, 224.
Meyers *v.* Duluth Transfer R. Co. (53 Minn. 335, 55 N. W. Rep. 140), Em. Dom., 418.
Meyers *v.* Scott (2 N. Y. Supp. 753, 20 N. Y. S. R. 35, 50 Hun 603, mem.), Stockh., 126, 127.
Meyers *v.* Union Trust Co. (82 Mo. 237), Animals, 353.
Miami Coal Co. *v.* Wigton (19 Ohio St. 560), Em. Dom., 82.
Miami Powder Co. *v.* Port Royal & W. C. R. Co. (55 Am. & Eng. R. Ca. 688, 38 So. Car. 78, 16 S. E. Rep. 339), Car. of M., 123, 705, 715, 723.
Michaels *v.* New York C. R. Co. (30 N. Y. 564), Car. of M., 105, 179, 632, 644.

Michie *v.* Erie & H. R. Co. (26 U. C. C. P. 566), Direct., 29.
Michigan *v.* Flint & P. M. R. Co. (152 U. S. 363, 14 Sup. Ct. Rep. 586), Fed. Cts., 25.
Michigan Air Line R. Co. *v.* Barnes (40 Mich. 383), Em. Dom., 268, 538, 874.
Michigan Air Line R. Co. *v.* Barnes (44 Mich. 222, 6 N. W. Rep. 651), Em. Dom., 341, 466, 559, 819, 822, 823, 840.
Michigan Air Line R. Co. *v.* Mellen (5 Am. & Eng. R. Cas. 245, 44 Mich. 321, 6 N. W. Rep. 845), Acct'ng, 3; Direct., 44; Estop., 25.
Michigan C. R. Co. *v.* Anderson (20 Mich. 244), Fires, 301.
Michigan C. R. Co. *v.* Austin (40 Mich. 247), Employés, Inj. to, 189.
Michigan C. R. Co. *v.* Boyd (91 Ill. 268), Bills of L., 30.
Michigan C. R. Co. *v.* Burrows (33 Mich. 6), Car. of M., 57, 581; Discrim., 9.
Michigan C. R. Co. *v.* Campau (35 Mich. 468, 15 Am. Ry. Rep. 314), Tresp., Inj. to, 105.
Michigan C. R. Co. *v.* Carrow (73 Ill. 348), Bagg., 88, 89, 115; Bailm., 3.
Michigan C. R. Co. *v.* Chicago & M. L. S. R. Co. (1 Ill. App. 399), Attach., 11, 29; Mort., 48.
Michigan C. R. Co. *v.* Coleman (28 Mich. 440, 12 Am. Ry. Rep. 59), Car. of P., 143, 221, 238, 374; Contrib. Neg., 104; Evid., 37, 89, 202; Husb. & W., 25; Stat. & D., 76, 117; Witn., 79.
Michigan C. R. Co. *v.* Curtis (80 Ill. 324), Car. of M., 129, 633.
Michigan C. R. Co. *v.* Dolan (32 Mich. 510), Agency, 41; Employés, Inj. to, 293; Fel. Serv., 1, 486.
Michigan C. R. Co. *v.* Dunham (30 Mich. 128), Evid., 189; Release, 2; Tender, 2.
Michigan C. R. Co. *v.* Edwards (33 Mich. 16), Charges, 45.
Michigan C. R. Co. *v.* Gilbert (2 Am. & Eng. R. Cas. 230, 46 Mich. 176, 9 N. W. Rep. 243), Employés, Inj. to, 575; Evid., 63; Fel. Serv., 149, 481, 485, 490; Witn., 182.
Michigan C. R. Co. *v.* Gougar (55 Ill. 503), Evid., 202.
Michigan C. R. Co. *v.* Hale (6 Mich. 243), Car. of M., 346; Lim. of Liab., 6, 14.
Michigan C. R. Co. *v.* Lantz (32 Mich. 502, 8 Am. Ry. Rep. 74), Car. of M., 346.
Michigan C. R. Co. *v.* Leahey, Employés, Inj. to, 634.
Michigan C. R. Co. *v.* Michigan Southern R. Co. (4 Mich. 361), Mich. Cent. R. Co., 2.
Michigan C. R. Co. *v.* Michigan Southern R. Co. (19 How. (U. S.) 378), Fed. Cts., 25.
Michigan C. R. Co. *v.* Mineral Springs Mfg. Co. (16 Wall. (U. S.) 318), Car. of M., 87, 322, 432.
Michigan C. R. Co. *v.* Myrick (9 Am. & Eng. R. Cas. 25, 107 U. S. 102, 1 Sup. Ct. Rep. 425), Car. of L. S., 21, 102; Car. of M., 597; Fed. Cts., 28.
Michigan C. R. Co. *v.* Phillips (60 Ill. 190), Bills of L., 59, 113.
Michigan C. R. Co. *v.* Porter (17 Ind. 380), Tax., 67, 101.
Michigan C. R. Co. *v.* Probate Judge (14 Am. & Eng. R. Cas. 351, 48 Mich. 638), Em. Dom., 515, 796.
Michigan C. R. Co. *v.* Slack (1 Holmes (U. S.) 231), Rev., 9.
Michigan C. R. Co. *v.* Slack (100 U. S. 595), Rev., 5, 9.
Michigan C. R. Co. *v.* Smithson (1 Am. & Eng. R. Cas. 101, 45 Mich. 212, 7 N. W. Rep. 791), Employés, Inj. to, 95, 97, 206, 215.
Michigan C. R. Co. *v.* Ward (2 Mich. 538), Car. of M., 221, 346.
Michigan City *v.* Boeckling (122 Ind. 39, 23 N. E. Rep. 518), Imp. Neg., 6; St. Rys., 16, 322.
Michigan College *v.* Charlesworth (54 Mich. 522, 20 N. W. Rep. 566), Med. Serv., 16.
Michigan Congress Water Co. *v.* Chicago & G. T. R. Co. (2 Int. Com. Rep. 428, 2 Int. Com. Com. 594), Int. Com., 52, 56.
Michigan Midland & C. R. Co. *v.* Bacon (33 Mich. 466), Subscr., 15, 85, 125.
Michigan S. & N. I. R. Co. *v.* Auditor-General (9 Mich. 448), Tax., 178.
Michigan S. & N. I. R. Co. *v.* Bivens (13 Ind. 263), Car. of M., 237, 243.
Michigan S. & N. I. R. Co. *v.* Caster (13 Ind. 164), Car. of M., 586, 762.
Michigan S. & N. I. R. Co. *v.* Day (20 Ill. 375), Agency, 53; Car. of M., 132, 165, 555.
Michigan S. & N. I. R. Co. *v.* Fisher (27 Ind. 96), Animals, 53, 194.
Michigan S. & N. I. R. Co. *v.* Heaton (37 Ind. 448, 3 Am. Ry. Rep. 363), Car. of M., 455.
Michigan S. & N. I. R. Co. *v.* Lantz (29 Ind. 528), Contrib. Neg., 53; Derailm., 2.
Michigan S. & N. I. R. Co. *v.* McDonough (1 Mich. (N. P.) [Supp.] lxxxvi), Car. of L. S., 1.
Michigan S. & N. I. R. Co. *v.* McDonough (21 Mich. 165), Car. of L. S., 1, 13; Car. of M., 112; Witn., 55.
Michigan S. & N. I. R. Co. *v.* Meyres (21 Ill. 627), Bagg., 47, 116.
Michigan S. & N. I. R. Co. *v.* Oehm (56 Ill. 293, 4 Am. Ry. Rep. 451), Bagg., 37.
Michigan S. & N. I. R. Co. *v.* Shannon (13 Ind. 171), Proc., 10, 47.
Michigan S. & N. I. R. Co. *v.* Shelton (66 Ill. 424), Eject. Pass., 98.
Michigan S. & N. I. R. Co. *v.* Shurtz (7 Mich. 515), Car. of M., 95.
Mickee *v.* Wood M. & R. Mach. Co. (70 Hun 456, 53 N. Y. S. R. 689), Employés, Inj. to, 187.
Middlebury Bank *v.* Rutland & W. R. Co. (30 Vt. 159), Contr., 12; Direct., 41; Pres., 9.
Middleport *v.* Aetna Life Ins. Co. (82 Ill. 562), Mun. Aid, 4, 266, 332.
Middlesex R. Co. *v.* Boston & C. R. Co. (115 Mass. 347, 7 Am. Ry. Rep. 469), Leases, 26.
Middlesex R. Co. *v.* Charlestown (8 Allen (Mass.) 330), St. Rys., 283.

Middlesex R. Co. *v.* Wakefield (103 Mass. 261), Bridges, 73; St. Rys., 165.
Middleton *v.* New Jersey W. L. R. Co. (25 N. J. Eq. 306), Receiv., 111.
Middleton *v.* New Jersey W. L. R. Co. (26 N. J. Eq. 269; reversed on another point in 27 N. J. Eq. 557), Jurisd., 12; Mort., 231; Stat., 68.
Middleton *v.* Wilmington & W. R. Co. (95 N. Car. 167), Penalty, 11.
Middletown *v.* Boston & N. Y. Air Line R. Co. (24 Am. & Eng. R. Cas. 153, 53 Conn 351, 5 Atl. Rep. 706), Leases, 21.
Middletown *v.* New York, N. H. & H. R. Co. (62 Conn. 492, 27 Atl. Rep. 119), Stat., 67.
Middletown *v.* Rondout & O. R. Co. (12 Abb. Pr. N. S. (N. Y.) 276), Injunc., 12.
Middletown Furniture Mfg. Co. *v.* Philadelphia & R. R. Co. (145 Pa. St. 187, 22 Atl. Rep. 748), Judgm., 17; Pl., 169.
Middough *v.* St. Joseph & D. C. R. Co. (51 Mo. 520, 3 Am. Ry. Rep. 261), Proc., 19.
Midland G. W. R. Co. *v.* Dublin & M. R. Co. (4 Ry. & C. T. Cas. 145), Arb., 1.
Midland G. W. R. Co. *v.* Dublin & M. R. Co. (5 Ry. & C. T. Cas. 142), Leases, 131.
Midland G. W. R. Co. *v.* Evans (4 Ex. 649, 6 Railw. Cas. 205, 7 D. & L. 203, 19 L. J. Ex. 118), Subscr., 87.
Midland G. W. R. Co. *v.* Gordon (5 Railw. Cas. 76, 16 M. & W. 804, 11 Jur. 440, 16 L. J. Ex. 165), Incorp., 4; Subscr., 73, 165.
Midland G. W. R. Co. *v.* Leech (3 H. L. Cas. 872), Consol., 21.
Midland Pac. R. Co. *v.* McCartney (1 Neb. 398), Em. Dom., 918, 922.
Midland Pac. R. Co. *v.* McDermid (91 Ill. 170), Proc., 20.
Midland R. Co. *v.* Ambergate, N. & B. R. Co. (10 Hare 359, 1 Ry. & C. T. Cas. 19), Injunc., 33; Leases, 126; Stat. & D., 148; Words & Ph., 183.
Midland R. Co. *v.* Badgworth (11 Jur. N. S. 14, 34 L. J. M. C. 25, 2 Ry. & C. T. Cas. 19), Tax., 367, 373.
Midland R. Co. *v.* Bromley (17 C. B. 372, 2 Jur. N. S. 140, 25 L. J. C. P. 94), Bagg., 61, 117.
Midland R. Co. *v.* Chesterfield Lighting Com'rs (1 Jur. N. S. 797), Tax., 381.
Midland R. Co. *v.* Daykin (17 C. B. 126, 25 L. J. C. P. 73), Animals, 202.
Midland R. Co. *v.* Fisher (43 Am. & Eng. R. Cas. 578, 125 Ind. 19, 24 N. E. Rep. 756), Em. Dom., 216.
Midland R. Co. *v.* Freeman (L. R. 12 Q. B. D. 629, 53 L. J. M. C. 79, 32 W. R. 830, 48 J. P. 660), Car. of L. S., 115.
Midland R. Co. *v.* Great Western R. Co. (42 L. J. Ch. 438, L. R. 8 Ch. 841, 21 W. R. 657, 28 L. T. 718, 1 Ry. & C. T. Cas. 24), Connect. L., 4; Leases, 129.
Midland R. Co. *v.* Great Western R. Co. (2 Ry. & C. T. Cas. 88), Contr., 33, 37.
Midland R. Co. *v.* Haunchwood B. & T. Co. (6 Am. & Eng. R. Cas. 555, L. R. 20 Ch. D. 552, 51 L. J. Ch. D. 778, 46 L. T. 301, 30 W. R. 640), Em. Dom., 1158; Mines, etc., 6.
Midland R. Co. *v.* Hitchcock (4 Am. & Eng. R. Cas. 522, 34 N. J. Eq. 278; affirming 33 N. J. Eq. 86), Pl., 82.
Midland R. Co. *v.* Hitchcock (14 Am. & Eng. R. Cas. 598, 37 N. J. Eq. 549), Estop., 35; Reorg., 7.
Midland R. Co. *v.* London & N. W. R. Co. (L. R. 2 Eq. 524, 35 L. J. Ch. 831), Ult. Vir., 11.
Midland R. Co. *v.* Manchester, S. & L. R. Co. (22 L. T. 601), Leases, 122.
Midland R. Co. *v.* Miles (24 Am. & Eng. R. Cas. 137, L. R. 30 Ch. D. 634, 53 L. T. 381, 34 W. R. 136), Mines, etc., 3, 7.
Midland R. Co. *v.* Miles (L. R. 33 Ch. D. 632), Mines, etc., 3.
Midland R. Co. *v.* Neath & B. R. Co. (2 Ry. & C. T. Cas. 366), Leases, 119.
Midland R. Co. *v.* Ontario Rolling Mills (10 Ont. App. 677; affirming 2 Ont. 1), Contr., 76.
Midland R. Co. *v.* Robinson (43 Am. & Eng. R. Cas. 557, L. R. 15 App. Cas. 19; affirming L. R. 37 Ch. D. 386), Mines, etc., 4, 6; Words & Ph., 134.
Midland R. Co. *v.* Smith (113 Ind. 233, 15 N. E. Rep. 256, 12 West. Rep. 699), Em. Dom., 1033; Injunc., 8.
Midland R. Co. *v.* Smith (109 Ind. 488, 9 N. E. Rep. 474; further appeal 125 Ind. 509), Em. Dom., 314, 316.
Midland R. Co. *v.* Smith (44 Am. & Eng. R. Cas. 222, 125 Ind. 509, 25 N. E. Rep. 153), Em. Dom., 228, 328, 934; Lim. of Ac., 23.
Midland R. Co. *v.* Stevenson (50 Am. & Eng. R. Cas. 663, 130 Ind. 97, 29 N. E. Rep. 385), Exec., 10.
Midland R. Co. *v.* Wilcox (43 Am. & Eng. R. Cas. 629, 122 Ind. 84, 23 N. E. Rep. 506), Liens, 17, 20, 23, 38.
Midland T. & F. Co. *v.* Wilson (28 N. J. Eq. 537), Ferries, 5.
Midland Wagon Co. *v.* Potteries, S. & N. W. R. Co. (6 Q. B. D. 36, 50 L. J. Ex. D. 6, 43 L. T. 511, 29 W. R. 78, 3 Ry. & C. T. Cas. xvii), Exec., 13.
Mierson *v.* Hope (2 Sweeney (N. Y.) 561), Car. of M., 221; Exp. Cos., 39, 41.
Mifflin *v.* Harrisburg, P. M. & L. R. Co. (16 Pa. St. 182), Em. Dom., 163.
Mikel *v.* St. Louis, K. C. & N. R. Co. (54 Mo. 145), Proc., 40.
Mikesell *v.* Durkee (34 Kan. 509, 9 Pac. Rep. 278; further appeal 36 Kan. 97, 12 Pac. Rep. 351), St. Rys., 203.
Mikesell *v.* Durkee (36 Kan. 97, 12 Pac. Rep. 351), Priv. Rds., 2.
Mikkelson *v.* Ocean & I. Transp. Co. (31 N. Y. S. R. 408, 9 N. Y. Supp. 741), Employés, Inj. to, 685.
Milan Taxpayers *v.* Tennessee C. R. Co. (11 Lea (Tenn.) 329), Mun. Aid, 184, 273.
Milbank *v.* New York, L. E. & W. R. Co. (64 How. Pr. (N. Y.) 20), Corp., 12.
Milburn *v.* Cedar Rapids (12 Iowa 246), Sts. & H., 44, 223.
Milburn *v.* Hannibal & St. J. R. Co. (21 Mo. App. 426), Animals, 67, 382; Evid., 64.
Milburn *v.* Kansas City, St. J. & C. B. R.

Co. (29 Am. & Eng. R. Cas. 244, 86 Mo. 104), Animals, 198, 218; Contrib. Neg., 4.
Miles *v.* Atlantic, M. & O. R. Co. (4 Hughes (U. S.) 172), Children, Inj. to, 98.
Miles *v.* Hannibal & St. J. R. Co. (31 Mo. 407), Animals, 355.
Miles *v.* Ray (100 Ind. 166), Mun. Aid, 411.
Miley *v.* Broadway & S. A. R. Co. (29 N. Y. S. R. 107, 8 N. Y. Supp. 455, 55 Hun 608), Witn., 170.
Milhau *v.* Sharp (15 Barb. (N. Y.) 193), St. Rys., 25.
Milhau *v.* Sharp (27 N. Y. 611; affirming 7 Abb. Pr. 220, 28 Barb. 228, 17 Barb. 435), Priv. Rds., 2.
Millard *v.* Burley (13 Neb. 259, 13 N. W. Rep. 279), Mort., 25.
Millard *v.* Missouri, K. & T. R. Co. (6 Am. & Eng. R. Cas. 311, 86 N. Y. 441; affirming 20 Hun 191), Judgm., 17.
Mill Boy, The (4 McCrary (U. S.) 383), Car. of M., 253.
Millen *v.* Brasch (9 Am. & Eng. R. Cas. 326, L. R. 10 Q. B. D. 142, 52 L. J. Q. B. D. 127, 47 L. T. 685, 31 W. R. 190, 47 J. P. 180; reversing L. R. 8 Q. B. D. 35, 51 L. J. Q. B. D. 166, 45 L. T. 653, 46 J. P. 183), Car. of M., 444, 525.
Miller, In re (13 U. C. Q. B. 582), Em. Dom., 1268.
Miller *v.* Auburn & S. R. Co. (6 Hill (N. Y.) 61), License, 3.
Miller *v.* Barnstable County Com'rs (119 Mass. 485), Em. Dom., 246.
Miller *v.* Beeler (25 Ill. 163), Deeds, 18, 21.
Miller *v.* Berlin (13 Blatchf. (U. S.) 245), Mun. Aid, 377, 380.
Miller *v.* Burlington & M. R. Co. (8 Neb. 219), Agency, 72.
Miller *v.* Canal Com'rs (21 Pa. St. 23), Govt. Rds., 2.
Miller *v.* Chicago & G. T. R. Co. (90 Mich. 230, 51 N. W. Rep. 370), Employés, Inj. to, 136; Fel. Serv., 268.
Miller *v.* Chicago & N. W. R. Co. (59 Iowa 707, 13 N. W. Rep. 859), Animals, 248, 599.
Miller *v.* Chicago & N. W. R. Co. (66 Iowa 364, 23 N. W. Rep. 756), Fires, 173.
Miller *v.* Chicago, B. & Q. R. Co. (3 McCrary (U. S.) 460, 17 Fed. Rep. 97), Rem. of C., 42.
Miller *v.* Chicago, M. & St. P. R. Co. (41 Fed. Rep. 898), Mal. Pros., 7, 9.
Miller *v.* Chicago, M. & St. P. R. Co. (58 Wis. 310, 17 N. W. Rep. 130), Attach., 40.
Miller *v.* Chicago, M. & St. P. R. Co. (68 Wis. 184, 31 N. W. Rep. 479), Death, etc., 254.
Miller *v.* Chicago, M. & St. P. R. Co. (76 Iowa 318, 41 N. W. Rep. 28), Fires, 298.
Miller *v.* Chicago, R. I. & P. R. Co. (23 Am. & Eng. R. Cas. 235, 66 Iowa 546, 24 N. W. Rep. 36), Fences, 86.
Miller *v.* Com. (27 Gratt. (Va.) 110), Words & Ph., 163.
Miller *v.* Cornwall R. Co. (154 Pa. St. 473, 26 Atl. Rep. 779), Employés, Inj. to, 1, 486; Fel. Serv., 507.
Miller *v.* Duff (34 Mo. 167), Sales, 12.
Miller *v.* Ft. Lee Park & Steamboat Co. (25 N. Y. Supp. 924), Dam., 44.
Miller *v.* Georgia R. & B. Co. (50 Am. & Eng. R. Cas. 79, 88 Ga. 563, 15 S. E. Rep. 316), Car. of M., 421.
Miller *v.* Grand Trunk R. Co. (25 U. C. C. P. 389), Cross., Inj. at, 264.
Miller *v.* Grand Trunk R. Co. (45 U. C. Q. B. 222), Drains, 4.
Miller *v.* Gulf, C. & S. F. R. Co. (24 Am. & Eng. R. Cas. 158, 65 Tex. 659), Bills & N., 10; Mun. Aid, 238.
Miller *v.* Gzowski (6 U. C. C. P. 71), Em. Dom., 1222.
Miller *v.* Hannibal & St. J. R. Co. (12 Am. & Eng. R. Cas. 30, 90 N. Y. 430, 43 Am. Rep. 179; reversing 24 Hun 607), Bills of L., 14.
Miller *v.* Hanover Junction & S. R. Co. (87 Pa. St. 95), Subscr., 168.
Miller *v.* Houston City St. R. Co. (55 Fed. Rep. 366), Stock, 69.
Miller *v.* Illinois C. R. Co. (24 Barb (N. Y.) 312), Stock, 24.
Miller *v.* Iowa Land Co. (3 Am. & Eng. R. Cas. 27, 56 Iowa 374, 9 N. W. Rep. 316), Deeds, 49.
Miller *v.* Keokuk & D. M. R. Co. (14 Am. & Eng. R. Cas. 293, 63 Iowa 680, 16 N. W. Rep. 567), Dam., 99; Em. Dom., 683; Lim. of Ac., 31; Waters & W., 25.
Miller *v.* Lancaster (5 Colwd. (Tenn.) 514), Consol., 44.
Miller *v.* Long Island R. Co. (71 N. Y. 380; reversing 9 Hun 194), Tresp., 9.
Miller *v.* Louisville & N. R. Co. (83 Ala. 274, 3 Am. St. Rep. 722, 4 So. Rep. 842), Agency, 28.
Miller *v.* Louisville, N. A. & C. R. Co. (128 Ind. 97, 27 N. E. Rep. 339), Cross., Inj. at, 217; Evid., 49; Imp. Neg., 27.
Miller *v.* Manhattan R. Co. (73 Hun 512, 26 N. Y. Supp. 162, 56 N. Y. S. R. 189), Elev. Rys., 203; Evid., 59; New Tr., 49; Trial, 118.
Miller *v.* Mansfield (112 Mass. 260), Car. of M., 349.
Miller *v.* Minnesota & N. W. R. Co. (38 Am. & Eng. R. Cas. 234, 76 Iowa 655, 39 N. W. Rep. 188), Indep. Contr., 18.
Miller *v.* Missouri Pac. R. Co. (53 Am. & Eng. R. Cas. 598, 109 Mo. 350, 19 S. W. Rep. 58), Death, etc., 368; Fel. Serv., 73, 218, 244, 263, 334.
Miller *v.* Morrill (51 Me. 9), Direct., 46.
Miller *v.* New York (12 Wall. (U. S.) 159), Quo War., 1.
Miller *v.* New York (15 Wall. (U. S.) 478, 4 Am. Ry. Rep. 23), Charters, 43, 45.
Miller *v.* New York & E. R. Co. (18 How. Pr. (N. Y.) 374, 8 Abb. Pr. 431), Bonds, 4.
Miller *v.* New York & E. R. Co. (21 Barb. (N. Y.) 513), Charters, 45; Em. Dom., 371.
Miller *v.* New York C. & H. R. R. Co. (14 N. Y. S. R. 656), Employés, Inj. to, 173.
Miller *v.* New York C. & H. R. R. Co. (20 N. Y. Supp. 163, 65 Hun 623, mem., 48 N. Y. S. R. 23), Negl., 70.

Miller *v.* New York, L. & W. R. Co. (47 Am. & Eng. R. Cas. 369, 125 N. Y. 118, 26 N. E. Rep. 35, 34 N. Y. S. R. 607; reversing 20 N. Y. S. R. 157, 3 N. Y. Supp. 245), Leases, 41, 47.
Miller *v.* Norfolk & W. R. Co. (41 Fed. Rep. 431), Proc., 15.
Miller *v.* Northern Pac. R. Co. (36 Minn. 296, 30 N. W. Rep. 892), Evid., 95.
Miller *v.* Ohio & M. R. Co. (24 Ill. App. 326), Fel. Serv., 278.
Miller *v.* Pittsburg & C. R. Co. (40 Pa. St. 237), Subscr., 43, 114, 226.
Miller *v.* Prairie du Chien & McG. R. Co. (34 Wis. 533), Bridges, 9, 10, 59; Em. Dom., 553.
Miller *v.* Ratterman (43 Am. & Eng. R. Cas. 339, 47 Ohio St. 141, 24 N. E. Rep. 496), Divid., 8; Stock, 5; Stockh., 19; Tax., 101.
Miller *v.* Rutland & W. R. Co. (36 Vt. 452), Mort., 12.
Miller *v.* Rutland & W. R. Co. (40 Vt. 399), Coupons, 7, 9, 10; Mort., 304.
Miller *v.* St. Louis, I. M. & S. R. Co. (29 Am. & Eng. R. Cas. 254, 90 Mo. 389, 2 S. W. Rep. 439), Fires, 84, 264, 289; Negl., 46.
Miller *v.* St. Louis R. Co. (5 Mo. App. 471), Car. of P., 489, 581; Contrib. Neg., 16; New Tr., 15; Pl., 107.
Miller *v.* St. Louis R. Co. (7 Mo. App. 471), St. Rys., 380.
Miller *v.* St. Paul City R. Co. (42 Minn. 454, 44 N. W. Rep. 533), Cable Rys., 11.
Miller *v.* South Carolina R. Co. (33 So. Car. 359, 11 S. E. Rep. 1093), Car. of M., 619.
Miller *v.* Southern Pac. Co. (48 Am. & Eng. R. Cas. 294, 20 Oreg. 285, 26 Pac. Rep. 70), Employés, Inj. to, 4, 45; Fel. Serv., 3, 134, 214, 419.
Miller *v.* Southwestern R. Co. (55 Ga. 143), Death, etc., 41.
Miller *v.* Steam Nav. Co. (10 N. Y. 431; affirming 13 Barb. 361), Car. of M., 149.
Miller *v.* Swann (89 Ala. 631, 7 So. Rep. 771), Land Grants, 16.
Miller *v.* Texas & N. O. R. Co. (83 Tex. 518, 18 S. W. Rep. 954), Car. of M., 544, 592; Evid., 105.
Miller *v.* Union Pac. R. Co. (2 McCrary (U. S.) 87, 4 Fed. Rep. 768), Employes, Inj. to, 391, 531.
Miller *v.* Union Pac. R. Co. (5 McCrary (U. S.) 300, 17 Fed. Rep. 67), Employés, Inj. to, 128; Fel. Serv., 91, 315; Negl., 1, 34.
Miller *v.* Union Pac. R. Co. (4 McCrary (U. S.) 115, 12 Fed. Rep. 600), Employés, Inj. to, 435.
Miller *v.* Wabash R. Co. (47 Mo. App. 630), Animals, 127, 185; Fences, 56.
Miller *v.* Wheeler & W. Mfg. Co. (46 Fed. Rep. 882), Citizens., 4.
Millered *v.* Lake Ontario, A. & N. Y. R. Co. (9 How. Pr. (N. Y.) 238), Constr. Rys., 93.
Millie *v.* Manhattan R. Co. (5 Misc. 301, 25 N. Y. Supp. 753), Elev. Rys., 202.
Milligan *v.* Grand Trunk R. Co. (17 U. C. C. P. 115), Car. of M., 684.
Milliman *v.* New York C. & H. R. R. Co. (66 N. Y. 642; affirming 4 Hun 409, 6 T. & C. 585), Car. of P., 115, 147, 248.
Milliman *v.* Oswego & S. R. Co. (10 Barb. (N. Y.) 87), Farm Cross., 3.
Millington *v.* Texas & P. R. Co. (2 Tex. App. (Civ. Cas.) 148), Lim. of Ac., 36.
Millott *v.* New York & N. E. R. Co. (46 N. Y. S. R. 145, 64 Hun 634, 19 N. Y. Supp. 122), Employés, Inj. to, 611.
Milloy *v.* Grand Trunk R. Co. (55 Am. & Eng. R. Cas. 579, 23 Ont. 454), Car. of M., 318.
Mills *v.* Central R. Co. (24 Am. & Eng. R. Cas. 47, 41 N. J. Eq. 1, 2 Atl. Rep. 453), Charters, 43; Leases, 21, 107.
Mills *v.* Chicago, M. & St. P. R. Co. (76 Wis. 422, 45 N. W. Rep. 225), Fires, 111, 316.
Mills *v.* Dow (133 U. S. 423, 10 Sup. Ct. Rep. 413), Contr., 85; Evid., 187.
Mills *v.* East Tenn., V. & G. R. Co. (87 Ga. 102, 13 S. E. Rep. 205), Death, etc., 218.
Mills *v.* Greenville & C. R. Co. (5 Am. & Eng. R. Cas. 55, 13 So. Car. 97), Culverts, 15; Flood. Eds., 80.
Mills *v.* Michigan C. R. Co. (45 N. Y. 622), Car. of M., 626, 643.
Mills *v.* New York & H. R. Co. (2 Robt. (N. Y.) 326; affirmed in 41 N. Y. 619), St. Rys., 321.
Mills *v.* Northern R. of Buenos Ayres Co. (23 L. T. 719, 19 W. R. 171, L. R. 5 Ch. 621), Stock, 22; Stockh., 125.
Mills *v.* Orange, A. & M. R. Co. (1 MacArth. (D. C.) 285), Cross., Inj. at, 24.
Mills *v.* Orange, A. & M. R. Co. (2 MacArth. (D. C.) 314), Contrib. Neg., 39, 123; Fel. Serv., 131; Negl., 78.
Mills *v.* Parlin (14 Am. & Eng. R. Cas. 147, 106 Ill. 60), App., 4; Injunc., 7.
Mills *v.* Stewart (41 N. Y. 384), Stockh., 54.
Millsaps *v.* Louisville, N. O. & T. R. Co. (69 Miss. 423, 13 So. Rep. 696), Employés, 4; Fel. Serv., 430.
Mills County *v.* Burlington & M. R. R. Co. (47 Iowa 66), Contr., 9; Estop., 32.
Mills County *v.* Burlington & M. R. R. Co. (10 Am. & Eng. R. Cas. 693, 107 U. S. 557, 2 Sup. Ct. Rep. 654), Land Grants, 128.
Millvale *v.* Evergreen R. Co. (46 Am. & Eng. R. Cas. 219, 131 Pa. St. 1, 18 Atl. Rep. 993), Constr. Rys., 7; Sts. & H., 54, 63, 68, 76.
Millward *v.* Midland R. Co. (L. R. 14 Q. B. D. 68, 54 L. J. Q. B. D. 202, 52 L. T. 255, 33 W. R. 366, 49 J. P. 453), Employés, Inj. to, 782.
Millwood C. & C. Co. *v.* Madison (Pa.) (2 Atl. Rep. 39), Car. of P., 596.
Milne *v.* Douglass (4 McCrary (U. S.) 368, 13 Fed. Rep. 37), Car. of M., 544.
Milner *v.* Brydges (18 New Brun. 113), Tresp., 13.
Milner *v.* Great Northern R. Co. (50 L. T. 367), Agency, 105.
Milner *v.* Pensacola (2 Woods (U. S.) 632), Mun. Aid, 24, 272, 379.
Milnes, In re (L. R. 1 Ch. D. 28, 24 W. R. 98), Em. Dom., 1154.

Milnor *v.* Georgia R. & B. Co. (4 Ga. 385), Constr. Rys., 72.
Milnor *v.* New York & N. H. R. Co. (53 N. Y. 363, 5 Am. Ry. Rep. 381; affirming 4 Daly 355), Bagg., 20; For. Corp., 12.
Miltenberger *v.* Logansport, C. & S. W. R. Co. (12 Am. & Eng. R. Cas. 464, 106 U. S. 286, 1 Sup. Ct. Rep. 140), Mort., 87, 88, 97, 181; Receiv., 23, 24.
Miltimore *v.* Chicago & N. W. R. Co. (37 Wis. 190), Car. of M., 181.
Milton *v.* Denver & R. G. R. Co. (1 Colo. App. 307, 29 Pac. Rep. 22), Car. of M., 114, 657.
Milwaukee & C. R. Co. *v.* Hunter (11 Wis. 160), Contrib. Neg., 88, 105; Cross., Inj. at, 34; Evid., 192.
Milwaukee & M. R. Co., Ex parte (5 Wall. (U. S.) 188), Mand., 6.
Milwaukee & M. R. Co., Ex parte (18 Law. Ed. (U. S.) 887), Mand., 2.
Milwaukee & M. R. Co. *v.* Chamberlain (6 Wall. (U. S.) 748), Judgm., 48.
Milwaukee & M. R. Co. *v.* Eble (3 Pinn. (Wis.) 334, 4 Chand. 72), Em. Dom., 384, 463, 647, 691, 758; Witn., 119.
Milwaukee & M. R. Co. *v.* Fairchild (6 Wis. 403), Car. of M., 170.
Milwaukee & M. R. Co. *v.* Finney (10 Wis. 388), Agency, 82; Dam., 32; Evid., 206.
Milwaukee & M. R. Co. *v.* Howard (18 Law. Ed. (U. S.) 252), Receiv., 165.
Milwaukee & M. R. Co. *v.* Howard (131 U. S. lxxxi, app'x.), Mort., 215.
Milwaukee & M. R. Co. *v.* James (6 Wall. (U. S.) 750), Judgm., 37.
Milwaukee & M. R. Co. *v.* Milwaukee & St. P. R. Co. (6 Wall. (U. S.) 742), Mort., 52.
Milwaukee & M. R. Co. *v.* Milwaukee & W. R. Co. (20 Wis. 174), Cov'ts, 16.
Milwaukee & M. R. Co. *v.* Soutter (2 Wall. (U. S.) 440), Mort., 299.
Milwaukee & M. R. Co. *v.* Soutter (2 Wall. (U. S.) 443, n.), Mort., 292.
Milwaukee & M. R. Co. *v.* Soutter (2 Wall. (U. S.) 510), Receiv., 2, 177.
Milwaukee & M. R. Co. *v.* Soutter (13 Wall. (U. S.) 517, 4 Am. Ry. Rep. 277), Reorg., 11.
Milwaukee & M. R. Co. *v.* Soutter (17 Law. Ed. (U. S.) 604), Receiv., 2, 165.
Milwaukee & M. R. Co. *v.* Waukesha County Sup'rs (9 Wis. 431, n.), Tax., 52.
Milwaukee & N. I. R. Co. *v.* Field (12 Wis. 340), Stat., 63; Subscr., 199, 209.
Milwaukee & N. R. Co. *v.* Brooks Locomotive Works (30 Am. & Eng. R. Cas. 499, 121 U. S. 430, 7 Sup. Ct. Rep. 1094), Attach., 27.
Milwaukee & N. R. Co. *v.* Strange (20 Am. & Eng. R. Cas. 413, 63 Wis. 178, 23 N. W. Rep. 432), Em. Dom., 434, 889, 983.
Milwaukee & St. P. R. Co. *v.* Arms (91 U. S. 489, 6 Am. Ry. Rep. 512), Car. of P., 638; Collis., 3.
Milwaukee & St. P. R. Co. *v.* Crawford County Sup'rs (29 Wis. 116, 12 Am. Ry. Rep. 210), Tax., 149, 171.
Milwaukee & St. P. R. Co. *v.* Faribault (23 Minn. 167, 17 Am. Ry. Rep. 40), Sts. & H., 22.
Milwaukee & St. P. R. Co. *v.* Kellogg (94 U. S. 469, 17 Am. Ry. Rep. 309), Fires, 4, 24, 115, 148, 226, 330; Words & Ph., 42.
Milwaukee & St. P. R. Co. *v.* Kossuth County (41 Iowa 57), Tax., 259.
Milwaukee & St. P. R. Co. *v.* Milwaukee (34 Wis. 271), Elevators, 1; Tax., 79, 161, 169, 170, 181.
Milwaukee & St. P. R. Co. *v.* Milwaukee & M. R. Co. (20 Wis. 165), Mort., 173.
Milwaukee & St. P. R. Co. *v.* Smith (74 Ill. 197), Car. of M., 403, 603.
Milwaukee & St. P. R. Co. *v.* Soutter (131 U. S. 86, app'x.), App., 8.
Milwaukee Chamber of Commerce *v.* Flint & P. M. R. Co. (2 Int. Com. Rep. 393, 2 Int. Com. Com. 553), Int. Com., 67.
Milwaukee Malt Extract Co. *v.* Chicago, R. I. & P. R. Co. (73 Iowa 98, 34 N. W. Rep. 761), Intox'ing L., 2.
Milwaukee R. Co., Ex parte (5 Wall. (U. S.) 825), Mand., 21.
Milwaukee St. R. Co. *v.* Adlam (85 Wis. 142, 55 N. W. Rep. 181), St. Rys., 151.
Mims *v.* Macon & W. R. Co. (3 Ga. 333), Vend. & P., 5.
Mine Hill & S. H. R. Co. *v.* Lippincott (86 Pa. St. 468), Leases, 78.
Miner *v.* Connecticut River R. Co. (153 Mass. 398, 26 N. E. Rep. 994), Agency, 42; Animals, 426.
Miner *v.* New York C. & H. R. R. Co. (47 Am. & Eng. R. Cas. 212, 123 N. Y. 242, 25 N. E. Rep. 339, 33 N. Y. S. R. 211; affirming 46 Hun 612, 13 N. Y. S. R. 15), Em. Dom., 132, 451.
Miner *v.* Norwich & W. R. Co. (32 Conn. 91), Bills of L., 39.
Mineral Point R. Co. *v.* Barron (83 Ill. 365), Attach., 37.
Mineral Point R. Co. *v.* Keep (22 Ill. 9), Constr. Rys., 48; Proc., 36, 46; Witn., 5; Words & Ph., 163.
Mineral Range R. Co. *v.* Detroit & L. S. Copper Co. (25 Fed. Rep. 515), Rem. of C., 15.
Miners' Ditch Co. *v.* Zellerbach (37 Cal. 543), Corp., 2.
Minneapolis & N. W. R. Co. *v.* Woodworth (32 Minn. 452, 21 N. W. Rep. 476), Em. Dom., 847.
Minneapolis & St. C. R. Co., In re (39 Minn. 162, 39 N. W. Rep. 65), Cross. Rys., 21.
Minneapolis & St. C. R. Co. *v.* Duluth & W. R. Co. (46 Am. & Eng. R. Cas. 473, 45 Minn. 104, 47 N. W. Rep. 464), Land Grants, 132.
Minneapolis & St. L. R. Co., In re (30 Am. & Eng. R. Cas. 279, 36 Minn. 481, 32 N. W. Rep. 556), Cross. Rys., 10, 37; Em. Dom., 920.
Minneapolis & St. L. R. Co. *v.* Bassett (20 Minn. 535) (Gil. 478), Subscr., 138.
Minneapolis & St. L. R. Co. *v.* Becket (75 Iowa 183, 39 N. W. Rep. 260), Mand., 23.
Minneapolis & St. L. R. Co. *v.* Beckwith (38 Am. & Eng. R. Cas. 267, 129 U. S. 26, 9 Sup. Ct. Rep. 207), Animals, 10; Fences, 6; Words & Ph., 163.

Minneapolis & St. L. R. Co. *v.* Columbus Rolling Mill Co. (29 Am. & Eng. R. Cas. 583, 119 U. S. 149, 7 Sup. Ct. Rep. 168), Contr., 8.
Minneapolis & St. L. R. Co. *v.* Cox (76 Ill. 306, 41 N. W. Rep. 24), Spec. Perf., 3, 7; Stat. & D., 36, 42.
Minneapolis & St. L. R. Co. *v.* Emmons (149 U. S. 364, 13 Sup. Ct. Rep. 870), Fences, 4.
Minneapolis & St. L. R. Co. *v.* Kanne (17 Am. & Eng. R. Cas. 122, 32 Minn. 174, 19 N. W. Rep. 975), Em. Dom., 505.
Minneapolis & St. L. R. Co. *v.* Morrison (23 Minn. 308, 17 Am. Ry. Rep. 85), Charters, 140.
Minneapolis & St. L. R. Co. *v.* Railroad & W. Com. (44 Minn. 336, 40 N. W. Rep. 559), Ry. Com'rs, 28.
Minneapolis & St. L. R. Co. *v.* St. Paul, M. & M. R. Co. (26 Am. & Eng. R. Cas. 638, 35 Minn. 265, 28 N. W. Rep. 705), Leases, 85; Location, etc., 19.
Minneapolis & St. L. R. Co. *v.* United States (24 Ct. of Cl. 350), Car. of Mails, 3, 8, 10, 15.
Minneapolis Mill Co. *v.* Minneapolis & St. L. R. Co. (46 Minn. 330, 48 N. W. Rep. 1132), Sts. & H., 2.
Minneapolis Mill Co. *v.* Minneapolis & St. L. R. Co. (51 Minn. 304, 53 N. W. Rep. 639), Estop., 19; License, 16.
Minneapolis R. Terminal Co., In re (38 Minn. 157, 36 N. W. Rep. 105), Em. Dom., 341, 346, 956.
Minneapolis, St. P. & S. St. M. R. Co. *v.* Milner (57 Fed. Rep. 276), Quarantine, 1, 2, 3.
Minneapolis, St. P. & S. St. M. R. Co. *v.* Nestor (50 Fed. Rep. 1), Rem. of C., 45.
Minnesota & I. S. R. Co. *v.* Hiams (53 Iowa 501, 5 N. W. Rep. 703), Mun. Aid, 132.
Minnesota & P. R. Co. *v.* Sibley (2 Minn. 13) (Gil. 1), State Aid, 24.
Minnesota Belt Line R. & T. Co. *v.* Gluek (45 Minn. 463, 48 N. W. Rep. 194), Em. Dom., 624, 635; Witn., 122.
Minnesota C. R. Co. *v.* Donaldson (38 Minn. 115, 35 N. W. Rep. 725), Tax., 164.
Minnesota C. R. Co. *v.* McNamara (13 Minn. 508) (Gil. 468), Em. Dom., 740.
Minnesota C. R. Co. *v.* Melvin (21 Minn. 339), Vend. & P., 1.
Minnesota C. R. Co. *v.* Peterson (14 Am. & Eng. R. Cas. 319, 31 Minn. 42, 16 N. W. Rep. 456), Em. Dom., 890.
Minnesota Co. *v.* St. Paul Co. (2 Wall. (U. S.) 609), Mort., 50, 202; Receiv., 42.
Minnesota L. & I. Co. *v.* Davis (40 Minn. 455, 42 N. W. Rep. 299), Land Grants, 38.
Minnesota Valley R. Co. *v.* Doran (15 Minn. 230) (Gil. 179); further appeal) 17 Minn. 188) (Gil. 162), Em. Dom., 668.
Minnesota Valley R. Co. *v.* Doran (17 Minn. 188) (Gil. 162), 4 Am. Ry. Rep. 187), Em. Dom., 574, 589, 714, 740.
Minnett *v.* Milwaukee & St. P. R. Co. (3 Dill. (U. S.) 460), Rem. of C., 46.
Minock *v.* Detroit, G. H. & M. R. Co. (97 Mich. 425, 56 N. W. Rep. 780), Car. of P., 241, 471; Cross. Rys., 79.
Minor *v.* Buffalo & L. H. R. Co. (9 U. C. C. P. 280), Flood. Lds., 4.
Minor *v.* Chicago & N. W. R. Co. (19 Wis. 40), Bagg., 71.
Minor *v.* Clark (5 Silv. Sup. Ct. 358, 28 N. Y. S. R. 184, 8 N. Y. Supp. 616), Negl., 75.
Minor *v.* London & N. W. R. Co. (1 C. B. N. S. 325, 2 Jur. N. S. 1168, 26 L. J. C. P. 39), Jurisd., 5.
Minot *v.* Philadelphia, W. & B. R. Co. (18 Wall. (U. S.) 206, 7 Am. Ry. Rep. 312; affirming 7 Phila. (Pa.) 555), Int. Com., 203; Tax., 44, 145.
Minot *v.* Philadelphia, W. & B. R. Co. (2 Abb. (U. S.) 323; affirmed in 18 Wall. 206), Charters, 76; Int. Com., 206.
Minster *v.* Citizens' R. Co. (53 Mo. App. 276), Dam., 90; Evid., 125; Imp. Neg., 25.
Minter *v.* Hannibal & St. J. R. Co. (82 Mo. 128), Animals, 629, 630.
Minter *v.* Pacific R. Co. (41 Mo. 503), Bagg., 49.
Minter *v.* Union Pac. R. Co. (3 Utah 500, 24 Pac. Rep. 911), Employés, Inj. to, 529.
Minty *v.* Union Pac. R. Co. (2 Idaho 437, 21 Pac. Rep. 660), Employés, Inj. to, 183, 599, 627.
Mire *v.* East La. R. Co. (44 Am. & Eng. R. Cas. 495, 42 L. Ann. 385, 7 So. Rep. 473), Employés, Inj. to, 14, 15.
Missimer *v.* Philadelphia & R. R. Co. (17 Phila. (Pa.) 172), Car. of P., 187, 541.
Mississippi & M. R. Co. *v.* Byington (14 Iowa 572), Em. Dom., 880, 895.
Mississippi & M. R. Co. *v.* Cromwell (91 U. S. 643), Eq., 20.
Mississippi & M. R. Co. *v.* McClure (10 Wall. (U. S.) 511), Fed. Cts., 25.
Mississippi & M. R. Co. *v.* Rock (4 Wall. (U. S.) 177), Fed. Cts., 25
Mississippi & M. R. Co. *v.* Rosseau (8 Iowa 373), Em. Dom., 277, 870, 901, 915.
Mississippi & M. R. Co. *v.* Ward (2 Black (U. S.) 485), Bridges, 88.
Mississippi & R. R. Boom Co. *v.* Patterson (98 U. S. 403), Rem. of C., 15.
Mississippi & T. R. Co. *v.* Archibald (41 Am. & Eng. R. Cas. 4, 67 Miss. 38, 7 So. Rep. 212), Flood. Lds., 49; Waters & W., 14, 24.
Mississippi & T. R. Co. *v.* Ayres (16 Lea (Tenn.) 725), Actions, 7; Evid., 247; Witn., 152, 164.
Mississippi & T. R. Co. *v.* Devaney (42 Miss. 555, 2 Am. Rep. 608), Charters, 144; Location, etc., 17.
Mississippi & T. R. Co. *v.* Gill (66 Miss. 39, 5 So. Rep. 393), Car. of P., 635, 638.
Mississippi & T. R. Co. *v.* Green (9 Heisk. (Tenn.) 588), Contr., 74.
Mississippi & T. R. Co. *v.* Harris (36 Miss. 17), Subscr., 136.
Mississippi & T. R. Co. *v.* Harrison (39 Am. & Eng. R. Cas. 449, 66 Miss. 419, 6 So. Rep. 319), Car. of P., 233.
Mississippi & T. R. Co. *v.* Wilson (10 Heisk. (Tenn.) 496), War, 8.
Mississippi C. R. Co. *v.* Caruth (51 Miss. 77), Flood. Lds., 12; New Tr., 30.

Mississippi C. R. Co. *v.* Fort (44 Miss. 423), Actions, 9.
Mississippi C. R. Co. *v.* Kennedy (41 Miss. 671), Bagg., 37, 124; Just. P., 11.
Mississippi C. R. Co. *v.* Mason (51 Miss. 234), Contrib. Neg., 11, 16, 104; Flood. Lds., 14; Negl., 67; Waters & W., 10, 11.
Mississippi C. R. Co. *v.* Miller (40 Miss. 45), Animals, 48, 382.
Mississippi C. R. Co. *v.* Plant (58 Ga. 167), Attach., 40.
Mississippi C. R. Co. *v.* Southern R. Assoc. (8 Phila. (Pa.) 107), Parties, 1.
Mississippi C. R. Co. *v.* Southern R. Assoc. (11 Am. & Eng. R. Cas. 576, 7 Baxt. (Tenn.) 595), Leases, 57.
Mississippi C. R. Co. *v.* State (46 Miss. 157), Stat., 31; War, 3.
Mississippi C. R. Co. *v.* United States (23 Ct. of Cl. 27), Car. of Mails, 14.
Mississippi C. R. Co. *v.* Whitehead (41 Miss. 225), Em. Dom., 1061.
Mississippi Home Ins. Co. *v.* Louisville, N. O. & T. R. Co. (54 Am. & Eng. R. Cas. 512, 70 Miss. 119, 12 So. Rep. 156), Fires, 31, 76, 105, 109, 110, 121, 296, 300, 302.
Mississippi Mills *v.* Cook (56 Miss. 40), Tax., 35, 53, 137.
Mississippi, O. & R. R. R. Co. *v.* Cross (20 Ark. 443), Quo War., 3; Subscr., 146, 163.
Mississippi, O. & R. R. R. Co. *v.* Gaster (20 Ark. 455), Subscr., 69, 88, 100.
Mississippi, O. & R. R. R. Co. *v.* Gaster (22 Ark. 361), Subscr., 67.
Mississippi, O. & R. R. R. Co. *v.* Gaster (24 Ark. 96), Charters, 17, 36; Direct., 57; Injunc., 24; Subscr., 120, 124.
Mississippi, O. & R. R. R. Co. *v.* Mayor, etc., of Camden (23 Ark. 300), Mun. Aid, 74.
Mississippi, O. & R. R. R. Co. *v.* Turrentine (21 Ark. 445), Subscr., 91.
Mississippi R. Co. *v.* McDonald (12 Heisk. (Tenn.) 54), Charters, 20; Em. Dom., 522, 818.
Mississippi River & B. T. R. Co. *v.* Jones (54 Mo. App. 529), Em. Dom., 294.
Mississippi River Bridge Co. *v.* Ring (58 Mo. 491), Em. Dom., 47, 137, 650, 742, 800.
Mississippi, T. & L. B. R. Co. *v.* Wooten (36 La. Ann. 441), Charters, 3; Em. Dom., 144, 850.
Mississippi Valley & W. R. Co. *v.* United States Exp. Co. (81 Ill. 534), Attach., 24; Mort., 84.
Mississippi Valley Co. *v.* Chicago, St. L. & N. O. R. Co. (2 Am. & Eng. R. Cas. 414, 58 Miss. 896), Mort., 40.
Mississippi Valley R. Co. *v.* Chicago, St. L. & N. O. R. Co. (8 Am. & Eng. R. Cas. 575, 58 Miss. 846), Consol., 44.
Mississippi Valley Transp. Co. *v.* Fosdick (Mann (La.) 3), Bills of L., 104; Car. of M., 375.
Missouri *v.* Harris (144 U. S. 210, 12 Sup. Ct. Rep. 838), Fed. Cts., 17.
Missouri *v.* Kansas City, Ft. S. & G. R. Co. (32 Fed. Rep. 722), Lim. of Ac., 63.
Missouri & I. R. T. & L. Co. *v.* Cape Girardeau & S. W. R. Co. (1 Int. Com. Rep. 607, 1 Int. Com. Com. 30), Int. Com., 29.
Missouri C. & O. Co. *v.* Hannibal & St. J. R. Co. (35 Mo. 84), Car. of M., 67.
Missouri Furnace Co. *v.* Abend (107 Ill. 44; affirming 9 Ill. App. 319), App., 32; Employés, Inj. to, 2, 93, 182, 250, 252, 267, 619, 748; Fel. Serv., 138, 159; Trial, 129.
Missouri, K. & T. R. Co. *v.* Baker (14 Kan. 563), Constr. Rys., 89.
Missouri, K. & T. R. Co. *v.* Brown (14 Kan. 557), Agency, 44; Constr. Ry., 89; Liens, 54.
Missouri, K. & T. R. Co. *v.* Cook (47 Kan. 216, 27 Pac. Rep. 847), Land Grants, 94.
Missouri, K. & T. R. Co. *v.* Crowe (9 Kan. 496), Proc., 33.
Missouri, K. & T. R. Co. *v.* Davidson (14 Kan. 349), Fires, 5, 22.
Missouri, K. & T. R. Co. *v.* Elliott (56 Fed. Rep. 772), Arb., 5.
Missouri, K. & T. R. Co. *v.* Ft. Scott (15 Kan. 435), Contr., 44, 101; Dam., 84.
Missouri, K. & T. R. Co. *v.* Graves (4 Tex. App. (Civ. Cas.) 149, 16 S. W. Rep. 102), Car. of L. S., 81; Car. of M., 50.
Missouri, K. & T. R. Co. *v.* Haines (10 Kan. 439), Em. Dom., 669; Witn., 68.
Missouri, K. & T. R. Co. *v.* Kansas Pac. R. Co. (97 U. S. 491), Land Grants, 3, 5, 6.
Missouri, K. & T. R. Co. *v.* Long (6 Am. & Eng. R. Cas. 254, 27 Kan. 684), Cat.-Gds., 1; Sts. & H., 177, 185; Words & Ph., 17.
Missouri, K. & T. R. Co. *v.* Moore (4 Tex. App. (Civ. Cas.) 323, 15 S. W. Rep. 714), Cross., Inj. at, 336; Evid., 231.
Missouri, K. & T. R. Co. *v.* Noyes (5 Am. & Eng. R. Cas. 440, 25 Kan. 340), Land Grants, 8.
Missouri, K. & T. R. Co. *v.* Roberts (152 U. S. 114, 14 Sup. Ct. Rep. 496), Land Grants, 30.
Missouri, K. & T. R. Co. *v.* Texas & St. L. R. Co. (4 Woods (U. S.) 360, 10 Fed. Rep. 497), Charters, 16; Cross. Rys., 62, 72.
Missouri, K. & T. R. Co. *v.* Trinity County Lumber Co. (1 Tex. Civ. App. 553, 21 S. W. Rep. 290), Car. of M., 203; Int. Com., 132.
Missouri, K. & T. R. Co. *v.* Trinity County Lumber Co. (85 Tex. 405, 21 S. W. Rep. 539), App., 2.
Missouri, K. & T. R. Co. *v.* United States (92 U. S. 760, n.), Land Grants, 10.
Missouri, K. & T. R. Co. *v.* Ward (10 Kan. 352), Em. Dom., 1072; License, 9.
Missouri, K. & T. R. Co. *v.* Weaver (16 Kan. 456), Eject. Pass., 125; New Tr., 23, 30.
Missouri Pac. R. Co. *v.* Abney (30 Kan. 41, 1 Pac. Rep. 385), Animals, 308, 584.
Missouri Pac. R. Co. *v.* Aiken (71 Tex. 373, 9 S. W. Rep. 437), Car. of L. S., 125; Car. of P., 646.
Missouri Pac. R. Co. *v.* Ayers (Tex.) (8 S. W. Rep. 538), Fires, 254, 345.
Missouri Pac. R. Co. *v.* Baier (37 Neb. 235, 55 N. W. Rep. 913), Car. of P., 585; Death, etc., 280; Negl., 63.
Missouri Pac. R. Co. *v.* Barber (44 Am &

Eng. R. Cas. 523, 44 Kan. 612, 24 Pac. Rep. 969), Death, etc., 130; Employés, Inj. to, 154.
Missouri Pac. R. Co. *v.* Barnes (2 Tex. App. (Civ. Cas.) 507), Bills of L., 84; Car. of M., 20, 21, 744, 773; Words & Ph., 7.
Missouri Pac. R. Co. *v.* Bartlett (32 Am. & Eng. R. Cas. 343, 69 Tex. 79, 6 S. W. Rep. 549), Fires, 133, 287.
Missouri Pac. R. Co. *v.* Bartlett (81 Tex. 42, 16 S. W. Rep. 638), Evid., 140; Fires, 41; Words & Ph., 136.
Missouri Pac. R. Co. *v.* Baxter (45 Am. & Eng. R. Cas. 471, 45 Kan. 520, 26 Pac. Rep. 49), Animals, 487; Fences, 82, 84.
Missouri Pac. R. Co. *v.* Beeson (12 Am. & Eng. R. Cas. 52, 30 Kan. 298, 2 Pac. Rep. 496), Bills of L., 43.
Missouri Pac. R. Co. *v.* Behee (2 Tex. Civ. App. 107, 21 S. W. Rep. 384), Libel & S., 3, 7, 12.
Missouri Pac. R. Co. *v.* Bond (3 Tex. Civ. App. 104, 20 S. W. Rep. 930), Death, etc., 231, 277; Evid., 174; Fel. Serv., 425.
Missouri Pac. R. Co. *v.* Bradshaw (33 Kan. 533, 6 Pac. Rep. 917), Animals, 158, 521; Fences, 82.
Missouri Pac. R. Co. *v.* Brazzil (72 Tex. 233, 10 S. W. Rep. 403), Release, 4; Trial, 161.
Missouri Pac. R. Co. *v.* Breeding (4 Tex. App. (Civ. Cas.) 217, 16 S. W. Rep. 184), Car. of M., 695, 801; New Tr., 38.
Missouri Pac. R. Co. *v.* Bridges (39 Am. & Eng. R. Cas. 604, 74 Tex. 520, 12 S. W. Rep. 210), Cross., Inj. at, 26; Death, etc., 433.
Missouri Pac. R. Co. *v.* Brown (75 Tex. 267, 12 S. W. Rep. 1117), Death, etc., 310, 337.
Missouri Pac. R. Co. *v.* Brown (Tex.) (18 S. W. Rep. 670), Licensees, Inj. to, 5; Tresp., Inj. to, 69.
Missouri Pac. R. Co. *v.* Burnett (3 Tex. App. (Civ. Cas.) 287), Contrib. Neg., 49; Cross., Inj. at, 251; Witn., 94.
Missouri Pac. R. Co. *v.* Cady (44 Kan. 633, 24 Pac. Rep. 1088), Fires, 5, 83.
Missouri Pac. R. Co. *v.* Callahan (Tex.) (41 Am. & Eng. R. Cas. 85, 12 S. W. Rep. 833), Car. of L. S., 132, 138; Contrib. Neg., 96; Evid., 65, 89; Witn., 167.
Missouri Pac. R. Co. *v.* Callbreath (66 Tex. 526, 1 S. W. Rep. 622), Employés, Inj. to, 27, 34, 182, 204.
Missouri Pac. R. Co. *v.* Carpenter (44 Kan. 257, 24 Pac. Rep. 462), Agency, 22.
Missouri Pac. R. Co. *v.* Carter (28 Am. & Eng. R. Cas. 249, 85 Mo. 448), Em. Dom., 240, 259, 264, 788.
Missouri Pac. R. Co. *v.* Chicago & A. R. Co. (23 Am. & Eng. R. Cas. 718, 25 Fed. Rep. 317), Car. of M., 644.
Missouri Pac. R. Co. *v.* Childers (1 Tex. Civ. App. 302, 21 S. W. Rep. 76), Car. of L. S., 154.
Missouri Pac. R. Co. *v.* China Mfg. Co. (79 Tex. 26, 14 S. W. Rep. 785), Car. of M., 481; Lim. of Liab., 40.
Missouri Pac. R. Co. *v.* Christman (65 Tex. 369), Evid., 133; Trial, 143.
Missouri Pac. R. Co. *v.* Collier (18 Am. & Eng. R. Cas. 281, 62 Tex. 318), Evid., 92, 201; Proc., 31.
Missouri Pac. R. Co. *v.* Colquitt (Tex.) (9 S. W. Rep. 603), App., 57.
Missouri Pac. R. Co. *v.* Coon (14 Am. & Eng. R. Cas. 202, 15 Neb. 232, 18 N. W. Rep. 62), Witn., 118.
Missouri Pac. R. Co. *v.* Cornell (11 Am. & Eng. R. Cas. 56, 30 Kan. 35, 1 Pac. Rep. 312), Fires, 326.
Missouri Pac. R. Co. *v.* Cornwall (70 Tex. 611, 8 S. W. Rep. 312), Car. of L. S., 78; Trial, 165.
Missouri Pac. R. Co. *v.* Cox (2 Tex. App. (Civ. Cas.) 217), App., 44; Cat.-Gds., 27; Constr. Rys., 11; Dam., 23, 66.
Missouri Pac. R. Co. *v.* Creath (3 Tex. App. (Civ. Cas.) 109), Car. of M., 545, 733.
Missouri Pac. R. Co. *v.* Crenshaw (71 Tex. 340, 9 S. W. Rep. 262), Employés, Inj. to, 182, 186, 221.
Missouri Pac. R. Co. *v.* Cullers (81 Tex. 382, 17 S. W. Rep. 19), Fires, 247; Jurisd., 6; Missouri Pac. R. Co., 2.
Missouri Pac. R. Co. *v.* Curtis (3 Tex. App. (Civ. Cas.) 379), Car. of P., 124; Dam., 11.
Missouri Pac. R. Co. *v.* Donaldson (73 Tex. 124, 11 S. W. Rep. 163), Fires, 240, 299.
Missouri Pac. R. Co. *v.* Douglass (16 Am. & Eng. R. Cas. 98, 2 Tex. App. (Civ. Cas.) 32), Bills of L., 10; Car. of M., 77, 111, 732, 741; Custom, 8; Pl., 7.
Missouri Pac. R. Co. *v.* Dulaney (38 Kan. 246, 16 Pac. Rep. 343), Em. Dom., 823.
Missouri Pac. R. Co. *v.* Dwyer (36 Kan. 58, 12 Pac. Rep. 352), App., 126; Employés, Inj. to, 153, 774; Fel. Serv., 95, 222, 224.
Missouri Pac. R. Co. *v.* Dyche (28 Kan. 200), Evid., 150.
Missouri Pac. R. Co. *v.* Earle (4 Tex. App. (Civ. Cas.) 19, 14 S. W. Rep. 1068), Animals, 454.
Missouri Pac. R. Co. *v.* Eckel (56 Am. & Eng. R. Cas. 174, 49 Kan. 794, 31 Pac. Rep. 693), Animals, 80, 103, 560; Fences, 63.
Missouri Pac. R. Co. *v.* Edwards (75 Tex. 334, 12 S. W. Rep. 853), App., 61; Car. of M., 481.
Missouri Pac. R. Co. *v.* Edwards (78 Tex. 307, 14 S. W. Rep. 607), Car. of L. S., 87, 138, 144.
Missouri Pac. R. Co. *v.* Evans (37 Am. & Eng. R. Cas. 144, 71 Tex. 361, 9 S. W. Rep. 325), Tresp., Inj. to, 73.
Missouri Pac. R. Co. *v.* Fagan (35 Am. & Eng. R. Cas. 666, 72 Tex. 127, 9 S. W. Rep. 749, 2 L. R. A. 75), Car. of L. S., 31, 62, 80, 89, 145, 156; Car. of M., 768; Custom, 2; Evid., 37, 148, 202; Lim. of Liab., 17; Witn., 97, 110.
Missouri Pac. R. Co. *v.* Fennell (79 Tex. 448, 15 S. W. Rep. 693), Car. of L. S., 146.
Missouri Pac. R. Co. *v.* Finley (38 Kan. 550, 16 Pac. Rep. 951), Agency, 52; Car. of L. S., 112; Pl., 75; Stat., 18, 19; Witn., 147.
Missouri Pac. R. Co. *v.* Flannigan (47 Ill. App. 322), Attach., 7.
Missouri Pac. R. Co. *v.* Foreman (73 Tex. 311, 11 S. W. Rep. 326), Car. of P., 38, 135, 633; Contrib. Neg., 102.

Missouri Pac. R. Co. *v.* Gano (47 Kan. 457, 28 Pac. Rep. 155), Ejectm., 7.
Missouri Pac. R. Co. *v.* Gedney (45 Am. & Eng. R. Cas. 492, 44 Kan. 329, 24 Pac. Rep. 464), Animals, 64.
Missouri Pac. R. Co. *v.* Gernan (84 Tex. 141, 19 S. W. Rep. 461), Evid., 204.
Missouri Pac. R. Co. *v.* Gill (49 Kan. 441, 30 Pac. Rep. 414), Animals, 80, 308.
Missouri Pac. R. Co. *v.* Graves (2 Tex. App. (Civ. Cas.) 594), Car. of L. S., 21; Evid., 115; Pl., 23.
Missouri Pac. R. Co. *v.* Haley (5 Am. & Eng. R. Cas. 594, 25 Kan. 35), Employés Inj. to, 162; Fel. Serv., 163, 178, 179.
Missouri Pac. R. Co. *v.* Harmonson (4 Tex. App. (Civ. Cas.) 133, 16 S. W. Rep. 539), Car. of M., 50; Witn., 142.
Missouri Pac. R. Co. *v.* Harrelson (45 Am. & Eng. R. Cas. 457, 44 Kan. 253, 24 Pac. Rep. 465), Fences, 4, 39.
Missouri Pac. R. Co. *v.* Harris (1 Tex. App. (Civ. Cas.) 730), Car. of L. S., 68; Car. of M., 1, 2, 14; Int. Com., 217; Lim. of Liab., 25, 28.
Missouri Pac. R. Co. *v.* Harris (28 Am. & Eng. R. Cas. 107, 67 Tex. 166, 2 S. W. Rep. 574), Car. of L. S., 78, 80; Car. of M., 482; Lim. of Liab., 28.
Missouri Pac. R. Co. *v.* Haynes (37 Am. & Eng. R. Cas. 645, 72 Tex. 175, 10 S. W. Rep. 398), Car. of M., 82, 363.
Missouri Pac. R. Co. *v.* Haynes (82 Tex. 448, 18 S. W. Rep. 605), Judgm., 43.
Missouri Pac. R. Co. *v.* Hays (14 Am. & Eng. R. Cas. 177, 15 Neb. 224, 18 N. W. Rep. 51), Em. Dom., 460, 698, 921.
Missouri Pac. R. Co. *v.* Heath (Tex.) (18 S. W. Rep. 477), Car. of L. S., 150.
Missouri Pac. R. Co. *v.* Heidenheimer (82 Tex. 195, 17 S. W. Rep. 608), Bills of L., 56, 108, 112, 123; Car. of M., 307, 513.
Missouri Pac. R. Co. *v.* Hennessey (42 Am. & Eng. R. Cas. 225, 75 Tex. 155, 12 S. W. Rep. 608), App., 37; Evid., 87; Negl., 89; Pl., 23, 26, 112.
Missouri Pac. R. Co. *v.* Henning (48 Kan. 465, 29 Pac. Rep. 597), Costs, 5.
Missouri Pac. R. Co. *v.* Henry (75 Tex. 220, 12 S. W. Rep. 828), Children, Inj. to, 193; Death, etc., 46, 324; Employés, Inj. to, 134.
Missouri Pac. R. Co. *v.* Hewett (2 Tex. App. (Civ. Cas.) 205), Car. of M., 795.
Missouri Pac. R. Co. *v.* Hill (3 Tex. App. (Civ. Cas.) 454), Fel. Serv., 94, 358.
Missouri Pac. R. Co. *v.* Holcomb (44 Am. & Eng. R. Cas. 303, 44 Kan. 332, 24 Pac. Rep. 467), Car. of P., 288, 289.
Missouri Pac. R. Co. *v.* Holley (30 Kan. 465, 1 Pac. Rep. 130, 554), App., 117.
Missouri Pac. R. Co. *v.* Houseman (41 Kan. 300, 304, 21 Pac. Rep. 284), Em. Dom., 283; Lim. of Ac., 55.
Missouri Pac. R. Co. *v.* Howe (4 Tex. App. (Civ. Cas.) 296, 15 S. W. Rep. 198), Fires, 170.
Missouri Pac. R. Co. *v.* Humes (22 Am. & Eng. R. Cas. 557, 115 U. S. 512, 6 Sup. Ct. Rep. 110), Animals, 10; Fences, 6.
Missouri Pac. R. Co. *v.* International Marine Ins. Co. (55 Am. & Eng. R. Cas. 548, 84 Tex. 149, 19 S. W. Rep. 459), Agency, 16; Bills of L., 99; Car. of M., 411, 482; Fire Ins., 15.
Missouri Pac. R. Co. *v.* Ivy (37 Am. & Eng. R. Cas. 46, 71 Tex. 409, 1 L. R. A. 500, 9 S. W. Rep. 346), Car. of L. S., 125, 126; Evid., 176.
Missouri Pac. R. Co. *v.* Ivy (79 Tex. 444, 15 S. W. Rep. 692), Car. of L. S., 34, 140, 146.
Missouri Pac. R. Co. *v.* James (Tex.) (10 S. W. Rep. 332), Employés, Inj. to, 622; Fel. Serv., 62, 73.
Missouri Pac. R. Co. *v.* Jarrard (65 Tex. 560), Employés, Inj. to, 759; Witn., 99.
Missouri Pac. R. Co. *v.* Johnson (44 Kan. 660, 24 Pac. Rep. 1116), Evid., 291.
Missouri Pac. R. Co. *v.* Johnson (37 Am. & Eng. R. Cas. 128, 72 Tex. 95, 10 S. W. Rep. 325), Car. of P., 165, 166; Dam., 38; Derailm., 6; Evid., 164; New Tr., 72; Phys. Exam., 4.
Missouri Pac. R. Co. *v.* Johnson (3 Tex. App. (Civ. Cas.) 334), Flood. Lds., 70, 98.
Missouri Pac. R. Co. *v.* Johnston (35 Kan. 58, 10 Pac. Rep. 103), Animals, 159.
Missouri Pac. R. Co. *v.* Jones (41 Am. & Eng. R. Cas. 363, 75 Tex. 151, 12 S. W. Rep. 972), Employés, Inj. to, 497, 772.
Missouri Pac. R. Co. *v.* Kaiser (82 Tex. 144, 18 S. W. Rep. 305), Eject. Pass., 106.
Missouri Pac. R. Co. *v.* Kincaid (11 Am. & Eng. R. Cas. 83, 29 Kan. 654), Fires, 248, 252, 324.
Missouri Pac. R. Co. *v.* King (2 Tex. Civ. App. 122, 20 S. W. Rep. 1014, 23 S. W. Rep. 917), Employés, Inj. to, 29, 458.
Missouri Pac. R. Co. *v.* King (15 Am. & Eng. R. Cas. 529, 35 Kan. 500, 3 Pac. Rep. 371), Animals, 187, 536.
Missouri Pac. R. Co. *v.* Kocher (46 Kan. 272, 26 Pac. Rep. 731), Animals, 185.
Missouri Pac. R. Co. *v.* Kuthman (2 Tex. App. (Civ. Cas.) 406), Charges, 27, 56; Trial, 21.
Missouri Pac. R. Co. *v.* Lamothe (76 Tex. 219, 13 S. W. Rep. 194), Death, etc., 221, 225, 352; Evid., 149, 160; Trial, 93.
Missouri Pac. R. Co. *v.* Lawler (3 Tex. App. (Civ. Cas.) 38), Animals, 50; Negl., 3.
Missouri Pac. R. Co. *v.* Lee (35 Am. & Eng. R. Cas. 364, 70 Tex. 496, 7 S. W. Rep. 857), Children, Inj. to, 182; Cross., Inj. at, 102; Death, etc., 136; Dedica., 2; Estop., 19; Negl., 104; Sts. & H., 14.
Missouri Pac. R. Co. *v.* Leggett (27 Kan. 323), Animals, 127.
Missouri Pac. R. Co. *v.* Lehmberg (75 Tex. 61, 12 S. W. Rep. 838), Death, etc., 210, 429, 430; Employés, Inj. to, 216; Evid., 46, 89; Trial, 126.
Missouri Pac. R. Co. *v.* Levi (4 Tex. App. (Civ. Cas.) 20), Car. of M., 18.
Missouri Pac. R. Co. *v.* Lewis (24 Neb. 848, 2 L. R. A. 67, 40 N. W. Rep. 401), Death, etc., 63, 90, 110; Evid., 166.
Missouri Pac. R. Co. *v.* Long (81 Tex. 253, 16 S. W. Rep. 1016), Car. of P., 236, 241, 406.

Missouri Pac. R. Co. *v.* Lybrand (3 Tex. App. (Civ. Cas.) 405), Charges, 55.
Missouri Pac. R. Co. *v.* Lyde (11 Am. & Eng. R. Cas. 188, 57 Tex. 505), Dam., 86, 105; Employés, Inj. to, 99, 142.
Missouri Pac. R. Co. *v.* Lynch (15 Am. & Eng. R. Cas. 517, 31 Kan. 531, 3 Pac. Rep. 372), Cat.-Gds., 5.
Missouri Pac. R. Co. *v.* McCally (41 Kan. 639, 655, 21 Pac. Rep. 574), Employés, Inj. to, 330, 542, 726.
Missouri Pac. R. Co. *v.* McClanahan (27 Am. & Eng. R. Cas. 82, 66 Tex. 530, 1 S. W. Rep. 576), Tickets & F., 29.
Missouri Pac. R. Co. *v.* McElyea (38 Am. & Eng. R. Cas. 200, 71 Tex. 386, 9 S. W. Rep. 313, 1 L. R. A. 411), Employés, Inj. to, 19, 145; Trial, 197.
Missouri Pac. R. Co. *v.* McKernan (82 Tex. 204, 17 S. W. Rep. 1057), Stat. & D., 110.
Missouri Pac. R. Co. *v.* Mackey (22 Am. & Eng. R. Cas. 306, 33 Kan. 298, 6 Pac. Rep. 291), Fel. Serv., 163, 181, 463; New Tr., 74; Witn., 98, 143.
Missouri Pac. R. Co. *v.* Mackey (33 Am. & Eng. R. Cas. 390, 127 U. S. 205, 8 Sup. Ct. Rep. 1161; affirming 22 Am. & Eng. R. Cas. 306, 33 Kan. 298, 6 Pac. Rep. 291), Fel. Serv., 163.
Missouri Pac. R. Co. *v.* McLiney (32 Mo. App. 166), Assump., 4; Bills of L., 56, 122.
Missouri Pac. R. Co. *v.* Maffit (94 Mo. 56, 12 West. Rep. 412, 6 S. W. Rep. 600), Adv. Poss., 7; Words & Ph., 18.
Missouri Pac. R. Co. *v.* Maltby (25 Am. & Eng. R. Cas. 421, 34 Kan. 125, 8 Pac. Rep. 235), Attach., 35.
Missouri Pac. R. Co. *v.* Manson (13 Am. & Eng. R. Cas. 540, 31 Kan. 337, 2 Pac. Rep. 800), Cat.-Gds., 8, 15, 16; Words & Ph., 41.
Missouri Pac. R. Co. *v.* Marten (Tex.) (22 Am. & Eng. R. Cas. 409), Trial, 159; Witn., 96.
Missouri Pac. R. Co. *v.* Martin (2 Tex. App. (Civ. Cas.) 571), Witn., 94.
Missouri Pac. R. Co. *v.* Martino (2 Tex. Civ. App. 634, 18 S. W. Rep. 1066, 21 S. W. Rep. 781), Car. of P., 649; Husb. & W., 23; Tickets & F., 84.
Missouri Pac. R. Co. *v.* Merrill (40 Kan. 404, 19 Pac. Rep. 793), App., 60; Fires, 5, 171, 263, 335.
Missouri Pac. R. Co. *v.* Metzger (35 Am. & Eng. R. Cas. 148, 24 Neb. 90, 38 N. W. Rep. 27), Animals, 460; Trial, 88.
Missouri Pac. R. Co. *v.* Mitchell (72 Tex. 171, 10 S. W. Rep. 411), Car. of P., 176, 646; Pl., 116.
Missouri Pac. R. Co. *v.* Mitchell (41 Am. & Eng. R. Cas. 224, 75 Tex. 77, 12 S. W. Rep. 810), Dam., 42, 77, 78; Evid., 90; Trial, 53.
Missouri Pac. R. Co. *v.* Morrow (19 Am. & Eng. R. Cas. 630, 32 Kan. 217, 4 Pac. Rep. 87), Cat.-Gds., 9, 16.
Missouri Pac. R. Co. *v.* Morrow (31 Am. & Eng. R. Cas. 520, 36 Kan. 495, 13 Pac. Rep. 789), Animals, 328; Bills of Partic., 3.
Missouri Pac. R. Co. *v.* Moseley (57 Fed. Rep. 921), Contrib. Neg., 8, 123; Licensees, Inj. to, 26; Tresp., Inj. to, 105.
Missouri Pac. R. Co. *v.* Neiswanger (39 Am. & Eng. R. Cas. 471, 41 Kan. 621, 21 Pac. Rep. 582), Car. of P., 445; Evid., 67; Stat. & D., 143.
Missouri Pac. R. Co. *v.* Nevin (16 Am. & Eng. R. Cas. 252, 31 Kan. 385, 2 Pac. Rep. 791), Car. of M., 116; Witn., 116.
Missouri Pac. R. Co. *v.* Nicholson (2 Tex. App. (Civ. Cas.) 147), Car. of L. S., 11, 156; Evid., 148.
Missouri Pac. R. Co. *v.* Owens (1 Tex. App. (Civ. Cas.) 163), Consol., 1, 47; Contr., 46; Estop., 16; Evid., 164, 204; Leases, 12.
Missouri Pac. R. Co. *v.* Paine (1 Tex. Civ. App. 621, 21 S. W. Rep. 78), Car. of L. S., 83, 143; Evid., 275.
Missouri Pac. R. Co. *v.* Parkhurst (3 Tex. App. (Civ. Cas.) 198), Charges, 27, 55.
Missouri Pac. R. Co. *v.* Peay (Tex.) (20 S. W. Rep. 57), Cross., Inj. at, 264, 359; New Tr., 38.
Missouri Pac. R. Co. *v.* Peregoy (36 Kan. 424, 14 Pac. Rep. 7), Death, etc., 275, 374; Fel. Serv., 146.
Missouri Pac. R. Co. *v.* Pierce (19 Am. & Eng. R. Cas. 318, 33 Kan. 61, 5 Pac. Rep. 378), Cross., Inj. at, 113, 130.
Missouri Pac. R. Co. *v.* Pierce (39 Kan. 391, 18 Pac. Rep. 305), Evid., 294.
Missouri Pac. R. Co. *v.* Piper (26 Kan. 58), Animals, 349; Pl., 156.
Missouri Pac. R. Co. *v.* Platzer (38 Am. & Eng. R. Cas. 366, 73 Tex. 117, 11 S. W. Rep. 160, 3 L. R. A. 639), Fires, 74, 78, 319.
Missouri Pac. R. Co. *v.* Platzer (Tex.) (15 S. W. Rep. 577), App., 117.
Missouri Pac. R. Co. *v.* Porter (73 Tex. 304, 11 S. W. Rep. 324), Children, Inj. to, 167.
Missouri Pac. R. Co. *v.* Porter (112 Mo. 361, 20 S. W. Rep. 568), Em. Dom., 646, 649, 680, 681, 688.
Missouri Pac. R. Co. *v.* Price (3 Tex. App. (Civ. Cas.) 430), Bills of L., 10.
Missouri Pac. R. Co. *v.* Rabb (3 Tex. App. (Civ. Cas.) 63), Fires, 345.
Missouri Pac. R. Co. *v.* Rains (3 Tex. App. (Civ. Cas.) 90), Charges, 55, 56.
Missouri Pac. R. Co. *v.* Reynolds (13 Am. & Eng. R. Cas. 510, 31 Kan. 132, 1 Pac. Rep. 150), Animals, 67, 576.
Missouri Pac. R. Co. *v.* Richmond (38 Am. & Eng. R. Cas. 241, 73 Tex. 568, 4 L. R. A. 280, 11 S. W. Rep. 555, 29 Cent. L. J. 69), Libel & S., 2, 7, 8, 12.
Missouri Pac. R. Co. *v.* Ricketts (45 Am. & Eng. R. Cas. 485, 45 Kan. 617, 26 Pac. Rep. 50), Cat.-Gds., 9, 34.
Missouri Pac. R. Co. *v.* Roads (23 Am. & Eng. R. Cas. 165, 33 Kan. 640, 7 Pac. Rep. 213), Animals, 153, 217, 386; Fences, 84.
Missouri Pac. R. Co. *v.* Rountree (2 Tex. App. (Civ. Cas.) 330), Med. Serv., 18.
Missouri Pac. R. Co. *v.* Rushin (3 Tex. App. (Civ. Cas.) 385), Car. of M., 717, 771.
Missouri Pac. R. Co. *v.* Russell (Tex.) (15 S. W. Rep. 206), Car. of L. S., 159.

Missouri Pac. R. Co. *v.* Russell (Tex.) (18 S. W. Rep. 594), Car. of L. S., 158.
Missouri Pac. R. Co. *v.* Ryan (2 Tex. App. (Civ. Cas.) 378), Bills of L., 53; Car. of L. S., 89.
Missouri Pac. R. Co. *v.* Sasse (Tex. Civ. App.) (22 S. W. Rep. 187), Employés, Inj. to, 603, 667; Fel. Serv., 83, 217, 335.
Missouri Pac. R. Co. *v.* Scammon (41 Kan. 521, 21 Pac. Rep. 590), Judgm., 20.
Missouri Pac. R. Co. *v.* Schoennen (37 Mo. App. 612), Trial, 133.
Missouri Pac. R. Co. *v.* Scott (78 Tex. 360, 14 S. W. Rep. 791), App., 8.
Missouri Pac. R. Co. *v.* Scott (2 Tex. App. (Civ. Cas.) 279), Car. of L. S., 80.
Missouri Pac. R. Co. *v.* Sharitt (44 Am. & Eng. R. Cas. 657, 43 Kan. 375, 387, 23 Pac. Rep. 430), Employés, 14.
Missouri Pac. R. Co. *v.* Sherwood (55 Am. & Eng. R. Cas. 478, 84 Tex. 125, 19 S. W. Rep. 455), Bills of L., 55; Car. of M., 481, 482, 483; Evid., 160, 194, 205, 279; Lim. of Liab., 26.
Missouri Pac. R. Co. *v.* Shuford (37 Am. & Eng. R. Cas. 194, 72 Tex. 165, 10 S. W. Rep. 408), Car. of P., 637, 646; Dam., 38; Negl., 3.
Missouri Pac. R. Co. *v.* Shumaker (46 Kan. 769, 27 Pac. Rep. 126), Animals, 56; Witn., 149.
Missouri Pac. R. Co. *v.* Slater (3 Tex. App. (Civ. Cas.) 25), Bagg., 26, 45.
Missouri Pac. R. Co. *v.* Smith (Tex.) (16 S. W. Rep. 803), Car. of L. S., 73.
Missouri Pac. R. Co. *v.* Smith (84 Tex. 348, 19 S. W. Rep. 509), Car. of L. S., 145; Car. of M., 708.
Missouri Pac. R. Co. *v.* Somers (71 Tex 700, 9 S. W. Rep. 741), Employés, Inj. to, 209.
Missouri Pac. R. Co. *v.* Somers (78 Tex 439, 14 S. W. Rep. 779), Employés, Inj. to, 238, 338.
Missouri Pac. R. Co. *v.* Speed (3 Tex. Civ. App. 454, 22 S. W. Rep. 527), Evid., 130; Lim. of Ac., 24; Pl., 149; Sts. & H., 176.
Missouri Pac. R. Co. *v.* Stevens (35 Kan. 622, 12 Pac. Rep. 25), Animals, 192; Witn., 106.
Missouri Pac. R. Co. *v.* Stults (15 Am. & Eng. R. Cas. 97, 31 Kan. 752, 3 Pac. Rep. 522), Agency, 38; Stat. Agts., 2, 5.
Missouri Pac. R. Co. *v.* Teague (2 Tex. App. (Civ. Cas.) 685), Fires, 152.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (28 Am. & Eng. R. Cas. 1, 30 Fed. Rep. 2), Discrim., 59; Int. Com., 30; Par. & Comp. L., 5.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (31 Fed. Rep. 526), Fires, 248.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (31 Fed. Rep. 527), Fel. Serv., 268, 464.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (31 Am. & Eng. R. Cas. 76, 31 Fed. Rep. 862), Int. Com., 112; Receiv., 57, 65.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (31 Fed. Rep. 864), Car. of M., 50.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (33 Fed. Rep. 359), Refer., 4.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (33 Fed. Rep. 360), Fires, 277.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (33 Fed. Rep. 361), Fires, 274.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (33 Fed. Rep. 701), Receiv., 66.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (33 Fed. Rep. 803), Employés, Inj. to, 779; Refer., 4.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (34 Fed. Rep. 92), Car. of P., 576.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (36 Fed. Rep. 879), Car. of P., 377.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (38 Fed. Rep. 775), Costs, 10.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (38 Fed. Rep. 816), Fel. Serv., 90, 252.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (41 Fed. Rep. 319), Receiv., 66.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (41 Fed. Rep. 913), Car. of L. S., 34, 39, 146.
Missouri Pac. R. Co. *v.* Texas & P. R. Co. (41 Fed. Rep. 917), Fires, 47, 268.
Missouri Pac. R. Co. *v.* Texas Pac. R. Co. (42 Am. & Eng. R. Cas. 34, 41 Fed. Rep. 311), New Tr., 86; Receiv., 124.
Missouri Pac. R. Co. *v.* Texas Pac. R. Co. (41 Fed. Rep. 316), Cross., Inj. at, 305; Imp. Neg., 24.
Missouri Pac. R. Co. *v.* Turner (2 Tex. App. (Civ. Cas.) 720), Agency, 115.
Missouri Pac. R. Co. *v.* Twiss (55 Am. & Eng. R. Cas. 434, 35 Neb. 267, 53 N. W. Rep. 76), Car. of M., 548.
Missouri Pac. R. Co. *v.* Tygard (22 Am. & Eng. R. Cas. 54, 84 Mo. 263, 54 Am. Rep. 97), Subscr., 32, 212, 217.
Missouri Pac. R. Co. *v.* Vandeventer (37 Am. & Eng. R. Cas. 651, 26 Neb. 222, 41 N. W. Rep. 998), Car. of M., 484.
Missouri Pac. R. Co. *v.* Vandeventer (28 Neb. 112), Animals, 536.
Missouri Pac. R. Co. *v.* Walker (Tex.) (7 S. W. Rep. 791), Evid., 282; New Tr., 90.
Missouri Pac. R. Co. *v.* Watson (72 Tex. 631, 10 S. W. Rep. 731), Car. of P., 366; Contrib. Neg., 75.
Missouri Pac. R. Co. *v.* Watts (22 Am. & Eng. R. Cas. 277, 63 Tex. 549), Employés, Inj. to, 7, 27, 182; Fel. Serv., 113; Leases, 60.
Missouri Pac. R. Co. *v.* Watts (64 Tex. 568), Employés, Inj. to, 29.
Missouri Pac. R. Co. *v.* Weisman (2 Tex. Civ. App. 86, 21 S. W. Rep. 426), Car. of M., 632, 645.
Missouri Pac. R. Co. *v.* Weisen (65 Tex. 443), Tresp., Inj. to, 111.
Missouri Pac. R. Co. *v.* Wernwag (35 Mo. App. 449), Em. Dom., 557, 673, 854.
Missouri Pac. R. Co. *v.* Whipsker (77 Tex. 14, 13 S. W. Rep. 639), Attach., 39.
Missouri Pac. R. Co. *v.* White (3 Tex. App. (Civ. Cas.) 200), Car. of M., 778; Evid., 115.
Missouri Pac. R. Co. *v.* White (76 Tex. 102, 13 S. W. Rep. 65), Employés, Inj. to, 34.
Missouri Pac. R. Co. *v.* White (48 Am. & Eng. R. Cas. 206, 80 Tex. 202, 15 S. W. Rep. 808), App., 69; Employés, Inj. to, 348, 745; New Tr., 33, 91; Rem. of C., 59.
Missouri Pac. R. Co. *v.* Williams (75 Tex.

4, 12 S. W. Rep. 835), Employés, Inj. to, 312; Fel. Serv., 81, 217, 315, 333.
Missouri Pac. R. Co. *v.* Wilson (11 Am. & Eng. R. Cas. 447, 28 Kan. 637), Animals, 187, 192, 249.
Missouri Pac. R. Co. *v.* Wilson (45 Mo. App. 1), Em. Dom., 259.
Missouri Pac. R. Co. *v.* Wise (3 Tex. App. (Civ. Cas.) 461), Dam., 66; Fires, 358; Parties, 6; Proc., 4.
Missouri Pac. R. Co. *v.* Wortham (37 Am. & Eng. R. Cas. 82, 73 Tex. 25, 3 L. R. A. 368, 10 S. W. Rep. 741), Car. of P., 238, 239, 609; Stat. & D., 76; Tresp., Inj. to, 126.
Missouri Pac. R. Co. *v.* York (18 Am. & Eng. R. Cas. 623, 2 Tex. App. (Civ. Cas.) 557), Bagg., 40, 88, 104.
Missouri Pac. R. Co. *v.* Young (25 Neb. 651, 41 N. W. Rep. 646), Car. of M., 539; Transfer Cos., 2.
Missouri Pac. R. Co. *v.* Youngstrom (47 Kan. 349, 27 Pac. Rep. 982), Fences, 44.
Missouri River, Ft. S. & G. R. Co. *v.* Blake (9 Kan. 489), Tax., 260.
Missouri River, Ft. S. & G. R. Co. *v.* Brickley (21 Kan. 275), Contr., 72.
Missouri River, Ft. S. & G. R. Co. *v.* Miami County Com'rs (12 Kan. 482), Contr., 12; Counties, 7.
Missouri River, Ft. S. & G. R. Co. *v.* Miami County Com'rs (12 Kan. 230), Mun. Aid, 161, 397.
Missouri River, Ft. S. & G. R. Co. *v.* Morris (7 Kan. 210, 1 Am. Ry. Rep. 353), Tax., 27, 260.
Missouri River, Ft. S. & G. R. Co. *v.* Morris (13 Kan. 302), Tax., 118.
Missouri River, Ft. S. & G. R. Co. *v.* Owen (8 Kan. 409, 5 Am. Ry. Rep. 119), Em. Dom., 559, 561, 629, 644, 931, 943.
Missouri River, Ft. S. & G. R. Co. *v.* Shepard (9 Kan. 647), Em. Dom., 291, 335.
Missouri River, Ft. S. & G. R. Co. *v.* Shirley (20 Kan. 660), Animals, 627; Appeal., 6; Words & Ph., 186.
Missouri River Packet Co. *v.* Hannibal & St. J. R. Co. (20 Am. & Eng. R. Cas. 275, 79 Mo. 478), Bridges, 49, 71, 82, 86.
Missouri River Packet Co. *v.* Hannibal & St. J. R. Co. (1 McCrary (U. S.) 281, 2 Fed. Rep. 285), Bridges, 3, 21, 49; Dam., 65.
Missouri River R. Co. *v.* Richards (8 Kan. 101), Employés, 18; Officers, 14; Trial, 186; Witn., 113.
Missouri Valley & B. R. & B. Co. *v.* Harrison County (74 Iowa 283, 37 N. W. Rep. 372), Tax., 259.
Missouri Valley R. Co. *v.* Caldwell (8 Kan. 244, 5 Am. Ry. Rep. 287), Car. of M., 454.
Mitchell, Ex parte (12 So. Car. 83), Receiv., 94.
Mitchell, In re (L. R. 6 Ch. D. 655, 37 L. T. 145, 25 W. R. 903), Debent., 7.
Mitchell *v.* Broadway & S. A. R. Co. (54 N. Y. S. R. 116, 70 Hun 387, 24 N. Y. Supp. 32), New Tr., 45, 77.
Mitchell *v.* Chesapeake & O. R. Co. (17 Ill. App. 231), Bills of L., 48.
Mitchell *v.* Chicago & G. T. R. Co. (12 Am. & Eng. R. Cas. 163, 51 Mich. 236, 16 N. W. Rep. 388, 47 Am. Rep. 566), Car. of P., 408, 411; Negl., 40, 43, 100.
Mitchell *v.* Deeds (49 Ill. 416), Consol., 8.
Mitchell *v.* Georgia R. Co. (68 Ga. 644), Car. of L. S., 62; Pl., 148.
Mitchell *v.* Great Western R. Co. (35 U. C. Q. B. 148), Em. Dom., 1281.
Mitchell *v.* Great Western R. Co. (38 U. C. Q. B. 471), Em. Dom., 1252, 1262, 1265.
Mitchell *v.* Illinois & St. L. R. & C. Co. (68 Ill. 286), Em. Dom., 517, 957.
Mitchell *v.* Illinois & St. L. R. & C. Co. (85 Ill. 566), Em. Dom., 567, 926.
Mitchell *v.* Kavanagh (38 Iowa 286), Constr. Rys., 58.
Mitchell *v.* Lancashire & Y. R. Co. (10 Q. B. 256, 44 L. J. Q. B. 107, 23 W. R. 853, 33 L. T. 161, 3 Ry. & C. T. Cas. xxviii), Car. of M., 324, 328.
Mitchell *v.* Metropolitan El. R. Co. (4 Silv. App. 82, 132 N. Y. 552, 30 N. E. Rep. 385, 43 N. Y. S. R. 476; affirming 56 Hun 642, 31 N. Y. S. R. 80, 9 N. Y. Supp. 130), App., 107; Elev. Rys., 118, 121, 141; Em. Dom., 909.
Mitchell *v.* Metropolitan El. R. Co. (134 N. Y. 11, 31 N. E. Rep. 260, 45 N. Y. S. R. 318; affirming 31 N. Y. S. R. 625, 9 N. Y. Supp. 829), Elev. Rys., 88.
Mitchell *v.* Missouri Pac. R. Co. (82 Mo. 106), Animals, 608, 629.
Mitchell *v.* New Orleans & N. E. R. Co. (41 La. Ann. 363, 6 So. Rep. 522), Em. Dom., 1074; Lim. of Ac., 18.
Mitchell *v.* New York C. & H. R. R. Co. (2 Hun (N. Y.) 535, 5 T. & C. 122; affirmed on another point in 64 N. Y. 655, mem.), Death, etc., 424.
Mitchell *v.* New York C. & H. R. R. Co. (64 N. Y. 655; affirming 2 Hun 535, 5 T. & C. 122), Death, etc., 194.
Mitchell *v.* New York, L. E. & W. R. Co. (146 U. S. 513, 13 Sup. Ct. 259), Death, etc., 330.
Mitchell *v.* New York, L. E. & W. R. Co. (36 Hun (N. Y.) 177), Flood. Lds., 38.
Mitchell *v.* Philadelphia, W. & B. R. Co. (132 Pa. St. 226, 19 Atl. Rep. 28), Children, Inj. to, 34.
Mitchell *v.* Rochester R. Co. (25 N. Y. Supp. 744, 4 Misc. 575, 30 Abb. N. Cas. 362; affirmed in 77 Hun 607, mem.), Dam., 72; Negl., 44.
Mitchell *v.* Rome R. Co. (17 Ga. 574), Bills & N., 1, 4, 8; Subscr., 131, 186.
Mitchell *v.* Southern Pac. R. Co. (87 Cal. 62, 25 Pac. Rep. 245), App., 38; Car. of P., 479, 483, 567; Evid., 144.
Mitchell *v.* Southwestern R. Co. (75 Ga. 398), Jurisd., 7; Mal. Pros., 3; Proc., 40.
Mitchell *v.* State (94 Ala. 68, 10 So. Rep. 518), Crim. L., 35; Witn., 65.
Mitchell *v.* Strough (35 Hun (N. Y.) 83), Mun. Aid, 438.
Mitchell *v.* United States Exp. Co. (46 Iowa 214), Bills of L., 21; Car. of M., 473.
Mitchell *v.* Western & A. R. Co. (30 Ga. 22), Car. of P., 149; Car. of Slaves, 2, 4; Evid., 133.

Mitchell *v.* Western & A. R. Co. (66 Ga. 242), Cert., 12.
Mix *v.* Illinois C. R. Co. (116 Ill. 502, 6 N. E. Rep. 42), Abate., 10.
Mix *v.* Lafayette, B. & M. R. Co. (67 Ill. 319), Em. Dom., 357, 559; Sts. & H., 244, 271, 288.
Moakler *v.* Willamette Valley R. Co. (41 Am. & Eng. R. Cas. 135, 18 Oreg. 189, 22 Pac. Rep. 948, 6 L. R. A. 656), Car. of P., 493.
Moberly *v.* Kansas City, St. J. & C. B. R. Co. (17 Mo. App. 518; affirmed in 98 Mo. 183, 11 S. W. Rep. 569), Cross., Inj. at, 29, 276.
Moberly *v.* Kansas City, St. J. & C. B. R. Co. (98 Mo. 183, 11 S. W. Rep. 569), Cross., Inj. at, 245; Cross., Sts. & H., 10; Trial, 145.
Mobile *v.* Louisville & N. R. Co. (36 Am. & Eng. R. Cas. 171, 84 Ala. 115, 4 So. Rep. 106), Franch., 3, 5, 9; Sts. & H., 302.
Mobile *v.* Watson (116 U. S. 289, 6 Sup. Ct. Rep. 398), Mun. Aid, 24, 390.
Mobile & B. R. Co. *v.* Holborn (84 Ala. 133, 4 So. Rep. 146), Employés, Inj. to, 141, 300, 591.
Mobile & B. R. Co. *v.* Kimbrough (96 Ala. 127, 11 So. Rep. 307), Animals, 62.
Mobile & B. R. Co. *v.* Ladd (92 Ala. 287, 9 So. Rep. 169), Animals, 383.
Mobile & B. R. Co. *v.* Worthington (95 Ala. 598, 10 So. Rep. 839), Constr. Rys., 111, 112; Evid., 173; Witn., 175.
Mobile & C. P. R. Co. *v.* Talman (15 Ala. 472), Mort., 1, 86; Pl., 82.
Mobile & G. R. Co. *v.* Alabama Midland R. Co. (39 Am. & Eng. R. Cas. 6, 87 Ala. 501, 6 So. Rep. 404), Em. Dom., 115.
Mobile & G. R. Co. *v.* Alabama Midland R. Co. (39 Am. & Eng. R. Cas. 117, 87 Ala. 520, 6 So. Rep. 407), Cross. Rys., 70; Em. Dom., 247, 1040.
Mobile & G. R. Co. *v.* Caldwell (83 Ala. 196, 3 So. Rep. 445), Animals, 51, 480, 493; Tresp., Inj. to, 124.
Mobile & G. R. Co. *v.* Cogsbill (85 Ala. 456, 5 So. Rep. 188), Adv. Poss., 5; Evid., 205.
Mobile & G. R. Co. *v.* Copeland (63 Ala. 219, 35 Am. Rep. 13), Car. of M., 586.
Mobile & G. R. Co. *v.* Jones (57 Ga. 198), Guar., 2.
Mobile & G. R. Co. *v.* Peebles (47 Ala. 317), Tax., 18, 332.
Mobile & G. R. Co. *v.* Pike County Com'rs Court (97 Ala. 105, 11 So. Rep. 732), Mand., 29.
Mobile & G. R. Co. *v.* Prewitt (46 Ala. 63), Car. of M., 1, 325, 359.
Mobile & G. R. Co. *v.* Williams (52 Ala. 278), Trial, 144.
Mobile & G. R. Co. *v.* Williams (54 Ala. 168), Car. of M., 712; Evid., 11.
Mobile & M. R. Co. *v.* Ashcraft (48 Ala. 15), Evid., 46, 67, 219; New Tr., 28; Trial, 149.
Mobile & M. R. Co. *v.* Ashcraft (49 Ala. 305), Derailm., 3; Evid., 67.
Mobile & M. R. Co. *v.* Blakely (59 Ala. 471), Animals, 571; Crim. L., 13; Negl., 7; Tresp., Inj. to, 3, 64; Witn., 150.
Mobile & M. R. Co. *v.* Brewer (76 Ala. 135), Stat. Agts., 11.
Mobile & M. R. Co. *v.* Clanton (59 Ala. 392), Employés, 16; Employés, Inj. to, 341; Set-off, 6.
Mobile & M. R. Co. *v.* Crenshaw (8 Am. & Eng. R. Cas. 340, 65 Ala. 566), Children, Inj. to, 2, 74, 75; Contrib. Neg., 56; Lim. of Ac., 60; Pl., 23.
Mobile & M. R. Co. *v.* Gilmer (85 Ala. 422, 5 So. Rep. 138), Consol., 39, 42; Cov'ts, 5, 17; Dam., 54; Estop., 30.
Mobile & M. R. Co. *v.* Jay (61 Ala. 247), Med. Serv., 15.
Mobile & M. R. Co. *v.* Jay (65 Ala. 113), Evid., 230.
Mobile & M. R. Co. *v.* Jurey (16 Am. & Eng. R. Cas. 132, 111 U. S. 584, 4 Sup. Ct. Rep. 566), Bills of L., 24, 43; Car. of M., 158, 718.
Mobile & M. R. Co. *v.* McKellar (59 Ala. 458), Tresp., 6.
Mobile & M. R. Co. *v.* Smith (59 Ala. 245), Agency, 85; Employés, Inj. to, 590; Fel. Serv., 1, 136, 142, 198, 214, 215, 354.
Mobile & M. R. Co. *v.* Steiner (61 Ala. 559), Charges, 10, 61; Paym., 5; Reorg., 12; Stat., 15.
Mobile & M. R. Co. *v.* Wilkinson (72 Ala. 286), Deeds, 2.
Mobile & M. R. Co. *v.* Yeates (67 Ala. 164), Att'ys, 23; Estop., 3.
Mobile & O. R. Co. *v.* Barnhill (50 Am. & Eng. R. Cas. 646, 91 Tenn. 395, 19 S. W. Rep. 21), Attach., 13.
Mobile & O. R. Co. *v.* Dale (61 Miss. 206), Animals, 480, 492, 516.
Mobile & O. R. Co. *v.* Davis (26 Am. & Eng. R. Cas. 425, 62 Miss. 271), Receiv., 131, 185.
Mobile & O. R. Co. *v.* Davis (42 Am. & Eng. R. Cas. 70, 130 Ill. 146, 22 N. E. Rep. 850; reversing 31 Ill. App. 490, 24 Ill. App. 250), Cross., Inj. at, 112, 137.
Mobile & O. R. Co. *v.* Dismukes (49 Am. & Eng. R. Cas. 42, 94 Ala. 131, 10 So. Rep. 289), Int. Com., 226.
Mobile & O. R. Co. *v.* Etheridge (16 Lea (Tenn.) 398), Animals, 24; Cham., 2.
Mobile & O. R. Co. *v.* Francis (Miss.) (9 So. Rep. 508), Car. of L. S., 31; Car. of M., 677.
Mobile & O. R. Co. *v.* Franks (41 Miss. 494), Lim. of Liab., 25.
Mobile & O. R. Co. *v.* George (94 Ala. 199, 10 So. Rep. 145), Contrib. Neg., 67, 70, 71, 74, 118; Dam., 41; Employés, Inj. to, 1, 204, 330, 508, 509, 533; Pl., 117, 121; Witn., 186.
Mobile & O. R. Co. *v.* Gray (23 Am. & Eng. R. Cas. 373, 62 Miss. 383), Fires, 11, 261, 269, 287.
Mobile & O. R. Co. *v.* Gunn (68 Miss. 366, 8 So. Rep. 648), Animals, 536.
Mobile & O. R. Co. *v.* Holt (62 Miss. 170), Animals, 539.
Mobile & O. R. Co. *v.* Hopkins (41 Ala. 486), Bagg., 20, 102.

Mobile & O. R. Co. *v.* Hudson (50 Miss. 572), Animals, 47, 480, 495.
Mobile & O. R. Co. *v.* Jarboe (41 Ala. 644), Bills of L., 104.
Mobile & O. R. Co. *v.* Jurey (16 Am. & Eng. R. Cas. 132, 111 U. S. 584, 4 Sup. Ct. Rep. 566), Subrog., 4.
Mobile & O. R. Co. *v.* Klein (43 Ill. App. 63), Car. of P., 153, 440, 567.
Mobile & O. R. Co. *v.* McArthur (43 Miss. 180), Car. of P., 572.
Mobile & O. R. Co. *v.* Malone (46 Ala. 391), Animals, 61, 311.
Mobile & O. R. Co. *v.* Moore (34 Ill. App. 519), Animals, 403.
Mobile & O. R. Co. *v.* Moseley (52 Miss. 127), Tax., 140, 164.
Mobile & O. R. Co. *v.* Mullins (70 Miss. 730, 12 So. Rep. 826), Car. of L. S., 49.
Mobile & O. R. Co. *v.* Nicholas (57 Am. & Eng. R. Cas. 100, 98 Ala. 92, 12 So. Rep. 723), Reorg., 1; Stockh., 16.
Mobile & O. R. Co. *v.* People (42 Am. & Eng. R. Cas. 671, 132 Ill. 559, 24 N. E. Rep. 643), Stat. & D., 15, 16, 33.
Mobile & O. R. Co. *v.* People (24 Ill. App. 250; reversed on other grounds in 130 Ill. 146, 22 N. E. Rep. 850), Penalty, 13.
Mobile & O. R. Co. *v.* Sessions (28 Fed. Rep. 592), Commerce, 4.
Mobile & O. R. Co. *v.* State (29 Ala. 573), Charters, 91; State Aid, 1.
Mobile & O. R. Co. *v.* State (51 Miss. 137), Sts. & H., 317, 335, 336.
Mobile & O. R. Co. *v.* Stroud (31 Am. & Eng. R. Cas. 443, 64 Miss. 784, 2 So. Rep. 171), Cross., Inj. at, 225; Death, etc., 146; Sts. & H., 386; Tresp., Inj. to, 54.
Mobile & O. R. Co. *v.* Thomas (42 Ala. 672), Car. of P., 586; Employés, Inj. to, 131, 132, 139, 514, 592; Fel. Serv., 1, 49, 111, 136.
Mobile & O. R. Co. *v.* Tupelo F. Mfg. Co. (42 Am. & Eng. R. Cas. 497, 67 Miss. 35, 7 So. Rep. 279), Car. of M., 654.
Mobile & O. R. Co. *v.* Watly (69 Miss. 145. 13 So. Rep. 825), Children, Inj. to, 130; Death, etc., 407; Tresp., Inj. to, 59.
Mobile & O. R. Co. *v.* Weiner (49 Miss. 725), Car. of M., 12, 458; Lim. of Liab., 2, 12; Words & Ph., 7.
Mobile & O. R. Co. *v.* Williams (53 Ala. 595, 13 Am. Ry. Rep. 153), Animals, 57, 516, 616; Just. P., 17.
Mobile & O. R. Co. *v.* Wisdom (5 Heisk. (Tenn.) 125, 1 Am. Ry. Rep. 107), Estop., 23; Mand., 17; Mun. Aid, 426.
Mobile & O. R. Co. *v.* Yandal (5 Sneed (Tenn.) 294), Subscr., 9.
Mobile & S. H. R. Co. *v.* Kennerly (74 Ala. 566), Tax., 7, 210.
Mobile Bank *v.* Mobile & O. R. Co. (69 Ala. 305), Evid., 179; Judgm., 13.
Mobile Sav. Bank *v.* Oktibbeha County Sup'rs (24 Fed. Rep. 110), Mun. Aid, 128, 324, 362, 373, 377.
Mobley *v.* Breed (48 Ga. 44), Em. Dom., 235, 381; Evid., 155; Witn., 103.
Mocanaqua Coal Co. *v.* Northern C. R. Co. (4 Brews. (Pa.) 158, 9 Phila. 250), Injunc., 9, 10; Leases, 35.
Moebus *v.* Herrmann (108 N. Y. 349, 15 N. E. Rep. 415, 13 N. Y. S. R. 648, 11 Cent. Rep. 90; affirming 38 Hun 370), Cross., Inj. at, 271.
Moers *v.* Reading (21 Pa. St. 188), Mun. Aid, 47, 109.
Moffatt *v.* Grand Trunk R. Co. (15 U. C. C. P. 392), Trover, 13.
Moffatt *v.* Great Western R. Co. (15 L. T. 630), Car. of L. S., 21.
Moggy *v.* Canadian Pac. R. Co. (3 Man. 209), Cross., St. & H., 18.
Mohawk & H. R. Co., In re (19 Wend. (N. Y.) 135), Direct., 9.
Mohawk & H. R. Co. *v.* Artcher (6 Paige (N. Y.) 83), Cross., Sts. & H., 65.
Mohawk & H. R. Co. *v.* Clute (4 Paige (N. Y.) 384), Tax., 276.
Mohawk & H. R. Co. *v.* Costigan (2 Sandf. Ch. (N. Y.) 306), Agency, 36.
Mohawk & H. R. Co. *v.* Niles (3 Hill (N. Y.) 162), Car. of M., 547.
Mohawk Bridge Co. *v.* Utica & S. R. Co. (6 Paige (N. Y.) 554), Bridges, 91; Charters, 64.
Mohr *v.* Boston & A. R. Co. (106 Mass. 67), Car. of M., 510, 512.
Mohr *v.* Chicago & N. W. R. Co. (40 Iowa 579), Car. of M., 337.
Mohrhardt *v.* S. P. & T. N. R. Co. (2 Tex. App. (Civ. Cas.) 278), Employés, 12.
Moison *v.* Great Western R. Co. (14 U. C. Q. B. 102), Flood. Lds., 69.
Moison *v.* Great Western R. Co. (14 U. C. Q. B. 109), Lim. of Ac., 31.
Molair *v.* Port Royal & A. R. Co. (35 Am. & Eng. R. Cas. 135, 29 So. Car. 152, 7 S. E. Rep. 60), Animals, 48, 59.
Molair *v.* Port Royal & A. R. Co. (31 So. Car. 510, 10 S. E. Rep. 243), Animals, 385, 576.
Mold *v.* Wheatcroft (27 Beav. 510), Em Dom., 1098.
Moline *v.* Tasmanian R. Co. (32 L. T. 828), Discov., 7.
Mollandin *v.* Union Pac. R. Co. (4 McCrary (U. S.) 290, 14 Fed. Rep. 394), Sts. & H., 143.
Mollison *v.* Lockhart (30 New Brun. 398), Car. of M., 514.
Molloy *v.* Long Island R. Co. (59 Hun 424, 36 N. Y. S. R. 626, 13 N. Y. Supp. 38 affirmed in 137 N. Y. 629, mem., 51 N. Y S. R. 931, 33 N. E. Rep. 745, mem.), Mal. Pros., 7, 14.
Molloy *v.* New York C. & H. R. R. Co. (10 Daly (N. Y.) 453), Assault, 4.
Molsons Bank *v.* Carscaden (8 Man. 451), Constr. Rys., 42.
Monadnock R. Co. *v.* Felt (52 N. H. 379, 2 Am. Ry. Rep. 186), Subscr., 207.
Monadnock R. Co. *v.* Manufacturers' Ins. Co. (113 Mass. 77), Fire Ins., 5.
Monadnock R. Co. *v.* Peterborough (49 N. H. 281, Mun. Aid, 128, 155.
Monaghan *v.* New York C. & H. R. R. Co. (45 Hun 113, 9 N. Y. S. R. 672), Employés, Inj. to, 230; Fel. Serv., 424.
Monahan *v.* Keokuk & D. M. R. Co. (45 Iowa 523), Animals, 201.
Monahan *v.* Story (2 E. D. Smith (N. Y.) 393), Employés, 7.

Monell *v.* Northern C. R. Co. (16 Hun (N. Y.) 585; affirming 67 Barb. 531), Receipts, 1.
Money *v.* Lower Vein Coal Co. (55 Iowa 671), Employés, Inj. to, 223.
Moneypenny *v.* Sixth Ave. R. Co. (7 Robt. (N. Y.) 328, 4 Abb. Pr. N. S. 357, 35 How. Pr. 452), St. Rys., 255, 257.
Monkhouse *v.* Grand Trunk R. Co. (8 Ont. App. 637), Employés, Inj. to, 64.
Monklands R. Co. *v.* Glasgow, A. & M. J. R. Co. (11 Scotch Sess. Cas. 2d. Ser. 1395, 2 Ry. & C. T. Cas. 15), Leases, 36.
Monmouth County M. F. Ins. Co. *v.* Hutchinson (21 N. J. Eq. 107), Fire Ins., 11.
Monmouthshire R. & C. Co. *v.* Williams (27 L. T. 134, 1 Ry. & C. T. Cas. 22), Charges, 64, 120.
Monongahela Bridge Co. *v.* Pittsburg & B. R. Co. (114 Pa. St. 478, 8 Atl. Rep. 233), Bridges, 100; St. Rys., 75.
Monro *v.* Pacific Coast Dredging & R. Co. (84 Cal. 515, 24 Pac. Rep. 303), Death, etc., 14.
Monroe *v.* Adams Exp. Co. (65 Ind. 60), Trial, 217.
Monroe *v.* Ft. Wayne, J. & S. R. Co. (28 Mich. 272, 12 Am. Ry. Rep. 273), Evid., 502; Subscr., 50, 128, 156.
Monroe *v.* Galveston, H. & H. R. Co. (19 Abb. Pr. (N. Y.) 90), Cred. Bill, 7.
Montana C. R. Co. *v.* Helena & R. M. R. Co. (6 Mont. 416, 12 Pac. Rep. 916), Injunc., 27; Location, etc., 30.
Montana R. Co. *v.* Warren (6 Mont. 275, 12 Pac. Rep. 641), Em. Dom., 652, 664; Witn., 109, 118.
Montana R. Co. *v.* Warren (47 Am. & Eng. R. Cas. 194, 137 U. S. 348, 11 Sup. Ct. Rep. 96), Witn., 117, 118.
Montana Union R. Co. *v.* Langlois (42 Am. & Eng. R. Cas. 646, 9 Mont. 419, 8 L. R. A. 753, 24 Pac. Rep. 209), Hacks, etc., 3.
Montclair R. Co. *v.* Benson (36 N. J. L. 557, 12 Am. Ry. Rep. 467), Em. Dom., 557, 625.
Montclair Tp. *v.* New York & G. L. R. Co. (40 Am. & Eng. R. Cas. 342, 45 N. J. Eq. 436, 18 Atl. Rep. 242), Charters, 43, 147.
Montclair Tp. *v.* Ramsdell (107 U. S. 147, 2 Sup. Ct. Rep. 391), Mun. Aid, 283, 370.
Monteith *v.* Merchants' D. & T. Co. (1 Ont. 47), Car. of M., 788.
Montell *v.* Consolidation Coal Co. (45 Md. 16), Charters, 112.
Monterey & S. V. R. Co. *v.* Hildreth (53 Cal. 123), Incorp., 9.
Montgomery *v.* Alabama G. S. R. Co. (97 Ala. 305, 12 So. Rep. 170), Cross., Inj. at, 319; Tresp., Inj. to, 4.
Montgomery *v.* Long Island R. Co. (25 N. Y. S. R. 159, 53 Hun 633, 6 N. Y. Supp. 178), New Tr., 53.
Montgomery *v.* Long Island R. Co. (29 N. Y. S. R. 822, 8 N. Y. Supp. 811, 55 Hun 611, mem.), Witn., 139.
Montgomery *v.* Wabash, St. L. & P. R. Co. (90 Mo. 446, 2 S. W. Rep. 409), Animals, 556; Trial, 33.
Montgomery *v.* Wilmington & W. R. Co. (6 Jones (N. Car.) 464), Animals, 466; Witn., 28.
Montgomery & E. R. Co. *v.* Chambers (79 Ala. 338), Contrib. Neg., 105; Negl., 22; Side Tr., 5.
Montgomery & E. R. Co. *v.* Culver (22 Am. & Eng. R. Cas. 411, 75 Ala. 587), Bagg., 20, 22, 23, 109, 113, 118.
Montgomery & E. R. Co. *v.* Hartwell (43 Ala. 508), Attach., 44, 46.
Montgomery & E. R. Co. *v.* Kolb (18 Am. & Eng. R. Cas. 512, 73 Ala. 396, 49 Am. Rep. 54), Car. of M., 64, 69, 76; Custom, 6.
Montgomery & E. R. Co. *v.* Mallette (92 Ala. 209, 9 So. Rep. 363), Car. of P., 131, 623, 628; Dam., 102; Derailm., 4; Witn., 104, 164.
Montgomery & E. R. Co. *v.* Perryman (91 Ala. 413, 8 So. Rep. 699), Animals, 512.
Montgomery & E. R. Co. *v.* Stewart (91 Ala. 421, 8 So. Rep. 708), Car. of P., 219, 378, 386, 391; Evid., 44.
Montgomery & E. R. Co. *v.* Thompson (77 Ala. 448, 54 Am. Rep. 72), Stat. & D., 26, 77, 110, 114, 129; Tresp., Inj. to, 9.
Montgomery & E. R. Co. *v.* Trebles (44 Ala. 255), Bills & N., 22.
Montgomery & W. P. R. Co. *v.* Boring (51 Ga. 582), Car. of P., 273, 640; Dam., 7, 101; Negl., 63; Parties, 7; Pl., 7.
Montgomery & W. P. R. Co. *v.* Branch (59 Ala. 139), Cred. Bill, 6; Eq., 9; Mort., 87; Sales of Rds., 15.
Montgomery & W. P. R. Co. *v.* Duer (46 Ga. 272), Tax., 341.
Montgomery & W. P. R. Co. *v.* Edmonds (41 Ala. 667), Car. of M., 156, 157, 726, 752, 772; Witn., 9.
Montgomery & W. P. R. Co. *v.* Moore (51 Ala. 394), Car. of M., 108, 543; Evid., 138.
Montgomery & W. P. R. Co. *v.* Varner (19 Ala. 185), Witn., 121.
Montgomery & W. P. R. Co. *v.* Walton (14 Ala. 207), Em. Dom., 137.
Montgomery City Council *v.* Louisville & N. R. Co. (84 Ala. 127, 4 So. Rep. 626), Stat. & D., 17; Sts. & H., 306.
Montgomery City Council *v.* Shoemaker (51 Ala. 114), Mun. Corp., 6.
Montgomery City Council *v.* State (38 Ala. 162), Mun. Aid, 124.
Montgomery County *v.* Burlington & M. R. R. Co. (38 Iowa 208), Land Grants, 131.
Montgomery Gaslight Co. *v.* Montgomery & E. R. Co. (86 Ala. 372, 5 So. Rep. 735), Actions, 2; Contrib. Neg., 1, 5, 10, 12, 15, 105, 116; Negl., 84.
Montgomery R. Co. *v.* Hurst (9 Ala. 513), Agency, 5; Bills & N., 24.
Montgomery Southern R. Co. *v.* Matthews (24 Am. & Eng. R. Cas. 9, 77 Ala. 357, 54 Am. Rep. 60), Sales, 10; Subscr., 114, 143, 145, 150.
Montgomery Southern R. Co. *v.* Sayre (20 Am. & Eng. R. Cas. 203, 72 Ala. 443), Em. Dom., 53, 573.
Montour R. Co. *v.* Scott (1 Pennyp. (Pa.) 503), Em. Dom., 692.
Montpelier & W. R. R. Co. *v.* Langdon (45 Vt. 137), Subscr., 190.
Montpelier & W. R. R. Co. *v.* Langdon (46 Vt. 284), Subscr., 6, 17, 156.
Montreal *v.* Montreal St. R. Co. (3 Montr. Super. 320), St. Rys., 137, 299.

Montreal & E. S. L. R. Co. *v.* Queen (2 Can. Exch. 159), Em. Dom., 1235, 1246.
Montreal & E. S. L. R. Co. *v.* Stewart (20 Nov. Sc. 115), Jurisd., 10.
Montreal Bank *v.* Chicago, C. & W. R. Co. (48 Iowa 518), Receiv., 97.
Montreal St. R. Co. *v.* Ritchie (5 Montr. L. R. 77), Mal. Pros., 7.
Montreal St. R. Co. *v.* Ritchie (16 Can. Sup. Ct. 622), Injunc., 54.
Moody *v.* Alabama G. S. R. Co. (Ala.) (10 So. Rep. 905), Trial, 91.
Moody *v.* Corbett (L. R. 1 Q. B. 510, 35 L. J. Q. B. 161, 14 W. R. 737, 5 B. & S. 859, 34 L. J. Q. B. 166), Em. Dom., 1109.
Moody *v.* Jacksonville, T. & K. W. R. Co. (14 Am. & Eng. R. Cas. 53, 20 Fla. 597), Em. Dom., 58, 59, 90, 238, 381.
Moody *v.* London, B. & S. C. R. Co. (1 B. & S. 290, 9 W. R. 780, 31 L. J. Q. B. 54), Evid., 266.
Moody *v.* Minneapolis & St. L. R. Co. (38 Am. & Eng. R. Cas. 319, 77 Iowa 29, 41 N. W. Rep. 477), Animals, 218.
Moody *v.* Pacific R. Co. (68 Mo. 470), Death, etc., 192; Evid., 79; Pl., 149.
Moody *v.* Peterson (11 Ill. App. 180), Comp. Neg., 4; Contrib. Neg., 110.
Moody *v.* Philadelphia & R. R. Co. (16 Phila. (Pa.) 74), Int., 16.
Moody *v.* St. Paul & S. C. R. Co. (41 Iowa 284), App., 117.
Mooers *v.* Kennebec & P. R. Co. (58 Me. 279), Injunc., 16; Lim. of Ac., 48, 54.
Moon *v.* Northern Pac. R. Co. (48 Am. & Eng. R. Cas. 195, 46 Minn. 106, 48 N. W. Rep. 679), Employés, Inj. to, 484; Trial, 109.
Moon *v.* Richmond & A. R. Co. (17 Am. & Eng. R. Cas. 531, 78 Va. 745), Employés, Inj. to, 185; Fel. Serv., 196, 214, 260, 476.
Mooney *v.* Boston & M. R. Co. (65 N. H. 670, 19 Atl. Rep. 571), App., 14.
Mooney *v.* Hannibal & St. J. R. Co. (28 Mo. 570), Just. P., 1.
Mooney *v.* Hudson River R. Co. (1 Sweeney (N. Y.) 325), Car. of P., 648; Sts. & H., 371, 372.
Mooney *v.* Hudson River R. Co. (5 Robt. (N. Y.) 548), Imp. Neg., 19.
Mooney *v.* New York El. R. Co. (30 N. Y. S. R. 561, 9 N. Y. Supp. 522, 16 Daly 145), Elev. Rys., 148.
Mooney *v.* New York El. R. Co. (52 N. Y. S. R. 256, 22 N. Y. Supp. 795, 3 Misc. 612, mem.; reargument granted in 52 N. Y. S. R. 939), Elev. Rys., 175.
Mooney *v.* Rome R. Co. (76 Ga. 749), Em. Dom., 62.
Mooney *v.* Third Ave. R. Co. (2 City Ct. (N. Y.) 366), Husb. & W., 23; Negl., 82.
Mooney *v.* Trow Directory P. & B. Co. (51 N. Y. S. R. 418), St. Rys., 494.
Mooney *v.* Union Pac. R. Co. (60 Iowa 346), Attach., 34.
Moore *v.* Boston & A. R. Co. (159 Mass. 399, 34 N. E. Rep. 366), Contrib. Neg., 30.
Moore *v.* Brooklyn City R. Co. (31 Hun (N. Y.) 90), Aband., 4.
Moore *v.* Brooklyn City R. Co. (36 Am. & Eng. R. Cas. 76, 108 N. Y. 98, 15 N. E. Rep. 191, 13 N. Y. S. R. 97; affirming 36 Hun 642, mem.), Stat. & D., 53; St. Rys., 127.
Moore *v.* Burlington & W. R. Co. (31 Am. & Eng. R. Cas. 572, 72 Iowa 75, 33 N. W. Rep. 371), Animals, 79.
Moore *v.* Campbell (111 Ind. 328, 9 West. Rep. 827, 12 N. E. Rep. 495), Subscr., 221.
Moore *v.* Cape Fear & Y. V. R. Co. (112 N. Car. 236, 17 S. E. Rep. 152), Liens, 43, 50, 52, 58, 59.
Moore *v.* Central Ontario R. Co. (14 Am. & Eng. R. Cas. 397, 2 Ont. 647), Em. Dom., 1220, 1271.
Moore *v.* Central R. Co. (24 N. J. L. 268), Contrib. Neg., 99.
Moore *v.* Central R. Co. (47 Iowa 688), Contrib. Neg., 42; Cross., Inj. at, 172, 344; Dam., 86.
Moore *v.* Chicago, B. & Q. R. Co. (22 Am. & Eng. R. Cas. 396, 65 Iowa 505, 54 Am. Rep. 26, 22 N. W. Rep. 650), Employés, 8; Witn., 145.
Moore *v.* Chicago, B. & Q. R. Co. (75 Iowa 263, 39 N. W. Rep. 390), Waters & W., 21, 24.
Moore *v.* Chicago, M. & St. P. R. Co. (78 Wis. 120, 47 N. W. Rep. 273), Fires, 243, 249, 300, 350; Witn., 118.
Moore *v.* Chicago, R. I. & P. R. Co. (43 Iowa 385), Attach., 39.
Moore *v.* Chicago, St. L. & N. O. R. Co. (9 Am. & Eng. R. Cas. 401, 59 Miss. 243), App., 94; Evid., 175; New Tr., 95; Witn., 38.
Moore *v.* Chicago, St. P., M. & O. R. Co. (21 Fed. Rep. 817), Rem. of C., 2.
Moore *v.* Columbia & G. R. Co. (58 Am. & Eng. R. Cas. 493, 38 So. Car. 1, 16 S. E. Rep. 781), Agency, 75; App., 72; Eject. Pass., 9, 19, 22, 54, 55, 64, 67, 68, 97; Tickets, & F., 123; Tresp., Inj. to, 17, 123.
Moore *v.* Des Moines & Ft. D. R. Co. (27 Am. & Eng. R. Cas. 315, 69 Iowa 491, 30 N. W. Rep. 51), Car. of P., 137, 601; Trial, 137.
Moore *v.* Edison Electric Ill. Co. (43 La. Ann. 792, 9 So. Rep. 433), Car. of P., 484; Evid., 139; Negl., 43; St. Rys., 380.
Moore *v.* Fitchburg R. Corp. (4 Gray (Mass.) 465), App., 100; Eject. Pass., 97; Parties, 12.
Moore *v.* Great Northern R. Co. (L. R. 8 Ir. 95), Car. of L. S., 84; Car. of M., 486.
Moore *v.* Great Northern R. Co. (L. R. 10 Ir. 95, 4 Ry. & C. T. Cas. xx), Car. of L. S., 96; Charges, 85; Lim. of Liab., 22.
Moore *v.* Great Western R. Co. (10 U. C. Q. B. 243), Constr. Rys., 106.
Moore *v.* Green & C. St. Pass. R. Co. (3 Phila. (Pa.) 210), Injunc., 12.
Moore *v.* Green & C. St. Pass. R. Co. (3 Phila. (Pa.) 417), Em. Dom., 479.
Moore *v.* Green & C. St. Pass. R. Co. (4 Phila. (Pa.) 261), St. Rys., 84.
Moore *v.* Hanover Junction & S. R. Co. (4 Am. & Eng. R. Cas. 256, 94 Pa. St. 324), Subscr., 225.
Moore *v.* Henry (18 Mo. App. 35), Bills of L., 38; Car. of M., 593, 656.

Moore *v.* Holliday (4 Dill. (U. S.) 52), Tax., 362.
Moore *v.* House (64 Ill. 162), Constr. Rys., 87.
Moore *v.* Hudson River R. Co. (12 Barb. (N. Y.) 156), Constr. Rys., 25.
Moore *v.* Illinois C. R. Co. (68 Ill. 385), Tickets & F., 130.
Moore *v.* McLaren (11 U. C. C. P. 534), Subscr., 61.
Moore *v.* Metropolitan R. Co. (2 Mackey (D. C.) 437), Children, Inj. to, 73, 75, 105, 127, 132; Negl., 62.
Moore *v.* Metropolitan R. Co. (L. R. 8 Q. B. 36, 42 L. J. Q. B. 23, 27 L. T. 579, 21 W. R. 145), False Imp., 3, 8.
Moore *v.* Michigan C. R. Co. (3 Mich. 23), Car. of M., 374.
Moore *v.* Midland R. Co. (7 Ir. R. C. L. 232), Car. of M., 464.
Moore *v.* Midland R. Co. (9 Ir. R. C. L. 20), Car. of M., 464.
Moore *v.* Missouri Pac. R. Co. (28 Mo. App. 622), Trial, 196.
Moore *v.* Missouri Pac. R. Co. (7 Am. & Eng. R. Cas. 568, 73 Mo. 438), App., 121.
Moore *v.* New Albany & S. R. Co. (15 Ind. 78), Subscr., 224.
Moore *v.* New York C. & H. R. R. Co. (42 N. Y. S. R. 489, 62 Hun 621, 17 N. Y. Supp. 205), Cross., Inj. at, 266.
Moore *v.* New York C. & H. R. R. Co. (49 N. Y. S. R. 516, 2 Misc. 23, 21 N. Y. Supp. 436), Cross., Inj. at, 136, 340.
Moore *v.* New York C. & H. R. R. Co. (75 Hun 381, 27 N. Y. Supp. 449, 57 N. Y. S. R. 695), Evid., 292.
Moore *v.* New York El. R. Co. (15 Daly 506, 8 N. Y. Supp. 329, 29 N. Y. S. R. 146, 18 Civ. Pro. 146, 24 Abb. N. Cas. 77), Trial, 47.
Moore *v.* New York El. R. Co. (27 J. & S. 32, 36 N. Y. S. R. 81, 12 N. Y. Supp. 552; reversed in 126 N. Y. 671, mem., 27 N. E. Rep. 791, 37 N. Y. S. R. 777), Elev. Rys., 118; Judgm., 17.
Moore *v.* New York El. R. Co. (4 Silv. App. 488, 126 N. Y. 671, 27 N. E. Rep. 791, 37 N. Y. S. R. 777; reversing 27 J. & S. 32, 36 N. Y. S. R. 81, 12 N. Y. Supp. 552), Elev. Rys., 134, 138, 187.
Moore *v.* New York El. R. Co. (130 N. Y. 523, 29 N. E. Rep. 997, 42 N. Y. S. R. 588; reversing 15 Daly 510, 24 Abb. N. Cas. 74, 29 N. Y. S. R. 432, 8 N. Y. Supp. 769), Elev. Rys., 55, 131.
Moore *v.* New York El. R. Co. (23 N. Y. Supp. 863, 53 N. Y. S. R. 169, 4 Misc. (N. Y.) 132), App., 143; Elev. Rys., 135, 166
Moore *v.* Norfolk & W. R. Co. (87 Va. 489, 12 S. E. Rep. 968), Employés, Inj. to, 315, 316.
Moore *v.* North Carolina R. Co. (74 N. Car. 528), Abate., 11.
Moore *v.* Northern Pac. R. Co. (37 Minn. 147, 33 N. W. Rep. 334), Mal. Pros., 14.
Moore *v.* North River Constr. Co. (22 Blatchf. (U. S.) 115), Rem. of C., 41.
Moore *v.* Pennsylvania R. Co. (4 Am. & Eng. R. Cas. 569, 99 Pa. St. 301, 44 Am. Rep. 106, 11 W. N. C. 310), Children, Inj. to, 34.
Moore *v.* Philadelphia, W. & B. R. Co. (108 Pa. St. 349), Cross., Inj. at, 172, 198.
Moore *v.* Shreveport (3 La. Ann. 645), Contrib. Neg., 104.
Moore *v.* Superior & St. C. R. Co. (34 Wis. 173, 7 Am. Ry. Rep. 253), Em. Dom., 312.
Moore *v.* Taylor (5 N. Y. S. R. 202, 42 Hun 45, 651), Constr. Rys., 41.
Moore *v.* Wabash, St. L. & P. R. Co. (81 Mo. 499), Animals, 127, 619.
Moore *v.* Wabash, St. L. & P. R. Co. (84 Mo. 481), Stat. & D., 61, 73.
Moore *v.* Wabash, St. L. & P. R. Co. (21 Am. & Eng. R. Cas. 509, 85 Mo. 588), Fel. Serv., 81, 202, 218.
Moore *v.* Ward (1 Hilt. (N. Y.) 337), Bills & N., 5.
Moore *v.* Willamette T. & L. Co. (7 Oreg. 355), Rip. Rts., 3.
Moorhead *v.* Little Miami R. Co. (17 Ohio 340), Location, etc., 20.
Moosic Mt. & C. R. Co., Appeal of (Pa.) (13 Atl. Rep. 915), Cross. Rys., 62, 64.
Moots *v.* State (21 Ohio St. 653), Witn., 82.
Moral School Tp. *v.* Harrison (74 Ind. 93), Car. of M., 234.
Moran *v.* Eastern R. Co. (48 Minn. 46, 50 N. W. Rep. 930), Employés, Inj. to, 159; Evid., 294; Fel. Serv., 186.
Moran *v.* Hollings (125 Mass. 93), Death, etc., 81.
Moran *v.* Lydecker (27 Hun (N. Y.) 582, 11 Abb. N. Cas. 298), Charters, 77; Em. Dom., 1003.
Moran *v.* Miami County Com'rs (2 Black (U. S.) 722), Mun. Aid, 377.
Moran *v.* Nashville & C. R. Co. (2 Baxt. (Tenn.) 379), Cross., Inj. at, 129.
Moran *v.* New York C. & H. R. R. Co. (67 Barb. (N. Y.) 96, 3 T. & C. 770), App., 104; Fel. Serv., 268, 470.
Moran *v.* Pittsburg, C. & St. L. R. Co. (32 Fed. Rep. 878), Mort., 37.
Moran *v.* Portland Steam Packet Co. (35 Me. 55), Actions, 3.
Moran *v.* Ross (39 Am. & Eng. R. Cas. 1, 79 Cal. 159, 21 Pac. Rep. 547), Em. Dom., 83, 84, 117, 353; Ry. Com'rs, 5.
Moran *v.* Ross (79 Cal. 549, 21 Pac. Rep. 958), Em. Dom., 729.
Morehead *v.* Atlantic & N. C. R. Co. (7 Jones (N. Car.) 500), Jurisd., 7.
Morehead *v.* International R. Co. (46 Tex. 178, 13 Am. Ry. Rep. 314), Judgm., 42.
Morehead *v.* Western N. C. R. Co. (96 N. Car. 362, 2 S. E. Rep. 247), App., 146; Stock, 69.
Morehouse *v.* Texas Trunk R. Co. (4 Tex. App. (Civ. Cas.) 462, 17 S. W. Rep. 1086), Car. of M., 697.
Moreland *v.* Boston & P. R. Co. (141 Mass. 31, 6. N. E. Rep. 225), Car. of P., 266.
Moreland *v.* Missouri Pac. R. Co. (17 Mo. App. 77), Animals, 351.
Morey *v.* King (51 Vt. 383), Constr. Rys., 99.
Morgan's Appeal (39 Mich. 675; former appeal 36 Mich. 428), Em. Dom., 62, 470, 790.

Morgan *v.* Camden & A. R. Co. (18 Phila. (Pa.) 384), Contr., 88; Lim. of Ac., 4.
Morgan *v.* Camden & A. R. Co. (Pa.) (16 Atl. Rep. 353), Car. of P., 404.
Morgan *v.* Central R. Co. (77 Ga. 788), Fright. Teams, 5; Nuis., 5; Trial, 197.
Morgan *v.* Chicago & A. R. Co. (76 Mo. 161), Liens, 50, 51, 58.
Morgan *v.* Chicago & A. R. Co. (96 U. S. 716), Dedica., 2; Estop., 13.
Morgan *v.* Chicago & N. R. Co. (36 Mich. 428), Em. Dom., 296.
Morgan *v.* Chicago, M. & St. P. R. Co. (83 Wis. 328, 35 N. W. Rep. 741), Judgm., 16.
Morgan *v.* [illegible] County Com'rs (27 Kan. 229), Tax., 309.
Morgan *v.* Des Moines & St. L. R. Co. (20 Am. & Eng. R. Cas. 67, 64 Iowa 589, 52 Am. Rep. 462, 21 N. W. Rep. 96), Sts. & H., 257.
Morgan *v.* Dibble (29 Tex. 107), Car. of M., 93, 253.
Morgan *v.* Donovan (58 Ala. 241, 21 Am. Ry. Rep. 109), Deeds of Tr., 5.
Morgan *v.* East Tenn. & V. R. Co. (4 Woods (U. S.) 523), Charters, 173.
Morgan *v.* East Tenn. & V. R. Co. (48 Fed. Rep. 705), Rem. of C., 36.
Morgan *v.* Farrel (58 Conn. 413, 20 Atl. Rep. 614), Evid., 103.
Morgan *v.* Hannibal & St. J. R. Co. (63 Mo. 129, 20 Am. Ry. Rep. 444), Land Grants, 133.
Morgan *v.* Hudson River O. & I. Co. (133 N. Y. 666, 31 N. E. Rep. 234, 45 N. Y. S. R. 112, 4 Silv. App. 266), Employés, Inj. to, 21.
Morgan *v.* Illinois & St. L. Bridge Co. (5 Dill. (U. S.) 96), Children, Inj. to, 116; Nuis., 26.
Morgan *v.* Jones (8 Ex. 620, 22 L. J. Ex. 232), Int., 12.
Morgan *v.* Kansas Pac. R. Co. (21 Blatchf. (U. S.) 134, 15 Fed. Rep. 55), Mort., 177.
Morgan *v.* Lake Shore & M. S. R. Co. (130 Ind. 101, 28 N. E. Rep. 548), Ejectm., 3.
Morgan *v.* Louisiana (93 U. S. 217), Tax., 155, 156.
Morgan *v.* Metropolitan R. Co. (37 L. J. C. P. 265, 18 L. T. 568; affirmed in 38 L. J. C. P. 87, L. R. 4 C. P. 97, 19 L. T. 655), Em. Dom., 1124, 1131.
Morgan *v.* New Orleans, M. & C. R. Co. (1 Woods (U. S.) 15), Stockh., 78.
Morgan *v.* New Orleans, M. & T. R. Co. (2 Woods (U. S.) 244), Contr., 80, 87.
Morgan *v.* New York & A. R. Co. (10 Paige (N. Y.) 290), Cred. Bill, 2; Receiv., 31; Stockh., 24, 61.
Morgan *v.* New York & M. R. Co. (28 N. Y. S. R. 86, 7 N. Y. Supp. 731, 55 Hun 606, mem.), Em. Dom., 798.
Morgan *v.* New York & M. R. Co. (130 N. Y. 692, 3 Silv. App. 669, 29 N. E. Rep. 990, 42 N. Y. S. R. 597; affirming 55 Hun 606, 28 N. Y. S. R. 86, 7 N. Y. Supp. 731), Em. Dom., 856.
Morgan *v.* New York C. & H. R. R. Co. (23 N. Y. Supp. 107), App., 98.
Morgan *v.* Norfolk Southern R. Co. (98 N. Car. 247, 3 S. E. Rep. 506), Nuis., 5.
Morgan *v.* Pennsylvania R. Co. (19 Blatchf. (U. S.) 239, 7 Fed. Rep. 78), Licensees, Inj. to, 12.
Morgan *v.* Southern Pac. R. Co. (54 Am. & Eng. R. Cas. 101, 95 Cal. 501, 30 Pac. Rep. 601), App., 81; Car. of P., 471, 646; Dam., 101.
Morgan *v.* Southern Pac. Co. (54 Am. & Eng. R. Cas. 101, 95 Cal. 510, 30 Pac. Rep. 603), Death, etc., 132, 381, 404, 435.
Morgan *v.* Vale of Neath R. Co. (5 B. & S. 736, L. R. 1 Q. B. 149, 35 L. J. Q. B. 23, 13 L. T. 564, 34 L. J. Q. B. 23, 14 W. R. 144; affirming 5 B. & S. 570, 10 Jur. N. S. 1074, 33 L. J. Q. B. 260, 13 W. R. 1031), Fel. Serv., 3, 113, 407, 433.
Morgan County *v.* Allen (3 Am. & Eng. R. Cas. 92, 103 U. S. 498), Insolv., 3, 4; Judgm., 15; Mun. Aid, 336.
Morgan County *v.* Thomas (76 Ill. 120), Deeds of Tr., 5; Mun. Aid, 174, 203; Reorg., 13; Subscr., 114.
Morgan El. R. Co. *v.* Pullman (14 Fed. Rep. 648), Pat. for Inv., 16.
Morgan Envelope Co. *v.* Boustead (7 Ont. 697), Car. of M., 515.
Morgan's L. & T. R. & S. Co. *v.* Board of Reviewers (33 Am. & Eng. R. Cas. 438, 41 La. Ann. 1156, 3 So. Rep. 507), Tax., 262; Words & Ph., 39.
Morgan's L. & T. R. & S. Co. *v.* Bourdier (McGloin (La.) 232), Em. Dom., 271, 283.
Morgan's L. & T. R. & S. Co. *v.* Texas & C. R. Co. (45 Am. & Eng. R. Cas. 631, 137 U. S. 171, 11 Sup. Ct. Rep. 61), Fed. Cts., 4; Mort., 80, 126, 163.
Morgan's L. & T. R. & S. Co. *v.* Texas C. R. Co. (32 Fed. Rep. 525), Judgm., 43.
Morgan R. R. & S. S. Co., In re (32 La. Ann. 371), Em. Dom., 433, 708.
Moriarty *v.* Central Iowa R. Co. (20 Am. & Eng. R. Cas. 438, 64 Iowa 696, 21 N. W. Rep. 143), Animals, 260; Cat.-Gds., 32.
Moriarty *v.* Harnden's Exp. Co. (1 Daly (N. Y.) 227), Car. of M., 4, 443; Exp. Cos., 70.
Morier *v.* St. Paul, M. & M. R. Co. (15 Am. & Eng. R. Cas. 135, 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. Rep. 952), Fires, 83.
Morin *v.* Queen (20 Can. Sup. Ct. 515; affirming 2 Can. Exch. 396), Flood. Lds., 34.
Morin *v.* St. Paul, M. & M. R. Co. (10 Am. & Eng. R. Cas. 223, 30 Minn. 100, 14 N. W. Rep. 460), Em. Dom., 580, 1029.
Morison *v.* Broadway & S. A. R. Co. (28 N. Y. S. R. 498, 8 N. Y. Supp. 436, 55 Hun 608; affirmed in 130 N. Y. 166, 41 N. Y. S. R. 248, 29 N. E. Rep. 105), St. Rys., 345, 366, 398, 446.
Morison *v.* Broadway & S. A. R. Co. (130 N. Y. 166, 29 N. E. Rep. 105, 41 N. Y. S. R. 248; affirming 55 Hun 608, mem., 28 N. Y. S. R. 498), St. Rys., 394.
Morison *v.* New York El. R. Co. (26 N. Y. Supp. 640, 57 N. Y. S. R. 246), Elev. Rys., 181.
Morison *v.* New York El. R. Co. (74 Hun 398, 26 N. Y. Supp. 641, 57 N. Y. S. R. 245), Elev. Rys., 140.
Morley *v.* Eastern Exp. Co. (116 Mass. 97), Exp. Cos., 86.
Morley *v.* Great Western R. Co. (16 U. C. Q. B. 504), Death, etc., 427.

Morley *v.* **Lake Shore & M. S. R. Co.** (146 U. S. 162, 13 Sup. Ct. Rep. 54), Int., 17.
Morley *v.* **Midland R. Co.** (3 F. & F. 961), Husb. & W., 41.
Moroney *v.* **Brooklyn City R. Co.** (30 N. Y. S. R. 911, 9 N. Y. Supp. 546), St. Rys., 451.
Morrell *v.* **Chicago, M. & St. P. R. Co.** (49 Minn. 526, 52 N. W. Rep. 140), Sts. & H., 247.
Morrell *v.* **Long Island R. Co.** (1 N. Y. Supp. 65; reversed in 15 Daly 127, 22 N. Y. S. R. 30, 3 N. Y. Supp. 928), Estop., 31; Trial, 106.
Morrell *v.* **Long Island R. Co.** (15 Daly (N. Y.) 127, 3 N. Y. Supp. 928, 22 N. Y. S. R. 30), Contr., 99.
Morrell *v.* **Old Colony R. Co.** (158 Mass. 69, 32 N. E. Rep. 1030), Arb., 22.
Morrill *v.* **Boston & M. R. Co.** (55 N. H. 531, 11 Am. Ry. Rep. 484), Contr., 63.
Morrill *v.* **Boston & M. R. Co.** (58 N. H. 68), Evid., 255.
Morrill *v.* **Noyes** (56 Me. 458), Mort., 55.
Morrill *v.* **Wabash, St. L. & P. R. Co.** (36 Am. & Eng. R. Cas. 425, 96 Mo. 174, 9 S. W. Rep. 657), Deeds, 34; Dissol., 28, 32; Right of W., 4.
Morris *v.* **Atlantic Ave. R. Co.** (40 Am. & Eng. R. Cas. 677, 116 N. Y. 552, 22 N. E. Rep. 1097, 27 N. Y. S. R. 667; reversing 5 N. Y. S. R. 874), Evid., 76; St. Rys., 309, 519.
Morris *v.* **Brown** (19 N. Y. S. R. 355, 111 N. Y. 318, 18 N. E. Rep. 722; reversing 4 N. Y. S. R. 832), Agency, 75; Negl., 1; Tresp., Inj. to, 81.
Morris *v.* **Cheney** (51 Ill. 451), Bonds, 13; Subscr., 85.
Morris *v.* **Chicago, B. & Q. R. Co.** (45 Iowa 29), Contrib. Neg., 48; Dam., 102.
Morris *v.* **Chicago, M. & St. P. R. Co.** (26 Fed. Rep. 22), Cross., Inj. at, 9, 10, 122, 145, 192, 193; Cross., Sts. & H., 87; Death, etc., 378, 381, 382; Evid., 143; Imp. Neg., 2; Sunday, 6.
Morris *v.* **Chicago, R. I. & P. R. Co.** (19 Am. & Eng. R. Cas. 180, 65 Iowa 727, 54 Am. Rep. 39, 23 N. W. Rep. 143), Death, etc., 111; States, 4.
Morris *v.* **Eighth Ave. R. Co.** (52 N. Y. S. R. 61, 22 N. Y. Supp. 666), Car. of P., 476; Contrib. Neg., 111; New Tr., 71; Witn., 47.
Morris *v.* **Hannibal & St. J. R. Co.** (19 Am. & Eng. R. Cas. 666, 79 Mo. 367), Animals, 145, 368; Fences, 63.
Morris *v.* **Indianapolis & St. L. R. Co.** (10 Ill. App. 389), Trial, 58.
Morris *v.* **Indianapolis, B. & W. R. Co.** (76 Ill. 522), Fences, 92.
Morris *v.* **Louisville, N. A. & C. R. Co.** (123 Ind. 489, 24 N. E. Rep. 335), Liens, 18.
Morris *v.* **Missouri Pac. R. Co.** (78 Tex. 17, 14 S. W. Rep. 228), Actions, 6.
Morris *v.* **Morris County Com'rs** (7 Kan. 576), Mun. Aid, 32, 64, 157.
Morris *v.* **New York C. & H. R. R. Co.** (1 Silv. App. 513, 106 N. Y. 678, mem., 13 N. E. Rep. 455, 11 N. Y. S. R. 455, 11 N. Y. S. R. 204; reversing 36 Hun 647, mem.), Car. of P., 150, 156
Morris *v.* **New York, O. & W. R. Co.** (73 Hun (N. Y.) 560, 26 N. Y. Supp. 342, 56 N. Y. S. R. 231), App., 142; Witn., 89.
Morris *v.* **St. Louis, K. C. & N. R. Co.** (58 Mo. 78), Animals, 126, 322.
Morris *v.* **St. Paul & C. R. Co.** (19 Minn. 528 (Gil. 459), 10 Am. Ry. Rep. 289), Name, 1.
Morris *v.* **St. Paul & C. R. Co.** (21 Minn. 91), Evid., 187.
Morris *v.* **Third Ave. R. Co.** (1 Daly (N. Y.) 202, 23 How. Pr. 345), Bagg., 882; Bailm., 5.
Morris *v.* **Tottenham & F. G. R. Co.** (51 Am. & Eng. R. Cas. 360, [1892] 2 Ch. 47), Em. Dom., 1089.
Morris *v.* **Wisconsin Midland R. Co.** (82 Wis. 541, 52 N. W. Rep. 758), Em. Dom., 154, 159; Sts. & H., 259.
Morris & E. R. Co. *v.* **Ayres** (29 N. J. L. 393), Car. of M., 222, 325, 339, 372, 428; Car. of P., 62.
Morris & E. R. Co. *v.* **Blair** (9 N. J. Eq. 635), Injunc., 18.
Morris & E. R. Co. *v.* **Bonnell** (34 N. J. L. 474), Em. Dom., 574; New Tr., 28.
Morris & E. R. Co. *v.* **Central R. Co.** (31 N. J. L. 205), Charters, 67, 68; Cross. Rys., 1; Location, etc., 20.
Morris & E. R. Co. *v.* **Green** (15 N. J. Eq. 469; affirming 12 N. J. Eq. 165), Agency, 48.
Morris & E. R. Co. *v.* **Haslan** (33 N. J. L. 147), Cross., Inj. at, 305.
Morris & E. R. Co. *v.* **Hudson Tunnel R. Co.** (25 N. J. Eq. 384), Sts. & H., 233.
Morris & E. R. Co. *v.* **Mayor, etc., of Newark** (10 N. J. Eq. 352), Em. Dom., 47, 161; Sts. & H., 52, 61, 293.
Morris & E. R. Co. *v.* **Prudden** (20 N. J. Eq. 530), Injunc., 2, 9; Nuis., 20; Sts. & H., 229, 245.
Morris & E. R. Co. *v.* **State** (36 N. J. L. 553, 12 Am. Ry. Rep. 470), Crim. L., 6, 31; Fires, 23.
Morris & E. R. Co. *v.* **Sussex R. Co.** (20 N. J. Eq. 542), Charters, 149; Contr., 21, 31; Discrim., 42.
Morris C. & B. Co. *v.* **Central R. Co.** (16 N. J. Eq. 419), Em. Dom., 332.
Morris C. & B. Co. *v.* **Fagin** (22 N. J. Eq. 430), Injunc., 7.
Morrisey *v.* **Hughes** (65 Vt. 553, 27 Atl. Rep. 205), Fel. Serv., 57.
Morrison *v.* **Bucksport & B. R. Co.** (67 Me. 353), Flood. Lds., 34.
Morrison *v.* **Burlington, C. R. & N. R. Co.** (84 Iowa 663, 51 N. W. Rep. 75), Animals, 347, 435, 530; Ex. & Ad., 7; Fences, 88; Trial, 48, 133.
Morrison *v.* **Davis** (20 Pa. St. 171), Bills of L., 43; Car. of M., 445, 757.
Morrison *v.* **Eaton & H. R. Co.** (14 Ind. 110), Charters, 55.
Morrison *v.* **Erie R. Co.** (56 N. Y. 302, 6 Am. Ry. Rep. 166), Car. of P., 419, 428; Children, Inj. to, 125.
Morrison *v.* **European & N. A. R. Co.** (15 New Brun. 295), Bagg., 124.
Morrison *v.* **Great Eastern R. Co.** (53 L. T. 384), Em. Dom., 1102.
Morrison *v.* **Kansas City, St. J. & C. B. R.**

Co. (27 Mo. App. 418), Animals, 182; Fences, 79, 85; Negl., 47.
Morrison *v.* New York & N. H. R. Co. (32 Barb. (N. Y.) 568), Animals, 536.
Morrison *v.* New York C. & H. R. R. Co. (63 N. Y. 643; affirming 4 Hun 424), Evid., 287.
Morrison *v.* Ogdensburg & L. C. R. Co. (52 Barb. (N. Y.) 173), Agency, 27; Employés, 7.
Morrison *v.* Phillips & C. Constr. Co. (44 Wis. 405, 19 Am. Ry. Rep. 312), Car. of L. S., 26, 67, 68; Car. of M., 434.
Morrison *v.* St. Louis, I. M. & S. R. Co. (96 Mo. 602, 9 S. W. Rep. 626, 10 S. W. Rep. 148), Tax., 269, 296.
Morrison County *v.* St. Paul & N. P. R. Co. (42 Minn. 451, 44 N. W. Rep. 982), Tax., 119.
Morrissey *v.* Chicago, B. & Q. R. Co. (58 Am. & Eng. R. Cas. 622, 38 Neb. 406, 56 N. W. Rep. 946), Flood. Lds., 37; Waters & W., 9, 27.
Morrissey *v.* Eastern R. Co. (126 Mass. 377), Children, Inj. to, 35; Tresp., Inj. to, 69a.
Morrissey *v.* Providence & W. R. Co. (15 R. I. 271, 3 Atl. Rep. 10), Children, Inj. to, 10; Pl., 70.
Morrissey *v.* Schindler (18 Neb. 672, 26 N. W. Rep. 476), Trial, 85.
Morritt *v.* Northeastern R. Co. (L. R. 1 Q. B. S. 302, 45 L. J. Q. B. D. 289, 34 L. T. 940, 24 W. R. 386; affirming 45 L. J. Q. B. D. 289, 24 W. R. 235, 35 L. T. 94), Car. of M., 520.
Morrow *v.* Hannibal & St. J. R. Co. (29 Mo. App. 432), Animals, 40, 465.
Morrow *v.* Missouri Pac. R. Co. (82 Mo. 169), Animals, 351.
Morrow *v.* Missouri Pac. R. Co. (17 Mo. App. 103), Fences, 11.
Morrow *v.* St. Louis, A. & T. R. Co. (81 Tex. 405, 17 S. W. Rep. 44), Sts. & H., 282, 285.
Morse, Petition of (18 Pick. (Mass.) 443), Em. Dom., 776.
Morse *v.* Androscoggin R. Co. (39 Me. 285), Bailm., 6.
Morse *v.* Auburn & S. R. Co. (10 Barb. (N. Y.) 621), Car. of P., 618.
Morse *v.* Brainard (41 Vt. 550), Car. of M., 593, 612.
Morse *v.* Chicago, R. I. & P. R. Co. (73 Iowa 226, 34 N. W. Rep. 825), Bills of L., 128; Car. of M., 496.
Morse *v.* Connecticut River R. Co. (6 Gray (Mass.) 450), Evid., 194.
Morse *v.* Duncan (8 Am. & Eng. R. Cas. 374, 14 Fed. Rep. 396), Car. of P., 610; Dam., 18, 71.
Morse *v.* Erie R. Co. (65 Barb. (N. Y.) 490), Cross., Inj. at, 249, 250.
Morse *v.* Hannibal & St. J. R. Co. (72 Mo. 585), App., 36.
Morse *v.* Minneapolis & St. L. R. Co. (11 Am. & Eng. R. Cas. 168, 30 Minn. 465, 16 N. W. Rep. 358), Employés, Inj. to, 201; Evid., 67, 87, 90.
Morse *v.* New York C. & H. R. R. Co. (39 Hun (N. Y.) 414; affirmed in 103 N. Y. 686, mem., 7 N. Y. S. R. 863), Employés, Inj. to, 133.
Morse *v.* Richmond (41 Vt. 435), Fright. Teams, 2.
Morse *v.* Rutland & B. R. Co. (27 Vt. 49), Animals, 153; Negl., 70.
Morsemann *v.* Manhattan R. Co. (16 Daly (N. Y.) 249, 10 N. Y. Supp. 105, 32 N. Y. S. R. 61), Dam., 90; Elev. Rys., 216; Negl., 104, 105.
Morss *v.* Boston & M. R. Co. (2 Cush. (Mass.) 536), Em. Dom., 826, 856; Fences, 14.
Mortimer *v.* Louisville & N. R. Co. (10 Bush (Ky.) 485), Lim. of Ac., 15, 61.
Mortimer *v.* Manhattan R. Co. (25 J. & S. 509, 29 N. Y. S. R. 262, 8 N. Y. Supp. 536), Elev. Rys., 78.
Mortimer *v.* Manhattan R. Co. (129 N. Y. 81, 29 N. E. Rep. 5, 41 N. Y. S. R. 122; affirming 27 J. & S. 579, 37 N. Y. S. R. 970, 14 N. Y. Supp. 952), Elev. Rys., 83, 93, 119.
Mortimer *v.* Metropolitan El. R. Co. (22 J. & S. (N. Y.) 322), Elev. Rys., 187.
Mortimer *v.* New York El. R. Co. (25 J. & S. 244, 25 N. Y. S. R. 872, 6 N. Y. Supp. 898), Elev. Rys., 58.
Mortimer *v.* New York El. R. Co. (44 N. Y. S. R. 692, 63 Hun 629, 18 N. Y. Supp. 2), Elev. Rys., 93, 136.
Mortimer *v.* South Wales R. Co. (5 Jur. N. S. 784, 28 L. J. Q. B. 129, 1 El. & El. 375), Em. Dom., 1187.
Mortimore *v.* Mortimore (28 L. J. Ch. 558, 4 DeG. & J. 472), Trusts, 6.
Morton *v.* Bartlett (15 New Brun. 215), Eject. Pass., 127.
Morton *v.* Detroit, B. C. & A. R. Co. (81 Mich. 423, 46 N. W. Rep. 111), Employés, Inj. to, 94, 148.
Morton *v.* Nevada (52 Fed. Rep. 350, 10 U. S. App. 333, 3 C. C. A. 109; affirming 41 Fed. Rep. 582), Lim. of Ac., 41.
Morton *v.* New Orleans & S. R. Co. (79 Ala. 590), Cred. Bill, 11; Mort., 270, 271, 283; State Aid, 7.
Moseley *v.* Albany Northern R. Co. (14 How. Pr. (N. Y.) 71), Ejectm., 15.
Moseley *v.* Chamberlain (18 Wis. 700), Fel. Serv., 1, 202.
Moseley *v.* Jamison (68 Miss. 336, 8 So. Rep. 744), Dam., 17.
Moser *v.* St. Paul & D. R. Co. (42 Minn. 486, 44 N. W. Rep. 530), Animals, 270; Fences, 59; Pl., 136.
Moses *v.* Boston & M. R. Co. (24 N. H. 71), Car. of M., 38, 62, 319; Lim. of Liab., 12; Witn., 14.
Moses *v.* Boston & M. R. Co. (32 N. H. 523), Car. of M., 84, 342; Lim. of Liab., 12.
Moses *v.* Central Park, N. & E. R. R. Co. (52 N. Y. S. R. 213, 3 Misc. 322, 23 N. Y. Supp. 23), Trial, 188
Moses *v.* East Tenn., V. & G. R. Co. (73 Ga. 356), Eject. Pass., 33, 37; Tickets & F., 108.
Moses *v.* Louisville, N. O. & T. R. Co. (30 Am. & Eng. R. Cas. 556, 39 La. Ann. 649, 2 So. Rep. 567), App., 128; Car. of P., 217, 265, 271; Stat. & D., 61, 119.

Moses *v.* Pittsburg, Ft. W. & C. R. Co. (21 Ill. 516), Charters, 64; Sts. & H., 37, 70.
Moses *v.* Port Townsend S. R. Co. (5 Wash. 595, 32 Pac. Rep. 488), Car. of L. S., 143; Car. of M., 639.
Moses *v.* Southern Pac. R. Co. (42 Am. & Eng. R. Cas. 555, 18 Oreg. 385, 23 Pac. Rep. 498), Animals, 55, 60, 199, 200, 255, 279.
Moses *v.* Tompkins (84 Ala. 613, 4 So. Rep. 763), Injunc., 50.
Mosher *v.* Russell (44 Hun (N. Y.) 12), Evid., 177; Trial, 157.
Mosher *v.* St. Louis, I. M. & S. R. Co. (34 Am. & Eng. R. Cas. 339, 127 U. S. 390, 8 Sup. Ct. Rep. 1324; affirming 21 Am. & Eng. R. Cas. 283, 23 Fed. Rep. 326), Tickets & F., 69, 83.
Mosher *v.* Southern Exp. Co. (38 Ga. 37), Exp. Cos., 77, 83.
Moshier *v.* Utica & S. R. Co. (8 Barb. (N. Y.) 427), Animals, 81; Fright. Teams, 2; Negl., 72; Nuis., 5; Sts. & H., 176.
Mosier *v.* Hilton (15 Barb. (N. Y.) 657), Em. Dom., 249; Incorp., 3; Stat., 34.
Moskovitz *v.* Lighte (68 Hun (N. Y.) 102), Death, etc., 435; Evid., 116.
Mosner *v.* Rome, W. & O. R. Co. (5 N. Y. Supp. 807, 51 Hun 638), Sts. & H., 167.
Moss *v.* Bettis (4 Heisk. (Tenn.) 661), Car. of M., 1.
Moss *v.* Johnson (22 Ill. 633), Car. of P., 57; Employés, Inj. to, 10.
Moss *v.* Manhattan R. Co. (35 N. Y. S. R. 798, 58 Hun 611, 13 N. Y. Supp. 46), Elev. Rys., 162, 167.
Moss *v.* New York El. R. Co. (27 Abb. N. Cas. (N. Y.) 318, 17 N. Y. Supp. 586), Abate., 1; Judgm., 18.
Moss *v.* Pacific R. Co. (49 Mo. 167, 1 Am. Ry. Rep. 576), Fel. Serv., 3, 140.
Moss *v.* St. Louis, I. M. & S. R. Co. (83 Mo. 86), Em. Dom., 993; Right of W., 11.
Mote *v.* Chicago & N. W. R. Co. (27 Iowa 22), Bagg., 66, 69; Car. of M., 329.
Motel *v.* Sixth Ave. R. Co. (99 N. Y. 632, 2 How. Pr. N. S. 30), Children, Inj. to, 80, 81.
Mott *v.* Central R. Co. (70 Ga. 680, 48 Am. Rep. 595), Death, etc., 49.
Mott *v.* Hudson River R. Co. (8 Bosw. (N. Y.) 345), Contrib. Neg., 18; Witn., 55, 150.
Mott *v.* Hudson River R. Co. (1 Robt. (N. Y.) 585), Fires, 76, 81, 334.
Mott *v.* Pennsylvania R. Co. (30 Pa. St. 9), Stockh., 87; Tax., 44.
Motteram *v.* Eastern Counties R. Co. (7 C. B. N. S. 58, 6 Jur. N. S. 583, 29 L. J. M. C. 59), Car. of P., 68, 522; Evid., 244.
Moules *v.* Delaware & H. Canal Co. (141 Pa. St. 632, 21 Atl. Rep. 733), Employés, Inj. to, 355.
Moulton *v.* Evansville (25 Fed. Rep. 382), Mun. Aid, 24, 342, 377, 380.
Moulton *v.* St. Paul, M. & M. R. Co. (12 Am. & Eng. R. Cas. 13, 31 Minn. 85, 47 Am. Rep. 781, 16 N. W. Rep. 497), Car. of L. S., 21, 78.
Moultrie County *v.* Fairfield (7 Am. & Eng. R. Cas. 194, 105 U. S. 370), Mun. Aid, 161, 247, 266, 381, 393.
Moultrie County *v.* Rockingham Ten-Cent Sav. Bank (92 U. S. 631), Mun. Aid, 29, 377.
Moundsville *v.* Ohio River R. Co. (54 Am. & Eng. R. Cas. 538, 37 W. Va. 92, 16 S. E. Rep. 514), Sts. & H., 356.
Mt. Holly Paper Co.'s Appeal (99 Pa. St. 513), Stock, 34.
Mt. Pleasant *v.* Baltimore & O. R. Co. (138 Pa. St. 365, 20 Atl. Rep. 1052), Sts. & H., 355.
Mount Pleasant Mfg. Co. *v.* Cape Fear & Y. V. R. Co. (42 Am. & Eng. R. Cas. 498, 106 N. Car. 207, 10 S. E. Rep. 1046), Charges, 39, 48.
Mt. Sterling Coalroad Co. *v.* Little (14 Bush (Ky.) 429), Subscr., 3.
Mount Vernon *v.* Hovey (52 Ind. 563), Mun. Aid, 263, 344.
Mount Vernon Co. *v.* Alabama G. S. R. Co. (92 Ala. 296, 8 So. Rep. 687), Car. of M., 265.
Mt. Washington R. Co. *v.* Coe (50 Fed. Rep. 637), Rem. of C., 44, 50.
Mt. Washington Road Co., Petition of (35 N. H. 134), Em. Dom., 523, 691, 709.
Mowatt, Ex parte (1 Drew. 247), Subscr., 38.
Mower *v.* Kemp (46 Am. & Eng. R. Cas. 480, 42 La. Ann. 1007, 8 So. Rep. 830), Evid., 111; Land Grants, 14, 31; State Aid, 22.
Mowrey *v.* Central City R. Co. (66 Barb. (N. Y.) 43; affirmed in 51 N. Y. 666, mem.), Children, Inj. to, 45, 74, 75; Contrib. Neg., 9, 10, 25, 98; Negl., 1; St. Rys., 393.
Mowrey *v.* Indianapolis & C. R. Co. (4 Biss. (U. S.) 78), Charters, 36; Consol., 12; Direct., 22; Injunc., 13; Proc., 40; Stockh., 110; Subscr., 122.
Moxley *v.* Canada Atl. R. Co. (11 Ont. Pr. 39; reversing 10 Ont. Pr. 553), Discov., 3.
Moxley *v.* New Jersey & N. Y. R. Co. (49 N. Y. S. R. 363, 66 Hun 632, 21 N. Y. Supp. 347), Fences, 41.
Moye *v.* Wrightsville & T. R. Co. (83 Ga. 669, 10 S. E. Rep. 441), Animals, 52.
Moyer *v.* Ft. Wayne, C. & L. R. Co. (51 Am. & Eng. R. Cas. 68, 132 Ind. 88, 31 N. E. Rep. 567), Reorg., 13.
Moyer *v.* New York C. & H. R. R. Co. (8 Am. & Eng. R. Cas. 531, 88 N. Y. 351; reversing 24 Hun 138), Flood. Lds., 16.
Moyer *v.* New York C. & H. R. R. Co. (98 N. Y. 645, mem.; affirming (?) 32 Hun 644, mem.), Witn., 156.
Moylan *v.* Second Ave. R. Co. (128 N. Y. 583, mem., 3 Silv. App. 461, 27 N. E. Rep. 977, 37 N. Y. S. R. 871; affirming 59 Hun 619 mem., 35 N. Y. S. R. 644, 13 N. Y. Supp. 494), St. Rys., 391.
Moynihan *v.* Pennsylvania R. Co. (8 Mackey (D. C.) 573), Evid., 243.
Mudgett *v.* Bay State Steamboat Co. (1 Daly (N. Y.) 151), Bagg., 81.
Muehlhausen *v.* St. Louis R. Co. (28 Am. & Eng. R. Cas. 157, 91 Mo. 332, 2 S. W. Rep. 315), App., 83; Car. of P., 13; Children, Inj. to, 44, 46, 54; St. Rys., 336; Trial, 118, 129, 133.

Mueller *v.* St. Louis & I. M. R. Co. (31 Mo. 262), Em. Dom., 1081.
Muff *v.* Wabash, St. L. & P. R. Co. (22 Mo. App. 584), Animals, 414.
Muhl *v.* Michigan Southern R. Co. (10 Ohio St. 272), Death, etc., 50.
Muhle *v.* New York, T. & M. R. Co. (57 Am. & Eng. R. Cas. 591, 86 Tex. 459, 25 S. W. Rep. 607), Em. Dom., 867, 973.
Muhlenberg *v.* Philadelphia & R. R. Co. (47 Pa. St. 16), Bonds, 40.
Muhr *v.* Mayor, etc., of N. Y. (16 N. Y. S. R. 688, 2 N. Y. Supp. 59), Contrib. Neg., 104; Sts. & H., 367.
Muir *v.* Louisville & P. Canal Co. (8 Dana (Ky.) 161), Canals, 2.
Muirhead *v.* Hannibal & St. J. R. Co. (19 Mo. App. 634), Employés, Inj. to, 97, 258, 590, 609.
Muirhead *v.* Hannibal & St. J. R. Co. (103 Mo. 251, 15 S. W. Rep. 530), Employés, Inj. to, 110.
Muldoon *v.* Seattle City R. Co. (58 Am. & Eng. R. Cas. 546, 7 Wash. 528, 35 Pac. Rep. 422), Cable Rys., 12; Passes, 27.
Muldowney *v.* Illinois C. R. Co. (32 Iowa 176, 10 Am. Ry. Rep. 58), Death, etc., 330, 342.
Muldowney *v.* Illinois C. R. Co. (36 Iowa 462), Contrib. Neg., 28; Employés, Inj. to, 100, 223; Death, etc., 378; Witn., 151, 179.
Muldowney *v.* Illinois C. R. Co. (39 Iowa 615, 8 Am. Ry. Rep. 487), Employés, Inj. to, 223, 363, 409; Witn., 192.
Muldowney *v.* Morris & E. R. Co. (42 Hun 444, 6 N. Y. S. R. 80), Em. Dom., 983.
Muldrow *v.* Wilmington & M. R. Co. (13 Rich. (So. Car.) 69), Bailm., 5.
Mulford *v.* Metropolitan El. R. Co. (12 N. Y. Supp. 929, 36 N. Y. S. R. 51), Elev. Rys., 93, 151.
Mulhado *v.* Brooklyn City R. Co. (30 N. Y. 370), Phys. Exam., 5; St. Rys., 367, 413.
Mulhern *v.* Union Pac. R. Co. (2 Wyom. 465), Trial, 62.
Mulherrin *v.* Delaware, L. & W. R. Co. (81 Pa. St. 366, 15 Am. Ry. Rep. 456), Employés, Inj. to, 1, 323; Tresp., Inj. to, 73.
Mulholland *v.* Des Moines, A. & W. R. Co. (10 Am. & Eng. R. Cas. 99, 60 Iowa 740, 13 N. W. Rep. 726), Lim. of Ac., 24; Sts. & H., 220.
Mullan *v.* Wisconsin C. R. Co. (47 Am. & Eng. R. Cas. 649, 46 Minn. 474, 49 N. W. Rep. 249), Car. of P., 323.
Mullarkey *v.* Philadelphia, W. & B. R. Co. (9 Phila. (Pa.) 114), Car. of M., 615.
Mullen *v.* Central Park & E. R. R. Co. (49 N. Y. S. R. 80, 21 N. Y. Supp. 101, 1 Misc. 216), St. Rys., 456.
Mullen *v.* Old Colony R. Co. (127 Mass. 86), Release, 16.
Mullen *v.* Philadelphia & S. M. Steamship Co. (9 Phila. (Pa.) 16), Employés, Inj. to, 95; Fel. Serv., 17.
Mullen *v.* Philadelphia Traction Co. (19 Phila. (Pa.) 441), Leases, 55.
Muller *v.* Cincinnati, H. & D. R. Co. (2 Cin. Super. Ct. 280), Bills of L., 31.
Muller *v.* Dows (94 U. S. 444), Consol., 37; Fed. Cts., 8; Mort., 161, 170.
Muller *v.* Second Ave. R. Co. (16 J. & S. (N. Y.) 546), Death, etc., 254.
Muller *v.* Southern Pac. Branch R. Co. (83 Cal. 240, 23 Pac. Rep. 265), Em. Dom., 459, 625, 1005; Sts. & H., 142, 260, 264, 275.
Mulligan *v.* Illinois C. R. Co. (36 Iowa 181, 2 Am. Ry. Rep. 322), Bills of L., 26; Car. of M., 679.
Mulligan *v.* Long Island R. Co. (39 N. Y. S. R. 20, 60 Hun 579), Agency, 94.
Mulligan *v.* New York & R. B. R. Co. (53 Am. & Eng. R. Cas. 47, 129 N. Y. 506, 29 N. E. Rep. 952, 42 N. Y. S. R. 83; reversing 39 N. Y. S. R. 20, 14 N. Y. Supp. 456), Car. of P., 303; False Imp., 12.
Mulligan *v.* New York C. & H. R. R. Co. (33 N. Y. S. R. 534, 58 Hun 602, 11 N. Y. Supp. 452), Death, etc., 192.
Mulligan *v.* Northern Pac. R. Co. (Dak.) (27 Am. & Eng. R. Cas. 33, 29 N. W. Rep. 659), Agency, 57, 78.
Mulliner *v.* Midland R. Co. (L. R. 11 Ch. D. 611, 48 L. J. Ch. D. 258, 40 L. T. 121, 27 W. R. 330), Corp., 10; Em. Dom., 1116.
Mullins *v.* North & S. R. Co. (54 Ga. 580), State Aid, 17; Subscr., 158.
Mulloy *v.* Nashville & D. R. Co. (8 Lea (Tenn.) 427), Charters, 150, 179.
Mulvaney *v.* Brooklyn City R. Co. (1 Misc. 425, 49 N. Y. S. R. 637, 21 N. Y. Supp. 427), Employés, Inj. to, 45, 48.
Mulvey *v.* Rhode Island Locomotive Works (14 R. I. 204), Employés, Inj. to, 94, 618; Negl., 61.
Mumford *v.* Memphis & C. R. Co. (2 Lea (Tenn.) 393), Agency, 30.
Mumford *v.* Oxford, W. & W. R. Co. (1 H. & N. 34, 25 L. J. Ex. 265), Nuis., 5; Parties, 2.
Mumpower *v.* Hannibal & St. J. R. Co. (59 Mo. 245), Animals, 353, 390, 549.
Munch *v.* New York C. R. Co. (29 Barb. (N. Y.) 647), Animals, 281; Fences, 87.
Muncie St. R. Co. *v.* Maynard (5 Ind. App. 372, 32 N. E. Rep. 343), Fright. Teams, 2; St. Rys., 374, 494.
Muncy Creek R. Co. *v.* Hill (84 Pa. St. 459), Receiv., 37.
Mundhenk *v.* Central Iowa R. Co. (11 Am. & Eng. R. Cas. 463, 57 Iowa 718, 11 N. W. Rep. 656), Animals, 308; Cat.-Gds., 9; Evid., 195, 198.
Mundorf *v.* New York El. R. Co. (62 Hun 465, 42 N. Y. S. R. 439, 17 N. Y. Supp. 124), Elev. Rys., 101.
Mundt *v.* Sheboygan & F. du L. R. Co. (31 Wis. 451), Constr. Rys., 97; Words & Ph., 6, 59.
Mundy *v.* New York, L. E. & W. R. Co. (75 Hun 479, 27 N. Y. Supp. 469, 57 N. Y. S. R. 367), Flood. Lds., 57, 84.
Munger *v.* Baker (65 Barb. (N. Y.) 539), Tresp., 21.
Munger *v.* Tonawanda R. Co. (4 N. Y. 349; affirming 5 Den. 255), Animals, 54, 272; Children, Inj. to, 125; Contrib. Neg., 4.
Munhall *v.* Pennsylvania R. Co. (5 Am. &

Eng. R. Cas. 337, 92 Pa. St. 150), Charges, 60; Discrim., 42.
Municipal Council of Peterborough & Victoria *v.* Grand Trunk R. Co. (18 U. C. Q. B. 220), Consol., 31.
Municipal Freehold Land Co. *v.* Metropolitan & D. R. Joint Committee (1 C. & E. 184), Em. Dom., 1157.
Munkers *v.* Kansas City, St. J. & C. B. R. Co. (60 Mo. 334, 9 Am. Ry. Rep. 234), Flood. Lds., 71; Right of W., 6; Words & Ph., 179, 183.
Munkres *v.* Kansas City, St. J. & C. B. R. Co. (5 Am. & Eng. R. Cas. 79, 72 Mo. 514), Flood. Lds., 78.
Munkwitz *v.* Chicago, M. & St. P. R. Co. (22 Am. & Eng. R. Cas. 151, 64 Wis. 403, 25 N. W. Rep. 438), Em. Dom., 560, 671.
Munn *v.* Illinois (94 U. S. 113), Discrim., 82; Elevators, 5; Stat., 22, 23.
Munns *v.* Isle of Wight R. Co. (L. R. 5 Ch. 414, 18 W. R. 781, 23 L. T. 96, 39 L. J. Ch. 522), Em. Dom., 1209.
Munos *v.* Southern Pac. Co. (51 Fed. Rep. 188, 2 C. C. A. 163), Death, etc., 100.
Munro *v.* Pacific Coast D. & R. Co. (84 Cal. 515, 24 Pac. Rep. 303), Blasting, 2; Contrib. Neg., 109; Death, etc., 163, 308, 411.
Munro *v.* Wivenhoe & B. R. Co. (4 DeG., J. & S. 723), Constr. Rys., 102.
Munroe *v.* Third Ave. R. Co. (18 J. & S. (N. Y.) 114), Contrib. Neg., 88; St. Rys., 367, 398.
Munson *v.* Boston, H. & E. R. Co. (120 Mass. 81), Bank'cy, 2.
Munson *v.* Syracuse, G. & C. R. Co. (29 Hun (N. Y.) 76), Direct., 45.
Munson *v.* Syracuse, G. & C. R. Co. (29 Am. & Eng. R. Cas. 377, 103 N. Y. 58, 8 N. E. Rep. 355, 3 N. Y. S. R. 31; affirming 29 Hun 76), Contr., 2; Direct., 45, 48; Em. Dom., 191; Incorp., 6; Reorg., 3.
Munster *v.* Southeastern R. Co. (4 Jur. N. S. 738, 27 L. J. C. P. 308, 4 C. B. N. S. 676), Bagg., 86.
Murch *v.* Concord R. Corp. (29 N. H. 9, 61 Am. Dec. 631), Car. of P., 3; Contrib. Neg., 4; Leases, 112; Sts. & H., 369, 383.
Murdoch *v.* Manitoba S. W. C. R. Co. (Man. (T. Wood) 334), Employés, 1.
Murdock *v.* Boston & A. R. Co. (6 Am. & Eng. R. Cas. 406, 133 Mass. 15, 41 Am. Rep. 57), False Imp., 19.
Murdock *v.* Boston & A. R. Co. (21 Am. & Eng. R. Cas. 268, 137 Mass. 293, 50 Am. Rep. 307), Eject. Pass., 34.
Murdock *v.* Prospect Park & C. I. R. Co. (73 N. Y. 579; reversing 10 Hun 598), Em. Dom., 224, 1032; License, 16.
Murdock *v.* Woodson (2 Dill. (U. S.) 188), Injunc., 12; Mort., 141.
Murfreesboro R. Co. *v.* Hertford County Com'rs (108 N. Car. 56, 12 S. E. Rep. 952), Mun. Aid, 151.
Murphy *v.* Atlanta & W. P. R. Co. (89 Ga. 832, 15 S. E. Rep. 774), Car. of P., 158, 206, 588.
Murphy *v.* Boston & A. R. Co. (8 Am. & Eng. R. Cas. 510, 88 N. Y. 146; affirming 24 Hun 142, 59 How. Pr. 197, 8 Abb. N. Cas. 41), Fel. Serv., 22, 370, 385.
Murphy *v.* Brooklyn City R. Co. (6 N. Y. S. R. 47, 42 Hun 657), Witn., 61.
Murphy *v.* Central Park, N. & E. R. R. Co. (16 J. & S. (N. Y.) 96), Agency, 103.
Murphy *v.* Chicago (29 Ill. 279), Sts. & H., 159, 298.
Murphy *v.* Chicago & A. R. Co. (14 Am. & Eng. R. Cas. 675, 133 Mass. 121), Cross., Inj. at, 5.
Murphy *v.* Chicago & N. W. R. Co. (45 Wis. 222, 18 Am. Ry. Rep. 17), Fires, 117, 324.
Murphy *v.* Chicago, M. & St. P. R. Co. (80 Iowa 26, 45 N. W. Rep. 392), Death, etc., 104.
Murphy *v.* Chicago, R. I. & P. R. Co. (38 Iowa 539), Death, etc., 221, 342; Negl., 6.
Murphy *v.* Chicago, R. I. & P. R. Co. (45 Iowa 661), Death, etc., 236.
Murphy *v.* Coney Island & B. R. Co. (36 Hun (N. Y.) 199), Derailm., 4.
Murphy *v.* Grand Trunk R. Co. (1 Ont. 619), Animals, 177.
Murphy *v.* Hobbs (7 Colo. 541), Dam., 28.
Murphy *v.* Holbrook (20 Ohio St. 137), Fel. Serv., 73; Receiv., 71, 73, 138.
Murphy *v.* Kingston & P. R. Co. (25 Am. & Eng. R. Cas. 179, 11 Ont. 302), Em. Dom., 1221.
Murphy *v.* Mairs (6 N. Y. S. R. 42), Employés, Inj. to, 31.
Murphy *v.* New York & N. H. R. Co. (29 Conn. 496), Death, etc., 418.
Murphy *v.* New York & N. H. R. Co. (30 Conn. 184), Death, etc., 84, 139.
Murphy *v.* New York C. & H. R. R. Co. (8 Am. & Eng. R. Cas. 490, 88 N. Y. 445; affirming 25 Hun 311), Death, etc., 413.
Murphy *v.* New York C. & H. R. R. Co. (31 Hun (N. Y.) 358), Evid., 256.
Murphy *v.* New York C. & H. R. R. Co. (11 Daly (N. Y.) 122), Employés, Inj. to, 297.
Murphy *v.* New York C. & H. R. R. Co. (118 N. Y. 527, 23 N. E. Rep. 812, 29 N. Y. S. R. 941; affirming 10 N. Y. S. R. 156, 44 Hun 242), Employés, Inj. to, 311; Fel. Serv., 98.
Murphy *v.* New York C. R. Co. (66 Barb. (N. Y.) 125), Evid., 90, 209; Witn., 182.
Murphy *v.* New York, L. E. & W. R. Co. (42 N. Y. S. R. 580, 62 Hun 587, 17 N. Y. Supp. 302), Employés, Inj. to, 487.
Murphy *v.* Ninth Ave. R. Co. (6 Misc. 298, 26 N. Y. Supp. 783, 58 N. Y. S. R. 140), St. Rys., 347.
Murphy *v.* Rome, W. & O. P. Co. (32 N. Y. S. R. 381, 10 N. Y. Supp. 354, 56 Hun 645), Car. of P., 428.
Murphy *v.* St. Louis & I. M. R. Co. (2 Am. & Eng. R. Cas. 83, 71 Mo. 202), Fel. Serv., 487.
Murphy *v.* St. Louis & I. M. R. Co. (4 Mo. App. 565; reversed on other grounds in 71 Mo. 202), Fel. Serv., 1, 57, 492.
Murphy *v.* St. Louis, I. M. & S. R. Co. (43 Mo. App. 342), Car. of P., 13, 14, 213, 383, 384.
Murphy *v.* Sioux City & P. R. Co. (55 Iowa

473, 39 Am. Rep. 175, 8 N. W. Rep. 320), Fires, 151, 157.
Murphy *v.* Suburban Rapid Transit Co. (40 N. Y. S. R. 228, 15 N. Y. Supp. 837), Bridges, 50.
Murphy *v.* Union R. Co. (118 Mass. 228, 9 Am. Ry. Rep. 282), St. Rys., 521.
Murphy *v.* Wabash R. Co. (115 Mo. 111, 21 S. W. Rep. 862), Employés, Inj. to, 87, 190, 358, 574, 726; Negl., 60.
Murphy *v.* Wabash R. Co. (3 Int. Com. Rep. 725, 5 Int. Com. Com. 122), Int. Com., 45.
Murphy *v.* Western & A. R. Co. (21 Am. & Eng. R. Cas. 258, 23 Fed. Rep. 637), Assault, 9; Car. of P., 309; Col. Pers., 8, 13; Eject. Pass., 1, 44, 54.
Murphy *v.* Wilmigton & W. R. Co. (70 N. Car. 437), Cross., Inj. at, 225.
Murphy *v.* Wilson (52 L. J. Q. B. D. 524, 48 L. T. 788, 47 J. P. 565, 48 J. P. 24), Words & Ph., 125.
Murray *v.* Brooklyn City R. Co. (27 N. Y. S. R. 280, 7 N. Y. Supp. 900), New Tr., 78; St. Rys., 431; Witn., 76.
Murray *v.* Central R. & B. Co. (90 Ga. 83, 15 S. E. Rep. 645), Fires, 340.
Murray *v.* Denver & R. G. R. Co. (11 Colo. 124, 17 Pac. Rep. 484), Employés, Inj. to, 593.
Murray *v.* Deyo (10 Hun (N. Y.) 3), Set-off, 1; Witn., 55.
Murray *v.* Fitchburg R. Co. (130 Mass. 99), Tresp., 12.
Murray *v.* Glasgow & S. W. R. Co. (11 Court Sess. Cas. (4th ser.) 205, 4 Ry. & C. T. Cas. 456), Charges, 95; Discrim., 41.
Murray *v.* Grand Trunk R. Co. (3 Chan. Chamb. (U. C.) 306), Pl., 162.
Murray *v.* Great Western R. Co. (6 Ont. Pr. 211), Proc., 15.
Murray *v.* Gulf, C. & S. F. R. Co. (22 Am. & Eng. R. Cas. 464, 63 Tex. 407), Charges, 27, 55.
Murray *v.* Gulf, C. & S. F. R. Co. (38 Am. & Eng. R. Cas. 177, 73 Tex. 2, 11 S. W. Rep. 125), Contrib. Neg., 66, 76, 77; Employés, Inj. to, 450; Trial, 171.
Murray *v.* Hudson River R. Co. (47 Barb. (N. Y.) 196; affirmed in 48 N. Y. 655, 6 Alb. L. J. 198), Dam., 67, 70, 71, 73; New Tr., 67.
Murray *v.* Lardner (2 Wall. (U. S.) 110), Mun. Aid, 375.
Murray *v.* Metropolitan District R. Co (27 L. T. 762), Car. of P., 187.
Murray *v.* Missouri Pac. R. Co. (101 Mo. 236, 13 S. W. Rep. 817), Contrib. Neg., 4; Cross., Inj. at, 74, 131, 348; Dam., 73; Negl., 103.
Murray *v.* New York C. R. Co. (3 Abb. App. Dec. (N. Y.) 339, 4 Keyes 274), Animals, 146; Stat., 38.
Murray *v.* Pontchartrain R. Co. (31 La. Ann. 490), Death, etc., 174.
Murray *v.* Richmond & D. R. Co. (93 N. Car. 92), Children, Inj. to, 74, 75, 83.
Murray *v.* St. Louis C. & W. R. Co. (41 Am. & Eng. R. Cas. 446, 98 Mo. 573, 12 S. W. Rep. 252, 5 L. R. A. 735), Fel. Serv., 444.
Murray *v.* Silver City, D. & P. R. Co. (26 Am. & Eng. R. Cas. 154, 3 N. Mex. 337, 9 Pac. Rep. 369), Pl., 110.
Murray *v.* South Carolina R. Co. (10 Rich. (So. Car.) 227), Animals, 44, 256, 472, 513; Cross., Inj. at, 130; Sts. & H., 409.
Murray *v.* South Carolina R. Co. (1 McMull. (So. Car.) 385), Fel. Serv., 1.
Murray *v.* Stevens (110 Mass. 95), Mand., 3.
Murray *v.* Usher (117 N. Y. 542, 23 N. E. Rep. 564, 27 N. Y. S. R. 928; affirming 46 Hun 404, 11 N. Y. S. R. 789), Agency, 33, 83; Death, etc., 414.
Murray *v.* Warner (55 N. H. 546), Car. of M., 270.
Murray *v.* Washington & G. R. Co. (2 MacArth. (D. C.) 195), New Tr., 24.
Murrell *v.* Dixey (14 La. Ann. 296), Car. of M., 792.
Murrell *v.* Pacific Exp. Co. (54 Ark. 72, 14 S. W. Rep. 1098), Exp. Cos., 90.
Murtaugh *v.* New York C. & H. R. R. Co. (23 N. Y. S. R. 636, 3 N. Y. S. 833, 49 Hun 456), Employés, Inj. to, 141, 218, 618; Negl., 86; New Tr., 63; Witn., 98, 151.
Murtfeldt *v.* New York, W. S. & B. R. Co. (25 Am. & Eng. R. Cas. 144, 102 N. Y. 703, 1 Silv. App. 93, 7 N. E. Rep. 404, 2 N. Y. S. R. 444; affirming 34 Hun 632), Indep. Contr., 6, 16; Judgm., 27; Parties, 6; Spec. Perf., 19, 20; Tresp., 15.
Murton *v.* Kingston & M. Forwarding Co. (32 U. C. C. P. 366), Bills of L., 49.
Murzynowski *v.* Delaware, L. & W. R. Co. (39 N. Y. S. R. 299, 15 N. Y. Supp. 841), Abate., 2.
Muscatine *v.* Chicago, R. I. & P. R. Co. (79 Iowa 645, 44 N. W. Rep. 909), Lim of Ac., 7, 35; Tax., 75.
Muscatine *v.* Chicago, R. I. & P. R. Co. (88 Iowa 291, 55 N. W. Rep. 100), Sts. & H., 345.
Muscatine *v.* Mississippi & M. R. Co. (1 Dill. (U. S.) 536), Tax., 245, 355.
Muscatine Western R. Co. *v.* Horton (38 Iowa 33), Mun. Aid, 233; Words & Ph., 29.
Muschamp *v.* Lancaster & P. J. R. Co. (8 M. & W. 421, 2 Railw. Cas. 607, 5 Jur. 656), Car. of M., 586.
Muscogee R. Co. *v.* Neal (26 Ga. 120), Stat., 21.
Muscogee R. Co. *v.* Redd (54 Ga. 33), Car. of Slaves, 1, 4; Evid., 202.
Muser *v.* Holland (17 Blatchf. (U. S.) 412, 1 Fed. Rep. 382), Exp. Cos., 72.
Musgrove *v.* Vicksburg & N. R. Co. (50 Miss. 677), Mun. Aid, 417; Stat., 21, 68.
Musick *v.* Atlantic & P. R. Co. (57 Mo. 134), Animals, 117.
Musick *v.* Kansas City, S. & M. R. Co. (43 Mo. App. 326), Em. Dom., 893.
Musick *v.* Kansas City, S. & M. R. Co. (114 Mo. 309, 21 S. W. Rep. 491), Em. Dom., 190, 234, 301, 429.
Musselwhite *v.* Atlantic, M. & O. R. Co. (4 Hughes (U. S.) 166), Fires, 253.
Musser *v.* Johnson (42 Mo. 74), Assign., 10.
Musser *v.* McRae (38 Minn. 409, 38 N. W.

Rep. 103; further appeal 44 Minn. 343, 46 N. W. Rep. 673), Land Grants, 51.
Musser *v.* McRae (44 Minn. 343, 46 N. W. Rep. 673), Land Grants, 45.
Mustard *v.* Hoppess (69 Ind. 324), Mun. Aid, 168, 411.
Muster *v.* Chicago, M. & St. P. R. Co. (18 Am. & Eng. R. Cas. 113, 61 Wis. 325, 21 N. W. Rep. 223, 49 Am. Rep. 41), Car. of Mails, 7; Car. of P., 129; Employés, Inj. to, 170; Evid., 117; Negl., 41.
Mutlow, In re (L. R. 10 Ch. D. 131, 48 L. J. Ch. D. 198, 27 W. R. 245), Em. Dom., 1095.
Mutter *v.* Eastern & M. R. Co. (L. R. 38 Ch. D. 92), Stock, 81; Stockh., 8.
Mutual Life Ins. Co. *v.* Easton & A. R. Co. (17 Am. & Eng. R. Cas. 78, 38 N. J. Eq. 132), Mort., 317.
Myatt *v.* St. Helen's & R. G. R. Co. (1 G. & D. 663, 2 Railw. Cas. 756, 2 Q. B. 364, 6 Jur. 641), Ejectm., 14; Mort., 14.
Myer *v.* Muscatine (1 Wall. (U. S.) 384), Mun. Aid, 31.
Myers *v.* Baltimore & O. R. Co. (150 Pa. St. 386, 24 Atl. Rep. 747), Cross., Inj. at, 232, 252, 313.
Myers *v.* Catterson (L. R. 43 Ch. D. 470), Injunc., 10.
Myers *v.* Chicago, M. & St. P. R. Co. (50 Minn. 371, 52 N. W. Rep. 962), Trial, 85.
Myers *v.* Indianapolis & St. L. R. Co. (113 Ill. 386, 1 N. E. Rep. 899), Employés, Inj. to, 328; Negl., 61.
Myers *v.* Johnson County (14 Iowa 47), Mun. Aid, 268.
Myers *v.* Long Island R. Co. (10 N. Y. S. R. 430, 45 Hun 591), Death, etc., 260.
Myers *v.* Metropolitan El. R. Co. (46 N. Y. S. R. 196, 19 N. Y. Supp. 223), Elev. Rys., 117.
Myers *v.* Pennsylvania Co. (2 Int. Com. Rep. 403, 2 Int. Com. Com. 573), Int. Com., 44.
Myers *v.* Pennsylvania Co. (2 Int. Com. Rep. 544, 3 Int. Com. Com. 130), Int. Com., 166.
Myers *v.* Richmond & D. R. Co. (8 Am. & Eng. R. Cas. 293, 87 N. Car. 345), Fright. Teams, 3.
Myers *v.* St. Andrews & Q. R. Co. (10 New Brun. 577), Constr. Rys., 68.
Myers *v.* San Francisco (42 Cal. 215), Death, etc., 418.
Myers *v.* Schuylkill River E. S. R. Co. (19 Phila. (Pa.) 468), Em. Dom., 760; Witn., 149.
Myers *v.* Snyder (Bright. N. P. (Pa.) 489), Agency, 73; Negl., 5, 102.
Myers *v.* Union Pac. R. Co. (3 McCrary (U. S.) 578), Rem. of C., 9.
Myers *v.* Wabash, St. L. & P. R. Co. (27 Am. & Eng. R. Cas. 53, 90 Mo. 98, 2 S. W. Rep. 263), Car. of L. S., 70.
Myers *v.* York & C. R. Co. (2 Curt. (U. S.) 28), Constr. Rys., 119.
Myers *v.* York & C. R. Co. (43 Me. 232), Coupons, 5.
Myhan *v.* Louisiana E. L. & P. Co. (41 La. Ann. 964, 7 L. R. A. 172, 6 So. Rep. 799), Children, Inj. to, 192.
Mykleby *v.* Chicago, St. P., M. & O. R. Co. (34 Am. & Eng. R. Cas. 387, 39 Minn. 54, 38 N. W. Rep. 763), Assault, 14; Tresp., Inj. to, 86.
Mykleby *v.* Chicago, St. P., M. & O. R. Co. (49 Minn. 457, 52 N. W. Rep. 213), App., 27.
Myles *v.* New York, N. H. & H. R. Co. (6 N. Y. S. R. 24, 42 Hun 656), Employés, Inj. to, 94.
Mynard *v.* Syracuse, B. & N. Y. R. Co. (71 N. Y. 180, 15 Am. Ry. Rep. 412, 27 Am. Rep. 28; reversing 7 Hun 399), Car. of L. S., 24; Lim. of Liab., 33, 43.
Mynning *v.* Detroit, L. & N. R. Co. (23 Am. & Eng. R. Cas. 317, 59 Mich. 257, 26 N. W. Rep. 514), Comp. Neg., 28; Cross., Inj. at, 190; Death, etc., 238, 377; Side Tr., 4.
Mynning *v.* Detroit, L. & N. R. Co. (28 Am. & Eng. R. Cas. 665, 64 Mich. 93, 31 N. W. Rep. 147), Contrib. Neg., 84; Cross., Inj. at, 234, 254; Death, etc., 194.
Mynning *v.* Detroit, L. & N. R. Co. (67 Mich. 677, 12 West. Rep. 427, 35 N. W. Rep. 811), Contrib. Neg., 104, 113; Death, etc., 289, 342.
Myrick *v.* Michigan C. R. Co. (9 Biss. (U. S.) 44), Bills of L., 53; Car. of L. S., 51, 53, 107.
Myron *v.* Michigan C. R. Co. (61 Mich. 387, 28 N. W. Rep. 146), Cat.-Gds., 31.
Mytton *v.* Midland R. Co. (4 H. & N. 615, 28 L. J. Exch. 385, 33 L. T. 587, 7 W. R. 737), Bagg., 24, 45.

Nabring *v.* Bank of Mobile (58 Ala. 204), Exec., 11; Stock, 43, 49; Trover, 6.
Nagel *v.* Missouri Pac. R. Co. (10 Am. & Eng. R. Cas. 702, 75 Mo. 653, 42 Am. Rep. 418), Children, Inj. to, 26, 32, 141, 158, 174, 181; Dam., 5.
Nagle *v.* Allegheny Valley R. Co. (88 Pa. St. 35), Children, Inj. to, 70, 102.
Nagle *v.* California Southern R. Co. (88 Cal. 86, 25 Pac. Rep. 1106), Car. of P., 139, 142, 151, 362, 410; Trial, 68.
Naglee *v.* Alexandria & F. R. Co. (32 Am. & Eng. R. Cas. 401, 83 Va. 707, 3 S. E. Rep. 369), Deeds of Tr., 4.
Najac *v.* Boston & L. R. Co. (7 Allen (Mass.) 329), Bagg., 19.
Nall *v.* Louisville, N. A. & C. R. Co. (48 Am. & Eng. R. Cas. 309, 129 Ind. 260, 28 N. E. Rep. 183, 611), Employés, Inj. to, 39, 277; Fel. Serv., 211, 218.
Nall *v.* St. Louis, K. C. & N. R. Co. (59 Mo. 112, 8 Am. Ry. Rep. 447), Animals, 602, 606.
Nall *v.* Wabash, St. L. & P. R. Co. (97 Mo. 68, 10 S. W. Rep. 610), App., 112.
Nalley *v.* Hartford Carpet Co. (51 Conn. 524, 50 Am. Rep. 47), Evid., 84.
Nance *v.* Carolina C. R. Co. (76 N. Car. 9), Just. P., 2.
Nance *v.* Carolina C. R. Co. (94 N. Car. 619), Car. of P., 221, 422, 428.
Nance *v.* Georgia, C. & N. R. Co. (35 So. Car. 307, 14 S. E. Rep. 629), Trover, 14.
Nance *v.* Newport News & M. V. R. Co. (Ky.) (17 S. W. Rep. 570), Employés, Inj to, 672.
Nance *v.* St. Louis, I. M. & S. R. Co. (19

Am. & Eng. R. Cas. 594, 79 Mo. 196), Animals, 127.
Nanney *v.* Morgan (L. R. 37 Ch. D. 346; affirming L. R. 35 Ch. D. 598), Stock, 40.
Nanson *v.* Jacob (12 Mo. App. 125), Car. of M., 261, 539.
Nanson *v.* Jacob (32 Am. & Eng. R. Cas. 553, 93 Mo. 331, 12 West. Rep. 358, 6 S. W. Rep. 246; affirming 12 Mo. App. 125), Car. of M., 539; Transfer Cos., 2; Trover, 10.
Nantasket Beach R. Co. *v.* Ransom (147 Mass. 240, 17 N. E. Rep. 640, 6 N. Eng. Rep. 685), Em. Dom., 870.
Napa Valley R. Co. *v.* Napa County Sup'rs (30 Cal. 435), Mun. Aid, 15, 286; Words & Ph., 179.
Napier *v.* Glasgow & S. W. R. Co. (1 Ry. & C. T. Cas. 292, 4 Sess. Cas. 87, 3d ser.), Car. of M., 533.
Napman *v.* People (19 Mich. 352), Hacks, etc., 4.
Narra *v.* Chicago & N. W. R. Co. (41 Wis. 69), Fires, 148.
Nary *v.* New York, O. & W. R. Co. (29 N. Y. S. R. 630, 55 Hun 612, 9 N. Y. Supp. 153; affirmed in 125 N. Y. 759, mem., 36 N. Y. S. R. 1010), Collis., 31; Death, etc., 255; Fel. Serv., 47; Trial, 109; Witn., 143.
Nash, Ex parte (15 Q. B. 92, 14 Jur. 574, 19 L. J. Q. B. 296), Stock, 81.
Nash *v.* Chicago, M. & St. P. R. Co. (12 Am. & Eng. R. Cas. 261, 62 Iowa 49, 17 N. W. Rep. 106), Liens, 53.
Nash *v.* Lowry (37 Minn. 261, 33 N. W. Rep. 787), St. Rys., 35.
Nash *v.* New York C. & H. R. R. Co. (14 N. Y. S. R. 531), Contrib. Neg., 84; Cross., Inj. at, 269.
Nash *v.* New York C. & H. R. R. Co. (15 N. Y. S. R. 879, 48 Hun 618, 1 N. Y. Supp. 269), Cross., Inj. at, 96.
Nash *v.* New York C. & H. R. R. Co. (125 N. Y. 715, mem., 34 N. Y. S. R. 788, 3 Silv. App. 315; reversing 51 Hun 594, 22 N. Y. S. R. 106, 4 N. Y. Supp. 525), Contrib. Neg., 31; Cross., Inj. at, 278.
Nash *v.* Richmond & F. R. Co. (82 Va. 55), Cross., Inj. at, 290; Negl., 75.
Nash *v.* Sharpe (19 Hun (N. Y.) 365), Car. of P., 629.
Nash *v.* Sullivan (10 Am. & Eng. R. Cas. 552, 29 Minn. 206, 12 N. W. Rep. 698), Land Grants, 36, 120.
Nash *v.* Tousley (28 Minn. 5, 8 N. W. Rep. 875), Death, etc., 96.
Nashua & L. R. Co. *v.* Boston & L. R. Co. (27 Fed. Rep. 821), Direct., 34.
Nashua & L. R. Co. *v.* Nashua (62 N. H. 602), Tax., 81, 334.
Nashua & L. R. Corp. *v.* Boston & L. R. Corp. (16 Am. & Eng. R. Cas. 488, 19 Fed. Rep. 804), Consol., 37; Contr., 95.
Nashua & L. R. Corp. *v.* Boston & L. R. Corp. (42 Am. & Eng. R. Cas. 688, 136 U. S. 356, 10 Sup. Ct. Rep. 1004), Consol., 15, 37; Stat. & D., 10.
Nashua & L. R. Corp. *v.* Boston & L. R. Corp. (157 Mass. 268, 31 N. E. Rep. 1060), Arb., 21; Ult. Vir., 19.
Nashua & L. R. Corp. *v.* Boston & L. R. Corp. (8 Fed. Rep. 458), Fed. Cts., 10.
Nashua & L. R. Corp. *v.* Paige (15 Am. & Eng. R. Cas. 120, 135 Mass. 145), Superint., 5; Trial, 106.
Nashua & R. R. Co. *v.* Derry (58 N. H. 65), Stat. & D., 28.
Nashua & R. R. Co. *v.* Lee (55 N. H. 568), Cross., Sts. & H., 70.
Nashua I. & S. Co. *v.* Worcester & N. R. Co. (62 N. H. 159), Negl., 79.
Nashua Lock Co. *v.* Worcester & N. R. Co. (48 N. H. 339), Car. of M., 665.
Nashville & C. R. Co. *v.* Anthony (1 Lea (Tenn.) 516), Animals, 49, 62; Words & Ph., 204.
Nashville & C. R. Co. *v.* Carroll (6 Heisk. (Tenn.) 347, 12 Am. Ry. Rep. 20), Contrib. Neg., 4, 5, 22; Fel. Serv., 107; Leases, 91; Words & Ph., 144.
Nashville & C. R. Co. *v.* Chumley (6 Heisk. (Tenn.) 325), Employés, 16.
Nashville & C. R. Co. *v.* Cowardin (11 Hunph. (Tenn.) 348), Em. Dom., 92, 186, 187.
Nashville & C. R. Co. *v.* David (6 Heisk. (Tenn.) 261, 12 Am. Ry. Rep. 9), Car. of M., 22, 184.
Nashville & C. R. Co. *v.* Eakin (6 Coldw. (Tenn.) 582), Death, etc., 115.
Nashville & C. R. Co. *v.* Elliott (1 Coldw. (Tenn.) 611), Employés, Inj. to, 45, 130, 139.
Nashville & C. R. Co. *v.* Erwin (3 Am. & Eng. R. Cas. 465), Agency, 63.
Nashville & C. R. Co. *v.* Estes (3 Am. & Eng. R. Cas. 492, 10 Lea (Tenn.) 749), Car. of M., 17; War, 10.
Nashville & C. R. Co. *v.* Estis (7 Heisk. (Tenn.) 622), Car. of M., 17; War, 10.
Nashville & C. R. Co. *v.* Fugett (3 Coldw. (Tenn.) 402), Animals, 480, 515; Witn., 14.
Nashville & C. R. Co. *v.* Jackson (6 Heisk. (Tenn.) 271, 12 Am. Ry. Rep. 54), Car. of M., 127, 459.
Nashville & C. R. Co. *v.* McDaniel (17 Am. & Eng. R. Cas. 604, 12 Lea (Tenn.) 386), Fel. Serv., 111.
Nashville & C. R. Co. *v.* McMahon (70 Ga. 585), Proc., 1.
Nashville & C. R. Co. *v.* Messino (1 Sneed (Tenn.) 220), Car. of P., 1, 2, 5, 25, 129, 131, 161, 182, 191; Evid., 175, 195; Negl., 27, 105.
Nashville & C. R. Co. *v.* Nowlin (1 Lea (Tenn.) 523), Cross., Inj. at, 207; Tresp., Inj. to, 46.
Nashville & C. R. Co. *v.* Peacock (25 Ala. 229), Animals, 31, 389; Stat., 66.
Nashville & C. R. Co. *v.* Prince (2 Heisk. 580), Death, etc., 84, 285.
Nashville & C. R. Co. *v.* Smith (6 Heisk. (Tenn.) 174), Death, etc., 178, 181, 375, 378; New Tr., 72.
Nashville & C. R. Co. *v.* Smith (11 Heisk. (Tenn.) 455), Death, etc., 323.
Nashville & C. R. Co. *v.* Smith (15 Am. & Eng. R. Cas. 469, 9 Lea (Tenn.) 470), Contrib. Neg., 51; Death, etc., 341, 344.
Nashville & C. R. Co. *v.* Sprayberry (8 Baxt. (Tenn.) 341, 9 Heisk. (Tenn.) 852,

20 Am. Ry. Rep. 55), Car. of P., 503, 519; Death, etc., 123; States, 4.
Nashville & C. R. Co. *v.* Starnes (9 Heisk. (Tenn.) 52, 19 Am. Ry. Rep. 280), Agency, 77; Dam., 32.
Nashville & C. R. Co. *v.* Stevens (9 Heisk. (Tenn.) 12, 19 Am. Ry. Rep. 363), Dam., 102; Death, etc., 346, 385.
Nashville & C. R. Co. *v.* Thomas (5 Heisk. (Tenn.) 262), Animals, 65; Evid., 145; Sts. & H., 296.
Nashville & C. R. Co. *v.* Troxlee (1 Lea (Tenn.) 520), Car. of P., 203.
Nashville & C. R. Co. *v.* Tyne (Tenn.) (7 Am. & Eng. R. Cas. 515), Abate., 16; Fires, 38, 231; Witn., 99.
Nashville & C. R. Co. *v.* United States (101 U. S. 639), Set-off, 4.
Nashville & D. R. Co. *v.* Comans (45 Ala. 437), Animals, 13, 33.
Nashville & D. R. Co. *v.* Jones (9 Heisk. (Tenn.) 27, 19 Am. Ry. Rep. 261), Car. of P., 180; Employés, Inj. to, 96, 99; Fel. Serv., 114, 370.
Nashville & D. R. Co. *v.* Orr (18 Wall. (U. S.) 471, 6 Am. Ry. Rep. 396), Mort., 180.
Nashville & D. R. Co. *v.* State (1 Baxt. (Tenn.) 55), Crim. L., 32; Lim. of Ac., 58.
Nashville & K. R. Co. *v.* Wilson County (48 Am. & Eng. R. Cas. 648, 89 Tenn. 597, 15 S. W. Rep. 446), Tax., 137, 139.
Nashville & N. W. R. Co. *v.* Jones (2 Coldw. (Tenn.) 574), Subscr., 221.
Nashville, C. & St. L. R. Co. *v.* Alabama (38 Am. & Eng. R. Cas. 1, 128 U. S. 96, 9 Sup. Ct. Rep. 28; affirming 83 Ala. 71), Employés, 2.
Nashville, C. & St. L. R. Co. *v.* Edwards (52 Am. & Eng. R. Cas. 62, 91 Ga. 24, 16 S. E. Rep. 347), Leases, 58; Pl., 146; Trial, 69.
Nashville, C. & St. L. R. Co. *v.* Foster (11 Am. & Eng. R. Cas. 180, 10 Lea (Tenn.) 351), Death, etc., 103; Fel. Serv., 164, 196, 223, 227, 372; New Tr., 83.
Nashville, C. & St. L. R. Co. *v.* Franklin County (7 Am. & Eng. R. Cas. 258, 5 Lea (Tenn.) 707), Tax., 282.
Nashville, C. & St. L. R. Co. *v.* Handman (13 Lea (Tenn.) 423), Employés, Inj. to, 260; Fel. Serv., 22, 102, 281.
Nashville, C. & St. L. R. Co. *v.* Heggie (86 Ga. 210, 12 S. E. Rep. 363), Car. of L. S., 32, 34.
Nashville, C. & St. L. R. Co. *v.* Hembree (38 Am. & Eng. R. Cas. 300, 85 Ala. 481, 5 So. Rep. 173), Animals, 52, 65, 69, 480, 567; Negl., 43.
Nashville, C. & St. L. R. Co. *v.* Hodges (7 Lea (Tenn.) 663), Tax., 145, 282.
Nashville, C. & St. L. R. Co. *v.* Johnson (15 Lea (Tenn.) 677), Car. of P., 563.
Nashville, C. & St. L. R. Co. *v.* Sadler (91 Tenn. 508, 19 S. W. Rep. 618), Animals, 78.
Nashville, C. & St. L. R. Co. *v.* Seaborn (32 Am. & Eng. R. Cas. 9, 85 Tenn. 391, 4 S. W. Rep. 661), Death, etc., 336.
Nashville, C. & St. L. R. Co. *v.* United States (113 U. S. 261, 5 Sup. Ct. Rep. 460), Judgm., 28.
Nashville, C. & St. L. R. Co. *v.* Weaks (13 Lea (Tenn.) 148), Fires, 136.
Nashville, C. & St. L. R. Co. *v.* Wheeler (Tenn.) (4 Am. & Eng. R. Cas. 633), Employes, Inj. to, 202.
Nashville, C. & St. L. R. Co. *v.* Wheless (15 Am. & Eng. R. Cas. 315, 10 Lea (Tenn.) 741, 43 Am. Rep. 317), Fel. Serv., 268.
Nasmith *v.* Dickey (44 U. C. Q. B. 414), Stockh., 65.
Nasmith *v.* Manning (5 Can. Sup. Ct. 417; affirming 5 Ont. App. 126; reversing 29 U. C. C. P. 34), Subscr., 11.
Nason *v.* Woonsocket Union R. Co. (4 R. I. 377), Em. Dom., 639.
Nassau Bank *v.* Jones (20 Am. & Eng. R. Cas. 637, 95 N. Y. 115), Subscr., 230.
Nassau Cable Co., In re (36 Hun (N. Y.) 272, 2 How. Pr. N. S. 124), St. Rys., 64.
Natchez & J. R. Co. *v.* McNeil (19 Am. & Eng. R. Cas. 518, 61 Miss. 434), Animals, 39.
Natchez Cotton Mills Co. *v.* Mullins (67 Miss. 672, 7 So. Rep. 542), Death, etc., 48.
Natchez, J. & C. R. Co. *v.* Bolls (62 Miss. 50), Sales, 12; Trial, 35.
Natchez, J. & C. R. Co. *v.* Cook (63 Miss. 38), Death, etc., 5.
Natchez, J. & C. R. Co. *v.* Currie (62 Miss. 506), Em. Dom., 1001, 1063, 1081.
Natchez, J. & C. R. Co. *v.* Lambert (70 Miss. 779, 13 So. Rep. 33), Consol., 28; Tax., 209, 214, 244.
Nathan *v.* Shivers (16 Am. & Eng. R. Cas. 276, 71 Ala. 117, 46 Am. Rep. 303), Charges, 71.
Nathan *v.* Tompkins (82 Ala. 437), Direct., 12, 15; Injunc., 52.
National Bank *v.* Atlanta & C. A. L. R. Co. (25 So. Car. 216), Bills of L., 47, 48, 108, 112.
National Bank *v.* Barber (5 Am. & Eng. R. Cas. 181, 24 Kan. 534), Tax., 27.
National Bank *v.* Chicago, B. & N. R. Co. (44 Minn. 224, 46 N. W. Rep. 342, 560), Bills of L., 16, 109, 111, 121; Car. of M., 295.
National Bank *v.* Com. (9 Wall. (U. S.) 353), Tax., 138.
National Bank *v.* Lake Shore & M. S. R. Co. (21 Ohio St. 221), Attach., 48, 61.
National Bank *v.* Yankton County (2 Dak. 365, 101 U. S. 129), Mun. Aid, 22.
National Bank of Commerce *v.* Huntington (129 Mass. 444), Attach., 12.
National Cable R. Co. *v.* Mt. Adams & E. P. I. R. Co. (38 Fed. Rep. 840), Pat. for Inv., 3, 26, 42.
National Cable R. Co. *v.* Sioux City Cable R. Co. (42 Fed. Rep. 679), Pat. for Inv., 27.
National Docks & N. J. J. Connecting R. Co. *v.* State (53 N. J. L. 217, 21 Atl. Rep. 570), Cross. Rys., 16, 20, 21, 29, 37, 41, 69; Incorp., 2.
National Docks R. Co. *v.* Central R. Co. (32 N. J. Eq. 755; reversing 31 N. J. Eq. 475), Em. Dom., 61, 84, 180; Injunc., 5.
National Exchange Bank *v.* Hartford, P. & F. R. Co. (8 R. I. 375), Coupons, 4, 21.

National Line Steamship Co. *v.* Smart (107 Pa. St. 492), Car. of M., 330, 339.
National Park Bank *v.* Nichols (2 Biss. (U. S.) 146), Stockh., 49; Subscr., 174.
National Tube Works Co. *v.* Baltimore & O. R. Co. (Pa.) (28 Am. & Eng. R. Cas. 13, 8 Atl. Rep. 6), Charges, 64.
Nattress *v.* Philadelphia & R. R. Co. (150 Pa. St. 527, 24 Atl. Rep. 753), Employés, Inj. to, 321.
Naugatuck R. Co. *v.* Beardsley Scythe Co. (33 Conn. 218), Charges, 76.
Naugatuck R. Co. *v.* Waterbury Button Co. (24 Conn. 468), Car. of M., 613; Connect. L., 5.
Nave *v.* Alabama G. S. R. Co. (54 Am. & Eng. R. Cas. 151, 96 Ala. 264, 11 So. Rep. 391), Death, etc., 280; Employés, Inj. to, 158, 328; Tresp., Inj. to, 23; Witn., 95, 119.
Nave *v.* Pacific Exp. Co. (19 Mo. App. 563), Exp. Cos., 32, 49.
Nay *v.* Hannibal & St. J. R. Co. (51 Mo. 575), Animals, 637.
Naylor *v.* Chicago & N. W. R. Co. (5 Am. & Eng. R. Cas. 460, 53 Wis. 661, 11 N. W. Rep. 24), Employés, Inj. to, 206, 226.
Naylor *v.* New York C. & H. R. R. Co. (33 Fed. Rep. 801), Employés, Inj. to, 184, 194; Fel. Serv., 422.
Neal *v.* Knox & L. R. Co. (61 Me. 298), Em. Dom., 428.
Neal *v.* Pittsburg & C. R. Co. (31 Pa. St. 19), Em. Dom., 854.
Neal *v.* Pittsburg & C. R. Co. (2 Grant's Cas. (Pa.) 137), Em. Dom., 274; Location, etc., 6.
Neal *v.* Railroad Com'rs (85 Me. 62, 26 Atl. Rep. 994), Ry. Com'rs, 5.
Neal *v.* Saunderson (10 Miss. 572), Car. of M., 11, 15; Words & Ph., 7, 109.
Neal *v.* Wilmington & W. R. Co. (8 Jones (N. Car.) 482), Car. of M., 96, 222.
Neale *v.* Depot R. Co. (94 Cal. 425, 29 Pac. Rep. 954), Husb. & W., 15, 38.
Nealon *v.* Grand Trunk R. Co. (5 N. Y. S. R. 256, 42 Hun 651), Bagg., 21.
Near *v.* Delaware & H. Canal Co. (32 Hun (N. Y.) 557; affirmed (?) 98 N. Y. 663, mem.), Death, etc., 299.
Neary *v.* Philadelphia, W. & B. R. Co. (Del.) (9 Atl. Rep. 405; affirming 5 Del. Ch. 600, 8 Atl. Rep. 363), Tax., 130, 137, 149.
Neath & B. R. Co., Ex parte (L. R. 2 Ch. D. 201, 45 L. J. Ch. D. 196), Em. Dom., 1151.
Neath & B. R. Co., In re ([1892] 1 Ch. 349), Reorg., 9.
Neath & B. R. Co., In re (43 L. J. Ch. 277, L. R. 9 Ch. 263, 22 W. R. 242, 30 L. T. 3), Em. Dom., 1149, 1152.
Nebenzahal *v.* Fargo (15 Daly (N. Y.) 130, 3 N. Y. Supp. 929, 22 N. Y. S. R. 231, 23 N. Y. S. R. 65), Car. of M., 278
Nebraska & C. R. Co. *v.* Scott (31 Neb. 571, 48 N. W. Rep. 390), Sts. & H., 262.
Nebraska & C. R. Co. *v.* Storer (22 Neb. 90, 34 N. W. Rep. 69), Em. Dom., 936.
Nebraska R. Co. *v.* Lett (8 Neb. 251, 20 Am. Ry. Rep. 364), Pres., 13.
Nebraska R. Co. *v.* Van Dusen (6 Neb. 160), Em. Dom., 548, 941.
Needham *v.* Grand Trunk R. Co. (38 Vt. 294), Death, etc., 36, 109, 383.
Needham *v.* Louisville & N. R. Co. (85 Ky. 423, 3 S. W. Rep. 797, 11 S. W. Rep. 306), Death, etc., 358; Employés, Inj. to, 231, 238; Negl., 75; Words & Ph., 150.
Needham *v.* San Francisco & S. J. R. Co. (37 Cal. 409), Animals, 277.
Neely *v.* Charlotte, C. & A. R. Co. (33 So. Car. 136, 11 S. E. Rep. 636), Animals, 569; Cross., Inj. at, 118.
Neer *v.* Williams (10 Am. & Eng. R. Cas. 561, 27 Kan. 1), Land Grants, 102.
Neff *v.* Chicago & N. W. R. Co. (14 Wis. 370), Em. Dom., 938, 939.
Nefzger *v.* Davenport & St. P. R. Co. (36 Iowa 642), Mun. Aid, 120.
Negus *v.* Brooklyn (10 Abb. N. Cas. (N. Y.) 180, 1 Civ. Pro. 471, 62 How. Pr. 291), Elev. Rys., 4, 53.
Nehrbas *v.* Central Pac. R. Co. (14 Am. & Eng. R. Cas. 670, 62 Cal. 320), Children, Inj. to, 20, 72, 104; Contrib. Neg., 87, 105, 106; Cross., Inj. at, 287, 365; Death, etc., 403, 434.
Neibles *v.* Minneapolis & St. L. R. Co. (37 Minn. 151, 33 N. W. Rep. 332), Agency, 7; Contr., 9.
Neier *v.* Missouri Pac. R. Co. (12 Mo. App. 25), Contrib. Neg., 21; Negl., 27; Sts. & H., 318, 326, 377.
Neier *v.* Missouri Pac. R. Co. (12 Mo. App. 35), Contrib. Neg., 16, 48; Husb. & W., 23; Negl., 110; Sts. & H., 38.
Neier *v.* Missouri Pac. R. Co. (Mo.) (1 S. W. Rep. 387), Cross., Inj. at, 192, 255; Pl., 51.
Neiler *v.* Kelley (69 Pa. St. 403), Trover, 6, 18.
Neilon *v.* Kansas City, St. J. & C. B. R. Co. (28 Am. & Eng. R. Cas. 386, 85 Mo. 599), Fel. Serv., 150.
Neilson *v.* Chicago, M. & N. W. R. Co. (14 Am. & Eng. R. Cas. 239, 58 Wis. 516, 17 N. W. Rep. 310), Em. Dom., 683, 758; Witn., 119.
Neilson *v.* Iowa Eastern R. Co. (44 Iowa 71), Mort., 106.
Neilson *v.* Iowa Eastern R. Co. (51 Iowa 184, 714), Liens, 21, 23, 26, 41, 42.
Neiman *v.* Delaware & H. Canal Co. (149 Pa. St. 92, 24 Atl. Rep. 96), Cross., Inj. at, 275.
Neitzey *v.* Baltimore & P. R. Co. (26 Am. & Eng. R. Cas. 553, 5 Mackey (D. C.) 34), New Tr., 6; Nuis., 36; Sts. & H., 170, 174, 291.
Nellis *v.* New York C. R. Co. (30 N. Y. 505), Tickets & F., 125, 131.
Nelson *v.* Atlantic & P. R. Co. (68 Mo. 593), Car. of P., 426.
Nelson *v.* Boston & M. R. Co. (155 Mass. 356, 29 N. E. Rep. 586), Evid., 59.
Nelson *v.* Central R. & B. Co. (48 Ga. 152), Animals, 76.
Nelson *v.* Central R. & B. Co. (88 Ga. 225, 14 S. E. Rep. 210), Employés, Inj. to, 353.
Nelson *v.* Chesapeake & O. R. Co. (54 Am. & Eng. R. Cas. 82, 88 Va. 971, 14 S. E.

Rep. 838), Death, etc., 113, 146; Employés, Inj. to, 732.
Nelson *v.* Chicago, B. & Q. R. Co. (2 Ill. App. 180), Car. of M., 309.
Nelson *v.* Chicago, M. & St. P. R. Co. (30 Minn. 74, 14 N. W. Rep. 360), Animals, 137.
Nelson *v.* Chicago, M. & St. P. R. Co. (35 Minn. 170, 28 N. W. Rep. 215), Fires, 237, 246, 272.
Nelson *v.* Chicago, M. & St. P. R. Co. (77 Iowa 405, 42 N. W. Rep. 335), Fel. Serv., 475.
Nelson *v.* Chicago, M. & St. P. R. Co. (73 Iowa 576, 35 N. W. Rep. 611), Fel. Serv., 175.
Nelson *v.* Chicago, M. & St. P. R. Co. (22 Am. & Eng. R. Cas. 391, 60 Wis. 320, 19 N. W. Rep. 52), Car. of P., 122; Employés, 16; Negl., 61; Time-tables, 3.
Nelson *v.* Chicago, R. I. & P. R. Co. (38 Iowa 564), Contrib. Neg., 104; Death, etc., 284.
Nelson *v.* Cook (12 U. C. Q. B. 22), Em. Dom., 1279.
Nelson *v.* Galveston, H. & S. A. R. Co. (48 Am. & Eng. R. Cas. 8, 78 Tex. 621, 14 S. W. Rep. 1021), Death, etc., 51, 163.
Nelson *v.* Great Northern R. Co. (52 Minn. 276, 53 N. W. Rep. 1129), Fences, 52.
Nelson *v.* Haywood County (38 Am. & Eng. R. Cas. 620, 87 Tenn. 781, 11 S. W. Rep. 885), Mun. Aid, 3, 49, 180, 208, 317, 342, 362.
Nelson *v.* Hudson River R. Co. (48 N. Y. 498, 2 Am. Ry. Rep. 305), Agency, 13; Car. of M., 441; Charges, 10.
Nelson *v.* Jenks (51 Minn. 108, 52 N. W. Rep. 1081), Insolv., 6.
Nelson *v.* Long Island R. Co. (7 Hun (N. Y.) 140), Eject. Pass., 49.
Nelson *v.* Minneapolis & St. L. R. Co. (40 Am. & Eng. R. Cas. 234, 41 Minn. 131, 42 N. W. Rep. 788), Fences, 101.
Nelson *v.* Oregon R. & N. Co. (13 Oreg 141, 9 Pac. Rep. 321), App., 124.
Nelson *v.* St. Louis & S. F. R. Co. (49 Kan. 165, 30 Pac. Rep. 178), Cat.-Gds., 33.
Nelson *v.* Vermont & C. R. Co. (26 Vt. 717), Charters, 27; Leases, 40.
Nelson & N. R. Co. *v.* Bates (4 U. C. C. P. 507), Incorp., 5.
Nemaha County *v.* Frank (120 U. S. 41, 7 Sup. Ct. Rep. 395), Mun. Aid, 390.
Nesbit *v.* Garner (75 Iowa 314, 39 N. W. Rep. 516, Imp. Neg., 7.
Nesbitt *v.* Louisville, C. & C. R. Co. (2 Spears (So. Car.) 697), Constr. Rys., 30; Pres., 1.
Neslie *v.* Second & T. St. Pass. R. Co. (27 Am. & Eng. R. Cas. 180, 113 Pa. St. 300, 6 Atl. Rep. 72), St. Rys., 384.
Nestelle *v.* Northern Pac. R. Co. (56 Fed. Rep. 261), Death, etc., 101.
Neston Colliery Co. *v.* London & N. W. R. Co. (4 Ry. & C. T. Cas. 257), Car. of M., 221; Charges, 117, 119; Ry. Com'rs, 10.
Nette *v.* New York El. R. Co. (1 Misc. (N. Y.) 342), Elev. Rys., 178.
Nette *v.* New York El. R. Co. (2 Misc. 62, 49 N. Y. S. R. 349, 20 N. Y. Supp. 844; denying reargument in 1 Misc. 342, 48 N. Y. S. R. 723, 20 N. Y. Supp. 627), Elev. Rys., 113.
Nettles *v.* Marco (33 So. Car. 47, 11 S. E. Rep. 595), Subscr., 154, 184, 201.
Nettles *v.* South Carolina R. Co. (7 Rich. (So. Car.) 190), Car. of M., 130, 240, 786.
Neubauer *v.* New York, L. E. & W. R. Co. (101 N. Y. 607, mem., 4 N. E. Rep. 125; affirming 31 Hun 173, mem.), Fel. Serv., 1.
Neuman *v.* Third Ave. R. Co. (18 J. & S. (N. Y.) 412; appeal dismissed (?) 97 N. Y. 632, mem.), Phys. Exam., 2.
Neustadt *v.* Illinois C. R. Co. (31 Ill. 484), Tax., 199.
Nevada & M. R. Co. *v.* De Lissa (103 Mo. 125, 15 S. W. Rep. 366), Em. Dom., 360; Witn., 122.
Nevada Bank *v.* Steinmitz (64 Cal. 301), Mun. Aid, 175, 316, 340.
Neville *v.* Chicago & N. W. R. Co. (79 Iowa 232, 44 N. W. Rep. 367), App., 51, 85; Employés, Inj. to, 532, 643; Pl., 23.
Nevin *v.* Pullman Palace Car Co. (11 Am. & Eng. R. Cas. 92, 106 Ill. 222), Sleep. Car Cos., 7, 9.
Nevins *v.* Bay State Steamboat Co. (4 Bosw. (N. Y.) 225), Bagg., 36, 66; Tickets & F., 1, 112.
New Albany *v.* Burke (11 Wall. (U. S.) 96), Lim. of Ac., 9; Mun. Aid, 202.
New Albany *v.* Smith (16 Ind. 215), Mun. Corp., 46.
New Albany & S. R. Co. *v.* Aston (13 Ind. 545), Animals, 153, 386.
New Albany & S. R. Co. *v.* Campbell (12 Ind. 55), Car. of M., 248, 362.
New Albany & S. R. Co. *v.* Combs (13 Ind. 490), Appear., 7.
New Albany & S. R. Co. *v.* Connelly (7 Ind. 32), Em. Dom., 29; Injunc., 16.
New Albany & S. R. Co. *v.* Fields (10 Ind. 187), Subscr., 15, 148, 168.
New Albany & S. R. Co. *v.* Fix (12 Ind. 485), Animals, 134.
New Albany & S. R. Co. *v.* Gillespy (7 Ind. 245), Witn., 13.
New Albany & S. R. Co. *v.* Grooms (9 Ind. 243), Proc., 36.
New Albany & S. R. Co. *v.* Haskell (11 Ind. 301), Actions, 7; Citizens., 4; Superint., 1.
New Albany & S. R. Co. *v.* Higman (18 Ind. 77), Nuis., 3.
New Albany & S. R. Co. *v.* Huff (19 Ind. 315), Ferries, 5; Trial, 217.
New Albany & S. R. Co. *v.* Laiman (8 Ind. 212), Pl., 146.
New Albany & S. R. Co. *v.* McCormick (10 Ind. 499), Contr., 22; Subscr., 67, 81, 189, 199.
New Albany & S. R. Co. *v.* McNamara (11 Ind. 543), Animals, 119; Fences, 3; Proc., 1, 39.
New Albany & S. R. Co. *v.* Maiden (12 Ind. 10), Animals, 12, 280; Fences, 38.
New Albany & S. R. Co. *v.* O'Daily (12 Ind. 551), Em. Dom., 161; Sts. & H., 232.
New Albany & S. R. Co. *v.* O'Daily (13 Ind. 353), Em. Dom., 161.
New Albany & S. R. Co. *v.* Pace (13 Ind.

411), Animals, 88; Cat.-Gds., 2; Fences, 22, 86.
New Albany & S. R. Co. *v.* Peterson (14 Ind. 112), Waters & W., 30.
New Albany & S. R. Co. *v.* Pickens (5 Ind. 247), Subscr., 82, 93.
New Albany & S. R. Co. *v.* Powell (13 Ind. 373), Proc., 36.
New Albany & S. R. Co. *v.* Slaughter (10 Ind. 218), Subscr., 172.
New Albany & S. R. Co. *v.* Tilton (12 Ind. 3), Animals, 12; Fences, 3; Proc., 36.
New Albany & S. R. Co. *v.* Welsh (9 Ind. 479), Animals, 296.
New Albany F. & R. Mill *v.* Cooper (131 Ind. 363, 30 N. E. Rep. 294), Employés, Inj. to, 461; Indep. Contr., 7.
Newall *v.* Staffordshire Gravel Co. (N. J. Eq.) (11 Atl. Rep. 495), Em. Dom., 1032.
Newark *v.* Delaware, L. & W. R. Co. (42 N. J. Eq. 196, 7 Atl. Rep. 123), Cross., Sts. & H., 31.
Newark & S. O. Horse Car. Co. *v.* Hunt (50 N. J. L. 308, 11 Cent. Rep. 219, 12 Atl. Rep. 697), Nuis., 14; Words & Ph., 40.
Newark Pass. R. Co. *v.* Block (56 Am. & Eng. R. Cas. 590, 55 N. J. L. 605, 27 Atl. Rep. 1067), Elec. Rys., 21; St. Rys., 488; Trial, 73.
Newaygo Mfg. Co. *v.* Chicago & W. M. R. Co. (29 Am. & Eng. R. Cas. 505, 64 Mich. 114, 30 N. W. Rep. 910), Em. Dom., 208; Tresp., 1; Waters & W., 17.
New Bedford & F. H. St. R. Co. *v.* Acushnet St. R. Co. (143 Mass. 200, 9 N. E. Rep. 536), St. Rys., 245.
New Bedford R. Co. *v.* Old Colony R. Co. (120 Mass. 397), Consol., 46.
Newbold, In re (14 C. B. N. S. 405), Em. Dom., 1176.
Newbold *v.* Peoria & S. R. Co. (5 Ill. App. 367), Receiv., 107.
New Brighton & N. C. R. Co., Appeal of (105 Pa. St. 13), Location, etc., 27.
New Brunswick & C. R. & L. Co. *v.* Muggeridge (4 H. & N. 160, 5 Jur. N. S. 1131, 28 L. J. Ex. 365), Subscr., 1.
New Brunswick R. Co., Ex parte (15 New Brun. 78), Mun. Aid, 204.
New Brunswick R. Co. *v.* Armstrong (23 New Brun. 193), Animals, 151, 536.
New Brunswick R. Co. *v.* McLeod (17 New Brun. 257), Paym., 3.
New Brunswick R. Co. *v.* Robinson (29 Am. & Eng. R. Cas. 132, 11 Can. Sup. Ct. 688; reversing 23 New Brun. 323), Fires, 50.
New Brunswick R. Co. *v.* Vanwart (17 Can. Sup. Ct. 35), Side Tr., 4.
New Buffalo Tp. *v.* Cambria Iron Co. (105 U. S. 73), Mun. Aid, 6, 207, 318.
Newburger *v.* Howard (6 Phila. (Pa.) 174), Exp. Cos., 72.
Newbury *v.* Connecticut & P. R. R. Co. (25 Vt. 377), Sts. & H., 206, 398.
Newburyport Turnpike Corp. *v.* Eastern R. Co. (23 Pick (Mass.) 326), Cross., Sts. & H., 99.
Newby *v.* Chicago, R. I. & P. R. Co. (19 Mo. App. 391), Car. of L. S., 46.
Newby *v.* Oregon C. R. Co. (1 Sawy. (U. S.) 63), Bonds, 35; Stockh., 128.
New Castle & F. R. Co. *v.* McChesney (85 Pa. St. 522, 18 Am. Ry. Rep. 518), Embankm., 4.
Newcastle & R. R. Co. *v.* Brumback (5 Ind. 543), Em. Dom., 733; Witn., 13.
Newcastle & R. R. Co. *v.* Peru & I. R. Co. (3 Ind. 464), Charters, 63; Location, etc., 1.
Newcastle Northern R. Co. *v.* New Castle & S. V. R. Co. (152 Pa. St. 96, 25 Atl. Rep. 173; affirming 1 Pa. Dist. 768), Ejectm., 14.
New Castle Northern R. Co. *v.* Simpson (21 Fed. Rep. 533), Constr. Rys., 25.
New Castle Northern R. Co. *v.* Simpson (23 Fed. Rep. 214), Ult. Vir., 25.
New Castle Northern R. Co. *v.* Simpson (26 Fed. Rep. 133), Liens, 17.
Newcastle-under-Lyne & Leek Turnpike Road (Trustees) *v.* North Staffordshire R. Co. (5 H. & N. 160), Bridges, 33, 42.
New Central Coal Co. *v.* George's Creek C. & I. Co. (37 Md. 537), Em. Dom., 62, 179, 188, 246, 1037; Incorp., 3.
Newcomb, In re (18 N. Y. Supp. 16, 42 N. Y. S. R. 442), Direct., 3, 7, 11.
Newcombe *v.* Chicago & N. W. R. Co. (28 N. Y. S. R. 716, 55 Hun 607, 8 N. Y. Supp. 366), Pl., 84.
Newell *v.* Great Western R. Co. (19 Mich. 336), Proc., 20.
Newell *v.* Minneapolis, L. & M. R. Co. (24 Am. & Eng. R. Cas. 298, 35 Minn. 112, 27 N. W. Rep. 839), Sts. & H., 38, 137, 140, 142.
Newell *v.* Ryan (40 Hun (N. Y.) 286; affirmed in 116 N. Y. 656, mem.), Employés, Inj. to, 717.
Newell *v.* Smith (49 Vt. 255, 17 Am. Ry. Rep. 100), Bills of L., 40; Car. of M., 578, 746, 778; Receiv., 64.
New England Car Spring Co. *v.* Baltimore & O. R. Co. (11 Md. 81), Liens, 26.
New England Exp. Co. *v.* Maine C. R. Co. (57 Me. 188), Exp. Cos., 9.
New England Iron Co. *v.* Gilbert El. R. Co. (16 Am. & Eng. R. Cas. 609, 91 N. Y. 153), Constr. Rys., 125.
New England Mfg. Co. *v.* Starin (60 Conn. 369, 22 Atl. Rep. 953), Car. of M., 751.
New England Mut. L. Ins. Co. *v.* Phillips (141 Mass. 535, 6 N. E. Rep. 534), Direct., 12; Eastern R. Co., 1.
Newfoundland *v.* Newfoundland R. Co. (13 App. Cas. 199), Contr., 73; Set-off, 7.
New Foundland R. Constr. Co. *v.* Schack (40 N. J. Eq. 222, 1 Atl. Rep. 23), Receiv., 5, 25.
Newgass *v.* Atlantic & D. R. Co. (56 Fed. Rep. 676), Liens, 3, 5, 34; Mort., 59.
Newgass *v.* St. Louis, A. & T. R. Co. (54 Ark. 140, 15 S. W. Rep. 188), Em. Dom., 460, 657, 685, 691.
Newhall *v.* Central Pac. R. Co. (51 Cal. 345), Bills of L., 125.
Newhall *v.* Galena & C. U. R. Co. (14 Ill. 273), Branch & L. Roads, 13; Charters, 54; Em. Dom., 185.
Newhall *v.* Sanger (92 U. S. 761), Land Grants, 49.
New Hamburg & P. C. R. Co., In re (27 N. Y. Supp. 664), Ry. Com'rs, 25.
New Hampshire C. R. Co. *v.* Johnson (30 N. H. 390), Subscr., 50, 104, 177, 182.

Newhard *v.* Pennsylvania R. Co. (55 Am. & Eng. R. Cas. 258, 153 Pa. St. 417, 26 Atl. Rep. 105), Cross., Inj. at, 10, 123, 277.
Newhart *v.* St. Paul City R. Co. (51 Minn. 42, 52 N. W. Rep. 983), Employés, Inj. to, 139, 242, 616.
New Haven *v.* Fair Haven & W. R. Co. (38 Conn. 422, 3 Am. Ry. Rep. 230), St. Rys., 294, 297.
New Haven *v.* New Haven & D. R. Co. (62 Conn. 252, 25 Atl. Rep. 316), Sts. & H., 147.
New Haven *v.* New York & N. H. R. Co. (39 Conn. 128, 4 Am. Ry. Rep. 253), Bridges, 3.
New Haven & D. R. Co. *v.* Chapman (38 Conn. 56, 4 Am. Ry. Rep. 1), Incorp., 8; Subscr., 120.
New Haven & N. Co. *v.* Campbell (128 Mass. 104, 35 Am. Rep. 360), Car. of M., 392.
New Haven & N. Co. *v.* Hammersley (2 Am. & Eng. R. Cas. 418, 104 U. S. 1), Charters, 45.
New Haven & N. Co. *v.* Hayden (107 Mass. 525), Direct., 38; Right of W., 9.
New Haven & N. Co. *v.* Hayden (117 Mass. 433, 8 Am. Ry. Rep. 54), Dam., 54.
New Haven & N. Co. *v.* Hayden (119 Mass. 361), Subscr., 24.
New Haven & N. Co. *v.* Northampton (102 Mass. 116), Em. Dom., 775, 781, 782, 783.
New Haven, M. & W. R. Co. v. Chatham (42 Conn. 465, 10 Am. Ry. Rep. 168), Mun. Aid, 115.
New Jersey *v.* Yard (95 U. S. 104), Charters, 24; Tax., 140.
New Jersey & N. Y. R. Co., In re (29 N. J. Eq. 67), Insolv., 1.
New Jersey & N. Y. R. Co. *v.* Young (49 Fed. Rep. 723, 1 U. S. App. 96, 1 C. C. A. 428), Employés, Inj. to, 250, 305, 750; Fel. Serv., 59.
New Jersey Exp. Co. *v.* Nichols (33 N. J. L. 434; affirming 32 N. J. L. 166), Contrib. Neg., 8, 13, 88, 105; Dam., 86; Negl., 18; Trial, 83.
New Jersey Fruit Exch. *v.* Central R. Co. (2 Int. Com. Rep. 84, 2 Int. Com. Com. 142), Int. Com., 29.
New Jersey Midland R. Co. *v.* Hitchcock (14 Am. & Eng. R. Cas. 598, 37 N. J. Eq. 549), Bailm., 2.
New Jersey Midland R. Co. *v.* Strait (35 N. J. L. 322), Consol., 30; Subscr., 59.
New Jersey Midland R. Co. *v.* Van Syckle (37 N. J. L. 496), Consol., 35; Em. Dom., 231; Tresp., 10.
New Jersey Midland R. Co. *v.* Wortendyke (27 N. J. Eq. 658; reversing 27 N. J. Eq. 110), Mort., 60, 222; Subrog., 1.
New Jersey R. & T. Co. *v.* Pennsylvania R. Co. (27 N. J. L. 100), Car. of M., 9, 11, 46.
New Jersey R. & T. Co. *v.* Pollard (22 Wall. (U. S.) 341), Car. of P., 584; Evid., 125.
New Jersey R. & T. Co. *v.* Suydam (17 N. J. L. 25), Em. Dom., 789, 961.
New Jersey R. & T. Co. *v.* West (32 N. J. L. 91), Children, Inj. to, 193; Cross., Inj. at, 72, 191.
New Jersey R. & T. Co. *v.* West (33 N. J. L. 430), Trial, 79.
New Jersey R. Co., Ex parte (16 N. J. L. 393), Cert, 1.
New Jersey R. Co. *v.* Kennard (21 Pa. St. 203), Car. of P., 493.
New Jersey R. Co. *v.* Palmer (33 N. J. L. 90), Ferries, 11.
New Jersey Southern R. Co. *v.* Long Branch Com'rs (39 N. J. L. 28, 14 Am. Ry. Rep. 211), Em. Dom., 109; Cross., Sts. & H., 47; Dissol., 21; Franch., 1; Sts. & H., 24.
New Jersey Steamboat Co. *v.* Brockett (121 U. S. 637, 7 Sup. Ct. Rep. 1039), Car. of P., 302.
New Jersey Steamboat Co. *v.* Mayor, etc., of N. Y. (2 Silv. App. 23, 109 N. Y. 621, mem., 15 N. E. Rep. 877, 14 N. Y. S. R. 57; affirming 39 Hun 657, mem.), App., 116; Trial, 55.
New Jersey Steam Nav. Co. *v.* Merchants' Bank (6 How. (U. S.) 344), Car. of M., 450; Lim. of Liab., 12, 27.
New Jersey W. L. R. Co. *v.* Beardsley (35 N. J. L. 479), Exec., 17.
New Jersey Z. & I. Co. *v.* Morris C. & B. Co. (36 Am. & Eng. R. Cas. 515, 44 N. J. Eq. 398, 15 Atl. Rep. 227), Em. Dom., 88, 131, 143.
Newlin Tp. *v.* Davis (77 Pa. St. 317), Bridges, 20, 54.
New London City Nat. Bank *v.* Ware River R. Co. (41 Conn. 542), Pl., 35.
New London Nat. Bank *v.* Lake Shore & M. S. R. Co. (21 Ohio St. 221), Stock, 66.
New London Northern R. Co. *v.* Boston & A. R. Co. (102 Mass. 386), Ry. Com'rs, 3.
Newman *v.* Alabama G. S. R. Co. (38 Fed. Rep. 819), Car. of P., 644; Evid., 291.
Newman *v.* Chicago, M. & St. P. R. Co. (44 Am. & Eng. R. Cas. 555, 80 Iowa 672, 45 N. W. Rep. 1054), Employés, Inj. to, 302.
Newman *v.* Davenport (9 Baxt. (Tenn.) 538), Receiv., 74.
Newman *v.* Metropolitan El. R. Co. (43 Am. & Eng. R. Cas. 412, 118 U. S. 618, 23 N. E. Rep. 901, 30 N. Y. S. R. 36; reversing 45 Hun 590, 10 N. Y. S. R. 12), Elev. Rys., 41, 163.
Newman *v.* New York, L. E. & W. R. Co. (54 Hun 335, 27 N. Y. S. R. 135, 7 N. Y. Supp. 560), Dam., 18; False Imp., 6, 14.
Newman *v.* Phillipsburg H. C. R. Co. (43 Am. & Eng. R. Cas. 305, 52 N. J. L. 446, 19 Atl. Rep. 1102), Children, Inj. to, 137, 139.
Newman *v.* St. Louis & I. M. R. Co. (2 Mo. App. 402), Dam., 23.
Newman *v.* Vicksburg & M. R. Co. (64 Miss. 115, 8 So. Rep. 172), Animals, 66, 78, 81.
Newmarket R. Co. *v.* Foster (2 C. L. R. 1617), Tax., 381.
Newmarket R. Co. *v.* St. Andrew (3 El. & Bl. 94, 2 C. L. R. 621, 18 Jur. 572, 23 L. J. M. C. 76, 7 Railw. Cas. 858), Tax., 369
New Mexican R. Co. *v.* Hendricks (N. Mex.) (30 Pac. Rep. 901), Em. Dom., 161; Sts. & H., 208, 276.

Newmeyer *v.* Missouri & M. R. Co. (52 Mo. 81, 3 Am. Ry. Rep. 187), Mun. Aid, 400.
New Orleans *v.* Crescent City R. Co. (40 Am. & Eng. R. Cas. 281, 41 La. Ann. 904, 6 So. Rep. 719), Estop., 4.
New Orleans *v.* New Orleans & C. R. Co. (35 La. Ann. 650), Tax., 320.
New Orleans *v.* New Orleans & C. R. Co. (35 La. Ann. 679), Tax., 29.
New Orleans *v.* New Orleans & N. R. Co. (44 La. Ann. 64, 10 So. Rep. 401), Spec. Perf., 1, 3.
New Orleans *v.* New Orleans City & L. R. Co. (40 La. Ann. 587, 4 So. Rep. 512), St. Rys., 288.
New Orleans *v.* New Orleans, M. & C. R. Co. (27 La. Ann. 414), Stat., 34; Wharves, 1.
New Orleans *v.* New Orleans, St. L. & C. R. Co. (37 La. Ann. 45), Tax., 262.
New Orleans *v.* Orleans R. Co. (42 La. Ann. 4, 7 So. Rep. 59), Tax., 396.
New Orleans *v.* Pontchartrain R. Co. (41 La. Ann. 519, 7 So. Rep. 83), Tax., 29.
New Orleans *v.* St. Charles St. R. Co. (28 La. Ann. 497), Mun. Corp., 5.
New Orleans & C. R. Co. *v.* Board of Assessors (32 La. Ann. 19), Tax., 262.
New Orleans & C. R. Co. *v.* Carrollton (3 La. Ann. 282), Dedica., 3; Sts. & H., 6.
New Orleans & C. R. Co. *v.* Darms (39 La. Ann. 766, 2 So. Rep. 230), Refresh. Rooms, 1.
New Orleans & C. R. Co. *v.* Harper (11 La. Ann. 212), Lim. of Ac., 10.
New Orleans & C. R. Co. *v.* Hood (3 La. Ann. 226), App., 140.
New Orleans & C. R. Co. *v.* Second Municipality (1 La. Ann. 128), Charters, 67.
New Orleans & G. R. Co. *v.* Frank (30 Am. & Eng. R. Cas. 275, 39 La. Ann. 707, 2 So. Rep. 310), Em. Dom., 832; Subscr., 18.
New Orleans & M. Packet Co. *v.* James (32 Fed. Rep. 21), Commerce, 6.
New Orleans & N. E. R. Co. *v.* Bourgeois (66 Miss. 3, 5 So. Rep. 629), Animals, 45, 51, 67; Negl., 100.
New Orleans & N. E. R. Co. *v.* Burkett (Miss.) (2 So. Rep. 253), Animals, 51.
New Orleans & N. E. R. Co. *v.* Jones (Miss.) (3 So. Rep. 653), Animals, 456.
New Orleans & N. E. R. Co. *v.* Jopes (52 Am. & Eng. R. Cas. 447, 142 U. S. 18, 12 Sup. Ct. Rep. 109), Assault, 12.
New Orleans & N. E. R. Co. *v.* Mississippi, T. & L. R. Co. (36 La. Ann. 561), Injunc., 4.
New Orleans & N. E. R. Co. *v.* Reese (18 Am. & Eng. R. Cas. 110, 61 Miss. 581), Agency, 3, 5; Indep. Contr., 17.
New Orleans & N. E. R. Co. *v.* Thornton (65 Miss. 256, 3 So. Rep. 654), Animals, 75.
New Orleans & P. R. Co. *v.* Robertson (34 La. Ann. 865), Charters, 153; Em. Dom., 555.
New Orleans & P. R. Co. *v.* Union Trust Co. (45 Am. & Eng. R. Cas. 458, 41 Fed. Rep. 717), Mort., 39.
New Orleans & S. R. Co. *v.* Jones (2 Am. & Eng. R. Cas. 425, 68 Ala. 48), Ejectm., 35; Em. Dom., 373, 420, 1014, 1018, 1075.
New Orleans, B. R. & M. R. Co. *v.* Brown (64 Miss. 479, 1 So. Rep. 637), Em. Dom., 990; Tresp., 19.
New Orleans, B. R., V. & M. R. Co. *v.* Drake (20 Am. & Eng. R. Cas. 391, 60 Miss. 621), Em. Dom., 36.
New Orleans, B. R., V. & M. R. Co. *v.* Norwood (62 Miss. 565, 52 Am. Rep. 191), Employés, 4.
New Orleans City & L. R. Co. *v.* New Orleans (50 Am. & Eng. R. Cas. 391, 44 La. Ann. 728, 11 So. Rep. 78), St. Rys., 46; Sts. & H., 297.
New Orleans City & L. R. Co. *v.* New Orleans (44 La. Ann. 748, 11 So. Rep. 77), St. Rys., 18, 46.
New Orleans City & L. R. Co. *v.* New Orleans (143 U. S. 192, 12 Sup. Ct. Rep. 406), St. Rys., 282.
New Orleans City & L. R. Co. *v.* New Orleans (44 La. Ann. 1053, 11 So. Rep. 687), Tax., 262.
New Orleans City & L. R. Co. *v.* New Orleans (54 Am. & Eng. R. Cas. 297, 44 La. Ann. 1055, 11 So. Rep. 820), Tax., 262.
New Orleans City R. Co. *v.* Crescent City R. Co. (12 Fed. Rep. 308), St. Rys., 46.
New Orleans City R. Co. *v.* Crescent City R. Co. (23 La. Ann. 759), St. Rys., 46.
New Orleans City R. Co. *v.* McCloskey (35 La. Ann. 784), Land. & T., 3.
New Orleans Cotton Exch. *v.* Cincinnati, N. O. & T. P. R. Co. (2 Int. Com. Rep. 289, 2 Int. Com. Com. 375), Int. Com., 10, 32, 33, 52, 113.
New Orleans Cotton Exch. *v.* Illinois C. R. Co. (2 Int. Com. Rep. 777, 3 Int. Com., Com. 534), Int. Com., 44, 122.
New Orleans Cotton Exch. *v.* Louisville, N. O. & T. R. Co. (3 Int. Com. Rep. 523, 4 Int. Com. Com. 694), Int. Com., 131, 170.
New Orleans, Ft. J. & G. I. R. Co. *v.* Barton (43 La. Ann. 171, 9 So. Rep. 19), Em. Dom., 720.
New Orleans, Ft. J. & G. I. R. Co. *v.* Rabasse (44 La. Ann. 178, 10 So. Rep. 708), Em. Dom., 826.
New Orleans, J. & G. N. R. Co. *v.* Allbritton (38 Miss. 242), Agency, 71; Collis., 12, 14; Dam., 35.
New Orleans, J. & G. N. R. Co. *v.* Bailey (40 Miss. 395), Dam., 31; Side Tr., 4.
New Orleans, J. & G. N. R. Co. *v.* Echols (54 Miss. 264), Dam., 4; Pl., 96.
New Orleans, J. & G. N. R. Co. *v.* Enochs (42 Miss. 603), Animals, 29; New Tr., 16.
New Orleans, J. & G. N. R. Co. *v.* Estlin (12 La. Ann. 184), Lim. of Ac., 42.
New Orleans, J. & G. N. R. Co. *v.* Field (46 Miss. 573, 2 Am. Ry. Rep. 439), Animals, 48, 55, 70, 250; Fences, 12.
New Orleans, J. & G. N. R. Co. *v.* Harris (27 Miss. 517), Charters, 18, 21, 36; Stockh., 111.
New Orleans, J. & G. N. R. Co. *v.* Harrison (48 Miss. 112), Agency, 80; Assault, 4; Employés, Inj. to, 340.
New Orleans, J. & G. N. R. Co. *v.* Hemp-

hill (35 Miss. 17), Em. Dom., 282, 536, 545, 962.
New Orleans, J. & G. N. R. Co. *v.* Hughes (49 Miss. 258), Employés, Inj. to, 12, 182, 293; Fel. Serv., 50, 106, 143, 189, 202, 208.
New Orleans, J. & G. N. R. Co. *v.* Hurst (36 Miss. 660), Car. of P., 530, 651.
New Orleans, J. & G. N. R. Co. *v.* Lea (12 La. Ann. 388), Evid., 265; Stockh., 64; Subscr., 170.
New Orleans, J. & G. N. R. Co. *v.* McBride (38 Miss. 32), Em. Dom., 926.
New Orleans, J. & G. N. R. Co. *v.* Mitchell (52 Miss. 808), Cross., Inj. at, 221.
New Orleans, J. & G. N. R. Co. *v.* Moore (40 Miss. 39), Bagg., 29, 123; Car. of M., 775.
New Orleans, J. & G. N. R. Co. *v.* Moye (39 Miss. 374), Em. Dom., 1073; Sts. & H., 212.
New Orleans, J. & G. N. R. Co. *v.* Statham (42 Miss. 607), Car. of P., 230, 235; Dam., 27, 30.
New Orleans, J. & G. N. R. Co. *v.* Tyson (46 Miss. 729, 1 Am. Ry. Rep. 474), Car. of M., 215, 235, 778.
New Orleans, J. & G. N. R. Co. *v.* Wallace (50 Miss. 244), Appear., 3; Citizens., 3; For. Corp., 19.
New Orleans, M. & C. R. Co. *v.* Bougere (23 La. Ann. 803), Em. Dom., 896.
New Orleans, M. & C. R. Co. *v.* Dunn (51 Ala. 128), Injunc., 14; Mun. Aid, 269, 270.
New Orleans, M. & C. R. Co. *v.* Frederic (46 Miss. 1), Em. Dom., 283, 289.
New Orleans, M. & C. R. Co. *v.* Hanning (15 Wall. (U. S.) 649, 4 Am. Ry. Rep. 242), Constr. Rys., 14; Tresp., Inj. to, 9.
New Orleans, M. & C. R. Co. *v.* New Orleans (26 La. Ann. 478), Mun. Corp., 1.
New Orleans, M. & C. R. Co. *v.* New Orleans (26 La. Ann. 517), Sts. & H., 45.
New Orleans, M. & C. R. Co. *v.* Zeringue (23 La. Ann. 521), Em. Dom., 953.
New Orleans, M. & T. R. Co. *v.* Ellerman (9 Am. & Eng. R. Cas. 144, 105 U. S. 166), Wharves, 5.
New Orleans, M. & T. R. Co. *v.* Mississippi (102 U. S. 135), Rem. of C., 9, 45.
New Orleans, M. & T. R. Co. *v.* Mississippi (20 Am. & Eng. R. Cas. 510, 112 U. S. 12, 5 Sup. Ct. Rep. 19), Bridges, 70.
New Orleans, M. & T. R. Co. *v.* Southern & A. Tel. Co. (53 Ala. 211, 13 Am. Ry. Rep. 135), Em. Dom., 247, 902; Tel. & T. Lines, 2, 4.
New Orleans, M. & T. R. Co. *v.* Toulme (59 Miss. 284), Animals, 211, 554; Negl., 27.
New Orleans Mut. Ins. Co. *v.* New Orleans, J. & G. N. R. Co. (20 La. Ann. 302), Car. of M., 453; Lim. of Liab., 27.
New Orleans, O. & G. W. R. Co. *v.* Lagarde (10 La. Ann. 150), Em. Dom., 591, 737.
New Orleans, O. & G. W. R. Co. *v.* Morgan (10 Wall. (U. S.) 256), App., 7.
New Orleans, O. & G. W. R. Co. *v.* Williams (16 La. Ann. 315), Direct., 38.
New Orleans Pac. R. Co. *v.* Gay (31 La. Ann. 430), Em. Dom., 737, 774, 845.
New Orleans Pac. R. Co. *v.* Gay (32 La. Ann. 471), Em. Dom., 131.
New Orleans Pac. R. Co. *v.* Murrell (34 La. Ann. 536), Em. Dom., 821.
New Orleans Pac. R. Co. *v.* Murrell (36 La. Ann. 344), Em. Dom., 631, 687.
New Orleans Pac. R. Co. *v.* Parker (143 U. S. 42, 12 Sup. Ct. Rep. 364; affirming 33 Fed. Rep. 693), Land Grants, 5; Mort., 39, 209, 296; Parties, 24; Words & Ph., 18.
New Orleans Pac. R. Co. *v.* United States (33 Am. & Eng. R. Cas. 74, 124 U. S. 124, 8 Sup. Ct. Rep. 417; affirming 21 Ct. of Cl. 459), Land Grants, 61.
New Orleans, St. L. & C. R. Co. *v.* Burke (53 Miss. 200, 9 Am. Ry. Rep. 308), Car. of P., 85, 314, 322, 323, 638; Dam., 37, 38.
New Orleans, St. L. & C. R. Co. *v.* Faler (9 Am. & Eng. R. Cas. 96, 58 Miss. 911), Bills of L., 74; Car. of M., 458; Lim. of Liab., 30.
New Orleans, St. L. & C. R. Co. *v.* McDonald (53 Miss. 240), Mun. Aid, 39, 259.
New Orleans, St. L. & C. R. Co. *v.* State (52 Miss. 877), War, 3, 9.
New Orleans, S. F. & L. R. Co. *v.* Delamore (34 La. Ann. 1225), Exec., 5.
New Orleans, S. F. & L. R. Co. *v.* Delamore (114 U. S. 501, 5 Sup. Ct. Rep. 1009; Bank'cy, 2, 6; Fed. Cts., 24.
New Orleans Waterworks Co. *v.* Louisiana Sugar Refining Co. (125 U. S. 18, 8 Sup. Ct. Rep. 741), Fed. Cts., 25.
Newport *v.* South Covington & C. St. R. Co. (89 Ky. 29, 11 S. W. Rep. 954), St. Rys., 292.
Newport & C. Bridge Co. *v.* Douglass (12 Bush (Ky.) 673, 18 Am. Ry. Rep. 221), Attach., 27; Bonds, 24, 41, 47; Mort., 34, 74, 88, 215, 226, 270, 273; Proc., 22; Set-off, 1; Spec. Perf., 15; State Aid, 18.
Newport & C. Bridge Co. *v* Foote (9 Bush (Ky.) 264), Sts. & H., 161.
Newport, A. & H. R. Co. *v.* Hawes (3 Ex. 476), Subscr., 87.
Newport News & M. V. Co. *v.* Dentzel (91 Ky. 42, 14 S. W. Rep. 958), Death, etc., 96; Employés, Inj. to, 163; Fel. Serv., 74, 238; Negl., 75.
Newport News & M. V. R. Co. *v.* Griffin (92 Tenn. 694, 22 S. W. Rep. 737), Tel. & T. Lines, 10.
Newport News & M. V. Co. *v.* Howe (52 Fed. Rep. 362, 6 U. S. App. 172, 3 C. C. A. 121), Employés, Inj. to, 158; Fed. Cts., 15; Fel. Serv., 1, 268.
New Providence *v.* Halsey (117 U. S. 336, 6 Sup. Ct. Rep. 764), Farm Cross., 3; Mun. Aid, 363.
New River Co. *v.* Midland R. Co. (25 W. R. 502, 36 L. T. 539), Em. Dom., 1165, 1201.
Newry & A. R. Co. *v.* Great Northern R. Co. (3 Ry. & C. T. Cas. 28), Charges, 102.
Newry & E. R. Co. *v.* Coombe (3 Ex. 565, 5 Railw. Cas. 633, 18 L. J. Ex. 325), Subscr., 161.
Newry & E. R. Co. *v.* Edmunds (2 Ex. 119, 5 Railw. Cas. 275, 12 Jur. 101, 17 L. J. Ex. 102), Subscr., 66, 74; Words & Ph., 32.

Newry & E. R. Co. *v.* Ulster R. Co. (8 DeG., M. & G. 487), Arb., 30.
Newry Nav. Co. *v.* Great Northern R. Co. (7 Ry. & C. T. Cas. 176), Car. of M., 534.
Newsom *v.* Georgia R. Co. (66 Ga. 57), Evid., 175.
Newsom *v.* Georgia R. Co. (62 Ga. 339), App., 135; Evid., 37.
Newson *v.* New York C. R. Co. (29 N. Y. 383), Contrib. Neg., 28; Death, etc., 76.
Newstadt *v.* Adams (5 Duer (N. Y.) 43), Charges, 1; Exp. Cos., 72, 86.
Newton *v.* Agricultural Branch R. Corp. (15 Gray (Mass.) 27), Location, etc., 17.
Newton *v.* Chicago, R. I. & P. R. Co. (23 Am. & Eng. R. Cas. 298, 66 Iowa 422, 23 N. W. Rep. 905), Bridges, 31, 42.
Newton *v.* Keech (9 Hun (N. Y.) 355), Mun. Aid, 421.
Newton *v.* New York & N. E. R. Co. (32 Am. & Eng. R. Cas. 347, 56 Conn. 21, 5 N. Eng. Rep. 615, 12 Atl. Rep. 644), Fires, 22, 139, 140; Lim. of Ac., 57.
New York *v.* Central R. Co. (12 Wall. (U. S.) 455), Fed. Cts., 25.
New York *v.* Miln (11 Pet. (U. S.) 102), Commerce, 10.
New York & A. R. Co. *v.* New York, W. S. & B. R. Co. (11 Abb. N. Cas. (N. Y.) 386), Injunc., 9; Location, etc., 16, 27.
New York & B. Bridge, In re (137 N. Y. 95, 32 N. E. Rep. 1054, 50 N. Y. S. R. 182), Em. Dom., 433, 886; Int., 1.
New York & B. Bridge *v.* Third M. E. Church (45 N. Y. S. R. 615, 64 Hun 634, mem., 18 N. Y. Supp. 257), Em. Dom., 764.
New York & B. R. Co., In re (62 Barb. (N. Y.) 85), Em. Dom., 235, 281, 283, 337, 495, 501; Location, etc., 6.
New York & B. R. Co. *v.* Godwin (12 Abb. Pr. N. S. (N. Y.) 21), Em. Dom., 274, 495.
New York & B. Rapid Transit Co. *v.* Parrott (36 Fed. Rep. 462), Injunc., 20.
New York & B. B. R. Co., in re (20 Hun (N. Y.) 201), Em. Dom., 105, 108.
New York & C. R. Co. *v.* Gunnison (1 Hun (N. Y.) 496, 3 T. & C. 632), Em. Dom., 64.
New York & C. R. Co. *v.* Myers (18 How. (U. S.) 246), Arb., 23.
New York & E. R. Co. *v.* Coburn (6 How. Pr. (N. Y.) 223), Em. Dom., 870, 923.
New York & E. R. Co. *v.* Cook (2 Sandf. (N. Y.) 732), Witn., 13.
New York & E. R. Co. *v.* Corey (5 How. Pr. (N. Y.) 177), Em. Dom., 341, 511, 796, 923.
New York & E. R. Co. *v.* Purdy (18 Barb. (N. Y.) 574), Just. P., 5.
New York & E. R. Co. *v.* Sabin (26 Pa. St. 242), Tax., 145, 181.
New York & E. R. Co. *v.* Shepard (5 McLean (U. S.) 455), Fed. Cts., 8.
New York & E. R. Co. *v.* Skinner (19 Pa. St. 298), Animals, 70, 275, 536.
New York & E. R. Co. *v.* Young (33 Pa. St. 175), Em. Dom., 176, 668; For. Corp., 6; Location, etc., 1.
New York & G. L. R. Co. *v.* Montclair Tp. (47 N. J. Eq. 591, 21 Atl. Rep. 493), Stat., 34.
New York & G. L. R. Co. *v.* Stanley (10 Am. & Eng. R. Cas. 345, 35 N. J. Eq. 283; affirming 34 N. J. Eq. 55), Ejectm., 33; Injunc., 44.
New York & G. L. R. Co. *v.* Stanley (39 N. J. Eq. 361), Em. Dom., 454.
New York & G. L. R. Co. *v.* State (32 Am. & Eng. R. Cas. 186, 50 N. J. L. 303, 11 Cent. Rep. 555, 13 Atl. Rep. 1), Bridges, 17, 38; Crim. L., 21; Evid., 264.
New York & H. R. Co., In re (39 Hun (N. Y.) 338), Em. Dom., 880; Sts. & H., 257.
New York & H. R. Co., In re (98 N. Y. 12), Em. Dom., 868.
New York & H. R. Co. *v.* Forty-second St. & G. S. F. R. Co. (32 How. Pr. (N. Y.) 481, 50 Barb. 309; affirming 50 Barb. 285, 26 How. Pr. 68), Cross. Rys., 84; Franch., 2, 4; Sts. & H., 65, 68.
New York & H. R. Co. *v.* Hawes (56 N. Y. 175, 6 Am. Ry. Rep. 173; reversing 3 J. & S. 372), Injunc., 41.
New York & H. R. Co. *v.* Kip (46 N. Y. 546; affirming 11 Abb. Pr. N. S. 90), Em. Dom., 47, 186.
New York & H. R. Co. *v.* Lyon (16 Barb. (N. Y.) 651), Tax., 276.
New York & H. R. Co. *v.* Marsh (12 N. Y. 308), Tax., 338.
New York & H. R. Co. *v.* Mayor, etc., of N. Y. (1 Hilt. (N. Y.) 562), Contr., 1; St. Rys., 19; Sts. & H., 71, 300.
New York & H. R. Co. *v.* Morrisania (7 Hun (N. Y.) 652), Sts. & H., 352.
New York & H. R. Co. *v.* Story (6 Barb. (N. Y.) 419; reversed on another point in 6 N. Y. 85), Constr. Rys., 118.
New York & J. R. Co., In re (21 How. Pr. (N. Y.) 434), Em. Dom., 816.
New York & L. B. R. Co. *v.* Dennis (40 N. J. L. 340), Injunc., 64.
New York & L. I. Bridge Co., In re (54 Hun 400, 27 N. Y. S. R. 503, 7 N. Y. Supp. 445; affirming 21 N. Y. S. R. 858, 5 N. Y. Supp. 77), Stat., 17.
New York & M. R. Co. *v.* Lent (22 N. Y. S. R. 839, 51 Hun 644, 4 N. Y. Supp. 88), Em. Dom., 808.
New York & N. E. R. Co.'s Appeal (45 Am. & Eng. R. Cas. 109, 58 Conn. 532, 20 Atl. Rep. 670), Cross., Sts. & H., 98.
New York & N. E. R. Co.'s Appeal (55 Am. & Eng. R. Cas. 88, 62 Conn. 527, 26 Atl. Rep. 122), App., 132; Charters, 30; Cross., Sts. & H., 97, 98, 111; Pl., 169; Stat., 7, 18.
New York & N. E. R. Co. *v.* Boston (127 Mass. 229), Sts. & H., 21.
New York & N. E. R. Co. *v.* Bristol (151 U. S. 556, 14 Sup. Ct. Rep. 437; affirming 55 Am. & Eng. R. Cas. 38, 62 Conn. 527, 26 Atl. Rep. 122), Cross., Sts. & H., 98.
New York & N. E. R. Co. *v.* Comstock (49 Am. & Eng. R. Cas. 295, 60 Conn. 200, 22 Atl. Rep. 511), Em. Dom., 134, 144.
New York & N. E. R. Co. *v.* Drury (10 Am. & Eng. R. Cas. 518, 133 Mass. 167), Assign., 16; Cov'ts, 16.

New York & N. E. R. Co. *v.* Gilchrist (16 How. Pr. (N. Y.) 564), Charges, 70.
New York & N. E. R. Co. *v.* Hyde (56 Fed. Rep. 188), Fel. Serv., 39, 301; Pl., 11.
New York & N. E. R. Co. *v.* New York, N. H. & H. R. Co. (25 Am. & Eng. R. Cas. 215, 52 Conn. 274), Consol., 18; Em. Dom., 273; Franch., 10; Location, etc., 3; Pres., 1; Sales of Rds., 1.
New York & N. E. R. Co. *v.* Providence (16 R. I. 746, 19 Atl. Rep. 759), Easem., 2; Reorg., 12.
New York & N. E. R. Co. *v.* Sanders (16 Am. & Eng. R. Cas. 280, 134 Mass. 53), Charges, 70.
New York & N. E. R. Co. *v.* Waterbury (49 Am. & Eng. R. Cas. 307, 60 Conn. 1, 22 Atl. Rep. 439), Cross., Sts. & H., 75, 99, 101.
New York & N. E. R. Co. *v.* Woodruff (42 Fed. Rep. 468), Injunc., 2.
New York & N. H. R. Co. *v.* Ketchum (27 Conn. 170), Direct., 27, 31; Passes, 6.
New York & N. H. R. Co. *v.* Mayor, etc., of N. Y. (4 Blatchf. (U. S.) 193), Sts. & H., 64.
New York & N. H. R. Co. *v.* New Haven (42 Conn. 279, 10 Am. Ry. Rep. 162), St. & H., 342.
New York & N. H. R. Co. *v.* Schuyler (17 N. Y. 592, 7 Abb. Pr. 41; reversing 1 Abb. Pr. 417), Stock, 75.
New York & N. H. R. Co. *v.* Schuyler (38 Barb. (N. Y.) 534), Agency, 86; Direct., 37; Stock, 31, 33, 38, 44, 65, 69, 74, 78, 79, 83.
New York & N. H. R. Co. *v.* Schuyler (34 N. Y. 30; modifying 38 Barb. 534), Agency, 72; Stock, 41.
New York & N. H. R. Co. *v.* Schuyler (17 How. Pr. (N. Y.) 464), Injunc., 39.
New York & N. H. R. Co. *v.* Schuyler (8 Abb. Pr. (N. Y.) 239), Parties, 23.
New York & N. R. Co. *v.* New York & N. E. R. Co. (3 Int. Com. Rep. 542, 4 Int. Com. Com. 702), Int. Com., 54, 105.
New York & N. R. Co. *v.* New York & N. E. R. Co. (53 Am. & Eng. R. Cas. 7, 50 Fed. Rep. 867), Int. Com., 99.
New York & O. M. R. Co., In re (40 How. Pr. (N. Y.) 335), Em. Dom., 493.
New York & O. M. R. Co. *v.* Van Horn (57 N. Y. 473), Subscr., 140.
New York & W. U. Tel. Co. *v.* Jewett (115 N. Y. 166, 21 N. E. Rep. 1036, 24 N. Y. S. R. 560; affirming 43 Hun 565), Receiv., 178.
New York Board of Trade & Transp. Co. *v.* Pennsylvania R. Co. (3 Int. Com. Rep. 417, 4 Int. Com. Com. 447), Int. Com., 26, 72, 134.
New York Bridge Co., In re (67 Barb. (N. Y.) 295), Bridges, 5, 95; Em. Dom., 195, 368.
New York Cable R. Co., In re (109 N. Y. 32, 15 N. E. Rep. 882, 14 N. Y. S. R. 51; affirming 45 Hun 153, 9 N. Y. S. R. 836), Elev. Rys., 20, 24; Rap. T. Acts, 1.
New York Cable R. Co., In re (36 Hun (N. Y.) 355), St. Rys., 114.
New York Cable R. Co. *v.* Chambers St. & G. S. F. R. Co. (40 Hun (N. Y.) 29), Charters, 24; St. Rys., 49.
New York Cable R. Co. *v.* Forty-second St. M. & St. N. A. R. Co. (13 Daly (N. Y.) 118), Rap. T. Acts, 4; St. Rys., 111.
New York Cable Co. *v.* Mayor, etc., of N. Y. (104 N. Y. 1, 10 N. E. Rep. 332, 4 N. Y. S. R. 308; affirming 40 Hun 1), Elev. Rys., 13; Em. Dom., 63; Franch., 10; Rap. T. Acts, 1, 3, 4, 5, 7.
New York C. & H. R. R. Co., In re (5 Silv. Sup. Ct. (N. Y.) 353), Em. Dom., 186.
New York C. & H. R. R. Co., In re (60 N. Y. 112, 10 Am. Ry. Rep. 147), Em. Dom., 937.
New York C. & H. R. R. Co., In re (60 N. Y. 116, 10 Am. Ry. Rep. 150; affirming 2 Hun 482, 5 T. & C. 84), Em. Dom., 54, 391.
New York C. & H. R. R. Co., In re (4 Hun (N. Y.) 381, 6 T. & C. 669), Em. Dom., 69.
New York C. & H. R. R. Co., In re (5 Hun (N. Y.) 105), Em. Dom., 805.
New York C. & H. R. R. Co., In re (64 N. Y. 60; dismissing appeal from 5 Hun 105), Em. Dom., 799, 805.
New York C. & H. R. R. Co., In re (70 N. Y. 191, 18 Am. Ry. Rep. 395), Em. Dom., 235, 319.
New York C. & H. R. R. Co., In re (67 Barb. (N. Y.) 426), Em. Dom., 69.
New York C. & H. R. R. Co., In re (6 Hun (N. Y.) 149), Em. Dom., 604, 665.
New York C. & H. R. R. Co., In re (77 N. Y. 248; affirming (?) 6 Hun 149), Em. Dom., 4, 96, 125, 186, 187.
New York C. & H. R. R. Co., In re (15 Hun (N. Y.) 63), Em. Dom., 619.
New York C. & H. R. R. Co., In re (10 Am. & Eng. R. Cas. 542, 90 N. Y. 342, 27 Hun 398; modifying (?) 21 Hun 406), Em. Dom., 424.
New York, C. & H. R. R. Co., In re (33 Hun (N. Y.) 274), Em. Dom., 312.
New York C. & H. R. R. Co., In re (59 Hun 7, 28 N. Y. S. R. 64, 8 N. Y. Supp. 290; affirmed in 121 N. Y. 665, mem.), Corp., 8; Em. Dom., 98.
New York C. & H. R. R. Co. *v.* Aldridge (42 N. Y. S. R. 18, 16 N. Y. Supp. 674, 62 Hun 621), Ejectm., 11.
New York C. & H. R. R. Co. *v.* Aldridge (135 N. Y. 83, 32 N. E. Rep. 50, 48 N. Y. S. R. 373; affirming 42 N. Y. S. R. 18, 16 N. Y. Supp. 674), Rip. Rts., 4, 5.
New York C. & H. R. R. Co. *v.* Eby (Pa.) (12 Atl. Rep. 482), Car. of M., 569.
New York C. & H. R. R. Co. *v.* Flynn (74 Hun 124, 26 N. Y. Supp. 859, 56 N. Y. S. R. 375), Hacks, etc., 1.
New York C. & H. R. R. Co. *v.* Fraloff (100 U. S. 24, 21 Am. Ry. Rep. 428), Bagg., 30, 88, 89, 95.
New York C. & H. R. R. Co. *v.* Metropolitan Gas-light Co. (63 N. Y. 326; affirming 5 Hun 201), Em. Dom., 103, 121, 186.
New York C. & H. R. R. Co. *v.* People (12 Hun (N. Y.) 195; modified in 74 N. Y. 302), Cross., Sts. & H., 23, 26.

New York C. & H. R. R. Co. *v.* Pierce (35 Hun (N. Y.) 306), Em. Dom., 680.
New York C. & H. R. R. Co. *v.* Sheeley (27 N. Y. Supp. 185, 57 N. Y. S. R. 766), Hacks, etc., 1, 2.
New York C. & H. R. R. Co. *v.* Standard Oil Co. (6 Am. & Eng. R. Cas. 353, 87 N. Y. 486; affirming 20 Hun 39), Car. of M., 254.
New York C. & H. R. R. Co. *v.* United States (21 Ct. of Cl. 468), Car. of Mails, 4.
New York C. & H. R. R. Co. *v.* United States (24 Ct. of Cl. 22), Int., 27.
New York C. R. Co., In re (20 Barb. (N. Y.) 419), Em. Dom., 67.
New York C. R. Co., In re (49 N. Y. 414, 2 Am. Ry. Rep. 175; reversing 49 Barb. 501; affirming 6 Alb. L. J. 173), Leases, 54.
New York C. R. Co., In re (66 N. Y. 407; affirming 5 Hun 86), Em. Dom., 62, 364, 366.
New York C. R. Co., In re (11 N. Y. S. R. 866, 46 Hun 679, mem.), Sts. & H., 272.
New York C. R. Co. *v.* Lockwood (17 Wall. (U. S.) 357, 3 Am. Ry. Rep. 495), Car. of L. S., 125; Car. of P., 337; Passes, 28.
New York C. R. Co. *v.* Marvin (11 N. Y. 276), Em. Dom., 887.
New York C. R. Co. *v.* Saratoga & S. R. Co. (39 Barb. (N. Y.) 289), Consol., 40; Leases, 1, 102.
New York, C. & St. L. R. Co. *v.* Auer (24 Am. & Eng. R. Cas. 383, 106 Ind. 219, 55 Am. Rep. 734, 6 N. E. Rep. 330), Animals, 313.
New York, C. & St. L. R. Co. *v.* Doane (37 Am. & Eng. R. Cas. 87, 115 Ind. 435, 15 West. Rep. 465, 17 N. E. Rep. 913, 1 L. R. A. 157, 7 Am. St. Rep. 451), Car. of P., 141, 229, 273, 287, 292, 456.
New York, C. & St. L. R. Co. *v.* Grand Rapids & I. R. Co. (35 Am. & Eng. R. Cas. 283, 116 Ind. 60, 15 West. Rep. 548, 18 N. E. Rep. 182), Cross. Rys., 77, 82; Dam., 83; Evid., 40, 254; Witn., 138.
New York, C. & St. L. R. Co. *v.* Hammond (132 Ind. 475, 32 N. E. Rep. 83), Em. Dom., 851.
New York, C. & St. L. R. Co. *v.* Randall (102 Ind. 453, 26 N. E. Rep. 122), Leases, 1.
New York City & N. R. Co. *v.* Central Union Tel. Co. (21 Hun (N. Y.) 261), Words & Ph., 15.
New York Dist. R. Co., In re (32 Am. & Eng. R. Cas. 202, 107 N. Y. 42, 14 N. E. Rep. 187, 11 N. Y. S. R. 753; affirming 42 Hun 621, 4 N. Y. S. R. 739), St. Rys., 12; Underground Rys., 1, 2.
New York El. R. Co., In re (70 N. Y. 327, 3 Abb. N. Cas. 401; affirming 7 Hun 239, mem.), Elev. Rys., 4, 6, 8, 9, 11, 19, 21, 22, 23; Stat., 17.
New York El. R. Co., In re (35 Hun (N. Y.) 414), Em. Dom., 801.
New York El. R. Co., In re (36 Hun (N. Y.) 427), Elev. Rys., 129, 132.
New York El. R. Co., In re (41 Hun 502, 3 N. Y. S. R. 320), Em. Dom., 803.
New York El. R. Co., In re (44 Hun 117, 8 N. Y. S. R. 431), Em. Dom., 853.
New York El. R. Co., In re (29 N. Y. S. R. 190, 8 N. Y. Supp. 707, 55 Hun 608), Em. Dom., 510.
New York El. R. Co., In re (35 N. Y. S. R. 947, 58 Hun 610, 12 N. Y. Supp. 857), Elev. Rys., 32, 50; Em. Dom., 511.
New York El. R. Co., In re (40 N. Y. S. R. 647, 61 Hun 625, 15 N. Y. Supp. 909), Em. Dom., 811.
New York El. R. Co., In re (43 N. Y. S. R. 651, 17 N. Y. Supp. 778; affirmed in 133 N. Y. 690, mem., 31 N. E. Rep. 627, 45 N. Y. S. R. 933), Elev. Rys., 28; Em. Dom., 78.
New York El. R. Co., In re (44 N. Y. S. R. 387, 17 N. Y. Supp. 870), Em. Dom., 361, 504.
New York El. R. Co., In re (44 N. Y. S. R. 532, 17 N. Y. Supp. 872, 63 Hun 629), Elev. Rys., 32, 41.
New York El. R. Co. *v.* Fifth Nat. Bank (43 Am. & Eng. R. Cas. 403, 135 U. S. 432, 10 Sup. Ct. Rep. 743), Elev. Rys., 113.
New York El. R. Co. *v.* Harold (30 Hun (N. Y.) 466), Pl., 61.
New York El. R. Co. *v.* Manhattan R. Co. (63 How. Pr. (N. Y.) 14), Leases, 2.
New York G. & I. Co. *v.* Memphis Water Co. (107 U. S. 205), Bonds, 51.
New York, H. & N. R. Co. *v.* Boston, H. & E. R. Co. (36 Conn. 196), Em. Dom., 91; Location, etc., 12, 30.
New York, H. & N. R. Co. *v.* Hunt (39 Conn. 75, 4 Am. Ry. Rep. 56), Subscr., 35.
New York, L. & W. R. Co., In re (10 Am. & Eng. R. Cas. 113, 88 N. Y. 279; affirming 25 Hun 556), Location, etc., 18.
New York, L. & W. R. Co., In re (26 Hun (N. Y.) 194), Em. Dom., 261.
New York, L. & W. R. Co., In re (26 Hun (N. Y.) 592, 63 How. Pr. 123), Em. Dom., 233, 770, 784.
New York, L. & W. R. Co., In re (63 How. Pr. (N. Y.) 265), Em. Dom., 511.
New York, L. & W. R. Co., In re (27 Hun (N. Y.) 116), Em. Dom., 603, 650, 808.
New York, L. & W. R. Co., In re (27 Hun (N. Y.) 151), Em. Dom., 645, 652.
New York, L. & W. R. Co., In re (29 Hun (N. Y.) 1), Em. Dom., 710, 811.
New York, L. & W. R. Co., In re (14 Am. & Eng. R. Cas. 402, 93 N. Y. 385; affirming 29 Hun 602), Em. Dom., 801.
New York, L. & W. R. Co., In re (33 Hun (N. Y.) 270), Cross. Rys., 37.
New York, L. & W. R. Co., In re (98 N. Y. 447; affirming 33 Hun 639), Em. Dom., 232.
New York, L. & W. R. Co., In re (33 Hun 148; affirmed (?) 98 N. Y. 664), Em. Dom., 172, 308, 512; Estop., 12; Sts. & H., 108.
New York, L. & W. R. Co., In re (35 Hun (N. Y.) 232), Ry. Com'rs, 24.
New York, L. E. & W. R. Co., In re

(99 N. Y. 388, 2 N. E. Rep. 35; dismissing appeal from 26 Hun 673), App., 6; Cross. Rys. 68.
New York, L. & W. R. Co., In re (23 Am. & Eng. R. Cas. 43, 99 N. Y. 12, 1 N. E. Rep. 27; affirming 35 Hun 220), Em. Dom., 78, 105, 125, 343; Incorp., 9.
New York, L. & W. R. Co., In re (27 Am. & Eng. R. Cas. 404, 102 N. Y. 704, 7 N. E. Rep. 559, 2 N. Y. S. R. 456, 1 Silv. App. 79; reversing 40 Hun 130; which modified 2 How. Pr. N. S. 225), Arb., 9, 14.
New York, L. & W. R. Co., In re (44 Hun 194, 8 N. Y. S. R. 251), Em. Dom., 144.
New York, L. & W. R. Co., In re (44 Hun (N. Y.) 275, 7 N. Y. S. R. 649), Cross. Rys., 37.
New York, L. & W. R. Co., In re (49 Hun 539, 18 N. Y. S. R. 431, 2 N. Y. Supp. 478), Em. Dom., 638.
New York, L. & W. R. Co., In re (35 N. Y. S. R. 540, 59 Hun 615, 12 N. Y. Supp. 422; affirmed in 128 N. Y. 617, mem., 38 N. Y. S. R. 1014), Em. Dom., 895.
New York, L. & W. R. Co., In re (126 N. Y. 632, 26 N. E. Rep. 1100, 36 N. Y. S. R. 459; reversing 59 Hun 615, 14 N. Y. Supp. 947, 25 N. Y. S. R. 999), Em. Dom., 880.
New York, L. E. & W. R. Co., In re (110 N. Y. 374, 18 N. E. Rep. 120, 18 N. Y. S. R. 159; affirming 44 Hun 215, 7 N. Y. S. R. 791), Cross. Rys., 13.
New York, L. E. & W. R. Co. *v.* Atlantic Refining Co. (49 Am. & Eng. R. Cas. 131, 129 N. Y. 597, 29 N. E. Rep. 829, 42 N. Y. S. R. 346; reversing 36 N. Y. S. R. 658, 13 N. Y. Supp. 466), Car. of M., 245; Negl., 5.
New York, L. E. & W. R. Co. *v.* Ball (47 Am. & Eng. R. Cas. 586, 53 N. J. L. 283, 21 Atl. Rep. 1052), Car. of P., 107, 495, 497.
New York, L. E. & W. R. Co. *v.* Bell (28 Am. & Eng. R. Cas. 338, 112 Pa. St. 400, 4 Atl. Rep. 50), Fel. Serv., 113, 204, 412.
New York, L. E. & W. R. Co. *v.* Bennett (50 Fed. Rep. 496, 6 U. S. App. 1, 1 C. C. A. 544), Eject. Pass., 41, 58; Tickets & F., 53.
New York, L. E. & W. R. Co. *v.* Burns (39 Am. & Eng. R. Cas. 423, 51 N. J. L. 340, 17 Atl. Rep. 630), Car. of P., 57; Eject. Pass., 3.
New York, L. E. & W. R. Co. *v.* Carhart (36 Hun (N. Y.) 288), Discov., 8.
New York, L. E. & W. R. Co. *v.* Carhart (1 N. Y. S. R. 426, 40 Hun 639), Employés, 8; Evid., 183; Int., 1.
New York, L. E. & W. R. Co. *v.* Daugherty (6 Am. & Eng. R. Cas. 139, 11 W. N. C. (Pa.) 437), Car. of P., 137; Derailm., 6; Evid., 144; Witn., 192.
New York, L. E. & W. R. Co. *v.* Delaware County Sup'rs (67 How. Pr. (N. Y.) 5; affirmed in 30 Hun 222, mem.), Tax., 276.
New York, L. E. & W. R. Co. *v.* Enches (39 Am. & Eng. R. Cas. 444, 127 Pa. St. 316, 17 Atl. Rep. 991), Car. of P., 419, 597.
New York, L. E. & W. R. Co. *v.* Estill (147 U. S. 591, 13 Sup. Ct. Rep. 444; affirming 41 Fed. Rep. 849), Car. of L. S., 27, 134, 144, 156, 161, 162.
New York, L. E. & W. R. Co. *v.* Haring (21 Am. & Eng. R. Cas. 436, 47 N. J. L. 137), St. Rys., 524; Ult. Vir., 27, 28.
New York, L. E. & W. R. Co. *v.* Hughes (46 N. J. L. 67), Tax., 274.
New York, L. E. & W. R. Co. *v.* Leaman (54 N. J. L. 202, 23 Atl. Rep. 691), Cross., Inj. at, 128, 147.
New York, L. E. & W. R. Co. *v.* Lyons (119 Pa. St. 324, 11 Cent. Rep. 834, 13 Atl. Rep. 205, 21 W. N. C. 277), Employés, Inj. to, 238, 383.
New York, L. E. & W. R. Co. *v.* McHenry (9 N. Y. S. R. 148, 44 Hun 629), Discov., 8.
New York, L. E. & W. R. Co. *v.* McHenry (12 Am. & Eng. R. Cas. 370, 17 Fed. Rep. 414, 21 Blatchf. (U. S.) 400), Pl., 150.
New York, L. E. & W. R. Co. *v.* Madison (123 U. S. 524, 8 Sup. Ct. Rep. 246), Employés, Inj. to, 571.
New York, L. E. & W. R. Co. *v.* Marion County Com'rs (48 Ohio St. 249, 27 N. E. Rep. 548), Tax., 278.
New York, L. E. & W. R. Co. *v.* National Steamship Co. (17 N. Y. Supp. 28; former appeal 14 N. Y. Supp. 253), Car. of M., 639.
New York, L. E. & W. R. Co. *v.* National Steamship Co. (137 N. Y. 23, 32 N. E. Rep. 993, 49 N. Y. S. R. 901; affirming 62 Hun 621, 43 N. Y. S. R. 361, 17 N. Y. Supp. 28; and reaffirming 37 N. Y. S. R. 731, 60 Hun 577, 14 N. Y. Supp. 253), Car. of M., 650; Charges, 80.
New York, L. E. & W. R. Co. *v.* Nickals (119 U. S. 296, 7 Sup. Ct. Rep. 209), Divid., 8.
New York, L. E. & W. R. Co. *v.* Randel (23 Am. & Eng. R. Cas. 308, 47 N. J. L. 144), Cross., Inj. at, 145, 150, 213.
New York, L. E. & W. R. Co. *v.* Robinson (15 N. Y. S. R. 237, 48 Hun 614), Abate., 2.
New York, L. E. & W. R. Co. *v.* Steinbrenner (23 Am. & Eng. R. Cas. 330, 47 N. J. L. 161), Contrib. Neg., 85; Imp. Neg., 18, 27.
New York, L. E. & W. R. Co. *v.* Winter (52 Am. & Eng. R. Cas. 328, 143 U. S. 60, 12 Sup. Ct. Rep. 356), App., 125; Eject. Pass., 25, 62; Tickets & F., 2, 49; Trial, 163.
New York Nat. Exch. Bank *v.* Metropolitan El. R. Co. (21 J. & S. 511; affirmed in 108 N. Y. 660, mem., 15 N. E. Rep. 445, 13 N. Y. S. R. 903), Elev. Rys., 183.
New York, N. H. & H. R. Co. *v.* Cockcroft (46 Fed. Rep. 881), Rem. of C., 16, 39.
New York, N. H. & H. R. Co. *v.* Cockcroft (49 Fed. Rep. 3), Fed. Cts., 15.
New York, N. H. & H. R. Co. *v.* Franz (30 N. Y. S. R. 367, 8 N. Y. Supp. 727), Em. Dom., 493.
New York, N. H. & H. R. Co. *v.* Jackson

(15 N. Y. S. R. 167; affirmed in 120 N. Y. 664, mem., 24 N. E. Rep. 1104, 31 N. Y. S. R. 1000), Stat. & D., 12.
New York, N. H. & H. R. Co. *v.* Martin (158 Mass. 313, 33 N. E. Rep. 578), Att'ys, 10.
New York, N. H. & H. R. Co. *v.* New Britain (13 Am. & Eng. R. Cas. 400, 49 Conn. 40), Sts. & H., 342
New York, N. H. & H. R. Co. *v.* New Haven (46 Conn. 257), Sts. & H., 4.
New York, N. H. & H. R. Co. *v.* Welsh (52 N. Y. S. R. 532, 23 N. Y. Supp. 195, 69 Hun 615, mem.), Em. Dom., 68, 69, 77.
New York, O. & W. R. Co. *v.* Western Union Tel. Co. (36 Hun (N. Y.) 205), Fixt., 10.
New York, P. & N. R. Co. *v.* Bates (68 Md. 184, 11 Atl. Rep. 705), Agency, 10.
New York, P. & N. R. Co. *v.* Cooper (37 Am. & Eng. R. Cas. 33, 85 Va. 939, 9 S. E. Rep. 321), Imp. Neg., 23; Trial, 173.
New York, P. & N. R. Co. *v.* Coulbourn (69 Md. 360, 16 Atl. Rep. 208, 1 L. R. A. 541, 18 Md. L. J. 823), Car. of P., 424; Employés, Inj. to, 159.
New York, P. & N. R. Co. *v.* Kellam (32 Am. & Eng. R. Cas. 114, 83 Va. 851, 3 S. E. Rep. 703), Death, etc., 194; Negl., 41; Witn., 35.
New York Produce Exch. *v.* New York C. & H. R. R. Co. (2 Int. Com. Rep. 553, 3 Int. Com. Com. 137), Int. Com., 1[illegible].
New York, P. & B. R. Co. *v.* Dixon (114 N. Y. 80, 21 N. E. Rep. 110, 22 N. Y. S. R. 684; reversing 47 Hun 634, 13 N. Y. S. R. 445), Agency, 108.
New York, S. & W. R. Co. *v.* Lawton (11 Am. & Eng. R. Cas. 406, 35 N. J. Eq. 386), Spec. Perf., 22.
New York, S. & W. R. Co. *v.* Trimmer (46 Am. & Eng. R. Cas. 585, 63 N. J. L. 1, 20 Atl. Rep. 761), Ejectm., 10.
New York, T. & M. R. Co. *v.* Gallaher (79 Tex. 685, 15 S. W. Rep. 694), Discrim., 3; Evid., 230; Trial, 118.
New York, T. & M. R. Co. *v.* Sutherland (3 Tex. App. (Civ. Cas.) 177), Animals, 298.
New York, W. & R. R. Co., In re (21 Hun (N. Y.) 250), Em. Dom., 807.
New York, W. S. & B. R. Co., In re (89 N. Y. 453; reversing 27 Hun 57), Em. Dom., 326.
New York, W. S. & B. R. Co., In re (28 Hun (N. Y.) 472), Em. Dom., 118.
New York, W. S. & B. R. Co., In re (29 Hun (N. Y.) 269), Em. Dom., 96, 287.
New York, W. S. & B. R. Co., In re (29 Hun (N. Y.) 609, mem.), Witn., 119.
New York, W. S. & B. R. Co., In re (29 Hun (N. Y.) 646; affirmed in part in 94 N. Y. 287), Em. Dom., 806, 880.
New York, W. S. & B. R. Co., In re (17 Am. & Eng. R. Cas. 145, 94 N. Y. 287; affirming in part 29 Hun 646), Em. Dom., 774, 890.
New York, W. S. & B. R. Co., In re (25 Am. & Eng. R. Cas. 198, 101 N. Y. 685, 5 N. E. Rep. 769), Em. Dom., 994.
New York, W. S. & B. R. Co., In re (33 Hun (N. Y.) 231), Em. Dom., 884; Witn., 105.
New York, W. S. & B. R. Co., In re (33 Hun (N. Y.) 293, 6 Civ. Pro. 302), Em. Dom., 946.
New York, W. S. & B. R. Co., In re (37 Hun (N. Y.) 317), Em. Dom., 656, 926.
New York, W. S. & B. R. Co., In re (64 How. Pr. (N. Y.) 216), Em. Dom., 312.
New York, W. S. & B. R. Co., In re (35 Hun (N. Y.) 260), Em. Dom., 640.
New York, W. S. & B. R. Co., In re (35 Hun (N. Y.) 575), Em. Dom., 500.
New York, W. S. & B. R. Co., In re (35 Hun (N. Y.) 633), Em. Dom., 611, 708.
New York, W. S. & B. R. Co. *v.* Bell (28 Hun (N. Y.) 426), Em. Dom., 456, 638, 645.
New York, W. S. & B. R. Co. *v.* Church (31 Hun (N. Y.) 440), Em. Dom., 803.
New York, W. S. & B. R. Co. *v.* LeFevre (27 Hun (N. Y.) 537), Em. Dom., 456.
New York, W. S. & B. R. Co. *v.* Omerod (29 Hun (N. Y.) 274), Injunc., 54.
New York, W. S. & B. R. Co. *v.* Thorne (1 How. Pr. N. S. (N. Y.) 190), Em. Dom., 979.
New York, W. S. & B. R. Co. *v.* Townsend (36 Hun (N. Y.) 630), Em. Dom., 500, 851, 954.
Ney *v.* Dubuque & S. C. R. Co. (20 Iowa 347), Constr. Rys., 76.
Ney *v.* Swinney (36 Ind. 454, 3 Am. Ry. Rep. 17), Em. Dom., 1039.
Niagara & D. R. R. Co. *v.* Buckwell (3 Ont. Pr. 82), Em. Dom., 1272.
Niagara Bridge Works *v.* Jose (59 N. H. 81), Direct., 42.
Niagara Falls & L. O. R. Co. *v.* Hotchkiss (16 Barb. (N. Y.) 270), Em. Dom., 137.
Niagara Falls & W. R. Co., In re (15 N. Y. S. R. 546, 48 Hun [illegible]sem., 1; Em. Dom., 258.
Niagara Falls & W. R. Co., In re (16 N. Y. S. R. 80, 4 N. Y. Supp. 485), Em. Dom., 182, 361.
Niagara Falls & W. R. Co., In re (33 Am. & Eng. R. Cas. 99, 108 N. Y. 375, 15 N. E. Rep. 429, 13 N. Y. S. R. 690, 11 Cent. Rep. 272; affirming 46 Hun 94, 11 N. Y. S. R. 632), Em. Dom., 86, 181, 182.
Niagara Falls & W. R. Co., In re (121 N. Y. 319, 24 N. E. Rep. 452, 31 N. Y. S. R. 47; affirming 51 Hun 637, 20 N. Y. S. R. 983), Em. Dom., 495.
Niagara Falls H. P. & M. Co., In re 68 Hun 391, 51 N. Y. S. R. 887), Location, etc., 10, 11.
Niagara Falls Int. Bridge Co. *v.* Great Western R. Co. (39 Barb. (N. Y.) 212), Bridges, 104.
Niagara Falls Int. Bridge Co. *v.* Great Western R. Co. (22 U. C. Q. B. 592), Contr., 85.
Niagara Falls Int. Bridge Co. *v.* Great Western R. Co. (25 U. C. Q. B. 313), Passes, 3.
Niantic Sav. Bank *v.* Douglas (5 Ill. App. 579), Consol., 34; Mun. Aid, 247, 320.

Nichol *v.* Canada Southern R. Co. (40 U. C. Q. B. 583), Fences, 49; Flood. Lds., 35.
Nichol *v.* Mayor, etc., of Nashville (9 Humph. (Tenn.) 252), Mun. Aid, 426.
Nicholas *v.* New York C. & H. R. R. Co. (4 Hun (N. Y.) 327, 6 T. & C. 606), Car. of M., 476.
Nicholas *v.* New York C. & H. R. R. Co. (9 Am. & Eng. R. Cas. 103, 89 N. Y. 370), Car. of M., 454; Lim. of Liab., 33.
Nicholls *v.* Great Southern & W. R. Co. (7 Ir. C. L. 40, 21 W. R. 387), Car. of P., 261.
Nicholls *v.* Great Western R. Co. (27 U. C. Q. B. 382), Cross., Inj. at, 249.
Nicholls *v.* State (68 Wis. 416, 32 N. W. Rep. 543), Crim. L., 10.
Nichols *v.* Ann Arbor & Y. St. R. Co. (50 Am. & Eng. R. Cas. 250, 87 Mich. 361, 49 N. W. Rep. 538), St. Rys., 214.
Nichols *v.* Brooklyn City R. Co. (30 Hun (N. Y.) 437; affirmed in 100 N. Y. 635, mem.), Evid., 211.
Nichols *v.* Chesapeake, O. & S. W. R. Co. (Ky.) (2 S. W. Rep. 181), Stat. & D., 62; Trial, 70, 76.
Nichols *v.* Chicago & W. M. R. Co. (52 Am. & Eng. R. Cas. 304, 90 Mich. 203, 51 N. W. Rep. 364), Car. of P., 231, 240.
Nichols *v.* Chicago, R. I. & P. R. Co. (69 Iowa 154, 28 N. W. Rep. 571), Employés, Inj. to, 410.
Nichols *v.* Chicago, St. P., M. & O. R. Co. (29 Am. & Eng. R. Cas. 175, 36 Minn. 452, 32 N. W. Rep. 176), Fires, 195, 322.
Nichols *v.* Dubuque & D. R. Co. (27 Am. & Eng. R. Cas. 183, 68 Iowa 732, 28 N. W. Rep. 44), Car. of P., 428, 569; Contrib. Neg., 42; Evid., 44; Husb. & W., 26; Trial, 139.
Nichols *v.* Louisville & N. R. Co. (Ky.) (34 Am. & Eng. R. Cas. 37, 6 S. W. Rep. 339), Tresp., Inj. to, 71.
Nichols *v.* Marshland (L. R. 10 Ex. 255), Words & Ph., 246.
Nichols *v.* Mase (17 Am. & Eng. R. Cas. 230, 94 N. Y. 160), Mort., 66.
Nichols *v.* Middlesex R. Co. (106 Mass. 463, 8 Am. Ry. Rep. 47), St. Rys., 405.
Nichols *v.* New Haven & N. Co. (42 Conn. 103), Tax., 215.
Nichols *v.* People (17 N. Y. 114), Crim. L., 27.
Nichols *v.* Sixth Ave. R. Co. (38 N. Y. 131; affirming 10 Bosw. 260), St. Rys., 367, 425; Trial, 70.
Nichols *v.* Smith (115 Mass. 332), Car. of M., 65; Evid., 1.
Nichols *v.* Somerset & K. R. Co. (43 Me. 356), Em. Dom., 415.
Nichols *v.* Southern Pac. R. Co. (52 Am. & Eng. R. Cas. 205, 23 Oreg. 123, 18 L. R. A. 55, 31 Pac. Rep. 296), Eject. Pass., 36, 95; Evid., 204; Tickets & F., 44, 58, 103.
Nichols *v.* Union Pac. R. Co. (7 Utah 510, 27 Pac. Rep. 693), Dam., 108; Eject. Pass., 65.
Nichols *v.* Washington, O. & W. R. Co. (32 Am. & Eng. R. Cas. 27, 83 Va. 99, 5 Am. St. Rep. 257, 5 S. E. Rep. 171), Licensees, Inj. to, 11; Stat. & D., 65.
Nicholson, In re (6 Man. 419), Em. Dom., 1254.
Nicholson, In re (7 Man. 400), Em. Dom., 1232, 1243.
Nicholson *v.* Erie R. Co. (41 N. Y. 525), Death, etc., 192.
Nicholson *v.* Great Western R. Co. (5 C. B. N. S. 366, 28 L. J. C. P. 89, 4 Jur. N. S. 1187, 1 Ry. & C. T. Cas. 121), Discrim., 12, 15, 25.
Nicholson *v.* Hannibal & St. J. R. Co. (82 Mo. 73), Animals, 368.
Nicholson *v.* Lancashire & Y. R. Co. (3 H. & C. 534, 34 L. J. Ex. 84, 12 L. T. 391), Car. of P., 280.
Nicholson *v.* Louisville, N. A. & C. R. Co. (55 Ind. 504, 16 Am. Ry. Rep. 258), Mort., 150.
Nicholson *v.* Mobile & M. R. Co. (49 Ala. 205), Lim. of Ac., 4.
Nicholson *v.* New York & N. H. R. Co. (22 Conn. 74), Sts. & H., 293.
Nickals *v.* New York, L. & W. R. Co. (13 Am. & Eng. R. Cas. 139, 21 Blatchf. (U. S.) 177, 15 Fed. Rep. 575), Divid., 8.
Nickerson *v.* Atchison, T. & S. F. R. Co. (3 McCrary (U. S.) 455, 17 Fed. Rep. 408), Deeds of Tr., 10.
Nickey *v.* St. Louis, I. M. & S. R. Co. (35 Mo. App. 79), Car. of M., 296; Evid., 241; Lim. of Liab., 27.
Nicks *v.* Chicago, St. P. & K. C. R. Co. (84 Iowa 27, 50 N. W. Rep. 222), Cross., Sts. & H., 116; Sts. & H., 157, 263.
Nicol *v.* Illinois C. R. Co. (44 La. Ann. 816, 11 So. Rep. 34), Tresp., 26.
Nicolay *v.* St. Clair County (3 Dill. (U. S.) 163), Mun. Aid, 54, 377.
Nicoll *v.* East Tenn., V. & G. R. Co. (89 Ga. 260, 15 S. E. Rep. 309), Car. of L. S., 72.
Nicoll *v.* New York & E. R. Co. (12 N. Y. 121; affirming 12 Barb. 460), Deeds, 26, 31.
Nictaux & A. R. Co., In re (14 Nov. Sc. 252), Em. Dom., 1251.
Nield *v.* London & N. W. R. Co. (44 L. J. Ex. 15), Waters & W., 18.
Niemann *v.* Michigan C. R. Co. (80 Mich. 197, 44 N. W. Rep. 1049), Animals, 262.
Niemeyer *v.* Little Rock Junction R. Co. (20 Am. & Eng. R. Cas. 174, 43 Ark. 111), Em. Dom., 344, 1036.
Nieto *v.* Clark (1 Cliff. (U. S.) 145), Car. of P., 308, 316.
Nightingale *v.* Oregon C. R. Co. (2 Sawy. (U. S.) 338), Att'ys, 9.
Nihan *v.* St. Catharines & N. C. R. Co. (16 Ont. 459), Em. Dom., 1224, 1277.
Nilson *v.* Jonesboro (57 Ark. 168, 20 S. W. Rep. 1093), Constr. Rys., 35.
Nines *v.* St. Louis, I. M. & S. R. Co. (107 Mo. 475(18 S. W. Rep. 26), Car. of M., 590, 674.
Ninth Ave. R. Co. *v.* New York El. R. Co. (3 Abb. N. Cas. (N. Y.) 22), Injunc., 64.
Ninth Ave. R. Co. *v.* New York El. R. Co. (7 Daly (N. Y.) 174, 3 Abb. N. Cas. 347), Elev. Rys., 70.
Ninth Nat. Bank *v.* Knox County (37 Fed. Rep. 75), Mun. Aid, 115.
Niskern *v.* Chicago, M. & St. P. R. Co.

(22 Fed. Rep. 811), Fires, 266, 272, 274, 288.
Nispel *v.* Western U. R. Co. (64 Ill. 311), Appear., 1.
Nissen *v.* Missouri R. Co. (19 Mo. App. 662), St. Rys., 341.
Nitshill & L. Coal Co. *v.* Caledonian R. Co. (2 Ry. & C. T. Cas. 39), Discrim., 10.
Nivette *v.* New Orleans & L. S. R. Co. (42 La. Ann. 1153, 8 So. Rep. 581), St. Rys., 176.
Nix *v.* Texas Pac. R. Co. (82 Tex. 473, 18 S. W. Rep. 571), Employés, Inj. to, 97, 635; Fel. Serv., 211, 217.
Nixon *v.* Brownlow (2 H. & N. 455, 26 L. J. Ex. 273), Stockh., 57.
Nixon *v.* Brownlow (3 H. & N. 686, 4 Jur. N. S. 878, 27 L. J. Ex. 508), Subscr., 73.
Nixon *v.* Campbell (24 Am. & Eng. R. Cas. 605, 106 Ind. 47, 4 N. E. Rep. 296, 7 N. E. Rep. 258), Mun. Aid, 261, 262, 411.
Nixon *v.* Chicago, R. I. & P. R. Co. (84 Iowa 331, 51 N. W. Rep. 157), Cross., Inj. at, 264.
Nixon *v.* Grand Trunk R. Co. (23 Ont. 124), Animals, 337.
Nixon *v.* Kilkenny & G. S. & W. R. Co. (1 H. & N. 47, 2 Jur. N. S. 427, 25 L. J. Ex. 249), Stockh., 29.
Nizam State R. Co. *v.* Wyatt (L. R. 24 Q. B. D. 548), Tax., 402.
Njus *v.* Chicago, M. & St. P. R. Co. (47 Minn. 92, 49 N. W. Rep. 527), Employés, Inj. to, 767; Fel. Serv., 175.
Noble *v.* Alabama (43 Ga. 466), Injunc., 3.
Noble *v.* Callender (2 Ohio St. 199), Stockh., 63.
Noble *v.* Cunningham (74 Ill. 51), Negl., 20.
Noble *v.* Des Moines & St. L. R. Co. ('14 Am. & Eng. R. Cas. 208, 61 Iowa 6[illegible], 17 N. W. Rep. 26), Em. Dom., 775, 825.
Noble *v.* Illinois C. R. Co. (111 Ill. 437), Deeds, 38, 46.
Noble *v.* Vincennes (42 Ind. 125), Mun. Aid, 89.
Nobles *v.* Union River L. R. Co. (147 U. S. 165, 13 Sup. Ct. Rep. 271), Pub. Lds., 2.
Nobles County *v.* Sioux City & St. P. R. Co. (26 Minn. 294, 3 N. W. Rep. 701), Tax., 80.
Noblesville *v.* Lake Erie & W. R. Co. (130 Ind. 1, 29 N. E. Rep. 484), St. Rys., 6; Sts. & H., 2.
Noe *v.* Chicago, B. & Q. R. Co. (76 Iowa 360, 41 N. W. Rep. 42), Flood. Lds., 18, 72, 81; Witn., 96.
Noel *v.* Dubuque, B. & M. R. Co. (44 Iowa 293), App., 126.
Noesen *v.* Port Washington (37 Wis. 168), Estop., 12; Mun. Aid, 299; Subscr., 124.
Nolan *v.* Brooklyn City & N. R. Co. (3 Am. & Eng. R. Cas. 463, 87 N. Y. 63, 41 Am. Rep. 345), St. Rys., 410, 412; Witn., 40.
Nolan *v.* New York C. & H. R. R. Co. (40 N. Y. S. R. 848, 61 Hun 623, 16 N. Y. Supp. 826), Cross., Inj. at, 298.
Nolan *v.* New York, N. H. & H. R. Co. (9 J. & S. (N. Y.) 541), Eject. Pass., 41.
Nolan *v.* New York, N. H. & H. R. Co. (25 Am. & Eng. R. Cas. 342, 53 Conn. 461, 4 Atl. Rep. 106), Children, Inj. to, 1; Contrib. Neg., 20; Fences, 74; Negl., 75; Tresp., Inj. to, 52, 69a, 120
Nolan *v.* Ohio & M. R. Co. (39 Mo. 114), Bagg., 114.
Noll *v.* Dubuque, B. & M. R. Co. (32 Iowa 66, 10 Am. Ry. Rep. 18), Em. Dom., 112.
Nolon *v.* Chicago & A. R. Co. (23 Mo. App. 353), Animals, 251.
Nolton *v.* Western R. Corp. (15 N. Y. 444; affirming 10 How. Pr. 97), Car. of Mails, 18; Car. of P., 54; Passes, 9.
Nonce *v.* Richmond & D. R. Co. (33 Fed. Rep. 429), Actions, 7; Lim. of Ac., 3, 8.
Noonan *v.* New York C. & H. R. R. Co. (42 N. Y. S. R. 41, 62 Hun 618, 16 N. Y. Supp. 678; affirmed 131 N. Y. 594, mem., 42 N. Y. S. R. 949, 30 N. E. Rep. 67), Cross., Inj. at, 271; Death, etc., 219, 297; Employés, Inj. to, 23, 496; Fel. Serv., 126.
Nooney *v.* New York El. R. Co. (43 N. Y. S. R. 360, 62 Hun 622, 17 N. Y. Supp. 111), Elev. Rys., 93.
Nord *v.* Burlington & M. R. R. Co. (37 Iowa 498), Lim. of Ac., 62.
Nordemeyer *v.* Loescher (1 Hilt. (N. Y.) 499), Bagg., 46, 93.
Norfolk, In re (22 W. R. 817, 31 L. T. 79), Em. Dom., 1143.
Norfolk & P. R. Co. *v.* Ormsby (27 Gratt. (Va.) 455, 17 Am. Ry. Rep. 321), Children, Inj. to, 5, 69, 127; Negl., 6.
Norfolk & S. R. Co. *v.* Warren (92 N. Car. 620), Em. Dom., 869.
Norfolk & W. R. Co. *v.* Adams (Va.) (56 Am. & Eng. R. Cas. 330, 18 S. E. Rep. 673), Car. of M., 419, 421.
Norfolk & W. R. Co. *v.* Anderson (58 Am. & Eng. R. Cas. 53, 90 Va. 1, 17 S. E. Rep. 757), Eject. Pass., 116, 130; Tickets & F., 39, 99; Trial, 56.
Norfolk & W. R. Co. *v.* Bohannon (85 Va. 293, 7 S. E. Rep. 236), Fires, 253, 344.
Norfolk & W. R. Co. *v.* Briggs (Va.) (14 S. E. Rep. 753), Employés, Inj. to, 419.
Norfolk & W. R. Co. *v.* Burge (32 Am. & Eng. R. Cas. 101, 84 Va. 63, 4 S. E. Rep. 21), Cross., Inj. at, 245, 291; Sts. & H., 370; Trial, 114.
Norfolk & W. R. Co. *v.* Carper (88 Va. 556, 14 S. E. Rep. 328), Death, etc., 174; Trial, 127.
Norfolk & W. R. Co. *v.* Com. (47 Am. & Eng. R. Cas. 1, 88 Va. 95, 13 S. E. Rep. 340), Crim. L., 50; Int. Com., 223.
Norfolk & W. R. Co. *v.* Cottrell (31 Am. & Eng. R. Cas. 235, 83 Va. 512, 3 S. E. Rep. 123), Employés, Inj. to, 182, 204, 410; Proc., 28.
Norfolk & W. R. Co. *v.* Donnelly (53 Am. & Eng. R. Cas. 571, 88 Va. 853, 14 S. E. Rep. 692), Fel. Serv., 34, 113, 306.
Norfolk & W. R. Co. *v.* Emmert (31 Am. & Eng. R. Cas. 194, 83 Va. 640, 3 S. E. Rep. 145), Employés, Inj. to, 400.
Norfolk & W. R. Co. *v.* Ferguson (79 Va. 241), Car. of P., 458; Contrib. Neg., 100; Evid., 143; Negl., 41, 102.
Norfolk & W. R. Co. *v.* Galliher (80 Va. 639, 16 S. E. Rep. 935), Car. of P., 12, 14, 24, 108; False Im[illegible], 9, 10.
Norfolk & W. R. Co. *v.* Gilman (88 Va. 239,

13 S. E. Rep. 475), Contrib. Neg., 67, 105; Employés, Inj. to, 48, 99.
Norfolk & W. R. Co. *v.* Groseclose (88 Va. 267, 13 S. E. Rep. 454), Car. of P., 12, 221; Children, Inj. to, 127; Evid., 160.
Norfolk & W. R. Co. *v.* Harman (83 Va. 553, 8 S. E. Rep. 251), Death, etc., 139; Tresp., Inj. to, 45, 104; Trial, 93.
Norfolk & W. R. Co. *v.* Howison (81 Va. 125), Liens, 33, 40, 41.
Norfolk & W. R. Co. *v.* Irvine (84 Va. 553, 1 L. R. A. 110, 5 S. E. Rep. 532), Bagg., 59, 88.
Norfolk & W. R. Co. *v.* Irvine (37 Am. & Eng. R. Cas. 227, 85 Va. 217, 7 S. E. Rep. 233), Bagg., 99; Trial, 145.
Norfolk & W. R. Co. *v.* Jackson (85 Va. 489, 8 S. E. Rep. 370), Employés, Inj. to, 537.
Norfolk & W. R. Co. *v.* Lindamood (Va.) (14 S. E. Rep. 694), Employés, Inj. to, 451.
Norfolk & W. R. Co. *v.* McDonald (88 Va. 352, 13 S. E. Rep. 706), Employés, Inj. to, 275, 408.
Norfolk & W. R. Co. *v.* Nunnally (88 Va. 546, 14 S. E. Rep. 367), Employés, Inj. to, 100, 145.
Norfolk & W. R. Co. *v.* Pendleton (86 Va. 1004, 11 S. E. Rep. 1062), Charges, 44; Tickets & F., 115.
Norfolk & W. R. Co. *v.* Pendleton (88 Va. 350, 13 S. E. Rep. 709), Charges, 44; Consol., 40.
Norfolk & W. R. Co. *v.* Pennsylvania (45 Am. & Eng. R. Cas. 9, 136 U. S. 114, 10 Sup. Ct. Rep. 958; reversing 26 Am. & Eng. R. Cas. 48, 114 Pa. St. 256, 6 Atl. Rep. 45), Int. Com., 7, 208.
Norfolk & W. R. Co. *v.* Postal Tel. Cable Co. (88 Va. 932, 14 S. E. Rep. 689), Injunc., 12; Tel. & T. Lines, 1.
Norfolk & W. R. Co. *v.* Postal Tel. Cable Co. (88 Va. 936, 14 S. E. Rep. 690), Injunc., 12.
Norfolk & W. R. Co. *v.* Prindle (27 Am. & Eng. R. Cas. 332, 82 Va. 122), Witn., 23.
Norfolk & W. R. Co. *v.* Prinnell (Va.) (30 Am. & Eng. R. Cas. 574, 3 S. E. Rep. 95), Car. of P., 218.
Norfolk & W. R. Co. *v.* Read (87 Va. 185, 12 S. E. Rep. 395), Assign., 2; Car. of M., 652; Witn., 25.
Norfolk & W. R. Co. *v.* Shippers' Compress Co. (30 Am. & Eng. R. Cas. 57, 83 Va. 272, 2 S. E. Rep. 139), Ult. Vir., 14.
Norfolk & W. R. Co. *v.* Smoot (81 Va. 495), Injunc., 2; Parties, 6.
Norfolk & W. R. Co. *v.* Smyth County (87 Va. 521, 12 S. E. Rep. 1009), Tax., 12.
Norfolk & W. R. Co. *v.* Stephens (85 Va. 302, 7 S. E. Rep. 251), Em. Dom., 691.
Norfolk & W. R. Co. *v.* Stone (88 Va. 310, 13 S. E. Rep. 432), Cross., Inj. at, 250, 299.
Norfolk & W. R. Co. *v.* Sutherland (89 Va. 703), Car. of L. S., 33.
Norfolk & W. R. Co. *v.* Williams (80 Va. 165, 15 S. E. Rep. 522), Employés, Inj. to, 10, 355, 364.
Norfolk & W. R. Co. *v.* Wysor (26 Am. & Eng. R. Cas. 234, 82 Va. 250), Actions, 11; Car of M., 60; Car. of P., 61, 62, 65; Eject. Pass., 19; Tickets & F., 68.
Norfolk Southern R. Co. *v.* Barnes (40 Am. & Eng. R. Cas. 121, 104 N. Car. 25, 10 S. E. Rep. 83, 5 L. R. A. 611), Car. of M., 270.
Norfolk Southern R. Co. *v.* Ely (95 N. Car. 77), Em. Dom., 50, 869, 937.
Norfolk Southern R. Co. *v.* Ely (101 N. Car. 8, 7 S. E. Rep. 476), Em. Dom., 516, 867.
Norris *v.* Androscoggin R. Co. (39 Me. 273), Fences, 9, 88.
Norris *v.* Brooklyn City R. Co. (4 Misc. (N. Y.) 294), St. Rys., 353.
Norris *v.* Brooklyn City R. Co. (53 N. Y. S. R. 332), St. Rys., 431.
Norris *v.* Savannah, F. & W. R. Co. (28 Am. & Eng. R. Cas. 66, 23 Fla. 182, 11 Am. St. Rep. 355, 1 So. Rep. 475), Car. of M., 135, 137.
Norris *v.* United States (14 Ct. of Cl. 354), Claims Against U. S., 6.
Norris *v.* Vermont C. R. Co. (28 Vt. 99), Em. Dom., 220; Flood. Lds., 7.
Norris *v.* Waco (57 Tex. 635), Em. Dom., 373; Tax., 2, 47, 53.
Norristown *v.* Norristown Pass. R. Co. (148 Pa. St. 87, 23 Atl. Rep. 1060), St. Rys., 91, 137, 142, 147, 171.
North *v.* Cleveland & M. R. Co. (10 Ohio St. 548), Proc., 14.
North *v.* Great Northern R. Co. (6 Jur. N. S. 98), Bailm., 4; Contr., 23.
North *v.* London & S. W. R. Co. (14 C. B. N. S. 132, 9 Jur. N. S. 896, 32 L. J. C. P. 156, 11 W. R. 624, 8 L. T. 246), Car. of M., 398; Charges, 71.
North *v.* Merchants' & M. Transp. Co. (146 Mass. 315, 5 N. Eng. Rep. 907, 15 N. E. Rep. 779), Car. of M., 557.
North *v.* Platte County (29 Neb. 447, 45 N. W. Rep. 692), Mun. Aid, 334.
Northam B. & R. Co. *v.* London & S. R. Co. (6 M. & W. 428, 1 Railw. Cas. 665, 4 Jur. 892), Words & Ph., 238.
North American Ins. Co. *v.* St. Louis, I. M. & S. R. Co. (3 McCrary (U. S.) 233, 11 Fed. Rep. 380), Assign., 24; Bills of L., 79; Car. of M., 156.
Northampton County *v.* Easton Pass. R. Co. (148 Pa. St. 282, 23 Atl. Rep. 895), Tax., 181.
Northampton County *v.* Lehigh C. & N. Co. (75 Pa. St. 461), Tax., 79.
North & S. R. Co. *v.* Winfree (51 Ga. 318), Subscr., 210.
North & S. St. R. Co. *v.* Crayton (86 Ga. 499, 12 S. E. Rep. 877), Trial, 190.
North & S. St. R. Co. *v.* Spullock (88 Ga. 283, 14 S. E. Rep. 478), Subscr., 106.
North & S. W. J. R. Co. *v.* Brentford Union Assessment Committee (L. R. 18 Q B D. 740), Tax., 373.
North & W. B. R. Co. *v.* Swank (105 Pa. St. 555), Em. Dom., 220, 695.
North Baltimore Pass. R. Co. *v.* Mayor, etc., of Baltimore (75 Md. 247, 23 Atl. Rep. 470), St. Rys., 240.
North Baltimore Pass. R. Co. *v.* North Ave. R. Co. (50 Am. & Eng. R. Cas. 408, 75 Md. 233, 23 Atl. Rep. 466), Elec. Rys., 4.
North Beach & M. R. Co., Appeal of (32

Cal. 499), Em. Dom., 438; St. Rys., 1; Sts. & H., 341.
North Birmingham St. R. Co. *v.* Calderwood (89 Ala. 247, 7 So. Rep. 360), Contrib. Neg., 14, 106; Evid., 109; St. Rys., 432, 440; Trial, 137.
North Branch Pass. R. Co. *v.* City Pass. R. Co. (38 Pa. St. 361), St. Rys., 11.
North British R. Co. *v.* Edinburgh & G. R. Co. (16 Sc. Sess. Cas. (2d Series) 250, 2 Ry. & C. T. Cas. 21), Stat. & D., 146.
North British R. Co. *v.* Perth, Provost of, L. R. (10 App. Cas. 579), Bridges, 30.
North British R. Co. *v.* Tod (12 C. & F. 722, 10 Jur. 975), Em. Dom., 1140.
North Carolina & R. & D. R. Co. *v.* Carolina C. R. Co. (83 N. Car. 489), Em. Dom., 80.
North Carolina R. Co. *v.* Alamance Com'rs (77 N. Car. 4), Tax., 220, 331.
North Carolina R. Co. *v.* Alamance Com'rs (82 N. Car. 259), Tax., 41, 319, 362.
North Carolina R. Co. *v.* Alamance Com'rs (91 N. Car. 454), Tax., 104.
North Carolina R. Co. *v.* Carolina C. R. Co. (83 N. Car. 489), Em. Dom., 111.
North Carolina R. Co. *v.* Drew (3 Woods (U. S.) 674), Estop., 26; Injunc., 1, 39; Mort., 139.
North Carolina R. Co. *v.* Drew (3 Woods (U. S.) 691; affirmed in 3 Am. & Eng. R. Cas. 1, 103 U. S. 118), Bonds, 32; Consol., 42; Receiv., 17, 76; State Aid, 16; Trusts, 11.
North Carolina R. Co. *v.* Goodwin (110 N. Car. 175, 14 S. E. Rep. 687), Em. Dom., 780.
North Carolina R. Co. *v.* Leath (4 Jones (N. Car.) 340), Subscr., 7, 127, 222.
North Carolina R. Co. *v.* Moore (70 N. Car. 6), Corp., 5.
North Carolina R. Co. *v.* Swasey (23 Wall. (U. S.) 405), App., 8.
North Carolina R. Co. *v.* Swepson (71 N. Car. 350), Officers, 2.
North Carolina R. Co. *v.* Temple (134 U. S. 22, 10 Sup. Ct. Rep. 509), State Aid, 28.
North Carolina R. Co. *v.* Vinson (8 Jones (N. Car.) 119), App., 129.
North Carolina R. Co. *v.* Wilson (81 N. Car. 223), Trusts, 15.
North Chicago City R. Co. *v.* Gastka (39 Am. & Eng. R. Cas. 377, 128 Ill. 613, 21 N. E. Rep. 522; affirming 27 Ill. App. 518), St. Rys., 519.
North Chicago City R. Co. *v.* Lake View (11 Am. & Eng. R. Cas. 42, 105 Ill. 207), Nuis., 1; St. Rys., 76, 264.
North Chicago R. Co. *v.* Fidelity Ins. Co. (19 Phila. (Pa.) 354), Mort., 146.
North Chicago Rolling Mill Co. *v.* Johnson (114 Ill. 57), Employés, Inj. to, 157, 589; Evid., 65, 89; Fel. Serv., 51, 206.
North Chicago Rolling Mill Co. *v.* Morrissey (18 Am. & Eng. R. Cas. 47, 111 Ill. 646), Death, etc., 342, 344.
North Chicago St. R. Co. *v.* Cook (43 Ill. App. 634; affirmed in 145 Ill. 551, 33 N. E. Rep. 958), Dam., 73; St. Rys., 326, 366.
North Chicago St. R. Co. *v.* Cook (145 Ill. 551, 33 N. E. Rep. 958), Car. of P., 153; St. Rys., 366, 367; Witn., 144.
North Chicago St. R. Co. *v.* Cotton (52 Am. & Eng. R. Cas. 238, 140 Ill. 486, 29 N. E. Rep. 899; affirming 41 Ill. App. 311), Cable Rys., 12; Collis., 11; Employés, Inj. to, 763; Evid., 51, 125; Pl., 107, 109; St Rys., 441; Witn., 65.
North Chicago St. R. Co. *v.* Hudson (44 Ill. App. 60), Animals, 410.
North Chicago St. R. Co. *v.* Lotz (44 Ill. App. 78), St. Rys., 433.
North Chicago St. R. Co. *v.* Louis (138 Ill. 9, 27 N. E. Rep. 451; reversing 35 Ill. App. 477), Contrib. Neg., 121; Negl., 102, 114.
North Chicago St. R. Co. *v.* Olds (40 Ill. App. 421), Car. of P., 118; Tresp., Inj. to, 12, 89.
North Chicago St. R. Co. *v.* Thurston (43 Ill. App. 587), Children, Inj. to, 54.
North Chicago St. R. Co. *v.* Williams (52 Am. & Eng. R. Cas. 522, 140 Ill. 275, 29 N. E. Rep. 672; affirming 40 Ill. App. 590), St. Rys., 336, 347, 374, 383, 391, 393, 397, 414, 421; Trial, 163.
Northeast & S. W. Ala. R. Co., Ex parte (37 Ala. 679, Ala. Sel. Cas. 608), Subscr., 179.
Northeastern Neb. R. Co. *v.* Frazier (36 Am. & Eng. R. Cas. 606, 25 Neb. 42, 40 N. W. Rep. 604), Em. Dom., 429, 456, 460, 926; Trial, 15, 30; Witn., 146.
Northeastern R. Co. *v.* Barnett (89 Ga. 399, 15 S. E. Rep. 492), App., 117.
Northeastern R. Co. *v.* Cairns (32 W. R. 829), Charges, 67.
Northeastern R. Co. *v.* Chandler (84 Ga. 37, 10 S. E. Rep. 586), Evid., 247.
Northeastern R. Co. *v.* Crosland (11 W. R. 83, 32 L. J. Ch. 353, 4 DeG., F. & J. 550), Mines, etc., 2, 9.
Northeastern R. Co. *v.* Jackson (19 W. R. 198), Direct., 29, 45.
Northeastern R. Co. *v.* Leadgate Local Board (18 W. R. 691, L. R. 5 Q. B. 157, 39 L. J. M. C. 65, 22 L. T. 62), Tax., 380.
Northeastern R. Co. *v.* Martin (78 Ga. 603, 3 S. E. Rep. 701), Animals, 62.
Northeastern R. Co. *v.* Morris (59 Ga. 364), State Aid, 17.
Northeastern R. Co. *v.* Payne (8 Rich. (So. Car.) 177), Charters, 64.
Northeastern R. Co. *v.* Rodrigues (10 Rich. (So. Car.) 278), Subscr., 149, 164, 181.
Northeastern R. Co. *v.* Sneath (8 Rich. (So. Car.) 185), Em. Dom., 552, 692.
Northeastern R. Co. *v.* Wanless (43 L. J. Q. B. 185, L. R. 7 H. L. Cas. 12, 22 W. R. 561, 30 L. T. 275; affirming L. R. 6 Q. B. 481), Cross., Inj. at, 46.
Northern C. M. R. Co. *v.* Eslow (40 Mich. 222), Subscr., 9.
Northern C. R. Co.'s Appeal (103 Pa. St. 621), Cross. Rys., 63, 65.
Northern C. R. Co. *v.* Bastian (15 Md. 494), Pres., 1.
Northern C. R. Co. *v.* Canton Co. (30 Md. 347), Fixt., 12.
Northern C. R. Co. *v.* Commonwealth (5 Am. & Eng. R. Cas. 318, 90 Pa. St. 300), Crim. L., 32.
Northern C. R. Co. *v.* Holland (117 Pa. St. 613, 12 Atl. Rep. 575, 10 Cent. Rep. 746, 20 W. N. C. 428), Constr. Rys., 12.
Northern C. R. Co. *v.* Husson (12 Am. &

Eng. R. Cas. 241, 101 Pa. St. 1), Employés, Inj. to, 402.
Northern C. R. Co. *v.* Jackson (7 Wall. (U. S.) 262), Tax., 99, 402.
Northern C. R. Co. *v.* Keighler (29 Md. 2), Eq., 19; Trusts, 9.
Northern C. R. Co. *v.* Mayor, etc., of Baltimore (21 Md. 93), Injunc., 8; Sts. & H., 85.
Northern C. R. Co. *v.* Mayor, etc., of Baltimore (46 Md. 425, 18 Am. Ry. Rep. 461), Cross., Sts. & H., 63, 75; Sts. & H., 156.
Northern C. R. Co. *v.* Mills (19 Am. & Eng. R. Cas. 160, 61 Md. 355), Husb. & W., 37.
Northern C. R. Co. *v.* O'Conner (52 Am. & Eng. R. Cas. 176, 76 Md. 207, 16 L. R. A. 449, 24 Atl. Rep. 449), Car. of P., 60, 573, 612; Tickets & F., 8, 36.
Northern C. R. Co. *v.* Prentiss (11 Md. 119), Med. Serv., 2.
Northern C. R. Co. *v.* Rider (45 Md. 24), Attach., 44, 46; Att'ys, 8.
Northern C. R. Co. *v.* Scholl (16 Md. 331), Car. of P., 517; Car. of Slaves, 7.
Northern C. R. Co. *v.* State (17 Md. 8), State Aid, 23.
Northern C. R. Co. *v.* State (29 Md. 420), Contrib. Neg., 7, 16; Death, etc., 174, 178, 255; Negl., 2, 9, 18.
Northern C. R. Co. *v.* State (31 Md. 357), Contrib. Neg., 7, 28, 98; Death, etc., 355; Negl., 79.
Northern C. R. Co. *v.* State (6 Am. & Eng. R. Cas. 66, 54 Md. 113), Death, etc., 194, 258; Negl., 37.
Northern C. R. Co. *v.* Ward (63 Md. 362), Animals, 283, 480, 513.
Northern Ind. R. Co. *v.* Connelly (10 Ohio St. 159), Sts. & H., 354.
Northern Ind. R. Co. *v.* Michigan C. R. Co. (5 McLean (U. S.) 444), For. Corp., 15; Parties, 22; Proc., 17.
Northern Ind. R. Co. *v.* Michigan C. R. Co. (15 How. (U. S.) 233), Jurisd., 6; Parties, 25.
Northern Ins. Co. *v.* St. Louis & S. F. R. Co. (5 McCrary (U. S.) 126, 15 Fed. Rep. 840), Assign., 3.
Northern L. Packet Co. *v.* Shearer (61 Ill. 263), Car. of M., 720; Witn., 23.
Northern Nat. Bank *v.* Porter Tp. (5 Fed. Rep. 568; affirmed in 110 U. S. 608, 4 Sup. Ct. Rep. 254), Mun. Aid, 332.
Northern Nat. Bank *v.* Porter Tp. (15 Am. & Eng. R. Cas. 575, 110 U. S. 608, 4 Sup. Ct. Rep. 254; affirming 5 Fed. Rep. 568), Mun. Aid, 109, 377, 379.
Northern Pac. & P. S. S. R. Co. *v.* Coleman (3 Wash. 228, 28 Pac. Rep. 514), Em. Dom., 457, 756.
Northern Pac. R. Co. *v.* Amacker (46 Fed. Rep. 233), Land Grants, 6.
Northern Pac. R. Co. *v.* Amato (49 Fed. Rep. 881, 1 U. S. App. 113, 1 C. C. A. 468; affirming 46 Fed. Rep. 561; affirmed in 144 U. S. 465, 12 Sup. Ct. Rep. 740), Tresp., Inj. to, 114.
Northern Pac. R. Co. *v.* Austin (43 Am. & Eng. R. Cas. 7, 135 U. S. 315, 10 Sup. Ct. Rep. 758), Rem. of C., 23.
Northern Pac. R. Co. *v.* Barden (51 Am. & Eng. R. Cas. 236, 46 Fed. Rep. 592), Land Grants, 47.
Northern Pac. R. Co. *v.* Barnes (53 Am. & Eng. R. Cas. 616, 2 N. Dak. 310, 51 N. W. Rep. 386), Int. Com., 196; Land Grants, 77; Tax., 42, 164, 175.
Northern Pac. R. Co. *v.* Barnersville & M. R. Co. (2 McCrary (U. S.) 224, 4 Fed. Rep. 172), Injunc., 37.
Northern Pac. R. Co. *v.* Behling (57 Fed. Rep. 1037), Fel. Serv., 186, 516.
Northern Pac. R. Co. *v.* Booth (152 U. S. 671, 14 Sup. Ct. Rep. 693), Fed. Cts., 18.
Northern Pac. R. Co. *v.* Burlington & M. R. Co. (1 Am. & Eng. R. Cas. 8, 2 McCrary (U. S.) 203, 4 Fed. Rep. 298), Em. Dom., 416, 422, 1050; License, 12.
Northern Pac. R. Co. *v.* Cannon (46 Am. & Eng. R. Cas. 419, 46 Fed. Rep. 224), Land Grants, 72.
Northern Pac. R. Co. *v.* Cannon (46 Fed. Rep. 237), Land Grants, 6.
Northern Pac. R. Co. *v.* Cannon (54 Fed. Rep. 252, 7 U. S. App. 507, 4 C. C. A. 303; affirming 46 Fed. Rep. 237), Land Grants, 80.
Northern Pac. R. Co. *v.* Carland (17 Am. & Eng. R. Cas. 364, 5 Mont. 146, 3 Pac. Rep. 134), Jurisd., 17; Stat., 11; Tax., 221, 270, 347.
Northern Pac. R. Co. *v.* Cavanaugh (51 Fed. Rep. 517, 2 C. C. A. 358), Fel. Serv., 96, 238.
Northern Pac. R. Co. *v.* Charless (51 Am. & Eng. R. Cas. 198, 51 Fed. Rep. 562, 7 U. S. App. 359, 2 C. C. A. 380), App., 125; Employés, Inj. to, 4, 127, 186; Fel. Serv., 64, 94.
Northern Pac. R. Co. *v.* Conger (56 Fed. Rep. 20), Witn., 28.
Northern Pac. R. Co. *v.* Egeland (56 Fed. Rep. 200), Employés, Inj. to, 741.
Northern Pac. R. Co. *v.* Everett (152 U. S. 107, 14 Sup. Ct. Rep. 474), Employés, Inj. to, 700.
Northern Pac. R. Co. *v.* Haas (2 Wash. 376, 26 Pac. Rep. 869), Em. Dom., 55.
Northern Pac. R. Co. *v.* Herbert (24 Am. & Eng. R. Cas. 407, 116 U. S. 642, 6 Sup. Ct. Rep. 590), Employés, Inj. to, 101, 106; Fel. Serv., 233, 374; New Tr., 82.
Northern Pac. R. Co. *v.* Hess (48 Am. & Eng. R. Cas. 91, 2 Wash. 383, 26 Pac. Rep. 866), Car. of P., 550; Contrib. Neg., 67; Evid., 289; Pl., 113.
Northern Pac. R. Co. *v.* Hinchman (53 Fed. Rep. 523), Pub. Lds., 14.
Northern Pac. R. Co. *v.* Holmes (3 Wash. T. 202, 14 Pac. Rep. 688), Trial, 68.
Northern Pac. R. Co. *v.* Holmes (3 Wash. T. 543, 18 Pac. Rep. 76), Cross., Inj. at, 11, 325.
Northern Pac. R. Co. *v.* Jackman (6 Dak. 236, 50 N. W. Rep. 123), Estop., 8.
Northern Pac. R. Co. *v.* Kranich (52 Fed. Rep. 911), Ejectm., 26.
Northern Pac. R. Co. *v.* Kindred (14 Fed. Rep. 77, 3 McCrary (U. S.) 627), Eq., 7.
Northern Pac. R. Co. *v.* Lewis (56 Am. & Eng. R. Cas. 86, 7 U. S. App. 254, 51 Fed. Rep. 658, 2 C. C. A. 446), Fires, 98, 121, 131, 145, 157, 227, 240, 256, 290.

Northern Pac. R. Co. *v.* Lilly (24 Am. & Eng. R. Cas. 111, 6 Mont. 65, 9 Pac. Rep. 889), Land Grants, 70, 73; Northern Pac. R. Co., 2.
Northern Pac. R. Co. *v.* Majors (14 Am. & Eng. R. Cas. 487, 5 Mont. 111, 2 Pac. Rep. 322), Land Grants, 70.
Northern Pac. R. Co. *v.* Mares (123 U. S. 710, 8 Sup. Ct. Rep. 321), Fel. Serv., 160, 475.
Northern Pac. R. Co. *v.* Meadows (46 Fed. Rep. 254), Land Grants 50.
Northern Pac. R. Co. *v.* Nickels (53 Am. & Eng. R. Cas. 388, 50 Fed. Rep. 718, 4 U. S. App. 369, 1 C. C. A. 625), Employés, Inj. to, 141, 409, 430.
Northern Pac. R. Co. *v.* O'Brien (1 Wash. 599, 21 Pac. Rep. 32), Contrib. Neg., 105; Employés, Inj. to, 164, 663; Fel. Serv., 117, 262; Pl., 110, 117.
Northern Pac. R. Co. *v.* Paine (119 U. S. 561, 7 Sup. Ct. Rep. 323), Rem. of C., 55.
Northern Pac. R. Co. *v.* Patterson (10 Mont. 90, 24 Pac. Rep. 704), Tax., 359.
Northern Pac. R. Co. *v.* Peronto (10 Am. & Eng. R. Cas. 670, 3 Dak. 217, 14 N. W. Rep. 103), Land Grants, 81, 83.
Northern Pac. R. Co. *v.* Peterson (51 Fed. Rep. 182, 4 U. S. App. 574, 2 C. C. A. 157), Fel. Serv., 164, 218, 334.
Northern Pac. R. Co. *v.* Peterson (55 Fed. Rep. 940), Cross., Inj. at, 299.
Northern Pac. R. Co. *v.* Raymond (37 Am. & Eng. R. Cas. 379, 5 Dak. 356, 40 N. W. Rep. 538, 1 L. R. A. 732, 2 Int. Com. Rep. 321), Int. Com., 196; Tax., 290.
Northern Pac. R. Co. *v.* Roberts (42 Fed. Rep. 734), Mun. Aid, 53; Pl., 88.
Northern Pac. R. Co. *v.* St. Paul, M. & M. R. Co. (1 Am. & Eng. R. Cas. 12, 1 McCrary (U. S.) 302, 3 Fed. Rep. 702), Em. Dom., 404; Injunc., 27; Northern Pac. R. Co., 1.
Northern Pac. R. Co. *v.* St. Paul, M. & M. R. Co. (1 Am. & Eng. R. Cas. 15, 2 McCrary (U. S.) 260, 4 Fed. Rep. 688), Indem. Bonds, 7.
Northern Pac. R. Co. *v.* St. Paul, M. & M. R. Co. (25 Am. & Eng. R. Cas. 99, 26 Fed. Rep. 551), Land Grants, 5.
Northern Pac. R. Co. *v.* St. Paul, M. & M. R. Co. (47 Fed. Rep. 536), Judgm., 28.
Northern Pac. R. Co. *v.* Sanders (46 Am. & Eng. R. Cas. 431, 46 Fed. Rep. 239; affirmed on rehearing in 47 Fed. Rep. 604; affirmed on writ of error in 49 Fed. Rep. 129, 1 C. C. A. 192, 7 U. S. App. 47), Land Grants, 74, 80.
Northern Pac. R. Co. *v.* Shimmell (24 Am. & Eng. R. Cas. 1, 6 Mont. 161, 9 Pac. Rep. 889), Exec., 9; Northern Pac. R. Co., 2.
Northern Pac. R. Co. *v.* Spokane (52 Fed. Rep. 428), Injunc., 6.
Northern Pac. R. Co. *v.* Spokane (56 Fed. Rep. 915), Sts. & H., 1, 7; Ult. Vir., 17.
Northern Pac. R. Co. *v.* Sullivan (53 Fed. Rep. 219, 10 U. S. App. 473, 3 C. C. A. 506), Trial, 125.
Northern Pac. R. Co. *v.* Territory (29 Am. & Eng. R. Cas. 82, 3 Wash. T. 303, 13 Pac. Rep. 604), Actions, 4; Estop., 19; Stat. & D., 13; Trial, 95.
Northern Pac. R. Co. *v.* Traill County (25 Am. & Eng. R. Cas. 364, 115 U. S. 600, 6 Sup. Ct. Rep. 201), Land Grants, 61; Tax., 113.
Northern Pac. R. Co. *v.* United States (15 Ct. of Cl. 428), Land Grant Rds., 4.
Northern Pac. R. Co. *v.* United States (36 Fed. Rep. 282), Land Grants, 77.
Northern Pac. R. Co. *v.* Walker (47 Fed. Rep. 681), Tax., 22, 113, 344, 357.
Northern Pac. R. Co. *v.* Washington Ter. (48 Am. & Eng. R. Cas. 475, 142 U. S. 492, 12 Sup. Ct. Rep. 283), Mand., 11, 28.
Northern Pac. R. Co. *v.* Whalen (3 Wash. T. 452, 17 Pac. Rep. 890), Injunc., 26.
Northern Pac. R. Co. *v.* Whalen (149 U. S. 157, 13 Sup. Ct. Rep. 822), Nuis., 3.
Northern Pac. R. Co. *v.* Wright (54 Fed. Rep. 67, 7 U. S. App. 502, 4 C. C. A. 193; affirming 51 Fed. Rep. 68), Land Grants, 80.
Northern Pac. Terminal Co. *v.* Lowenberg (14 Am. & Eng. R. Cas. 418, 9 Sawy. (U. S.) 348, 18 Fed. Rep. 339), Rem. of C., 15, 39.
Northern Pac. Terminal Co. *v.* Portland (14 Oreg. 24, 13 Pac. Rep. 705), Sts. & H., 27.
Northern R. Co. *v.* Carpentier (3 Abb. Pr. (N. Y.) 259, 13 How. Pr. 222), Arrest, 2.
Northern R. Co. *v.* Carpentier (4 Abb. Pr. (N. Y.) 47), Arrest, 1.
Northern R. Co. *v.* Concord & C. R. Co (27 N. H. 183), Em. Dom., 109, 788, 800, 920.
Northern R. Co. *v.* Concord R. Co. (50 N. H. 166, 1 Am. Ry. Rep. 164), Contr., 65.
Northern R. Co. *v.* Fitchburg R. Co. (6 Allen (Mass.) 254), Car. of M., 560, 635.
Northern R. Co. *v.* Lister (27 U. C. Q. B. 57), Agency, 29.
Northern R. Co. *v.* Miller (10 Barb. (N. Y.) 260), Subscr., 38, 77, 122.
Northern R. Co. *v.* New York (12 Wall. (U. S.) 384), Fed. Cts., 25.
Northern R. Co. *v.* Page (22 Barb. (N. Y.) 130), Eject. Pass., 9; Tickets & F., 37, 60.
Northern Transp. Co. *v.* McClary (66 Ill. 233), Car. of M., 645, 773.
Northern Transp. Co. *v.* Sellick (52 Ill. 249), Car. of M., 306, 307.
North Hudson County R. Co. *v.* Booraem (28 N. J. Eq. 450, 14 Am. Ry. Rep. 202; reversing 27 N. J. Eq. 371), Em. Dom., 141, 657.
North Hudson County R. Co. *v.* Booraem (28 N. J. Eq. 593), Em. Dom., 763.
North Hudson County R. Co. *v.* Isley (34 Am. & Eng. R. Cas. 94, 49 N. J. L. 468, 10 Atl. Rep. 665, 9 Cent. Rep. 122), St. Rys., 233, 474.
North Hudson County R. Co. *v.* May (27 Am. & Eng. R. Cas. 151, 48 N. J. L. 401, 5 Atl. Rep. 276; reversed on other grounds in 49 N. J. L. 445, 9 Atl. Rep. 688), Evid., 202; St. Rys., 411; Witn., 10.
North Lebanon R. Co. *v.* McGrann (33 Pa. St. 530), Constr. Rys., 71.
North London R. Co. *v.* Attorney-General (45 L. J. Ex. D. 315, L. R. 1 App. Cas.

148, 24 W. R. 852, 34 L. T. 297; affirming 43 L. J. Ex. 223, L. R. 9 Ex. 330, 31 L. T. 377), Tickets & F., 142.
North London R. Co. *v.* Great Northern R. Co. (47 L. T. N. S. 383; reversed in L. R. 11 Q. B. D. 30, 52 L. J. Q. B. D. 380, 48 L. T. 695, 31 W. R. 490), Arb., 1.
North London R. Co. *v.* Great Northern R. Co. (L. R. 11 Q. B. D. 30, 52 L. J. Q. B. D. 380, 48 L. T. 695, 31 W. R. 490; reversing 47 L. T. N. S. 383), Arb., 13.
North London R. Co. *v.* Metropolitan Board of Works (5 Jur. N. S. 1121, 28 L. J. Ch. 909), Incorp., 4.
North Lonsdale I. & S. Co. *v.* Furness R. Co. (7 Ry. & C. T. Cas. 146), Charges, 91.
North Manheim Tp., Appeal of (Pa.) (36 Am. & Eng. R. Cas. 194, 22 W. N. C. 149, 14 Atl. Rep. 137), Cross., Sts. & H., 16, 17, 92; Sts. & H., 201, 245, 422; Turnp., 2.
North Manheim Tp. *v.* Reading & P. R. Co. (18 Phila. (Pa.) 650), Cross., Sts. & H., 27.
North Mo. R. Co., In re (51 Mo. 586), Jurisd., 21.
North Mo. R. Co. *v.* Akers (4 Kan. 453), Car. of L. S., 152, 160, 453; Words & Ph., 163.
North Mo. R. Co. *v.* Gott (25 Mo. 540), Em. Dom., 321, 494.
North Mo. R. Co. *v.* Lackland (25 Mo. 515), Em. Dom., 886, 969.
North Mo. R. Co. *v.* Maguire (20 Wall. (U. S.) 46, 6 Am. Ry. Rep. 445), Tax., 145.
North Mo. R. Co. *v.* Maguire (49 Mo. 482, 1 Am. Ry. Rep. 43), Tax., 269.
North Mo. R. Co. *v.* Maguire (49 Mo. 490, 1 Am. Ry. Rep. 243), Tax., 36, 146.
North Mo. R. Co. *v.* Miller (31 Mo. 19), Subscr., 217.
North Mo. R. Co. *v.* Reynal (25 Mo. 534), Em. Dom., 979.
North Mo. R. Co. *v.* Wheatley (49 Mo. 136), Evid., 214.
North Mo. R. Co. *v.* Winkler (29 Mo. 318), Subscr., 226.
North Mo. R. Co. *v.* Winkler (33 Mo. 354), Subscr., 158.
North Monkland R. Co. *v.* North British R. Co. (3 Ry. & C. T. Cas. 282), Charges, 98.
North Norwich Tp., In re (44 U. C. Q. B. 34), Mun. Aid, 267.
North of England R. Co. *v.* Langbaurgh (24 L. T. 544), Bridges, 32, 42.
North Pac. R. Co. *v.* Reynolds (50 Cal. 90, 280), Em. Dom., 354, 845, 921.
North Pa. R. Co. *v.* Adams (54 Pa. St. 94), Costs, 5; Coupons, 12.
North Pa. R. Co. *v.* Commercial Bank (35 Am. & Eng. R. Cas. 556, 123 U. S. 727, 8 Sup. Ct. Rep. 266), Car. of L. S., 50, 59; Trial, 183.
North Pa. R. Co. *v.* Davis (26 Pa. St. 238), Em. Dom., 433, 481, 891.
North Pa. R. Co. *v.* Heileman (49 Pa. St. 60), Cross., Inj. at, 9, 254.
North Pa. R. Co. *v.* Kirk (1 Am. & Eng. R. Cas. 45, 90 Pa. St. 15), Death, etc., 288, 202, 406; Negl., 91.
North Pa. R. Co. *v.* Mahoney (57 Pa. St. 187), Children, Inj. to, 127, 137.
North Pa. R. Co. *v.* Rehman (49 Pa. St. 101), Animals, 185.
North Pa. R. Co. *v.* Robinson (44 Pa. St. 175), Death, etc., 94, 353, 388.
North Pa. R. Co. *v.* Stone (3 Phila. (Pa.) 421), Mun. Corp., 53.
North River Constr. Co., In re (38 N. J. Eq. 433; affirmed in 40 N. J. Eq. 340), Subrog., 5.
Northrop *v.* Syracuse, B. & N. Y. R. Co. (3 Abb. App. Dec. (N. Y.) 386, 5 Abb. Pr. N. S. 425), Car. of M., 351.
Northrup *v.* New York, O. & W. R. Co. (37 Hun (N. Y.) 295), Contrib. Neg., 84; Witn., 128.
Northrup *v.* Railway Pass. A. Co. (43 N. Y. 516), Acc. Ins., 5, 10.
North Shore R. Co. *v.* McWillie (17 Can. Sup. Ct. 511), Fires, 56, 139.
North Shore R. Co. *v.* McWillie (5 Montr. L. R. 122), Fires, 32; Lim. of Ac., 51.
North Shore R. Co. *v.* Pion (L. R. 14 App. Cas. 612), Em. Dom., 1205, 1232.
North Side St. R. Co. *v.* Tippens (4 Tex. App. (Civ. Cas.) 226, 14 S. W. Rep. 1067), Elec. Rys., 22.
North Side St. R. Co. *v.* Want (4 Tex. App. (Civ. Cas.) 237, 15 S. W. Rep. 40), Pl., 153; St. Rys., 473.
North Simcoe R. Co., In re (36 U. C. Q. B. 101), Mun. Aid, 209.
North Staffordshire R. Co., In re (6 Railw. Cas. 17, 2 Ex. 235, 17 L. J. Ex. 350), Em. Dom., 1170.
North Staffordshire R. Co., In re (6 Railw. Cas. 25, 2 Ex. 244, 17 L. J. Ex. 354), Em. Dom., 1174.
North Staffordshire R. Co. *v.* Dale (8 El. & Bl. 836, 4 Jur. N. S. 631, 27 L. J. M. C. 147), Bridges, 32, 42.
Northumberland *v.* Atlantic & St. L. R. Co. (35 N. H. 574), Sts. & H., 404.
Northumberland County *v.* Philadelphia & E. R. Co. (Pa.) (9 Atl. Rep. 504), Tax., 280.
Northwestern Fuel Co. *v.* Burlington & C. R. R. Co. (20 Fed. Rep. 712), Car. of M., 751.
Northwestern Fuel Co. *v.* Danielson (57 Fed. Rep. 915), Employés, Inj. to, 38; Fel. Serv., 72; Negl., 53, 56.
Northwestern Iowa G. & S. Shippers Assoc. *v.* Chicago & N. W. R. Co. (2 Int. Com. Rep. 431, 2 Int. Com. Com. 604), Int. Com., 86, 112, 117.
Northwestern N. C. R. Co. *v.* Jenkins (65 N. Car. 173), Mand., 20.
Northwestern R. Co. *v.* Hack (66 Ill. 238), Agency, 73.
Northwestern R. Co. *v.* M'Michael (6 Ex. 273, 6 Railw. Cas. 495, 20 L. J. Ex. 233), Subscr., 59.
Northwestern R. Co *v.* M'Michael (6 Railw. Cas. 618, 5 Ex. 114, 15 Jur. 132, 20 L. J. Ex. 97), Subscr., 161.
Northwestern R. Co. *v.* Whinray (10 Ex. 77, 2 C. L. R. 1207, 23 L. J. Ex. 261), Indem. Bonds, 5.
North Wis. R. Co. *v.* Barron County Sup'rs (8 Biss. (U. S.) 414), Land Grants, 5.
Norton *v.* Atchison, T. & S. F. R. Co. (97

Cal. 388, 30 Pac. Rep. 585, 32 Pac. Rep. 452), Judgm., 44.
Norton *v.* Brownsville Com'rs (129 U. S. 479, 9 Sup. Ct. Rep. 322), Mun. Aid, 3, 74.
Norton *v.* Brownsville Taxing Dist. (36 Fed. Rep. 99), Mun. Aid, 129.
Norton *v.* Dyersburg (127 U. S. 160, 8 Sup. Ct. Rep. 1111), Mun. Aid, 322.
Norton *v.* Eastern R. Co. (113 Mass. 366), Cross., Inj. at, 139.
Norton *v.* Hannibal & St. J. R. Co. (48 Mo. 387), Animals, 615.
Norton *v.* London & N. W. R. Co. (9 Ch. D. 623, 13 Ch. D. 268, 47 L. J. Ch. D. 859, 3 Ry. & C. T. Cas. xxix), Easem., 14; Em. Dom., 1106; Nuis., 2, 5.
Norton *v.* London & N. W. R. Co. (L. R. 13 Ch. D. 268, 41 L. T. 429, 28 W. R. 173; affirming L. R. 9 Ch. D. 623, 47 L. J. Ch. 859, 39 L. T. 25, 27 W. R. 352), Adv. Poss., 1; Em. Dom., 1113; Lim. of Ac., 52.
Norton *v.* Milner (12 Am. & Eng. R. Cas. 639, 89 Ind. 197), Mun. Aid, 411.
Norton *v.* St. Louis & H. R. Co. (40 Mo. App. 642), Derailm., 4; Phys. Exam., 3.
Norton *v.* Shelby County (118 U. S. 425, 6 Sup. Ct. Rep. 1121), Mun. Aid, 49, 136, 331.
Norton *v.* State (74 Ind. 337), Crim. L., 10.
Norton *v.* Wallkill Valley R. Co. (61 Barb. (N. Y.) 476, 42 How. Pr. 228), Location, etc., 8, 13.
Norton *v.* Wallkill Valley R. Co. (63 Barb. (N. Y.) 77; reversing 61 Barb. 476, 42 How. Pr. 228), Em. Dom., 287, 288.
Norvall *v.* Canada Southern R. Co. (5 Ont. App. 13), Em. Dom., 1278.
Norvall *v.* Canada Southern R. Co. (28 U. C. C. P. 309), Em. Dom., 1276.
Norvell *v.* Canada Southern R. Co. (9 Ont. App. 310), Em. Dom., 1211, 1265, 1273.
Norwalk Bank *v.* Adams Exp. Co. (19 How. Pr. (N. Y.) 462, 4 Blatchf. (U. S.) 455), Exp. Cos., 20.
Norway Plains Co. *v.* Boston & M. R. Co. (1 Gray (Mass.) 263), Car. of M., 222, 335.
Norwich *v.* Attorney-General (2 Up. Can. E. & A. 541), Mun. Aid, 199.
Norwich & W. R. Co. *v.* Cahill (18 Conn. 484), Evid., 204.
Norwich & W. R. Co. *v.* Johnson (15 Wall. (U. S.) 8), App., 132.
Norwich & W. R. Co. *v.* Johnson (15 Wall. (U. S.) 195), Coupons, 7.
Norwich & W. R. Co. *v.* Killingly (25 Conn. 402), Sts. & H., 40.
Norwich & W. R. Co. *v.* Worcester (36 Am. & Eng. R. Cas. 447, 147 Mass. 518, 18 N. E. Rep. 409), App., 61; Leases, 50.
Norwich & W. R. Co. *v.* Worcester County Com'rs (151 Mass. 69, 23 N. E. Rep. 721), Tax., 79, 169.
Norwood *v.* Memphis & C. R. Co. (72 Ala. 563), Parties, 23.
Norwood *v.* Raleigh & G. R. Co. (111 N. Car. 236, 16 S. E. Rep. 4), Contrib. Neg., 107; Evid., 280; Tresp., Inj. to, 54, 102.
Norwood & M. R. Co., In re (14 N. Y. S. R. 437, 47 Hun 489), Em. Dom., 510, 645, 657, 904.
Nosler *v.* Chicago, B. & Q. R. Co. (73 Iowa 268, 34 N. W. Rep. 850), Cross., Inj. at, 241, 276; Evid., 76, 77, 231; Witn., 110, 182.
Nottawasaga *v.* Hamilton & N. W. R. Co. (38 Am. & Eng. R. Cas. 698, 16 Ont. App. 52), Words & Ph., 84.
Nottingham *v.* Baltimore & P. R. Co. (3 MacArth. (D. C.) 517), Nuis., 27; Sts. & H., 215.
Nova Scotia C. R. Co. *v.* Halifax Banking Co. (23 Nov. Sc. 172), Injunc., 21.
Novock *v.* Michigan C. R. Co. (63 Mich. 121, 29 N. W. Rep. 525), Employés, Inj. to, 740.
Noyes *v.* Boscawen (64 N. H. 361, 10 Atl. Rep. 690), Imp. Neg., 17.
Noyes *v.* City Council of Springfield (116 Mass. 87), Cross., Sts. & H., 111.
Noyes *v.* Gardner (147 Mass. 505, 18 N. E. Rep. 423), Cross., Inj. at, 31.
Noyes *v.* Rich (52 Me. 115), Mort., 222.
Noyes *v.* Rutland & B. R. Co. (27 Vt. 110), Agency, 106; Car. of M., 593.
Noyes *v.* St. Louis, A. & T. H. R. Co. (Ill.) (21 N. E. Rep. 487), Deeds, 26.
Noyes *v.* Smith (28 Vt. 59), Fel. Serv., 142.
Noyes *v.* Southern Pac. R. Co. (Cal.) (24 Pac. Rep. 927), Death, etc., 211.
Noyes *v.* Southern Pac. R. Co. (48 Am. & Eng. R. Cas. 591, 92 Cal. 285, 28 Pac. Rep. 288), Death, etc., 253.
Nudd *v.* Wells (11 Wis. 407), Car. of M., 130, 132, 144, 737, 787.
Nugent *v.* Boston, C. & M. R. Co. (38 Am. & Eng. R. Cas. 52, 80 Me. 62, 12 Atl. Rep. 797), Contrib. Neg., 84; Employés, Inj. to, 84, 479, 481, 618; Evid., 89; Leases, 42.
Nugent *v.* Cincinnati, H. & I. S. L. R. Co. (2 Disney (Ohio) 302), Agency, 86; Subscr., 143.
Nugent *v.* Putnam County (3 Biss. (U. S.) 105; reversed in 19 Wall. 241), Mun. Aid, 207, 383.
Nugent *v.* Putnam County Sup'rs (19 Wall. (U. S.) 241), Mun. Aid, 196; Subscr., 118.
Nugent *v.* Smith (L. R. 1 C. P. D. 423, 45 L. J. C. P. D. 697, 34 L. T. 827, 25 W. R. 117; reversing L. R. 1 C. P. D. 19, 45 L. J. C. P. D. 19, 33 L. T. 731, 24 W. R. 237), Car. of M., 15, 21, 110; Words & Ph., 7.
Nunn *v.* Georgia R. Co. (71 Ga. 710, 51 Am. Rep. 284), Car. of P., 231.
Nutter *v.* Boston & M. R. Co. (60 N. H. 483), Cross., Inj. at, 346; Evid., 31; Witn., 128.
Nutter *v.* Chicago, R. I. & P. R. Co. (22 Mo. App. 328), Animals, 381; Evid., 112; Negl., 41; Sts. & H., 384.
Nutter *v.* Lexington & W. C. R. Co. (6 Gray (Mass.) 85), Stock, 28.
Nutting *v.* Burked (48 Mich. 241, 12 N. W. Rep. 184), Bills & N., 18.
Nutting *v.* Connecticut River R. Co. (1 Gray (Mass.) 502), Car. of M., 575.
Nutting *v.* Kings County El. R. Co. (48 Hun 348, 15 N. Y. S. R. 877, 1 N. Y. Supp. 383), Elev. Rys., 73.
Nutting *v.* Kings County El. R. Co. (42

N. Y. S. R. 621, 62 Hun 621, 16 N. Y. Supp. 673), New Tr., 17.
Nutting *v.* Thomason (46 Ga. 34), Stock, 73.
Nutting *v.* Thomasson (57 Ga. 418), Divid., 7.
Nuzum *v.* Pittsburg, C. & St. L. R. Co. (30 W. Va. 228, 4 S. E. Rep. 242), Animals, 62; Cross., Inj. at, 130; Tresp., Inj. to, 26.
Nye *v.* Burlington & L. R. Co. (60 Vt. 585, 11 Atl. Rep. 689), Proc., 41.
Nye *v.* Marysville & Y. C. St. R. Co. (97 Cal. 461, 32 Pac. Rep. 530), St. Rys., 519.
Nye *v.* Northern C. R. Co. (24 Hun (N. Y.) 556), Rem. of C., 44, 49, 53.
Nye *v.* Taunton Branch R. Co. (113 Mass. 277), Dower, 1.

Oakes *v.* Northern Pac. R. Co. (47 Am. & Eng. R. Cas. 437, 20 Oreg. 392, 26 Pac. Rep. 230), Bagg., 2, 30, 37, 38.
Oakland R. Co. *v.* Fielding (48 Pa. St. 320), Children, Inj. to, 104; Cross., Inj. at, 29, 362.
Oakland R. Co. *v.* Keenan (56 Pa. St. 198), Exec., 1, 3.
Oakland R. Co. *v.* Oakland, B. & F. V. R. Co. (45 Cal. 365, 5 Am. Ry. Rep. 148), Charters, 83; St. Rys., 48, 74, 117.
Oakland R. Co. *v.* Thomas (1 Pennyp. (Pa.) 435), App., 113.
Oakley *v.* Toronto, G. & B. R. Co. (6 Ont. Pr. 253), Words & Ph., 145.
Oates *v.* Union Pac. R. Co. (104 Mo. 514, 16 S. W. Rep. 487), Death, etc., 86, 120.
Oatts *v.* Cincinnati, N. O. & T. P. R. Co. (Ky.) (22 S. W. Rep. 330), Tresp., Inj. to, 39.
O'Bannon *v.* Louisville, C. & L. R. Co. (8 Bush (Ky.) 348), Animals, 5, 50; Lim. of Ac., 2, 61.
O'Bannon *v.* Louisville & N. R. Co. (Ky.) (6 S. W. Rep. 434), Death, etc., 268.
O'Bannon *v.* Southern Exp. Co. (51 Ala. 481), Car. of M., 63.
Ober *v.* Crescent City R. Co. (52 Am. & Eng. R. Cas. 576, 44 La. Ann. 1059, 11 So. Rep. 818), Pl., 30; St. Rys., 176, 334, 397.
Ober *v.* Indianapolis & St. L. R. Co. (13 Mo. App. 81), Car. of M., 493, 767; Parties, 5.
Oberdorfer *v.* Philadelphia & R. R. Co. (149 Pa. St. 6, 27 Atl. Rep. 304), Death, etc., 270.
Oberfelder *v.* Metropolitan El. R. Co. (138 N. Y. 181, 52 N. Y. S. R. 158, 33 N. E. Rep. 937; affirming 46 N. Y. S. R. 967, 18 N. Y. Supp. 958), Elev. Rys., 38.
O'Boyle *v.* Shannon (80 Ind. 159), App., 10.
O'Brien *v.* American Dredging Co. (53 N. J. L. 291, 21 Atl. Rep. 324), Fel. Serv., 73, 311.
O'Brien *v.* Baltimore Belt R. Co. (50 Am. & Eng. R. Cas. 194, 74 Md. 363, 22 Atl. Rep. 141), Em. Dom., 161; Eq., 5; Sts. & H., 81.
O'Brien *v.* Boston & A. R. Co. (138 Mass. 387, 52 Am. Rep. 279), Fel. Serv., 1, 52.
O'Brien *v.* Boston & W. R. Co. (15 Gray (Mass.) 20), Eject. Pass., 48, 96.
O'Brien *v.* Chicago, R. I. & P. R. Co. (53 Barb. (N. Y.) 568, 4 Abb. Pr. N. S. 381, 36 How. Pr. 24), Stock, 28.
O'Brien *v.* Credit Valley R. Co. (25 U. C. C. P. 275), Agency, 50; Contr., 20.
O'Brien *v.* New York C. & H. R. R. Co. (1 Am. & Eng. R. Cas. 259, 80 N. Y. 236), Eject. Pass., 47, 48.
O'Brien *v.* New York, N. H. & H. R. Co. (36 N. Y. S. R. 801, 59 Hun 623, 13 N. Y. Supp. 305), Witn., 168.
O'Brien *v.* Norwich & W. R. Co. (17 Conn. 372), Nuis., 11.
O'Brien *v.* Pennsylvania S. V. R. Co. (119 Pa. St. 184, 11 Cent. Rep. 679, 13 Atl. Rep. 74, 21 W. N. C. 141), Em. Dom., 1002.
O'Brien *v.* Philadelphia, W. & B. R. Co. (3 Phila. (Pa.) 76), Contrib. Neg., 9; Neg., 1.
O'Brien *v.* Wabash, St. L. & P. R. Co. (21 Mo. App. 12), Animals, 362.
Ocean Ins. Co. *v.* Portsmouth M. R. Co. (3 Met. (Mass.) 420), Attach., 20, 54.
Ocean P. & N. Co. *v.* Woolsey (22 N. Y. S. R. 72, 51 Hun 643), Cov'ts, 13.
Ocean Steamship Co. *v.* McAlpin (69 Ga. 437), Evid., 138.
Ocean Steamship Co. *v.* Way (90 Ga. 747), Bagg., 34.
Ochiltree *v.* Iowa R. Contracting Co. (21 Wall. (U. S.) 249, 7 Am. Ry. Rep. 525), Stockh., 38, 43.
O'Connell *v.* Baltimore & O. R. Co. (20 Md. 212), Employés, Inj. to, 95; Fel. Serv., 1, 3, 102, 137.
O'Connell *v.* East Tenn., V. & G. R. Co. (48 Am. & Eng. R. Cas. 61, 87 Ga. 246, 13 S. E. Rep. 489), Embankm., 4.
O'Connell *v.* St. Louis C. & W. R. Co. (106 Mo. 482, 17 S. W. Rep. 494), Car. of P., 142, 151; New Tr., 60.
O'Conner *v.* Chicago, R. I. & P. R. Co. (75 Iowa 617, 34 N. W. Rep. 795), Pl., 167.
O'Connor *v.* Boston & L. R. Corp. (15 Am. & Eng. R. Cas. 362, 135 Mass. 352), Children, Inj. to, 107, 141; Cross., Inj. at, 1, 355; Tresp., Inj. to, 19.
O'Connor *v.* Chicago, M. & St. P. R. Co. (27 Minn. 166, 36 Am. Rep. 829, n., 6 N. W. Rep. 481), Evid., 174.
O'Connor *v.* Current River R. Co. (111 Mo. 185, 20 S. W. Rep. 16), Liens, 36, 57.
O'Connor *v.* Fond du Lac, A. & P. R. Co. (5 Am. & Eng. R. Cas. 82, 52 Wis. 526, 9 N. W. Rep. 287, 38 Am. Rep. 753), Flood. Lds., 38.
O'Connor *v.* Illinois C. R. Co. (83 Iowa 105, 48 N. W. Rep. 1002), Employés, Inj. to, 538, 611.
O'Connor *v.* Illinois C. R. Co. (44 La. Ann. 339, 10 So. Rep. 678), Negl., 8; Tresp., Inj. to, 78.
O'Connor *v.* Missouri Pac. R. Co. (32 Am. & Eng. R. Cas. 61, 94 Mo. 150, 13 West. Rep. 587, 7 S. W. Rep. 106), Contrib. Neg., 83, 105; Cross., Inj. at, 242; Death, etc., 146; Fly. Switch, 1.
O'Connor *v.* St. Louis, K. C. & N. R. Co. (5 Am. & Eng. R. Cas. 324, 56 Iowa 735, 10 N. W. Rep. 263), Cross., Inj. at, 357; Sts. & H., 279, 293.

O'Connor *v.* Smith (84 Tex. 232, 19 S. W. Rep. 168), Constr. Rys., 32, 44.
Oconto *v.* Chicago & N. W. R. Co. (44 Wis. 231), Sts. & H., 357.
Ode *v.* Manhattan R. Co. (56 Hun 199, 31 N. Y. S. R. 106, 9 N. Y. Supp. 338), Elev. Rys., 162, 169.
Odell *v.* Boston & M. R. Co. (109 Mass. 50), Sales, 5.
Odell *v.* Metropolitan El. R. Co. (3 Misc. (N. Y.) 335, 52 N. Y. S. R. 7), App., 38; Elev. Rys., 91, 125.
Odell *v.* New York C. & H. R. R. Co. (120 N. Y. 323, 24 N. E. Rep. 478, 31 N. Y. S. R. 27; reversing 42 Hun 655, 6 N. Y. S. R. 99), Employés, Inj. to, 309.
Odell *v.* New York El. R. Co. (130 N. Y. 690, 3 Silv. App. 667, 29 N. E. Rep. 998, 42 N. Y. S. R. 591; reversing 27 N. Y. S. R. 985, 8 N. Y. Supp. 951), Elev. Rys., 166, 178.
Oderkirk *v.* Fargo (34 N. Y. S. R. 166, 58 Hun 347, 11 N. Y. Supp. 871), Car. of M., 344.
Oderkirk *v.* Fargo (41 N. Y. S. R. 9, 16 N. Y. Supp. 220, 61 Hun 418), Exp. Cos., 56, 85, 88; Witn., 66.
Odessa Tramways Co. *v.* Mendel (L. R. 8 Ch. D. 235, 47 L. J. Ch. D. 505, 26 W. R. 887, 38 L. T. 731; affirming 37 L. T. 275), Subscr., 64, 168.
O'Donald *v.* Evansville, I. & C. S. L. R. Co. (14 Ind. 259), Pl., 9; Subscr., 198.
O'Donnell *v.* Allegheny R. Co. (50 Pa. St. 490), Car. of P., 561.
O'Donnell *v.* Allegheny Valley R. Co. (59 Pa. St. 239), Car. of P., 57, 496; Employés, Inj. to, 93; Fel. Serv., 121, 433.
O'Donnell *v.* Chicago, M. & St. P. R. Co. (69 Iowa 102, 28 N. W. Rep. 464), Fright. Teams, 2.
O'Donnell *v.* Duluth, S. S. & A. R. Co. (89 Mich. 174, 50 N. W. Rep. 801), Death, etc., 211.
O'Donnell *v.* Missouri Pac. R. Co. (7 Mo. App. 190), Contrib. Neg., 4; Tresp., Inj. to, 91.
O'Donnell *v.* New York & H. R. Co. (8 Daly (N. Y.) 409; affirmed in 77 N. Y. 625, mem.), App., 118.
O'Donnell *v.* New York C. & H. R. R. Co. (12 N. Y. S. R. 206, 46 Hun 678, mem.; affirmed in 113 N. Y. 641, mem., 21 N. E. Rep. 414, 22 N. Y. S. R. 997), Death, etc., 194.
O'Donnell *v.* Providence & W. R. Co. (6 R. I. 211), Cross., Inj. at, 105.
O'Dougherty *v.* Boston & W. R. Co. (1 T. & C. (N. Y.) 477), Car. of M., 246, 280.
Odum *v.* Rutledge & J. R. Co. (94 Ala. 488, 10 So. Rep. 222), Em. Dom., 145, 490, 887.
Oelrich *v.* Pittsburg (1 Pittsb. (Pa.) 522), Coupons, 14; Mun. Aid, 273.
Oels *v.* Helena & L. S. & R. Co. (10 Mont. 524, 26 Pac. Rep. 1000), Trial, 12.
O'Fallon *v.* Ohio & M. R. Co. (45 Ill. App. 572), Bridges, 9; Words & Ph., 181.
Offield *v.* Wabash, St. L. & P. R. Co. (22 Mo. App. 607), Flood. Lds., 53.
O'Flaherty *v.* Union R. Co. (45 Mo. 70), Children, Inj. to, 114; Negl., 73.
Ogden *v.* Daviess County (5 Am. & Eng. R. Cas. 145, 102 U. S. 634), Mun. Aid, 273.
Ogden *v.* Kirby (79 Ill. 555), Subscr., 212; Trial, 97.
Ogden *v.* Pennsylvania R. Co. (Pa.) (16 Atl. Rep. 353), Children, Inj. to, 20.
Ogden City R. Co. *v.* Ogden City (46 Am. & Eng. R. Cas. 101, 7 Utah 207, 26 Pac. Rep. 288), Elec. Rys., 1; Sts. & H., 247.
Ogdensburg & L. C. R. Co. *v.* Nashua & L. R. Co. (112 U. S. 311, 5 Sup. Ct. Rep. 161; affirming 5 Fed. Rep. 882), Contr., 101.
Ogdensburg & L. C. R. Co. *v.* Pratt (49 How. Pr. (N. Y.) 84), Car. of L. S., 9; Car. of M., 596.
Ogdensburg & L. C. R. Co. *v.* Pratt (22 Wall. (U. S.) 123, 11 Am. Ry. Rep. 431), Car. of M., 578, 582, 605.
Ogdensburg & L. C. R. Co. *v.* Vermont & C. R. Co. (4 Hun (N. Y.) 268, 6 T. & C. 488), Leases, 25.
Ogdensburg & L. C. R. Co. *v.* Vermont & C. R. Co. (16 Abb. Pr. N. S. (N. Y.) 249; affirmed in 4 Hun 712), Connect. L., 5; Parties, 11.
Ogdensburg & L. C. R. Co. *v.* Vermont & C. R. Co. (4 Hun (N. Y.) 712; Leases, 49.
Ogdensburg & L. C. R. Co. *v.* Vermont & C. R. Co. (63 N. Y. 176; not dismissing appeal from 4 Hun 712; App., 1; Costs, 4.
Ogdensburg, C. & R. R. Co. *v.* Wooley (3 Abb. App. Dec. (N. Y.) 398, 1 Keyes 118, 34 How. Pr. 54), Subscr., 21.
Ogdensburg, R. & C. R. Co. *v.* Frost (21 Barb. (N. Y.) 541), Subscr., 1, 38, 77, 140.
Ogilvie, In re (L. R. 7 Ch. 174, 41 L. J. Ch. 336), Em. Dom., 1123.
Ogle *v.* Philadelphia, W. & B. R. Co. (3 Houst. (Del.) 302; affirming 3 Houst. 267), Cross., Sts. & H., 51; Land Grants, 9; Side Tr., 1, 4.
O'Hagan *v.* Dillon (10 J. & S. (N. Y.) 456), Contrib. Neg., 99.
O'Hanlan *v.* Great Western R. Co. (11 Jur. N. S. 797, 6 B. & S. 484, 34 L. J. Q. B. 154, 13 W. R. 741, 12 L. T. 490), Car. of M., 761.
O'Hara *v.* Lexington & O. R. Co. (1 Dana (Ky.) 232), Em. Dom., 31.
O'Hara *v.* Pennsylvania R. Co. (2 Grant's Cas. (Pa.) 241), App., 8.
O'Hare *v.* Chicago & A. R. Co. (95 Mo. 662, 15 West. Rep. 427, 9 S. W. Rep. 23), Employés, Inj. to, 588; Negl., 66; Trial, 53.
O'Hare *v.* Chicago, M. & N. R. Co. (139 Ill. 151, 28 N. E. Rep. 923), Em. Dom., 3, 62, 92, 324, 364, 529, 550, 620, 623.
O'Hare *v.* Pennsylvania R. Co. (25 Pa. St. 445), Em. Dom., 341, 474, 480.
Ohio *v.* Cleveland & T. R. Co. (6 Ohio St. 489), Stock, 57; Subscr., 44.
Ohio & I. R. Co. *v.* Ridge (5 Blackf. (Ind.) 78), Charters, 156.
Ohio & M. Packet Co. *v.* McCool (Ind.) (8 Am. & Eng. R. Cas. 390), Evid., 144.
Ohio & M. R. Co. *v.* Allender (47 Ill. App. 484), Car. of P., 380, 472.
Ohio & M. R. Co. *v.* Anderson (10 Ill. App. 213), Pl., 39; Receiv., 71, 179.

Ohio & M. R. Co. *v.* Applewhite (52 Ind. 540), Car. of P., 258, 259.
Ohio & M. R. Co. *v.* Atteberry (43 Ill. App. 80), Animals, 439.
Ohio & M. R. Co. *v.* Barker (125 Ill. 303, 15 West Rep. 139, 17 N. E. Rep. 797; further appeal 134 Ill. 470), Adv. Poss., 5; Deeds, 14.
Ohio & M. R. Co. *v.* Barker (134 Ill. 470, 25 N. E. Rep. 785; former appeal 125 Ill. 303), Em. Dom., 515.
Ohio & M. R. Co. *v.* Bass (36 Ill. App. 126), Employés, Inj. to, 409.
Ohio & M. R. Co. *v.* Bath (11 Ind. 538), Witn., 97.
Ohio & M. R. Co. *v.* Boyd (16 Ind. 438), Proc., 39.
Ohio & M. R. Co. *v.* Bridgeport (43 Ill. App. 89), Bridges, 15, 32, 42; Sts. & H., 176.
Ohio & M. R. Co. *v.* Brown (23 Ill. 94), Animals, 353, 358.
Ohio & M. R. Co. *v.* Brown (46 Ill. App. 137), Car. of L. S., 121.
Ohio & M. R. Co. *v.* Brown (49 Ill. App. 40), Car. of L. S., 121.
Ohio & M. R. Co. *v.* Brubaker (47 Ill. 462), Fences, 82; Words & Ph., 40.
Ohio & M. R. Co. *v.* Burrow (32 Ill. App. 161), Eject. Pass., 110.
Ohio & M. R. Co. *v.* Burton (21 Ind. 217), Trover, 16.
Ohio & M. R. Co. *v.* Clutter (82 Ill. 123), Animals, 62, 143, 560; App., 124.
Ohio & M. R. Co. *v.* Cole (41 Ind. 331), Animals, 73.
Ohio & M. R. Co. *v.* Collarn (5 Am. & Eng. R. Cas. 554, 73 Ind. 261, 38 Am. Rep. 134), Agency, 40; Employés, Inj. to, 444, 511; Fel. Serv., 152; Negl., 67; New Tr., 30; Pl., 172.
Ohio & M. R. Co. *v.* Combs (142 Ill. 187, 31 N. E. Rep. 598; affirming 43 Ill. App. 119), Embankm., 4.
Ohio & M. R. Co. *v.* Cope (36 Ill. App. 97), Eject. Pass., 34.
Ohio & M. R. Co. *v.* Cosby (27 Am. & Eng. R. Cas. 339, 107 Ind. 32, 7 N. E. Rep. 373), Dam., 41, 69; Husb. & W., 32, 37.
Ohio & M. R. Co. *v.* Cox (26 Ill. App. 491), Estop., 1.
Ohio & M. R. Co. *v.* Craucher (132 Ind. 275, 31 N. E. Rep. 941), Pl., 174.
Ohio & M. R. Co. *v.* Craycraft (5 Ind. App. 335, 32 N. E. Rep. 297), Animals, 187, 211, 332, 547, 576; Negl., 89.
Ohio & M. R. Co. *v.* Crumbo (4 Ind. App. 456, 30 N. E. Rep. 434), Constr. Rys., 116.
Ohio & M. R. Co. *v.* Cullison (40 Ill. App. 67), Eject. Pass., 95.
Ohio & M. R. Co. *v.* Davis (23 Ind. 553), Collis., 10; Cross., Inj. at, 53.
Ohio & M. R. Co. *v.* Dickerson (59 Ind. 317), Car. of P., 287, 288, 291; Dam., 24, 25; Employés, Inj. to, 764.
Ohio & M. R. Co. *v.* Dunbar (20 Ill. 623), Car. of L. S., 36; Leases, 113.
Ohio & M. R. Co. *v.* Eaves (42 Ill. 288), Animals, 231; Cross., Inj. at, 135.
Ohio & M. R. Co. *v.* Elliott (34 Ill. App. 589), Adv. Poss., 3; Flood. Lds., 65; Waters & W., 13.
Ohio & M. R. Co. *v.* Emrich (24 Ill. App. 245), Bills of L., 32; Car. of M., 674, 708.
Ohio & M. R. Co. *v.* Engrer (4 Ind. App. 261, 30 N. E. Rep. 924), Negl., 43, 89.
Ohio & M. R. Co. *v.* Erwin (45 Ill. App. 558), Lim. of Ac., 61.
Ohio & M. R. Co. *v.* Fitch (20 Ind. 498), Animals, 648; Pl., 39; Receiv., 4, 183.
Ohio & M. R. Co. *v.* Fowler (85 Ill. 21), Animals, 281.
Ohio & M. R. Co. *v.* Gross (41 Ill. App. 561), Animals, 52.
Ohio & M. R. Co. *v.* Gullett (15 Ind. 487), Contrib. Neg., 21.
Ohio & M. R. Co. *v.* Hamlin (42 Ill. App. 441), Car. of L. S., 94; Car. of M., 573.
Ohio & M. R. Co. *v.* Hammersley (28 Ind. 371), Death, etc., 240; Employés, Inj. to, 185; Evid., 218; Fel. Serv., 1, 2, 3, 4, 50, 142.
Ohio & M. R. Co. *v.* Hardy (64 Ind. 454), App., 133.
Ohio & M. R. Co. *v.* Hatton (60 Ind. 12), Car. of P., 255, 546.
Ohio & M. R. Co. *v.* Hawkins (1 Ind. App. 213, 27 N. E. Rep. 331), Contrib. Neg., 72.
Ohio & M. R. Co. *v.* Hay (64 Ind. 597), App., 133.
Ohio & M. R. Co. *v.* Hays (35 Ind. 173, 5 Am. Ry. Rep. 576), Animals, 590.
Ohio & M. R. Co. *v.* Hecht (34 Am. & Eng. R. Cas. 447, 115 Ind. 443, 15 West. Rep. 122, 17 N. E. Rep. 297), App., 79; Dam., 22, 67; Pl., 116, 172.
Ohio & M. R. Co. *v.* Hemberger (43 Ind. 462), Drains, 6.
Ohio & M. R. Co. *v.* Hill (117 Ind. 56, 18 N. E. Rep. 461), Death, etc., 194, 199.
Ohio & M. R. Co. *v.* Hoeltman (34 Ill. App. 429), Flood. Lds., 71.
Ohio & M. R. Co. *v.* Irvin (27 Ill. 178), Animals, 430, 475; Witn., 110.
Ohio & M. R. Co. *v.* Jones (27 Ill. 41), Animals, 313; Fences, 49.
Ohio & M. R. Co. *v.* Jones (63 Ill. 472, 7 Am. Ry. Rep. 477), Animals, 28.
Ohio & M. R. Co. *v.* Judy (120 Ind. 397, 22 N. E. Rep. 252), App., 125; Dam., 101; Eject. Pass., 129; New Tr., 29.
Ohio & M. R. Co. *v.* Kasson (37 N. Y. 218), Sales, 8.
Ohio & M. R. Co. *v.* Lackey (78 Ill. 55), Stat., 20.
Ohio & M. R. Co. *v.* Lawrence County (27 Ill. 50), Tax., 257.
Ohio & M. R. Co. *v.* Levy (134 Ind. 343, 32 N. E. Rep. 815), Sts. & H., 383.
Ohio & M. R. Co. *v.* McCarthy (96 U. S. 258), Car. of M., 595.
Ohio & M. R. Co. *v.* McCartney (121 Ind. 385, 23 N. E. Rep. 258), Fires, 178; Negl., 89.
Ohio & M. R. Co. *v.* McClelland (25 Ill. 140), Cross., Inj. at, 170; Fences, 4.
Ohio & M. R. Co. *v.* McClure (47 Ind. 317), Animals, 353.
Ohio & M. R. Co. *v.* McDaneld (5 Ind.

App. 108, 31 N. E. Rep. 836), App., 36; Cross., Inj. at, 109, 330; Negl., 74.
Ohio & M. R. Co. *v.* McGehee (47 Ill. App. 348), Farm Cross., 10.
Ohio & M. R. Co. *v.* McPherson (35 Mo. 13), Direct., 19; Subscr., 156.
Ohio & M. R. Co. *v.* Maisch (29 Ill. App. 640), App., 55.
Ohio & M. R. Co. *v.* Meisenheimer (27 Ill. 30), Animals, 124.
Ohio & M. R. Co. *v.* Miller (46 Ind. 215, 7 Am. Ry. Rep. 240), Animals, 621.
Ohio & M. R. Co. *v.* Mueller (46 Ill. App. 109), Evid., 295.
Ohio & M. R. Co. *v.* Muhling (30 Ill. 9), Passes, 16.
Ohio & M. R. Co. *v.* Neutzel (143 Ill. 46, 32 N. E. Rep. 529), Flood. Lds., 74.
Ohio & M. R. Co. *v.* Nickless (71 Ind. 271), Car. of P., 643; Contrib. Neg., 72; Passes. 12; Receiv., 129.
Ohio & M. R. Co. *v.* Nickless (73 Ind. 382), Pl., 50.
Ohio & M. R. Co. *v.* Noe (77 Ill. 513), Car. of M., 388.
Ohio & M. R. Co. *v.* Nuetzel (43 Ill. App. 108), Embankm., 2, 4; Flood. Lds., 21, 97; Lim. of Ac., 58.
Ohio & M. R. Co. *v.* O'Donnell (26 Ill. App. 348), App., 121.
Ohio & M. R. Co. *v.* Pearcy (128 Ind. 197, 27 N. E. Rep. 479), Death, etc., 44, 145; Employés, Inj. to, 100, 144, 308, 348; Fel. Serv., 94, 226.
Ohio & M. R. Co. *v.* People (29 Ill. App. 561), Car. of P., 227; Words & Ph., 193.
Ohio & M. R. Co. *v.* People (119 Ill. 207, 10 N. E. Rep. 545), Tax., 300, 321.
Ohio & M. R. Co. *v.* People (45 Ill. App. 583), Pl., 67.
Ohio & M. R. Co. *v.* People (49 Ill. App. 225), Penalty, 12; Pl., 70.
Ohio & M. R. Co. *v.* People (32 Ill. App. 69), Mand., 34.
Ohio & M. R. Co. *v.* People (123 Ill. 467, 14 N. E. Rep. 874), Consol., 24, 37.
Ohio & M. R. Co. *v.* People (123 Ill. 648, 15 N. E. Rep. 277), Tax., 257.
Ohio & M. R. Co. *v.* People (30 Am. & Eng. R. Cas. 509, 120 Ill. 200, 11 N. E. Rep. 347, 9 West. Rep. 167), Car. of P., 106; Mand., 2, 4, 7, 15, 30; Pl., 69; Quo War., 3.
Ohio & M. R. Co. *v.* People (30 Am. & Eng. R. Cas. 427, 121 Ill. 483, 13 N. E. Rep. 236, 11 West. Rep. 375), Fences, 21, 76; Mand., 3.
Ohio & M. R. Co. *v.* Porter (92 Ill. 437), Comp. Neg., 12; Evid., 173.
Ohio & M. R. Co. *v.* Press Pub. Co. (52 Am. & Eng. R. Cas. 155, 48 Fed. Rep. 206), Libel & S., 1, 6.
Ohio & M. R. Co. *v.* Ramey (139 Ill. 9, 28 N. E. Rep. 1087; affirming 39 Ill. App. 409), Embankm., 4; Flood. Lds., 21.
Ohio & M. R. Co. *v.* Reed (40 Ill. App. 47), Cross., Inj. at, 131, 149, 160.
Ohio & M. R. Co. *v.* Robb (36 Ill. App. 627), Employés, Inj. to, 293; Fel. Serv., 306.
Ohio & M. R. Co. *v.* Rowland (50 Ind. 349), Animals, 564.
Ohio & M. R. Co. *v.* Rowland (51 Ind. 285), Trial, 181.
Ohio & M. R. Co. *v.* Russell (23 Am. & Eng. R. Cas. 149, 115 Ill. 52, 3 N. E. Rep. 561), Fences, 2, 45; Receiv., 45.
Ohio & M. R. Co. *v.* Saxton (27 Ill. 420), Animals, 313.
Ohio & M. R. Co. *v.* Schiebe (44 Ill. 460), Car. of P., 204, 394.
Ohio & M. R. Co. *v.* Selby (47 Ind. 471, 8 Am. Ry. Rep. 177), Car. of L. S., 126, 127; Car. of P., 549; Evid., 31, 47, 139; Lim. of Liab., 27; Passes, 10, 28; Pl., 157.
Ohio & M. R. Co. *v.* Shanefelt (47 Ill. 497), Fires, 58, 66, 68, 120, 124; Negl., 9.
Ohio & M. R. Co. *v.* Simms (43 Ill. App. 260), Car. of P., 278; Death, etc., 271; Franch., 6; Stat. & D., 68.
Ohio & M. R. Co. *v.* Simon (40 Ind. 278), Lim. of Ac., 58; Nuis., 7.
Ohio & M. R. Co. *v.* Singletary (34 Ill. App. 425), Flood. Lds., 48.
Ohio & M. R. Co. *v.* Smith (5 Ind. App. 36, 31 N. E. Rep. 371), Att'ys, 21.
Ohio & M. R. Co. *v.* Smith (5 Ind. App. 560, 32 N. E. Rep. 809), Car. of P., 550; Trial, 218.
Ohio & M. R. Co. *v.* Stansberry (56 Am. & Eng. R. Cas. 285, 132 Ind. 533, 32 N. E. Rep. 218), Car. of P., 443; Stat. & D., 138.
Ohio & M. R. Co. *v.* State (49 Ohio St. 668, 32 N. E. Rep. 933), Direct., 11; Stockh., 17.
Ohio & M. R. Co. *v.* Stein (133 Ind. 243, 31 N. E. Rep. 180, 32 N. E. Rep. 831), Evid., 202.
Ohio & M. R. Co. *v.* Stratton (78 Ill. 88), Car. of P., 425; Children, Inj. to, 120.
Ohio & M. R. Co. *v.* Stribling (38 Ill. App. 17), Animals, 67, 397, 428, 540, 568, 573.
Ohio & M. R. Co. *v.* Swarthout (67 Ind. 567), Tickets & F., 7.
Ohio & M. R. Co. *v.* Taylor (27 Ill. 207), Animals, 507.
Ohio & M. R. Co. *v.* Thillman (43 Ill. App. 78), Constr. Rys., 4; Waters & W., 11.
Ohio & M. R. Co. *v.* Thillman (143 Ill. 127, 32 N. E. Rep. 529), Bridges, 20, 23; Embankm., 4; Em. Dom., 984, 989, 1081; Flood. Lds., 21, 53, 87; Trial, 113; Waters & W., 11.
Ohio & M. R. Co. *v.* Tindall (13 Ind. 366), Death, etc., 42, 89, 344; Fel. Serv., 1, 202, 278.
Ohio & M. R. Co. *v.* Trapp (4 Ind. App. 69, 30 N. E. Rep. 812), Fires, 47, 58, 156, 186, 342, 364; Trial, 204.
Ohio & M. R. Co. *v.* Trowbridge (45 Am. & Eng. R. Cas. 200, 126 Ind. 391, 26 N. E. Rep. 64), Fright. Teams, 2; Sts. & H., 374, 403, 411.
Ohio & M. R. Co. *v.* Voight (122 Ind. 288, 23 N. E. Rep. 774), Death, etc., 322; Evid., 11, 284.
Ohio & M. R. Co. *v.* Wachter (34 Am. & Eng. R. Cas. 194, 123 Ill. 440, 15 N. E. Rep. 279; affirming 23 Ill. App. 415), Em. Dom., 435, 989; Flood. Lds., 16.

Ohio & M. R. Co. *v.* Walker (32 Am. & Eng. R. Cas. 121, 113 Ind. 196, 15 N. E. Rep. 234, 17 West. Rep. 731), Contrib. Neg., 72; Cross., Inj. at, 10, 12; Negl., 89; Pl., 172; Tresp., Inj. to, 2.
Ohio & M. R. Co. *v.* Wangelin (43 Ill. App. 324), Death, etc., 275; Employes, Inj. to, 94, 136.
Ohio & M. R. Co. *v.* Webb (142 Ill. 404, 32 N. E. Rep. 527), Witn., 140.
Ohio & M. R. Co. *v.* Weber (5 Am. & Eng. R. Cas. 101, 96 Ill. 443), Consol., 37; Tax., 257; Words & Ph., 33, 164, 182, 205.
Ohio & M. R. Co. *v.* Wheeler (1 Black (U. S.) 286), Charters, 15; Fed. Cts., 8.
Ohio & M. R. Co. *v.* Wrape (4 Ind. App. 100, 30 N. E. Rep. 428), Fires, 186.
Ohio & M. R. Co. *v.* Wrape (4 Ind. App. 108, 30 N. E. Rep. 427), Animals, 173, 405, 413.
Ohio & M. R. Co. *v.* Yohe (51 Ind. 181), Car. of M., 297, 726.
Ohio & P. R. Co. *v.* Bradford (19 Pa. St. 363), Em. Dom., 924.
Ohio & P. R. Co. *v.* Brittian (1 Pittsb. (Pa.) 271), Animals, 296.
Ohio & P. R. Co. *v.* Wallace (14 Pa. St. 245), Em. Dom., 481.
Ohio C. R. Co. *v.* Central Trust Co. (133 U. S. 83, 10 Sup. Ct. Rep. 235), App., 11; Mort., 207.
Ohio, I. & I. R. Co. *v.* Cramer (23 Ind. 490), Subscr., 19, 66, 82.
Ohio, I. & W. R. Co. *v.* Dooley (32 Ill. App. 228), Flood. Lds., 50, 58.
Ohio, I. & W. R. Co. *v.* Heady (Ind. App.) (28 N. E. Rep. 212), Animals, 108, 117.
Ohio, I. & W. R. Co. *v.* Johnson (31 Ill. App. 183), Employés, Inj. to, 102.
Ohio, I. & W. R. Co. *v.* Kleinsmith (38 Ill. App. 45), Animals, 450; Trial, 123.
Ohio, I. & W. R. Co. *v.* Neady (5 Ind. App. 328, 32 N. E. Rep. 213), Animals, 352; Cat.-Gds., 11.
Ohio, I. & W. R. Co. *v.* People (39 Ill. App. 473), Sts. & H., 404.
Ohio R. Co. *v.* State (10 Ohio 360), Quo War., 2.
Ohio River R. Co. *v.* Blake (38 W. Va. 718, 18 S. E. Rep. 957), Em. Dom., 537.
Ohio River R. Co. *v.* Gibbens (35 W. Va. 57, 12 S. E. Rep. 1093), Injunc., 12.
Ohio River R. Co. *v.* Harness (20 Am. & Eng. R. Cas. 405, 24 W. Va. 511), Em. Dom., 315, 850.
Ohio River R. Co. *v.* Sehon (33 W. Va. 559, 11 S. E. Rep. 18), Spec. Perf., 9.
Ohio Southern R. Co. *v.* Morey (43 Am. & Eng. R. Cas. 97, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. Rep. 269), Pl., 8.
Ohio Valley R. & M. Co. *v.* Kuhn (Ky.) (5 S. W. Rep. 419), Em. Dom., 836.
Ohio Valley R. & M. Co. *v.* Thomas (Ky.) (5 S. W. Rep. 470), Em. Dom., 926.
Ohio Valley R. & T. Co. *v.* Kerth (130 Ind. 314, 30 N. E. Rep. 298), Em. Dom., 650; Evid., 231; Witn., 123.
Ohio Valley R. Co. *v.* Watson (58 Am. & Eng. R. Cas. 418, 93 Ky. 654, 21 S. W. Rep. 244), Car. of P., 168, 290, 291, 563; Derailm., 3; Evid., 90.
Ohle *v.* Chicago & N. W. R. Co. (64 Iowa 599, 21 N. W. Rep. 101), Estop., 12.
Oil Creek & A. R. R. Co. *v.* Clark (72 Pa. St. 231, 6 Am. Ry. Rep. 476), Tickets & F., 40.
Oil Creek & A. R. R. Co. *v.* Keighron (74 Pa. St. 316, 6 Am. Ry. Rep. 192), Fires, 82.
Oil Creek & A. R. R. Co. *v.* Pennsylvania Transp. Co. (83 Pa. St. 160, 16 Am. Ry. Rep. 322), Ult. Vir., 23.
Oil Creek R. Co. *v.* Atlantic & G. W. R. Co. (57 Pa. St. 65), Constr. Rys., 28.
O'Keefe *v.* Chicago, R. I. & P. R. Co. (32 Iowa 467, 10 Am. Ry. Rep. 63), Comp. Neg., 27.
O'Kelly *v.* Richmond & D. R. Co. (89 N. Car. 58), Rem. of C., 27.
O'Laughlin *v.* New York C. & H. R. R. Co. (9 N. Y. S. R. 384, 45 Hun 588; affirmed in 113 N. Y. 623, mem., 20 N. E. Rep. 876, 22 N. Y. S. R. 992), Employés, Inj. to, 2; Fel. Serv., 57, 509.
Olcott *v.* Fond du Lac County (2 Biss. (U. S.) 368), Fed. Cts., 14.
Olcott *v.* Fond du Lac County Sup'rs (16 Wall. (U. S.) 678), Mun. Aid, 247, 405.
Olcott *v.* Headrick (141 U. S. 543, 12 Sup. Ct. Rep. 81), Mort., 255.
Olcott *v.* Tioga R. Co. (20 N. Y. 210; reversing 26 Barb. 147), Lim. of Ac., 73.
Olcott *v.* Tioga R. Co. (27 N. Y. 546; affirming 40 Barb. 179), Bills & N., 12; Connect. L., 2; Evid., 18; Pres., 9.
Old Colony & F. R. R. Co. *v.* Plymouth County Com'rs (11 Gray (Mass.) 512), Cross., Sts. & H., 45, 73.
Old Colony & F. R. R. Co. *v.* Plymouth County (14 Gray (Mass.) 155), Cross., Sts. & H., 76, 84.
Old Colony R. Co. *v.* Fall River (147 Mass. 455, 18 N. E. Rep. 425), Injunc., 32, 40.
Old Colony R. Co. *v.* Framingham Water Co. (153 Mass. 561, 27 N. E. Rep. 662), Em. Dom., 104, 112.
Old Colony R. Co. *v.* Miller (125 Mass. 1), Em. Dom., 638, 760.
Old Colony R. Co. *v.* Slavens (38 Am. & Eng. R. Cas. 382, 148 Mass. 363, 19 N. E. Rep. 372), Car. of Mails, 7; Car. of P., 532; Stat. & D., 130.
Old Colony R. Co. *v.* Tripp (33 Am. & Eng. R. Cas. 488, 147 Mass. 35, 17 N. E. Rep. 89), Discrim., 30.
Old Colony R. Co. *v.* Wilder (21 Am. & Eng. R. Cas. 41, 137 Mass. 536), Car. of M., 381.
Old Colony R. Corp. *v.* Evans (6 Gray (Mass.) 25), Spec. Perf., 9, 27.
Oldenburg *v.* New York C. & H. R. R. Co. (29 N. Y. S. R. 836, 9 N. Y. Supp. 419), Evid., 76, 234.
Oldenburg *v.* New York C. & H. R. R. Co. (124 N. Y. 414, 26 N. E. Rep. 1021, 36 N. Y. S. R. 402; affirming 33 N. Y. S. R. 663, 11 N. Y. Supp. 689, 29 N. Y. S. R. 836), Crossing, Inj. at, 54, 55; Death, etc., 202, 292.
Oldfield *v.* New York & H. R. Co. (14 N. Y. 310; affirmed 3 E. D. Smith 103), Death, etc., 221, 387; St. Rys., 484.

Oldtown & L. R. Co. *v.* Veazie (39 Me. 571), Subscr., 50, 166, 203.
Oler *v.* Baltimore & R. R. Co. (41 Md. 583, 7 Am. Ry. Rep. 495), St. Rys., 79; Subscr., 34, 160.
Oleson *v.* Green Bay & L. P. R. Co. (36 Wis. 383), Mun. Aid, 16, 53.
Oliver *v.* Chicago & A. R. Co. (17 Ill. 587), Attach., 56.
Oliver *v.* Great Western R. Co. (28 U. C. C. P. 143), Stat. Agts., 10.
Oliver *v.* Memphis & L. R. R. Co. (30 Ark. 128), Tax., 205, 351.
Oliver *v.* New York & E. R. Co. (1 Edm. Sel. Cas. (N. Y.) 589), Bridges, 51; Car. of P., 139, 142; Elev. Rys., 200; Negl., 84.
Oliver *v.* Northeastern R. Co. (L. R. 9 Q. B. 409, 43 L. J. Q. B. 198), Cross., Inj. at, 34; Sts. & H., 359.
Oliver *v.* North Pac. Transp. Co. (3 Oreg. 84), Agency, 84; Dam., 70, 73, 74.
Oliver *v.* Pittsburg, V. & C. R. Co. (44 Am. & Eng. R. Cas. 175, 131 Pa. St. 408, 19 Atl. Rep. 47), Em. Dom., 1016; Parties, 4.
Oliver *v.* Union Point & W. P. R. Co. (39 Am. & Eng. R. Cas. 107, 83 Ga. 257, 9 S. E. Rep. 1086), Em. Dom., 385, 412, 869, 957; Tender, 7.
Olivier *v.* Louisville & N. R. Co. (47 Am. & Eng. R. Cas. 576, 43 La. Ann. 804, 9 So. Rep. 431), App., 115; Car. of P., 475; Evid., 192.
Olmsted *v.* Rochester & P. R. Co. (8 N. Y. S. R. 856, 44 Hun 627; affirmed in 106 N. Y. 673, mem., 13 N. E. Rep. 937, 11 N. Y. S. R. 881, mem.), Receiv., 8, 91.
Olmsted *v.* Rochester & P. R. Co. (46 Hun 552, 12 N. Y. S. R. 551), Receiv., 39.
Olney *v.* Wharf (115 Ill. 519, 5 N. E. Rep. 366), Sts. & H., 141, 159.
Olp *v.* Gardner (48 Hun 169, 15 N. Y. S. R. 544), Evid., 166, 212.
Olsen *v.* Oregon S. L. & U. N. R. Co. (9 Utah 129, 33 Pac. Rep. 623), Cross., Inj. at, 119, 131, 238, 351; Evid., 298.
Olson *v.* Chicago, M. & St. P. R. Co. (81 Wis. 41, 50 N. W. Rep. 412, 1096), Fright. Teams, 5; Stat. & D., 123.
Olson *v.* St. Paul & D. R. Co. (47 Am. & Eng. R. Cas. 573, 45 Minn. 536, 48 N. W. Rep. 445), App., 125; Car. of L. S., 129; Conduct., 11.
Olson & St. Paul, M. & M. R. Co. (34 Minn. 477, 26 N. W. Rep. 605), Death, etc., 137.
Olson *v.* St. Paul, M. & M. R. Co. (33 Am. & Eng. R. Cas. 386, 38 Minn. 117, 35 N. W. Rep. 866), Employés, Inj. to, 271, 309; Fel. Serv., 310, 343.
Olson *v.* St. Paul, M. & M. R. Co. (34 Am. & Eng. R. Cas. 152, 154, 38 Minn. 419, 479, 37 N. W. Rep. 953), Waters & W., 27, 28.
Omaha *v.* Kramer (25 Neb. 489, 41 N. W. Rep. 295), Em. Dom., 15; Witn., 123; Words & Ph., 149.
Omaha & N. N. R. Co. *v.* Redick (17 Am. & Eng. R. Cas. 107, 16 Neb. 313, 20 N. W. Rep. 309), Estop., 17.
Omaha & N. P. R. Co. *v.* Janecek (30 Neb. 276, 46 N. W. Rep. 478), Constr. Rys., 12.
Omaha & N. W. R. Co. *v.* Menk (4 Neb. 21), Em. Dom., 786, 856.
Omaha & R. V. R. Co. *v.* Brown (11 Am. & Eng. R. Cas. 501, 14 Neb. 170, 15 N. W. Rep. 321), Flood. Lds., 80.
Omaha & R. V. R. Co. *v.* Brown (20 Am. & Eng. R. Cas. 286, 16 Neb. 161, 20 N. W. Rep. 202), Bridges, 22.
Omaha & R. V. R. Co. *v.* Brown (44 Am. & Eng. R. Cas. 475, 29 Neb. 492, 46 N. W. Rep. 39), Flood. Lds., 74; Jurisd., 7; Lim. of Ac., 31; Vend. & P., 7.
Omaha & R. V. R. Co. *v.* Clark (55 Am. & Eng. R. Cas. 145, 35 Neb. 867, 53 N. W. Rep. 970), Fright. Teams, 1, 6.
Omaha & R. V. R. Co. *v.* Cook (37 Neb. 435, 55 N. W. Rep. 943), Trial, 31.
Omaha & R. V. R. Co. *v.* Hall (33 Neb. 229, 50 N. W. Rep. 10), New Tr., 16, 27.
Omaha & R. V. R. Co. *v.* Martin (19 Am. & Eng. R. Cas. 236, 14 Neb. 295, 15 N. W. Rep. 696), Cross., Inj. at, 6; Tresp., Inj. to, 21.
Omaha & R. V. R. Co. *v.* Moschel (56 Am. & Eng. R. Cas. 674, 38 Neb. 281, 56 N. W. Rep. 875), Lim. of Ac., 50; Pl., 144; Sts. & H., 241.
Omaha & R. V. R. Co. *v.* Rogers (20 Am. & Eng. R. Cas. 79, 16 Neb. 117, 19 Pac. Rep. 603), Sts. & H., 141.
Omaha & R. V. R. Co. *v.* Severin (45 Am. & Eng. R. Cas. 122, 30 Neb. 318, 46 N. W. Rep. 842), Cat.-Gds., 13; Farm Cross., 7.
Omaha & R. V. R. Co. *v.* Standen (34 Am. & Eng. R. Cas. 179, 22 Neb. 343, 35 N. W. Rep. 183), Bridges, 48; Em. Dom., 15; Flood. Lds., 11, 68.
Omaha & R. V. R. Co. *v.* Standen (29 Neb. 622, 46 N. W. Rep. 46), Flood. Lds., 74.
Omaha & R. V. R. Co. *v.* Walker (20 Am. & Eng. R. Cas. 396, 17 Neb. 432, 23 N. W. Rep. 348), Em. Dom., 565, 574.
Omaha & St. L. R. Co. *v.* Wabash, St. L. & P. R. Co. (50 Am. & Eng. R. Cas. 700, 108 Mo. 298, 18 S. W. Rep. 1101), Mort., 38.
Omaha Belt R. Co. *v.* Johnson (24 Neb. 707, 40 N. W. Rep. 134), App., 115; Em. Dom., 516.
Omaha Belt R. Co. *v.* McDermott (25 Neb. 714, 41 N. W. Rep. 648), Em. Dom., 645.
Omaha Horse R. Co. *v.* Cable Tramway Co. (30 Fed. Rep. 324), Cable Rys., 1; St. Rys., 53.
Omaha Horse R. Co. *v.* Cable Tramway Co. (32 Fed. Rep. 727), Cable Rys., 7; Dam., 64; Em. Dom., 167, 379, 414.
Omaha Horse R. Co. *v.* Doolittle (7 Neb. 481), Contrib. Neg., 16, 24.
Omaha, N. & B. H. R. Co. *v.* Gerrard (23 Am. & Eng. R. Cas. 73, 17 Neb. 587), Em. Dom., 424.
Omaha, N. & B. H. R. Co. *v.* O'Donnell (35 Am. & Eng. R. Cas. 346, 22 Neb. 475, 35 N. W. Rep. 235), Cross., Inj. at, 130, 218.
Omaha, N. & B. H. R. Co. *v.* O'Donnell (24 Neb. 753, 40 N. W. Rep. 298), New Tr., 23, 90.
Omaha, N. & B. H. R. Co. *v.* Umstead (20 Am. & Eng. R. Cas. 399, 17 Neb. 459, 23 N. W. Rep. 350), Em. Dom., 951.

Omaha Southern R. Co. *v.* Beeson (36 Neb. 361, 54 N. W. Rep. 557), Em. Dom., 564, 603, 612, 933; Sts. & H., 36.
Omaha St. R. Co. *v.* Craig (58 Am. & Eng. R. Cas. 208, 39 Neb. 601, 58 N. W. Rep. 209), Negl., 1, 67, 111; St. Rys., 403, 420; Trial, 29.
O'Malley *v.* Chicago City R. Co. (30 Ill. App. 309), New Tr., 87.
O'Malley *v.* Chicago City R. Co. (33 Ill. App. 354), Trial, 196.
O'Malley *v.* Missouri Pac. R. Co. (53 Am. & Eng. R. Cas. 280, 113 Mo. 319, 20 S. W. Rep. 1079), Employés, Inj. to, 606; Negl., 51, 62, 102.
O'Malley *v.* New York, L. E. & W. R. Co. (51 N. Y. S. R. 366, 67 Hun 130, 22 N. Y. Supp. 48), Employés, Inj. to, 348, 454.
O'Malley *v.* St. Paul, M. & M. R. Co. (45 Am. & Eng. R. Cas. 62, 43 Minn. 289, 45 N. W. Rep. 440), Children, Inj. to, 27, 31, 159.
O'Mara *v.* Delaware & H. Canal Co. (18 Hun (N. Y.) 192), Sts. & H., 415.
O'Mara *v.* Hudson River R. Co. (38 N. Y. 445), Children, Inj. to, 2, 75; Cross., Inj. at, 136; Death, etc., 434.
O'Mellia *v.* Kansas City, St. J. & C. B. R. Co. (115 Mo. 205, 21 S. W. Rep. 503), Death, etc., 226, 279, 373; Employés, Inj. to, 134, 193, 239, 383, 687; Negl., 53, 67; Witn., 176.
Ominger *v.* New York C. & H. R. R. Co. (4 Hun (N. Y.) 159, 6 T. & C. 498), Employés, Inj. to, 488, 723.
Omnibus R. Co. *v.* Baldwin (1 Am. & Eng. R. Cas. 316, 57 Cal. 160), Stat., 8; St. Rys., 4, 48, 68, 120, 243.
Onderdonk *v.* New York & S. B. R. Co. (74 Hun 42, 26 N. Y. Supp. 310, 56 N. Y. S. R. 190), Car. of P., 234, 236, 414.
O'Neal *v.* Chicago & I. C. R. Co. (132 Ind. 110, 31 N. E. Rep. 669), Employés, Inj. to, 38, 99, 182, 206, 301.
O'Neall *v.* South Carolina R. Co. (9 Rich. (So. Car.) 465), Car. of Slaves, 9.
Oneida *v.* Madison County Sup'rs (49 N. Y. S. R. 344, 136 N. Y. 269, 32 N. E. Rep. 852; affirming 40 N. Y. S. R. 985), Mun. Aid, 278, 421.
O'Neil *v.* Dry Dock, E. B. & B. R. Co. (52 Am. & Eng. R. Cas. 573, 129 N. Y. 125, 29 N. E. Rep. 84, 41 N. Y. S. R. 107; affirming 27 J. & S. 123, 36 N. Y. S. R. 934, 15 N. Y. Supp. 84), St. Rys., 449; Trial, 160; Witn., 131.
O'Neil *v.* Lamb (53 Iowa 725, 6 N. W. Rep. 59), Sts. & H., 69.
O'Neil *v.* St. Louis, I. M. & S. R. Co. (3 McCrary (U. S.) 423, 9 Fed. Rep. 337), Employés, Inj. to, 34, 182, 205, 526.
O'Neill *v.* Brooklyn Heights R. Co. (71 Hun (N. Y.) 114), Animals, 554; Cross., Inj. at, 366.
O'Neill *v.* Chicago & N. W. R. Co. (50 Fed. Rep. 189), Employés, Inj. to, 694.
O'Neill *v.* Chicago & N. W. R. Co. (1 McCrary (U. S.) 505), Negl., 67.
O'Neill *v.* Great Western R. Co. (7 U. C. C. P. 203), Car. of M., 82.
O'Neill *v.* Keokuk & D. M. R. Co. (45 Iowa 546), Employés, Inj. to, 370, 430; New Tr., 12.
O'Neill *v.* Lynn & B. R. Co. (155 Mass. 371, 29 N. E. Rep. 630), St. Rys., 410.
O'Neill *v.* New York C. & H. R. R. Co. (60 N. Y. 138, 10 Am. Ry. Rep. 121; reversing 3 T. & C. 399), Car. of M., 317.
O'Neill *v.* New York, O. & W. R. Co. (40 Am. & Eng. R. Cas. 240, 115 N. Y. 579, 22 N. E. Rep. 217, 26 N. Y. S. R. 269; affirming 10 N. Y. S. R. 147, 45 Hun 458), Fires, 96, 249.
O'Neill *v.* Third Ave. R. Co. (52 N. Y. S. R. 486, 3 Misc. 521, 23 N. Y. Supp. 20), St. Rys., 495.
Onset St. R. Co. *v.* Plymouth County Com'rs (56 Am. & Eng. R. Cas. 524, 154 Mass. 395, 28 N. E. Rep. 286), Em. Dom., 255; St. Rys., 215, 224, 226.
Onstott *v.* People (123 Ill. 489, 15 N. E. Rep. 34), Mun. Aid, 125, 127, 137.
Ontario *v.* Hill (99 N. Y. 324), Mun. Aid, 106.
Ontario & Q. R. Co., In re (17 Am. & Eng. R. Cas. 100, 6 Ont. 338), Em. Dom., 1237, 1244, 1245, 1259.
Ontario & Q. R. Co. *v.* Curé, etc. (7 Montr. L. R. 110), Em. Dom., 1258, 1260.
Ontario & Q. R. Co. *v.* Latour (4 Montr. Super. 84), Em. Dom., 1255, 1271.
Ontario & Q. R. Co. *v.* Philbrick (12 Can. Sup. Ct. 288; affirming 5 Ont. 674), Em. Dom., 1228.
Ontario & S. Ste. M. R. Co. *v.* Canadian Pac. R. Co. (14 Ont. 432), Constr. Rys., 3; Incorp., 3.
Ontario Bank *v.* Hanlon (23 Hun (N. Y.) 283), Bills of L., 51.
Ontario Bank *v.* New Jersey Steamboat Co. (59 N. Y. 510; affirming 5 Daly 117), Trover, 15.
Ontario E. & T. Co. *v.* Grand Trunk R. Co. (7 Montr. Super. 308), Exp. Cos., 9.
Ontario, S. & H. R. U. Co., In re (4 Grant's Ch. (U. C.) 101), Em. Dom., 1225.
Onthank *v.* Lake Shore & M. S. R. Co. (71 N. Y. 194, 27 Am. Rep. 35; affirming 8 Hun 131), Easem., 11.
Opdyke *v.* Pacific R. Co. (3 Dill. (U. S.) 55), Guar., 12.
Opelika *v.* Daniel (59 Ala. 211), Mun. Aid, 25.
Openshaw *v.* Utah & N. R. Co. (6 Utah 132), Death, etc., 297, 322; Employés, Inj. to, 23; Fel. Serv., 238.
Opinion of the Court given to the General Assembly (55 Mo. 497), State Aid, 26.
Opinion of the Judges, etc. (5 Metc. (Mass.) 596), Stat., 63.
Opinion of the Justices (54 Am. & Eng. R. Cas. 306, 65 N. H. 673, 23 Atl. Rep. 620), Tax., 97.
Oppenheimer *v.* Denver & R. G. R. Co. (28 Am. & Eng. R. Cas. 120, 9 Colo. 320, 12 Pac. Rep. 217), Eject. Pass., 33, 90.
Oppenheimer *v.* Manhattan R. Co. (45 N. Y. S. R. 134, 63 Hun 633, 18 N. Y. Supp. 411), Eject. Pass., 60; False Imp., 10.
Oppenheimer *v.* United States Exp. Co. (69 Ill. 62), Exp. Cos., 28, 72.

Opsahl *v.* Judd (30 Minn. 126, 14 N. W. Rep. 575), Death, etc., 161, 282.
Orange & A. R. Co. *v.* Alexandria City Council (17 Gratt. (Va.) 176), Mun. Corp., 4; Tax., 7, 127, 144.
Orange & A. R. Co. *v.* Fulvey (17 Gratt. (Va.) 366), Judgm., 7.
Orange & N. Horse R. Co. *v.* Ward (25 Am. & Eng. R. Cas. 359, 47 N. J. L. 560, 4 Atl. Rep. 331), Contrib. Neg., 85, 88.
Orange, A. & M. R. Co. *v.* Miles (76 Va. 773), Animals, 342, 369.
Orange, A. & M. R. Co. *v.* Placide (35 Md. 315), Constr. Rys., 30, 36, 119.
Orange Belt R. Co. *v.* Craver (32 Fla. 28, 13 So. Rep. 444), Em. Dom., 453, 832, 834, 840; Witn., 118.
Orange County Bank *v.* Brown (9 Wend. (N. Y.) 85), Bagg., 5, 40.
Orcutt *v.* Northern Pac. R. Co. (45 Minn. 368, 47 N. W. Rep. 1068), Car. of L. S., 126.
Orcutt *v.* Pacific Coast R. Co. (85 Cal. 291, 24 Pac. Rep. 661), Animals, 193, 277, 279, 555; Contrib. Neg., 87; Cross., Inj. at, 134.
Order of Railway Conductors, In re (1 Int. Com. Rep. 18), Int. Com., 11, 155, 183.
Oregon *v.* Jennings (119 U. S. 74, 7 Sup. Ct. Rep. 124), Mun. Aid, 168, 377, 393.
Oregon *v.* Oregon C. R. Co. (2 Oreg. 256), App., 10.
Oregon & C. R. Co. *v.* Barlow (3 Oreg. 311, 6 Am. Ry. Rep. 184), Em. Dom., 574, 685, 701, 723.
Oregon & C. R. Co. *v.* Croisan (54 Am. & Eng. R. Cas. 312, 22 Oreg. 393, 30 Pac. Rep. 219), Tax., 279.
Oregon & C. R. Co. *v.* Jackson (21 Oreg. 360, 28 Pac. Rep. 74), Tresp., 20, 27.
Oregon & C. R. Co. *v.* Lane County (23 Oreg. 386, 31 Pac. Rep. 964), Tax., 123, 279, 344.
Oregon & C. R. Co. *v.* Potter (5 Oreg. 228), Contr., 9.
Oregon C. R. Co. *v.* Scoggin (3 Oreg. 161, 7 Am. Ry. Rep. 413), Subscr., 6.
Oregon C. R. Co. *v.* Wait (3 Oreg. 91, 6 Am. Ry. Rep. 517), Em. Dom., 360, 750; Fences, 12; Pl., 47.
Oregon C. R. Co. *v.* Wait (3 Oreg. 428), Em. Dom., 360, 750.
Oregon B. P. & P. Co., In re (13 Nat. Bank. Reg. 199), Words & Ph., 162
Oregon Cascade R. Co. *v.* Baily (3 Oreg. 164, 7 Am. Ry. Rep. 416), Em. Dom., 106, 114, 129, 178, 238, 360, 560, 632, 642; Incorp., 2.
Oregon Cascades R. Co. *v.* Oregon Steam Nav. Co. (3 Oreg. 179), Em. Dom., 274.
Oregonian R. Co. *v.* Hill (9 Oreg. 377), Em. Dom., 235, 371, 384, 843.
Oregonian R. Co. *v.* Oregon R. & N. Co. (11 Sawy. (U. S.) 33), Spec. Perf., 15.
Oregonian R. Co. *v.* Oregon R. & N. Co. (27 Fed. Rep. 277, 11 Sawy. (U. S.) 564), Estop., 16; Pl., 57
Oregonian R. Co. *v.* Oregon R. & N. Co. (12 Sawy. (U. S.) 109), Leases, 24.
Oregonian R. Co. *v.* Oregon R. & N. Co. (37 Fed. Rep. 733), Spec. Perf., 15.
Oregonian R. Co. *v.* Wright (10 Oreg. 162), Evid., 181.
Oregon R. & N. Co. *v.* Dacres (1 Wash. 195, 23 Pac. Rep. 415), Animals, 349, 644; Evid., 200.
Oregon R. & N. Co. *v.* Day (30 Am. & Eng. R. Cas. 333, 3 Wash. 252, 14 Pac. Rep. 588), Em. Dom., 349.
Oregon R. & N. Co. *v.* Egley (2 Wash. 409, 26 Pac. Rep. 973), Children, Inj. to, 18, 90.
Oregon R. & N. Co. *v.* Mosier (14 Oreg. 519, 13 Pac. Rep. 300, 58 Am. Rep. 321), Em. Dom., 657; Fixt., 2.
Oregon R. & N. Co. *v.* Oregonian R. Co. (39 Am. & Eng. R. Cas. 176, 130 U. S. 1, 9 Sup. Ct. Rep. 409), Leases, 13, 80.
Oregon R. & N. Co. *v.* Oregonian R. Co. (145 U. S. 52, 12 Sup. Ct. Rep. 814), Leases, 80.
Oregon R. & N. Co. *v.* Oregon Real Estate Co. (10 Oreg. 444), Em. Dom., 130, 274.
Oregon R. & N. Co. *v.* Owsley (3 Wash. T. 38, 13 Pac. Rep. 186), Em. Dom., 587, 756; Estop., 33.
Oregon R. & N. Co. *v.* Smalley (42 Am. & Eng. R. Cas. 550, 1 Wash. 206, 23 Pac. Rep. 1008), Animals, 6, 8.
Oregon R. & N. Co. *v.* Swinburne (22 Oreg. 574, 30 Pac. Rep. 322), Indem. Bonds, 4.
Oregon R. Co. *v.* Bridwell (17 Am. & Eng. R. Cas. 130, 11 Oreg. 282, 3 Pac. Rep. 684), Em. Dom., 821, 844.
Oregon R. Co. *v.* Oregon R. & N. Co. (28 Fed. Rep. 505, 12 Sawy. (U. S.) 109), Leases, 79; Pl., 118.
Oregon R. Co. *v.* Portland (9 Oreg. 231), Em. Dom., 127.
Oregon S. L. & U. N. R. Co. *v.* Ilwaco R. & N. Co. (50 Am. & Eng. R. Cas. 554, 51 Fed. Rep. 611), Wharves, 5.
Oregon S. L. & U. N. R. Co. *v.* Mitchell (7 Utah 505, 27 Pac. Rep. 693), Em. Dom., 273, 436, 458.
Oregon S. L. & U. N. R. Co. *v.* Northern Pac. R. Co. (51 Am. & Eng. R. Cas. 145, 51 Fed. Rep. 465), Car. of M., 641; Car. of P., 513; Charges, 80; Charters, 70; Int. Com., 101.
Oregon S. L. R. Co. *v.* Northern Pac. R. Co. (2 Int. Com. Rep. 630, 3 Int. Com. Com. 264), Int. Com., 167.
Oregon S. L. R. Co. *v.* Yeates (33 Am. & Eng. R. Cas. 481, 2 Idaho 365, 17 Pac. Rep. 457), Tax., 256.
Oregon Steam Nav. Co. *v.* Portland (2 Oreg. 81), Tax., 279.
O'Reilly *v.* Kerns (52 Pa. St. 214), Constr. Rys., 70, 100.
O'Reilly *v.* Milwaukee & N. W. R. Co. (68 Wis. 212, 31 N. W. Rep. 485), Attach., 6.
O'Reilly *v.* New York & N. E. R. Co. (42 Am. & Eng. R. Cas. 50, 16 R. I. 388, 29 Cent. L. J. 210, 6 L. R. A. 719, 17 Atl. Rep. 906), Death, etc., 109, 112, 114; Ex. & Ad., 11; Pl., 4.
O'Reilly *v.* New York El. R. Co. (27 N. Y. Supp. 758), Elev. Rys., 52.
Organ *v.* Memphis & L. R. R. Co. (30 Am. & Eng. R. Cas. 75, 51 Ark. 235, 11 S. W. Rep. 96), Em. Dom., 55, 143, 383, 428, 688,

863, 983, 1032, 1034, 1043, 1044; Lim. of Ac., 48, 52; Parties, 4, 6; Pl., 147, 177; Rip. Rts., 10.
Oriental Inland Steam Co., In re (30 L. T. 317, 22 W. R. 622; affirmed in 31 L. T. 5, 22 W. R. 810, L. R. 9 Ch. 557, 43 L. J. Ch. 699), Dissol., 22.
Orinamme, The (3 Sawy. (U. S.) 397), Car. of P., 137, 621.
Orleans v. Platt (99 U. S. 676), Mun. Aid, 318.
Ormerod v. New York, W. S. & B. R. Co. (21 Blatchf. (U. S.) 106), Waters & W., 5.
Ormond v. Central Iowa R. Co. (58 Iowa 742, 13 N. W. Rep. 54), Fires, 156, 202.
Ormond v. Hayes (60 Tex. 180), Car. of P., 29, 32, 597; Trial, 136.
Ormsbee v. Boston & P. R. Corp. (14 R. I. 102, 51 Am. Rep. 354), Cross., Inj. at, 264, 269; Fly. Switch, 2.
Ormsby v. Union Pac. R. Co. (2 McCrary (U. S.) 48, 4 Fed. Rep. 706), Car. of L. S., 63, 69, 72, 80, 156; Car. of M., 132; Contrib. Neg., 12, 82.
Ornsorff v. Adams Exp. Co. (3 Bush (Ky.) 194), Exp. Cos., 63, 65.
O'Rorke v. Great Western R. Co. (23 U. C. Q. B. 427), Car. of L. S., 95.
O'Rorke v. Union Pac. R. Co. (18 Am. & Eng. R. Cas. 19, 22 Fed. Rep. 789), Employés, Inj. to, 101.
O'Rourke v. Chicago, B. & Q. R. Co. (44 Iowa 526), Car. of M., 191.
O'Rourke v. Chicago, M. & St. P. R. Co. (55 Iowa 332, 7 N. W. Rep. 582), Judgm., 35.
O'Rourke v. Hart (7 Bosw. (N. Y.) 511), Indep. Contr., 7.
Oroville & V. R. Co. v. Plumas County Sup'rs (37 Cal. 354), Incorp., 3, 17; Mand., 33; Mun. Aid, 289; Pl., 9.
Orr v. Chicago & A. R. Co. (21 Mo. App. 333), Car. of M., 588, 590.
Orr v. Quimby (54 N. H. 590), Em. Dom., 38, 71, 190, 414.
Orth v. St. Paul, M. & M. R. Co. (43 Minn. 208, 45 N. W. Rep. 151), Fires, 178.
Orth v. St. Paul, M. & M. R. Co. (47 Minn. 384, 50 N. W. Rep. 363), Evid., 289.
Ortman v. Union Pac. R. Co. (17 Am. & Eng. R. Cas. 136, 32 Kan. 419, 4 Pac. Rep. 858), Em. Dom., 833, 947; New Tr., 14.
Ortt v. Minneapolis & St. L. R. Co. (36 Minn. 396, 31 N. W. Rep. 519), Car. of L. S., 101; Car. of M., 604, 734; Lim. of Liab., 27.
Orwell, The (13 P. D. 80), Death, etc., 11.
Osage Valley & S. K. R. Co. v. Morgan County Court (53 Mo. 156), Mun. Aid, 449.
Osborn v. Hartford & N. H. R. Co. (40 Conn. 498, 5 Am. Ry. Rep. 226), Tax., 88.
Osborn v. Michigan Air Line R. Co. (2 Flipp. (U. S.) 503), Intervent., 1.
Osborn v. New York & N. H. R. Co. (40 Conn. 491, 5 Am. Ry. Rep. 218), Tax., 53, 149.
Osborne v. Brooklyn City R. Co. (5 Blatchf. (U. S.) 366), Sts. & H., 141.
Osborne v. Jersey City & A. R. Co. (27 Hun (N. Y.) 580), Cross., Sts. & H., 5, 24.
Osborne v. Knox & L. R. Co. (68 Me. 49, 19 Am. Ry. Rep. 7), Employés, Inj. to, 409.
Osborne v. London & W. R. Co. (35 Am. & Eng. R. Cas. 483, 21 Q. B. D. 220, 57 L. J. Q. B. 618, 6 Ry. & C. T. Cas. lxviii), Contrib. Neg., 99; Stat. & D., 101.
Osborne v. Mayor, etc., of Mobile (44 Ala. 493; affirmed in 16 Wall. (U. S.) 479), Tax., 392.
Osborne v. Missouri Pac. R. Co. (35 Fed. Rep. 84), Sts. & H., 224.
Osborne v. Missouri Pac. R. Co. (37 Fed. Rep. 830; affirmed in 147 U. S. 248, 13 Sup. Ct. Rep. 299), Injunc., 7.
Osborne v. Mobile (16 Wall. (U. S.) 479, 4 Am. Ry. Rep. 364; affirming 44 Ala. 493), Mun. Corp., 6.
Osborne v. Pennsylvania R. Co. (Ky.) (11 S. W. Rep. 207), Trial, 126.
Osborne v. Preston & B. R. Co. (9 U. C. C. P. 241), Pl., 19.
Osgood v. Chicago, D. & V. R. Co. (6 Biss. (U. S.) 330), Rem. of C., 4, 33, 51, 54.
Osgood v. Concord R. Co. (21 Am. & Eng. R. Cas. 44, 63 N. H. 255), Penalty, 6.
Osgood v. Lynn & B. R. Co. (3 Am. & Eng. R. Cas. 395, 130 Mass. 492), St. Rys., 183.
O'Shields v. Georgia Pac. R. Co. (83 Ga. 621, 10 S. E. Rep. 268), Lim. of Ac., 8.
Oshkosh v. Milwaukee & L. W. R. Co. (39 Am. & Eng. R. Cas. 681, 74 Wis. 534, 43 N. W. Rep. 489), Sts. & H., 176, 183, 189, 191, 413.
Osler v. Toronto, G. & B. R. Co. (8 Prac. (Ont.) 506), Bonds, 43.
Osterberg v. Union Trust Co. (93 U. S. 424), Mort., 249, 258.
Ostertag v. Pacific R. Co. (64 Mo. 421, 17 Am. Ry. Rep. 257), Children, Inj. to, 103.
O'Sullivan v. Chicago, M. & St. P. R. Co. (23 Ill. App. 646), Employés, Inj. to, 478.
O'Sullivan v. New York El. R. Co. (25 N. Y. S. R. 903, 7 N. Y. Supp. 51), Injunc., 15.
O'Sullivan v. Victoria R. Co. (44 U. C. Q. B. 128), Fel. Serv., 309.
Oswald v. Minneapolis & N. W. R. Co. (29 Minn. 5, 11 N. W. Rep. 112), New Tr., 13.
Oswego Tp. v. Anderson (44 Kan. 214, 24 Pac. Rep. 486), Mun. Aid, 413.
Otis v. Janesville (47 Wis. 422), Imp. Neg., 2.
Otis Co. v. Missouri Pac. R. Co. (55 Am. & Eng. R. Cas. 636, 112 Mo. 622, 20 S. W. Rep. 676), Bills of L., 80; Car. of M., 114, 151, 152, 482, 699; Fires, 265.
Otoe County v. Baldwin (15 Am. & Eng. R. Cas. 563), 111 U. S. 1, 4 Sup. Ct. Rep. 265), Mun. Aid, 22, 41.
O'Toole v. Central Park, N. & E. R. R. Co. (12 N. Y. Supp. 347, 58 Hun 609, 35 N. Y. S. R. 591; affirmed in 128 N. Y. 597, mem., 28 N. E. Rep. 251), Contrib. Neg., 41; Cross., Inj. at, 300; New Tr., 44; St. Rys., 433, 505.
O'Toole v. Pittsburg & L. E. R. Co. (158 Pa. St. 99, 27 Atl. Rep. 737), Collis., 21, 23.
Ottawa v. Chicago & R. I. R. Co. (25 Ill. 43), Eq., 5.
Ottawa v. Chicago & R. I. R. Co. (25 Ill. 47), Tax., 319.

Ottawa County *v.* Montreal, O. & W. R. Co. (14 Can. Sup. Ct. 193; affirming 1 Montr. L. R. 46, which affirms 26 L. C. Jur. 148), Mun. Aid, 297.
Ottawa, O. & F. R. V. R. Co. *v.* Black (79 Ill. 262), Leases, 22; Subscr., 129, 130.
Ottawa, O. & F. R. V. R. Co. *v.* Hall (1 Ill. App. 612), Evid., 186; Subscr., 155.
Ottawa, O. & F. R. V. R. Co. *v.* McMath (1 Ill. App. 429), App., 105.
Ottawa, O. C. & C. G. R. Co. *v.* Adolph (41 Kan. 600, 21 Pac. Rep. 643), Em. Dom., 593; Evid., 254; Witn., 123.
Ottawa, O. C. & C. G. R. Co. *v.* Fisher (42 Kan. 675, 22 Pac. Rep. 713), Witn., 127.
Ottawa, O. C. & C. G. R. Co. *v.* Larson (36 Am. & Eng. R. Cas. 163, 40 Kan. 301, 2 L. R. A. 59, 19 Pac. Rep. 661), Sts. & H., 12, 116, 250.
Ottenot *v.* New York, L. & W. R. Co. (43 Am. & Eng. R. Cas. 129, 119 N. Y. 603, 2 Silv. App. 469, 23 N. E. Rep. 169, 28 N. Y. S. R. 483; reversing 19 N. Y. S. R. 465, 2 N. Y. Supp. 722), Sts. & H., 294.
Ottinger *v.* New York El. R. Co. (39 N. Y. S. R. 339, 60 Hun 583, 15 N. Y. Supp. 18), Elev. Rys., 93, 191.
Ottinger *v.* New York El. R. Co. (43 N. Y. S. R. 817, 63 Hun 631, 17 N. Y. Supp. 912), Elev. Rys., 100, 121, 162; Witn., 50.
Ottinger *v.* New York El. R. Co. (18 N. Y. Supp. 238), Elev. Rys., 130, 150.
Ottinger *v.* Southern Pac. R. Co. (1 Int. Com. Rep. 607, 1 Int. Com. Com. 144), Int. Com., 19, 150.
Otto *v.* St. Louis, I. M. & S. R. Co. (12 Mo. App. 168), Negl., 89; Sts. & H., 389.
Ottumwa, C. F. & St. P. R. Co. *v.* McWilliams (29 Am. & Eng. R. Cas. 544, 71 Iowa 164, 32 N. W. Rep. 315), Em. Dom., 200, 226; Homest., 1; Spec. Perf., 3, 25, 28.
Ouimit *v.* Henshaw (35 Vt. 605), Bagg., 20, 27, 31, 60, 65, 69.
Oursler *v.* Baltimore & O. R. Co. (14 Am. & Eng. R. Cas. 298, 60 Md. 358), Dam., 19; Deeds, 13, 33.
Ousley *v.* Central R. & B. Co. (86 Ga. 538, 12 S. E. Rep. 938), Employés, Inj. to, 116, 400.
Overby *v.* Chesapeake & O. R. Co. (53 Am. & Eng. R. Cas. 417, 37 W. Va. 524, 16 S. E. Rep. 813), Contrib. Neg., 5; Employés, Inj. to, 428; Witn., 145, 151.
Overland M. & E. Co. *v.* Carroll (7 Colo. 43, 1 Pac. Rep. 682), Exp. Cos., 24, 36, 65; Lim. of Liab., 43; Words & Ph., 7.
Overmyer *v.* Williams (15 Ohio 26), Charters, 155.
Overseers of the Poor *v.* Headlam & L. & N. W. R. Co. (21 Q. B. D. 96), Distress, 3.
Overton *v.* Indiana, B. & W. R. Co. (1 Ind. App. 436, 27 N. E. Rep. 651), Animals, 63, 546.
Overton *v.* Memphis & L. R. R. Co. (3 McCrary (U. S.) 436, 10 Fed. Rep. 866), Receiv., 12.
Overton *v.* Olean (37 Hun (N. Y.) 47), Sts. & H., 422.
Oviatt *v.* Dakota C. R. Co. (43 Minn. 300, 45 N. W. Rep. 436), Car. of P., 153, 291.
Owen, In re (L. R. 3 Q. B. 54, 37 L. J. Q. B. 35, 7 B. & S. 758), Em. Dom., 1146.
Owen *v.* Great Western R. Co. (46 L. J. Q. B. D. 486, 36 L. T. 850), Car. of P., 426.
Owen *v.* Hudson River R. Co. (2 Bosw. (N. Y.) 374), Sts. & H., 386, 395.
Owen *v.* Hudson River R. Co. (35 N. Y. 516; affirming 7 Bosw. 329), Cross., Inj. at, 192.
Owen *v.* Louisville & N. R. Co. (35 Am. & Eng. R. Cas. 687, 87 Ky. 620, 9 S. W. Rep. 698), Car. of L. S., 51, 80; Contrib. Neg., 51; Pl., 73.
Owen *v.* New York C. R. Co. (1 Lans. (N. Y.) 108; affirmed (?) 47 N. Y. 670, mem.), Employés, Inj. to, 206, 365.
Owen *v.* St. Louis & S. F. R. Co. (25 Am. & Eng. R. Cas. 371, 83 Mo. 454), Charges, 9, 26.
Owens *v.* Baltimore & O. R. Co. (39 Am. & Eng. R. Cas. 276, 35 Fed. Rep. 715), Employés, Inj. to, 755; Relief Assoc., 6, 7.
Owens *v.* Hannibal & St. J. R. Co. (58 Mo. 386, 9 Am. Ry. Rep. 19), Animals, 38, 62, 65, 72, 390; Negl., 66; Trial, 191.
Owens *v.* Hastings (18 Kan. 446), Sales, 8.
Owens *v.* Kansas City, St. J. & C. B. R. Co. (33 Am. & Eng. R. Cas. 524, 95 Mo. 169, 15 West. Rep. 88, 8 S. W. Rep. 350), Car. of P., 560, 596; Phys. Exam., 3; Witn., 100.
Owens *v.* Missouri Pac. R. Co. (38 Fed. Rep. 571), Trial, 45.
Owens *v.* Missouri Pac. R. Co. (30 Am. & Eng. R. Cas. 205, 67 Tex. 679, 4 S. W. Rep. 593), Flood. Lds., 96; Trial, 188.
Owens *v.* Ohio C. R. Co. (20 Fed. Rep. 10), Mort., 177.
Owens *v.* Pennsylvania R. Co. (41 Fed. Rep. 187), Cross., Inj. at, 116, 297.
Owens *v.* People's Pass. R. Co. (155 Pa. St. 334, 26 Atl. Rep. 748), Dam., 25; St. Rys., 85, 478.
Owens *v.* Richmond & D. R. Co. (88 N. Car. 502), Contrib. Neg., 105.
Owensboro & N. R. Co. *v.* Griffith (92 Ky. 137, 17 S. W. Rep. 277), Stat. & D., 50.
Owensboro & N. R. Co. *v.* Sutton (Ky.) (13 S. W. Rep. 1086), Sts. & H., 170.
Owensboro & N. R. Co. *v.* Todd (45 Am. & Eng. R. Cas. 461, 91 Ky. 175, 15 S. W. Rep. 56), Fences, 2, 5.
Owensboro, F. R. & G. R. R. Co. *v.* Barker (Ky.) (22 S. W. Rep. 444), Ejectm., 29.
Owensboro, F. R. & G. R. R. Co. *v.* Harrison (94 Ky. 408, 22 S. W. Rep. 545), App., 17; Em. Dom., 1026.
Owen Sound Steamship Co. *v.* Canadian Pac. R. Co. (40 Am. & Eng. R. Cas. 593, 17 Ont. 691), Ult. Vir., 4.
Owsley *v.* Montgomery & W. P. R. Co. (37 Ala. 560, Ala. Sel. Cas. 485), False Imp., 15; Mal. Pros., 3.
Owsley *v.* Oregon R. & N. Co. (36 Am. & Eng. R. Cas. 679, 1 Wash. 491, 20 Pac. Rep. 782), Em. Dom., 773, 775.
Owston *v.* Grand Trunk R. Co. (28 Grant's Ch. (U. C.) 428; former appeal 26 Grant's Ch. 93), Pl., 83.
Owston *v.* Grand Trunk R. Co. (28 Grant's Ch. (U. C.) 431), Parties, 22.

Oxanna *v.* Allen (90 Ala. 468, 8 So. Rep. 79), St. Rys., 264.
Oxlade *v.* Northeastern R. Co. (No. 1) (1 C. B. N. S. 454, 26 L. J. C. P. 129, 1 Ry. & C. T. Cas. 72), Car. of M., 35, 532; Discrim., 1, 10, 15, 20, 25.
Oxlade *v.* Northeastern R. Co. (3 Ry. & C. T. Cas. 35), Charges, 108.
Oxlade *v.* Northeastern R. Co. (9 W. R. 272, 3 L. T. 671), Car. of M., 35.
Oxlade *v.* Northeastern R. Co. (15 C. B. N. S. 680, 1 Ry. & C. T. Cas. 162), Car. of M., 24, 35; Discrim., 38.
Oxley *v.* St. Louis, K. C. & N. R. Co. (65 Mo. 629), Car. of L. S., 141.

Pabst *v.* Baltimore & O. R. Co. (2 MacArth. (D. C.) 42), Car. of P., 601.
Pacific Cable R. Co. *v.* Butte City St. R. Co. (52 Fed. Rep. 863), Pat. for Inv., 27, 29.
Pacific Cable R. Co. *v.* Butte City St. R. Co. (53 Fed. Rep. 545), Pat. for Inv., 27.
Pacific Cable R. Co. *v.* Butte City St. R. Co. (55 Fed. Rep. 760), Pat. for Inv., 15.
Pacific Coast R. Co. *v.* Porter (33 Am. & Eng. R. Cas. 167, 74 Cal. 261, 15 Pac. Rep. 774), Em. Dom., 301, 729, 825.
Pacific Coast Steamship Co. *v.* Railroad Com'rs (9 Sawy. (U. S.) 253, 18 Fed. Rep. 10), Ry. Com'rs, 38.
Pacific Exp. Co. *v.* Darnell (62 Tex. 639), Car. of M., 800; Dam., 50; Pl., 106.
Pacific Exp. Co. *v.* Darnell (Tex.) (32 Am. & Eng. R. Cas. 543, 6 S. W. Rep. 765), Bills of L., 97; Exp. Cos., 90; Pl., 149.
Pacific Exp. Co. *v.* Dunn (81 Tex. 85, 16 S. W. Rep. 792), Fires, 201, 243.
Pacific Exp. Co. *v.* Foley (46 Am. & Eng. R. Cas. 680, 46 Kan. 457, 26 Pac. Rep. 665), Car. of M., 444.
Pacific Exp. Co. *v.* Lasker Real Estate Assoc. (81 Tex. 81, 16 S. W. Rep. 792), Contrib. Neg., 18; Fires, 341.
Pacific Exp. Co. *v.* Malin (132 U. S. 531, 10 Sup. Ct. Rep. 160), Set-off, 8.
Pacific Exp. Co. *v.* Seibert (44 Fed. Rep. 310; affirmed in 48 Am. & Eng. R. Cas. 610, 142 U. S. 339, 3 Int. Com. Rep. 810), Exp. Cos., 1; Int. Com., 214.
Pacific Exp. Co. *v.* Seibert (48 Am. & Eng. R. Cas. 610, 142 U. S. 339, 12 Sup. Ct. Rep. 250), Int. Com., 196; Tax., 36.
Pacific Exp. Co. *v.* Williams (2 Tex. App. (Civ. Cas.) 714), Interpl., 2.
Pacific Hotel Co. *v.* Lieb (83 Ill. 602), Words & Ph., 33.
Pacific Postal Tel. Cable Co. *v.* Western Union Tel. Co. (50 Am. & Eng. R. Cas. 605, 50 Fed. Rep. 493), Tel. & T. Lines, 4.
Pacific R. Com., In re (31 Am. & Eng. R. Cas. 508, 12 Sawy. (U. S.) 550, 32 Fed. Rep. 241), Cent. Pac. R. Co., 1; Ry. Com'rs, 5, 26.
Pacific R. Co. *v.* Atlantic & P. R. Co. (17 Am. & Eng. R. Cas. 203, 20 Fed. Rep. 277), Leases, 101, 104.
Pacific R. Co. *v.* Brown (14 Kan. 469), Animals, 234.
Pacific R. Co. *v.* Cass County (53 Mo. 17, 12 Am. Ry. Rep. 336), Tax., 132, 269.
Pacific R. Co. *v.* Chrystal (25 Mo. 544), Em. Dom., 742.
Pacific R. Co. *v.* County Clerk (57 Mo. 223), Tax., 269.
Pacific R. Co. *v.* Governor (23 Mo. 353), Mand., 22; Stat., 1.
Pacific R. Co. *v.* Houts (12 Kan. 328), Comp. Neg., 22; Contrib. Neg., 16; Negl., 110; Sts. & H., 382.
Pacific R. Co. *v.* Hughes (22 Mo. 291), Subscr., 120.
Pacific R. Co. *v.* Ketchum (95 U. S. 1), Mort., 217.
Pacific R. Co. *v.* Ketchum (101 U. S. 289), App., 107; Att'ys, 4; Fed. Cts., 18; Jurisd., 2.
Pacific R. Co. *v.* Leavenworth (1 Dill. (U. S.) 393), Sts. & H., 91.
Pacific R. Co. *v.* McCombs (39 Mo. 329), Land Grants, 40.
Pacific R. Co. *v.* Maguire (20 Wall. (U. S.) 36, 6 Am. Ry. Rep. 437), Tax., 36.
Pacific R. Co. *v.* Maguire (51 Mo. 142), Tax., 208.
Pacific R. Co. *v.* Missouri Pac. R. Co. (20 Am. & Eng. R. Cas. 590, 23 Fed. Rep. 565, 5 McCrary (U. S.) 373), Citizens., 1, 2, 4; Rem. of C., 27, 34.
Pacific R. Co. *v.* Missouri Pac. R. Co. (111 U. S. 505, 4 Sup. Ct. Rep. 583; reversing 3 Fed. Rep. 772, 1 McCrary 647), Direct., 44; Eq., 7; Fed. Rep., 4; Mort., 289.
Pacific R. Co. *v.* Nash (7 Kan. 280), Evid., 76.
Pacific R. Co. *v.* Perkins (36 Neb. 456, 54 N. W. Rep. 845), Em. Dom., 56.
Pacific R. Co. *v.* Renshaw (18 Mo. 210), Subscr., 122.
Pacific R. Co. *v.* Seely (45 Mo. 212), Contr., 59; Corp., 8.
Pacific R. Co. *v.* Thomas (19 Kan. 256, 17 Am. Ry. Rep. 483), Agency, 112; Med. Serv., 12.
Pacific R. Co. *v.* United States (26 Ct. of Cl. 200), Claims against U. S., 11; War, 7.
Pacific R. Co. *v.* United States (26 Ct. of Cl. 564), Int., 4.
Pacific R. Co. *v.* Wade (50 Am. & Eng. R. Cas. 302, 91 Cal. 449, 27 Pac. Rep. 708), Receiv., 38, 132; St. Rys., 11, 243, 253; Trial, 2.
Pacific R. Co. *v.* Walker (12 Kan. 601), Tresp., 10.
Pacific R. Co. *v.* Watson (61 Mo. 57), Mun. Corp., 40.
Pacific Rolling Mill Co. *v.* Dayton, S. & G. R. R. Co. (7 Sawy. (U. S.) 61, 5 Fed. Rep. 852), Officers, 14.
Pacific Rolling Mill Co. *v.* Riverside & A. R. Co. (90 Cal. 627, 27 Pac. Rep. 525), Spec. Perf., 2.
Pack *v.* Chesapeake & O. R. Co. (5 W. Va. 118), Em. Dom., 885, 890.
Packard *v.* Bergen Neck R. Co. (48 N. J. Eq. 281, 22 Atl. Rep. 227), Cross., Sts. & H., 90; Em. Dom., 945, 966; Injunc., 18, 32.
Packard *v.* Bergen Neck R. Co. (54 N. J. L. 229, 23 Atl. Rep. 722), Em. Dom., 746.

Packard *v.* Bergen Neck R. Co. (54 N. J. L. 553, 25 Atl. Rep. 506), Em. Dom., 553, 556, 599, 603, 823.
Packard *v.* Earle (113 Mass. 280), Exp. Cos., 42.
Packard *v.* Getman (6 Cow. (N. Y.) 757), Trover, 1.
Packard *v.* Illinois C. R. Co. (30 Iowa 474), Animals, 200.
Packard *v.* Jefferson County Com'rs (2 Colo. 338), Mun. Aid, 154.
Packard *v.* Taylor (35 Ark. 402, 37 Am. Rep. 37), Car. of M., 11, 543.
Packer *v.* Sunbury & E. R. Co. (19 Pa. St. 211), Charters, 178; Injunc., 1.
Paddock *v.* Atchison, T. & S. F. R. Co. (37 Fed. Rep. 841, 4 L. R. A. 231), Car. of P., 320; Eject. Pass., 105.
Paducah & E. R. Co. *v.* Commonwealth (10 Am. & Eng. R. Cas. 318, 80 Ky. 147), Cross., St. & H., 24, 29; Sts. & H., 346.
Paducah & E. R. Co. *v.* Letcher (Ky.) (12 Am. & Eng. R. Cas. 61), Trial, 101, 211, 213.
Paducah & M. R. Co. *v.* Hoehl (12 Bush (Ky.) 41, 18 Am. Ry. Rep. 338), App., 40; Children, Inj. to, 74, 82; Contrib. Neg., 13, 58 105; Cross., Inj. at, 4, 124, 130, 138, 353.
Paducah & M. R. Co. *v.* Parks (86 Tenn. 554, 8 S. W. Rep. 842), Subscr., 190, 319.
Paducah & M. R. Co. *v.* Stovall (12 Heisk. (Tenn.) 1), Em. Dom., 435, 753.
Page *v.* Chicago, M. & St. P. R. Co. (70 Ill. 324), Em. Dom., 455, 647.
Page *v.* Contoocook Valley R. Co. (21 N. H. 438), Trial, 29.
Page *v.* Eastern & M. R. Cos. (1 C. & E. 280), Officers, 8.
Page *v.* Fall River, W. & P. R. Co. (31 Fed. Rep. 257), Officers, 15.
Page *v.* Great Eastern R. Co. (24 L. T. N. S. 585), Animals, 412, 462.
Page *v.* Heineberg (40 Vt. 81), Aband., 8.
Page *v.* Mayor, etc., of N. Y. (32 N. Y. S. R. 563, 10 N. Y. Supp. 826, 57 Hun 123), Witn., 193.
Page *v.* New York C. R. Co. (6 Duer (N. Y.) 523), Eject. Pass., 40.
Page *v.* North Carolina R. Co. (71 N. Car. 222), Animals, 40.
Page *v.* Sumpter (53 Wis. 652, 11 N. W. Rep. 60), Animals, 582, 592.
Page County *v.* Burlington & M. R. R. Co. (40 Iowa 520), Estop., 4; Land Grants, 131.
Paige *v.* Smith (99 Mass. 395), Receiv., 131.
Paine *v.* Central Vt. R. Co. (25 Am. & Eng. R. Cas. 37, 118 U. S. 152, 6 Sup. Ct. Rep. 1019; affirming 14 Fed. Rep. 269), Bills & N., 17.
Paine *v.* Chicago, R. I. & P. R. Co. (45 Iowa 569), Eject. Pass., 112; Tickets & F., 134.
Paine *v.* Grand Trunk R. Co. (58 N. H. 611), Evid., 266; Negl., 100; Sts. & H., 417.
Paine *v.* Grand Trunk R. Co. (63 N. H. 623, 3 Atl. Rep. 634), Negl., 61.
Paine *v.* Lake Erie & L. R. Co. (21 Ind. 283), Consol., 40; Direct., 48, 49; Pl., 4.
Paine *v.* State Land Office Com'r (66 Mich. 245, 9 West. Rep. 855, 33 N. W. Rep. 491), Pub. Lds., 7.
Paine *v.* Wright (6 McLean (U. S.) 395), Tax., 106, 346.
Painesville & H. R. Co. *v.* King (17 Ohio St. 534), Contr., 5.
Paint *v.* Queen (2 Can. Exch. 149), Em. Dom., 1236, 1242, 1243, 1247.
Painter, Ex parte (2 C. B. N. S. 702, 1 Ry. & C. T. Cas. 58), Hacks, etc., 1.
Painton *v.* Northern C. R. Co. (5 Am. & Eng. R. Cas. 454, 83 N. Y. 7), Employés, Inj. to, 96, 108.
Pakalinsky *v.* New York C. & H. R. R. Co. (2 Am. & Eng. R. Cas. 251, 82 N. Y. 424), Cross., Inj. at, 102, 344.
Paland *v.* Chicago, St. L. & N. O. R. Co. (42 La. Ann. 290, 7 So. Rep. 899), App., 146.
Paland *v.* Chicago, St. L. & N. O. R. Co. (44 La. Ann. 1003, 11 So. Rep. 707), Contrib. Neg., 1.
Palatka & I. R. R. Co. *v.* State (32 Am. & Eng. R. Cas. 191, 23 Fla. 546, 11 Am. St. Rep. 395, 3 So. Rep. 158), Crim. L., 32; Sts. & H., 41, 165, 195, 403, 404.
Palfrey *v.* Portland, C. & P. R. Co. (4 Allen (Mass.) 55), Death, etc., 1.
Pallett *v.* Kings County El. R. Co. (10 N. Y. Supp. 691, 32 N. Y. S. R. 954; affirmed in 126 N. Y. 630, mem.), Death, etc., 258.
Pallez *v.* Brooklyn City R. Co. (22 N. Y. S. R. 657, 51 Hun 644, 4 N. Y. Supp. 385; affirmed in 123 N. Y. 652, mem., 25 N. E. Rep. 954, mem.), St. Rys., 326; Trial, 163.
Palm *v.* New York, N. H. & H. R. Co. (35 N. Y. S. R. 457, 26 J. & S. 502, 12 N. Y. Supp. 554), Tickets & F., 115, 133.
Palm *v.* New York, N. H. & H. R. Co. (42 N. Y. S. R. 219, 28 J. & S. 162, 17 N. Y. Supp. 471), Penalty, 12; Tickets & F., 115.
Palm *v.* Ohio & M. R. Co. (18 Ill. 217), Contr., 106.
Palmer *v.* Boorn (80 Mo. 99), Land Grants, 133.
Palmer *v.* Caledonian R. Co. ([1892] 1 Q. B. 823; reversing [1892] 1 Q. B. 607), Proc., 40.
Palmer *v.* Charlotte, C. & A. R. Co. (3 So. Car. 580), Eject. Pass., 26, 112; Tickets & F., 60.
Palmer *v.* Chicago, B. & Q. R. Co. (35 Am. & Eng. R. Cas. 629, 56 Conn. 137, 6 N. Eng. Rep. 470, 13 Atl. Rep. 818), Car. of M., 557, 618.
Palmer *v.* Chicago, St. L. & P. R. Co. (31 Am. & Eng. R. Cas. 364, 112 Ind. 250, 11 West. Rep. 678, 14 N. E. Rep. 70), Licensees, Inj. to, 6; Tresp., Inj. to, 29, 33, 54, 57.
Palmer *v.* Delaware & H. Canal Co. (44 Am. & Eng. R. Cas. 298, 120 N. Y. 170, 24 N. E. Rep. 302, 30 N. Y. S. R. 817; affirming 46 Hun 486, 11 N. Y. S. R. 872), Car. of P., 162, 194, 609.
Palmer *v.* Denver & R. G. R. Co. (3 McCrary (U. S.) 635, 12 Fed. Rep. 392), Employés, Inj. to, 93, 99, 182.
Palmer *v.* Detroit, L. & L. M. R. Co. (86 Mich. 1, 22 N. W. Rep. 88), Cross., Inj. at, 318.

Palmer *v.* Forbes (23 Ill. 301), Exec., 2; Mort., 10, 48, 61, 137; Reorg., 1.
Palmer *v.* Grand Junction R. Co. (4 M. & W. 749, 7 D. P. C. 232, 1 H. & H. 489, 3 Jur. 559), Actions, 5; Car. of M., 3, 435.
Palmer *v.* Holland (51 N. Y. 416), Exp. Cos., 17.
Palmer *v.* Howard County (45 Iowa 61), Land Grants, 131.
Palmer *v.* Kansas City, St. J. & C. B. R. Co. (57 Mo. 249), Just. P., 11.
Palmer *v.* London & S. W. R. Co. (L. R. 1 C. P. 588, 35 L. J. C. P. 289, 1 Ry. & C. T. Cas. 243), Discrim., 62, 74.
Palmer *v.* London, B. & S. C. R. Co. (L. R. 6 C. P. 194, 40 L. J. C. P. 133, 1 Ry. & C. T. Cas. 271), Discrim., 62.
Palmer *v.* Metropolitan R. Co. (31 L. J. Q. B. 259), Arb., 19.
Palmer *v.* Michigan C. R. Co. (87 Mich. 281, 49 N. W. Rep. 613), Employés, Inj. to, 561, 701.
Palmer *v.* Michigan C. R. Co. (93 Mich. 303, 53 N. W. Rep. 397), Att'ys, 13; Dam., 77; Employés, Inj. to, 29; Fel. Serv., 217.
Palmer *v.* Missouri Pac. R. Co. (21 Mo. App. 437), Animals, 608.
Palmer *v.* Missouri Pac. R. Co. (76 Mo. 217), Fires, 25, 97, 124, 259, 277.
Palmer *v.* New York C. & H. R. R. Co. (37 Am. & Eng. R. Cas. 533, 112 N. Y. 234, 19 N. E. Rep. 678, 20 N. Y. S. R. 904; affirming 43 Hun 633, 5 N. Y. S. R. 436), Cross., Inj. at, 46, 54, 307.
Palmer *v.* Northern Pac. R. Co. (31 Am. & Eng. R. Cas. 544, 37 Minn. 223, 33 N. W. Rep. 707, 5 Am. St. Rep. 839), Animals, 62, 190.
Palmer *v.* Pennsylvania Co. (35 Hun (N. Y.) 369, 2 How. Pr. N. S. 156; appeal dismissed in 99 N. Y. 679), Proc., 30.
Palmer *v.* Pennsylvania Co. (37 Am. & Eng. R. Cas. 150, 111 N. Y. 488, 18 N. E. Rep. 850, 19 N. Y. S. R. 493; reversing 42 Hun 650, 4 N. Y. S. R. 888), Car. of P., 210; Stat. & D., 88.
Palmer *v.* Platt (27 Hun (N. Y.) 534; affirmed in 98 N. Y. 628), Stat. & D., 66.
Palmer *v.* St. Paul & D. R. Co. (35 Am. & Eng. R. Cas. 447, 38 Minn. 415, 38 N. W. Rep. 100), Animals, 392; Evid., 80.
Palmer *v.* Utah & N. R. Co. (36 Am. & Eng. R. Cas. 443, 2 Idaho 350, 16 Pac. Rep. 553), Leases, 111.
Palmer *v.* Utah & N. R. Co. (2 Idaho 290, 13 Pac. Rep. 425), Fel. Serv., 73.
Palmeri *v.* Manhattan R. Co. (53 Am. & Eng. R. Cas. 56, 133 N. Y. 261, 30 N. E. Rep. 1001, 44 N. Y. S. R. 894; affirming 60 Hun 579, 39 N. Y. S. R. 23, 14 N. Y. Supp. 468), Agency, 94, 97.
Palmer Tp., In re (109 Pa. St. 274), Cross., Sts. & H., 92.
Palmes *v.* Louisville & N. R. Co. (19 Fla. 231), Charters, 34; Tax., 150.
Palys *v.* Erie R. Co. (30 N. J. Eq. 604; reversed on another point in 32 N. J. Eq. 302), Cross., Inj. at, 322; Words & Ph., 60.
Palys *v.* Jewett (32 N. J. Eq. 302; reversing on another point 30 N. J. Eq. 604), App., 5; Contrib. Neg., 10, 44; Cross., Inj. at, 226; Receiv., 128.
Pana *v.* Bowler (12 Am. & Eng. R. Cas. 563, 107 U. S. 529, 2 Sup. Ct. Rep. 704), Coupons, 12; Judgm., 18; Mun. Aid, 145, 244.
Pana *v.* Lippincott (2 Ill. App. 466), Mun. Aid, 208, 357.
Panama R. Co. *v.* Johnson (58 Hun (N. Y.) 557, 35 N. Y. S. R. 560, 12 N. Y. Supp. 499), Agency, 29.
Panama R. Co. *v.* Johnson (44 N. Y. S. R. 382, 63 Hun 629, 17 N. Y. Supp. 777), Crim. L., 17.
Panama R. Co. *v.* Robinson (4 T. & C. (N. Y.) 672, 2 Hun 381), Arrest, 1.
Pankey *v.* Richmond & D. R. Co. (3 Int. Com. Rep. 33, 3 Int. Com. Com. 658), Int. Com., 36.
Pannell *v.* Nashville, F. & S. R. Co. (55 Am. & Eng. R. Cas. 92, 97 Ala. 298, 12 So. Rep. 230), Cross., Inj. at, 310.
Paola & F. R. R. Co. *v.* Anderson County Com'rs (16 Kan. 302), Counties, 5; Mun. Aid, 179.
Papooshek *v.* Winona & St. P. R. Co. (44 Minn. 195, 46 N. W. Rep. 329), Sts. & H., 254; Witn., 118.
Papot *v.* Southwestern R. Co. (74 Ga. 296), Employés, Inj. to, 139.
Pappenheim *v.* Metropolitan El. R. Co. (50 Am. & Eng. R. Cas. 260, 128 N. Y. 436, 28 N. E. Rep. 518, 40 N. Y. S. R. 445; affirming 27 J. & S. 576, 36 N. Y. S. R. 1024, 13 N. Y. Supp. 955), Elev. Rys., 85, 145, 183; Em. Dom., 1064; Tresp., 8.
Paquet *v.* Jackson (4 Low. Can. 495), Constr. Rys., 14.
Paquet *v.* Mt. Tabor St. R. Co. (40 Am. & Eng. R. Cas. 321, 18 Oreg. 233, 22 Pac. Rep. 906), Sts. & H., 223.
Paraguassu Steam Tramroad Co., In re (42 L. J. Ch. 442, 27 L. T. 509, 21 W. R. 68; reversed in L. R. 8 Ch. 254, 42 L. J. Ch. 404, 28 L. T. 50, 21 W. R. 249), Dissol., 22.
Paramore *v.* Western R. Co. (53 Ga. 383), Car. of L. S., 105.
Pardee *v.* Drew (25 Wend. (N. Y.) 459), Bagg., 37.
Pardington *v.* South Wales R. Co. (1 H. & N. 392, 2 Jur. N. S. 1210, 26 L. J. C. P. 105), Car. of L. S., 92.
Paret *v.* New York El. R. Co. (28 J. & S. (N. Y.) 441), Elev. Rys., 60, 78.
Paret *v.* New York El. R. Co. (46 N. Y. S. R. 29, 18 N. Y. Supp. 580), Elev. Rys., 138, 171; Ex. & Ad., 12.
Paris & D. R. Co. *v.* Henderson (89 Ill. 86), Contr., 71.
Paris & D. R. Co. *v.* Mullins (66 Ill. 526), Animals, 62.
Paris & G. N. R. Co. *v.* Greiner (84 Tex. 443, 19 S. W. Rep. 564), Homest., 3.
Parish *v.* Eden (62 Wis. 272, 22 N. W. Rep. 399), Children, Inj. to, 141, 173; Cross., Inj. at, 245.
Parish *v.* Missouri, K. & T. R. Co. (63 Mo. 284, 20 Am. Ry. Rep. 417), Animals, 639.
Parish *v.* Wheeler (22 N. Y. 494), Mort., 21.
Park *v.* Chicago & S. W. R. Co. (43 Iowa

636, 14 Am. Ry. Rep. 489), Sts. & H., 212, 216, 268.
Park *v.* New York, L. E. & W. R. Co. (57 Fed. Rep. 799), Receiv., 67.
Park *v.* Preston (108 N. Y. 434, 15 N. E. Rep. 705, 13 N. Y. S. R. 809; affirming 37 Hun 645, mem.), Car. of M., 11, 108.
Parkdale *v.* West (12 App. Cas. 602), Em. Dom., 1138, 1210.
Parke's Appeal (94 Pa. St. 137), Location, etc., 4.
Parke *v.* Davis (6 U. C. Q. B. 411), Pl., 39.
Parker *v.* Boston & M. R. Co. (3 Cush. (Mass.) 107), Bridges, 46; Cross., St. & H., 104; Em. Dom., 345, 719, 929, 988; Estop., 31; Sts. & H., 157; Waters & W., 30.
Parker *v.* Bristol & E. R. Co. (6 Ex. 702, 6 Railw. Cas. 776, 1 Ry. & C. T. Cas. 16), Charges, 40, 43, 48.
Parker *v.* Dubuque S. W. R. Co. (34 Iowa 399, 5 Am. Ry. Rep. 513), Animals, 39.
Parker *v.* East Tenn., V. & G. R. Co. (13 Lea (Tenn.) 669), Em. Dom., 1033.
Parker *v.* Erie R. Co. (5 Hun (N. Y.) 57), Agency, 98.
Parker *v.* Flagg (26 Me. 181), Car. of M., 149.
Parker *v.* Ft. Worth & D. C. R. Co. (71 Tex. 132, 8 S. W. Rep. 541), Tresp. to Try Title, 2.
Parker *v.* Ft. Worth & D. C. R. Co. (51 Am. & Eng. R. Cas. 643, 84 Tex. 333, 19 S. W. Rep. 518), Em. Dom., 245, 283, 314, 316, 786.
Parker *v.* Georgia Pac. R. Co. (83 Ga. 539, 10 S. E. Rep. 233), Employés, Inj. to, 297; Evid., 244; Trial, 109.
Parker *v.* Great Western R. Co. (7 M. & G. 253, 7 Scott N. R. 835, 8 Jur. 194, 13 L. J. C. P. 105, 3 Railw. Cas. 563, 1 Ry. & C. T. Cas. 15), Charges, 39, 91, 114; Discrim., 55, 56, 63; Incorp., 4; Stat., 45.
Parker *v.* Great Western R. Co. (11 C. B. 545, 1 Ry. & C. T. Cas. 17), Charters, 119; Discrim., 63.
Parker *v.* Great Western R. Co. (6 El. & Bl. 77, 2 Jur. N. S. 325, 25 L. J. Q. B. 209), Charges, 28, 87, 93; Discrim., 19.
Parker *v.* Hannibal & St. J. R. Co. (50 Am. & Eng. R. Cas. 521, 109 Mo. 362, 19 S. W. Rep. 1119), Fel. Serv., 25, 124, 411, 439.
Parker *v.* Lake Shore & M. S. R. Co. (20 Ill. App. 280), Contrib. Neg., 87.
Parker *v.* Lake Shore & M. S. R. Co. (93 Mich. 607, 53 N. W. Rep. 834), Animals, 260; Fences, 56.
Parker *v.* Long Island R. Co. (13 Hun (N. Y.) 319), Car. of P., 639.
Parker *v.* Massachusetts R. Co. (115 Mass. 580), Liens, 9.
Parker *v.* Metropolitan R. Co. (109 Mass. 506, 2 Am. Ry. Rep. 521), Ferries, 8.
Parker *v.* Milwaukee & St. P. R. Co. (30 Wis. 689, 7 Am. Ry. Rep. 255), Car. of M., 206, 342.
Parker *v.* New Orleans, B. R & V. R. Co. (33 Fed. Rep. 693; reversed in 143 U. S. 42, 12 Sup. Ct. Rep. 364), Land Grants, 59; Mort., 35, 36, 65.
Parker *v.* Northern C. M. R. Co. (53 Mich. 23), Subscr., 14, 156.
Parker *v.* Providence & S. Steamboat Co. (17 R. I. 376, 22 Atl. Rep. 284), Ex. & Ad., 8.
Parker *v.* Rensselaer & S. R. Co. (16 Barb. (N. Y.) 315), Animals, 647; Cat.-Gds., 12, 24.
Parker *v.* Smith (3 Ill. App. 356), Mun. Aid, 235, 382.
Parker *v.* Southeastern R. Co. (37 L. T. 540, 25 W. R. 564, L. R. 2 C. P. D. 416, 46 L. J. C. P. 768, 3 Ry. & C. T. Cas. xiii; reversing L. R. 1 C. P. D. 618, 45 L. J. C. P. 515, 34 L. T. 654), Bagg., 131.
Parker *v.* Thomas (19 Ind. 213), Subscr., 229.
Parker *v.* Thomas (28 Ind. 277), Location, etc., 3.
Parker *v.* Truesdale (54 Minn. 241, 55 N. W. Rep. 901), Sts. & H., 153.
Parker *v.* Waycross & F. R. Co. (81 Ga. 387, 8 S. E. Rep. 871), Indep. Contr., 17.
Parker *v.* Western R. Co. (6 El. & Bl. 77, 2 Jur. N. S. 325, 25 L. J. Q. B. 209), Charges, 73.
Parker *v.* White (27 New Brun. 442), Car. of P., 214.
Parker *v.* Wilmington & W. R. Co. (8 Am. & Eng. R. Cas. 420, 86 N. Car. 221), Cross., Inj. at, 198; Death, etc., 200.
Parker *v.* Winsor (5 Kan. 362), Tax., 118.
Parkhurst *v.* Capital City R. Co. (56 Am. & Eng. R. Cas. 455, 23 Oreg. 471, 32 Pac. Rep. 304), St. Rys., 45.
Parkhurst *v.* Northern C. R. Co. (19 Md. 472), Mort., 29.
Parkinson *v.* Alexander (37 Kan. 110, 14 Pac. Rep. 466), Constr. Rys., 39; Liens, 19.
Parkinson *v.* Great Western R. Co. (40 L. J. C. P. 222, L. R. 6 C. P. 554, 24 L. T. 830, 19 W. R. 1063), Discrim., 20, 63.
Parkinson *v.* Nashua & L. R. Co. (61 N. H. 416), Evid., 70.
Parks *v.* Evansville, I. & C. S. L. R. Co. (23 Ind. 567), Subscr., 198; Vend. & P., 8.
Parks *v.* Hannibal & St. J. R. Co. (20 Mo. App. 440), Animals, 89.
Parks *v.* Iowa C. R. Co. (24 Iowa 188), Land Grants, 131.
Parks *v.* Marshall (10 Ind. 20), Bills & N., 25.
Parks *v.* Nashville, C. & St. L. R. Co. (18 Am. & Eng. R. Cas. 404, 13 Lea (Tenn.) 1, 49 Am. Rep. 655), Penalty, 13, 15.
Parks *v.* West Side R. Co. (50 Am. & Eng. R. Cas. 616, 82 Wis. 219, 52 N. W. Rep. 92), Name, 4; Proc., 6.
Parks *v.* Wisconsin C. R. Co. (33 Wis. 413), Em. Dom., 57, 546, 597, 607; Trial, 16; Witn., 118.
Parlin *v.* Mills (11 Ill. App. 396), Sts. & H., 213.
Parmelee *v.* Chicago (60 Ill. 267), St. Rys., 133, 208.
Parmelee *v.* Farro (22 Ill. App. 467), Comp. Neg., 3.
Parmelee *v.* Fischer (22 Ill. 212), Bagg., 29.
Parmelee *v.* Lowitz (74 Ill. 116), Car. of M., 8.

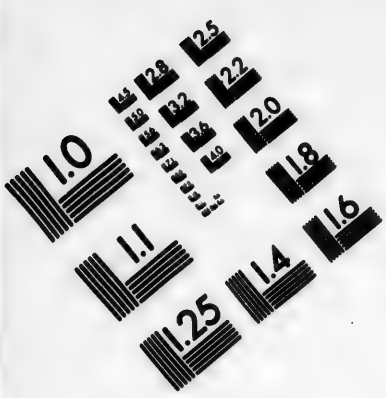
Parmelee *v.* Oswego & S. R. Co. (7 Barb. (N. Y.) 599; affirmed in 6 N. Y. 74), Pub. Lds., 46.
Parmelee *v.* Savannah, F. & W. R. Co. (78 Ga. 239, 2 S. E. Rep. 686), Lim. of Ac., 37; Pl., 148.
Parmelee *v.* Tennessee & S. V. R. Co. (13 Lea (Tenn.) 600), Liens, 41.
Parmelee *v.* Western Transp. Co. (26 Wis. 439), Car. of M., 34, 613.
Parmenter *v.* Boston, H. T. & W. R. Co. (37 Hun (N. Y.) 354), Trial, 41.
Parmley *v.* St. Louis, I. M. & S. R. Co. (3 Dill. (U. S.) 13), Injunc., 34.
Parmley *v.* St. Louis, I. M. & S. R. Co. (3 Dill. (U. S.) 25), Tax., 208, 222, 359.
Parnell *v.* Great Western R. Co. (4 U. C. C. P. 517), Fences, 56.
Parody *v.* Chicago, M. & St. P. R. Co. (5 McCrary (U. S.) 38, 15 Fed. Rep. 205), Employés, Inj. to, 253, 254, 753.
Parr *v.* London, C. & D. R. Co. (24 L. T. 558), Discov., 4.
Parrish *v.* Pensacola & A. R. Co. (28 Fla. 251, 9 So. Rep. 696), Fel. Serv., 1, 21, 202, 291.
Parrot *v.* Cincinnati, H. & D. R. Co. (3 Ohio St. 330), Pl., 22.
Parrot *v.* Cincinnati, H. & D. R. Co. (10 Ohio St. 624), Nuis., 5; Sts. & H., 163.
Parrott *v.* Barney (1 Sawy. (U. S.) 423), Exp. Cos., 27.
Parrott *v.* Housatonic R. Co. (47 Conn. 575), Fires, 339, 348.
Parrott *v.* Wells (15 Wall. (U. S.) 524; affirming 1 Sawy. 423, 2 Abb. 197), Explosions, 6; Exp. Cos., 27; Negl., 9.
Parshall *v.* Minneapolis & St. L. R. Co. (35 Fed. Rep. 649), App., 65; Imp. Neg., 24; Pl., 110; Trial, 188.
Parsons *v.* Childs (36 Iowa 108), Mun. Aid, 412
Parsons *v.* Greenville & C. R. Co. (1 Hughes (U. S.) 279), Abate., 2.
Parsons *v.* Hardy (14 Wend. (N. Y.) 215), Car. of M., 136.
Parsons *v.* Howe (41 Me. 218), Em. Dom., 1061.
Parsons *v.* Jackson (99 U. S. 434), Bonds, 48.
Parsons *v.* Missouri Pac. R. Co. (94 Mo. 286, 12 West. Rep. 615, 6 S. W. Rep. 464), Contrib. Neg., 75; Dam., 37; Death, etc., 233, 324, 381, 403, 404, 419, 433; Employés, Inj. to 16, 100, 119, 144; New Tr., 30.
Parsons *v.* New York C. & H. R. R. Co. (37 Hun (N. Y.) 128), Car. of P., 281, 453; Cross., Inj. at, 246.
Parsons *v.* New York C. & H. R. R. Co. (113 N. Y. 355, 21 N. E. Rep. 145, 22 N. Y. S. R. 697, 3 L. R. A. 683; affirming 48 Hun 615, 15 N. Y. S. R. 1016, mem.), Car. of P., 38; Cross., Inj. at, 215, 218; Negl., 27.
Parsons *v.* Northampton (154 Mass. 410, 28 N. E. Rep. 350), Cross., Sts. & H., 102.
Parsons *v.* Port Dover & L. H. R. Co. (28 U. C. C. P. 84), Em. Dom., 1232.
Parsons *v.* Robinson (122 U. S. 112, 7 Sup. Ct. Rep. 1153), Mort., 299.
Parsons & P. R. Co. *v.* Montgomery (46 Kan. 120, 26 Pac. Rep. 403), Em. Dom., 927.
Partee *v.* Georgia R. Co. (27 Am. & Eng. R. Cas. 12, 72 Ga. 347), Ry. Com'rs, 8.
Partridge *v.* Great Western R. Co. (8 U. C. C. P. 97), Em. Dom., 1234.
Parvis *v.* Philadelphia, W. & B. R. Co. (Del.) (17 Atl. Rep. 702), Abate., 14; Contrib. Neg., 19, 20; Negl., 6.
Paschall *v.* Whitsett (11 Ala. 472), Attach., 58; Dissol., 30; Stockh., 27.
Passaic *v.* State (37 N. J. L. 538; affirming 37 N. J. L. 137), Mun. Corp., 52.
Passenger R. Co. *v.* Young (21 Ohio St. 518), St. Rys., 525.
Passenger Tariffs, In re (2 Int. Com. Rep. 445, 2 Int. Com. Com. 649), Int. Com., 36, 87, 139, 177.
Passenger T. & R. Wars, In re (2 Int. Com. Rep. 340, 2 Int. Com. Com. 513), Int. Com., 89, 118, 141.
Passmore *v.* Philadelphia, W. & B. R. Co. (9 Phila. (Pa.) 579), Em. Dom., 431.
Patchell *v.* Irish Northwestern R. Co. (6 Ir. C. L. 117), Car. of P., 211.
Patchett *v.* Pacific Coast R. Co. (100 Cal. 505), Adv. Poss., 1; Lim. of Ac., 68.
Patent *v.* Philadelphia & R. R. Co. (17 Phila. (Pa.) 291), Em. Dom., 1055.
Paterson *v.* Buffalo & L. H. R. Co. (17 Grant's Ch. (U. C.) 521), Contr., 12; Em. Dom., 1280.
Paterson *v.* Central R. & B. Co. (85 Ga. 653, 11 S. E. Rep. 872), Contrib. Neg., 74.
Paterson & P. Horse R. Co. *v.* Mayor, etc., of Paterson (24 N. J. Eq. 158), Estop., 26; St. Rys., 102, 104, 105, 259.
Paterson, N. & N. Y. R. Co. *v.* Kamlah (28 Am. & Eng. R. Cas. 250, 42 N. J. Eq. 93, 6 Atl. Rep. 444), Injunc., 44.
Paterson R. Co. *v.* Grundy (56 Am. & Eng. R. Cas. 486, 51 N. J. Eq. 213, 26 Atl. Rep. 788), Elec. Rys., 6, 7, 12, 16; Stat., 34; St. Rys., 15, 41, 68, 79, 191.
Patochi *v.* Central Pac. R. Co. (52 Cal. 90), Trial, 195.
Patrick *v.* Richmond & D. R. Co. (26 Am. & Eng. R. Cas. 78, 93 N. Car. 422), Superint., 1.
Patry *v.* Chicago, St. P., M. & O. R. Co. (77 Wis. 218, 46 N. W. Rep. 56), App., 49; Eject. Pass., 66, 119.
Patry *v.* Chicago, St. P., M. & O. R. Co. (82 Wis. 408, 52 N. W. Rep. 312), App., 100; Eject. Pass., 64, 81, 90; Trial, 206; Witn., 190.
Patscheider *v.* Great Western R. Co. (L. R. 3 Exch. D. 153, 38 L. T. 149, 26 W. R. 268), Bagg., 60, 66.
Pattee *v.* Chicago, M. & St. P. R. Co. (34 Am. & Eng. R. Cas. 399, 5 Dak. 267, 38 N. W. Rep. 435), Car. of P., 168; Derailm., 4; Evid., 90; Negl., 99.
Patten *v.* Chicago & N. W. R. Co. (32 Wis. 524), Negl., 75; Stat. & D., 140.
Patten *v.* Chicago & N. W. R. Co. (36 Wis. 413), App., 125.
Patten *v.* Chicago, M. & St. P. R. Co. (75 Iowa 459, 39 N. W. Rep. 708), Animals, 121.

Patten *v.* Northern C. R. Co. (33 Pa. St. 426), Em. Dom., 704, 718, 725, 751.
Patten *v.* Union Pac. R. Co. (29 Fed. Rep. 590), Car. of M., 560, 627.
Patterson's Appeal (40 Am. & Eng. R. Cas. 507, 129 Pa. St. 109, 18 Atl. Rep. 563), Em. Dom., 1038; Waters & W., 16.
Patterson *v.* Ball (19 Wis. 243), Evid., 275; Officers, 14.
Patterson *v.* Burlington & M. R. Co. (38 Iowa 279), Death, etc., 235.
Patterson *v.* Chicago, D. & V. R. Co. (75 Ill. 588), Injunc., 14.
Patterson *v.* Chicago, M. & St. P. R. Co. (70 Iowa 593, 33 N. W. Rep. 228), Witn., 46.
Patterson *v.* Clyde (67 Pa. St. 500), Car. of M., 560.
Patterson *v.* Detroit, L. & N. R. Co. (19 Am. & Eng. R. Cas. 415, 56 Mich. 172, 22 N. W. Rep. 260), Car. of P., 626; Sts. & H., 214.
Patterson *v.* Great Western R. Co. (8 U. C. C. P. 89), Lim. of Ac., 56.
Patterson *v.* Great Western R. Co. (9 U. C. C. P. 229), Constr. Rys., 99.
Patterson *v.* Kansas City, Ft. S. & M. R. Co. (47 Mo. App. 570), Stat. Agts., 3.
Patterson *v.* North Carolina R. Co. (64 N. Car. 147), Car. of M., 17, 180; War, 10.
Patterson *v.* Philadelphia & R. R. Co. (20 Phila. (Pa.) 295), Em. Dom., 206.
Patterson *v.* Philadelphia, W. & B. R. Co. (4 Houst. (Del.) 103, 7 Am. Ry. Rep. 207), Contrib. Neg., 30; Tresp., Inj. to, 29; Words & Ph., 150.
Patterson *v.* Pittsburg & C. R. Co. (76 Pa. St. 389), Employés, Inj. to, 257.
Patterson *v.* South & N. Ala. R. Co. (89 Ala. 318, 7 So. Rep. 437), Contrib. Neg., 97; Cross., Sts. & H., 29, 202; Dam., 19; Witn., 165.
Patterson *v.* South Carolina R. Co. (4 So. Car. 153), Evid., 206.
Patterson *v.* Wabash, St. L. & P. R. Co. (18 Am. & Eng. R. Cas. 130, 54 Mich. 91, 19 N. W. Rep. 761), Car. of P., 525; Cross. Rys., 74; Evid., 162, 175; Parties, 8.
Patterson *v.* Yuba County Sup'rs (12 Cal. 106), Mun. Aid, 303.
Pattison *v.* Culton (33 Ind. 240), Car. of M., 496..
Pattison *v.* Yuba County Sup'rs (13 Cal. 175), Mun. Aid, 20, 220.
Patton *v.* Central Iowa R. Co. (73 Iowa 306, 35 N. W. Rep. 149), Employés, Inj. to, 27, 77.
Patton *v.* East Tenn., V. & G. R. Co. (48 Am. & Eng. R. Cas. 581, 89 Tenn. 370, 15 S. W. Rep. 919), Cross., Inj. at, 265; Negl., 36, 50, 88; Pl., 70; Tresp., Inj. to, 114, 116.
Patton *v.* Philadelphia Traction Co. (132 Pa. St. 76, 20 Atl. Rep. 682), St. Rys., 473.
Patton *v.* Pittsburg, C. & St. L. R. Co. (11 Am. & Eng. R. Cas. 658, 96 Pa. St. 169), Death, etc., 122; Pl., 158; States, 4.
Patton *v.* St. Louis & S. F. R. Co. (23 Am. & Eng. R. Cas. 364, 87 Mo. 117), Fires, 124, 164, 223, 230.
Patton *v.* West End Narrow Gauge R. Co. (14 Mo. App. 589), Animals, 222, 603.
Patton *v.* Western N. C. R. Co. (31 Am. & Eng. R. Cas. 298, 96 N. Car. 455, 1 S. E. Rep. 863), Employés, Inj. to, 386; Fel. Serv., 73, 217, 349, 476.
Paul *v.* Baltimore & O. & C. R. Co. (44 Fed. Rep. 513), Consol., 37.
Paul *v.* Connersville & N. J. R. Co. (51 Ind. 527), Deeds, 9; Vend. & P., 4.
Paul *v.* Missouri Pac. R. Co. (3 Dill. (U. S.) 25), Tax., 208.
Paul *v.* Pacific R. Co. (4 Dill. (U. S.) 35), Tax., 269.
Paul *v.* Virginia (8 Wall. (U. S.) 168), Citizens., 1; Commerce, 7.
Pauling *v.* London & N. W. R. Co. (7 Railw. Cas. 816, 8 Exch. 867, 23 L. J. Exch. 105), Agency, 110.
Paulitsch *v.* New York C. & H. R. R. Co. (26 Am. & Eng. R. Cas. 162, 102 N. Y. 280, 6 N. E. Rep. 577, 1 N. Y. S. R. 656; reversing 18 J. & S. 241), Car. of P., 380; Tickets & F., 5.
Paulmier *v.* Erie R. Co. (34 N. J. L. 151), Contrib. Neg., 18; Death, etc., 64, 435; Employés, Inj. to, 31; Fel. Serv., 57, 63.
Pavitt *v.* Lehigh Valley R. Co. (153 Pa. St. 302, 25 Atl. Rep. 1107), Car. of L. S., 99; Car. of M., 490.
Pawlet *v.* Rutland & W. R. Co. (28 Vt. 297), Indep. Contr., 5, 26.
Pawnee County Com'rs *v.* Atchison, T. & S. F. R. Co. (21 Kan. 748), Tax., 341.
Paxon *v.* Illinois C. R. Co. (56 Iowa 427, 9 N. W. Rep. 334), Discrim., 4.
Payne *v.* Bristol & E. R. Co. (6 M. & W. 320, 2 Railw. Cas. 75), Em. Dom., 1087, 1140, 1142.
Payne *v.* Chicago, R. I. & P. R. Co. (39 Iowa 523, 9 Am. Ry. Rep. 176), Cross., Inj. at, 199; Imp. Neg., 7.
Payne *v.* Chicago, R. I. & P. R. Co. (44 Iowa 236), Cross., Inj. at, 61; Cross., Sts. & H., 21.
Payne *v.* Elliot (54 Cal. 339), Trover, 6.
Payne *v.* Forty-second St. & G. S. F. R. Co. (8 J. & S. (N. Y.) 8), Evid., 198, 276.
Payne *v.* Fredericton R. Co. (13 New Brun. 497), Tresp., 11.
Payne *v.* Humeston & S. R. Co. (70 Iowa 584, 31 N. W. Rep. 886), Children, Inj. to, 38, 145.
Payne *v.* Kansas & A. V. R. Co. (47 Am. & Eng. R. Cas. 228, 46 Fed. Rep. 546), Em. Dom., 64, 157, 163, 183, 373, 442, 459, 652, 1034; Eq., 5; Injunc., 2, 11, 35; Pub. Lds., 12.
Payne *v.* Kansas City, St. J. & C. B. R. Co. (35 Am. & Eng. R. Cas. 113, 72 Iowa 214, 33 N. W. Rep. 633), Animals, 178, 398, 399, 566, 599.
Payne *v.* Kansas City, St. J. & C. B. R. Co. (112 Mo. 6, 20 S. W. Rep. 322), Culverts, 15; Flood. Lds., 15, 80; Nuis., 3.
Payne *v.* Morgan's L. & T. R. & S. Co. (38 La. Ann. 164, 58 Am. Rep. 174), Constr. Rys., 4; Embankm., 4.
Payne *v.* Morgan's L. & T. R. & S. Co. (43 La. Ann. 981, 10 So. Rep. 10), Charters, 148; Em. Dom., 420.
Payne *v.* Reese (100 Pa. St. 301), Employés, Inj. to, 97.

Payne *v.* Troy & B. R. Co. (6 Am. & Eng. R. Cas. 54, 83 N. Y. 572), Cross., Inj. at, 39; Negl., 67.
Payne *v.* Troy & B. R. Co. (9 Hun (N. Y.) 526), Animals, 412.
Payne *v.* Western & A. R. Co. (18 Am. & Eng. R. Cas. 119, 13 Lea (Tenn.) 507, 49 Am. Rep. 666), Agency, 73; Libel & S., 2; Words & Ph., 210.
Peabody *v.* Flint (6 Allen (Mass.) 52), Stockh., 99.
Peabody *v.* Oregon R. & N. Co. (47 Am. & Eng. R. Cas. 598, 21 Oreg. 121, 26 Pac. Rep. 1053), Eject. Pass., 9, 54; Evid., 130.
Peache *v.* Colman (1 H. & R. 393, L. R. 1 C. P. 324, 12 Jur. N. S. 273, 35 L. J. M. C. 118, 14 W. R. 439), Intox'ing L., 6.
Peake *v.* Baltimore & O. R. Co. (24 Am. & Eng. R. Cas. 467, 26 Fed. Rep. 495), Judgm., 17.
Peake *v.* Wabash R. Co. (18 Ill. 88), Evid., 233; Name, 2; Subscr., 78, 103, 106; Witn., 13.
Pearce *v.* Humphreys (34 Fed. Rep. 282), Stat. & D., 139.
Pearce *v.* Madison & I. R. Co. (21 How. (U. S.) 441), Consol., 5.
Pearce *v.* The Thomas Newton (41 Fed. Rep. 106), Car. of M., 180, 369.
Pearson *v.* Chicago, B. & K. C. R. Co. (33 Mo. App. 543), Animals, 117, 161, 474; Fences, 58.
Pearson *v.* Chicago, M. & St. P. R. Co. (48 Am. & Eng. R. Cas. 364, 47 Minn. 9, 49 N. W. Rep. 302), Fel. Serv., 188.
Pearson *v.* Concord R. Corp. (13 Am. & Eng. R. Cas. 102, 62 N. H. 537, 13 Am. St. Rep. 590), Direct., 45; Stockh. 95, 98; Subscr., 230.
Pearson *v.* Duane (4 Wall. (U. S.) 605), Car. of P., 114, 115; Eject. Pass., 45.
Pearson *v.* Great Northern R. Co. (18 W. R. 259), Em. Dom., 1144.
Pearson *v.* Johnson (54 Miss. 259), Em. Dom., 376.
Pearson *v.* Milwaukee & St. P. R. Co. (45 Iowa 497), Animals, 260.
Pearson *v.* Union R. Co. (14 Mo. App. 579), Children, Inj. to, 66, 101.
Pearson *v.* Wheeler (55 N. H. 41), Evid., 275.
Peart *v.* Grand Trunk R. Co. (19 Am. & Eng. R. Cas. 239, 10 Ont. App. 191), Cross., Inj. at, 227.
Pease *v.* Chicago & N. W. R. Co. (17 Am. & Eng. R. Cas. 527, 61 Wis. 163, 20 N. W. Rep. 908), Fel. Serv., 1, 30, 236.
Pease *v.* Delaware, L. & W. R. Co. (10 Daly (N. Y.) 459), For. Corp., 24.
Pease *v.* Delaware, L. & W. R. Co. (26 Am. & Eng. R. Cas. 185, 101 N. Y. 367, 54 Am. Rep. 699; reversing 11 Daly 350), Eject. Pass., 48.
Peaslee *v.* Chatham (69 Hun (N. Y.) 389), Death, etc., 269.
Peaslee *v.* Fitchburg R. Co. (152 Mass. 155, 25 N. E. Rep. 71), Employés, Inj. to, 22; Fel. Serv., 185.
Peasley, In re (44 Fed. Rep. 271), Witn., 86, 87.
Peavey *v.* Calais R. Co. (30 Me. 498), Charters, 66; Em. Dom., 74.
Peavy *v.* Georgia R. & B. Co. (37 Am. & Eng. R. Cas. 114, 81 Ga. 485, 8 S. E. Rep. 70), Assault, 13; Eject. Pass., 44, 55.
Peck *v.* Bligh (37 Ill. 317), Bills & N., 13; Guar., 4.
Peck *v.* Dinsmore (4 Port. (Ala.) 212), Bills of L., 40; Car. of M., 741; Evid., 225.
Peck *v.* Fonda, J. & G. R. Co. (25 N. Y. S. R. 95, 53 Hun 634, 3 Silv. Sup. Ct. 10, 6 N. Y. Supp. 379), Flood. Lds., 62; Trial, 45.
Peck *v.* Hiler (24 Barb. (N. Y.) 178, 14 How. Pr. 155), Leases, 71.
Peck *v.* Hiler (31 Barb. (N. Y.) 117), Leases, 71.
Peck *v.* Louisville, N. A. & C. R. Co. (22 Am. & Eng. R. Cas. 193, 101 Ind. 366), Em. Dom., 67.
Peck *v.* Michigan C. R. Co. (19 Am. & Eng. R. Cas. 257, 57 Mich. 3, 23 N. W. Rep. 466), Cross., Inj. at, 77.
Peck *v.* Miller (39 Mich. 594), Constr. Rys., 91.
Peck *v.* Missouri Pac. R. Co. (31 Mo. App. 123), Evid., 280.
Peck *v.* Neil (3 McLean (U. S.) 22), Car. of P., 99, 100; Dam., 27.
Peck *v.* New York & N. J. R. Co. (59 How. Pr. (N. Y.) 419; appeal dismissed in 85 N. Y. 246), Mort., 203.
Peck *v.* New York & N. J. R. Co. (7 Am. & Eng. R. Cas. 422, 85 N. Y. 246; dismissing appeal from 22 Hun 129, mem., 59 How. Pr. 419), Judgm., 45.
Peck *v.* New York C. & H. R. R. Co. (4 Hun (N. Y.) 236, 6 T. & C. 436), Agency, 98; Eject. Pass., 119, 125.
Peck *v.* New York C. & H. R. R. Co. (70 N. Y. 587; affirming 8 Hun 286, and confirming 4 Hun 236, 6 T. & C. 436), Car. of P., 73; Eject. Pass., 1.
Peck *v.* New York, N. H. & H. R. Co. (14 Am. & Eng. R. Cas. 633, 50 Conn. 379), Cross., Inj. at, 217; Imp. Neg., 26.
Peck *v.* San Antonio (51 Tex. 490), Charters, 172.
Peck *v.* Superior S. L. R. Co. (36 Minn. 343, 31 N. W. Rep. 217), Em. Dom., 457.
Peckham *v.* Dutchess County R. Co. (47 N. Y. S. R. 182, 20 N. Y. Supp. 39), Farm Cross., 3.
Peckham *v.* Van Wagenen (83 N. Y. 40), Divid., 13.
Peddicord *v.* Baltimore, C. & E. M. Pass. R. Co. (34 Md. 463), Em. Dom., 164.
Peddicord *v.* Missouri Pac. R. Co. (85 Mo. 160), Animals, 153.
Peden *v.* Chicago, R. I. & P. R. Co. (78 Iowa 131, 4 L. R. A. 401, 42 N. W. Rep. 625), Cov'ts, 19; Evid., 241; Pl., 100.
Peden *v.* Chicago, R. I. & P. R. Co. (73 Iowa 328, 35 N. W. Rep. 424, 5 Am. St. Rep. 680), Cov'ts, 3, 15; Deeds, 28.
Pederson *v.* Seattle Con. St. R. Co. (6 Wash. 202, 33 Pac. Rep. 351, 34 Pac. Rep. 605), App., 100; New Tr., 17; Release, 14.
Peebles *v.* Boston & A. R. Co. (112 Mass. 498), Car. of M., 312.

Peebles *v.* North Carolina R. Co. (63 N. Car. 238), Abate., 4.
Peed *v.* Millikan (79 Ind. 86), Mun. Aid, 411.
Peek *v.* Derry (37 Ch. D. 541), Direct., 22, 55; Words & Ph., 119.
Peek *v.* North Staffordshire R. Co. (10 H. L. Cas. 473, 9 Jur. N. S. 914, 32 L. J. Q. B. 241, 11 W. R. 1023, 8 L. T. 768), Car. of M., 411; Lim. of Liab., 2, 4, 9, 11, 21, 39.
Peeples *v.* Brunswick & A. R. Co. (60 Ga. 281), Pl., 63.
Peet *v.* Chicago & N. W. R. Co. (19 Wis. 118), Car. of M., 614.
Peet *v.* Chicago & N. W. R. Co. (20 Wis. 594), Car. of M., 39, 140, 612, 778.
Peet *v.* Chicago, M. & St. P. R. Co. (Iowa) (55 N. W. Rep. 508), Animals, 145.
Peetz *v.* St. Charles St. R. Co. (42 La. Ann. 541, 7 So. Rep. 688), Evid., 120.
Pegler *v.* Monmouthshire R. & C. Co. (6 H. & N. 644, 39 L. J. Ex. 249, 9 W. R. 497, 4 L. T. 331), Charges, 65, 116.
Pegram *v.* Charlotte, C. & A. R. Co. (6 Am. & Eng. R. Cas. 470, 84 N. Car. 696, 37 Am. Rep. 639), Stat. Agts, 2.
Peik *v.* Chicago & N. W. R. Co. (94 U. S. 164, 16 Am. Ry. Rep. 413), Charges, 12, 25; Consol., 37; Int. Com., 216.
Peirce *v.* Boston & L. R. Corp. (24 Am. & Eng. R. Cas. 634, 27 Am. & Eng. R. Cas. 538, 141 Mass. 481, 6 N. E. Rep. 96), Em. Dom., 142, 986; Tresp., 8.
Pekin *v.* Brereton (67 Ill. 477), Sts. & H., 172.
Pekin *v.* Reynolds (31 Ill. 529), Coupons, 12.
Pekin *v.* Winkel (77 Ill. 56), Sts. & H., 159.
Pelland *v.* Canadian Pac. R. Co. (7 Mont. L. R. (Sup. Ct.) 131), Bagg., 6, 60, 114.
Pelsall C. & I. Co. *v.* London & N. W. R. Co. (23 Q. B. D. 536, 7 Ry. & C. T. Cas. 1), Car. of M., 598; Charges, 108, 109, 110; Words & Ph., 166.
Pelsall C. & I. Co. *v.* London & N. W. R. Co. (7 Ry. & C. T. Cas. 36), Charges, 111.
Pelton *v.* Rensselaer & S. R. Co. (54 N. Y. 214), Car. of M., 231.
Pelzer Mfg. Co. *v.* St. Paul F. & M. Ins. Co. (41 Fed. Rep. 271, 19 Ins. L. J. 372), Fire Ins., 12.
Pemberton Co. *v.* New York C. R. Co. (104 Mass. 144), Bills of L., 74.
Pembina C. S. M. & M. Co. *v.* Pennsylvania (125 U. S. 181, 8 Sup. Ct. Rep. 737), Citizens., 1; For. Corp., 4.
Pembroke *v.* Hannibal & St. J. R. Co. (32 Mo. App. 61), Bridges, 31; Passes, 16.
Pembroke Tp. *v.* Canada C. R. Co. (14 Am. & Eng. R. Cas. 117, 3 Ont. 503), Sts. & H., 67.
Pence *v.* Chicago, R. I. & P. R. Co. (19 Am. & Eng. R. Cas. 366, 63 Iowa 746, 19 N. W. Rep. 785), Cross., Inj. at, 252.
Pence *v.* Chicago, R. I. & P. R. Co. (42 Am. & Eng. R. Cas. 126, 79 Iowa 389, 44 N. W. Rep. 686), App., 97; Cross., Inj. at, 338; Evid., 298; New Tr., 77; Trial, 123, 125; Witn., 128.
Pence *v.* St. Paul, M. & M. R. Co. (28 Minn. 488, 11 N. W. Rep. 80), Ejectm., 4; Leases, 12.
Pendall *v.* Rench (4 McLean (U. S.) 259), Bills of L., 3; Car. of M., 104, 760.
Pendergast *v.* Adams Exp. Co. (101 Mass. 120), Exp. Cos., 76.
Pendergast *v.* Burlington & M. R. R. Co. (53 Iowa 326, 5 N. W. Rep. 171), Land Grants, 131.
Pendleton County *v.* Amy (13 Wall. (U. S.) 297, 4 Am. Ry. Rep. 109), Coupons, 18; Estop., 20.
Pendleton St. R. Co. *v.* Rahmann (22 Ohio St. 446), New Tr., 82.
Pendleton St. R. Co. *v.* Shires (18 Ohio St. 255), St. Rys., 337.
Pendleton St. R. Co. *v.* Stallmann (22 Ohio St. 1), Contrib. Neg., 113.
Pendril *v.* Second Ave. R. Co. (43 How. Pr. (N. Y.) 399, 2 J. & S. 481), Children, Inj. to, 66; Contrib. Neg., 84, 85; Negl., 61.
Penfield *v.* Chesapeake, O. & S. W. R. Co. (134 U. S. 351, 10 Sup. Ct. Rep. 566), Lim. of Ac., 8.
Peninsular R. Co. *v.* Duncan (28 Mich. 130, 12 Am. Ry. Rep. 248), Subscr., 36.
Peninsular R. Co. *v.* Gary (22 Fla. 356), Med. Serv., 6.
Peninsular R. Co. *v.* Howard (20 Mich. 18, 1 Mich. N. P. [Supp.] vi), Em. Dom., 535, 538, 920.
Peninsular R. Co. *v.* Tharp (28 Mich. 506), Consol., 18.
Peniston *v.* Chicago, St. L. & N. O. R. Co. (34 La. Ann. 777), Car. of P., 269, 271.
Penn *v.* Buffalo & E. R. Co. (49 N. Y. 204, 3 Am. Ry. Rep. 355; reversing 3 Lans. 443), Car. of L. S., 21, 97.
Penn *v.* Calhoun (121 U. S. 251, 7 Sup. Ct. Rep. 906), Mort., 270.
Pennell *v.* Delta Transp. Co. (94 Mich. 247, 53 N. W. Rep. 1049), Custom, 3, 7.
Pennington *v.* Atlanta & C. A. L. R. Co. (35 So. Car. 439, 14 S. E. Rep. 852), Trial, 65.
Pennington *v.* Detroit, G. H. & M. R. Co. (90 Mich. 505, 51 N. W. Rep. 634), Employés, Inj. to, 274; Pl., 142.
Pennington *v.* Philadelphia, W. & B. R. Co. (18 Am. & Eng. R. Cas. 310, 62 Md. 95), Eject. Pass., 35.
Penn Mut. L. Ins. Co. *v.* Heiss (141 Ill. 35, 31 N. E. Rep. 138), Em. Dom., 58; Estop., 18, 373, 383, 414, 435, 988; Mort., 278; Parties, 4; Sts. & H., 107, 120, 223, 224, 272, 280, 294.
Pennock *v.* Coe (23 How. (U. S.) 117), Charters, 108; Mort., 37, 55.
Pennsylvania *v.* Quicksilver Min. Co. (10 Wall. (U. S.) 553), Pl., 9.
Pennsylvania *v.* Wheeling & B. Bridge Co. (13 How. (U. S.) 518), Bridges, 87.
Pennsylvania *v.* Wheeling & B. Bridge Co. (18 How. (U. S.) 421), Bridges, 82.
Pennsylvania & D. R. Co. *v.* Leuffer (84 Pa. St. 168), Liens, 45.
Pennsylvania & N. E. R. Co. *v.* Ryerson (36 N. J. Eq. 112), Spec. Perf., 23.
Pennsylvania & N. Y. C. & R. Co. *v.*

Billings (10 Am. & Eng. R. Cas. 72, 94 Pa. St. 40), Canals, 5.
Pennsylvania & N. Y. C. & R. Co. *v.* Huff (Pa.) (8 Atl. Rep. 789), Cross., Inj. at, 277.
Pennsylvania & N. Y. C. & R. Co. *v.* Mason (109 Pa. St. 296, 58 Am. Rep. 722), Employés, Inj. to, 143; Fel. Serv., 67, 370, 385.
Pennsylvania & N. Y. C. & R. Co. *v.* Vandyke (137 Pa. St. 249, 20 Atl. Rep. 653), Tax., 86.
Pennsylvania & N. Y. R. & C. Co. *v.* Bunnell (81 Pa. St. 414, 16 Am. Ry. Rep. 1), Em. Dom., 327, 616, 621, 630, 642, 662, 751; Witn., 115.
Pennsylvania & N. W. R. Co. *v.* Harkins (50 Am. & Eng. R. Cas. 587, 149 Pa. St. 121, 24 Atl. Rep. 175), Employés, 23.
Pennsylvania Canal Co. *v.* Central Iron Works (7 Phila. (Pa.) 662), Ejectm., 23.
Pennsylvania Co. *v.* Allen (3 Pennyp. (Pa.) 170), Negl., 84; Trial, 121.
Pennsylvania Co. *v.* Backes (133 Ill. 255, 24 N. E. Rep. 563; affirming 35 Ill. App. 375), Employés, Inj. to, 206, 490; Side Tr., 4.
Pennsylvania Co. *v.* Boylan (10 Am. & Eng. R. Cas. 734, 104 Ill. 595), Culverts, 18.
Pennsylvania Co. *v.* Bray (125 Ind. 229, 25 N. E. Rep. 439), Eject. Pass., 71, 90, 98, 106, 108; Tickets & F., 68.
Pennsylvania Co. *v.* Brush (130 Ind. 347, 28 N. E. Rep. 615), Death, etc., 144.
Pennsylvania Co. *v.* Chicago, M. & St. P. R. Co. (144 Ill. 197, 33 N. E. Rep. 415), Lim. of Ac., 36.
Pennsylvania Co. *v.* Chicago, M. & St. P. R. Co. (44 Ill. App. 132), Car. of M., 740.
Pennsylvania Co. *v.* Clark (2 Ind. App. 146, 27 N. E. Rep. 586), Car. of L. S., 138; Car. of M., 37; Evid., 180; Pl., 7.
Pennsylvania Co. *v.* Conlan (6 Am. & Eng. R. Cas. 243, 101 Ill. 93), Death, etc., 227; Employés, Inj. to, 573; Negl., 63, 114; Pl., 142; Trial, 169; Witn., 128, 143.
Pennsylvania Co. *v.* Davis (4 Ind. App. 51, 29 N. E. Rep. 425), Death, etc., 54, 136, 146.
Pennsylvania Co. *v.* Dean (18 Am. & Eng. R. Cas. 188, 92 Ind. 459), Car. of P., 540; Pl., 173.
Pennsylvania Co. *v.* Dolan (6 Ind. App. 109, 32 N. E. Rep. 802), Contr., 16, 49, 57; Employés, 8; Pl., 6; Release, 23.
Pennsylvania Co. *v.* Ellett (35 Ill. App. 278), Death, etc., 239.
Pennsylvania Co. *v.* Ellett (42 Am. & Eng. R. Cas. 64, 132 Ill. 654, 24 N. E. Rep. 559; affirming 35 Ill. App. 278), App., 116; Death, etc., 141; Franch., 6; Leases, 111, 115; Negl., 81.
Pennsylvania Co. *v.* Erie & P. R. Co. (29 Am. & Eng. R. Cas. 549, 108 Pa. St. 621), Leases, 57.
Pennsylvania Co. *v.* Fairchild (69 Ill. 260), Car. of M., 688; Contr., 85.
Pennsylvania Co. *v.* Frana (13 Ill. App. 91), Mun. Corp., 12.
Pennsylvania Co. *v.* Frana (112 Ill. 398), Cross., Inj. at, 22, 260, 287, 351; Dam., 35; Negl., 63; Pl., 107; Trial, 125.
Pennsylvania Co. *v.* Frund (4 Ind. App. 469, 30 N. E. Rep. 1116), Cross., Inj. at, 44; Cross., Sts. & H., 29; Witn., 165.
Pennsylvania Co. *v.* Gallagher (15 Am. & Eng. R. Cas. 341, 40 Ohio St. 637, 48 Am. Rep. 689), Employés, Inj. to, 492.
Pennsylvania Co. *v.* Gallentine (7 Am. & Eng. R. Cas. 517, 77 Ind. 322), Contrib. Neg., 53, 70; Fires, 185.
Pennsylvania Co. *v.* Hankey (93 Ill. 580), Employés, Inj. to, 412, 583.
Pennsylvania Co. *v.* Hensil (6 Am. & Eng. R. Cas. 79, 70 Ind. 569, 36 Am. Rep. 188), App., 41; Cross., Inj. at, 86; Evid., 235; Negl., 63.
Pennsylvania Co. *v.* Hine (41 Ohio St. 276), Tickets & F., 88.
Pennsylvania Co. *v.* Hoagland (3 Am. & Eng. R. Cas. 436, 78 Ind. 203), Car. of P., 242, 411.
Pennsylvania Co. *v.* Holderman (69 Ind. 18), Car. of M., 726.
Pennsylvania Co. *v.* Horton (132 Ind. 189, 31 N. E. Rep. 45), Contrib. Neg., 72; Cross., Inj. at, 265, 360; Negl., 29.
Pennsylvania Co. *v.* Jacksonville, T. & K. W. R. Co. (55 Fed. Rep. 131), Mort., 160; Stockh., 80.
Pennsylvania Co. *v.* James (81* Pa. St. 194), Children, Inj. to, 145; Death, etc., 403; Sts. & H., 301.
Pennsylvania Co. *v.* Keane (41 Ill. App. 317; affirmed in 143 Ill. 172), Car. of P., 453; Death, etc., 286; Trial, 156.
Pennsylvania Co. *v.* Keane (143 Ill. 172, 32 N. E. Rep. 260), Dam., 86; Death, etc., 275; Negl., 114.
Pennsylvania Co. *v.* Krick (47 Ind. 368), Cross., Inj. at, 9, 92; Negl., 90.
Pennsylvania Co. *v.* Langendorf (49 Am. & Eng. R. Cas. 317, 48 Ohio St. 316, 28 N. E. Rep. 172), Contrib. Neg., 33, 86.
Pennsylvania Co. *v.* Lilly (4 Am. & Eng. R. Cas. 540, 73 Ind. 252), Death, etc., 132, 409, 434.
Pennsylvania Co. *v.* Lindley (2 Ind. App. 111, 28 N. E. Rep. 106), Animals, 127, 420, 519, 537; Fences, 52.
Pennsylvania Co. *v.* Lombardo (49 Ohio St. 1, 29 N. E. Rep. 573), Cham., 3.
Pennsylvania Co. *v.* Long (15 Am. & Eng. R. Cas. 345, 94 Ind. 250), Death, etc., 240; Employés, Inj. to, 465, 477.
Pennsylvania Co. *v.* Louisville, N. A. & C. R. Co. (2 Int. Com. Rep. 603, 3 Int. Com. Com. 223), Int. Com., 170.
Pennsylvania Co. *v.* Lynch (90 Ill. 333), Employés, Inj. to, 388.
Pennsylvania Co. *v.* McCormack (53 Am. & Eng. R. Cas. 107, 131 Ind. 250, 30 N. E. Rep. 27), Employés, Inj. to, 69; Death, etc., 146, 226, 306; Side Tr., 6.
Pennsylvania Co. *v.* Marion (27 Am. & Eng. R. Cas. 132, 104 Ind. 239, 3 N. E. Rep. 874), Contrib. Neg., 20; Dam., 73; Evid., 75; Negl., 87; Stat. & D., 78, 131.
Pennsylvania Co. *v.* Marion (123 Ind. 415, 7 L. R. A. 687, 23 N. E. Rep. 973), Car. of P., 414, 420; Stat. & D., 61, 76, 136; Witn., 88.
Pennsylvania Co. *v.* Marshall (119 Ill. 399, 10 N. E. Rep. 220; affirming 18 Ill. App.



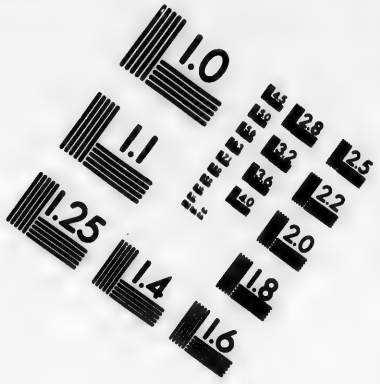
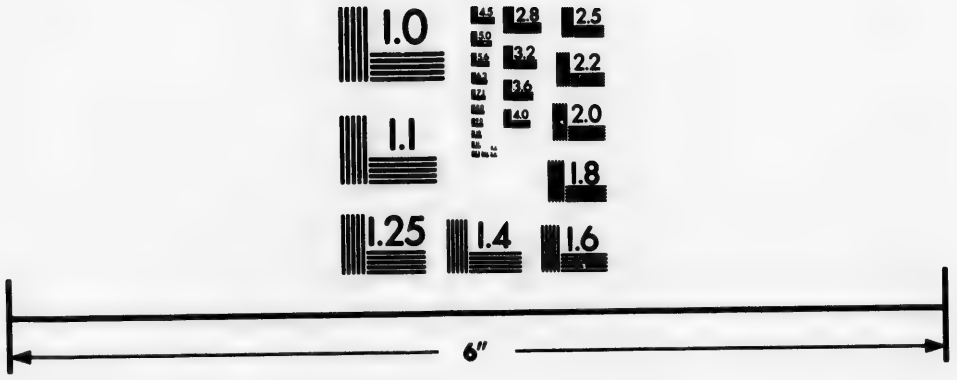
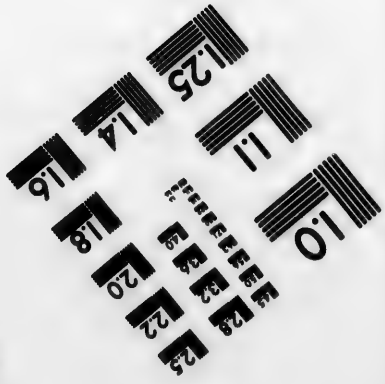


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639), Comp. Neg., 12; Death, etc., 318, 319, 357.
Pennsylvania Co. *v.* Miller (35 Ohio St. 541), Bagg., 74; New Tr., 7.
Pennsylvania Co. *v.* Mitchell (124 Ind. 473, 24 N. E. Rep. 1065), Animals, 117; Fences, 66; Witn., 134.
Pennsylvania Co. *v.* Morel (40 Ohio St. 338), Cross., Inj. at, 287.
Pennsylvania Co. *v.* Newmeyer (52 Am. & Eng. R. Cas. 454, 129 Ind. 401, 28 N. E. Rep. 860), Car. of P., 288, 291; Evid., 36; Negl., 110; Phys. Exam., 2.
Pennsylvania Co. *v.* O'Shaughnessy (41 Am. & Eng. R. Cas. 479, 122 Ind. 588, 23 N. E. Rep. 675), Contrib. Neg., 72; Employés, Inj. to, 7, 323, 369, 435.
Pennsylvania Co. *v.* Pennsylvania S. V. R. Co. (151 Pa. St. 338, 25 Atl. Rep. 107), Em. Dom., 45, Sts. & H., 254, 255.
Pennsylvania Co. *v.* Philadelphia, G. & N. R. Co. (153 Pa. St. 160, 25 Atl. Rep. 1043; affirming 1 Pa. Dist. 301), Stock, 89; Stockh., 109.
Pennsylvania Co. *v.* Platt (46 Am. & Eng. R. Cas. 558, 47 Ohio St. 366, 25 N. E. Rep. 1028), Estop., 26; Pl., 55.
Pennsylvania Co. *v.* Poor (23 Am. & Eng. R. Cas. 711, 103 Ind. 553, 3 N. E. Rep. 253), Car. of M., 726.
Pennsylvania Co. *v.* Rathgeb (32 Ohio St. 66), Contrib. Neg., 86; Cross., Inj. at, 242, 254, 264; Negl., 76.
Pennsylvania Co. *v.* Roney (12 Am. & Eng. R. Cas. 223, 89 Ind. 453, 46 Am. Rep. 173), Employés, Inj. to, 354, 431, 614.
Pennsylvania Co. *v.* Roy (1 Am. & Eng. R. Cas. 225, 102 U. S. 451), Car. of P., 561; Sleep. Car Cos., 37, 38.
Pennsylvania Co. *v.* Rudel (6 Am. & Eng. R. Cas. 30, 100 Ill. 603), Pl., 116; Trial, 174.
Pennsylvania Co. *v.* Rusie (95 Ind. 236), Animals, 615.
Pennsylvania Co. *v.* Sedwick (59 Ind. 336), Pl., 172.
Pennsylvania Co. *v.* Sinclair (62 Ind. 301), Contrib. Neg., 2, 4, 10, 50; Death, etc., 148; Negl., 4.
Pennsylvania Co. *v.* Sloan (35 Am. & Eng. R. Cas. 440, 125 Ill. 72, 17 N. E. Rep. 37; affirming 24 Ill. App. 48), Cross., Inj. at, 77, 355, 361; Evid., 32; Leases, 91; Lim. of Ac., 13; Pl., 91.
Pennsylvania Co. *v.* Smith (98 Ind. 42), Pl., 108.
Pennsylvania Co. *v.* Spaulding (35 Am. & Eng. R. Cas. 184, 112 Ind. 47, 13 N. E. Rep. 268), Cat.-Gds., 13; Farm Cross., 13.
Pennsylvania Co. *v.* Stegemeier (118 Ind. 305, 20 N. E. Rep. 843), Cross., Inj. at, 279.
Pennsylvania Co. *v.* Stoelke (8 Am. & Eng. R. Cas. 523, 104 Ill. 201), Death, etc., 213; Negl., 61; Trial, 145, 184; Witn., 102.
Pennsylvania Co. *v.* Swan (37 Ill. App. 83), Cross., Inj. at, 338.
Pennsylvania Co. *v.* Thompson (49 N. J. Eq. 318, 24 Atl. Rep. 544; reversing 48 N. J. Eq. 105, 21 Atl. Rep. 182), Nuis., 25.
Pennsylvania Co. *v.* Toomey (1 Am. & Eng. R. Cas. 461, 91 Pa. St. 256), Tresp., Inj. to, 85.
Pennsylvania Co. *v.* Watson (81* Pa. St. 293), Fires, 247, 248, 280.
Pennsylvania Co. *v.* Weddle (26 Am. & Eng. R. Cas. 120, 100 Ind. 138), False Imp., 6, 16; Mal. Pros., 14, 15.
Pennsylvania Co. *v.* Wentz (3 Am. & Eng. R. Cas. 478, 37 Ohio St. 333), Car. of P., 83, 258; Eject. Pass., 76.
Pennsylvania Co. *v.* Whitcomb (31 Am. & Eng. R. Cas. 149, 111 Ind. 212, 9 West. Rep. 823, 12 N. E. Rep. 380), Employés, Inj. to, 40, 99, 420, 423; Fel. Serv., 214, 216.
Pennsylvania Co. *v.* Whitlock (22 Am. & Eng. R. Cas. 629, 99 Ind. 16), Fires, 97.
Pennsylvania Co. *v.* Woodworth (26 Ohio St. 585), Car. of P., 53; Exp. Cos., 13.
Pennsylvania C. R. Co. *v.* Schwarzenberger (45 Pa. St. 208), Bagg., 21.
Pennsylvania, P. & B. R. Co. *v.* Root (47 Am. & Eng. R. Cas. 181, 53 N. J. L. 253, 21 Atl. Rep. 285), Witn., 160.
Pennsylvania R. Co.'s Appeal (80 Pa. St. 265), Pres., 5.
Pennsylvania R. Co.'s Appeal (86 Pa. St. 80), Stock, 42, 86.
Pennsylvania R. Co.'s Appeal (3 Am. & Eng. R. Cas. 507, 93 Pa. St. 150), Em. Dom., 115; Sts. & H., 54.
Pennsylvania R. Co.'s Appeal (115 Pa. St. 514, 5 Atl. Rep. 872), Branch & L. Roads, 4; Sts. & H., 37, 151.
Pennsylvania R. Co.'s Appeal (116 Pa. St. 55, 8 Atl. Rep. 914), Cross. Rys., 62.
Pennsylvania R. Co.'s Appeal (125 Pa. St. 189, 17 Atl. Rep. 478), Eq., 7; Injunc., 8.
Pennsylvania R. Co.'s Appeal (39 Am. & Eng. R. Cas. 685, 128 Pa. St. 509, 18 Atl. Rep. 522), Sts. & H., 195, 196.
Pennsylvania R. Co. *v.* Ackerman (74 Pa. St. 265, 7 Am. Ry. Rep. 165), Cross., Inj. at, 244, 298.
Pennsylvania R. Co. *v.* Adams (55 Pa. St. 499), Death, etc., 29, 44, 272.
Pennsylvania R. Co. *v.* Allegheny Valley R. Co. (42 Fed. Rep. 82), Mort., 236.
Pennsylvania R. Co. *v.* Allegheny Valley R. Co. (48 Fed. Rep. 139), Mort., 235.
Pennsylvania R. Co. *v.* Allen (53 Pa. St. 276), Car. of P., 618; Dam., 104.
Pennsylvania R. Co. *v.* American Oil Works (42 Am. & Eng. R. Cas. 357, 126 Pa. St. 485, 17 Atl. Rep. 671), Car. of M., 498.
Pennsylvania R. Co. *v.* Angel (26 Am. & Eng. R. Cas. 559, 41 N. J. Eq. 316, 7 Atl. Rep. 432, 56 Am. Rep. 1), Em. Dom., 374; Nuis., 9, 23.
Pennsylvania R. Co. *v.* Aspell (23 Pa. St. 147), Car. of P., 128, 342, 433, 624.
Pennsylvania R. Co. *v.* Atha (22 Fed. Rep. 920), Licensees, Inj. to, 13.
Pennsylvania R. Co. *v.* Ayres (36 Am. & Eng. R. Cas. 1, 50 N. J. L. 660, 13 Cent. Rep. 292, 14 Atl. Rep. 901), Dedica., 5.
Pennsylvania R. Co. *v.* Baltimore & N. Y. R. Co. (37 Fed. Rep. 129), Bridges, 65, 68; Evid., 99.
Pennsylvania R. Co. *v.* Baltimore & O. R. Co. (14 Am. & Eng. R. Cas. 79, 60 Md.

263), Balt. & O. R. Co., 6; Charters, 99; Cross. Rys., 5; Em. Dom., 516.
Pennsylvania R. Co. *v.* Bantom (54 Pa. St. 495), Death, etc., 411.
Pennsylvania R. Co. *v.* Barnett (59 Pa. St. 259), Cross., Inj. at, 154; Fright. Teams, 3.
Pennsylvania R. Co. *v.* Beale (73 Pa. St. 504, 6 Am. Ry. Rep. 158), Cross., Inj. at, 232, 288; Death, etc., 194.
Pennsylvania R. Co. *v.* Bell (122 Pa. St. 58, 15 Atl. Rep. 561), Stat. & D., 116.
Pennsylvania R. Co. *v.* Berry (68 Pa. St. 272, 1 Am. Ry. Rep. 501), Car. of M., 594.
Pennsylvania R. Co. *v.* Bock (6 Am. & Eng. R. Cas. 20, 93 Pa. St. 427), Actions, 11; Children, Inj. to, 129, 153.
Pennsylvania R. Co. *v.* Books (57 Pa. St. 339), Car. of P., 22, 565, 581, 594, 597, 617, 613; Evid., 162.
Pennsylvania R. Co. *v.* Borough of Irwin (85 Pa. St. 336, 18 Am. Ry. Rep. 562), Bridges, 29.
Pennsylvania R. Co. *v.* Bost (104 Pa. St. 26), Employés, 1; Employés, Inj. to, 457.
Pennsylvania R. Co. *v.* Bowers (37 Am. & Eng. R. Cas. 353, 124 Pa. St. 183, 16 Atl. Rep. 836), Death, etc., 371.
Pennsylvania R. Co. *v.* Braddock Elec. R. Co. (1 Pa. Dist. 111), Cross. Rys., 69; Elec. Rys., 5.
Pennsylvania R. Co. *v.* Braddock Elec. R. Co. (152 Pa. St. 116, 25 Atl. Rep. 780; reversing 1 Pa. Dist. 626), Cross. Rys., 85, 86; Cross., St. & H., 92.
Pennsylvania R. Co. *v.* Bruner (55 Pa. St. 318), Cert., 11; Em. Dom., 480, 482, 790.
Pennsylvania R. Co. *v.* Butler (57 Pa. St. 335), Death, etc., 344, 381.
Pennsylvania R. Co. *v.* Canal Com'rs (7 Pa. St. 9), Govt. Rds., 2.
Pennsylvania R. Co. *v.* Canfield (46 Pa. St. 211), Charges, 48, 59.
Pennsylvania R. Co. *v.* Com. (3 Grant's Cas. (Pa.) 128), Int. Com., 200.
Pennsylvania R. Co. *v.* Com. (94 Pa. St. 474), Tax., 280.
Pennsylvania R. Co. *v.* Com. (Pa.) (29 Am. & Eng. R. Cas. 145, 7 Atl. Rep. 368), Par. & Comp. L., 1, 2, 3.
Pennsylvania R. Co. *v.* Connell (18 Am. & Eng. R. Cas. 339, 112 Ill. 295, 54 Am. Rep. 238), Eject. Pass., 38, 54, 57, 111; Tickets & F., 67, 103.
Pennsylvania R. Co. *v.* Connell (127 Ill. 419, 20 N. E. Rep. 89; affirming 26 Ill. App. 594), Eject. Pass., 90, 106; Witn., 44.
Pennsylvania R. Co. *v.* Consolidation Coal Co. (55 Md. 158), Cross. Rys., 70.
Pennsylvania R. Co. *v.* Coon (111 Pa. St. 430, 3 Atl. Rep. 234), Cross., Inj. at, 172; Negl., 1.
Pennsylvania R. Co. *v.* Cooper (58 Pa. St. 408), Em. Dom., 764.
Pennsylvania R. Co. *v.* Dale (76 Pa. St. 47), Car. of P., 561; Collis., 11.
Pennsylvania R. Co. *v.* Duncan (29 Am. & Eng. R. Cas. 354, 111 Pa. St. 352, 5 Atl. Rep. 742), Charters, 158; Em. Dom., 373, 988.
Pennsylvania R. Co. *v.* Duncan (129 Pa. St. 181), Em. Dom., 172.
Pennsylvania R. Co. *v.* Duquesne Borough (46 Pa. St. 223), Bridges, 28; Sts. & H., 355.
Pennsylvania R. Co. *v.* Eby (107 Pa. St. 166), Em. Dom., 406, 608, 1064, 1077, 1084; Trial, 187.
Pennsylvania R. Co. *v.* First G. Lutheran Congregation (53 Pa. St. 445), Em. Dom., 124, 458, 485, 523.
Pennsylvania R. Co. *v.* Flanigan (26 Am. & Eng. R. Cas. 88, 112 Pa. St. 558, 4 Atl. Rep. 364), Employés, 13.
Pennsylvania R. Co. *v.* Fortney (1 Am. & Eng. R. Cas. 128, 90 Pa. St. 323), Death, etc., 294.
Pennsylvania R. Co. *v.* Freeport (138 Pa. St. 91, 20 Atl. Rep. 940), Injunc., 30.
Pennsylvania R. Co. *v.* Fries (87 Pa. St. 234), Car. of M., 149.
Pennsylvania R. Co. *v.* Fuller (3 Pennyp. (Pa.) 176), Evid., 284.
Pennsylvania R. Co. *v.* Garvey (108 Pa. St. 369), Death, etc., 202.
Pennsylvania R. Co. *v.* Goodman (62 Pa. St. 329), Cross., Inj. at, 342; Death, etc., 192, 400.
Pennsylvania R. Co. *v.* Gorsuch (84 Pa. St. 411), Em. Dom., 867, 868.
Pennsylvania R. Co. *v.* Green (140 U. S. 49, 11 Sup. Ct. Rep. 650), Stat. & D., 139.
Pennsylvania R. Co. *v.* Heister (8 Pa. St. 445), Em. Dom., 925.
Pennsylvania R. Co. *v.* Henderson (43 Pa. St. 449), Death, etc., 341.
Pennsylvania R. Co. *v.* Henderson (51 Pa. St. 315), Car. of L. S., 128; Death, etc., 126, 283, 393; Evid., 84.
Pennsylvania R. Co. *v.* Hope (80 Pa. St. 373), Fires, 320; Words & Ph., 42.
Pennsylvania R. Co. *v.* Horst (110 Pa. St. 226, 1 Atl. Rep. 217), Fright. Teams, 3.
Pennsylvania R. Co. *v.* Hughes (39 Pa. St. 521), Trover, 5.
Pennsylvania R. Co. *v.* Jones (2 Pa. Dist. 759), Em. Dom., 368.
Pennsylvania R. Co. *v.* Jones (50 Pa. St. 417), Priv. Ways, 11.
Pennsylvania R. Co. *v.* Keiffer (22 Pa. St. 356), Em. Dom., 473, 773.
Pennsylvania R. Co. *v.* Keller (67 Pa. St. 300), Death, etc., 89, 324.
Pennsylvania R. Co. *v.* Kelly (31 Pa. St. 372), Children, Inj. to, 75, 127; Death, etc., 408; Sts. & H., 404.
Pennsylvania R. Co. *v.* Kerr (62 Pa. St. 353), Fires, 90, 334; Words & Ph., 42.
Pennsylvania R. Co. *v.* Kilgore (32 Pa. St. 292), Car. of P., 234, 428.
Pennsylvania R. Co. *v.* Langdon (1 Am. & Eng. R. Cas. 87, 92 Pa. St. 21), Car. of P., 495; Death, etc., 371.
Pennsylvania R. Co. *v.* Lewis (79 Pa. St. 33), Children, Inj. to, 74; Death, etc., 300.
Pennsylvania R. Co. *v.* Lippincott (30 Am. & Eng. R. Cas. 399, 116 Pa. St. 472, 8 Cent. Rep. 818, 9 Atl. Rep. 871, 19 W. N. C. 513), Sts. & H., 287.
Pennsylvania R. Co. *v.* Locomotive E. S. Truck Co. (110 U. S. 490, 4 Sup. Ct. Rep.

220; reversing 2 Fed. Rep. 677, 10 Phila. (Pa.) 252), Pat. for Inv., 3.
Pennsylvania R. Co. *v.* Lyons (41 Am. & Eng. R. Cas. 154, 129 Pa. St. 113, 18 Atl. Rep. 759), Car. of P., 234, 420, 427, 567, 609.
Pennsylvania R. Co. *v.* McCloskey (23 Pa. St. 526), Car. of L. S., 132; Car. of P., 355; Death, etc., 326; Passes, 34.
Pennsylvania R. Co. *v.* MacKinney (37 Am. & Eng. R. Cas. 153. 124 Pa. St., 462, 17 Atl. Rep. 14), Car. of P., 586, 609.
Pennsylvania R. Co. *v.* McTighe (46 Pa. St. 316), Contrib. Neg., 122; Cross., Inj. at, 229.
Pennsylvania R. Co. *v.* Magee (Pa.) (13 Atl. Rep. 839), Em. Dom., 172, 373.
Pennsylvania R. Co. *v.* Marchant (33 Am. & Eng. R. Cas. 116, 110 Pa. St. 541, 12 Cent. Rep. 261, 13 Atl. Rep 690, 21 W. N. C. 300), Em. Dom., 175, 668.
Pennsylvania R. Co. *v.* Matthews (36 N. J. L. 531, 12 Am. Ry. Rep. 482), Cross., Inj. at, 65.
Pennsylvania R. Co. *v.* Miller (132 U. S. 75, 10 Sup. Ct. Rep. 34), Charters, 28; Em. Dom., 19.
Pennsylvania R. Co. *v.* Miller (87 Pa. St. 395), Car. of M., 178.
Pennsylvania R. Co. *v.* Miller (25 Am. & Eng. R. Cas. 282, 112 Pa. St. 34, 3 Atl. Rep. 780), Waters & W., 20.
Pennsylvania R. Co. *v.* Mooney (39 Am. & Eng. R. Cas. 612, 126 Pa. St. 244, 17 Atl. Rep. 590), Cross., Inj. at, 234, 286.
Pennsylvania R. Co. *v.* Morgan (82 Pa. St. 134, 16 Am. Ry. Rep. 89), Children, Inj. to, 12.
Pennsylvania R. Co. *v.* National Docks & N. J. J. Connecting R. Co. (51 Fed. Rep. 858), Judgm., 26.
Pennsylvania R. Co. *v.* National Docks & N. J. J. Connecting R. Co. (56 Fed. Rep. 697), Cross. Rys., 73.
Pennsylvania R. Co. *v.* National R. Co. (23 N. J. Eq. 441), Injunc., 14; Land Grants, 4; Par. & Comp. L., 4.
Pennsylvania R. Co. *v.* New York & L. B. R. Co. (23 N. J. Eq. 157), Em. Dom., 380.
Pennsylvania R. Co. *v.* Ogier (35 Pa. St. 60), Death, etc., 323, 420; Negl., 66.
Pennsylvania R. Co. *v.* Page (Pa.) (32 Am. & Eng. R. Cas. 386, 12 Atl. Rep. 662), Fires, 205, 291, 296.
Pennsylvania R. Co. *v.* Parke (42 Pa. St. 31), Deeds, 35.
Pennsylvania R. Co. *v.* Pemberton & N. Y. R. Co. (28 N. J. Eq. 338), Receiv., 13.
Pennsylvania R. Co. *v.* Pennock (51 Pa. St. 244), Attach., 48.
Pennsylvania R. Co. *v.* Peoples (31 Ohio St. 537), Actions, 10; Attach., 12.
Pennsylvania R. Co. *v.* Peters (30 Am. & Eng. R. Cas. 607, 116 Pa. St. 206, 8 Cent. Rep. 408, 9 Atl. Rep. 317, 19 W. N. C. 418), Car. of P., 428; Negl., 65.
Pennsylvania R. Co. *v.* Philadelphia (47 Pa. St. 189), Mun. Corp., 53.
Pennsylvania R. Co. *v.* Philadelphia Belt Line R. Co. (149 Pa. St. 218, 24 Atl. Rep. 210; affirming 1 Pa. Dist. 1), Injunc., 48.
Pennsylvania R. Co. *v.* Pittsburg (17 Am. & Eng. R. Cas. 438, 104 Pa. St. 522), Tax., 75.
Pennsylvania R. Co. *v.* Pittsburg Grain Elevator Co. (50 Pa. St. 499), Injunc., 32.
Pennsylvania R. Co. *v.* Porter (29 Pa. St. 165), Em. Dom., 314, 327, 480.
Pennsylvania R. Co. *v.* Price (1 Am. & Eng. R. Cas. 234, 96 Pa. St. 256), Car. of Mails, 18; Car. of P., 10, 13; Words & Ph., 159.
Pennsylvania R. Co. *v.* Raiordon (119 Pa. St. 577, 12 Cent. Rep. 177, 13 Atl. Rep. 324, 21 W. N. C. 283), Car. of L. S., 39; Lim. of Liab., 27.
Pennsylvania R. Co. *v.* Reed (58 Am. & Eng. R. Cas. 422, 60 Fed. Rep. 694), Car. of P., 391.
Pennsylvania R. Co. *v.* Reichert (10 Am. & Eng. R. Cas. 429, 58 Md. 261), Contr., 74; Dam., 39; Em. Dom., 794, 856; Words & Ph., 95.
Pennsylvania R. Co. *v.* Riblet (66 Pa. St. 164), Fences, 2.
Pennsylvania R. Co. *v.* Righter (2 Am. & Eng. R. Cas. 220, 42 N. J. L. 180), Comp. Neg., 30; Contrib. Neg., 5, 24, 85, 88; Cross., Inj. at, 193, 264, 267, 316; Negl., 5.
Pennsylvania R. Co. *v.* St. Louis, A. & T. H. R. Co. (116 U. S. 472, 6 Sup. Ct. Rep. 644), Evid., 107; Fed. Cts., 10.
Pennsylvania R. Co. *v.* St. Louis, A. & T. H. R. Co. (24 Am. & Eng. R. Cas. 58, 118 U. S. 290, 6 Sup. Ct. Rep. 1094), Leases, 13, 15, 28, 80, 101.
Pennsylvania R. Co. *v.* Sellers (127 Pa. St. 406, 17 Atl. Rep. 987), Evid., 32.
Pennsylvania R. Co. *v.* Shay (82 Pa. St. 198, 15 Am. Ry. Rep. 462), Release, 11.
Pennsylvania R. Co. *v.* Sly (65 Pa. St. 205), Lease, 55; Words & Ph., 232.
Pennsylvania R. Co. *v.* Spicker (23 Am. & Eng. R. Cas. 672, 105 Pa. St. 142), Eject. Pass., 96, 105; Evid., 241; Tickets & F., 75, 106.
Pennsylvania R. Co. *v.* State (19 Am. & Eng. R. Cas. 326, 61 Md. 108), Cross., Inj. at, 306.
Pennsylvania R. Co. *v.* Stern (35 Am. & Eng. R. Cas. 551, 119 Pa. St. 24, 12 Atl. Rep. 756), Bills of L., 47, 48, 56, 60.
Pennsylvania R. Co. *v.* Stranahan (79 Pa. St. 405), Fires, 240.
Pennsylvania R. Co. *v.* Suburban Rapid Transit Co. (1 Pa. Dist. 636), Cross. Rys., 86; Elec. Rys., 5.
Pennsylvania R. Co. *v.* Thompson (45 N. J. Eq. 870, 19 Atl. Rep. 622), Adv. Poss., 3.
Pennsylvania R. Co. *v.* Titusville & P. Plank Road Co. (71 Pa. St. 350), Car. of M., 740, 793.
Pennsylvania R. Co. *v.* Vandever (36 Pa. St. 298), Death, etc., 345, 381.
Pennsylvania R. Co. *v.* Vandiver (42 Pa. St. 365), Death, etc., 350; Eject. Pass., 58.
Pennsylvania R. Co. *v.* Wachter (15 Am. & Eng. R. Cas. 187, 60 Md. 395), Employés, Inj. to, 291, 393; Fel. Serv., 23, 25, 136, 149, 440.
Pennsylvania R. Co. *v.* Weber (72 Pa. St. 27), Death, etc., 223, 237.

Pennsylvania R. Co. *v.* Weber (76 Pa. St. 157). Cross., Inj. at, 229, 258.
Pennsylvania R. Co. *v.* Werner (89 Pa. St. 59), Death, etc., 202.
Pennsylvania R. Co. *v.* White (88 Pa. St. 327), Car. of P., 453.
Pennsylvania R. Co. *v.* Wilson (Pa.) (3 Atl. Rep. 783), Pl., 56.
Pennsylvania R. Co. *v.* Zebe (33 Pa. St. 318), Car. of P., 404; Death, etc., 386.
Pennsylvania R. Co. *v.* Zebe (37 Pa. St. 420), Car. of P., 404; Death, etc., 87.
Pennsylvania R. Co. *v.* Zink (126 Pa. St. 288, 17 Atl. Rep. 614), Employés, Inj. to, 217, 731.
Pennsylvania R. Co. *v.* Zug (47 Pa. St. 480), Agency, 87.
Pennsylvania R. Co. *v.* Zwick (1 Ind. App. 280, 27 N. E. Rep. 508), Animals, 372.
Pennsylvania S. V. R. Co. *v.* Cleary (39 Am. & Eng. R. Cas. 132, 125 Pa. St. 442, 17 Atl. Rep. 468), Em. Dom., 559, 560, 602.
Pennsylvania S. V. R. Co. *v.* Keller (Pa.) (11 Atl. Rep. 381), Em. Dom., 637.
Pennsylvania S. V. R. Co. *v.* Philadelphia & R. R. Co. (20 Phila. (Pa.) 420), Cross. Rys., 24, 50.
Pennsylvania S. V. R. Co. *v.* Philadelphia & R. R. Co. (151 Pa. St. 502, 24 Atl. Rep. 1086), Injunc., 19.
Pennsylvania S. V. R. Co. *v.* Philadelphia & R. R. Co. (56 Am. & Eng. R. Cas. 610, 157 Pa. St. 42, 27 Atl. Rep. 683), Sts. & H., 54, 146.
Pennsylvania S. V. R. Co. *v.* Reading Paper Mills (149 Pa. St. 18, 24 Atl. Rep. 205), Em. Dom., 129, 136.
Pennsylvania S. V. R. Co. *v.* Walsh (38 Am. & Eng. R. Cas. 466, 124 Pa. St. 544, 17 Atl. Rep. 186), Sts. & H., 122.
Pennsylvania S. V. R. Co. *v.* Ziemer (124 Pa. St. 560, 17 Atl. Rep. 187), Em. Dom., 763, 1002; Witn., 115.
Pennsylvania Transp. Co.'s Appeal (101 Pa. St. 576), Stockh., 3.
Penny, In re (7 El. & Bl. 660, 3 Jur. N. S. 957, 26 L. J. Q. B. 225), Em. Dom., 1195, 1197.
Penny *v.* Southeastern R. Co. (7 El. & Bl. 660, 3 Jur. N. S. 957, 26 L. J. Q. B. 225), Cert., 1; Em. Dom., 1202.
Penobscot & K. R. Co. *v.* Bartlett (12 Gray (Mass.) 244), Contr., 86; Subscr., 51.
Penobscot & K. R. Co. *v.* Dunn (39 Me. 587), Evid., 233; Subscr., 62, 206; Witn., 13.
Penobscot R. Co. *v.* Dummer (40 Me. 172), Evid., 233; Subscr., 1, 34.
Penobscot R. Co. *v.* White (41 Me. 512), Subscr., 102, 105, 205.
Penrose *v.* Erie C. Co. (3 Phila. (Pa.) 198), Attach., 27; Officers, 15.
Pensacola *v.* Louisville & N. R. Co. (21 Fla. 492), Tax., 254.
Pensacola & A. R. Co. *v.* Anderson (26 Fla. 425, 8 So. Rep. 127), New Tr., 2.
Pensacola & A. R. Co. *v.* Atkinson (20 Fla. 450), Constr. Rys., 54; Evid., 13, 230.
Pensacola & A. R. Co. *v.* Hyer (32 Fla. 539, 14 So. Rep. 381), Bridges, 49.
Pensacola & A. R. Co. *v.* Jackson (21 Fla. 146), Injunc., 8.
Pensacola & A. R. Co. *v.* State (37 Am. & Eng. R. Cas. 579, 25 Fla. 310, 3 L. R. A. 661, 5 So. Rep. 833, 2 Int. Com. Rep. 522), Evid., 275; Ry. Com'rs, 25, 26, 28.
Pensacola R. Co. *v.* Schaffer (76 Ala. 233), Liens, 20.
Penton *v.* Grand Trunk R. Co. (28 U. C. Q. B. 367), Bagg., 67.
People *v.* A[illegible]s (16 Hun (N. Y.) 549), Crim. L., 3.
People *v.* Adams (125 N. Y. 471, 26 N. E. Rep. 746, 36 N. Y. S. R. 166; affirming 56 Hun 645, mem., 32 N. Y. S. R. 398, 10 N. Y. Supp. 295), Tax., 276.
People *v.* Adirondack Co. (57 Barb. (N. Y.) 656; affirmed in 6 Alb. L. J. 174), Mun. Aid, 209.
People *v.* Albany & S. R. Co. (55 Barb. (N. Y.) 344; affirmed (?) 57 N. Y. 161; see 2 Lans. 459, 5 Lans. 25), Direct., 11.
People *v.* Albany & S. R. Co. (1 Lans. (N. Y.) 308, 7 Abb. Pr. N. S. 265, 38 How. Pr. 228), Receiv., 22.
People *v.* Albany & S. R. Co. (57 N. Y. 161, 6 Am. Ry. Rep. 73; reversing 5 Lans. 25; which modifies 1 Lans. 308, 38 How. Pr. 228, 55 Barb. 344, 7 Abb. Pr. N. S. 265; see 57 Barb. 205, 2 Lans. 459, 8 Abb. Pr. 122, 39 How. Pr. 49), Parties, 1; Quo War., 10; Trial, 4.
People *v.* Albany & V. R. Co. (12 Abb. Pr. (N. Y.) 171, 20 How. Pr. 358), Contempt, 9; Injunc., 56.
People *v.* Albany & V. R. Co. (37 Barb. (N. Y.) 216; affirming 11 Abb. Pr. 136, 19 How. Pr. 523), Aband., 3, 4; Charters, 17, 59; Injunc., 30.
People *v.* Albany & V. R. Co. (24 N. Y. 261; affirming 16 Abb. Pr. 465), Aband., 4; Franch., 6.
People *v.* Albany & V. R. Co. (77 N. Y. 232; reversing 15 Hun 126), Quo War., 7.
People *v.* Allen (52 N. Y. 538), Mun. Aid, 102, 106.
People *v.* Assessors (17 N. Y. S. R. 980, 2 N. Y. Supp. 240), Tax., 276.
People *v.* Atlantic Ave. R. Co. (48 [illegible] & Eng. R. Cas. 688, 125 N. Y. 513, 26 N. E. Rep. 622, 35 N. Y. S. R. 872; affirming 57 Hun 378, 32 N. Y. S. R. 717, 10 N. Y. Supp. 907), Dissol., 1, 6, 7.
People *v.* Babcock (16 Hun (N. Y.) 313), Exp. Cos., 25.
People *v.* Baltimore & O. R. Co. (117 N. Y. 150, 22 N. E. Rep. 1026, 27 N. Y. S. R. 153; reversing 50 Hun 192, 20 N. Y. S. R. 44, 3 N. Y. Supp. 29), Em. Dom., 91, 99.
People *v.* Barker (48 N. Y. 70, 2 Am. Ry. Rep. 149; affirming 33 How. Pr. 150, 48 Barb. 173), Tax., 276.
People *v.* Barker (141 N. Y. 196, 36 N. E. Rep. 184, 56 N. Y. S. R. 834; affirming 72 Hun 126, 55 N. Y. S. R. 186, 25 N. Y. Supp. 340), Tax., 276.
People *v.* Barnard (36 Am. & Eng. R. Cas. 70, 110 N. Y. 548, 18 N. E. Rep. 354, 18 N. Y. S. R. 542; reversing 48 Hun 57, 15

N. Y. S. R. 689), Mand., 24; St. Rys., 21, 83, 90.
People *v.* Barnett Sup'r (91 Ill. 422), Mun. Aid, 293, 296.
People *v.* Barrett (18 Hun (N. Y.) 206), Mun. Aid, 106.
People *v.* Beardsley (52 Barb. (N. Y.) 105; affirmed in 41 N. Y. 619, mem.), Tax., 84.
People *v.* Betts (55 N. Y. 600), Em. Dom., 959.
People *v.* Bishop (111 Ill. 124), Mun. Aid, 1, 137, 160.
People *v.* Board of Assessors (40 N. Y. 154), Tax., 276.
People *v.* Board of Assessors (92 N. Y. 430; affirming 27 Hun 614, mem.), Tax., 276.
People *v.* Boston & A. R. Co. (70 N. Y. 569), Charters, 31.
People *v.* Boston, H. T. & W. R. Co. (12 Abb. N. Cas. (N. Y.) 230), Consol., 4.
People *v.* Boston, H. T. & W. R. Co. (27 Hun (N. Y.) 528), Franch., 10.
People *v.* Broadway R. Co. (48 Am. & Eng. R. Cas. 692, 126 N. Y. 29, 26 Abb. N. Cas. 407, 26 N. E. Rep. 961, 36 N. Y. S. R. 376; reversing 56 Hun 45, 29 N. Y. S. R. 343, 9 N. Y. Supp. 6), Stat., 45; St. Rys., 125.
People *v.* Brooklyn (65 N. Y. 349), St. Rys., 138.
People *v.* Brooklyn, F. & C. I. R. Co. (9 Am. & Eng. R. Cas. 454, 89 N. Y. 75; affirming 24 Hun 529, mem.), Reorg., 3; Stat., 35; St. Rys., 12; Sts. & H., 53.
People *v.* Brooks (57 Ill. 142), Mun. Aid, 115.
People *v.* Brown (55 N. Y. 180), Mun. Aid, 86, 421, 450.
People *v.* Bruff (9 Abb. N. Cas. (N. Y.) 153, 60 How. Pr. 1), Abate., 2; Receiv., 10, 18.
People *v.* Brumback (24 Ill. App. 501), Death, etc., 125.
People *v.* Budd (117 N. Y. 1, 22 N. E. Rep. 670, 26 N. Y. S. R. 533), Tickets & F., 114.
People *v.* Burnside (3 Lans. (N. Y.) 74), Ry. Com'rs, 4.
People *v.* Campbell (74 Hun 210, 26 N. Y. Supp. 832, 56 N. Y. S. R. 358), Int. Com., 202.
People *v.* Carter (52 Hun 458, 24 N. Y. S. R. 104, 5 N. Y. Supp. 507; affirmed in 117 N. Y. 625, mem., 26 N. Y. S. R. 979, 22 N. E. Rep. 1128), Tax., 40.
People *v.* Caryl (3 Park. Ch. (N. Y.) 326), Eject. Pass., 19, 42, 44, 54, 90, 96.
People *v.* Cass County (77 Ill. 438), Mun. Aid, 287.
People *v.* Cassity (46 N. Y. 46; affirming 2 Lans. 294), Tax., 276.
People *v.* Cayuga County Sup'rs (136 N. Y. 281, 32 N. E. Rep. 854, 40 N. Y. S. R. 340; reversing 45 N. Y. S. R. 89, 18 N. Y. Supp. 808), Mun. Aid, 421.
People *v.* Central C. T. R. Co. (21 Hun (N. Y.) 476), App., 144.
People *v.* Central Pac. R. Co. (43 Cal. 398), Tax., 69, 138.
People *v.* Central Pac. R. Co. (62 Cal. 506), Mand., 35.
People *v.* Central Pac. R. Co. (76 Cal. 29, 18 Pac. Rep. 90), Pl., 18; State Aid, 14.
People *v.* Central Pac. R. Co. (41 Am. & Eng. R. Cas. 653, 83 Cal. 393, 23 Pac. Rep. 303), Pl., 9; Tax., 21, 287, 315.
People *v.* Central R. Co. (42 N. Y. 283; reversing 48 Barb. 478, 33 How. Pr. 407), Jurisd., 6.
People *v.* Chambers (42 Cal. 201, 4 Am. Ry. Rep. 49), Incorp., 8.
People *v.* Chapin (34 Am. & Eng. R. Cas. 136, 106 N. Y. 265, 12 N. E. Rep. 595, 8 N. Y. S. R. 678; reversing 42 Hun 239, 3 N. Y. S. R. 728), Ry. Com'rs, 42.
People *v.* Chapman (66 Ill. 137), Mun. Aid, 127.
People *v.* Cheeseman (16 Am. & Eng. R. Cas. 400, 7 Colo. 376, 3 Pac. Rep. 716), Union D. Cos., 1.
People *v.* Cheetham (45 Hun (N. Y.) 6, 9 N. Y. S. R. 30, 20 Abb. N. Cas. 44), Cert., 8; Tax., 276.
People *v.* Chicago & A. R. Co. (Ill.) (35 Am. & Eng. R. Cas. 462, 22 N. E. Rep. 857), Charters, 64; Stat. & D., 15, 18.
People *v.* Chicago & A. R. Co. (40 Am. & Eng. R. Cas. 352, 130 Ill. 175, 22 N. E. Rep. 857), Contr., 59; Stat. & D., 13, 29.
People *v.* Chicago & A. R. Co. (55 Ill. 95, 1 Am. Ry. Rep. 480), Elevators, 7, 9.
People *v.* Chicago & A. R. Co. (67 Ill. 118, 2 Am. Ry. Rep. 66), Cross., St. & H., 25, 32.
People *v.* Chicago & A. R. Co. (140 Ill. 210, 29 N. E. Rep. 730), Tax., 321.
People *v.* Chicago & N. W. R. Co. (57 Ill. 436, 10 Am. Ry. Rep. 457), Side Tr., 2; Sts. & H., 97.
People *v.* Chicago & W. I. R. Co. (24 Am. & Eng. R. Cas. 612, 116 Ill. 181, 4 N. E. Rep. 480), Tax., 257.
People *v.* Chicago, B. & Q. R. Co. (11 Biss. (U. S.) 584, 16 Fed. Rep. 706), Rem. of C., 24.
People *v.* Chicago W. D. R. Co. (18 Ill. App. 125), St. Rys., 77.
People *v.* Chicago W. D. R. Co. (25 Am. & Eng. R. Cas. 258, 118 Ill. 113, 7 N. E. Rep. 116), Mand., 8; St. Rys., 26, 31, 85.
People *v.* Clapp (46 N. Y. S. R. 509, 64 Hun 547, 19 N. Y. Supp. 531), Tax., 276.
People *v.* Clark (53 Barb. (N. Y.) 171), Mun. Aid, 103, 303.
People *v.* Clayton (88 Ill. 45, 21 Am. Ry. Rep. 281), Mun. Aid, 243.
People *v.* Cline (63 Ill. 394, 7 Am. Ry. Rep. 373), Mun. Aid, 125, 164, 165.
People *v.* Coffey (48 N. Y. S. R. 882, 66 Hun 160, 21 N. Y. Supp. 34), St. Rys., 299.
People *v.* Coleman (21 N. Y. S. R. 178, 51 Hun 640, 4 N. Y. Supp. 417), Stat., 34.
People *v.* Colorado C. R. Co. (45 Am. & Eng. R. Cas. 599, 42 Fed. Rep. 638), Fed. Cts., 1; Mand., 26, 29, 30; Rem. of C., 55.
People *v.* Commissioners (4 Wall. (U. S.) 244), Tax., 138.
People *v.* Com'rs of Taxes (2 Am. & Eng. R. Cas. 343, 82 N. Y. 459; affirming 19 Hun 460), Tax., 66.
People *v.* Com'rs of Taxes (101 N. Y. 322,

4 N. E. Rep. 127; reversing 23 Hun 687), Tax., 66, 87.
People *v.* Com'rs of Taxes (64 How. Pr. (N. Y.) 405), Tax., 276.
People *v.* Com'rs of Taxes (21 N. Y. S. R. 355, 51 Hun 641, mem., 4 N. Y. Supp. 45), Tax., 276.
People *v.* Com'rs of Taxes (21 N. Y. S. R. 357, 51 Hun 641, mem., 4 N. Y. Supp. 47), Tax., 276.
People *v.* Com'rs of Taxes (21 N. Y. S. R. 358, 51 Hun 641, mem., 4 N. Y. Supp. 41), Tax., 276.
People *v.* Com'rs of Taxes (21 N. Y. S. R. 350, 51 Hun 641, mem., 4 N. Y. Supp. 43), Tax., 276.
People *v.* Com'rs of Taxes (104 N. Y. 240, 10 N. E. Rep. 437, 5 N. Y. S. R. 647; affirming 40 Hun 631, mem.), Tax., 276.
People *v.* Com'rs of Taxes (64 N. Y. 541; affirming 5 Hun 200), Tax., 173.
People *v.* Com'rs of Taxes (46 How. Pr. (N. Y.) 227, 1 T. & C. 635; affirmed in 60 N. Y. 638, mem.), Tax., 276.
People *v.* Com'rs of Taxes (31 Hun (N. Y.) 32), Tax., 276.
People *v.* Cook (39 Cal. 658), Mun. Aid, 441.
People *v.* Cook (36 Am. & Eng. R. Cas. 256, 110 N. Y. 443, 18 N. E. Rep. 113; affirming 47 Hun 467), Reorg., 17; Stat., 13.
People *v.* Cook (57 Am. & Eng. R. Cas. 256, 148 U. S. 397, 13 Sup. Ct. Rep. 645; affirming 36 Am. & Eng. R. Cas. 256, 110 N. Y. 443, 18 N. E. Rep. 113), Reorg., 17.
People *v.* Cook (42 N. Y. S. R. 245, 62 Hun 303, 17 N. Y. Supp. 546), Tax., 276.
People *v.* Coon (25 Cal. 635), Mun. Aid, 202; Stat., 63.
People *v.* Crockett (9 Cal. 112), Stock, 34.
People *v.* Delaware & H. Canal Co. (54 Hun 598, 27 N. Y. S. R. 624, 7 N. Y. Supp. 890; affirmed in 121 N. Y. 666, mem., 24 N. E. Rep. 1093), Tax., 40, 276.
People *v.* Delaware, L. & W. R. Co. (35 Hun (N. Y.) 29), Indep. Contr., 25.
People *v.* Detroit & P. R. Co. (1 Mich. 458), Tax., 53.
People *v.* Detroit, G. H. & M. R. Co. (42 Am. & Eng. R. Cas. 257, 79 Mich. 471, 44 N. W. Rep. 934), Farm Cross., 2.
People *v.* Devin (17 Ill. 84), Stockh., 16.
People *v.* District Court (11 Colo. 147, 17 Pac. Rep. 298), Priv. Rds., 1.
People *v.* Dixon (8 Hun (N. Y.) 178), Tax., 276.
People *v.* Douglass (87 Cal. 281, 25 Pac. Rep. 417), Car. of P., 22, 581; Crim. L., 9.
People *v.* Duguid (68 Hun 243, 52 N. Y. S. R. 190, 22 N. Y. Supp. 988), Tax., 276.
People *v.* Dunkel (39 Mich. 255), Crim. L., 9.
People *v.* Dupuyt (71 Ill. 651), Mun. Aid, 29, 278.
People *v.* Dutcher (56 Ill. 144, 4 Am. Ry. Rep. 103), Mun. Aid, 139, 226.
People *v.* Dutchess & C. R. Co. (58 N. Y. 152, 7 Am. Ry. Rep. 10), Sts. & H., 192, 200.
People *v.* Eddy (3 Lans. (N. Y.) 80, 57 Barb. 593), Ry. Com'rs, 4.
People *v.* Edick (32 N. Y. S. R. 404, 10 N. Y. Supp. 299), Tax., 276.
People *v.* Eel River & E. R. Co. (98 Cal. 665, 33 Pac. Rep. 728), Direct., 54; Sts. & H., 6, 11; Ult. Vir., 18.
People *v.* Erie R. Co. (36 How. Pr. (N. Y.) 129), Receiv., 12, 16.
People *v.* Erie R. Co. (56 How. Pr. (N. Y.) 122), Cred. Bill, 6.
People *v.* First Judge (2 Hill (N. Y.) 398), Em. Dom., 539, 547.
People *v.* Ford County Sup'rs (63 Ill. 142), Mun. Aid, 312.
People *v.* Ft. Edward (70 N. Y. 28), Mun. Aid, 117, 127, 136.
People *v.* Fort St. & E. R. Co. (41 Mich. 413), St. Rys., 154.
People *v.* Ft. Wayne & E. R. Co. (92 Mich. 522, 52 N. W. Rep. 1010), St. Rys., 37, 44, 191.
People *v.* Franklin (5 Lans. (N. Y.) 129), Mun. Aid, 82, 84, 89, 91, 104.
People *v.* Ganley (29 N. Y. S. R. 130, 8 N. Y. Supp. 563, 56 Hun 639; affirmed in 131 N. Y. 566, mem., 42 N. Y. S. R. 947, 30 N. E. Rep. 64), Tax., 276.
People *v.* Genesee Valley C. R. Co. (30 Hun (N. Y.) 565; affirmed in 95 N. Y. 666, mem.), Costs, 4.
People *v.* Gilon (41 Hun 510, 3 N. Y. S. R. 358), Sts. & H., 352.
People *v.* Gilon (126 N. Y. 147, 27 N. E. Rep. 282, 37 N. Y. S. R. 17; reversing 58 Hun 76, 33 N. Y. S. R. 838, 11 N. Y. Supp. 439), St. Rys., 301; Tax., 276.
People *v.* Glann (70 Ill. 232), Mun. Aid, 226.
People *v.* Grant (50 N. Y. S. R. 465, 21 N. Y. Supp. 232, 66 Hun 634; affirmed in 138 N. Y. 653, mem., 53 N. Y. S. R. 931, 34 N. E. Rep. 513), St. Rys., 21.
People *v.* Granville (104 Ill. 285), Mun. Aid, 29, 288.
People *v.* Hamill (134 Ill. 666, 17 N. E. Rep. 799, 29 N. E. Rep. 280), Mun. Aid, 29, 317, 329.
People *v.* Haren (19 N. Y. S. R. 818, 3 N. Y. Supp. 86), Tax., 276.
People *v.* Harp Sup'rs (67 Ill. 62), Mun. Aid, 115, 126, 286.
People *v.* Hatch (65 Barb. (N. Y.) 430, 1 T. & C. 113), Mun. Aid, 89.
People *v.* Havemeyer (3 Hun (N. Y.) 97, 16 Abb. Pr. N. S. 219, 4 T. & C. 365, 47 How. Pr. 494), Mand., 24; Stat., 1, 34; Sts. & H., 25; Tax., 40.
People *v.* Hill (65 Barb. (N. Y.) 435; appeal dismissed in 53 N. Y. 547), Mun. Aid, 434.
People *v.* Henshaw (61 Barb. (N. Y.) 409), Mun. Aid, 6, 89.
People *v.* Hicks (105 N. Y. 198, 7 N. Y. S. R. 359, 11 N. E. Rep. 653; affirming 40 Hun 598, 2 N. Y. S. R. 294), Tax., 276.
People *v.* Hills (1 Lans. (N. Y.) 202), Direct., 4, 12, 35; Quo War., 3.
People *v.* Hitchcock (2 T. & C. (N. Y.) 134), Mun. Aid, 224.
People *v.* Hoe (20 Hun (N. Y.) 26), Rap. T. Acts, 2.
People *v.* Holden (82 Ill. 93), Mun. Aid, 233.
People *v.* Holden (91 Ill. 446), Mun. Aid, 293.

People *v.* Hudson River R. Co. (2 Abb. Pr. N. S. (N. Y.) 249, 32 How. Pr. 394), Injunc., 24.
People *v.* Hughitt (5 Lans. (N. Y.) 89), Mun. Aid, 87, 99.
People *v.* Hulbert (59 Barb. (N. Y.) 446), Mun. Aid, 44, 82, 88, 104, 171, 437.
People *v.* Hulbert (46 N. Y. 110; reversing 59 Barb. 446), Mun. Aid, 81, 437.
People *v.* Hutton (18 Hun (N. Y.) 116), Mun. Aid, 101, 106.
People *v.* Illinois & St. L. R. & C. Co. (122 Ill. 506, 14 N. E. Rep. 261), Car. of M., 56.
People *v.* Illinois C. R. Co. (62 Ill. 510, 6 Am. Ry. Rep. 201), Land Grants, 115.
People *v.* Jackson County Sup'rs (92 Ill. 441), Mun. Aid, 117, 137, 160.
People *v.* Kalamazoo Circuit Judge (35 Mich. 227, 15 Am. Ry. Rep. 349), Pl., 155.
People *v.* Keator (2 How. Pr. N. S. (N. Y.) 479), Tax., 276.
People *v.* Keator (67 How. Pr. (N. Y.) 277; affirmed in 36 Hun 592), Tax., 276.
People *v.* Keator (36 Hun (N. Y.) 592, 17 Abb. N. Cas. 369; affirming 67 How. Pr. 277; appeal dismissed in 101 N. Y. 610, mem., 3 How. Pr. N. S. 210), Tax., 276.
People *v.* Kerr (37 Barb. (N. Y.) 357; modifying 20 How. Pr. 144; affirmed in 27 N. Y. 188), Injunc., 32.
People *v.* Kerr (27 N. Y. 188, 25 How. Pr. 258), Em. Dom., 161, 180.
People *v.* Ketchum (72 Ill. 212), Charters, 125.
People *v.* Knowles (47 N. Y. 415), Mun. Aid, 436, 437.
People *v.* Laenna (67 Ill. 65), Mun. Aid, 138, 139.
People *v.* Lake Shore & M. S. R. Co. (13 Am. & Eng. R. Cas. 611, 52 Mich. 277, 17 N. W. Rep. 841), Cross., Sts. & H., 59.
People *v.* Lake Shore & M. S. R. Co. (11 Hun (N. Y.) 1; appeal dismissed in 70 N. Y. 220), For. Corp., 2.
People *v.* Laurence (70 Hun (N. Y.) 80, 53 N. Y. S. R. 536, 23 N. Y. Supp. 1095), Crim. L., 27.
People *v.* Law (34 Barb. (N. Y.) 494, 22 How. Pr. 109), Parties, 21; St. Rys., 98; Sts. & H., 106, 120, 142.
People *v.* Lawrence (41 N. Y. 137; affirming 36 Barb. 177), Stat., 34.
People *v.* Lockport & B. R. Co. (13 Hun (N. Y.) 211), Location, etc., 22.
People *v.* Loew (102 N. Y. 471, 2 N. Y. S. R. 52; affirming 39 Hun 490), Stat., 17.
People *v.* Logan County Sup'rs (45 Ill. 162), Mun. Aid, 80, 109.
People *v.* Logan County Sup'rs (63 Ill. 374), Estop., 12; Mun. Aid, 120, 137, 154, 165, 168, 286, 293, 294.
People *v.* Long Island R. Co. (31 Hun (N. Y.) 125), Mand., 15.
People *v.* Long Island R. Co. (60 How. Pr. (N. Y.) 395, 9 Abb. N. Cas. 181), Corp., 4; Mun. Corp., 26; Stat., 6.
People *v.* Long Island R. Co. (134 N. Y. 506, 31 N. E. Rep. 873, 47 N. Y. S. R. 648; affirming 58 Hun 412, 34 N. Y. S. R. 715, 12 N. Y. Supp. 41), Crim. L., 18; Stat., 7; Words & Ph., 163.
People *v.* Los Angeles Elec. R. Co. (91 Cal. 338, 27 Pac. Rep. 673), Elec. Rys., 2; Franch., 10; St. Rys., 116.
People *v.* Louisville & N. R. Co. (120 Ill. 48, 10 N. E. Rep. 657), Aband., 4; Car. of P., 215; Consol., 24, 34, 40; Contr., 1; Mun. Aid, 230; Sales of Rds., 14; Stat. & D., 47.
People *v.* Louisville & N. R. Co. (Ill.) (25 Am. & Eng. R. Cas. 235, 5 N. E. Rep. 379), Cov'ts, 8; Jurisd., 15; Mort., 249.
People *v.* Low (40 Hun (N. Y.) 176), Cert., 10.
People *v.* McKay (8 Am. & Eng. R. Cas. 205, 46 Mich. 439, 9 N. W. Rep. 486), Assault, 7; Stat. & D., 108.
People *v.* McLane (62 Cal. 616), Mand., 3.
People *v.* McMaster (10 Abb. Pr. N. S. (N. Y.) 132), Mun. Aid, 104.
People *v.* McRoberts (62 Ill. 38, 7 Am. Ry. Rep. 445), Em. Dom., 9, 28, 379, 775.
People *v.* Manhattan R. Co. (9 Abb. N. Cas. (N. Y.) 448, 24 Hun 662, mem.), Receiv., 27.
People *v.* Manhattan R. Co. (20 Abb. N. Cas. (N. Y.) 393), Mand., 24.
People *v.* Matchellor (53 N. Y. 128, 5 Am. Ry. Rep. 25), Mun. Aid, 15.
People *v.* Metropolitan El. R. Co. (26 Hun (N. Y.) 82), Leases, 22.
People *v.* Michigan S. & N. I. R. Co. (4 Mich. 398), Tax., 101.
People *v.* Michigan Southern R. Co. (3 Mich. 496), Em. Dom., 447, 448.
People *v.* Mississippi & A. R. Co. (13 Ill. 66), Quo War., 5.
People *v.* Mississippi & A. R. Co. (14 Ill. 440), Charters, 97.
People *v.* Mitchell (35 N. Y. 551; affirming 45 Barb. 208), Mun. Aid, 8, 54, 73.
People *v.* Morgan (65 Barb. (N. Y.) 473; overruled in 18 Hun 116; reversed in 55 N. Y. 587), Cert., 9, 10; Mun. Aid, 106, 433; Stat., 34.
People *v.* Morgan (55 N. Y. 587; reversing 65 Barb. 473, 1 T. & C. 101), Mun. Aid, 225.
People *v.* Newton (126 N. Y. 656, 27 N. E. Rep. 370, 37 N. Y. S. R. 391; dismissing appeal from 26 J. & S. 439, 34 N. Y. S. R. 584, 11 N. Y. Supp. 782, 19 Civ. Pro. Rep. 416), App., 20.
People *v.* Newton (34 N. Y. S. R. 584, 26 J. & S. 439, 19 Civ. Pro. 416, 11 N. Y. Supp. 782), Mand., 2.
People *v.* Newton (16 N. Y. S. R. 86, 1 N. Y. Supp. 197; reversing 14 N. Y. S. R. 906), Cable Rys., 1.
People *v.* Newton (38 Am. & Eng. R. Cas. 391, 112 N. Y. 396, 19 N. E. Rep. 831, 21 N. Y. S. R. 8; affirming 48 Hun 477, 1 N. Y. Supp. 197, 16 N. Y. S. R. 86), Cable Rys., 3.
People *v.* New York & H. R. Co. (26 How. Pr. (N. Y.) 44), Mun. Corp., 49.
People *v.* New York & H. R. Co. (45 Barb. (N. Y.) 73), Injunc., 15; Sts. & H., 84, 247, 422.
People *v.* New York C. & H. R. R. Co. (74 N. Y. 302; modifying 12 Hun 195),

Bridges, 31, 42; Crim. L., 21, 32; Cross., Sts. & H., 91; Sts. & H., 188.
People *v.* New York C. & H. R. R. Co. (23 N. Y. Supp. 456, 52 N. Y. S. R. 530), Cross., Sts. & H., 48, 63; Em. Dom., 113.
People *v.* New York C. & H. R. R. Co. (9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 3 Civ. Pro. 11, 2 McCar. 345; reversing 2 Civ. Pro. 82), Car. of M., 48; Car. of P., 106; Mand., 15, 30.
People *v.* New York, C. & St. L. R. Co. (129 N. Y. 474, 29 N. E. Rep. 959, 42 N. Y. S. R. 90; reversing 61 Hun 66, 39 N. Y. S. R. 725, 15 N. Y. Supp. 635), Consol., 6; Tax., 65.
People *v.* New York C. R. Co. (51 N. Y. 623), Agency, 105.
People *v.* New York C. R. Co. (24 N. Y. 485; affirming 34 Barb. 123), Canals, 6; Words & Ph., 199.
People *v.* New York C. R. Co. (5 Park. Cr. (N. Y.) 195), Crim. L., 18.
People *v.* New York C. R. Co. (13 N. Y. 78; affirming 25 Barb. 199), Cross., Inj. at, 154.
People *v.* New York C. R. Co. (28 Barb. (N. Y.) 284), Lim. of Ac., 65.
People *v.* New York C. U. R. Co. (39 N. Y. S. R. 425, 15 N. Y. Supp. 225; appeal dismissed in 129 N. Y. 621, mem., 41 N. Y. S. R. 945), Pl., 67.
People *v.* New York C. U. R. Co. (39 N. Y. S. R. 571, 15 N. Y. Supp. 245, 60 Hun 583, mem.), Pl., 174.
People *v.* New York C. U. R. Co. (21 N. Y. Supp. 373, 66 Hun 633, 50 N. Y. S. R. 454; affirmed in 137 N. Y. 606, mem., 51 N. Y. S. R. 930, 33 N. E. Rep. 744), Dissol., 7, 16, 17.
People *v.* New York, L. E. & W. R. Co. (17 Abb. N. Cas. (N. Y.) 304), Stat. & D., 29, 58.
People *v.* New York, L. E. & W. R. Co. (63 How. Pr. (N. Y.) 291), Mand., 15.
People *v.* New York, L. E. & W. R. Co. (22 Hun (N. Y.) 533), Car. of M., 47, 48.
People *v.* New York, L. E. & W. R. Co. (29 Am. & Eng. R. Cas. 480, 104 N. Y. 58, 9 N. E. Rep. 856, 5 N. Y. S. R. 550; reversing 40 Hun 570, 2 N. Y. S. R. 237), Stat. & D., 14, 20.
People *v.* New York, N. H. & H. R. Co. (10 Am. & Eng. R. Cas. 230, 89 N. Y. 266), Bridges, 24; Crim. L., 31; Nuis., 3; Sts. & H., 180.
People *v.* New York, N. H. & H. R. Co. (55 Hun 409, 29 N. Y. S. R. 172, 8 N. Y. Supp. 672; affirmed in 123 N. Y. 635, mem., 25 N. E. Rep. 953, mem., 33 N. Y. S. R. 1028), Car. of P., 190; Int. Com., 216; Stat., 58.
People *v.* New York, N. H. & H. R. Co. (11 Hun (N. Y.) 297), Sts. & H., 314.
People *v.* Niagara County Sup'rs (4 Hill. (N. Y.) 20), Tax., 100.
People *v.* North Chicago R. Co. (88 Ill. 537, 21 Am. Ry. Rep. 359), St. Rys., 219.
People *v.* Northern Pac. R. Co. (18 J. & S. (N. Y.) 456), Stockh., 7.
People *v.* North Pac. Coast R. Co. (24 Am. & Eng. R. Cas. 610, 68 Cal. 551, 10 Pac. Rep. 45), Tax., 322.
People *v.* O'Brien (36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173; reversing 10 N. Y. S. R. 596, 45 Hun 519), Dissol., 12, 28; Em. Dom., 129; Receiv., 75; Stat., 10; St. Rys., 12, 20, 28, 244.
People *v.* Ohio & M. R. Co. (21 Ill. App. 23), Fences, 76.
People *v.* Oldtown Sup'rs (88 Ill. 202, 21 Am. Ry. Rep. 297), Mun. Aid, 80.
People *v.* Oliver (1 T. & C. (N. Y.) 570), Mun. Aid, 88.
People *v.* Pacheco (27 Cal. 175), State Aid, 14.
People *v.* Park & O. R. Co. (76 Cal. 156, 18 Pac. Rep. 141), Nuis., 10; Trial, 100; Words & Ph., 178.
People *v.* Paton (5 N. Y. S. R. 316, 20 Abb. N. Cas. 172), Stock, 42, 81.
People *v.* Peck (42 How. Pr. (N. Y.) 425), Mun. Aid, 81, 89, 91, 93, 94, 95.
People *v.* Phillips (67 N. Y. 582), Mun. Aid, 435.
People *v.* Phyfe (53 Am. & Eng. R. Cas. 30, 136 N. Y. 554, 32 N. E. Rep. 978, 49 N. Y. S. R. 680; reversing 20 N. Y. Supp. 461), Crim. L., 38.
People *v.* Pierce (31 Barb. (N. Y.) 138), Tax., 127, 276.
People *v.* Pitman (9 N. Y. S. R. 469, 45 Hun 588), Cert., 8; Tax., 276.
People *v.* Pittsburg R. Co. (53 Cal. 694), Em. Dom., 188.
People *v.* Pittsburg R. Co. (22 Am. & Eng. R. Cas. 206, 67 Cal. 625, 8 Pac. Rep. 381), Tax., 21.
People *v.* Placerville & S. V. R. Co. (34 Cal. 656), Tax., 21, 249.
People *v.* Pond (13 Abb. N. Cas. (N. Y.) 1; appeal dismissed in 92 N. Y. 643, mem.), Tax., 276.
People *v.* Potrero & B. V. R. Co. (67 Cal. 166, 7 Pac. Rep. 445), Bridges, 61, 64.
People *v.* Pueblo County Com'rs (2 Colo. 360, 20 Am. Ry. Rep. 237), Mun. Aid, 73, 142.
People *v.* Reid (46 N. Y. S. R. 408, 64 Hun 553, 19 N. Y. Supp. 528), Tax., 68, 276.
People *v.* Remington (10 N. Y. S. R. 310, 45 Hun 329; affirmed in 109 N. Y. 631, mem., 16 N. E. Rep. 680, mem.), Liens, 45.
People *v.* Rensselaer & S. R. Co. (15 Wend. (N. Y.) 113), Charters, 167; Quo War., 8, 11.
People *v.* Rich (54 Cal. 74), St. Rys., 243.
People *v.* River Raisin & L. E. R. Co. (12 Mich. 389), Corp., 7; Quo War., 8.
People *v.* Rochester & S. L. R. Co. (14 Hun (N. Y.) 371; modified and affirmed in 76 N. Y. 294; see 15 Hun 188), Cat.-Gds., 6.
People *v.* Rochester & S. L. R. Co. (76 N. Y. 294), Mand., 29, 31.
People *v.* Rochester & S. L. R. Co. (15 Hun (N. Y.) 188), Mand., 36.
People *v.* Rome, W. & O. R. Co. (28 Am. & Eng. R. Cas. 35, 103 N. Y. 95, 8 N. E.

Rep. 369, 3 N. Y. S. R. 39; reversing 38 Hun 640, mem.), Mand., 7.
People *v.* Roosa (2 How. Pr. N. S. (N. Y.) 454), Tax., 276.
People *v.* Ross (15 How. Pr. (N. Y.) 63), Tax., 276.
People *v.* Sacramento County Sup'rs (59 Cal. 321), Tax., 249.
People *v.* St. Louis (10 Ill. 351), Rip. Rts., 1.
People *v.* St. Louis & C. R. Co. (106 Ill. 412), App., 4.
People *v.* St. Louis & S. F. R. Co. (44 Hun 552, 7 N. Y. S. R. 415, 19 Abb. N. Cas. 1), Refer., 1.
People *v.* Salem Tp. (20 Mich. 452), Mun. Aid, 19; Words & Ph., 176.
People *v.* San Francisco & A. R. Co. (35 Cal. 606), Ferries, 8, 13; Tax., 6.
People *v.* San Francisco Sup'rs (27 Cal. 655), Contr., 7; Mun. Aid, 149, 294, 308.
People *v.* Santa Anna (67 Ill. 57), Mun. Aid, 138, 165.
People *v.* Sawyer (52 N. Y. 296), Mun. Aid, 89.
People *v.* Schoonmaker (63 Barb. (N. Y.) 44), Mun. Aid, 104; Words & Ph., 196.
People *v.* Shields (6 Hun (N. Y.) 556), Tax., 276.
People *v.* Smith (45 N. Y. 772; affirming 3 Lans. 291), Mun. Aid, 81, 88, 433, 437.
People *v.* Smith (55 N. Y. 135), Mun. Aid, 87.
People *v.* Smith (85 N. Y. 628; dismissing appeal from 24 Hun 66), App., 12.
People *v.* Southern Pac. R. Co. (65 Cal. 553, 4 Pac. Rep. 568), Rem. of C., 6.
People *v.* Spencer (55 N. Y. 1), Mun. Aid, 99.
People *v.* Squire (110 N. Y. 666, 2 Silv. App. 113, 18 N. E. Rep. 362, 18 N. Y. S. R. 528; affirming 21 J. & S. 536), App., 142.
People *v.* Stanford (77 Cal. 360, 18 Pac. Rep. 85, 19 Pac. Rep. 693), Assign., 6; Franch., 10; Quo War., 3, 7, 8, 9, 12.
People *v.* State Treasurer (23 Mich. 499, 1 Am. Ry. Rep. 96), Mand., 19; Mun. Aid, 15, 416.
People *v.* State Treasurer (24 Mich. 468, 4 Am. Ry. Rep. 116), Mun. Aid, 399, 401.
People *v.* Stites (75 Cal. 570, 17 Pac. Rep. 693), Crim. L., 35.
People *v.* Stockton & C. R. Co. (49 Cal. 414), Superint., 2.
People *v.* Stockton & V. R. Co. (45 Cal. 306, 5 Am. Ry. Rep. 1), Incorp., 10; Subscr., 20.
People *v.* Stupp (18 N. Y. S. R. 500, 49 Hun 544, 2 N. Y. Supp. 537), Bills & N., 14; Mun. Aid, 421.
People *v.* Sturtevant (9 N. Y. 263; affirming 1 Duer 451, 512), St. Rys., 36.
People *v.* Suffern (68 N. Y. 321; affirming 6 Hun 304), Mun. Aid, 88.
People *v.* Tazewell County (22 Ill. 147), Mun. Aid, 148, 279, 311.
People *v.* Third Ave. R. Co. (45 Barb. (N. Y.) 63, 30 How. Pr. 121; affirmed (?) 31 How. Pr. 637), Evid., 133; Nuis., 19; St. Rys., 19.
People *v.* Tinsdale (10 Abb. Pr. N. S. (N. Y.) 374), Crim. L., 14.
People *v.* Toohey (4 N. Y. S. R. 895), Tax., 276.
People *v.* Troy & B. R. Co. (37 How. Pr. (N. Y.) 427), Bridges, 17, 32; Cross., St. & H., 25; Mand., 12.
People *v.* Troy Assessors (2 Abb. N. Cas. (N. Y.) 86), Sts. & H., 352.
People *v.* Trustees of Schools (78 Ill. 136), Mun. Aid, 11.
People *v.* Tubbs (49 N. Y. 356, 4 Am. Ry. Rep. 127; affirming 59 Barb. 401), Location, etc., 8, 10, 11.
People *v.* Ulster & D. R. Co. (128 N. Y. 240, 28 N. E. Rep. 635, 40 N. Y. S. R. 280; affirming 58 Hun 266, 34 N. Y. S. R. 983, 12 N. Y. Supp. 303), Dissol., 4, 11, 19, 24.
People *v.* Ulster & D. R. Co. (28 N. Y. S. R. 19, 54 Hun 639, 5 Silv. Sup. Ct. 32, 8 N. Y. Supp. 149), Quo War., 9.
People *v.* Van Valkenburgh (63 Barb. (N. Y.) 105), Mun. Aid, 80, 87, 212.
People *v.* Wabash, St. L. & P. R. Co. (12 Ill. App. 263), Att'y-Gen., 4.
People *v.* Wabash, St. L. & P. R. Co. (7 Am. & Eng. R. Cas. 628, 104 Ill. 476), Charges, 12.
People *v.* Wagner (7 Lans. (N. Y.) 467, 1 T. & C. 221), Mun. Aid, 89, 433.
People *v.* Walter (68 N. Y. 403; reversing 2 Hun 385, 4 T. & C. 638), Mun. Aid, 435.
People *v.* Waynesville Sup'r (88 Ill. 469, 21 Am. Ry. Rep. 339), Mun. Aid, 236 242.
People *v.* Wells (19 Cal. 293), Tax., 393.
People *v.* Wemple (117 N. Y. 136, 29 Am. & Eng. R. Corp. Cas. 610, 22 N. E. Rep. 1046, 27 N. Y. S. R. 341, 6 L. R. A. 303, 2 Int. Com. Rep. 735; affirming 52 Hun 434, 24 N. Y. S. R. 668, 5 N. Y. Supp. 581), Tax., 71.
People *v.* Wemple (131 N. Y. 64, 43 N. Y. S. R. 963, mem., 29 N. E. Rep. 1002; affirming 61 Hun 83), Int. Com., 201.
People *v.* Wemple (54 Am. & Eng. R. Cas. 1, 138 N. Y. 1, 51 N. Y. S. R. 702; affirming 65 Hun 252, 47 N. Y. S. R. 695, 20 N. Y. Supp. 287, 29 Abb. N. Cas. 85), Int. Com., 201; Tax., 67.
People *v.* Wilder (3 N. Y. S. R. 159), Tax., 276.
People *v.* Young (65 Cal. 225, 3 Pac. Rep. 813), Crim. L., 10.
People *v.* Zoeller (15 N. Y. Supp. 684), Tax., 276.
People's Bank *v.* Alabama G. S. R. Co. (65 Miss. 365, 4 So. Rep. 115), Tax., 397.
People's Pass. R. Co. *v.* Baldwin (14 Phila. (Pa.) 231), St. Rys., 74.
People's Pass. R. Co. *v.* Green (6 Am. & Eng. R. Cas. 168, 56 Md. 84), Evid., 49; St. Rys., 408.
People's Pass. R. Co. *v.* Lauderbach (Pa.) (26 Am. & Eng. R. Cas. 166, 3 Atl. Rep. 672), Collis., 24.
People's Pass. R. Co. *v.* Marshall St. R. Co.

(20 Phila. (Pa.) 203), Charters, 57; St. Rys., 72.
People's Pass. R. Co. *v.* Memphis (Tenn.) (16 S. W. Rep. 973), St. Rys., 45, 51.
People's Pass. R. Co. *v.* Weiller (Pa.) (2 Atl. Rep. 510), St. Rys., 346.
People's R. Co., In re (38 Am. & Eng. R. Cas. 404, 112 N. Y. 578, 20 N. E. Rep. 367, 21 N. Y. S. R. 496; affirming 48 Hun 617, mem.), Cable Rys., 4; St. Rys., 63, 101; Sts. & H., 128.
People's R. Co. *v.* Memphis R. Co. (10 Wall. (U. S.) 38), St. Rys., 40.
People's R. Co. *v.* Syracuse, B. & N. Y. R. Co. (22 Abb. N. Cas. 427, 6 N. Y. Supp. 326), Cross. Rys., 85.
People's Rapid Transit Co., In re (46 Am. & Eng. R. Cas. 114, 125 N. Y. 93, 34 N. Y. S. R. 595, 26 N. E. Rep. 25; affirming 32 N. Y. S. R. 552, 57 Hun 587, 10 N. Y. Supp. 849), Elev. Rys., 2.
People's Rapid Transit Co. *v.* Dash (46 Am. & Eng. R. Cas. 114, 125 N. Y. 93, 26 N. E. Rep. 25, 34 N. Y. S. R. 595; affirming 57 Hun 587, 32 N. Y. S. R. 552, 10 N. Y. Supp. 849), Elev. Rys., 2; Stat., 37; Sts. & H., 53.
People's St. R. Co. *v.* Spencer (156 Pa. St. 85, 27 Atl. Rep. 113), Leases, 3; Trial, 96.
Peoria & B. V. R. Co. *v.* Bryant (15 Ill. 438), Em. Dom., 785.
Peoria & F. R. Co. *v.* Barnum (14 Am. & Eng. R. Cas. 331, 107 Ill. 160), Em. Dom., 922, 926.
Peoria & O. R. Co. *v.* Elting (17 Ill. 429), Subscr., 121.
Peoria & P. U. R. Co. *v.* Barton (38 Ill. App. 469), Bridges, 15, 23; Flood. Lds., 11.
Peoria & P. U. R. Co. *v.* Buckley (21 Am. & Eng. R. Cas. 94, 114 Ill. 337, 2 N. E. Rep. 179), Wareh., 11.
Peoria & P. U. R. Co. *v.* Chicago, P. & S. W. R. Co. (36 Am. & Eng. R. Cas. 488, 127 U. S. 200, 8 Sup. Ct. Rep. 1125), Receiv., 67.
Peoria & P. U. R. Co. *v.* Chicago, R. I. & P. R Co. (18 Am. & Eng. R. Cas. 506, 109 Ill. 135, 50 Am. Rep. 605), Car. of M., 7, 36.
Peoria & P. U. R. Co. *v.* Clayberg (15 Am. & Eng. R. Cas. 356, 107 Ill. 644), Comp. Neg., 9, 15; Death, etc., 229; Negl., 105.
Peoria & P. U. R. Co. *v.* Herman (39 Ill. App. 287), Cross., Inj. at, 63, 72; Death, etc., 341.
Peoria & P. U. R. Co. *v.* O'Brien (18 Ill. App. 28), Death, etc., 345; Negl., 106.
Peoria & P. U. R. Co. *v.* Peoria & F. R. Co. (10 Am. & Eng. R. Cas. 129, 105 Ill. 110), Corp., 20; Cross. Rys., 48; Em. Dom., 606, 715, 886, 907; Witn., 197.
Peoria & P. U. R. Co. *v.* United States Rolling Stock Co. (136 Ill. 643, 27 N. E. Rep. 59; reversing 28 Ill. App. 79), Car. of M., 23, 94, 356, 620; Words & Ph., 7.
Peoria & R. I. R. Co. *v.* Birkett (62 Ill. 332, 7 Am. Ry. Rep. 334), Em. Dom., 129, 591, 821, 837, 990.
Peoria & R. I. R. Co. *v.* Bryant (57 Ill. 473, 10 Am. Ry. Rep. 464), Em. Dom., 318, 562, 717, 821.
Peoria & R. I. R. Co. *v.* Coal Valley Mining Co. (68 Ill. 489, 2 Am. Ry. Rep. 295), Consol., 26.
Peoria & R. I. R. Co. *v.* Lane (83 Ill. 448), Car. of P., 494; Leases, 112.
Peoria & R. I. R. Co. *v.* McClenahan (74 Ill. 435), Animals, 75.
Peoria & R. I. R. Co. *v.* Mitchell (74 Ill. 394), Em. Dom., 846, 854.
Peoria & R. I. R. Co. *v.* Preston (35 Iowa 115, 5 Am. Ry. Rep. 7), Subscr., 50, 121.
Peoria & R. I. R. Co. *v.* Rice (75 Ill. 329), Em. Dom., 257.
Peoria & R. I. R. Co. *v.* Schertz (84 Ill. 135, 16 Am. Ry. Rep. 434), Sts. & H., 141, 213, 224.
Peoria & R. I. R. Co. *v.* Warner (61 Ill. 52, 12 Am. Ry. Rep. 444), Em. Dom., 55, 1069.
Peoria & S. R. Co. *v.* Thompson (7 Am. & Eng. R. Cas. 101, 103 Ill. 187), Bonds, 2; Mort., 241.
Peoria, A. & D. R. Co. *v.* Sawyer (71 Ill. 361), Em. Dom., 357, 714.
Peoria Bridge Assoc. *v.* Loomis (20 Ill. 235), Bridges, 20; Dam., 28, 67, 68, 70, 73, 74.
Peoria, D. & E. R. Co. *v.* Aten (43 Ill. App. 68), Animals, 35, 118, 452; Negl., 41.
Peoria, D. & E. R. Co. *v.* Babbs (23 Ill. App. 454), Farm Cross., 13; Fences, 90.
Peoria, D. & E. R. Co. *v.* Berry (15 Ill. App. 155), Cross., Inj. at, 352.
Peoria, D. & E. R. Co. *v.* Booth (11 Ill. App. 358), New Tr., 103.
Peoria, D. & E. R. Co. *v.* Dugan (10 Ill. App. 233), Animals, 58, 117.
Peoria, D. & E. R. Co. *v.* Duggan (32 Ill. App. 351), Injunc., 4.
Peoria, D. & E. R. Co. *v.* Duggan (20 Am. & Eng. R. Cas. 489, 109 Ill. 537, 50 Am. Rep. 619), Animals, 9, 584; Fences, 2; Stat., 26.
Peoria, D. & E. R. Co. *v.* Foltz (13 Ill. App. 535), Cross., Inj. at, 162.
Peoria, D. & E. R. Co. *v.* Goar (29 Am. & Eng. R. Cas. 189, 118 Ill. 134, 8 N. E. Rep. 682), Tax., 257.
Peoria, D. & E. R. Co. *v.* Hardwick (48 Ill. App. 562), Employés, Inj. to, 46, 137, 260.
Peoria, D. & E. R. Co. *v.* Johns (43 Ill. App. 83), Employés, Inj. to, 193, 634; Fel. Serv., 305; Negl., 94.
Peoria, D. & E. R. Co. *v.* Lyons (9 Ill. App. 350), Cross., Sts. & H., 25; Sts. & H., 417.
Peoria, D. & E. R. Co. *v.* Miller (11 Ill. App. 375), Animals, 210; Comp. Neg., 16.
Peoria, D. & E. R. Co. *v.* People (116 Ill. 401, 6 N. E. Rep. 497), Evid., 111; Mun. Aid, 410.
Peoria, D. & E. R. Co. *v.* People (141 Ill. 483, 31 N. E. Rep. 113), Tax., 257.
Peoria, D. & E. R. Co. *v.* Powell (32 Ill. App. 53), App., 121.
Peoria, D. & E. R. Co. *v.* Puckett (42 Ill. App. 642), Employés, Inj. to, 268, 409, 738.
Peoria, D. & E. R. Co. *v.* Purviance (15 Ill. App. 112), Animals, 584.

Peoria, D. & E. R. Co. *v.* Reed (17 Ill. App. 413), Negl., 61.
Peoria, D. & E. R. Co. *v.* Rice (46 Ill. App. 60), New Tr., 29; Phys. Exam., 2.
Peoria, D. & E. R. Co. *v.* Rice (144 Ill. 227, 33 N. E. Rep. 951), Contrib. Neg., 44; Employés, Inj. to, 647; Fel. Serv., 124, 289, 347; Phys. Exam., 2; Trial, 154.
Peoria, D. & E. R. Co. *v.* Shelly (25 Ill. App. 141), Animals, 190.
Peoria, D. & E. R. Co. *v.* Schiller (12 Ill. App. 443), Cat.-Gds., 11; Fences, 8.
Peoria, D. & E. R. Co. *v.* Wagner (18 Ill. App. 398), Evid., 234; Negl., 104.
Peoria G. L. & C. Co. *v.* Peoria Terminal R. Co. (146 Ill. 372, 34 N. E. Rep. 550), Em. Dom., 569, 570, 583, 620, 626.
Peoria, P. & J. R. Co. *v.* Barton (80 Ill. 72), Animals, 124, 174, 204.
Peoria, P. & J. R. Co. *v.* Black (58 Ill. 33, 10 Am. Ry. Rep. 399), Em. Dom., 732, 946.
Peoria, P. & J. R. Co. *v.* Champ (75 Ill. 577), Animals, 265.
Peoria, P. & J. R. Co. *v.* Laurie (63 Ill. 264, 7 Am. Ry. Rep. 214), Em. Dom., 50, 313, 732; Witn., 158.
Peoria, P. & J. R. Co. *v.* McIntire (39 Ill. 298), Animals, 315.
Peoria, P. & J. R. Co. *v* Peoria & S. R. Co. (66 Ill. 174), Em. Dom., 111, 843.
Peoria, P. & J. R. Co. *v.* Reynolds (88 Ill. 418, 21 Am. Ry. Rep. 324), Car. of P., 165, 587; Derailm., 5.
Peoria, P. & J. R. Co. *v.* Siltman (67 Ill. 72), Cross., Inj. at, 125, 141.
Peoria, P. & J. R. Co. *v.* Siltman (88 Ill. 529, 21 Am. Ry. Rep. 352), Cross., Inj. at, 150.
Pepper *v.* Southeastern R. Co. (17 L. T. 469), Bagg., 130.
Percey *v.* Fitchburg R. Co. (27 N. Y. Supp. 1040, 57 N. Y. S. R. 467), Trial, 64.
Pereira *v.* Central Pac. R. Co. (18 Am. & Eng. R. Cas. 565, 66 Cal. 92, 4 Pac. Rep. 988), Bills of L., 17; Car. of M., 138, 578.
Perigo *v.* Chicago, R. I. & P. R. Co. (52 Iowa 276, 3 N. W. Rep. 43), Employés, Inj. to, 231.
Perigo *v.* Chicago, R. I. & P. R. Co. (55 Iowa 326, 7 N. W. Rep. 627), Employés, Inj. to, 85, 307, 619; Evid., 192.
Perishable Freight Transp. Co. *v.* O'Neill (41 Ill. App. 423), Car. of M., 185.
Perkins *v.* Buffalo, R. & P. R. Co. (32 N. Y. S. R. 41, 10 N. Y. Supp. 356, 57 Hun 586, mem.; affirmed in 125 N. Y. 776, mem., 36 N. Y. S. R. 1011), Death, etc., 262, 295; Evid., 298.
Perkins *v.* Chicago, St. L. & N. O. R. Co. (21 Am. & Eng. R. Cas. 378, 60 Miss. 726), Car. of P., 3, 288.
Perkins *v.* Concord R. Co. (44 N. H. 223), Evid., 210, 221; Witn., 189.
Perkins *v.* Eastern R. Co. (29 Me. 307), Animals, 56, 117; Fences, 66.
Perkins *v.* London & N. W. R. Co. (1 Ry. & C. T. Cas. 327), Charges, 112.
Perkins *v.* Maine C. R. Co. (72 Me. 95), Em. Dom., 371, 1075.
Perkins *v.* Missouri, K. & T. R. Co. (55 Mo. 201), Eject. Pass., 52, 57, 90, 113.
Perkins *v.* New York C. R. Co. (24 N. Y. 196), Car. of P., 334, 338; Passes, 35.
Perkins *v.* Portland, S. & P. R. Co. (47 Me. 573), Agency, 110, 112; Car. of M., 615; Car. of P., 507, 508; Ult. Vir., 6.
Perkins *v.* Port Washington (37 Wis. 177), Mun. Aid, 301.
Perkins *v.* St. Louis, I. M. & S. R. Co. (103 Mo. 52, 15 S. W. Rep. 320), Animals, 9, 80, 137.
Perkiomen Ave. Pass. R. Co.'s Appeal (Pa.) (4 Atl. Rep. 458), Injunc., 19.
Perley *v.* Boston, C. & M. R. Co. (57 N. H. 212), Em. Dom., 989.
Perley *v.* Eastern R. Co. (98 Mass. 414), Fires, 9, 80.
Perley *v.* New York C. & H. R. R. Co. (65 N. Y. 374), Bagg., 38.
Perlmutter *v.* Highland St. R. Co. (121 Mass. 497), App., 37.
Perren *v.* Monmouthshire R. & C. Co. (11 C. B. 855, 17 Jur. 532, 22 L. J. C. P. 162), Tender, 7.
Perrin *v.* Manhattan R. Co. (56 Fed. Rep. 503), Pat. for Inv., 30.
Perrin *v.* New London (67 Wis. 416, 30 N. W. Rep. 623), Mun. Aid, 74, 278, 283.
Perriques *v.* Missouri Pac. R. Co. (19 Am. & Eng. R. Cas. 578, 78 Mo. 91), Animals, 353.
Perry *v.* Carmichael (1 Am. & Eng. R. Cas. 174, 95 Ill. 519), Death, etc., 57, 58.
Perry *v.* Central R. Co. (66 Ga. 746), Car. of P., 223, 273; Dam., 7; Negl., 48.
Perry *v.* Dubuque S. W. R. Co. (36 Iowa 102), Animals, 184, 509, 543.
Perry *v.* Erie Transfer Co. (20 N. Y. Supp. 891; reversing 19 N. Y. Supp. 239; adhered to in 23 N. Y. Supp. 878), For. Corp., 24.
Perry *v.* Florida C. & P. R. Co. (3 Int. Com. Rep. 740, 5 Int. Com. Com. 97), Int. Com., 31, 35, 98, 142, 175, 176.
Perry *v.* Georgia R. & B. Co. (85 Ga. 193, 11 S. E. Rep. 605), Death, etc., 132.
Perry *v.* Keene (56 N. H. 514, 20 Am. Ry. Rep. 184), Mun. Aid, 43.
Perry *v.* Keene (58 N. H. 40), Mun. Aid, 153.
Perry *v.* Little Rock & Ft. S. R. Co. (25 Am. & Eng. R. Cas. 44, 44 Ark. 383), Contr., 2.
Perry *v.* New Orleans, M. & C. R. Co. (55 Ala. 413), Evid., 111; St. Rys., 22.
Perry *v.* Pittsburg Union Pass. R. Co. (153 Pa. St. 236, 25 Atl. Rep. 772), St. Rys., 519.
Perry *v.* St. Joseph & W. R. Co. (11 Am. & Eng. R. Cas. 663, 29 Kan. 420), Death, etc., 60.
Perry *v.* Southern Pac. R. Co. (50 Cal. 578, 12 Am. Ry. Rep. 187), Fires, 66, 249, 318, 320.
Perry *v.* Thompson (98 Mass. 249), Car. of M., 432.
Perry *v.* Turner (55 Mo. 418), Stockh., 42.
Perry County *v.* Newark, S. & S. R. Co. (43 Ohio St. 451, 2 N. E. Rep. 854), Bridges, 29; Lim. of Ac., 30.

Perry County *v.* Selma, M. & M. R. Co. (58 Ala. 546, 20 Am. Ry. Rep. 372), Tax., 246, 319.
Perry County *v.* Selma, M. & M. R. Co. (7 Am. & Eng. R. Cas. 298, 65 Ala. 391), Tax., 12, 246, 319, 322.
Perry County R. Extension Co. *v.* Newport & S. V. R. Co. (55 Am. & Eng. R. Cas. 12, 150 Pa. St. 193, 24 Atl. Rep. 709), Cross. Rys., 1, 63, 64, 65; Cross., Sts. & H., 92.
Peise *v.* Atchison, T. & S. F. R. Co. (51 Mo. App. 171), Animals, 447.
Pershing *v.* Chicago, B. & Q. R. Co. (34 Am. & Eng. R. Cas. 405, 71 Iowa 561, 32 N. W. Rep. 488), Bridges, 20; Car. of P., 139, 140, 174, 180; Death, etc., 239; Derailm., 5.
Persinger *v.* Wabash, St. L. & P. R. Co. (82 Mo. 196), Animals, 489.
Person *v.* Warren R. Co. (32 N. J. L. 441), Mand., 18.
Peru & I. R. Co. *v.* Bradshaw (6 Ind. 146), Death, etc., 18.
Peru & I. R. Co. *v.* Hanna (68 Ind. 562), Sts. & H., 344.
Peru & I. R. Co. *v.* Hasket (10 Ind. 409), Animals, 73.
Peruvian R. Co. *v.* Thames & M. M. I. Co. (L. R. 2 Ch. 617, 36 L. J. Ch. 864, 16 L. T. N. S. 644, 15 W. R. 1002), Bills & N., 4, 5.
Peschel *v.* Chicago, M. & St. P. R. Co. (17 Am. & Eng. R. Cas. 545, 62 Wis. 338, 21 N. W. Rep. 269), Fel. Serv., 1, 13, 15, 317.
Peterborough R. Co. *v.* Nashua & L. R. Co. (59 N. H. 385), Estop., 25; Stock, 53.
Peterborough R. Co. *v.* Wood (61 N. H. 418), Evid., 178.
Peterkin *v.* New Orleans (2 Woods (U. S.) 100), Mun. Aid, 396, 405.
Peters *v.* Boston & M. R. Co. (114 Mass. 127), Leases, 8, 13.
Peters *v.* Hastings & D. R. Co. (19 Minn. 260) (Gil. 220), Em. Dom., 937.
Peters *v.* Lewes & E. G. R. Co. (1 Am. & Eng. R. Cas. 583, L. R. 16 Ch. D. 703; affirmed in 3 Am. & Eng. R. Cas. 624, L. R. 18 Ch. D. 429), Em. Dom., 1093, 1168.
Peters *v.* Lewes & E. G. R. Co. (L. R. 18 Ch. D. 429, 50 L. J. Ch. D. 839, 45 L. T. 234, 29 W. R. 875; affirming L. R. 16 Ch. D. 703, 50 L. J. Ch. D. 172, 44 L. T. 372, 29 W. R. 422), Trusts, 8.
Peters *v.* Lincoln & N. W. R. Co. (2 McCrary (U. S.) 275, 12 Fed. Rep. 513), Leases, 20.
Peters *v.* Lincoln & N. W. R. Co. (4 McCrary (U. S.) 269, 14 Fed. Rep. 319), Leases, 20; Subscr., 146.
Peters *v.* Marietta & C. R. Co. (18 Am. & Eng. R. Cas. 492, 42 Ohio St. 275, 41 Am. Rep. 814), Charges, 22, 41.
Peters *v.* New Orleans, J. & G. N. R. Co. (16 La. Ann. 222), Car. of L. S., 4.
Peters *v.* New Orleans, M. & C. R. Co. (56 Ala. 528), Bridges, 60.
Peters *v.* Rylands (20 Pa. St. 497), Govt. Rds, 7.
Peters *v.* St. Louis & I. M. R. Co. (23 Mo. 107), Liens, 43.
Peters *v.* St. Louis & I. M. R. Co. (24 Mo. 586), Assign., 20; Contr. Rys., 92; Liens, 43, 50.
Peters *v.* St. Louis & I. M. R. Co. (59 Mo. 406), Appear., 5.
Peters *v.* Stewart (35 Am. & Eng. R. Cas. 174, 72 Wis. 133, 39 N. W. Rep. 380), Fences, 58.
Petersburg *v.* Petersburg R. Co. (29 Gratt. (Va.) 773), Tax., 224.
Petersburg R. Co. *v.* Hite (81 Va. 767), Contrib. Neg., 109; Fright. Teams, 4.
Petersburg R. Co. *v.* Northampton County Com'rs (81 N. Car. 487), Tax., 144.
Petersen *v.* Case (18 Am. & Eng. R. Cas. 578, 21 Fed. Rep. 885), Car. of M., 565, 566, 621.
Peterson *v.* Chicago & N. W. R. Co. (31 Am. & Eng. R. Cas. 292, 67 Mich. 102, 10 West. Rep. 870, 34 N. W. Rep. 260), Employés, Inj. to, 176; Fel. Serv., 1, 20, 45, 142, 333.
Peterson *v.* Chicago & W. M. R. Co. (64 Mich. 621, 31 N. W. Rep. 548), Fright. Teams, 3; Sts. & H., 405; Trial, 105.
Peterson *v.* Chicago, M. & St. P. R. Co. (36 Minn. 399, 31 N. W. Rep. 515), Release, 18.
Peterson *v.* Chicago, M. & St. P. R. Co. (38 Minn. 511, 39 N. W. Rep. 485), Release, 15; Witn., 189, 191.
Peterson *v.* Chicago, R. I. & P. R. Co. (80 Iowa 92, 45 N. W. Rep. 573), Bagg., 21; Tickets & F., 2.
Peterson *v.* Ferreby (30 Iowa 327), Em. Dom., 156, 954.
Peterson *v.* Navy Yard, B. S. & F. R. Co. (5 Phila. (Pa.) 199), Nuis., 3; Sts. & H., 245.
Peterson *v.* Reg. (2 Can. Exch. 67), Agency, 118.
Petrie *v.* Columbia & G. R. Co. (27 So. Car. 63, 2 S. E. Rep. 837), Evid., 202.
Petrie *v.* Columbia & G. R. Co. (35 Am. & Eng. R. Cas. 430, 29 So. Car. 303, 7 S. E. Rep. 515), App., 24; Cross., Inj. at, 144; Death, etc., 43, 200, 252, 310, 353, 413; Trial, 39, 72, 78.
Petrie *v.* New York C. & H. R. R. Co. (49 N. Y. S. R. 279, 66 Hun 282, 21 N. Y. Supp. 159), Cross., Inj. at, 158, 297.
Petrie *v.* Pennsylvania R. Co. (1 Am. & Eng. R. Cas. 258, 42 N. J. L. 449), Tickets & F., 46.
Petrie *v.* Wright (14 Miss. 647), Constr. Rys., 22; Contr., 1; Fraud. Conv., 2; Mort., 206.
Pettibone *v.* La Crosse & M. R. Co. (14 Wis. 443), Em. Dom., 449, 1040, 1043.
Pettibone *v.* Toledo, C. & St. L. R. Co. (36 Am. & Eng. R. Cas. 227, 148 Mass. 411, 19 N. E. Rep. 337, 1 L. R. A. 787), Bonds, 34.
Pettingill *v.* Androscoggin R. Co. (51 Me. 370), Attach., 27.
Pettus *v.* Georgia R. & B. Co. (3 Woods (U. S.) 620), Rem. of C., 20.
Petty *v.* Hannibal & St. J. R. Co. (28 Am. & Eng. R. Cas. 618, 88 Mo. 306), Contrib. Neg., 59, 84; Cross., Inj. at, 120, 130, 198, 291; Death, etc., 295.
Petty *v.* Myers (49 Ind. 1), Mun. Aid, 30, 244, 411.

Pew *v.* Buffalo & L. H. R. Co. (17 U. C. Q. B. 282), Em. Dom., 1216.
Peyser *v.* Metropolitan El. R. Co. (12 Daly (N. Y.) 70), Elev. Rys., 51.
Peyser *v.* Metropolitan El. R. Co. (13 Daly (N. Y.) 122), Elev. Rys., 51, 117, 145, 162.
Peyser *v.* New York El. R. Co. (12 Abb. N. Cas. (N. Y.) 276), Elev. Rys., 50, 65.
Peyton *v.* Chicago, R. I. & P. R. Co. (70 Iowa 522, 30 N. W. Rep. 877), Animals, 107.
Peyton *v.* New York El. R. Co. (42 N. Y. S. R. 843, 62 Hun 536, 17 N. Y. Supp. 244), Elev. Rys., 119.
Peyton *v.* Texas & P. R. Co. (41 Am. & Eng. R. Cas. 550, 41 La. Ann. 861, 6 So. Rep. 690), App., 126; Death, etc., 177; Negl., 23.
Pfaff *v.* Terre Haute & I. R. Co. (29 Am. & Eng. R. Cas. 181, 108 Ind. 144, 9 N. E. Rep. 93), Tax., 77; Words & Ph., 182.
Pfeffele *v.* Second Ave. R. Co. (34 Hun (N. Y.) 497), Trial, 57.
Pfeffer *v.* Buffalo R. Co. (4 Misc. (N. Y.) 465), App., 126; Elec. Rys., 25, 30.
Pfeifer *v.* Sheboygan & F. du L. R. Co. (18 Wis. 155), Em. Dom., 856; Estop., 9.
Pfiffner *v.* Stillwater & St. P. R. Co. (23 Minn. 343), Vend. & P., 2.
Pfister *v.* Central Pac. R. Co. (27 Am. & Eng. R. Cas. 246, 70 Cal. 169, 11 Pac. Rep. 686), Bagg., 29, 40; Car. of M., 35; Exp. Cos., 9; Tickets & F., 52; Words & Ph., 175.
Pfister *v.* Milwaukee Elect. R. Co. (83 Wis. 86, 53 N. W. Rep. 27), Bonds, 4.
Pfister *v.* State (82 Ind. 382), Mand., 19.
Pflegar *v.* Hastings & D. R. Co. (5 Am. & Eng. R. Cas. 85, 28 Minn. 510, 11 N. W. Rep. 72), App., 33; Em. Dom., 687.
Pharr *v.* Collins (35 La. Ann. 939, 48 Am. Rep. 251), Car. of M., 385.
Phelan *v.* Albany & S. R. Co. (1 Lans. (N. Y.) 258), Constr. Rys., 19.
Phelan *v.* Ganebin (5 Colo. 14), Attach., 12.
Phelan *v.* New York C. & H. R. R. Co. (12 N. Y. S. R. 413, 46 Hun 679), App., 127.
Phelps *v.* George's Creek & C. R. Co. (16 Am. & Eng. R. Cas. 600, 60 Md 536), Constr. Rys., 120; Evid., 13, 206, 230; Witn., 14.
Phelps *v.* Illinois C. R. Co. (63 Ill. 468), Spec. Perf., 1, 7.
Phelps *v.* Illinois C. R. Co. (94 Ill. 548), Car. of M., 60; Pl., 31; War, 4.
Phelps *v.* Lewiston (15 Blatchf. (U. S.) 131), Coupons, 2; Mun. Aid, 104, 365, 378, 380.
Phelps *v.* London & N. W. R. Co. (19 C. B. N. S. 321, 11 Jur. N. S. 652, 34 L. J. C. P. 250, 13 W. R. 782, 12 L. T. 496), Bagg., 45.
Phelps *v.* New Haven & N. Co. (43 Conn. 453), Dam., 62.
Phelps *v.* Pacific R. Co. (51 Mo. 477), Animals, 185.
Phelps *v.* St. Catharines & N. C. R. Co. (18 Ont. 581), Bonds, 32.
Phelps *v.* St. Catharines & N. C. R. Co. (46 Am. & Eng. R. Cas. 336, 19 Ont. 501), Bonds, 31, 32.
Phelps *v.* Winona & St. P. R. Co. (32 Am. & Eng. R. Cas. 56, 37 Minn. 485, 35 N. W. Rep. 273, 5 Am. St. Rep. 867), Death, etc., 228, 282; Witn., 118.
Phelps *v.* Yates (16 Blatchf. (U. S.) 192), Mun. Aid, 378.
Phettiplace *v.* Northern Pac. R. Co. (58 Am. & Eng. R. Cas. 61, 84 Wis. 412, 54 N. W. Rep. 1092), Eject. Pass., 66, 132; New Tr., 36; Tickets & F., 126.
Phifer *v.* Carolina C. R. Co. (72 N. Car. 433), Em. Dom., 954.
Phifer *v.* Carolina C. R. Co. (89 N. Car. 311, 45 Am. Rep. 687), Bills of L., 66; Car. of M., 547; Lim. of Liab., 4.
Philadelphia *v.* Citizens' Pass. R. Co. (56 Am. & Eng. R. Cas. 503, 151 Pa. St. 128, 24 Atl. Rep. 1099), St. Rys., 13, 72, 96.
Philadelphia *v.* Continental Pass. R. Co. (11 Phila. (Pa.) 315), St. Rys., 99.
Philadelphia *v.* Eastwick (35 Pa. St. 75), Mun. Corp., 8.
Philadelphia *v.* Empire Pass. R. Co. (3 Brews. (Pa.) 547), St. Rys., 8, 145, 147.
Philadelphia *v.* Empire City Pass. R. Co. (7 Phila. (Pa.) 321), Mun. Corp., 10; St. Rys., 8, 133.
Philadelphia *v.* Evans (139 Pa. St. 483, 21 Atl. Rep. 200), St. Rys., 143.
Philadelphia *v.* Germantown Pass. R. Co. (10 Phila. (Pa.) 165), Mun. Corp., 53.
Philadelphia *v.* Lombard & S. St. Pass. R. Co. (3 Grant's Cas. (Pa.) 403), St. Rys., 86.
Philadelphia *v.* Lombard & S. St. Pass. R. Co. (4 Brews. (Pa.) 14), St. Rys., 88, 96.
Philadelphia *v.* Lombard & S. St. Pass. R. Co. (5 Phila. (Pa.) 248), Injunc., 32.
Philadelphia *v.* Philadelphia & G. F. Pass. R. Co. (52 Pa. St. 177), St. Rys., 280; Tax., 57.
Philadelphia *v.* Philadelphia & R. R. Co. (19 Phila. (Pa.) 507), Elev. Rys., 18.
Philadelphia *v.* Philadelphia & R. R. Co. (58 Pa. St. 253), Charters, 51; Deeds, 22; Govt. Rds., 8; Injunc., 30; Judgm., 15.
Philadelphia *v.* Philadelphia, W. & B. R. Co. (33 Pa. St. 41), Sts. & H., 355.
Philadelphia *v.* Philadelphia, W. & B. R. Co. (2 Phila. (Pa.) 37), St. Rys., 139.
Philadelphia *v.* Philadelphia, W. & B. R. Co. (2 Phila. (Pa.) 244), Sts. & H., 355.
Philadelphia *v.* Ridge Ave. Pass. R. Co. (13 Am. & Eng. R. Cas. 341, 102 Pa. St. 190), Tax., 107.
Philadelphia *v.* Ridge Ave. Pass. R. Co. (54 Am. & Eng. R. Cas. 319, 142 Pa. St. 484, 21 Atl. Rep. 982), Judgm., 15; Stat., 34.
Philadelphia *v.* Ridge Ave. Pass. R. Co. (143 Pa. St. 444, 22 Atl. Rep. 695), St. Rys., 150.
Philadelphia *v.* River Front R. Co. (43 Am. & Eng. R. Cas. 167, 133 Pa. St. 134, 19 Atl. Rep. 356), Parties, 22; Side Tr., 1.
Philadelphia *v.* Second & T. St. Pass. R. Co. (2 Pa. Dist. 705), St. Rys., 141.
Philadelphia *v.* Thirteenth & F. St. Pass. R. Co. (8 Phila. (Pa.) 648), Consol., 4; Stat., 43; St. Rys., 207.

Philadelphia *v.* Weller (4 Brews. (Pa.) 24), St. Rys., 189.
Philadelphia & B. C. R. Co.'s Appeal (70 Pa. St. 355), Exec., 5.
Philadelphia & B. C. R. Co. *v.* Johnson (54 Pa. St. 127), Bonds, 57.
Philadelphia & B. C. R. Co. *v.* United States (103 U. S. 703; affirming 13 Ct. of Cl. 199), Car. of Mails, 12.
Philadelphia & E. R. Co. *v.* Cake (14 Am. & Eng. R. Cas. 211, 95 Pa. St. 139), Em. Dom., 481, 485.
Philadelphia & E. R. Co. *v.* Catawissa R. Co. (53 Pa. St. 20), Connect. L., 1; Leases, 35; Stockh., 87.
Philadelphia & G. F. Pass. R. Co.'s Appeal (20 Am. & Eng. R. Cas. 1, 102 Pa. St. 123), Charters, 32, 65; Em. Dom., 101; St. Rys., 13.
Philadelphia & G. F. Pass. R. Co. *v.* Philadelphia (11 Phila. (Pa.) 358), Nuis., 20; St. Rys., 165.
Philadelphia & G. F. R. Co. *v.* Catharine & B. St. R. Co. (20 Phila. (Pa.) 233), St. Rys., 250.
Philadelphia & R. R. Co.'s Appeal (4 Am. & Eng. R. Cas. 118, 11 W. N. C. (Pa.) 325), Bonds, 1, 4.
Philadelphia & R. R. Co.'s Appeal (Pa.) (3 Atl. Rep. 838), Exec., 5.
Philadelphia & R. R. Co. *v.* Anderson (6 Am. & Eng. R. Cas. 407, 94 Pa. St. 351, 39 Am. Rep. 787), Car. of P., 167, 170; Embankm., 6.
Philadelphia & R. R. Co. *v.* Barnard (3 Ben. (U. S.) 39), Bills of L., 111.
Philadelphia & R. R. Co. *v.* Barnes (7 Phila. (Pa.) 543), Rev., 6; Tax., 289.
Philadelphia & R. R. Co. *v.* Beck (40 Am. & Eng. R. Cas. 140, 125 Pa. St. 620, 17 Atl. Rep. 505), Car. of M., 167.
Philadelphia & R. R. Co. *v.* Boyer (2 Am. & Eng. R. Cas. 172, 97 Pa. St. 91), Cross. Rys., 85; Death, etc., 238; Imp. Neg., 21.
Philadelphia & R. R. Co. *v.* Carr (6 Am. & Eng. R. Cas. 185, 99 Pa. St. 505, 11 W. N. C. 549), Cross., Inj. at, 322.
Philadelphia & R. R. Co. *v.* Com. (15 Wall. (U. S.) 284, 4 Brews. (Pa.) 222), Tax., 44.
Philadelphia & R. R. Co. *v.* Com. (13 Am. & Eng. R. Cas. 367, 104 Pa. St. 80), Tax., 89, 317.
Philadelphia & R. R. Co. *v.* Derby (14 How. (U. S.) 468), Agency, 74; Collis., 17; Passes, 37.
Philadelphia & R. R. Co. *v.* Dows (15 Phila. (Pa.) 101), Car. of M., 392.
Philadelphia & R. R. Co. *v.* Edelstein (Pa.) (16 Atl. Rep. 847), Car. of P., 609.
Philadelphia & R. R. Co. *v.* Ervin (89 Pa. St. 71), Wharves, 4.
Philadelphia & R. R. Co. *v.* Getz (28 Am. & Eng. R. Cas. 244, 133 Pa. St. 214, 6 Atl. Rep. 356), Em. Dom., 433, 708.
Philadelphia & R. R. Co. *v.* Gilson (8 Watts (Pa.) 243), Em. Dom., 751.
Philadelphia & R. R. Co. *v.* Hendrickson (80 Pa. St. 182), Fires, 20, 45, 102, 104, 106, 117, 311.
Philadelphia & R. R. Co. *v.* Huber (128 Pa. St. 63, 18 Atl. Rep. 334), Employés, Inj. to, 703.
Philadelphia & R. R. Co. *v.* Hughes (33 Am. & Eng. R. Cas. 348, 119 Pa. St. 301, 11 Cent. Rep. 822, 13 Atl. Rep. 286, 21 W. N. C. 166), Employés, Inj. to, 97, 108, 144, 238, 624.
Philadelphia & R. R. Co. *v.* Hummell (44 Pa. St. 375), Tresp., Inj. to, 21.
Philadelphia & R. R. Co. *v.* Kenney (9 Phila. (Pa.) 403), Divid., 10.
Philadelphia & R. R. Co. *v.* Killips (88 Pa. St. 405), Cross., Inj. at, 89, 122, 155.
Philadelphia & R. R. Co. *v.* Knight (124 Pa. St. 58, 16 Atl. Rep. 492), Coupons, 12.
Philadelphia & R. R. Co. *v.* Lawrence (10 Phila. (Pa.) 604), Em. Dom., 133, 178, 235, 426; Mines, etc., 1.
Philadelphia & R. R. Co. *v.* Lehigh C. & N. Co. (36 Pa. St. 204), Deeds of Tr., 12.
Philadelphia & R. R. Co. *v.* Little (41 N. J. Eq. 519, 7 Atl. Rep. 356), App., 9.
Philadelphia & R. R. Co. *v.* Long (75 Pa. St. 257), Children, Inj. to, 127, 145.
Philadelphia & R. R. Co. *v.* Love (125 Pa. St. 488, 17 Atl. Rep. 455), Direct., 22.
Philadelphia & R. R. Co. *v.* Morris (7 Phila. (Pa.) 286), Rip. Rts., 3.
Philadelphia & R. R. Co. *v.* Morrison (5 Phila. (Pa.) 515), Land. & T., 8.
Philadelphia & R. R. Co. *v.* Noar (3 Pennyp. (Pa.) 443), Death, etc., 293.
Philadelphia & R. R. Co. *v.* Obert (23 Am. & Eng. R. Cas. 65, 109 Pa. St. 193, 1 Atl. Rep. 398), Em. Dom., 370.
Philadelphia & R. R. Co. *v.* O'Donnell (12 Phila. (Pa.) 213), Agency, 29.
Philadelphia & R. R. Co. *v.* Patent (Pa.) (5 Atl. Rep. 747), Em. Dom., 70; Sts. & H., 212.
Philadelphia & R. R. Co. *v.* Pennsylvania (15 Wall. (U. S.) 232), Int. Com., 199.
Philadelphia & R. R. Co. *v.* Pennsylvania (15 Wall. (U. S.) 284), Int. Com., 197.
Philadelphia & R. R. Co. *v.* Pennsylvania S. V. R. Co. (151 Pa. St. 569, 25 Atl. Rep. 177), Em. Dom., 399.
Philadelphia & R. R. Co. *v.* Philadelphia (8 Phila. (Pa.) 284), Injunc., 12.
Philadelphia & R. R. Co. *v.* Philadelphia (47 Pa. St. 325), Philadelphia & R. R. Co., 1.
Philadelphia & R. R. Co. *v.* Pollock (17 Phila. (Pa.) 537), Certif. of Indebt., 4.
Philadelphia & R. R. Co. *v.* Pollock (17 Am. & Eng. R. Cas. 483, 19 Fed. Rep. 401), Rev., 4; Tax., 109.
Philadelphia & R. R. Co. *v.* Ramsey (89 Pa. St. 474), Car. of M., 611.
Philadelphia & R. R. Co. *v.* Reading & P. R. Co. (2 Pa. Dist. 857), Em. Dom., 326, 716.
Philadelphia & R. R. Co. *v.* Schertle (2 Am. & Eng. R. Cas. 158, 97 Pa. St. 450), Employés, Inj. to, 15.
Philadelphia & R. R. Co. *v.* Schultz (2 Am. & Eng. R. Cas. 271, 93 Pa. St. 341), Fires, 122, 323.
Philadelphia & R. R. Co. *v.* Smith (29 Am.

& Eng. R. Cas. 400, 105 Pa. St. 195), Coupons, 16.
Philadelphia & R. R. Co. *v.* Spearen (47 Pa. St. 300), Children, Inj. to, 2, 75; Cross., Inj. at, 20.
Philadelphia & R. R. Co. *v.* Thornton (3 Phila. (Pa.) 257), Arb., 23.
Philadelphia & R. R. Co. *v.* Troutman (Pa.) (6 Am. & Eng. R. Cas. 117, 11 W. N. C. 453), Cross., Inj. at, 324; Fly. Switch, 4; Licensees, Inj. to, 6.
Philadelphia & R. R. Co. *v.* Wireman (88 Pa. St. 264), Car. of M., 309, 493.
Philadelphia & R. R. Co. *v.* Yeiser (8 Pa. St. 366), Fires, 22, 225, 246, 351, 352.
Philadelphia & R. R. Co. *v.* Yerger (73 Pa. St. 121), Fires, 307.
Philadelphia & S. M. Steamship Co. *v.* Pennsylvania (122 U. S. 326, 7 Sup. Ct. Rep. 1118), Int. Com., 198.
Philadelphia & S. R. Co. *v.* Lewis (33 Pa. St. 33), Bonds, 1, 22, 24, 47.
Philadelphia & T. R. Co., Case of (6 Whart. (Pa.) 25), Location, etc., 9; Sts. & H., 54.
Philadelphia & T. R. Co. *v.* Hagan (47 Pa. St. 244), Cross., Inj. at, 353, 356; Trial, 162.
Philadelphia & W. C. R. Co. *v.* Hickman (28 Pa. St. 318), Subscr., 6, 19, 103, 206; Witn., 13.
Philadelphia & W. R. Co. *v.* Maryland (10 How. (U. S.) 376), Tax., 65, 70, 146.
Philadelphia, B. & W. R. Co. *v.* Layer (112 Pa. St. 414, 3 Atl. Rep. 874), Children, Inj. to, 21.
Philadelphia City Pass. R. Co. *v.* Hassard (75 Pa. St. 367), Children, Inj. to, 46, 48, 112.
Philadelphia City Pass. R. Co. *v.* Henrice (4 Am. & Eng. R. Cas. 544, 92 Pa. St. 431, 37 Am. Rep. 699), Children, Inj. to, 62, 161.
Philadelphia F. Assoc. *v.* New York (119 U. S. 110, 7 Sup. Ct. Rep. 108), For. Corp., 14.
Philadelphia, G. & N. R. Co. *v.* Johnson (2 Whart. (Pa.) 275), Em. Dom., 785.
Philadelphia, G. & N. R. Co. *v.* Pennsylvania S. V. R. Co. (16 Phila. (Pa.) 636), Em. Dom., 101; Sts. & H., 54.
Philadelphia, G. & N. R. Co. *v.* Smick (2 Whart. (Pa.) 273), Em. Dom., 945.
Philadelphia, G. & N. R. Co. *v.* Wilt (4 Whart. (Pa.) 143), Tresp., 28.
Philadelphia, N. & N. Y. R. Co. *v.* Cooper (105 Pa. St. 239), Em. Dom., 1010, 1021.
Philadelphia, N. & N. Y. R. Co. *v.* Snyder (120 Pa. St. 90, 13 Atl. Rep. 708), Em. Dom., 114.
Philadelphia Pass. R. Co. *v.* Union Pass. R. Co. (9 Phila. (Pa.) 495), Stat., 34.
Philadelphia Traction Co. *v.* Bernheimer (38 Am. & Eng. R. Cas. 487, 125 Pa. St. 615, 17 Atl. Rep. 477), Cable Rys., 15.
Philadelphia Traction Co. *v.* Orbann (34 Am. & Eng R. Cas. 432, 119 Pa. St. 37, 11 Cent. Rep. 628, 12 Atl. Rep. 816, 21 W. N. C. 76), Dam., 18, 32; Employés, Inj. to, 1.
Philadelphia, W & B. R. Co.'s Appeal (121 Pa. St. 44, 15 Atl. Rep. 476), Bridges, 12, 41.
Philadelphia, W. & B. R. Co., In re (7 Phila. (Pa.) 461), Em. Dom., 280, 406.
Philadelphia, W. & B. R. Co. *v.* Alvord (128 Pa. St. 42, 18 Atl. Rep. 391), Car. of P., 599, 609.
Philadelphia, W. & B. R. Co. *v.* Anderson (44 Am. & Eng. R. Cas. 345, 72 Md. 519, 20 Atl. Rep. 2), Car. of P., 139, 154, 232, 453, 585.
Philadelphia, W. & B. R. Co. *v.* Appeal Tax Court (50 Md. 397), Tax., 132, 264.
Philadelphia, W. & B. R. Co. *v.* Bayless (2 Gill (Md.) 355), Tax., 144.
Philadelphia, W. & B. R. Co. *v.* Bowers (4 Houst. (Del.) 506, 6 Am. Ry. Rep. 105), Charters, 19; Franch., 8.
Philadelphia, W. & B. R. Co. *v.* Brannen (Pa.) (2 Atl. Rep. 429), Fright. Teams, 1, 2.
Philadelphia, W. & B. R. Co. *v.* Constable (39 Md. 149, 11 Am. Ry. Rep. 276), Fires, 81, 85; Pl., 33.
Philadelphia, W. & B. R. Co. *v.* Conway (112 Pa. St. 511, 4 Atl. Rep. 362), App., 109; Death, etc., 94.
Philadelphia, W. & B. R. Co. *v.* Cowell (28 Pa. St. 329), Agency, 112.
Philadelphia, W. & B. R. Co. *v.* Davis (34 Am. & Eng. R. Cas. 143, 68 Md. 281, 11 Atl. Rep. 822, 10 Cent. Rep. 551), Culverts, 5, 12; Flood. Lds., 42.
Philadelphia, W. & B. R. Co. *v.* Dubois (12 Wall. (U. S.) 47), Pat. for Inv., 25.
Philadelphia, W. & B. R. Co. *v.* Fronk (32 Am. & Eng. R. Cas. 31, 67 Md. 339, 9 Cent. Rep. 64, 10 Atl. Rep. 204, 307), Farm Cross., 12.
Philadelphia, W. & B. R. Co. *v.* Gesner (20 Pa. St. 240), Em. Dom., 762, 926.
Philadelphia, W. & B. R. Co. *v.* Hahn (Pa.) (32 Am. & Eng. R. Cas. 24, 12 Atl. Rep. 479), Indep. Contr., 10.
Philadelphia, W. & B. R. Co. *v.* Harper (29 Md. 330), Bagg., 20.
Philadelphia, W. & B. R. Co. *v.* Hoeflich (18 Am. & Eng. R. Cas. 373, 62 Md. 300, 50 Am. Rep. 223), Dam., 29, 30; Eject. Pass., 4, 10, 119, 124; Tickets & F., 120.
Philadelphia, W. & B. R. Co. *v.* Hogeland (66 Md. 149, 7 Atl. Rep. 105), Contrib. Neg., 82; Cross., Inj. at, 8, 139, 253; Imp. Neg., 11.
Philadelphia, W. & B. R. Co. *v.* Howard (13 How. (U. S.) 307), Constr. Rys., 21, 33, 43, 44, 51; Contr., 12.
Philadelphia, W. & B. R. Co. *v.* Keenan (103 Pa. St. 124), Employés, Inj. to, 684.
Philadelphia, W. & B. R. Co. *v.* Kent County R. Co. (5 Houst. (Del.) 127), Citizens., 1.
Philadelphia, W. & B. R. Co. *v.* Kerr (25 Md., 521), Negl., 1, 18.
Philadelphia, W. & B. R. Co. *v.* Larkin (47 Md. 155, 18 Am. Ry. Rep. 536), Assault, 18; Eject. Pass., 42, 54, 115, 119.
Philadelphia, W. & B. R. Co. *v.* Lehman (6 Am. & Eng. R. Cas. 194, 56 Md. 209, 40 Am. Rep. 415), Car. of L. S., 38, 50; Car. of M., 204, 572, 637; Sunday, 2.
Philadelphia, W. & B. R. Co. *v.* McCormick

(124 Pa. St. 427, 16 Atl. Rep. 848), Car. of P., 230.
Philadelphia, W. & B. R. Co. *v.* Neary (5 Del. Ch. 600, 8 Atl. Rep. 363), Tax., 357.
Philadelphia, W. & B. R. Co. *v.* Philadelphia (9 Phila. (Pa.) 563), Cross., Sts. & H., 54.
Philadelphia, W. & B. R. Co. *v.* Philadelphia & H. Towboat Co. (23 How. (U. S.) 209), Constr. Rys., 8.
Philadelphia, W. & B. R. Co. *v.* Philadelphia & R. R. Co. (1 Pa. Dist. 73), Branch & L. Roads, 4; Charters, 161; Sts. & H., 62.
Philadelphia, W. & B. R. Co. *v.* Quigley (21 How. (U. S.) 202, 6 Am. Ry. Rep. 493), Libel & S., 4, 7, 12.
Philadelphia, W. & B. R. Co. *v.* Rice (26 Am. & Eng. R. Cas. 264, 64 Md. 63), Eject. Pass., 119.
Philadelphia, W. & B. R. Co. *v.* State (20 Md. 157), Crim. L., 31; Nuis., 13.
Philadelphia, W. & B. R. Co. *v.* State (10 Am. & Eng. R. Cas. 792, 58 Md. 372), Car. of M., 553; Contrib. Neg., 85; Death, etc., 125, 156; Employés, Inj. to, 189; Fel. Serv., 126.
Philadelphia, W. & B. R. Co. *v.* State (66 Md. 501, 8 Atl. Rep. 272), App., 53.
Philadelphia, W. & B. R. Co. *v.* Stebbing (19 Am. & Eng. R. Cas. 36, 62 Md. 504), App., 45; Cross., Inj. at, 173; Evid., 143; Negl., 41; Sts. & H., 316, 386; Trial, 184.
Philadelphia, W. & B. R. Co. *v.* Stinger (78 Pa. St. 219), Animals, 222; Cross., Inj. at, 15, 133, 152.
Philadelphia, W. & B. R. Co. *v.* Trimble (4 Whart. (Pa.) 47), Em. Dom., 674, 819.
Philadelphia, W. & B. R. Co. *v.* Weaver (34 Md. 431), Agency, 115.
Philadelphia, W. & B. R. Co. *v.* Williams (54 Pa. St. 103), Charters, 56, 67; Sts. & H., 109.
Philadelphia, W. & B. R. Co. *v.* Woelpper (64 Pa. St. 366), Mort., 54.
Philbrick, In re (11 Ont. Pr. 373), Em. Dom., 1224, 1226.
Phillipps *v.* London, B. & S. C. R. Co. (4 Giff. 46, 9 Jur. N. S. 348, 7 L. T. 663), Sts. & H., 404.
Phillips *v.* Albany (28 Wis. 340, 5 Am. Ry. Rep. 46), Charters, 90; Evid., 105; Mun. Aid, 9, 232.
Phillips *v.* Allegheny Valley R. Co. (107 Pa. St. 472), Lim. of Ac., 35.
Phillips *v.* Canadian Pac. R. Co. (1 Man. 110), Animals, 56.
Phillips *v.* Chicago, M. & St. P. R. Co. (23 Am. & Eng. R. Cas. 453, 64 Wis. 475, 25 N. W. Rep. 544), Employés, Inj. to, 453; Fel. Serv., 127, 391, 428; Words & Ph., 193.
Phillips *v.* Dunkirk, W. & P. R. Co. (78 Pa. St. 177), Em. Dom., 1023.
Phillips *v.* Earle (8 Pick. (Mass.) 182), Car. of M., 201.
Phillips *v.* Eastern R. Co. (22 Am. & Eng. R. Cas. 247, 138 Mass. 122), Leases, 12, 21, 93; Words & Ph., 137.
Phillips *v.* East Tenn., V. & G. R. Co. (48 Am. & Eng. R. Cas. 61, 87 Ga. 272, 13 S. E. Rep. 644), Tresp., Inj. to, 101.
Phillips *v.* Great Western R. Co. (L. R. 7 Ch. 409, 41 L. J. Ch. 614, 26 L. T. 532, 20 W. R. 562), Refresh. Rooms, 2.
Phillips *v.* London & S. W. R. Co. (L. R. 4 Q. B. D. 406, 48 L. J. Q. B. D. 693, 40 L. T. 813, 27 W. R. 797; affirmed in L. R. 5 Q. B. D. 78, 41 L. T. 121, 28 W. R. 10), New Tr., 87.
Phillips *v.* London & S. W. R. Co. (L. R. 5 Q. B. D. 78, 41 L. T. 121, 28 W. R. 10; affirming L. R. 4 Q. B. D. 406, 48 L. J. Q. B. 693, 40 L. T. 813, 27 W. R. 797), Car. of P., 627.
Phillips *v.* London & S. W. R. Co. (L. R. 5 C. P. D. 280, 49 L. J. Q. B. 233, 42 L. T. 6), Car. of P., 627.
Phillips *v.* Milwaukee & N. R. Co. (77 Wis. 349, 46 N. W. Rep. 543), Death, etc., 193.
Phillips *v.* Missouri Pac. R. Co. (24 Am. & Eng. R. Cas. 368, 86 Mo. 540), Animals, 2, 10.
Phillips *v.* New York C. & H. R. R. Co. (127 N. Y. 657, mem., 3 Silv. App. 467, 27 N. E. Rep. 978, 38 N. Y. S. R. 675; affirming 53 Hun 634, 25 N. Y. S. R. 91, 3 Silv. Sup. Ct. 5, 6 N. Y. Supp. 621), Imp. Neg., 19; Negl., 47.
Phillips *v.* North Carolina R. Co. (78 N. Car. 294, 16 Am. Ry. Rep. 206) Car. of M., 573, 596, 613.
Phillips *v.* Northern R. Co. (41 N. Y. S. R. 780, 16 N. Y. Supp. 909), Car. of P., 371; Leases, 43.
Phillips *v.* Pease (39 Cal. 582), Em. Dom., 763.
Phillips *v.* Rensselaer & S. R. Co. (49 N. Y. 177, 3 Am. Ry. Rep. 477; reversing 57 Barb. 644), Car. of P., 389.
Phillips *v.* Rensselaer & S. R. Co. (57 Barb. (N. Y.) 644; reversed in 49 N. Y. 177, 3 Am. Ry. Rep. 477), Car. of P., 368, 374, 566; Trial, 72.
Phillips *v.* Rome, W. & O. R. Co. (30 N. Y. S. R. 41, 9 N. Y. Supp. 799; affirmed in 128 N. Y. 578, mem., 38 N. Y. S. R. 1010), Leases, 103.
Phillips *v.* St. Clair Incline Plane Co. (153 Pa. St. 230, 25 Atl. Rep, 735), Em. Dom., 438.
Phillips *v.* Terry (3 Abb. App. Dec. (N. Y.) 607), Witn., 153, 174.
Phillips *v.* Veazie (40 Me. 96), Sts. & H., 360.
Phillipsburg Bank *v.* Lackawanna R. Co. (27 N. J. L. 206), Attach., 9.
Philo *v.* Illinois C. R. Co. (33 Iowa 47), Death, etc., 19; Words & Ph., 162.
Philpott *v.* Missouri Pac. R. Co. (27 Am. & Eng. R. Cas. 323, 85 Mo. 164), Death, etc., 53, 162, 231.
Phinizy *v.* Augusta & K. R. Co. (56 Fed. Rep. 273), Citizens., 3; Fed. Cts., 3; Mort., 163; Receiv., 170.
Phinney *v.* Bronson (43 Kan. 451, 23 Pac. Rep. 624), Employés, 13; Evid., 235.
Phipps *v.* London & N. W. R. Co. (50 Am. & Eng. R. Cas. 494, [1892] 2 Q. B. 229), Discrim., 22.

Phipps *v.* Western Md. R. Co. (66 Md. 319, 7 Atl. Rep. 556), Sts. & H., 221.
Phœnix Ins. Co. *v.* Erie & W. Transp. Co. (10 Biss. (U. S.) 18), Bills of L., 99; Fire Ins., 13; Jurisd., 11; Lim. of Liab., 28.
Phœnix Ins. Co. *v.* Erie & W. Transp. Co. (117 U. S. 312, 6 Sup. Ct. Rep. 750; affirming 10 Biss. 18), Fire Ins., 11, 14.
Phœnix Ins. Co. *v.* Hamilton (14 Wall. (U. S.) 504), Fire Ins., 19.
Phœnix Ins. Co. *v.* New York C. & H. R. R. Co. (75 Hun 216, 26 N. Y. Supp. 1102), Fires, 209.
Phœnix Pot Works *v.* Pittsburg & L. E. R. Co. (139 Pa. St. 284, 20 Atl. Rep. 1058), Bills of L., 72.
Phyfe *v.* Manhattan R. Co. (30 Hun (N. Y.) 377), Dam., 49.
Pianciani *v.* London & S. W. R. Co. (18 C. B. 226), Bagg., 111.
Piatt *v.* People (29 Ill. 54), Mun. Aid, 133, 164, 168.
Picard *v.* East Tenn., V. & G. R. Co. (24 Fed. Rep. 614; reversed in 130 U. S. 637, 9 Sup. Ct. Rep. 640), Tax., 155.
Picard *v.* East Tenn., V. & G. R. Co. (39 Am. & Eng. R. Cas. 551, 130 U. S. 637, 9 Sup. Ct. Rep. 640), Tax., 156.
Picard *v.* Ridge Ave. Pass. R. Co. (147 Pa. St. 195, 23 Atl. Rep. 566), St. Rys., 339, 393, 405.
Pickard *v.* Pullman Southern Car Co. (24 Am. & Eng. R. Cas. 511, 117 U. S. 34, 6 Sup. Ct. Rep. 635), Int. Com., 194.
Pickens *v.* Richmond & D. R. Co. (40 Am. & Eng. R. Cas. 649, 104 N. Car. 312, 10 S. E. Rep. 556), Eject. Pass., 48, 49, 51, 54.
Pickering *v.* Ilfracombe R. Co. (37 L. J. C. P. 118, L. R. 3 C. P. 235, 16 W. R. 458, 17 L. T. 650), Subscr., 75.
Pickert *v.* Ridgefield Park R. Co. (25 N. J. Eq. 316), Em. Dom., 1043.
Pickford *v.* Caledonian R. Co. (1 Ry. & C. T. Cas. 252, 4 Sess. Ca. [3d ser.] 755), Car. of M., 208, 534.
Pickford *v.* Grand Junction R. Co. (8 M. & W. 372, 9 D. P. C. 766, 2 Railw. Cas. 592, 5 Jur. 731), Car. of M., 727.
Pickford *v.* Grand Junction R. Co. (10 M. & W. 399, 3 Railw. Cas. 193, 1 Ry. & C. T. Cas. 17), Charges, 114; Discrim., 13, 18.
Pickford *v.* Grand Junction R. Co. (12 M. & W. 766), Car. of M., 38.
Pickford *v.* Grand Junction R. Co. (3 Railw. Cas. 538, 1 Ry. & C. T. Cas. 19), Discrim., 5.
Pictou R. Damages, In re (13 Nov. Sc. 448), Em. Dom., 1251.
Pidcock *v.* Union Pac. R. Co. (5 Utah 612, 1 L. R. A. 131, 19 Pac. Rep. 191), Employés, Inj. to, 71, 190.
Piddington *v.* Southeastern R. Co. (5 C. B. N. S. 111, 4 Jur. N. S. 953, 27 L. J. C. P. 295), Charges, 30.
Pieart *v.* Chicago, R. I. & P. R. Co. (82 Iowa 148, 47 N. W. Rep. 1017), Contrib. Neg., 9, 20; Death, etc., 359; Employés, Inj. to, 139, 253, 622.
Piedmont & C. R. Co. *v.* McKenzie (52 Am. & Eng. R. Cas. 667, 75 Md. 458, 24 Atl. Rep. 157), Bridges, 23.
Piedmont & C. R. Co. *v.* Speelman (30 Am. & Eng. R. Cas. 316, 67 Md. 260, 9 Cent. Rep. 71, 10 Atl. Rep. 77, 293), Incorp., 10; Injunc., 7, 14; Leases, 101.
Piedmont Mfg. Co. *v.* Columbia & G. R. Co. (16 Am. & Eng. R. Cas. 194, 19 So. Car. 353), Bills of L., 6, 28, 53; Car. of M., 3, 483, 577, 597, 608; Contr., 100; Fires, 209.
Piedmont R. Co. *v.* Reidsville (101 N. Car. 404, 2 L. R. A. 284, 2 Int. Com. Rep. 416, 8 S. E. Rep. 124), Int. Com., 211.
Piek *v.* Chicago & N. W. R. Co. (6 Biss. (U. S.) 177), Charges, 6; Charters, 42; Ry. Com'rs, 41.
Piel *v.* Covington S. R. T. R. Co. (Ky.) (12 S. W. Rep. 759), Em. Dom., 955.
Pielke *v.* Chicago, M. & St. P. R. Co. (38 Am. & Eng. R. Cas. 349, 5 Dak. 444, 41 N. W. Rep. 669), Fires, 320; Negl., 72; Words & Ph., 42.
Pielke *v.* Chicago, M. & St. P. R. Co. (6 Dak. 444, 43 N. W. Rep. 813), App., 117; Fires, 320.
Pier *v.* Finch (24 Barb. (N. Y.) 514), Tickets & F., 5, 94.
Pier *v.* Finch (29 Barb. (N. Y.) 170), Assault, 12.
Pierce *v.* Central Iowa R. Co. (73 Iowa 140, 34 N. W. Rep. 783), Employés, Inj. to, 159, 665; Fel. Serv., 163, 175.
Pierce *v.* Chicago & N. W. R. Co. (36 Wis. 283), Attach., 39.
Pierce *v.* Commonwealth (13 Am. & Eng. R. Cas. 74, 104 Pa. St. 150), Direct., 5.
Pierce *v.* Concord R. Co. (51 N. H. 590), Fires, 160.
Pierce *v.* Emery (32 N. H. 484), Mort., 36, 42.
Pierce *v.* Keator (70 N. Y. 419, 26 Am. Rep. 612; affirming 9 Hun 532), Deeds, 44.
Pierce *v.* Milwaukee & St. P. R. Co. (23 Wis. 387), Car. of M., 326.
Pierce *v.* Milwaukee & St. P. R. Co. (24 Wis. 551), Mort., 35, 38.
Pierce *v.* Milwaukee Constr. Co. (38 Wis. 253), Cred. Bill, 12.
Pierce *v.* St. Anne (30 Fed. Rep. 36), Mun. Aid, 391.
Pierce *v.* Worcester & N. R. Co. (105 Mass. 199, 3 Am. Ry. Rep. 557), Em. Dom., 703; Fires, 218.
Pierce *v.* Wright (6 Lans. (N. Y.) 306, 45 How. Pr. 1), Mun. Aid, 106, 304.
Pierson Tp. *v.* Reynolds Tp. Board (49 Mich. 224, 13 N. W. Rep. 525), Mun. Aid, 227.
Piggot *v.* Eastern Counties R. Co. (3 C. B. 229, 10 Jur. 571, 15 L. J. C. P. 225), Fires, 232, 266.
Pigott, In re (L. R. 18 Ch. D. 146, 50 L. J. Ch. 679, 44 L. T. 792, 29 W. R. 727), Em. Dom., 1176, 1200.
Pike *v.* Bangor & C. S. L. R. Co. (68 Me. 415, 20 Am. Ry. Rep. 407), Mun. Aid, 203; Subscr., 49, 54.
Pike *v.* Chicago & A. R. Co. (39 Fed. Rep. 754), Cross., Inj. at, 153; Employés, Inj. to, 534; Pl., 26.

Pike *v.* Chicago & A. R. Co. (41 Fed. Rep. 95), Employés, Inj. to, 4; Fel. Serv., 79, 213, 264; New Tr., 19, 20.
Pike *v.* Chicago, M. & St. P. R. Co. (40 Wis. 583, 13 Am. Ry. Rep. 447), Bagg., 74.
Pike *v.* Eddy (53 Mo. App. 505), Car. of L. S., 113.
Pike *v.* Grand Trunk R. Co. (38 Am. & Eng. R. Cas. 336, 39 Fed. Rep. 255), Death, etc., 74; Trial, 96.
Pike *v.* Providence & W. R. Co. (1 Holmes (U. S.) 445), Pat. for Inv., 4, 15.
Pilbrow *v.* Pilbrow's Atmospheric R. & C. P. Co. (5 C. B. 440, 5 D. & L. 551, 5 Railw. Cas. 89, 17 L. J. C. P. 166), Incorp., 6.
Pilcher *v.* Atchison, T. & S. F. R. Co. (38 Kan. 516, 16 Pac. Rep. 945), Cov'ts, 11; Em. Dom., 132; Homest., 1.
Pile *v.* Pile (45 L. J. Ch. 841, L. R. 3 Ch. D. 36, 24 W. R. 1003, 35 L. T. 18), Em. Dom., 1160.
Pilgrim *v.* Southampton & D. R. Co. (7 C. B. 205, 13 Jur. 515, 18 L. J. C. P. 139), Em. Dom., 1205.
Pilkinton *v.* Gulf, C. & S. F. R. Co. (70 Tex. 226, 7 S. W. Rep 805), Employés, Inj. to, 427; Evid., 170; Fel. Serv., 147.
Pill *v.* Brooklyn Heights R. Co. (6 Misc. 267, 27 N. Y. Supp. 230, 57 N. Y. S. R. 783), Dam., 45.
Piller *v.* Southern Pac. R. Co. (52 Cal. 42), Lim. of Ac., 25.
Pillsbury *v.* Mayor, etc., of Augusta (79 Me. 71, 8 Atl. Rep. 150), Sts. & H., 31.
Pimlico, P. & G. S. Tramway Co. *v.* Greenwich Union (L. R. 9 Q. B. 9, 22 W. R. 87, 43 L. J. M. C. 29), Tax., 383.
Pinchin *v.* London & B. R. Co. (1 Kay & J. 34, 2 Eq. 1172, 1 Jur. N. S. 241, 24 L. J. Ch. 417, 3 W. R. 125, 5 De G., M. & G. 851), Em. Dom., 1103, 1125, 1129.
Pindell *v.* St. Louis & H. R. Co. (34 Mo. App. 675), Car. of M., 223; Pl., 94; Trial, 142.
Pindell *v.* St. Louis & H. R. Co. (41 Mo. App. 84), Car. of M., 357.
Pine *v.* St. Paul City R. Co. (52 Am. & Eng. R. Cas. 584, 50 Minn. 144, 52 N. W. Rep. 392, 16 L. R. A. 347), Eject. Pass., 107; St. Rys., 526.
Pine Grove Tp. *v.* Talcott (19 Wall. (U. S.) 666), Mun. Aid, 37, 343.
Pineo *v.* New York C. & H. R. R. Co. (34 Hun (N. Y.) 80; affirmed (?) 99 N. Y. 644, mem.), Death, etc., 182, 434.
Pingery *v.* Cherokee & D. R. Co. (78 Iowa 438, 43 N. W. Rep. 285), Em. Dom., 467, 613, 614, 643, 676.
Pingree *v.* Detroit, L. & N. R. Co. (66 Mich. 143, 9 West. Rep. 703, 33 N. W. Rep. 298), Car. of M., 295, 382.
Pinkard *v.* Allen (75 Ala. 73), Mort., 271.
Pinkerton *v.* Boston & A. R. Co. (109 Mass. 527, 7 Am. Ry. Rep. 480), Em. Dom., 270, 661, 974; Location, etc., 14.
Pinkerton *v.* Manchester & L. R. Co. (42 N. H. 424), Pledge, etc., 2; Stock, 70, 80, 82.
Pinnell *v.* St. Louis, A. & T. R. Co. (49 Mo. App. 170), Animals, 277.
Pinneo *v.* Lackawanna & B. R. Co. (43 Pa. St. 361), Em. Dom., 546, 615.
Pinney *v.* First Div. St. P. & P. R. Co. (19 Minn. 251 (Gil. 211) 20 Am. Ry. Rep. 71), Car. of M., 221; Words & Ph., 189.
Pinnix *v.* Charlotte & S. C. R. Co. (66 N. Car. 34), Car. of M., 499.
Pion *v.* North Shore R. Co. (14 Can. Sup. Ct. 677; reversing 12 Quebec L. R. 205), Rip. Rts., 10.
Piper *v.* Chicago, M. & St. P. R. Co. (77 Wis. 247, 46 N. W. Rep. 165), Cross., Inj. at, 148, 215 260, 352; Negl., 29.
Piper *v.* Minneapolis St. R. Co. (52 Minn. 269, 53 N. W. Rep. 1060), St. Rys., 367, 385.
Piper *v.* New York C. & H. R. R. Co. (1 T. & C. (N. Y.) 290; affirmed in 56 N. Y. 630, mem.), Employés, Inj. to, 75, 578.
Piper *v.* New York C. & H. R. R. Co. (27 N. Y. Supp. 593, 76 Hun 44), Sleep. Car Cos., 23.
Piper *v.* Union Pac. R. Co. (14 Kan. 574), Em. Dom., 849.
Pippen *v.* Wilmington, C. & A. R. Co. (75 N. Car. 54), Animals, 493.
Piquegno *v.* Chicago & G. T. R. Co. (52 Mich. 40, 17 N. W. Rep. 232, 50 Am. Rep. 243), Employés, Inj. to, 183, 184.
Piquignot *v.* Pennsylvania R. Co. (16 How. (U. S.) 104), Pl., 9.
Pitcher *v.* Lake Shore & M. S. R. Co. (28 N. Y. S. R. 647, 8 N. Y. Supp. 389; further appeal 16 N. Y. Supp. 62; affirmed in 137 N. Y. 568, 50 N. Y. S. R. 943, 33 N. E. Rep. 339), Car. of L. S., 126, 133.
Pitcher *v.* Lake Shore & M. S. R. Co. (40 N. Y. S. R. 896, 61 Hun 623, 16 N. Y. Supp. 62; affirmed in 137 N. Y. 568, mem., 50 N. Y. S. R. 943, 33 N. E. Rep. 339), Car. of L. S., 126, 128, 132; Car. of P., 375; Trial, 108.
Pitcher *v.* People's St. R. Co. (154 Pa. St. 560, 26 Atl. Rep. 559), Children, Inj. to, 45.
Pitkin *v.* Long Island R. Co. (2 Barb. Ch. (N. Y.) 221), Easem., 6.
Pitlock *v.* Wells (109 Mass. 452), Exp. Cos., 26.
Pittsburg *v.* Grier (22 Pa. St. 54), Wharves, 4.
Pittsburg, A. & M. Pass. R. Co., Appeal of (1 Pennyp. (Pa.) 449), St. Rys., 86.
Pittsburg, A. & M. Pass. R. Co. *v.* Caldwell (74 Pa. St. 421, 6 Am. Ry. Rep. 100), Children, Inj. to, 46, 137; Evid., 244.
Pittsburg, A. & M. Pass. R. Co. *v.* Donahue (70 Pa. St. 119), Children, Inj. to, 52; Dam., 70.
Pittsburg, A. & M. Pass. R. Co. *v.* McCurdy (114 Pa. St. 554, 8 Atl. Rep. 230), Libel & S., 9, 10.
Pittsburg, A. & M. R. Co. *v.* Pearson (72 Pa. St. 169, 7 Am. Ry. Rep. 42), Children, Inj. to, 144.
Pittsburg & B. Pass. R. Co. *v.* Birmingham (51 Pa. St. 41), St. Rys., 155.
Pittsburg & B. Pass. R. Co. *v.* Pittsburg (80 Pa. St. 72), St. Rys., 155.
Pittsburg & C. R. Co., Appeal of (99 Pa. St. 177), Eq., 5.

Pittsburg & C. R. Co. *v.* Allegheny County (63 Pa. St. 126), Divid., 3; Exec., 26; Int., 1, 3; Lim. of Ac., 6; Mort., 2; Mun. Aid, 6.
Pittsburg & C. R. Co. *v.* Andrews (39 Md. 329, 10 Am. Ry. Rep. 485), Car. of P., 490, 493, 627.
Pittsburg & C. R. Co. *v.* Barker (29 Pa. St. 160), Pledge, etc., 4.
Pittsburg & C. R. Co. *v.* Bedford & B. R. Co. (81* Pa. St. 104), Leases, 13, 35.
Pittsburg & C. R. Co. *v.* Byers (32 Pa. St. 22), Lim. of Ac., 20.
Pittsburg & C. R. Co. *v.* Clarke (29 Pa. St. 146), Stock, 34; Subscr., 2, 73.
Pittsburg & C. R. Co. *v.* Garrard (1 Pittsb. (Pa.) 378), Mun. Aid, 356.
Pittsburg & C. R. Co. *v.* Graham (2 Grant's Cas. (Pa.) 259), Lim. of Ac., 9, 42.
Pittsburg & C. R. Co. *v.* Graham (36 Pa. St. 77), Lim. of Ac., 42.
Pittsburg & C. R. Co. *v.* McClurg (56 Pa. St. 294), Car. of P., 492.
Pittsburg & C. R. Co. *v.* Mt. Pleasant & B. F. R. Co. (76 Pa. St. 481), Leases, 100.
Pittsburg & C. R. Co. *v.* Pillow (76 Pa. St. 510), Car. of P., 85, 318.
Pittsburg & C. R. Co. *v.* Plummer (37 Pa. St. 413), Subscr., 170.
Pittsburg & C. R. Co. *v.* Sentmeyer (5 Am. & Eng. R. Cas. 508, 92 Pa. St. 276, 37 Am. Rep. 684), Employés, Inj. to, 97.
Pittsburg & C. R. Co. *v.* Shaw (Pa.) (36 Am. & Eng. R. Cas. 453, 14 Atl. Rep. 323), Refer., 4; Tel. & T. Lines, 3.
Pittsburg & C. R. Co. *v.* Southwest Pa. R. Co. (77 Pa. St. 173), Cross. Rys., 63, 65.
Pittsburg & C. R. Co. *v.* Stewart (41 Pa. St. 54), Pres., 1; Subscr., 167, 201.
Pittsburg & L. E. R. Co. *v.* Bruce (10 Am. & Eng. R. Cas. 1, 102 Pa. St. 23), Em. Dom., 1024, 1030.
Pittsburg & L. E. R. Co. *v.* Cunnington (13 Am. & Eng. R. Cas. 529, 39 Ohio St. 327), Evid., 226; Fences, 57.
Pittsburg & L. E. R. Co. *v.* Henly (53 Am. & Eng. R. Cas. 194, 48 Ohio St. 608, 29 N. E. Rep. 575), Employés, Inj. to, 110, 184.
Pittsburg & L. E. R. Co. *v.* Jones (23 Am. & Eng. R. Cas. 77, 111 Pa. St. 204, 2 Atl. Rep. 410), Ferries, 6.
Pittsburg & L. E. R. Co. *v.* Robinson (1 Am. & Eng. R. Cas. 468, 95 Pa. St. 426), Em. Dom., 451, 637, 751; Witn., 115.
Pittsburg & S. L. R. Co. *v.* Rothschild (Pa.) (26 Am. & Eng. R. Cas. 50, 4 Atl. Rep. 385), Consol., 37; Mort., 2, 169.
Pittsburg & S. R. Co.'s Appeal (2 Grant's Cas. (Pa.) 151), Subscr., 184.
Pittsburg & S. R. Co. *v.* Allegheny County (79 Pa. St. 210), Mun. Aid, 185, 194.
Pittsburg & S. R. Co. *v.* Biggar (34 Pa. St. 455), Subscr., 222.
Pittsburg & S. R. Co. *v.* Clarke (2 Pittsb. (Pa.) 48), Trial, 23.
Pittsburg & S. R. Co. *v.* Gazzam (32 Pa. St. 340), Subscr., 2, 3.
Pittsburg & S. R. Co. *v.* Hall (25 Pa. St. 336), Em. Dom., 482.
Pittsburg & S. R. Co. *v.* Jones (59 Pa. St. 433), Exec., 26, 28.
Pittsburg & S. R. Co. *v.* Proudfit (2 Pittsb. (Pa.) 85), Subscr., 198.
Pittsburg & S. R. Co. *v.* Woodrow (1 Pittsb. (Pa.) 450, 3 Phila. 271), Mun. Aid, 228; Subscr., 7, 222.
Pittsburg & W. R. Co. *v.* Patterson (107 Pa. St. 461), Em. Dom., 621, 650, 709.
Pittsburg & W. R. Co. *v.* Perkins (49 Ohio St. 326, 31 N. E. Rep. 350), Em. Dom., 644.
Pittsburg, B. & B. R. Co. *v.* McCloskey (23 Am. & Eng. R. Cas. 86, 110 Pa. St. 436, 1 Atl. Rep. 555), Em. Dom., 645, 668, 692, 723.
Pittsburg, B. & W. R. Co. *v.* Rohrman (Pa.) (12 Am. & Eng. R. Cas. 176), Derailm., 6; Name, 4.
Pittsburg, C. & Y. R. Co. *v.* Moses (24 Am. & Eng. R. Cas. 295, 2 Atl. Rep. 188), Cross. Sts. & H., 19.
Pittsburg, C. & St. L. R. Co. *v.* Adams (23 Am. & Eng. R. Cas. 408, 105 Ind. 151, 5 N. E. Rep. 187), Employés, Inj. to, 32, 99, 266, 280, 283, 461, 535; Fel. Serv., 102; Pl., 24, 173.
Pittsburg, C. & St. L. R. Co. *v.* Allen (19 Am. & Eng. R. Cas. 657, 40 Ohio St. 206), Animals, 156.
Pittsburg, C. & St. L. R. Co. *v.* Baltimore & O. R. Co. (2 Int. Com. Rep. 729, 3 Int. Com. Com. 465), Int. Com., 87, 140.
Pittsburg, C. & St. L. R. Co. *v.* Barrett (3 Am. & Eng. R. Cas. 256, 36 Ohio St. 448), Bills of L., 31; Car. of M., 75; Lim. of Liab., 16, 41, 42.
Pittsburg, C. & St. L. R. Co. *v.* Board of Public Works (28 W. Va. 264), App., 6.
Pittsburg, C. & St. L. R. Co. *v.* Bolner (57 Ind. 572, 18 Am. Ry. Rep. 450), Animals, 630, 645.
Pittsburg, C. & St. L. R. Co. *v.* Bosworth (38 Am. & Eng. R. Cas. 20[illegible] Ohio St. 81, 2 L. R. A. 199, 18 N. [illegible] 533), Fences, 38.
Pittsburg, C. & St. L. R. Co. *v.* [illegible]yer (45 Ind. 496), Animals, 95.
Pittsburg, C. & St. L. R. Co. *v.* Brown (44 Ind. 409), Animals, 352.
Pittsburg, C. & St. L. R. Co. *v.* Brown (67 Ind. 45), Cross., Inj. at, 99, 100.
Pittsburg, C. & St. L. R. Co. *v.* Campbell (86 Ill. 443), Fires, 160.
Pittsburg, C. & St. L. R. Co. *v.* Central Ohio R. Co. (9 Am. & Eng. R. Cas. 535, 38 Ohio St. 614), Partit., 1.
Pittsburg, C. & St. L. R. Co. *v.* Columbus, C. & I. C. R. Co. (8 Biss. (U. S.) 456), Leases, 17, 31, 71, 81.
Pittsburg, C. & St. L. R. Co. *v.* Conn (104 Ind. 64, 3 N. E. Rep. 636), Contrib. Neg., 102; Cross., Inj. at, 334; Negl., 87.
Pittsburg, C. & St. L. R. Co. *v.* Culver (60 Ind. 469), Fires, 22, 176, 183.
Pittsburg, C. & St. L. R. Co. *v.* Currant (61 Ind. 38), Animals, 645.
Pittsburg, C. & St. L. R. Co. *v.* Dewin (86 Ill. 296), Eject. Pass., 112, 125.
Pittsburg, C. & St. L. R. Co. *v.* Eby (55 Ind.

567, 16 Am. Ry. Rep. 244), Animals, 160, 162, 168.
Pittsburg, C. & St. L. R. Co. *v.* Ehrhart (36 Ind. 118, 5 Am. Ry. Rep. 541), Fences, 78.
Pittsburg, C. & St. L. R. Co. *v.* Fierst (9 Am. & Eng. R. Cas. 437, 96 Pa. St. 144), Reorg., 13.
Pittsburg, C. & St. L. R. Co. *v.* Fleming (30 Ohio St. 480), Animals, 576; Contrib. Neg., 86; Negl., 76.
Pittsburg, C. & St. L. R. Co. *v.* Goss (13 Ill. App. 619), Employés, Inj. to, 389.
Pittsburg, C. & St. L. R. Co. *v.* Hackney (53 Ind. 488), Animals, 441.
Pittsburg, C. & St. L. R. Co. *v.* Hannon (60 Ind. 417), Animals, 338, 645.
Pittsburg, C. & St. L. R. Co. *v.* Hays (49 Ind. 207), Car. of L. S., 138.
Pittsburg, C. & St. L. R. Co. *v.* Heck (50 Ind. 303), Sales, 6.
Pittsburg, C. & St. L. R. Co. *v.* Hedges (41 Ohio St. 233), Pl., 36.
Pittsburg, C. & St. L. R. Co. *v.* Heiskell (13 Am. & Eng. R. Cas. 555, 38 Ohio St. 666), Animals, 149, 495.
Pittsburg, C. & St. L. R. Co. *v.* Henderson (5 Am. & Eng. R. Cas. 529, 37 Ohio St. 549). Fel. Serv., 70, 91; Trial, 115.
Pittsburg, C. & St. L. R. Co. *v.* Hennigh (39 Ind. 509), Eject. Pass., 27, 124.
Pittsburg, C. & St. L. R. Co. *v.* Hine (25 Ohio St. 629, 10 Am. Ry. Rep. 157), Death, etc., 102.
Pittsburg, C. & St. L. R. Co. *v.* Hixon (8 Am. & Eng. R. Cas. 717, 79 Ind. 111), Fires, 122, 183, 277; Witn., 121.
Pittsburg, C. & St. L. R. Co. *v.* Hixon (32 Am. & Eng. R. Cas. 374, 110 Ind. 225, 11 N. E. Rep. 285), Fires, 184, 191, 252, 264, 280, 350; New Tr., 26; Pl., 172; Trial, 217.
Pittsburg, C. & St. L. R. Co. *v.* Hollowell (65 Ind. 188), Car. of L. S., 60; Strikes, 1; Words & Ph., 246.
Pittsburg, C. & St. L. R. Co. *v.* Howard (11 Am. & Eng. R. Cas. 488, 40 Ohio St. 6), Animals, 153.
Pittsburg, C. & St. L. R. Co. *v.* Hume (34 Ind. 326), App., 117.
Pittsburg, C. & St. L. R. Co. *v.* Hunt (71 Ind. 229), Animals, 292, 339, 368, 381; Leases, 46.
Pittsburg, C. & St. L. R. Co. *v.* Jones (11 Am. & Eng. R. Cas. 76, 86 Ind. 496, 44 Am. Rep. 334), Fires, 121, 124, 182, 270.
Pittsburg, C. & St. L. R. Co. *v.* Kain (35 Ind. 291, 5 Am. Ry. Rep. 574), Animals, 645; Leases, 60; Pl., 104.
Pittsburg, C. & St. L. R. Co. *v.* Keller (49 Ind. 211), Animals, 352.
Pittsburg, C. & St. L. R. Co. *v.* Keokuk & H. Bridge Co. (39 Am. & Eng. R. Cas. 213, 131 U. S. 371, 9 Sup. Ct. Rep. 770), Contr., 47, 105, 110; Pres., 9; Ult. Vir., 26.
Pittsburg, C. & St. L. R. Co. *v.* Kirk (102 Ind. 399, 52 Am. Rep. 675, 1 N. E. Rep. 849), Agency, 74; Fel. Serv., 126.
Pittsburg, C. & St. L. R. Co. *v.* Kitley (37 Am. & Eng. R. Cas. 511, 118 Ind. 152, 20 N. E. Rep. 727), Cross., Inj. at, 333; Evid., 62; Pl., 172; Sts. & H., 411, 414.
Pittsburg, C. & St. L. R. Co. *v.* Knutson (69 Ill. 103), Comp. Neg., 9; Cross., Inj. at, 336.
Pittsburg, C. & St. L. R. Co. *v.* Krouse (30 Ohio St. 222, 15 Am. Ry. Rep. 298), Car. of P., 29, 420, 564; Licensees, Inj. to, 15.
Pittsburg, C. & St. L. R. Co. *v.* Laufman (78 Ind. 319), Animals, 212.
Pittsburg, C. & St. L. R. Co. *v.* Lyon (37 Am. & Eng. R. Cas. 231, 123 Pa. St. 140, 16 Atl. Rep. 607), Car. of P., 63, 88, 638.
Pittsburg, C. & St. L. R. Co. *v.* McGrath (115 Ill. 172, 3 N. E. Rep. 439; affirming 15 Ill. App. 85), Comp. Neg., 17; Death, etc., 252, 357; Evid., 261; Witn., 64.
Pittsburg, C. & St. L. R. Co. *v.* McMillan (7 Am. & Eng. R. Cas. 588, 37 Ohio St. 554), Animals, 495.
Pittsburg, C. & St. L. R. Co. *v.* Marshall (85 Pa. St. 187, 18 Am. Ry. Rep. 388), Mort., 88.
Pittsburg, C. & St. L. R. Co. *v.* Martin (8 Am. & Eng. R. Cas. 253, 82 Ind. 476), App., 118; Cross., Inj. at, 133, 205, 299, 335.
Pittsburg, C. & St. L. R. Co. *v.* Moore (33 Ohio St. 384), Consol., 32; Tickets & F., 132.
Pittsburg, C. & St. L. R. Co. *v.* Morton (61 Ind. 539), Actions, 9; Car. of M., 43, 49, 740.
Pittsburg, C. & St. L. R. Co. *v.* Nash (43 Ind. 423), Car. of M., 89.
Pittsburg, C. & St. L. R. Co. *v.* Nelson (51 Ind. 150), Fires, 36, 68, 132, 178; Negl., 89.
Pittsburg, C. & St. L. R. Co. *v.* Noel (7 Am. & Eng. R. Cas. 524, 77 Ind. 110), Evid., 232; Fires, 25, 132, 178, 234, 255, 316.
Pittsburg, C. & St. L. R. Co. *v.* Nuzum (50 Ind. 141, 9 Am. Ry. Rep. 396), Car. of P., 214, 226, 256, 258.
Pittsburg, C. & St. L. R. Co. *v.* Nuzum (60 Ind. 533; former appeal 50 Ind. 141), Pl., 42; Stat. Agts., 3.
Pittsburg, C. & St. L. R. Co. *v.* Porter (32 Ohio St. 328), New Tr., 12, 13.
Pittsburg, C. & St. L. R. Co. *v.* Ranney (5 Am. & Eng. R. Cas. 533, 37 Ohio St. 665), Fel. Serv., 1, 73, 268.
Pittsburg, C. & St. L. R. Co. *v.* Shannon (11 Ill. App. 222), Comp. Neg., 4.
Pittsburg, C. & St. L. R. Co. *v.* Shields (44 Am. & Eng. R. Cas. 647, 47 Ohio St. 387, 8 L. R. A. 464, 24 N. E. Rep. 658), Agency, 83, 84; Children, Inj. to, 8; Negl., 10.
Pittsburg, C. & St. L. R. Co. *v.* Smith (26 Ohio St. 124), Animals, 139.
Pittsburg, C. & St. L. R. Co. *v.* Smith (13 Am. & Eng. R. Cas. 579, 38 Ohio St. 410), Animals, 140.
Pittsburg, C. & St. L. R. Co. *v.* Spencer (21 Am. & Eng. R. Cas. 478, 98 Ind. 186), Car. of P., 534; Collis., 4, 10; Negl., 76; Trial, 213.
Pittsburg, C. & St. L. R. Co. *v.* Sponier (8 Am. & Eng. R. Cas. 453, 85 Ind. 165), Dam., 68, 70, 71; New Tr., 51; Sts. & H., 409.
Pittsburg, C. & St. L. R. Co. *v.* Staley (19

Am. & Eng. R. Cas. 381, 41 Ohio St. 118, 52 Am. Rep. 74), Sts. & H., 407.
Pittsburg, C. & St. L. R. Co. *v.* State (49 Am. & Eng. R. Cas. 503, 49 Ohio St. 189, 30 N. E. Rep. 435), Tax., 43.
Pittsburg, C. & St. L. R. Co. *v.* Stuart (71 Ind. 500), Animals, 77, 382.
Pittsburg, C. & St. L. R. Co. *v.* Theobald (51 Ind. 246), Car. of P., 544; Evid., 194.
Pittsburg, C. & St. L. R. Co. *v.* Thompson (56 Ill. 138, 3 Am. Ry. Rep. 454), Car. of P., 152, 586, 632; New Tr., 60.
Pittsburg, C. & St. L. R. Co. *v.* Troxell (57 Ind. 246), Animals, 73, 338.
Pittsburg, C. & St. L. R. Co. *v.* United States (13 Ct. of Cl. 314), Car. of Mails, 9.
Pittsburg, C. & St. L. R. Co. *v.* Vandyne (57 Ind. 576, 18 Am. Ry. Rep. 454), Car. of P., 115; Tickets & F., 22.
Pittsburg, C. & St. L. R. Co. *v.* Van Houten (48 Ind. 90), Eject. Pass., 18, 44.
Pittsburg, C. & St. L. R. Co. *v.* Williams (3 Am. & Eng. R. Cas. 457, 74 Ind. 462), Car. of P., 605; Derailm., 4, 6.
Pittsburg, C. & St. L. R. Co. *v.* Wooley (12 Bush (Ky.) 451), Agency, 112.
Pittsburg, C. & St. L. R. Co. *v.* Wright (5 Am. & Eng. R. Cas. 628, 80 Ind. 182), Contrib. Neg., 72; Cross., Inj. at, 330; Evid., 175.
Pittsburg, C. & St. L. R. Co. *v.* Wright (6 Am. & Eng. R. Cas. 114, 80 Ind. 236), Contrib. Neg., 82; Cross., Inj. at, 244; Negl., 61.
Pittsburg, C. & St. L. R. Co. *v.* Yundt (3 Am. & Eng. R. Cas. 502, 78 Ind. 373, 41 Am. Rep. 580), Cross., Inj. at, 70, 84, 245.
Pittsburg, C., C. & St. L. R. Co. *v.* Backus (54 Am. & Eng. R. Cas. 227, 133 Ind. 625, 33 N. E. Rep. 432), Int. Com., 185; Tax., 25, 258; Words & Ph., 163.
Pittsburg, C., C. & St. L. R. Co. *v.* Racer (5 Ind. App. 209, 31 N. E. Rep. 853), Car. of L. S., 5, 138, 141.
Pittsburg, C., C. & St. L. R. Co. *v.* Russ (57 Fed. Rep. 822), Eject. Pass., 57, 72, 113, 120; Tickets & F., 99.
Pittsburg, Ft. W. & C. R. Co. *v.* Bingham (29 Ohio St. 364), Stat. & D., 73.
Pitsburg, F. W. & C. R. Co. *v.* Brigham (29 Ohio St. 374), Stat. & D., 60.
Pittsburg, Ft. W. & C. R. Co. *v.* Bumstead (48 Ill. 221), Children, Inj. to, 22; Collis., 15.
Pittsburg, Ft. W. & C. R. Co. *v.* Cheevers (44 Ill. App. 118), Hacks, etc., 5.
Pittsburg, Ft. W. & C. R. Co. *v.* Collins (87 Pa. St. 405), Death, etc., 203.
Pittsburg, Ft. W. & C. R. Co. *v.* Devinney (17 Ohio St. 197), Fel. Serv., 138, 237.
Pittsburg, Ft. W. & C. R. Co. *v.* Dunn (56 Pa. St. 280), Cross., Inj. at, 6, 26.
Pittsburg, Ft. W. & C. R. Co. *v.* Evans (53 Pa. St. 250), Cross., Inj. at, 108; Negl., 104.
Pittsburg, Ft. W. & C. R. Co. *v.* Fawsett (56 Ill. 513, 4 Am. Ry. Rep. 405), Agency, 9; Contr., 109.
Pittsburg, Ft. W. & C. R. Co. *v.* Gilleland (56 Pa. St. 445), Culverts, 14.
Pittsburg, Ft. W. & C. R. Co. *v.* Harbaugh (4 Brews. (Pa.) 115), Leases, 45.
Pittsburg, Ft. W. & C. R. Co. *v.* Hazen (84 Ill. 36, 16 Am. Ry. Rep. 422), Strikes, 1, 2; Words & Ph., 246.
Pittsburg, Ft. W. & C. R. Co. *v.* Hinds (53 Pa. St. 512), Car. of P., 317, 325, 328, 348; Strikes, 4.
Pittsburg, Ft. W. & C. R. Co. *v.* Karns (13 Ind. 87), Fright. Teams, 2.
Pittsburg, Ft. W. & C. R. Co. *v.* Krichbaum (24 Ohio St. 119, 7 Am. Ry. Rep. 200), Contrib. Neg., 117; Cross., Inj. at, 221.
Pittsburg, Ft. W. & C. R. Co. *v.* Lewis (33 Ohio St. 196), Fel. Serv., 1, 56, 73, 197, 210, 268, 458.
Pittsburg, Ft. W. & C. R. Co. *v.* Maurer (21 Ohio St. 421), Cross., Inj. at, 8, 37; Sts. & H., 185, 414.
Pittsburg, Ft. W. & C. R. Co. *v.* Methven (21 Ohio St. 586), Animals, 274; Penalty, 1, 13.
Pittsburg, Ft. W. & C. R. Co. *v.* Peet (152 Pa. St. 488, 25 Atl. Rep. 612), Em. Dom., 129, 973, 1028.
Pittsburg, Ft. W. & C. R. Co. *v.* Pittsburg (1 Pittsb. (Pa.) 392), Charters, 53, 57; Sts. & H., 92.
Pittsburg, Ft. W. & C. R. Co. *v.* Powers (74 Ill. 341), Employés, Inj. to, 765; Evid., 68; Fel. Serv., 20, 106, 153, 296.
Pittsburg, Ft. W. & C. R. Co. *v.* Reich (101 Ill. 157), Evid., 205; Lim. of Ac., 6; Right of W., 2; Sts. & H., 73, 87, 146, 292; Witn., 145.
Pittsburg, Ft. W. & C. R. Co. *v.* Reno (123 Ill. 273, 14 N. E. Rep. 195, 11 West. Rep. 795; affirming 22 Ill. App. 470), Vend. & P., 1.
Pittsburg, Ft. W. & C. R. Co. *v.* Rose (24 Ohio St. 219, 7 Am. Ry. Rep. 1), Stat. & D., 41; Words & Ph., 73.
Pittsburg, Ft. W. & C. R. Co. *v.* Ruby (38 Ind. 294, 10 Am. Ry. Rep. 199), Agency, 39; Fel. Serv., 5, 478.
Pittsburg, Ft. W. & C. R. Co. *v.* Shaeffer (59 Pa. St. 350), Officers, 9.
Pittsburg, Ft. W. & C. R. Co. *v.* Slusser (19 Ohio St. 157), Dam., 32.
Pittsburg, Ft. W. & C. R. Co. *v.* Swinney (59 Ind. 100), Em. Dom., 568, 580, 934; Witn., 76.
Pittsburg, Ft. W. & C. R. Co. *v.* Swinney (17 Am. & Eng. R. Cas. 124, 91 Ind. 399), Estop., 7.
Pittsburg, Ft. W. & C. R. Co. *v.* Swinney (97 Ind. 586), Em. Dom., 977, 1056; Ex. & Ad., 12; Tresp., 18.
Pittsburg, Ft. W. & C. R. Co. *v.* Vining (27 Ind. 513), Children, Inj. to, 121, 129, 136, 157; Death, etc., 18, 49, 86.
Pittsburg Junction R. Co.'s Appeal (28 Am. & Eng. R. Cas. 266, 122 Pa. St. 511, 6 Atl. Rep. 564, 9 Am. St. Rep. 128), Cross. Rys., 65; Em. Dom., 102, 105, 110.
Pittsburg Junction R. Co. *v.* Allegheny Valley R. Co. (146 Pa. St. 297, 23 Atl. Rep. 313), Cross. Rys., 18; Em. Dom., 101.

Pittsburg Junction R. Co. *v.* McCutcheon (Pa.) (7 Atl. Rep. 146), Elev. Rys., 160.
Pittsburg, McK. & Y. R. Co. *v.* Com. (104 Pa. St. 583), Sts. & H., 177.
Pittsburg Nat. Bank *v.* Shoenberger (25 Am. & Eng. R. Cas. 177, 111 Pa. St. 95, 2 Atl. Rep. 190), Branch & L. Roads, 10, 16.
Pittsburg, O. & E. L. Pass. R. Co. *v.* Kane (Pa.) (6 Atl. Rep. 845), Negl., 52.
Pittsburg Southern R. Co. *v.* Reed (Pa.) (28 Am. & Eng. R. Cas. 233, 6 Atl. Rep. 838), Em. Dom., 978; Witn., 54, 160.
Pittsburg Southern R. Co. *v.* Taylor (104 Pa. St. 306, 49 Am. Rep. 580), Dam., 35; Fright. Teams, 3, 5, 6.
Pittsburg, V. & C. R. Co. *v.* Bentley (88 Pa. St. 178), Em. Dom., 431, 698, 707.
Pittsburg, V. & C. R. Co. *v.* Com. (10 Am. & Eng. R. Cas. 321, 101 Pa. St. 192), Sts. & H., 177, 195.
Pittsburg, V. & C. R. Co. *v.* Pittsburg, C. & S. L. R. Co. (Pa.) (57 Am. & Eng. R. Cas. 46, 28 Atl. Rep. 155), Aband., 2, 7; Branch & L. Roads, 4.
Pittsburg, V. & C. R. Co. *v.* Rose (74 Pa. St. 362, 3 Am. Ry. Rep. 56, 6 Am. Ry. Rep. 343), Embankm., 2; Em. Dom., 633, 639; Sts. & H., 260; Words & Ph., 79.
Pittsburg, V. & C. R. Co. *v.* Vance (115 Pa. St. 325, 8 Atl. Rep. 764), Em. Dom., 610, 621, 651; Witn., 31, 118, 123.
Pittsburg, W. & K. R. Co. *v.* Applegate (16 Am. & Eng. R. Cas. 440, 21 W. Va. 172), Stockh., 1; Subscr., 131; Trial, 17.
Pittsburg, W. & K. R. Co. *v.* Benwood Iron Works (36 Am. & Eng. R. Cas. 531, 31 W. Va. 710, 2 L. R. A. 680, 8 S. E. Rep. 453), Em. Dom., 179, 181, 182.
Pittsfield & F. P. R. Co. *v.* Harrison (16 Ill. 81), Witn., 13.
Pittsfield & N. A. R. Co. *v.* Foster (1 Cush. (Mass.) 480), Em. Dom., 549.
Pitzman *v.* Freeburg (92 Ill. 111), Mun. Aid, 55, 66.
Pitzner *v.* Shinnick (39 Wis. 129), Animals, 182.
Pixley *v.* Gould (13 Ill. App. 565), Right of W., 8.
Pixley *v.* Third Ave. R. Co. (1 J. & S. (N. Y.) 406), St. Rys., 435.
Pixley *v.* Western Pac. R. Co. (33 Cal. 183), Charters, 187; Contr., 6; Pres., 9.
Place *v.* Union Exp. Co. (2 Hilt. (N. Y.) 19), Car. of M., 2, 31, 133, 703; Exp. Cos., 22, 67; Lim. of Liab., 3.
Plainview *v.* Winona & St. P. R. Co. (30 Am. & Eng. R. Cas. 259, 36 Minn. 505, 32 N. W. Rep. 745), Mun. Aid, 38, 331; Reorg., 13.
Planet P. & F. Co. *v.* St. Louis, O. H. & C. R. Co. (115 Mo. 613, 22 S. W. Rep. 616), Estop., 26; Injunc., 7.
Plank *v.* New York C. & H. R. R. Co. (1 T. & C. (N. Y.) 319; affirmed in 60 N. Y. 607, mem.), Employés, Inj. to, 12, 93, 293, 668.
Plant *v.* Grand Trunk R. Co. (27 U. C. Q. B. 78), Death, etc., 219; Fel. Serv., 17.
Plant *v.* Long Island R. Co. (10 Barb. (N. Y.) 26), Sts. & H., 138.
Plant *v.* Midland R. Co. (21 L. T. 836), Car. of P., 412.
Plantation No. 4 *v.* Hall (61 Me. 517), Car. of M., 32.
Planz *v.* Boston & A. R. Co. (157 Mass. 377, 32 N. E. Rep. 356), Car. of P., 49; Tresp., Inj. to, 13, 82.
Plaster *v.* Illinois C. R. Co. (35 Iowa 449, 5 Am. Ry. Rep. 528), Animals, 70, 487, 495.
Plate *v.* New York C. R. Co. (37 N. Y. 472), Estop., 9.
Platt *v.* Bright (29 N. J. Eq. 128, 19 Am. Ry. Rep. 95), Em. Dom., 288, 403.
Platt *v.* Chicago, B. & Q. R. Co. (Iowa) (11 N. W. Rep. 883), Sts. & H., 79.
Platt *v.* Chicago, B. & Q. R. Co. (74 Iowa 127, 37 N. W. Rep. 107), Nuis., 10, 26, 41.
Platt *v.* Chicago, St. P., M. & O. R. Co. (84 Iowa 694, 51 N. W. Rep. 254), Employés, Inj. to, 368.
Platt *v.* Forty-second St. & G. S. F. R. Co. (4 T. & C. (N. Y.) 406, 2 Hun 124), St. Rys., 413.
Platt *v.* New York & B. R. Co. (26 Conn. 544), Insolv., 1.
Platt *v.* Pennsylvania Co. (22 Am. & Eng. R. Cas. 129, 43 Ohio St. 228, 1 N. E. Rep. 420), Em. Dom., 146, 749, 988.
Platt *v.* Pennsylvania R. Co. (11 N. Y. Supp. 632), Fire Ins., 11.
Platt *v.* Philadelphia & R. R. Co. (54 Fed. Rep. 569), Receiv., 22.
Platt *v.* Richmond, Y. R. & C. R. Co. (32 Am. & Eng. R. Cas. 517, 108 N. Y. 358, 11 Cent. Rep. 101, 15 N. E. Rep. 393, 13 N. Y. S. R. 660; affirming 20 J. & S. 496), Bills of L., 80; Contr., 86; Fire Ins., 14.
Platt *v.* Union Pac. R. Co. (99 U. S. 48), Land Grants, 95.
Platt *v.* Wells (2 Robt. (N. Y.) 101, 26 How. Pr. 442), Car. of M., 257.
Platteville *v.* Galena & S. W. R. Co. (43 Wis. 493, 17 Am. Ry. Rep. 1), Injunc., 24; Mun. Aid, 234, 235.
Player *v.* Burlington, C. R. & N. R. Co. (12 Am. & Eng. R. Cas. 112, 62 Iowa 723, 16 N. W. Rep. 347), Car. of L. S., 131.
Pleasants *v.* North Beach & M. R. Co. (34 Cal. 586), Col. Pers., 13; St. Rys., 343.
Pleasants *v.* Raleigh & A. A. L. R. Co. (95 N. Car. 195), Employés, Inj. to, 96, 241; Negl., 51.
Pleasant Tp. *v.* Aetna Life Ins. Co. (138 U. S. 67, 11 Sup. Ct. Rep. 215), Mun. Aid, 46.
Plessy, Ex parte (58 Am. & Eng. R. Cas. 550, 45 La. Ann. 80, 11 So. Rep. 948, 18 L. R. A. 639), Col. Pers., 2; Commerce, 7.
Plopper *v.* New York, C. & H. R. R. Co. (13 Hun (N. Y.) 625), Car. of P., 404.
Plott *v.* Chicago & N. W. R. Co. (21 Am. & Eng. R. Cas. 319, 63 Wis. 511, 23 N. W. Rep. 412), Car. of P., 83, 251, 257, 258.
Plott *v.* Western N. C. R. Co. (65 N. Car. 74), Em. Dom., 851.
Plummer *v.* Eastern R. Co. (6 Am. & Eng. R. Cas. 165, 73 Me. 591), Cross., Inj. at, 245.

Plummer *v.* Ossipee (59 N. H. 55), Evid., 70, 211; Husb. & W., 25.
Plunkett *v.* Minneapolis, S. St. M. & A. R. Co. (79 Wis. 222, 48 N. W. Rep. 519), Animals, 381, 430, 527; Fences, 58.
Plymouth & D. R. Co. *v.* Great Western R. Co. (6 Ry. & C. T. Cas. 101), Charges, 105; Leases, 122.
Plymouth R. Co. *v.* Colwell (39 Pa. St. 337), Em. Dom., 186; Exec., 3, 4.
Plymouth Tp. *v.* Graver (125 Pa. St. 24, 17 Atl. Rep. 249), Fright. Teams, 2.
Poage *v.* Wabash, St. L. & P. R. Co. (24 Mo. App. 199), Deeds, 4; Vend. & P., 4.
Pocantico Water Works Co. *v.* Bird (130 N. Y. 249, 29 N. E. Rep. 246), Em. Dom., 181.
Poeppers *v* Missouri, K. & T. R. Co. (67 Mo. 715), Fires, 84.
Pointin *v.* Porrier (49 J. P. 199), Car. of M., 184.
Poland *v.* Lamoille Valley R. Co. (4 Am. & Eng. R. Cas. 408, 52 Vt. 144), Mort., 86, 99, 102.
Poler *v.* New York C. R. Co. (16 N. Y. 476), Farm Cross., 11; Fences, 38, 88.
Polhans *v.* Atchison, T. & S. F. R. Co. (45 Mo. App. 153), Fires, 266; Just. P., 1.
Polhans *v.* Atchison, T. & S. F. R. Co. (115 Mo. 535, 22 S. W. Rep. 478; affirming 45 Mo. App. 153), Just. P., 8.
Polhemus *v.* Fitchburg R. Co. (113 N. Y. 617, mem., 2 Silv. App. 150, 20 N. E. Rep. 601, 21 N. Y. S. R. 933), Trial, 37.
Polhemus *v.* Fitchburg R. Co. (46 Am. & Eng. R. Cas. 330, 123 N. Y. 502, 26 N. E. Rep. 31, 34 N. Y. S. R. 420; affirming 50 Hun 397, 21 N. Y. S. R. 117, 3 N. Y. Supp. 327), Consol., 30.
Police Jury *v.* McDonogh (8 La. Ann. 341), Mun. Aid, 34.
Poling *v.* Ohio River R. Co. (38 W. Va. 645, 18 S. E. Rep. 782), Car. of Mails, 7; Car. of P., 129; Evid., 231; Licensees, Inj. to, 13; Pl., 23.
Pollard *v.* Louisville, C. & L. R. Co. (7 Bush (Ky.) 597), Evid., 194.
Pollard *v.* Maddox (28 Ala. 321), Assign. for Cred., 6; Em. Dom., 200; Estop., 13.
Pollard *v.* New Jersey R. & T. Co. (101 U. S. 223), Husb. & W., 39.
Pollard *v.* New York & N. H. R. Co. (7 Bosw. (N. Y.) 437), Collis., 17, 18.
Pollard *v.* Pleasant Hill (3 Dill. (U. S.) 195), Mun. Aid, 312, 378.
Pollard *v.* Woburn (104 Mass. 84), Sts. & H., 364.
Pollich *v.* Sellers (42 La. Ann. 623, 7 So. Rep. 786), Employés, Inj. to, 268.
Pollitt *v.* Kings County El. R. Co. (32 N. Y. S. R. 954, 57 Hun 591, 10 N. Y. Supp. 691; affirmed in 126 N. Y. 630, mem., 36 N. Y. S. R. 1013), Elev. Rys., 221.
Pollock *v.* Brooklyn & C. T. R. Co. (39 N. Y. S. R. 568, 60 Hun 584, 15 N. Y. Supp. 189; affirmed in 133 N. Y. 624, mem., 30 N. E. Rep. 1150, 44 N. Y. S. R. 932), St. Rys., 431, 447.
Pollock *v.* Eastern R. Co. (124 Mass. 158, 17 Am Ry. Rep. 402), Eastern R. Co., 1; Fright. Teams, 3.
Polly *v.* Saratoga & W. R. Co. (9 Barb. (N. Y.) 449), Appear., 2; Em. Dom., 417, 514, 1069.
Pomeroy *v.* Chicago & M. R. Co. (25 Wis. 641), Em. Dom., 434, 451.
Pomeroy *v.* Milwaukee & C. R. Co. (16 Wis. 640), Em. Dom., 1067; Sts. & H., 250.
Pomeroy *v.* New York & N. H. R. Co. (4 Blatchf. (U. S.) 120), Proc., 17.
Pomona Branch R. Co. *v.* Camden & A. R. Co. (N. J.) (44 Am. & Eng. R. Cas. 179, 20 Atl. Rep. 350), Em. Dom., 388.
Pompton *v.* Cooper Union (101 U. S. 196), Mun. Aid, 377.
Pond *v.* Framingham & L. R. Co. (9 Am. & Eng. R. Cas. 551, 130 Mass. 194), Injunc., 16.
Pond *v.* Hudson River R. Co. (17 How. Pr. (N. Y.) 543), Citizens., 4; Trial, 9.
Pond *v.* Metropolitan El. R. Co. (112 N. Y. 186, 19 N. E. Rep. 487, 20 N. Y. S. R. 479; reversing 42 Hun 567, 4 N. Y. S. R. 661), Elev. Rys., 138.
Pond *v.* Sibley (19 Blatchf. (U. S.) 189), Rem. of C., 28.
Pond *v.* Vermont Valley R. Co. (12 Blatchf. (U. S.) 280), Appear., 3; Injunc., 25; Stockh., 88.
Pondir *v.* New York, L. E. & W. R. Co. (55 N. Y. S. R. 63, 72 Hun 384), Stockh., 116.
Pontchartrain R. Co. *v.* Hierne (2 La. Ann. 129), Agency, 39; Stat., 63.
Pontchartrain R. Co. *v.* Lafayette & P. R. Co. (10 La. Ann. 741), Charters, 162.
Pontchartrain R. Co. *v.* New Orleans (27 La. Ann. 162), Mun. Corp., 20.
Pontchartrain R. Co. *v.* New Orleans & C. R. Co. (11 La. Ann. 253), Charters, 50.
Pontiac, O. & P. A. R. Co. *v.* King (68 Mich. 111, 12 West. Rep. 422, 35 N. W. Rep. 705), Bills & N., 23.
Pontiac Pac. J. R. Co. *v.* Brady (4 Montr. L. R. (Q. B.) 346), Animals, 66, 165.
Pontifex *v.* Midland R. Co. (25 W. R. 215, 35 L. T. N. S. 706, 37 L. T. N. S. 403, L. R. 3 Q. B. D. 23, 47 L. J. Q. B. 28, 26 W. R. 209), Actions, 9; Car. of M., 776.
Ponton *v.* Wilmington & W. R. Co. (6 Jones (N. Car.) 245), Fel. Serv., 1, 137, 202.
Pool *v.* Chicago, M. & St. P. R. Co. (3 Am. & Eng. R. Cas. 332, 53 Wis. 657, 11 N. W. Rep. 15), Agency, 105; Car. of P., 300; Employés, Inj. to, 392, 670.
Pool *v.* Chicago, M. & St. P. R. Co. (8 Am. & Eng. R. Cas. 360, 56 Wis. 227, 14 N. W. Rep. 46), App., 119; Employés, Inj. to, 127, 392, 731; Negl., 75; Trial, 205.
Pool *v.* Columbia & G. R. Co. (23 So. Car. 286), Car. of M., 509.
Pool *v.* Southern Pac. R. Co. (7 Utah 303, 26 Pac. Rep. 654), Death, etc., 214, 322; Fel. Serv., 419.
Poole *v.* Chicago, B. & Q. R. Co. (2 McCrary (U. S.) 251, 6 Fed. Rep. 844), New Tr., 11, 13.
Poole *v.* Georgia R. & B. Co. (89 Ga. 320, 15 S. E. Rep. 321), Car. of P., 214.

Poole *v.* Houston & T. C. R. Co. (9 Am. & Eng. A. Cas. 197, 58 Tex. 134), Att'ys, 4; Car. of M., 494, 505.
Poole *v.* North Carolina R. Co. (8 Jones (N. Car.) 340), Tresp., Inj. to, 71.
Poole *v.* Northern Pac. R. Co. (16 Oreg. 261, 19 Pac. Rep. 107), Tickets & F., 22, 120.
Pooley *v.* Great Eastern R. Co. (34 L. T. 537), Car. of M., 257.
Poor *v.* European & N. A. R. Co. (59 Me. 270), Stock, 28.
Pope *v.* Kansas City Cable R. Co. (43 Am. & Eng. R. Cas. 290, 99 Mo. 400, 12 S. W. Rep. 891), Cable Rys., 15; Death, etc., 138, 263; Negl., 111.
Pope *v.* Terre Haute C. & M. Co. (87 N. Y. 137; affirming 24 Hun 238, 60 How. Pr. 419), Proc., 16, 20.
Popham *v.* Twenty-third St. R. Co. (16 J. & S. (N. Y.) 229; see 97 N. Y. 652, mem.), Actions, 16.
Popp *v.* New York C. & H. R. R. Co. (26 N. Y. S. R. 639, 54 Hun 635, 4 Silv. Sup. Ct. 243, 7 N. Y. Supp. 249), Dam., 91; Trial, 72; Witn., 167.
Porcher *v.* Northeastern R. Co. (14 Rich. (So. Car.) 181), Car. of M., 12; Words & Ph., 7.
Portadown, D. & O. J. R. Co., In re (10 Ir. Eq. 368), Em. Dom., 1154.
Portage County Sup'rs *v.* Wisconsin C. R. Co. (121 Mass. 460), Mun. Aid, 8, 182; Stock, 50.
Portage Lake Bridge Co. *v.* Wright (78 Mich. 426, 44 N. W. Rep. 498), Contr., 39.
Port Clinton R. Co. *v.* Cleveland & T. R. Co. (13 Ohio St. 544), Leases, 49; Mun. Aid, 226; Spec. Perf., 19.
Port Dover & L. H. R. Co. *v.* Grey (36 U. C. Q. B. 425), Subscr., 94, 98, 142, 204.
Port Edwards, C. & N. R. Co. *v.* Arpin (80 Wis. 214, 49 N. W. Rep. 828), Stock, 22.
Porter *v.* Androscoggin & K. R. Co. (37 Me. 349), Assump., 1; Contr., 12; Deeds, 3.
Porter *v.* Buckfield Branch R. Co. (32 Me. 539), Constr. Rys., 119; Refer., 3.
Porter *v.* Chicago & N. W. R. Co. (20 Iowa 73), Bills of L., 20; Car. of M., 333.
Porter *v.* Chicago & N. W. R. Co. (1 Neb. 14), Proc., 30.
Porter *v.* Chicago & R. I. R. Co. (20 Ill. 407), Car. of M., 149, 338.
Porter *v.* Chicago & W. M. R. Co. (80 Mich. 156, 44 N. W. Rep. 1054), Car. of P., 261.
Porter *v.* Chicago, R. I. & P. R. Co. (41 Iowa 358), Arrest, 4; Assault, 11; Car. of P., 96; Tresp., Inj. to, 112.
Porter *v.* Hannibal & St. J. R. Co. (60 Mo. 160), Children, Inj. to, 167; Employés, Inj. to, 145.
Porter *v.* Hannibal & St. J. R. Co. (2 Am. & Eng. R. Cas. 44, 71 Mo. 66, 36 Am. Rep. 454), Agency, 42; Dam., 71; Employés, Inj. to, 96, 211, 221, 261; New Tr., 72.
Porter *v.* Janesville (3 Fed. Rep. 617), Fed. Cts., 7.
Porter *v.* Metropolitan El. R. Co. (120 N. Y. 284, 24 N. E. Rep. 454, 30 N. Y. S. R. 938), Elev. Rys., 80.
Porter *v.* Midland R. Co. (46 Am. & Eng. R. Cas. 70, 125 Ind. 476, 25 N. E. Rep. 556), Sts. & H., 209.
Porter *v.* New York C. R. Co. (34 Barb. (N. Y.) 353), Conduct., 12; Tickets & F., 125.
Porter *v.* New York, L. E. & W. R. Co. (36 N. Y. S. R. 315, 13 N. Y. Supp. 491, 59 Hun 177; affirmed in 129 N. Y. 624, mem., 41 N. Y. S. R. 946, 29 N. E. Rep. 1029), Car. of L. S., 130; Release, 17.
Porter *v.* Norfolk County Com'rs (13 Metc. (Mass.) 479), Em. Dom., 527.
Porter *v.* North Mo. R. Co. (33 Mo. 128), Sts. & H., 215, 271.
Porter *v.* Pittsburg Bessemer Steel Co. (30 Am. & Eng. R. Cas. 472, 120 U. S. 649, 7 Sup. Ct. Rep. 741), Mort., 128, 299.
Porter *v.* Pittsburg Bessemer Steel Co. (30 Am. & Eng. R. Cas. 495, 122 U. S. 267, 7 Sup. Ct. Rep. 1206), Mort., 112.
Porter *v.* Richmond & D. R. Co. (34 Am. & Eng. R. Cas. 137, 97 N. Car. 46, 2 S. E. Rep. 374), Contr., 92; Evid., 230.
Porter *v.* Rockford, R. I. & St. L. R. Co. (76 Ill. 561), Tax., 4, 24, 97, 101, 103, 108, 257, 347.
Porter *v.* Sewell Car Heating Co. (17 Civ. Pro. 386, 7 N. Y. Supp. 166), Proc., 20.
Porter *v.* Southern Exp. Co. (4 So. Car. 135), Exp. Cos., 69, 81, 84.
Porter *v.* Western N. C. R. Co. (97 N. Car. 66, 2 Am. St. Rep. 272, 2 S. E. Rep. 580), Fel. Serv., 160; New Tr., 26.
Porterfield *v.* Bond (39 Am. & Eng. R. Cas. 48, 38 Fed. Rep. 391), Em. Dom., 722; Sts. & H., 317, 377.
Porth *v.* Manhattan R. Co. (33 N. Y. S. R. 709, 26 J. & S. 366, 11 N. Y. Supp. 633; affirmed in 134 N. Y. 615, mem., 47 N. Y. S. R. 929, mem.), Elev. Rys., 13, 61, 96.
Port Huron & G. R. Co. *v.* St. Clair Circuit Judge (31 Mich. 456), Receiv., 5.
Port Huron & N. W. R. Co. *v.* Callanan (61 Mich. 12, 27 N. W. Rep. 717), Em. Dom., 517, 796.
Port Huron & N. W. R Co. *v.* Callanan (61 Mich. 22, 11 West. Rep. 525, 34 N. W. Rep. 678), Arb., 20; Em. Dom., 492.
Port Huron & N. W. R. Co. *v.* Richards (90 Mich. 577, 51 N. W. Rep. 680), Stat. & D., 23; Words & Ph., 83.
Port Huron & S. W. R. Co. *v.* Potter (55 Mich. 627, 22 N. W. Rep. 70), Assump., 3.
Port Huron & S. W. R. Co. *v.* Voorheis (14 Am. & Eng. R. Cas. 227, 50 Mich. 506, 15 N. W. Rep. 882), App., 28; Em. Dom., 453, 507, 508, 509, 867, 920.
Port Jervis, M. & N. Y. R. Co. *v.* New York, L. E. & W. R. Co. (52 Am. & Eng. R. Cas. 107, 132 N. Y. 439, 30 N. E. Rep. 855, 44 N. Y. S. R. 597; affirming 56 Hun 647, 32 N. Y. S. R. 359, 10 N. Y. Supp. 852), Connect. L., 2, 4.
Portland *v.* Atlantic & St. L. R. Co. (66 Me. 485), Cross., Inj. at, 27; Sts. & H., 399.
Portland *v.* Atlantic & St. L. R. Co. (74 Me. 241), Mun. Aid, 173.
Portland *v.* Oregonian R. Co. (7 Sawy. (U. S.) 122, 6 Fed. Rep. 321), Injunc., 19, 63.

Portland & O. R. Co. *v.* Cumberland County Com'rs (64 Me. 505), Em. Dom., 959.
Portland & O. R. Co. *v.* Standish (65 Me. 63, 10 Am. Ry. Rep. 111), Mun. Aid, 128, 133.
Portland & O. C. R. Co. *v.* Grand Trunk R. Co. (46 Me. 69), Connect. L., 3; Sales of Rds., 10.
Portland & O. C. R. Co. *v.* Hartford (58 Me. 23), Mun. Aid, 233, 448.
Portland & R. R. Co. *v.* Deering (23 Am. & Eng. R. Cas. 51, 78 Me. 61, 57 Am. Rep. 784, 2 Atl. Rep. 670), Cross., St. & H., 58, 77; Witn., 119.
Portland & W. V. R. Co. *v.* Portland (27 Am. & Eng. R. Cas. 353, 14 Oreg. 188, 12 Pac. Rep. 265, 58 Am. Rep. 299), Em. Dom., 127.
Portland Sav. Bank *v.* Evansville (25 Fed. Rep. 389), Mun. Aid, 377.
Portland, S. & P. R. Co. *v.* Boston & M. R. Co. (101 Mass. 269), Connect. L., 5.
Portland, S. & P. R. Co. *v.* Boston & M. R. Co. (65 Me. 122, 10 Am. Ry. Rep. 117), Sts. & H., 296.
Portland, S. & P. R. Co. *v.* Graham (11 Metc. (Mass.) 1), Subscr., 184.
Portland, S. & P. R. Co. *v.* Grand Trunk R. Co. (63 Me. 90), Contr., 78.
Portland, S. & P. R. Co. *v.* Saco (60 Me. 196), Tax., 128, 341; Words & Ph., 185.
Port of Mobile *v.* Louisville & N. R. Co. (36 Am. & Eng. R. Cas. 171, 84 Ala. 115, 4 So. Rep. 106), Sts. & H., 104.
Portpatrick R. Co. *v.* Calendonian R. Co. (3 Ry. & C. T. Cas. 189), Arb., 1, 3; Leases, 134; Ry. Com'rs, 6, 29.
Port Richmond & P. P. Elec. R. Co. *v* Staten Island R. T. R. Co. (71 Hun (N. Y.) 179), Cross. Rys., 86.
Port Rowan & L. S. R. Co. *v.* South Norfolk R. Co. (13 Ont. Pr. 327), Costs, 6.
Port Royal & A. R. Co. *v.* Branch (78 Ga. 113), Parties, 21.
Port Royal & A. R. Co. *v.* Tompkins (83 Ga. 759, 10 S. E. Rep. 356), Pl., 110.
Port Royal & W. C. R. Co. *v.* Griffin (86 Ga. 172, 12 S. E. Rep. 303), Fires, 292; New Tr., 23.
Port Royal & W. C. R. Co. *v.* Phinizy (40 Am. & Eng. R. Cas. 212, 83 Ga. 192, 9 S. E. Rep. 609), Animals, 208, 526.
Port Royal R. Co. *v.* Hammond (58 Ga. 523), Jurisd., 6.
Portsmouth Tramways Co., In re ([1892] 2 Ch. 362), Dissol., 15.
Portway *v.* Colne Valley & H. R. Co. (7 Ry. & C. T. Cas. 102), Car. of M., 534.
Port Whitby & P. P. R. Co. *v.* Dumble (22 U. C. C. P. 39), Constr. Rys., 107; Contr., 12.
Port Whitby & P. P. R. Co. *v.* Jones (31 U. C. Q. B. 170), Subscr., 177.
Post *v.* Buffalo, P. & W. R. Co. (108 Pa. St. 585), Fires, 134.
Post *v.* Chicago & N. W. R. Co. (9 Am. & Eng. R. Cas. 345, 14 Neb. 110, 45 Am. Rep. 100, 15 N. W. Rep. 225), Eject. Pass., 36; Tickets & F., 39.
Post *v.* Kendall County Sup'rs (12 Am. & Eng. R. Cas. 546, 105 U. S. 667), Mun. Aid, 29.
Post *v.* Manhattan R. Co. (125 N. Y. 697, 26 N. E. Rep. 14, 3 Silv. App. 274, 34 N. Y. S. R. 590; affirming 23 N. Y. S. R. 1007), App., 107.
Post *v.* Pulaski County (49 Fed. Rep. 628, 9 U. S. App. 1, 1 C. C. A. 405; affirming 47 Fed. Rep. 282; petition for certiorari denied in 145 U. S. 650, 12 Sup. Ct. Rep. 986), Mun. Aid, 152, 384.
Post *v.* Toledo, C. & St. L. R. Co. (144 Mass. 341, 11 N. E. Rep. 540), Discov., 1.
Post *v.* United States Exp. Co. (76 Mich. 574, 43 N. W. Rep. 636), Cross., Inj. at, 328.
Post *v.* West Shore R. Co. (47 Am. & Eng. R. Cas. 322, 123 N. Y. 580, 26 N. E. Rep. 7, 34 N. Y. S. R. 484; affirming 50 Hun 301, 20 N. Y. S. R. 180, 3 N. Y. Supp. 172), Spec. Perf., 8, 13; Sts. & H., 179, 200.
Postal Tel. Cable Co. *v.* Alabama G. S. R. Co. (47 Am. & Eng. R. Cas. 252, 92 Ala. 331, 9 So. Rep. 555), Em. Dom., 868.
Postal Tel. Cable Co. *v.* Louisville, N. O. & T. R. Co. (43 La. Ann. 522, 9 So. Rep. 119), Em. Dom., 92, 436, 926.
Postal Tel. Cable Co. *v.* Norfolk & W. R. Co. (88 Va. 920, 14 S. E. Rep. 689), Tel. & T. Lines, 2.
Postal Tel. Cable Co. *v.* Norfolk & W. R. Co. (87 Va. 349, 12 S. E. Rep. 613), App., 8.
Postal Tel. Cable Co. *v.* Norfolk & W. R. Co. (88 Va. 929, 14 S. E. Rep. 691), Contempt, 5.
Postmaster-General *v.* Highland R. Co. (2 Ry. & C. T. Cas. 34), Car. of Mails, 1.
Potomac, The (105 U. S. 630), Subrog., 4.
Potomac Coal Co. *v.* Cumberland & P. R. Co. (38 Md. 226), Paym., 5.
Potter *v.* Boston Locomotive Works (12 Gray (Mass.) 154), Sales, 1.
Potter *v.* Bunnell (20 Ohio St. 150), Cross., Inj. at, 37; Receiv., 127.
Potter *v.* Chicago & N. W. R. Co. (20 Wis. 533), Contrib. Neg., 69.
Potter *v.* Chicago & N. W. R. Co. (21 Wis. 372), Death, etc., 174, 406.
Potter *v.* Chicago & N. W. R. Co. (22 Wis. 615), Death, etc., 406, 433.
Potter *v.* Chicago, R. I. & P. R. Co. (46 Iowa 399, 16 Am. Ry. Rep. 57), App., 56; Fel. Serv., 176, 412; Trial, 114.
Potter *v.* Flint & P. M. R. Co. (62 Mich. 22, 28 N. W. Rep. 714), Cross., Inj. at, 245, 316.
Potter *v.* Greenwich (92 N. Y. 662; affirming 26 Hun 326), Mun. Aid, 322.
Potter *v.* Hannibal & St. J. R. Co. (18 Mo. App. 694), Animals, 209, 210, 545; Negl., 41.
Potter *v.* Indiana & L. M. R. Co. (95 Mich. 389, 54 N. W. Rep. 956), Canals, 1; Rip. Rts., 9.
Potter *v.* Metropolitan Dist. R. Co. (28 L. T. 231), Evid., 255.
Potter *v.* Metropolitan R. Co. (28 L. T. 735), Dam., 104.

Potter *v.* Metropolitan R. Co. (32 L. T. 36; affirming 30 L. T. 765), Ex. & Ad., 12.
Potter *v.* New York C. & H. R. R. Co. (38 N. Y. S. R. 798, 60 Hun 313, 15 N. Y. Supp. 12), Animals, 94; Fences, 17.
Potter *v.* New York C. & H. R. R. Co. (29 J. & S. (N. Y.) 351), Death, etc., 436.
Potter *v.* New York C. & H. R. R. Co. (136 N. Y. 77, 32 N. E. Rep. 603, 48 N. Y. S. R. 843; reversing 46 N. Y. S. R. 895, 19 N. Y. Supp. 862), Evid., 122; Fel. Serv., 41.
Potter *v.* Pittsburg Southern R. Co. (Pa.) (2 Atl. Rep. 75), Em. Dom., 410.
Potter *v.* Saginaw Union St. R. Co. (83 Mich. 285, 47 N. W. Rep. 217), Elec. Rys., 16.
Potter *v.* Sharp (24 Hun (N. Y.) 179), Bills of L., 93.
Potter *v.* Wilmington & W. R. Co. (21 Am. & Eng. R. Cas. 328, 92 N. Car. 541), Children, Inj. to, 23.
Potteries, S. & N. W. R. Co., In re (39 L. J. Ch. 273, 22 L. T. 53, L. R. 5 Ch. 67), Reorg., 19.
Potteries, S. & N. W. R. Co., In re (L. R. 25 Ch. D. 251, 53 L. J. Ch. D. 556, 50 L. T. 104, 32 W. R. 300), Dissol., 23; Em. Dom., 1160, 1191.
Potteries, S. & N. W. R. Co. *v.* Minor (40 L. J. Ch. 685, L. R. 6 Ch. 621, 19 W. R. 883, 25 L. T. 522), Reorg., 19.
Potter Mfg. Co. *v.* Chicago & G. T. R. Co. (5 Int. Com. Com. 514), Int. Com., 34, 50, 51, 155.
Potts *v.* Chicago City R. Co. (33 Fed. Rep. 610), Cable Rys., 8; Dam., 20; Negl., 45; St. Rys., 338, 339.
Potts *v.* New York & N. E. R. Co. (3 Am. & Eng. R. Cas. 424, 131 Mass. 455, 41 Am. Rep. 247), Car. of M., 656; Charges, 70.
Potts *v.* Pennsylvania S. V. R. Co. (33 Am. & Eng. R. Cas. 184, 119 Pa. St. 278, 11 Cent. Rep. 818, 13 Atl. Rep. 291, 21 W. N. C. 174), Em. Dom., 457.
Potts *v.* Port Carlisle D. & R. Co. (8 W. R. 524, 2 L. T. 283), Employés, Inj. to, 610.
Potts *v.* Quaker City El. R. Co. (2 Pa. Dist. 200), Elev. Rys., 3, 70; St. Rys., 13.
Potts *v.* Wabash, St. L. & P. R. Co. (17 Mo. App. 394), Car. of L. S., 4; Car. of M., 474; Lim of Liab., 30.
Pottsville *v.* People's R. Co. (148 Pa. St. 175, 23 Atl. Rep. 900), Side Tr., 1.
Potwin Place *v.* Topeka R. Co. (56 Am. & Eng. R. Cas. 549, 51 Kan. 609, 33 Pac. Rep. 309), Mand., 8, 30; St. Rys., 42, 262.
Pou *v.* Covington & M. R. Co. (40 Am. & Eng. R. Cas. 610, 84 Ga. 311, 10 S. E. Rep. 744), Liens, 35.
Poucher *v.* New York C. R. Co. (49 N. Y. 263), Car. of L. S., 128.
Poughkeepsie & E. R. Co., In re (63 Barb. (N. Y.) 151), Em. Dom., 453.
Poughkeepsie Bridge Co., In re (108 N. Y. 483, 15 N. E. Rep. 601), Em. Dom., 47, 86.
Poughkeepsie Iron Co. *v.* New York C. & H. R. R. Co. (3 Int. Com. Rep. 248, 4 Int. Com. Com. 195), Int. Com., 16, 68.
Poughkeepsie, H. & B. R. Co. *v.* Simpson (23 Hun (N. Y.) 43; affirmed in 89 N. Y. 636, mem.), Tax., 226.
Pouilin *v.* Canadian Pac. R. Co. (47 Fed. Rep. 858), Eject. Pass., 70, 72.
Pouilin *v.* Canadian Pac. R. Co. (52 Am. & Eng. R. Cas. 188, 52 Fed. Rep. 197, 6 U. S. App. 298, 2 C. C. A. 23), Eject. Pass., 29, 34; Tickets & F., 6.
Poulin *v.* Broadway & S. A. R. Co. (61 N. Y. 621; affirming 2 J. & S. 296), St. Rys., 367.
Pouliot *v.* Queen (1 Can. Exch. 313), Em. Dom., 1238, 1259, 1270.
Poulton *v.* London & S. W. R. Co. (8 B. & S. 616, 16 W. R. 309, L. R. 2 Q. B. 534, 36 L. J. Q. B. 294, 17 L. T. N. S. 11), Agency, 33, 95.
Pound *v.* Port Huron & S. W. R. Co. (19 Am. & Eng. R. Cas. 640, 54 Mich. 13, 19 N. W. Rep. 570), Fences, 107.
Pounder *v.* Northeastern R. Co. (52 Am. & Eng. R. Cas. 433, [1892] 1 Q. B. 385), Assault, 9.
Pountney *v.* Clayton (14 Am. & Eng. R. Cas. 476, L. R. 11 Q. B. D. 820, 52 L. J. Q. B. 566, 49 L. T. 283, 31 W. R. 664, 47 J. P. 788; reversing 47 L. T. 731, 31 W. R. 501), Em. Dom., 1121; Mines, etc., 9.
Powell *v.* Augusta & S. R. Co. (77 Ga. 192, 3 S. E. Rep. 757), Evid., 28, 175, 247, 257.
Powell *v.* Brunswick County Sup'rs (88 Va. 707, 14 S. E. Rep. 543), Mun. Aid, 52.
Powell *v.* Dayton, S. & G. R. R. Co. (12 Oreg. 488, 8 Pac. Rep. 544), Contr., 44; Cov'ts, 17.
Powell *v.* Dayton, S. & G. R. R. Co. (14 Oreg. 356, 12 Pac. Rep. 665), Cov'ts, 2.
Powell *v.* Dayton, S. & G. R. R. Co. (16 Oreg. 33, 8 Am. St. Rep. 251, 16 Pac. Rep. 863), Leases, 67.
Powell *v.* Hannibal & St. J. R. Co. (35 Mo. 457), Animals, 126; Witn., 50.
Powell *v.* Missouri Pac. R. Co. (8 Am. & Eng. R. Cas. 467, 76 Mo. 80), Contrib. Neg., 123; Cross., Inj. at, 268; Negl., 41.
Powell *v.* Myers (26 Wend. (N. Y.) 591), Bagg., 61, 64.
Powell *v.* New York C. & H. R. R. Co. (22 Hun (N. Y.) 56), Children, Inj. to, 108.
Powell *v.* New York C. & H. R. R. Co. (2 Silv. App. 9, 109 N. Y. 613, mem., 15 N. E. Rep. 891, 14 N. Y. S. R. 74; affirming 38 Hun 640, mem.), Contrib. Neg., 104; Cross., Inj. at, 225, 304.
Powell *v.* Northern Pac. R. Co. (46 Minn. 249, 48 N. W. Rep. 907), Evid., 289.
Powell *v.* North Mo. R. Co. (42 Mo. 63), Consol., 24; Stat., 64.
Powell *v.* Oregonian R. Co. (13 Sawy. (U. S.) 535, 36 Fed. Rep. 726; see 38 Fed. Rep. 187), Lim. of Ac., 21; Stockh., 24, 35.
Powell *v.* Pennsylvania R. Co. (32 Pa. St. 414), Car. of L. S., 41, 72.
Powell *v.* Pittsburg, C. & St. L. R. Co. (25 Ohio St. 70, 13 Am. Ry. Rep. 477), Tickets & F., 88.
Powell *v.* State (9 Am. & Eng. R. Cas. 156,

52 Wis. 217, 9 N. W. Rep. 17), Crim. L., 27.
Powell *v.* Virginia Constr. Co. (88 Tenn. 692, 13 S. W. Rep. 691), Employés, 5; Evid., 178; Indep. Contr., 1, 8, 9.
Powell *v.* Willamette Valley R. Co. (15 Oreg. 393, 15 Pac. Rep. 663), Stock, 51.
Powell *v.* Wilmington & W. R. Co. (68 N. Car. 395), New Tr., 5.
Powell Duffryn Steam Coal Co. *v.* Taff Vale R. Co. (29 L. T. 575, 22 W. R. 182; affirmed in L. R. 9 Ch. 331, 43 L. J. Ch. 575, 30 L. T. 208), Contr., 45.
Powell Duffryn Steam Coal Co. *v.* Taff Vale R. Co. (L. R. 9 Ch. 331, 43 L. J. Ch. 575, 30 L. T. 208, 2 Ry. & C. T. Cas. 22; affirming 29 L. T. 575, 22 W. R. 182, 26 L. T. 357, 20 W. R. 460), Injunc., 33; Leases, 128.
Power *v.* Savannah, S. & S. R. Co. (56 Ga. 471), Evid., 1.
Powers *v.* Bears (12 Wis. 214), Em. Dom., 390, 500.
Powers *v.* Boston (154 Mass. 60, 27 N. E. Rep. 995), Sts. & H., 368; Trial, 101.
Powers *v.* Boston & M. R. Co. (153 Mass. 188, 26 N. E. Rep. 446), Collis., 19; Custom, 3.
Powers *v.* City Council of Springfield (116 Mass. 84), Cross., St. & H., 111.
Powers *v.* Dougherty County Inferior Court (23 Ga. 65), Mun. Aid, 28.
Powers *v.* Hazelton & L. R. Co. (33 Ohio St. 429), Em. Dom., 344, 365, 367, 559, 595, 647; Witn., 54.
Powers *v.* Hurmert (51 Mo. 136, 3 Am. Ry. Rep. 68), Em. Dom., 1076.
Powers *v.* Jourdan (4 N. Y. S. R. 839; affirmed in 110 N. Y. 680, mem., 18 N. E. Rep. 483, mem.), Receiv., 55.
Powers *v.* Manhattan R. Co. (20 Civ. Pro. 78, 14 N. Y. Supp. 130), Elev. Rys., 197.
Powers *v.* Manhattan R. Co. (120 N. Y. 178, 24 N. E. Rep. 295, 30 N. Y. S. R. 584), Em. Dom., 1084.
Powers *v.* New York C. & H. R. R. Co. (60 Hun 19, 38 N. Y. S. R. 558, 14 N. Y. Supp. 408; affirmed in 128 N. Y. 659, mem., 29 N. E. Rep. 148, mem., 40 N. Y. S. R. 979), Employés, Inj. to, 99, 113; Negl., 57, 75.
Powers *v.* New York, L. E. & W. R. Co. (21 Am. & Eng. R. Cas. 609, 98 N. Y. 274; reversing 32 Hun 415), Employés, Inj. to, 389.
Powers *v.* Rome, W. & O. R. Co. (3 Hun (N. Y.) 285, 5 T. & C. 449), Pl., 168.
Powers *v.* Sixty Tons of Marble (21 La. Ann. 402), Car. of M., 383.
Powhatan Steamboat Co. *v.* Appomattox R. Co. (24 How. (U. S.) 247), Sunday, 2.
Powrie *v.* Kansas Pac. R. Co. (1 Colo. 529), Agency, 17; Officers, 10.
Poyer *v.* Des Plaines (123 Ill. 111, 13 N. E. Rep. 819), Mun. Corp., 15.
Poynder *v.* Great Northern R. Co. (2 Phillips 330, 16 L. J. Ch. 444), Em. Dom., 1151.
Poynder *v.* Great Northern R. Co. (5 Railw. Cas. 196), Em. Dom., 1168.
Praeger *v.* Bristol & E. R. Co. (24 L. T. 105), Car. of P., 241.
Prairie *v.* Lloyd (3 Am. & Eng. R. Cas. 58, 97 Ill. 179), Mun. Aid, 65, 126, 127, 134, 138, 158, 305, 360.
Prater *v.* Strother (Ky.) (13 S. W. Rep. 252), Mun. Aid, 414.
Prather *v.* Jeffersonville, M. & I. R. Co. (52 Ind. 16; further appeal sub nom. Prather *v.* Western Union Tel. Co. 14 Am. & Eng. R. Cas. 1, 89 Ind. 501), Charters, 129; Em. Dom., 47, 67, 314; Words & Ph., 137.
Prather *v.* Richmond & D. R. Co. (80 Ga. 427, 9 S. E. Rep. 530), Death, etc., 235, 314; Employés, Inj. to, 204, 427, 438, 598; Fel. Serv., 25, 261.
Prather *v.* Ross (17 Ind. 495), Bills & N., 12; Witn., 146.
Prather *v.* Western Union Tel. Co. (14 Am. & Eng. R. Cas. 1, 89 Ind. 501; former appeal 52 Ind. 16), Tel. & T. Lines, 1.
Pratt *v.* Atlantic & St. L. R. Co. (42 Me. 579), Charters, 58, 98; Fires, 7, 96; Words & Ph., 12.
Pratt *v.* Boston & A. R. Co. (126 Mass. 442) Parties, 23.
Pratt *v.* Brown (80 Tex. 608, 16 S. W. Rep. 443), False Imp., 3; Stat. & D., 2.
Pratt *v.* Buffalo City R. Co. (19 Hun (N. Y.) 30), Easem., 5.
Pratt *v.* Chicago, M. & St. P. R. Co. (38 Minn. 455, 38 N. W. Rep. 356), Collis., 4.
Pratt *v.* Des Moines N. W. R. Co. (32 Am. & Eng. R. Cas. 236, 72 Iowa 249, 33 N. W. Rep. 666), Assign., 1; Estop., 23; Lim. of Ac., 50.
Pratt *v.* Grand Trunk R. Co. (95 U. S. 43), Car. of M., 618.
Pratt *v.* Grand Trunk R. Co. (8 Ont. 499), Corp., 10.
Pratt *v.* Hudson River R. Co. (21 N. Y. 305), Officers, 10.
Pratt *v.* Lake Shore & M. S. R. Co. (45 N. Y. S. R. 715, 63 Hun 616, 18 N. Y. Supp. 682; affirmed in 136 N. Y. 654, mem., 32 N. E. Rep. 1016, 49 N. Y. S. R. 915), Employés, Inj. to, 348, 744.
Pratt *v.* Munson (84 N. Y. 582), Reorg., 4.
Pratt *v.* Munson (17 Hun (N. Y.) 475), Words & Ph., 33.
Pratt *v.* Ogdensburg & L. C. R. Co. (102 Mass. 557), App., 121; Car. of L. S., 47; Car. of M., 52, 663.
Pratt *v.* Roseland R. Co. (51 Am. & Eng. R. Cas. 632, 50 N. J. Eq. 150, 24 Atl. Rep. 1027), Em. Dom., 413, 1033.
Pratt C. & I. Co. *v.* Brawley (83 Ala. 371, 3 Am. St. Rep. 751, 3 So. Rep. 555), Children, Inj. to, 67, 70, 78, 115, 127, 128, 132, 138, 147.
Pratt C. & I. Co. *v.* Davis (79 Ala. 308), Animals, 173; Cross., St. & H., 29.
Preble *v.* Portage County Sup'rs (8 Biss. (U. S.) 358), Mun. Aid, 356, 393.
Prendegast *v.* New York C. & H. R. R. Co. (58 N. Y. 652), Fences, 32; Tresp., Inj. to, 41.
Prendergast *v.* Grand Trunk R. Co (25 U. C. Q. B. 193), Lim. of Ac., 57.

Prentice *v.* Decker (49 Barb. (N. Y.) 21), Bagg., 78, 107; Car. of M., 475.
Prentiss *v.* Boston (112 Mass. 43), St. Rys., 322.
Presbrey *v.* Old Colony & N. R. Co. (103 Mass. 1), Em. Dom., 144, 626, 686, 995.
Presby *v.* Grand Trunk R. Co. (66 N. H. 615, 22 Atl. Rep. 554), Fright. Teams, 6.
Presbyterian Soc. *v.* Auburn & R. R. Co. (3 Hill (N. Y.) 567), Sts. & H., 220, 249.
Prescott & A. C. R. Co. *v.* Rees (Ariz.) (28 Pac. Rep. 1134), Comp. Neg., 26; Fires, 221.
Presley *v.* State (59 Ala. 98), Crim. L., 30.
Pressley *v.* Mobile & G. R. Co. (11 Am. & Eng. R. Cas. 227, 4 Woods (U. S.) 569, 15 Fed. Rep. 199), Agency, 76.
Preston *v.* Central R. & B. Co. (84 Ga. 588, 11 S. E. Rep. 143), Employés, Inj. to, 521.
Preston *v.* Cincinnati, C. & H. V. R. Co. (36 Fed. Rep. 54), Stockh., 50.
Preston *v.* Dubuque & P. R. Co. (11 Iowa 15), Em. Dom., 138; Words & Ph., 58.
Preston *v.* Liverpool, M. & N. upon T. J. R. Co. (5 H. L. Cas. 605, 2 Jur. N. S. 241, 25 L. J. Ch. 421), Contr., 1, 2, 4; Vend. & P., 3.
Preston *v.* Sabine & E. T. R. Co. (70 Tex. 375, 7 S. W. Rep. 825), Fixt., 4.
Preston *v.* St. Johnsbury & L. C. R. Co. (64 Vt. 280, 25 Atl. Rep. 486), Death, etc., 149; Employés, Inj. to, 526.
Prettyman *v.* Oregon R. & N. Co. (13 Oreg. 341, 10 Pac. Rep. 634), Dam., 52.
Prettyman *v.* Tazewell County Sup'rs (19 Ill. 406), Mun. Aid, 6, 113, 132, 150, 311.
Prewitt *v.* Eddy (14 Am. & Eng. R. Cas. 138, 115 Mo. 283, 21 S. W. Rep. 742), Contrib. Neg., 9, 36; Cross., Inj. at, 316; Tresp., Inj. to, 35, 60.
Price *v.* Bala & F. R. Co. (50 L. T. 787), Injunc., 10.
Price *v.* Burlington, C. R. & M. R. Co. (42 Iowa 16), App., 92.
Price *v.* Chicago, M. & St. P. R. Co. (40 Mo. App. 189), Contr., 13.
Price *v.* Denver & R. G. R. Co. (37 Am. & Eng. R. Cas. 626, 12 Colo. 402, 21 Pac. Rep. 188), Car. of M., 639, 656.
Price *v.* Garland (3 N. Mex. 285, 6 Pac. Rep. 472), Constr. Rys., 75.
Price *v.* Grand Rapids & I. R. Co. (13 Ind. 58), Subscr., 54.
Price *v.* Grand Rapids & I. R. Co. (18 Ind. 137), Subscr., 40, 95.
Price *v.* Great Western R. Co. (4 Railw. Cas. 707, 16 M. & W. 244, 16 L. J. Ex. 87), Int., 12.
Price *v.* Hannibal & St. J. R. Co. (15 Am. & Eng. R. Cas. 168, 77 Mo. 508), Employés, Inj. to, 223, 320.
Price *v.* Lancaster County (20 Neb. 252, 29 N. W. Rep. 931), Tax., 121.
Price *v.* Milwaukee & St. P. R. Co. (27 Wis. 98, 2 Am. Ry. Rep. 14), Em. Dom., 668, 679.
Price *v.* New Jersey R. & T. Co. (31 N. J. L. 229), Animals, 69, 302, 432.
Price *v.* New Jersey R. & T. Co. (32 N. J. L. 19), Animals, 261.
Price *v.* Oswego & S. R. Co. (58 Barb. (N. Y.) 599; reversed in 50 N. Y. 213, 3 Am. Ry. Rep. 235), Car. of M., 261.
Price *v.* Oswego & S. R. Co. (50 N. Y. 213, 3 Am. Ry. Rep. 325; reversing 58 Barb. 599), Car. of M., 277.
Price *v.* Pennsylvania R. Co. (18 Am. & Eng. R. Cas. 273, 113 U. S. 218, 5 Sup. Ct. Rep. 427), Car. of Mails, 18.
Price *v.* Pittsburg, Ft. W. & C. R. Co. (34 Ill. 13), Deeds, 5; Land. & T., 7.
Price *v.* Powell (3 N. Y. 322), Parties, 5.
Price *v.* Price (6 Dana (Ky.) 107), Dower, 2.
Price *v.* Richmond & D. R. Co. (33 So. Car. 556, 12 S. E. Rep. 413), Death, etc., 31, 169.
Price *v.* Richmond & D. R. Co. (38 So. Car. 199, 17 S. E. Rep. 732), Employés, Inj. to, 93, 113; Evid., 149, 201, 251; Pl., 73; Trial, 117; Witn., 62, 179, 180.
Price *v.* St. Louis, K. C. & N. R. Co. (3 Am. & Eng. R. Cas. 365, 72 Mo. 414), Car. of P., 421; Contrib. Neg., 5, 48, 113; Pl., 116.
Price *v.* State (41 Tex. 215), Crim. L., 27.
Price *v.* Weehawken Ferry Co. (31 N. J. Eq. 31), Right of W., 5.
Prickett *v.* Atchison, T. & S. F. R. Co. (23 Am. & Eng. R. Cas. 232, 33 Kan. 748, 7 Pac. Rep. 611), Animals, 283; Fences, 52, 58.
Prickett *v.* New Orleans Anchor Line (13 Mo. App. 436), Car. of P., 28.
Pride *v.* Indianapolis, D. & W. R. Co. (21 N. Y. S. R. 261, 51 Hun (N. Y.) 640, 4 N. Y. Supp. 15), Attach., 40.
Prideaux *v.* Mineral Point (43 Wis. 513, 28 Am. Rep. 558), Imp. Neg., 2.
Priest *v.* Glenn (51 Fed. Rep. 400, 4 U. S. App. 478, 2 C. C. A. 305; affirming 48 Fed. Rep. 19), Subscr., 103, 170.
Priest *v.* Glenn (51 Fed. Rep. 405, 4 U. S. App. 509, 2 C. C. A. 311; affirming 47 Fed. Rep. 472, 48 Fed. Rep. 19), Judgm., 17.
Priest *v.* Hudson River R. Co. (10 Abb. Pr. N. S. (N. Y.) 60, 40 How. Pr., 456, 2 Sweeney 595), Assault, 1, 2.
Priest *v.* Hudson River R. Co. (65 N. Y. 589), Assault, 8.
Priest *v.* Missouri Pac. R. Co. (85 Mo. 521), Just. P., 17.
Priestley *v.* Fowler (3 M. & W. 1), Employés, Inj. to, 182, 204; Fel. Serv., 1.
Priestly *v.* Northern I. & C. Co. (26 Ill. 206), Car. of M., 801.
Prime *v.* Twenty-third St. R. Co. (1 Abb. N. Cas. (N. Y.) 63), St. Rys., 201.
Prince *v.* Boston & L. R. Corp. (101 Mass. 542), Bills of L., 126.
Prince *v.* International & G. N. R. Co. (21 Am. & Eng. R. Cas. 152, 64 Tex. 144), Car. of P., 13, 45, 547; Passes, 9.
Prince *v.* New York C. & H. R. R. Co. (38 N. Y. S. R. 793, 60 Hun 581, mem., 14 N. Y. Supp. 817), Farm Cross., 11.
Prince George County *v.* Atlantic, M. & O. R. Co. (87 Va. 283, 12 S. E. Rep. 667), App., 2; Tax., 12, 336.
Pringle *v.* Chicago, R. I. & P. R. Co. (18

Am. & Eng. R. Cas. 91, 64 Iowa 613, 21 N. W. Rep. 108), Contrib. Neg., 12; Employés, Inj. to, 311, 572; Witn., 42.
Pringle *v.* Pennsylvania R. Co. (3 Phila. (Pa.) 82), Car. of L. S., 21.
Printup *v.* Cherokee R. Co. (45 Ga. 365), Injunc., 15.
Pritchard *v.* LaCrosse & M. R. Co. (7 Wis. 232), Animals, 45.
Pritchard *v.* Savannah St. & R. R. R. Co. (87 Ga. 294, 13 S. E. Rep. 493), Abate., 4.
Private Road in Huntingdon Borough (149 Pa. St. 133, 24 Atl. Rep. 189), Stat., 66.
Proctor *v.* Cincinnati, H. & D. R. Co. (3 Int. Com. Rep. 131, 4 Int. Com. Com. 87), Int. Com., 34, 166.
Proctor *v.* Eastern R. Co. (105 Mass. 512, 1 Am. Ry. Rep. 511), Car. of M., 165.
Proctor *v.* Hannibal & St. J. R. Co. (64 Mo. 112, 9 Am. Ry. Rep. 440), Death, etc., 25; Fel. Serv., 147, 150; Words & Ph., 16, 156.
Proctor *v.* Missouri, K. & T. R. Co. (42 Mo. App. 124), Fel. Serv., 99, 371; Proc., 13, 40; Receiv., 135.
Proctor *v.* Old Colony R. Co. (154 Mass. 251, 28 N. E. Rep. 13), Evid., 194; Flood. Lds., 72.
Proctor *v.* Wilmington & W. R. Co. (72 N. Car. 579), Animals, 466.
Prop'rs of Bridges *v.* Hoboken L. & I. Co. (13 N. J. Eq. 81; affirmed in 13 N. J. Eq. 503), Bridges, 45, 90.
Prop'rs of Bridges *v.* Hoboken L. & I. Co. (13 N. J. Eq. 503), Words & Ph., 27.
Prop'rs of Bridges *v.* Hoboken L. & I. Co. (1 Wall. (U. S.) 116), Bridges, 92.
Prop'rs of Locks, etc. *v.* Lowell Horse R. Corp. (109 Mass. 221), St. Rys., 160.
Proprietors of Locks & Canals *v.* Nashua & L. R. Co. (104 Mass. 1), Aband., 7; Em. Dom., 986; Franch., 9.
Prop'rs of Locks & Canals *v.* Nashua & L. R. Corp. (10 Cush. (Mass.) 385), Em. Dom., 255; Sts. & H., 286.
Prop'rs of Warwick & B. C. N. Co. *v.* Prop'rs of Birmingham C. N. Co. (3 Ry. & C. T. Cas. 113, 324), Canals, 7.
Prospect Park & C. I. R. Co., In re (67 N. Y. 371, 15 Am. Ry. Rep. 102; affirming 8 Hun 30), Charters, 2, 120; Consol., 1; Em. Dom., 72, 275, 279, 947; Stat., 34.
Prospect Park & C. I. R. Co., In re (20 Hun (N. Y.) 184), Em. Dom., 883.
Prospect Park & C. I. R. Co., In re (24 Hun (N. Y.) 199; appeal dismissed in 85 N. Y. 489), Em. Dom., 810.
Prospect Park & C. I. R. Co., In re (14 Am. & Eng. R. Cas. 362, 85 N. Y. 489), Em. Dom., 888, 891.
Prospect Park & C. I. R. Co., In re (13 Hun (N. Y.) 345; affirmed in 16 Hun 261), Sts. & H., 278.
Prospect Park & C. I. R. Co., In re (16 Hun (N. Y.) 261; confirming 13 Hun 345), Em. Dom., 662.
Prospect Park & C. I. R. Co. *v.* Coney Island & B. R. Co. (50 N. Y. S. R. 862, 66 Hun 366, 21 N. Y. Supp. 1046), Contr., 105.
Prospect Park & C. I. R. Co. *v.* Williamson (14 Am. & Eng. R. Cas. 34, 91 N. Y. 552; reversing 24 Hun 216), Em. Dom., 119.
Prosser *v.* Northern Pac. R. Co. (152 U. S. 59, 14 Sup. Ct. Rep. 528), Waters & W., 2.
Protheroe *v.* Tottenham & F. G. R. Co. ([1891] 3 Ch. 278), Em. Dom., 1137.
Protzman *v.* Indianapolis & C. R. Co. (9 Ind. 467), Em. Dom., 184; Sts. & H., 208, 254.
Prouty *v.* Lake Shore & M. S. R. Co. (52 N. Y. 363, 4 Am. Ry. Rep. 388), Consol., 29, 41, 44.
Prouty *v.* Lake Shore & M. S. R. Co. (6 Hun (N. Y.) 246; appeal dismissed (?) 64 N. Y. 641, mem.), Pl., 10.
Prouty *v.* Lake Shore & M. S. R. Co. (26 Hun (N. Y.) 546), Int., 17.
Prouty *v.* Lake Shore & M. S. R. Co. (85 N. Y. 272), Pl., 166.
Prouty *v.* Michigan S. & N. I. R. Co. (4 T. & C. (N. Y.) 230, 1 Hun 655), Divid., 8, 13; For. Corp., 23.
Provencher *v.* Canadian Pac. R. Co. (5 Montr. L. R. (Sup. Ct.) 9), Bagg., 124, 127.
Providence *v.* Union R. Co. (12 R. I. 473), St. Rys., 90, 254.
Providence & W. R. Co., Petition of (17 R. I. 324, 21 Atl. Rep. 965), Em. Dom., 88, 109, 113; Location, etc., 21.
Providence & W. R. Co., In re (17 R. I. 324, 21 Atl. Rep. 965), Em. Dom., 66.
Providence & W. R. Co. *v.* Norwich & W. R. Co. (22 Am. & Eng. R. Cas. 493, 138 Mass. 277), Stat. & D., 147; Union D. Cos., 3.
Providence & W. R. Co. *v.* Worcester (155 Mass. 35, 29 N. E. Rep. 56), Em. Dom., 455, 600, 604.
Providence & W. R. Co. *v.* Wright (2 R. I. 459), Tax., 130.
Providence & W. R. Co. *v.* Yonkers F. Ins. Co. (10 R. I. 74, 6 Am. Ry. Rep. 134), Fire Ins., 6.
Providence Bank *v.* Billings (4 Pet. (U. S.) 514), Tax., 146.
Providence Coal Co. *v.* Providence & W. R. Co. (1 Int. Com. Rep. 363, 1 Int. Com. Com. 107), Int. Com., 59, 61.
Providence Coal Co. *v.* Providence & W. R. Co. (26 Am. & Eng. R. Cas. 42, 15 R. I. 303, 4 Atl. Rep. 394), Discrim., 71.
Providence L. Ins. & I. Co. *v.* Martin (32 Md. 310), Acc. Ins., 10.
Provolt *v.* Chicago, R. I. & P. R. Co. (57 Mo. 256, 9 Am. Ry. Rep. 161), Em. Dom., 1018.
Provolt *v.* Chicago, R. I. & P. R. Co. (69 Mo. 633), Em. Dom., 842, 854, 863, 1034.
Provost *v.* Morgan's L. & T. R. & S. Co. (46 Am. & Eng. R. Cas. 535, 42 La. Ann. 809, 8 So. Rep. 584), Em. Dom., 223.
Pruitt *v.* Hannibal & St. J. R. Co. (62 Mo. 527), Car. of L. S., 5, 11, 14, 16; Dam., 50; Stat. Agts., 3; War, 4; Words & Ph., 7.

Pruitt *v.* Shelbyville Lateral Branch R. Co. (2 Ind. 530), Em. Dom., 937.
Pry *v.* Hannibal & St. J. R. Co. (73 Mo. 123), App., 125; Appear., 5.
Pryor *v.* Louisville & N. R. Co. (90 Ala. 32, 8 So. Rep. 55), Employés, Inj. to, 17, 417; Pl., 142.
Pryor *v.* St. Louis, K. C. & N. R. Co. (69 Mo. 215), Animals, 69, 480; Negl., 28, 41.
Pryzbylowicz *v.* Missouri River R. Co. (3 McCrary (U. S.) 586, 17 Fed. Rep. 492), Em. Dom., 1017.
Public Parks Com'rs, In re (47 Hun 302, 13 N. Y. S. R. 581), Sts. & H., 352.
Pucket *v.* St. Louis, I. M. & S. R. Co. (25 Mo. App. 650), Actions, 13; Animals, 303.
Pudor *v.* Boston & M. R. Co. (26 Me. 458), Bagg., 114.
Pueblo & A. V. R. Co. *v.* Rudd (10 Am. & Eng. R. Cas. 404, 5 Colo. 270), Em. Dom., 47, 730, 803.
Pueblo & A. V. R. Co. *v.* Taylor (6 Am. & Eng. R. Cas. 474, 6 Colo. 1, 45 Am. Rep. 512), Contr., 1; Direct., 44; Right of W., 8.
Puff *v.* Lehigh Valley R. Co. (71 Hun (N. Y.) 577), Cross., Inj. at, 258, 326; Evid., 294.
Pugh *v.* Golden Valley R. Co. (L. R. 15 Ch. D. 330, 49 L. J. Ch. D. 721, 42 L. T. 863, 28 W. R. 863; affirming L. R. 12 Ch. D. 27, 48 L. J. Ch. D. 666, 41 L. T. 30), Waters & W., 16.
Pugh *v.* Hurtt (52 How. Pr. (N. Y.) 22), Receiv., 119.
Pugh *v.* Raleigh & G. R. Co. (Phil. (N. Car.) 359), Charters, 166; Ferries, 3.
Pullan *v.* Cincinnati & C. A. L. R. Co. (4 Biss. (U. S.) 35), Deeds, 14; Franch., 4; Injunc., 2; Mort., 9, 49, 78, 215, 216.
Pullan *v.* Cincinnati & C. A. L. R. Co. (5 Biss. (U. S.) 237), Mort., 29, 57, 204.
Pullen & Liverpool (Mayor), In re (51 L. J. Q. B. 285, 46 L. T. N. S. 391), Arb., 19.
Pulling *v.* Great Eastern R. Co. (6 Am. & Eng. R. Cas. 488, L. R. 9 Q. B. D. 110, 51 L. J. Q. B. D. 453, 30 W. R. 798), Ex. & Ad., 12.
Pulling *v.* London, C. & D. R. Co. (33 Beav. 644, 3 De. G., J. & S. 661, 10 Jur. N. S. 665, 12 W. R. 770, 969, 10 L. T. 393, 740; affirmed in 33 L. J. Ch. 505), Em. Dom., 1101, 1104.
Pullman *v.* Baltimore & O. R. Co. (4 Hughes (U. S.) 236, 5 Fed. Rep. 72), Pat. for Inv., 18.
Pullman Palace Car Co. *v.* Bales (47 Am. & Eng. R. Cas. 416, 80 Tex. 211, 15 S. W. Rep. 785), Sleep. Car Cos., 11.
Pullman Palace Car Co. *v.* Barker (4 Colo. 344), Car. of P., 110; Dam., 7; Sleep. Car Cos., 22.
Pullman Palace Car Co. *v.* Bluhm (18 Am. & Eng. R. Cas. 87, 109 Ill. 20, 50 Am. Rep. 601), Car. of P., 610; Employés, Inj. to, 703; Evid., 28.
Pullman Palace Car Co. *v.* Board of Assessors (55 Fed. Rep. 206), Int. Com., 193.
Pullman Palace Car Co. *v.* Boston & A. R. Co. (44 Fed. Rep. 195), Pat. for Inv., 34.
Pullman Palace Car Co. *v.* Central Transp. Co. (139 U. S. 62, 11 Sup. Ct. Rep. 489), Sleep. Car Cos., 2; Ult. Vir., 2.
Pullman Palace Car Co. *v.* Chicago, M. & St. P. R. Co. (56 Fed. Rep. 756; reversing 49 Fed. Rep. 409), Injunc., 40.
Pullman Palace Car Co. *v.* Com. (107 Pa. St. 148), Tax., 94.
Pullman Palace Car Co. *v.* Ehrman (34 Am. & Eng. R. Cas. 362, 65 Miss. 383, 4 So. Rep. 113), Sleep. Car Cos., 9.
Pullman Palace Car Co. *v.* Freudenstein (58 Am. & Eng. R. Cas. 589, 3 Colo. App. 540, 34 Pac. Rep. 578), Sleep. Car Cos., 34.
Pullman Palace Car Co. *v.* Gardner (16 Am. & Eng. R. Cas. 324, 3 Pennyp. (Pa.) 78), Evid., 67; Sleep. Car Cos., 26, 27, 33.
Pullman Palace Car Co. *v.* Gavin (58 Am. & Eng. R. Cas. 585, 93 Tenn. 53, 23 S. W. Rep. 70), Sleep. Car Cos., 24, 25, 31.
Pullman Palace Car Co. *v.* Harkins (55 Fed. Rep. 932, 5 C. C. A. 326, 17 U. S. App. 22; affirming 52 Fed. Rep. 724), Employés, Inj. to, 29, 94; Fel. Serv., 64; Witn., 78, 131.
Pullman Palace Car Co. *v.* Laack (41 Ill. App. 34), Employés, Inj. to, 334; Negl., 48.
Pullman Palace Car Co. *v.* Laack (143 Ill. 242, 32 N. E. Rep. 285), Contrib. Neg., 18; Employés, Inj. to, 4, 7, 34, 93, 186, 293, 334, 660, 716; Fel. Serv., 3, 57, 79, 114, 202, 213, 511; Negl., 46, 47, 48, 49, 72, 82.
Pullman Palace Car Co. *v.* Lee (49 Ill. App. 75), Eject. Pass., 53; Sleep. Car Cos., 12, 36.
Pullman Palace Car Co. *v.* Lowe (40 Am. & Eng. R. Cas. 637, 28 Neb. 239, 44 N. W. Rep. 226, 6 L. R. A. 809), Sleep. Car Cos., 25.
Pullman Palace Car Co. *v.* McDonald (2 Tex. Civ. App. 322, 21 S. W. Rep. 945), Eject. Pass., 106.
Pullman Palace Car Co. *v.* Martin (58 Am. & Eng. R. Cas. 583, 92 Ga. 161, 18 S. E. Rep. 364), Pl., 64; Sleep. Car Cos., 27.
Pullman Palace Car Co. *v.* Matthews (74 Tex. 654, 12 S. W. Rep. 744), Sleep. Car Cos., 25, 26, 31.
Pullman Palace Car Co. *v.* Missouri, K. & T. R. Co. (55 Fed. Rep. 138), Injunc., 4.
Pullman Palace Car Co. *v.* Missouri Pac. R. Co. (3 McCrary (U. S.) 645, 11 Fed. Rep. 634), Contr., 34.
Pullman Palace Car Co. *v.* Missouri Pac. R. Co. (23 Am. & Eng. R. Cas. 537, 115 U. S. 587, 6 Sup. Ct. Rep. 194), Sleep. Car Cos., 2.
Pullman Palace Car Co. *v.* Pennsylvania (46 Am. & Eng. R. Cas. 236, 141 U. S. 18, 11 Sup. Ct. Rep. 876; affirming 107 Pa. St. 156), Int. Com., 191.
Pullman Palace Car Co. *v.* Pollock (34 Am. & Eng. R. Cas. 217, 69 Tex. 120, 5 Am. St. Rep. 31, 5 S. W. Rep. 814), Bagg., 79; Sleep. Car Cos., 5, 24.
Pullman Palace Car Co. *v.* Reed (75 Ill. 125), Eject. Pass., 125; Tickets & F., 22.
Pullman Palace Car Co. *v.* Smith (73 Ill.

360, 9 Am. Ry. Rep. 328), Sleep. Car Cos., 31.
Pullman Palace Car Co. *v.* Smith (79 Tex. 468, 14 S. W. Rep. 993), Contrib. Neg., 124; Sleep. Car Cos., 6, 17; Witn., 19, 173.
Pullman Palace Car Co. *v.* State (29 Am. & Eng. R. Cas. 194, 64 Tex. 274, 53 Am. Rep. 758), Tax., 47.
Pullman Palace Car Co. *v.* Taylor (65 Ind. 153), Sleep. Car Cos., 9.
Pullman Palace Car Co. *v.* Texas & P. R. Co. (4 Woods (U. S.) 317, 11 Fed. Rep. 625), Sleep. Car Cos., 3.
Pullman Palace Car Co. *v.* Twombly (29 Fed. Rep. 658), Tax., 132, 348.
Pullman Palace Car Co. *v.* Wagner Palace Car Co. (38 Fed. Rep. 416), Pat. for Inv., 35.
Pullman Southern Car Co. *v.* Gaines (3 Tenn. Ch. 587), Tax., 46.
Pullutro *v.* Delaware, L. & W. R. Co. (27 N. Y. S. R. 63, 7 N. Y. Supp. 510), Employés, Inj. to, 688, 740; Fel. Serv., 57.
Pullutro *v.* Delaware, L. & W. R. Co. (39 N. Y. S. R. 293, 15 N. Y. Supp. 783), New Tr., 22.
Pumpelly *v.* Green Bay & M. Canal Co. (13 Wall. (U. S.) 166), Flood. Lds., 8.
Purcell *v.* Bear Creek (138 Ill. 524, 28 N. E. Rep. 1085), Mun. Aid, 317.
Purcell *v.* Richmond & D. R. Co. (47 Am. & Eng. R. Cas. 457, 108 N. Car. 414, 12 S. E. Rep. 954, 956), Actions, 10; Car. of P., 117, 546; Dam., 19, 26.
Purcell *v.* St. Paul City R. Co. (52 Am. & Eng. R. Cas. 611, 48 Minn. 134, 50 N. W. Rep. 1034, 16 L. R. A. 203), Car. of P., 207, 560.
Purcell *v.* Southern Exp. Co. (34 Ga. 315), Car. of M., 114, 453, 460, 702; Evid., 187; Lim. of Liab., 14.
Purdy *v.* Grand Trunk R. Co. (15 U. C. Q. B. 571), Indep. Contr., 15.
Purdy *v.* Lansing (128 U. S. 557, 9 Sup. Ct. Rep. 172), Mun. Aid, 234.
Purdy *v.* Manhattan El. R. Co. (36 N. Y. S. R. 43, 13 N. Y. Supp. 295), Elev. Rys., 163; Injunc., 1, 3.
Purdy *v.* Manhattan El. R. Co. (51 N. Y. S. R. 766, 22 N. Y. Supp. 943, 3 Misc. 50), Elev. Rys., 125, 161.
Purdy *v.* New York & N. H. R. Co. (61 N. Y. 353, 12 Am. Ry. Rep. 138), Animals, 15.
Purdy *v.* Rome, W. & O. R. Co. (125 N. Y. 209, 26 N. E. Rep. 255, 34 N. Y. S. R. 737; affirming 52 Hun 267, 23 N. Y. S. R. 469, 5 N. Y. Supp. 217), Release, 26.
Purifoy *v.* Richmond & D. R. Co. (46 Am. & Eng. R. Cas. 232, 108 N. Car. 100, 12 S. E. Rep. 741), Charters, 64, 70; Location, etc., 16; Right of W., 2, 3.
Purinton *v.* Maine C. R. Co. (78 Me. 569, 7 Atl. Rep. 707), App., 117; Cross., Inj. at, 165.
Purinton *v.* Northern Ill. R. Co. (46 Ill. 297), Contr., 70; Em. Dom., 201, 225, 226.
Purl *v.* St. Louis, K. C. & N. R. Co. (6 Am. & Eng. R. Cas. 27, 72 Mo. 168), Cross., Inj. at, 272, 300.
Purple *v.* Hudson River R. Co. (1 Abb. Pr. (N. Y.) 33, 4 Duer 74), Assign., 3.
Purtell *v.* Chicago F. & B. Co. (39 Am. & Eng. R. Cas. 242, 74 Wis. 132, 42 N. W. Rep. 265), Liens, 24, 47.
Pusey *v.* New Jersey W. L. R. Co. (14 Abb. Pr. N. S. (N. Y.) 434), Certif. of Indebt., 1; Contr., 93.
Pusey *v.* Wright (31 Pa. St. 387), Em. Dom., 988.
Putnam *v.* Broadway & S. A. R. Co. (55 N. Y. 108, 15 Abb. Pr. N. S. 383, 6 Am. Ry. Rep. 40; reversing 4 J. & S. 195), Assault, 4; Car. of P., 85, 318, 322; St. Rys., 328, 363.
Putnam *v.* New Albany (4 Biss. (U. S.) 365), Cred. Bill, 4; Mun. Aid, 22; Subscr., 197.
Putnam *v.* New York C. & H. R. R. Co. (47 Hun (N. Y.) 439, 14 N. Y. S. R. 329), Contrib. Neg., 10; Trial, 171.
Putnam *v.* Southern Pac. R. Co. (21 Oreg. 230, 27 Pac. Rep. 1033), Death, etc., 46.
Putney Overseers *v.* London & S. W. R. Co. ([1891] 1 Q. B. 440; affirming [1891] 1 Q. B. 182), Incorp., 6.
Pyle *v.* East Tenn., V. & G. R. Co. (1 Int. Com. Rep. 767, 1 Int. Com. Com. 465), Int. Com., 84.
Pym *v.* Great Northern R. Co. (2 F. & F. 619), Car. of P., 572.
Pym *v.* Great Northern R. Co. (4 B. & S. 396, 10 Jur. N. S. 199, 32 L. J. Q. B. 377, 11 W. R. 922, 8 L. T. 734; affirming 2 B. & S. 759, 8 Jur. N. S. 819, 31 L. J. Q. B. 249, 10 W. R. 737, 6 L. T. 537), Death, etc., 11, 44, 381.
Pyne *v.* Broadway & S. A. R. Co. (46 N. Y. S. R. 662, 19 N. Y. Supp. 217; affirmed in 138 N. Y. 627, 51 N. Y. S. R. 934, 33 N. E. Rep. 1083), St. Rys., 472, 489; Witn., 41.
Pyne *v.* Chicago, B. & Q. R. Co. (54 Iowa 223, 37 Am. Rep. 198, 6 N. W. Rep. 281), Fel. Serv., 175.
Pyrce *v.* Monmouthshire C. & R. Co. (L. R. 4 App. Cas. 197, 49 L. J. Ex. D. 130, 40 L. T. 630, 27 W. R. 666), Charges, 107.
Pzolla *v.* Michigan C. R. Co. (19 Am. & Eng. R. Cas. 334, 54 Mich. 273, 20 N. W. Rep. 71), Stat. & D., 114.

Quackenbush *v.* Chicago & N. W. R. Co. (34 Am. & Eng. R. Cas. 545, 73 Iowa 458, 35 N. W. Rep. 523), Car. of P., 205, 469; Evid., 245; Trial, 168.
Quackenbush *v.* Wisconsin & M. R. Co. (62 Wis. 411, 22 N. W. Rep. 519), Animals, 6; Employés, Inj. to, 77, 234; Words & Ph., 163.
Quackenbush *v.* Wisconsin & M. R. Co. (71 Wis. 472, 37 N. W. Rep. 834), Fences, 4.
Quade *v.* New York, N. H. & H. R. Co. (27 J. & S. 479, 14 N. Y. Supp. 875, 39 N. Y. S. R. 157), Proc., 27.
Quaife *v.* Chicago & N. W. R. Co. (48 Wis. 513, 4 N. W. Rep. 658, 33 Am. Rep. 821), Car. of P., 646; Negl., 98; Phys. Exam., 5; Witn., 59.
Quakenbush *v.* Chicago & W. M. R. Co. (91 Mich. 308, 51 N. W. Rep. 883), Constr. Rys., 91.
Quarrier *v.* Baltimore & O. R Co. (18 Am.

& Eng. R. Cas. 535, 20 W. Va. 424), Car. of M., 708; Rem. of C., 34, 53.
Quayle *v.* Missouri, K. & T. R. Co. (63 Mo. 465, 21 Am. Ry. Rep. 220), Em. Dom., 329, 787.
Quebec *v.* Quebec C. R. Co. (10 Can. Sup. Ct. 563), Bonds, 26.
Quebec & R. R. Co. *v.* Quinn (6 Low. Can. 129), Em. Dom., 1273.
Quebec, M. & C. R. Co. *v.* Mathieu (19 Can. Sup. Ct. 426), Em. Dom., 1255.
Quebec, M., O. & O. R. Co. *v.* O'Neil (4 Quebec L. R. 216), Em. Dom., 1211, 1218.
Quebec St. R. Co. *v.* Quebec (38 Am. & Eng. R. Cas. 412, 15 Can. Sup. Ct. 164), St. Rys., 10.
Quebec Warehouse Co. *v.* Levis (11 Can. Sup. Ct. 666), Mun. Corp., 41.
Queen *v.* Barry (2 Can. Exch. 333), Em. Dom., 1217, 1240.
Queen *v.* Birmingham & G. R. Co. (2 Q. B. 47, 2 Railw. Cas. 694), Cross. Sts. & H., 18.
Queen *v.* Birmingham & O. J. R. Co. (15 Q. B. 647, n., 20 L. J. Q. B. 304), Em. Dom., 1131.
Queen *v.* Buffalo & L. H. R. Co. (23 U. C. Q. B. 208), Em. Dom., 1241.
Queen *v.* Caledonian R. Co. (16 Q. B. 19, 15 Jur. 396, 20 L. J. Q. B. 147), Em. Dom., 1139, 1140; Mand., 12.
Queen *v.* Cambrian R. Co. (38 L. J. Q. B. 198, 10 B. & S. 315, L. R. 4 Q. B. 320, 17 W. R. 667, 20 L. T. 437), Em. Dom., 1177.
Queen *v.* Carnatic R. Co. (L. R. 8 Q. B. 299, 42 L. J. Q. B. 299, 21 W. R. 621, 28 L. T. 413), Husb. & W., 7; Stock, 63.
Queen *v.* Carrier (2 Can. Exch. 36), Em. Dom., 1236, 1243, 1247.
Queen *v.* Croydon & N. Tramways Co. (L. R. 18 Q. B. D. 39), Tramw., 3.
Queen *v.* Demers (3 Can. Exch. 293), Em. Dom., 1211.
Queen *v.* Dow (14 New Brun. 300), Ult. Vir., 22.
Queen *v.* Eastern Counties R. Co. (5 Jur. 365), Em. Dom., 1183.
Queen *v.* Eastern Counties R. Co. (3 Railw. Cas. 466, 2 D., N. S. 945, 7 Jur. 628, 12 L. J. Q. B. 271), Em. Dom., 1184.
Queen *v.* East Lancashire R. Co. (9 Q. B. 980, 11 Jur. 169, 16 L. J. Q. B. 127), Em. Dom., 1183.
Queen *v.* East London R. Co. (17 L. T. 291), Em. Dom., 1133, 1157.
Queen *v.* Edwards (L. R. 13 Q. B. D. 586, 53 L. J. M. C. 149, 51 L. T. 586, 49 J. P. 117), Em. Dom., 1166.
Queen *v.* Fisher (3 B. & S. 191, 9 Jur. N. S. 571, 32 L. J. Q. B. 12), Em. Dom., 1091.
Queen *v.* Great Northern R. Co. (46 L. J. Q. B. 4, L. R. 2 Q. B. D. 151), Em. Dom., 1167.
Queen *v.* Great Northern R. Co. (14 Q. B. 25, 6 Railw. Cas. 246, 14 Jur. 128, 19 L. J. Q. B. 25), Em. Dom., 1185.
Queen *v.* Great N. of E. R. Co. (9 Q. B. 315, 10 Jur. 755, 16 L. J. M. C. 16), Crim. L., 1.
Queen *v.* Great Western R. Co. (14 U. C. C. P. 462), Bridges, 5, 95.
Queen *v.* Hull & S. R. Co. (6 Q. B. 70, 3 Railw. Cas. 705, 8 Jur. 491, 13 L. J. Q. B. 257), Em. Dom., 1208.
Queen *v.* Lambourn Valley R. Co. (L. R. 22 Q. B. D. 463), Stock, 64.
Queen *v.* Lancashire & Y. R. Co. (6 Railw. Cas. 654, 20 L. J. Q. B. 507), Em. Dom., 1208.
Queen *v.* Lancaster & P. J. R. Co. (6 Q. B. 759, 3 Railw. Cas. 724, 9 Jur. 303, 14 L. J. Q. B. 84), Em. Dom., 1185.
Queen *v.* London & B. R. Co. (3 D. & L. 399, 4 Railw. Cas. 119, 15 L. J. Q. B. 42), Em. Dom., 1149.
Queen *v.* London & G. R. Co. (3 Railw. Cas. 138, 2 G. & D. 444, 3 Q. B. 166, 6 Jur. 892), Em. Dom., 1102.
Queen *v.* London & N. W. R. Co. (3 El. & Bl. 443, 18 Jur. 993, 23 L. J. Q. B. 185), Em. Dom., 1172, 1185.
Queen *v.* London & N. W. R. Co. (9 L. T. 423), Em. Dom., 1181.
Queen *v.* London & S. R. Co. (2 P. & D. 243, 10 Ad. & El. 13, 1 Railw. Cas. 717), Em. Dom., 1157.
Queen *v.* London & S. W. R. Co. (5 Railw. Cas. 669, 12 Q. B. 775, 12 Jur. 973, 17 L. J. Q. B. 326), Em. Dom., 1102, 1184.
Queen *v.* London, B. & S. C. R. Co. (L. R. 15 Q. B. 313, 6 Railw. Cas. 440, 15 Jur. 372, 20 L. K. M. C. 124), Tax., 366, 374.
Queen *v.* McCurdy (2 Can. Exch. 311), Em. Dom., 1233, 1248.
Queen *v.* McGreevy (18 Can. Sup. Ct. 371), Govt. Rds., 9.
Queen *v.* McKenzie (2 Can. Exch. 198), Spec. Perf., 25.
Queen *v.* McLeod (8 Can. Sup. Ct. 1; reversing 1 Can. Exch. 365), Govt. Rds., 13.
Queen *v.* Malcolm (2 Can. Exch. 357), Govt. Rds., 11.
Queen *v.* Manchester & L. R. Co. (8 Ad. & El. 413, 3 N. & P. 439, 1 W., W. & H. 458, 2 Jur. 857), Em. Dom., 1203.
Queen *v.* Manchester, S. & L. R. Co. (L. R. 2 Q. B. 336, 16 L. T. 173, 36 L. J. Q. B. 171, 15 W. R. 676), Em. Dom., 1181.
Queen *v.* Metropolitan Board of Works (L. R. 4 Q. B. 358, 10 B. & S. 391, 39 L. J. Q. B. 201, 17 W. R. 1094), Em. Dom., 1191, 1194.
Queen *v.* Metropolitan R. Co. (13 L. T. 444), Em. Dom., 1179.
Queen *v.* Metropolitan R. Co. (17 L. T. 291), Em. Dom., 1134.
Queen *v.* Midland R. Co. (L. R. 10 Q. B. 389, 2 Ry. & C. T. Cas. xvi), Tax., 363, 381.
Queen *v.* Midland R. Co. (19 Q. B. D. 540, 56 L. J. Ch. D. 585, 5 Ry. & C. T. Cas. 267), Arb., 2.
Queen *v.* Newport Dock Co. (9 Jur. N. S. 73, 31 L. J. M. C. 266, 6 L. T. 456), Tax., 380.
Queen *v.* North London R. Co. (51 L. J. Q. B. 241, 30 W. R. 272), Em. Dom., 1146.
Queen *v.* North Midland R. Co. (2 Railw. Cas. 1), Em. Dom., 1158.
Queen *v.* North Staffordshire R. Co. (7 Jur. N. S. 363, 30 L. J. M. C. 68, 3 El. & El.

392, 9 W. R. 235, 3 L. T. 554, 2 Ry. & C. T. Cas. 18), Tax., 368, 376.
Queen *v.* North Union R. Co. (1 Railw. Cas. 729), Em. Dom., 1183, 1184.
Queen *v.* Paradis (16 Can. Sup. Ct. 716; reversing 1 Can. Exch. 191), Em. Dom., 1273.
Queen *v.* Peters (16 New Brun. 77), Car. of M., 745.
Queen *v.* Port Henry & P. W. R. Co. (38 U. C. Q. B. 431), Crim. L., 33.
Queen *v.* Pouliot (2 Can. Exch. 49), Contr., 96.
Queen *v.* Poulter (L. R. 20 Q. B. D. 132), Em. Dom., 1198.
Queen *v.* Railway Com'rs (40 Am. & Eng. R. Cas. 59, 22 Q. B. D. 642), Charges, 19.
Queen *v.* Rigby (6 Railw. Cas. 479, 14 Q. B. 687, 19 L. J. Q. B. 153, 14 Jur. 329), Cross. Sts. & H., 17.
Queen *v.* Second Ave. R. Co. (3 J. & S. (N. Y.) 154, 44 How. Pr. 281), Contr., 3.
Queen *v.* Shropshire Union R. & C. Co. (42 L. J. Q. B. 193, L. R. 8 Q. B. 420, 27 L. T. 412, 21 W. R. 953), Stock, 63.
Queen *v.* Sigsworth (2 Can. Exch. 194), Em. Dom., 1221.
Queen *v.* Smith (10 Can. Sup. Ct. 1; reversing 1 Can. Exch. 376), Govt. Rds., 15.
Queen *v.* Smith (L. R. 12 Q. B. D. 481, 53 L. J. Q. B. D. 115, 32 W. R. 275), Em. Dom., 1146.
Queen *v.* South Devon R. Co. (15 Q. B. 1043, 15 Jur. 464, 20 L. J. Q. B. 145), Arb., 15; Em. Dom., 1177.
Queen *v.* South Wales R. Co. (12 Q. B. 988, 6 Railw. Cas. 197, 13 Jur. 1095, 18 L. J. Q. B. 310), Em. Dom., 1202.
Queen *v.* Train (2 B. & S. 640, 31 L. J. M. C. 169, 3 F. & F. 22), Tramw., 2.
Queen *v.* Vaughan (38 L. J. M. C. 49, L. R. 4 Q. B. 190, 17 W. R. 115), Em. Dom., 1157.
Queen *v.* Warwickshire (2 Railw. Cas. 661), Em. Dom., 1146.
Queen *v.* Wycombe R. Co. (8 B. & S. 259, 36 L. J. Q. B. 121, L. R. 2 Q. B. 310, 15 L. T. 610, 15 W. R. 489), Em. Dom., 1139; Sts. & H., 60.
Queen *v.* York, N. & B. R. Co. (6 Railw. Cas. 648, 16 Q. B. 886, 20 L. J. Q. B. 503), Em. Dom., 1208.
Queensbury *v.* Culver (19 Wall. (U. S.) 83), Mun. Aid, 6, 247.
Quested *v.* Newburyport & A. Horse R. Co. (127 Mass. 204), Leases, 43.
Quibell *v.* Union Pac. R. Co. (7 Utah 122, 25 Pac. Rep. 734), Employés, Inj. to, 388; Fel. Serv., 138; Negl., 75.
Quick *v.* Hannibal & St. J. R. Co. (31 Mo. 399), Animals, 355.
Quick *v.* Indianapolis & St. L. R. Co. (29 Ill. App. 143; reversed on other grounds in 130 Ill. 334, 22 N. E. Rep. 709), Trial, 215.
Quick *v.* Indianapolis & St. L. R. Co. (130 Ill. 334, 22 N. E. Rep. 709), Employés, Inj. to, 23.
Quick *v.* London & W. R. Co. (5 Railw. Cas. 20, 5 D. & L. 685, 13 Jur. 408, 18 L. J. Q. B. 89), Arb., 16.
Quick *v.* Taylor (113 Ind. 540, 16 N. E. Rep. 588), Em. Dom., 130; Vend. & P., 6.
Quicke, Ex parte (13 W. R. 924, 12 L. T. 580), Em. Dom., 1208.
Quigley *v.* Central Pac. R. Co. (11 Nev. 350), Agency, 80; Eject. Pass., 19, 107, 120, 125; Rem. of C., 33, 46, 47.
Quigley *v.* Central Pac. R. Co. (5 Sawy. (U. S.) 107), Eject. Pass., 105, 106; Tickets & F., 25.
Quigley *v.* Delaware & H. Canal Co. (142 Pa. St. 388, 21 Atl. Rep. 827), Cross., Inj. at, 102, 139; Dam., 64; Evid., 292.
Quigley *v.* Pennsylvania S. V. R. Co. (121 Pa. St. 35, 15 Atl. Rep. 478), Sts. & H., 106.
Quill *v.* New York C. & H. R. R. Co. (11 N. Y. Supp. 80, 16 Daly 313, 32 N. Y. S. R. 612; affirmed in 126 N. Y. 629, mem., 36 N. Y. S. R. 1012), Contrib. Neg., 83; Cross., Inj. at, 63, 205, 336, 357; Death, etc., 294, 350; Evid., 288; Negl., 82, 105, 114; New Tr., 3.
Quillinan *v.* Canada Southern R. Co. (20 Am. & Eng. R. Cas. 31, 6 Ont. 567), Nuis., 31.
Quimby *v.* Boston & M. R. Co. (40 Am. & Eng. R. Cas. 693, 150 Mass. 365, 5 L. R. A. 846, 23 N. E. Rep. 205), Passes, 20, 24.
Quimby *v.* Boston & M. R. Co. (69 Me. 340), Stat. & D., 99, 135.
Quimby *v.* Vanderbilt (17 N. Y. 306), Car. of P., 505; Tickets & F., 2.
Quimby *v.* Vermont C. R. Co. (23 Vt. 387), Animals, 578; Fences, 13.
Quin *v.* Manhattan R. Co. (7 N. Y. S. R. 252), Car. of P., 429.
Quincy *v.* Chicago, B. & Q. R. Co. (92 Ill. 21), Sts. & H., 82, 86.
Quincy *v.* Chicago, B. & Q. R. Co. (94 Ill. 537), Mort., 35; Sts. & H., 83, 97.
Quincy *v.* Cooke (12 Am. & Eng. R. Cas. 645, 107 U. S. 549, 2 Sup. Ct. Rep. 614), Mun. Aid, 22, 153.
Quincy, A. & St. L. R. Co. *v.* Wellhoener (72 Ill. 60), Animals, 35.
Quincy Horse R. & C. Co. *v.* Gnuse (137 Ill. 264, 27 N. E. Rep. 190; reversing 38 Ill. App. 212), Evid., 174; Witn., 36.
Quincy Horse R. & C. Co. *v.* Gruse (26 Ill. App. 397), Contrib. Neg., 122.
Quincy Min. Co. *v.* Kitts (42 Mich. 34, 3 N. W. Rep. 240), Employés, Inj. to, 294.
Quincy, M. & P. R. Co. *v.* Humphreys (28 Abb. N. Cas. (N. Y.) 332, 145 U. S. 82, 12 Sup. Ct. Rep. 787), Receiv., 67, 83.
Quincy, M. & P. R. Co. *v.* Humphreys (51 Am. & Eng. R. Cas. 38, 145 U. S. 82, 12 Sup. Ct. Rep. 787; affirming 34 Fed. Rep. 259), Mort., 114; Receiv., 1.
Quincy, M. & P. R. Co. *v.* Kellogg (54 Mo. 334, 12 Am. Ry. Rep. 382), Em. Dom., 236, 259, 262, 291, 789.
Quincy, M. & P. R. Co. *v.* Morris (84 Ill. 410, 16 Am. Ry. Rep. 494), Mun. Aid, 137, 209; Stat., 34.
Quincy, M. & P. R. Co. *v.* Ridge (57 Mo. 599), Em. Dom., 519, 646, 742, 895, 921.

Quincy & P. R. Co. *v.* Taylor (43 Mo. 35), Em. Dom., 291.
Quincy R. Bridge Co. *v.* Adams County (88 Ill. 615, 21 Am. Ry. Rep. 378), Charters, 15; Tax., 65, 175.
Quinlan *v.* Sixth Ave. R. Co. (4 Daly (N. Y.) 487), St. Rys., 434.
Quinn *v.* Atlantic Ave. R. Co. (34 N. Y. S. R. 801, 12 N. Y. Supp. 223; affirmed in 134 N. Y. 611, mem., 45 N. Y. S. R. 935, mem., 31 N. E. Rep. 629, mem.), App., 83; St. Rys., 474; Trial, 167.
Quinn *v.* Chicago, B. & Q. R. Co. (17 Am. & Eng. R. Cas. 63, 63 Iowa 510, 19 N. W. Rep. 336), Nuis., 38; Waters & W., 29.
Quinn *v.* Illinois C. R. Co. (51 Ill. 495), Death, etc., 184.
Quinn *v.* Long Island R. Co. (34 Hun (N. Y.) 331), Car. of P., 618, 646.
Quinn *v.* New York, N. H. & H. R. Co. (56 Conn. 44, 5 N. Eng. Rep. 685, 12 Atl. Rep. 97), Witn., 72, 94.
Quinn *v.* Power (87 N. Y. 535, 41 Am. Rep. 392), Ferries, 11.
Quinn *v.* Power (29 Hun (N. Y.) 183), Death, etc., 244.
Quinn *v.* South Carolina R. Co. (37 Am. & Eng. R. Cas. 166, 29 So. Car. 381, 7 S. E. Rep. 614, 1 L. R. A. 682), Car. of P., 493, 639; Dam., 25, 32; New Tr., 29.

Raben *v.* Central Iowa R. Co. (33 Am. & Eng. R. Cas. 520, 73 Iowa 579, 5 Am. St. Rep. 708, 35 N. W. Rep. 645), Car. of P., 233, 240.
Raben *v.* Central Iowa R. Co. (31 Am. & Eng. R. Cas. 45, 74 Iowa 732, 34 N. W. Rep. 621), Car. of P., 218, 418, 553, 591; Dam., 41.
Raben *v.* Georgia R. Co. (78 Ga. 47), Children, Inj. to, 96.
Race *v.* Union Ferry Co. (138 N. Y. 644, 34 N. E. Rep. 280), Ferries, 11.
Racine *v.* New York C. & H. R. R. Co. (70 Hun (N. Y.) 453, 53 N. Y. S. R. 680, 24 N. Y. Supp. 388), Employés, Inj. to, 39, 43, 151, 222; Explosions, 3.
Racine & M. R. Co. *v.* Farmers' L. & T. Co. (49 Ill. 331), Consol., 4, 37.
Racine & M. R. Co. *v.* Farmers' L. & T. Co. (70 Ill. 249), App., 12.
Racine & M. R. Co. *v.* Farmers' L. & T. Co. (86 Ill. 187), Mort., 292.
Racine County Bank *v.* Ayres (12 Wis. 512), Assign., 8; Name, 2; Subscr., 199, 203, 216.
Radcliffe *v.* St. Louis, I. M. & S. R. Co. (90 Mo. 127, 2 S. W. Rep. 277), Animals, 351, 487, 621.
Radke *v.* Minneapolis & St. L. R. Co. (41 Minn. 350, 43 N. W. Rep. 6), Estop., 13.
Radke *v.* Winona & St. P. R. Co. (39 Minn. 262, 39 N. W. Rep. 624), Land Grants, 120.
Radley *v.* London & N. W. R. Co. (L. R. 1 App. Cas. 754, 46 L. J. Ex. D. 573, 35 L. T. 637, 25 W. R. 147; reversing L. R. 10 Ex. 100, 44 L. J. Ex. 73, 33 L. T. 209; which reversed L. R. 9 Ex. 71, 43 L. J. Ex. Ch. 73), Contrib. Neg., 48.
Radmann *v.* Chicago, M. & St. P. R. Co. (78 Wis. 22, 47 N. W. Rep. 97), App., 54.
Rae *v.* Grand Trunk R. Co. (9 Am. & Eng. R. Cas. 470, 14 Fed. Rep. 401), Commerce, 7.
Rafferty *v.* Central Traction Co. (50 Am. & Eng. R. Cas. 239, 147 Pa. St. 579, 23 Atl. Rep. 884), Leases, 35; St. Rys., 13, 192, 210, 221.
Rafferty *v.* Missouri Pac. R. Co. (15 Mo. App. 559), New Tr., 87.
Rafferty *v.* Missouri Pac. R. Co. (91 Mo. 33, 3 S. W. Rep. 393), Death, etc., 152; Evid., 126; Sts. & H., 339.
Ragan *v.* Aiken (9 Am. & Eng. R. Cas. 201, 9 Lea (Tenn.) 609, 42 Am. Rep. 684), Charges, 20; Discrim., 9, 21, 28, 36, 37, 42; Franch., 4; Pl., 81.
Ragan *v.* Kansas City & S. E. R. Co. (111 Mo. 456, 20 S. W. Rep. 234), Em. Dom., 459, 742, 997; Witn., 109.
Ragon *v.* Toledo, A. A. & N. M. R. Co. (91 Mich. 379, 51 N. W. Rep. 1004), Employés, Inj. to, 50, 69; Excava., 3; Side Tr., 6.
Ragon *v.* Toledo, A. A. & N. M. R. Co. (97 Mich. 265, 56 N. W. Rep. 612), Employés, Inj. to, 95, 208, 211, 229.
Ragsdale *v.* Alabama G. S. R. Co. (67 Miss. 106, 6 So. Rep. 630), Tax., 328.
Ragsdale *v.* Memphis & C. R. Co. (3 Baxt. (Tenn.) 426), Fel. Serv., 277.
Ragsdale *v.* Northern Pac. R. Co. (42 Fed. Rep. 383), Fel. Serv., 34, 192, 250, 299.
Ragsdale *v.* Vicksburg & M. R. Co. (62 Miss. 480), Land Grants, 8a.
Rahman *v.* Minnesota & N. W. R. Co. (43 Minn. 42, 44 N. W. Rep. 522), Employés, Inj. to, 398.
Raiford *v.* Mississippi C. R. Co. (43 Miss. 233), Animals, 63, 70, 250, 466.
Railroad Commission *v.* Savannah, F. & W. R. Co. (3 Int. Com. Rep. 688, 5 Int. Com. Com. 13), Int. Com., 31, 164.
Railroad Com'rs, In re (20 Am. & Eng. R. Cas. 507, 15 Neb. 679, 50 N. W. Rep. 276), Ry. Com'rs, 1.
Railroad Com'rs, In re (83 Me. 273, 22 Atl. Rep. 168), Ry. Com'rs, 21.
Railroad Com'rs *v.* Charlotte, C. & A. R. Co. (26 Am. & Eng. R. Cas. 29, 22 So. Car. 220), Commerce, 2; Int. Com., 220, 221; Ry. Com'rs, 38, 39.
Railroad Com'rs *v.* Columbia & G. R. Co. (30 Am. & Eng. R. Cas. 177, 26 So. Car. 353, 2 S. E. Rep. 127), Penalty, 11; Ry. Com'rs, 34.
Railroad Com'rs *v.* Oregon R. & N. Co. (35 Am. & Eng. R. Cas. 542, 17 Oreg. 65, 19 Pac. Rep. 702, 2 L. R. A. 195), Ry. Com'rs, 5, 15, 36.
Railroad Com'rs *v.* Portland & O. C. R. Co. (63 Me. 269), Car. of P., 106; Charters, 54; Direct., 34; Mand., 1; Stat. & D., 14.
Railroad Co. *v.* Ford (11 Heisk. (Tenn.) 388), Animals, 317.
Railroad Co. *v.* Philadelphia (6 Phila. (Pa.) 238) St. Rys., 286.
Railroad Co. *v.* Mercer (11 Phila. (Pa.) 226), Judgm., 10, 12.

Railroad Co. *v.* Neal (1 Woods (U. S.) 353), Injunc., 41.
Railroad Co. *v.* Walker (11 Heisk. (Tenn.) 383), Contrib. Neg., 51.
Railroad School Tax., In re (17 Am. & Eng. R. Cas. 491, 78 Mo. 596), Tax., 58, 269.
Railstone *v.* York, N. & B. R. Co. (15 Q. B. 404, 14 Jur. 1021, 19 L. J. Q. B. 644), Em. Dom., 1180.
Railway & G. L. Imp. Co., In re (42 L. T. 206, 28 W. R. 541), Direct., 43, 53.
Railway Co. *v.* Fisher (39 Ohio St. 330), Subscr., 124.
Railway Co. *v.* Hicks (89 Tenn. 301, 17 S. W. Rep. 1036), Employés, Inj. to, 163.
Railway Co. *v.* Leech (41 Ohio St. 388), Employés, Inj. to, 393.
Railway Co. *v.* Valleley (32 Ohio St. 345), Eject. Pass., 43, 52, 57, 77.
Railway Pass. A. Co. *v.* Burwell (44 Ind. 460), Acc. Ins., 8.
Railway Register Mfg. Co. *v.* Broadway & S. A. R. Co. (22 Fed. Rep. 655), Pat. for Inv., 6, 37.
Railway Register Mfg. Co. *v.* Broadway & S. A. R. Co. (30 Fed. Rep. 238), Pat. for Inv., 37.
Railway Register Mfg. Co. *v.* North Hudson County R. Co. (24 Fed. Rep. 793), Pat. for Inv., 37.
Railway Register Mfg. Co. *v.* Third Ave. R. Co. (33 Fed. Rep. 31), Pat. for Inv., 37.
Railway Sleepers Supply Co., In re (L. R. 29 Ch. D. 204, 54 L. J. Ch. 720, 52 L. T. 731, 33 W. R. 595), Direct., 25.
Railway Transfer Co. *v.* Railroad & W. Com. (39 Minn. 231, 39 N. W. Rep. 150), Ry. Com'rs, 28.
Rainey *v.* Baltimore & O. R. Co. (10 Am. & Eng. R. Cas. 368, 15 Fed. Rep. 767), Em. Dom., 1038.
Rainey *v.* New York C. & H. R. R. Co. (23 N. Y. Supp. 80, 52 N. Y. S. R. 677, 68 Hun 495), Cross., Inj. at, 54, 56, 229; Death, etc., 235, 262, 264, 349.
Rains *v.* St. Louis, I. M. & S. R. Co. (5 Am. & Eng. R. Cas. 610, 71 Mo. 164), Contrib. Neg., 5, 9; Death, etc., 409; Employés, Inj. to, 237; Fel. Serv., 218; Trial, 99.
Rajnowski *v.* Detroit, B. C. & A. R. Co. (74 Mich. 15, 41 N. W. Rep. 849), Fires, 363.
Rajnowski *v.* Detroit, B. C. & A. R. Co. (74 Mich. 20, 41 N. W. Rep. 847), Children, Inj. to, 141; Death, etc., 74, 96, 382; Evid., 247; Fires, 189; Witn., 131.
Rajnowski *v.* Detroit, B. C. & A. R. Co. (78 Mich. 681, 44 N. W. Rep. 335; adhering to 74 Mich. 20, 41 N. W. Rep. 847), Fires, 100.
Rajotte *v.* Canadian Pac. R. Co. (5 Man. 365), Employés, Inj. to, 63.
Raleigh, The (41 Fed. Rep. 527), Car. of P., 646.
Raleigh & A. A. L. R. Co. *v.* Jenkins (68 N. Car. 499, 502), State Aid, 28.
Raleigh & A. A. L. R. Co. *v.* Wicker (74 N. Car. 220), Em. Dom., 692, 696, 748; Flood. Lds., 6.
Raleigh & G. R. Co. *v.* Davis (2 Dev. & B. (N. Car.) 451), Em. Dom., 129, 180, 415, 523.
Raleigh & G. R. Co. *v.* Jones (1 Ired. (N. Car.) 24), Em. Dom., 872.
Raleigh & G. R. Co. *v.* Lewis (99 N. Car. 62, 5 S. E. Rep. 82), Tax., 342.
Raleigh & G. R. Co. *v.* Reid (64 N. Car. 155; reversed in 13 Wall. (U. S.) 269), Tax., 97.
Raleigh & G. R. Co. *v.* Reid (13 Wall. (U. S.) 269), 3 Am. Ry. Rep. 199), Tax., 177.
Raleigh & G. R. Co. *v.* Wake County Com'rs (17 Am. & Eng. R. Cas. 466, 87 N. Car. 414), Tax., 177.
Raleigh & W. R. Co. *v.* Glendon & G. M. & M. Co. (112 N. Car. 661, 17 S. E. Rep. 77), Injunc., 2.
Ralls County *v.* Douglass (7 Am. & Eng. R. Cas. 212, 105 U. S. 728), Coupons, 20; Mun. Aid, 136, 352, 360, 395; Rev., 11.
Ralls County Court *v.* United States (105 U. S. 733), Coupons, 23; Mun. Aid, 24, 393, 405.
Ralph *v.* Chicago & N. W. R. Co. (32 Wis. 177), Car. of M., 712; Evid., 291.
Ramsay *v.* Midland R. Co. (10 Ont. Pr. 48), Discov., 10.
Ramsay *v.* Richmond & D. R. Co. (91 N. Car. 418), Pl., 7.
Ramsdell *v.* New York & N. E. R. Co. (151 Mass. 245, 23 N. E. Rep. 1103), Death, etc., 23.
Ramsden *v.* Boston & A. R. Co. (104 Mass. 117), Assault, 2.
Ramsden *v.* Manchester, S. J. & A. R. Co. (1 Ex. 723, 5 Railw. Cas. 552, 12 Jur. 293), Em. Dom., 1150.
Ramsey *v.* Edgefield & K. R. Co. (3 Tenn. Ch. 170), Stat. & D., 35.
Ramsey *v.* Erie R. Co. (38 How. Pr. (N. Y.) 193, 7 Abb. Pr. N. S. 156), Receiv., 16, 27.
Ramsey *v.* Gould (39 How. Pr. (N. Y.) 62, 8 Abb. Pr. N. S. 174, 57 Barb. 398; affirmed in 3 Lans. 181), Acct'ng, 2; Stockh., 89, 96.
Ramsey *v.* Louisville, C. & L. R. Co. (89 Ky. 99, 20 S. W. Rep. 162), Contrib. Neg., 13, 21, 22; Cross., Inj. at, 186, 261; Pl., 24.
Ramsey *v.* Rushville & M. Gravel Road Co. (81 Ind. 394), Contrib. Neg., 83.
Ramsey County *v.* Chicago, M. & St. P. R. Co. (33 Minn. 537, 24 N. W. Rep. 313), Tax., 144, 182.
Ranch *v.* New York, L. & W. R. Co. (17 N. Y. S. R. 401, 2 N. Y. Supp. 108), Witn., 141.
Rand *v.* Ft. Scott, W. & W. R. Co. (50 Kan. 114, 31 Pac. Rep. 683), Em. Dom., 436.
Rand *v.* Merchants' Dispatch Transp. Co. (59 N. H. 363), Lim. of Liab., 18.
Rand *v.* Rome, W. & O. R. Co. (32 N. Y. S. R. 426, 10 N. Y. Supp. 300, 56 Hun 645), App., 117.
Rand *v.* White Mountains R. Co. (40 N. H. 79), Attach., 33; Dam., 52.
Randall *v.* Baltimore & O. R. Co. (15 Am. & Eng. R. Cas. 243, 109 U. S. 478, 3 Sup.

Ct. Rep. 322), Employés, Inj. to, 72; Fel. Serv., 44, 117, 269; Trial, 183.
Randall *v.* Connecticut River R. Co. (132 Mass. 269), Cross., Inj. at, 293.
Randall *v.* Elwell (52 N. Y. 521), Tax., 303.
Randall *v.* Frankford, S. & P. C. Pass. R. Co. (139 Pa. St. 464, 22 Atl. Rep. 639), Children, Inj. to, 47.
Randall *v.* Jacksonville St. R. Co. (17 Am. & Eng. R. Cas. 184, 19 Fla. 409), St. Rys., 191, 199.
Randall *v.* New York El. R. Co. (27 N. Y. Supp. 1062), Elev. Rys., 107.
Randall *v.* Richmond & D. R. Co. (42 Am. & Eng. R. Cas. 603, 104 N. Car. 410, 10 S. E. Rep. 691), Animals, 494; Cross., Inj. at, 196.
Randall *v.* Richmond & D. R. Co. (45 Am. & Eng. R. Cas. 507, 107 N. Car. 748, 12 S. E. Rep. 605), Animals, 480; Stat., 38.
Randall *v.* Richmond & D. R. Co. (49 Am. & Eng. R. Cas. 74, 108 N. Car. 612, 13 S. E. Rep. 137), Car. of M., 429, 633.
Randall *v.* Texas C. R. Co. (22 Am. & Eng. R. Cas. 102, 63 Tex. 586), Homest., 1.
Randle *v.* Pacific R. Co. (65 Mo. 325), Nuis., 3.
Randlette *v.* Judkins (23 Am. & Eng. R. Cas. 478, 77 Me. 114), Conduct., 10; Tresp., 24.
Randolph *v.* Hannibal & St. J. R. Co. (18 Mo. App. 609), Assault, 2, 17; Conduct., 11.
Randolph *v.* Larned (27 N. J. Eq. 557), Sales of Rds., 1.
Randolph *v.* Middleton (26 N. J. Eq. 543), Mort., 159; Stat., 12.
Randolph *v.* New Jersey W. L. R. Co. (28 N. J. Eq. 49, 14 Am. Ry. Rep. 11), Mort., 44, 75.
Randolph *v.* Wilmington & R. R. Co. (11 Phila. (Pa.) 502), Mort., 8, 170, 242.
Randolph County *v.* Post (93 U. S. 502), Mun. Aid, 210, 229.
Rangeley *v.* Midland R. Co. (37 L. J. Ch. 313, L. R. 3 Ch. 306, 16 W. R. 547, 18 L. T. 69), Em. Dom., 1097, 1098.
Ranger *v.* Great Western R. Co. (5 H. of L. Cas. 72), Agency, 86; Constr. Rys., 30.
Ranger *v.* New Orleans (2 Woods (U. S.) 128), Mun. Aid, 352, 405.
Ranger *v.* New Orleans, J. & G. N. R. Co. (Mann. (La.) 176), App., 132.
Rankin *v.* Central Pac. R. Co. (73 Cal. 96, 15 Pac. Rep. 57), App., 1; Trial, 189.
Rankin *v.* Florida, etc., R. Co. (1 Bankr. Reg. (196) 647), Bank'cy, 1.
Rankin *v.* Great Western R. Co. (4 U. C. C. P. 463), Em. Dom., 1210, 1276.
Rankin *v.* Pacific R. Co. (55 Mo. 167), Car. of M., 37, 222, 778.
Rankine *v.* Elliott (16 N. Y. 377; affirming 14 How. Pr. 339), Stockh., 32.
Ranlet *v.* Concord R. Corp. (62 N. H. 561), Em. Dom., 643, 680, 927.
Ranney *v.* Bader (67 Mo. 476), Mun. Aid, 40; Tax., 337.
Ranney v. Baeder (50 Mo. 600, 3 Am. Ry. Rep. 141), Mun. Aid, 315.
Ranney *v.* St. Johnsbury & L. C. R. Co. (64 Vt. 277, 24 Atl. Rep. 1053), Death, etc., 149.
Ransier *v.* Minneapolis & St. L. R. Co. (11 Am. & Eng. R. Cas. 647, 30 Minn. 215, 14 N. W. Rep. 883), Evid., 63.
Ransier *v.* Minneapolis & St. L. R. Co. (21 Am. & Eng. R. Cas. 601, 32 Minn. 331, 20 N. W. Rep. 332), Em. Dom., 16; Employés, Inj. to, 347; Fel. Serv., 64.
Ransom *v.* Chicago, St. P., M. & O. R. Co. (19 Am. & Eng. R. Cas. 16, 62 Wis. 178, 22 N. W. Rep. 147, 51 Am. Rep. 718), Cross., Inj. at, 102, 139.
Ransom *v.* Citizens' R. Co. (104 Mo. 375, 16 S. W. Rep. 416), St. Rys., 33, 126, 191.
Ransom *v.* New York & E. R. Co. (15 N. Y. 415), Dam., 70.
Ransome *v.* Eastern Counties R. Co. (No. 1) (1 C. B. N. S. 437, 3 Jur. N. S. 217, 26 L. J. C. P. 91, 1 Ry. & C. T. Cas. 63), Discrim., 11, 16, 17, 81.
Ransome *v.* Eastern Counties R. Co. (No. 2) (4 C. B. N. S. 135, 4 Jur. N. S. 284, 27 L. J. C. P. 166, 1 Ry. & C. T. Cas. 109), Discrim., 40, 41, 47.
Ransome *v.* Eastern Counties R. Co. (No. 3) (4 C. B. N. S. 159, 1 Ry. & C. T. Cas. 116, 4 Jur. N. S. 859), Discrim., 75.
Ransome *v.* Eastern Counties R. Co. (No. 4) (8 C. B. N. S. 709, 7 Jur. N. S. 99, 29 L. J. C. P. 329, 8 W. R. 527, 2 L. T. 376, 1 Ry. & C. T. Cas. 155), Discrim., 45, 47.
Raoul *v.* Newman (59 Ga. 408), Med. Serv., 16.
Rapid Transit R. Com'rs, In re (18 N. Y. Supp. 320, 45 N. Y. S. R. 810), Elev. Rys., 15, 18; Rap. T. Acts, 3, 5, 6.
Rapid Transit R. Com'rs, In re (47 N. Y. S. R. 347, 65 Hun 63, 19 N. Y. Supp. 561), Elev. Rys., 6, 9, 12, 23.
Rapid Transit R. Com'rs, In re (21 N. Y. Supp. 570, 50 N. Y. S. R. 418, 66 Hun 634, mem.), Rap. T. Acts, 8.
Rapier *v.* London Tramways Co. ([1893] 2 Ch. 588), Nuis., 4.
Rapp *v.* St. Joseph & I. R. Co. (106 Mo. 423, 17 S. W. Rep. 487), Contrib. Neg., 113; Death, etc., 368.
Raridan *v.* Central Iowa R. Co. (69 Iowa 527, 29 N. W. Rep. 599), Cat.-Gds., 27, 33.
Raridon *v.* Central Iowa R. Co. (19 Am. & Eng. R. Cas. 615, 65 Iowa 640, 22 N. W. Rep. 909), Cat.-Gds., 24.
Raritan & D. B. R. Co. *v.* Delaware & R. Canal Co. (18 N. J. Eq. 546; modifying 16 N. J. Eq. 356), Charters, 103; Par. & Comp. L., 4.
Raritan Tp. *v.* Port Reading R. Co. (50 Am. & Eng. R. Cas. 169, 49 N. J. Eq. 11, 23 Atl. Rep. 127), Bridges, 2, 46; Cross. Sts. & H., 4, 90; Nuis., 18.
Rascher *v.* East Detroit & G. P. R. Co. (90 Mich. 413, 51 N. W. Rep. 463), Elec. Rys., 34; St. Rys., 450, 459, 507.
Rashdall *v.* Ford (L. R. 2 Eq. 750, 35 L. J. Ch. 769, 14 W. R. 950, 14 L. T. 790), Direct., 42.
Rashleigh *v.* Southeastern R. Co. (10 C. B. 612), Cov'ts, 14.
Rasmussen *v.* Chicago, R. I. & P. R. Co. (18 Am. & Eng. R. Cas. 54, 65 Iowa 236,

21 N. W. Rep. 583), Employés, Inj. to, 226.
Rastrick *v.* Derbyshire, S. & W. J. R. Co. (9 Ex. 149, 7 Railw. Cas. 799, 17 Jur. 977, 23 L. J. Ex. 2), Stockh., 29.
Rastrick *v.* Great Western R. Co. (27 U. C. Q. B. 396), App., 47.
Rates and Charges on Food Products (3 Int. Com. Rep. 93, 4 Int. Com. Com. 48), Int. Com., 39.
Rates and Charges on Food Products (3 Int. Com. Rep. 151, 4 Int. Com. Com. 116), Int. Com., 148.
Rathbone *v.* New York C. & H. R. R. Co. (140 N. Y. 48, 55 N. Y. S. R. 306, 35 N. E. Rep. 418; reversing 52 N. Y. S. R. 933, mem., 23 N. Y. Supp. 1148, mem., 69 Hun 617, mem.), Lim. of Liab., 20.
Rathbone *v.* Union R. Co. (13 Am. & Eng. R. Cas. 58, 13 R. I. 709), St. Rys., 402.
Rathbun *v.* Citizens' Steamboat Co. (76 N. Y. 376, 57 How. Pr. 191), Car. of M., 271.
Rathbun *v.* Northern C. R. Co. (50 N. Y. 656, mem.), Lim. of Ac., 73.
Rathburn *v.* Burlington & M. R. R. Co. (19 Am. & Eng. R. Cas. 137, 16 Neb. 441, 20 N. W. Rep. 390), Sts. & H., 383.
Ratterman *v.* American Exp. Co. (49 Ohio St. 608, 32 N. E. Rep. 754), Tax., 339.
Ratterman *v.* Western Union Tel. Co. (127 U. S. 411, 8 Sup. Ct. Rep. 1127), Int. Com., 189.
Rau *v.* Minnesota Valley R. Co. (13 Minn. 442) (Gil. 407), Waters & W., 29.
Rauch *v.* Lloyd (31 Pa. St. 358), Children, Inj. to, 21 75; Cross., Inj. at, 312; Govt. Rds., 7.
Rauenstein *v.* New York, L. & W. R. Co. (31 N. Y. S. R. 911), Cross., Sts. & H., 119.
Rauenstein *v.* New York, L. & W. R. Co. (136 N. Y. 528, 32 N. E. Rep. 1047, 49 N. Y. S. R. 893; reversing 47 N. Y. S. R. 139, 19 N. Y. Supp. 833), Embankm., 1; Sts. & H., 158.
Rauth *v.* New York El. R. Co. (23 N. Y. Supp. 750), Judgm., 43.
Ravary *v.* Ontario & Q. R. Co. (5 Montr. Super. 54), Lim. of Ac., 49.
Ravenna *v.* Pennsylvania Co. (45 Ohio St. 118, 10 West. Rep. 463, 12 N. E. Rep. 445), Cross., Inj. at, 86.
Ravenscraft *v.* Missouri Pac. R. Co. (27 Mo. App. 617), Animals, 64, 381; Negl., 63, 89.
Rawitzky *v.* Louisville & N. R. Co. (31 Am. & Eng. R. Cas. 129, 40 La. Ann. 47, 3 So. Rep. 387), Eject. Pass., 35; Tickets & F., 78.
Rawley *v.* Southern Pac. R. Co. (33 Fed. Rep. 305), Fed. Cts., 3.
Rawlings *v.* Metropolitan R. Co. (37 L. J. Ch. 824, 18 L. T. 871), Em. Dom., 1130.
Raworth *v.* Northern Pac. R. Co. (3 Int. Com. Rep. 857, 5 Int. Com. Com. 234), Int. Com., 24, 119, 129.
Rawson *v.* Holland (59 N. Y. 611; affirming 5 Daly 155, 47 How. Pr. 292), Bills of L., 52, 78; Car. of M., 561, 602.
Rawson *v.* Newport News & M. V. Co. (2 Int. Com. Rep. 626, 3 Int. Com. Com. 266), Int. Com., 170.
Rawson *v.* Pennsylvania R. Co. (48 N. Y. 212, 3 Am. Ry. Rep. 528; affirming 2 Abb. Pr. N. S. 220), Bagg., 98; Husb. & W., 28.
Ray *v.* Atchison & N. R. Co. (4 Neb. 439), Em. Dom., 1035.
Ray *v.* Blair (12 U. C. C. P. 257), Exec., 15; Stockh., 35, 47, 63.
Ray *v.* St. Louis, I. M. & S. R. Co. (25 Mo. App. 104), Fences, 108.
Ray *v.* Walker ([1892] 2 Q. B. 88), Deeds, 49.
Rayburn *v.* Central Iowa R. Co. (74 Iowa 637, 35 N. W. Rep. 606, 38 N. W. Rep. 520), App., 111; Car. of P., 378; Contrib. Neg., 82; Dam., 91; Employés, Inj. to, 769; Fel. Serv., 163, 174; Negl., 61; Pl., 142; Trial, 103.
Ray County *v.* Vansycle (96 U. S. 675), Mun. Aid, 136, 340, 342.
Rayle *v.* Indianapolis, P. & C. R. Co. (32 Ind. 259), Injunc., 52.
Raymond *v.* Burlington, C. R. & N. R. Co. (18 Am. & Eng. R. Cas. 217, 13 Am. & Eng. R. Cas. 6, 65 Iowa 152, 17 N. W. Rep. 923, 21 N. W. Rep. 495), App., 79; Car. of P., 137; Contrib. Neg., 103; Witn., 90.
Raymond *v.* Chicago, M. & St. P. R. Co. (1 Int. Com. Rep. 627, 1 Int. Com. Com. 230), Int. Com., 35.
Raymond *v.* Clark (46 Conn. 129), Mort., 25.
Raymond *v.* Danbury & N. R. Co. (14 Blatchf. (U. S.) 133), Dam., 99.
Raymond *v.* Danbury & N. R. Co. (43 Conn. 596), Fed. Cts., 15; Trial, 1.
Razor *v.* St. Louis, I. M. & S. R. Co. (7 Am. & Eng. R. Cas. 562, 73 Mo. 471), Animals, 615; Fences, 66; Just. P., 8.
Read *v.* Boston & A. R. Co. (140 Mass. 199, 4 N. E. Rep. 227), Employés, Inj. to, 558; Sunday, 7.
Read *v.* Camden (54 N. J. L. 347, 24 Atl. Rep. 549; reversing 53 N. J. L. 322), Cert., 1; Cross. Sts & H., 47; Mun. Corp., 17.
Read *v.* Decker (67 N. Y. 182; affirming 5 Hun 646), Constr. Rys., 112.
Read *v.* Erie R. Co. (20 Am. & Eng. R. Cas. 121, 97 N. Y. 341; modifying 25 Hun 563), Easem., 11; Waters & W., 12.
Read *v.* Great Eastern R. Co. (37 L. J. Q. B. 278, L. R. 3 Q. B. 555, 16 W. R. 1040, 18 L. T. N. S. 82, 9 B. & S. 714), Acc. & Sat., 5; Death, etc., 11.
Read *v.* Hitchings (71 Me. 590), Constr. Rys., 84.
Read *v.* Pennsylvania R. Co. (44 N. J. L. 280), Fires, 29, 252, 285; Negl., 92.
Read *v.* St. Louis, K. C. & N. R. Co. (60 Mo. 199, 9 Am. Ry. Rep. 201), Bills of L., 72, 92; Car. of M., 473; Lim. of Liab., 27; Strikes, 2.
Read *v.* Spaulding (5 Bosw. (N. Y.) 395), Exp. Cos., 23.
Read *v.* Spaulding (30 N. Y. 630; affirming 5 Bosw. 395), Car. of M., 105, 135.
Read *v.* Victoria Station & P. R. Co. (1 H.

& C. 826, 9 Jur. N. S. 1061, 32 L. J. Ex. 167), Em. Dom., 1205, 1179; Estop., 9.
Reading *v.* Pennsylvania R. Co. (52 N. J. L. 264, 19 Atl. Rep. 321), Dam., 102; Husb. & W., 30.
Reading *v.* Wedder (66 Ill. 80), Mun. Aid, 205, 234.
Reading & C. R. Co. *v.* Latshaw (2 Am. & Eng. R. Cas. 267, 93 Pa. St. 449), Fires, 252, 316.
Reading & C. R. Co. *v.* Ritchie (19 Am. & Eng. R. Cas. 267, 102 Pa. St. 425), Cross., Inj. at, 184, 232.
Reading & P. R. Co. *v.* Balthaser (119 Pa. St. 472, 12 Cent. Rep. 173, 13 Atl. Rep. 294, 21 W. N. C. 253), Em. Dom., 601.
Reading & P. R. Co. *v.* Balthaser (126 Pa. St. 1, 17 Atl. Rep. 518), Em. Dom., 559, 637, 760; Witn., 31.
Reading City Pass. R. Co. *v.* Eckert (Pa.) (4 Atl. Rep. 530), St. Rys., 338, 430.
Reading R. Co. *v.* Berks County (6 Pa. St. 70), Tax., 181.
Reading R. Co. *v.* Boyer (13 Pa. St. 497), Em. Dom., 267.
Reagan *v.* Farmers' L. & T. Co. (58 Am. & Eng. R. Cas. 670, 154 U. S. 362, 14 Sup. Ct. Rep. 1047), Charters, 18; Fed. Cts., 1, 3; Ry. Com'rs, 1, 40, 41.
Reagan *v.* Mercantile Trust Co. (58 Am. & Eng. R. Cas. 699, 154 U. S. 413, 14 Sup. Ct. Rep. 1060), Charges, 13.
Reagan *v.* Pacific R. Co. (21 Mo. 30), Attach., 61.
Reagan *v.* St. Louis, K. & N. W. R. Co. (93 Mo. 348, 12 West. Rep. 367, 6 S. W. Rep. 371), Employés, Inj. to, 18, 20, 520; Fly. Switch, 1, 3.
Ream *v.* Pittsburg, Ft. W. & C. R. Co. (49 Ind. 93), Death, etc., 146, 175.
Ream *v.* Stone (102 Ill. 359), Mort., 105.
Reardon *v.* Missouri Pac. R. Co. (114 Mo. 384, 21 S. W. Rep. 731), Dam., 86; Employés, Inj. to, 510; Tresp., Inj. to, 57, 60, 63, 64.
Reary *v.* Louisville, N. O. & T. R. Co. (34 Am. & Eng. R. Cas. 277, 40 La. Ann. 32, 8 Am. St. Rep. 497, 3 So. Rep. 390), Agency, 63; Car. of P., 435; Tresp., Inj. to, 24.
Rebelsky *v.* Chicago & N. W. R. Co. (79 Iowa 55, 44 N. W. Rep. 536), Contrib. Neg., 104; Negl., 67.
Reber *v.* Bond (38 Fed. Rep. 822), Car. of P., 293.
Reburn *v.* Ontario & Q. R. Co. (6 Montr. L. R. 381; affirming 5 Montr. Super. 211), Em. Dom., 1249.
Rece *v.* Newport News & M. V. Co. (32 W. Va. 164, 9 S. E. Rep. 212), Charters, 15; Citizens., 2; Rem. of C., 35.
Recka *v.* Ocean Steamship Co. (3 Misc. (N. Y.) 526), Employés, Inj. to, 211.
Records *v.* Philadelphia, W. & B. R. Co. (9 Phila. (Pa.) 55), Sales, 7.
Redd *v.* Henry County Sup'rs (31 Gratt. (Va.) 695), Mun. Aid, 22, 115, 183, 202, 299.
Redd *v.* Muscogee R. Co. (48 Ga. 102, 11 Am. Ry. Rep. 390), Car. of P., 558; Car. of Slaves, 4.
Redding *v.* East Tenn., V. & G. R. Co. (74 Ga. 385), Fel. Serv., 171.
Redding *v.* South Carolina R. Co. (3 So. Car. 1), Agency, 80; Trial, 102.
Redding *v.* South Carolina R. Co. (5 So. Car. 67), Col. Pers., 10.
Reddington *v.* Philadelphia Traction Co. (132 Pa. St. 154, 19 Atl. Rep. 28), St. Rys., 387.
Reddon *v.* Union Pac. R. Co. (5 Utah 344, 15 Pac. Rep. 262), Employés, Inj. to, 601, 629, 781; Fel. Serv., 217, 328.
Redfield *v.* Utica & S. R. Co. (25 Barb. (N. Y.) 54), Ejectm., 9.
Redfield *v.* Wickham (13 App. Cas. 467), Exec., 1.
Redhead *v.* Midland R. Co. (8 B. & S. 371, 36 L. J. Q. B. 181, L. R. 2 Q. B. 412, 15 W. R. 831, 16 L. T. 485; affirmed on appeal in 9 B. & S. 519, L. R. 4 Q. B. 379, 38 L. J. Q. B. 169, 20 L. T. 682, 17 W. R. 737), Car. of P., 185, 195.
Redhead *v.* Midland R. Co. (9 B. & S. 519, 38 L. J. Q. B. 169, L. R. 4 Q. B. 379, 17 W. R. 737, 20 L. T. 628), Car. of P., 185.
Redigan *v.* Boston & M. R. Co. (155 Mass. 44, 28 N. E. Rep. 1133), Stat. & D., 73.
Redlien *v.* Long Island R. Co. (7 N. Y. S. R. 263, 43 Hun 639), New Tr., 20.
Redman *v.* Philadelphia, M. & M. R. Co. (1 Am. & Eng. R. Cas. 1, 33 N. J. Eq. 165), Em. Dom., 39.
Redmond *v.* Chicago, R. I. & P. R. Co. (76 Mo. 550), Fires, 309.
Redmond *v.* Galena & S. W. R. Co. (39 Wis. 426, 13 Am. Ry. Rep. 401), Constr. Rys., 97; Words & Ph., 59.
Redmond *v.* Rome, W. & O. R. Co. (31 N. Y. S. R. 366, 10 N. Y. Supp. 330, 56 Hun 645), Tresp., Inj. to, 105; Trial, 67.
Redmond *v.* St. Paul, M. & M. R. Co. (39 Minn. 248, 40 N. W. Rep. 64), App., 98; Em. Dom., 453.
Redner *v.* Lehigh & H. R. R. Co. (73 Hun (N. Y.) 562, 26 N. Y. Supp. 1050, 56 N. Y. S. R. 230), Car. of P., 217.
Red River & L. of W. R. Co. *v.* Sture (32 Minn. 95, 20 N. W. Rep. 229), Pub. Lds., 8.
Red River, S. & W. R. Co. *v.* Blount (3 Tex. Civ. App. 282, 22 S. W. Rep. 930), Parties, 6; Trial, 10.
Red Rock *v.* Henry (106 U. S. 596, 1 Sup. Ct. Rep. 434), Mun. Aid, 61, 231.
Red Willow County *v.* Chicago, B. & Q. R. Co. (39 Am. & Eng. R. Cas. 556, 26 Neb. 660, 42 N. W. Rep. 879), Tax., 271.
Redwood *v.* Metropolitan R. Co. (6 D. C. 302), Agency, 93.
Reed *v.* Ashburnham R. Co. (120 Mass. 43), Pres., 2.
Reed *v.* Atlantic & P. R. Co. (22 Blatchf. (U. S.) 469), Fed. Cts., 16.
Reed *v.* Atlantic & P. R. Co. (21 Fed. Rep. 283), Judgm., 23.
Reed *v.* Axtell (33 Am. & Eng. R. Cas. 503, 84 Va. 231, 4 S. E. Rep. 587), Receiv., 122; Stat. & D., 120.

Reed *v.* Benton & M. R. & B. Co. (5 Miss. 257), Pl., 60.
Reed *v.* Burlington, C. R. & N. R. Co. (31 Am. & Eng. R. Cas. 190, 72 Iowa 66, 33 N. W. Rep. 451), Agency, 42; Employés, Inj. to, 429, 623.
Reed *v.* Canastota Northern R. Co. (47 N. Y. S. R. 593, 20 N. Y. Supp. 241), Em. Dom., 1081.
Reed *v.* Chicago, M. & St. P. R. Co. (32 Am. & Eng. R. Cas. 320, 71 Wis. 399, 37 N. W. Rep. 225), Fires, 243, 278.
Reed *v.* Chicago, M. & St. P. R. Co. (25 Fed. Rep. 886), Em. Dom., 765; Fed. Cts., 14.
Reed *v.* Chicago, R. I. & P. R. Co. (8 Am. & Eng. R. Cas. 180, 57 Iowa 23, 10 N. W. Rep. 285), Dam., 90.
Reed *v.* Chicago, St. P., M. & O. R. Co. (74 Iowa 188, 37 N. W. Rep. 149), Cross., Inj. at, 133, 240; Negl., 66; New Tr., 68; Sts. & H., 411.
Reed *v.* Duluth, S. S. & A. R. Co. (Mich.) (58 Am. & Eng. R. Cas. 77, 59 N. W. Rep. 144), Car. of P., 264.
Reed *v.* Fargo (4 Silv. Sup. Ct. 143, 7 N. Y. Supp. 185), Lim. of Liab., 12.
Reed *v.* Hanover Branch R. Co. (105 Mass. 303, 1 Am. Ry. Rep. 32), Em. Dom., 430, 533, 760.
Reed *v.* Hobbs (3 Ill. 297), Constr. Rys., 24.
Reed *v.* Jones (6 Wis. 680), Injunc., 38.
Reed *v.* Louisville Bridge Co. (8 Bush (Ky.) 69), Em. Dom., 62, 560.
Reed *v.* Metropolitan El. R. Co. (45 N. Y. S. R. 330, 63 Hun 633, 18 N. Y. Supp. 811), Elev. Rys., 183.
Reed *v.* Minneapolis St. R. Co. (34 Minn. 557, 27 N. W. Rep. 77), Children, Inj. to, 59, 124, 136.
Reed *v.* Missouri Pac. R. Co. (50 Mo. App. 504), Fires, 81, 199, 265; Negl., 43; Penalty, 8.
Reed *v.* New York C. R. Co. (56 Barb. (N. Y.) 493; reversed in 45 N. Y. 575), Car. of P., 169; Negl., 21, 91, 103, 105; New Tr., 57.
Reed *v.* New York C. R. Co. (45 N. Y. 574), Evid., 90; Witn., 80.
Reed *v.* Northeastern R. Co. (37 So. Car. 42, 16 S. E. Rep. 289), Death, etc., 84, 130, 138; Pl., 32.
Reed *v.* Ohio & M. R. Co. (36 Am. & Eng. R. Cas. 234, 126 Ill. 48, 15 West. Rep. 190, 17 N. E. Rep. 807), Em. Dom., 63, 274, 277, 351, 603, 650.
Reed *v.* Omnibus R. Co. (33 Cal. 212), Penalty, 9, 10; Stat., 21; Tickets & F., 130.
Reed *v.* Pennsylvania R. Co. (56 Fed. Rep. 184), Car. of P., 344; Contrib. Neg., 12; Witn., 139.
Reed *v.* Peoria & O. R. Co. (18 Ill. 403), Abate., 15; Tresp., 29.
Reed *v.* Philadelphia, W. & B. R. Co. (3 Houst. (Del.) 176), Car. of M., 42, 55, 72, 78, 104, 187, 575.
Reed *v.* Richmond & A. R. Co. (Va.) (33 Am. & Eng. R. Cas. 503, 4 S. E. Rep. 587), Receiv., 128.
Reed *v.* Richmond St. R. Co. (50 Ind. 342), Subscr., 6.
Reed *v.* Rome, W. & O. R. Co. (48 Hun 231, 16 N. Y. S. R. 58; affirmed in 125 N. Y. 708, mem., 26 N. E. Rep. 753, 34 N. Y. S. R. 1013), Car. of L. S., 144; Witn., 110.
Reed *v.* State (108 N. Y. 407, 15 N. E. Rep. 735, 13 N. Y. S. R. 815), Waters & W., 29.
Reed *v.* United States Exp. Co. (48 N. Y. 462, 8 Am. Ry. Rep. 561), Evid., 226; Exp. Cos., 70.
Reedie *v.* London & N. W. R. Co. (6 Railw. Cas. 184, 4 Ex. 244, 13 Jur. 659, 20 L. J. Ex. 65), Negl., 18.
Reedy *v.* East Tenn., V. & G. R. Co. (87 Ga. 323, 13 S. E. Rep. 555), Trial, 77.
Rees *v.* Schuylkill River E. S. R. Co. (135 Pa. St. 629, 20 Atl. Rep. 149), Em. Dom., 458, 641.
Rees *v.* Watertown (19 Wall. (U. S.) 107), Mun. Aid, 393, 439.
Reese *v.* Pennsylvania R. Co. (41 Am. & Eng. R. Cas. 31, 131 Pa. St. 422, 19 Atl. Rep. 72), Tickets & F., 129.
Reese *v.* Third Ave. R. Co. (16 Fed. Rep. 368), New Tr., 6.
Reeves *v.* Delaware, L. & W. R. Co. (30 Pa. St. 454), Animals, 233; Cross., Inj. at, 215.
Reeves *v.* Philadelphia Traction Co. (152 Pa. St. 153, 25 Atl. Rep. 516; reversing 1 Pa. Dist. 506), Elec. Rys., 2; Stat., 17.
Regan *v.* Chicago, M. & St. P. R. Co. (51 Wis. 599, 8 N. W. Rep. 292), Death, etc., 133.
Regan *v.* Chicago, M. & St. P. R. Co. (85 Wis. 43, 54 N. W. Rep. 623), Cross., Inj. at, 257, 259.
Regan *v.* Grand Trunk R. Co. (61 N. H. 579), Car. of M., 126, 137, 184.
Regan *v.* New York & N. E. R. Co. (49 Am. & Eng. R. Cas. 590, 60 Conn. 124, 22 Atl. Rep. 503), Dam., 110; Fires, 361; Subrog., 4.
Reg. *v.* Ambergate, N. & B. R. Co. (1 El. & Bl. 372, 17 Jur. 668, 22 L. J. Q. B. 191), Estop., 3.
Reg. *v.* Bedford U. A. Committee (43 L. J. M. C. 81), Tax., 369.
Reg. *v.* Birmingham & G. R. Co. (3 Railw. Cas. 148, 2 G. & D. 236, 9 C. & P. 478, 6 Jur. 804; see s. c. 3 Q. B. 223, 1 G. & D. 457, 5 Jur. 40), Crim. L., 21.
Reg. *v.* Birmingham & G. R. Co. (1 G. & D. 324, 4 Jur. 966), Cross., St. & H., 18.
Reg. *v.* Boulton (3 New Sess. Cas. 705, 2 C. & K. 917, 1 Den. C. C. 508, T. & M. 201, 13 Jur. 1034, 19 L. J. M. C. 67, 3 Cox C. C. 576), Crim. L., 23.
Reg. *v.* Bristol & E. R. Co. (3 Railw. Cas. 777), Contr., 12.
Reg. *v.* Charnwood Forest R. Co. (1 C. & E. 419), Stock., 64.
Reg. *v.* Coleridge (45 L. J. Q. B. D. 649, 34 L. T. 752), Tel. & T. Lines, 11.
Reg. *v.* Cumberland (Justices) (5 Railw. Cas. 332, 5 D. & L. 431, 12 Jur. 1025, 17 L. J. Q. B. 102), Att'ys, 1.
Reg. *v.* Derbyshire S. & W. J. R. Co. (2 C. L. R. 1653, 18 Jur. 1054, 23 L. J. Q. B. 333), Mand., 31; Stockh., 29.
Reg. *v.* East & W. I. D. & B. J. R. Co. (2 El. & Bl. 466, 17 Jur. 1181, 22 L. J. Q. B.

380), Constr. Rys., 10; Cross. Sts. & H., 22; Words & Ph., 238.
Reg. v. Eastern Counties R. Co. (3 Railw. Cas. 22, 2 Q. B. 569, 2 G. & D. 1, 6 Jur. 820), Cross. Sts. & H., 23.
Reg. v. Eastern Counties R. Co. (9 Jur. N. S. 1339, 32 L. J. M. C. 174, 4 B. & S. 58), Tax., 372.
Reg. v. Eastern Counties R. Co. (18 Jur. 679, n., 7 Railw. Cas. 900, n.), Tax., 369.
Reg. v. Fletton (30 L. J. M. C. 89, 3 El. & El. 450, 9 W. R. 309, 3 L. T. 689), Tax., 369.
Reg. v. Frere (4 El. & Bl. 598, 1 Jur. N. S. 700, 24 L. J. M. C. 68), Crim. L., 44.
Reg. v. Gilmore (15 Cox C. C. 85), Crim. L., 35.
Reg. v. Grand Junction R. Co. (3 P. & D. 57, 11 A. & E. 128, n.), Coroners, 1.
Reg. v. Grand Junction R. Co. (4 Q. B. 18, 4 Railw. Cas. 1, D. & M. 237, 8 Jur. 508, 13 L. J. M. C. 941), Tax., 369.
Reg v. Grand Trunk R. Co. (15 U. C. Q. B. 121), Crim. L., 36.
Reg. v. Grand Trunk R. Co. (17 U. C. Q. B. 165), Crim. L., 31.
Reg. v. Great Northern R. Co. (25 W. R. 41, 35 L. T. 551), Em. Dom., 1167.
Reg. v. Great Western R. Co. (15 L. J. M. C. 80, 2 Ry. & C. T. Cas. 17), Tax., 374.
Reg. v. Great Western R. Co. (12 U. C. Q. B. 250), Sts. & H., 180.
Reg. v. Great Western R. Co. (21 U. C. Q. B. 555), Sts. & H., 59.
Reg. v. Great Western R. Co. (32 U. C. Q. B. 506), Crim. L., 32.
Reg. v. Great Western R. Co. (3 Q. B. 333, 3 Railw. Cas. 161, 2 G. & D. 773, 6 Jur. 823), Coroners, 1.
Reg. v. Headlam & L. & N. W. R. Co. (57 L. J. M. C. 89, 6 Ry.& C. T. Cas. lxx), Tax., 382.
Reg. v. Irish S. E. R. Co. (1 Ir. C. L. 29), Car. of Mails, 17.
Reg. v. Kitchener (29 L. T. 697, 12 Cox C. C. 522, L. R. 2 C. C. 88, 43 L. J. M. C. 9, 22 W. R. 134), Bridges, 33.
Reg. v. Leeds & B. R. Co. (16 Jur. 817, 21 L. J. M. C. 193), Em. Dom., 1166.
Reg. v. Liverpool, M. & N.-upon-T. R. Co. (16 Jur. 949, 21 L. J. Q. B. 284), Stock, 64.
Reg. v. Llantrissant (38 L. J. M. C. 93, L. R. 4 Q. B. 354, 17 W. R. 671, 20 L. T. 364, 2 Ry. & C. T. Cas. 19), Tax., 367, 379.
Reg. v. London & N. W. R. Co. (12 W. R. 208), Em. Dom., 1202.
Reg. v. London & N. W. R. Co. (L. R. 9 Q. B. 134, 22 W. R. 263, 29 L. T. 910), Tax., 369.
Reg. v. London & N. W. R. Co. (46 L. J. M. C. 102), Sts. & H., 359; Tax., 382.
Reg. v. London & S. W. R. Co. (13 Jur. 10), Em. Dom., 1183.
Reg. v. London & S. W. R. Co. (2 G. & D. 49, 6 Jur. 686, 1 Q. B. 558, 2 Railw. Cas. 629), Tax., 369.
Reg. v. Londonderry & C. R. Co. (13 Q. B. 998, 6 Railw. Cas. 1, 13 Jur. 939, 18 L. J. Q. B. 343), Subscr., 68.
Reg. v. Manchester, S. & L. R. Co. (4 El. & Bl. 88, 1 Jur. N. S. 419), Em. Dom., 1167.
Reg. v. Metropolitan Dist. R. Co. (L. R. 6 Q. B. 698, 40 L. J. M. C. 113), Tax., 365.
Reg. v. Metropolitan R. Co. (8 Jur. N. S. 617, 31 L. J. Q. B. 261, 10 W. R. 717), Em. Dom., 1157.
Reg. v. Metropolitan R. Co. (50 L. T. 6; affirming 48 L. T. 367), Tel. & T. Lines, 11.
Reg. v. Midland & S. W. J. R. Co. (8 B. & S. 456), Em. Dom., 1185.
Reg. v. Midland R. Co. (4 El. & Bl. 958), Tax., 381.
Reg. v. Nash (2 Den. C. C. 448, 16 Jur. 553, 21 L. J. M. C. 147), Crim. L., 24.
Reg. v. Norwich & B. R. Co. (4 Railw. Cas. 112, 3 D. & L. 385, 15 L. J. Q. B. 24), Bridges, 19.
Reg. v. Paget (L. R. 8 Q. B. D. 151, 51 L. J. M. C. 9, 45 L. T. 794, 30 W. R. 230), Crim. L., 44; Tickets & F., 148.
Reg. v. Petrie (20 Ont. 317), Crim. L., 8.
Reg. v. Rawson (15 L. T. 179), Sts. & H., 359.
Reg. v. Rhymney R. Co. (L. R. 4 Q. B. 276, 10 B. & S. 198, 38 L. J. M. C. 75, 17 W. R. 530), Tax., 363.
Reg. v. Rochdale Improvement Act (2 Jur. N. S. 861), Em. Dom., 1157.
Reg. v. Romp (17 Ont. 567), Crim. L., 35.
Reg. v. St. John Water Com'rs (19 Can. Sup. Ct. 125; affirming 2 Can. Exch. 78), Agency, 116.
Reg. v. St. Pancras (32 L. J. M. C. 146, 2 Ry. & C. T. Cas. 18), Tax., 370.
Reg. v. Scott (2 G. & D. 729, 3 Q. B. 543, 3 Railw. Cas. 187, 6 Jur. 1084), Crim. L., 32.
Reg. v. Sharpe (3 Railw. Cas. 33), Crim. L., 32.
Reg. v. Sherard (33 L. J. M. C. 5, 2 Ry. & C. T. Cas. 18), Tax., 363, 369.
Reg. v. Smith (43 U. C. Q. B. 369), Forc. Ent., 1.
Reg. v. Southeastern R. Co. (32 L. T. 858), Bridges, 32.
Reg. v. Southeastern R. Co. 4 H. L. Cas. 471, 17 Jur. 901; affirmed in 17 Q. B. 485, 15 Jur. 871, 20 L. J. Q. B. 428), Cross. Sts. & H., 26; Mand., 36.
Reg. v. South Wales R. Co. (14 Q. B. 902, 6 Railw. Cas. 489, 14 Jur. 828, 19 L. J. Q. B. 272), Sales of Rds., 2.
Reg. v. Stockton & D. R. Co. (8 L. T. 422, 2 Ry. & C. T. Cas. 19), Tax., 371.
Reg. v. Toronto St. R. Co. (24 U. C. Q. B. 454), Crim. L., 36.
Reg. v. Verral (18 Ont. 117), Bagg., 75.
Reg. v. West Midland R. Co. (11 W. R. 857), Em. Dom., 1177.
Reg. v. Wilson (16 Jur. 973, 21 L. J. Q. B. 281, 18 Q. B. 348), Sts. & H., 404.
Reg. v. York & N. M. R. Co. (3 Railw. Cas. 764), Constr. Rys., 6.
Regner v. Glens Falls, S. H. & Ft. E. St. R. Co. (74 Hun 202, 26 N. Y. Supp. 625, 56 N. Y. S. R. 300), Eject. Pass., 92; New Tr., 36; St. Rys., 521.

Rehler *v.* Western N. Y. & P. R. Co. (28 N. Y. S. R. 311, 8 N. Y. Supp. 286), Fences, 77.
Rehman *v.* Railroad Co. (5 Phila. (Pa.) 450), Animals, 187.
Reibel *v.* Cincinnati, I., St. L. & C. R. Co. (114 Ind. 476, 15 West. Rep. 331, 17 N. E. Rep. 107), Car. of P., 129, 133, 426.
Reichel *v.* New York C. & H. R. R. Co. (18 Civ. Pro. (N. Y.) 248, 9 N. Y. Supp. 414, 29 N. Y. S. R. 843), Costs, 12.
Reichel *v.* New York C. & H. R. R. Co. (130 N. Y. 682, 3 Silv. App. 662, 29 N. E. Rep. 763, 42 N. Y. S. R. 510; reversing 29 N. Y. S. R. 999, mem., 9 N. Y. Supp. 960), Employés, Inj. to, 177, 670.
Reichert *v.* St. Louis & S. F. R. Co. (38 Am. & Eng. R. Cas. 453, 51 Ark. 491, 11 S. W. Rep. 696), Ejectm., 9; Estop., 26; Sts. & H., 142.
Reichman *v.* Second Ave. R. Co. (15 N. Y. S. R. 928, 48 Hun 620, 1 N. Y. Supp. 836), Evid., 70; Witn., 167.
Reichmann *v.* Manhattan R. Co. (26 Hun (N. Y.) 433), Discov., 8.
Reid *v.* Bank of Mobile (14 Am. & Eng. R. Cas. 554, 70 Ala. 199), Agency, 41; State Aid, 4; Trusts, 1, 11.
Reid *v.* New York, N. H. & H. R. Co. (44 N. Y. S. R. 688, 63 Hun 630, 17 N. Y. Supp. 801; affirmed 136 N. Y. 638, mem., 32 N. E. Rep. 1014, 49 N. Y. S. R. 913, mem.), App., 65; Cross., Inj. at, 73; Death, etc., 221.
Reid *v.* Northwestern R. Co. (32 Pa. St. 257), Exec., 32.
Reiff *v.* Pennsylvania R. Co. (18 Phila. (Pa.) 260), Lim. of Ac., 13.
Reilly *v.* Hannibal & St. J. R. Co. (34 Am. & Eng. R. Cas. 81, 94 Mo. 600, 13 West. Rep. 658, 7 S. W. Rep. 407), Agency, 85; Children, Inj. to, 5, 144; Death, etc., 255; Witn., 9.
Reilly *v.* Lee (16 N. Y. Supp. 313), Constr. Rys., 23; Evid., 153.
Reineman *v.* Covington, C. & B. H. R. Co. (51 Iowa 338, 1 N. W. Rep. 619), Car. of M., 389.
Reineman *v.* Covington, C. & B. H. R. Co. (7 Neb. 310), Mun. Aid, 6, 41, 167.
Reinhold *v.* Ludeling (29 La. Ann. 552), Stockh., 37.
Reinig *v.* Broadway R. Co. (49 Hun 269, 17 N. Y. S. R. 622, 1 N. Y. Supp. 907), Employés, Inj. to, 27.
Reining *v.* New York, L. & W. R. Co. (27 N. Y. S. R. 69, 7 N. Y. Supp. 516), Em. Dom., 1008.
Reining *v.* New York, L. & W. R. Co. (50 Am. & Eng. R. Cas. 205, 128 N. Y. 157, 28 N. E. Rep. 640, 40 N. Y. S. R. 401; affirming 35 N. Y. S. R. 731, 13 N. Y. Supp. 238), Sts. & H., 74, 141, 154, 165, 293.
Reiser *v.* Pennsylvania Co. (152 Pa. St. 38, 25 Atl. Rep. 175), Fel. Serv., 153, 155, 416, 424.
Reisner *v.* Atchison U. D. & R. Co. (10 Am. & Eng. R. Cas. 155, 27 Kan. 382), Em. Dom., 453, 596, 597, 763.
Reisner *v.* Strong (10 Am. & Eng. R. Cas. 335, 24 Kan. 410), Em. Dom., 75, 1035.
Reist *v.* Grand Trunk R. Co. (6 U. C. C. P. 421), Farm Cross., 14.
Reist *v.* Grand Trunk R. Co. (15 U. C. Q. B. 355), Farm Cross., 14.
Reitenbaugh *v.* Chester Valley R. Co. (21 Pa. St. 100), Em. Dom., 274, 285, 312, 481, 665, 926.
Reitze *v.* Meadville & L. R. Co. (126 Pa. St. 437, 17 Atl. Rep. 663), Animals, 633.
Relative T. & B. Rates on Oil, In re (2 Int. Com. Rep. 245, 2 Int. Com. Com. 365), Int. Com., 66, 77.
Religious Teachers, In re (1 Int. Com. Rep. 21), Int. Com., 182.
Relyea *v.* Kansas City, Ft. S. & G. R. Co. (53 Am. & Eng. R. Cas. 578, 112 Mo. 86, 20 S. W. Rep. 480), Employés, Inj. to, 155; Fel. Serv., 25, 114, 206, 376.
Rembe *v.* New York, O. & W. R. Co. (1 Silv. App. 154, 102 N. Y. 721, mem., 7 N. E. Rep. 797, 2 N. Y. S. R. 498; affirming 32 Hun 68, mem.), App., 115; Cross., Inj. at, 272; Sts. & H., 176, 184.
Rembert *v.* South Carolina R. Co. (39 Am. & Eng. R. Cas. 252, 31 So. Car. 309, 9 S. E. Rep. 968), Bridges, 24; Pl., 45; Trial, 116.
Remer *v.* Long Island R. Co. (36 Hun (N. Y.) 253), Contrib. Neg., 83.
Remer *v.* Long Island R. Co. (48 Hun (N. Y.) 352, 15 N. Y. S. R. 884, 1 N. Y. Supp. 124; affirmed in 113 N. Y. 669, mem., 21 N. E. Rep. 1116, 23 N. Y. S. R. 994), Contrib. Neg., 83; Death, etc., 176, 204, 221; Tresp., Inj. to, 28, 57, 114; Witn., 98, 182.
Reming *v.* New York, L. & W. R. Co. (1 N. Y. S. R. 733), Sts. & H., 250, 284.
Remshart *v.* Savannah & C. R. Co. (54 Ga. 579), Injunc., 7.
Renaud *v.* Great Western R. Co. (12 U. C. Q. B. 408), Animals, 198.
Rend *v.* Chicago & N. W. R. Co. (2 Int. Com. Rep. 313, 2 Int. Com. Com. 540), Int. Com., 49.
Rend *v.* Chicago W. D. R. Co. (8 Ill. App. 517), St. Rys., 316.
Renfro *v.* Chicago, R. I. & P. R. Co. (86 Mo. 302), Employés, Inj. to, 182, 204; Fel. Serv., 6, 40.
Renneker *v.* South Carolina R. Co. (18 Am. & Eng. R. Cas. 149, 20 So. Car. 219), Car. of P., 442; Stat. & D., 137.
Renner *v.* Northern Pac. R. Co. (46 Fed. Rep. 344), Cross., Inj. at, 309.
Rennie *v.* Northern R. Co. (27 U. C. C. P. 153), Car. of M., 270.
Rensselaer & S. R. Co., In re (4 Paige (N. Y.) 553), Em. Dom., 693; Fences, 32.
Rensselaer & S. R. Co. *v.* Davis (43 N. Y. 137), Em. Dom., 47, 62, 181, 886.
Rensselaer & S. R. Co. *v.* Davis (55 N. Y. 145, 6 Am. Ry. Rep. 129), Em. Dom., 773.
Rensselaer & S. R. Co. *v.* Miller (47 Vt. 146), Mort., 157.
Renwick *v.* Davenport & N. W. R. Co. (47 Iowa 511), Mun. Aid, 31.
Renwick *v.* Davenport & N. W. R. Co. (49 Iowa 664), Em. Dom., 708, 1001; Rip. Rts., 10.
Renwick *v.* New York C. R. Co. (36 N. Y.,

132, 34 How. Pr. 91), Cross., Inj. at, 130, 276; Evid., 291.
Republican River Bridge Co. *v.* Kansas Pac. R. Co. (92 U. S. 315; affirming 12 Kan. 409), Land Grants, 93.
Republican Valley & W. R. Co. *v.* Chase County (48 Am. & Eng. R. Cas. 641, 33 Neb. 759, 51 N. W. Rep. 132), Tax., 271.
Republican Valley R. Co. *v.* Arnold (10 Am. & Eng. R. Cas. 219, 13 Neb. 485, 14 N. W. Rep. 478), Witn., 123.
Republican Valley R. Co. *v.* Fellers (20 Am. & Eng. R. Cas. 256, 16 Neb. 169, 20 N. W. Rep. 217), Constr. Rys., 10; Estop., 13.
Republican Valley R. Co. *v.* Fink (18 Neb. 82, 24 N. E. Rep. 439), Em. Dom., 390, 985, 1083.
Republican Valley R. Co. *v.* Fink (18 Neb. 89, 24 N. W. Rep. 691), Flood. Lds., 78, 80; Words & Ph., 7.
Republican Valley R. Co. *v.* Fink (28 Neb. 397, 44 N. W. Rep. 434; former appeal 18 Neb. 82, 24 N. W. Rep. 439), Jurisd., 18.
Republican Valley R. Co. *v.* Hayes (10 Am. & Eng. R. Cas. 217, 13 Neb. 489, 14 N. W. Rep. 521), Em. Dom., 561, 914.
Republican Valley R. Co. *v.* Linn (14 Am. & Eng. R. Cas. 198, 15 Neb. 234, 18 N. W. Rep. 35), Em. Dom., 725, 938; Witn., 119.
Republican Valley R. Co. *v.* McPherson (12 Neb. 480, 11 N. W. Rep. 739), App., 130.
Resor *v.* Ohio & M. R. Co. (17 Ohio St. 139), Deeds, 4.
Resser *v.* Carney (52 Minn. 397, 54 N. W. Rep. 89), Land Grants, 51.
Retan *v.* Lake Shore & M. S. R. Co. (55 Am. & Eng. R. Cas. 97, 94 Mich. 146, 53 N. W. Rep. 1094), Contrib. Neg., 83; Cross., Inj. at, 221, 319, 365; Sts. & H., 349.
Reusch *v.* Chicago, B. & Q. R. Co. (11 Am. & Eng. R. Cas. 559, 57 Iowa 687, 11 N. W. Rep. 647), Em. Dom., 190.
Reusens *v.* Mexican Nat. Constr. Co. (22 Fed. Rep. 522, 23 Blatchf. (U. S.) 19; appeal dismissed in U. S. Sup. Ct. Feb. 13, 1888), Subscr., 143.
Revelle *v.* St. Louis, I. M. & S. R. Co. (74 Mo. 438), Animals, 618; Lim. of Ac., 61.
Rex *v.* Leeds & S. R. Co. (3 Ad. & El. 683), Em. Dom., 1158.
Rex *v.* Morris (1 B. & Ad. 441), Branch & L. Roads, 9.
Rex *v.* Pease (1 N. & M. 690, 4 B. & Ad. 30, 2 L. J. M. C. 36), Fright. Teams, 2.
Rex *v.* Severn & W. R. Co. (2 B. & A. 646), Aband., 9.
Reynolds, Ex parte (44 Am. & Eng. R. Cas. 60, 52 Ark. 330, 12 S. W. Rep. 570), Em. Dom., 6, 391, 392.
Reynolds *v.* Boston & A. R. Co. (121 Mass. 291), Car. of M., 561.
Reynolds *v.* Boston & M. R. Co. (43 N. H. 580), Car. of M., 500, 510.
Reynolds *v.* Boston & M. R. Co. (53 Am. & Eng. R. Cas. 177, 64 Vt. 66, 24 Atl. Rep. 134), Employés, Inj. to, 29, 115, 126.
Reynolds *v.* Burlington & M. R. R. Co. (11 Neb. 186, 7 N. W. Rep. 737), Contr., 68.
Reynolds *v.* Caldwell (51 Pa. St. 298), Constr. Rys., 59, 64, 73.
Reynolds *v.* Chicago & A. R. Co. (85 Mo. 90), Charges, 54; Evid., 117.
Reynolds *v.* Dunkirk & S. L. R. Co. (17 Barb. (N. Y.) 613), Em. Dom., 230.
Reynolds *v.* Faris (80 Ind. 14), Mun. Aid, 411.
Reynolds *v.* Kneeland (44 N. Y. S. R. 458, 63 Hun 283, 17 N. Y. Supp. 895), Fel. Serv., 16.
Reynolds *v.* New York C. & H. R. R. Co. (58 N. Y. 248, 7 Am. Ry. Rep. 6; reversing 2 T. & C. 644), Death, etc., 192.
Reynolds *v.* New York C. & H. R. R. Co. (21 N. Y. S. R. 319, 50 Hun 606, mem., 3 N. Y. Supp. 331), Car. of M., 282.
Reynolds *v.* Pittsburg, C. & St. L. R. Co. (29 Ohio St. 602), Judgm., 16.
Reynolds *v.* Roosevelt (30 N. Y. S. R. 369, 8 N. Y. Supp. 749), Employés, 12.
Reynolds *v.* Texas & P. R. Co. (37 La. Ann. 694), Evid., 280; Stat. & D., 102.
Reynolds *v.* Western N. Y. & P. R. Co. (1 Int. Com. Rep. 685, 1 Int. Com. Com. 347, 393), Int. Com., 53, 82, 169.
Reynolds *v.* Whitby R. Co. (26 Grant's Ch. (U. C.) 519), Direct., 29.
Reynolds *v.* Williams (4 Biss. (U. S.) 108), Rev., 10.
Reynolds & H. C. Co. *v.* Police Jury (44 La. Ann. 863, 11 So. Rep. 236), Agency, 78; Mun. Aid, 415.
Reynoldsville & F. C. R. Co. *v.* Buffalo, R. & P. R. Co. (134 Pa. St. 541, 19 Atl. Rep. 674), Cross. Rys., 71.
Rhea *v.* Newport News & M. V. R. Co. (52 Am. & Eng. R. Cas. 657, 50 Fed. Rep. 16), Bridges, 85; Commerce, 2; Int. Com., 27.
Rhea *v.* St. Louis & S. F. R. Co. (84 Mo. 345), Animals, 122, 300; Fences, 54.
Rheiner *v.* Chicago, St. P., M. & O. R. Co. (36 Minn. 170, 30 N. W. Rep. 548), Cross., Inj. at, 242.
Rheiner *v.* Union Depot St. R. & T. Co. (14 Am. & Eng. R. Cas. 373, 31 Minn. 289, 17 N W. Rep. 623), Em. Dom., 299, 300.
Rhine *v.* Danville, H. & W. R. Co. (10 Phila. (Pa.) 336), Attach., 60.
Rhinebeck & C. R. Co., In re (67 N. Y. 242, 16 Am. Ry. Rep. 75; affirming 8 Hun 34), Em. Dom., 855, 970.
Rhines *v.* Chicago & N. W. R. Co. (35 Am. & Eng. R. Cas. 123, 75 Iowa 597, 39 N. W. Rep. 912), Animals, 463; Fences, 68.
Rhing *v.* Broadway & S. A. R. Co. (53 Hun (N. Y.) 321, 25 N. Y. S. R. 563, 6 N. Y. Supp. 641), Agency, 88.
Rhoades *v.* Chicago & G. T. R. Co. (21 Am. & Eng. R. Cas. 659, 58 Mich. 263, 25 N. W. Rep. 182), Cross., Inj. at, 276; Evid., 298.
Rhodes *v.* Georgia R. & B. Co. (41 Am. & Eng. R. Cas. 302, 84 Ga. 320, 10 S. E. Rep. 922), Children, Inj. to, 113.
Rhodes *v.* Louisville & N. R. Co. (9 Bush (Ky.) 688), Car. of L. S., 71; Car. of M., 456.
Rhodes *v.* Northern Pac. R. Co. (21 Am. & Eng. R. Cas. 31, 34 Minn. 87, 24 N. W. Rep. 347), Car. of M., 54.

Rhodes *v.* Utica, I. & E. R. Co. (5 Hun (N. Y.) 344), Animals, 281.
Rhymney Iron Co. *v.* Rhymney R. Co. (6 Ry. & C. T. Cas. 60), Discrim., 66, 67.
Rhymney R. Co. *v.* Rhymney Iron Co. (25 Q. B. D. 146), Charges, 43.
Rhymney R. Co. *v.* Taff Vale R. Co. (30 L. J. Ch. 482, 29 Beav. 153, 7 Jur. N. S. 202, 9 W. R. 222; affirmed in 30 L. J. Ch. 486, n., 4 L. T. 534, 1 Ry. & C. T. Cas. 21), Franch., 8; Leases, 118, 128.
Rhys *v.* Dare Valley R. Co. (L. R. 19 Eq. 93, 23 W. R. 23), Em. Dom., 1200.
Ribon *v.* Chicago, R. I. & P. R. Co. (16 Wall. (U. S.) 446, 4 Am. Ry. Rep. 285), Mort., 288.
Ricard *v.* North Pa. R. Co. (89 Pa. St. 193), Employés, Inj. to, 1.
Rice's Appeal (79 Pa. St. 168), Direct., 45; Mort., 269, 270.
Rice *v.* Atchison, T. & S. F. R. Co. (3 Int. Com. Rep. 263, 4 Int. Com. Com. 228), Int. Com., 65.
Rice *v.* Boston & W. R. Corp (12 Allen (Mass.) 141), Deeds, 37.
Rice *v.* Boston & W. R. Corp. (98 Mass. 212), Car. of M., 266.
Rice *v.* Chicago, B. & N. R. Co. (30 Ill. App. 481), Crim. L., 32; Estop., 4; Sts. & H., 201.
Rice *v.* Cincinnati, W. & B. R. Co. (2 Int. Com. Rep. 584, 3 Int. Com. Com. 186), Int. Com., 53, 168.
Rice *v.* Cincinnati, W. & B. R. Co. (3 Int. Com. Rep. 841, 5 Int. Com. Com. 193), Int. Com., 17, 78.
Rice *v.* Columbus, T. & T. R. Co. (32 Ohio St. 380), Husb. & W., 7.
Rice *v.* Hart (118 Mass. 201), Car. of M., 335.
Rice *v.* Illinois C. R. Co. (22 Ill. App. 643), Bagg., 9; Bailm., 2; Passes, 18.
Rice *v.* Indianapolis & St. L. R. Co. (3 Mo. App. 27), Car. of M., 107, 164, 203, 545.
Rice *v.* Kansas Pac. R. Co. (63 Mo. 314, 20 Am. Ry. Rep. 424), Car. of L. S., 80.
Rice *v.* Louisville & N. R. Co. (1 Int. Com. Rep. 722, 1 Int. Com. Com. 503), Int. Com., 78, 131, 164.
Rice *v.* Minnesota & N. W. R. Co. (1 Black (U. S.) 358), Land Grants, 1, 34.
Rice *v.* Ontario Steamboat Co. (56 Barb. (N. Y.) 384), Car. of M., 124, 762.
Rice *v.* Pacific R. Co. (55 Mo. 146), Lim. of Ac., 20.
Rice *v.* Rock Island & A. R. Co. (21 Ill. 93), Subscr., 121, 156.
Rice *v.* St. Louis, I. M. & S. R. Co. (30 Mo. App. 110), Just. P., 20.
Rice *v.* St. Louis S. W. R. Co. (5 Int. Com. Com. 660, 4 Int. Com. Rep. 321), Int. Com., 151.
Rice *v.* St. Paul & P. R. Co. (24 Minn. 464), Mort., 217.
Rice *v.* Sioux City & St. P. R. Co. (14 Am. & Eng. R. Cas. 549, 110 U. S. 695, 4 Sup. Ct. Rep. 177), Land Grants, 128.
Rice *v.* Southern Pa. I. & R. Co. (9 Phila. (Pa.) 204), Mort., 77; Pledge, etc., 3.
Rice *v.* Western N. Y. & P. R. Co. (2 Int. Com. Rep. 298, 2 Int. Com. Com. 389), Int. Com., 46, 52, 124.
Rice *v.* Western N. Y. & P. R. Co. (2 Int. Com. Rep. 496, 3 Int. Com. Com. 87), Int. Com., 166.
Rice *v.* Western N. Y. & P. R. Co. (3 Int. Com. Rep. 162, 4 Int. Com. Com. 131), Int. Com., 43, 56, 63, 77.
Rice, B. & F. M. & I. Co. *v.* Worcester (130 Mass. 575), Mand., 10.
Rich *v.* Manhattan R. Co. (46 N. Y. S. R. 673, 19 N. Y. Supp. 543), Elev. Rys., 72.
Rich *v.* Manhattan R. Co. (53 N. Y. S. R. 346, 138 N. Y. 668, mem., 34 N. E. Rep. 402; dismissing appeal from 19 N. Y. Supp. 543, 46 N. Y. S. R. 673), App., 12.
Rich *v.* Mentz (19 Fed. Rep. 725), Mun. Aid, 87.
Rich *v.* Mentz Tp. (134 U. S. 632, 10 Sup. Ct. Rep. 610), Mun Aid, 80.
Rich *v.* New York C. & H. R. R. Co. (11 Am. & Eng. R. Cas. 594, 87 N. Y. 382), Pl., 97.
Rich *v.* New York El. R. Co. (16 Daly 518, 14 N. Y. Supp. 167), Elev. Rys., 66, 164, 170.
Richards *v.* Attleborough Branch R. Co. (153 Mass. 120, 26 N. E. Rep. 418), Priv. Ways, 3.
Richards *v.* Buffalo, N. Y. & P. R. Co. (137 Pa. St. 524, 19 Atl. Rep. 931), Ejectm., 30; Em. Dom., 1021, 1031.
Richards *v.* Chesapeake & O. R. Co. (1 Hughes (U. S.) 28), Mort., 177; Receiv., 8.
Richards *v.* Chicago, St. P. & K. C. R. Co. (45 Am. & Eng. R. Cas. 54, 81 Iowa 426, 47 N. W. Rep. 63), Licensees, Inj. to, 23; Trespass, Inj. to, 26, 98.
Richards *v.* Des Moines Valley R. Co. (18 Iowa 259), Em. Dom., 1034.
Richards *v.* Great Eastern R. Co. (28 L. T. 711), Car. of P., 187, 574.
Richards *v.* London & S. C. R. Co. (7 C. B. 839, 6 Railw. Cas. 49, 13 Jur. 986, 18 L. J. C. P. 251), Bagg., 80.
Richards *v.* Merrimack & C. R. R. Co. (44 N. H. 127), Mort., 1, 3, 62, 71.
Richards *v.* Michigan C. R. Co. (40 Fed. Rep. 165), Pat. for Inv., 2, 38.
Richards *v.* Michigan S. & N. I. R. Co. (20 Ill. 404), Car. of M., 338.
Richards *v.* Swansea I. & T. Co. (L. R. 9 Ch. D. 425, 38 L. T. 833, 26 W. R. 764), Em. Dom., 1103, 1136.
Richards *v.* Westcott (7 Bosw. (N. Y.) 6), Exp. Cos., 28.
Richardson *v.* Brooklyn City & N. R. Co. (7 Hun (N. Y.) 69), Att'ys, 19.
Richardson *v.* Burlington & M. R. Co. (8 Iowa 260), Citizens., 4; Proc., 38; Trial, 12.
Richardson *v.* Canadian Pac. R. Co. (45 Am. & Eng. R. Cas. 413, 19 Ont. 369), Car. of M., 351, 648.
Richardson *v.* Chicago & N. W. R. Co. (56 Wis. 347, 14 N. W. Rep. 176), Animals, 221.
Richardson *v.* Chicago & N. W. R. Co. (16 Am. & Eng. R. Cas. 172, 58 Wis. 534, 17 N. W. Rep. 399), Car. of L. S., 138.

Richardson *v.* Chicago & N. W. R. Co. (18 Am. & Eng. R. Cas. 530, 61 Wis. 596, 21 N. W. Rep. 49), Car. of L. S., 5; Car. of M., 60.
Richardson *v.* Chouteau (37 Fed. Rep. 532), Car. of M., 541.
Richardson *v.* Great Eastern R. Co. (L. R. 10 C. P. 490), Car. of P., 150.
Richardson *v.* Great Eastern R. Co. (24 W. R. 907, L. R. 1 C. P. D. 342, 35 L. T. 351, 3 Ry. & C. T. Cas. xvii; reversing L. R. 10 C. P. 480, 32 L. T. 248), Car. of P., 194; Employés, Inj. to, 154.
Richardson *v.* Green (43 Am. & Eng. R. Cas. 380, 133 U. S. 30, 10 Sup. Ct. Rep. 280), Direct., 45, 46; Insolv., 3; Stockh., 31.
Richardson *v.* Lawrence County (17 Law. Ed. (U. S.) 558), Mun. Aid, 364.
Richardson *v.* Louisville & N. R. Co. (85 Ala. 559, 5 So. Rep. 308, 2 L. R. A. 716), Bagg., 107.
Richardson *v.* Metropolitan R. Co. (37 L. J. C. P. 300), Car. of P., 465.
Richardson *v.* Midland R. Co. (4 Ry. & C. T. Cas. 1), Discrim., 11, 41, 45, 47.
Richardson *v.* New York C. & H. R. R. Co. (40 N. Y. S. R. 616, 61 Hun 624, 15 N. Y. Supp. 868; affirmed in 133 N. Y. 563, mem., 30 N. E. Rep. 1148, 44 N. Y. S. R. 930), Cross., Inj. at, 77, 259, 278; Negl., 70.
Richardson *v.* New York C. R. Co. (45 N. Y. 846), Cross., Inj. at, 145.
Richardson *v.* New York C. R. Co. (98 Mass. 85), Death, etc., 119; States, 4.
Richardson *v.* Norfolk & W. R. Co. (37 W. Va. 641, 17 S. E. Rep. 195), Liens, 21.
Richardson *v.* Northeastern R. Co. (L. R. 7 C. P. 75, 41 L. J. C. P. 60, 26 L. T. 131, 20 W. R. 461), Car. of L. S., 116.
Richardson *v.* Sibley (11 Allen (Mass.) 65), Mort., 2.
Richardson *v.* Vermont & M. R. Co. (44 Vt. 613, 1 Am. Ry. Rep. 115), Jurisd., 4; Stockh., 12; Subscr., 42.
Richardson *v.* Vermont C. R. Co. (25 Vt. 465), Embankm., 1; Excava., 4; Sts. & H., 176.
Richardson *v.* Wilmington & M. R. Co. (8 Rich. (So. Car.) 120), Tresp., Inj. to, 103.
Richardson's Mo. Exp. Co. *v.* Cunningham (25 Mo. 396), Exp. Cos., 91.
Richeson *v.* People (115 Ill. 450, 5 N. E. Rep. 121), Mun. Aid, 8, 226, 242.
Richey *v.* Missouri Pac. R. Co. (7 Mo. App. 150; reversed and remanded on stip. April 20, 1880), Cross., Inj. at, 301.
Richland *v.* People (3 Ill. App. 210), Mun. Aid, 112.
Richmond *v.* Bronson (5 Den. (N. Y.) 55), Car. of M., 761; Int., 1.
Richmond *v.* Chicago & W. M. R. Co. (49 Am. & Eng. R. Cas. 367, 87 Mich. 374, 49 N. W. Rep. 621), Cross., Inj. at, 269, 307; Death, etc., 380.
Richmond *v.* Dubuque & S. C. R. Co. (26 Iowa 191), Contr., 64; Elevators, 10; Words & Ph., 11.
Richmond *v.* Dubuque & S. C. R. Co. (40 Iowa 264, 33 Iowa 422; affirmed in 19 Wall. (U. S.) 584), Bridges, 2; Elevators, 10.
Richmond *v.* North London R. Co. (37 L. J. Ch. 273, 16 W. R. 449, L. R. 5 Eq. 352, 18 L. T. 8; affirmed in L. R. 3 Ch. 679, 37 L. J. Ch. 886), Em. Dom., 1132.
Richmond *v.* Quincy, O. & K. C. R. Co. (49 Mo. App. 104), Car. of P., 234, 420.
Richmond *v.* Railway R. Mfg. Co. (12 N. Y. Supp. 358, 35 N. Y. S. R. 139, 58 Hun 610, mem.), Contr., 36.
Richmond *v.* Richmond & D. R. Co. (21 Gratt. (Va.) 604), Mun. Corp., 4; Tax., 145, 169.
Richmond *v.* Sacramento Valley R. Co. (18 Cal. 351), Animals, 48, 66, 244; Fences, 13; Negl., 61.
Richmond *v.* Second Ave. R. Co. (47 N. Y. S. R. 306, 19 N. Y. Supp. 597), Bills of Partic., 2.
Richmond *v.* Second Ave. R. Co. (27 N. Y. Supp. 780), App., 107; New. Tr., 71; St. Rys., 387.
Richmond & A. R. Co., In re (1 Int. Com. Rep. 22), Int. Com., 129.
Richmond & A. R. Co. *v.* Lynchburg (81 Va. 473), Mun. Corp., 43; Tax., 49.
Richmond & D. R. Co. *v.* Alamance County Com'rs (76 N. Car. 212, 14 Am. Ry. Rep. 304), Tax., 161.
Richmond & D. R. Co. *v.* Alamance County Com'rs 7 Am. & Eng. R. Cas. 339, 84 N. Car. 504), Tax., 132, 220.
Richmond & D. R. Co. *v.* Allison (48 Am. & Eng. R. Cas. 101, 86 Ga. 145, 12 S. E. Rep. 352), Dam., 24, 84.
Richmond & D. R. Co. *v.* Allison (89 Ga. 567, 16 S. E. Rep. 116), New Tr., 74.
Richmond & D. R. Co. *v.* Anderson (31 Gratt. (Va.) 812), Contrib. Neg., 21, 48.
Richmond & D. R. Co. *v.* Bedell (88 Ga. 591, 15 S. E. Rep. 676), Contr., 93.
Richmond & D. R. Co. *v.* Benson (86 Ga. 203, 12 S. E. Rep. 357), Car. of M., 129, 447, 775.
Richmond & D. R. Co. *v.* Black (Ala.) (9 So. Rep. 568), Trial, 151.
Richmond & D. R. Co. *v.* Blake (49 Fed. Rep. 904), Tax., 344.
Richmond & D. R. Co. *v.* Brogden (74 N. Car. 707, 13 Am. Ry. Rep. 114), Tax., 220, 277.
Richmond & D. R. Co. *v.* Brown (89 Va. 749, 17 S. E. Rep. 132), Employés, Inj. to, 166, 333; Fel. Serv., 238.
Richmond & D. R. Co. *v.* Buice (88 Ga. 180, 14 S. E. Rep. 205), Animals, 49, 381.
Richmond & D. R. Co. *v.* Burnett (88 Va. 538, 14 S. E. Rep. 372), App., 117; Employés, Inj. to, 93, 104, 529.
Richmond & D R. Co. *v.* Burnsed (70 Miss. 437, 12 So. Rep. 958), Car. of L. S., 118; Car. of P., 439; Tresp., Inj. to, 81.
Richmond & D. R. Co. *v.* Childress (41 Am. & Eng. R. Cas. 216, 82 Ga. 719, 9 S. E. Rep. 602, 3 L. R. A. 808), Phys. Exam., 3.
Richmond & D. R. Co. *v.* Davis (86 Ga. 76, 12 S. E. Rep. 266), App., 117, 145.
Richmond & D. R. Co. *v.* Dickey (90 Ga.

491, 16 S. E. Rep. 212), Employés, Inj. to, 108; Fel. Serv., 464.
Richmond & D. R. Co. *v.* Didzoneit (1 App. Cas. (D. C.) 482), Contrib. Neg., 107.
Richmond & D. R. Co. *v.* Durham & N. R. Co. (40 Am. & Eng. R. Cas. 488, 104 N. Car. 658, 10 S. E. Rep. 659), Connect. L., 2, 4.
Richmond & D. R. Co. *v.* Elliott (149 U. S. 266, 13 Sup. Ct. Rep. 837), Employés, Inj. to, 142, 765.
Richmond & D. R. Co. *v.* Farmer (97 Ala. 141, 12 So. Rep. 86), App., 35; Contrib. Neg., 44; New Tr., 60; Pl., 108.
Richmond & D. R. Co. *v.* Findley (32 Fed. Rep. 641), Rem. of C., 5, 13.
Richmond & D. R. Co. *v.* Free (97 Ala. 231, 12 So. Rep. 294), Employés, Inj. to, 419.
Richmond & D. R. Co. *v.* Freeman (97 Ala. 289, 11 So. Rep. 800), Collis., 30; Cross. Rys., 82; Death, etc., 335, 422.
Richmond & D. R. Co. *v.* George (48 Am. & Eng. R. Cas. 331, 88 Va. 223, 13 S. E. Rep. 429), Employés, Inj. to, 99, 111, 118.
Richmond & D. R. Co. *v.* Green (73 Ga. 814), New Tr., 18.
Richmond & D. R. Co. *v.* Hammond (93 Ala. 181, 9 So. Rep. 577), Death, etc., 221, 227, 282; Employés, Inj. to, 456; Evid., 175.
Richmond & D. R. Co. *v.* Hissong (97 Ala. 187, 13 So. Rep. 209), Evid., 185, 247; Witn., 76.
Richmond & D. R. Co. *v.* Howard (79 Ga. 44, 3 S. E. Rep. 426), Cross., Inj. at, 206, 351; Words & Ph., 150.
Richmond & D. R. Co. *v.* Jefferson (52 Am. & Eng. R. Cas. 438, 89 Ga. 554, 16 S. E. Rep. 69), Col. Pers., 9; New Tr., 44.
Richmond & D. R. Co. *v.* Johnston (89 Ga. 560, 15 S. E. Rep. 908), Cross., Inj. at, 151; Death, etc., 294, 435.
Richmond & D. R. Co. *v.* Jones (92 Ala. 218, 9 So. Rep. 276), Employés, Inj. to, 23, 98, 406, 417; Fel. Serv., 167; Witn., 133.
Richmond & D. R. Co. *v.* Kerler (88 Ga. 39, 13 S. E. Rep. 833), Evid., 192.
Richmond & D. R. Co. *v.* Medley (7 Am. & Eng. R. Cas. 493, 75 Va. 499), Fires, 62, 104, 121, 249.
Richmond & D. R. Co. *v.* Moffett (88 Va. 785, 14 S. E. Rep. 370), Car. of P., 172; Negl., 102.
Richmond & D. R. Co. *v.* Moore (15 Am. & Eng. R. Cas. 239, 78 Va. 93), Employés, Inj. to, 124.
Richmond & D. R. Co. *v.* Morris (31 Gratt. (Va.) 200), Car. of P., 415; Contrib. Neg., 4, 5, 13, 16.
Richmond & D. R. Co. *v.* Noell (86 Va. 19, 13 Va. L. J. 320, 9 S. E. Rep. 473), Animals, 561, 570; Sts. & H., 403.
Richmond & D. R. Co. *v.* Norment (84 Va. 167, 4 S. E. Rep. 211), Dam., 45, 67, 70, 71, 73; Employés, Inj. to, 93, 225; Fel. Serv., 106, 287.
Richmond & D. R. Co. *v.* Orange County Com'rs (74 N. Car. 506), Tax., 220.
Richmond & D. R. Co. *v.* Pannill (89 Va. 552, 16 S. E. Rep. 748), Employés, Inj. to, 417.
Richmond & D. R. Co. *v.* Payne (42 Am. & Eng. R. Cas. 366, 86 Va. 481, 10 S. E. Rep. 749), Car. of M., 474.
Richmond & D. R. Co. *v.* Pickleseimer (85 Va. 798, 10 S. E. Rep. 44, 13 Va. L. J. 646), Car. of L. S., 131; Contrib. Neg., 116; Words & Ph., 60.
Richmond & D. R. Co. *v.* Picklesimer (89 Va. 389, 16 S. E. Rep. 245), Contrib. Neg., 23.
Richmond & D. R. Co. *v.* Powers (56 Am. & Eng. R. Cas. 296, 149 U. S. 43, 13 Sup. Ct. Rep. 748), Car. of P., 609; Stat. & D., 114.
Richmond & D. R. Co. *v.* Risdon (48 Am. & Eng. R. Cas. 244, 87 Va. 335, 12 S. E. Rep. 786),Employés, Inj. to, 66, 209, 422.
Richmond & D. R. Co. *v.* Rudd (88 Va. 648, 14 S. E. Rep. 361), Employés, Inj. to, 16.
Richmond & D. R. Co *v.* Scott (52 Am. & Eng. R. Cas. 405, 88 Va. 958, 14 S. E. Rep. 763),Car. of P., 484, 551.
Richmond & D. R. Co. *v.* Shomo (90 Ga. 496, 16 S. E. Rep. 220), Bills of L., 8, 40, 41, 51; Car. of M., 674.
Richmond & D. R. Co. *v.* Smith (92 Ala. 237, 9 So. Rep. 223), Car. of P., 411.
Richmond & D. R. Co. *v.* Thouron (134 U. S. 45, 10 Sup. Ct. Rep. 517), Fed. Cts., 19.
Richmond & D. R. Co. *v.* Trammel (55 Am. & Eng. R. Cas. 520, 53 Fed. Rep. 196), Ry. Com'rs, 17.
Richmond & D. R. Co. *v.* Trousdale (Ala.) (55 Am. & Eng. R. Cas. 400, 13 So. Rep. 23), Car. of L. S., 36, 134, 145, 151, 156.
Richmond & D. R. Co. *v.* Vance (93 Ala. 144, 9 So. Rep. 574), Dam., 19, 26, 27; Evid., 93; Negl., 97.
Richmond & D. R. Co. *v.* Weems (97 Ala. 270, 12 So. Rep. 186), Employés, Inj. to, 504; Trial, 109, 156.
Richmond & D. R. Co. *v.* White (88 Ga. 805, 15 S. E. Rep. 802), Car. of M., 21, 184, 223, 226; Trial, 137.
Richmond & D. R. Co. *v.* Williams (88 Ga. 16, 14 S. E. Rep. 120), New Tr., 31.
Richmond & D. R. Co. *v.* Williams (39 Am. & Eng. R. Cas. 326, 86 Va. 165, 9 S. E. Rep. 990), Employés, Inj. to, 7, 45, 99; Fel. Serv., 96, 238.
Richmond & D. R. Co. *v.* Wright (88 Ga. 19, 13 S. E. Rep. 820), App., 24.
Richmond & D. R. Co. *v.* Yeamans (86 Va. 860, 12 S. E. Rep. 946), Contrib. Neg., 113, 119; Cross., Inj. at, 325; Evid., 282.
Richmond & P. R. Co. *v.* Kasey (30 Gratt. (Va.) 218), Officers, 6; Stat. Agts., 11.
Richmond & Y. R. R. Co. *v.* Wicker (13 Gratt. (Va.) 375), Location, etc., 5.
Richmond City R. Co. *v.* Scott (44 Am. & Eng. R. Cas. 418, 86 Va. 902, 11 S. E. Rep. 404), Car. of P., 142, 232, 542; St. Rys., 355.
Richmond, F. & P. R. Co. *v.* Ashby (79 Va. 130), Tickets & F., 10.
Richmond, F. & P. R. Co. *v.* Knopffs (86 Va. 981, 11 S. E. Rep. 881), Em. Dom., 87, 894.

Richmond, F. & P. R. Co. *v.* Louisa R. Co. (13 How. (U. S.) 71), Charters, 50.
Richmond, F. & P. R. Co. *v.* Richmond (26 Gratt. (Va.) 83), Corp., 1; Sts. & H., 64.
Richmond, F. & P. R. Co. *v.* Richmond (96 U. S. 521), Sts. & H., 310.
Richmond, F. & P. R. Co. *v.* Snead (19 Gratt. (Va.) 354), Evid., 182; Pres., 1.
Richmond St. R. Co. *v.* Reed (9 Am. & Eng. R. Cas. 697, 83 Ind. 9), Incorp., 9.
Richter *v.* Pennsylvania Co. (104 Pa. St. 511), Employés, Inj. to, 1.
Ricker *v.* American L. & T. Co. (140 Mass. 346), Car-Trust Assoc., 3.
Ricker *v.* Fairbanks (40 Me. 43), Constr. Rys., 33.
Ricker *v.* Shoemaker (81 Tex. 22, 16 S. W. Rep. 645), Lim. of Ac., 12.
Rickerson Roller Mill Co. *v.* Grand Rapids & I. R. Co. (32 Am. & Eng. R. Cas. 487, 67 Mich. 110, 10 West. Rep. 888, 34 N. W. Rep. 269), Car. of M., 580, 615.
Ricket *v.* Metropolitan R. Co. (5 B. & S. 149, 11 Jur. N. S. 260, 34 L. J. Q. B. 257, 13 W. R. 455, 12 L. T. 75; reversed in 5 B. & S. 156, 38 L. J. Q. B. 205, L. R. 2 H. L. Cas. 175, 16 L. T. 542, 15 W. R. 937), Em. Dom., 1194.
Ricketts *v.* Baltimore & O. R. Co. (4 Lans. (N. Y.) 446; affirmed in 59 N. Y. 637, mem.), Bills of L., 66.
Ricketts *v.* Baltimore & O. R. Co. (61 Barb. (N. Y.) 18), Car. of M., 687.
Ricketts *v.* Birmingham St. R. Co. (37 Am. & Eng. R. Cas. 12, 85 Ala. 600, 5 So. Rep. 353), Evid., 151, 203; St. Rys., 365, 387.
Ricketts *v.* Chesapeake & O. R. Co. (41 Am. & Eng. R. Cas. 42, 33 W. Va. 433, 7 L. R. A. 354, 10 S. E. Rep. 801), Dam., 32; Leases, 16, 40; Trial, 93.
Ricketts *v.* East & W. I. Docks Co. (7 Railw. Cas. 295, 12 C. B. 160, 16 Jur. 1072, 21 L. J. C. P. 201), Fences, 85.
Ricord, Ex parte (11 Nev. 287), Crim. L., 17.
Ricord *v.* Central Pac. R. Co. (2 Am. & Eng. R. Cas. 394, 15 Nev. 167), Mal. Pros., 3, 6, 11, 13, 14.
Riddle *v.* Baltimore & O. R. Co. (1 Int. Com. Rep. 701, 1 Int. Com. Com. 372), Int. Com., 167.
Riddle *v.* Baltimore & O. R. Co. (1 Int. Com. Rep. 778, 1 Int. Com. Com. 608), Int. Com., 93.
Riddle *v.* New York, L. E. & W. R. Co. (39 Fed. Rep. 290), For. Corp., 17.
Riddle *v.* New York, L. E. & W. R. Co. (1 Int. Com. Rep. 787, 1 Int. Com. Com. 594), Int. Com., 32, 93, 97.
Riddle *v.* Philadelphia & N. W. R. Co. (1 Pittsb. (Pa.) 158), Mun. Aid, 47.
Riddle *v.* Pittsburg & L. E. R. Co. (1 Int. Com. Rep. 688, 1 Int. Com. Com. 374), Int. Com., 93.
Riddle *v.* Pittsburg & L. E. R. Co. (1 Int. Com. Rep. 773, 1 Int. Com. Com. 490), Int. Com., 164, 165, 166.
Riddlesburg C. & I. Co.'s Appeal (114 Pa. St. 58, 6 Atl. Rep. 381), Employés, 10.
Rideal *v.* Great Western R. Co. (1 F. & F. 706), Release, 8.
Ridell *v.* New York C. & H. R. R. Co. (73 N. Y. 618), Fires, 146.
Ridenhour *v.* Kansas City Cable R. Co. (102 Mo. 270, 13 S. W. Rep. 889, 14 S. W. Rep. 760), App., 105; Children, Inj. to, 72, 74, 103; Pl., 140; St. Rys., 367; Words & Ph., 150, 187.
Ridenore *v.* Wabash, St. L. & P. R. Co. (81 Mo. 227), Animals, 180, 570.
Ridenour *v.* Wherritt (30 Ind. 485), Agency, 27; Trusts, 12.
Rideout *v.* Milwaukee, L. S. & W. R. Co. (81 Wis. 237, 51 N. W. Rep. 439), Car. of L. S., 138.
Rider *v.* Burlington & M. R. R. Co. (10 Am. & Eng. R. Cas. 688, 14 Neb. 120, 15 N. W. Rep. 371), Land Grants, 98.
Rider *v.* New York, W. S. & B. R. Co. (65 How. Pr. (N. Y.) 419), Waters & W., 31.
Rider *v.* Wabash, St. L. & P. R. Co. (14 Mo. App. 529), Bagg., 42, 48, 113; Evid., 206.
Ridge Ave. Pass. R. Co. *v.* Philadelphia (10 Phila. (Pa.) 37), Injunc., 7.
Ridge Ave. Pass. R. Co. *v.* Philadelphia (124 Pa. St. 219, 16 Atl. Rep. 741), Stat., 34.
Ridgefield & N. Y. R. Co. *v.* Brush (43 Conn. 86, 11 Am. Ry. Rep. 18), Subscr., 19, 199.
Ridgefield & N. Y. R. Co. *v.* Reynolds (46 Conn. 375), Subscr., 207.
Ridgway *v.* Griswold (1 McCrary (U. S.) 151), Consol., 23, 24.
Ridgway L. & H. Co. *v.* Pennsylvania R. Co. (18 Phila. (Pa.) 601), Right of W., 15.
Ridings *v.* Hall (48 Mo. 100), Mun. Aid, 66, 192.
Ridings *v.* Hannibal & St. J. R. Co. (33 Mo. App. 527), Contrib. Neg., 87; Employés, Inj. to, 720; Negl., 59.
Ridley *v.* Manhattan R. Co. (25 N. Y. Supp. 380, 72 Hun 164, 55 N. Y. S. R. 473), Judgm., 44.
Ried *v.* New York, N. H. & H. R. Co. (44 N. Y. S. R. 688, 63 Hun 630, 17 N. Y. Supp. 801; affirmed in 136 N. Y. 638, mem., 32 N. E. Rep. 1014, 49 N. Y. S. R. 913), Death, etc., 189.
Riedinger *v.* Marquette & W. R. Co. (29 Am. & Eng. R. Cas. 611, 62 Mich. 29, 28 N. W. Rep. 775), Sts. & H., 133, 136, 227, 403.
Rigby *v.* Great Western R. Co. (14 M. & W. 811, 15 L. J. Ex. 60, 10 Jur. 488), Cov'ts, 17.
Rigg *v.* Boston, R. B. & L. R. Co. (158 Mass. 309, 33 N. E. Rep. 512), Contrib. Neg., 40.
Rigg *v.* Manchester, S. & L. R. Co. (12 Jur. N. S. 525, 14 W. R. 834), Stat. & D., 80.
Riggins *v.* Missouri River, Ft. S. & G. R. Co. (9 Am. & Eng. R. Cas. 242, 73 Mo. 598), Car. of M., 410, 418.
Riggs *v.* Johnson County (6 Wall. (U. S.) 166), Mand., 25.
Riggs *v.* Pennsylvania & N. E. R. Co. (16 Fed. Rep. 804), Bonds, 48.
Rigler *v.* Charlotte, C. & A. R. Co. (26 Am. & Eng. R. Cas. 386, 94 N. Car. 604), Con-

trib. Neg., 4, 5, 24; Cross., Inj. at, 13, 196, 265, 269, 313; Negl., 1.
Riker *v.* Alsop (27 Fed. Rep. 251), Reorg., 7.
Riley *v.* Connecticut River R. Co. (15 Am. & Eng. R. Cas. 181, 135 Mass. 292), Employés, Inj. to, 296.
Riley *v.* New York, L. E. & W. R. Co. (34 Hun (N. Y.) 97), Agency, 53; Bills of L., 44.
Riley *v.* Southwestern R. Co. (1 Am. & Eng. R. Cas. 345, 63 Ga. [illegible]) Ejectm., 16.
Riley *v.* State (95 I. [illegible]) Crim. L., 35.
Riley *v.* State (32 Tex. [illegible]) Crim. L., 17.
Riley *v.* Wabash, St. L. & P. R. Co. (18 Mo. App. 385), Evid., 234, 244.
Riley *v.* West Virginia C. & P. R. Co. (27 W. Va. 145), Contrib Neg., 12, 105; Employés, Inj. to, 45, 89, 184, 203, 758; Evid., 47; Fel. Serv., 73, 214, 314; Negl., 61.
Rinard *v.* Burlington & W. R. Co. (66 Iowa 440, 23 N. W. Rep. 914), Sts. & H., 215.
Rine *v.* Chicago & A. R. Co. (25 Am. & Eng. R. Cas. 545, 88 Mo. 392), Death, etc., 160, 225; Tresp., Inj. to, 125.
Rine *v.* Chicago & A. R. Co. (41 Am. & Eng. R. Cas. 555, 100 Mo. 228, 12 S. W. Rep. 640), Death, etc., 25; Negl., 97; Tresp., Inj. to, 53, 58.
Rinear *v.* Grand Rapids & I. R. Co. (35 Am. & Eng. R. Cas. 166, 70 Mich. 620, 14 West. Rep. 908, 38 N. W. Rep. 599), Animals, 535; Fences, 58.
Rinesmith *v.* People's Freight R. Co. (1 Am. & Eng. R. Cas. 374, 90 Pa. St. 262), Witn., 42.
Ring *v.* Johnson County (6 Iowa 265), Mun. Aid, 391.
Ring *v.* Mississippi River Bridge Co. (57 Mo. 496), Em. Dom., 1055.
Ring *v.* Missouri Pac. R. Co. (112 Mo. 220, 20 S. W. Rep. 436), Employés, Inj. to, 30, 163.
Ringgold *v.* Haven (1 Cal. 108), Car. of M., 748, 758.
Ringo *v.* St. Louis, I. M. & S. R. Co. (91 Mo. 667, 10 West. Rep. 268, 4 S. W. Rep. 396), Animals, 620; App., 95.
Rintoul *v.* New York C. & H. R. R. Co. (21 Blatchf. (U. S.) 439, 17 Fed. Rep. 905), Bills of L., 79; Car. of M., 756; Fire Ins., 14.
Rintoul *v.* New York C. & H. R. R. Co. (20 Fed. Rep. 313), Fire Ins., 13.
Rio Grande & E. P. R. Co. *v.* Milmo (79 Tex. 628, 15 S. W. Rep. 475), Pl., 103; Receiv., 47.
Rio Grande & E. P. R. Co. *v.* Milmo Nat. Bank (72 Tex. 467, 10 S. W. Rep. 563), Evid., 227.
Rio Grande & E. P. R. Co. *v.* Ortiz (44 Am. & Eng. R. Cas. 67, 75 Tex. 602, 12 S. W. Rep. 1129), Em. Dom., 421, 849, 1009.
Rio Grande & N. R. Co. *v.* Vaughn (3 Colo. App. 465), Animals, 9, 10.
Rio Grande R. Co. *v.* Brownsville (45 Tex. 88, 13 Am. Ry. Rep. 223), Charters, 51, 64; Sts. & H., 56, 66, 103, 420.
Rio Grande R. Co. *v.* Scanlan (44 Tex. 649), Injunc., 54; Tax., 359.
Rio Grande Southern R. Co. *v.* Deasey (3 Colo. App. 196, 32 Pac. Rep. 725), Trial, 215.
Rio Grande Southern R. Co. *v.* Knight (1 Colo. App. 219, 28 Pac. Rep. 19), Em. Dom., 730.
Rio Grande Western R. Co. *v.* Rothschild (20 Civ. Pro. (N. Y.) 197, 37 N. Y. S. R. 44, 13 N. Y. Supp. 361), Coupons, 18.
Riordan *v.* Ocean Steamship Co. (124 N. Y. 655, 26 N. E. Rep. 1027, 36 N. Y. S. R. 476; affirming 32 N. Y. S. R. 328, 11 N. Y. Supp. 56), Death, etc., 342.
Rioux *v.* Queen (2 Can. Exch. 91), Em. Dom., 1259.
Ripley *v.* Great Northern R. Co. (L. R. 10 Ch. 435, 23 W. R. 685, 31 L. T. 869), Em. Dom., 1194.
Ripley *v.* New Jersey R. & T. Co. (31 N. J. L. 388), Tickets & F., 65.
Rippe *v.* Chicago, D. & M. R. Co. (20 Minn. 187) (Gil. 166), Em. Dom., 550.
Rippe *v.* Chicago, D. & M. R. Co. (22 Minn. 44), Em. Dom., 941.
Rippe *v.* Chicago, D. & M. R. Co. (23 Minn. 18, 17 Am. Ry. Rep. 19), Em. Dom., 600, 920; Rip. Rts., 6; Witn., 85.
Rippe *v.* Chicago, M. & St. P. R. Co. (40 Am. & Eng. R. Cas. 231, 42 Minn. 34, 5 L. R. A. 864, 43 N. W. Rep. 652), Fences, 53.
Riser *v.* Mississippi & T. R. Co. (32 Miss. 359), Pl., 76.
Risley *v.* Howell (57 Fed. Rep. 544), Mun. Aid., 7.
Risley *v.* Indianapolis, B. & W. R. Co. (62 N. Y. 240; reversing 1 Hun 202, 4 T. & C. 13), Constr. Rys., 99.
Ritchie *v.* Cincinnati, N. O. & T. P. R. Co. (Ky.) (21 S. W. Rep. 641), Estop., 26.
Ritt *v.* Louisville & N. R. Co. (Ky.) (31 Am. & Eng. R. Cas. 289, 4 S. W. Rep. 796), Fel. Serv., 74, 233, 447, 505.
Rivers *v.* Bradley (53 Fed. Rep. 305), Rem. of C., 29.
River Thames Conservators *v.* Victoria Station & P. R. Co. (38 L. J. C. P. 4, L. R. 4 C. P. 59), Em. Dom., 1164.
Rixford *v.* Smith (52 N. H. 355, 13 Am. Ry. Rep. 42), Car. of L. S., 21, 22.
Roach *v.* Canadian Pac. R. Co. (1 Man. 158), Car. of M., 644.
Roach *v.* Consolidated Imperial Min. Co. (7 Sawy. (U. S.) 224), Death, etc., 26, 85.
Roach *v.* Flushing & N. S. R. Co. (58 N. Y. 626), Cross., Inj. at, 137.
Road in Lancaster City (68 Pa. St. 396), Sts. & H., 127.
Road in Sterrett Tp., In re (114 Pa. St. 627, 7 Atl. Rep. 765), Sts. & H., 28.
Roanoke Inv. Co. *v.* Kansas City & S. E. R. Co. (51 Am. & Eng. R. Cas. 426, 108 Mo. 50, 17 S. W. Rep. 1000), Aband., 2, 8; Em. Dom., 213; Right of W., 3.
Robarge *v.* Central Vt. R. Co. (18 Abb. N. Cas. (N. Y.) 363), Attach., 54.
Robb *v.* Alvia, K. & D. M. R. Co. (44 Iowa 440), Em. Dom., 782.
Robb *v.* Chicago & A. R. Co. (47 Mo. 540), Jurisd., 6.
Robb *v.* East Tenn., V. & G. R. Co. (87 Ga.

631, 13 S. E. Rep. 566), Employés, Inj. to, 409.
Robbins *v.* Hudson River R. Co. (7 Bosw. (N. Y.) 1), New Tr., 88.
Robbins *v.* Milwaukee & H. R. Co. (6 Wis. 636), Em. Dom., 369, 646, 691, 758.
Robbins *v.* Omaha & N. P. R. Co. (27 Neb. 73, 42 N. W. Rep. 905), Em. Dom., 948.
Robbins *v.* Omnibus R. Co. (32 Cal. 472), St. Rys., 161.
Robbins *v.* St. Louis, I. M. & S. R. Co. (34 Mo. App. 609), Indep. Contr., 28.
Robbins *v.* St. Paul, S. & T. F. R. Co. (22 Minn. 286, 19 An.. Ry. Rep. 398), Em. Dom., 132.
Robbins *v.* St. Paul, S. & T. F. R. Co. (24 Minn. 191), Em. Dom., 844.
Robbins *v.* Shelby County Taxing Dist. (120 U. S. 489, 7 Sup. Ct. Rep. 592), Int. Com., 3.
Robel *v.* Chicago, M. & St. P. R. Co. (35 Minn. 84, 27 N. W. Rep. 305), Children, Inj. to, 187; Employés, Inj. to, 736.
Roberts *v.* Alexandria & F. R. Co. (83 Va. 312, 2 S. E. Rep. 518), Cross., Inj. at, 110; Trial, 39.
Roberts *v.* Bolles (101 U. S. 119), Mun. Aid, 145, 344.
Roberts *v.* Boston & L. R. Corp. (115 Mass. 57), Em. Dom., 527.
Roberts *v.* Boston & M. R. Co. (83 Me. 298, 22 Atl. Rep. 174), New Tr., 22.
Roberts *v.* Central Pass. R. Co. (1 Brews. (Pa.) 538), Em. Dom., 485.
Roberts *v.* Chicago & N. W. R. Co. (35 Wis. 679), Cross., Inj. at, 29, 151, 301; Cross. Sts. & H., 25; Evid., 298; New Tr., 42.
Roberts *v.* Chicago, St. P., M. & O. R. Co. (33 Minn. 218, 22 N. W. Rep. 389), Fel. Serv., 420.
Roberts *v.* Chittenden (88 N. Y. 33), Car. of M., 704.
Roberts *v.* Easton (19 Ohio St. 78), St. Rys., 106, 107, 111.
Roberts *v.* Great Western R. Co. (4 C. B. N. S. 506, 4 Jur. N. S. 1240, 27 L. J. C. P. 266), Animals, 107, 200; Car. of L. S., 51.
Roberts *v.* Great Western R. Co. (13 U. C. Q. B. 615), Lim. of Ac., 6.
Roberts *v.* Johnson (58 N. Y. 613; affirming 5 J. & S. 157), Witn., 151.
Roberts *v.* Koehler (12 Sawy. (U. S.) 252, 30 Fed. Rep. 94), Bagg., 91; Tickets & F., 46.
Roberts *v.* Missouri, K. & T. R. Co. (43 Am. & Eng. R. Cas. 532, 43 Kan. 102, 22 Pac. Rep. 1006), Pub. Lds., 16, 45; Stat., 17.
Roberts *v.* Missouri Pac. R. Co. (19 Mo. App. 649), Animals, 608.
Roberts *v.* Mobile & O. R. Co. (32 Miss. 373), Subscr., 24, 48.
Roberts *v.* New York El. R. Co. (50 Am. & Eng. R. Cas. 326, 128 N. Y. 455, 28 N. E. Rep. 486, 40 N. Y. S. R. 454; reversing 27 J. & S. 576, 36 N. Y. S. R. 1024, 12 N. Y. Supp. 957), Elev. Rys., 121, 183, 190.
Roberts *v.* Ogdensburg & L. C. R. Co. (29 Hun (N. Y.) 154), Phys. Exam., 2.
Roberts *v.* Old Colony R. Co. (123 Mass. 552), Arb., 33.
Roberts *v.* Philadelphia, G. & N. R. Co. (1 Phila. (Pa.) 262), Location, etc., 17.
Roberts *v.* Preston (9 C. B. N. S. 208), Crim. L., 35.
Roberts *v.* Quincy, O. & K. C. R. Co. (43 Mo. App. 287), Animals, 108.
Roberts *v.* Quincy, O. & K. C. R. Co. (49 Mo. App. 164), Animals, 570.
Roberts *v.* Richmond & D. R. Co. (20 Am. & Eng. R. Cas 473, 88 N. Car. 560), Animals, 57, 494, 589.
Roberts *v.* Richmond & D. R. Co. (109 N. Car. 670, 14 S. E. Rep. 106), Witn., 9.
Roberts *v.* Turner (12 Johns. (N. Y.) 232), Car. of M., 31.
Roberts *v.* Wabash, St. L. & P. R. Co. (Mo.) (25 Am. & Eng. R. Cas. 298, 3 West. Rep. 783), Fences, 66, 96; Pl., 10, 156.
Robertson *v.* Atlantic & P. R. Co. (64 Mo. 412), Cat.-Gds., 10.
Robertson *v.* Central R. Co. (10 Am. & Eng. R. Cas. 420, 57 Iowa 376, 10 N. W. Rep. 728), Comprom., 4; Em. Dom., 902.
Robertson *v.* Cornelson (34 Fed. Rep. 716), Dam., 67, 70, 71; Employés, Inj. to, 97.
Robertson *v.* Eldora R. & C. Co. (27 Iowa 245), Em. Dom., 940, 941.
Robertson *v.* Great Southern & W. R. Co. (11 Ir. C. L. 63, 3 Ry. & C. T. Cas. xi), Charges, 43.
Robertson *v.* Great Southern & W. R. Co. (2 Ry. & C. T. Cas. 374), Charges, 110.
Robertson *v.* Halifax Coal Co. (22 Nov. Sc. 84), Cross., Inj. at, 252.
Robertson *v.* Kennedy (2 Dana (Ky.) 430), Words & Ph., 7, 49.
Robertson *v.* Kennedy (2 Dana (Ky.) 431), Car. of M., 12.
Robertson *v.* Midland G. W. R. Co. (2 Ry. & C. T. Cas. 409), Charges, 111; Discrim., 12.
Robertson *v.* National Steamship Co. (17 N. Y. Supp. 459; reversing on another point 14 N. Y. Supp. 313), Car. of M., 123, 165.
Robertson *v.* New York & E. R. Co. (22 Barb. (N. Y.) 91), Car. of P., 21; Evid., 136; Tresp., Inj. to, 13.
Robertson *v.* Old Colony R. Co. (156 Mass. 525, 31 N. E. Rep. 650), Priv. Cars, 2.
Robertson *v.* Rockford (21 Ill. 451), Consol., 22; Mun. Aid, 2, 66.
Robertson *v.* Sibley (10 Minn. 323) (Gil. 253), Minneapolis & C. V. R. Co., 2; Stockh., 60.
Robertson *v.* Springfield & S. R. Co. (18 Mo. App. 185), Em. Dom., 1004.
Robertson *v.* Springfield & S. R. Co. (21 Mo. App. 633), Pl., 147.
Robertson *v.* Terre Haute & I. R. Co. (8 Am. & Eng. R. Cas. 175, 78 Ind. 77, 41 Am. Rep. 552), Fel. Serv., 427.
Robertson *v.* Wabash, St. L. & P. R. Co. (84 Mo. 119), Animals, 211, 362, 400; Sts. & H., 319; Witn., 106.
Robinson *v.* Atlantic & G. W. R. Co. (66 Pa. St. 160), Exec., 14; Receiv., 42.
Robinson *v.* Austin (2 Gray (Mass.) 564), Trover, 10, 11.
Robinson *v.* Baker (5 Cush. (Mass.) 137), Car. of M., 382.

Robinson *v.* Bidwell (22 Cal. 379), Mun. Aid, 26.
Robinson *v.* Chicago & A. R. Co. (57 Mo. 494), Fences, 65.
Robinson *v.* Chicago, R. I. & P. R. Co. (67 Iowa 292, 25 N. W. Rep. 249), Cat.-Gds., 9.
Robinson *v.* Chicago, R. I. & P. R. Co. (71 Iowa 102, 32 N. W. Rep. 193), Negl., 32.
Robinson *v.* Chicago R. I. & P. R. Co. (79 Iowa 495, 44 N. W. Rep. 718), Cat.-Gds., 18.
Robinson *v.* Conc. (22 Vt. 213), Children, Inj. to, 118, 127.
Robinson *v.* Cornish (13 N. Y. Supp. 577), Exp. Cos., 22.
Robinson *v.* Fitchburg & W. R. Co. (7 Gray (Mass.) 92), Evid., 47, 57, 70, 143, 175, 230; Witn., 97.
Robinson *v.* Flint (58 Barb. (N. Y.) 100), Sales, 15.
Robinson *v.* Flint & P. M. R. Co. (45 Am. & Eng. R. Cas. 496, 79 Mich. 323, 44 N. W. Rep. 779), Animals, 262.
Robinson *v.* Grand Trunk R. Co. (32 Mich. 322), Animals, 145.
Robinson *v.* Great Northern R. Co. (48 Minn. 445, 51 N. W. Rep. 384), Sts. & H., 194.
Robinson *v.* Great Western R. Co. (14 W. R. 206, 1 H. & R. 97, 35 L. J. C. P. 123, L. R. 1 C. P. 329), Car. of L. S., 92.
Robinson *v.* Houston & T. C. R. Co. (46 Tex. 540, 13 Am. Ry. Rep. 303), Employés, Inj. to, 247, 294; Fel. Serv., 1.
Robinson *v.* Illinois C. R. Co. (30 Iowa 401), Agency, 28.
Robinson *v.* Iron R. Co. (46 Am. & Eng. R. Cas. 383, 135 U. S. 522, 10 Sup. Ct. Rep. 907), Mort., 288.
Robinson *v.* London & S. W. R. Co. (19 C. B. N. S. 51, 11 Jur. N. S. 390, 34 L. J. C. P. 234, 13 W. R. 660), Lim. of Liab., 1.
Robinson *v.* Louisville & N. R. Co. (2 Lea (Tenn.) 594), App., 45.
Robinson *v.* Manhattan R. Co. (5 Misc. 209, 25 N. Y. Supp. 91, 54 N. Y. S. R. 792), Contrib. Neg., 32, 43; Elev. Rys., 201; Negl., 33.
Robinson *v.* Memphis & C. R. Co. (9 Fed. Rep. 129), Stat. Agts., 4.
Robinson *v.* Memphis & C. R. Co. (16 Fed. Rep. 57), Car. of M., 100.
Robinson *v.* Merchants' Despatch Transp. Co. (45 Iowa 470), Bills of L., 34, 78; Car. of M., 416, 773; Contr., 89.
Robinson *v.* Missisquoi R. Co. (30 Am. & Eng. R. Cas. 299, 59 Vt. 426, 4 N. Eng. Rep. 891, 10 Atl. Rep. 522), Lim. of Ac., 48.
Robinson *v.* New Brunswick R. Co. (23 New Brun. 323), Fires, 115, 195, 224, 240.
Robinson *v.* New York & E. R. Co. (27 Barb. (N. Y.) 512), Constr. Rys., 10; Flood. Lds., 9, 79; Sts. & H., 176; Waters & W., 31.
Robinson *v.* New York C. & H. R R. Co. (65 Barb. (N. Y.) 146), Contrib. Neg., 104, 121.
Robinson *v.* New York C. & H. R R. Co. (66 N. Y. 11, 23 Am. Rep. 1; affirming 65 Barb. 146), Car. of P., 365; Imp. Neg., 19.
Robinson *v.* New York C. & H. R. R. Co. (20 Blatchf. (U. S.) 338, 9 Fed. Rep, 877), Explosions, 3; Negl., 101; Witn., 28.
Robinson *v.* Northampton St. R. Co. (157 Mass. 224, 32 N. E. Rep. 1), St. Rys., 367.
Robinson *v.* Oceanic Steam Nav. Co. (112 N. Y. 315, 16 Civ. Pro. 255, 19 N. E. Rep. 625, 20 N. Y. S. R. 741; affirming 15 Civ. Pro. 88, 24 J. & S. 108), Death, etc., 96.
Robinson *v.* Ohio & P. R. Co. (2 Pittsb. (Pa.) 257), Receiv., 42.
Robinson *v.* Oregon S. L. & U. N. R. Co. (7 Utah 493, 27 Pac. Rep. 689), Children, Inj. to, 19.
Robinson *v.* Philadelphia & R. R. Co. (28 Fed. Rep. 340), Mort., 205.
Robinson *v.* Pittsburg & C. R. Co. (32 Pa. St. 334), Subscr., 168.
Robinson *v.* Pittsburg R. Co. (2 Am. & Eng. R. Cas. 429, 57 Cal. 417), Ejectm., 31.
Robinson *v.* Rogers (24 Gratt. (Va.) 319), State Aid, 37.
Robinson *v.* St. Louis, I. M. & S. R. Co. (21 Mo. App. 141), Animals, 32, 126; Witn., 149.
Robinson *v.* St. Louis, K. C. & N. R. Co. (11 Am. & Eng. R. Cas. 31, 75 Mo. 494), Car. of M., 414.
Robinson *v.* Western Pac. R. Co. (48 Cal. 409, 7 Am. Ry. Rep. 244), Comp. Neg., 21; Contrib. Neg., 9, 11, 21, 56, 105, 106; Cross., Inj. at, 166, 314, 365; Sts. & H., 412.
Robinson *v.* West Pennsylvania R. Co. (72 Pa. St. 316), Aband., 8.
Robinson-Rea Mfg. Co. *v.* Mellon (139 Pa. St. 257, 21 Atl. Rep. 91), Constr. Rys., 107.
Robison *v.* McCraken (52 Fed. Rep. 726), Constr. Rys., 16.
Robostelli *v.* New York, N. H. & H. R. Co. (34 Am. & Eng. R. Cas. 515, 33 Fed. Rep. 796), Car. of P., 20, 281, 451; Tickets & F., 59; Trial, 181.
Robostelli *v.* New York, N. H. & H. R. Co. (34 Fed. Rep. 719), Death, etc., 439.
Robson *v.* Buffalo & L. H. R. Co. (10 U. C. C. P. 279), Car. of M., 764.
Robson *v.* Northeastern R. Co. (L. R. 2 Q. B. D. 85, 46 L. J. Q. B. D. 50, 25 W. R. 418, 35 L. T. 535; affirming 32 L. T. 551, L. R. 10 Q. B. 271, 44 L. J. Q. B. 112, 23 W. R. 791), Car. of P., 229.
Roby *v.* New York C. & H. R. R. Co. (48 N. Y. S. R. 201, 65 Hun 532, 20 N. Y. Supp. 551), Em. Dom., 980.
Roby *v.* Yates (70 Hun 35, 23 N. Y. Supp. 1108), Judgm., 19; Leases, 34.
Rochat *v.* North Hudson County R. Co. (30 Am. & Eng. R. Cas. 644, 49 N. J. L. 445, 9 Atl. Rep. 688, 10 Atl. Rep. 710, 8 Cent. Rep. 345; reversing 48 N. J. L. 401, 5 Atl. Rep. 276), St. Rys., 340.
Roche *v.* Brooklyn City & N. R. Co. (105 N. Y. 294, 11 N. E. Rep. 630, 7 N. Y. S. R. 361), Evid., 211.
Rocheleau *v.* St. Lawrence & A. R. Co. (2 Low. Can. 337), Inj. to Cars by Cattle, 1.
Rochester *v.* Alfred Bank (13 Wis. 432), Mun. Aid, 329.

Rochester *v.* Barnes (26 Barb. (N. Y.) 657), Stockh., 41.
Rochester *v.* Bronson (41 How. Pr. (N. Y.) 78), Receiv., 12, 16.
Rochester *v.* Davis (44 How. Pr. (N. Y.) 95), Mun. Aid, 301
Rochester & G. H. R. Co., In re (12 N. Y. Supp. 566, 59 Hun 617, 35 N. Y. S. R. 1000; appeal dismissed in 128 N. Y. 611, mem., 38 N. Y. S. R. 1012), Em. Dom., 61, 189, 190.
Rochester & G. V. R. Co. *v.* Beckwith (10 How. Pr. (N. Y.) 168), Em. Dom., 787, 796, 803, 811, 814, 884.
Rochester & H. V. R. Co. *v.* Myers (43 N. Y. S. R. 734, 63 Hun 625, 17 N. Y. Supp. 311), Em. Dom., 810.
Rochester & S. R. Co. *v.* Budlong (6 How. Pr. (N. Y.) 467), Em. Dom., 453, 509, 510, 802, 926; Witn., 123, 124, 126.
Rochester Elec. R. Co., In re (46 Am. & Eng. R. Cas. 157, 123 N. Y. 351, 25 N. E. Rep. 381, 33 N. Y. S. R. 695; affirming 57 Hun 56, 32 N. Y. S. R. 1, 10 N. Y. Supp. 379), St. Rys., 65, 92; Turnp., 2.
Rochester, H. & L. R. Co., In re (9 N. Y. S. R. 560, 44 Hun 625), Em. Dom., 327.
Rochester, H. & L. R. Co., In re (110 N. Y. 119, 13 Cent. Rep. 234, 17 N. E. Rep. 678, 16 N. Y. S. R. 863; affirming 45 Hun 126, 9 N. Y. S. R. 560, 19 Abb. N. Cas. 421), Em. Dom., 68, 179, 278; Evid., 117.
Rochester, H. & L. R. Co., In re (50 Hun 29, 18 N. Y. S. R. 654, 2 N. Y. Supp. 457), Em. Dom., 897; Evid., 254; Subscr., 6, 27, 29.
Rochester, H. & L. R. Co. *v.* New York, L. E. & W. R. Co. (48 Hun (N. Y.) 190, 15 N. Y. S. R. 686, 14 Civ. Pro. 262), Contempt, 11; Proc., 30.
Rochester, H. & L. R. Co. *v.* New York, L. E. & W. R. Co. (35 Am. & Eng. R. Cas. 267, 110 N. Y. 128, 13 Cent. Rep. 232, 17 N. E. Rep. 680, 16 N. Y. S. R. 838; affirming 44 Hun 206, 8 N. Y. S. R. 237), Injunc., 24; Location, etc., 26.
Rochester, L. & H. R. Co., In re (26 N. Y. S. R. 753, 54 Hun 634, 4 Silv. Sup. Ct. 92, 7 N. Y. Supp. 279), Em. Dom., 229, 250, 361.
Rochester, N. & P. R. Co. *v.* Cuyler (7 Lans. (N. Y.) 431), Mun. Aid, 99, 206.
Rochester, R. & St. L. R. Co. *v.* Jewell (107 Ind. 332, 8 N. E. Rep. 215), Proc., 7.
Rochester R. Co. *v.* Robinson (133 N. Y. 242, 30 N. E. Rep. 1008, 44 N. Y. S. R. 872; reversing 38 N. Y. S. R. 1022, 16 N. Y. Supp. 381), Em. Dom., 329.
Rochette *v.* Chicago, M. & St. P. R. Co. (17 Am. & Eng. R. Cas. 192, 32 Minn. 201, 20 N. W. Rep. 140), Sts. & H., 216.
Rock Creek Tp. *v.* St. Joseph & G. I. R. Co. (42 Am. & Eng. R. Cas. 255, 43 Kan. 543, 23 Pac. Rep. 585), Cross. Sts. & H., 57, 69.
Rock Creek Tp. *v.* Strong (96 U. S. 271), Mun. Aid, 69, 314, 322, 379.
Rockford, R. I. & St. L. R. Co., Ex parte (1 Low. (U. S.) 345), Bank'cy, 10.
Rockford, R. I. & St. L. R. Co. *v.* Beckemeier (72 Ill. 267), Dam., 59.
Rockford, R. I. & St. L. R. Co. *v.* Byam (80 Ill. 528), Cross., Inj. at, 194.
Rockford, R. I. & St. L. R. Co. *v.* Connell (67 Ill. 216), Animals, 511.
Rockford, R. I. & St. L. R. Co. *v.* Coppinger (66 Ill. 510), Em. Dom., 565, 636, 845.
Rockford, R. I. & St. L. R. Co. *v.* Coultas (67 Ill. 398), Car. of P., 478.
Rockford, R. I. & St. L. R. Co. *v.* Delaney (82 Ill. 198), Children, Inj. to, 94; Comp. Neg., 9; Death, etc., 404.
Rockford, R. I. & St. L. R. Co. *v.* Heflin (65 Ill. 366), Animals, 593; Fences, 49.
Rockford, R. I. & St. L. R. Co. *v.* Hillmer (72 Ill. 235), Cross., Inj. at, 122, 295; Evid., 295.
Rockford, R. I. & St. L. R. Co. *v.* Irish (72 Ill. 404), Animals, 241, 283, 288; Comp. Neg., 16; Fences, 11.
Rockford, R. I. & St. L. R. Co. *v.* Lewis (58 Ill. 49), Animals, 48, 455.
Rockford, R. I. & St. L. R. Co. *v.* Linn (67 Ill. 109), Animals, 466; Cross., Inj. at, 141.
Rockford, R. I. & St. L. R. Co. *v.* Lynch (67 Ill. 149), Animals, 125, 480, 576, 590; Evid., 155; Fences, 16, 49.
Rockford, R. I. & St. L. R. Co. *v.* McKinley (64 Ill. 338), Em. Dom., 595, 913
Rockford, R. I. & St. L. R. Co. *v.* Phillips (66 Ill. 548), Animals, 301, 342, 361, 365; Negl., 90.
Rockford, R. I. & St. L. R. Co. *v.* Rafferty (73 Ill. 58), Animals, 69, 246, 578.
Rockford, R. I. & St. L. R. Co. *v.* Rogers (62 Ill. 346), Fires, 66.
Rockford, R. I. & St. L. R. Co. *v.* Sage (65 Ill. 328), Contr., 2; Direct., 29, 30, 33.
Rockford, R. I. & St. L. R. Co. *v.* Shunick (65 Ill. 223, 2 Am. Ry. Rep. 28), Agency, 87; Em. Dom., 228, 229.
Rockford, R. I. & St. L. R. Co. *v.* Spillers (67 Ill. 167), Animals, 467.
Rockford, R. I. & St. L. R. Co. *v.* Wells (66 Ill. 321), Em. Dom., 1084.
Rockford, R. I. & St. L. R. Co. *v.* Wilcox (66 Ill. 417), Agency, 108.
Rock Island & A. R. Co. *v.* Lynch (23 Ill. 645), Em. Dom., 500, 597.
Rock Island & P. R. Co. *v.* Dimick (55 Am. & Eng. R. Cas. 65, 144 Ill. 628, 32 N. E. Rep. 291), Farm Cross., 9, 10; Right of W., 5.
Rock Island & P. R. Co. *v.* Potter (36 Ill. App. 590), Car. of L. S., 103, 144.
Rockville & W. Turnpike-Road *v.* Van Ness (2 Cranch (U. S. C. C.) 449), Incorp., 11.
Rockwell *v.* New York & N. E. R. Co. (51 Conn. 401), Fences, 9.
Rockwell *v.* Third Ave. R. Co. (64 Barb. (N. Y.) 438; affirmed in 53 N. Y. 625, mem.), New Tr., 74; St. Rys., 176, 178.
Rodbourn *v.* Utica, I. & E. R. Co. (28 Hun (N. Y.) 369), Estop., 7; Receiv., 164.
Roddy *v.* Missouri Pac. R. Co. (104 Mo. 234, 15 S. W. Rep. 1112), Contr., 91, 106; Contrib. Neg., 84; Employés, Inj. to, 348, 745; Indep. Contr., 7, 11; Negl., 1, 34.
Rodemacher *v.* Milwaukee & St. P. R. Co. (41 Iowa 297), Fires, 4, 142, 330.
Roden *v.* Chicago & G. T. R. Co. (133 Ill.

72, 24 N. E. Rep. 425; affirming 30 Ill. App. 354) Tresp., Inj. to, 43.
Roderick *v.* Baltimore & O. R. Co. (7 W. Va. 54), Car. of L. S., 45; New Tr., 29.
Rodgers *v.* Central Pac. R. Co. (67 Cal. 607), Employés, Inj. to, 55.
Rodgers *v.* Lees (140 Pa. St. 475, 21 Atl. Rep. 399), Tresp., Inj. to, 69a.
Rodgers *v.* Wells (44 Mich. 411, 6 N. W. Rep. 860), Assign., 11; Stockh., 9; Trial, 54.
Rodman *v.* Michigan C. R. Co. (17 Am. & Eng. R. Cas. 521, 55 Mich. 57, 20 N. W. Rep. 788), Employés, Inj. to, 194.
Rodney *v.* Illinois C. R. Co. (19 Ill. 42), Car. of Slaves, 7.
Rodney *v.* Southern R. Assoc. (14 Daly 70, 3 N. Y. S. R. 564), Officers, 15.
Rodrian *v.* New York, N. H. & H. R. Co. (28 N. Y. S. R. 625, 7 N. Y. Supp. 811), Cross., Inj. at, 111, 121; Death, etc., 295.
Rodrian *v.* New York, N. H. & H. R. Co. (125 N. Y. 526, 26 N. E. Rep. 741, 35 N. Y. S. R. 814; reversing 28 N. Y. S. R. 625, 7 N. Y. Supp. 811), Cross., Inj. at, 264, 269, 276; Death, etc., 194.
Roe *v.* Birkenhead, L. & C. J. R. Co. (7 Ex. 36, 6 Railw. Cas. 795, 21 L. J. Ex. 9), False Imp., 3.
Roe *v.* Elmendorf (52 How. Pr. (N. Y.) 232), Sts. & H., 181.
Roelker *v.* St. Louis & S. E. R. Co. (50 Ind. 127), Sts. & H., 247.
Rogahn *v.* Moore Mfg. & F. Co. (79 Wis. 573, 48 N. W. Rep. 669), Agency, 105.
Rogan *v.* Wabash R. Co. (51 Mo. App. 665), Car. of M., 462, 800; Lim. of Liab., 3.
Rogan *v.* Watertown (30 Wis. 259, 8 Am. Ry. Rep. 20), Mun. Aid, 248, 280, 309, 336.
Rogen *v.* Morgan (16 N. Y. S. R. 693, 1 N. Y. Supp. 273), Contrib. Neg., 87.
Roger, In re (1 Drew & Sm. 338, 30 L. J. Ch. 153, 6 Jur. N. S. 1363, 9 W. R. 64, 3 L. T. 397), Debent., 10.
Rogers *v.* Burlington (3 Wall. (U. S.) 654), Mun. Aid, 6, 271, 352
Rogers *v.* Chicago & N. W. R. Co. (6 Abb. N. Cas. (N. Y.) 253), Bonds, 63.
Rogers *v.* Dexter & P. R. Co. (85 Me. 372, 27 Atl. Rep. 257), Constr. Rys., 90.
Rogers *v.* Florence R. Co. (39 Am. & Eng. R. Cas. 348, 31 So. Car. 378, 9 S. E. Rep. 1059), Constr. Rys., 16; Fires, 158; Indep. Contr., 2, 4; Negl., 61.
Rogers *v.* Galveston City R. Co. (76 Tex. 502, 13 S. W. Rep. 540), Employés, Inj. to, 240.
Rogers *v.* Great Western R. Co. (16 U. C. Q. B. 389), Car. of M., 613.
Rogers *v.* Hastings & D. R. Co. (22 Minn. 25), Direct., 30.
Rogers *v.* Hersey (15 Low. Can. 141), Stockh., 57, 62.
Rogers *v.* Hull Dock Co. (10 Jur. N. S. 1245, 13 W. R. 217, 34 L. J. Ch. 165), Em. Dom., 1157.
Rogers *v.* Kennebec & P. R. Co. (35 Me. 319), Charters, 130; Dam., 13; Em. Dom., 426, 994.
Rogers *v.* Keokuk (18 Law. Ed. (U. S.) 74), Mun. Aid, 22, 352.
Rogers *v.* London, C. & D. R. Co. (26 W. R. 192), Jurisd., 5.
Rogers *v.* Long Island R. Co. (38 How. Pr. (N. Y.) 289, 2 Lans. 269), Bagg., 52, 53.
Rogers *v.* Long Island R. Co. (1 T. & C. (N. Y.) 396; affirmed 56 N. Y. 620, mem.), Bagg., 53, 107.
Rogers *v.* Michigan S. & N. I. R. Co. (28 Barb. (N. Y.) 539), For. Corp., 12; Injunc., 7.
Rogers *v.* Mobile & O. R. Co. (Tenn.) (12 Am. & Eng. R. Cas. 442), Receiv., 71, 122, 135, 179.
Rogers *v.* Newburyport R. Co. (1 Allen (Mass.) 16), Animals, 281.
Rogers *v.* Oxford, W. & W. R. Co. (25 Beav. 322; affirmed on appeal in 2 De G. & J. 662), Leases, 12.
Rogers *v.* Pacific R. Co. (35 Mo. 153), Car. of Slaves, 5.
Rogers *v.* Port Huron & L. M. R. Co. (10 Am. & Eng. R. Cas. 635, 45 Mich. 460, 8 N. W. Rep. 46), Land Grants, 32.
Rogers *v.* Rhymney R. Co. (26 L. T. 879, 21 W. R. 21), Death, etc., 255.
Rogers *v.* State (90 Ga. 463, 16 S. E. Rep. 205), Crim. L., 27.
Rogers *v.* Stephens (86 N. Y. 623, mem.; affirming 21 Hun 44), Mun. Aid, 44.
Rogers *v.* Wheeler (43 N. Y. 598; affirming 2 Lans. 486), Mort., 152.
Rogers *v.* Wheeler (52 N. Y. 262, 4 Am. Ry. Rep. 411), Car. of M., 66.
Rogers L. & M. Works *v.* Erie R. Co. (20 N. J. Eq. 379), Car. of M., 35, 36; Charges, 46; Injunc., 10; Stockh., 125.
Rogers L. & M. Works *v.* Southern R. Assoc. (34 Fed. Rep. 278), Bonds, 1.
Rogersville & J. R. Co. *v.* Kyle (14 Am. & Eng. R. Cas. 576, 9 Lea (Tenn.) 691), Dissol., 8.
Rogstad *v.* St. Paul, M. & M. R. Co. (14 Am. & Eng. R. Cas. 648, 31 Minn. 208, 17 N. W. Rep. 287), Stat. & D., 115.
Rohback *v.* Pacific R. Co. (43 Mo. 187), Fel. Serv., 39, 295; Words & Ph., 163.
Rohland *v.* St. Louis & S. F. R. Co. (89 Mo. 180, 1 S. W. Rep. 147), Animals, 608.
Roland *v.* Centerville, M. & A. R. Co. (11 Am. & Eng. R. Cas. 47, 61 Iowa 380, 16 N. W. Rep. 355), Liens, 18.
Rolke *v.* Chicago & N. W. R. Co. (26 Wis. 537, 3 Am. Ry. Rep. 548), Fires, 76.
Roll *v.* Northern C. R. Co. (15 Hun (N. Y.) 496; affirmed in 80 N. Y. 647, mem.), Employés, Inj. to, 297, 332, 496.
Roller *v.* Sutter St. R. Co. (19 Am. & Eng. R. Cas. 333, 66 Cal. 230, 5 Pac. Rep. 108), Death, etc., 238.
Rolston *v.* Crittenden (120 U. S. 390, 7 Sup. Ct. Rep. 599), Fed. Cts., 11.
Rolston *v.* Missouri Fund Com'rs (120 U. S. 390, 7 Sup. Ct. Rep. 599; reversing in part 3 McCrary 332, 10 Fed. Rep. 254), State Aid, 26.
Roman *v.* Strauss (10 Md. 89), Sts. & H., 246.
Roman *v.* Woolfolk (98 Ala. 219, 13 So. Rep. 212), Stockh., 88.
Roman Catholic Church *v.* Texas & P. R. Co. (41 Fed. Rep. 564), Lim. of Ac., 4.

Rome & C. Constr. Co. *v.* Dempsey (86 Ga. 499, 12 S. E. Rep. 882), Employés, Inj. to, 420.
Rome & C. Constr. Co. *v.* Jennings (85 Ga. 444, 11 S. E. Rep. 839), Fences, 106.
Rome & C. Constr. Co. *v.* Smith (84 Ga. 238, 10 S. E. Rep. 728), Rem. of C., 48, 54.
Rome & D. R. Co. *v.* Chasteen (40 Am. & Eng. R. Cas. 559, 88 Ala. 591, 7 So. Rep. 94), Employés, Inj. to, 422; Indep. Contr., 2, 7; Leases, 40.
Rome & D. R. Co. *v.* Sibert (97 Ala. 393, 12 So. Rep. 69), Em. Dom., 944; Mort., 247; Receiv., 75.
Rome R. Co. *v.* Barnett (89 Ga. 718, 15 S. E. Rep. 639), Death, etc., 151, 174.
Rome R. Co. *v.* Mayor, etc., of Macon (14 Ga. 275), Tax., 227.
Rome R. Co. *v.* Ransom (78 Ga. 705, 3 S. E. Rep. 626), Animals, 638; Cert., 12.
Rome R. Co. *v.* Sloan (39 Ga. 636), Car. of M., 760.
Rome R. Co. *v.* Sullivan (14 Ga. 277), Car. of M., 227, 305, 340; Trover, 11.
Rome R. Co. *v.* Sullivan (25 Ga. 228), Car. of M., 43, 601; Contr., 109; Pl., 127.
Rome R. Co. *v.* Sullivan (32 Ga. 400), Car. of M., 130, 747.
Rome R. Co. *v.* Tolbert (85 Ga. 447, 11 S. E. Rep. 849), Tresp., Inj. to, 23, 47, 92.
Rome R. Co. *v.* Wimberly (75 Ga. 316, 58 Am. Rep. 468), Bagg., 18.
Rome, W. & O. R. Co. *v.* Ontario Southern R. Co. (16 Hun (N. Y.) 445), Cross. Rys., 3.
Rome, W. & O. R. Co. *v.* Smith (39 Hun (N. Y.) 332; affirmed in 101 N. Y. 684, mem.), Tax., 276.
Romick *v.* Chicago, R. I. & P. R. Co. (15 Am. & Eng. R. Cas. 288, 62 Iowa 167, 17 N. W. Rep. 458), Contrib. Neg., 48; Employés, Inj. to, 159.
Ronan *v.* Midland R. Co. (L. R. 14 Ir. 157), Car. of L. S., 67.
Rondout & O. R. Co. *v.* Deyo (5 Lans. (N. Y.) 298), Em. Dom., 510, 604, 634, 636, 924.
Rondout & O. R. Co. *v.* Field (38 How. Pr. (N. Y.) 187), Em. Dom., 923.
Ronn *v.* Des Moines (78 Iowa 63, 42 N. W. Rep. 582), Evid., 247.
Rood *v.* Chicago, M. & St. P. R. Co. (43 Wis. 146, 17 Am. Ry. Rep. 170), Stat., 69.
Rood *v.* New York & E. R. Co. (18 Barb. (N. Y.) 80), Deeds, 2; Fires, 19, 20, 22, 25, 45, 149, 246, 338.
Rood *v.* Railway Pass. & F. C. M. B. Assoc. (31 Fed. Rep. 62), Relief Assoc., 9.
Roof *v.* Charlotte, C. & A. R. Co. (4 So. Car. 61), Animals, 480.
Rooney *v.* Sacramento Valley R. Co. (6 Cal. 638), Em. Dom., 427.
Roosevelt *v.* New York El. R. Co. (25 J. & S. 438, 29 N. Y. S. R. 266, 8 N. Y. Supp. 547), Elev. Rys., 121.
Roosevelt *v.* New York & H. R. Co. (30 How. Pr. (N. Y.) 226, 45 Barb. 554), Bonds, 57, 58.
Roosevelt Hospital *v.* New York El. R. Co. (50 N. Y. S. R. 456, 66 Hun 633, mem., 21 N. Y. Supp. 205), Elev. Rys., 115; Evid., 236.
Root *v.* Catskill Mt. R. Co. (33 Fed. Rep. 858), New Tr., 8.
Root *v.* Great Western R. Co. (45 N. Y. 524; reversing 2 Lans. 199), Car. of M., 589, 633.
Root *v.* Great Western R. Co. (65 Barb. (N. Y.) 619, 1 T. & C. 10; affirmed in 55 N. Y. 636, mem.), Car. of M., 743; Evid., 226.
Root *v.* Illinois C. R. Co. (29 Iowa 102), Pl., 9.
Root *v.* Long Island R. Co. (40 Am. & Eng. R. Cas. 55, 114 N. Y. 300, 21 N. E. Rep. 403, 23 N. Y. S. R. 226, 4 L. R. A. 331; affirming 1 N. Y. S. R. 503), Discrim., 64.
Root *v.* New York & N. E. R. Co. (27 N. Y. Supp. 611, 76 Hun 23), Agency, 56; Bills of L., 29.
Root *v.* New York C. Sleeping Car Co. (28 Mo. App. 199), Sleep. Car Cos., 27, 32, 35.
Root *v.* Sioux City Cable R. Co. (42 Fed. Rep. 500), Pat. for Inv., 27.
Root *v.* Third Ave. R. Co. (37 Fed. Rep. 673), Pat. for Inv., 26.
Root *v.* Third Ave. R. Co. (39 Fed. Rep. 281; affirmed in 146 U. S. 210, 13 Sup. Ct. Rep. 100), Pat. for Inv., 4.
Root *v.* Third Ave. R. Co. (146 U. S. 210, 13 Sup. Ct. Rep. 100; affirming 39 Fed. Rep. 281), Pat. for Inv., 6.
Root *v.* Third Ave. R. Co. (43 Fed. Rep. 73), Pat. for Inv., 26.
Rooth *v.* Northeastern R. Co. (36 L. J. Ex. 83, L. R. 2 Ex. 173, 15 W. R. 695, 15 L. T. 624), Car. of L. S., 93.
Rosa *v.* Butterfield (33 N. Y. 665), Bills & N., 23; Guar., 12.
Rosa *v.* Missouri, K. & T. R. Co. (18 Kan. 124, 15 Am. Ry. Rep. 210), Em. Dom., 427.
Rosby *v.* St. Paul, M. & M. R. Co. (37 Minn. 171, 33 N. W. Rep. 698), Pl., 76.
Rose *v.* Boston & A. R. Co. (58 N. Y. 217, 9 Am. Ry. Rep. 515), Employés, Inj. to, 165, 442.
Rose *v.* Chicago & N. W. R. Co. (72 Iowa 625, 34 N. W. Rep. 450), Fires, 188, 264.
Rose *v.* Des Moines Valley R. Co. (39 Iowa 246, 9 Am. Ry. Rep. 7, 20 Am. Ry. Rep. 326), Agency, 84; Death, etc., 380, 428; Lim. of Liab., 27; Passes, 15, 29.
Rose *v.* Gulf, C. & S. F. R. Co. (Tex.) (17 S. W. Rep. 789), Fel. Serv., 46, 411.
Rose *v.* Louisville, N. O. & T. R. Co. (70 Miss. 725, 12 So. Rep. 825), Col. Pers., 12; Stat. & D., 109; Trial, 156.
Rose *v.* Northeastern R. Co. (L. R. 2 Ex. D. 248, 46 L. J. Ex. 374, 25 W. R. 205, 35 L. T. 693; reversing 34 L. T. 761), Car. of P., 229.
Rose *v.* San Antonio & M. G. R. Co. (31 Tex. 49), Mun. Aid, 233.
Rose *v.* Stephens & C. Transp. Co. (20 Blatchf. (U. S.) 465, 19 Fed. Rep. 808), New Tr., 92.
Rose *v.* West Phila. R. Co. (Pa.) (12 Atl. Rep. 78), Release, 17; St. Rys., 392; Trial, 117.

Rose *v.* Wilmington & W. R. Co. (106 N. Car. 168, 11 S. E. Rep. 526), Car. of P., 310; Conduct., 11; Eject. Pass., 116.
Rosebrooks *v.* Dinsmore (4 Abb. App. Dec. (N. Y.) 118, 5 Abb. Pr. N. S. 59, 36 How. Pr. 138; reversing 4 Robt. 672), Car. of M., 735.
Rosecrans *v.* Wabash, St. L. & P. R. Co. (83 Mo. 678), App., 120.
Roseman *v.* Carolina C. R. Co. (52 Am. & Eng. R. Cas. 638, 112 N. Car. 709, 16 S. E. Rep. 766), Death, etc., 77; Eject. Pass., 52, 54, 57, 64, 65.
Rosenbaum *v.* St. Paul & D. R. Co. (34 Am. & Eng. R. Cas. 274, 38 Minn. 173, 36 N. W. Rep. 447), Car. of P., 59, 298; Employés, Inj. to, 48; Tresp., Inj. to, 19.
Rosenbaum *v.* Union Pac. R. Co. (2 How. Pr. N. S. (N. Y.) 45; affirmed (?) 100 N. Y. 617, mem.), Citizens., 4; Consol., 44.
Rosenberg *v.* Staten Island R. Co. (38 N. Y. S. R. 106, 14 N. Y. Supp. 476), Actions, 14.
Rosenberger *v.* Grand Trunk R. Co. (15 Am. & Eng. R. Cas. 448, 8 Ont. App. 482), Cross., Inj. at, 15.
Rosenfeld *v.* Peoria, D. & E. R. Co. (21 Am. & Eng. R. Cas. 87, 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. Rep. 344), Bills of L., 84; Car. of M., 444; Lim. of Liab., 41.
Rosenfield *v.* Express Co. (1 Woods (U. S.) 131), Car. of M., 288, 295.
Rosenkrans *v.* Lafayette, B. & M. R. Co. (16 Am. & Eng. R. Cas. 483, 18 Fed. Rep. 513), Consol., 11.
Rosenkranz *v.* Lindell R. Co. (108 Mo. 9, 18 S. W. Rep. 890), Children, Inj. to, 66, 141; Dam., 45, 67.
Rosenstein *v.* Missouri Pac. R. Co. (16 Mo. App. 225), Bills of L., 95; Words & Ph., 157.
Rosenthal *v.* St. Louis, I. M. & S. R. Co. (40 Mo. App. 579), Stat. Agts., 6.
Rosenthal *v.* Taylor, B. & H. R. Co. (79 Tex. 325, 15 S. W. Rep. 268), Estop., 33; Flood. Lds., 10; Sts. & H., 250, 274.
Rosevelt *v.* Manhattan R. Co. (27 J. & S. 197, 37 N. Y. S. R. 894, 13 N. Y. Supp. 598; affirmed in 133 N. Y. 537, mem., 30 N. E. Rep. 1148, 44 N. Y. S. R. 929, mem.), Dam., 79; Evid., 42, 74, 209; Pl., 114; Witn., 57, 173.
Ross, In re (5 D. & L. 695, 5 Railw. Cas. 516, 18 L. J. Q. B. 199), Em. Dom., 1146.
Ross *v.* Adams (28 N. J. L. 160), Em. Dom., 403, 440.
Ross *v.* Boston & W. R. Co. (6 Allen (Mass.) 87), Fires, 9, 229, 304.
Ross *v.* Chicago, B. & Q. R. Co. (77 Ill. 127), Charters, 3; Em. Dom., 226; Estop., 25; Right of W., 10; Stat., 33.
Ross *v.* Elizabethtown & S. R. Co. (20 N. J. L. 230), Em. Dom., 291, 493, 508.
Ross *v.* Elizabethtown & S. R. Co. (2 N. J. Eq. 422), Em. Dom., 432, 1034; Injunc., 30.
Ross *v.* Georgia, C. & N. R. Co. (46 Am. & Eng. R. Cas. 34, 33 So. Car. 477, 12 S. E. Rep. 101), Pl., 133; Priv. Ways, 11.
Ross *v.* Grand Trunk R. Co. (25 Am. & Eng. R. Cas. 209, 10 Ont. 447), Lim. of Ac., 48.
Ross *v.* Harvey (32 Ga. 388), Citizens., 4.
Ross *v.* Kansas City, St. J. & C. B. R. Co. (49 Am. & Eng. R. Cas. 499, 111 Mo. 18, 19 S. W. Rep. 541), Stat., 41.
Ross *v.* Lafayette & I. R. Co. (6 Ind. 297), Subscr., 18, 82.
Ross *v.* McArthur (52 Am. & Eng. R. Cas. 1, 85 Iowa 203, 52 N. W. Rep. 125), Arb., 1; Constr. Rys., 28, 58, 65.
Ross *v.* Manhattan El. R. Co. (29 N. Y. S. R. 517, 8 N. Y. Supp. 495, 25 J. & S. 412), Elev. Rys., 51, 101; Witn., 61.
Ross *v.* Metropolitan El. R. Co. (25 J. & S. 412, 29 N. Y. S. R. 517, 9 N. Y. Supp. 495), Elev. Rys., 119.
Ross *v.* Missouri, K. & T. R. Co. (4 Mo. App. 582), Bagg., 38, 68.
Ross *v.* Montana Union R. Co. (45 Fed Rep. 424), Pat. for Inv., 23.
Ross *v.* Natchez, J. & C. R. Co. (61 M 12), Animals, 391; Just. P., 3.
Ross *v.* Natchez, J. & C. R. Co. (23 Am. & Eng. R. Cas. 196, 62 Miss. 23), Animals, 536.
Ross *v.* New York C. & H. R. R. Co. (5 Hun (N. Y.) 488; affirmed in 74 N. Y. 617, mem.), Fel. Serv., 108, 259.
Ross *v.* Pennsylvania R. Co. (Pa.) (27 Am. & Eng. R. Cas. 367, 4 Atl. Rep. 850), Em. Dom., 130, 957.
Ross *v.* Pennsylvania R. Co. (17 Phila. (Pa.) 339), Em. Dom., 973.
Ross *v.* Ross (25 Ga. 297), Attach., 31.
Ross *v.* Southwestern R. Co. (53 Ga. 514), Stock, 55.
Ross *v.* Texas & P. R. Co. (44 Fed. Rep. 44), Death, etc., 433; Evid., 291.
Ross *v.* Troy & B. R. Co. (49 Vt. 364), Car. of M., 181.
Ross *v.* Union Pac. R. Co. (Woolw. (U. S.) 26), Spec. Perf., 15.
Ross *v.* United States (10 Ct. of Cl. 424), Claims Against U. S., 9.
Ross *v.* Walker (139 Pa. St. 42, 21 Atl. Rep. 157), Employés, Inj. to, 93, 463; Fel. Serv., 73, 132, 310, 313, 314.
Ross *v.* West Phila. Pass. R. Co. (17 Phila. (Pa.) 361), New Tr., 6; Release, 13.
Rossignoll *v.* Northeastern R. Co. (75 Ga. 354), Fences, 107.
Rost *v.* Missouri Pac. R. Co. (76 Tex. 168, 12 S. W. Rep. 1131), Fires, 39, 173; Negl., 1.
Roth *v.* Buffalo & S. L. R. Co. (34 N. Y. 548), Bagg., 64.
Rothan *v.* St. Louis, O. H. & C. R. Co. (113 Mo. 132, 20 S. W. Rep. 892), Em. Dom., 415, 493.
Rothchild *v.* Grand Trunk R. Co. (30 N. Y. S. R. 642, 19 Civ. Pro. 53, 10 N. Y. Supp. 36; affirmed at general term in 38 N. Y. S. R. 869, 14 N. Y. Supp. 807, 60 Hun 582, mem.), Actions, 8; Pl., 62.
Rothe *v.* Milwaukee & St. P. R. Co. (21 Wis. 256), Death, etc., 192.
Rothschild *v.* Grand Trunk R. Co. (38 N. Y. S. R. 869, 60 Hun 582, 14 N. Y. Supp. 807), Bagg., 109; Pl., 62.

Rothschild *v.* Michigan C. R. Co. (69 Ill. 164), Car. of M., 334.
Rothschild *v.* Rio Grande Western R. Co. (45 N. Y. S. R. 809, 63 Hun 632, 18 N. Y. Supp. 548), Pl., 4.
Rothschild *v.* Wabash R. Co. (15 Mo. App. 242), Discrim., 4, 13, 14.
Rothschild *v.* Wabash, St. L. & P. R. Co. (30 Am. & Eng. R. Cas. 76, 92 Mo. 91, 10 West. Rep. 72, 4 S. W. Rep. 418), Charges, 45.
Rott *v.* Forty-second St. & G. S. F. R. Co. (24 J. & S. 151, 1 N. Y. Supp. 518), St. Rys., 430.
Roudanez *v.* Mayor, etc., of New Orleans (29 La. Ann. 271), Mun. Aid, 415.
Roul *v.* East Tenn., V. & G. R. Co. (85 Ga. 197, 11 S. E. Rep. 558), Employés, Inj. to, 441.
Rounds *v.* Delaware, L. & W. R. Co. (64 N. Y. 129, 21 Am. Rep. 597; affirming 3 Hun 329, 5 T. & C. 475), Agency, 82; Car. of P., 96; Trial, 102; Tresp., Inj. to, 112.
Rountree *v.* State (58 Ala. 381), Crim. L., 27.
Rouse *v.* Chicago & E. I. R. Co. (42 Ill. App. 421), Flood. Lds., 52.
Rouse *v.* Metropolitan St. R. Co. (41 Mo. App. 298), St. Rys., 531.
Rouser *v.* North Park St. R. Co. (97 Mich. 565, 56 N. W. Rep. 937), St. Rys., 527.
Roushlange *v.* Chicago & A. R. Co. (33 Am. & Eng. R. Cas. 142, 115 Ind. 106, 14 West. Rep. 853, 17 N. E. Rep. 198), Constr. Rys., 12; Embankm., 2; Em. Dom., 989.
Roux *v.* Blodgett & D. Lumber Co. (85 Mich. 519, 48 N. W. Rep. 1092), Contrib. Neg., 84; Employés, Inj. to, 250.
Rowand *v.* Martin (7 Man. 160), Em. Dom., 1269.
Rowand *v.* Railway Com'r (6 Man. 401), Em. Dom., 1267.
Rowcliffe *v.* Devon & S. R. Co. (21 W. R. 433), Arb., 16.
Rowe *v.* Beckett (30 Ind. 154), Deeds of Tr., 12.
Rowe *v.* Grand Trunk R. Co. (16 U. C. C. P. 500), Release, 17, 21.
Rowe *v.* Greenville & C. R. Co. (7 So. Car. 167), Animals, 256.
Rome *v.* Lewis (30 Ind. 163), Deeds of Tr., 12.
Rowe *v.* St. Paul, M. & M. R. Co. (39 Am. & Eng. R. Cas. 255, 41 Minn. 384, 43 N. W. Rep. 76), Waters & W., 28.
Rowe *v.* Shilson (4 B. & Ad. 726, 1 N. & M. 734), Charges, 128.
Rowell *v.* Railroad Co. (57 N. H. 132), Fires, 13, 33.
Rowen *v.* New York, N. H. & H. R. Co. (59 Conn. 364, 21 Atl. Rep. 1073), Contrib. Neg., 9, 10; Cross., Inj. at, 145.
Rowland, Ex parte (5 Am. & Eng. R. Cas. 208, 104 U. S. 604), Mun. Aid, 439.
Rowland *v.* Cannon (35 Ga. 105), Death, etc., 174.
Rowland *v.* Missouri Pac. R. Co. (20 Mo. App. 463), Fel. Serv., 81, 86, 101, 132, 221, 312, 346, 348.
Rowland *v.* Murphy (66 Tex. 534, 1 S. W. Rep. 658), Negl., 61; Pl., 67, 155.
Rowland *v.* New York, N. H. & H. R. Co. (49 Am. & Eng. R. Cas. 61, 61 Conn. 103, 23 Atl. Rep. 755), Car. of M., 415.
Rowland *v.* Pennsylvania R. Co. (52 Pa. St. 250), Charges, 59.
Rowland *v.* Philadelphia, W. & B. R. Co. (63 Conn. 415, 28 Atl. Rep. 102), Evid., 210, 228.
Rowland *v.* St. Louis, I. M. & S. R. Co. (7 Am. & Eng. R. Cas. 566, 73 Mo. 619), Animals, 621, 629.
Rowley *v.* London & N. W. R. Co. (42 L. J. Ex. 153, L. R. 8 Ex. 221, 21 W. R. 869, 29 L. T. 180), Death, etc., 375; Witn., 148.
Rown *v.* Christopher & T. St. R. Co. (34 Hun (N. Y.) 471), False Imp., 11, 18.
Roxbury *v.* Boston & P. R. Corp. (2 Gray (Mass.) 460), Cross. Sts. & H., 113.
Roxbury *v.* Boston & P. R. Corp. (6 Cush. (Mass.) 424), Charters, 73, 101; Cross. Sts. & H., 113.
Roxbury *v.* Central Vt. R. Co. (60 Vt. 121, 6 N. Eng. Rep. 534, 14 Atl. Rep. 92), Cross., Inj. at, 27; Cross. Sts. & H., 24; Receiv., 123.
Roy *v.* Compagnie, etc. (6 Low. Can. 277; reversing 4 Low. Can. 189), Em. Dom., 1257.
Roy *v.* Grand Trunk R. Co. (1 Montr. L. R. 353), Cross., Inj. at, 344; Tresp., Inj. to, 119.
Royal Canadian Bank *v.* Grand Trunk R. Co. (23 U. C. C. P. 225), Bills of L., 5, 117; Car. of M., 726.
Royston *v.* Illinois C. R. Co. (67 Miss. 376, 7 So. Rep. 320), Assault, 9; Col. Pers., 12.
Rozen *v.* Dry Dock, E. B. & B. R. Co. (27 N. Y. Supp. 337, 7 Misc. 130), Conduct., 6.
Rozwadosfskie *v.* International & G. N. R. Co. (1 Tex. Civ. App. 487, 20 S. W. Rep. 872), Car. of P., 37; Death, etc., 174; Stat. & D., 102; Tresp., Inj. to, 74.
Rozzelle *v.* Hannibal & St. J. R. Co. (19 Am. & Eng. R. Cas. 591, 79 Mo. 349), Animals, 353; Fences, 65.
Ruabon B. & T. C. Co. *v.* Great Western R. Co. (54 Am. & Eng. R. Cas. 600, [1893] 1 Ch. 427), Mines, etc., 6.
Ruben *v.* Ludgate Hill Steamship Co. (17 N. Y. S. R. 17, 49 Hun 608, mem.), Car. of M., 723.
Rubens *v.* Ludgate Hill Steamship Co. (20 N. Y. Supp. 481), Bills of L., 26, 64, 71; Car. of M., 76.
Rubey *v.* Shain (54 Mo. 207), Mun. Aid, 212, 418.
Ruch *v.* Rock Island (97 U. S. 693), Witn., 5.
Rucker *v.* Donovan (13 Kan. 251), Car. of M., 383, 497, 501, 502.
Rucker *v.* Missouri Pac. R. Co. (21 Am. & Eng. R. Cas. 245, 61 Tex. 499), Car. of P., 461.
Ruckman *v.* Ridgefield Park R. Co. (38 N. J. L. 98, 13 Am. Ry. Rep. 31), Pl., 77.
Rudd *v.* Richmond & D. R. Co. (23 Am. &

Eng. R. Cas. 253, 80 Va. 546), Children, Inj. to, 97.
Ruddick *v.* St. Louis, K. & N. W. R. Co. (116 Mo. 25, 22 S. W. Rep. 499), Cov'ts, 3.
Ruddy *v.* Midland G. W. R. Co. (L. R. 8 Ir. 224), Car. of L. S., 144; Lim. of Liab., 5, 39.
Rude *v.* St. Louis (93 Mo. 408, 12 West. Rep. 238, 6 S. W. Rep. 257), Sts. & H., 216.
Rudy *v.* Rio Grande Western R. Co. (52 Am. & Eng. R. Cas. 351, 8 Utah 165, 30 Pac. Rep. 366), Eject. Pass., 35, 67.
Rue *v.* Missouri Pac. R. Co. (36 Am. & Eng. R. Cas. 449, 74 Tex. 474, 8 S. W. Rep. 533), Contr., 53; For. Corp., 6.
Ruel *v.* Consolidated European & N. A. R. Co. (16 New Brun. 481), Attach., 17, 27.
Ruffner *v.* Cincinnati, H. & D. R. Co. (34 Ohio St. 96, 21 Am. Ry. Rep. 1), Fires, 260.
Ruggles *v.* Illinois (11 Am. & Eng. R. Cas. 49, 108 U. S. 526, 2 Sup. Ct. Rep. 832), Charges, 4; Charters, 28, 124.
Ruggles *v.* People (91 Ill. 256), Charges, 8; Discrim., 2.
Rummel *v.* New York, L. & W. R. Co. (30 N. Y. S. R. 235), Sts. & H., 134, 141.
Rumsey *v.* Delaware, L. & W. R. Co. (53 Am. & Eng. R. Cas. 376, 6 Kulp (Pa.) 359), Employés, Inj. to, 235.
Rumsey *v.* Delaware, L. & W. R. Co. (151 Pa. St. 74, 25 Atl. Rep. 37), Employés, Inj. to, 199, 223.
Rumsey *v.* New York & N. E. R. Co. (39 Am. & Eng. R. Cas. 34, 114 N. Y. 423, 21 N. E. Rep. 1066, 23 N. Y. S. R. 928), Rip. Rts., 7.
Rumsey *v.* New York & N. E. R. Co. (125 N. Y. 681, mem., 3 Silv. App. 203, 34 N. Y. S. R. 454; reversing 22 N. Y. S. R. 820, 51 Hun 644, mem., 4 N. Y. Supp. 293; adhering to former appeal in 114 N. Y. 423, 21 N. E. Rep. 1066, 23 N. Y. S. R. 928), Em. Dom., 96; Waters & W., 12.
Rumsey *v.* New York & N. E. R. Co. (130 N. Y. 88, 28 N. E. Rep. 763, 40 N. Y. S. R. 583; affirming 28 N. Y. S. R. 984; former appeal 114 N. Y. 423), Rip. Rts., 9.
Rumsey *v.* New York & N. E. R. Co. (52 Am. & Eng. R. Cas. 20, 133 N. Y. 79, 30 N. E. Rep. 654, 44 N. Y. S. R. 248; reversing 60 Hun 585, 39 N. Y. S. R. 894, 15 N. Y. Supp. 509), Em. Dom., 605, 609, 634; Rip. Rts., 10.
Rumsey *v.* New York & N. E. R. Co. (136 N. Y. 543, 32 N. E. Rep. 979, 49 N. Y. S. R. 683; reversing 63 Hun 200, 45 N. Y. S. R. 33, 17 N. Y. Supp. 672; former appeal 133 N. Y. 79), Em. Dom., 994.
Rumsey *v.* New York & N. E. R. Co. (50 N. Y. S. R. 253, 66 Hun 631, 21 N. Y. Supp. 193), Costs, 1.
Rumsey *v.* Northeastern R. Co. (14 C. B. N. S. 641, 32 L. J. C. P. 244, 11 W. R. 911, 8 L. T. N. S. 666, 10 Jur. N. S. 208), Bagg., 92, 96.
Rundle *v.* Delaware & R. Canal Co. (14 How. (U. S.) 80), Waters & W., 1.
Runt *v.* Herring (2 Misc. 105, 21 N. Y. Supp. 244), Employés, Inj. to, 179.
Runyon *v.* Central R. Co. (25 N. J. L. 556), Contrib. Neg., 21.
Rupard *v.* Chesapeake & O. R. Co. (88 Ky. 280, 11 S. W. Rep. 70), Contrib. Neg., 123; Fright. Teams, 3.
Ruple, Appeal of (Pa.) (17 Atl. Rep. 193), Deeds, 9.
Ruppel *v.* Manhattan R. Co. (13 Daly (N. Y.) 11), Fires, 261.
Ruppert *v.* Chicago, O. & St. J. R. Co. (43 Iowa 490, 14 Am. Ry. Rep. 470), Em. Dom., 429, 878, 954.
Rusch *v.* Milwaukee, L. S. & W. R. Co. (54 Wis. 136, 11 N. W. Rep. 253), Em. Dom., 1057, 1058, 1075.
Rush *v.* Burlington, C. R. & N. R. Co. (11 Am. & Eng. R. Cas. 298, 57 Iowa 201, 10 N. W. Rep. 628), Em. Dom., 227.
Rush *v.* Coal Bluff Min. Co. (131 Ind. 135, 30 N. E. Rep. 904), Negl., 59, 67; Trial, 184.
Rush *v.* Missouri Pac. R. Co. (28 Am. & Eng. R. Cas. 484, 36 Kan. 129, 12 Pac. Rep. 582), Constr. Rys., 4; Employés, Inj. to, 230.
Rushenberg *v.* St. Louis, I. M. & S. R. Co. (54 Am. & Eng. R. Cas. 118, 109 Mo. 112, 19 S. W. Rep. 216), Children, Inj. to, 38; Death, etc., 126.
Russ *v.* Wabash Western R. Co. (112 Mo. 45, 20 S. W. Rep. 472), Fel. Serv., 73, 100, 217, 313, 349; Witn., 192.
Russell *v.* Farley (7 Am. & Eng. R. Cas. 453, 105 U. S. 433), Injunc., 66.
Russell *v.* Hanley (20 Iowa 219), Fences, 91.
Russell *v.* Hannibal & St. J. R. Co. (26 Mo. App. 368), Animals, 126; Fences, 60.
Russell *v.* Hannibal & St. J. R. Co. (83 Mo. 507), Animals, 354, 621; Fences, 53.
Russell *v.* Horn Pond Branch R. Corp. (4 Gray (Mass.) 607), Witn., 118.
Russell *v.* Hudson River R. Co. (17 N. Y. 134; reversing 5 Duer 39), Fel. Serv., 26, 278; Witn., 81.
Russell *v.* Livingston (16 N. Y. 515; reversing 19 Barb. 346), Car. of M., 68.
Russell *v.* Minneapolis & St. L. R. Co. (32 Minn. 230, 20 N. W. Rep. 147), Employés, Inj. to, 208.
Russell *v.* Richmond & D. R. Co. (47 Fed. Rep. 204), Conduct., 5; Employés, Inj. to, 179, 419, 430.
Russell *v.* St. Paul, M. & M. R. Co. (20 Am. & Eng. R. Cas. 191, 33 Minn. 210, 22 N. W. Rep. 379), Em. Dom., 579, 603, 651.
Russell *v.* Texas & P. R. Co. (68 Tex. 646, 5 S. W. Rep. 686), Charters, 177; Corp., 16; Franch., 4; Receiv., 36, 38, 42, 112.
Russell *v.* Waterford & L. R. Co. (L. R. 16 Ir. 314), Judgm., 22.
Russell *v.* Wisconsin, M. & P. R. Co. (39 Minn. 145, 39 N. W. Rep. 302), Contr., 14; Pl., 118; Sales, 3.
Russell Mfg. Co. *v.* New Haven Steamboat Co. (50 N. Y. 121), Car of M., 154.
Russell Mfg. Co. *v.* New Haven Steamboat Co. (52 N. Y. 657), Car. of M., 225.

Ruthe *v.* Green Bay & M. R. Co. (37 Wis. 344), Attach., 40; Proc., 32.
Rutherfoord *v.* Cincinnati & P. R. Co. (35 Ohio St. 559), Liens, 24.
Rutherford *v.* Brachman (40 Ohio St. 604), Constr. Rys., 32, 55.
Rutherford *v.* Shreveport & H. R. Co. (41 Am. & Eng. R. Cas. 129, 41 La. Ann. 793, 6 So. Rep. 644), Car. of P., 616; Dam., 26.
Ruthin & C. D. R. Co., In re (27 Am. & Eng. R. Cas. 434, 32 Ch. D. 438), Aband., 10.
Ruthven Woolen Mfg. Co. *v.* Great Western R. Co. (18 U. C. C. P. 316), Car. of M., 801.
Rutland & B. R. Co. *v.* Cole (24 Vt. 33), Subscr., 111.
Rutland & B. R. Co. *v.* Crocker (4 Blatchf. (U. S.) 179, 29 Vt. 540), Subscr., 24.
Rutland & B. R. Co. *v.* Lincoln (29 Vt. 206), Agency, 109.
Rutland & B. R. Co. *v.* Proctor (29 Vt. 93), Ult. Vir., 7.
Rutland & B. R. Co. *v.* Thrall (35 Vt. 536), Direct., 37; Evid., 151; Subscr., 42, 70, 179.
Rutland & W. R. Co. *v.* Bank of Middlebury (32 Vt. 639), Trover, 19.
Rutland R. Co. *v.* Haven (62 Vt. 39, 19 Atl. Rep. 769), Assump., 4.
Rutledge *v.* Hannibal & St. J. R. Co. (19 Am. & Eng. R. Cas. 669, 78 Mo. 286), Fences, 63, 86.
Rutledge *v.* Missouri Pac. R. Co. (110 Mo. 312, 19 S. W. Rep. 38), Employés, Inj. to, 18, 22, 67, 196, 398, 426; Witn., 44.
Rutledge *v.* Woodstock & L. E. R & H. Co. (12 U. C. Q. B. 663), Em. Dom., 1275.
Rutten *v.* Union Pac. R. Co. (12 Am. & Eng. R. Cas. 374, 17 Fed. Rep. 480), Bonds, 52.
Rutter *v.* Missouri Pac. R. Co. (21 Am. & Eng. R. Cas. 212, 81 Mo. 169), Death, etc., 104; Lim. of Ac., 67.
Ruttles *v.* Covington (Ky.) (38 Am. & Eng. R. Cas. 408, 10 S. W. Rep. 644), Mun. Corp., 30; Sts. & H., 71.
Rutz *v.* Calhoun (100 Ill. 392), Mun. Aid, 410.
Ryall *v.* Central Pac. R. Co. (76 Cal. 474, 18 Pac. Rep. 430), Employés, Inj. to, 316.
Ryall *v.* Kennedy (8 J. & S. (N. Y.) 347), Death, etc., 95.
Ryan *v.* Anglesea R. Co. (N. J. Eq.) (35 Am. & Eng. R. Cas. 51, 12 Atl. Rep. 539), Mort., 191, 197; Receiv., 134.
Ryan *v.* Canada Southern R. Co. (26 Am. & Eng. R. Cas. 344, 10 Ont. 745), Death, etc., 212.
Ryan *v.* Central Pac. R. Co. (5 Sawy. (U. S.) 260; affirmed in 99 U. S. 382), Land Grants, 49.
Ryan *v.* Central Pac. R. Co. (99 U. S. 382), Land Grants, 8.
Ryan *v.* Chicago & N. W. R. Co. (60 Ill. 171, 12 Am. Ry. Rep. 327), Fel. Serv., 122.
Ryan *v.* Cumberland Valley R. Co. (23 Pa. St. 384), Fel. Serv., 261.
Ryan *v.* Gilmer (2 Mont. 517), Car. of P., 139.
Ryan *v.* Gross (68 Md. 377, 11 Cent. Rep. 502, 12 Atl. Rep. 115, 16 Atl. Rep. 302), Fires, 43, 81, 204, 247; Pl., 134.
Ryan *v.* Hays (23 Am. & Eng. R. Cas. 501, 62 Tex. 42), Mort., 278; Receiv., 75, 82, 186.
Ryan *v.* Hudson River R. Co. (1 J. & S. (N. Y.) 137), Agency, 80; Evid., 139.
Ryan *v.* Leavenworth, A. & N. W. R. Co. (21 Kan. 365), Direct., 48; Divid., 6; Lim. of Ac., 70; Stockh., 21, 98, 99, 100.
Ryan *v.* Long Island R. Co. (51 Hun 607, 22 N. Y. S. R. 655, 4 N. Y. Supp. 381), Employés, Inj. to, 237.
Ryan *v.* Louisville, N. O. & T. R. Co. (44 La. Ann. 806, 11 So. Rep. 30), Contrib. Neg., 103.
Ryan *v.* Lynch (68 Ill. 160), Mun. Aid, 331.
Ryan *v.* Manhattan R. Co. (10 N. Y. S. R. 376, 45 Hun 592, mem.), Witn., 61.
Ryan *v.* Manhattan R. Co. (44 Am. & Eng. R. Cas. 426, 121 N. Y. 126, 23 N. E. Rep. 1131, 30 N. Y. S. R. 624; reversing 49 Hun 609, 17 N. Y. S. R. 998, 1 N. Y. Supp. 899), Elev. Rys., 207; St. Rys., 389.
Ryan *v.* Mississippi Valley & S. I. R. Co. (62 Miss. 162), Em. Dom., 993.
Ryan *v.* Missouri, K. & T. R. Co. (23 Am. & Eng. R. Cas. 703, 65 Tex. 13), Bills of L., 26, 36, 45; Car. of M., 174, 176, 416; Contr., 89.
Ryan *v.* New York C. & H. R. R. Co. (37 Hun (N. Y.) 186), Children, Inj. to, 104.
Ryan *v.* New York C. R. Co. (35 N. Y. 210), Fires, 90, 92, 334.
Ryan *v.* Pennsylvania R. Co. (132 Pa. St. 304, 19 Atl. Rep. 81), Bridges, 53.
Ryan *v.* Rochester & S. R. Co. (9 How. Pr. (N. Y.) 453), Fences, 69.
Ryan *v.* Varga (37 Iowa 78), Mun. Aid, 97.
Ryberg *v.* Portland Cable R. Co. (22 Oreg. 224, 29 Pac. Rep. 614), Trial, 70.
Ryder *v.* Alton & S. R. Co. (13 Ill. 516), Divid., 2; Evid., 233; Subscr., 98, 102, 131, 173.
Ryder *v.* Burlington, C. R. & N. R. Co. (51 Iowa 460, 1 N. W. Rep. 747), Car. of L. S., 58.
Ryder *v.* Bushwick R. Co. (134 N. Y. 83, 31 N. E. Rep. 251, 45 N. Y. S. R. 388; affirming 57 Hun 591, 32 N. E. Rep. 1105, 10 N. Y. Supp. 748), Stock, 69.
Ryland *v.* Peters (1 Phila. (Pa.) 264), Car. of P., 129, 182; Govt. Rds., 4, 6.

Saare *v.* Union R. Co. (20 Mo. App. 211), Children, Inj. to, 106; Evid., 220.
Sabin *v.* Vermont C. R. Co. (25 Vt. 363), Actions, 2; Blasting, 3; Em. Dom., 705, 1061.
Sabine & E. T. R. Co. *v.* Brousard (34 Am. & Eng. R. Cas. 199, 69 Tex. 617, 7 S. W. Rep. 374), Animals, 416; Dam., 105; Flood. Lds., 22, 70, 80, 90; Witn., 105.
Sabine & E. T. R. Co. *v.* Brousard (41 Am. & Eng. R. Cas. 26, 75 Tex. 597, 12 S. W. Rep. 1126), Flood. Lds., 78.
Sabine & E. T. R. Co. *v.* Crus: (83 Tex. 460, 18 S. W. Rep. 755), Charges, 55, 56.
Sabine & E. T. R. Co. *v.* Dean (76 Tex. 73, 13 S. W. Rep. 45), Cross., Inj. at, 275.

Sabine & E. T. R. Co. *v.* Ewing (1 Tex. Civ. App. 531, 21 S. W. Rep. 700), Employés, Inj. to, 649; Fel. Serv., 95, 284; Trial, 160.
Sabine & E. T. R. Co. *v.* Hadnot (30 Am. & Eng. R. Cas. 197, 67 Tex. 503, 4 S. W. Rep. 138), App., 135; Flood. Lds., 76; Negl., 87; Witn., 198.
Sabine & E. T. R. Co. *v.* Hanks (73 Tex. 323, 11 S. W. Rep. 377), Death, etc., 34; Negl., 2.
Sabine & E. T. R. Co. *v.* Hanks (79 Tex. 642, 15 S. W. Rep. 476), Death, etc., 336.
Sabine & E. T. R. Co. *v.* Hanks (2 Tex. Civ. App. 306, 21 S. W. Rep. 947), Death, etc., 331.
Sabine & E. T. R. Co. *v.* Joachimi (58 Tex. 452), App., 29.
Sabine & E. T. R. Co. *v.* Joachimi (11 Am. & Eng. R. Cas. 539, 58 Tex. 456), Flood. Lds., 92, 93, 100, 101.
Sabine & E. T. R. Co. *v.* Johnson (65 Tex. 389), Flood. Lds., 47, 87, 96; Sts. & H., 419.
Sabine & E. T. R. Co. *v.* Johnson (Tex.) (7 S. W. Rep. 378; former appeal 65 Tex. 389), App., 117; New Tr., 86.
Sabine & E. T. R. Co. *v.* Smith (73 Tex. 1, 11 S. W. Rep. 123), Flood. Lds., 98.
Sabine & E. T. R. Co. *v.* Wood (34 Am. & Eng. R. Cas. 190, 69 Tex. 679, 7 S. W. Rep. 372), Embankm., 4.
Sacalaris *v.* Eureka & P. R. Co. (16 Am. & Eng. R. Cas. 580, 18 Nev. 155, 1 Pac. Rep. 835), Evid., 102.
Sachrowitz *v.* Atchison, T. & S. F. R. Co. (34 Am. & Eng. R. Cas. 382, 37 Kan. 212, 15 Pac. Rep. 242), Agency, 96; Assault, 6.
Sack *v.* Dolese (35 Ill. App. 636), Employés, Inj. to, 153, 154.
Sackett *v.* Greenwich (38 Conn. 525), Sts. & H., 16.
Sacramento & P. R. Co. *v.* San Francisco Superior Court (55 Cal. 453), Mort., 215.
Sacramento County *v.* Central Pac. R. Co. (61 Cal. 250), App., 9.
Sacramento, P. & N. R. Co. *v.* Harlan (24 Cal. 334), Em. Dom., 963.
Sacramento Valley R. Co. *v.* Moffatt (6 Cal. 75), Em. Dom., 691.
Sacramento Valley R. Co. *v.* Moffatt (7 Cal. 577), Em. Dom., 370, 371, 427.
Sadd *v.* Malden, W. & B. R. Co. (6 Railw. Cas. 779, 6 Ex. 143, 20 L. J. Ex. 102), Em. Dom., 1089.
Sadler *v.* South Staffordshire & B. D. S. Tramways Co. (38 Am. & Eng. R. Cas. 476, L. R. 23 Q. B. D. 17), Tramw., 6.
Sadowski *v.* Michigan Car Co. (84 Mich. 100, 47 N. W. Rep. 598), Fel. Serv., 49, 114; Negl., 53.
Saffer *v.* Dry Dock, E. B. & B. R. Co. (24 N. Y. S. R. 210, 53 Hun 629, 2 Silv. Sup. Ct. 343, 5 N. Y. Supp. 700), Dam., 77; Evid., 31; St. Rys., 367, 400.
Safford *v.* Boston & M. R. Co. (103 Mass. 583), Fires, 91.
Safford *v.* People (85 Ill. 558), Injunc., 59, 60.
Safford *v.* Vermont & C. R. Co. (60 Vt. 185, 6 N. Eng. Rep. 510, 14 Atl. Rep. 91), Att'ys, 1.
Sage *v.* Central R. Co. (93 U. S. 412), App., 1; Fed. Cts., 26.
Sage *v.* Central R. Co. (99 U. S. 334), Mort., 209.
Sage *v.* Culver (24 N. Y. Supp. 514, 71 Hun 42, 54 N. Y. S. R. 297; affirmed in 147 N. Y. 241, 41 N. E. Rep. 513), Stockh., 100, 101.
Sage *v.* Lake Shore & M. S. R. Co. (70 N. Y. 220, 18 Am. Ry. Rep. 555; dismissing appeal from 11 Hun 1), Stock, 81.
Sage *v.* Memphis & L. R. R. Co. (17 Am. & Eng. R. Cas. 359, 5 McCrary (U. S.) 643, 18 Fed. Rep. 571), Receiv., 174.
Sage *v.* Memphis & L. R. R. Co. (35 Am. & Eng. R. Cas. 40, 125 U. S. 361, 8 Sup. Ct. Rep. 887), Receiv., 19, 91.
Sage *v.* St. Paul, S. & T. F. R. Co. (44 Fed. Rep. 817; affirming 32 Fed. Rep. 821), Land Grants, 120.
Sager *v.* Portsmouth, S. & P. & E. R. Co. (31 Me. 228), Car. of M., 119, 472; Lim. of Liab., 13, 27.
Saginaw, T. & H. R. Co. *v.* Chappell (22 Am. & Eng. R. Cas. 16, 56 Mich. 190, 22 N. W. Rep. 278), Subscr., 155; Sunday, 1.
Saginaw Union St. R. Co. *v.* Michigan C. R. Co. (56 Am. & Eng. R. Cas. 481, 91 Mich. 657, 52 N. W. Rep. 49), Elec. Rys., 14.
Sahlgaard *v.* St. Paul City R. Co. (48 Minn. 232, 51 N. W. Rep. 111), St. Rys., 366, 395.
St. Albans *v.* National Car Co. (57 Vt. 68), Charters, 46; Tax., 135.
St. Andrew's Church *v.* Great Western R. Co. (12 U. C. C. P. 399), Bridges, 5, 95.
St. Catharines & N. C. R. Co., In re (15 Ont. 583), Em. Dom., 1212.
St. Catharines R. Co. *v.* Norris (44 Am. & Eng. R. Cas. 119, 17 Ont. 667), Em. Dom., 1244.
St. Charles St. R. Co. *v.* Board of Assessors (31 La. Ann. 852), Tax., 29, 262.
St. Clair *v.* Chicago, B. & Q. R. Co. (42 Am. & Eng. R. Cas. 414, 80 Iowa 304, 45 N. W. Rep. 570), Car. of M., 108, 132, 698.
St. Clair *v.* Missouri Pac. R. Co. (29 Mo. App. 76), Eject. Pass., 114; New Tr., 15; Pl., 89; Words & Ph., 51.
St. Clair St. R. Co. *v.* Eadie (23 Am. & Eng. R. Cas. 269, 43 Ohio St. 91, 1 N. E. Rep. 519, 54 Am. Rep. 144, n.), Children, Inj. to, 127, 128.
St. Denis *v.* Compagnie, etc. (6 Montr. Super. 484), Em. Dom., 1258, 1273.
St. Germans *v.* Crystal Palace & S. L. J. R. Co. (19 W. R. 584, L. R. 11 Eq. 568, 24 L. T. 288), Em. Dom., 1209.
St. James Parish *v.* Newburyport & A. H. R. Co. (141 Mass. 500, 6 N. E. Rep. 749), Agency, 107.
St. John *v.* Eastern R. Co. (1 Allen (Mass.) 544), Evid., 144.
St. John *v.* Erie R. Co. (10 Blatchf. (U. S.) 271), Divid., 8.
St. John *v.* Erie R. Co. (22 Wall. (U. S.) 136, 11 Am. Ry. Rep. 446), Mort., 118; Words & Ph., 140.
St. John *v.* MacDonald (14 Can. Sup. Ct. 1; affirming 25 New Brun. 318), Ferries, 11.

St. John *v.* Southern Exp. Co. (1 Woods (U. S.) 612), Exp. Cos., 36, 77.
St. John *v.* Van Santvoord (25 Wend. (N. Y.) 660), Car. of M., 579.
St. John & M. R. Co. *v.* Montgomery (21 New Brun. 441), Fences, 69.
St. John B. & R. E. Co., Ex parte (30 New Brun. 551), Tax., 228.
St. Johns *v.* Central Vt. R. Co. (L. R. 14 App. Cas. 590), Tax., 384.
St. Johns & H. R. Co. *v.* Bartola (28 Fla. 82, 9 So. Rep. 853), Liens, 62; Pl., 85.
St. Johnsbury & L. C. R. Co. *v.* Hunt (15 Am. & Eng. R. Cas. 113, 55 Vt. 570, 45 Am. Rep. 639), Mal. Pros., 10.
St. Johnsbury & L. C. R. Co. *v.* Hunt (29 Am. & Eng. R. Cas. 234, 59 Vt. 294, 7 Atl. Rep. 277), Agency, 3; Mal. Pros., 14.
St. Johnsbury & L. C. R. Co. *v.* Hunt (38 Am. & Eng. R. Cas. 238, 60 Vt. 588, 7 N. Eng. Rep. 39, 1 L. R. A. 189, 6 Am. St. Rep. 138, 15 Atl. Rep. 186), Arrest, 5.
St. Johnsbury & L. C. R. Co. *v.* Willard (61 Vt. 134, 2 L. R. A. 528, 17 Atl. Rep. 38), Em. Dom., 657; Judgm., 22.
St. Joseph *v.* Hannibal & St. J. R. Co. (39 Mo. 476), Tax., 10, 198.
St. Joseph *v.* Quebec C. R. Co. (11 Quebec L. R. 193), Just. P., 1.
St. Joseph *v.* Saville (39 Mo. 460), Contr., 52.
St. Joseph *v.* Union R. Co. (116 Mo. 636, 22 S. W. Rep. 794), St. Rys., 318.
St. Joseph & D. C. R. Co. *v.* Baldwin (7 Neb. 247), Land Grants, 29.
St. Joseph & D. C. R. Co. *v.* Baldwin (2 Am. & Eng. R. Cas. 510, 5 Am. & Eng. R. Cas. 408, 103 U. S. 426), Land Grants, 29.
St. Joseph & D. C. R. Co. *v.* Buchanan County Court (39 Mo. 485), Mun. Aid, 8, 141.
St. Joseph & D. C. R. Co. *v.* Callender (13 Kan. 496), Em. Dom., 390, 1012.
St. Joseph & D. C. R. Co. *v.* Chase (11 Kan. 47), Fires, 84, 206, 227, 240, 324.
St. Joseph & D. C. R. Co. *v.* Dryden (11 Kan. 186), Injunc., 48.
St. Joseph & D. C. R. Co. *v.* Dryden (17 Kan. 278), Injunc., 27; Trial, 60.
St. Joseph & D. C. R. Co. *v.* Grover (11 Kan. 302), Animals, 561.
St. Joseph & D. C. R. Co. *v.* Orr (8 Kan. 419, 5 Am. Ry. Rep. 127), Em. Dom., 559, 596, 624, 735, 943.
St. Joseph & D. C. R. Co. *v.* Ryan (11 Kan. 602), Contr., 60; Stat. & D., 58.
St. Joseph & D. C. R. Co. *v.* Smith (19 Kan. 225), Receiv., 46, 125; Tax., 260.
St. Joseph & G. I. R. Co. *v.* Devereux (41 Fed. Rep. 14), Tax., 78.
St. Joseph & I. R. Co. *v.* Cudmore (47 Am. & Eng. R. Cas. 249, 103 Mo. 634, 15 S. W. Rep. 535), Em. Dom., 520.
St. Joseph & I. R. Co. *v.* Shambaugh (106 Mo. 557, 17 S. W. Rep. 581), Charters, 6, 8, 9, 29; Em. Dom., 14, 286, 343, 693, 714; Incorp., 3, 7.
St. Joseph & St. L. R. Co. *v.* Humphreys (145 U. S. 105, 12 Sup. Ct. Rep. 795), Receiv., 36, 67.
St. Joseph & W. R. Co. *v.* Wheeler (26 Am. & Eng. R. Cas. 173, 35 Kan. 185, 10 Pac. Rep. 461), Car. of P., 50; Conduct., 3; Death, etc., 410.
St. Joseph County Com'rs *v.* South Bend & M. St. R. Co. (118 Ind. 68, 20 N. E. Rep. 499), Contr., 44; St. Rys., 83.
St. Joseph F. & M. Ins. Co. *v.* Leland (90 Mo. 177, 2 S. W. Rep. 431), Mun. Aid, 418.
St. Joseph Hydraulic Co. *v.* Cincinnati, W. & M. R. Co. (109 Ind. 172, 9 N. E. Rep. 727), Em. Dom., 315.
St. Joseph Terminal R. Co. *v.* Hannibal & St. J. R. Co. (94 Mo. 535, 13 West. Rep. 181, 6 S. W. Rep. 691), Em. Dom., 182, 351, 885, 920.
St. Joseph Tp. *v.* Rogers (16 Wall. (U. S.) 644, 2 Am. Ry. Rep. 105), Mun. Aid, 22, 126, 135.
St. Julien *v.* Morgan L. & T. R. Co. (35 La. Ann. 924), Em. Dom., 1018.
St. Julien *v.* Morgan's L. & T. R. & S. Co. (33 Am. & Eng. R. Cas. 92, 39 La. Ann. 1063, 3 So. Rep. 280), Em. Dom., 1074; Tresp., 1; Trial, 9.
St. Lawrence & A. R. Co., In re (133 N. Y. 270, 31 N. E. Rep. 218, 45 N. Y. S. R. 207), Em. Dom., 308, 1031.
St. Lawrence & A. R. Co., In re (49 N. Y. S. R. 598, 66 Hun 306, 21 N. Y. Supp. 131), Em. Dom., 40, 406.
St. Lawrence & A. R. Co. *v.* De Camp (23 N. Y. Supp. 544), Em. Dom., 772.
St. Lawrence & O. R. Co. *v.* Lett (26 Am. & Eng. R. Cas. 454, 11 Can. Sup. Ct. 422; affirming 11 Ont. App. 1, which reverses 1 Ont. 545), Death, etc., 400.
St. Louis, The (48 Fed. Rep. 312), Adm., 1, 2.
St. Louis *v.* Alexander (23 Mo. 483), Injunc., 54.
St. Louis *v.* Gleason (89 Mo. 67, 14 S. W. Rep. 768), Em. Dom., 235.
St. Louis *v.* Gleason (93 Mo. 33, 8 S. W. Rep. 348), Em. Dom., 235, 238.
St. Louis *v.* Missouri Pac. R. Co. (114 Mo. 13, 21 S. W. Rep. 202), Ejectm., 16.
St. Louis *v.* Missouri R. Co. (87 Mo. 151; affirming 13 Mo. App. 524), St. Rys., 163.
St. Louis *v.* O'Flynn (119 Ill. 200, 10 N. E. Rep. 395), Sts. & H., 211.
St. Louis *v.* St. Louis R. Co. (50 Mo. 94, 3 Am. Ry. Rep. 237), St. Rys., 161.
St. Louis *v.* St. Louis R. Co. (26 Am. & Eng. R. Cas. 534, 89 Mo. 44, 1 S. W. Rep. 305; affirming 14 Mo. App. 221), St. Rys., 272.
St. Louis *v.* Shield (62 Mo. 247), Incorp., 11.
St. Louis *v.* Wiggins Ferry Co. (11 Wall. (U. S.) 423), Tax., 67.
St. Louis, A. & C. R. Co. *v.* Dalby (19 Ill. 353), Actions, 2; Assault, 2; Tickets & F., 28, 32, 124.
St. Louis, A. & R. I. R. Co. *v.* Coultas (33 Ill. 189), Em. Dom., 411.
St. Louis, A. & T. H. R. Co. *v.* Andres (16 Ill. App. 292), Comp. Neg., 4; Contrib. Neg., 3.
St. Louis, A. & T. H. R. Co. *v.* Balsley (18 Ill. App. 79), Leases, 41; Stat., 63.

St. Louis, A. & T. H. R. Co. *v.* Belleville (20 Ill. App. 580), Sts. & H., 98.
St. Louis, A. & T. H. R. Co. *v.* Belleville (32 Am. & Eng. R. Cas. 278, 122 Ill. 376, 12 N. E. Rep. 680, 10 West. Rep. 605), Sts. & H., 83, 403, 410.
St. Louis, A. & T. H. R. Co. *v.* Berger (9 Ill. App. 341), Negl., 106.
St. Louis, A. & T. H. R. Co. *v.* Brown (34 Ill. App. 552), Flood. Lds., 63; Leases, 65; Nuis., 12.
St. Louis, A. & T. H. R. Co. *v.* Carr (47 Ill. App. 353), Car. of P., 157, 353, 480.
St. Louis, A. & T. H. R. Co. *v.* Claunch (41 Ill. App. 592), Flood. Lds., 76; Trial, 45.
St. Louis, A. & T. H. R. Co. *v.* Cleveland, C., C. & I. R. Co. (33 Am. & Eng. R. Cas. 16, 125 U. S. 658, 8 Sup. Ct. Rep. 1011), Leases, 97; Mort., 114, 274.
St. Louis, A. & T. H. R. Co. *v.* Corgan (49 Ill. App. 229), Employés, Inj. to, 182, 295; Fel. Serv., 150, 158, 493; Witn., 50.
St. Louis, A. & T. H. R. Co. *v.* Dorsey (47 Ill. 288), Proc., 45.
St. Louis, A. & T. H. R. Co. *v.* Flannagan (23 Ill. App. 489), Car. of M., 42; Charges, 72.
St. Louis, A. & T. H. R. Co. *v.* Fullerton (45 Ill. App. 618), Animals, 568.
St. Louis, A. & T. H. R. Co. *v.* Gilham (39 Ill. 455), Fires, 40.
St. Louis, A. & T. H. R. Co. *v.* Hawkins (39 Ill. App. 406), Bagg., 58.
St. Louis, A. & T. H. R. Co. *v.* Hill (11 Ill. App. 248), Discrim., 2, 79.
St. Louis, A. & T. H. R. Co. *v.* Hill (14 Ill. App. 579), Discrim., 1, 2, 37, 38, 52.
St. Louis, A. & T. H. R. Co. *v.* Huggins (20 Ill. App. 639), Negl., 75; Trial, 141.
St. Louis, A. & T. H. R. Co. *v.* Indianapolis & St. L. R. Co. (9 Biss. (U. S.) 99), Eq., 18.
St. Louis, A. & T. H. R. Co. *v.* Indianapolis & St. L. R. Co. (9 Biss. (U. S.) 144), Consol., 37; Spec. Perf., 10.
St. Louis, A. & T. H. R. Co. *v.* Karnes (10 Am. & Eng. R. Cas. 39, 101 Ill. 402), Em. Dom., 1011.
St. Louis, A. & T. H. R. Co. *v.* Linder (39 Ill. 433), Animals, 117, 313.
St. Louis, A. & T. H. R. Co. *v.* Manly (58 Ill. 300, 11 Am. Ry. Rep. 102), Collis., 18; Cross., Inj. at, 13, 264.
St. Louis, A. & T. H. R. Co. *v.* Miller (43 Ill. 199), Charters, 77; Consol., 42, 47.
St. Louis, A. & T. H. R. Co. *v.* Montgomery (39 Ill. 335), Car. of M., 317; Fires, 289; Wareh., 4.
St. Louis, A. & T. H. R. Co. *v.* Overturf (19 Ill. App. 656, mem.), Animals, 353.
St. Louis, A. & T. H. R. Co. *v.* Pflugmacher (9 Ill. App. 300), Comp. Neg., 19; Cross., Inj. at, 135, 250.
St. Louis, A. & T. H. R. Co. *v.* Russell (39 Ill. App. 443), Animals, 197, 198.
St. Louis, A. & T. H. R. Co. *v.* South (43 Ill. 176), Tickets & F., 27.
St. Louis, A. & T. H. R. Co. *v.* Strotz (47 Ill. App. 342), Fires, 266, 288, 311.
St. Louis, A. & T. H. R. Co. *v.* Thomas (85 Ill. 464), Agency, 29.
St. Louis, A. & T. H. R. Co. *v.* Todd (36 Ill. 409), Comp. Neg., 20; Fences, 41.
St. Louis, A. & T. H. R. Co. *v.* Walker (39 Ill. App. 388), Witn., 30.
St. Louis, A. & T. H. R. Co. *v.* Winkelmann (47 Ill. App. 276), Bridges, 22; Flood. Lds., 71, 84.
St. Louis & C. R. Co. *v.* Blackwood (14 Ill. App. 503), Ry. Com'rs, 14.
St. Louis & C. R. Co. *v.* Carroll (13 Ill. App. 585), Tickets & F., 22, 77.
St. Louis & C. R. Co. *v.* Drennan (26 Ill. App. 263), Em. Dom., 1078; Indep. Contr., 16.
St. Louis & C. R. R. Co. *v.* Eakins (30 Iowa 279), Evid., 148, 233; Subscr., 12, 184.
St. Louis & C. R. Co. *v.* East St. Louis & C. R. Co. (139 Ill. 401, 28 N. E. Rep. 1088; affirming 39 Ill. App. 354), Leases, 105.
St. Louis & C. R. Co. *v.* Hardway (17 Ill. App. 321), Bagg., 31, 69, 74.
St. Louis & C. R. Co. *v.* Thomas (34 Fed. Rep. 774; affirmed in 37 Fed. Rep. 839), Em. Dom., 189.
St. Louis & C. R. Co. *v.* Vanover (14 Ill. App. 522), Animals, 447.
St. Louis & F. R. Co. *v.* Almeroth (62 Mo. 343), Em. Dom., 898.
St. Louis & I. M. R. Co. *v.* Clark (53 Mo. 214, 12 Am. Ry. Rep. 480), Stat., 38.
St. Louis & I. M. R. Co. *v.* Larned (6 Am. & Eng. R. Cas. 436, 103 Ill. 293), Bills of L., 126; Car. of M., 304, 593.
St. Louis & K. C. R. Co. *v.* Olive (40 Ill. App. 82), Med. Serv., 6.
St. Louis & P. R. Co. *v.* Kerr (48 Ill. App. 496), Int., 1; Liens, 17, 18.
St. Louis & St. J. R. Co. *v.* Richardson (45 Mo. 466), Em. Dom., 742, 802.
St. Louis & S. F. R. Co. *v.* Apperson (97 Mo. 300, 10 S. W. Rep. 478), Mun. Aid, 144; Tax., 269, 339.
St. Louis & S. F. R. Co. *v.* Armstrong (25 Kan. 561), Animals, 627.
St. Louis & S. F. R. Co. *v.* Barger (52 Ark. 78, 12 S. W. Rep. 156), Evid., 194.
St. Louis & S. F. R. Co. *v.* Basham (47 Ark. 321, 1 S. W. Rep. 555), Animals, 480.
St. Louis & S. F. R. Co. *v.* Bradley (54 Fed. Rep. 630, 2 U. S. App. 637, 4 C. C. A. 528), Witn., 149.
St. Louis & S. F. R. Co. *v.* Byron (24 Kan. 350), Animals, 329, 615.
St. Louis & S. F. R. Co. *v.* Clark (55 Am. & Eng. R. Cas. 367, 48 Kan. 321, 29 Pac. Rep. 312), Car. of L. S., 24, 98, 152; New Tr., 26.
St. Louis & S. F. R. Co. *v.* De Ford (38 Kan. 299, 16 Pac. Rep. 442), Proc., 37.
St. Louis & S. F. R. Co. *v.* Dudgeon (28 Kan. 283), Animals, 154, 349, 423.
St. Louis & S. F. R. Co. *v.* Edwards (7 Am. & Eng. R. Cas. 547, 26 Kan. 72), Cat.-Gds., 29, 30; Witn., 106.
St. Louis & S. F. R. Co. *v.* Evans & H. Fire Brick Co. (22 Am. & Eng. R. Cas. 517, 85 Mo. 307), Em. Dom., 14, 37, 373, 401, 889; Estop., 3; Stat., 53.

St. Louis & S. F. R. Co. *v.* Farr (56 Fed. Rep. 994, 6 C. C. A. 211, 12 U. S. App. 520), Employés, Inj. to, 753, 762, 763; Witn., 177.
St. Louis & S. F. R. Co. *v.* Foltz (52 Fed. Rep. 627), Em. Dom., 77; For. Corp., 9; Husb. & W., 6; Words & Ph., 55.
St. Louis & S. F. R. Co. *v.* Fudge (35 Am. & Eng. R. Cas. 246, 39 Kan. 543, 18 Pac. Rep. 720), Fires, 164; Trial, 216.
St. Louis & S. F. R. Co. *v.* George (85 Tex. 150, 19 S. W. Rep. 1036), Agency, 83; Bridges, 34; Employés, Inj. to, 152; Evid., 88.
St. Louis & S. F. R. Co. *v.* Gill (47 Am. & Eng. R. Cas. 462, 54 Ark. 101, 15 S. W. Rep. 18), Charges, 4, 7, 13; Tickets & F., 133.
St. Louis & S. F. R. Co. *v.* Kinman (49 Kan. 627, 31 Pac. Rep. 126), Animals, 309.
St. Louis & S. F. R. Co. *v.* McBride (141 U. S. 127, 11 Sup. Ct. Rep. 982), Fed. Cts., 19.
St. Louis & S. F. R. Co. *v.* McClain (80 Tex. 85, 15 S. W. Rep. 789), Contrib. Neg., 11, 13; Employés, Inj. to, 93, 225, 297, 353; Fel. Serv., 15, 57; Negl., 66.
St. Louis & S. F. R. Co. *v.* McReynolds (24 Kan. 368), Animals, 626; Appear., 7.
St. Louis & S. F. R. Co. *v.* Marker (41 Ark. 542), Consol., 46; Employés, Inj. to, 207, 378.
St. Louis & S. F. R. Co. *v.* Mitchell (57 Ark. 418, 21 S. W. Rep. 883), Car. of P., 162; Derailm., 5; Evid., 125.
St. Louis & S. F. R. Co. *v.* Mossman (30 Kan. 336, 2 Pac. Rep. 146), Animals, 469.
St. Louis & S. F. R. Co. *v.* Murray (52 Am. & Eng. R. Cas. 373, 55 Ark. 248, 18 S. W. Rep. 50), Car. of P., 439; Evid., 211.
St. Louis & S. F. R. Co. *v.* O'Loughlin (49 Fed. Rep. 440, 4 U. S. App. 283, 1 C. C. A. 311), Animals, 578.
St. Louis & S. F. R. Co. *v.* Payne (13 Am. & Eng. R. Cas. 632, 29 Kan. 166), Fright. Teams, 5.
St. Louis & S. F. R. Co. *v.* Richardson (47 Kan. 517, 28 Pac. Rep. 183), Fires, 318.
St. Louis & S. F. R. Co. *v.* Rierson (38 Kan. 359, 16 Pac. Rep. 443), Judgm., 46.
St. Louis & S. F. R. Co. *v.* Ritz (19 Am. & Eng. R. Cas. 611, 33 Kan. 404, 6 Pac. Rep. 533), Cat.-Gds., 34; Fences, 109; Witn., 134.
St. Louis & S. F. R. Co. *v.* Ryan (56 Ark. 245, 19 S. W. Rep. 839), Tickets & F., 115, 132.
St. Louis & S. F. R. Co. *v.* Sageley (56 Ark. 549, 20 S. W. Rep. 413), Animals, 473; Witn., 68.
St. Louis & S. F. R. Co. *v.* Sharp (13 Am. & Eng. R. Cas. 595, 27 Kan. 134), Fences, 108.
St. Louis & S. F. R. Co. *v.* Shoemaker (11 Am. & Eng. R. Cas. 379, 27 Kan. 677), Dam., 40.
St. Louis & S. F. R. Co. *v.* Shoemaker (38 Kan. 723, 17 Pac. Rep. 584), Trial, 220.
St. Louis & S. F. R. Co. *v.* Schumacher (152 U. S. 77, 14 Sup. Ct. Rep. 479), Employés, Inj. to, 718.
St. Louis & S. F. R. Co. *v.* Smith (20 Am. & Eng. R. Cas. 150, 42 Ark. 265), Em. Dom., 618.
St. Louis & S. F. R. Co. *v.* Snaveley (47 Kan. 637, 28 Pac. Rep. 615), Fires, 188.
St. Louis & S. F. R. Co. *v.* Stevenson (54 Ark. 116, 15 S. W. Rep. 22), Bridges, 98.
St. Louis & S. F. R. Co. *v.* Traweek (84 Tex. 65, 19 S. W. Rep. 370), Employés, Inj. to, 478; Proc., 29; Trial, 5.
St. Louis & S. F. R. Co. *v.* Trimble (54 Ark. 354, 15 S. W. Rep. 899), App., 126; Eject. Pass., 106; Judgm., 20.
St. Louis & S. F. R. Co. *v.* Weaver (28 Am. & Eng. R. Cas. 341, 35 Kan. 412, 11 Pac. Rep. 408), App., 115; Contrib. Neg., 105; Employés, Inj. to, 46; Evid., 84, 219; Fel. Serv., 116, 352.
St. Louis & S. F. R. Co. *v.* Williams (53 Ark. 58, 13 S. W. Rep. 796), Tax., 248.
St. Louis & S. F. R. Co. *v.* Wilson (20 Am. & Eng. R. Cas. 595, 114 U. S. 60, 5 Sup. Ct. Rep. 738), Rem. of C., 40.
St. Louis & S. F. R. Co. *v.* Woolum (84 Tex. 570, 19 S. W. Rep. 782), Employés, Inj. to, 770; Trial, 21.
St. Louis & S. E. R. Co. *v.* Britz (72 Ill. 256), Comp. Neg., 4; Employés, Inj. to, 242; Fel. Serv., 136, 291, 378.
St. Louis & S. E. R. Co. *v.* Casner (72 Ill. 384), Animals, 464.
St. Louis & S. E. R. Co. *v.* Dorman (72 Ill. 504), Car. of L. S., 4.
St. Louis & S. E. R. Co. *v.* Lux (63 Ill. 523), Em. Dom., 854, 886.
St. Louis & S. E. R. Co. *v.* Mathias (50 Ind. 65, 8 Am. Ry. Rep. 381), Contrib. Neg., 4; Cross., Inj. at, 264, 268, 269; Negl., 20, 89; Sts. & H., 378, 390.
St. Louis & S. E. R. Co. *v.* Myrtle (51 Ind. 566), Eject. Pass., 135; New Tr., 4; Tickets & F., 23; Trial, 199.
St. Louis & S. E. R. Co. *v.* Needles (85 Ill. 462), Em. Dom., 1027.
St. Louis & S. E. R. Co. *v.* Smuck (49 Ind. 302, 8 Am. Ry. Rep. 209), Bills of L., 102; Lim. of Liab., 43.
St. Louis & S. E. R. Co. *v.* Teters (68 Ill. 144), Em. Dom., 369, 381, 613, 854.
St. Louis & S. E. R. Co. *v.* Valirius (56 Ind. 511, 18 Am. Ry. Rep. 116), Employés, Inj. to, 29, 101, 119, 472.
St. Louis & S. W. R. Co. *v.* Kay (85 Tex. 558, 22 S. W. Rep. 665), Stat., 52, 65.
St. Louis & S. W. R. Co. *v.* Rice (85 Ill. 406), Assump., 1.
St. Louis & T. Packet Co. *v.* Missouri Pac. R. Co. (35 Mo. App. 272), Car. of M., 556.
St. Louis & T. H. R. Co. *v.* Rose (20 Ill. App. 670), Car. of M., 306.
St. Louis, A. & T. R. Co. *v.* Anderson (17 Am. & Eng. R. Cas. 97, 39 Ark. 167), Em. Dom., 645, 724, 728; Witn., 109.
St. Louis, A. & T. R. Co. *v.* Berry (4 Tex. App. (Civ. Cas.) 235, 15 S. W. Rep. 48), Car. of P., 642.
St. Louis, A. & T. R. Co. *v.* Burns (71 Tex. 470, 9 S. W. Rep. 467), Evid., 179.

St. Louis, A. & T. R. Co. *v.* Crosnoe (37 Am. & Eng. R. Cas. 313, 72 Tex. 79, 10 S. W. Rep. 342), Licensees, Inj. to, 18.
St. Louis, A. & T. R. Co. *v.* Dutton (Tex.) (10 S. W. Rep. 291), Contr., 95.
St. Louis, A. & T. R. Co. *v.* Evans (78 Tex. 369, 14 S. W. Rep. 798), Animals, 384, 440.
St. Louis, A. & T. R. Co. *v.* Felton (4 Tex. App. (Civ. Cas.) 60, 14 S. W. Rep. 1072), Animals, 447.
St. Louis, A. & T. R. Co. *v.* Finley (79 Tex. 85, 15 S. W. Rep. 266), Car. of P., 29, 137, 144; Words & Ph., 150.
St. Louis, A. & T. R. Co. *v.* Fire Assoc. of Phila. (55 Ark. 163, 18 S. W. Rep. 43), Car. of M., 189; Fire Ins., 12; Fires, 35, 47.
St. Louis, A. & T. R. Co. *v.* Graham (55 Ark. 294, 18 S. W. Rep. 56), Flood. Lds., 89; New Tr., 38.
St. Louis, A. & T. R. Co. *v.* Hardy (52 Am. & Eng. R. Cas. 224, 55 Ark. 134, 17 S. W. Rep. 711), Sleep. Car Cos., 8.
St. Louis, A. & T. R. Co. *v.* Harris (73 Tex. 375, 11 S. W. Rep. 405), Contr., 102; Parties, 1.
St. Louis, A. & T. R. Co. *v.* Hauks (45 Am. & Eng. R. Cas. 521, 78 Tex. 300, 14 S. W. Rep. 691), Animals, 82.
St. Louis, A. & T. R. Co. *v.* Heard (3 Tex. App. (Civ. Cas.) 470), Land. & T., 4.
St. Louis, A. & T. R. Co. *v.* Holden (3 Tex. App. (Civ. Cas.) 391), Animals, 292.
St. Louis, A. & T. R. Co. *v.* Hoover (53 Ark. 377, 13 S. W. Rep. 1092), Agency, 18, 62; Med. Serv., 4.
St. Louis, A. & T. R. Co. *v.* Johnson (45 Am. & Eng. R. Cas. 381, 53 Ark. 282, 13 S. W. Rep. 1096), Car. of M., 160, 290.
St. Louis, A. & T. R. Co. *v.* Johnston (78 Tex. 536, 15 S. W. Rep. 104), Death, etc., 282, 344, 430; Evid., 87; Witn., 131.
St. Louis, A. & T. R. Co. *v.* Jones (Tex.) (14 S. W. Rep. 309), Employés, Inj. to, 566; Evid., 43, 75, 87, 193; Witn., 99.
St. Louis, A. & T. R. Co. *v.* Kelton (55 Ark. 483, 18 S. W. Rep. 933), Employés, Inj. to, 252.
St. Louis, A. & T. R. Co. *v.* Knott (54 Ark. 424, 16 S. W. Rep. 9), Fences, 13; Indep. Contr., 16.
St. Louis, A. & T. R. Co. *v.* Lemon (83 Tex. 143, 18 S. W. Rep. 331), Employés, Inj. to, 213; Fel. Serv., 217, 219.
St. Louis, A. & T. R. Co. *v.* McKee (4 Tex. App. (Civ. Cas.) 28, 15 S. W. Rep. 45), Car. of M., 213.
St. Louis, A. & T. R. Co. *v.* Mackie (37 Am. & Eng. R. Cas. 94, 71 Tex. 491, 1 L. R. A. 667, 9 S. W. Rep. 451), Car. of P., 317, 318; Dam., 102; Evid., 175; Tickets & F., 53.
St. Louis, A. & T. R. Co. *v.* McKinsey (78 Tex. 298, 14 S. W. Rep. 645), Fires, 101; Judgm., 10.
St. Louis, A. & T. R. Co. *v.* Mara (Ark.) (16 S. W. Rep. 196), Employés, Inj. to, 389.
St. Louis, A. & T. R. Co. *v.* Matthews (40 Am. & Eng. R. Cas. 523, 75 Tex. 92, 12 S. W. Rep. 976), Liens, 45.
St. Louis, A. & T. R. Co. *v.* Neel (55 Am. & Eng. R. Cas. 428, 56 Ark. 279, 19 S. W. Rep. 963), Bills of L., 21; Car. of M., 47, 72, 76, 97, 635, 652; Connect. L., 4.
St. Louis, A. & T. R. Co. *v.* Overbaum (4 Tex. App. (Civ. Cas.) 182, 16 S. W. Rep. 936), Em. Dom., 921.
St. Louis, A. & T. R. Co. *v.* Pickens (3 Tex. App. (Civ. Cas.) 471), Animals, 587, 593.
St. Louis, A. & T. R. Co. *v.* Putnam (1 Tex. Civ. App. 142, 20 S. W. Rep. 1002), Employés, Inj. to, 126.
St. Louis, A. & T. R. Co. *v.* Robbins (4 Tex. App. (Civ. Cas.) 63, 14 S. W. Rep. 1075), Car. of L. S., 87.
St. Louis, A. & T. R. Co. *v.* Sandal (3 Tex. App. (Civ. Cas.) 453), Liens, 56, 61.
St. Louis, A. & T. R. Co. *v.* Sharp (3 Tex. App. (Civ. Cas.) 394), Tresp., Inj. to, 95.
St. Louis, A. & T. R. Co. *v.* State (52 Ark. 51, 11 S. W. Rep. 1035), Crim. L., 32.
St. Louis, A. & T. R. Co. *v.* State (56 Ark. 166, 19 S. W. Rep. 572), Cross., Inj. at, 99; Penalty, 1, 11.
St. Louis, A. & T. R. Co. *v.* Ticer (3 Tex. App. (Civ. Cas.) 475), Husb. & W., 12.
St. Louis, A. & T. R. Co. *v.* Triplett (48 Am. & Eng. R. Cas. 283, 54 Ark. 289, 16 S. W. Rep. 266, 15 S. W. Rep. 831), App., 94; Employés, Inj. to, 18, 255, 519; Fel. Serv., 1, 3, 79, 447.
St. Louis, A. & T. R. Co. *v.* Tucker (3 Tex. App. (Civ. Cas.) 390), Passes, 17.
St. Louis, A. & T. R. Co. *v.* Turner (1 Tex. Civ. App. 625, 20 S. W. Rep. 1008), App., 66; Car. of L. S., 80, 138, 143, 146; Evid., 178; New Tr., 29; Pl., 126.
St. Louis, A. & T. R. Co. *v.* Welch (38 Am. & Eng. R. Cas. 81, 72 Tex. 298, 2 L. R. A. 839, 10 S. W. Rep. 529), Employés, 4; Fel. Serv., 25, 435.
St. Louis, A. & T. R. Co. *v.* Whitaker (68 Tex. 630, 5 S. W. Rep. 448), Receiv., 25.
St. Louis, A. & T. R. Co. *v.* Whitley (77 Tex. 126, 13 S. W. Rep. 853), Appear., 3; Proc., 40, 48.
St. Louis Bolt & I. Co. *v.* Brennan (20 Ill. App. 555), Employés, Inj. to, 330.
St. Louis Bridge & C. Co. *v.* Memphis, C. & N. W. R. Co. (72 Mo. 664), Liens, 38, 41.
St. Louis Bridge & T. R. Co. *v.* People (39 Am. & Eng. R. Cas. 562, 127 Ill. 627, 21 N. E. Rep. 348), Evid., 106; Tax., 257.
St. Louis Bridge Co. *v.* Fellows (31 Ill. App. 282), Death, etc., 360.
St. Louis Bridge Co. *v.* Fellows (39 Ill. App. 456), New Tr., 22.
St. Louis Coal R. Co. *v.* Moore (14 Ill. App. 510), Car. of P., 174.
St. Louis County *v.* St. Paul & D. R. Co. (45 Minn. 510, 48 N. W. Rep. 334), Tax., 165.
St. Louis County Com'rs *v.* Nettleton (22 Minn. 356), Mun. Aid, 314.
St. Louis, Ft. S. & W. R. Co. *v.* Grove (39 Kan. 731, 18 Pac. Rep. 958), Att'ys, 1.
St. Louis, Ft. S. & W. R. Co. *v.* Irwin (37 Kan. 701, 16 Pac. Rep. 146), Employés, Inj. to, 45, 55, 57, 100, 182, 206, 719.

St. Louis, Ft. S. & W. R. Co. *v.* McAuliff (43 Kan. 185, 23 Pac. Rep. 102), Em. Dom., 701, 828.
St. Louis, Ft. S. & W. R. Co. *v.* Martin (10 Am. & Eng. R. Cas. 514, 29 Kan. 750), Em. Dom., 774.
St. Louis, Ft. S. & W. R. Co. *v.* Noble (43 Kan. 310, 23 Pac. Rep. 438), App., 113.
St. Louis, Ft. S. & W. R. Co. *v.* Tiernan (40 Am. & Eng. R. Cas. 525, 37 Kan. 606, 15 Pac. Rep. 544), Bills & N., 23, 24; Charters, 10; Contr., 47; Direct., 35; Evid., 190; Incorp., 6; Officers, 11.
St. Louis, Ft. S. & W. R. Co. *v.* Willis (33 Am. & Eng. R. Cas. 397, 38 Kan. 330, 16 Pac. Rep. 728), Indep. Contr., 3, 18; Words & Ph., 198.
St. Louis Ins. Co. *v.* St. Louis, V., T. H. & I. R. Co. (3 Am. & Eng. R. Cas. 260, 104 U. S. 146), Car. of M., 543, 606, 615.
St. Louis, I. M. & S. R. Co., Ex parte (16 Am. & Eng. R. Cas. 547, 40 Ark. 141), Proc., 32, 46.
St. Louis, I. M. & S. R. Co. *v.* Adcock (40 Am. & Eng. R. Cas. 682, 52 Ark. 406, 12 S. W. Rep. 874), Car. of P., 62, 257; Stat. & D., 32; Tickets & F., 74.
St. Louis, I. M. & S. R. Co. *v.* Alexander (49 Ark. 190, 4 S. W. Rep. 753), Tax., 329.
St. Louis, I. M. & S. R. Co. *v.* Amos (54 Ark. 159, 15 S. W. Rep. 362), Cross., Inj. at, 257, 259; Witn., 22.
St. Louis, I. M. & S. R. Co. *v.* Anthony (7 Am. & Eng. R. Cas. 366, 73 Mo. 431), Tax., 350.
St. Louis, I. M. & S. R. Co. *v.* Atchison (47 Ark. 74, 14 S. W. Rep. 468), Car. of P., 254, 258.
St. Louis, I. M. & S. R. Co. *v.* Bennett (53 Ark. 208, 13 S. W. Rep. 742), Agency, 19.
St. Louis, I. M. & S. R. Co. *v.* Berry (41 Ark. 509), Consol., 5, 24; Tax., 137, 144, 158.
St. Louis, I. M. & S. R. Co. *v.* Berry (113 U. S. 465, 5 Sup. Ct. Rep. 529), Tax., 158.
St. Louis, I. M. & S. R. Co. *v.* Berryhill (3 Tex. App. (Civ. Cas.) 387), Car. of P., 214.
St. Louis, I. M. & S. R. Co. *v.* Biggs (50 Ark. 169, 6 S. W. Rep. 724), Animals, 314, 591.
St. Louis, I. M. & S. R. Co. *v.* Biggs (52 Ark. 240, 12 S. W. Rep. 331), Lim. of Ac., 30, 31.
St. Louis, I. M. & S. R. Co. *v.* Bone (52 Ark. 26, 11 S. W. Rep. 950), Car. of M., 150.
St. Louis, I. M. & S. R. Co. *v.* Box (52 Ark. 368, 12 S. W. Rep. 757), Cross., Inj. at, 224.
St. Louis, I. M. & S. R. Co. *v.* Branch (45 Ark. 524), Eject. Pass., 65, 104.
St. Louis, I. M. & S. R. Co. *v.* Brown (49 Ark. 253, 4 S. W. Rep. 781), Animals, 342.
St. Louis, I. M. & S. R. Co. *v.* Camden Bank (Ark.) (1 S. W. Rep. 704), Ac'ts, 2; Assign., 4.
St. Louis, I. M. & S. R. Co. *v.* Cantrell (8 Am. & Eng. R. Cas. 198, 37 Ark. 519, 40 Am. Rep. 105), Car. of P., 229, 238, 261, 429, 616.
St. Louis, I. M. & S. R. Co. *v.* Chambliss (54 Ark. 214, 15 S. W. Rep. 469), Animals, 494.
St. Louis, I. M. & S. R. Co. *v.* Clark (51 Fed. Rep. 483, 2 C. C. A. 331), Att'ys, 21.
St. Louis, I. M. & S. R. Co. *v.* Commercial U. Ins. Co. (49 Am. & Eng. R. Cas. 137, 139 U. S. 223, 11 Sup. Ct. Rep. 554), Bills of L., 14; Car. of M., 97; Nuis., 29.
St. Louis, I. M. & S. R. Co. *v.* Davis (54 Ark. 389, 15 S. W. Rep. 895), Employés, Inj. to, 136, 230.
St. Louis, I. M. & S. R. Co. *v.* Davis (55 Ark. 462, 18 S. W. Rep. 628), Death, etc., 406.
St. Louis, I. M. & S. R. Co. *v.* Davis (56 Ark. 51, 19 S. W. Rep. 107), Eject. Pass., 11, 116.
St. Louis, I. M. & S. R. Co. *v.* Edwards (3 Tex. App. (Civ. Cas.) 410), Car. of P., 553.
St. Louis, I. M. & S. R. Co. *v.* Edwards (3 Tex. App. (Civ. Cas.) 415), Husb. & W., 21.
St. Louis, I. M. & S. R. Co. *v.* Fairbairn (30 Am. & Eng. R. Cas. 166, 48 Ark. 491, 4 S. W. Rep. 50), Stat. & D., 77.
St. Louis, I. M. & S. R. Co. *v.* Ferguson (57 Ark. 16, 20 S. W. Rep. 545), Animals, 49, 80.
St. Louis, I. M. & S. R. Co. *v.* Freeman (4 Am. & Eng. R. Cas. 608, 36 Ark. 41), Children, Inj. to, 127, 129, 130, 145, 182; Contrib. Neg., 4, 8, 10, 50; Death, etc., 403, 404; Tresp., Inj. to, 45.
St. Louis, I. M. & S. R. Co. *v.* Gaines (46 Ark. 555), Employés, Inj. to, 96, 136; Fel. Serv., 17, 222, 223.
St. Louis, I. M. & S. R. Co. *v.* Gaines (Ark.) (13 S. W. Rep. 740; affirming 46 Ark. 555), Employés, Inj. to, 611.
St. Louis, I. M. & S. R. Co. *v.* Grafton (51 Ark. 504, 11 S. W. Rep. 702), Lim. L., 2.
St. Louis, I. M. & S. R. Co. *v.* Hagan (19 Am. & Eng. R. Cas. 446, 42 Ark. 122), Animals, 480, 594; Evid., 125.
St. Louis, I. M. & S. R. Co. *v.* Hall (42 Am. & Eng. R. Cas. 208, 53 Ark. 7, 13 S. W. Rep. 138), App., 126; Dam., 38.
St. Louis, I. M. & S. R. Co. *v.* Harper (44 Ark. 524), Employés, Inj. to, 99, 102, 136, 139, 592; Fel. Serv., 64, 114, 405.
St. Louis, I. M. & S. R. Co. *v.* Harris (26 Am. & Eng. R. Cas. 608, 47 Ark. 340, 1 S. W. Rep. 609), Flood. Lds., 4; Waters & W., 15.
St. Louis, I. M. & S. R. Co. *v.* Heath (18 Am. & Eng. R. Cas. 557, 41 Ark. 476), Car. of M., 132, 693; Words & Ph., 131.
St. Louis, I. M. & S. R. Co. *v.* Hecht (9 Am. & Eng. R. Cas. 222, 38 Ark. 357), Fires, 55, 110.
St. Louis, I. M. & S. R. Co. *v.* Henderson (57 Ark. 402), Car. of L. S., 8; Evid., 11.
St. Louis, I. M. & S. R. Co. *v.* Hendricks (48 Ark. 177, 2 S. W. Rep. 783), Agency, 7, 21.
St. Louis, I. M. & S. R. Co. *v.* Hendricks (53 Ark. 201, 13 S. W. Rep. 699), Animals, 65; Cross., Inj. at, 131.
St. Louis, I. M. & S. R. Co. *v.* Higgins (21

Am. & Eng. R. Cas. 629, 44 Ark. 293), Employés, Inj. to, 399; Release, 6, 16.
St. Louis, I. M. & S. R. Co. *v.* Higgins (44 Am. & Eng. R. Cas. 541, 53 Ark. 458, 14 S. W. Rep. 653), Employés, Inj. to, 619.
St. Louis, I. M. & S. R. Co. *v.* Hindsman (1 Tex. App. (Civ. Cas.) 82), Dagg., 26, 124; Car. of M., 799.
St. Louis, I. M. & S. R. Co. *v.* Hopkins (54 Ark. 209, 15 S. W. Rep. 610), St. Rys., 319.
St. Louis, I. M. & S. R. Co. *v.* Knight (30 Am. & Eng. R. Cas. 88, 122 U. S. 79, 7 Sup. Ct. Rep. 1132), Bills of L., 18; Car. of M., 734.
St. Louis, I. M. & S. R. Co. *v.* Lear (55 Am. & Eng. R. Cas. 414, 54 Ark. 399, 15 S. W. Rep. 330), Car. of L. S., 108.
St. Louis, I. M. & S. R. Co. *v.* Ledbetter (45 Ark. 246), Tresp., Inj. to, 109.
St. Louis, I. M. & S. R. Co. *v.* Leigh (45 Ark. 368, 55 Am. Rep. 558), Eject. Pass., 32.
St. Louis, I. M. & S. R. Co. *v.* Lesser (46 Ark. 236), Car. of L. S., 24, 65, 90; Lim. of Liab., 38.
St. Louis, I. M. & S. R. Co. *v.* Lindsay (55 Ark. 281, 18 S. W. Rep. 59), Animals, 606.
St. Louis, I. M. & S. R. Co. *v.* Lyman (57 Ark. 512, 22 S. W. Rep. 170), Flood. Lds., 73, 81, 97; Witn., 136, 162.
St. Louis, I. M. & S. R. Co. *v.* Loftin (30 Ark. 693), Tax., 141; Words & Ph., 33.
St. Louis, I. M. & S. R. Co. *v.* Loftin (98 U. S. 559), Mun. Aid, 439; Tax., 190.
St. Louis, I. M. & S. R. Co. *v.* McCormick (71 Tex. 660, 9 S. W. Rep. 540), Death, etc., 124.
St. Louis, I. M. & S. R. Co. *v.* McGee (10 Am. & Eng. R. Cas. 649, 75 Mo. 522), Land Grants, 41.
St. Louis, I. M. & S. R. Co. *v.* McGee (26 Am. & Eng. R. Cas. 525, 115 U. S. 469, 6 Sup. Ct. Rep. 123), Land Grants, 15.
St. Louis, I. M. & S. R. Co. *v.* Maddry (58 Am. & Eng. R. Cas. 327, 57 Ark. 306, 21 S. W. Rep. 472), Car. of P., 357, 439; Contrib. Neg., 26; Death, etc., 187, 191, 287, 389, 430.
St. Louis, I. M. & S. R. Co. *v.* Meese (44 Ark. 414), Bridges, 82.
St. Louis, I. M. & S. R. Co. *v.* Monday (31 Am. & Eng. R. Cas. 424, 49 Ark. 257, 4 S. W. Rep. 782), Tresp., Inj. to, 52, 54.
St. Louis, I. M. & S. R. Co. *v.* Morgart (45 Ark. 318), Employés, Inj. to, 45, 363; Fel. Serv., 25, 134, 149, 151, 277.
St. Louis, I. M. & S. R. Co. *v.* Morgart (Ark.) (8 S. W. Rep. 179), Death, etc., 215; Employés, Inj. to, 56, 596.
St. Louis, I. M. & S. R. Co. *v.* Morgart (56 Ark. 213, 19 S. W. Rep. 751), App., 143.
St. Louis, I. M. & S. R. Co. *v.* Morris (5 Am. & Eng. R. Cas. 48, 35 Ark. 622), Flood. Lds., 17, 55, 90, 96; Lim. of Ac., 31; Tresp., 6.
St. Louis, I. M. & S. R. Co. *v.* Mudford (21 Am. & Eng. R. Cas. 139, 44 Ark. 439), Car. of M., 777; Trover, 18.
St. Louis, I. M. & S. R. Co. *v.* Mudford (32 Am. & Eng. R. Cas. 539, 48 Ark. 502, 3 S. W. Rep. 814), Car. of M., 784.
St. Louis, I. M. & S. R. Co. *v.* Needham (54 Am. & Eng. R. Cas. 88, 52 Fed. Rep. 371, 10 U. S. App. 339, 3 C. C. A. 129), Death, etc., 92, 94, 345, 394.
St. Louis, I. M. & S. R. Co. *v.* Newcom (56 Fed. Rep. 951), App., 143; Pl., 11.
St. Louis, I. M. & S. R. Co. *v.* O'Baugh (49 Ark. 418, 5 S. W. Rep. 711), Cov'ts, 3.
St. Louis, I. M. & S. R. Co. *v.* Peach Orchard & G. R. Co. (20 Am. & Eng. R. Cas. 251, 42 Ark. 249), Cross. Rys., 22.
St. Louis, I. M. & S. R. Co. *v.* Person (30 Am. & Eng. R. Cas. 567, 49 Ark. 182, 4 S. W. Rep. 755), Car. of P., 234, 428, 600.
St. Louis, I. M. & S. R. Co. *v.* Petty (57 Ark. 359, 21 S. W. Rep. 884), Em. Dom., 64, 184; Side Tr., 1.
St. Louis, I. M. & S. R. Co. *v.* Phelps (46 Ark. 485), Car. of M., 778.
St. Louis, I. M. & S. R. Co. *v.* Rexroad (58 Am. & Eng. R. Cas. 615, 59 Ark. 180, 26 S. W. Rep. 1037), Car. of P., 206; Children, Inj. to, 14; Witn., 21.
St. Louis, I. M. & S. R. Co. *v.* Rice (51 Ark. 467, 4 L. R. A. 173, 11 S. W. Rep. 699), Contrib. Neg., 13; Employés, Inj. to, 136, 143, 416; Fel. Serv., 144, 150, 446.
St. Louis, I. M. & S. R. Co. *v.* Robbins (57 Ark. 377, 21 S. W. Rep. 886), Death, etc., 428, 429; Employés, Inj. to, 76.
St. Louis, I. M. & S. R. Co. *v.* Roberts (56 Ark. 387, 19 S. W. Rep. 1055), Death, etc., 265, 334.
St. Louis, I. M. & S. R. Co. *v.* Rosenberry (45 Ark. 256), Car. of P., 259, 429, 431; Evid., 44.
St. Louis, I. M. & S. R. Co. *v.* Rosenberry (Ark.) (11 S. W. Rep. 212; affirming 45 Ark. 256), Car. of P., 431.
St. Louis, I. M. & S. R. Co. *v.* Ross (56 Ark. 271, 19 S. W. Rep. 837), Death, etc., 175; Trial, 85.
St. Louis, I. M. & S. R. Co. *v.* Ruddell (53 Ark. 32, 13 S. W. Rep. 418), Em. Dom., 196.
St. Louis, I. M. & S. R. Co. *v.* St. Louis (92 Mo. 160, 10 West. Rep. 359, 4 S. W. Rep. 664), Sts. & H., 50.
St. Louis, I. M. & S. R. Co. *v.* Schneider (30 Mo. App. 620), Waters & W., 9; Words & Ph., 248.
St. Louis, I. M. & S. R. Co. *v.* Shackelford (42 Ark. 417), Fel. Serv., 261.
St. Louis, I. M. & S. R. Co. *v.* Smith (48 Ark. 317, 3 S. W. Rep. 364), Employés, 17.
St. Louis, I. M. & S. R. Co. *v.* Southern Exp. Co. (16 Am. & Eng. R. Cas. 95, 108 U. S. 24, 2 Sup. Ct. Rep. 6; see 10 Fed. Rep. 869), App., 7.
St. Louis, I. M. & S. R. Co. *v.* Spann (57 Ark. 127), Bills of L., 68; Car. of L. S., 69.
St. Louis, I. M. & S. R. Co. *v.* Spann (Ark.) (20 S. W. Rep. 914), App., 125.

St. Louis, I. M. & S. R. Co. *v.* State (55 Ark. 200, 17 S. W. Rep. 806), Penalty, 1, 15, 16; Pl., 125.
St. Louis, I. M. & S. R. Co. *v.* State (Ark.) (22 S. W. Rep. 918), Crim. L., 19.
St. Louis, I. M. & S. R. Co. *v.* Sweet (57 Ark. 287, 21 S. W. Rep. 587), Car. of P., 153; Death, etc., 271; Evid., 175.
St. Louis, I. M. & S. R. Co. *v.* Taylor (57 Ark. 136), Animals, 313, 480, 514.
St. Louis, I. M. & S. R. Co. *v.* Tippett (56 Ark. 457, 20 S. W. Rep. 161), Death, etc., 199.
St. Louis, I. M. & S. R. Co. *v.* Vincent (36 Ark. 451), Animals, 405, 514, 573.
St. Louis, I. M. & S. R. Co. *v.* Walbrink (26 Am. & Eng. R. Cas. 604, 47 Ark. 330, 1 S. W. Rep. 545), Em. Dom., 695; Fences, 65; Waters & W., 16.
St. Louis, I. M. & S. R. Co. *v.* Weakly (35 Am. & Eng. R. Cas. 635, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. Rep. 134), Bills of L., 26, 82; Car. of L. S., 86, 105, 145, 149; Car. of M., 671; Evid., 137, 176; Lim. of Liab., 8.
St. Louis, I. M. & S. R. Co. *v.* White (30 Am. & Eng. R. Cas. 545, 48 Ark. 495, 4 S. W. Rep. 52), App., 117.
St. Louis, I. M. & S. R. Co. *v.* Wilkerson (46 Ark. 513), Tresp., Inj. to, 111.
St. Louis, I. M. & S. R. Co. *v.* Williams (49 Ark. 492, 31 Am. & Eng. R. Cas. 555, 5 S. W. Rep. 883), Animals, 9.
St. Louis, I. M. & S. R. Co. *v.* Worthen (41 Am. & Eng. R. Cas. 589, 52 Ark. 529, 13 S. W. Rep. 254), Tax., 20, 248, 356.
St. Louis, I. M. & S. R. Co. *v.* Wright (57 Ark. 327), Animals, 308.
St. Louis, I. M. & S. R. Co. *v.* Yarborough (52 Am. & Eng. R. Cas. 682, 56 Ark. 612, 20 S. W. Rep. 515), Flood. Lds., 91, 99; Lim. of Ac., 31; Witn., 104.
St. Louis, I. M. & S. R. Co. *v.* Yocum (34 Ark. 493), Death, etc., 127.
St. Louis, I. M. & S. R. Co. *v.* Yonley (45 Am. & Eng. R. Cas. 578, 53 Ark. 503, 14 S. W. Rep. 800), Indep. Contr., 1, 13.
St. Louis, J. & C. R. Co. *v.* Blind Institution (43 Ill. 303), Em. Dom., 95.
St. Louis, J. & C. R. Co. *v.* Kilpatrick (61 Ill. 457, 12 Am. Ry. Rep. 438), Animals, 328.
St. Louis, J. & C. R. Co. *v.* Lurton (72 Ill. 118), Bridges, 16; Contr., 28.
St. Louis, J. & C. R. Co. *v.* Mathers (71 Ill. 592), Contr., 60.
St. Louis, J. & C. R. Co. *v.* Mathers (9 Am. & Eng. R. Cas. 600, 104 Ill. 257), Contr., 60.
St. Louis, J. & C. R. Co. *v.* Mitchell (47 Ill. 165), Em. Dom., 691, 821.
St. Louis, J. & C. R. Co. *v.* Springfield & N. W. R. Co. (2 Am. & Eng. R. Cas. 487, 96 Ill. 274), Cross. Rys., 43.
St. Louis, J. & C. R. Co. *v.* Terhune (50 Ill. 151), Cross., Inj. at, 134.
St. Louis, J. & C. R. Co. *v.* Thomas (47 Ill. 116), Animals, 329, 353.
St. Louis, J. & S. R. Co. *v.* Kirby (10 Am. & Eng. R. Cas. 214, 104 Ill. 345), Em. Dom., 690, 710, 732.
St. Louis, K. & A. R. Co. *v.* Chapman (38 Kan. 307, 16 Pac. Rep. 695), Em. Dom., 371, 633; Witn., 117.
St. Louis, K. & A. R. Co. *v.* Quinn (24 Kan. 370), Em. Dom., 937.
St. Louis, K. & S. W. R. Co. *v.* Hammers (51 Kan. 127, 32 Pac. Rep. 922), Em. Dom., 686.
St. Louis, K. & S. W. R. Co. *v.* Morse (50 Kan. 99, 31 Pac. Rep. 676), Em. Dom., 942.
St. Louis, K. C. & C. R. Co. *v.* Dewees (23 Fed. Rep. 519, 691), Injunc., 6; Receiv., 12.
St. Louis, K. C. & C. R. Co. *v.* Lewright (44 Mo. App. 212), Em. Dom., 893.
St. Louis, K. C. & C. R. Co. *v.* Lewright (113 Mo. 660, 21 S. W. Rep. 210), Em. Dom., 243, 315, 329, 935.
St. Louis, K. C. & C. R. Co. *v.* North (31 Mo. App. 351), Em. Dom., 574, 676, 702; Evid., 135.
St. Louis, K. C. & N. R. Co. *v.* Cleary (16 Am. & Eng. R. Cas. 122, 77 Mo. 634, 46 Am. Rep. 13), Car. of L. S., 98.
St. Louis, K. C. & N. R. Co. *v.* Piper (13 Kan. 505, 8 Am. Ry. Rep. 204), Car. of L. S., 101.
St. Louis, K. C. & N. R. Co. *v.* Thacher (13 Kan. 564), Agency, 44.
St. Louis, K. & N. W. R. Co. *v.* Clark (57 Am. & Eng. R. Cas. 595, 119 Mo. 357, 24 S. W. Rep. 157), Em. Dom., 402, 413.
St. Louis, K. & N. W. R. Co. *v.* Clark (57 Am. & Eng. R. Cas. 542, 121 Mo. 169, 25 S. W. Rep. 192), Em. Dom., 144, 402, 556, 620, 641, 684.
St. Louis, K. & N. W. R. Co. *v.* St. Louis Union Stock Yard Co. (57 Am. & Eng. R. Cas. 677, 120 Mo. 541, 25 S. W. Rep. 399), Em. Dom., 584, 625, 711, 715, 742; Witn., 115, 122.
St. Louis, L. & D. R. Co. *v.* Wilder (17 Kan. 239), Em. Dom., 435, 844, 943.
St. Louis, L. & W. R. Co. *v.* Maddox (18 Kan. 546), Evid., 160, 183.
St. Louis, L. & W. R. Co. *v.* Miller (18 Kan. 212, 15 Am. Ry. Rep. 215), Animals, 627.
St. Louis Merchants' Br. T. R. Co. *v.* Wiggins (47 Ill. App. 474), Med. Serv., 14.
St. Louis Millers' Assoc., In re (1 Int. Com. Com. 20, 1 Int. Com. Rep. 22), Int. Com., 76.
St. Louis Nat. Stock Yards *v.* Tiblier (39 Ill. App. 422), Stock Yards, 4.
St. Louis Nat. Stock Yards *v.* Wiggins Ferry Co. (112 Ill. 384), Judgm., 14; License, 3; Spec. Perf., 6.
St. Louis, O. H. & C. R. Co. *v.* Fowler (113 Mo. 458, 20 S. W. Rep. 1069), Em. Dom., 317, 402, 453, 464; Trial, 16; Witn., 124.
St. Louis R. Co. *v.* Northwestern St. L. R. Co. (69 Mo. 65; reversing 2 Mo. App. 69), Par. & Comp. L., 6.
St. Louis R. Co. *v.* Pacific R. Co. (52 Fed. Rep. 770), Fed. Cts., 5; Jurisd., 2.
St. Louis R. Co. *v.* Southern R. Co. (105 Mo. 577, 15 S. W. Rep. 1013), St. Rys., 231, 241, 246, 254.

St. Louis R. Co. *v.* South St. Louis R. Co. (72 Mo. 67), Par. & Comp. L., 6.
St. Louis, R. I. & C. R. Co. *v.* People (147 Ill. 9, 35 N. E. Rep. 228), Mun. Aid, 410.
St. Louis S. W. R. Co. *v.* Graham (50 Fed. Rep. 258), App., 29.
St. Louis S. W. R. Co. *v.* Jacobs (44 La. Ann. 922, 11 So. Rep. 571), Right of W., 7.
St. Louis S. W. R. Co. *v.* Stark (55 Fed. Rep. 758), Mort., 255.
St. Louis Transfer R. Co. *v.* St. Louis, I. M. & S. R. Co. (100 Mo. 419, 13 S. W. Rep. 710), Cross. Rys., 56, 57.
St. Louis Transfer R. Co. *v.* St. Louis M. B. T. R. Co. (55 Am. & Eng. R. Cas. 17, 111 Mo. 666, 20 S. W. Rep. 319), Cross. Rys., 87; St. Rys., 48; Sts. & H., 98, 100.
St. Louis, V. & T. H. R. Co. *v.* Bell (81 Ill. 76), Children, Inj. to, 91.
St. Louis, V. & T. H. R. Co. *v.* Brown (58 Ill. 61, 10 Am. Ry. Rep. 403), Em. Dom., 732.
St. Louis, V. & T. H. R. Co. *v.* Capps (67 Ill. 607), Sts. & H., 251, 266, 268, 269.
St. Louis, V. & T. H. R. Co. *v.* Capps (72 Ill. 188), Sts. & H., 251, 283.
St. Louis, V. & T. H. R. Co. *v.* Dawson (3 Ill. App. 118), Proc., 28.
St. Louis, V. & T. H. R. Co. *v.* Dunn (78 Ill. 197), Cross., Inj. at, 88, 314.
St. Louis, V. & T. H. R. Co. *v.* Faitz (23 Ill. App. 498), Cross., Inj., at, 135, 244.
St. Louis, V. & T. H. R. Co. *v.* Funk (85 Ill. 460), Fires, 277.
St. Louis, V. & T. H. R. Co. *v.* Haller (82 Ill. 208), Sts. & H., 96, 270, 276.
St. Louis, V. & T. H. R. Co. *v.* Hurst (14 Ill. App. 419), Flood. Lds., 72, 75.
St. Louis, V. & T. H. R. Co. *v.* Hurst (25 Ill. App. 98), Flood. Lds., 61.
St. Louis, V. & T. H. R. Co. *v.* Hurst (25 Ill. App. 181), Animals, 35, 407.
St. Louis, V. & T. H. R. Co. *v.* Kaulbrumer (59 Ill. 152, 11 Am. Ry. Rep. 186), Trover, 7.
St. Louis, V. & T. H. R. Co. *v.* Mollet (59 Ill. 235, 11 Am. Ry. Rep. 193), Em. Dom., 675.
St. Louis, V. & T. H. R. Co. *v.* Morgan (12 Ill. App. 256), Animals, 211.
St. Louis, V. & T. H. R. Co. *v.* Moudy (38 Ill. App. 322), Animals, 449.
St. Louis, V. & T. H. R. Co. *v.* Summit (3 Ill. App. 155), Sts. & H., 186.
St. Louis, V. & T. H. R. Co. *v.* Surrell (88 Ill. 535, 21 Am. Ry. Rep. 356), Tax., 257.
St. Louis, V. & T. H. R. Co. *v.* Terre Haute & I. R. Co. (33 Fed. Rep. 440; affirmed in 52 Am. & Eng. R. Cas. 68, 145 U. S. 393, 12 Sup. Ct. Rep. 953), Ejectm., 10; Leases, 20; Lim. of Ac., 75.
St. Louis, V. & T. H. R. Co. *v.* Terre Haute & I. R. Co. (52 Am. & Eng. R. Cas. 68, 145 U. S. 393, 12 Sup. Ct. Rep. 953), Contr., 85; Eq., 3, 7; Leases, 20, 28, 29, 32.
St. Louis, V. & T. H. R. Co. *v.* Washburn (97 Ill. 253), Animals, 94.
St. Louis, W. & W. R. Co. *v.* Curl (11 Am. & Eng. R. Cas. 458, 28 Kan. 622), Animals, 165; Leases, 39, 42.
St. Louis, W. & W. R. Co. *v.* Ransom (29 Kan. 298), App., 19.
St. Louis, W. & W. R. Co. *v.* Ritz (11 Am. & Eng. R. Cas. 35, 30 Kan. 30, 1 Pac. Rep. 27), Consol., 16; Constr. Rys., 79; Trial, 139.
St. Luke's Vestry *v.* North Metropolitan Tramways Co. (L. R. 1 Q. B. D. 760, 35 L. T. 329), Tramw., 3.
St. Onge *v.* Day (11 Colo. 368, 18 Pac. Rep. 278), Right of W., 22.
St. Paul *v.* Chicago, M. & St. P. R. Co. (49 Minn. 88, 51 N. W. Rep. 662), Ejectm., 32.
St. Paul *v.* St. Paul & S. C. R. Co. (23 Minn. 469, 17 Am. Ry. Rep. 177), Tax., 149.
St. Paul *v.* St. Paul, M. & M. R. Co. (39 Minn. 112, 38 N. W. Rep. 925), Tax., 232.
St. Paul *v.* Smith (27 Minn. 364, 38 Am. Rep. 296, 7 N. W. Rep. 734), Hacks, etc., 4.
St. Paul & C. R. Co. *v.* McDonald (34 Minn. 195, 25 N. W. Rep. 453), Tax., 119.
St. Paul & D. R. Co. *v.* United States (18 Ct. of Cl. 405), Claims Against U. S., 13.
St. Paul & D. R. Co. *v.* United States (112 U. S. 733, 5 Sup. Ct. Rep. 366; affirming 18 Ct. of Cl. 405), Car. of Mails, 5.
St. Paul & N. P. R. Co., In re (22 Am. & Eng. R. Cas. 94, 34 Minn. 227, 25 N. W. Rep. 345), Em. Dom., 124, 182, 258, 884.
St. Paul & N. P. R. Co., In re (28 Am. & Eng. R. Cas. 255, 36 Minn. 85, 30 N. W. Rep. 432), Consol., 37; Em. Dom., 294; Proc., 33.
St. Paul & N. P. R. Co., In re (30 Am. & Eng. R. Cas. 294, 37 Minn. 164, 33 N. W. Rep. 701), Cross. Rys., 10.
St. Paul & N. P. R. Co. *v.* St. Paul, M. & M. R. Co. (57 Fed. Rep. 272), Land Grants, 33, 39.
St. Paul & P. R. Co. *v.* Northern Pac. R. Co. (139 U. S. 1, 11 Sup. Ct. Rep. 389), Land Grants, 5, 6, 55, 74, 75, 79.
St. Paul & P. R. Co. *v.* Schurmeir (7 Wall. (U. S.) 272), Rip. Rts., 10; Sts. & H., 145.
St. Paul & S. C. R. Co. *v.* Brown (24 Minn. 517), Land Grants, 132.
St. Paul & S. C. R. Co. *v.* Covell (2 Dak. 483, 11 N. W. Rep. 106), Em. Dom., 509.
St. Paul & S. C. R. Co. *v.* McDonald (22 Am. & Eng. R. Cas. 208, 34 Minn. 182, 25 N. W. Rep. 57), Mort., 72; Tax., 164.
St. Paul & S. C. R. Co. *v.* Matthews (16 Minn. 341) (Gil. 303), Charters, 170; Em. Dom., 322, 561, 831.
St. Paul & S. C. R. Co. *v.* Minneapolis & St. L. R. Co. (26 Minn. 243, 37 Am. Rep. 404, 2 N. W. Rep. 700), Connect. L., 4.
St. Paul & S. C. R. Co. *v.* Murphy (19 Minn. 500) (Gil. 433), Em. Dom., 228, 458, 556, 578, 630, 634, 821, 958; Witn., 64.
St. Paul & S. C. R. Co. *v.* Robinson (39 Am. & Eng. R. Cas. 502, 40 Minn. 360, 42 N. W. Rep. 79), Judgm., 17; Tax., 164.
St. Paul & S. C. R. Co. *v.* Ward (51 Am. & Eng. R. Cas. 325, 47 Minn. 40, 49 N. W. Rep. 401), Land Grants, 8.
St. Paul & S. C. R. Co. *v.* Winona & St. P. R. Co. (112 U. S. 720, 5 Sup. Ct. Rep. 334), Land Grants, 7.
St. Paul, M. & M. R. Co. *v.* Greenalgh (139

U. S. 19, 11 Sup. Ct. Rep. 395), Land Grants, 50.
St. Paul, M. & M. R. Co. *v.* Greenhalgh (26 Fed. Rep. 563), Pub. Lds., 19.
St. Paul, M. & M. R. Co. *v.* Minneapolis (24 Am. & Eng. R. Cas. 309, 35 Minn. 141, 27 N. W. Rep. 500), Cross. Sts. & H., 42, 73, 84; Em. Dom., 297.
St. Paul, M. & M. R. Co. *v.* Minneapolis (44 Minn. 149, 46 N. W. Rep. 324), Sts. & H., 8.
St. Paul, M. & M. R. Co. *v.* Northern Pac. R. Co. (49 Fed. Rep. 306, 4 U. S. App. 149, 1 C. C. A. 246), Injunc., 1.
St. Paul, M. & M. R. Co. *v.* Phelps (137 U. S. 528, 11 Sup. Ct. Rep. 168; reversing 26 Fed. Rep. 569), Land Grants, 11, 35, 36.
St. Paul, M. & M. R. Co. *v.* St. Paul Union Depot Co. (44 Minn. 325, 46 N. W. Rep. 566), Union D. Cos., 6.
St. Paul, M. & M. R. Co. *v.* Todd County (142 U. S. 282, 12 Sup. Ct. Rep. 281), Fed. Cts., 25.
St. Paul Roller Mill Co. *v.* Great Western Despatch Co. (27 Fed. Rep. 434), Bills of L., 61; Car. of L., 513.
St. Paul, S. & T. F. R. Co. *v.* First Div. St. P. & P. R. R. Co. (26 Minn. 31, 1 N. W. Rep. 580), Pub. Lds., 33.
St. Paul, S. & T. F. R. Co. *v.* Robbins (23 Minn. 439, 17 Am. Ry. Rep. 81), Subscr., 15, 93.
St. Paul, S. & T. F. R. Co. *v.* Sage (49 Fed. Rep. 315, 4 U. S. App. 160, 1 C. C. A. 256), Lim. of Ac., 29.
St. Paul Union Depot Co. *v.* Minnesota & N. W. R. Co. (50 Am. & Eng. R. Cas. 55, 47 Minn. 154, 49 N. W. Rep. 646), Union D. Cos., 4.
St. Paul Union Depot Co. *v.* St. Paul (30 Minn. 359, 15 S. W. Rep. 684), Em. Dom., 119.
St. Paul Union Depot Co. *v.* St. Paul, M. & M. R. Co. (26 Am. & Eng. R. Cas. 567, 35 Minn. 320, 29 N. W. Rep. 140), Union D. Cos., 6.
St. Paul Water Co. *v.* Ware (16 Wall. (U. S.) 566), Indep. Contr., 10.
St. Stephen Branch R. Co. *v.* Black (13 New Brun. 139), Subscr., 21.
St. Thomas *v.* Credit Valley R. Co. (7 Ont. 332), Contr., 76.
St. Thomas *v.* Credit Valley R. Co. (12 Ont. App. 273), Spec. Perf., 16.
St. Thomas *v.* Credit Valley R. Co. (36 Am. & Eng. R. Cas. 473, 15 Ont. 673), Stat. & D., 43.
St. Thomas's Hospital *v.* Charing-Cross R. Co. (1 Johns. & H. 400, 7 Jur. N. S. 256, 30 L. J. Ch. 395, 9 W. R. 411, 4 L. T. 13), Em. Dom., 1093, 1101, 1103.
St. Vrain Stone Co. *v.* Denver, U. & P. R. Co. (18 Colo. 211, 32 Pac. Rep. 827), Evid., 179.
Sala *v.* Chicago, R. I. & P. R. Co. (85 Iowa 678, 52 N. W. Rep. 664), Cross., Inj. at, 198, 266, 268.
Saldana *v.* Galveston, H. & S. A. R. Co. (43 Fed. Rep. 862), Cross., Inj. at, 107; Dam., 67, 70, 71; Tresp., Inj. to, 59.
Salem *v.* Eastern R. Co. (98 Mass. 431), Nuis., 2, 14.
Salem *v.* Goller (76 Ind. 291), Contrib. Neg., 26.
Salem & S. D. R. Co. *v.* Essex County Com'rs (9 Allen (Mass.) 563), Cert., 3; Em. Dom., 792, 811.
Salida *v.* McKinna (16 Colo. 523, 27 Pac. Rep. 810), Husb. & W., 23.
Salina *v.* Trosper (27 Kan. 544), Dam., 71; Trial, 217.
Saline County, In re (45 Mo. 52), Cert., 4.
Salinger *v.* Simmons (8 Abb. Pr. N. S. (N. Y.) 409), Car. of M., 72, 351.
Salisbury *v.* Great Northern R. Co. (16 Jur. 740, 21 L. J. Q. B. 185, 17 Q. B. 840), Em. Dom., 1126.
Salisbury *v.* Great Northern R. Co. (5 C. B. N. S. 174, 5 Jur. N. S. 70, 28 L. J. C. P. 40), Sts. & H., 207.
Salisbury *v.* Western N. C. R. Co. (29 Am. & Eng. R. Cas. 518, 91 N. Car. 490), Waters & W., 20.
Salisbury *v.* Western N. C. R. Co. (98 N. Car. 465, 4 S. E. Rep. 465), Waters & W., 22.
Salisbury & D. J. R. Co. *v.* London & S. W. R. Co. (3 Ry. & C. T. Cas. 314), Leases, 135.
Salmon *v.* Delaware, L. & W. R. Co. (38 N. J. L. 5, 39 N. J. L. 299, 13 Am. Ry. Rep. 14), Fires, 58, 126.
Salmon *v.* New York C. & H. R. R. Co. (23 N. Y. S. R. 442, 52 Hun 612, 1 Silv. Sup. Ct. 237, 5 N. Y. Supp. 225), Cross., Inj. at, 350.
Salter *v.* Metropolitan Dist. R. Co. (L. R. 9 Eq. 432, 39 L. J. Ch. 567), Em. Dom., 1101.
Salter *v.* Utica & B. R. R. Co. (59 N. Y. 631), Cross., Inj. at, 274; Evid., 292.
Salter *v.* Utica & B. R. R. Co. (75 N. Y. 273; reversing 13 Hun 187), Cross., Inj. at, 254; Death, etc., 194; Trial, 177.
Salter *v.* Utica & B. R. R. Co. (86 N. Y. 401; affirming 23 Hun 533), Death, etc., 440.
Salter *v.* Utica & B. R. R. Co. (8 Am. & Eng. R. Cas. 437, 88 N. Y. 42; affirming 24 Hun 494), Cross., Inj. at, 300; Death, etc., 314; Negl., 110.
Salters *v.* Delaware & H. Canal Co. (3 Hun (N. Y.) 338, 5 T. & C. 559), Employés, Inj. to, 73, 93, 95; Evid., 84.
Saltonstall *v.* Stockton (Taney (U. S.) 11; affirmed in 13 Pet. (U. S.) 181), Actions, 9; Car. of P., 100, 109, 346, 582; Contrib. Neg., 41; Negl., 61.
Saltsman *v.* New York, L. E. & W. R. Co. (65 Hun (N. Y.) 448, 48 N. Y. S. R. 55, 20 N. Y. Supp. 361), Bills of L., 43.
Saltzman *v.* Brooklyn City R. Co. (73 Hun 567, 26 N. Y. Supp. 311, 56 N. Y. S. R. 220), Witn., 168.
Sammon *v.* New York & H. R. R. Co. (6 J. & S. (N. Y.) 414), Employés, Inj. to, 313; Evid., 36.
Sammon *v.* New York & H. R. Co. (62 N.

Y. 251, 12 Am. Ry. Rep. 150), Fel. Serv., 423.
Sampsell *v.* Chicago & G. T. R. Co. (13 Am. & Eng. R. Cas. 591, 51 Mich. 608, 17 N. W. Rep. 77), Animals, 589.
Sampson *v.* Buffalo, N. Y. & P. R. Co. (2 Hun (N. Y.) 512, 4 T. & C. 600), Liens, 40.
Sampson *v.* Buffalo, N. Y. & P. R. Co. (13 Hun (N. Y.) 280), Liens, 41.
Sampson *v.* People (140 Ill. 466, 30 N. E. Rep. 689), Mun. Aid, 248.
Sams *v.* Port Royal & A. R Co. (10 Am. & Eng. R. Cas. 683, 15 So. Car. 484), Ejectm., 1.
Samson *v.* Queen (2 Can. Exch. 30), Em. Dom., 1232.
Samuel *v.* Cheney (135 Mass. 278, 46 Am. Rep. 467), Car. of M., 275.
Samuel *v.* Holladay (1 Woolw. (U. S.) 400), By-laws, 3; Contr., 85; Direct., 18; Parties, 21; Stockh., 12, 123, 125.
Samuels *v.* Louisville & N. R. Co. (30 Am. & Eng. 79, 31 Fed. Rep. 57), Charges, 20, 26; Discrim., 59; Evid., 140.
Samuels *v.* McDonald (11 Abb. Pr. N. S. (N. Y.) 344, 42 How. Pr. 360), Bagg., 105; Bailm., 3.
Samuels *v.* Richmond & D. R. Co. (52 Am. & Eng. R. Cas. 315, 35 So. Car. 493, 14 S. E. Rep. 943), Car. of P., 638; Dam., 26, 34, 37.
San Antonio *v.* Gould (34 Tex. 49), Mun. Aid, 50, 307.
San Antonio *v.* Jones (28 Tex. 19), Charter, 78; Mun. Aid, 50, 56; Stat., 52.
San Antonio *v.* Lane (32 Tex. 405), Mun. Aid, 6, 344, 363.
San Antonio *v.* Mehaffy (96 U. S. 312), Mun. Aid, 50, 307, 379.
San Antonio & A. P. R. Co., In re (44 Fed. Rep. 145), Rem. of C., 41.
San Antonio & A. P. R. Co. *v.* Bennett (76 Tex. 151, 13 S. W. Rep. 319), Contrib. Neg., 75, 105; Death, etc., 284.
San Antonio & A. P. R. Co. *v.* Busch (Tex. Civ. App.) (21 S. W. Rep. 164), Dam., 61; Evid., 178.
San Antonio & A. P. R. Co. *v.* Cockrill (72 Tex. 613, 10 S. W. Rep. 702), Jurisd., 7; Parties, 10.
San Antonio & A. R. Co. *v.* Gwynn (4 Tex. App. (Civ. Cas.) 338, 15 S. W. Rep. 509), Dam., 73; Flood. Lds., 26, 70.
San Antonio & A. P. R. Co. *v.* Harrison (72 Tex. 478, 10 S. W. Rep. 556), Attach., 46; Evid., 223.
San Antonio & A. P. R. Co. *v.* Knoepfli (82 Tex. 270, 17 S. W. Rep. 1052), Cat.-Gds., 4.
San Antonio & A. P. R. Co. *v.* Leal (4 Tex. App. (Civ. Cas.) 213, 16 S. W. Rep. 909), Animals, 456.
San Antonio & A. P. R. Co. *v.* MacGregor (2 Tex. Civ. App. 586, 22 S. W. Rep. 269), Witn., 123.
San Antonio & A. P. R. Co. *v.* Mayfield (4 Tex. App. (Civ. Cas.) 223, 15 S. W. Rep. 503), Car. of L. S., 150.
San Antonio & A. P. R. Co. *v.* Robinson (73 Tex. 277, 11 S. W. Rep. 327), Car. of P., 587; Dam., 86; Derailm., 4; Evid., 170, 175, 202; Trial, 89.
San Antonio & A. P. R. Co. *v.* Robinson (79 Tex. 608, 15 S. W. Rep. 584), Car. of P., 606.
San Antonio & A. P. R. Co. *v.* Ruby (80 Tex. 172, 15 S. W. Rep. 1040), Em. Dom., 156, 435, 462, 628; Parties, 10; Witn., 118.
San Antonio & A. P. R. Co. *v.* State (45 Am. & Eng. R. Cas. 586, 79 Tex. 264, 14 S. W. Rep. 1063), Cross. Rys., 6, 78; Penalty, 11.
San Antonio & A. P. R. Co. *v.* Wallace (44 Am. & Eng. R. Cas. 564, 76 Tex. 636, 13 S. W. Rep. 565), Employés, Inj. to, 301, 429, 446.
San Antonio & A. P. R. Co. *v.* Wilson (50 Am. & Eng. R. Cas. 513, 4 Tex. App. (Civ. Cas.) 565, 19 S. W. Rep. 910), Employés, 13, 18.
San Antonio & N. P. R. Co. *v.* Bailey (4 Tex. App. (Civ. Cas.) 104, 15 S. W. Rep. 203), Car. of M., 50.
San Antonio St. R. Co. *v.* Cailloutte (79 Tex. 341, 15 S. W. Rep. 390), Death, etc., 94, 310; Negl., 87.
San Antonio St. R. Co. *v.* Helm (19 Am. & Eng. R. Cas. 158, 64 Tex. 147), App., 100; Husb. & W., 39.
San Benito County *v.* Southern Pac. R. Co. (37 Am. & Eng. R. Cas. 374, 77 Cal. 518, 19 Pac. Rep. 827), Mun. Corp., 6; Tax., 393.
San Bernardino & E. R. Co. *v.* Haven (94 Cal. 489, 29 Pac. Rep. 875), Em. Dom., 640, 700, 729.
San Bernardino Board of Trade *v.* Atchison, T. & S. F. R. Co. (3 Int. Com. Rep. 138, 4 Int. Com. Com. 104), Int. Com., 116, 131.
San Bernardino County *v.* Southern Pac. R. Co. (118 U. S. 417, 6 Sup. Ct. Rep. 1144), Tax., 322.
Sanborn *v.* Atchison, T. & S. F. R. Co. (35 Kan. 292, 10 Pac. Rep. [illegible] Employés, Inj to, 470.
Sanborn *v.* Chicago & N. W. R. Co. (16 Wis. 19), Sts. & H., 7.
Sanborn *v.* Detroit, B. C. & A. R. Co. (50 Am. & Eng. R. Cas. 114, 91 Mich. 538, 52 N. W. Rep. 153), Cross., Inj. at, 115.
Sanchez *v.* San Antonio & A. P. R. Co. (3 Tex. Civ. App. 89, 22 S. W. Rep. 242), Car. of P., 453; Stat. & D., 62.
Sandbach Charity Trustees *v.* North Staffordshire R. Co. (37 L. T. N. S. 391), Arb., 16.
Sandeen *v.* Kansas City, St. J. & C. B. R. Co. (79 Mo. 278), Pl., 96.
Sanders *v.* Lake Shore & M. S. R. Co. (94 N. Y. 641), Dam., 111; Divid., 8.
Sanders *v.* New York El. R. Co. (15 Daly (N. Y.) 388, 7 N. Y. Supp. 641, 27 N. Y. S. R. 795), Abate., 14.
Sanders *v.* New York El. R. Co. (16 Daly 261, 10 N. Y. Supp. 112, 31 N. Y. S. R. 544), Elev. Rys., 171, 180.
Sanders *v.* Reister (1 Dak. (Bennett) 145, 46 N. W. Rep. 680), Contrib. Neg., 105; Evid., 211; Witn., 22.
Sanderson *v.* Frazier (8 Colo. 79, 5 Pac. Rep. 632), Contrib. Neg., 105.

Sanderson *v.* Kingston Marine R. Co. (3 U. C. Q. B. 168), Wharves, 2.
Sanderson *v.* Kingston Marine R. Co. (4 U. C. Q. B. 340), Wharves, 2.
Sanderson *v.* Ohio C. R. & C. Co. (61 Wis. 609, 21 N. W. Rep. 818), Appear., 7.
Sanderson *v.* Sanderson (36 L. T. 847), Death, etc., 71.
Sandford *v.* Catawissa, W. & E. R. Co. (24 Pa. St. 378), Exp. Cos., 9.
Sandford *v.* Hestonville, M. & F. Pass. R. Co. (136 Pa. St. 84, 20 Atl. Rep. 799), Children, Inj. to, 43, 49; St. Rys., 415.
Sandford *v.* Hestonville, M. & F. Pass. R. Co. (153 Pa. St. 300, 25 Atl. Rep. 833), Children, Inj. to, 46, 48.
Sandford *v.* Martin (31 Iowa 67), Em. Dom., 47.
Sandford *v.* Newark & H. R. Co. (37 N. J. L. 1), Evid., 183.
Sandford *v.* New York Sup'rs (15 How. Pr. (N. Y.) 172), Tax., 71.
Sandham *v.* Chicago, R. I. & P. R. Co. (38 Iowa 88), Animals, 38, 69.
San Diego *v.* San Diego & L. A. R. Co. (44 Cal. 106), Deeds, 1; Stat., 63.
San Diego L. & T. Co. *v.* Neale (78 Cal. 63, 20 Pac. Rep. 372, 3 L. R. A. 83), Em. Dom., 654, 729; Witn., 115.
Sands *v.* Manistree River Imp. Co. (123 U. S. 288, 8 Sup. Ct. Rep. 113), Rip. Rts., 1.
Sandusky & C. R. Co. *v.* Sloan (27 Ohio St. 341, 11 Am. Ry. Rep. 264), Animals, 220.
Sandval *v.* Ford (55 Iowa 461, 8 N. W. Rep. 324), Liens, 32, 33.
Sandwich *v.* Great Northern R. Co. (L. R. 10 Ch. D. 707, 49 L. J. Ch. D. 225, 27 W. R. 616, 3 Ry. & C. T. Cas. xv), Waters & W., 20.
Sandy River R. Co. *v.* Stubbs (24 Am. & Eng. R. Cas. 87, 77 Me. 594, 2 Atl. Rep. 9), Direct., 44.
Sanford *v.* Cape Girardeau & S. W. R. Co. (40 Mo. App. 15), Assump., 6.
Sanford *v.* Catawissa, W. & E. R. Co. (2 Phila. (Pa.) 107), Exp. Cos., 9.
Sanford *v.* Chicago & L. S. R. Co. (2 Mich. N. P. [Supp.] 132), Em. Dom., 314, 818, 823
Sanford *v.* Eighth Ave. R. Co. (23 N. Y. 343, 80 Am. Dec. 286; reversing 7 Bosw. 122), Eject. Pass., 58, 63; St. Rys., 519.
Sanford *v.* Housatonic R. Co. (11 Cush. (Mass.) 155), App., 92; Car. of M., 487; Parties, 5.
San Francisco *v.* Central Pac. R. Co. (63 Cal. 467, 49 Am. Rep. 98), Tax., 249.
San Francisco *v.* Fry (63 Cal. 470), Tax., 103.
San Francisco & N. P. R. Co. *v.* Bee (48 Cal. 398), Reorg., 10.
San Francisco & N. P. R. Co. *v.* Dinwiddie (8 Sawy. (U. S.) 312, 13 Fed. Rep. 789), Tax., 249.
San Francisco & N. P. R. Co. *v.* State Board of Equalization (13 Am. & Eng. R. Cas. 248, 60 Cal. 12), Tax., 21, 249.
San Francisco & N. P. R. Co. *v.* Taylor (86 Cal. 246, 24 Pac. Rep. 1027), Em. Dom., 657.
San Francisco & S. J. R. Co. *v.* Mahoney (29 Cal. 112), Em. Dom., 333, 399, 426, 459, 508, 882.
San Francisco, A. & S. R. Co. *v.* Caldwell (31 Cal. 367), Em. Dom., 60, 180, 371, 645, 729.
San Francisco R. Co. *v.* Mahoney (29 Cal. 112), Em. Dom., 384.
Sangamon & M. R. Co. *v.* Henry (14 Ill. 156), Car. of L. S., 37, 158.
Sangamon & M. R. Co. *v.* Morgan County (14 Ill. 163), Tax., 130, 257.
Sanger *v.* Southern Pac. Co. (2 Int. Com. Rep. 548, 3 Int. Com. Com. 134), Int. Com., 171.
San José *v.* San José & S. C. R. Co. (53 Cal. 475), Mun. Corp., 6; St. Rys., 285; Tax., 393.
San José & A. R. Co. *v.* Mayne (44 Am. & Eng. R. Cas. 158, 83 Cal. 566, 23 Pac. Rep. 522), Em. Dom., 458, 631, 632, 780, 828, 897, 907.
Sankey *v.* Terre Haute & S. W. R. Co. (42 Ind. 402), Mun. Aid, 30, 444.
San Mateo County *v.* Southern Pac. R. Co. (8 Am. & Eng. R. Cas. 1, 13 Fed. Rep. 145, 7 Sawy. (U. S.) 517), Charters, 41; Tax., 249.
San Mateo County *v.* Southern Pac. R. Co. (8 Sawy. (U. S.) 238, 13 Fed. Rep. 722; appeal dismissed in 116 U. S. 138, 6 Sup. Ct. Rep. 317), Tax., 6, 249; Words & Ph., 163.
Sanquer *v.* London & S. W. R. Co. (16 C. B. 163, 3 C. L. R. 811), Car. of M., 280.
Sanson *v.* Northern R. Co. (29 Grant Ch. (Ont.) 459), Bridges, 88.
Santa Ana *v.* Harlin (99 Cal. 538, 34 Pac. Rep. 224), Em. Dom., 602, 603, 624, 650; Sts. & H., 15; Witn., 109, 115.
Santa Clara County *v.* Southern Pac. R. Co (66 Cal. 642), Tax., 393.
Santa Clara County *v.* Southern Pac. R. Co. (13 Am. & Eng. R. Cas. 182, 18 Fed. Rep. 385, 9 Sawy. (U. S.) 165), Tax., 21, 69, 235.
Santa Clara County *v.* Southern Pac. R. Co. (24 Am. & Eng. R. Cas. 523, 118 U. S. 394, 6 Sup. Ct. Rep. 1132), Corp., 1; Tax., 249.
Santa Cruz *v.* Santa Cruz R. Co. (56 Cal. 143), Tax., 393.
Santa Cruz County Sup'rs *v.* Santa Cruz R. Co. (15 Am. & Eng. R. Cas. 661, 111 U. S. 361, 4 Sup. Ct. Rep. 474), Fed. Cts., 25.
Santa Cruz R. Co. *v.* Santa Cruz County Sup'rs (62 Cal. 239), Mun. Aid, 441.
Santa Cruz R. Co. *v.* Schwartz (53 Cal. 106), Subscr., 207.
Santa Cruz R. Co. *v.* Spreckles (9 Am. & Eng. R. Cas. 679, 65 Cal. 193, 3 Pac. Rep. 661, 802), Direct., 46; Subscr., 53.
Santa Fé County Com'rs *v.* New Mexico & S. P. R. Co. (3 N. Mex. 116, 2 Pac. Rep. 376), Tax., 137, 175.
Sapp *v.* Northern C. R. Co. (51 Md. 115), Easem., 8.
Sappenfield *v.* Main St. & A. P. R. Co. (91 Cal. 48, 27 Pac. Rep. 590), Employés, Inj. to, 11, 95, 97, 98, 99, 570, 592; Witn., 141.
Sappington *v.* Little Rock, M. R. & T. R.

Co. (11 Am. & Eng. R. Cas. 330, 37 Ark. 23), Right of W., 9; Sales of Rds., 14.
Sappington *v.* Missouri Pac. R. Co. (14 Mo. App. 86), Estop., 5; Fires, 261, 269, 289, 322.
Saratoga & S. R. Co. *v.* Row (24 Wend. (N. Y.) 74), Contr., 80.
Saratoga & S. R. Co. *v.* Schenectady Stove Co. (66 How. Pr. (N. Y.) 43), Em. Dom., 391.
Saratoga Elec. R. Co., In re (58 Hun (N. Y.) 287, 34 N. Y. S. R. 556, 12 N. Y. Supp. 318), Cross. Rys., 13, 27, 86.
Sargent *v.* Birchard (43 Vt. 570), Car. of M., 735; Fires, 181.
Sargent *v.* Boston & L. R. Corp. (115 Mass. 416), Discrim., 61; Exp. Cos., 8.
Sargent *v.* Essex Marine R. Corp. (9 Pick. (Mass.) 202), Stock, 40.
Sargent *v.* Kansas Midland R. Co. (48 Kan. 672, 29 Pac. Rep. 1063), Constr. Rys., 25; Direct., 48, 51.
Sargent *v.* Ohio & M. R. Co. (1 Handy (Ohio) 52), Nuis., 3, 19; Sts. & H., 232, 422.
Sargent *v.* St. Louis & S. F. R. Co. (58 Am. & Eng R. Cas. 184, 114 Mo. 348, 21 S. W. Rep. 823), Car. of P., 265, 278; Stat. & D., 103, 111, 112, 137, 143.
Sarnia *v.* Great Western R. Co. (17 U. C. Q. B. 65), Pl., 21.
Sather *v.* Chicago, M. & St. P. R. Co. (38 Am. & Eng. R. Cas. 283, 40 Minn. 91, 41 N. W. Rep. 458), Animals, 462; Cat.-Gds., 13; Farm Cross., 13.
Sauer *v.* Union Oil Co. (43 La. Ann. 699, 9 So. Rep. 566), Evid., 120; Negl., 102.
Sauerborn *v.* New York C. & H. R. R. Co. (52 N. Y. S. R. 784, 23 N. Y. Supp. 478, 69 Hun 429; affirmed in 141 N. Y. 553), Contrib. Neg., 87; Cross., Inj. at, 136; Death, etc., 202, 353.
Sauerhering *v.* Iron Bridge & M. R. Co. (25 Wis. 447), Mun. Aid, 140, 302.
Saunders *v.* Atlanta & F. R. Co. (83 Ga. 437, 10 S. E. Rep. 266), Employés, 13.
Saunders *v.* New York C. & H. R. R. Co. (30 Abb. N. Cas. 88, 23 N. Y. Supp. 927), Rip. Rts., 7, 11.
Saunders *v.* New York C. & H. R. R. Co. (71 Hun 153, 54 N. Y. S. R. 364, 24 N. Y. Supp. 659; affirming 23 N. Y. Supp. 927, 30 Abb. N. Cas. 88; modified and affirmed in 144 N. Y. 75, 38 N. E. Rep. 992), Land Grants, 124.
Saunders *v.* St. Louis, K. C. & N. R. Co. (57 Mo. 117), Fences, 65.
Saunders *v.* Southeastern R. Co (L. R. 5 Q. B. D. 456, 49 L. J. Q. B. D. 761, 3 Ry. & C. T. Cas. xxi, 43 L. T. 281, 29 W. R. 56), Tickets & F., 145, 146.
Saussy *v.* South Fla. R. Co. (22 Fla. 327), Fires, 203.
Sauter *v.* New York C. & H. R. R. Co. (66 N. Y. 50; affirming 6 Hun 446), Car. of P., 248; Death, etc., 165, 284.
Savage *v.* Chicago, M. & St. P. R. Co. (13 Am. & Eng. R. Cas. 566, 31 Minn. 419, 18 N. W. Rep. 272), Animals, 542.
Savage *v.* Corn Exchange Ins. Co. (36 N. Y. 655; affirming 4 Bosw. 1), Fire Ins., 1.
Savage *v.* Pickard (22 Am. & Eng. R. Cas. 490, 14 Lea (Tenn.) 46), Ry. Com'rs, 43.
Savannah *v.* Atlantic & G. R. Co. (3 Woods (U. S.) 432), Tax., 11.
Savannah *v.* Jessup (9 Am. & Eng. R. Cas. 573, 106 U. S. 563, 1 Sup. Ct. Rep. 512), Tax., 13, 323.
Savannah *v.* Kelly (12 Am. & Eng. R. Cas. 679, 108 U. S. 184, 2 Sup. Ct. Rep. 468), Mun. Aid, 61.
Savannah & C. R. Co. *v.* Callahan (49 Ga. 506), Liens, 17.
Savannah & M. R. Co. *v.* Lancaster (62 Ala. 555), Bonds, 16; Deeds, 3; Deeds of Tr., 8, 18; Mort., 1.
Savannah & M. R. Co. *v.* Shearer (58 Ala. 672, 20 Am. Ry. Rep. 451), Death, etc., 12, 79, 237, 418; Tresp., Inj. to, 48.
Savannah & T. R. Co. *v.* Mayor, etc., of Savannah (45 Ga. 602, 3 Am. Ry. Rep. 36), Mun. Corp., 54; Stat., 57; St. Rys., 87; Sts. & H., 222.
Savannah & W. R. Co. *v.* Jarvis (95 Ala. 149), Animals, 51, 551.
Savannah & W. R. Co. *v.* Meadors (95 Ala. 137, 10 So. Rep. 141), Death, etc., 136, 205; Pl., 108; Sts. & H., 335; Tresp., Inj. to, 3, 49.
Savannah & W. R. Co. *v.* Phillips (90 Ga. 829, 17 S. E. Rep. 82), Employés, Inj. to, 130, 626; Indep. Contr., 11; Negl., 71.
Savannah & W. R. Co. *v.* Woodruff (86 Ga. 94, 13 S. E. Rep. 156), Injunc., 14; Side Tr., 1; Sts. & H., 150.
Savannah, A. & G. R. Co. *v.* Shiels (33 Ga. 601), Charters, 64; Mun. Corp., 54; Nuis., 9; Sts. & H., 13.
Savannah, A. & M. R. Co. *v.* Fort (84 Ga. 300, 10 So. Rep. 1014), Injunc., 19.
Savannah, D. & W. S. L. R. Co. *v.* Schieffelin (80 Ga. 576, 5 S. E. Rep. 781), App., 121.
Savannah, F. & W. R. Co. *v.* Barber (71 Ga. 644), Employés, Inj. to, 299, 396, 599; Trial, 52.
Savannah, F. & W. R. Co. *v.* Clark (23 Fla. 308, 2 So. Rep. 667), App., 133.
Savannah, F. & W. R. Co. *v.* Collins (77 Ga. 376, 4 Am. St. Rep. 87, 3 S. E. Rep. 416), Car. of M., 202; Evid., 1, 182.
Savannah, F. & W. R. Co. *v.* Daniels (90 Ga. 608), Bridges, 74.
Savannah, F. & W. R. Co. *v.* Davis (43 Am. & Eng. R. Cas. 542, 25 Fla. 917, 7 So. Rep. 29), Lim. of Ac., 55; Pub. Lds., 4.
Savannah, F. & W. R. Co. *v.* Flannagan (39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471), Death, etc., 211, 221, 271, 323; Evid., 31, 70, 85, 94, 263.
Savannah, F. & W. R. Co. *v.* Folks (76 Ga. 527), Employés, Inj. to, 451.
Savannah, F. & W. R. Co. *v.* Geiger (29 Am. & Eng. R. Cas. 274, 21 Fla. 669, 58 Am. Rep. 697), Animals, 4, 7, 45, 51, 55, 245, 342, 480; Inj. to Cars by Cattle, 2.
Savannah, F. & W. R. Co. *v.* Goss (80 Ga. 524, 5 S. E. Rep. 777), Evid., 73.

Savannah, F. & W. R. Co. *v.* Gray (77 Ga. 440, 3 S. E. Rep. 158), Animals, 51.
Savannah, F. & W. R. Co. *v.* Gray (85 Ga. 825, 11 S. E. Rep. 1022), New Tr., 93.
Savannah, F. & W. R. Co. *v.* Harper (70 Ga. 119), Dam., 102.
Savannah, F. & W. R. Co. *v.* Harrigan (80 Ga. 602, 7 S. E. Rep. 280), Witn., 42.
Savannah, F. & W. R. Co *v.* Harris (42 Am. & Eng. R. Cas. 457, 26 Fla. 148, 7 So. Rep. 544), Car. of M., 108, 543, 653.
Savannah, F. & W. R. Co. *v.* Hoffmayer (75 Ga. 410), Evid., 116, 146.
Savannah, F. & W. R. Co. *v.* Holland (41 Am. & Eng. R. Cas. 196, 82 Ga. 257, 10 S. E. Rep. 200), Dam., 34; Evid., 175; Trial, 118; Witn., 37.
Savannah, F. & W. R. Co. *v.* Lawton (75 Ga. 192), Flood. Lds., 19.
Savannah, F. & W. R. Co. *v.* McIntosh (27 Am. & Eng. R. Cas. 269, 73 Ga. 532), Bagg., 23.
Savannah, F. & W. R. Co. *v.* Morton (71 Ga. 24), Tax., 53, 255, 302, 344, 361.
Savannah, F. & W. R. Co. *v.* Pritchard (28 Am. & Eng. R. Cas. 57, 77 Ga. 412, 4 Am. St. Rep. 92, 1 S. E. Rep. 261), Car. of M., 146, 579, 786; Contr., 10.
Savannah, F. & W. R. Co. *v.* Rice (23 Fla. 575, 3 So. Rep. 170), Animals, 67.
Savannah, F. & W. R. Co. *v.* Smith (86 Ga. 229, 12 S. E. Rep. 579), New Tr., 99.
Savannah, F. & W. R. Co. *v.* State (32 Am. & Eng. R. Cas. 182, 23 Fla. 579, 3 So. Rep. 204), Crim. L., 32.
Savannah, F. & W. R. Co. *v.* Steininger (84 Ga. 579, 11 S. E. Rep. 236), Evid., 278.
Savannah, F. & W. R. Co. *v.* Stewart (71 Ga. 427), Car. of P., 138; Comp. Neg., 21; Contrib. Neg., 51; Crim. L., 45; Death, etc., 334, 373, 395; Tresp., Inj. to, 25, 68, 73.
Savannah, F. & W. R. Co. *v.* Stewart (72 Ga. 207), Animals, 536.
Savannah, F. & W. R. Co. *v.* Watson (86 Ga. 795, 13 S. E. Rep. 156), Pl., 154.
Savannah, F. & W. R. Co. *v.* Watson (89 Ga. 110, 14 S. E. Rep. 890), New Tr., 47.
Savannah, F. & W. R. Co. *v.* Watts (82 Ga. 229, 9 S. E. Rep. 129), Car. of P., 426.
Savannah, G. & N. A. R. Co. *v.* Wilcox (48 Ga. 432, 11 Am. Ry. Rep. 375), Car. of M., 295, 298, 300; Proc., 12.
Savannah, S. & S. R. Co. *v.* Bonaud (58 Ga. 180), Car. of P., 122; Time-tables, 3.
Savannah, S. & S. R. Co. *v.* Coast Line R. Co. (49 Ga. 202), Injunc., 5.
Savannah St. & R. R. Co. *v.* Bryan (86 Ga. 312, 12 S. E. Rep. 307), Assault, 4, 21.
Savery *v.* New York C. & H. R. R. Co. (2 Int. Com. Rep. 210, 2 Int. Com. Com. 338), Int. Com., 25, 47.
Savin *v.* Hoylake R. Co. (4 H. & C. 67, L. R. 1 Ex. 9, 35 L. J. Ex. 52, 11 Jur. N. S. 934, 14 W. R. 109, 13 L. T. 374), Incorp., 6.
Savitz *v.* Ohio & M. R. Co. (49 Ill. App. 315), Discrim., 2.
Sawtell *v.* Western & A. R. Co. (61 Ga. 567), Death, etc., 80.
Sawtelle *v.* Railway Pass. A. Co. (15 Blatchf. (U. S.) 216), Acc. Ins., 9.
Sawyer *v.* Chicago & N. W. R. Co. (22 Wis. 403), Car. of M., 284; Contr., 26.
Sawyer *v.* Concord R. Co. (58 N. H. 517), Abate., 15; Death, etc., 378.
Sawyer *v.* Cox (63 Ill. 130), Deeds, 3, 6; Evid., 152; Land Grants, 21.
Sawyer *v.* Dulaney (30 Tex. 479), Car. of P., 101.
Sawyer *v.* Hannibal & St. J. R. Co. (37 Mo. 241), Car. of P., 151, 158, 177, 587; Derailm., 5; Words & Ph., 7.
Sawyer *v.* Joslin (20 Vt. 172), Car. of M., 510.
Sawyer *v.* Sanders (56 Iowa 422, 9 N. W. Rep. 341), Em. Dom., 437.
Sawyer *v.* Manchester & K. R. Co. (62 N. H. 135, 13 Am. St. Rep. 541), Mun. Aid, 254.
Sawyer *v.* Minneapolis & St. L. R. Co. (33 Am. & Eng. R. Cas. 394, 38 Minn. 103, 35 N. W. Rep. 671, 8 Am. St. Rep. 648), Employés, Inj. to, 484.
Sawyer *v.* Nashua (59 N. H. 404), Tax., 99.
Sawyer *v.* Northfield (7 Cush. (Mass.) 490), Bridges, 36.
Sawyer *v.* Rutland & B. R. Co. (27 Vt. 370), Fel. Serv., 127.
Sawyer *v.* Vermont & M. R. Co. (105 Mass. 196, 2 Am. Ry. Rep. 459), Animals, 154; Fences, 9.
Saxton *v.* New York El. R. Co. (28 J. & S. 421, 18 N. Y. Supp. 188, 44 N. Y. S. R. 832), Elev. Rys., 109.
Saxton *v.* New York El. R. Co. (47 N. Y. S. R. 186, 19 N. Y. Supp. 746), Elev. Rys., 117.
Saxton *v.* New York El. R. Co. (54 N. Y. S. R. 421; reversing 47 N. Y. S. R. 186), Elev. Rys., 164.
Saxton *v.* New York El. R. Co. (139 N. Y. 320, 34 N. E. Rep. 728), Elev. Rys., 166, 175.
Saxton *v.* Texas, S. F. & N. R. Co. (4 N. Mex. 201, 16 Pac. Rep. 851), Constr. Rys., 100.
Sayer *v.* Kansas City, Ft. S. & M. R. Co. (43 Mo. App. 360), Animals, 604.
Sayles *v.* Chicago & N. W. R. Co. (1 Biss. (U. S.) 468), Pat. for Inv., 5, 6, 7.
Sayles *v.* Chicago & N. W. R. Co. (3 Biss. (U. S.) 52; reversed in 97 U. S. 554), Pat. for Inv., 20.
Sayles *v.* Dubuque & S. C. R. Co. (5 Dill. (U. S.) 561), Pat. for Inv., 14.
Sayles *v.* Jourdan (2 N. Y. Supp. 827, 50 Hun 604, 19 N. Y. S. R. 349; affirmed in 121 N. Y. 685, mem., 24 N. E. Rep. 1098), Receiv., 74.
Sayre *v.* Louisville U. B. Assoc. (1 Duv. (Ky.) 143), By-laws, 2.
Sayre *v.* New York & H. R. Co. (3 Duer (N. Y.) 54), Stat. & D., 43.
Sayward *v.* Carlson (1 Wash. 29, 23 Pac. Rep. 830), Pl., 142.
Scagel *v.* Chicago, M. & St. P. R. Co. (83 Iowa 380, 49 N. W. Rep. 990), Death, etc., 267; Derailm., 8; Evid., 247; Trial, 206; Witn., 55, 58.

Scaggs *v.* Baltimore & W. R. Co. (10 Md. 268), Cross., Inj. at, 25; Estop., 13; Witn., 18.
Scaggs *v.* Delaware & H. Canal Co. (26 N. Y. Supp. 323, 56 N. Y. S. R. 319, 74 Hun 198), Cross., Inj. at, 16, 324.
Scaling *v.* Pullman Palace Car Co. (24 Mo. App. 29), Sleep. Car Cos., 5, 24, 27.
Scammon *v.* Kansas City, St. J. & C. B. R. Co. (41 Mo. App. 194), Charges, 45, 54; Int. Com., 10.
Scammon *v.* Wells (42 Am. & Eng. R. Cas. 400, 84 Cal. 311, 24 Pac. Rep. 284), Exp. Cos., 28, 48, 81, 82, 90; Trover, 20.
Scanlan *v.* Boston (140 Mass. 84, 2 N. E. Rep. 787), Cross., Inj. at, 31.
Scanlon *v.* Boston & A. R. Co. (38 Am. & Eng. R. Cas. 48, 147 Mass. 484, 7 N. Eng. Rep. 141, 18 N. E. Rep. 209), Employés, Inj. to, 190, 211.
Scanlon *v.* London & P. S. R. Co. (23 Grant's Ch. (U. C.) 559), Em. Dom., 1232.
Scarborough *v.* Alabama Midland R. Co. (94 Ala. 497, 10 S. E. Rep. 316), Indep. Contr., 25.
Scarce *v.* Indiana & I. C. R. Co. (17 Ind. 193; further appeal 23 Ind. 223), Subscr., 174.
Scarlett *v.* Great Western R. Co. (41 U. C. Q. B. 211), Lim. of Liab., 35.
Scates *v.* King (110 Ill. 456), Mun. Aid, 246.
Schable *v.* Hannibal & St. J. R. Co. (69 Mo. 91), Animals, 604.
Schacherl *v.* St. Paul City R. Co. (41 Am. & Eng. R. Cas. 233, 42 Minn. 42, 43 N. W. Rep. 837), St. Rys., 402.
Schadewald *v.* Milwaukee, L. S. & W. R. Co. (55 Wis. 569, 13 N. W. Rep. 458), Death, etc., 256, 396; Employés, Inj. to, 226.
Schaefer *v.* Georgia R. Co. (66 Ga. 39), Evid., 152, 226.
Schaefert *v.* Chicago, M. & St. P. R. Co. (62 Iowa 624, 17 N. W. Rep. 893), Cross., Inj. at, 140, 198, 223.
Schaeffer *v.* Bonham (95 Ill. 368), Mun. Aid, 154, 266, 410.
Schafer *v.* Gilmer (13 Nev. 330), Car. of P., 101.
Schafer *v.* Schafer (75 Iowa 349, 39 N. W. Rep. 697), Em. Dom., 437.
Schaible *v.* Lake Shore & M. S. R. Co. (97 Mich. 318, 56 N. W. Rep. 565), Employés, Inj. to, 167, 328; Fly. Switch, 1.
Schall *v.* Bowman (62 Ill. 321), Mun. Aid, 1.
Schaper *v.* Brooklyn & L. I. C. R. Co. (4 N. Y. S. R. 860, 42 Hun 657; affirmed in 124 N. Y. 630, mem., 3 Silv. App. 335, 26 N. E. Rep. 311, 35 N. Y. S. R. 112), Cable Rys., 1; St. Rys., 106.
Schaper *v.* Brooklyn & L. I. C. R. Co. (124 N. Y. 630, 3 Silv. App. 335, 26 N. E. Rep. 311, 35 N. Y. S. R. 112), Elev. Rys., 2.
Schapierer *v.* Third Ave. R. Co. (39 N. Y. S. R. 209, 14 N. Y. Supp. 921), New Tr., 42.
Schappert *v.* Ringler (13 J. & S. (N. Y.) 345), Death, etc., 235, 342.
Schaub *v.* Hannibal & St. J. R. Co. (106 Mo. 74, 16 S. W. Rep. 924), Death, etc., 344, 395; Employés, Inj. to, 330, 418; Fel. Serv., 3, 434.
Scheckner *v.* Milwaukee & P. du C. R. Co. (21 Iowa 515), Pl., 69.
Scheffer *v.* Washington City, V. M. & G. S. R. Co. (8 Am. & Eng. R. Cas. 59, 105 U. S. 249), Death, etc., 37.
Scheffler *v.* Minneapolis & St. L. R. Co. (32 Minn. 125, 19 N. W. Rep. 656), Death, etc., 95.
Scheffler *v.* Minneapolis & St. L. R. Co. (19 Am. & Eng. R. Cas. 173, 32 Minn. 518, 21 N. W. Rep. 711), Death, etc., 373, 385; Evid., 247; Tresp., Inj. to, 44.
Scheiderer *v.* Travelers' Ins. Co. (12 Am. & Eng. R. Cas. 160, 58 Wis. 13, 16 N. W. Rep. 47), Acc. Ins., 4, 8.
Schell *v.* Erie R. Co. (51 Barb. (N. Y.) 368, 35 How. Pr. 438, 4 Abb. Pr. N. S. 287), Injunc., 12.
Schenectady & S. Plank-road Co. *v.* Thatcher (11 N. Y. 102), Subscr., 160.
Schermeely *v.* Stillwater & St. P. R. Co. (16 Minn. 506) (Gil. 457), Em. Dom., 551.
Schermerhorn *v.* Hudson River R. Co. (38 N. Y. 103), Fences, 64.
Schermerhorn *v.* Mt. McGregor R. Co. (23 N. Y. Supp. 417, 69 Hun 512, 52 N. Y. S. R. 892), Cross. Sts. & H., 1, 25, 29; Sts. & H., 178, 199.
Schermerhorn *v.* Peck (44 Am. & Eng. R. Cas. 219, 43 Kan. 667, 23 Pac. Rep. 1043), Em. Dom., 436.
Schertz *v.* Indianapolis, B. & W. R. Co. (15 Am. & Eng. R. Cas. 523, 107 Ill. 577; affirming 12 Ill. App. 304), Animals, 135, 580.
Schestanber *v.* Manhattan R. Co. (9 N. Y. S. R. 215, 44 Hun 628; affirmed in 112 N. Y. 664, mem., 20 N. E. Rep. 413, 20 N. Y. S. R. 978), Elev. Rys., 208; Evid., 280.
Scheu *v.* Benedict (116 N. Y. 510, 22 N. E. Rep. 1073, 27 N. Y. S. R. 526), Car. of M., 366.
Scheu *v.* Erie R. Co. (10 Hun (N. Y.) 498), Car. of M., 303.
Scheu *v.* New York, L. & W. R. Co. (12 N. Y. S. R. 99), Pl., 22.
Schick *v.* Brooklyn City R. Co. (32 N. Y. S. R. 245, 10 N. Y. Supp. 528), New Tr., 20.
Schierhold *v.* North Beach & M. R. Co. (40 Cal. 447), Children, Inj. to, 2, 118, 119, 143; Evid., 31, 54; Negl., 56; St. Rys., 451, 461.
Schild *v.* Central Park, N. & E. R. R. Co. (133 N. Y. 446, 31 N. E. Rep. 327, 45 N. Y. S. R. 656; affirming 62 Hun 620, mem., 41 N. Y. S. R. 795, 16 N. Y. Supp. 701), St. Rys., 460, 468.
Schiff *v.* New York C. & H. R. R. Co. (52 How. Pr. (N. Y.) 91), Bills of L., 44, 66.
Schilling *v.* Chicago, M. & St. P. R. Co. (34 Am. & Eng. R. Cas. 60, 71 Wis. 255, 37 N. W. Rep. 414, 40 N. W. Rep. 616), Tresp., Inj. to, 105.
Schimmele *v.* Chicago, M. & St. P. R. Co. (34 Minn. 216, 25 N. W. Rep. 347), Animals, 601.
Schindler *v.* Milwaukee, L. S. & W. R. Co. (42 Am. & Eng. R. Cas. 192, 77 Mich. 136, 43 N. W. Rep. 911; further appeal 87

Mich. 400, 49 N. W. Rep. 670), Pl., 111, 115.
Schindler *v.* Milwaukee, L. S. & W. R. Co. (87 Mich. 400, 49 N. W. Rep. 670), Children, Inj. to, 20, 195; Fly. Switch, 1; Imp. Neg., 13; Licensees, Inj. to, 19.
Schindler *v.* New York, L. E. & W. R. Co. (1 N. Y. S. R. 289), Children, Inj. to, 115, 125, 167.
Schittenhelm *v.* Louisville & N. R. Co. (Ky.) (19 Am. & Eng. R. Cas. 111), Animals, 222.
Schlapbach *v.* Richmond & D. R. Co. (53 Am. & Eng. R. Cas. 42, 35 So. Car. 517, 15 S. E. Rep. 241), Stat. Agts., 8.
Schlengener *v.* Chicago, M. & St. P. R. Co. (19 Am. & Eng. R. Cas. 625, 61 Iowa 235, 16 N. W. Rep. 103), Animals, 464; Proc., 32.
Schlereth *v.* Missouri Pac. R. Co. (96 Mo. 509, 10 S. W. Rep. 66), Contrib. Neg., 75, 79; Death, etc., 368; Negl., 29, 104.
Schlereth *v.* Missouri Pac. R. Co. (115 Mo. 87, 21 S. W. Rep. 1110), App., 81; Death, etc., 279, 368; Employés, Inj. to, 158, 323; Fel. Serv., 1, 298; Sts. & H., 376; Trial, 55.
Schlesinger *v.* Kansas City & S. R. Co. (39 Fed. Rep. 741), Deeds, 24; Fraud. Conv., 2.
Schlesinger *v.* Kansas City & S. R. Co. (152 U. S. 444, 14 Sup. Ct. Rep. 647), Land Grants, 8a.
Schlessinger *v.* Adams Exp. Co. (9 Phila. (Pa.) 70), Charges, 71; Evid., 204; Exp. Cos., 89.
Schlichting *v.* Wintgen (25 Hun (N. Y.) 626), Death, etc., 102, 163.
Schliehauf *v.* Canada Southern R. Co. (28 Grant's Ch. (U. C.) 236), Stat. & D., 34.
Schloss *v.* Atchison, T. & S. F. R. Co. (85 Tex. 601, 22 S. W. Rep. 1014), Bills of L., 1; Car. of M., 293; Charges, 55; Stat., 46.
Schmid *v.* New York, L. E. & W. R. Co. (32 Hun (N. Y.) 335; affirmed (?) 98 N. Y. 634, mem.), Receiv., 186.
Schmidt *v.* Burlington, C. R. & N. R. Co. (75 Iowa 606, 39 N. W. Rep. 916), Cross., Inj. at, 318; Trial, 125.
Schmidt *v.* Chicago & N. W. R. Co. (83 Ill. 405), Comp. Neg., 4, 19; Negl., 74; Trial, 167.
Schmidt *v.* Market St. & W. G. R. Co. (90 Cal. 37, 27 Pac. Rep. 61), St. Rys., 207.
Schmidt *v.* Milwaukee & St. P. R. Co. (23 Wis. 186), Children, Inj. to, 10, 68, 73, 75.
Schmidt *v.* Minneapolis, L. & M. R. Co. (38 Minn. 491, 38 N. W. Rep. 487), Em. Dom., 676.
Schmidt *v.* Philadelphia & R. R. Co. (149 Pa. St. 357, 24 Atl. Rep. 218), Cross., Inj. at, 326.
Schmidt *v.* Steinway & H. P. R. Co. (4 Silv. App. (N. Y.) 119), Negl., 9, 59.
Schmidt *v.* Steinway & H. P. R. Co. (55 Hun 496, 29 N. Y. S. R. 201, 8 N. Y. Supp. 664, 9 N. Y. Supp. 939), Fel. Serv., 47; Negl., 82; St. Rys., 478.
Schmidt *v.* Steinway & H. P. R. Co. (132 N. Y. 566, mem., 30 N. E. Rep. 389, 43 N. Y. S. R. 683; reversing 57 Hun 590, mem., 32 N. Y. S. R. 912, 10 N. Y. Supp. 672), St. Rys., 478.
Schmitt *v.* Dry Dock, E. B. & B. R. Co. (2 N. Y. City Ct. 359), Dam., 76; Negl., 97.
Schmitt *v.* Dry Dock, E. B. & B. R. Co. (3 N. Y. S. R. 257), Evid., 39.
Schmitz *v.* St. Louis, I. M. & S. R. Co. (46 Mo. App. 380), Children, Inj. to, 147, 167, 182, 184; Evid., 284; Sts. & H., 412.
Schmitz *v.* Union El. R. Co. (50 Hun 407, 21 N. Y. S. R. 424, 3 N. Y. Supp. 331), Elev. Rys., 27.
Schmolze *v.* Chicago, M. & St. P. R. Co. (83 Wis. 659, 53 N. W. Rep. 743, 54 N. W. Rep. 106), Cross., Inj. at, 256, 262.
Schneider *v.* Chicago, B. & N. R. Co. (42 Minn. 68, 43 N. W. Rep. 783), Fel. Serv., 186.
Schneider *v.* Detroit (72 Mich. 240, 40 N. W. Rep. 329), Mun. Corp., 32.
Schneider *v.* Evans (25 Wis. 241), Car. of M., 384.
Schneider *v.* Missouri Pac. R. Co. (75 Mo. 295), Cross., Inj. at, 91; Negl., 89.
Schneider *v.* Missouri Pac. R. Co. (29 Mo. App. 68), Waters & W., 28.
Schneider *v.* New Orleans & C. R. Co. (54 Fed. Rep. 466), Elec. Rys., 30.
Schneider *v.* Pennsylvania Co. (Pa.) (3 Atl. Rep. 26), Dam., 85.
Schneider *v.* Second Ave. R. Co. (15 N. Y. Supp. 556, 27 J. & S. 536, 39 N. Y. S. R. 37; reversed on other grounds in 133 N. Y. 583, 30 N. E. Rep. 752, 44 N. Y. S. R. 680), Collis., 24, 25, 27; New Tr., 77.
Schneider *v.* Second Ave. R. Co. (133 N. Y. 583, 30 N. E. Rep. 752, 44 N. Y. S. R. 680, 4 Silv. App. 232), Collis., 27; Contrib. Neg., 43; Neg., 33, 92; St. Rys., 337, 344, 431.
Schneider *v.* Turner (27 Ill. App. 220), Contr., 55.
Schneider *v.* Wisconsin C. Co. (81 Wis. 356, 51 N. W. Rep. 582), Pl., 174.
Schneir *v.* Chicago, R. I. & P. R. Co. (40 Iowa 337), Animals, 480, 495.
Schnibbe *v.* Central R. & B. Co. (85 Ga. 592, 11 S. E. Rep. 876), Employés, Inj. to, 238.
Schnur *v.* Citizens' Traction Co. (153 Pa. St. 29, 25 Atl. Rep. 650), Cable Rys., 14; Children, Inj. to, 66.
Schoen *v.* Dry Dock, E. B. & B. R. Co. (26 J. & S. 149, 31 N. Y. S. R. 400, 9 N. Y. Supp. 709), Death, etc., 234; Trial, 85.
Schoenfeld *v.* Milwaukee City R. Co. (74 Wis. 433, 43 N. W. Rep. 162), St. Rys., 428.
Schofield *v.* Chicago, M. & St. P. R. Co. (2 McCrary (U. S.) 268), Cross., Inj. at, 196, 268.
Schofield *v.* Chicago, M. & St. P. R. Co. (19 Am. & Eng. R. Cas. 353, 114 U. S. 615, 5 Sup. Ct. Rep. 1125), Cross., Inj. at, 251, 256.
Schofield *v.* Pennsylvania S. V. R. Co. (2 Pa. Dist. 57), Branch & L. Roads, 4; Bridges, 59, 61.
Schoharie Valley R. Co.'s Case (12 Abb. Pr. N. S. (N. Y.) 394), Direct., 13; Stock, 81.

Scholes *v.* North London R. Co. (21 L. T. 835), Dam., 10.
Scholl *v.* Broadway R. Co. (43 N. Y. S. R. 770, 63 Hun 629, mem., 28 Abb. N. Cas. 205, 17 N. Y. Supp. 755), Trial, 73.
Schoolcraft *v.* Louisville & N. R. Co. (48 Am. & Eng. R. Cas. 1, 92 Ky. 233, 17 S. W. Rep. 567), Death, etc., 8, 148, 180.
School District *v.* Boston, H. & E. R. Co. (102 Mass. 552), Car. of M., 455, 725.
School District No. 15 *v.* Allen County Com'rs (22 Kan. 568), Ult. Vir., 17.
Schooling *v.* St. Louis, K. C. & N. R. Co. (75 Mo. 518), Animals, 40.
Schopman *v.* Boston & W. R. Co. (9 Cush. (Mass.) 24), Car. of P., 512; Tickets & F., 24.
Schorestene *v.* Iselin (23 N. Y. Supp. 557, 69 Hun 250), Contr., 8; Reorg., 4.
Schreiber *v.* Chicago & E. R. Co. (23 Am. & Eng. R. Cas. 130, 115 Ill. 340, 3 N. E. Rep. 427), Em. Dom., 145, 152, 460.
Schrieber *v.* Twenty-third St. R. Co. (10 N. Y. S. R. 441, 45 Hun 592), St. Rys., 367.
Schreiner *v.* St. Louis R. Co. (5 Mo. App. 596), St. Rys., 392.
Schrier *v.* Milwaukee, L. S. & W. R. Co. (65 Wis. 457, 27 N. W. Rep. 167), Death, etc., 433; Trial, 71.
Schroeder *v.* Chicago & A. R. Co. (53 Am. & Eng. R. Cas. 436, 108 Mo. 322, 18 S. W. Rep. 1094), Contrib. Neg., 45; Employés, Inj. to, 8, 182, 185, 297, 334, 701, 716; Fel. Serv., 312, 314.
Schroeder *v.* Chicago, R. I. & P. R. Co. (41 Iowa 344), Fel. Serv., 174.
Schroeder *v.* Chicago, R. I. & P. R. Co. (47 Iowa 375, 14 Am. Ry. Rep. 359), Fel. Serv., 175; Phys. Exam., 1.
Schroeder *v.* De Graff (5 Am. & Eng. R. Cas. 298, 28 Minn. 299, 9 N. W. Rep. 857), Em. Dom., 1082; Tresp., 15, 16.
Schroeder *v.* Detroit, G. H. & M. R. Co. (44 Mich. 387, 6 N. W. Rep. 872), Em. Dom., 961.
Schroeder *v.* Hudson River R. Co. (5 Duer (N. Y.) 55), Car. of M., 92, 215, 562, 593.
Schubert *v.* Minneapolis & St. L. R. Co. (27 Minn. 360, 7 N. W. Rep. 366), Animals, 122, 288.
Schue *v.* Benedict (116 N. Y. 510, 22 N. E. Rep. 1073, 27 N. Y. S. R. 526), Car. of M., 239.
Schuerman *v.* Missouri R. Co. (3 Mo. App. 565), Contrib. Neg., 105, 113.
Schular *v.* Hudson River R. Co. (38 Barb. (N. Y.) 653), Indep. Contr., 9; Pl., 45.
Schulenberg *v.* Harriman (21 Wall. (U. S.) 44; affirming 2 Dill. 398), Land Grants, 44.
Schulenburg *v.* Memphis, C. & N. W. R. Co. (67 Mo. 442), Liens, 22.
Schuler *v.* Northern Liberties & P. R. T. Co. (3 Whart. (Pa.) 555), Em. Dom., 133.
Schuler *v.* Third Ave. R. Co. (44 N. Y. S. R. 774, 17 N. Y. Supp. 834; affirmed in 48 N. Y. S. R. 663, 1 Misc. 351, 20 N. Y. Supp. 683), Evid., 28, 163; New Tr., 41.
Schuler *v.* Third Ave. R. Co. (48 N. Y. S. R. 663, 1 Misc. 351, 20 N. Y. Supp. 863), Evid., 211; Pl., 110; St. Rys., 341.
Schulte *v.* New Orleans City & L. R. Co. (44 La. Ann. 509, 10 So. Rep. 811), St. Rys., 493.
Schulte *v.* North Pac. Transp. Co. (50 Cal. 592), Nuis., 9.
Schulte *v.* St. Louis, I. M. & S. R. Co. (76 Mo. 324), Animals, 620; App., 146.
Schultz *v.* Chicago & N. W. R. Co. (44 Wis. 638, 18 Am. Ry. Rep. 146), Contrib. Neg., 42; Employés, Inj. to, 157, 182, 298; Release, 14.
Schultz *v.* Chicago & N. W. R. Co. (28 Am. & Eng. R. Cas. 404, 67 Wis. 616, 31 N. W. Rep. 321, 58 Am. Rep. 881), Employés, Inj. to, 14, 172, 198, 214; Fel. Serv., 382, 388.
Schultz *v.* Chicago, M. & St. P. R. Co. (48 Wis. 375, 4 N. W. Rep. 399), Employés, Inj. to, 769; Fel. Serv., 95, 315, 330; New Tr., 82.
Schultz *v.* New York C. & H. R. R. Co. (69 Hun 515, 53 N. Y. S. R. 149, 23 N. Y. Supp. 509), Cross., Inj. at, 280.
Schultz *v.* Pacific R. Co. (36 Mo. 13), Car. of P., 139, 140, 180; Death, etc., 234.
Schultz *v.* Third Ave. R. Co. (15 J. & S. (N. Y.) 285), New Tr., 93.
Schultz *v.* Third Ave. R. Co. (9 Am. & Eng. R. Cas. 412, 89 N. Y. 242; reversing 14 J. & S. 211), Trial, 190; Witn., 39, 41.
Schultze *v.* Missouri Pac. R. Co. (32 Mo. App. 438), Car. of P., 350; Contrib. Neg., 75, 76.
Schulze *v.* Great Eastern R. Co. (30 Am. & Eng. R. Cas. 134, 19 Q. B. D. 30, 56 L. J. Q. B. 442, 5 Ry. & C. T. Cas. vii), Car. of M., 805.
Schum *v.* Pennsylvania R. Co. (107 Pa. St. 8), Cross., Inj. at, 234.
Schumaker *v.* St. Paul & D. R. Co. (46 Minn. 39, 48 N. W. Rep. 559), Dam., 2, 8; Employés, Inj. to, 330; Trial, 104.
Schureman *v.* Missouri R. Co. (7 Mo. App. 570), Sts. & H., 380.
Schurmeier *v.* St. Paul & P. R. Co. (8 Minn. 113) (Gil. 88), Injunc., 35.
Schurmeier *v.* St. Paul & P. R. Co. (10 Minn. 82) (Gil. 59), Sts. & H., 49, 422.
Schurr *v.* Houston (10 N. Y. S. R. 262), Car. of P., 12, 17, 420.
Schuster *v.* Kansas City, St. J. & C. B. R. Co. (60 Mo. 290), Constr. Rys., 92.
Schut *v.* Chicago & W. M. R. Co. (70 Mich. 438), Animals, 9.
Schutter *v.* Adams Exp. Co. (5 Mo. App. 316), Exp. Cos., 75, 84.
Schuyler *v.* Fitchburg R. Co. (47 N. Y. S. R. 741, 20 N. Y. Supp. 287), Cat.-Gds., 28.
Schuyler County *v.* Mercer County (9 Ill. 20), Counties, 4.
Schulyer County *v.* Thomas (98 U. S. 169), Mun. Aid, 136.
Schuyler County Sup'rs *v.* People (25 Ill. 181), Mun. Aid, 186.
Schuylkill Nav. Co. *v.* Pottsville & M. R. Co. (17 Phila. (Pa.) 648), Injunc., 30.
Schuylkill River E. S. R. Co., In re (17 Phila. (Pa.) 11), Cross. Rys., 50.
Schuylkill River E. S. R. Co. *v.* Harris (124

Pa. St. 215, 16 Atl. Rep. 838), Em. Dom., 952.
Schuylkill River E. S. R. Co. *v.* Stocker (44 Am. & Eng. R. Cas. 137, 128 Pa. St. 233, 18 Atl. Rep. 399), Em. Dom., 452, 580, 602, 652; Witn., 118.
Schwab *v.* Union Line (13 Mo. App. 159), Car. of M., 125, 130, 131, 137, 694.
Schwabacher *v.* Kane (13 Mo. App. 126), Car. of M., 492, 494, 516.
Schwalbach *v.* Chicago, M. & St. P. R. Co. (73 Wis. 137, 40 N. W. Rep. 579), Evid., 207.
Schwartz *v.* Crescent City R. Co. (30 La. Ann. 15), St. Rys., 487.
Schwartz *v.* Hudson River R. Co. (4 Robt. (N. Y.) 347), Cross., Inj. at, 65, 284.
Schwarz *v.* Hannibal & St. J. R. Co. (58 Mo. 207), Animals, 390.
Schwarz *v.* Judd (28 Minn. 371, 10 N. W. Rep. 208), Death, etc., 129.
Schwerdtfeger *v.* New York & B. Transp. Co. (10 N. Y. S. R. 56, 45 Hun 590, mem.), Employés, Inj. to, 100.
Schwerin *v.* North Pac. C. R. Co. (13 Sawy. (U. S.) 507), Car. of P., 106.
Schwier *v.* New York C. & H. R. R. Co. (15 Hun (N. Y.) 572), Children, Inj. to, 21
Schwier *v.* New York C. & H. R. R. Co. (14 Am. & Eng. R. Cas. 656, 90 N. Y. 558; affirming 24 Hun 139), Children, Inj. to, 4; Trial, 121.
Schwinge *v.* London & B. R. Co. (3 Sm. & G. 30, 1 Jur. N. S. 368, 24 L. J. Ch. 405), Em. Dom., 1180.
Schwinger *v.* Raymond (83 N. Y. 192, 38 Am. Rep. 415), Car. of M., 120.
Scioto Valley R. Co. *v.* Cronin (38 Ohio St. 122), Liens, 50.
Scioto Valley R. Co. *v.* Lawrence (7 Am. & Eng. R. Cas. 93, 38 Ohio St. 41, 43 Am. Rep. 419), Sts. & H., 225.
Scioto Valley R. Co. *v.* McCoy (42 Ohio St. 251), Liens, 51.
Scipio *v.* Wright (101 U. S. 665), Mun. Aid, 91, 274.
Scofield *v.* Lake Shore & M. S. R. Co. (23 Am. & Eng. R. Cas. 612, 43 Ohio St. 571, 54 Am. Rep. 846, 3 N. E. Rep. 907), Car. of M., 1; Discrim., 13, 17, 71, 74, 81.
Scofield *v.* Lake Shore & M. S. R. Co. (2 Int. Com. Rep. 67, 2 Int. Com. Com. 90), Int. Com., 17, 31, 43.
Scofield *v.* Perkerson (46 Ga. 325, 350), Western & A. R. Co., 3, 4.
Scogin *v.* Perry (32 Tex. 21), Judgm., 38.
Scotland County *v.* Hill (112 U. S. 183, 5 Sup. Ct. Rep. 93), Mun. Aid, 365.
Scotland County *v.* Hill (132 U. S. 107, 10 Sup. Ct. Rep. 26; affirming 25 Fed. Rep. 395), Coupons, 12; Mun. Aid, 136, 374.
Scotland County *v.* Missouri, I. & N. R. Co. (65 Mo. 123), Charters, 17; Stat., 65; Tax., 137, 141, 181, 185.
Scotland County *v.* Thomas (94 U. S. 682; affirming 3 Dill. 7), Mun. Aid, 136.
Scotland County Court *v.* United States (140 U. S. 41, 11 Sup. Ct. Rep. 697), Mun. Aid, 405.
Scott, In re (6 Man. 193), Em. Dom., 1245.
Scott *v.* Baltimore, C. & R. Steamboat Co. (19 Fed. Rep. 56), Car. of M., 97.
Scott *v.* Central Park, N. & E. R. R. Co. (13 N. Y. S. R. 551, 47 Hun 634, mem.), Trial, 105.
Scott *v.* Central Park, N. & E. R. R. Co. (53 Hun (N. Y.) 414, 24 N. Y. S. R. 754, 6 N. Y. Supp. 382), Assault, 13.
Scott *v.* Central R. & B. Co. (52 Barb. (N. Y.) 45), Divid., 11, 14.
Scott *v.* Central R. Co. (77 Ga. 450), Death, etc., 388.
Scott *v.* Chicago, M. & St. P. R. Co. (68 Iowa 360, 24 N. W. Rep. 584), Animals, 122.
Scott *v.* Chicago, M. & St. P. R. Co. (78 Iowa 199, 42 N. W. Rep. 645), Animals, 445, 560.
Scott *v.* Clinton & S. R. Co. (6 Biss. (U. S.) 529), Mort., 54; Rem. of C., 4.
Scott *v.* Erie R. Co. (16 Am. & Eng. R. Cas. 51, 34 N. J. Eq. 354), Discrim., 74.
Scott *v.* Grand Trunk R. Co. (3 Ont. Pr. 276), Em. Dom., 1226.
Scott *v.* Great Western R. Co. (23 U. C. C. P. 182), Car. of M., 480.
Scott *v.* Hansheer (94 Ind. 1), Consol., 34; Mun. Aid, 80; Pl., 35.
Scott *v.* Indianapolis & V. R. Co. (Ind.) (10 Am. & Eng. R. Cas. 189), Judgm., 17.
Scott *v.* Manhattan R. Co. (42 N. Y. S. R. 697, 17 N. Y. Supp. 364, 28 J. & S. 233), App., 48; Elev. Rys., 153.
Scott *v.* Metropolitan El. R. Co. (2 Misc. 150, 50 N. Y. S. R. 214, 21 N. Y. Supp 630, 29 Abb. N. Cas. 435), Elev. Rys., 111.
Scott *v.* Metropolitan R. Co. (4 Mackey (D. C.) 152), Husb. & W., 22, 37.
Scott *v.* Mexican Nat. R. Co. (4 Tex. App. (Civ. Cas.) 496, 18 S. W. Rep. 137), Employés, 16.
Scott *v.* Middletown, U. & W. G. R. Co. (4 Am. & Eng. R. Cas. 114, 86 N. Y. 200; affirming 21 Hun 231), Agency, 107; Evid., 172; Sales, 12.
Scott *v.* Midland R. Co. (33 U. C. Q. B. 580), Charges, 20, 60; Discrim., 28; Stat., 2.
Scott *v.* Missouri Pac. R. Co. (38 Mo. App. 523), Penalty, 12.
Scott *v.* Oregon R. & N. Co. (28 Am. & Eng. R. Cas. 414, 14 Oreg. 211, 13 Pac. Rep. 98), Employés, Inj. to, 214, 267, 268.
Scott *v.* Pennsylvania R. Co. (130 N. Y. 679, 3 Silv. App. 624, 29 N. E. Rep. 289, 41 N. Y. S. R. 712; reversing 56 Hun 640, 30 N. Y. S. R. 843, 9 N. Y. Supp. 189), Cross., Inj. at, 252.
Scott *v.* Province (1 Pittsb. (Pa.) 189), Car. of M., 253.
Scott *v.* St. Louis, I. M. & S. R. Co. (75 Mo. 136), Animals, 361.
Scott *v.* St. Paul & C. R. Co. (21 Minn. 322, 18 Am. Ry. Rep. 421), Em. Dom., 130, 385; Words & Ph., 243.
Scott *v.* Third Ave. R. Co. (36 N. Y. S. R. 838, 59 Hun 456, 13 N. Y. Supp. 344), Death, etc., 343.
Scott *v.* Third Ave. R. Co. (41 N. Y. S. R.

152, 61 Hun 627, 16 N. Y. Supp. 350), Death, etc., 269.
Scott *v.* Union County (63 Iowa 583, 19 N. W. Rep. 667), Judgm., 34; Mun. Aid, 412.
Scott *v.* Uxbridge & R. R. Co. (L. R. 1 C. P. 596, 12 Jur. N. S. 602, 35 L. J. C. P. 293, 14 W. R. 893), Stockh., 29; Tender, 2.
Scott *v.* Wilmington & R. R. Co. (4 Jones (N. Car.) 432), Animals, 448.
Scott *v.* Wilmington & W. R. Co. (96 N. Car. 428, 2 S. E. Rep. 151), Contrib. Neg., 113; Cross., Inj. at, 253, 276; Trial, 129.
Scotthorn *v.* South Staffordshire R. Co. (8 Ex. 341, 22 L. J. Ex. 121, 7 Railw. Cas. 870), Car. of M., 499, 587.
Scottish Northeastern R. Co. *v.* Anderson (1 Sc. Sess. Cas. (3d ser.) 1056, 2 Ry. & C. T. Cas. 21), Charges, 107.
Scottish Northeastern R. Co. *v.* Stewart (3 Macq. H. L. Cas. 382, 5 Jur. N. S. 607), Contr., 5, 67; Em. Dom., 1169; Incorp., 4; Ult. Vir., 16; Vend. & P., 6.
Scovill *v.* Griffith (12 N. Y. 509), Trover, 10.
Scoville *v.* Hannibal & St. J. R. Co. (22 Am. & Eng. R. Cas. 534, 81 Mo. 434), Death, etc., 178, 294.
Scoville *v.* Hannibal & St. J. R. Co. (94 Mo. 84, 6 S. W. Rep. 654), Evid., 263.
Scranton Steel Co. *v.* Ward's D. & L. S. Line (40 Fed. Rep. 866), Estop., 30.
Scruggs *v.* Baltimore & O. R. Co. (5 McCrary (U. S.) 590, 18 Fed. Rep. 318), Bills of L., 81; Car. of M., 453.
Scruggs *v.* Davis (3 Head (Tenn.) 664), Car. of Slaves, 2.
Scruggs *v.* Memphis & C. R. Co. (108 U. S. 368, 2 Sup. Ct. Rep. 780), Leases, 34.
Scurlock *v.* Gulf, C. & S. F. R. Co. (77 Tex. 478, 14 S. W. Rep. 148), Attach., 50.
Seaboard & R. R. Co. *v.* Norfolk County Sup'rs (83 Va. 195, 2 S. E. Rep. 278), Tax., 62, 148.
Seaboard Mfg. Co. *v.* Woodson (94 Ala. 143, 10 So. Rep. 87), Employés, Inj. to, 509; Fel. Serv., 456.
Seaboard Mfg. Co. *v.* Woodson (98 Ala. 378, 11 So. Rep. 733), Dam., 16; Employés, Inj. to, 147, 249, 760.
Seale *v.* Gulf, C. & S. F. R. Co. (65 Tex. 274, 57 Am. Rep. 602), Death, etc., 74; Negl., 46, 48.
Sears *v.* Edmondson (71 Ala. 509), Witn., 106.
Seaman *v.* Erie R. Co. (2 Ben. (U. S.) 128), Adm., 4.
Seaman *v.* Farmers' L. & T. Co. (15 Wis. 578), Death, etc., 280.
Seaman *v.* Koehler (3 Silv. App. (N. Y.) 127), App., 111.
Seaman *v.* Koehler (122 N. Y. 646, 25 N. E. Rep. 353, 33 N. Y. S. R. 729), Collis., 25; Fel. Serv., 474.
Searcy *v.* Yarnell (47 Ark. 269, 1 S. W. Rep. 319), Direct., 40; Stockh., 115.
Searl *v.* School Dist. No. 2 (124 U. S. 197, 8 Sup. Ct. Rep. 460), Rem. of C., 15.
Searle *v.* Kanawha & O. R. Co. (37 Am. & Eng. R. Cas. 179, 32 W. Va. 370, 9 S. E. Rep. 248), Car. of P., 162, 197; Death, etc., 130, 139, 311, 389, 415.
Searle *v.* Lackawanna & B. R. Co. (33 Pa. St. 57), Em. Dom., 664; Mines, etc., 1; Words & Ph., 134.
Searles *v.* Alabama & V. R. Co. (69 Miss. 186, 13 So. Rep. 815), Car. of M., 569.
Searles *v.* Jacksonville, P. & M. R. Co. (2 Woods (U. S.) 621), Abate., 13; Injunc., 14; Mort., 295, 312; Parties, 24; Receiv., 24.
Searles *v.* Manhattan R. Co. (25 Am. & Eng. R. Cas. 358, 101 N. Y. 661, 5 N. E. Rep. 66; reversing (?) 17 J. & S. 425), Elev. Rys., 218; Evid., 142.
Searles *v.* Mann Boudoir Car Co. (45 Fed. Rep. 330), Sleep. Car Cos., 9.
Searles *v.* Milwaukee & St. P. R. Co. (35 Iowa 490, 5 Am. Ry. Rep. 524), Animals, 65, 248.
Sears *v.* Central R. & B. Co. (53 Ga. 630), Death, etc., 211; Employés, Inj. to, 414.
Sears *v.* Eastern R. Co. (14 Allen (Mass.) 433), Car. of P., 122; Tickets & F., 1; Time-tables, 1, 3.
Sears *v.* Iowa Midland R. Co. (39 Iowa 417), Mun. Aid, 412
Sears *v.* Kings County El. R. Co. (156 Mass. 440, 31 N. E. Rep. 490), Officers, 15.
Sears *v.* Marshalltown St. R. Co. (20 Am. & Eng. R. Cas. 36, 65 Iowa 742, 23 N. W. Rep. 150), St. Rys., 194, 229.
Sears *v.* Seattle Con. St. R. Co. (6 Wash. 227, 33 Pac. Rep. 389, 1081), App., 97; Car. of P., 646; Elec. Rys., 28; Trial, 91, 124; Witn., 105.
Seaton *v.* Chicago, R. I. & P. R. Co. (55 Mo. 416), Animals, 320.
Seats *v.* Georgia Midland & G. R. Co. (86 Ga. 811, 13 S. E. Rep. 88), Death, etc., 174.
Seattle *v.* Columbia & P. S. R. Co. (6 Wash. 379, 33 Pac. Rep. 1048), Mun. Corp., 56; Sts. & H., 78, 92, 154.
Seattle & M. R. Co. *v.* Claussen-Sweeney Brew. Co. (5 Wash. 462, 32 Pac. Rep. 102), Sales, 8.
Seattle & M. R. Co. *v.* Gilchrist (4 Wash. 509, 30 Pac. Rep. 738), Em. Dom., 560, 573, 616, 620, 640; Witn., 115, 124, 145.
Seattle & M. R. Co. *v.* Murphine (4 Wash. 448, 30 Pac. Rep. 720), Em. Dom., 368, 573, 603, 692.
Seattle & M. R. Co. *v.* O'Meara (4 Wash. 17, 29 Pac. Rep. 835), Em. Dom., 937.
Seattle & M. R. Co. *v.* Scheike (3 Wash. 625, 29 Pac. Rep. 217, 30 Pac. Rep. 503), Em. Dom., 708.
Seattle & M. R. Co. *v.* State (52 Fed. Rep. 594), Rem. of C., 16.
Seattle & M. R. Co. *v.* State (7 Wash. 150, 34 Pac. Rep. 551), Cross. Rys., 7, 27, 76, 96; Par. & Comp. L., 4; Sts. & H., 30.
Seattle & W. W. R. Co. *v.* Ah Kow (2 Wash. T. 36, 3 Pac. Rep. 188), Liens, 15.
Seaver *v.* Boston & M. R. Co. (14 Gray (Mass.) 466), Employés, Inj. to, 131; Fel. Serv., 17, 26, 222, 228, 276; Witn., 177.
Seawell *v.* Raleigh & A. R. Co. (106 N. Car. 272, 10 S. E. Rep. 1045), Animals, 70.
Sebrell *v.* Barrows (36 W. Va. 212, 14 S. E. Rep. 996), Witn., 193.

Secombe *v.* Milwaukee & St. P. R. Co. (2 Dill. (U. S.) 469), Consol., 4.
Secombe *v.* Milwaukee & St. P. R. Co. (23 Wall. (U. S.) 108, 49 How. Pr. 75, 11 Am. Ry. Rep. 355; affirming 2 Dill. 469), Em. Dom., 59, 72, 180, 234, 909; Judgm., 32.
Second & T. St. Pass. R. Co. *v.* Green & C. St. Pass. R. Co. (3 Phila. (Pa.) 430), Charters, 17.
Second & T. St. Pass. R. Co. *v.* Philadelphia (51 Pa. St. 465), Tax., 280, 301.
Second & T. St. R. Co. *v.* Morris (8 Phila. (Pa.) 304), St. Rys., 237.
Second Ave. R. Co. *v.* Coleman (24 Barb. (N. Y.) 300), Pl., 19.
Second Ave. R. Co. *v.* Mehrbach (17 J. & S. (N. Y.) 267), Pres., 10.
Second Ave. R. Co. *v.* Mehrbach (18 J. & S. (N. Y.) 1), Pres., 10.
Secongost *v.* Missouri Pac. R. Co. (53 Mo. App. 369), Easem., 15.
Secor *v.* Toledo, P. & W. R. Co. (7 Biss. (U. S.) 513), Contempt, 3.
Secor *v.* Toledo, P. & W. R. Co. (10 Fed. Rep. 15), Car. of P., 422.
Secord *v.* Costello (17 Grant's Ch. (U. C.) 328), Trusts, 1.
Secord *v.* Great Western R. Co. (15 U. C. Q. B. 631), Death, etc., 427, 430.
Secord *v.* St. Paul, M. & M. R. Co. (5 McCrary (U. S.) 515, 18 Fed. Rep. 221), Car. of P., 12, 44, 155, 348, 626; Med. Serv., 1.
Secretary of War *v.* Great Western R. Co. (13 Grant's Ch. (U. C.) 503), Em. Dom., 1210.
Security Bank *v.* Luttgen (29 Minn. 363, 13 N. W. Rep. 151), Bills of L., 128.
Sedalia *v.* Missouri, K. & T. R. Co. (17 Mo. App. 105), Em. Dom., 865, 920.
Sedalia, W. & S. R. Co. *v.* Abell (17 Mo. App. 645), Incorp., 8; Subscr., 50, 51, 162.
Sedalia, W. & S. R. Co. *v.* Abell (18 Mo. App. 632), Em. Dom., 652, 689, 693.
Sedalia, W. & S. R. Co. *v.* Smith (27 Mo. App. 371), Guar., 6.
Sedalia, W. & S. R. Co. *v.* Wilkerson (25 Am. & Eng. R. Cas. 78, 83 Mo. 235), Stockh., 1; Subscr., 6.
Sedgwick *v.* Illinois C. R. Co. (31 Am. & Eng. R. Cas. 207, 73 Iowa 158, 34 N. W. Rep. 790), Evid., 254; Pl., 142.
Sedgwick *v.* Illinois C. R. Co. (76 Iowa 340, 41 N. W. Rep. 35), Employés, Inj. to, 418.
Sedgwick County Com'rs *v.* Bailey (11 Kan. 631), Counties, 1; Mun. Aid, 413.
Seebach *v.* Metropolitan El. R. Co. (44 N. Y. S. R. 827, 18 N. Y. Supp. 208), Elev. Rys., 157.
Seefeld *v.* Chicago, M. & St. P. R. Co. (67 Wis. 96, 29 N. W. Rep. 904), Em. Dom., 552, 570, 623.
Seefeld *v.* Chicago, M. & St. P. R. Co. (32 Am. & Eng. R. Cas. 109, 70 Wis. 216, 35 N. W. Rep. 278), Contrib. Neg., 87; Cross., Inj. at, 288.
Seeley *v.* Missouri, K. & T. R. Co. (39 Fed. Rep. 252), Attach., 6, 50.
Seeley *v.* New York C. & H. R. R. Co. (25 Hun (N. Y.) 280), Trial, 83.
Seeley *v.* New York C. & H. R. R. Co. (29 Am. & Eng. R. Cas. 171, 102 N. Y. 719, 7 N. E. Rep. 734, 2 N. Y. S. R. 452, 1 Silv. App. 76; affirming 25 Hun 280), Fires, 312.
Seese *v.* Northern Pac. R. Co. (39 Fed. Rep. 487), Employés, Inj. to, 25, 117; Witn., 145.
Seibert *v.* Erie R. Co. (49 Barb. (N. Y.) 583), New Tr., 17.
Seibert *v.* Lewis (122 U. S. 284, 7 Sup. Ct. Rep. 1190), Mun. Aid, 24.
Seibert *v.* Minneapolis & St. L. R. Co. (57 Am. & Eng. R. Cas. 208, 52 Minn. 148, 53 N. W. Rep. 1134), Mort., 177, 195.
Seibert *v.* Minneapolis & St. L. R. Co. (52 Minn. 246, 53 N. W. Rep. 1151), Mort., 34.
Seibert *v.* Missouri, K. & T. R. Co. (72 Mo. 565), Animals, 78.
Seidlinger *v.* Brooklyn City R. Co. (28 Hun 503; affirmed (?) 97 N. Y. 642, mem.), St. Rys., 358.
Seigel *v.* Eisen (41 Cal. 109), St. Rys., 414, 486.
Seipel *v.* Baltimore & C. V. R. Ext. Co. (129 Pa. St. 425, 18 Atl. Rep. 568), Em. Dom., 265; Lim. of Ac., 48.
Seither *v.* Philadelphia Traction Co. (125 Pa. St. 397, 17 Atl. Rep. 338), Release, 20.
Seitz *v.* Dry Dock, E. B. & B. R. Co. (16 Daly 264, 10 N. Y. Supp. 1, 32 N. Y. S. R. 56), St. Rys., 366, 394; Trial, 130.
Selby *v.* Wilmington & W. R. Co. (113 N. Car. 588, 18 S. E. Rep. 88), Car. of L. S., 80, 152; Car. of M., 436.
Selden *v.* Delaware & H. Canal Co. (29 N. Y. 634), Em. Dom., 408; Evid., 153.
Selden *v.* Jacksonville (28 Fla. 558, 10 So. Rep. 457), Sts. & H., 121, 135, 293.
Selders *v.* Kansas City, Ft. S. & G. R. Co. (19 Mo. App. 334), Fences, 77.
Seley *v.* Texas & St. L. R. Co. (2 Tex. App. (Civ. Cas.) 66), Subscr., 226.
Self *v.* London, B. & S. C. R. Co. (42 L. T. 173, 3 Ry. & C. T. Cas. xiv), Car. of P., 523, 526.
Selheimer *v.* Elder (98 Pa. St. 154), Attach., 33.
Seligman *v.* Armijo (1 N. Mex. 459), Car. of M., 16.
Seligman *v.* St. Louis & S. F. R. Co. (22 Fed. Rep. 39), Stockh., 104.
Sellars *v.* Richmond & D. R. Co. (25 Am. & Eng. R. Cas. 451, 94 N. Car. 654), Cross. Rys., 77; Death, etc., 167; Leases, 111; Negl., 19, 46, 51.
Selleck *v.* Lake Shore & M. S. R. Co. (23 Am. & Eng. R. Cas. 338, 58 Mich. 195, 24 N. W. Rep. 774), Fright. Teams, 2.
Selleck *v.* Lake Shore & M. S. R. Co. (93 Mich. 375, 53 N. W. Rep. 556), Fright. Teams, 3; Negl., 18.
Selleck *v.* Langdon (55 Hun 19, 28 N. Y. S. R. 326, 8 N. Y. Supp. 573), Employés, Inj. to, 38.
Seller *v.* Steamship Pacific (1 Oreg. 409), Bills of L., 21; Car. of M., 405, 441, 457, 724.
Sellers *v.* Beaver (97 Ind. 111), Mun. Aid, 225.

Sellers *v.* Pennsylvania R. Co. (10 Phila. (Pa.) 319), Nuis., 20.
Sellers *v.* Texas C. R. Co. (48 Am. & Eng. R. Cas. 77, 81 Tex. 458, 17 S. W. Rep. 32), Deeds, 41; Flood. Lds., 16.
Selma & G. R. Co., Ex parte (45 Ala. 696), Mun. Aid, 8, 286.
Selma & G. R. Co., Ex parte (46 Ala. 230), Mun. Aid, 286.
Selma & G. R. Co., Ex parte (46 Ala. 423), State Aid, 2.
Selma & M. R. Co. *v.* Butts (43 Ala. 385), Car. of M., 1, 567.
Selma & M. R. Co. *v.* Knapp (42 Ala. 480), Sts. & H., 265, 267.
Selma & T. R. Co. *v.* Rountree (7 Ala. 670), Subscr., 21.
Selma & T. R. Co. *v.* Tipton (5 Ala. 787), Estop., 3; Pl., 9; Subscr., 15, 36, 77, 134, 165.
Selma, M. & M. R. Co. *v.* Anderson (51 Miss. 829), Subscr., 143, 144; Trial, 137.
Selma, R. & D. R. Co. *v.* Camp (45 Ga. 180, 3 Am. Ry. Rep. 53), Em. Dom., 562, 643.
Selma R. & D. R. Co. *v.* Fleming (48 Ga. 514), Animals, 550, 585.
Selma, R. & D. R. Co. *v.* Gammage (1 Am. & Eng. R. Cas. 41, 63 Ga. 604), Em. Dom., 767, 938, 943.
Selma, R. & D. R. Co. *v.* Harbin (40 Ga. 706), Consol., 29.
Selma, R. & D. R. Co. *v.* Keith (53 Ga. 178), Em. Dom., 595, 601, 634, 669, 1056.
Selma, R. & D. R. Co. *v.* Lacy (43 Ga. 461), Death, etc., 114.
Selma, R. & D. R. Co. *v.* Lacey (49 Ga. 106), Death, etc., 95, 100, 109; States, 4.
Selma, R. & D. R. Co. *v.* Redwine (51 Ga. 470), Em. Dom., 596, 633, 706, 759.
Selma, R. & D. R. Co. *v.* United States (139 U. S. 560, 11 Sup. Ct. Rep. 638), Car. of Mails, 13.
Selma, R. & D. R. Co. *v.* Webb (49 Ala. 240), Animals, 298.
Semel *v.* New York, N. H. & H. R. Co. (9 Daly (N. Y.) 321), Death, etc., 339.
Semler *v.* Com'rs of Emigration (1 Hilt. (N. Y.) 244), Bagg., 108.
Senate *v.* Chicago, M. & St. P. R. Co. (41 Mo. App. 295), Animals, 200, 567.
Senate Bill No. 69, In re (15 Colo. 601, 26 Pac. Rep. 157), Charges, 8.
Senecal *v.* Hatton (1 Montr. L. R. 112), Replev., 6.
Seneca Road Co. *v.* Auburn & R. R. Co. (5 Hill. (N. Y.) 170), Em. Dom., 384.
Senft *v.* Manhattan R. Co. (25 J. & S. 417, 29 N. Y. S. R. 519, 9 N. Y. Supp. 304, 24 Abb. N. Cas. 64), Elev. Rys., 90.
Senior *v.* Metropolitan R. Co. (9 Jur. N. S. 802, 32 L. J. Ex. 225, 2 H. & C. 258, 11 W. R. 836, 8 L. T. 544), Em. Dom., 1199.
Senn *v.* Southern R. Co. (108 Mo. 142, 18 S. W. Rep. 1007), App., 64; Death, etc., 292; Evid., 76, 176; St. Rys., 466.
Sennott *v.* St. Johnsbury & L. C. R. Co. (30 Am. & Eng. R. Cas. 349, 59 Vt. 226, 4 N. Eng. Rep. 367, 9 Atl. Rep. 554), Em. Dom., 863.
Serat *v.* Utica, I. & E. R. Co. (102 N. Y. 681, 6 N. E. Rep. 795, 2 N. Y. S. R. 15, 1 Silv. App. 70; affirming 32 Hun 642, mem.), Trover, 3.
Serensen *v.* Northern Pac. R. Co. (45 Fed. Rep. 407), Death, etc., 41, 129, 135, 428.
Serrell *v.* Derbyshire, S. & W. J. R. Co. (9 C. B. 811, 19 L. J. C. P. 371), Bills & N., 79.
Serwe *v.* Northern Pac. R. Co. (52 Am. & Eng. R. Cas. 348, 48 Minn. 78, 50 N. W. Rep. 1021), Eject. Pass., 72, 109.
Seska *v.* Chicago, M. & St. P. R. Co. (77 Iowa 137, 41 N. W. Rep. 596), Fires, 188, 263.
Sessions *v.* Western R. Corp. (16 Gray (Mass.) 132), Car. of M., 81, 249, 343.
Setzler *v.* Pennsylvania S. V. R. Co. (24 Am. & Eng. R. Cas. 280, 112 Pa. St. 56, 4 Atl. Rep. 370), Em. Dom., 645, 703.
Sevenoaks, M. & T. R. Co. *v.* London, C. & D. R. Co. (11 Ch. D. 625, 48 L. J. Ch. 513, 40 L. T. 545, 27 W. R. 672, 3 Ry. & C. T. Cas. xxx), Leases, 134.
Sevenoaks, M. & T. R. Co. *v.* London, C. & D. R. Co. (3 Ry. & C. T. Cas. 63), Leases, 140.
Seventh Ward Nat. Bank *v.* New York El. R. Co. (21 J. & S. (N. Y.) 412), Elev. Rys., 152.
Severin *v.* Cole (38 Iowa 463), Em. Dom., 288; Mort., 209.
Severn & W. & S. B. R. Co. *v.* Great Western R. Co. (5 Ry. & C. T. Cas. 156), Charges, 97, 102, 103.
Severy *v.* Central Pac. R. Co. (51 Cal. 194, 12 Am. Ry. Rep. 102), Deeds, 19.
Sevier *v.* Birmingham, S. & T. R. R. Co. (48 Am. & Eng. R. Cas. 503, 92 Ala. 258, 9 So. Rep. 405), Med. Serv., 6.
Sevier *v.* Vicksburg & M. R. Co (18 Am. & Eng. R. Cas. 245, 61 Miss. 8, 48 Am. Rep. 74), Car. of P., 231.
Sewall *v.* Brainerd (38 Vt. 364), Coupons, 7.
Seward *v.* Rising Sun (13 Am. & Eng. R. Cas. 315, 79 Ind. 351), Tax., 103.
Sewell *v.* Cape May & S. P. R. Co. (N. J. Eq.) (30 Am. & Eng. R. Cas. 155, 9 Atl. Rep. 785), Receiv., 19, 175.
Sexton *v.* Turner (89 Va. 341, 15 S. E. Rep. 862), Employés, Inj. to, 8, 182, 301.
Seybolt *v.* New York, L. E. & W. R. Co. (18 Am. & Eng. R. Cas. 162, 95 N. Y. 562, 47 Am. Rep. 75; affirming 31 Hun 100), Car. of Mails, 18; Car. of P., 54; Evid., 125, 282; Passes, 39.
Seyfarth *v.* St. Louis & I. M. R. Co. (52 Mo. 449), Car. of M., 744; Witn., 56.
Seymour *v.* Canandaigua & N. F. R. Co. (14 How. Pr. (N. Y.) 531, 25 Barb. 284), Mort., 35, 36, 40, 44, 46, 78.
Seymour *v.* Chicago, B. & Q. R. Co. (3 Biss. (U. S.) 43), Car. of P., 140; Contrib. Neg., 21; Husb. & W., 24; Stat. & D., 113, 121, 149.
Seymour *v.* Citizens' R. Co. (58 Am. & Eng. R. Cas. 395, 114 Mo. 266, 21 S. W. Rep. 739), St. Rys., 347, 409, 414, 421.
Seymour *v.* Jeffersonville, M. & I. R. Co. (47 Am. & Eng. R. Cas. 38, 126 Ind. 466, 26 N. E. Rep. 188), Sts. & H., 19.

Seymour *v.* London & S. W. R. Co. (5 Jur. N. S. 753), Em. Dom., 1091.
Seymour *v.* Long Dock Co. (20 N. J. Eq. 396), Constr. Rys., 30, 36, 38, 64.
Seymour *v.* Pittsburg, C. & St. L. R. Co. (44 Ohio St. 12, 4 N. E. Rep. 236), Lim. of Ac., 61.
Seymour *v.* Western R. Co. (106 U. S. 320, 1 Sup. Ct. Rep. 123), Contr., 91.
Shaber *v.* St. Paul, M. & M. R. Co. (2 Am. & Eng. R. Cas. 185, 28 Minn. 103, 9 N. W. Rep. 575), Cross., Inj. at, 60, 241; Death, etc., 221, 278; Evid., 31, 84; Negl., 28.
Shackelford *v.* New Orleans, J. & G. N. R. Co. (37 Miss. 202), Direct., 29, 41.
Shackleford *v.* Louisville & N. R. Co. (28 Am. & Eng. R. Cas. 591, 84 Ky. 43, 4 Am. St. Rep. 189), Tresp., Inj. to, 34, 41.
Shackleford *v.* Mississippi C. R. Co. (52 Miss. 159), Consol., 29.
Shackley *v.* Eastern R. Co. (98 Mass. 93), Eastern R. Co., 5.
Shade, In re (13 U. C. Q. B. 577), Em. Dom., 1252.
Shader *v.* Railway Pass. A. Co. (3 Hun (N. Y.) 424, 5 T. & C. 643), Acc. Ins., 12.
Shafter *v.* Evans (53 Cal. 32), Witn., 144.
Shamberg *v.* Delaware, L. & W. R. Co. (3 Int. Com. Rep. 502, 4 Int. Com. Com. 630), Int. Com., 61.
Shamokin Valley & P. R. Co. *v.* Malone (85 Pa. St. 25), Liens, 17; Lim. of Ac., 72.
Shamokin Valley R. Co. *v.* Livermore (47 Pa. St. 465), Mort., 20, 242.
Shanchan *v.* New York & N. H. R. Co. (10 Abb. Pr. (N. Y.) 398), Animals, 213.
Shane *v.* Kansas City, St. J. & C. B. R. Co. (5 Am. & Eng. R. Cas. 64, 71 Mo. 237, 36 Am. Rep. 480), Waters & W., 12.
Shankenbery *v.* Metropolitan St. R. Co. (46 Fed. Rep. 177), Elec. Rys., 31.
Shanly *v.* Grand Junction R. Co. (4 Ont. 156), Constr. Rys., 53.
Shanly *v.* Midland R. Co. (33 U. C. Q. B. 604), Constr. Rys., 106.
Shannon *v.* Boston & A. R. Co. (23 Am. & Eng. R. Cas. 511, 78 Me. 52, 2 Atl. Rep. 678), Car. of P., 15, 23, 420, 435, 436, 589.
Shannon *v.* Hannibal & St. J. R. Co. (54 Mo. App. 223), Fires, 344.
Shannon *v.* O'Boyle (51 Ind. 565), Counties, 7.
Sharon R. Co.'s Appeal (122 Pa. St. 533, 17 Atl. Rep. 234), Cross. Rys., 25.
Sharon R. Co. *v.* Sharpsville R. Co. (122 Pa. St. 533, 17 Atl. Rep. 234), Cross. Rys., 14; Em. Dom., 110.
Sharp *v.* Danville, M. & S. W. R. Co. (106 N. Car. 308, 11 S. E. Rep. 530), Judgm., 4.
Sharp *v.* Great Western R. Co. (9 M. & W. 7, 2 Railw. Cas. 722), Contr., 106.
Sharp *v.* Kansas City Cable R. Co. (52 Am. & Eng. R. Cas. 561, 114 Mo. 94, 20 S. W. Rep. 93), Cable Rys., 9.
Sharpe *v.* St. Louis & S. E. R. Co. (49 Ind. 296), Ejectm., 9.
Sharpe *v.* San Paulo Brazilian R. Co. (27 L. T. 699, L. R. 8 Ch. 605, n.), Constr. Rys., 30, 62.
Sharpe *v.* San Paulo R. Co. (L. R. 8 Ch. 597, 29 L. T. 9), Arb., 4; Constr. Rys., 51, 58, 60.
Sharpless *v.* Mayor, etc., of Phila. (21 Pa. St. 147), Mun. Aid, 9, 47.
Sharpley *v.* Louth & E. C. R. Co. (L. R. 2 Ch. D. 663, 46 L. J. Ch. D. 259, 35 L. T. 71), Stockh., 118.
Sharrod *v.* London & N. W. R. Co. (6 Railw. Cas. 239, 7 D. & L. 213, 14 Jur. 23, 10 L. J. Ex. 185, 4 Ex. 580), Animals, 302.
Shattuck *v.* Stoneham Branch R. Co. (6 Allen (Mass.) 115), Em. Dom., 622, 639; Witn., 122.
Shattuck *v.* Wilton R. Co. (23 N. H. 269), Em. Dom., 767.
Shaubut *v.* St. Paul & S. C. R. Co. (21 Minn. 502, 19 Am. Ry. Rep. 223), Nuis., 27; Sts. & H., 133, 216.
Shauck *v.* Northern C. R. Co. (25 Md. 462), Employés, Inj. to, 99; Fel. Serv., 1, 102, 139.
Shaver *v.* Bear River & A. W. & M. Co. (10 Cal. 396), Pres., 9.
Shaver *v.* Great Western R. Co. (6 U. C. C. P. 321), Farm Cross., 15.
Shaw *v.* Bill (95 U. S. 10), Att'ys, 6; Mort., 55, 160.
Shaw *v.* Boston & A. R. Co. (159 Mass. 597, 35 N. E. Rep. 92), Sts. & H., 408.
Shaw *v.* Boston & W. R. Corp. (8 Gray (Mass.) 45), Cross., Inj. at, 8, 362, 365; Evid., 214, 241; Pl., 139.
Shaw *v.* Canadian Pac. R. Co. (5 Man. 198), Car. of P., 530.
Shaw *v.* Canadian Pac. R. Co. (5 Man. 334), Bagg., 112.
Shaw *v.* Chicago, R. I. & P. R. Co. (82 Iowa 199, 47 N. W. Rep. 1004), Animals, 385.
Shaw *v.* Craft (37 Fed. Rep. 317), Imp. Neg., 26.
Shaw *v.* East & W. I. Dock Co. (6 Ry. & C. T. Cas. 94), Discrim., 6.
Shaw *v.* Grand Trunk R. Co. (7 U. C. C. P. 493), Bagg., 37.
Shaw *v.* Great S. & W. R. Co. (L. R. 8 Ir. 10), Car. of L. S., 3.
Shaw *v.* Holmes (3 C. B. 952), Discov., 3.
Shaw *v.* Jewett (6 Am. & Eng. R. Cas. 111, 86 N. Y. 616), Contrib. Neg., 79; Cross., Inj. at, 137, 246, 247, 261, 359.
Shaw *v.* Little Rock & Ft. S. R. Co. (100 U. S. 605), Mort., 141, 142.
Shaw *v.* Merchants' Nat. Bank (101 U. S. 557), Bills of L., 108, 109, 116, 118, 120.
Shaw *v.* Missouri Pac. R. Co. (104 Mo. 648, 16 S. W. Rep. 832), Death, etc., 136; Tresp., Inj. to, 60.
Shaw *v.* New York & N. E. R. Co. (41 Am. & Eng. R. Cas. 547, 150 Mass. 182, 22 N. E. Rep. 884), Stat. & D., 97.
Shaw *v.* Norfolk County R. Co. (5 Gray (Mass.) 162), Parties, 21.
Shaw *v.* Norfolk County R. Co. (16 Gray (Mass.) 407), Consol., 40.
Shaw *v.* Northern Pac. R. Co. (40 Minn. 144, 41 N. W. Rep. 548), Bagg. 1.

Shaw *v.* Pennsylvania S. V. R. Co. (17 Phila. (Pa.) 210), Em. Dom., 927.
Shaw *v.* South Carolina R. Co. (5 Rich. (So. Car.) 462), Car. of M., 237.
Shaw *v.* Van Rensselaer (60 How. Pr. (N. Y.) 143), Discov., 8.
Shaw *v.* York & N. M. R. Co. (6 Railw. Cas. 87, 13 Q. B. 347, 13 Jur. 385, 18 L. J. Q. B. 181), Car. of L. S., 64.
Shawhan *v.* Zinn (79 Ky. 300), Corp., 17; Stockh., 78, 123.
Shawmut Bank *v.* Plattsburg & M. R. Co. (31 Vt. 491), Ult. Vir., 20.
Shawnee County Com'rs *v.* Topeka Equipment Co. (26 Kan. 363), Tax., 92, 260.
Shea *v.* Boston & M. R. Co. (154 Mass. 31, 27 N. E. Rep. 672), Death, etc., 235.
Shea *v.* Knoxville & K. R. Co. (6 Baxt. (Tenn.) 277), Cred. Bill, 2, 8; Direct., 55; Evid., 98; Husb. & W., 31; Officers, 3; Pl., 88.
Shea *v.* Mabry (1 Lea (Tenn.) 319), Direct., 53.
Shea *v.* Manhattan R. Co. (15 Daly 528, 8 N. Y. Supp. 332, 29 N. Y. S. R. 313; affirming 27 N. Y. S. R. 33, 7 N. Y. Supp. 497), False Imp., 16.
Shea *v.* Pennsylvania R. Co. (Pa.) (13 Atl. Rep. 193), Fel. Serv., 44, 334.
Shea *v.* Potrero & B. V. R. Co. (44 Cal. 414, 5 Am. Ry. Rep. 448), Dam., 36; St. Rys., 456.
Shea *v.* St. Paul City R. Co. (50 Minn. 395, 52 N. W. Rep. 902), St. Rys., 457.
Shea *v.* Sixth Ave. R. Co. (62 N. Y. 180; affirming 5 Daly 221, 12 Am. Ry. Rep. 154), Pl., 67; St. Rys., 504.
Sheaf *v.* Utica & B. R. R. Co. (2 T. & C. (N. Y.) 388), Animals, 281.
Sheahan *v.* National Steamship Co. (49 N. Y. S. R. 484, 66 Hun 48, 20 N. Y. Supp. 740; affirmed on opinion below in 142 N. Y. 655, mem., 37 N. E. Rep. 569, mem.), Mal. Pros., 7, 8.
Shealy *v.* Chicago, M. & N. R. Co. (72 Wis. 471, 40 N. W. Rep. 145), Em. Dom., 312, 889; Pl., 67.
Shealy *v.* Chicago, M. & N. R. Co. (77 Wis. 653, 46 N. W. Rep. 887), Em. Dom., 172.
Shearer *v.* Douglas County Com'rs (13 Kan. 145), Em. Dom., 423.
Shearer *v.* Evansville, I. & C. S. L. R. Co. (12 Ind. 452), Subscr., 105.
Shearer *v.* Pacific Exp. Co. (43 Ill. App. 641), Exp. Cos., 48; Words & Ph., 7.
Sheboygan *v.* Sheboygan & F. du L. R. Co. (21 Wis. 667), Waters & W., 21.
Sheboygan County *v.* Parker (3 Wall. (U. S.) 93), Mun. Aid, 24.
Shedd *v.* Troy & B. R. Co. (40 Vt. 88), Tickets & F., 7, 41.
Sheehan *v.* Bradford, B. & K. R. Co. (15 Civ. Pro. 249, 3 N. Y. Supp. 790), Proc., 20.
Sheehan *v.* New York C. & H. R. R. Co. (12 Am. & Eng. R. Cas. 235, 91 N. Y. 332; reversing 25 Hun 310), Fel. Serv., 97, 424.
Sheehy *v.* Kansas City Cable R. Co. (32 Am. & Eng. R. Cas. 233, 94 Mo. 574, 13 West. Rep. 653, 7 S. W. Rep. 579), Cable Rys., 4.
Sheeler *v.* Chesapeake & O. R. Co. (81 Va. 188), Death, etc., 217; Evid., 143; Negl., 102.
Sheerman *v.* Toronto, G. & B. R. Co. (34 U. C. Q. B. 451), Employés, Inj. to, 488.
Sheets *v.* Connolly St. R. Co. (54 N. J. L. 518, 24 Atl. Rep. 483), Children, Inj. to, 80; St. Rys., 451.
Sheff *v.* Huntington (16 W. Va. 307), Contrib. Neg., 2, 82; New Tr., 48.
Sheffield *v.* Rochester & S. R. Co. (21 Barb. (N. Y.) 339), Contrib. Neg., 4, 5; Cross., Inj. at, 219; Trial, 193.
Sheffield & T. St. R. Co. *v.* Rand (83 Ala. 294, 3 So. Rep. 686), Sts. & H., 231.
Sheffield, A.-under-L. & M. R. Co. *v.* Woodcock (7 M. & W. 574, 2 Railw. Cas. 522), Direct., 2; Estop., 25; Subscr., 59, 68.
Shelby *v.* Chicago & E. I. R. Co. (143 Ill. 385, 32 N. E. Rep. 438; affirming 42 Ill. App. 339), Waters & W., 12.
Shelby *v.* Cincinnati, N. O. & T. P. R. Co. (85 Ky. 224, 3 S. W. Rep. 157), Cross., Inj. at, 108; Licensees, Inj. to, 24; Negl., 20; Tresp., Inj. to, 9.
Shelby County *v.* Jarnagin (Tenn.) (16 S. W. Rep. 1040), Mun. Aid, 313.
Shelby County *v.* Mississippi & T. R. Co. (16 Lea (Tenn.) 401, 1 S. W. Rep. 32), Tax., 282.
Shelby County Court *v.* Cumberland & O. R. Co. (8 Bush. (Ky.) 209), Charters, 111; Judgm., 33; Mun. Aid, 1, 22, 184, 226, 447.
Shelby County Judge *v.* Shelby R. Co. (5 Bush (Ky.) 225), Charters, 45; Mun. Aid, 12, 414.
Shelby R. Co. *v.* Louisville, C. & L. R. Co. (12 Bush (Ky.) 62, 18 Am. Ry. Rep. 213), Stockh., 9.
Shelbyville Lateral Branch R. Co. *v.* Lewark (4 Ind. 471), Dam., 65.
Shelbyville R. Co. *v.* Louisville, C. & L. R. Co. (21 Am. & Eng. R. Cas. 233, 82 Ky. 541), Car. of M., 540; Cross. Rys., 80.
Sheldon *v.* Flint & P. M. R. Co. (59 Mich. 172, 26 N. W. Rep. 507), Negl., 62.
Sheldon *v.* Hudson River R. Co. (14 N. Y. 218; reversing 29 Barb. 226), Fires, 21, 228, 262, 287.
Sheldon *v.* Keokuk N. L. Packet Co. (9 Biss. (U. S.) 307, 1 Fed. Rep. 789), Rem. of C., 39.
Sheldon *v.* Minneapolis & St. L. R. Co. (29 Minn. 318, 13 N. W. Rep. 134), Em. Dom., 315, 621; Witn., 52.
Sheldon *v.* Robinson (7 N. H. 157), Car. of M., 6.
Shellabarger *v.* Chicago, R. I. & P. R. Co. (19 Am. & Eng. R. Cas. 527, 66 Iowa 18, 23 N. W. Rep. 158), Fences, 75.
Shelmerdine *v.* Welsh (20 Phila. (Pa.) 109), Philadelphia & R. R. Co., 3; Stockh., 14.
Shelton *v.* Lake Shore & M. S. R. Co. (29 Ohio St. 214), Eject. Pass., 13.
Shelton *v.* Merchants' Despatch Transp. Co. (4 J. & S. (N. Y.) 527), Car. of M., 76.
Shelton *v.* Merchants' Despatch Transp. Co. (59 N. Y. 258, 48 How. Pr. 257; reversing

4 J. & S. 527), Agency, 13; Bills of L., 75; Car. of M., 117.
Shelton *v.* Platt (139 U. S. 591, 11 Sup. Ct. Rep. 646), Injunc., 34.
Shelton *v.* St. Louis, K. C. & N. R. Co. (60 Mo. 412), Animals, 126.
Shenandoah Valley R. Co. *v.* Clarke County Sup'rs (78 Va. 269), Tax., 12, 284, 342.
Shenandoah Valley R. Co. *v.* Dunlop (86 Va. 346), Em. Dom., 227.
Shenandoah Valley R. Co. *v.* Griffith (13 Am. & Eng. R. Cas. 120, 76 Va. 913), Attach., 31; Pl., 148; Subscr., 183.
Shenandoah Valley R. Co. *v.* Lewis (12 Am. & Eng. R. Cas. 305, 76 Va. 833), Spec. Perf., 1, 3; Witn., 19.
Shenandoah Valley R. Co. *v.* Lucado (86 Va. 390, 10 S. E. Rep. 422), Employés, Inj. to, 445.
Shenandoah Valley R. Co. *v.* Miller (80 Va. 821), Liens, 41.
Shenandoah Valley R. Co. *v.* Moose (83 Va. 827, 3 S. E. Rep. 796), Trial, 168.
Shenandoah Valley R. Co. *v.* Robinson (32 Va. 542), Eq., 5.
Shenandoah Valley R. Co. *v.* Shepherd (26 W. Va. 672), Em. Dom., 466, 643, 689, 712.
Shenango & A. R. Co. *v.* Braham (79 Pa. St. 447), Em. Dom., 645, 899.
Shenners *v.* West Side St. R. Co. (74 Wis. 447, 43 N. W. Rep. 103), Pl., 58.
Shenners *v.* West Side St. R. Co. (46 Am. & Eng. R. Cas. 187, 78 Wis. 382, 47 N. W. Rep. 622), Children, Inj. to, 195.
Sheobrink *v.* Canada Atl. R. Co (37 Am. & Eng. R. Cas. 462, 16 Ont. 515), Sts. & H., 7.
Shepard *v.* Boston & M. R. Co. (158 Mass. 174, 33 N. E. Rep. 508), Employés, Inj. to, 35, 391; Fel. Serv., 343.
Shepard *v.* Buffalo, N. Y. & E. R. Co. (35 N. Y. 641), Animals, 109, 139.
Shepard *v.* Chicago, R. I. & P. R. Co. (77 Iowa 54, 41 N. W. Rep. 564), Eject. Pass., 106.
Shepard *v.* Galveston, H. & H. R. Co. (2 Tex. Civ. App. 535, 22 S. W. Rep. 267), Right of W., 2.
Shepard *v.* Manhattan R. Co. (117 N. Y. 442, 23 N. E. Rep. 30, 27 N. Y. S. R. 705; affirming 24 N. Y. S. R. 185, 25 J. & S. 5, 5 N. Y. Supp. 189), Elev. Rys., 66, 84.
Shepard *v.* Manhattan R. Co. (131 N. Y. 215, 43 N. Y. S. R. 117, 21 Civ. Pro. 453, 30 N. E. Rep. 187), Elev. Rys., 170.
Shepard *v.* Missouri Pac. R. Co. (85 Mo. 629, 55 Am. Rep. 390), Phys. Exam., 3.
Shepard *v.* New Haven & N. Co. (45 Conn. 54), Evid., 64.
Shepard *v.* New York C. & H. R. R. Co. (44 N. Y. S. R. 816, 63 Hun 634, 18 N. Y. Supp. 665), Employés, Inj. to, 664.
Shepard *v.* New York El. R. Co. (39 N. Y. S. R. 430, 60 Hun 584, 15 N. Y. Supp. 175), Elev. Rys., 124.
Shepard *v.* Northwestern L. Ins. Co. (40 Fed. Rep. 341), Land Grants, 32.
Shepard *v.* St. Louis I. M. & S. R. Co. (3 Mo. App. 550), App., 115; Death, etc., 103.
Shepardson *v.* Milwaukee & B. R. Co. (6 Wis. 605), Charters, 138; Em. Dom., 45.
Shepaug Voting Trust Cases (60 Conn. 553, 24 Atl. Rep. 32), Branch & L. Roads, 3; Contr., 52; Direct., 49; Stockh., 17.
Sheperd *v.* Bristol & E. R. Co. (37 L. J. Ex. 113, L. R. 3 Ex. 189, 16 W. R. 982, 18 L. T. 528), Car. of L. S., 52.
Shepherd *v.* Baltimore & O. R. Co. (38 Am. & Eng. R. Cas. 437, 130 U. S. 426, 9 Sup. Ct. Rep. 598), Sts. & H., 235.
Shepherd *v.* Canadian Pac. R. Co. (11 Ont. Pr. 517), Em. Dom., 1273.
Shepley *v.* Atlantic & St. L. R. Co. (55 Me. 395), Mort., 3, 138.
Shepp *v.* New York C. & H. R. R. Co. (21 N. Y. S. R. 568, 51 Hun 638, 4 N. Y. Supp. 951), Fires, 310.
Shepp *v.* Norristown Pass. R. Co. (2 Pa. Dist. 679), Stock, 23.
Shepperd *v.* Midland R. Co. (20 W. R. 705, 25 L. T. 879), Stat. & D., 88.
Sherard *v.* Richmond & D. R. Co. (35 So. Car. 467, 14 S. E. Rep. 952), Witn., 35.
Sherfey *v.* Evansville & T. H. R. Co. (121 Ind. 427, 23 N. E. Rep. 273), Contrib. Neg., 53; Death, etc., 148; Evid., 58; Witn., 97.
Sheridan *v.* Brooklyn City & N. R. Co. (36 N. Y. 39, 34 How. Pr. 217), Car. of P., 348; Children, Inj. to, 47, 173; St. Rys., 327.
Sherley *v.* Billings (8 Bush (Ky.) 147), Car. of P., 137, 301, 306, 307, 309, 644.
Sherlock *v.* Alling (44 Ind. 184), Death, etc., 288.
Sherlock *v.* Chicago, B. & Q. R. Co. (130 Ill. 403, 22 N. E. Rep. 844), Evid., 20; Witn., 109.
Sherlock *v.* Louisville, N. A. & C. R. Co. (115 Ind. 22, 14 West. Rep. 843, 17 N. E. Rep. 171), Adv. Poss., 2; Em. Dom., 435, 670; Estop., 26; Flood. Lds., 25, 50; Lim. of Ac., 52; Nuis., 13; Pl., 12.
Sherman *v.* Buffalo Bayou, B. & C. R. Co. (21 Tex. 349), Lim. of Ac., 73.
Sherman *v.* Chicago & N. W. R. Co. (40 Iowa 45, 8 Am. Ry. Rep. 410), Eject. Pass., 35; Tickets & F., 101.
Sherman *v.* Chicago, M. & St. P. R. Co. (34 Minn. 259, 25 N. W. Rep. 593), Employés, Inj. to, 710.
Sherman *v.* Delaware, L. & W. R. Co. (31 Am. & Eng. R. Cas. 15, 106 N. Y. 542, 13 N. E. Rep. 616, 11 N. Y. S. R. 318), Witn., 36, 66.
Sherman *v.* Hannibal & St. J. R. Co. (4 Am. & Eng. R. Cas. 589, 72 Mo. 62, 37 Am. Rep. 423), Car. of P., 46, 296; Children, Inj. to, 1, 13.
Sherman *v.* Hudson River R. Co. (64 N. Y. 254; affirming 5 Daly 521), Car. of M., 221, 543.
Sherman *v.* Milwaukee, L. S. & W. R. Co. (40 Wis. 645, 13 Am. Ry. Rep. 459), Em. Dom., 49, 90, 373, 1083.
Sherman *v.* New York C. R. Co. (22 Barb. (N. Y.) 239), Agency, 24.
Sherman *v.* Rochester & S. R. Co. (17 N. Y. 153; affirming 15 Barb. 574), Fel. Serv., 25, 102, 236.

Sherman *v.* St. Paul, M. & M. R. Co. (10 Am. & Eng. R. Cas. 193, 30 Minn. 227, 15 N. W. Rep. 239), Em. Dom., 560; Witn., 116.
Sherman *v.* Western Stage Co. (24 Iowa 515), Contrib. Neg., 5, 17; Death, etc., 59, 418, 432; Lim. of Ac., 32.
Sherman *v.* Western Transp. Co. (62 Barb. (N. Y.) 150), Negl., 1.
Sherrard *v.* Lafayette County (3 Dill. (U. S.) 236), Mun. Aid, 329.
Sherrill *v.* Chesapeake, O. & S. W. R. Co. (89 Ky. 302, 12 S. W. Rep. 465), Trial, 11.
Sherrin *v.* St. Joseph & St. L. R. Co. (103 Mo. 378, 15 S. W. Rep. 442), Fel. Serv., 37, 319, 350.
Sherrod *v.* Hampton (25 Ala. 652), Assump., 4.
Sherry *v.* New York C. & H. R. R. Co. (1 Silv. App. 319, 10 N. E. Rep. 128, 5 N. Y. S. R. 574, 104 N. Y. 652; reversing 40 Hun 634, mem.), Cross., Inj. at, 321; Trial, 72.
Sherwood *v.* Buffalo & N. Y. C. R. Co. (12 How. Pr. (N. Y.) 136), Exec., 30.
Sherwood *v.* Chicago & W. M. R. Co. (44 Am. & Eng. R. Cas. 337, 82 Mich. 374, 46 N. W. Rep. 773), Car. of P., 607; Dam., 67, 70, 71, 72, 73, 74.
Sherwood *v.* Chicago & W. M. R. Co. (88 Mich. 108, 50 N. W. Rep. 101; former appeal 82 Mich. 374, 46 N. W. Rep. 773), Evid., 76; New Tr., 11; Trial, 120; Witn., 166.
Sherwood *v.* Fleming (25 Tex. [Supp.] 408), Pub. Lds., 33, 36.
Sherwood *v.* Metropolitan El. R. Co. (36 N. Y. S. R. 195, 58 Hun 611, 12 N. Y. Supp. 852; affirmed in 128 N. Y. 624, mem., 40 N. Y. S. R. 157), Elev. Rys., 107, 138, 148; Witn., 195.
Sherwood *v.* Newport News & M. V. Co. (55 Fed. Rep. 1), Rem. of C., 38.
Sherwood *v.* Saginaw, T. & H. R. Co. (16 Am. & Eng. R. Cas. 605, 53 Mich. 317, 19 N. W. Rep. 14), Constr. Rys., 76.
Sherwood *v.* St. Paul & C. R. Co. (21 Minn. 122, 11 Am. Ry. Rep. 364), Em. Dom., 456, 464, 678.
Sherwood *v.* St. Paul & C. R. Co. (21 Minn. 127, 11 Am. Ry. Rep. 370), Em. Dom., 456, 609, 823, 843.
Sherwood *v.* Saratoga & W. R. Co. (15 Barb. (N. Y.) 650), Jurisd., 7; Proc., 39, 45.
Shibley, In re (13 Ont. Pr. 237), Em. Dom., 1228.
Shields *v.* Grand Trunk R. Co. (7 U. C. C. P. 111), Animals, 449.
Shields *v.* Great Northern R. Co. (7 Jur. N. S. 631, 30 L. J. Q. B. 331, 9 W. R. 739, 4 L. T. 479), Jurisd., 5; Proc., 40.
Shields *v.* New York C. & H. R. R. Co. (133 N. Y. 557, 30 N. E. Rep. 596, 44 N. Y. S. R. 72, reversing 60 Hun 586, 39 N. Y. S. R. 750, 15 N. Y. Supp. 613), Death, etc., 220; Employés, Inj. to, 352.
Shields *v.* Ohio (95 U. S. 319), Consol., 23.
Shields *v.* State (26 Ohio St. 86), Tickets & F., 114.
Shiff *v.* New York C. & H. R. R. Co. (16 Hun (N. Y.) 278, 52 How. Pr. 91; affirmed in 81 N. Y. 638, mem.), Car. of M., 400, 682.
Shimmel *v.* Erie R. Co. (5 Daly (N. Y.) 396), Officers, 17.
Shinbone *v.* Randolph County (56 Ala. 183), Mun. Aid, 440.
Shine *v.* Kentucky C. R. Co. (85 Ky. 177, 3 S. W. Rep. 18), Em. Dom., 531, 860.
Shiner *v.* Russell (6 N. Y. S. R. 78), Fel. Serv., 1, 58, 198.
Shinners *v.* Prop'rs of Locks & Canals (154 Mass. 168, 28 N. E. Rep. 10), Employés, Inj. to, 570.
Shipley *v.* Baltimore & P. R. Co. (34 Md. 336), Em. Dom., 32, 738.
Shipley *v.* Continental R. Co. (13 Phila. (Pa.) 128), Leases, 30; St. Rys., 200.
Shipley *v.* Terre Haute (4 Am. & Eng. R. Cas. 345, 74 Ind. 297), Constr. Rys., 88; Stat., 34.
Shipper *v.* Pennsylvania R. Co. (47 Pa. St. 338), Charges, 60; Discrim., 46.
Shirley *v.* Waco Tap R. Co. (78 Tex. 131, 10 S. W. Rep. 543), Deeds of Tr., 5, 7; Lim. of Ac., 46.
Shively *v.* Cedar Rapids, I. F. & N. W. R. Co. (74 Iowa 169, 7 Am. St. Rep. 471, 37 N. W. Rep. 133), Nuis., 7, 38.
Shoebrink *v.* Canada Atlantic R. Co. (37 Am. & Eng. R. Cas. 462, 16 Ont. 515), Children, Inj. to, 4; Fences, 13.
Shoemaker *v.* Cedar Rapids, I. F. & N. W. R. Co. (45 Minn. 366, 48 N. W. Rep. 191), Em. Dom., 1010; Right of W., 7.
Shoemaker *v.* Kingsbury (12 Wall. (U. S.) 369), Car. of P., 2, 5.
Shoemaker *v.* New York C. & H. R. R. Co. (4 N. Y. Supp. 931, 21 N. Y. S. R. 541, 50 Hun 602, mem.; affirmed in 121 N. Y. 670, mem., 24 N. E. Rep. 1094), Evid., 70; Sts. & H., 379; Witn., 68, 158.
Shoemaker *v.* St. Louis & S. F. R. Co. (14 Am. & Eng. R. Cas. 266, 30 Kan. 359, 2 Pac. Rep. 517), Trial, 220.
Shoenberger *v.* Mulhollan (8 Pa. St. 134), Branch & L. Roads, 12.
Shoner *v.* Pennsylvania Co. (130 Ind. 170, 28 N. E. Rep. 616, 29 N. E. Rep. 775), Cross., Inj. at, 250; Employés, Inj. to, 157, 297, 325.
Shonhoff *v.* Jackson Branch R. Co. (97 Mo. 151, 10 S. W. Rep. 618), Cross., Inj. at, 225; Excava., 2.
Shontz *v.* Evans (40 Iowa 139), Mun. Aid, 412.
Short *v.* Baltimore City Pass. R. Co. (50 Md. 73), St. Rys., 317.
Short *v.* Chicago, M. & St. P. R. Co. (34 Fed. Rep. 225), Rem. of C., 42, 47, 48.
Short *v.* New Orleans & N. E. R. Co. (69 Miss. 848, 13 So. Rep. 826), Employés, Inj. to, 603, 626.
Short *v.* Rochester & P. R. Co. (Pa.) (8 Atl. Rep. 596), Em. Dom., 668.
Shortle *v.* Louisville, N. A. & C. R. Co. (130 Ind. 505, 30 N. E. Rep. 639), Lim. of Ac., 48.
Shortle *v.* Terre Haute & I. R. Co. (51 Am. & Eng. R. Cas. 576, 131 Ind. 338, 30 N.

E. Rep. 1084), Em. Dom., 353, 432; Lim. of Ac., 48.
Shotwell *v.* St. Joseph & St. L. R. Co. (37 Mo. App. 654), Fences, 107.
Shoup *v.* Central Branch U. P. R. Co. (5 Am. & Eng. R. Cas. 125, 24 Kan. 547), Tax., 260, 329.
Showalter *v.* Southern Kan. R. Co. (49 Kan. 421, 32 Pac. Rep. 42), Sts. & H., 36.
Shreveport & A. R. Co. *v.* Hollingsworth (44 Am. & Eng. R. Cas. 164, 42 La. Ann. 749, 7 So. Rep. 693), Em. Dom., 11, 766.
Shrewsbury *v.* Birmingham R. Co. (6 H. L. Cas. 113), Contr., 1.
Shrewsbury *v.* North Staffordshire R. Co. (L. R. 1 Eq. 593, 12 Jur. N. S. 63, 35 L. J. Ch. 156, 14 W. R. 220, 13 L. T. 648), Contr., 2, 67; Incorp., 6.
Shrewsbury & B. R. Co. *v.* London & N. W. R. Co. (17 Q. B. 652, 16 Jur. 311, 21 L. J. Q. B. 89; affirming 2 M. & G. 324, 2 H. & T. 257, 14 Jur. 921, 20 L. J. Ch. 90), Car. of Mails, 4; Contr., 61; Leases, 17, 21.
Shrewsbury & B. R. Co. *v.* London & N. W. R. Co. (4 DeG., M. & G. 115, 17 Jur. 845, 22 L. J. Ch. 682), Charges, 3; Leases, 26.
Shriver *v.* Sioux City & St. P. R. Co. (24 Minn. 506), Car. of M., 186, 468, 653; Witn., 106.
Shroeder *v.* Hudson River R. Co. (5 Duer (N. Y.) 55), Car. of M., 702.
Shropshire Union R. & C. Co. *v.* Anderson (3 Ex. 401, 6 Railw. Cas. 56, 6 D. & L. 482, 13 Jur. 175, 18 L. J. Ex. 232), Subscr., 107.
Shropshire Union R. & C. Co. *v.* Reg. (L. R. 7 H. L. Cas. 496, 23 W. R. 709, 32 L. T. 283; reversing L. R. 8 Q. B. 435, 42 L. J. Q. B. 193, 21 W. R. 953, which reversed L. R. 8 Q. B. 420), Stock, 1, 38, 46.
Shuck *v.* Chicago, R. I. & P. R. Co. (73 Iowa 333, 35 N. W. Rep. 429), Animals, 368; Tender, 4.
Shufelt *v.* Flint & P. M. R. Co. (96 Mich. 327, 55 N. W. Rep. 1013), Cross., Inj. at, 236, 299.
Shular *v.* St. Louis, I. M. & S. R. Co. (28 Am. & Eng. R. Cas. 186, 92 Mo. 339, 2 S. W. Rep. 310), Eject. Pass., 5, 9.
Shultz *v.* Chicago, M. & St. P. R. Co. (40 Wis. 589, 13 Am. Ry. Rep. 453), Employés, 6.
Shultz *v.* Third Ave. R. Co. (15 Daly 95, 2 N. Y. Supp. 693, 19 N. Y. S. R. 917), St. Rys., 433.
Shumacher *v.* St. Louis & S. F. R. Co. (39 Fed. Rep. 174, 17 Wash. L. Rep. 550), Contrib. Neg., 50; Employés, Inj. to, 375; Negl., 1, 4, 90; New Tr., 30.
Shuman *v.* Indianapolis & St. L. R. Co. (11 Ill. App. 472), Animals, 48, 69.
Shumway *v.* Chicago & I. R. Co. (4 Fed. Rep. 385), Rem. of C., 6.
Shurley *v.* New York, L. E. & W. R. Co. (121 Pa. St. 511, 15 Atl. Rep. 567), Fences, 9.
Shurtleff *v.* Wiscasset (74 Me. 130), Mun. Aid, 377.
Shurtz *v.* Schoolcraft & T. R. R. Co. (9 Mich. 269), Subscr., 7, 50.
Shute *v.* Chicago & M. R. Co. (26 Ill. 436), Em. Dom., 249, 377.
Shutt *v.* Cumberland Valley R. Co. (149 Pa. St. 266, 24 Atl. Rep. 305), Car. of P., 450.
Sibilrud *v.* Minneapolis & St. L. R. Co. (7 Am. & Eng. R. Cas. 499, 29 Minn. 58, 11 N. W. Rep. 146), Fires, 67, 261, 289.
Sibley *v.* Mobile (3 Woods (U. S.) 535), Mun. Aid, 323, 439.
Sibley *v.* Ratliffe (37 Am. & Eng. R. Cas. 295, 50 Ark. 477, 8 S. W. Rep. 686), Children, Inj. to, 147; Evid., 289; Tresp., Inj. to, 54; Trial, 172.
Sicard *v.* Buffalo, N. Y. & P. R. Co. (15 Blatchf. (U. S.) 525), Bank'cy, 10; Judgm., 14.
Sickels *v.* Anderson (63 Mich. 421, 30 N. W. Rep. 78), Mun. Aid, 258.
Sickles *v.* Richardson (23 Hun (N. Y.) 559), Bonds, 11; Evid., 170; Pledge, etc., 3.
Sidekum *v.* Wabash, St. L. & P. R. Co. (30 Am. & Eng. R. Cas. 640, 93 Mo. 400, 10 West. Rep. 277, 4 S. W. Rep. 701), Dam., 70, 71; Evid., 90; Phys. Exam., 3, 5.
Sidman *v.* Richmond & D. R. Co. (2 Int. Com. Rep. 766, 3 Int. Com. Com. 512), Int. Com., 178; Tickets & F., 66.
Siefke *v.* Manhattan R. Co. (27 J. & S. (N. Y.) 444, 14 N. Y. Supp. 763, 39 N. Y. S. R. 355), Dam., 1; Elev. Rys., 171.
Siegel *v.* Milwaukee & N. R. Co. (79 Wis. 404, 48 N. W. Rep. 488), Cross., Inj. at, 274.
Siegenberg *v.* Metropolitan Dist. R. Co. (49 L. T. 554, 32 W. R. 333), Em. Dom., 1103.
Siela *v.* Hannibal & St. J. R. Co. (82 Mo. 430), Employés, Inj. to, 96.
Sigafoos *v.* Minneapolis, L. & M. R. Co. (36 Am. & Eng. R. Cas. 675, 39 Minn. 8, 38 N. W. Rep. 627), Em. Dom., 647; Witn., 123.
Sika *v.* Chicago & N. W. R. Co. (21 Wis. 370), Animals, 140, 277; Stat., 68.
Silberstein *v.* Houston, W. S. & P. F. R. Co. (40 Am. & Eng. R. Cas. 268, 117 N. Y. 293, 22 N. E. Rep. 951, 27 N. Y. S. R. 330; reversing 52 Hun 611, 22 N. Y. S. R. 452, 4 N. Y. Supp. 843), Evid., 89; St. Rys., 317.
Silf *v.* London, B. & S. C. R. Co. (43 L. T. N. S. 173), Agency, 84.
Sill *v.* South Carolina R. Co. (4 Rich. (So. Car.) 154), Car. of Slaves, 2, 9.
Sillcocks *v.* New York El. R. Co. (46 N. Y. S. R. 671, 19 N. Y. Supp. 476), Elev. Rys., 113, 119.
Silliman *v.* Fredericksburg, O. & C. R. Co. (27 Gratt. (Va.) 119, 17 Am. Ry. Rep. 157), Agency, 70; Bonds, 46; Corp., 4.
Silliman *v.* Hudson River Bridge Co. (4 Blatchf. (U. S.) 74), Bridges, 9, 69, 87.
Silver *v.* Kansas City, St. L. & C. R. Co. (19 Am. & Eng. R. Cas. 642, 78 Mo. 528, 47 Am. Rep. 118), Fences, 38, 46.
Silver *v.* Missouri Pac. R. Co. (44 Am. &

Eng. R. Cas. 467, 101 Mo. 79, 13 S. W. Rep. 410), Bridges, 27, 60, 71, 82; Fed. Cts., 12; Leases, 64.
Silver Creek & D. R. Co., In re (45 N. Y. S. R. 66, 63 Hun 635), Em. Dom., 924.
Silver Creek & D. R. Co. *v.* Baker (18 N. Y. Supp. 331), Em. Dom., 809.
Silvers *v.* Junction R. Co. (17 Ind. 142), Trial, 85.
Silverthorne *v.* Warren R. Co. (33 N. J. L. 173), Mand., 33; Tax., 324.
Simis *v.* New York, L. E. & W. R. Co. (48 N. Y. S. R. 687, 20 N. Y. Supp. 639, 1 Misc. 179), Tickets & F., 66.
Simkin *v.* London & N. W. R. Co. (35 Am. & Eng. R. Cas. 487, L. R. 21 Q. B. D. 453), Fright. Teams, 4.
Simkins *v.* Columbia & G. R. Co. (19 Am. & Eng. R. Cas. 467, 20 So. Car. 258), Animals, 38, 44, 51, 380, 480; Negl., 18.
Simmonds *v.* New York & N. E. R. Co. (23 Am. & Eng. R. Cas. 369, 52 Conn. 264, 52 Am. Rep. 587), Fires, 2, 86, 197.
Simmons *v.* Chicago & T. R. Co. (18 Am. & Eng. R. Cas. 50, 110 Ill. 340), Employés, Inj. to, 206, 296, 438; Trial, 183.
Simmons *v.* Louisville & N. R. Co. (Ky.) (18 S. W. Rep. 1024), Death, etc., 268; Employés, Inj. to, 213.
Simmons *v.* McConnell (86 Va. 494, 10 S. E. Rep. 838), Death, etc., 281.
Simmons *v.* Manhattan R. Co. (1 N. Y. S. R. 775, 41 Hun 643), Elev. Rys., 222; Employés, Inj. to, 182.
Simmons *v.* St. Paul & C. R. Co. (18 Minn. 184) (Gil. 168), Em. Dom., 546, 629; Witn., 124.
Simmons *v.* Southeastern R. Co. (7 Jur. N. S. 849), Car. of M., 784.
Simmons *v.* Taylor (38 Fed. Rep. 682), Mort., 313.
Simms *v.* Memphis, C. & L. R. Co. (12 Heisk. (Tenn.) 621), Lim. of Ac., 1.
Simms *v.* South Carolina R. Co. (31 Am. & Eng. R. Cas. 199, 26 So. Car. 490, 2 S. E. Rep. 486), Employés, Inj. to, 30, 110, 202; Trial, 64, 103.
Simms *v.* South Carolina R. Co. (30 Am. & Eng. R. Cas. 571, 27 So. Car. 268, 3 S. E. Rep. 301), Car. of P., 240; Negl., 9.
Simoneau *v.* Queen (2 Can. Exch. 391), Em. Dom., 1235; Govt. Rds., 13.
Simonin *v.* New York, L. E. & W. R. Co. (36 Hun (N. Y.) 214), Car. of P., 306, 629.
Simons *v.* Great Western R. Co. (18 C. B. 805, 26 L. J. C. P. 35), Car. of M., 447, 479; Lim. of Liab., 4.
Simons *v.* Great Western R. Co. (2 C. B. N. S. 620), Car. of M., 437.
Simonson *v.* Chicago, R. I. & P. R. Co. (49 Iowa 87), Dam., 86, 91, 93, 98; Evid., 247.
Simonson *v.* Thompson (25 Minn. 450), Pub. Lds., 40.
Simpkins *v.* Lake Shore & M. S. R. Co. (21 Blatchf. (U. S.) 55, 19 Fed. Rep. 802), Rem. of C., 55.
Simplot *v.* Chicago, M. & St. P. R. Co. (16 Fed. Rep. 350, 5 McCrary (U. S.) 158), Sts. & H., 141.
Simpson *v.* Carolina C. R. Co. (112 N. Car. 703, 16 S. E. Rep. 853), Constr. Rys., 117.
Simpson *v.* Cincinnati, N. O. & T. P. R. Co. (81 Ga. 495, 8 S. E. Rep. 524), Evid., 279.
Simpson *v.* East Tenn., V. & G. R. Co. (89 Tenn. 304, 15 S. W. Rep. 735), Abate., 8.
Simpson *v.* East Tenn., V. & G. R. Co. (5 Lea (Tenn.) 456), Fires, 289.
Simpson *v.* Great Western R. Co. (17 U. C. Q. B. 57), Animals, 54.
Simpson *v.* Greeley (8 Kan. 586), Estop., 15; Pub. Lds., 13.
Simpson *v.* Lancaster & C. R. Co. (15 Sim. 580, 11 Jur. 879), Em. Dom., 1132.
Simpson *v.* London & N. W. R. Co. (45 L. J. Q. B. D. 182, L. R. 1 Q. B. D. 274, 24 W. R. 294, 33 L. T. 805), Car. of M., 806.
Simpson *v.* Mad River R. Co. (6 McLean (U. S.) 603), Pat. for Inv., 11.
Simpson *v.* Manhattan R. Co. (17 N. Y. S. R. 68, 1 N. Y. Supp. 673), Evid., 84.
Simpson *v.* Memphis & C. R. Co. (66 Ala. 85), Animals, 18, 366.
Simpson *v.* New York, W. S. & B. R. Co. (19 J. & S. (N. Y.) 419), Constr. Rys., 30.
Simpson *v.* Ottawa & P. R. Co. (1 Chan. Chamb. (U. C.) 99, 126, 337), Receiv., 8, 58, 167.
Simpson *v.* Rome, W. & O. R. Co. (15 N. Y. S. R. 539, 48 Hun 113), Trial, 72.
Simpson County *v.* Louisville & N. R. Co. (Ky.) (19 S. W. Rep. 665), Estop., 26.
Sims *v.* Brooklyn St. R. Co. (4 Am. & Eng. R. Cas. 132, 37 Ohio St. 556), Direct., 59; St. Rys., 30.
Sims *v.* Commercial R. Co. (1 Railw. Cas. 431), Em. Dom., 1125.
Sims *v.* East & W. R. Co. (84 Ga. 152, 10 S. E. Rep. 543), Employés, Inj. to, 183, 461.
Sims *v.* Macon & W. R. Co. (28 Ga. 93), Evid., 175; Tresp., Inj. to, 54.
Sinclair *v.* Washington & G. R. Co. (Mac-Arth. & M. (D. C.) 13), New Tr., 82.
Sinclair *v.* Western N. C. R. Co. (111 N. Car. 507, 16 S. E. Rep. 336), Pl., 152.
Siner *v.* Great Western R. Co. (L. R. 4 Ex. 117, 38 L. J. Ex. 67, 20 L. T. 114, 17 W. R. 417; affirming L. R. 3 Ex. 150, 37 L. J. Ex. 98), Car. of P., 426.
Singer *v.* St. Louis, K. C. & N. R. Co. (6 Mo. App. 427), Coupons, 19.
Single *v.* Marathon County (38 Wis. 363), Mun. Aid, 8, 53.
Singleton *v.* Eastern Counties R. Co. (7 C. B. N. S. (97 E. C. L.) 287), Children, Inj. to, 126.
Singleton *v.* Hilliard (1 Strobh. (So. Car.) 203), Car. of M., 149.
Singleton *v.* Southwestern R. Co. (21 Am. & Eng. R. Cas. 226, 70 Ga. 464, 48 Am. Rep. 574), App., 125; Franch., 4; Leases, 40.
Sinking Fund Com'rs *v.* Green & B. R. Nav. Co. (79 Ky. 73), Waters & W., 2.
Sinking Fund Com'rs *v.* Northern Bank (1 Metc. (Ky.) 174), Govt. Rds., 3.
Sinnett *v.* Moles (38 Iowa 25), Mun. Aid, 412.

Sinnot *v.* Davenport (22 How. (U. S.) 227), Commerce, 6.
Sinnott *v.* Chicago & N. W. R. Co. (81 Wis. 95, 50 N. W. Rep. 1097), Em. Dom., 561; Sts. & H., 58, 110, 297.
Sinram *v.* Pittsburg, Ft. W. & C. R. Co. (28 Ind. 244), Inj. to Cars by Cattle, 1.
Sinton *v.* Carter County (23 Fed. Rep. 535; affirmed in 120 U. S. 517, 7 Sup. Ct. Rep. 650), Mun. Aid, 24.
Sioux City, etc., R. Co. *v.* Brown (10 Am. & Eng. R. Cas. 406, 13 Neb. 317, 14 N. W. Rep. 407), Em. Dom., 767.
Sioux City & D. M. R. Co. *v.* Chicago, M. & St. P. R. Co. (25 Am. & Eng. R. Cas. 150, 27 Fed. Rep. 770), Em. Dom., 117.
Sioux City & I. F. T. L. & L. Co. *v.* Griffey (72 Iowa 505, 34 N. W. Rep. 304), Land Grants, 24.
Sioux City & I. F. T. L. & L. Co. *v.* Griffey (143 U. S. 32, 12 Sup. Ct. Rep. 362), Ejectm., 27; Land Grants, 23.
Sioux City & I. F. T. L. & L. Co. *v.* Wilson (50 Iowa 422), Deeds, 5.
Sioux City & P. R. Co. *v.* Finlayson (16 Neb. 578, 20 N. W. Rep. 860, 47 Am. Rep. 724), Employés, Inj. to, 353, 781; Phys. Exam., 2.
Sioux City & P. R. Co. *v.* First Nat. Bank (1 Am. & Eng. R. Cas. 278, 10 Neb. 556, 7 N. W. Rep. 311), Bills of L., 15, 121, 128.
Sioux City & P. R. Co. *v.* Smith (22 Neb. 775, 36 N. W. Rep. 285), Fel. Serv., 100, 332.
Sioux City & P. R. Co. *v.* Stout (17 Wall. (U. S.) 657), Children, Inj. to, 33, 67; Tresp., Inj. to, 30.
Sioux City & P. R. Co. *v.* Union Pac. R. Co. (4 Dill. (U. S.) 307), Land Grants, 7.
Sioux City & P. R. Co. *v.* United States (17 Am. & Eng. R. Cas. 480, 110 U. S. 205, 3 Sup. Ct. Rep. 565), Rev., 7.
Sioux City & P. R. Co. *v.* Washington County (3 Neb. 30), Tax., 271.
Sioux City & P. R. Co. *v.* Weimer (20 Am. & Eng. R. Cas. 184, 16 Neb. 272, 20 N. W. Rep. 349), Cross. Sts. & H., 89; Em. Dom., 837; Witn., 4, 118.
Sioux City & St. P. R. Co. *v.* Chicago, M. & St. P. R. Co. (24 Am. & Eng. R. Cas. 100, 117 U. S. 406, 6 Sup. Ct. Rep. 790), Land Grants, 56.
Sioux City & St. P. R. Co. *v.* Countryman (83 Iowa 172, 49 N. W. Rep. 72), Land Grants, 26.
Sioux City & St. P. R. Co. *v.* Osceola County (43 Iowa 318, 14 Am. Ry. Rep. 450), Land Grants, 26; Tax., 117.
Sioux City & St. P. R. Co. *v.* Osceola County (45 Iowa 168), Mun. Aid, 363; Tax., 259.
Sioux City & St. P. R. Co. *v.* Osceola County (50 Iowa 177), Tax., 117.
Sioux City & St. P. R. Co. *v.* Osceola County (52 Iowa 26, 2 N. W. Rep. 593), Mun. Aid, 363, 412.
Sioux City & St. P. R. Co. *v.* Robinson (39 Am. & Eng. R. Cas. 510, 41 Minn. 452, 43 N. W. Rep. 326), Tax., 164.
Sioux City & St. P. R. Co. *v.* Singer (49 Minn. 301, 51 N. W. Rep. 905), Deeds, 31; Ejectm., 1.
Sioux City St. R. Co. *v.* Sioux City (40 Am. & Eng. R. Cas. 275, 78 Iowa 307, 43 N. W. Rep. 224), St. Rys., 26.
Sioux City St. R. Co. *v.* Sioux City (46 Am. & Eng. R. Cas. 169, 138 U. S. 98, 11 Sup. Ct. Rep. 226; affirming 40 Am. & Eng. R. Cas. 275, 78 Iowa 367), St. Rys., 304.
Sioux City St. R. Co. *v.* Sioux City (78 Iowa 742, 39 N. W. Rep. 498), St. Rys., 148.
Sioux City & St. P. R. Co. *v.* United States (34 Fed. Rep. 835), Parties, 21; Pub. Lds., 1.
Sioux City R. Contracting Co. *v.* Walker (47 Iowa 699), Pres., 1.
Sipperly *v.* Troy & B. R. Co. (9 How. Pr. (N. Y.) 83), Pl., 167.
Sira *v.* Wabash R. Co. (58 Am. & Eng. R. Cas. 538, 115 Mo. 127, 21 S. W. Rep. 905), Car. of P., 83, 225, 251, 308, 315, 330, 322, 323, 581; Conduct., 11; Eject. Pass., 41, 91, 103; Evid., 202, 219.
Sirhowy R. Co., In re (2 Ry. & C. T. Cas. 264), Leases, 130.
Sirrine *v.* Southwestern R. Co. (43 Ga. 280), Officers, 6.
Sisco *v.* Lehigh & H. R. R. Co. (75 Hun 582, 27 N. Y. Supp. 671), Employés, Inj. to, 88.
Sisson *v.* Cleveland & T. R. Co. (14 Mich. 489), Car. of L. S., 37, 71; Car. of M., 761, 778; Evid., 173; Witn., 55.
Sixth Ave. R. Co. *v.* Gilbert El. R. Co. (3 Abb. N. Cas. (N. Y.) 53), Elev. Rys., 195.
Sixth Ave. R. Co. *v.* Gilbert El. R. Co. (11 J. & S. (N. Y.) 292, 3 Abb. N. Cas. 372; reversing 9 J. & S. 489), Elev. Rys., 6; Em. Dom., 161, 172; Nuis., 3; Sts. & H., 121, 145.
Sixth Ave. R. Co. *v.* Kerr (72 N. Y. 330), St. Rys., 58, 66.
Sixth Ave. R. Co. *v.* Kerr (28 How. Pr. (N. Y.) 382; affirming 45 Barb. 138), Injunc., 50.
Sixth Ave. R. Co. *v.* Manhattan R. Co. (14 N. Y. Supp. 97), Elev. Rys., 163.
Sixth Ave. R. Co. *v.* Mayor, etc., of N. Y. (43 N. Y. S. R. 759, 63 Hun 271, 17 N. Y. Supp. 903), Mun. Corp., 9.
Sixth Ave. R. Co. *v.* Metropolitan El. R. Co. (56 Hun 182, 30 N. Y. S. R. 521, 9 N. Y. Supp. 207), Elev. Rys., 101, 123.
Sixth Ave. R. Co. *v.* Metropolitan El. R. Co. (138 N. Y. 548, 53 N. Y. S. R. 181, 34 N. E. Rep. 400; affirming 46 N. Y. S. R. 961, 18 N. Y. Supp. 939), Elev. Rys., 118, 175, 190.
Sizer *v.* Syracuse, B. & N. Y. R. Co. (7 Lans. (N. Y.) 67), Fel. Serv., 3, 143, 148, 162.
Skegness & St. L. Tramway Co., In re (41 Ch. D. 215), Dissol., 23; Incorp., 6.
Skellenger *v.* Chicago & N. W. R. Co. (12 Am. & Eng. R. Cas. 206, 61 Iowa 714, 17 N. W. Rep. 151), Trial, 183.

Skellie *v.* Central R. & B. Co. (81 Ga. 56, 6 S. E. Rep. 811), Car. of M., 779.
Skelly *v.* New York El. R. Co. (27 N. Y. Supp. 304, 57 N. Y. S. R. 63, 7 Misc. 88), Elev. Rys., 103, 165.
Skerratt *v.* North Staffordshire R. Co. (2 Phillips 475, 5 Railw. Cas. 166, 12 Jur. 46, 17 L. J. Ch. 161), Em. Dom., 1173.
Skiddy *v.* Atlantic, M. & O. R. Co. (3 Hughes (U. S.) 320), Bonds, 33; Receiv., 85, 92, 94; Stock, 5.
Skidmore *v.* Pittsburg, C. & St. L. R. Co. (112 U. S. 33, 5 Sup. Ct. Rep. 9), Ejectm., 14.
Skillman *v.* Chicago, M. & St. P. R. Co. (78 Iowa 404, 43 N. W. Rep. 275), Em. Dom., 980.
Skillman *v.* Cincinnati, S. & C. R. Co. (13 Am. & Eng. R. Cas. 31, 39 Ohio St. 444), Tickets & F., 128.
Skinner *v.* Atchison, T. & S. F. R. Co. (39 Fed. Rep. 188), Car. of P., 213.
Skinner *v.* Chicago & R. I. R. Co. (12 Iowa 191), Car. of M., 218.
Skinner *v.* Great Northern R. Co. (L. R. 9 Ex. 298, 43 L. J. Ex. 150, 32 L. T. 233, 23 W. R. 7), Discov., 6.
Skinner *v.* Hall (60 Me. 477), Car. of M., 575.
Skinner *v.* London, B. & S. C. R. Co. (5 Ex. 787, 15 Jur. 299), Evid., 145.
Skinner *v.* Prospect Park & C. I. R. Co. (51 N. Y. S. R. 554, 67 Hun 649, 22 N. Y. Supp. 30), Death, etc., 193.
Skinningrove Iron Co. *v.* Northeastern R. Co. (5 Ry. & C. T. Cas. 244), Charges, 89, 91, 92.
Skipp *v.* Eastern Counties R. Co. (9 Ex. 223, 23 L. J. Ex. 23, 3 C. L. R. 185), Employés, Inj. to, 238, 602.
Skipwith *v.* Great Western R. Co. (59 L. T. 520, 6 Ry. & C. T. Cas. lxx), Bagg., 130.
Skjeggerud *v.* Minneapolis & St. L. R. Co. (38 Minn. 56, 35 N. W. Rep. 572), Cross., Inj. at, 226; Sts. & H., 9.
Skoglund *v.* Minneapolis St. R. Co. (45 Minn. 330, 47 N. W. Rep. 1071), Husb. & W., 21.
Skottowe *v.* Oregon S. L. & U. N. R. Co. (51 Am. & Eng. R. Cas. 444, 22 Oreg. 430, 30 Pac. Rep. 222, 16 L. R. A. 593), Death, etc., 373; Evid., 87; Stat. & D., 76, 89.
Skowhegan & A. R. Co. *v.* Kinsman (22 Am. & Eng. R. Cas. 13, 77 Me. 370), Subscr., 37.
Skrainka *v.* Rohan (18 Mo. App. 340), Liens, 25.
Slack *v.* Blackburn (64 Iowa 373, 20 N. W. Rep. 478), Mun. Aid, 97.
Slack *v.* Maysville & L. R. Co. (13 B. Mon. (Ky.) 1), Charters, 17; Mun. Aid, 107; Stat., 7; Tax., 2.
Slate Creek Iron Co. *v.* Hall (Ky.) (12 S. W. Rep. 579), Employés, Inj. to, 85.
Slater *v.* Burlington, C. R. & N. R. Co. (71 Iowa 209, 32 N. W. Rep. 264), Children, Inj. to, 121; Imp. Neg., 7.
Slater *v.* Canada C. R. Co. (25 Grant's Ch. (U. C.) 363), Em. Dom., 1222.
Slater *v.* Emerson (19 How. (U. S.) 224), Constr. Rys., 32.
Slater *v.* Irwin (38 Iowa 261), Vend. & P., 5.
Slater *v.* Jewett (5 Am. & Eng. R. Cas. 515, 85 N. Y. 61, 39 Am. Rep. 627), Employés, Inj. to, 7, 25, 33, 165, 294, 442; Evid., 106; Fel. Serv., 20, 25, 34, 207, 217, 249, 427, 430; Time-tables, 2.
Slater *v.* Manhattan R. Co. (45 N. Y. S. R. 153, 63 Hun 633, 18 N. Y. Supp. 531), Elev. Rys., 167, 178.
Slater *v.* Northern Pac. R. Co. (2 Int. [illegible] Rep. 243, 2 Int. Com. Com. 359), Int. Com., 90, 149; Passes, 5.
Slater *v.* South Carolina R. Co. (35 Am. & Eng. R. Cas. 625, 29 So. Car. 96, 6 S. E. Rep. 936), Car. of M., 104.
Slatten *v.* Des Moines Valley R. Co. (29 Iowa 148), Dam., 1; Em. Dom., 668; Sts. & H., 157.
Slatterly *v.* New York, L. E. & W. R. Co. (21 N. Y. S. R. 552, 51 Hun 638, 4 N. Y. Supp. 910), Employés, Inj. to, 292; Fel. Serv., 1, 4, 76, 419.
Slattery *v.* Dublin, W. & W. R. Co. (10 Ir. C. L. 256), Death, etc., 262.
Slattery *v.* Dublin, W. & W. R. Co. (L. R. 3 App. Cas. 1155, 3 Ry. & C. T. Cas. xiii), Licensees, Inj. to, 5.
Slattery *v.* St. Louis, K. C. & N. R. Co. (55 Mo. 362), Fences, 65.
Slattery *v.* Toledo & W. R. Co. (23 Ind. 81), Employés, Inj. to, 541; Fel. Serv., 377.
Slatzman *v.* Brooklyn City R. Co. (73 Hun 567, 26 N. Y. Supp. 311, 56 N. Y. S. R. 220), Trial, 76.
Slaughter *v.* Metropolitan St. R. Co. (58 Am. & Eng. R. Cas. 604, 116 Mo. 269, 23 S. W. Rep. 760), Contrib. Neg., 98, 113; Dam., 77; Pl., 110; Trial, 93, 95.
Slavens *v.* South Pac. R. Co. (51 Mo. 308, 3 Am. Ry. Rep. 262), Jurisd., 7.
Slavin *v.* New York, N. H. & H. R. Co. (63 Conn. 573), Employés, Inj. to, 209.
Slawson *v.* Albany R. Co. (3 T. & C. (N. Y.) 708, 1 Hun 438; affirmed in 60 N. Y. 666, mem.), Sales, 9.
Slawson *v.* Grand St., P. P. & F. R. Co. (13 Am. & Eng. R. Cas. 451, 107 U. S. 649, 2 Sup. Ct. Rep. 663), Pat. for Inv., 37.
Sleeper *v.* Pennsylvania R. Co. (9 Am. & Eng. R. Cas. 291, 100 Pa. St. 259, 45 Am. Rep. 380), Tickets & F., 151.
Sleeper *v.* Worcester & N. R. Co. (58 N. H. 520), Animals, 288.
Slette *v.* Great Northern R. Co. (53 Minn. 341, 55 N. W. Rep. 137), Fel. Serv., 100; Negl., 27.
Slim *v.* Great Northern R. Co. (14 C. B. 647, 2 C. L. R. 864, 8 Jur. 1119, 23 L. J. C. P. 166), Car. of L. S., 15.
Sliney *v.* Duluth & W. R. Co. (46 Minn. 384, 49 N. W. Rep. 187), Employés, Inj. to, 272.
Slipher *v.* Earhart (83 Ind. 173), Subscr., 157, 215.
Slipper *v.* Tottenham & H. J. R. Co. (36 L. J. Ch. 841, L. R. 4 Eq. 112, 16 L. T. 446, 15 W. R. 861), Em. Dom., 1157; Land. & T., 5.
Sloan *v.* Baltimore & P. R. Co. (131 Pa. St. 568, 18 Atl. Rep. 903), Em. Dom., 914.

Sloan *v.* Central Iowa R. Co. (11 Am. & Eng. R. Cas. 145, 62 Iowa 728, 16 N. W. Rep. 331), Employés, 4; Employés, Inj. to, 736; Receiv., 72, 186.
Sloan *v.* Georgia Pac. R. Co. (44 Am. & Eng. R. Cas. 553, 86 Ga. 15, 12 S. E. Rep. 179), Employés, Inj. to, 420, 430.
Sloan *v.* Missouri Pac. R. Co. (74 Mo. 47), Animals, 356.
Sloan *v.* New York C. & H. R. R. Co. (1 Hun (N. Y.) 540, 4 T. & C. 135), Evid., 74; Husb. & W., 16.
Sloan *v.* New York C. R. Co. (45 N. Y. 125), Witn., 34, 100.
Sloan *v.* Pacific R. Co. (61 Mo. 24), Charges, 4; Charters, 19.
Sloan *v.* St. Louis, K. C. & N. R. Co. (58 Mo. 220), Car. of M., 52, 181.
Sloane *v.* New York El. R. Co. (17 N. Y. Supp. 769, 44 N. Y. S. R. 583; reversed in 33 N. E. Rep. 335, 50 N. Y. S. R. 705), Elev. Rys., 144, 157, 161, 167.
Slocum *v.* Fairchild (7 Hill (N. Y.) 292), Lim. of Liab., 12.
Slocumb *v.* Chicago, B. & Q. R. Co. (57 Iowa 675, 11 N. W. Rep. 641), Adv. Poss., 3; Estop., 26; Vend. & P., 4.
Sloman *v.* Great Western R. Co. (67 N. Y. 208, 5 Am. Ry. Rep. 113; reversing 6 Hun 546), Bagg., 38, 113.
Sloop *v.* St. Louis, I. M. & S. R. Co. (22 Mo. App. 593), Animals, 65, 447.
Slossen *v.* Burlington, C. R. & N. R. Co. (Iowa) (7 Am. & Eng. R. Cas. 509, 20 N. W. Rep. 860; reversed in 11 Am. & Eng. R. Cas. 67, 60 Iowa 215, 14 N. W. Rep. 244), App., 103; Fires, 135, 160; Trial, 164.
Slossen *v.* Burlington, C. R. & N. R. Co. (11 Am. & Eng. R. Cas. 67, 60 Iowa 215, 14 N. W. Rep. 244), Fires, 112, 196, 230, 293, 302, 327.
Small *v.* Chicago, R. I. & P. R. Co. (50 Iowa 338), Animals, 480; Fires, 263, 276.
Small *v.* Chicago, R. I. & P. R. Co. (55 Iowa 582, 8 N. W. Rep. 437), Assign., 10; Fires, 119, 334.
Small *v.* Georgia Southern & F. R. Co. (87 Ga. 602, 13 S. E. Rep. 694), Em. Dom., 180, 273.
Small *v.* Grand Trunk R. Co. (15 U. C. Q. B. 283), Nuis., 17.
Small *v.* Northern Pac. R. Co. (20 Fed. Rep. 753), Spec. Perf., 5.
Smalley *v.* Blackburn R. Co. (2 H. & N. 158, 27 L. J. Ex. 65), Ejectm., 34; Em. Dom., 1175.
Smalley *v.* Iowa Pac. R. Co. (36 Iowa 571), App., 28; Witn., 94.
Smart *v.* McBeth (13 U. C. C. P. 27), Stockh., 73.
Smart *v.* Portsmouth & C. R. Co. (20 N. H. 233), Em. Dom., 857, 985.
Smead *v.* Indianapolis, P. & C. R. Co. (11 Ind. 105), Bills & N., 4, 15; Charters, 17, 26, 35, 40.
Smead *v.* Lake Shore & M. S. R. Co. (23 Am. & Eng. R. Cas. 241, 58 Mich. 200, 24 N. W. Rep. 761), Animals, 348; Cat.-Gds., 15; Witn., 90.
Smedis *v.* Brooklyn & R. B. R. Co. (8 Am. & Eng. R. Cas. 445, 88 N. Y. 13; affirming 23 Hun 279), Cross., Inj. at, 129, 291, 326; Trial, 178.
Smedley *v.* Chicago & N. W. R. Co. (45 Ill. App. 426), App., 127.
Smith, In re (L. R. 40 Ch. D. 386), Em Dom., 1153.
Smith, In re (2 Low. (U. S.) 69), Bank'cy, 10.
Smith *v.* Alabama (33 Am. & Eng. R. Cas. 425, 124 U. S. 465, 8 Sup. Ct. Rep. 564), Int. Com., 212.
Smith *v.* Allison (23 Ind. 366), Subscr., 224.
Smith *v.* Atchison, T. & S. F. R. Co. (4 Am. & Eng. R. Cas. 554, 25 Kan. 738), Children, Inj. to, 1, 6, 12, 144.
Smith *v.* Baker ([1891] A. C. 325), Employés, Inj. to, 706.
Smith *v.* Baltimore & O. R. Co. (158 Pa. St. 82, 27 Atl. Rep. 847), Cross., Inj. at, 276; Trial, 73.
Smith *v.* Barre R. Co. (64 Vt. 21, 23 Atl. Rep. 632), Animals, 154; Fences, 82.
Smith *v.* Boston & M. R. Co. (44 N. H. 325), Bagg., 37; Witn., 23.
Smith *v.* Boston & M. R. Co. (63 N. H. 25), Fires, 13, 240, 361.
Smith *v.* Boston & M. R. Co. (6 Allen (Mass.) 262), Em. Dom., 858.
Smith *v.* Boston & M. R. Co. (120 Mass. 490), Sunday, 4, 6.
Smith *v.* Boston & M. R. Co. (16 Gray (Mass.) 521), Arb., 31.
Smith *v.* Boston, C. & M. R. Co. (33 N. H. 337), Attach., 11, 52, 62.
Smith *v.* Boston, C. & M. R. Co. (36 N. H. 458), Constr. Rys., 19, 20, 30; Contr., 94; Pl., 3.
Smith *v.* Bourbon County (42 Kan. 264, 21 Pac. Rep. 1109), Lim. of Ac., 12.
Smith *v.* Bourbon County Com'rs (43 Kan. 619, 29 Am. & Eng. Corp. Cas. 180, 23 Pac. Rep. 642), Cred. Bill, 6; Lim. of Ac., 18.
Smith *v.* Bourbon County Com'rs (127 U. S. 105, 8 Sup. Ct. Rep. 1043), Cred. Bill, 5.
Smith *v.* Buffalo, R. & P. R. Co. (55 N. Y. S. R. 223, 72 Hun 545, 25 N. Y. Supp. 638), Employés, Inj. to, 129.
Smith *v.* Buffalo St. R. Co. (35 Hun (N. Y.) 204), Employés, 7.
Smith *v.* Burlington & M. R. R. Co. (55 Mo. 526), Appear., 6.
Smith *v.* Burlington, C. R. & N. R. Co. (6 Am. & Eng. R. Cas. 149, 59 Iowa 73, 12 N. W. Rep. 763), Fel. Serv., 177.
Smith *v.* Butler (L. R. 16 Q. B. D. 349), Tramw., 5.
Smith *v.* Canada Car Co. (6 Ont. Pr. 107), Stock, 62.
Smit *v.* Cedar Falls & M. R. Co. (30 Iowa 244), Contr., 81.
Smith *v.* Cedar Rapids & M. R. R. Co. (43 Iowa 239, 14 Am. Ry. Rep. 426), Contr., 104.
Smith *v.* Central R. & B. Co. (41 Am. & Eng. R. Cas. 490, 82 Ga. 801, 10 S. E. Rep. 111), Tresp., Inj. to, 116; Trial, 63.
Smith *v.* Central R. & B. Co. (88 Ga. 266, 14 S. E. Rep. 567), Employés, 19.

Smith *v.* Chamberlain (58 Am. & Eng. R. Cas. 558, 38 So. Car. 529, 17 S. E. Rep. 371), Col. Pers., 5, 10, 11.
Smith *v.* Chicago & A. R. Co. (52 Am. & Eng. R. Cas. 483, 108 Mo. 243, 18 S. W. Rep. 971), Car. of P., 142, 205, 596; Dam., 90; Evid., 220.
Smith *v.* Chicago & N. W. R. Co. (18 Wis. 17), Reorg., 13; Stockh., 126.
Smith *v.* Chicago & N. W. R. Co. (43 Wis. 686, 17 Am. Ry. Rep. 145), Charges, 58.
Smith *v.* Chicago & N. W. R. Co. (19 Wis. 326), Reorg., 10.
Smith *v.* Chicago & N. W. R. Co. (1 Am. & Eng. R. Cas. 303, 49 Wis. 443, 5 N. W. Rep. 240), Charges, 58; Judgm., 15.
Smith *v.* Chicago & W. I. R. Co. (14 Am. & Eng. R. Cas. 384, 105 Ill. 511), Em. Dom., 352.
Smith *v.* Chicago, A. & St. L. R. Co. (67 Ill. 191), Ejectm., 21; Em. Dom., 263, 984, 1014, 1052.
Smith *v.* Chicago, C. & D. R. Co. (38 Iowa 518), Cat.-Gds., 9, 27, 33, 34.
Smith *v.* Chicago, M. & St. P. R. Co. (83 Wis. 271, 50 N. W. Rep. 497, 53 N. W. Rep. 550), Judgm., 19; Sunday, 1.
Smith *v.* Chicago, M. & St. P. R. Co. (56 Am. & Eng. R. Cas. 123, 4 S. Dak. 71, 55 N. W. Rep. 717), Cross., Inj. at, 229; Fires, 180, 237, 247, 290, 303, 364.
Smith *v.* Chicago, M. & St. P. R. Co. (13 Am. & Eng. R. Cas. 534, 60 Iowa 512, 15 N. W. Rep. 303), Animals, 310, 475.
Smith *v.* Chicago, M. & St. P. R. Co. (86 Iowa 202, 53 N. W. Rep. 128), App., 5; Connect. L., 2; Ry. Com'rs, 37.
Smith *v.* Chicago, M. & St. P. R. Co. (42 Wis. 520, 15 Am. Ry. Rep. 168), Employés, Inj. to, 611.
Smith *v.* Chicago, R. I. & P. R. Co. (34 Iowa 96), Animals, 56.
Smith *v.* Chicago, R. I. & P. R. Co. (34 Iowa 506, 5 Am. Ry. Rep. 535), Animals, 201; Fences, 58.
Smith *v.* Chicago, R. I. & P. R. Co. (55 Iowa 33, 7 N. W. Rep. 398), Car. of P., 454; Cross., Inj. at, 312.
Smith *v.* Chicago, R. I. & P. R. Co. (56 Iowa 720, 10 N. W. Rep. 244), Att'ys, 16.
Smith *v.* Citizens' R. Co. (52 Mo. App. 36), Cross., Inj. at, 240, 283.
Smith *v.* Clark County (54 Mo. 58), Coupons, 4, 15; Mun. Aid, 145, 172, 385, 393.
Smith *v.* Cork & B. R. Co. (5 Ir. Eq. 65), Divid., 8; Parties, 22.
Smith *v.* Crete, M. & W. R. Co. (29 Neb. 142), Em. Dom., 646.
Smith *v.* Davidson (45 Ind. 396), Mun. Aid, 224.
Smith *v.* Detroit, H. & S. W. R. Co. (22 Am. & Eng. R. Cas. 9, 56 Mich. 529, 23 N. W. Rep. 208), Evid., 183.
Smith *v.* Dinsmore (9 Daly (N. Y.) 188), Bills of L., 97.
Smith *v.* Dittman (11 N. Y. Supp. 769, 34 N. Y. S. R. 303, 16 Daly 427), Evid., 177; New Tr., 88.
Smith *v.* Dorn (96 Cal. 73, 30 Pac. Rep. 1024), Direct., 18, 23; Pl., 175; Stockh., 126.
Smith *v.* Drake (125 Pa. St. 501, 17 Atl. Rep. 449), Employés, Inj. to, 223.
Smith *v.* East & W. R. Co. (84 Ga. 183, 10 S. E. Rep. 602), Death, etc., 151.
Smith *v.* East End St. R. Co. (38 Am. & Eng. R. Cas. 470, 87 Tenn. 626, 11 S. W. Rep. 709), St. Rys., 103, 191, 208, 228.
Smith *v.* Eastern R. Co. (35 N. H. 356), Animals, 126, 342, 368, 480; Contrib. Neg., 61; Fences, 31.
Smith *v.* Eastern R. Co. (124 Mass. 154, 17 Am. Ry. Rep. 398), Eastern R. Co., 2.
Smith *v.* East Tenn., V. & G. R. Co. (98 Ala. 154, 13 So. Rep. 784), Just. P., 22.
Smith *v.* Everett (61 N. H. 632), Direct., 27.
Smith *v.* Exeter (37 N. H. 556), Tax., 103.
Smith *v.* Findley (34 Kan. 316, 8 Pac. Rep. 871), Charges, 51.
Smith *v.* Flora (64 Ill. 93), Sts. & H., 10.
Smith *v.* Florida C. & W. R. Co. (43 Fed. Rep. 731), Bonds, 46.
Smith *v.* Fond du Lac (10 Biss. (U. S.) 418, 8 Fed. Rep. 289), Mun. Aid, 53.
Smith *v.* Ft. Scott, H. & W. R. Co. (99 U. S. 398), Cred. Bill, 4.
Smith *v.* Georgia Pac. R. Co. (41 Am. & Eng. R. Cas. 143, 88 Ala. 538, 7 So. Rep. 119), Car. of P., 411; Negl., 53.
Smith *v.* Georgia R. & B. Co. (87 Ga. 764, 13 S. E. Rep. 904), Pl., 152.
Smith *v.* Gower (2 Duv. (Ky.) 17), Subscr., 175.
Smith *v.* Grand St., P. P. & F. R. Co. (11 Abb. N. Cas. (N. Y.) 62), Children, Inj. to, 161.
Smith *v.* Grand Trunk R. Co. (35 U. C. Q. B. 547), Bagg., 19.
Smith *v.* Great Eastern R. Co. (36 L. J. C. P. 22, 15 W. R. 131, 15 L. T. 246, L. R. 2 C. P. 4), Stat. & D., 72.
Smith *v.* Great Western R. Co. (6 U. C. C. P. 151), Farm Cross., 9.
Smith *v.* Great Western R. Co. (L. R. 3 App. Cas. 165, 47 L. J. Ch. 97, 37 L. T. 645; affirming L. R. 2 Ch. D. 235, 34 L. T. 267), Em. Dom., 1156, 1158; Mines, etc., 8.
Smith *v.* Griffith (3 Hill (N. Y.) 333), Car. of M., 758, 761.
Smith *v.* Hannibal & St. J. R. Co. (47 Mo. App. 546), Animals, 442.
Smith *v.* Hannibal & St. J. R. Co. (37 Mo. 287), Fires, 264, 284; Trial, 183.
Smith *v.* Hestonville, M. & F. Pass. R. Co. (2 Am. & Eng. R. Cas. 12, 92 Pa. St. 450, 37 Am. Rep. 705), Children, Inj. to, 129.
Smith *v.* Hestonville, M. & F. R. Co. (17 Phila. (Pa.) 184), St. Rys., 362.
Smith *v.* Hollett (34 Ind. 519), Subscr., 85.
Smith *v.* Holloway (46 Am. & Eng. R. Cas. 495, 124 Ind. 329, 24 N. E. Rep. 886), Em. Dom., 206, 221; Right of W., 12; Vend. & P., 2.
Smith *v.* Humeston & S. R. Co. (41 Am. & Eng. R. Cas. 278, 78 Iowa 583, 43 N. W. Rep. 545), Fel. Serv., 174, 175.

Smith *v.* Indiana & I. R. Co. (12 Ind. 61), Evid., 233; Subscr., 66, 82.
Smith *v.* Indianapolis & St. L. R. Co. (7 Am. & Eng. R. Cas. 582, 80 Ind. 233), Animals, 430; Witn., 118.
Smith *v.* Kansas City, St. J. & C. B. R. Co. (58 Iowa 622, 12 N. W. Rep. 619), Animals, 50, 217, 312, 568.
Smith *v.* Kansas City, St. J. & C. B. R. Co. (98 Mo. 20, 11 S. W. Rep. 259), Sts. & H., 157, 161, 165, 294.
Smith *v.* Kennebec & P. R. Co. (45 Me. 547), Attach., 23.
Smith *v.* King's Mountain R. Co. (3 So. Car. 53), Car. of M., 738.
Smith *v.* Lambeth Assessment Committee (L. R. 10 Q. B. D. 327, 52 L. J. M. C. 1, 4 Ry. & C. T. Cas. xvii), Tax., 304.
Smith *v.* Lewis (3 B. Mon. (Ky.) 229), Car. of M., 713.
Smith *v.* London & S. W. R. Co. (L. R. 6 C. P. 14, 40 L. J. C. P. 21, 23 L. T. 678, 19 W. R. 230; affirming L. R. 5 C. P. 98, 39 L. J. C. P. 68, 21 L. T. 668, 18 W. R. 343), Fires, 65, 98, 254.
Smith *v.* London, B. & S. C. R. Co. (7 C. B. 782), Car. of M., 518.
Smith *v.* Long Island R. Co. (102 N. Y. 190, 6 N. E. Rep. 397, 1 N. Y. S. R. 403; reversing in part 34 Hun 38), Officers, 14.
Smith *v.* Louisville & N. R. Co. (21 Am. & Eng. R. Cas. 157, 75 Ala. 449), Death, etc., 6, 12.
Smith *v.* Louisville & N. R. Co. (89 Tenn. 664, 15 S. W. Rep. 842), Death, etc., 96.
Smith *v.* Louisville, E. & St. L. R. Co. (124 Ind. 394, 24 N. E. Rep. 753), Car. of P., 45, 539.
Smith *v.* Louisville, N. O. & T. R. Co. (62 Miss. 510), Bridges, 83.
Smith *v.* Lynn (3 Up. Can. E. & A. 201), Stockh., 63.
Smith *v.* McAdam (3 Mich. 506), Mich. Cent. R. Co., 1.
Smith *v.* McCullough (3 Am. & Eng. R. Cas. 159, 104 U. S. 25), Mort., 24; Receiv., 50.
Smith *v.* McNamara (15 Hun (N. Y.) 447), Receiv., 66.
Smith *v.* Manhattan R. Co. (45 N. Y. S. R. 865, 18 N. Y. Supp. 759), Car. of P., 70, 301; Eject. Pass., 1, 47.
Smith *v.* Martin A. F. Car Heater Co. (47 N. Y. S. R. 26, 64 Hun 639, 19 N. Y. Supp. 285), Agency, 108; Pres., 1.
Smith *v.* Mayor, etc., of Boston (1 Gray (Mass.) 72), Em. Dom., 520; Mand., 24.
Smith *v.* Memphis & A. C. Packet Co. (Tenn.) (1 S. W. Rep. 104), Agency, 83.
Smith *v.* Memphis & L. R. R. Co. (18 Fed. Rep. 304), App., 3; Employes, Inj. to, 45, 309, 363, 445, 626; Fel. Serv., 38, 293.
Smith *v.* Metropolitan R. Co. (19 Am. & Eng. R. Cas. 171, 137 Mass. 61), Witn., 34.
Smith *v.* Midland R. Co. (4 Ont. 494), Tax., 388.
Smith *v.* Midland R. Co. (26 W. R. 10, 37 L. T. 224, 25 W. R. 861), Constr. Rys., 9; Nuis., 5.
Smith *v.* Midland R. Co. (57 L. T. 813, 6 Ry. & C. T. Cas. lxviii), Car. of L. S., 39.
Smith *v.* Minneapolis & St. L. R. Co. (26 Minn. 419, 4 N. W. Rep. 782), Death, etc., 204.
Smith *v.* Minneapolis & St. L. R. Co. (37 Minn. 103, 33 N. W. Rep. 316), Fences, 58.
Smith *v.* Missouri Pac. R. Co. (56 Fed. Rep. 458; reversing 50 Fed. Rep. 700), Death, etc., 151.
Smith *v.* Missouri Pac. R. Co. (29 Mo. App. 65), Animals, 351.
Smith *v.* Missouri Pac. R. Co. (113 Mo. 70, 20 S. W. Rep. 896), Collis., 33; Negl., 12, 32; Trial, 60.
Smith *v.* Nashua & L. R. Co. (27 N. H. 86), Car. of M., 79, 325.
Smith *v.* Nashville & C. R. Co. (6 Coldw. (Tenn.) 589), Evid., 140; Negl., 103.
Smith *v.* Nashville & K. R. Co. (88 Tenn. 611, 13 S. W. Rep. 128), Em. Dom., 426.
Smith *v.* New Haven (59 Conn. 203, 22 Atl. Rep. 146), Cross. Sts. & H., 64, 67.
Smith *v.* New Haven & N. R. Co. (12 Allen (Mass.) 531), Car. of L. S., 4, 158.
Smith *v.* New York & H. R. Co. (19 N. Y. 127; affirming 6 Duer 225), Employés, Inj. to, 98; Leases, 112, 116.
Smith *v.* New York & N. H. R. Co. (28 Barb. (N. Y.) 605, 10 How. Pr. 277), Assign., 2.
Smith *v.* New York & N. E. R. Co. (25 Am. & Eng. R. Cas. 205, 142 Mass. 21, 6 N. E. Rep. 842), Priv. Ways, 2.
Smith *v.* New York & O. M. R. Co. (63 N. Y. 58), Farm Cross., 3.
Smith *v.* New York C. & H. R. R. Co. (38 Hun (N. Y.) 33), Cross., Inj. at, 212.
Smith *v.* New York C. & H. R. R. Co. (11 N. Y. S. R. 795, 46 Hun 679), Cross., Inj. at, 316.
Smith *v.* New York C. & H. R. R. Co. (118 N. Y. 645, 23 N. E. Rep. 990, 30 N. Y. S. R. 96; reversing 45 Hun 588, 9 N. Y. S. R. 612), Employés, Inj. to, 104; Evid., 134.
Smith *v.* New York C. & H. R. R. Co. (44 N. Y. S. R. 55, 17 N. Y. Supp. 400; affirmed in 137 N. Y. 562, 33 N. E. Rep. 338), Contrib. Neg., 30; Cross., Inj. at, 220; Employés, Inj. to, 329.
Smith *v.* New York C. R. Co. (24 N. Y. 222; affirming 29 Barb. 132), Car. of L. S., 129.
Smith *v.* New York C. R. Co. (43 Barb. (N. Y.) 225; affirmed in 41 N. Y. 620), Car. of M., 106, 628, 644, 645, 653, 654.
Smith *v.* New York El. R. Co. (44 N. Y. S. R. 875, 18 N. Y. Supp. 132), Elev. Rys., 157.
Smith *v.* New York, L. E. & W. R. Co. (149 Pa. St. 249, 24 Atl. Rep. 304), Stat. & D., 55.
Smith *v.* New York, N. H. & H. R. Co. (33 N. Y. S. R. 707, 26 J. & S. 284, 11 N. Y. Supp. 586), Employés, Inj. to, 671.
Smith *v.* New York, S. & W. R. Co. (18 Am. & Eng. R. Cas. 399, 46 N. J. L. 7), Negl., 74; Sunday, 5.
Smith *v.* North Carolina R. Co. (1 Wins. (N. Car.) 203) Bags, 14.

Smith *v.* North Carolina R. Co. (64 N. Car. 235), Bagg., 103; Car. of M., 465; Negl., 76.
Smith *v.* North Carolina R. Co. (68 N. Car. 107), Agency, 11; Evid., 204; Witn., 45, 118.
Smith *v.* Northern Pac. R. Co. (57 Am. & Eng. R. Cas. 345, 58 Fed. Rep. 513), Pub. Lds., 40.
Smith *v.* Northern Pac. R. Co. (1 Int. Com. Rep. 611, 1 Int. Com. Com. 208), Int. Com., 181.
Smith *v.* North Staffordshire R. Co. (44 L. T. 85), Em. Dom., 1117.
Smith *v.* Occidental & O. Steamship Co. (99 Cal. 462, 34 Pac. Rep. 84), Evid., 284.
Smith *v.* O'Donnell (8 Lea (Tenn.) 468), Constr. Rys., 81; Evid., 183.
Smith *v.* Old Colony & N. R. Co. (10 R. I. 22, 6 Am. Ry. Rep. 144), Fires, 26, 181, 242.
Smith *v.* Omnibus R. Co. (36 Cal. 281), St. Rys., 307.
Smith *v.* Ontario (15 Blatchf. (U. S.) 267), Mun. Aid, 106.
Smith *v.* Pacific R. Co. (61 Mo. 17), Leases, 42.
Smith *v.* Passenger R. Co. (13 Phila. (Pa.) 6), Children, Inj. to, 98.
Smith *v.* Peninsular Car Works (60 Mich. 501, 27 N. W. Rep. 662, 1 Am. St. Rep. 542), Employés, Inj. to, 309.
Smith *v.* Pennsylvania S. V. R. Co. (141 Pa. St. 68, 21 Atl. Rep. 505), Em. Dom., 631.
Smith *v.* Philadelphia & R. R. Co. (57 Fed. Rep. 903), Flood. Lds., 91.
Smith *v.* Philadelphia & R. R. Co. (1 Pa. Dist. 322), Tickets & F., 13
Smith *v.* Philadelphia City Pass. R. Co. (15 Phila. (Pa.) 89), St. Rys., 283.
Smith *v.* Pittsburg, Ft. W. & C. R. Co. (23 Ohio St. 10), Eject. Pass., 7, 106; Tickets & F., 115.
Smith *v.* Point Pleasant & O. R. R. Co. (20 Am. & Eng. R. Cas. 160, 23 W. Va. 451), Injunc., 3.
Smith *v.* Port Dover & L. H. R. Co. (25 Am. & Eng. R. Cas. 639, 12 Ont. App. 288; affirming 8 Ont. 250), Receiv., 7.
Smith *v.* Potter (2 Am. & Eng. R. Cas. 140, 46 Mich. 258, 9 N. W. Rep. 273), Employés, Inj. to, 7, 154; Evid., 100; Fel. Serv., 2, 17, 57, 222, 223, 236; Receiv., 142.
Smith *v.* Putnam (61 N. H. 632), Direct., 60.
Smith *v.* Reading City Pass. R. Co. (156 Pa. St. 5, 26 Atl. Rep. 779; affirming 2 Pa. Dist. 490), Leases, 51.
Smith *v.* Richmond & D. R. Co. (34 Am. & Eng. R. Cas. 557, 99 N. Car. 241, 5 S. E. Rep. 896), Car. of P., 468; Contrib. Neg., 92; Negl., 53.
Smith *v.* Rio Grande Western R. Co. (9 Utah 141, 33 Pac. Rep. 626), Contrib. Neg., 82; Cross., Inj. at, 259; Negl., 60.
Smith *v.* Sac County (11 Wall. (U. S.) 139), Mun. Aid, 305.
Smith *v.* St. Louis & S. F. R. Co. (29 Am. & Eng. R. Cas. 106, 85 Mo. 418, 55 Am. Rep. 380), Car. of P., 512; Death, etc., 167.
Smith *v.* St. Louis, I. M. & S. R. Co. (91 Mo. 58, 3 S. W. Rep. 836), Evid., 175; Fences, 92.
Smith *v.* St. Louis, I. M. & S. R. Co. (25 Mo. App. 113), Animals, 153, 604.
Smith *v.* St. Louis, K. C. & N. R. Co. (69 Mo. 32), Car. of P., 7, 137; Employés, Inj. to, 67, 97, 229.
Smith *v.* St. Paul & D. R. Co. (44 Minn. 17, 46 N. W. Rep. 149), App., 23; Fel. Serv., 188.
Smith *v.* St. Paul & D. R. Co. (51 Minn. 86, 52 N. W. Rep. 1068), Employés, Inj. to, 434.
Smith *v.* St. Paul City R. Co. (16 Am. & Eng. R. Cas. 310, 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. Rep. 827), Collis., 24, 26; St. Rys., 325, 335; Trial, 43.
Smith *v.* St. Paul, M. & M. R. Co. (9 Am. & Eng. R. Cas. 262, 30 Minn. 169, 14 N. W. Rep. 797), Car. of P., 611; Derailm., 2, 7.
Smith *v.* Savannah, F. & W. R. Co. (42 Am. & Eng. R. Cas. 105, 84 Ga. 608, 11 S. E. Rep. 455), New Tr., 28; Tresp., Inj. to, 9, 114; Trial, 101.
Smith *v.* Seattle, L. S. & E. R. Co. (41 N. Y. S. R. 672, 61 Hun 627), Discov., 2.
Smith *v.* Seattle, L. S. & E. R. Co. (40 N. Y. S. R. 805, 66 Hun 627, 20 N. Y. Supp. 784), Discov., 5.
Smith *v.* Seattle, L. S. & E. R. Co. (55 N. Y. S. R. 627, 72 Hun 202, 25 N. Y. Supp. 368), Contr., 51.
Smith *v.* Sioux City & P. R. Co. (17 Am. & Eng. R. Cas. 561, 15 Neb. 583, 19 N. W. Rep. 638), Fel. Serv., 73, 217, 315; New Tr., 1.
Smith *v.* Smith (62 Ill. 493), Officers, 17.
Smith *v.* Smith (L. R. 3 Ex. 282, 38 L. J. Ex. 37), Em. Dom., 1109.
Smith *v.* Spencer (12 U. C. C. P. 277), Charters, 164; Exec., 14; Stockh., 1; Subscr., 1, 8.
Smith *v.* State (28 Ind. 321), Crim. L., 27.
Smith *v.* Superior Court (97 Cal. 348, 32 Pac. Rep. 322), Receiv., 16.
Smith *v.* Tallapoosa County (2 Woods (U. S.) 574), Coupons, 8; Evid., 110; Mun. Aid, 343, 377.
Smith *v.* Texas & P. R. Co. (2 Tex. Unrep. Cas. 329), Stat. & D., 104.
Smith *v.* Townsend (148 U. S. 490, 13 Sup. Ct. Rep. 634), Pub. Lds., 9.
Smith *v.* Turner (7 How. (U. S.) 283), Commerce, 3.
Smith *v.* Union Pac. R. Co. (2 Dill. (U. S.) 278), Fed. Cts., 9; Union Pac. R. Co., 9.
Smith *v.* Union R. Co. (61 Mo. 588), Contrib. Neg., 13, 82; Death, etc., 296.
Smith *v.* Wabash, St. L. & P. R. Co. (31 Am. & Eng. R. Cas. 331, 92 Mo. 359, 4 S. W. Rep. 129), App., 72, 126; Dam., 38; Fel. Serv., 427, 429, 430.
Smith *v.* Wabash, St. L. & P. R. Co. (19 Mo. App. 120), Animals, 192, 385.
Smith *v.* Washington City, V. M. & G. S. R. Co. (1 Am. & Eng. R. Cas. 493, 33 Gratt. (Va.) 617), Deeds of Tr., 9; Lim. of Ac., 53.

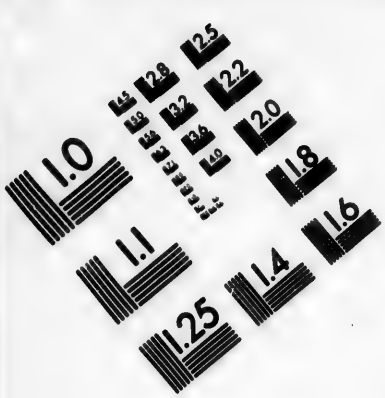
Smith *v.* Wendell (7 Cush. (Mass.) 498), Sts. & H., 363.
Smith *v.* Western R. Co. (49 Am. & Eng. R. Cas. 108, 91 Ala. 455, 8 So. Rep. 754), Car. of M., 104.
Smith *v.* Wilmington (98 N. Car. 343, 4 S. E. Rep. 489), Mun. Aid, 120.
Smith *v.* Winona & St. P. R. Co. (41 Am. & Eng. R. Cas. 289, 42 Minn. 87, 43 N. W. Rep. 968), Employés, Inj. to, 182, 209, 266.
Smith *v.* Wrightsville & T. R. Co. (41 Am. & Eng. R. Cas. 320, 83 Ga. 671, 10 S. E. Rep. 361), Employés, Inj. to, 332, 389; Trial, 109.
Smith *v.* Yates (15 Blatchf. (U. S.) 89), Mun. Aid, 234.
Smitha *v.* Louisville & N. R. Co. (86 Tenn. 198, 6 S. W. Rep. 209), Car. of L. S., 80.
Smith Bridge Co. *v.* Bowman (41 Ohio St. 37), Constr. Rys., 28; Liens, 24.
Smoot *v.* Kentucky C. R. Co. (13 Fed. Rep. 337), Col. Pers., 1.
Smoot *v.* Mobile & M. R. Co. (67 Ala. 13), Employés, Inj. to, 111, 144, 603; Fel. Serv., 1, 3, 56, 138.
Smotherman *v.* St. Louis, I. M. & S. R. Co. (29 Mo. App. 265), Car. of P., 478.
Smyth *v.* Stockton & C. R. Co. (Cal.) (4 Pac. Rep. 505), Fires, 45.
Smyth *v.* Ward (46 Iowa 339), Evid., 178; Liens, 40; Sales, 8.
Snashall *v.* Metropolitan R. Co. (8 Mackey (D. C.) 399), Husb. & W., 26, 31; Release, 7.
Sneesby *v.* Lancashire & Y. R. Co. (1 Q. B. Div. 42, 33 L. T. N. S. 372, 45 L. J. Q. B. 1; affirming L. R. 9 Q. B. 263, 43 L. J. Q. B. 69, 30 L. T. N. S. 492), Animals, 34.
Snell *v.* Brown (71 Ill. 133), Constr. Rys., 57.
Snell *v.* Cheney (88 Ill. 258), Contr., 45.
Snell *v.* Cottingham (72 Ill. 161), Constr. Rys., 19, 23, 29, 112, 113, 119.
Snell *v.* Dubuque & S. C. R. Co. (78 Iowa 88, 42 N. W. Rep. 588), Land Grants, 10.
Snell *v.* Ives (85 Ill. 279), Sales of Rds., 15.
Snell *v.* Leonard (55 Iowa 553, 8 N. W. Rep. 425), Mun. Aid, 31, 412.
Snell *v.* Pells (113 Ill. 145), Agency, 29.
Snell *v.* Rochester R. Co. (64 Hun 476, 46 N. Y. S. R. 441, 19 N. Y. Supp. 496), St. Rys., 179.
Snell *v.* Wasatch & J. V. R. Co. (14 Am. & Eng. R. Cas. 475, 3 Utah 192, 2 Pac. Rep. 193), Em. Dom., 1073.
Snelling *v.* Brooklyn & N. Y. Ferry Co. (13 N. Y. Supp. 398; affirmed in 128 N. Y. 579, mem., 28 N. E. Rep. 250, mem., 38 N. Y. S. R. 1010, mem.), Ferries, 11.
Snider *v.* Adams Exp. Co. (63 Mo. 376, 20 Am. Ry. Rep. 435), Car. of L. S., 64; Exp. Cos., 76, 84.
Snider *v.* Adams Exp. Co. (16 Am. & Eng. R. Cas. 261, 77 Mo. 523), Parties, 3.
Snider *v.* Crawford (47 Mo. App. 8), Agency, 78.
Snider *v.* Current River R. Co. (53 Mo. App. 638), Animals, 604.
Snider *v.* St. Louis, I. M. & S. R. Co. (7 Am. & Eng. R. Cas. 558, 73 Mo. 465), Animals, 127; App., 113; Fences, 66.
Snook *v.* Georgia Imp. Co. (38 Am. & Eng. R. Cas. 492, 83 Ga. 61, 9 S. E. Rep. 1104), Charters, 4; Subscr., 126.
Snow *v.* Boston & M. R. Co. (65 Me. 230, 10 Am. Ry. Rep. 27), Em. Dom., 566; Witn., 118.
Snow *v.* Deerfield Tp. (78 Pa. St. 181), Sts. & H., 195.
Snow *v.* Eastern R. Co. (12 Met. (Mass.) 44), Bagg., 114.
Snow *v.* Fitchburg R. Co. (18 Am. & Eng. R. Cas. 161, 136 Mass. 552, 49 Am. Rep. 40), Car. of Mails, 7; Car. of P., 278.
Snow *v.* Housatonic R. Co. (8 Allen (Mass.) 441), Employés, Inj. to, 738; Fel. Serv., 127.
Snow *v.* Indiana, B. & W. R. Co. (28 Am. & Eng. R. Cas. 77, 109 Ind. 422, 9 N. E. Rep. 702), Bills of L., 40; Car. of M., 729.
Snow *v.* Lake Shore & M. S. R. Co. (121 U. S. 617, 7 Sup. Ct. Rep. 1343; affirming 18 Fed. Rep. 602), Pat. for Inv., 16.
Snow *v.* Texas Trunk R. Co. (4 Woods (U. S.) 394, 16 Fed. Rep. 1), Liens, 58; Rem. of C., 30.
Snow *v.* Winslow (54 Iowa 200, 6 N. W. Rep. 191), Receiv., 98, 114.
Snowden *v.* Boston & M. R. Co. (151 Mass. 220, 24 N. E. Rep. 40), Car. of P., 352.
Snowden *v.* Norfolk Southern R. Co. (95 N. Car. 93), Animals, 64.
Snure *v.* Great Western R. Co. (13 U. C. Q. B. 376), Pl., 44.
Snyder *v.* Chicago, S. F. & C. R. Co. (112 Mo. 527, 20 S. W. Rep. 885), Em. Dom., 420, 421, 422.
Snyder *v.* Hannibal & St. J. R. Co. (60 Mo. 413), Agency, 75, 76.
Snyder *v.* Natchez, R. R. & T. R. Co. (44 Am. & Eng. R. Cas. 278, 42 La. Ann. 302, 7 So. Rep. 582), Car. of P., 22, 581; Death, etc., 160; Tresp., Inj. to, 24, 29.
Snyder *v.* Pennsylvania R. Co. (55 Pa. St. 340), Embankm., 2; Sts. & H., 121.
Snyder *v.* Pittsburg, C. & St. L. R. Co. (11 W. Va. 14, 18 Am. Ry. Rep. 154), Contrib. Neg., 2, 31; Fires, 61, 66, 105, 124, 126, 193, 249, 313.
Snyder *v.* Wabash, St. L. & P. R. Co. (29 Am. & Eng. R. Cas. 237, 86 Mo. 613), Assign., 3.
Snyder *v.* Western Union R. Co. (25 Wis. 60), Witn., 124.
Sobel *v.* New York El. R. Co. (31 N. Y. S. R. 114, 56 Hun 642, 9 N. Y. Supp. 342), Pl., 33.
Sobieski *v.* St. Paul & D. R. Co. (41 Minn. 169, 42 N. W. Rep. 863), Acc. & Sat., 2; Employés, Inj. to, 724, 773; Evid., 149.
Society, etc. *v.* Lehigh Valley R. Co. (32 N. J. Eq. 329; affirming 30 N. J. Eq. 145), Estop., 28.
Society for Savings *v.* New London (29 Conn. 174), Mun. Aid, 116.
Soderman *v.* Troy S. & I. Co. (53 N. Y. S. R. 678, 70 Hun 449), Employes, Inj. to, 612, 771.

Sodus Bay & C. R. Co. *v.* Hamlin (24 Hun (N. Y.) 390), Subscr., 10.
Sodus Bay & C. R. Co. *v.* Lapham (6 N. Y. S. R. 159, 43 Hun 314), Constr. Rys., 3.
Soeder *v.* St. Louis, I. M. & S. R. Co. (100 Mo. 673, 13 S. W. Rep. 714), App., 66; Death, etc., 267, 279, 299; Employes, Inj. to, 307.
Soldanels *v.* Missouri Pac. R. Co. (23 Mo. App. 516), Employés, Inj. to, 464.
Solen *v.* Virginia & T. R. Co. (13 Nev. 106), Contrib. Neg., 84, 87, 112; Cross., Inj. at, 287, 304, 361, 365; Licensees, Inj. to, 10; Pl., 55; Sts. & H., 369.
Solen *v.* Virginia & T. R. Co. (14 Nev. 405), Int., 5.
Solen *v.* Virginia & T. R. Co. (15 Nev. 313), Int., 5.
Solomon *v.* Central Park, N. & E. R. R. Co. (1 Sweeney (N. Y.) 298), Children, Inj. to, 75, 89; St. Rys., 410.
Solomon *v.* Manhattan R. Co. (31 Hun 5; appeal dismissed (?) 95 N. Y. 672, mem.), Elev. Rys., 201.
Solomon *v.* Manhattan R. Co. (27 Am. & Eng. R. Cas. 155, 103 N. Y. 437, 9 N. E. Rep. 430, 56 Am. Rep. 843, n., 3 N. Y. S. R. 636), Car. of P., 377, 589; Elev. Rys., 201.
Solomon *v.* Nicholas (113 Ill. 351, 1 N. E. Rep. 901), Constr. Rys., 83; Liens, 18.
Solomon *v.* Philadelphia & N. Y. E. Steamboat Co. (2 Daly (N. Y.) 104), Car. of M., 82, 207, 227.
Solomon R. Co. *v.* Jones (15 Am. & Eng. R. Cas. 201, 30 Kan. 601, 2 Pac. Rep. 657), Constr. Rys., 9; Employés, Inj. to, 93, 153, 488, 688; Fel. Serv., 178; Pres., 1.
Solomon R. Co. *v.* Jones (34 Kan. 443, 8 Pac. Rep. 730), App., 65; Evid., 197, 278; Witn., 30, 185.
Solon *v.* Williamsburgh Sav. Bank (114 N. Y. 122, 21 N. E. Rep. 168), Mun. Aid, 87, 307, 398.
Solway Junction R. Co. *v.* Maryport & C. R. Co. (3 Ry. & C. T. Cas. 264), Charges, 96.
Somerset *v.* Great Western R. Co. (46 L. T. 883), Deeds, 11.
Somerset & C. R. Co. *v.* Galbraith (23 Am. & Eng. R. Cas. 375, 109 Pa. St. 32, 1 Atl. Rep. 371), Employés, Inj. to, 448; Pl., 92.
Somerset & D. R. Co., In re (21 L. T. 656, 18 W. R. 332), Reorg., 19.
Somerset & K. R. Co. *v.* Cushing (45 Me. 524), Subscr., 49.
Somerset R. Co. *v.* Clarke (61 Me. 379), Subscr., 49.
Somerville, Ex parte (L. R. 23 Ch. D. 167, 32 L. J. Ch. 438, 48 L. T. 416, 31 W. R. 518), Em. Dom., 1147.
Somerville *v.* City R. Co. (43 N. Y. S. R. 425, 63 Hun 628, 17 N. Y. Supp. 719), St. Rys., 182.
Somerville & E. R. Co. *v.* Doughty (22 N. J. L. 495), Em. Dom., 640, 651, 724.
Sommer *v.* New York El. R. Co. (60 Hun 148, 38 N. Y. S. R. 419, 14 N. Y. Supp. 619), Elev. Rys., 171.
Sommer *v.* Pacific R. Co. (4 Mo. App. 586), Eq., 7.
Sommers *v.* Mississippi & T. R. Co. (7 Lea (Tenn.) 201), Children, Inj. to, 13; Death, etc., 350.
Sommerville *v.* Great Western R. Co. (11 U. C. Q. B. 304), Em. Dom., 1210.
Sommerville *v.* Merrill (1 Port. (Ala.) 107), Car. of M., 723.
Songstad *v.* Burlington, C. R. & N. R. Co. (38 Am. & Eng. R. Cas. 211, 5 Dak. 517, 41 N. W. Rep. 755), Employés, Inj. to, 183.
Sonier *v.* Boston & A. R. Co. (141 Mass. 10, 6 N. E. Rep. 84), Stat. & D., 143.
Soper *v.* Buffalo & R. R. Co. (19 Barb. (N. Y.) 310), Contr., 8; Direct., 38.
Sorensen *v.* Greeley (10 Colo. 369, 15 Pac. Rep. 803), Sts. & H., 211.
Sorenson *v.* Northern Pac. R. Co. (36 Fed. Rep. 166), Death, etc., 259; Witn., 164.
Sornberger *v.* Berggren (20 Neb. 399, 30 N. W. Rep. 413), Vend. & P., 1.
Sorrell *v.* Central R. Co. (75 Ga. 509), Charges, 44; Pl., 61.
Souch *v.* East London R. Co. (42 L. J. Ch. 477, L. R. 16 Eq. 108, 21 W. R. 590), Sts. & H., 252.
Souch *v.* East London R. Co. (22 W. R. 566), Em. Dom., 1156.
Soule *v.* Grand Trunk R. Co. (21 U. C. C. P. 308), Fright. Teams, 3; Lim. of Ac., 25.
Soule *v.* New York & N. H. R. Co. (24 Conn. 575), Death, etc., 96.
Southampton Dock Co. *v.* Richards (1 Scott N. R. 219, 1 M. & G. 448), Int., 2.
South & N. Ala. R. Co., Ex parte (95 U. S. 221), Mand., 21.
South & N. Ala. R. Co. *v.* Alabama (101 U. S. 832), Stat., 68.
South & N. Ala. R. Co. *v.* Bees (82 Ala. 340, 2 So. Rep. 752), Animals, 308, 366, 514.
South & N. Ala. R. Co. *v.* Brown (53 Ala. 651, 13 Am. Ry. Rep. 166), Animals, 308, 311; App., 33, 90.
South & N. Ala. R. Co. *v.* Chappell (61 Ala. 527), Agency, 79; Evid., 57; Pl., 33; Ult. Vir., 27.
South & N. Ala. R. Co. *v.* Donovan (36 Am. & Eng. R. Cas. 151, 84 Ala. 141, 4 So. Rep. 142), Children, Inj. to, 117, 133, 145, 151; Negl., 29; Tresp., Inj. to, 49.
South & N. Ala. R. Co. *v.* Falkner (49 Ala. 115), Attach., 59; Words & Ph., 247.
South & N. Ala. R. Co. *v.* Gilliam (85 Ala. 171, 4 So. Rep. 694), Land Grants, 18.
South & N. Ala. R. Co. *v.* Hagood (53 Ala. 647, 13 Am. Ry. Rep. 161), Animals, 18, 342.
South & N. Ala. R. Co. *v.* Henlein (52 Ala. 606), Car. of L. S., 24, 79, 89; Evid., 18; Lim. of Liab., 40.
South & N. Ala. R. Co. *v.* Henlein (56 Ala. 368, 19 Am. Ry. Rep. 200), Car. of L. S., 89; Judgm., 16; Lim. of Liab., 27; Set-off, 9.
South & N. Ala. R. Co. *v.* Highland Ave.

& B. R. Co. (98 Ala. 400, 13 So. Rep. 682), Spec. Perf., 4, 14.
South & N. Ala. R. Co. *v.* Huffman (76 Ala. 492, 52 Am. Rep. 349), Car. of P., 226, 330.
South & N. Ala. R. Co. *v.* Jones (56 Ala. 507), Animals, 67; App., 98.
South & N. Ala. R. Co. *v.* McLendon (63 Ala. 266), Bridges, 34; Dam., 27, 42, 70, 71, 73, 74, 93; Witn., 100.
South & N. Ala. R. Co. *v.* Morris (65 Ala. 193), Animals, 9; Lim. of Ac., 1.
South & N. Ala. R. Co. *v.* Pilgreen (62 Ala. 305), Animals, 477; Evid., 106.
South & N. Ala. R. Co. *v.* Reid (66 Ala. 250), Animals, 307.
South & N. Ala. R. Co. *v.* Schafner (78 Ala. 567), Animals, 361.
South & N. Ala. R. Co. *v.* Schaufler (21 Am. & Eng. R. Cas. 405, 75 Ala. 136), Car. of P., 363, 424, 431, 553.
South & N. Ala. R. Co. *v.* Small (70 Ala. 499), Animals, 577.
South & N. Ala. R. Co. *v.* Sullivan (59 Ala. 272), Contrib. Neg., 16, 48; Death, etc., 12, 55, 95, 170; Tresp., Inj. to, 48.
South & N. Ala. R. Co. *v.* Thompson (62 Ala. 494), Animals, 192; Cross., Inj. at, 162, 180, 254; Pl., 107.
South & N. Ala. R. Co. *v.* Williams (65 Ala. 74), Animals, 234, 516; Negl., 12.
South & N. Ala. R. Co. *v.* Wilson (27 Am. & Eng. R. Cas. 41, 78 Ala. 587), Car. of M., 179, 459, 735, 737.
South & N. Ala. R. Co. *v.* Wood (9 Am. & Eng. R. Cas. 419, 66 Ala. 167, 41 Am. Rep. 749), Car. of M., 104, 108, 222, 256, 353, 755.
South & N. Ala. R. Co. *v.* Wood (16 Am. & Eng. R. Cas. 267, 71 Ala. 215, 46 Am. Rep. 309), Evid., 138.
South & N. Ala. R. Co. *v.* Wood (18 Am. & Eng. R. Cas. 634, 72 Ala. 451), Car. of M., 712, 758, 761.
South & N. Ala. R. Co. *v.* Wood (21 Am. & Eng. R. Cas. 39, 74 Ala. 449, 49 Am. Rep. 819), Evid., 98.
Southard *v.* Central R. Co. (26 N. J. L. 13), Deeds, 34.
South Beach R. Co., In re (53 Hun 131, 26 N. Y. S. R. 649, 6 N. Y. Supp. 172; affirmed in 119 N. Y. 141, 28 N. Y. S. R. 942, 23 N. E. Rep. 486), St. Rys., 61.
South Beach R. Co., In re (119 N. Y. 141, 23 N. E. Rep. 486, 28 N. Y. S. R. 943; affirming 25 N. Y. S. R. 328), Em. Dom., 61; St. Rys., 60, 80.
South Boston R. Co. *v.* Middlesex R. Co. (121 Mass. 485), St. Rys., 123; Words & Ph., 90.
South Branch R. Co. *v.* Parker (41 N. J. Eq. 489, 5 Atl. Rep. 641), Estop., 14.
South Brooklyn R. & T. Co., In re (50 Hun 405, 18 N. Y. S. R. 51, 2 N. Y. Supp. 613), Em. Dom., 69, 333.
South Carolina *v.* Port Royal & A. R. Co. (56 Fed. Rep. 333), Rem. of C., 24.
South Carolina R. Co., Ex parte (2 Rich. (So. Car.) 434), Charters, 175; Em. Dom., 496; Location, etc., 17; So. Car. R. Co., 1.
South Carolina R. Co. *v.* Barrett (12 So. Car. 173), Trial, 56.
South Carolina R. Co. *v.* Blake (9 Rich. (So. Car.) 228), Em. Dom., 69, 346.
South Carolina R. Co. *v.* Bradford (10 Rich. (So. Car.) 307), Car. of M., 645.
South Carolina R. Co. *v.* Columbia & A. R. Co. (13 Rich. Eq. (So. Car.) 339), Charters, 57; Cross. Rys., 70.
South Carolina R. Co. *v.* Jones (4 Rich. Eq. (So. Car.) 459), Bridges, 98.
South Carolina R. Co. *v.* McDonald (5 Ga. 531), Attach., 20.
South Carolina R. Co. *v.* Moore (28 Ga. 398), Bridges, 86; Crim. L., 33; Nuis., 11.
South Carolina R. Co. *v.* Nix (68 Ga. 572), Death, etc., 85, 117, 136; Eject. Pass., 49, 50.
South Carolina R. Co. *v.* People's Sav. Inst. (12 Am. & Eng. R. Cas. 432, 64 Ga. 18), Attach., 4, 9, 47, 65.
South Carolina R. Co. *v.* Steiner (44 Ga. 546, 3 Am. Ry. Rep. 86), Sts. & H., 37, 212, 287.
South Carolina R. Co. *v.* Wilmington, C. & A. R. Co. (7 So. Car. 410), Leases, 98.
South Carolina Steamboat Co. *v.* South Carolina R. Co. (30 So. Car. 539, 4 L. R. A. 209, 9 S. E. Rep. 650), Bridges, 61; Nuis., 27, 31.
South Chicago R. Co. *v.* Dix (17 Am. & Eng. R. Cas. 157, 109 Ill. 237), Em. Dom., 184, 185; Side Tr., 1; Sts. & H., 130.
South Covington & C. St. R. Co. *v.* Berry (50 Am. & Eng. R. Cas. 434, 93 Ky. 43, 18 S. W. Rep. 1026), Injunc., 31; St. Rys., 267.
South Covington & C. St. R. Co. *v.* Gest (34 Fed. Rep. 628; affirmed in 36 Fed. Rep. 307), Coupons, 19; Dam., 53, 108; Judgm., 26.
South Covington & C. St. R. Co. *v.* Ware (27 Am. & Eng. R. Cas. 206, 84 Ky. 267, 1 S. W. Rep. 493), Contrib. Neg., 90; Dam., 76; Negl., 109; St. Rys., 385, 445.
South Devon R. Co. *v.* Devon & C. R. Co. (2 Ry. & C. T. Cas. 348), Leases, 120.
Southeast & St. L. R. Co. *v.* Stotlar (43 Ill. App. 94), Tresp., Inj. to, 105.
Southeastern R. Co. *v.* Dorking (7 Railw. Cas. 877, 3 El. & Bl. 491, 18 Jur. 672, 23 L. J. M. C. 84), Tax., 369, 373, 378.
Southeastern R. Co. *v.* European & A. E. P. Tel. Co. (9 Ex. 363, 23 L. J. Ex. 113), Tresp., 1.
Southeastern R. Co. *v.* Hebblewhite (4 P. & D. 246, 2 Railw. Cas. 247), Subscr., 94.
Southeastern R. Co. *v.* Jortin (6 H. L. Cas. 425, 4 Jur. N. S. 467, 27 L. J. Ch. 145), Mort., 87.
Southeastern R. Co. *v.* Railway Com'rs (L. R. 6 Q. B. D. 586, 50 L. J. Q. B. D. 201, 44 L. T. 203, 45 J. P. 388; reversing L. R. 5 Q. B. D. 217, 49 L. J. Q. B. D. 273, 41 L. T. 760, 28 W. R. 464, 44 J. P. 362), Prohib., 1; Ry. Com'rs, 6, 41.
Southeastern R. Co. *v.* Richardson (15 C. B. 810, 16 Jur. 151, 21 L. J. C. P. 122), Em. Dom., 1146.
Southeastern R. Co. *v.* Smitherman (47 J. P. 773), Death, etc., 300.

Southeastern R. Co. *v.* Waiton (2 F. & F. 457), Constr. Rys., 48.
Southeastern R. Co. *v.* Warton (6 H. & N. 520, 31 L. J. Ex. 515), Estop., 15.
Southerland *v.* Northern Pac. R. Co. (43 Fed. Rep. 646), Employés, Inj. to, 82.
Southerland *v.* Wilmington & W. R. Co. (106 N. Car. 100, 11 S. E. Rep. 189), App., 37; Evid., 202, 204.
Southern Boulevard R. Co., In re (43 N. Y. S. R. 611, 63 Hun 631, 17 N. Y. Supp. 828), Em. Dom., 908.
Southern Boulevard R. Co., In re (35 N. Y. S. R. 550, 58 Hun 497, 12 N. Y. Supp. 466, 58 Hun 497; appeal dismissed in 128 N. Y. 93, 38 N. Y. S. R. 844, 27 N. E. Rep. 1073), Em. Dom., 65; Sts. & H., 119.
Southern Boulevard R. Co., In re (49 N. Y. S. R. 732, 66 Hun 627, 20 N. Y. Supp. 769), Em. Dom., 926.
Southern Boulevard R. Co., In re (128 N. Y. 93, 27 N. E. Rep. 1073, 38 N. Y. S. R. 844), Em. Dom., 890.
Southern Boulevard R. Co., In re (141 N. Y. 532, 36 N. E. Rep. 600, 57 N. Y. S. R. 818; dismissing appeal from 49 N. Y. S. R. 732, 20 N. Y. Supp. 769), Em. Dom., 888.
Southern C. P. & M. Co. *v.* Bradley (52 Tex. 587), Death, etc., 372, 418; Negl., 3, 18, 106; Tresp., 7; Trial, 21.
Southern C. P. & M. Co. *v.* Galveston Wharf Co. (3 Tex. App. (Civ. Cas.) 309), Em. Dom., 342, 362, 754, 917.
Southern C. R. Co. *v.* Moravia (61 Barb. (N. Y.) 180), Int., 2.
Southern Development Co. *v.* Houston & T. C. R. Co. (27 Fed. Rep. 344), Contempt, 5.
Southern Exp. Co. *v.* Armstead (50 Ala. 350), Car. of M., 712; Exp. Cos., 46, 73.
Southern Exp. Co. *v.* Barnes (36 Ga. 532), Car. of M., 687.
Southern Exp. Co. *v.* Brown (67 Miss 260, 7 So. Rep. 318), Agency, 92; Evid., 72.
Southern Exp. Co. *v.* Caldwell (21 Wall. (U. S.) 264), Exp. Cos., 68.
Southern Exp. Co. *v.* Caperton (44 Ala. 101), Car. of M., 712, 720; Exp. Cos., 69.
Southern Exp. Co. *v.* Carroll (42 Ala. 437), Proc., 44.
Southern Exp. Co. *v.* Craft (43 Miss. 508), Proc., 28.
Southern Exp. Co *v.* Craft (49 Miss. 480), Car. of M., 708; Parties, 5.
Southern Exp. Co. *v.* Crook (44 Ala. 468), Car. of M., 420; Exp. Cos., 22, 28, 65, 70, 74.
Southern Exp. Co. *v.* Dickson (94 U. S. 549), Exp. Cos., 40, 48.
Southern Exp. Co. *v.* Everett (37 Ga. 688), Car. of M., 80, 199, 257.
Southern Exp. Co. *v.* Fitzner (59 Miss. 581), Exp. Cos., 15.
Southern Exp. Co. *v.* Frink (67 Ga. 201), Exp. Cos., 14.
Southern Exp. Co. *v.* Glenn (16 Lea. (Tenn.) 472, 1 S. W. Rep. 102), Exp. Cos., 31, 68; Words & Ph., 7.
Southern Exp. Co. *v.* Hess (53 Ala. 19), Car. of M., 652; Exp. Cos., 22, 79; Witn., 46.
Southern Exp. Co. *v.* Hood (15 Rich. (So. Car.) 66), Tax., 45.
Southern Exp. Co. *v.* Hunnicutt (54 Miss. 566), Exp. Cos., 68; Lim. of Liab., 27; Pl., 73.
Southern Exp. Co. *v.* Hunt (54 Miss. 664), Proc., 45.
Southern Exp. Co. *v.* Kaufman (12 Heisk. (Tenn.) 161), Exp. Cos., 35.
Southern Exp. Co. *v.* Louisville & N. R. Co. (4 Fed. Rep. 481), Discrim., 61; Exp. Cos., 8, 11.
Southern Exp. Co. *v.* McVeigh (20 Gratt. (Va.) 264), Actions, 2; Car. of M., 62, 724; Exp. Cos., 22, 26, 58.
Southern Exp. Co. *v.* Mayor, etc., of Mobile (49 Ala. 404), Mun. Corp., 6.
Southern Exp. Co. *v.* Memphis & C. R. Co. (2 McCrary (U. S.) 570, 8 Fed. Rep. 799), Exp. Cos., 8.
Southern Exp. Co. *v.* Moeller (85 Mo. 208), Exp. Cos., 14.
Southern Exp. Co. *v.* Moon (39 Miss. 822), Car. of M., 25, 35, 468; Exp. Cos., 61; Words & Ph., 7.
Southern Exp. Co. *v.* Newby (36 Ga. 635), Car. of M., 80, 432; Exp. Cos., 31, 70; Words & Ph., 7.
Southern Exp. Co. *v.* Palmer (48 Ga. 85), Car. of M., 671, 687; Lim. of Ac., 13; Pl., 33; Trover, 7.
Southern Exp. Co. *v.* Purcell (37 Ga. 103), Car. of M., 460; Lim. of Liab., 14.
Southern Exp. Co. *v.* St. Louis, I. M. & S. R. Co. (3 Am. & Eng. R. Cas. 594, 10 Fed. Rep. 210, 3 McCrary (U. S.) 147), Discrim., 61.
Southern Exp. Co. *v.* Seide (42 Am. & Eng. R. Cas. 398, 67 Miss. 609, 7 So. Rep. 547), Bills of L., 62, 72, 85.
Southern Exp. Co. *v.* Shea (38 Ga. 519), Car. of M., 602; Exp. Cos., 77, 79.
Southern Exp. Co. *v.* Skipper (85 Ga. 565, 11 S. E. Rep. 871), Proc., 22, 31.
Southern Exp. Co. *v.* Thornton (41 Miss. 216), Exp. Cos., 39, 79.
Southern Exp. Co. *v.* Todd (56 Fed. Rep. 104), Evid., 167.
Southern Exp. Co. *v.* Urquhart (52 Ga. 142), Exp. Cos., 79.
Southern Exp. Co. *v.* Van Meter (17 Fla. 783), Exp. Cos., 45, 79.
Southern Exp. Co. *v.* Western N. C. R. Co. (99 U. S. 191), Contr., 1; Spec. Perf., 15, 23.
Southern Exp. Co. *v.* Womack (1 Heisk. (Tenn.) 256), Car. of M., 17; Exp. Cos., 85; War, 10.
Southern Kan. & P. R. Co. *v.* Towner (41 Kan. 72, 21 Pac. Rep. 221), Charters, 176; Mun. Aid, 214, 240.
Southern Kan. R. Co. *v.* Briscoe (144 U. S. 133, 12 Sup. Ct. Rep. 538; affirming 40 Fed. Rep. 273), Animals, 318; Fed. Cts., 9.
Southern Kan. R. Co. *v.* Crocker (38 Am. & Eng. R. Cas. 203, 41 Kan. 747, 21 Pac. Rep. 785), Employés, Inj. to, 251.
Southern Kan. R. Co. *v.* Hinsdale (34 Am. & Eng. R. Cas. 256, 38 Kan. 507, 16 Pac. Rep. 937), Car. of P., 66; Dam., 64, 71;

Eject. Pass., 23, 64, 78, 166; Tickets & F., 23, 28.
Southern Kan. R. Co. *v.* Michaels (49 Kan. 388, 30 Pac. Rep. 408), New Tr., 30; Witn., 66.
Southern Kan. R. Co. *v.* Moore (49 Kan. 616, 31 Pac. Rep. 138), Employés, Inj. to, 269.
Southern Kan. R. Co. *v.* Pavey (48 Kan. 452, 29 Pac. Rep. 593), Car. of P., 411.
Southern Kan. R. Co. *v.* Rice (34 Am. & Eng. R. Cas. 316, 38 Kan. 398, 16 Pac. Rep. 817), Car. of P., 327; Conduct., 12; Eject. Pass., 53, 60, 63, 105, 106, 111, 114.
Southern Kan. R. Co. *v.* Robbins (41 Am. & Eng. R. Cas. 316, 43 Kan. 145, 23 Pac. Rep. 113), Employés, Inj. to, 582; Witn., 141.
Southern Kan. R. Co. *v.* Sanford (47 Am. & Eng. R. Cas. 615, 45 Kan. 372, 25 Pac. Rep. 891), Tresp., Inj. to, 86.
Southern Kan. R. Co. *v.* Schmidt (45 Am. & Eng. R. Cas. 489, 44 Kan. 374, 24 Pac. Rep. 496), App., 121.
Southern Kan. R. Co. *v.* Walsh (47 Am. & Eng. R. Cas. 493, 45 Kan. 653, 26 Pac. Rep. 45), Car. of P., 162, 646; Derailm., 4, 5.
Southern Minn. R. Co., In re (10 Bankr. Reg. 86), Bank'cy, 1.
Southern Minn. R. Co. *v.* Stoddard (6 Minn. 150) (Gil. 92), Charters, 68.
Southern Minn. R. Extension Co. *v.* St. Paul & S. C. R. Co. (55 Fed. Rep. 690), Judgm., 26; Land Grants, 120.
Southern Ohio R. Co. *v.* Morey (43 Am. & Eng. R. Cas. 97, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. Rep. 269), Indep. Contr., 13.
Southern Pac. Co. *v.* Block (84 Tex. 21, 19 S. W. Rep. 300), Proc., 9.
Southern Pac. Co. *v.* Burr (86 Cal. 279, 24 Pac. Rep. 1032), Ejectm., 28; Land Grants, 64.
Southern Pac. Co. *v.* Denton (146 U. S. 202, 13 Sup. Ct. Rep. 44), Fed. Cts., 3, 5.
Southern Pac. Co. *v.* Lafferty (57 Fed. Rep. 536), Employés, Inj. to, 164, 186; Evid., 73; Death, etc., 275, 283.
Southern Pac. Co. *v.* Leash (2 Tex. Civ. App. 68, 21 S. W. Rep. 563), Employés, Inj. to, 256.
Southern Pac. R. Co., In re (1 Int. Com. Com. 6, 1 Int. Com. Rep. 16), Int. Com., 129.
Southern Pac. R. Co. *v.* Araiza (57 Fed. Rep. 98), Land Grants, 88.
Southern Pac. R. Co. *v.* Aylward (79 Tex. 675, 15 S. W. Rep. 697), Employés, Inj. to, 148, 295, 636.
Southern Pac. R. Co. *v.* California (25 Am. & Eng. R. Cas. 525, 118 U. S. 109, 6 Sup. Ct. Rep. 993), Rem. of C., 7.
Southern Pac. R. Co. *v.* Crampton (Cal.) (10 Am. & Eng. R. Cas. 613), Land Grants, 86.
Southern Pac. R. Co. *v.* Doyle (11 Fed. Rep. 253, 8 Sawy. (U. S.) 60), South. Pac. R. Co., 4.
Southern Pac. R. Co. *v.* Duffey (48 Ga. 358), Evid., 204.
Southern Pac. R. Co. *v.* Dull (10 Sawy. (U. S.) 506, 22 Fed. Rep. 489), Land Grants, 1, 87; Pub. Lds., 18, 26.
Southern Pac. R. Co. *v.* Duncan (3 Tex. App. (Civ. Cas.) 285), Car. of L. S., 162; Witn., 163.
Southern Pac. R. Co. *v.* Esquibel (36 Am. & Eng. R. Cas. 410, 4 N. Mex. 337, 20 Pac. Rep. 109), Consol., 4; Corp., 10; Land Grants, 91.
Southern Pac. R. Co. *v.* Ferris (93 Cal. 263, 28 Pac. Rep. 828), Sts. & H., 37.
Southern Pac. R. Co. *v.* Garcia (64 Cal. 515, 2 Pac. Rep. 397), Land Grants, 49; Pub. Lds., 19.
Southern Pac. R. Co. *v.* Haas (Tex.) (49 Am. & Eng. R. Cas. 37, 17 S. W. Rep. 600), Charges, 59.
Southern Pac. R. Co. *v.* Haas (Tex. Civ. App.) (21 S. W. Rep. 1021), Discrim., 46.
Southern Pac. R. Co. *v.* Hamilton (54 Fed. Rep. 468, 7 U. S. App. 626, 4 C. C. A. 441), False Imp., 17, 21.
Southern Pac. R. Co. *v.* Hamilton (U. S.) (58 Am. & Eng. R. Cas. 470), Eject. Pass., 98.
Southern Pac. R. Co. *v.* Harrison (73 Tex. 103, 11 S. W. Rep. 168), Citizens., 2; Rem. of C., 35.
Southern Pac. R. Co. *v.* Johnson (45 Am. & Eng. R. Cas. 338, 4 Tex. App. (Civ. Cas.) 69, 15 S. W. Rep. 121), Strikes, 1.
Southern Pac. R. Co. *v.* McCusker (22 Am. & Eng. R. Cas. 187, 67 Cal. 67, 7 Pac. Rep. 122), Land Grants, 60.
Southern Pac. R. Co. *v.* Maddox (42 Am. & Eng. R. Cas. 528, 75 Tex. 300, 12 S. W. Rep. 815), Car. of L. S., 87, 145; Evid., 160; Receiv., 124.
Southern Pac. R. Co. *v.* Markey (Tex.) (19 S. W. Rep. 392), Employés, Inj. to, 89; Fel. Serv., 426; Witn., 65.
Southern Pac. R. Co. *v.* Orton (32 Fed. Rep. 457), Charters, 32; Corp., 4; Land Grants, 5, 89.
Southern Pac. R. Co. *v.* Orton (6 Sawy. (U. S.) 157), Franch., 10; Pub. Lds., 17; South. Pac. R. Co., 1, 2.
Southern Pac. R. Co. *v.* Poole (12 Sawy. (U. S.) 538, 32 Fed. Rep. 451), Land Grants, 84.
Southern Pac. R. Co. *v.* Purcell (77 Cal. 69, 18 Pac. Rep. 886), Ejectm., 26, 28; Land Grants, 113; Pub. Lds., 33.
Southern Pac. R. Co. *v.* Rauh (49 Fed. Rep. 696, 7 U. S. App. 84, 1 C. C. A. 416), Car. of P., 646; Evid., 76; Witn., 27.
Southern Pac. R. Co. *v.* Raymond (53 Cal. 223), Em. Dom., 62.
Southern Pac. R. Co. *v.* Reed (41 Cal. 256, 3 Am. Ry. Rep. 46), Sts. & H., 123, 136, 249, 250.
Southern Pac. R. Co. *v.* Seley (152 U. S. 145, 14 Sup. Ct. Rep. 530), Employés, Inj. to, 411.
Southern Pac. R. Co. *v.* Stanley (49 Fed. Rep. 263), Cloud on T., 1, 3, 4, 5; Land Grants, 5.
Southern Pac. R. Co. *v.* Terry (26 Am. &



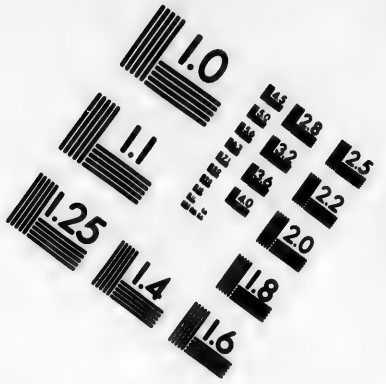
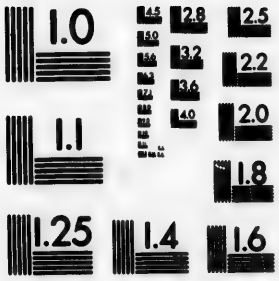
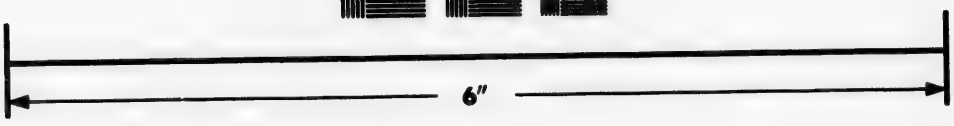
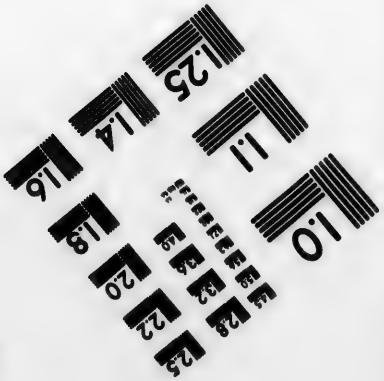


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Eng. R. Cas. 532, 70 Cal. 484, 11 Pac. Rep. 769), Ejectm., 16.
Southern Pac. R. Co. *v.* Tilley (41 Fed. Rep. 729, 14 Sawy. (U. S.) 420), Land Grants, 88.
Southern Pac. R. Co. *v.* United States (28 Ct. of Cl. 77), Car. of Mails, 14; Contr., 47; Corp., 4; Leases, 26; Pl., 60; Ult. Vir., 7, 23.
Southern Pac. R. Co. *v.* Wiggs (43 Fed. Rep. 333, 14 Sawy. (U. S.) 568), Land Grants, 85, 90.
Southern Pac. R. Co. *v.* Wilson (49 Cal. 396, 8 Am. Ry. Rep. 37) Em. Dom., 816.
Southern Pa. I. & R. Co. *v.* Stevens (87 Pa. St. 190), Subscr., 119, 178.
Southern R. & S. Assoc., In re (1 Int. Com. Rep. 278, 1 Int. Com. C[illegible]-1), Int. Com., 110, 114.
Southern R. Co., In re ([illegible] L. R. 165), Receiv., 7.
Southern R. Co. *v.* Kendrick (40 Miss. 374), Car. of P., 232, 600; Dam., 19, 37.
Southern R. Co. *v.* Mayor, etc., of Jackson (38 Miss. 334), Tax., 236.
Southern Steamship Co. *v.* Port Wardens of New Orleans (6 Wall. (U. S.) 31), Commerce, 10.
Southern Wire Co. *v.* St. Louis B. & T. R. Co. (38 Mo. App. 191), Int. Com., 20.
South Fla. R. Co. *v.* Price (32 Fla. 46, 13 So. Rep. 638), Fel. Serv., 283; Med. Serv., 1.
South Fla. R. Co. *v.* Rhodes (37 Am. & Eng. R. Cas. 100, 25 Fla. 40, 5 So. Rep. 633, 3 L. R. A. 733), Car. of P., 62, 87; Contr., 100; Eject. Pass., 54, 65, 68, 85; Pl., 25; Trial, 98, 115.
South Florida R. Co. *v.* Weese (32 Fla. 212, 13 So. Rep. 436), Actions, 7; Employés, Inj. to, 38, 223; Fel. Serv., 203, 499.
Southgate *v.* Atlantic & P. R. Co. (61 Mo. 89), Agency, 116; Attys., 1; Consol., 43; Witn., 156.
South Ga. & F. R. Co. *v.* Ayres (56 Ga. 230), Subscr., 129.
South Nashville St. R. Co. *v.* Morrow (39 Am. & Eng. R. Cas. 518, 87 Tenn. 406, 2 L. R. A. 853, 11 S. W. Rep. 348), Tax., 46, 97, 104, 133, 135, 282, 289.
South Ottawa *v.* Perkins (94 U. S. 260), Mun. Aid, 29, 357.
South Pac. R. Co. *v.* Laclede County (57 Mo. 147), Tax., 222.
South Park Com'rs *v.* Chicago, B. & Q. R. Co. (13 Am. & Eng. R. Cas. 415, 107 Ill. 105), Sts. & H., 343.
South Platte Land Co. *v.* Buffalo County Com'rs (7 Neb. 253), Words & Ph., 78.
South St. Louis R. Co. *v.* Plate (15 Mo. App. 588), Evid., 9.
Southsea & I. of W. S. Ferry Co. *v.* London & S. W. R. Co. (2 Ry. & C. T. Cas. 341), Charges, 91.
South Side Pass. R. Co. *v.* Trich (34 Am. & Eng. R. Cas. 549, 117 Pa. St. 390, 10 Cent. Rep. 367, 11 Atl. Rep. 627, 20 W. N. C. 324), Negl., 58; St. Rys., 366.
Southside R. Co. *v.* Daniel (20 Gratt. (Va.) 344), Em. Dom., 989; Estop., 9; Pl., 80.
South Staffordshire R. Co. *v.* Burnside (6 Railw. Cas. 611, 5 Exch. 129, 20 L. J. Exch. 120), Bank'cy, 10.
South Staffordshire T. Co. *v.* Sickness & A. A. Assoc. ([1891] 1 Q. B. 402), Acc. Ins., 1, 13.
South Wales R. Co. *v.* Redmond (10 C. B. N. S. 675, 9 W. R. 806, 4 L. T. 619), Corp., 5.
South Wales R. Co. *v.* Swansea Local Board of Health (4 El. & Bl. 189, 1 Jur. N. S. 326, 24 L. J. M. C. 30), Tax., 380.
Southward *v.* Railway Pass. A. Co. (34 Conn. 574), Acc. Ins., 10.
Southwark R. Co. *v.* Philadelphia (47 Pa. St. 314), Charters, 20, 57.
South Waverly, Appeal of (Pa.) (11 Atl. Rep. 245), Cross., St. & H., 6.
Southwestern, A. & I. T. R. Co. *v.* Martin (57 Ark. 355, 21 S. W. Rep. 465), Estop., 11.
Southwestern Land Co. *v.* Hickory Jackson Ditch Co. (18 Colo. 489, 33 Pac. Rep. 275), Em. Dom., 25, 326, 771.
Southwestern R. Co. *v.* Bentley (51 Ga. 311), Bagg., 94.
Southwestern R. Co. *v.* Bryant (67 Ga. 212), Pl., 62, 149.
Southwestern R. Co. *v.* Chapman (46 Ga. 557), Injunc., 41.
Southwestern R. Co. *v.* Cohen (49 Ga. 627), Car. of M., 663.
Southwestern R. Co. *v.* Felder (46 Ga. 433, 11 Am. Ry. Rep. 419), Car. of M., 334, 337.
Southwestern R. Co. *v.* Georgia (92 U. S. 676), Tax., 158.
Southwestern R. Co. *v.* Hankerson (61 Ga. 114), Contrib. Neg., 28, 51.
Southwestern R. Co. *v.* Johnson (60 Ga. 667), Death, etc., 174.
Southwestern R. Co. *v.* Knott (48 Ga. 516), Agency, 99.
Southwestern R. Co. *v.* Lee (47 Ga. 380), Flood. Lds., 76.
Southwestern R. Co. *v.* Mitchell (69 Ga. 114), License, 6.
Southwestern R. Co. *v.* Mitchell (80 Ga. 438, 5 S. E. Rep. 490), Mal. Pros., 8; New Tr., 13.
Southwestern R. Co. *v.* Papot (67 Ga. 675), Stock., 10; Witn., 16.
Southwestern R. Co. *v.* Paulk (24 Ga. 356), Car. of P., 435; Death, etc., 7, 106.
Southwestern R. Co. *v.* Pickett (36 Ga. 85), Car. of Slaves, 6.
Southwestern R. Co. *v.* Screven (45 Ga. 613), Franch., 9.
Southwestern R. Co. *v.* Singleton (66 Ga. 252), Car. of P., 89, 349, 424, 648; Tresp., Inj. to, 14.
Southwestern R. Co. *v.* Singleton (67 Ga. 306), Car. of P., 423, 609; Eject. Pass., 53; Evid., 144.
Southwestern R. Co. *v.* Southern & A. Tel. Co. (46 Ga. 43), Parties, 22; Tel. & T. Lines, 2.
Southwestern R. Co. *v.* Thomason (40 Ga. 408), Divid., 13; Ex. & Ad., 7.
Southwestern R. Co. *v.* Thornton (71 Ga. 61), Car. of M., 578.

Southwestern R. Co. *v.* Webb (48 Ala. 585), Car. of M., 1, 95.
Southwestern R. Co. *v.* Wright (116 U. S. 231, 6 Sup. Ct. Rep. 375), Tax., 167.
Southwestern R. Co. *v.* Wright (68 Ga. 311), Tax., 237, 345, 351.
Southwestern Telep. Co. *v.* Wougnter (56 Ark. 206, 19 S. W. Rep. 575), Employés, Inj. to, 182, 184.
Southwest Imp. Co. *v.* Smith (85 Va. 306, 7 S. E. Rep. 365), Employés, Inj. to, 332.
Southwold R. Co.'s Bill, In re (L. R. 1 Ch. D. 697, 45 L. J. Ch 800, 24 W. R. 293), Incorp., 6.
Southworth *v.* Old Colony & N. R. Co. (105 Mass. 342, 2 Am. Ry. Rep. 436), Animals, 287.
Southworth *v.* Palmyra & J. R. Co. (2 Mich. 287), Stat., 1.
South Yorkshire, D. & G. R. Co., In re (7 D. & L. 36, 14 Jur. 1093, 19 L. J. Q. B. 333), Em. Dom., 1124, 1183.
Soutter *v.* Miller (15 Fla. 625), Deeds of Tr., 1.
Soward *v.* Chicago & N. W. R. Co. (30 Iowa 551), Animals, 108, 185.
Sowden *v.* Idaho Quartz Min. Co. (55 Cal. 443), Employés, Inj. to, 185.
Sowerby *v.* Great Northern R. Co. (7 Ry. & C. T. Cas. 156), Charges, 115.
Spackman *v.* Great Western R. Co. (1 Jur. N. S. 790), Em. Dom., 1103.
Spade *v.* Hudson River R. Co. (16 Barb. (N. Y.) 383), Car. of M., 64, 65; Evid., 160.
Spader *v.* New York El. R. Co. (3 Abb. N. Cas. (N. Y.) 467), Elev. Rys., 6, 29; Stat., 6.
Spafford *v.* Duluth, R. W. & S. R. Co. (48 Minn. 515, 51 N. W. Rep. 469), Liens, 18.
Spaids *v.* New York Mail Steamship Co. (3 Daly (N. Y.) 139), Car. of M., 16.
Spancake *v.* Philadelphia & R. R. Co. (148 Pa. St. 184, 23 Atl. Rep. 1006), Fel. Serv., 334, 343.
Spangler *v.* Atchison, T. & S. F. R. Co. (42 Fed. Rep. 305), Rem. of C., 39.
Spangler *v.* Indiana & I. C. R. Co. (21 Ill. 276), Subscr., 60, 68, 88.
Spannagle *v.* Chicago & A. R. Co. (31 Ill. App. 460), Car. of P., 11, 12, 89, 377; Licensees, Inj. to, 15; Tickets & F., 74.
Sparhawk *v.* Union Pass. R. Co. (54 Pa. St. 401), Sunday, 10.
Sparks *v.* East Tenn., V. & G. R. Co. (82 Ga. 156, 8 S. E. Rep. 424), Trial, 67.
Sparks *v.* Kansas City, S. & M. R. Co. (31 Mo. App. 111), Death, etc., 88; Employés, Inj. to, 351.
Sparr *v.* St. Louis, K. C. & N. R. Co. (57 Mo. 152), Animals, 320; Fences, 65.
Sparrow *v.* Evansville & C. R. Co. (7 Ind. 369), Consol., 33; Subscr., 119.
Sparrow *v.* Oxford, W. & W. R. Co. (2 De G., M. & G. 94, 16 Jur. 703, 21 L. J. Ch. N. S. 731), Em. Dom., 1101, 1103.
Spartanburg & A. R. Co. *v.* Ezell (14 So. Car. 281), Incorp., 8.
Spartanburg & U. R. Co. *v.* DeGraffenreid (12 Rich. (So. Car.) 675), Subscr., 224.
Spartanburg Board of Trade *v.* Richmond & D. R. Co (2 Int. Com. Rep. 193, 2 Int. Com. Com. 304), Int. Com., 129.
Spaulding *v.* Arnold (125 N. Y. 194, 26 N. E. Rep. 295; affirming 6 N. Y. Supp. 336), Mun. Aid, 421.
Spaulding *v.* Chicago & N. W. R. Co. (30 Wis. 110, 7 Am. Ry. Rep. 507), Fires, 34, 37, 47, 247, 276, 289.
Spaulding *v.* Chicago & N. W. R. Co. (33 Wis. 582), Fires, 51, 268, 288, 322.
Spaulding *v.* Jarvis (32 Hun (N. Y.) 621), St. Rys., 496.
Spaulding *v.* Milwaukee & H. R. Co. (12 Wis. 607), Actions, 15.
Spaulding *v.* Milwaukee, L. S. & W. R. Co. (10 Am. & Eng. R. Cas. 509, 57 Wis. 304, 14 N. W. Rep. 368), App., 129; Em. Dom., 881.
Spealman *v.* Missouri Pac. R. Co. (71 Mo. 43), Animals, 10.
Spear *v.* Marquette, H. & O. R. Co. (8 Am. & Eng. R. Cas. 722, 49 Mich, 246, 13 N. W. Rep. 610), Fires, 194.
Spear *v.* Philadelphia, W. & B. R. Co. (119 Pa. St. 61, 12 Atl. Rep. 824), Death, etc., 239.
Spearman *v.* California St. R. Co. (8 Am. & Eng. R. Cas. 192, 57 Cal. 432), Death, etc., 255.
Spears *v.* Lake Shore & M. S. R. Co. (67 Barb. (N. Y.) 513), Car. of M., 707.
Spears *v.* Spartanburg, U. & C. R. Co. (11 So. Car. 158), Car. of M., 79, 82, 333, 340.
Specht *v.* Pennsylvania R. Co. (19 Phila. (Pa.) 365), Cross., Inj. at, 347; New Tr., 77.
Speck *v.* Hickman (5 Ill. App. 305), App., 140.
Speck *v.* Pullman Palace Car Co. (121 Ill. 33, 12 N. E. Rep. 213, 9 West. Rep. 771), Abate., 5.
Speed *v.* Atlantic & P. R. Co. (2 Am. & Eng. R. Cas. 77, 71 Mo. 303), Agency, 42; Employés, 4; Employés, Inj. to, 162.
Speer *v.* Atlanta & W. P. R. Co. (30 Ga. 135), Trial, 10.
Speer *v.* Missouri, K. & T. R. Co. (23 Kan. 571), Employés, Inj. to, 512.
Speers *v.* Great Western R. Co. (6 Ont. Pr. 170), Trial, 20.
Speiden *v.* Parker (46 N. J. Eq. 292, 19 Atl. Rep. 21), Fixt., 9.
Speir *v.* New Utrecht (17 N. Y. S. R. 727, 49 Hun 294), Dedica., 3; Easem., 8.
Speir *v.* New Utrecht (121 N. Y. 420, 31 N. Y. S. R. 414, 24 N. E. Rep. 692; modifying 49 Hun 294, 17 N. Y. S. R. 727, 2 N. Y. Supp. 426), Priv. Ways., 7.
Spellman *v.* Lincoln Rapid Transit Co. (58 Am. & Eng. R. Cas. 297, 36 Neb. 890, 55 N. W. Rep. 270), Car. of P., 137, 138, 139, 140; Derailm., 4; St. Rys., 305, 325.
Spellman *v.* New Orleans (45 Fed. Rep. 3), Int. Com., 215.
Spellman *v.* Richmond & D. R. Co. (35 So. Car. 475, 14 S. E. Rep. 947), Dam., 26, 32, 80; Eject. Pass., 115; Evid., 230.
Spence *v.* Chicago & N. W. R. Co. (25 Iowa 139), Animals, 158.
Spence *v.* Mobile & M. R. Co. (79 Ala. 576), Bonds, 59; Consol., 36; Mort., 103.
Spence *v.* Shapard (57 Ala. 598), Pl., 82; Stockh., 62.

Spence *v.* Windsor & A. R. Co. (10 Nov. Sc. 106), Fires, 23, 247.
Spencer *v.* Baltimore & O. R. Co. (4 Mackey (D. C.) 138, 54 Am. Rep. 269), Contrib. Neg., 47; Cross., Inj. at, 310.
Spencer *v.* Falls Turnpike Road (70 Md. 136, 16 Atl. Rep. 451), Injunc., 8.
Spencer *v.* Hartford, P. & F. R. Co. (10 R. I. 14, 6 Am. Ry. Rep. 150), Bridges, 48.
Spencer *v.* Illinois C. R. Co. (29 Iowa 55), Contrib. Neg., 14; Cross., Inj at, 91, 221, 279.
Spencer *v.* Milwaukee & P. du C. R. Co. (17 Wis. 487), Car. of P., 484, 493.
Spencer *v.* Montana C. R. Co. (49 Am. & Eng. R. Cas. 678, 11 Mont. 164, 27 Pac. Rep. 681), Fires, 300, 302.
Spencer *v.* New York & N. E. R. Co. (62 Conn. 242, 25 Atl. Rep. 350), Evid., 173.
Spencer *v.* New York C. & H. R. R. Co. (51 N. Y. S. R. 386, 67 Hun 156, 22 N. Y. Supp. 100), Employés, Inj. to, 66, 97, 182, 206.
Spencer *v.* Ohio & M. R. Co. (130 Ind. 181, 29 N. E. Rep. 915), Contrib. Neg., 72; Employés, Inj. to, 314; Fel. Serv., 446, 453.
Spencer *v.* Pennsylvania R. Co. (34 Fed. Rep. 899), Pat. for Inv., 24.
Spencer *v.* Point Pleasant & O. R. R. Co. (23 W. Va. 406), Em. Dom., 1032, 1034; Sts. & H., 143.
Spencer *v.* St. Paul & S. C. R. Co. (21 Minn. 362), Dam., 76; Sts. & H., 238.
Spencer *v.* St. Paul & S. C. R. Co. (22 Minn. 29, 19 Am. Ry. Rep. 416), Em. Dom., 1077.
Spencer *v.* Utica & S. R. Co. (5 Barb. (N. Y.) 337), Evid., 143.
Spencer-Bell to London & S. W. R. Co. (33 W. R. 771), Em. Dom., 1200.
Sperb *v.* Metropolitan El. R. Co. (41 N. Y. S. R. 155, 61 Hun 539, 16 N. Y. Supp. 392), Elev. Rys., 41, 89.
Sperb *v.* Metropolitan El. R. Co. (137 N. Y. 155, 32 N. E. Rep. 1050, 50 N. Y. S. R. 204; reversing 41 N. Y. S. R. 155, 61 Hun 539), Elev. Rys., 127, 138, 161.
Sperb *v.* Metropolitan El. R. Co. (137 N. Y. 596, 33 N. E. Rep. 319, 50 N. Y. S. R. 664; reversing 44 N. Y. S. R. 216, 17 N. Y. Supp. 469), Elev. Rys., 175.
Spettigue *v.* Great Western R. Co. (15 U. C. C. P. 315), Car. of M., 480.
Spicer *v.* Chesapeake & O. R. Co. (45 Am. & Eng. R. Cas. 28, 34 W. Va. 514, 12 S. E. Rep. 553), Cross., Inj. at, 149; Tresp., Inj. to, 10, 28, 41.
Spicer *v.* Chicago & N. W. R. Co. (29 Wis. 580, 12 Am. Ry. Rep. 204), Car. of P., 648; Dam., 70, 73, 74.
Spicer *v.* Lynn & B. R Co. (149 Mass. 207, 21 N. E. Rep. 363), Elect. Pass., 89.
Spier *v.* New Utrecht (17 N. Y. S. R. 727, 49 Hun 294), Em. Dom., 373.
Spies *v.* Accessory Transit Co. (5 Duer (N. Y.) 662), Husb. & W., 24, 29.
Spies *v.* Chicago & E. I. R. Co. (30 Fed. Rep. 397), Bonds, 55.
Spies *v.* Chicago & E. I. R. Co. (24 Blatchf. (U. S.) 280, 32 Fed. Rep. 713), Parties, 22.
Spies *v.* Chicago & E. I. R. Co. (40 Am. & Eng. R. Cas. 401, 40 Fed. Rep. 34), Bonds, 37; Mort., 43.
Spies *v.* Rome, W. & O. R. Co. (39 N. Y. S. R. 764, 61 Hun 619, 15 N. Y. Supp. 348), Ejectm., 14.
Spillane *v.* Missouri Pac. R. Co. (111 Mo. 555, 20 S. W. Rep. 293), Children, Inj. to, 156, 158; Cross., Inj. at, 218.
Spilman *v.* Roanoke Nav. Co. (74 N. Car. 675), Flood. Lds., 94; Lim. of Ac., 56.
Spinner *v.* New York C. & H. R. R. Co. (2 Hun (N. Y.) 421, 4 T. & C. 595), Animals, 180.
Spinner *v.* New York C. & H. R. R. Co. (67 N. Y. 153; affirming 6 Hun 600), Animals, 236; Fences, 57, 79.
Spisak *v.* Baltimore & O. R. Co. (152 Pa. St. 281, 25 Atl. Rep. 497), Fel. Serv., 193.
Spitalera *v.* Second Ave. R. Co. (25 N. Y. Supp. 919, 73 Hun 37), Trial, 138.
Spitze *v.* Baltimore & O. R. Co. (48 Am. & Eng. R. Cas. 495, 75 Md. 162, 23 Atl. Rep. 307), Release, 14.
Split Rock Cable R. Co., In re (51 Am. & Eng. R. Cas. 514, 128 N. Y. 408, 28 N. E. Rep. 506, 40 N. Y. S. R. 334; affirming 58 Hun 351, 34 N. Y. S. R. 169, 12 N. Y. Supp. 116), Em. Dom., 181.
Spofford *v.* Boston & M. R. Co. (128 Mass. 326), Tickets & F., 57.
Spofford *v.* Bucksport & B. R. Co. (66 Me. 26, 20 Am. Ry. Rep. 20), Em. Dom., 190, 316; Ry. Com'rs, 5, 19.
Spofford *v.* Southern Boulevard R. Co. (15 Daly 162, 4 N. Y. Supp. 388, 22 N. Y. S. R. 246), Sts. & H., 118.
Spohn *v.* Missouri Pac. R. Co. (26 Am. & Eng. R. Cas. 252, 87 Mo. 74), Car. of P., 322, 323; New Tr., 22.
Spohn *v.* Missouri Pac. R. Co. (101 Mo. 417, 14 S. W. Rep. 880), Car. of P., 128, 314, 564; Witn., 34.
Spohn *v.* Missouri Pac. R. Co. (116 Mo. 617, 22 S. W. Rep. 690), Car. of P., 619.
Spokane & P. R. Co. *v.* Lieuallen (2 Idaho 1101, 29 Pac. Rep. 854), Em. Dom., 451, 459.
Spokane County *v.* Northern Pac. R. Co. (5 Wash. 89, 31 Pac. Rep. 420), Tax., 287.
Spokane St. R. Co. *v.* Spokane (5 Wash. 634, 32 Pac. Rep. 456), Pl., 67; St. Rys., 38.
Spokane St. R. Co. *v.* Spokane Falls (46 Fed. Rep. 322), Injunc., 52.
Spokane St. R. Co. *v.* Spokane Falls (6 Wash. 521, 33 Pac. Rep. 1072), Cable Rys., 2; St. Rys., 3, 39.
Spoon *v.* Chicago & W. M. R. Co. (86 Mich. 309, 49 N. W. Rep. 35), Mort., 16.
Spooner *v.* Brooklyn City R. Co. (31 Barb. (N. Y.) 419; reversed in 54 N. Y. 230), St. Rys., 378.
Spooner *v.* Brooklyn City R. Co. (54 N. Y. 230, 6 Am. Ry. Rep. 198; reversing 36 Barb. 217, 31 Barb. 419), St. Rys., 427.
Spooner *v.* Delaware, L. & W. R. Co. (39 Am. & Eng. R. Cas. 599, 115 N. Y. 22, 21 N. E. Rep. 696, 23 N. Y. S. R. 554; af-

firming 41 Hun 643, 1 N. Y. S. R. 558), Children, Inj. to, 39; Cross., Inj. at, 22, 39; Pl., 89; Tresp., Inj. to, 3, 126.
Spooner *v.* Hannibal & St. J. R. Co. (23 Mo. App. 403), Bagg., 37, 123.
Spotts *v.* Wabash Western R. Co. (111 Mo. 380, 20 S. W. Rep. 190), Evid., 73, 170; Licensees, Inj. to, 8; Stat. & D., 65.
Sprague *v.* Atlee (81 Iowa 1, 46 N. W. Rep. 756), Employés, Inj. to, 776.
Sprague *v.* Fremont, E. & M. V. R. Co. (6 Dak. 86, 50 N. W. Rep. 617), Animals, 536; Stat., 19.
Sprague *v.* Hartford, P. & F. R. Co. (5 R. I. 233), For. Corp., 25.
Sprague *v.* Illinois River R. Co. (19 Ill. 174), Charters, 36; Subscr., 128.
Sprague *v.* Missouri Pac. R. Co. (23 Am. & Eng. R. Cas. 684, 34 Kan. 347, 8 Pac. Rep. 465), Car. of L. S., 65, 80.
Sprague *v.* New York C. R. Co. (52 N. Y. 637), Car. of M., 567.
Sprague *v.* Smith (29 Vt. 421), Car. of P., 524, 527.
Springer Transp. Co. *v.* Smith (16 Lea (Tenn.) 498, 1 S. W. Rep. 280), Car. of P., 126, 302, 617; Dam., 27, 30, 82; Eject. Pass., 61.
Springfield *v.* Connecticut River R. Co. (4 Cush. (Mass.) 63), Charters, 65; Sts. & H., 421.
Springfield & I. S. E. R. Co. *v.* Andrews (68 Ill. 56), Animals, 192.
Springfield & I. S. E. R. Co. *v.* Cold Spring Tp. Sup'rs (72 Ill. 603), Mun. Aid, 127.
Springfield & I. S. E. R. Co. *v.* Hall (67 Ill. 99), Em. Dom., 55.
Springfield & I. S. E. R. Co. *v.* Turner (68 Ill. 187), Em. Dom., 854.
Springfield & I. S. E. R. Co. *v.* Wayne County Clerk (74 Ill. 27), Mun. Aid, 443.
Springfield & M. R. Co. *v.* Henry (44 Ark. 360), Em. Dom., 706; Waters & W., 27.
Springfield & M. R. Co. *v.* Rhea (44 Ark. 258), Em. Dom., 574, 596, 631, 683, 685, 724.
Springfield & M. R. Co. *v.* Stewart (51 Ark. 285, 10 S. W. Rep. 767), Vend. & P., 5.
Springfield & N. W. R. Co. *v.* Ross (88 Ill. 179, 21 Am. Ry. Rep. 295), Judgm., 45.
Springfield & S. R. Co. *v.* Calkins (90 Mo. 538, 3 S. W. Rep. 82), Arb., 27; Em. Dom., 350, 453; Witn., 124.
Springfield City R. Co. *v.* De Camp (11 Ill. App. 475), Comp. Neg., 9, 17; Pl., 107.
Springfield, E. & S. E. R. Co. *v.* Peters (8 Ill. App. 300), Em. Dom., 892; Witn., 109.
Springfield, J. & P. R. Co. *v.* Western R. Constr. Co. (49 Ohio St. 681, 32 N. E. Rep. 961), Trial, 4.
Springfield R. Co. *v.* Springfield (85 Mo. 674), Franch., 9; St. Rys., 259.
Springfield St. R. Co. *v.* Sleeper (121 Mass. 29), Subscr., 207.
Springman *v.* Baltimore & P. R. Co. (5 Mackey (D. C.) 1), New Tr., 5.
Springport *v.* Teutonia Sav. Bank (75 N. Y. 397), Mun. Aid, 106.
Springport *v.* Teutonia Sav. Bank (5 Am. & Eng. R. Cas. 199, 84 N. Y. 403), Mun. Aid, 102.
Springs *v.* Schlich (81 Mich. 405, 45 N. W. Rep. 994), Mun. Aid, 353.
Spring Valley Water Works, In re (17 Cal. 132), Em. Dom., 860.
Spring Valley Water Works *v.* San Francisco (22 Cal. 434), Em. Dom., 508.
Sprong *v.* Boston & A. R. Co. (60 Barb. (N. Y.) 30; affirmed in 58 N. Y. 56, 9 Am. Ry. Rep. 475), Employés, Inj. to, 718.
Sprong *v.* Boston & A. R. Co. (58 N. Y. 56, 9 Am. Ry. Rep. 475; affirming 60 Barb. 30, 3 T. & C. 54), Employés, Inj. to, 305.
Spurck *v.* Lincoln & N. W. R. Co. (14 Neb. 293, 15 N. W. Rep. 701), Mun. Aid, 155, 253.
Spurlock *v.* Missouri Pac. R. Co. (76 Mo. 67), Judgm., 21.
Spurlock *v.* Missouri Pac. R. Co. (90 Mo. 199, 2 S. W. Rep. 219), Mun. Aid, 62; Stock, 21; Stockh., 3.
Spurlock *v.* Missouri Pac. R. Co. (93 Mo. 530, 12 West. Rep. 347, 6 S. W. Rep. 349), Car. of M., 741; Pl., 173, 178.
Spurlock *v.* Pacific R. Co. (61 Mo. 319), Stock, 34, 69.
Spurrier *v.* Front St. Cable R. Co. (3 Wash. 659, 29 Pac. Rep. 346), Cable Rys., 15; Contrib. Neg., 105; Cross., Inj. at, 365; St. Rys., 236; Witn., 9; Words & Ph., 77.
Squair *v.* Lookout Mountain R. Co. (42 Fed. Rep. 729), Stockh., 127.
Squares *v.* Campbell (60 Barb. (N. Y.) 391), Words & Ph., 78.
Squire *v.* Central Park, N. & E. R. R. Co. (4 J. & S. (N. Y.) 436), Children, Inj. to, 75; Contrib. Neg., 99; Death, etc., 256; Negl., 97.
Squire *v.* Michigan C. R. Co. (3 Int. Com. Rep. 515, 4 Int. Com. Com. 611), Int. Com., 35.
Squire *v.* New York C. R. Co. (98 Mass. 239), Car. of L. S., 48, 86; Lim. of Liab., 2.
Staal *v.* Grand Rapids & I. R. Co. (57 Mich. 239, 23 N. W. Rep. 795), Contrib. Neg., 84; Cross., Inj. at, 43, 175, 215, 226; Death, etc., 430; New Tr., 4.
Staal *v.* Grand St. & N. R. Co. (31 Am. & Eng. R. Cas. 21, 107 N. Y. 625, 1 Silv. App. 516, 13 N. E. Rep. 624, 11 N. Y. S. R. 352; reversing 36 Hun 208), Dam., 16, 86.
Staats *v.* Hudson River R. Co. (33 How. Pr. (N. Y.) 139, 3 Keyes 196, 4 Abb. App. Dec. 287; reversing 39 Barb. 298, 23 How. Pr. 463), Fences, 32.
Stacey *v.* Vermont C. R. Co. (27 Vt. 39), Em. Dom., 390, 852, 857; Location, etc., 24.
Stacey *v.* Winona & St. P. R. Co. (40 Am. & Eng. R. Cas. 217, 42 Minn. 158, 43 N. W. Rep. 905), Animals, 164; Cat.-Gds., 18.
Stack, In re (50 Hun 385, 21 N. Y. S. R. 953, 3 N. Y. Supp. 231), Sts. & H., 159.
Stack *v.* Charlotte C. & A. R. Co. (10 So. Car. 91), Sales, 12.
Stack *v.* East St. Louis (85 Ill. 377), Sts. & H., 136.
Stackhouse *v.* Lafayette (26 Ind. 17), Sts. & H., 166.
Stackman *v.* Chicago & N. W. R. Co. (80

Wis. 428, 50 N. W. Rep. 404), Employés, Inj. to, 42, 435.
Stackpole *v.* Eastern R. Co. (62 N. H. 493), Sales, 11.
Stackpole *v.* Seymour (127 Mass. 104), Stock, 64.
Stackus *v.* New York C. & H. R. R. Co. (79 N. Y. 464; reversing (?) 7 Hun 559), Contrib. Neg., 88; Cross., Inj. at, 290.
Stacy *v.* Milwaukee, L. S. & W. R. Co. (72 Wis. 331, 39 N. W. Rep. 532), Witn., 66.
Stacy *v.* Milwaukee, L. S. & W. R. Co. (85 Wis. 225, 54 N. W. Rep. 779), Fires, 316.
Stacy *v.* Vermont C. R. Co. (32 Vt. 551), Assump., 7.
Stadhecker *v.* Combs (9 Rich. (So. Car.) 193), Exp. Cos., 22, 86.
Stafford *v.* American Mills Co. (13 R. I. 310), Receiv., 6.
Stafford *v.* Chicago, B. & Q. R. Co. (114 Ill. 244, 2 N. E. Rep. 185; affirming 16 Ill. App. 84), Employés, Inj. to, 223; Fel. Serv., 1, 134, 205, 493.
Stafford *v.* Hannibal & St. J. R. Co. (22 Mo. App. 333), Stat. & D., 76, 141.
Stafford *v.* Walter (67 Ill. 83), Car. of M., 70, 710.
Stafford & U. R. Co., In re (41 L. J. Ch. 777, 20 W. R. 921), Reorg., 19.
Stager *v.* Ridge Ave. Pass. R. Co. (33 Am. & Eng. R. Cas. 540, 119 Pa. St. 70, 12 Atl. Rep. 821, 21 W. N. C. 131, 11 Cent. Rep. 427), St. Rys., 407, 435.
Stahl *v.* Pennsylvania Co. (155 Pa. St. 309, 26 Atl. Rep. 437; affirming 2 Pa. Dist. 286), Em. Dom., 1042.
Stallard *v.* Great Western R. Co. (2 B. & S. 419, 8 Jur. N. S. 1076, 31 L. J. Q. B. 137, 10 W. R. 488, 6 L. T. 217), Bagg., 128.
Stallknecht *v.* Pennsylvania R. Co. (53 How. Pr. (N. Y.) 305), States, 4.
Stallknecht *v.* Pennsylvania R. Co. (13 Hun (N. Y.) 451; affirming 53 How. Pr. 305), Death, etc., 110.
Stalnaker *v.* Morrison (6 Neb. 363), Land Grants, 93; Pub. Lds., 17.
Stamford *v.* Stamford Horse R. Co. (36 Am. & Eng. R. Cas. 140, 56 Conn. 381, 15 Atl. Rep. 749, 1 L. R. A. 375), Injunc., 14; St. Rys., 2, 77; Sts. & H., 230.
Stamm *v.* Southern R. Co. (1 Abb. N. Cas. (N. Y.) 438), Cross., Inj. at, 218; Negl., 99.
Stamps *v.* Birmingham, W. & S. V. R. Co. (7 Fare 251; affirmed in 2 Phillips 673, 17 L. J. Ch. 431), Em. Dom., 1132, 1174.
Standard Life & A. Ins. Co. *v.* Jones (94 Ala. 434, 10 So. Rep. 530), Acc. Ins., 9, 11, 12; Employés, Inj. to, 424.
Standard Oil Co. *v.* Southern Pac. R. Co. (54 Fed. Rep. 521, 7 U. S. App. 636, 4 C. C. A. 491; affirming 48 Fed. Rep. 109, which reversed 42 Fed. Rep. 295, 14 Sawy. 430), Intervent., 1; Pat. for Inv., 44.
Standard Oil Co. *v.* Tierney (49 Am. & Eng. R. Cas 117, 92 Ky. 367), Car. of M., 194.
Standifer *v.* Swann (78 Ala. 88), Agency, 68, 115; Land Grants, 111.
Stange *v.* Dubuque (14 Am. & Eng. R. Cas. 107, 62 Iowa 303, 17 N. W. Rep. 518), App., 64; St. Rys., 9, 211.
Stange *v.* Hill & W. D. St. R. Co. (54 Iowa 669, 7 N. W. Rep. 115), St. Rys., 17.
Stanley *v.* Chicago, R. I. & P. R. Co. (62 Mo. 508), Rem. of C., 33.
Stanley *v.* Cleveland, C. & C. R. Co. (18 Ohio St. 552), Sleep. Car Cos., 2.
Stanley *v.* Davenport (54 Iowa 463, 2 N. W. Rep. 1064, 6 N. W. Rep. 706), St. Rys., 17; Sts. & H., 44.
Stanley *v.* Missouri Pac. R. Co. (29 Am. & Eng. R. Cas. 250, 84 Mo. 625), Animals, 90, 620.
Stanley *v.* New York El. R. Co. (44 N. Y. S. R. 389, 63 Hun 629, 17 N. Y. Supp. 931), Elev. Rys., 115, 157, 174.
Stanley *v.* Richmond & D. Ext. R. Co. (72 Ga. 202), Death, etc., 270.
Stanley *v.* Union Depot R. Co. (114 Mo. 606, 21 S. W. Rep. 832), Negl., 6, 43, 82; St. Rys., 451.
Stanley *v.* Wabash, St. L. & P. R. Co. (42 Am. & Eng. R. Cas. 328, 100 Mo. 435, 13 S. W. Rep. 709, 8 L. R. A. 549, 3 Int. Com. Rep. 176), Int. Com., 216.
Stanly *v.* Richmond & D. R. Co. (16 Am. & Eng. R. Cas. 545, 89 N. Car. 331), Pl., 53.
Stanstead, S. & C. R. Co. *v.* Brigham (17 Low. Can. 54), Subscr., 106, 189.
Stanton *v.* Alabama & C. R. Co. (31 Fed. Rep. 585), Receiv., 103, 106.
Stanton *v.* Alabama & C. R. Co. (2 Woods (U. S.) 506), Receiv., 74, 96, 104.
Stanton *v.* Alabama & C. R. Co. (2 Woods (U. S.) 523), Bonds, 30, 48.
Stanton *v.* Louisville & N. R. Co. (91 Ala. 382, 8 So. Rep. 798), Animals, 326; Fright. Teams, 3; Sts. & H., 409.
Stanton *v.* Maynard (7 Allen (Mass.) 335), Bills & N., 23.
Stanton *v.* Metropolitan R. Co. (14 Allen (Mass.) 485), Sunday, 10.
Stanton *v.* Missouri Pac. R. Co. (15 Civ. Pro. (N. Y.) 296, 2 N. Y. Supp. 298), Actions, 11; Contr., 2; Incorp., 6; Stockh., 96, 97.
Stanton *v.* New York & E. R. Co. (47 Am. & Eng. R. Cas. 390, 59 Conn. 272, 22 Atl. Rep. 300), Contr., 4.
Stapley *v.* London, B. & S. C. R. Co. (4 H. & C. 93, L. R. 1 Ex. 21, 11 Jur. N. S. 954, 35 L. J. Ex. 7, 14 W. R. 132, 13 L. T. 406), Cross., Inj. at, 46.
Starin *v.* Edson (112 N. Y. 206, 19 N. E. Rep. 670, 20 N. Y. S. R. 898; reversing 42 Hun 549, 4 N. Y. S. R. 588, and affirming 1 N. Y. S. R. 544), Ferries, 4; Ult. Vir., 3, 7.
Starin *v.* Genoa (23 N. Y. 439; reversing 29 Barb. 442), Mun. Aid, 105, 106, 275, 277, 395.
Stark *v.* Baldwin (7 Neb. 114), Pub. Lds., 17.
Stark *v.* Sioux City & P. R. Co. (43 Iowa 501, 14 Am. Ry. Rep. 468), Em. Dom., 92.
Starkey *v.* De Graff (22 Minn. 431, 18 Am. Ry Rep. 444), Constr. Rys., 67.
Starling *v.* Grand Junction R. Co. (30 U. C. C. P. 247), Em. Dom., 1232.

Starnes *v.* Louisville & N. R. Co. (91 Tenn. 516, 19 S. W. Rep. 675), Bills of L., 82, 84.
Star of Hope, The (2 Sawy. (U. S.) 15), Bills of L., 43.
Starr *v.* Camden & A. R. Co. (24 N. J. L. 592), Sts. & H., 249.
Starry *v.* Dubuque & S. W. R. Co. (51 Iowa 419), Death, etc., 174.
Startz *v.* Pennsylvania & N. Y. C. & R. Co. (42 N. Y. S. R. 457, 16 N. Y. Supp. 810; affirmed in 136 N. Y. 639, mem., 32 N. E. Rep. 1014, 49 N. Y. S. R. 914), Death, etc., 294; Negl., 83.
Stastney *v.* Second Ave. R. Co. (29 J. & S. 104, 46 N. Y. S. R. 537, 18 N. Y. Supp. 800; affirmed in 138 N. Y. 609, 51 N. Y. S. R. 932, 33 N. E. Rep. 1082), St. Rys., 361, 382.
State *v.* Alabama & C. R. Co. (54 Ala. 139), Receiv., 163.
State *v.* Alabama & V. R. Co. (42 Am. & Eng. R. Cas. 681, 67 Miss. 647, 7 So. Rep. 502), Stat. & D., 31.
State *v.* Alabama & V. R. Co. (50 Am. & Eng. R. Cas. 10, 68 Miss. 653, 9 So. Rep. 469), Stat. & D., 53.
State *v.* Allen (5 Kan. 213), Mun. Aid, 78.
State *v.* American Exp. Co. (7 Biss. (U. S.) 227), Commerce, 12.
State *v.* Anderson (5 Kan. 90), Injunc., 15.
State *v.* Anderson County (8 Baxt. (Tenn.) 249), Mun. Aid, 382, 454.
State *v.* Anderson County Com'rs (28 Kan. 67), Mun. Aid, 110.
State *v.* Androscoggin R. Co. (20 Am. & Eng. R. Cas. 624, 76 Me. 411), Penalty, 12.
State *v.* Armell (8 Kan. 288, 5 Am. Ry. Rep. 141), Em. Dom., 133, 135.
State *v.* Ashmore (10 Rich. (So. Car.) 248), State Aid, 30.
State *v.* Asylum St. Bridge Com. (63 Conn. 91, 26 Atl. Rep. 580), Ry. Com'rs, 28.
State *v.* Atchison & N. R. Co. (32 Am. & Eng. R. Cas. 388, 24 Neb. 743, 38 N. W. Rep. 43), Charters, 51; Consol., 2, 4; Leases, 28, 31; Quo War., 7; Stock, 6.
State *v.* Atlantic & G. R. Co. (60 Ga. 268), Tax., 7.
State *v.* Atlantic City Council (34 N. J. L. 99), Sts. & H., 351.
State *v.* Babcock (19 Neb. 230, 27 N. W. Rep. 98), Mun. Aid, 247, 252.
State *v.* Babcock (21 Neb. 187, 31 N. W. Rep. 682), Mun. Aid, 99.
State *v.* Babcock (25 Neb. 709, 41 N. W. Rep. 654), Mun. Aid, 278.
State *v.* Bailey (16 Ind. 46), Consol., 12, 23; Constr. Rys., 107.
State *v.* Bailey (19 Ind. 452), Incorp., 9.
State *v.* Baker (17 Am. & Eng. R. Cas. 15, 20 Fla. 616), Em. Dom., 46, 348, 398, 1054.
State *v.* Baldwin (70 Iowa 180, 30 N. W. Rep. 476), Crim. L., 17.
State *v.* Baltimore & L. R. Co. (77 Md. 489, 26 Atl. Rep. 865), Consol., 46; Death, etc., 146.
State *v.* Baltimore, O. & C. R. Co. (120 Ind. 298, 22 N. E. Rep. 307), Crim. L., 32.
State *v.* Baltimore & O. R. Co. (36 Fed. Rep. 655), Relief Assoc., 6.
State *v.* Baltimore & O. R. Co. (6 Gill (Md.) 363), Assump., 1; Divid., 11, 12.
State *v.* Baltimore & O. R. Co. (12 Gill. & J. (Md.) 399), Charters, 5; Stat., 46.
State *v.* Baltimore & O. R. Co. (24 Md. 84), Children, Inj. to, 100; Death, etc., 174, 411.
State *v.* Baltimore & O. R. Co. (30 Md. 47), Contrib. Neg., 3.
State *v.* Baltimore & O. R. Co. (34 Md. 344), Stat., 23; Tax., 400.
State *v.* Baltimore & O. R. Co. (48 Md. 49), Balt. & O. R. Co., 3, 4, 5; Tax., 170, 187.
State *v.* Baltimore & O. R. Co. (10 Am. & Eng. R. Cas. 723, 58 Md. 221), Death, etc., 234, 257; Tresp., Inj. to, 47.
State *v.* Baltimore & O. R. Co. (35 Am. & Eng. R. Cas. 412, 69 Md. 339, 14 Atl. Rep. 688, 12 Cent. Rep. 890), Cross., Inj. at, 107, 314, 322; Negl., 67; Tresp., Inj. to, 59.
State *v.* Baltimore & O. R. Co. (69 Md. 494, 16 Atl. Rep. 210), Cross., Inj. at, 250; Tresp., Inj to, 31, 44, 58, 105.
State *v.* Baltimore & O. R. Co. (73 Md. 374, 21 Atl. Rep. 62), Cross., Inj. at, 236.
State *v.* Baltimore & O. R. Co. (15 W. Va. 362), Crim. L., 50; Evid., 99.
State *v.* Baltimore & O. R. Co. (18 Am. & Eng. R. Cas. 466, 24 W. Va. 783), Crim. L., 50; Int. Com., 223.
State *v.* Baltimore & P. R. Co. (15 Am. & Eng. R. Cas. 409, 58 Md. 482), Contrib. Neg., 9; Death, etc., 174, 205; Negl., 103.
State *v.* Bates County Court (57 Mo. 70), Mun. Aid, 216.
State *v.* Bayonne (51 N. J. L. 428, 17 Atl. Rep. 971), Cross. Sts. & H., 75.
State *v.* Bayonne (43 Am. & Eng. R. Cas. 176, 52 N. J. L. 503, 20 Atl. Rep. 69), Cross. Rys., 16; Sts. & H., 1, 5; Ult. Vir., 17.
State *v.* Bayonne (54 N. J. L. 474, 24 Atl. Rep. 448), Mun. Corp., 25.
State *v.* Bechel (22 Neb. 158, 34 N. W. Rep. 342), St. Rys., 93.
State *v.* Beckman (57 N. H. 174), Crim. L., 35.
State *v.* Bell (34 Ohio St. 194, 21 Am. Ry. Rep. 84), St. Rys., 32, 103.
State *v.* Bennett (47 N. J. L. 275), Proc., 15.
State *v.* Bentley (23 N. J. L. 532), Tax., 177.
State *v.* Benton (33 Neb. 823, 51 N. W. Rep. 140), Mun. Aid, 61, 68.
State *v.* Benton (33 Neb. 834, 51 N. W. Rep. 144), Mun. Aid, 68.
State *v.* Bergen Neck R. Co. (53 N. J. L. 108, 20 Atl. Rep. 762), Constr. Rys., 3.
State *v.* Berry (17 N. J. L. 80), Tax., 223.
State *v.* Bettle (50 N. J. L. 132, 11 Atl. Rep. 17; affirmed in 42 Am. & Eng. R. Cas. 271, 51 N. J. L. 512, 18 Atl. Rep. 750), Tax., 274.
State *v.* Binninger (1 Am. & Eng. R. Cas. 410, 42 N. J. L. 528), Tax, 181, 274.
State *v.* Bishop (51 Vt. 287), Crim. L., 10.
State *v.* Bissell (4 Greene (Iowa) 328), Mun. Aid, 122, 279.
State *v.* Blackstone (63 Wis. 362, 24 N. W. Rep. 72), Mun. Aid, 82.
State *v.* Board of Equalization (7 Nev. 83), Tax., 272.

State *v.* Board of Revenue (73 Ala. 65), Tax., 246, 400.
State *v.* Boothe (68 Mo. 546), Stockh., 38.
State *v.* Boston & M. R. Co. (58 N. H. 408), Death, etc., 447, 450; Negl., 8.
State *v.* Boston & M. R. Co. (58 N. H. 410, 510), Death, etc., 443, 446.
State *v.* Boston & M. R. Co. (35 Am. & Eng. R. Cas. 356, 80 Me. 430, 15 Atl. Rep. 36), Cross., Inj. at, 46, 183; Imp. Neg., 10.
State *v.* Boston, C. & M. R. Co. (25 Vt. 433), Quo War., 2.
State *v.* Bowers (N. J.) (5 Atl. Rep. 178), Tax., 137.
State *v.* Boyce (73 Md. 469, 21 Atl. Rep. 322), Wharves, 4.
State *v.* Boyd (9 Am. & Eng. R. Cas. 155, 86 N. Car. 634), Crim. L., 42.
State *v.* Branin (23 N. J. L. 484), Tax., 103, 174, 177.
State *v.* Brassfield (67 Mo. 331), Mun. Aid, 9, 40, 120, 130, 189.
State *v.* Brin (30 Minn. 522, 16 N. W. Rep. 406), Crim. L., 27.
State *v.* Brown (24 Am. & Eng. R. Cas. 192, 64 Md. 199, 1 Atl. Rep. 54, 6 Atl. Rep. 172), Deeds of Tr., 20.
State *v.* Callaway County Court (51 Mo. 395, 3 Am. Ry. Rep. 172), Charters, 135; Mun. Aid, 303.
State *v.* Camden (53 N. J. L. 322, 21 Atl. Rep. 565), Bridges, 17, 32, 39.
State *v.* Campbell (32 N. J. L. 309), Eject. Pass., 35, 49; Tickets & F., 7, 88.
State *v.* Canal & C. Sts. R. Co. (44 La. Ann. 526, 10 So. Rep. 940), Mand., 12.
State *v.* Canal & C. Sts. R. Co. (23 La. Ann. 333), Stockh., 28.
State *v.* Cape Girardeau & S. L. R. Co. (48 Mo. 468), Incorp., 3.
State *v.* Capner (49 N. J. L. 555, 9 Atl. Rep. 781), Cross. Sts. & H., 53, 75.
State *v.* Cecil County Com'rs (54 Md. 426), Witn., 145.
State *v.* Central Iowa R. Co. (71 Iowa 410, 32 N. W. Rep. 409), Mort., 253.
State *v.* Central Pac. R. Co. (7 Nev. 99), Tax., 272, 317.
State *v.* Central Pac. R. Co. (9 Nev. 79), Tax., 299, 306, 317.
State *v.* Central Pac. R. Co. (10 Nev. 47), Tax., 69, 272, 299, 319.
State *v.* Central Pac. R. Co. (10 Nev. 87), Tax., 300, 314.
State *v.* Central Pac. R. Co. (17 Nev. 259, 30 Pac. Rep. 887), Tax., 272.
State *v.* Central Pac. R. Co. (40 Am. & Eng. R. Cas. 467, 20 Nev. 372, 22 Pac. Rep. 237), Tax., 122, 317.
State *v.* Central Pac. R. Co. (21 Nev. 75, 25 Pac. Rep. 296), Tax., 272.
State *v.* Central Pac R. Co. (21 Nev. 94, 25 Pac. Rep. 442), Tax., 164, 293, 315, 317.
State *v.* Central Pac. R. Co. (21 Nev. 172, 26 Pac. Rep. 225, 1109), Tax., 318.
State *v.* Central Pac. R. Co. (21 Nev. 260, 30 Pac. Rep. 689), Tax., 122.
State *v.* Central Pac. R. Co. (54 Am. & Eng. R. Cas. 275, 21 Nev. 247, 30 Pac. Rep. 686), Tax., 122, 193, 291.
State *v.* Chapman (6 Nev. 320), Crim. L., 41.
State *v.* Chappell (7 Am. & Eng. R. Cas. 118, 74 Mo. 335), State Aid, 26.
State *v.* Cheraw & C. R. Co. (9 Am. & Eng. R. Cas. 631, 16 So. Car. 524), Mun. Aid, 183; Stock, 63; Words & Ph., 170, 219.
State *v.* Chesapeake & O. R. Co. (19 Am. & Eng. R. Cas. 429, 24 W. Va. 809), Crim. L., 32.
State *v.* Chester & L. R. Co. (5 Am. & Eng. R. Cas. 220, 13 So. Car. 290), Judgm., 30; Mun. Aid, 8, 316.
State *v.* Chicago & N. W. R. Co. (27 Am. & Eng. R. Cas. 15, 70 Iowa 162, 30 N. W. Rep. 398), Ry. Com'rs, 39.
State *v.* Chicago, B. & K. C. R. Co. (89 Mo. 523, 14 S. W. Rep. 522), Sales of Rds., 10, 11; Tax., 144, 154, 184, 230.
State *v.* Chicago, B. & P. R. Co. (17 Am. & Eng. R. Cas. 170, 63 Iowa 508, 19 N. W. Rep. 299), Crim. L., 32.
State *v.* Chicago, B. & Q. R. Co. (68 Iowa 135, 26 N. W. Rep. 37), Proc., 42.
State *v.* Chicago, B. & Q. R. Co. (36 Am. & Eng. R. Cas. 504, 25 Neb. 156, 41 N. W. Rep. 125), Consol., 37; Em. Dom., 76.
State *v.* Chicago, B. & Q. R. Co. (42 Am. & Eng. R. Cas. 248, 29 Neb. 412, 45 N. W. Rep. 469), Cross. Sts. & H., 10, 11, 62.
State *v.* Chicago, M. & N. R. Co. (49 Am. & Eng. R. Cas. 304, 79 Wis. 259, 48 N. W. Rep. 243), Farm Cross., 9; Mand., 31.
State *v.* Chicago, M. & St. P. R. Co. (36 Minn. 402, 31 N. W. Rep. 365), Elevators, 3.
State *v.* Chicago, M. & St. P. R. Co. (38 Minn. 281, 37 N. W. Rep. 782; reversed in 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702), Mand., 25; Ry. Com'rs, 2, 28.
State *v.* Chicago, M. & St. P. R. Co. (33 Fed. Rep. 391), Commerce, 7; Rem. of C., 9.
State *v.* Chicago, M. & St. P. R. Co. (77 Iowa 442, 4 L. R. A. 298, 42 N. W. Rep. 365), Crim. L., 32, 36.
State *v.* Chicago, M. & St. P. R. Co. (80 Iowa 586, 46 N. W. Rep. 741), Proc., 42; Sts. & H., 20.
State *v.* Chicago, M. & St. P. R. Co. (86 Iowa 304, 53 N. W. Rep. 253), Ry. Com'rs, 35.
State *v.* Chicago, M. & St. P. R. Co. (55 Am. & Eng. R. Cas. 487, 86 Iowa 641, 53 N. W. Rep. 323), Ry. Com'rs, 5, 12, 23, 29, 35.
State *v.* Chicago, M. & St. P. R. Co. (55 Am. & Eng. R. Cas. 515, 88 Iowa 445, 55 N. W. Rep. 331), Ry. Com'rs, 19, 33.
State *v.* Chicago, R. I. & P. R. Co. (50 Iowa 692), Crim. L., 32.
State *v.* Chicago, R. I. & P. R. Co. (19 Mo. App. 104), Stat., 46.
State *v.* Chicago, St. P., M. & O. R. Co. (37 Am. & Eng. R. Cas. 602, 40 Minn. 267, 41 N. W. Rep. 1047, 3 L. R. A. 238, 2 Int. Com. Rep. 519), Int. Com., 221.
State *v.* Chicago, St. P., M. & O. R. Co. (19 Neb. 476, 27 N. W. Rep. 434), Ry. Com'rs, 18.
State *v.* Chovin (7 Iowa 204), Car. of P., 60, 61, 109; Eject. Pass., 7, 54, 73; Tickets & F., 110, 127.

State *v.* Cincinnati & I. R. Co. (17 Ohio St. 103), Em. Dom., 969, 973.
State *v.* Cincinnati C. R. Co. (10 Am. & Eng. R. Cas. 83, 37 Ohio St. 157), Em. Dom., 95.
State *v.* Cincinnati, N. O. & T. P. R. Co. (13 Lea (Tenn.) 500), Tax., 282.
State *v.* Cincinnati, N. O. & T. P. R. Co. (42 Am. & Eng. R. Cas. 330, 47 Ohio St. 130, 7 L. R. A. 319, 23 N. E. Rep. 928), Quo War., 2.
State *v.* Cincinnati, W. & B. R. Co. (42 Am. & Eng. R. Cas. 330, 47 Ohio St. 130, 7 L. R. A. 319, 23 N. E. Rep. 928), Discrim., 11, 23.
State v. Clark (23 Minn. 422), Mun. Aid, 4, 243.
State *v.* Clark (53 N. J. L. 332, 21 Atl. Rep. 302), Charters, 20; Tax., 141.
State *v.* Clemens (38 Iowa 257), Crim. L., 35.
State *v.* Clinton (28 La. Ann. 393), State Aid, 19.
State *v.* Clinton County Com'rs (6 Ohio St. 280), Mun. Aid, 451.
State *v.* Clough (69 Wis. 369, 34 N. W. Rep. 399), App., 136.
State *v.* Cobb (7 Am. & Eng. R. Cas. 147, 64 Ala. 127), Mand., 22; State Aid, 1, 6; States, 2; Stat., 13.
State *v.* Cockrem (25 La. Ann. 356), Aband., 3; Mun. Corp., 47.
State *v.* Collector (38 N. J. L. 270, 13 Am. Ry. Rep. 47), Tax., 181.
State *v.* Collectors (26 N. J. L. 519; affirming 25 N. J. L. 315), Tax., 145, 165, 216.
State *v.* Columbia & A. R. Co. (1 So. Car. 46), Em. Dom., 1054.
State *v.* Columbus & X. R. Co. (48 Fed. Rep. 626), Rem. of C., 17.
State *v.* Com'r of Taxation (37 N. J. L. 228; affirmed in 38 N. J. L. 472), Charters, 37, 41, 43; Tax., 140, 239, 274.
State *v.* Com'r of R. Taxation (38 N. J. L. 472), Charters, 37; Tax., 61.
State *v.* Com'r of R. Taxation (37 N. J. L. 240), Consol., 28.
State *v.* Comptroller-General (4 So. Car. 185), State Aid, 34.
State *v.* Concord R. Co. (62 N. H. 375), Corp., 5.
State *v.* Concord R. Corp. (13 Am. & Eng. R. Cas. 94, 59 N. H. 85), Connect. L., 5, 6.
State *v.* Consolidated Coal Co. (46 Md. 1), Charters, 89; Cumberland & P. R. Co., 1; Em. Dom., 32.
State *v.* Consolidated European & N. A. R. Co. (67 Me. 479, 16 Am. Ry. Rep. 371), Death, etc., 367.
State *v.* Corbett (38 Am. & Eng. R. Cas. 35, 57 Minn. 345, 59 N. W. Rep. 317), Stat., 25, 64; Tickets & F., 152.
State *v.* Corrigan Con. St. R. Co. (29 Am. & Eng. R. Cas. 591, 85 Mo. 263, 55 Am. Rep. 361), St. Rys., 17, 157.
State *v.* Cozzens (46 Am. & Eng. R. Cas. 168, 42 La. Ann. 1069, 8 So. Rep. 268), Sts. & H., 297.
State *v.* Crawford (38 So. Car. 330, 17 S. E. Rep. 36), Crim. L., 10.
State *v.* Creeden (40 Am. & Eng. R. Cas. 31, 78 Iowa 556, 7 L. R. A. 295, 43 N. W. Rep. 673), Intox'ing L., 4; Wareh., 8.
State *v.* Crosset (81 N. Car. 579), Crim. L., 45.
State *v.* Cumberland & P. R. Co. (40 Md. 22), Int. Com., 207.
State *v.* Cutler (13 Kan. 131), Injunc., 58.
State *v.* Dallas County Court (3 Am. & Eng. R. Cas. 122, 72 Mo. 329), Mun. Aid, 154.
State *v.* Davenport & St. P. R. Co. (47 Iowa 507), Crim. L., 32; Sts. & H., 62; Words & Ph., 155.
State *v.* Daviess County Court (64 Mo. 30), Mun. Aid, 242.
State *v.* Dawson (16 Ind. 40), Charters, 5, 9.
State *v.* Dawson (22 Ind. 272), Charters, 6, 17.
State *v.* Dayton & S. E. R. Co. (5 Am. & Eng. R. Cas. 312, 36 Ohio St. 434), Franch., 7; Sts. & H., 176, 248, 422, 424.
State *v.* Delaware County Com'rs (92 Ind. 499), Mun. Aid, 256.
State *v.* Delaware, L. & W. R. Co. (30 N. J. L. 473; reversed in 31 N. J. L. 531), For. Corp., 1.
State *v.* Delaware, L. & W. R. Co. (23 Am. & Eng. R. Cas. 470, 48 N. J. L. 55, 2 Atl. Rep. 803), Mand., 15; Tickets & F., 61.
State *v.* Des Moines & Ft. D. R. Co. (49 Am. & Eng. R. Cas. 186, 84 Iowa 419, 51 N. W. Rep. 38), Aband., 9; Mand., 7; Ry. Com'rs, 35.
State *v.* Des Moines & K. C. R. Co. (Iowa) (54 N. W. Rep. 461), Aband., 5.
State *v.* Dexter & N. R. Co. (69 Me. 44), Tax., 137, 140.
State *v.* Dickson (3 Mo. App. 464), Em. Dom., 400.
State *v.* Dickson (38 Ga. 171), Govt. Rds., 5.
State *v.* District Court (54 Minn. 34, 55 N. W. Rep. 816), Tax., 267.
State *v.* District Court of Hennepin County (35 Minn. 461, 29 N. W. Rep. 60), Cross. Rys., 37, 53.
State *v.* District Court of Hennepin County (42 Am. & Eng. R. Cas. 241, 42 Minn. 247, 7 L. R. A. 121, 44 N. W. Rep. 7), Cross. Sts. & H., 82.
State *v.* Divine (31 Am. & Eng. R. Cas. 574, 98 N. Car. 778, 4 S. E. Rep. 477), Animals, 11; Crim. L., 26.
State *v.* Dorsey (118 Ind. 167, 20 N. E. Rep. 777), Crim. L., 29.
State *v.* Dover & R. R. Co. (14 Am. & Eng. R. Cas. 87, 43 N. J. L. 528), Cross. Rys., 22; Cross. Sts. & H., 90; Em. Dom., 67, 501, 509, 805, 926.
State *v.* Drummond (17 Am. & Eng. R. Cas. 149, 45 N. J. L. 511; affirmed in 46 N. J. L. 644), Cross. Sts. & H., 53.
State *v.* Drummond (20 Am. & Eng. R. Cas. 13, 46 N. J. L. 644; affirming 45 N. J. L. 511), Cross. Sts. & H., 53; Sts. & H., 24.
State *v.* Dubuque & S. C. R. Co. (Iowa) (55 N. W. Rep. 727), Crim. L., 36.
State *v.* Dulle (48 Mo. 282), Tax., 56.
State *v.* Duryea (45 N. J. L. 258), St. Rys., 284.
State *v.* East Line & R. R. R. Co. (Tex.) (48 Am. & Eng. R. Cas. 656), Dissol., 27; Mort., 107; Receiv., 85, 94.

State *v.* Easton & A. R. Co. (36 N. J. L. 181, 12 Am. Ry. Rep. 417), Em. Dom., 109, 260, 273, 288; Words & Ph., 166.
State *v.* East Orange (41 N. J. L. 127), Cross., Inj. at, 65, 74.
State *v.* Edgefield & K. R. Co. (4 Baxt. (Tenn.) 92), Receiv., 68.
State *v.* Edgefield & K. R. Co. (4 Am. & Eng. R. Cas. 86, 6 Lea (Tenn.) 353), Receiv., 55; State Aid, 35.
State *v.* Edwards (104 Mo. 125, 16 S. W. Rep. 117), Cert., 2.
State *v.* Edwards (109 Mo. 315, 19 S. W. Rep. 91), Crim. L., 10.
State *v.* Elizabeth (35 N. J. L. 359; affirmed in 37 N. J. L. 432), Sts. & H., 5.
State *v.* Elizabeth (37 N. J. L. 330), Sts. & H., 351; Tax., 216.
State *v.* Elizabeth (41 N. J. L. 319), Tax., 181.
State *v.* Emory (41 La. Ann. 1094, 6 So. Rep. 795), Just. P., 1.
State *v.* Evans (3 Ill. 208), Em. Dom., 691.
State *v.* Ewing (116 Mo. 129, 22 S. W. Rep. 476), Mun. Aid, 418.
State *v.* Farmer (46 N. H. 200), Witn., 86.
State *v.* Farmers' L. & T. Co. (50 Am. & Eng. R. Cas. 683, 81 Tex. 530, 17 S. W. Rep. 60), Att'y-Gen., 1; Intervent., 2; State Aid, 36.
State *v.* Ferguson (62 Mo. 77), Tax., 63.
State *v.* Fisher (109 N. Car. 817, 13 S. E. Rep. 878), Crim. L., 28.
State *v.* Fisk (3 Sneed (Tenn.) 695), Change Bills, 1.
State *v.* Flint & P. M. R. Co. (89 Mich. 481, 51 N. W. Rep. 103), Estop., 2.
State *v.* Florida C. R. Co. (15 Fla. 690), Bonds, 10; Eq., 17; State Aid, 16.
State *v.* Foley (31 Iowa 527), St. Rys., 210.
State *v.* Foulkes (20 Am. & Eng. R. Cas. 538, 94 Ind. 493), Quo War., 8.
State *v.* Francis (23 Kan. 495), Tax., 305.
State *v.* Fremont, E. & M. V. R. Co. (32 Am. & Eng. R. Cas. 426, 22 Neb. 313, 35 N. W. Rep. 118), Discrim., 48, 77; Mand., 28; Ry. Com'rs, 7, 13, 27, 31.
State *v.* Fremont, E. & M. V. R. Co. (32 Am. & Eng. R. Cas. 442, 23 Neb. 117), Ry. Com'rs, 13, 27.
State *v.* Fry (6 Am. & Eng. R. Cas. 340, 81 Ind. 7), Crim. L., 46; Tickets & F., 55, 152.
State *v.* Fuller (40 N. J. L. 328, 17 Am. Ry. Rep. 347), Tax., 165.
State *v.* Funding Board (28 La. Ann. 249), State Aid, 19.
State *v.* Garroutte (67 Mo. 445), Consol., 34; Mun. Aid, 21, 154, 187; Words & Ph., 133.
State *v.* Georgia Co. (54 Am. & Eng. R. Cas. 299, 112 N. Car. 34, 17 S. E. Rep. 10), Receiv., 5; Tax., 277, 312, 314.
State *v.* Georgia R. & B. Co. (54 Ga. 423), Charters, 76; Tax., 99.
State *v.* Gilmore (24 N. H. 461), Death, etc., 443, 445.
State *v.* Glenn (18 Nev. 34, 1 Pac. Rep. 186), Mort., 20.
State *v.* Goll (32 N. J. L. 285), Officers, 14.
State *v.* Goode (68 Iowa 593, 27 N. W. Rep. 772), Crim. L., 17.
State *v.* Goold (53 Me. 279), Eject. Pass., 24, 65; Tickets & F., 121.
State *v.* Gorham (37 Me. 451), Bridges, 9, 17, 33, 42; Crim. L., 21; Mand., 12.
State *v.* Goshen Tp. (14 Ohio St. 569), Mun. Aid, 111, 271, 340, 366.
State *v.* Goss (30 Am. & Eng. R. Cas. 118, 59 Vt. 266, 9 Atl. Rep. 829, 4 N. Eng. Rep. 518), Exp. Cos., 25; Intox'ing L., 5.
State *v.* Graham (23 La. Ann. 622), State Aid, 21.
State *v.* Grand Island & W. C. R. Co. (44 Am. & Eng. R. Cas. 189, 27 Neb. 694, 43 N. W. Rep. 419; further appeal 31 Neb. 209), Em. Dom., 394.
State *v.* Grand Island & W. C. R. Co. (47 Am. & Eng. R. Cas. 257, 31 Neb. 209, 47 N. W. Rep. 857; former appeal 27 Neb. 694), Em. Dom., 394.
State *v.* Grand Trunk R. Co. (58 Me. 176), Car. of P., 38, 40, 237; Death, etc., 447.
State *v.* Grand Trunk R. Co. (59 Me. 189), Crim. L., 32.
State *v.* Grand Trunk R. Co. (60 Me. 145), Death, etc., 445.
State *v.* Grand Trunk R. Co. (61 Me. 114), Death, etc., 442.
State *v.* Grand Trunk R. Co. (58 N. H. 198), Death, etc., 451.
State *v.* Grand Trunk R. Co. (65 N. H. 663, 23 Atl. Rep. 525), Negl., 53.
State *v.* Greene County (54 Mo. 540), Consol., 32; Mun. Aid, 153, 172.
State *v.* Haight (30 N. J. L. 428), Ferries, 14.
State *v.* Haight (30 N. J. L. 447), Tax., 128; Words & Ph., 232.
State *v.* Haight (34 N. J. L. 319), Tax., 216.
State *v.* Haight (35 N. J. L. 40), Tax., 149, 181.
State *v.* Haight (36 N. J. L. 54), Tax., 39.
State *v.* Hamilton (13 Nev. 386), Crim. L., 9.
State *v.* Hamilton (5 Ind. 310), Tax., 101, 258.
State *v.* Hancock (35 N. J. L. 537, 3 Am. Ry. Rep. 223; reversing 33 N. J. L. 315), Charters, 76.
State *v.* Hancock County Com'rs (11 Ohio St. 183), Mun. Aid, 235, 391.
State *v.* Hancock County Com'rs (12 Ohio St. 596), Mun. Aid, 353.
State *v.* Hannibal & St. J. R. Co. (30 Mo. App. 494), Penalty, 9.
State *v.* Hannibal & St. J. R. Co. (37 Mo. 265), Tax., 120.
State *v.* Hannibal & St. J. R. Co. (Mo.) (39 Am. & Eng. R. Cas. 547, 11 S. W. Rep. 746), Mun. Aid, 418.
State *v.* Hannibal & St. J. R. Co. (51 Mo. 532, 3 Am. Ry. Rep. 266), Proc., 32.
State *v.* Hannibal & St. J. R. Co. (60 Mo. 143, 9 Am. Ry. Rep. 239), Tax., 269.
State *v.* Hannibal & St. J. R. Co. (75 Mo. 208), Mun. Corp., 5.
State *v.* Hannibal & St. J. R. Co. (29 Am. & Eng. R. Cas. 604, 86 Mo. 13), Cross. Sts. & H., 24; Mand., 13, 28, 33.
State *v.* Hannibal & St. J. R. Co. (87 Mo. 236), Tax., 8, 269.
State *v.* Hannibal & St. J. R. Co. (89 Mo. 98, 14 S. W. Rep. 511), Tax., 78.
State *v.* Hannibal & St. J. R. Co. (37 Am. &

Eng. R. Cas. 406, 97 Mo. 348, 10 S. W. Rep. 436), Bridges, 89; Tax., 78.
State *v.* Hannibal & St. J. R. Co. (Mo.) (39 Am. & Eng. R. Cas. 547, 11 S. W. Rep. 746), Tax., 141.
State *v.* Hannibal & St. J. R. Co. (42 Am. & Eng. R. Cas. 263, 101 Mo. 120, 13 S. W. Rep. 406), Tax., 58, 198, 269.
State *v.* Hannibal & St. J. R. Co. (41 Am. & Eng. R. Cas. 581, 101 Mo. 136, 13 S. W. Rep. 505), Mun. Aid, 418; Tax., 198, 269, 316, 320.
State *v.* Hannibal & St. J. R. Co. (110 Mo. 265, 19 S. W. Rep. 816), Tax., 269.
State *v.* Hannibal & St. J. R. Co. (113 Mo. 297, 21 S. W. Rep. 14), Mun. Aid, 418.
State *v.* Harris (96 Mo. 29, 8 S. W. Rep. 794), Mun. Aid, 120, 128.
State *v.* Harshaw (41 Am. & Eng. R. Cas. 685, 76 Wis. 230, 45 N. W. Rep. 308), Tax., 151, 399.
State *v.* Hartford & N. H. R. Co. (29 Conn. 538), Connect. L., 5; Mand., 28.
State *v.* Haskell County Com'rs (40 Kan. 65, 19 Pac. Rep. 362), Mun. Aid, 32.
State *v.* Hastings (24 Minn. 78), Mun. Aid, 211, 214.
State *v.* Hathcock (18 Am. & Eng. R. Cas. 127, 20 So. Car. 419), Crim. L., 39.
State *v.* Haven (59 Vt. 399, 9 Atl. Rep. 841), Crim. L., 23.
State *v.* Hays (50 Mo. 34),Paym., 4; State Aid, 26.
State *v.* Hazelton & L. R. Co. (14 Am. & Eng. R. Cas. 51, 20 Am. & Eng. R. Cas. 560, 40 Ohio St. 504), Charters, 79.
State *v.* Heidenhain (43 Am. & Eng. R. Cas. 287, 42 La. Ann. 483, 7 So. Rep. 621), St. Rys., 271.
State *v.* Henderson (38 Ohio St. 644), Mand., 24; St. Rys., 32.
State *v.* Herod (29 Iowa 123), St. Rys., 288.
State *v.* Hibernia Underground R. Co. (47 N. J. L. 43; affirmed in 47 N. J. L. 518), Em. Dom., 97, 128, 188.
State *v.* Highland (25 Minn. 355), Mun. Aid, 54.
State *v.* Hilbert (36 Am. & Eng. R. Cas. 118, 72 Wis. 184, 39 N. W. Rep. 326), Stat., 45; St. Rys., 27, 290.
State *v.* Hill (1 Houst. (Del. Cr.) 421), Crim. L., 27.
State *v.* Hill (54 Ala. 67), Animals, 325.
State *v.* Hinson (82 N. Car. 597), Crim. L., 42.
State *v.* Hood (15 Rich. (So. Car.) 177), Tax., 179.
State *v.* Housatonic R. Co. (48 Conn. 44), Tax., 70.
State *v.* Hudson River R. & T. Co. (N. J.) (25 Atl. Rep. 853), Em. Dom., 295.
State *v.* Hudson Terminal R. Co. (20 Am. & Eng. R. Cas. 294, 46 N. J. L. 289), Em. Dom., 51, 331, 958.
State *v.* Hudson Tunnel R. Co (38 N. J. L. 548, 13 Am. Ry. Rep. 82; affirming 38 N. J. L. 17), Em. Dom., 117, 961; Incorp., 2; Tunnels, 3.
State *v.* Huft (39 La. Ann. 990, 3 So. Rep. 180), Just. P., 4.
State *v.* Humphreys (25 Ohio St. 520), Mun. Aid, 422.
State *v.* Hungerford (34 Am. & Eng. R. Cas. 265, 39 Minn. 6, 38 N. W. Rep. 628), Tickets & F., 27, 122.
State *v.* Illinois C. R. Co. (27 Ill. 64), Tax., 257.
State *v.* Indiana & I. S. R. Co. (56 Am. & Eng. R. Cas. 254, 133 Ind. 69, 32 N. E. Rep. 817), Evid., 106; Int. Com., 218; Stat. & D., 5; Stat., 19, 23; Time-tables, 4, 5; Words & Ph., 215.
State *v.* International & G. N. R. Co. (57 Tex. 534), Constr. Rys., 3.
State *v.* Iowa C. R. Co. (83 Iowa 720, 50 N. W. Rep. 280), Leases, 6; Mand., 29.
State *v.* Jacksonville, P. & M. R. Co. (15 Fla. 201), Pl., 161; Proc., 15; Receiv., 3, 23.
State *v.* Jacksonville, P. & M. R. Co. (16 Fla. 708), State Aid, 16.
State *v.* Jacksonville St. R. Co. (50 Am. & Eng. R. Cas. 179, 29 Fla. 590, 10 So. Rep. 590), Mand., 8; St. Rys., 9, 16, 87, 134, 136, 156, 194; Words & Ph., 195.
State *v.* Jefferson County Com'rs (11 Kan. 66), Mand., 28.
State *v.* Jenkins (78 N. Car. 478), Crim. L., 27.
State *v.* Jennings (48 Wis. 549, 4 N. W. Rep. 641), Mun. Aid, 141, 288.
State *v.* Jersey City (29 N. J. L. 170), Mun. Corp., 18.
State *v.* Jersey City (36 N. J. L. 56, 12 Am. Ry. Rep. 302), Tax., 274.
State *v.* Jersey City (28 Am. & Eng. Corp. Cas. 182, 52 N. J. L. 65, 18 Atl. Rep. 586), Sts. & H., 98.
State *v.* Johnson (Phil. (N. Car.) 140), Crim. L., 40.
State *v.* Jones (38 N. J. L. 83), Tax., 218.
State *v.* Jones (67 N. Car. 210), Pres., 14.
State *v.* Judge (23 La. Ann. 51), Injunc., 19.
State *v.* Judge (23 La. Ann. 595), App., 1.
State *v.* Judge (33 La. Ann. 954), Animals, 291; Tresp., 7.
State *v.* Judges (43 La. Ann. 1164, 10 So. Rep. 253), Stat., 60.
State *v.* Kansas C. R. Co. (49 Am. & Eng. R. Cas. 176, 47 Kan. 497, 28 Pac. Rep. 208), Ry. Com'rs, 26.
State *v.* Kansas City, Ft. S. & G. R. Co. (32 Fed. Rep. 722), Cross. Rys., 78; Parties, 13; Stat., 19; Stat. & D., 21.
State *v.* Kansas City, Ft. S. & M. R. Co. (54 Ark. 608, 16 S. W. Rep. 657), Adv. Poss., 3.
State *v.* Kansas City, St. J. & C. B. R. Co. (45 Iowa 139), Sts. & H., 11.
State *v.* Kansas City St. J. & C. B. R. Co. (16 Am. & Eng. R. Cas. 297, 77 Mo. 143), Charters, 146; Mand., 30.
State *v.* Kansas City, S. & M. R. Co. (54 Ark. 546, 16 S. W. Rep. 567), Crim. L., 19.
State *v.* Keokuk & W. R. Co. (41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290), Consol., 23, 28; Judgm., 21; Tax., 145.
State *v.* Kilty (9 Am. & Eng. R. Cas. 153, 28 Minn. 421, 10 N. W. Rep. 475), Crim. L., 35.

State *v.* Kingan (51 Ind. 142), Quo War., 3, 8.
State *v.* Kinney (34 Minn. 311, 25 N. W. Rep. 705), Conduct., 10; Eject. Pass., 60.
State *v.* Kirkwood (14 Iowa 162), Land Grants, 23.
State *v.* Knox & L. R. Co. (78 Me. 92, 2 Atl. Rep. 846), Tax., 149, 202.
State *v.* Knox County Com'rs (101 Ind. 308), Mun. Aid, 444.
State *v.* Lagrange & M. R. Co. (4 Humph. (Tenn.) 488), Attach., 20.
State *v.* Lake City (25 Minn. 404), Mun. Aid, 108, 255; Words & Ph., 245.
State *v.* Lancaster County Com'rs (4 Neb. 537), Tax., 15.
State *v.* Lancaster County Com'rs (6 Neb. 214), Mun. Aid, 4, 281, 284.
State *v.* Lime Sup'rs (23 Minn. 521), Mun. Aid, 233.
State *v.* Linn County Court (44 Mo. 504), Mun. Aid, 6, 40, 418.
State *v.* Little Rock, M. R. & T. R. Co. (31 Ark. 701), Mun. Aid, 140; State Aid, 13; Stat., 5.
State *v.* London (3 Head (Tenn.) 263), Crim. L., 18.
State *v.* Loomis (27 Minn. 521, 8 N. W. Rep. 758), Crim. L., 27.
State *v.* Louisville & N. R. Co. (50 Am & Eng. R. Cas. 161, 91 Tenn. 445, 19 S. W. Rep. 229), Crim. L., 32.
State *v.* Louisville, N. A. & C. R. Co. (10 Am. & Eng. R. Cas. 286, 86 Ind. 114), Sts. & H., 174.
State *v.* Love (37 N. J. L. 60), Tax., 165.
State *v.* Lubke (15 Mo. App. 152; affirmed on other grounds in 85 Mo. 338), Em. Dom., 373, 397, 402, 563.
State *v.* Lubke (85 Mo. 338), Mand., 5.
State *v.* McCrillus (4 Kan. 250), Mun. Aid, 393.
State *v.* McDaniel (22 Ohio St. 354), Direct., 3, 13; Reorg., 7.
State *v.* McDonald (7 Mo. App. 510), Crim. L., 9.
State *v.* McFetridge (8 Am. & Eng. R. Cas. 536, 56 Wis. 256, 14 N. W. Rep. 185), Tax., 399.
State *v.* McFetridge (64 Wis. 130, 24 N. W. Rep. 140), Tax., 399.
State *v.* McIver (2 So. Car. 25), Stock, 38, 62, 63, 64.
State *v.* McKay (43 Mo. 594), State Aid, 26.
State *v.* McMinnville & M. R. Co. (4 Am. & Eng. R. Cas. 95, 6 Lea (Tenn.) 369), Receiv., 54.
State *v.* Macon County Court (41 Mo. 453), Mun. Aid, 4.
State *v.* Macon County Court (68 Mo. 29), Charters, 145; Mand., 19, 24; Mun. Aid, 356, 418.
State *v.* Madison County Com'rs (92 Ind. 133), Mun. Aid, 121.
State *v.* Madison St. R. Co. (36 Am. & Eng. R. Cas. 135, 72 Wis. 612, 40 N. W. Rep. 487), St. Rys., 37.
State *v.* Maine C. R. Co. (60 Me. 490), Death, etc., 442.
State *v.* Maine C. R. Co. (66 Me. 488, 19 Am. Ry. Rep. 323), Charters, 43, 130, 133; Consol., 4, 32; Reorg., 1; Tax., 158.
State *v.* Maine C. R. Co. (74 Me. 376), Tax., 30.
State *v.* Maine C. R. Co. (19 Am. & Eng. R. Cas. 312, 76 Me. 357, 49 Am. Rep. 622), Contrib. Neg., 104; Cross., Inj. at, 313; Death, etc., 450.
State *v.* Maine C. R. Co. (21 Am. & Eng. R. Cas. 216, 77 Me. 244), Crim. L., 13; Death, etc., 449.
State *v.* Maine C. R. Co. (77 Me. 538, 1 Atl. Rep. 673), Crim. L., 13; Cross., Inj. at, 250, 313.
State *v.* Maine C. R. Co. (81 Me. 84, 16 Atl. Rep. 368), Death, etc., 447.
State *v.* Manchester & L. R. Co. (52 N. H. 528), Crim. L., 13; Cross., Inj. at, 204, 206; Death, etc., 445, 447; Negl., 6, 77, 91; Words and Ph., 172.
State *v.* Manchester & L. R. Co. (62 N. H. 29), Mand., 28.
State *v.* Mansfield Com'rs (23 N. J. L. 510), Em. Dom., 64, 186; Tax., 181.
State *v.* Marietta & C. R. Co. (35 Ohio St. 154), Receiv., 37.
State *v.* Marietta & N. G. R. Co. (108 N. Car. 24, 12 S. E. Rep. 1041), Tax., 277.
State *v.* Martin (51 Kan. 462, 33 Pac. Rep. 9), Charters, 81; Em. Dom., 52, 72.
State *v.* Mason City & Ft. D. R. Co. (55 Am. & Eng. R. Cas. 73, 85 Iowa 516, 52 N. W. Rep. 490), Farm Cross., 3; Ry. Com'rs, 23, 31, 33.
State *v.* Mayor, etc., of Bayonne (54 N. J. L. 293, 23 Atl. Rep. 648), Sts. & H., 152, 155
State *v.* Mayor, etc., of Charleston (10 Rich. (So. Car.) 491), Mun. Aid, 48, 209.
State *v.* Mayor, etc., of Hoboken (30 N. J. L. 225), Mun. Corp., 38; St. Rys., 270.
State *v.* Mayor, etc., of Hoboken (35 N. J. L. 205), Mun. Corp., 37; St. Rys., 7.
State *v.* Mayor, etc., of Hoboken (41 N. J. L. 71), St. Rys., 264, 286.
State *v.* Mayor, etc., of Jersey City (29 N. J. L. 170), Charters, 37; Nuis., 1; Sts. & H., 320, 322.
State *v.* Mayor, etc., of Jersey City (34 N. J. L. 31), Wharves, 3.
State *v.* Mayor, etc., of Jersey City (37 N. J. L. 348), Sts. & H., 307.
State *v.* Mayor, etc., of Jersey City (41 N. J. L. 471), Tax., 165, 239.
State *v.* Mayor, etc., of Jersey City (1 Am. & Eng. R. Cas. 406, 42 N. J. L. 97), Sts. & H., 351; Tax., 147, 274.
State *v.* Mayor, etc., of Jersey City (45 N. J. L. 297), St. Rys., 286.
State *v.* Mayor, etc., of Jersey City (26 Am. & Eng. R. Cas. 400, 47 N. J. L. 286), Sts. & H., 303.
State *v.* Mayor, etc., of Jersey City (49 N. J. L. 540, 9 Atl. Rep. 782, 8 Cent. Rep. 633), Tax., 85.
State *v.* Mayor, etc., of Manitowoc (52 Wis. 423, 9 N. W. Rep. 607), Mun. Aid, 455.
State *v.* Mayor, etc., of Newark (27 N. J. L. 185), Tax., 216.
State *v.* Mayor, etc., of Newark (44 N. J. L. 323), Tax., 274.

State *v.* Mayor, etc., of Newark (54 N. J. L. 102, 23 Atl. Rep. 284), Elec. Rys., 7.
State *v.* Mayor, etc., of New Orleans (32 La. Ann. 268), St. Rys., 18.
State *v.* Mayor, etc., of Perrysburg (14 Ohio St. 472), Mun. Aid, 4.
State *v.* Meehan (62 Conn. 126), Crim. L., 4.
State *v.* Memphis & C. R. Co. (14 Lea (Tenn.) 56), Tax., 282, 312.
State *v.* Merchant (9 Am. & Eng. R. Cas. 516, 37 Ohio St. 251), Direct., 5, 9.
State *v.* Mexican Gulf R. Co. (5 La. Ann. 333), Dissol., 12.
State *v.* Middle Tp. (38 N. J. L. 270, 13 Am. Ry. Rep. 47), Tax., 81.
State *v.* Miller (30 N. J. L. 368; affirmed in 31 N. J. L. 521), Charters, 41; Tax., 61.
State *v.* Miller (66 Mo. 328), Lott., 2.
State *v.* Milwaukee, L. S. & W. R. Co. (45 Wis. 579), Charters, 80; Quo War., 2, 4, 8.
State *v.* Mims (26 Minn. 191, 2 N. W. Rep. 492), Crim. L., 17.
State *v.* Minneapolis (32 Minn. 501, 21 N. W. Rep. 722), Mun. Aid, 227.
State *v.* Minneapolis & St. L. R. Co. (35 Am. & Eng. R. Cas. 250, 39 Minn. 219, 39 N. W. Rep. 153), Bridges, 4, 17, 18, 19, 41; Charters, 142; Cross. Sts. & H., 89; Mand., 13, 34; Sts. & H., 147.
State *v.* Minneapolis Eastern R. Co. (40 Minn. 156, 41 N. W. Rep. 465), Ry. Com'rs, 28.
State *v.* Minnesota C. R. Co. (29 Am. & Eng. R. Cas. 440, 36 Minn. 246, 30 N. W. Rep. 816), Charters, 79; Dissol., 7, 8, 20; Franch., 10; Tax., 164.
State *v.* Minton (23 N. J. L. 529), Tax., 211.
State *v.* Mississippi, O. & R. R. R. Co. (20 Ark. 495), Dissol., 10; Quo War., 9.
State *v.* Mississippi River Bridge Co. (54 Am. & Eng. R. Cas. 308, 109 Mo. 253, 19 S. W. Rep. 421), Tax., 78.
State *v.* Missouri Pac. R. Co. (20 Am. & Eng. R. Cas. 45, 33 Kan. 176, 5 Pac. Rep. 772), Mand., 12; Sts. & H., 311.
State *v.* Missouri Pac. R. Co. (10 Mo. App. 588), Crim. L., 19.
State *v.* Missouri Pac. R. Co. (80 Mo. 117), Mand., 33.
State *v.* Missouri Pac. R. Co. (92 Mo. 137, 6 S. W. Rep. 862), Mun. Aid, 418; Tax., 8, 36, 269, 318.
State *v.* Missouri Pac. R. Co. (114 Mo. 283, 21 S. W. Rep. 813), Mand., 26.
State *v.* Missouri Pac. R. Co. (25 Neb. 164, 41 N. W. Rep. 127), Missouri Pac. R. Co., 1.
State *v.* Missouri Pac. R. Co. (42 Am. & Eng. R. Cas. 661, 29 Neb. 550, 45 N. W. Rep. 785), Elevators, 3.
State *v.* Mobile & M. R. Co. (59 Ala. 321), Mand., 17.
State *v.* Monongahela River R. Co. (37 W. Va. 108, 16 S. E. Rep. 519), Sts. & H., 183.
State *v.* Montclair & G. L. R. Co. (13 Am. & Eng. R. Cas. 390, 43 N. J. L. 524), Tax., 274.
State *v.* Montclair R. Co. (35 N. J. L. 328), Em. Dom., 99, 127.
State *v.* Montgomery (74 Ala. 226), Mun. Aid, 352.
State *v.* Morgan (28 La. Ann. 482), Franch., 2, 4; Mort., 2; Tax., 217.
State *v.* Morris & E. R. Co. (23 N. J. L. 360), Agency, 72; Crim. L., 1, 31.
State *v.* Morris & E. R. Co. (25 N. J. L. 437), Crim. L., 32; Stat. & D., 11.
State *v.* Morrow (26 Mo. 131), Lott., 1.
State *v.* Musgang (51 Minn. 556, 53 N. W. Rep. 874), Crim. L., 27.
State *v.* Mutchler (41 N. J. L. 96), Tax., 78, 163.
State *v.* Mutchler (1 Am. & Eng. R. Cas. 395, 42 N. J. L. 461), Tax., 67, 78.
State *v.* Nashua & L. R. Co. (58 N. H. 182), Lim. of Ac., 64.
State *v.* Nashville, C. & St. L. R. Co. (7 Lea (Tenn.) 15), State Aid, 35.
State *v.* Nashville, C. & St. L. R. Co. (17 Am. & Eng. R. Cas. 420, 12 Lea (Tenn.) 583), Tax., 156.
State *v.* Nashville, C. & St. L. R. Co. (86 Tenn. 438, 6 S. W. Rep. 880), Tax., 170.
State *v.* National Docks R. Co. (N. J.) (26 Atl. Rep. 145), Em. Dom., 274; Sts. & H., 1.
State *v.* National Docks & N. J. J. Connecting R. Co. (54 N. J. L. 180, 23 Atl. Rep. 686), Em. Dom., 503.
State *v.* Neely (30 So. Car. 587, 9 S. E. Rep. 664), Mun. Aid, 19, 453.
State *v.* Nelson (11 Nev. 334), Crim. L., 41.
State *v.* Nemaha County Com'rs (7 Kan. 542, 1 Am. Ry. Rep. 319), Mun. Aid, 32.
State *v.* Nemaha County Com'rs (10 Kan. 569), Consol., 4; Mun. Aid, 206.
State *v.* Neville (110 Mo. 345, 19 S. W. Rep. 491), Em. Dom., 233, 967; Words and Ph., 114.
State *v.* Newark & N. Y. R. Co. (34 N. J. L. 301), Pl., 4.
State *v.* New Haven & N. Co. (37 Conn. 153), Stat. & D., 3.
State *v.* New Haven & N. Co. (41 Conn. 134, 6 Am. Ry. Rep. 84), Stat. & D., 5; Trial, 115.
State *v.* New Haven & N. Co. (42 Conn. 56), Stat. & D., 51.
State *v.* New Haven & N. Co. (43 Conn. 351), Charters, 35; Stat. & D., 51; Stat., 7.
State *v.* New Haven & N. Co. (45 Conn. 331), Charters, 65.
State *v.* New Orleans & C. R. Co. (30 La. Ann. 308), Stock, 61.
State *v.* New Orleans & C. R. Co. (37 La. Ann. 589), Mand., 3.
State *v.* New Orleans & C. R. Co. (44 La. Ann. 1026, 11 So. Rep. 709), Mun. Corp., 47.
State *v.* New Orleans & N. E. R. Co. (43 Am. & Eng. R. Cas. 263, 42 La. Ann. 11, 7 So. Rep. 84), Mand., 13; Rem. of C., 25.
State *v.* New Orleans & N. E. R. Co. (43 Am. & Eng. R. Cas. 258, 42 La. Ann. 138, 7 So. Rep. 226), Mand., 13; Words & Ph., 79, 121.
State *v.* New Orleans, C. & L. R. Co. (43 Am. & Eng. R. Cas. 276, 42 La. Ann. 550, 7 So. Rep. 606), St. Rys., 164.

State *v.* New Orleans, J. & G. N. R. Co. (20 La. Ann. 489), Direct., 14.
State *v.* Newport St. R. Co. (16 R. I. 533, 18 Atl. Rep. 161), St. Rys., 77.
State *v.* New York, N. H. & H. R. Co. (60 Conn. 326, 22 Atl. Rep. 765), Commerce, 13; Tax., 251.
State *v.* Nicholls (30 La. Ann. 980, 1217), State Aid, 19, 20.
State *v.* Norfolk & W. R. Co. (43 Am. & Eng. R. Cas. 330, 33 W. Va. 440, 10 S. E. Rep. 813), Crim. L., 50.
State *v.* Northeastern R. Co. (9 Rich. (So. Car.) 247), Mand., 10.
State *v.* Northern C. R. Co. (18 Md. 193), For. Corp., 3; Jurisd., 6, 10; Mort., 30; Receiv., 17; Set-off, 4.
State *v.* Northern C. R. Co. (44 Md. 131), Charters, 42; Consol., 28; Tax., 31.
State *v.* Northern Pac. R. Co. (17 Am. & Eng. R. Cas. 475, 32 Minn. 294, 20 N. W. Rep. 234), Tax., 146.
State *v.* Northern Pac. R. Co. (29 Am. & Eng. R. Cas. 219, 36 Minn. 207, 30 N. W. Rep. 663), Reorg., 17; Tax., 233.
State *v.* Northern Pac. R. Co. (39 Minn. 25, 38 N. W. Rep. 635), Tax., 96.
State *v.* North La. & T. R. Co. (25 La. Ann. 65), Charters, 5; Coupons, 7.
State *v.* North La. & T. R. Co. (34 La. Ann. 947), Stock, 1, 56.
State *v.* Norwich & W. R. Co. (30 Conn. 290), Tax., 176.
State *v.* Noyes (47 Me. 189), Charters, 48, 159; Stat., 20.
State *v.* O'Connor (78 Wis. 282, 47 N. W. Rep. 433), Cross. Sts. & H., 71.
State *v.* Ohio & M. R. Co. (23 Ind. 362), Crim. L., 1; Proc., 32.
State *v.* Ohio River R. Co. (56 Am. & Eng. R. Cas. 641, 38 W. Va. 242, 18 S. E. Rep. 582), Crim. L., 32.
State *v.* O'Neil (58 Vt. 140, 2 Atl. Rep. 586), Intox'ing L., 4.
State *v.* Orleans R. Co. (38 La. Ann. 312), Stock, 63.
State *v.* Ormsby County Com'rs (6 Nev. 95), Tax., 272.
State *v.* Ormsby County Com'rs (7 Nev. 392), Tax., 272.
State *v.* Overton (24 N. J. L. 435), By-laws, 2; Eject. Pass., 9, 54; Tickets & F., 40, 60, 112.
State *v.* Paris R. Co. (55 Tex. 76), Evid., 182; Injunc., 14.
State *v.* Parker (16 Nev. 79), Crim. L., 10.
State *v.* Parkville & G. R. R. Co. (32 Mo. 496), Injunc., 14.
State *v.* Parrott (71 N. Car. 311), Crim. L., 11.
State *v.* Passaic (37 N. J. L. 137; affirmed in 37 N. J. L. 538), Sts. & H., 351; Tax., 77.
State *v.* Paterson, N. & N. Y. R. Co. (9 Am. & Eng. R. Cas. 134, 43 N. J. L. 505; affirmed in 45 N. J. L. 186), Mand., 3.
State *v.* Pennsylvania R. Co. (41 N. J. L. 250), Mand., 32.
State *v.* Pennsylvania R. Co. (42 N. J. L. 490), Proc., 16.
State *v.* Pennsylvania R. Co. (45 N. J. L. 82), Mand., 26, 34.
State *v.* Pensacola & A. R. Co. (46 Am. & Eng. R. Cas. 704, 27 Fla. 403, 9 So. Rep. 89), Tickets & F., 116.
State *v.* Perrysburg (14 Ohio St. 472), Mun. Aid, 70, 309.
State *v.* Person (32 N. J. L. 134), Charters, 43; Tax., 128.
State *v.* Person (32 N. J. L. 566), Charters, 41; Tax., 128.
State *v.* Philadelphia, W. & B. R. Co. (45 Md. 361), Charters, 76; Tax., 31, 65; Words & Ph., 171.
State *v.* Philadelphia, W. & B. R. Co. (47 Md. 76, 18 Am. Ry. Rep. 253), Contrib. Neg., 4; Cross., Inj. at, 66; Negl., 61, 100.
State *v.* Philadelphia, W. & B. R. Co. (15 Am. & Eng. R. Cas. 481, 60 Md. 555), Death, etc., 257, 258; Negl., 102.
State *v.* Pittsburg & C. R. Co. (45 Md. 41), Death, etc., 118.
State *v.* Porter (26 Mo. 201), Crim. L., 17.
State *v.* Portland & K. R. Co. (57 Me. 402), Crim. L., 33.
State *v.* Portland & O. R. Co. (58 N. H. 113), Quo War., 2.
State *v.* Portland, S. & P. R. Co. (58 Me. 46), Crim. L., 32; Nuis., 9.
State *v.* Port Royal & W. C. R. Co. (31 So. Car. 609, 10 S. E. Rep. 1104), Mand., 35.
State *v.* Poynier (36 La. Ann. 572), Crim. L., 27.
State *v.* Pullman Palace Car Co. (64 Wis. 89, 23 N. W. Rep. 871), Tax., 399.
State *v.* Putnam County Com'rs (23 Fla. 632, 28 Am. & Eng. Corp. Cas. 164, 3 So. Rep. 164), Cross. Sts. & H., 37.
State *v.* Railroad Com'rs (41 N. J. L. 235), Receiv., 36, 58; Tax., 64, 89.
State *v.* Railroad Com'rs (36 Am. & Eng. R. Cas., 510, 56 Conn. 308, 15 Atl. Rep. 756), Em. Dom., 186; Ry. Com'rs, 18; Sts. & H., 115.
State *v.* Rainey (7 Am. & Eng. R. Cas. 183, 74 Mo. 229), Mun. Aid, 418.
State *v.* Ramsey County Dist. Court (13 Am. & Eng. R. Cas. 419, 31 Minn. 354, 17 N. W. Rep. 954), Tax., 267.
State *v.* Ramsey County Dist. Court (32 Minn. 181, 19 N. W. Rep. 732), St. Rys., 296.
State *v.* Rapp (39 Minn. 65, 38 N. W. Rep. 926), Em. Dom., 3, 62.
State *v.* Ray (52 Am. & Eng. R. Cas. 157, 109 N. Car. 736, 14 S. E. Rep. 83, 14 L. R. A. 529), Crim. L., 46; Tickets & F., 152.
State *v.* Receiver of Taxes (38 N. J. L. 299, 13 Am. Rep. 50), Stat., 57; Words & Ph., 22, 229.
State *v.* Recorder of Mortgages (28 La. Ann. 534), Mort., 91, 92.
State *v.* Republican Valley R. Co. (22 Am. & Eng. R. Cas. 500, 17 Neb. 647, 24 N. W. Rep. 329, 52 Am. Rep. 424), Car. of M., 256; Stat. & D., 15.
State *v.* Republican Valley R. Co. (22 Am. & Eng. R. Cas. 506, 18 Neb. 512, 26 N. W. Rep. 205; adhering to 17 Neb. 647, 24 N. W. Rep. 329), Stat. & D., 19, 28, 29.
State *v.* Richmond & D. R. Co. (72 N. Car.

634), Charters, 54; Constr. Rys., 7; Words & Ph., 93.
State *v.* Richmond & D. R. Co. (73 N. Car. 527), Crim. L., 1.
State *v.* Rio Grande R. Co. (41 Tex. 217), Charters, 86.
State *v.* Ripley County Com'rs (9 Ind. 310), Mun. Aid, 117.
State *v.* Rives (5 Ired. (N. Car.) 297), Dissol., 8, 32; Exec., 1, 26.
State *v.* Rogers (55 Am. & Eng. R. Cas. 530, 22 Oreg. 348, 30 Pac. Rep. 74), Ry. Com'rs, 12; Stat., 67.
State *v.* Roggen (22 Neb. 118, 34 N. W. Rep. 108), Mun. Aid, 161, 313.
State *v.* Roscoe (25 Minn. 445), Mun. Aid, 197.
State *v.* Ross (26 N. J. L. 224), Crim. L., 9; Eject. Pass., 54.
State *v.* Rush County Com'rs (35 Kan. 150, 10 Pac. Rep. 535), Mun. Aid, 110, 167.
State *v.* Rusk (10 Am. & Eng. R. Cas. 642, 55 Wis. 465, 13 N. W. Rep. 452), Land Grants, 127.
State *v.* Ryan (12 Nev. 401), Crim. L., 27.
State *v.* St. Charles St. R. Co. (44 La. Ann. 562, 10 So. Rep. 927), St. Rys., 139.
State *v.* St. Joseph, St. L. & S. F. R. Co. (46 Mo. App. 466), Cross., Inj. at, 103, 111.
State *v.* St. Louis & S. F. R. Co. (29 Mo. App. 301), Judgm., 18; Stockh., 7.
State *v.* St. Louis & S. F. R. Co. (117 Mo. 1, 22 S. W. Rep. 910), Tax., 269.
State *v.* St. Louis County Court (29 Am. & Eng. R. Cas. 192, 13 Mo. App. 53; affirmed in 84 Mo. 234), Tax., 94.
State *v.* St. Louis, I. M. & S. R. Co. (82 Mo. 683), Tax., 269.
State *v.* St. Louis, K. & N. W. R. Co. (29 Am. & Eng. R. Cas. 607, 86 Mo. 288), Sts. & H., 50.
State *v.* St. Louis, K. C. & N. R. Co. (3 Mo. App. 180), Branch & L. Roads, 6; Union D. Cos., 2.
State *v.* St. Louis, K. C. & N. R. Co. (10 Am. & Eng. R. Cas. 652, 75 Mo. 526), Tax., 269.
State *v.* St. Louis, K. C. & N. R. Co. (8 Mo. App. 582, app'x), Tax., 126, 269.
State *v.* St. Louis, K. C. & N. R. Co. (79 Mo. 420; affirming 9 Mo. App. 532), Stat., 17; Tax, 13.
State *v.* St. Louis, K. C. & N. R. Co. (77 Mo. 202), Tax., 36, 91.
State *v.* St. Paul & S. C. R. Co. (35 Minn. 222, 28 N. W. Rep. 245), Charters, 77, 78; Words & Ph., 194.
State *v.* St. Paul, M. & M. R. Co. (30 Minn. 311, 15 N. W. Rep. 307), Tax 180.
State *v.* St. Paul, M. & M. R. Co. (35 Minn. 131, 28 N. W. Rep. 3), Cross. Sts. & H., 25; Em. Dom., 183; Sts. & H., 38, 49.
State *v.* St. Paul, M. & M. R. Co. (34 Am. & Eng. R. Cas. 168, 38 Minn. 246, 36 N. W. Rep. 870), Cross. Sts. & H., 26.
State *v.* St. Paul, M. & M. R. Co. (40 Minn. 353, 42 N. W. Rep. 21), Stat., 65.
State *v.* St. Paul Union Depot Co. (41 Am. & Eng. R. Cas. 636, 42 Minn. 142, 43 N. W. Rep. 840), Tax., 73.
State *v.* Saline County Court (45 Mo. 242), Mun. Aid, 144.
State *v.* Saline County Court (48 Mo. 390), Mun. Aid, 378, 379.
State *v.* Saline County Court (51 Mo. 350, 3 Am. Ry. Rep. 149), Mun. Aid, 136, 301; Stat., 34.
State *v.* Sanderson (54 Mo. 203), Mun. Aid, 352, 418.
State *v.* Saunders (19 Kan. 127), Commerce, 3, 4.
State *v.* Scott (22 Neb. 628, 36 N. W. Rep. 121), Em. Dom., 77; For. Corp., 9.
State *v.* Seaboard & R. R. Co. (52 Fed. Rep. 450), Tax., 101, 277.
State *v.* Seay (23 Mo. App. 623), Em. Dom., 250.
State *v.* Severance (55 Mo. 378), Tax., 36, 127, 269, 287.
State *v.* Shardlow (45 Am. & Eng. R. Cas. 106, 43 Minn. 524, 46 N. W. Rep. 74), Cross. Sts. & H., 60, 80, 84.
State *v.* Sharp (106 Mo. 106, 17 S. W. Rep. 225), Crim. L., 27.
State *v.* Sherman (22 Ohio St. 411), For. Corp., 10; Franch., 4; Quo War., 9; Stockh., 38.
State *v.* Shields (89 Mo. 259, 1 S. W. Rep. 336), Crim. L., 10.
State *v.* Shortridge (56 Mo. 126), Mun. Aid, 449.
State *v.* Shreveport (27 La. Ann. 623), Mun. Aid, 201.
State *v.* Sioux City & N. R. Co. (46 Am. & Eng. R. Cas. 257, 43 Minn. 17, 44 N. W. Rep. 1032), For. Corp., 5.
State *v.* Sioux City & P. R. Co. (3 McCrary (U. S.) 1, 8 Fed. Rep. 794), For. Corp., 2.
State *v.* Sioux City & P. R. Co. (7 Neb. 357), Land Grants, 122.
State *v.* Sloan (67 N. Car. 357, 2 Am. Ry. Rep. 236), Crim. L., 6.
State *v.* Smith (18 Vt. 266, 16 Am. Ry. Rep. 394), Direct., 18, 40; Stock, 24, 31, 51.
State *v.* Somerville & F. R. Co. (28 N. J. L. 21), Charters, 174.
State *v.* South Carolina R. Co. (28 So. Car. 23, 4 S. E. Rep. 796), Bridges, 68.
State *v.* South Carolina R. Corp. (4 So. Car. 376), Tax., 45.
State *v.* Southern Minn. R. Co. (18 Minn. 40) (Gil. 21), Mand., 10.
State *v.* Southern Minn. R. Co. (21 Minn. 344, 19 Am. Ry. Rep. 239), Tax., 80.
State *v.* Southern Pac. R. Co. (55 Am. & Eng. R. Cas. 539, 23 Oreg. 424, 31 Pac. Rep. 960), Charters, 20; Rem. of C., 49; Tax., 279.
State *v.* Southern Pac. R. Co. (24 Tex. 80), Charters, 42, 80, 82; Quo War., 4, 5, 8.
State *v.* Southern R. Co. (100 Mo. 59, 13 S. W. Rep. 398), Em. Dom., 1054.
State *v.* Southwestern R. Co. (70 Ga. 11), Tax., 255, 299, 301.
State *v.* Spartanburg & U. R. Co. (8 So. Car. 129), Coupons, 11; Insolv., 4.
State *v.* Stewart (74 Wis. 620, 28 Am. & Eng. Corp. Cas. 310, 6 L. R. A. 394, 43 N. W. Rep. 947), Em. Dom., 62.
State *v.* Suffolk & C. R. Co. (35 Am. & Eng.

R. Cas. 529, 100 N. Car. 158, 5 S. E Rep. 379), Stat. & D., 4.
State *v.* Sullivan County Court (51 Mo. 522, 3 Am. Ry. Rep. 178), Mun. Aid, 136.
State *v.* Suwannee County Com'rs (21 Fla. 1), Mun. Aid, 442.
State *v.* Thompson (23 Kan. 338), Crim. L., 7.
State *v.* Thompson (20 N. H. 250), Eject. Pass., 28.
State *v.* Trenton (36 N. J. L. 79), Priv. Rds., 2.
State *v.* Trenton (53 N. J. L. 132, 20 Atl. Rep. 1079), Mun. Corp., 10; St. Rys., 263, 267.
State *v.* Trenton (54 N. J. L. 92, 23 Atl. Rep. 281), Cert., 1; Elec. Rys., 11.
State *v.* Troy & B. R. Co. (57 Vt. 144), Crim. L., 32.
State *v.* Tupper (Dudley (So. Car.) 135), Charters, 175; Crim. L., 31.
State *v.* Union R. Co. (42 Am. & Eng. R. Cas. 167, 70 Md. 69, 18 Atl. Rep. 1032), Cross., Inj. at, 122, 218; Death, etc., 293.
State *v.* Union Tp. (8 Ohio St. 394), Mun. Aid, 4.
State *v.* Union Tp. (15 Ohio St. 437), Mun. Aid, 451.
State *v.* Union Trust Co. (68 Mo. 463), Tax., 269.
State *v.* United N. J. R. & C. Co. (10 Am. & Eng. R. Cas. 103, 43 N. J. L. 110), Em. Dom., 93.
State *v.* United States & C. Exp. Co. (60 N. H., 219), Tax., 1, 38.
State *v.* Vanderbilt (3 Am. & Eng. R. Cas. 657, 37 Ohio St. 590), Consol., 4, 17.
State *v.* Van Horne (7 Ohio St. 327), Mun. Aid, 352.
State *v.* Vermont C. R Co. (27 Vt. 103), Crim. L., 31; Stat. & D., 11.
State *v.* Vermont C. R. Co. (28 Vt. 583), Crim. L., 19.
State *v.* Vermont C. R. Co. (30 Vt. 108), Crim. L., 32.
State *v.* Vernon (25 Vt. 244), Crim. L., 21.
State *v.* Vicksburg, S. & P. R. Co. (44 La. Ann. 981, 11 So. Rep. 865), Land Grants, 31.
State *v.* Wabash R. Co. (35 Am. & Eng. R. Cas. 1, 115 Ind. 466, 15 West. Rep. 449, 17 N. E. Rep. 909, 1 L. R. A. 179), Crim. L., 1, 32.
State *v.* Wabash, St. L. & P. R. Co. (25 Am. & Eng. R. Cas. 133, 83 Mo. 144), Stat. & D., 21.
State *v.* Wabash, St. L. & P. R. Co. (83 Mo. 395), Tax., 58.
State *v.* Wabash, St. L. & P. R. Co. (89 Mo. 562, 1 S. W. Rep. 130), Penalty, 11, 16.
State *v.* Wabash, St. L. & P. R. Co. (90 Mo. 166, 2 S. W. Rep. 275), Tax., 58, 184.
State *v.* Wabash, St. L. & P. R. Co. (97 Mo. 296, 10 S. W. Rep. 434), Tax., 8, 269.
State *v.* Walker (85 Mo. 41), Mun. Aid, 40, 418
State *v.* Walsh (42 Am. & Eng. R. Cas. 623, 43 Minn. 444, 45 N. W. Rep. 721), Crim. L., 15.
State *v.* Wapello County (9 Iowa 288), Mun. Aid, 289.
State *v.* Wapello County (13 Iowa 388), Corp., 3; Counties, 2.
State *v.* Washoe County Com'rs (5 Nev. 317), Tax., 272.
State *v.* Weldon (23 Am. & Eng. R. Cas. 134, 47 N. J. L. 59), Charters, 17, 23; Em. Dom., 869.
State *v.* Wentworth (37 N. H. 196), Crim. L., 35.
State *v.* Western & A. R. Co. (66 Ga. 563), Tax., 403.
State *v.* Western Md. R. Co. (21 Am. & Eng. R. Cas. 503, 63 Md. 433), Passes, 10, 16.
State *v.* Western N. C. R. Co. (22 Am. & Eng. R. Cas. 58, 89 N. Car. 584), Crim. L., 5.
State *v.* Western N. C. R. Co. (95 N. Car. 602), Crim. L., 6, 32.
State *v.* Western Union Tel. Co. (113 N. Car. 213, 18 S. E. Rep. 389), Ry. Com'rs, 11.
State *v.* West Wis. R. Co. (34 Wis. 197, 6 Am. Ry. Rep. 242), Dissol., 25; Quo War., 2.
State *v.* Wetherill (41 N. J. L. 147), Tax., 163, 172.
State *v.* Wheadon (39 Ind. 520), Constr. Rys., 3; Mun. Aid, 411.
State *v.* Whitesides (30 So. Car. 579, 9 S. E. Rep. 661, 3 L. R. A. 777), Mun. Aid, 48, 287.
State *v.* Wilkinson (20 Neb. 610, 31 N. W. Rep. 376), Mun. Aid, 340.
State *v.* Wilmington & M. R. Co. (Busb. (N. Car.) 234), Crim. L., 6.
State *v.* Wilmington & W. R. Co. (74 N. Car. 143), Bridges, 3, 33.
State *v.* Wilton R. Co. (19 N. H. 521), Charters, 190.
State *v.* Winona & St. P. R. Co. (19 Minn. 434) (Gil. 377), Penalty, 6.
State *v.* Winona & St. P. R. Co. (21 Minn. 315, 18 Am. Ry. Rep. 440), Tax., 243.
State *v.* Winona & St. P. R. Co. (21 Minn. 472), Contr., 29; Tax., 80.
State *v.* Woodruff (36 N. J. L. 94, 12 Am. Ry. Rep. 424), Consol., 28; Tax., 181, 191.
State *v.* Woodruff S. & P. Coach Co. (33 Am. & Eng. R. Cas. 476, 114 Ind. 155, 15 N. E. Rep. 814, 1 Int. Com. Rep. 798), Int. Com., 192.
State *v.* Yard (43 N. J. L. 121; affirmed in 43 N. J. L. 632), Tax., 274.
State *v.* Yard (11 Am. & Eng. R. Cas. 529, 43 N. J. L. 632), Rip. Rts., 6; Tax., 82, 274.
State *v.* Young (2 Am. & Eng. R. Cas. 348, 29 Minn. 474, 9 N. W. Rep. 737), Mun. Aid, 38.
State Auditor *v.* Jackson County (7 Am. & Eng. Cas. 273, 65 Ala. 142), Tax., 246.
State Board of Agriculture *v.* Citizens' St. R. Co. (47 Ind. 407), Contr., 1; Ult. Vir., 23.
State Board of Assessors *v.* Central R. Co. (24 Am. & Eng. R. Cas. 546, 48 N. J. L. 146, 4 Atl. Rep. 578; reversing 48 N. J. L. 1), Charters, 41; Tax., 1, 39, 62, 97, 274.
State Board of Assessors *v.* Morris & E. R. Co. (49 N. J. L. 193, 7 Atl. Rep. 826), For. Corp., 7; Tax., 39, 59, 92, 154; Words & Ph., 204.

State Board of Assessors *v.* Paterson & R. R. Co. (33 Am. & Eng. R. Cas. 468, 50 N. J. L. 446, 14 Atl. Rep. 610), Charters, 41; Tax., 143, 144, 146.
State Ins. Co. *v.* Oregon R. & N. Co. (20 Oreg. 563, 26 Pac. Rep. 838), Fire Ins., 18; Parties, 6.
State Line & J. R. Co.'s Appeal (77 Pa. St. 429), Charters, 3.
State Line R. Co. *v.* Playford (Pa.) (14 Atl. Rep. 355), Em. Dom., 437, 837; Witn., 122.
Staten Island R. Co., In re (10 N. Y. S. R. 393, 45 Hun 592), Em. Dom., 643, 929.
Staten Island R. T. Co., In re (47 Hun (N. Y.) 396; appeal dismissed in 110 N. Y. 648, mem., 17 N. E. Rep. 873), Em Dom., 924.
Staten Island R. T. R. Co., In re (37 Hun (N. Y.) 422; affirmed in 101 N. Y. 636), Subscr., 20.
Staten Island R. T. R. Co., In re (38 Hun (N. Y.) 381), Bills & N., 9; Incorp., 8; Stock, 16.
Staten Island R. T. R. Co., In re (27 Am. & Eng. R. Cas. 348, 103 N. Y. 251, 8 N. E. Rep. 548, 3 N. Y. S. R. 48; affirming 40 Hun 637, 1 N. Y. S. R. 507), Em. Dom., 342, 346.
Staten Island R. T. R. Co., In re (41 Hun 392, 1 N. Y. S. R. 507; appeal dismissed in 104 N. Y. 680, mem., 7 N. Y. S. R. 868), Em. Dom., 805.
Staten Island R. T. R. Co. *v.* Mayor, etc., of N. Y. (40 Am. & Eng. R. Cas. 607, 119 N. Y. 96, 23 N. E. Rep. 175, 28 N. Y. S. R. 805; affirming 53 Hun 630, mem., 25 N. Y. S. R. 1034, mem., 5 N. Y. Supp. 575, which affirms 2 N. Y. Supp. 680), Ferries, 4.
State Treasurer *v.* Auditor-General (13 Am. & Eng. R. Cas. 296, 46 Mich. 224, 9 N. W. Rep. 258), Consol., 3; For. Corp., 7; Tax., 70, 266.
State Treasurer *v.* Somerville & E. R. Co. (28 N. J. L. 21), Tax., 173.
Staton *v.* Norfolk & C. R. Co. (109 N. Car. 337, 13 S. E. Rep. 933), Waters & W., 26.
Staton *v.* Norfolk & C. R. Co. (52 Am. & Eng. R. Cas. 686, 111 N. Car. 278, 16 S. E. Rep. 181), Charters, 75; Flood. Lds., 86; Words & Ph., 151.
Staub *v.* Kendrick (40 Am. & Eng. R. Cas. 632, 121 Ind. 226, 23 N. E. Rep. 79, 6 L. R. A. 619), Bagg., 41.
Steacy *v.* Little Rock & Ft. S. R. Co. (5 Dill. (U. S.) 348), Stockh., 38, 64.
Steamboat Belfast *v.* Boon (41 Ala. 50), Car. of M., 19.
Steamboat Crystal Palace *v.* Vanderpool (16 B. Mon. (Ky.) 302), Bagg., 79.
Steamboat Farmer *v.* McCraw (26 Ala. 189), Car. of M., 721, 734; Negl., 6; Witn., 15.
Steamboat Keystone *v.* Moies (23 Mo. 243), Car. of M., 239.
Steamboat Missouri *v.* Webb (9 Mo. 193), Bills of L., 12, 13.
Steamboat New World *v.* King (16 How. (U. S.) 469), Passes, 9.
Steamboat State of New York (7 Ben. (U. S.) 450), Bagg., 107.
Steamboat Sultana *v.* Chapman (5 Wis. 454), Car. of M., 254; Custom, 5.
Steam Gauge & L. Co. *v.* Williams (50 Fed. Rep. 931, 1 U. S. App. 218, 2 C. C. A. 83; affirming 42 Fed. Rep. 843), Pat. for Inv., 40.
Steamship City of Brussels (6 Ben. (U. S.) 370), Death, etc., 2.
Stearn *v.* Pullman Car Co. (21 Am. & Eng. R. Cas. 443, 8 Ont. 471), Sleep. Car Cos., 34.
Stearns *v.* Atlantic & St. L. R. Co. (46 Me. 95), Fires, 28, 137, 142, 159, 170.
Stearns *v.* Old Colony & F. R. R. Corp. (1 Allen (Mass.) 493), Animals, 286; Fences, 10.
Stearns County *v.* St. Cloud, M. & A. R. Co. (36 Minn. 425, 32 N. W. Rep. 91), Injunc., 14.
Stebbins *v.* Central Vt. R. Co. (11 Am. & Eng. R. Cas. 79, 54 Vt. 464, 41 Am. Rep. 855), Fires, 331.
Stebbins *v.* Pueblo County Com'rs (2 McCrary (U. S.) 196, 4 Fed. Rep. 282), Mun. Aid, 217.
Stebbins *v.* Union Pac. R. Co. (2 Wyom. 71), Assump., 4; Bills & N., 1; Officers, 12; Paym., 5.
Stedman *v.* Western Transp. Co. (48 Barb. (N. Y.) 97), Car. of M., 37, 454, 476; Negl., 112.
Steeg *v.* St. Paul City R. Co. (52 Am. & Eng. R. Cas. 550, 50 Minn. 149, 52 N. W. Rep. 393, 16 L. R. A. 379, 20 Wash. L. Rep. 541), St. Rys., 326.
Steele *v.* Central R. Co. (43 Iowa 109), Employés, Inj. to, 311, 327, 633.
Steele *v.* Charlotte, C. & A. R. Co. (11 So. Car. 589), App., 24.
Steele *v.* Charlotte, C. & A. R. Co. (14 So. Car. 324), New Tr., 99.
Steele *v.* Grand Trunk R. Co. (31 U. C. C. P. 260), Car. of M., 424, 705.
Steele *v.* Midland R. Co. (L. R. 1 Ch. 275, 12 Jur. N. S. 218, 14 W. R. 367, 14 L. T. 3), Em. Dom., 1104.
Steele *v.* Midland R. Co. (21 L. T. 387), Em. Dom., 1204.
Steele *v.* Missouri Pac. R. Co. (84 Mo. 57), Animals, 607.
Steele *v.* Pacific Coast R. Co. (32 Am. & Eng. R. Cas. 333, 74 Cal. 323, 15 Pac. Rep. 851), Fires, 236, 240, 300; Trial, 55.
Steele *v.* Pittsburg, S. & L. E. R. Co. (36 N. Y. S. R. 198, 58 Hun 611, 12 N. Y. Supp. 576), Injunc., 49.
Steele *v.* Townsend (37 Ala. 247), Car. of M., 111; Evid., 138; Lim. of Liab., 27.
Steelton *v.* East Harrisburg Pass. R. Co. (1 Pa. Dist. 667), St. Rys., 95.
Steen *v.* St. Paul & D. R. Co. (37 Minn. 310, 34 N. W. Rep. 113), Employés, Inj. to, 101.
Steenrod *v.* Wheeling, P. & B. R. Co. (27 W. Va. 1), Em. Dom., 916; Spec. Perf., 5.
Steers *v.* Liverpool, N. Y. & P. Steamship Co. (57 N. Y. 1), Tickets & F., 14.
Steever *v.* Illinois C. R. Co. (16 Am. & Eng. R. Cas. 53, 62 Iowa 371, 17 N. W. Rep. 595), Penalty, 10.
Steffe *v.* Old Colony R. Co. (156 Mass. 262, 30 N. E. Rep. 1137), Att'ys, 11; Employés, Inj. to, 516, 619; Fel. Serv., 185.

Steffen *v.* Chicago & N. W. R. Co. (46 Wis. 259, 50 N. W. Rep. 348), Employés, Inj. to, 14, 182, 662; Negl., 102.
Steffenson *v.* Chicago, M. & St. P. R. Co. (45 Minn. 355, 47 N. W. Rep. 1068; further appeal 48 Minn. 285, 51 N. W. Rep. 610), Fel. Serv., 188.
Steffenson *v.* Chicago, M. & St. P. R. Co. (48 Minn. 285, 51 N. W. Rep. 610; former appeal 45 Minn. 355), App., 122; Trial, 93.
Steffenson *v.* Chicago, M. & St. P. R. Co. (51 Minn. 531, 53 N. W. Rep. 800), Negl., 91.
Steiger *v.* Erie R. Co. (5 Hun (N. Y.) 345), Lim. of Liab., 2.
Steiglider *v.* Missouri Pac. R. Co. (38 Mo. App. 511), Actions, 13.
Stein *v.* Railway Co. (10 Phila. (Pa.) 440), Death, etc., 242.
Stein *v.* Union Depot Co. (11 Mo. App. 599), Negl., 8.
Steinbrunner *v.* Pittsburg & W. R. Co. (146 Pa. St. 504, 23 Atl. Rep. 239), Death, etc., 284, 344.
Steiner *v.* Central R. Co. (60 Ga. 552), Attach., 44; Proc., 45.
Steiner *v.* Philadelphia Traction Co. (41 Am. & Eng. R. Cas. 535, 134 Pa. St. 199, 19 Atl. Rep. 491), Cable Rys., 17.
Steines *v.* Franklin County (48 Mo. 167), Mun. Aid, 22.
Steinmetz *v.* Metropolitan El. R. Co. (18 N. Y. Supp. 209), Elev. Rys., 72, 148, 181.
Steinweg *v.* Erie R. Co. (43 N. Y. 123), Bills of L., 78.
Stenhouse *v.* Charlotte, C. & A. R. Co. (70 N. Car. 542), Evid., 206.
Stephen *v.* La Banque d' Hochelaga (2 Montr. L. R. 491), Exec., 18.
Stephen *v.* Smith (29 Vt. 160), Eject. Pass., 65.
Stephens *v.* Benton (1 Duv. (Ky.) 112), Estop., 17.
Stephens *v.* Cork & K. J. R. Co. (6 Ir. R. Eq. 604), Reorg., 19.
Stephens *v.* Davenport & St. P. R. Co. (36 Iowa 327), Animals, 644, 645, 647.
Stephens *v.* Fox (83 N. Y. 313; affirming 17 Hun 435), Stockh., 74.
Stephens *v.* Hannibal & St. J. R. Co. (28 Am. & Eng. R. Cas. 538, 86 Mo. 221), Employés, Inj. to, 169, 276, 318; Fel. Serv., 218.
Stephens *v.* Hannibal & St. J. R. Co. (38 Am. & Eng. R. Cas. 110, 96 Mo. 207, 9 S. W. Rep. 589), Dam., 67, 70, 73, 74, 86; Employés, Inj. to, 435, 441; Fel. Serv., 313, 322.
Stephens *v.* Hudson Valley Knitting Co. (69 Hun (N. Y.) 375), Employés, Inj. to, 39.
Stephens *v.* London & S. W. R. Co. (18 Q. B. D. 121, 56 L. J. Q. B. 161, 56 L. T. 220, 5 Ry. & Ct. Cas. vii.), Car. of M., 524.
Stephens *v.* Nashville, C. & St. L. R. Co. (11 Am. & Eng. R. Cas. 671, 10 Lea (Tenn.) 448), Death, etc., 48.
Stephens *v.* St. Louis & S. F. R. Co. (50 Am. & Eng. R. Cas. 618, 47 Fed. Rep. 530), Rem. of C., 34, 56.
Stephens *v.* United Railroads Stock Yard Co. (29 Ohio St. 227), Liens, 13.
Stephens & C. Transp. Co. *v.* Central R. Co. (33 N. J. L. 229), Bridges, 64; Charters, 4; Pl., 9.
Stephens & C. Transp. Co. *v.* Central R. Co. (34 N. J. L. 280), Bridges, 68; Pl., 18.
Stephenson *v.* Brooklyn Cross-Town R. Co. (114 U. S. 149, 5 Sup. Ct. Rep. 777), Pat. for Inv., 2.
Stephenson *v.* Duncan (73 Wis. 404, 41 N. W. Rep. 337), Employés, Inj. to, 524.
Stephenson *v.* Grand Trunk R. Co. (34 Mich. 323), Fences, 87.
Stephenson *v.* New York & H. R. Co. (2 Duer (N. Y.) 341), Med. Serv., 12.
Stephenson *v.* Oatman (3 Lea (Tenn.) 462), Em. Dom., 486.
Stephenson *v.* Seaboard & R. R. Co. (11 Am. & Eng. R. Cas. 299, 86 N. Car. 455), Mort., 78.
Stephenson *v.* Southern Pac. R. Co. (93 Cal. 558, 29 Pac. Rep. 234), Agency, 81.
Stephenson *v.* Texas & P. R. Co. (42 Tex. 162), App., 132; Proc., 35.
Stephenson *v.* United States Exp. Co. (21 Wis., 405), Exp. Cos., 41.
Stepp *v.* Chicago, R. I. & P. R. Co. (85 Mo. 229), Cross., Inj. at, 120, 177, 178, 198, 264, 275; Death, etc., 227; Evid., 287; Negl., 28, 43, 103.
Sterett *v.* Denver & R. G. R. Co. (17 Hun (N. Y.) 316), Proc., 24.
Stern *v.* Michigan C. R. Co. (76 Mich. 591, 43 N. W. Rep. 587), Animals, 70; Cat.-Gds., 7, 10; Negl., 100.
Stern *v.* Wisconsin C. R. Co. (1 Fed. Rep. 555), Mort., 176.
Sternberg *v.* State (56 Am. & Eng. R. Cas. 424, 36 Neb. 307, 54 N. W. Rep. 553), St. Rys., 261.
Sternberger *v.* Cape Fear & Y. V. R. Co. (35 Am. & Eng. R. Cas. 693, 29 So. Car. 510, 7 S. E. Rep. 836, 2 Int. Com. Rep. 426, 2 L. R. A. 105), Int. Com., 221.
Sternberger *v.* Manhattan R. Co. (41 N. Y. S. R. 626, 16 N. Y. Supp. 539), Elev. Rys., 151.
Sternberger *v.* Metropolitan El. R. Co. (49 N. Y. S. R. 231, 20 N. Y. Supp. 857, 2 Misc. 113), Elev. Rys., 101, 114.
Sterry *v.* New York El. R. Co. (3 Silv. App. 599, 129 N. Y. 619, mem., 41 N. Y. S. R. 119, 29 N. E. Rep. 68; affirming 36 N. Y. S. R. 1023, 14 N. Y. Supp. 958), Elev. Rys., 86, 93.
Stertz *v.* Stewart (74 Wis. 160, 42 N. W. Rep. 214), Fires, 248; Witn., 112.
Stetler *v.* Chicago & N. W. R. Co. (46 Wis. 497, 21 Am. Ry. Rep. 402), Employés, Inj. to, 45, 54; Fel. Serv., 33, 57, 462, 515.
Stetler *v.* Chicago & N. W. R. Co. (49 Wis. 609, 6 N. W. Rep. 303), Car. of M., 255; Contrib. Neg., 18; Fel. Serv., 62; Pl., 125; Priv. Rds., 3.
Stetson *v.* Chicago & E. R. Co. (75 Ill. 74), Em. Dom., 726; Sts. & H., 141, 213, 224.
Steubenville *v.* McGill (41 Ohio St. 235), Sts. & H., 361.
Steubenville & I. R. Co. *v.* North Tp. (1 Ohio St. 105), Mun. Aid, 46.

Steubenville & I. R. Co. *v.* Patrick (7 Ohio St. 170), Em. Dom., 963.
Steubing *v.* New York El. R. Co. (64 Hun 639, mem., 19 N. Y. Supp. 313, 46 N. Y. S. R. 799; affirmed in 138 N. Y. 658, mem., 34 N. E. Rep. 369, 53 N. Y. S. R. 186, 30 Abb. N. Cas. 319), Elev. Rys., 193; Evid., 35; Witn., 82.
Steubing *v.* New York El. R. Co. (53 N. Y. S. R. 186, 30 Abb. N. Cas. 319, 138 N. Y. 658, 34 N. E. Rep. 369), Elev. Rys., 127, 128, 167, 175.
Steunkle *v.* Chicago, S. F. & C. R. Co. (42 Mo. App. 73), Agency, 114.
Stevens *v.* Anson (73 Me. 489), Mun. Aid, 167.
Stevens *v.* Boston & M. R. Co. (1 Gray (Mass.) 277), Car. of M., 171.
Stevens *v.* Boston & W. R. Corp. (8 Gray (Mass.) 262), Bills of L., 125; Car. of M., 382.
Stevens *v.* Buffalo & N. Y. C. R. Co. (31 Barb. (N. Y.) 590), Mort., 51.
Stevens *v.* Buffalo, C. & N. Y. R. Co. (45 How. Pr. (N. Y.) 104), Mort., 46; Usury, 1.
Stevens *v.* Central R. & B. Co. (34 Am. & Eng. R. Cas. 413, 80 Ga. 19, 5 S. E. Rep. 253), Evid., 28.
Stevens *v.* Corbitt (33 Mich. 458), Int., 8; Subscr., 15, 36.
Stevens *v.* Davison (8 Gratt. (Va.) 819), By-laws, 1; Direct., 58; Receiv., 1, 31.
Stevens *v.* Eldridge (4 Cliff. (U. S.) 348), Mort., 132.
Stevens *v.* Erie R. Co. (21 N. J. Eq. 259), Em. Dom., 47; Land Grants, 4, 123.
Stevens *v.* European & N. A. R. Co. (66 Me. 74, 19 Am. Ry. Rep. 48), Car. of P., 647; Derailm., 5; Evid., 125.
Stevens *v.* Great Western R. Co. (52 L. T. 324, 49 J. P. 310), Car. of M., 285.
Stevens *v.* Lake George & M. R. R. Co. (82 Mich. 426, 46 N. W. Rep. 730), Tax., 306, 308, 309.
Stevens *v.* Metropolitan Dist. R. Co. (L. R. 29 Ch. D. 60, 54 L. J. Ch. D. 737, 52 L. T. 832, 33 W. R. 531), Constr. Rys., 5.
Stevens *v.* Mid-Hants R. Co. (29 L. T. 318), Exec., 31.
Stevens *v.* Mid-Hants R. Co. (42 L. J. Ch. 694, L. R. 8 Ch. 1064, 21 W. R. 858), Reorg., 19.
Stevens *v.* Midland Counties R. Co. (10 Ex. 352, 2 C. L. R. 1300, 18 Jur. 932, 23 L. J. Ex. 328), Mal. Pros., 1, 3, 4.
Stevens *v.* New York & O. M. R. Co. (13 Blatchf. (U. S.) 104), Tax., 89, 342, 353.
Stevens *v.* New York & O. M. R. Co. (13 Blatchf. (U. S.) 412), Mort., 272.
Stevens *v.* New York El. R. Co. (130 N. Y. 95, 28 N. E. Rep. 667, 40 N. Y. S. R. 632; affirming 25 J. & S. 416, 29 N. Y. S. R. 361, 8 N. Y. Supp. 313), Elev. Rys., 130.
Stevens *v.* Paterson & N. R. Co. (20 N. J. Eq. 126), Injunc., 6, 7.
Stevens *v.* Paterson & N. R. Co. (34 N. J. L. 532), Rip. Rts., 1, 6.
Stevens *v.* Rutland & B. R. Co. (29 Vt. 545), Stockh., 87.
Stevens *v.* San Francisco & N. P. R. Co. (100 Cal. 554, 35 Pac. Rep. 165), Fel. Serv., 148, 282, 503.
Stevens *v.* Union Trust Co. (57 Hun 498, 33 N. Y. S. R. 130), Judgm., 18; Mort., 182.
Stevens *v.* Watson (4 Abb. App. Dec. (N. Y.) 302), Mort., 46.
Stevens County *v.* St. Paul, M. & M. R. Co. (29 Am. & Eng. R. Cas. 225, 36 Minn. 467, 31 N. W. Rep. 942), Charters, 169; Tax., 34, 207, 231.
Stevenson *v.* Chicago & A. R. Co. (5 McCrary (U. S.) 634, 18 Fed. Rep. 493), Contrib. Neg., 42.
Stevenson *v.* Jewett (16 Hun (N. Y.) 210), Fel. Serv., 358.
Stevenson *v.* Loehr (57 Ill. 509), Em. Dom., 435; Vend. & P., 7.
Stevenson *v.* New Orleans Pac. R. Co. (35 La. Ann. 498), Animals, 342; Fences, 13.
Stevenson *v.* Texas & P. R. Co. (12 Am. & Eng. R. Cas. 393, 105 U. S. 703), Exec., 5, 16, 29.
Steves *v.* Oswego & S. R. Co. (18 N. Y. 422), Cross., Inj. at, 101, 198.
Steward *v.* North Metropolitan Tramways Co. (16 Q. B. D. 556; dismissing appeal from 16 Q. B. D. 178), Pl., 155.
Stewart's Appeal (56 Pa. St. 413), Contr., 5.
Stewart's Appeal (72 Pa. St. 291), Reorg., 13.
Stewart *v.* Altstock (22 Oreg. 182, 29 Pac. Rep. 553), Land Grants, 74.
Stewart *v.* Baltimore & O. R. Co. (33 W. Va. 88, 10 S. E. Rep. 26), Fires, 172; Just. P., 3.
Stewart *v.* Boston & P. R. Co. (34 Am. & Eng. R. Cas. 499, 146 Mass. 605, 6 N. Eng. Rep. 273, 16 N. E. Rep. 466), Car. of P., 352.
Stewart *v.* Brooklyn & C. T. R. Co. (12 Am. & Eng. R. Cas. 127, 90 N. Y. 588, 43 Am. Rep. 185), Assault, 4; Car. of P., 304.
Stewart *v.* Burlington & M. R. R. Co. (11 Iowa 62), Trial, 187.
Stewart *v.* Burlington & M. R. R. Co. (32 Iowa 561, 10 Am. Ry. Rep. 1), Animals, 285.
Stewart *v.* Camden & A. R. Co. (33 N. J. L. 115), Ejectm., 22, 25, 28, 34.
Stewart *v.* Chesapeake & O. Canal Co. (4 Hughes (U. S.) 41, 5 Fed. Rep. 149), Jurisd., 9; Receiv., 19.
Stewart *v.* Chicago & N. W. R. Co. (27 Iowa 282), Animals, 158, 645.
Stewart *v.* Cincinnati, W. & M. R. Co. (80 Mich. 166, 44 N. W. Rep. 1116; further appeal 89 Mich. 315, 50 N. W. Rep. 852), Farm Cross., 14.
Stewart *v.* Cincinnati, W. & M. R. Co. (49 Am. & Eng. R. Cas. 456, 89 Mich. 315, 50 N. W. Rep. 852; former appeal 80 Mich. 166, 44 N. W. Rep. 1116), Evid., 36; Farm Cross., 11; Trial, 45.
Stewart *v.* Erie & W. Transp. Co. (17 Minn. 372, 5 Am. Ry. Rep. 333, 8 Am. Ry. Rep. 149), Car. of M., 595; Contr., 64; Stockh., 121; Ult. Vir., 1.
Stewart *v.* Everts (44 Am. & Eng. R. Cas. 313, 76 Wis. 35, 44 N. W. Rep. 1092), Evid., 90, 91, 92; Witn., 173.
Stewart *v.* Great Western R. Co. (2 DeG., J. & S. 319, 11 Jur. N. S. 627, 13 W. R. 907,

13 L. T. N. S. 79), Acc. & Sat., 6; Receipts, 2.
Stewart *v.* Houston & T. C. R. Co. (62 Tex. 246), Assign., 3; Att'ys, 14; Comprom., 3.
Stewart *v.* Hoyt (16 Am. & Eng. R. Cas. 513, 111 U. S. 373, 4 Sup. Ct. Rep. 519), Leases, 66.
Stewart *v.* Huntington (4 N. Y. S. R. 760, 43 Hun 635, mem., Contr., 82.
Stewart *v.* International & G. N. R. Co. (2 Am. & Eng. R. Cas. 497, 53 Tex. 289), Car. of P., 265, 272, 548.
Stewart *v.* Lansing (7 Am. & Eng. R. Cas. 225, 104 U. S. 505), Mun. Aid, 370, 432.
Stewart *v.* Lehigh Valley R. Co. (37 N. J. L. 53), Contr., 21.
Stewart *v.* Lehigh Valley R. Co. (38 N. J. L. 505, 13 Am. Ry. Rep. 54; affirming 36 N. J. L. 259), Contr., 56; Direct., 45; Leases, 29; Words & Ph., 82.
Stewart *v.* Little Miami R. Co. (14 Ohio 353), Charters, 68.
Stewart *v.* London & N. W. R. Co. (3 H. & C. 135, 10 Jur. N. S. 805, 33 L. J. Exch. 199, 12 W. R. 689, 10 L. T. N. S. 302), Bagg., 98.
Stewart *v.* Long Island R. Co. (102 N. Y. 601, 8 N. E. Rep. 200, 2 N. Y. S. R. 557; reversing 32 Hun 68), Leases, 3.
Stewart *v.* Louisville & N. R. Co. (83 Ala. 493, 4 So. Rep. 373), Death, etc., 95.
Stewart *v.* Manhattan, A. & B. R. Co. (27 Kan. 631), Animals, 361.
Stewart *v.* Merchants' Despatch Transp. Co. (47 Iowa 229), Bills of L., 78.
Stewart *v.* Metropolitan El. R. Co. (24 J. & S. 377, 4 N. Y. Supp. 445, 21 N. Y. S. R. 472), Elev. Rys., 50.
Stewart *v.* Minneapolis & St. L. R. Co. (36 Minn. 355), Tax., 328.
Stewart *v.* Newport News & M. V. Co. (86 Va. 988, 11 S. E. Rep. 885), Death, etc., 175.
Stewart *v.* New York, O. & W. R. Co. (28 N. Y. S. R. 215, 54 Hun 638, 5 Silv. Sup. Ct. 198, 8 N. Y. Supp. 19; affirmed in 126 N. Y. 631, mem., 36 N. Y. S. R. 1013), Employés, Inj. to, 317; Fel. Serv., 88, 141.
Stewart *v.* North British R. Co. (5 Sc. Sess. Cas. (4th series) 426, 3 Ry. & C. T. Cas. xi), Car. of M., 267.
Stewart *v.* Norwalk Trustees (22 Ohio St. 323), Mun. Aid, 116.
Stewart *v.* Ohio River R. Co. (38 W. Va. 438, 18 S. E. Rep. 604), Sts. & H., 274.
Stewart *v.* Pennsylvania Co. (2 Ind. App. 142, 28 N. E. Rep. 211), Fences, 58.
Stewart *v.* Pennsylvania Co. (130 Ind. 242, 29 N. E. Rep. 916), Contrib. Neg., 72; Death, etc., 174.
Stewart *v.* Pennsylvania R. Co. (Ind.) (14 Am. & Eng. R. Cas. 679), Cross., Inj. at, 331.
Stewart *v.* Philadelphia, W. & B. R. Co. (Del.) (17 Atl. Rep. 639), Contrib. Neg., 100; Employés, Inj. to, 2, 35, 38, 309; Fel. Serv., 73.
Stewart *v.* Polk County Sup'rs (30 Iowa 9), Mun. Aid, 31; Tax., 2.
Stewart *v.* Raymond R. Co. (15 Mass. 568), Em. Dom., 192, 852, 1034.
Stewart *v.* St. Louis, Ft. S. & W. R. Co. (41 Fed. Rep. 736), Direct., 45.
Stewart *v.* St. Paul, M. & M. R. Co. (43 Minn. 268, 45 N. W. Rep. 431), Employés, Inj. to, 660.
Stewart *v.* Sixth Ave. R. Co. (45 Fed. Rep. 21), New. Tr., 24.
Stewart *v.* Terre Haute & I. R. Co. (1 McCrary (U. S.) 312, 3 Fed. Rep. 768), Car. of M., 609.
Stewart *v.* Western Union R. Co. (4 Biss. (U. S.) 362), Leases, 68.
Stewart-Chute Lumber Co. *v.* Missouri Pac. R. Co. (39 Am. & Eng. R. Cas. 566, 28 Neb. 39, 44 N. W. Rep. 47), Liens, 11, 19.
Stickley *v.* Chesapeake & O. R. Co. (52 Am. & Eng. R. Cas. 56, 93 Ky. 323, 20 S. W. Rep. 261), Leases, 90.
Stickney *v.* Goudy (132 Ill. 213, 23 N. E. Rep. 1034), Eq., 19.
Stickney *v.* Maidstone (30 Vt. 738, Negl., 49.
Stiles *v.* Atlanta & W. P. R. Co. (8 Am. & Eng. R. Cas. 195, 65 Ga. 370), Car. of P., 90.
Stiles *v.* Davis (1 Black (U. S.) 101), Car. of M., 161.
Stiles *v.* Western R. Corp. (11 Metc. (Mass.) 376), Witn., 11.
Stillings *v.* Gibson (63 N. H. 1), Liens, 45.
Stillman *v.* Northen Pac., F. & B. H. R. Co. (34 Minn. 420, 26 N. W. Rep. 399), Em. Dom., 613, 701.
Stillson *v.* Hannibal & St. J. R. Co. (67 Mo. 671), Children, Inj. to, 124, 127; Sts. & H., 415.
Stilwell *v.* New York C. R. Co. (34 N. Y. 29), Evid., 192; Fly. Switch, 1.
Stilwell *v.* St. Louis & H. R. Co. (39 Mo. App. 221), Priv. Ways, 1, 5, 12.
Stimpson *v.* Baltimore & S. R. Co. (10 How. (U. S.) 329), Pat. for Inv., 33.
Stimpson *v.* Union Pac. R. Co. (8 Utah [illegible] 31 Pac. Rep. 449), Animals, 102; [illegible] 65.
Stimpson *v.* Union Pac. R. Co. (9 Utah [illegible] 33 Pac. Rep. 369), Animals, 6, 102, 45[illegible]
Stimson *v.* Connecticut River R. Co. (98 Mass. 83), Bagg., 24, 42.
Stimson *v.* Jackson (58 N. H. 138), Car. of M., 90, 190.
Stimson *v.* Milwaukee, L. S. & W. R. Co. (44 Am. & Eng. R. Cas. 381, 75 Wis. 381, 44 N. W. Rep. 748), Car. of P., 572, 583; Trial, 66.
Stinson *v.* Chicago, St. P. & M. R. Co. (27 Minn. 284, 6 N. W. Rep. 784), Em. Dom., 620, 650.
Stinson *v.* New York C. R. Co. (32 N. Y. 333), Car. of L. S., 130.
Stirk *v.* Central R. & B. Co. (79 Ga. 495, 5 S. E. Rep. 105), Employés, Inj. to, 34, 732; Evid., 75.
Stirn *v.* Metropolitan El. R. Co. (21 N. Y. S. R. 71, 51 Hun 640, 4 N. Y. Supp. 323), Elev. Rys., 137.
Stitt *v.* Eastern R. Co. (22 Fed. Rep. 649), Pat. for Inv., 35.
Stock *v.* Great Western R. Co. (7 U. C. C. P. 526), Constr. Rys., 106.

Stock *v.* Great Western R. Co. (9 U. C. C. P. 134), Constr. Rys., 108.
Stockmeyer *v.* Reed (55 Fed. Rep. 259), Employés, Inj. to, 4; Fel. Serv., 79, 213, 310, 355.
Stockport, T. & A. R. Co., In re (10 Jur. N. S. 614, 33 L. J. Q. B. 251, 10 L. T. 426, 12 W. R. 726), Em. Dom., 1191, 1193.
Stocksbridge Railway Bill, Ex parte (L. R. 2 Eq. 364), Incorp., 6.
Stockstill *v.* Dayton & M. R. Co. (24 Ohio St. 83), Trial, 71.
Stockton *v.* Baltimore & N. Y. R. Co. (1 Int. Com. Rep. 411, 32 Fed. Rep. 9), Bridges, 60; Commerce, 2; Em. Dom., 380; Int. Com., 1; Proc., 16.
Stockton *v.* Central R. Co. (51 Am. & Eng. R. Cas. 1, 50 N. J. Eq. 52, 24 Atl. Rep. 964), Corp., 4, 9; Injunc., 36; Leases, 12, 29; Stat., 34.
Stockton *v.* Central R. Co. (50 N. J. Eq. 489, 25 Atl. Rep. 942), Receiv., 11.
Stockton *v.* Powell (29 Fla. 1, 10 So. Rep. 688), Commerce, 1.
Stockton & C. R. Co. *v.* Galgiani (49 Cal. 139, 7 Am. Ry. Rep. 263), Em. Dom., 601, 893, 950.
Stockton & D. R. Co. *v.* Barrett (11 C. & F. 598, 8 Scott N. R. 641, 7 M. & G. 870), Charges, 7; Words & Ph., 209.
Stockton & D. R. Co. *v.* Brown (9 H. L. Cas. 246, 6 Jur. N. S. 1168, 8 W. R. 708), Em. Dom., 1089.
Stockton & L. Gravel Road Co. *v.* Stockton & C. R. Co. (45 Cal. 680), Incorp., 11.
Stockton & L. Gravel Road Co. *v.* Stockton & C. R. Co. (53 Cal. 11), Tresp., 16.
Stockton & V. R. Co. *v.* Stockton (41 Cal. 147, 3 Am. Ry. Rep. 102), Em. Dom., 180; Mun. Aid, 26, 72.
Stockton & V. R. Co. *v.* Stockton (51 Cal. 328, 12 Am. Ry. Rep. 85), Mun. Aid, 243.
Stockwell *v.* Chicago, C. & D. R. Co. (43 Iowa 470), Trial, 43.
Stoddard *v.* Delaware & H. Canal Co. (42 N. Y. S. R. 73, 62 Hun 619, mem., 16 N. Y. Supp. 621), Trial, 15.
Stoddard *v.* Long Island R. Co. (5 Sandf. (N. Y.) 180), Car. of M., 624; Lim. of Liab., 27.
Stoddard *v.* St. Louis, K. C. & N. R. Co. (65 Mo. 514), Employés, Inj. to, 738.
Stodder *v.* New York, L. E. & W. R. Co. (2 N. Y. Supp. 780, 19 N. Y. S. R. 772, 50 Hun 221; affirmed in 121 N. Y. 655, mem., 24 N. E. Rep. 1092), App., 61; Car. of P., 173; Evid., 97.
Stodghill *v.* Chicago, B. & Q. R. Co. (43 Iowa 26, 14 Am. Ry. Rep. 398), Em. Dom., 992.
Stodghill *v.* Chicago, B. & Q. R. Co. (53 Iowa 341, 5 N. W. Rep. 495), Judgm., 22; Waters & W., 22.
Stoeckman *v.* Terre Haute & I. R. Co. (15 Mo. App. 503), Death, etc., 120; Employés, Inj. to, 211, 600; Evid., 173.
Stoessiger *v.* Southeastern R. Co. (3 El. & Bl. 549, 2 C. L. R. 1595, 18 Jur. 605, 23 L. J. Q. B. 293), Car. of M., 527.
Stoher *v.* St. Louis, I. M. & S. R. Co. (31 Am. & Eng. R. Cas. 229, 91 Mo. 509, 10 West. Rep. 54, 4 S. W. Rep. 389), Culverts, 3, 12; Dam., 105; Death, etc., 388, 392; Evid., 91, 286; Negl., 69.
Stoher *v.* St. Louis, I. M. & S. R. Co. (105 Mo. 192, 16 S. W. Rep. 591), Derailm., 8; Employés, Inj. to, 51; Negl., 32.
Stoker *v.* Welland R. Co. (13 U. C. C. P. 386), Employés, Inj. to, 445.
Stokes *v.* Eastern Counties R. Co. (2 F. & F. 691), Negl., 17.
Stokes *v.* S..ltonstall (13 Pet. (U. S.) 181), Car. of P., 102, 104, 436.
Stokes *v.* Scott County (10 Iowa 166), Mun. Aid, 268.
Stokes *v.* Suffolk & C. R. Co. (107 N. Car. 178, 11 S. E. Rep. 991), Stat. & D., 92.
Stokes Bay R. & P. Co. *v.* London & S. W. R. Co. (2 Ry. & C. T. Cas. 143), Ry. Com'rs, 6.
Stokoe *v.* St. Paul, M. & M. R. Co. (40 Minn. 545, 42 N. W. Rep. 482), Att'ys, 22.
Stolt *v.* Chicago, M. & St. P. R. Co. (49 Minn. 353, 51 N. W. Rep. 1103), App., 131; Just. P., 15.
Stone *v.* Boston & M. R. Co. (7 Gray (Mass.) 539), Assign. for Cred., 5.
Stone *v.* Cheshire R. Co. (19 N. H. 427), Blasting, 2.
Stone *v.* Chicago & N. W. R. Co. (47 Iowa 82, 17 Am. Ry. Rep. 461), Car. of P., 41, 310; Eject. Pass., 9, 51; Tickets & F., 40, 47; Trial, 182.
Stone *v.* Chicago & W. M. R. Co. (30 Am. & Eng. R. Cas. 600, 66 Mich. 76, 9 West. Rep. 596, 33 N. W. Rep. 24), Release, 15; Witn., 195, 198.
Stone *v.* Commercial R. Co. (4 M. & C. 122, 1 Railw. Cas. 375), Em. Dom., 1125.
Stone *v.* Commercial R. Co. (9 Sim. 621), Em. Dom., 1104.
Stone *v.* Detroit, G. H. & M. R. Co. (3 Int. Com. Rep. 60, 3 Int. Com. Com. 613), Int. Com., 59.
Stone *v.* Dry Dock, E. B. & B. R. Co. (38 Am. & Eng. R. Cas. 489, 115 N. Y. 104, 21 N. E. Rep. 712, 23 N. Y. S. R. 551; reversing 46 Hun 184, 11 N. Y. S. R. 537), Children, Inj. to, 103, 105, 109; Evid., 133.
Stone *v.* Fairbury, P. & N. W. R. Co. (68 Ill. 394), Sts. & H., 255, 291.
Stone *v.* Farmers' L. & T. Co. (23 Am. & Eng. R. Cas. 577, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191), Charges, 4, 8, 24; Charters, 15; Ry. Com'rs, 1; Tickets & F., 114.
Stone *v.* Illinois C. R. Co. (23 Am. & Eng. R. Cas. 597, 116 U. S. 347, 6 Sup. Ct. Rep. 348, 388, 1191), Mun. Aid, 22.
Stone *v.* Natchez, J. & C. R. Co. (21 Am. & Eng. R. Cas. 17, 62 Miss. 646), Ry. Com'rs, 16.
Stone *v.* New Orleans & N. E. R. Co. (22 Am. & Eng. R. Cas. 606, 116 U. S. 352, 6 Sup. Ct. Rep. 349, 391), Ry. Com'rs, 7.
Stone *v.* Oregon City Mfg. Co. (4 Oreg. 52), Employés, Inj. to, 101, 238, 296.
Stone *v.* Pennsylvania R. Co. (41 Am. & Eng. R. Cas. 522, 132 Pa. St. 206, 19 Atl. Rep. 67), Fel. Serv., 193.
Stone *v.* Rice (58 Ala. 95), Car. of M., 253.

Stone *v.* South Carolina (117 U. S. 430, 6 Sup. Ct. Rep. 799), Rem. of C., 54.
Stone *v.* Wabash, St. L. & P. R. Co. (9 Ill. App. 48), Bills of L., 16, 108, 111; Replev., 2.
Stone *v.* Western Transp. Co. (38 N. Y. 240), Pl., 60.
Stone *v.* Wisconsin (94 U. S. 181), Charters, 139.
Stone *v.* Yazoo & M. V. R. Co. (21 Am. & Eng. R. Cas. 6, 62 Miss. 607, 52 Am. Rep. 193), Charges, 4, 12; Ry. Com'rs, 1, 16.
Stoneback *v.* Thomas Iron Co. (Pa.) (4 Atl. Rep. 721), Bridges, 103.
Stoneham *v.* London, B. & S. C. R. Co. (41 L. J. Q. B. 1, L. R. 7 Q. B. 1, 25 L. T. 788, 20 W. R. 77), Em. Dom., 1150, 1155.
Stoneham *v.* Ocean R. & G. A. I. Co. (19 Q. B. D. 237), Acc. Ins., 8.
Stoneham Branch R. Co. *v.* Gould (2 Gray (Mass.) 277), Subscr., 50, 187.
Stoneman *v.* Atlantic & P. R. Co. (58 Mo. 503), Animals, 194.
Stoneman *v.* Erie R. Co. (52 N. Y. 429; affirming 1 Sheld. 286), Bagg., 38; Husb. & W., 28.
Stoner *v.* Pennsylvania Co. (21 Am. & Eng. R. Cas. 340, 98 Ind. 384, 49 Am. Rep. 764), Car. of P., 371, 554.
Stoops *v.* Greenburgh & B. Plank-road Co. (10 Ind. 47), Estop., 5.
Stoothoff *v.* Long Island R. Co. (32 Hun (N. Y.) 437), Assign., 4.
Storck *v.* Metropolitan El. R. Co. (50 Am. & Eng. R. Cas. 287, 131 N. Y. 514, 30 N. E. Rep. 497, 43 N. Y. S. R. 730; affirming 27 J. & S. 588, 39 N. Y. S. R. 263, 14 N. Y. Supp. 311), Elev. Rys., 115, 149, 170.
Storm Lake *v.* Iowa Falls & S. C. R. Co. (20 Am. & Eng. R. Cas. 420, 62 Iowa 218, 17 N. W. Rep. 489), Sts. & H., 20.
Storrs *v.* Pensacola & A. R. Co. (29 Fla. 617, 11 So. Rep. 226), Ry. Com'rs, 2, 9, 25.
Story *v.* Chicago, M. & St. P. R. Co. (79 Iowa 402, 44 N. W. Rep. 690), Animals, 201, 236; Evid., 289.
Story *v.* Jersey City & B. P. Plank-road Co. (16 N. J. Eq. 13), Stockh., 87.
Story *v.* New York & H. R. Co. (6 N. Y. 85; reversing 6 Barb. 419), Constr. Rys., 119.
Story *v.* New York El. R. Co. (7 Am. & Eng. R. Cas. 596, 90 N. Y. 122, 11 Abb. N. Cas. 236; reversing 3 Abb. N. Cas. 478), Elev. Rys., 43, 50, 54, 68, 74.
Stott *v.* Grand Trunk R. Co. (24 U. C. C. P. 347), Fright. Teams, 3.
Stott *v.* New York, L. E. & W. R. Co. (50 N. Y. S. R. 500, 66 Hun 633, mem., 21 N. Y. Supp. 353), Cross., Inj. at, 327; Evid., 236.
Stough *v.* Chicago & N. W. R. Co. (30 Am. & Eng. R. Cas. 396, 71 Iowa 641, 33 N. W. Rep. 149), Em. Dom., 956; Sts. & H., 262.
Stourbridge Canal Co. *v.* Wheeley (2 B. & Ad. 792, 1 Ry. & C. T. Cas. 22), Stat., 45.
Stout *v.* Indianapolis & St. L. R. Co. (41 Ind. 149), App., 6.
Stout *v.* Sioux City & P. R. Co. (3 McCreary (U. S.) 1, 8 Fed. Rep. 794), Charters, 12; Fed. Cts., 10; For. Corp., 17.
Stout *v.* Sioux City & P. R. Co. (2 Dill. (U. S.) 294), Children, Inj. to, 25.
Stouter *v.* Manhattan R. Co. (6 N. Y. Supp. 163, 3 Silv. Sup. Ct. 413, 25 N. Y. S. R. 683; affirmed in 127 N. Y. 661, 3 Silv. App. 472, 38 N. Y. S. R. 162, 27 N. E. Rep. 805), Evid., 49, 231; New Tr., 69.
Stouter *v.* Manhattan R. Co. (127 N. Y. 661, 3 Silv. App. 472, 38 N. Y. S. R. 162, 27 N. E. Rep. 805), Car. of P., 568; Witn., 165.
Stoutimore *v.* Chicago, M. & St. P. R. Co. (39 Mo. App. 257), Animals, 387.
Stowe *v.* New York, B. & P. R. Co. (113 Mass. 521), Car. of M., 336, 752.
Stowell *v.* Stowell (9 Am. & Eng. R. Cas. 598, 45 Mich. 364, 8 N. W. Rep. 70), Bills & N., 10.
Strader *v.* Marietta & C. R. Co. (2 Cin. Super. Ct. 268; reversed on other grounds in 29 Ohio St. 448), Contrib. Neg., 122.
Strahan *v.* Malvern (77 Iowa 454, 42 N. W. Rep. 369), Mun. Corp., 2; Vend. & P., 6.
Strahorn *v.* Union S. Y. & T. Co. (43 Ill. 424), Car. of M., 291.
Straiton *v.* New York & N. H. R. Co. (2 E. D. Smith (N. Y.) 184), Car. of P., 518.
Straits of Canseau Marine R. Co. *v.* Queen (2 Can. Exch. 113), Em. Dom., 1239, 1241.
Stranahan *v.* Sea View R. Co. (84 N. Y. 308), Elev. Rys., 1.
Strand *v.* Chicago & W. M. R. Co. (28 Am. & Eng. R. Cas. 213, 64 Mich. 216, 31 N. W. Rep. 184), Car. of P., 428; Trial, 184.
Strand *v.* Chicago & W. M. R. Co. (31 Am. & Eng. R. Cas. 54, 67 Mich. 380, 11 West. Rep. 538, 34 N. W. Rep. 712), Car. of P., 147, 400, 434; Contrib. Neg., 28.
Strang *v.* Beloit & M. R. Co. (16 Wis. 635), Em. Dom., 314, 500, 789.
Strang *v.* Montgomery & E. R. Co. (3 Woods (U. S.) 613), Mort., 242.
Strange *v.* Houston & T. C. R. Co. (4 Am. & Eng. R. Cas. 338, 53 Tex. 162), Stock, 79.
Strasburg R. Co. *v.* Echternacht (21 Pa. St. 220), Subscr., 6.
Stratford & H. R. Co., In re (38 U. C. Q. B. 112), Mun. Aid, 234.
Stratford & M. R. Co. *v.* Stratton (2 B. & Ad. 519), Subscr., 59, 60.
Strathmore, In re (L. R. 18 Eq. 338), Em. Dom., 1148.
Stratton *v.* Central City Horse R. Co. (1 Am. & Eng. R. Cas. 115, 95 Ill. 25), Comp. Neg., 4, 16; St. Rys., 468; Trial, 145, 154.
Stratton *v.* European & N. A. R. Co. (74 Me. 422), Fires, 163.
Stratton *v.* European & N. A. R. Co. (17 Am. & Eng. R. Cas. 277, 76 Me. 269), Fires, 163, 175.
Stratton *v.* Omaha & R. V. R. Co. (37 Neb. 477, 55 N. W. Rep. 1058), Ejectm., 1.
Straub *v.* Eddy (47 Mo. App. 189), Animals, 334, 548; Fences, 58.
Straugh *v.* Detroit, L. & N. R. Co. (32 Am. & Eng. R. Cas. 164, 65 Mich. 706, 9 West. Rep. 592, 36 N. W. Rep. 161), Cross., Inj. at, 251.
Straughan *v.* Indianapolis & St. L. R. Co.

(38 Ind. 185, 10 Am. Ry. Rep. 263), Subscr., 28.
Straus *v.* Kansas City, St. J. & C. B. R. Co. (6 Am. & Eng. R. Cas. 384, 75 Mo. 185), Car. of P., 246, 247, 428; Contrib. Neg., 10.
Straus *v.* Kansas City, St. J. & C. B. R. Co. (27 Am. & Eng. R. Cas. 170, 86 Mo. 421; affirming 75 Mo. 185), Car. of P., 234, 247; Witn., 104.
Strauss *v* Chesapeake & O. R. Co. (7 W. Va. 368), Constr. Rys., 32, 36.
Strawberry Hill *v.* Chicago, M. & St. P. R. Co. (41 Fed. Rep. 568), Pl., 84.
Strawbridge *v.* Baltimore & O. R. Co. (14 Md. 360), Stat. Acts., 11.
Street *v.* Craven County Com'rs (70 N. Car. 644), Mun. Aid., 393, 422.
Street *v.* Morrison (10 New Brun. 296), Car. of M., 69.
Street *v.* New Orleans, Ft. J. & G. I. R. Co. (43 La. Ann. 116, 9 So. Rep. 15), Em. Dom., 1008.
Street *v.* Old Town Bank (67 Md. 421, 10 Atl. Rep. 319), Direct., 61.
Streeter *v.* Chicago, M. & St. P. R. Co. (40 Wis. 294, 13 Am. Ry. Rep. 439), Tickets & F., 134.
Streeter *v.* Chicago, M. & St. P. R. Co. (44 Wis. 383, 18 Am. Ry. Rep. 196), Charges, 58.
Street R. Co. *v.* Nolthenius (19 Am. & Eng. R. Cas. 191, 40 Ohio St. 376), Contrib. Neg., 64; Witn., 99.
Streetsville Plank-road Co. *v.* Hamilton & T. R. Co. (13 U. C. Q. B. 600), Bridges, 17.
Stretton *v.* Great Western & B. R. Co. (40 L. J. Ch. 50), Em. Dom., 1124.
Streubel *v.* Milwaukee & M. R. Co. (12 Wis., 67), Stat., 68.
Streyer *v.* Georgia Southern & F. R. Co. (51 Am. & Eng. R. Cas. 638, 90 Ga. 56, 15 S. E. Rep. 637), Em. Dom., 163; Sts. & H., 133, 262, 274.
Strickland *v.* Pennsylvania R. Co. (154 Pa. St. 348, 26 Atl. Rep. 431), Em. Dom., 433; Words & Ph., 129.
Strickler *v.* Midland R. Co. (125 Ind. 412, 25 N. E. Rep. 455), Estop., 26; Lim. of Ac., 24.
Strider *v.* Winchester & P. R. Co. (21 Gratt. (Va.) 440), Agency, 69.
Stringer *v.* Keokuk, Mt. P. & N. R. Co. (11 Am. & Eng. R. Cas. 608, 59 Iowa 277, 13 N. W. Rep. 308), Em. Dom., 216.
Stringer *v.* Missouri Pac. R. Co. (96 Mo. 299, 9 S. W. Rep. 905), Agency, 75; Tresp., Inj. to, 109
Stringham *v.* Cook (75 Wis. 589, 44 N. W. Rep. 777), Evid., 275.
Stringham *v.* Oshkosh & M. R. Co. (33 Wis. 471), Em. Dom., 92, 954.
Stringham *v.* Stewart (100 N. Y. 516, 3 N. E. Rep. 575; reversing 27 Hun 562, 64 How. Pr. 5), Fel. Serv., 64.
Stroble *v.* Chicago, M. & St. P. R. Co (28 Am. & Eng. R. Cas. 510, 70 Iowa 555, 31 N. W. Rep. 63), Employés, Inj. to, 350; Fel. Serv., 177.
Strohecker *v.* Alabama & C. R. Co. (42 Ga. 509), Waters & W., 30, 31.
Strohm *v.* New York, L. E. & W. R. Co. (19 Am. & Eng. R. Cas 167, 96 N. Y. 305; reversing 32 Hun 20), Witn., 168.
Strohn *v.* Detroit & M. R. Co. (21 Wis. 554), Car. of M., 406, 434, 747.
Strohn *v.* Detroit & M. R. Co. (23 Wis. 126), Car. of M., 12; Words & Ph., 7.
Stromeyer *v.* Combes (15 Daly 29, 2 N. Y. Supp. 232, 18 N. Y. S. R. 154), Stockh., 97.
Strong *v.* Brooklyn (68 N. Y. 1), Em. Dom., 1024.
Strong *v.* Brooklyn Cross-Town R. Co. (93 N. Y. 426), Stock, 30.
Strong *v.* Canton, A. & N. R. Co. (Miss.) (3 So. Rep. 465), Sts. & H., 317.
Strong *v.* Grand Trunk R. Co. (15 Mich. 206), Custom, 2.
Strong *v.* Sacramento & P. R. Co. (8 Am. & Eng. R. Cas. 273, 61 Cal. 326), Comp. Neg., 21; Contrib. Neg., 21; Cross., Inj. at, 13, 172, 204, 215, 219, 221, 247, 261, 294; Fright. Teams, 1.
Stroub *v.* Manhattan R. Co. (14 N. Y. Supp. 773; affirmed in 27 J. & S. 505, 39 N. Y. S. R. 378, 15 N. Y. Supp. 135), Elev. Rys., 40.
Stroudsburg *v.* Stroudsburg Pass. R. Co. (2 Pa. Dist. 35), St. Rys., 87; Sts. & H., 151.
Stroudsburg *v.* Wilkesbarre & E. R. Co. (2 Pa. Dist. 507), Sts. & H., 227.
Strough *v.* Jefferson County Sup'rs (119 N. Y. 212, 23 N. E. Rep. 552, 28 N. Y. S. R. 967; affirming 50 Hun 54, 3 N. Y. Supp. 110, 23 N. Y. S. R. 940), Assump., 4; Lim. of Ac., 44.
Strouss *v.* Wabash, St. L. & P. R. Co. (17 Fed. Rep. 209), Bagg., 12.
Strubbee *v.* Cincinnati R. Co. (78 Ky. 481), Tresp., 21.
Struthers *v.* Dunkirk, W. & P. R. Co. (87 Pa. St. 282), Sts. & H., 215, 287.
Struthers *v.* New York El. R. Co (54 N. Y. S. R. 785, 5 Misc. 239, 25 N. Y. Supp. 81), Elev. Rys., 102, 175, 179.
Strutzel *v.* St. Paul City R. Co. (47 Minn. 543, 50 N. W. Rep. 690), Children, Inj. to, 62, 116; Death, etc., 433.
Stryker, In re (73 Hun 327, 55 N. Y. S. R. 903, 26 N. Y. Supp. 209), Receiv., 92.
Stuart *v.* Crawley (2 Stark. 323), Car. of L. S., 116.
Stuart *v.* Havens (17 Neb. 211, 22 N. W. Rep. 419), Phys. Exam., 2, 5.
Stuart *v.* James River & K. Co. (24 Gratt. (Va.) 294), State Aid, 37.
Stuart *v.* Valley R. Co. (32 Gratt. (Va.) 27), Subscr., 27.
Stuart *v.* Valley R. Co. (32 Gratt. (Va.) 146), Jurisd., 8; Subscr., 8, 67, 107, 112, 167.
Stubbs *v.* Clarinda, C. S. & S. W. R. Co. (20 Am. & Eng. R. Cas. 492, 65 Iowa 513, 22 N. W. Rep. 654), Liens, 36, 40.
Stubley *v.* London & N. W. R. Co. (4 H. & C. 83, L. R. 1 Ex. 13, 11 Jur. N. S. 954, 35 L. J. Ex. 3, 14 W. R. 133, 13 L. T. 376), Cross., Inj. at, 85.
Stucke *v.* Milwaukee & M. R. Co. (9 Wis. 202), Animals, 50; Corp., 14.

Studer *v.* Buffalo & L. H. R. Co. (25 U. C. Q. B. 160), Animals, 144; Fences, 86.
Studley *v.* St. Paul & D. R. Co. (48 Minn. 249, 51 N. W. Rep. 115), Cross., Inj. at, 252, 320; Tresp., Inj. to, 121.
Stuebing *v.* Marshall (10 Daly (N. Y.) 406, 2 Civ. Pro. 77), Death, etc., 171.
Stuettgen *v.* Wisconsin C. Co. (80 Wis. 498, 50 N. W. Rep. 407), Death, etc., 358; Fences, 89.
Sturge *v.* Midland R. Co. (4 Jur. N. S. 273), Passes, 3.
Sturgeon *v.* St. Louis, K. C. & N. R. Co. (65 Mo. 569), App., 55; Car. of L. S., 156, 159.
Sturges *v.* Keith (57 Ill. 451), Trover, 16, 18.
Sturges *v.* Knapp (31 Vt. 1), Leases, 70, 94; Mort., 140.
Sturges *v.* Knapp (33 Vt. 486; former appeal 31 Vt. 1), Injunc., 54, 65, 66.
Sturges *v.* Knapp (36 Vt. 439), Injunc., 67.
Sturges *v.* Stetson (1 Biss. (U. S.) 246), Stock, 19, 52.
Sturges *v.* Stetson (3 Phila. (Pa.) 304), Bills & N., 23; Direct., 37.
Sturges *v.* Vanderbilt (73 N. Y. 384), Direct., 16; Dissol., 2, 29.
Sturgess *v.* Bissell (46 N. Y. 462), Car. of M., 758.
Sturgis *v.* Detroit, G. H. & M. R. Co. (72 Mich. 619, 40 N. W. Rep. 914), Stat. & D., 98; Tresp., Inj. to, 22.
Sturtevant *v.* Milwaukee, W. & B. V. R. Co. (11 Wis. 63), Em. Dom., 921, 933.
Stutsman County *v.* Wallace (142 U. S. 293, 12 Sup. Ct. Rep. 227), Tax., 329.
Stutz *v.* Chicago & N. W. R. Co. (69 Wis. 312, 34 N. W. Rep. 147), App., 23.
Stutz *v.* Chicago & N. W. R. Co. (37 Am. & Eng. R. Cas. 187, 73 Wis. 147, 40 N. W. Rep. 653), Car. of P., 620, 627; Dam., 44.
Stuyvesant *v.* Pearsall (15 Barb. (N. Y.) 244), Injunc., 32.
Styler *v.* Long Island R. Co. (75 Hun (N. Y.) 547, 27 N. Y. Supp. 1113), App., 117.
Suarez *v.* Manhattan R. Co. (39 N. Y. S. R. 549, 60 Hun 584, 15 N. Y. Supp. 222), Elev. Rys., 68, 93.
Suburban Rapid Transit Co., In re (38 Hun (N. Y.) 553; affirming 16 Abb. N. Cas. 152), Elev. Rys., 12, 14, 15, 44.
Suburban Rapid Transit Co. *v.* Mayor, etc., of N. Y. (128 N. Y. 510, 28 N. E. Rep. 525, 40 N. Y. S. R. 498; reversing 60 Hun 577, 37 N. Y. S. R. 642, 14 N. Y. Supp. 230), Rap. T. Acts, 7.
Sue, The (22 Fed. Rep. 843), Col. Pers., 8.
Suffield *v.* New Haven & N. Co. (53 Conn. 367, 5 Atl. Rep. 366), Ry. Com'rs, 21.
Sugarman *v.* Manhattan El. R. Co. (42 N. Y. S. R. 30, 16 N. Y. Supp. 533), App., 57; Fires, 328.
Suiter *v.* New York, L. E. & W. R. Co. (7 N. Y. S. R. 687, 44 Hun 627), Cross., Inj. at, 329.
Sullens *v.* Chicago, R. I. & P. R. Co. (74 Iowa 659, 7 Am. St. Rep. 501, 38 N. W. Rep. 545), Culverts, 21; Flood. Lds., 96; Lim. of Ac., 56; Trial, 188; Waters & W., 24.
Sullivan *v.* Boston & A. R. Co. (156 Mass. 378, 31 N. E. Rep. 128), Children, Inj. to, 41.
Sullivan *v.* Hannibal & St. J. R. Co. (72 Mo. 195), Animals, 187; Evid., 291.
Sullivan *v.* Hannibal & St. J. R. Co. (88 Mo. 169), Contrib. Neg., 110.
Sullivan *v.* Hannibal & St. J. R. Co. (107 Mo. 66, 17 S. W. Rep. 748), Fel. Serv., 327.
Sullivan *v.* Maine C. R. Co. (41 Am. & Eng. R. Cas. 195, 82 Me. 196, 19 Atl. Rep. 169), Sunday, 5.
Sullivan *v.* Mississippi & M. R. Co. (11 Iowa 421), Fel. Serv., 172.
Sullivan *v.* Missouri Pac. R. Co. (97 Mo. 113, 10 S. W. Rep. 852), Death, etc., 25, 136; Employés, Inj to, 159; Fel. Serv., 124, 441.
Sullivan *v.* Missouri Pac. R. Co. (117 Mo. 214, 23 S. W. Rep. 149), Contrib. Neg., 112, 113; Cross., Inj. at, 318; Death, etc., 317; Negl., 27.
Sullivan *v.* New York, N. H. & H. R. Co. (19 Blatchf. (U. S.) 388, 11 Fed. Rep. 848), Pl., 66.
Sullivan *v.* New York, N. H. & H. R. Co. (61 How. Pr. (N. Y.) 490, 1 Civ. Pro. 285), Actions, 11.
Sullivan *v.* New York, N. H. & H. R. Co. (154 Mass. 524, 28 N. E. Rep. 911), Cross., Inj. at, 259.
Sullivan *v.* New York, N. H. & H. R. Co. (62 Conn. 209, 25 Atl. Rep. 711), Fel. Serv., 134, 146, 196, 213, 324, 483.
Sullivan *v.* North Hudson County R. Co. (40 Am. & Eng. R. Cas. 324, 51 N. J. L. 518, 18 Atl. Rep. 689), Elev. Rys., 41; Em. Dom., 962.
Sullivan *v.* Old Colony R. Co. (148 Mass. 119, 18 N. E. Rep. 678), Eject. Pass., 43.
Sullivan *v.* Old Colony R. Co. (153 Mass. 118, 26 N. E. Rep. 240), Death, etc., 220.
Sullivan *v.* Oregon R. & N. Co. (21 Am. & Eng. R. Cas. 391, 12 Oreg. 392, 7 Pac. Rep. 508), Car. of P., 639; Dam., 34; Evid., 174.
Sullivan *v.* Oregon R. & N. Co. (42 Am. & Eng. R. Cas. 625, 19 Oreg. 319, 24 Pac. Rep. 408), Animals, 87, 127.
Sullivan *v.* Pennsylvania Co. (Pa.) (7 Atl. Rep. 177), Cross., Inj at, 344.
Sullivan *v.* Philadelphia & R. R. Co. (30 Pa. St. 234), Car. of P., 131, 161, 182, 211, 584, 590, 609.
Sullivan *v.* Portland & K. R. Co. (4 Cliff. (U. S.) 212; affirmed in 94 U. S. 806, 16 Am. Ry. Rep. 181), Reorg., 4.
Sullivan *v.* Portland & K. R. Co. (94 U. S. 806, 16 Am. Ry. Rep. 181), Reorg., 4.
Sullivan *v.* Thompson (99 Mass. 259), Exp. Cos., 42.
Sullivan *v.* Tioga R. Co. (112 N. Y. 643, 20 N. E. Rep. 569, 21 N. Y. S. R. 827, 8 Am. St. Rep. 793; affirming 44 Hun 304, 7 N. Y. S. R. 627, 12 Civ. Pro. 301), Death, etc., 294; Fel. Serv., 127.
Sullivan *v.* Toledo, W. & W. R. Co. (58 Ind. 26), Death, etc., 146; Fel. Serv., 1, 25, 202, 438.
Sullivan *v.* Union Pac. R. Co. (3 Dill. (U. S.) 334), Death, etc., 417.
Sullivan *v.* Union Pac. R. Co. (1 McCrary

(U. S.) 301, 2 Fed. Rep. 447), Death, etc., 1, 417.
Sullivan *v.* Utah & N. R. Co. (11 Mont. 236, 28 Pac. Rep. 307), Strikes, 7.
Sullivan *v.* Vicksburg, S. & P. R. Co. (30 Am. & Eng. R. Cas. 168, 39 La. Ann. 800, 2 So. Rep. 586), App., 128; Stat. & D., 69.
Sullivan *v.* Wabash, St. L. & P. R. Co. (58 Iowa 602, 12 N. W. Rep. 620), App., 117.
Sully *v.* Drennan (113 U. S. 287, 5 Sup. Ct. Rep. 453), Rem. of C., 27.
Sulphur Springs & M. P. R. Co. *v.* St. Louis, A. & T. R. Co. (2 Tex. Civ. App. 650, 22 S. W. Rep. 107, 23 S. W. Rep. 1012), Charters, 83, 92; Dissol., 28, 32; Tresp., to Try Title, 2.
Sulzbach *v.* Thomson (17 Phila. (Pa.) 530), Mort., 155.
Summerhays *v.* Kansas Pac. R. Co. (2 Colo. 484, 20 Am. Ry. Rep. 359), Fel. Serv., 1, 153, 488, 491.
Summers *v.* Crescent City R. Co. (34 La. Ann. 139, 44 Am. Rep. 419), St. Rys., 380.
Summers *v.* Hannibal & St. J. R. Co. (29 Mo. App. 41), Animals, 93, 351, 508; Fences, 69.
Summerville *v.* Hannibal & St. J. R. Co. (62 Mo. 391), Agency, 115.
Summerville *v.* Hannibal & St. J. R. Co. (29 Mo. App. 48), Animals, 65.
Summitt *v.* State (9 Am. & Eng. R. Cas. 302, 8 Lea (Tenn.) 413, 41 Am. Rep. 637), Hacks, etc., 2.
Sumner *v.* Chandler (18 New Brun. 175), Agency, 117.
Sumner *v.* Charlotte, C. & A. R. Co. (78 N. Car. 289, 16 Am. Ry. Rep. 201), Agency, 9.
Sumner *v.* Southern R. Assoc. (9 Am. & Eng. R. Cas. 18, 7 Baxt. (Tenn.) 345), Car. of M., 657.
Sumner *v.* Walker (30 Fed. Rep. 261), Car. of M., 541.
Sunbury & E. R. Co. *v.* Cooper (33 Pa. St. 278), Canals, 5.
Sunbury & E. R. Co. *v.* Hummell (27 Pa. St. 99), Em. Dom., 702.
Sunderland *v.* Westcott (2 Sweeney (N. Y.) 260, 40 How. Pr. 468), Car. of M., 216; Lim. of Liab., 14.
Sunflower Oil Co. *v.* Wilson (48 Am. & Eng. R. Cas. 664, 142 U. S. 313, 12 Sup. Ct. Rep. 235), Leases, 3.
Sunflower River Packet Co. *v.* Georgia Pac. R. Co. (39 Fed. Rep. 229), Waters & W., 4.
Surface *v.* Hannibal & St. J. R. Co. (60 Mo. 216), Car. of L. S., 113.
Surface *v.* Hannibal & St. J. R. Co. (63 Mo. 452), Car. of L. S., 113.
Survey *v.* Wells (5 Cal. 124), Exp. Cos., 90.
Susquehanna & W. V. R. & C. Co. *v.* Blatchford (11 Wall. (U. S.) 172), Fed. Cts., 3.
Sussex R. Co. *v.* Morris & E. R. Co. (19 N. J. Eq. 13; reversed in 19 N. J. Eq. 574), Connect. L., 4, 5; Contr., 21; Spec. Perf., 2.
Sutherland *v.* Great Western R. Co. (7 U. C. C. P. 409), Passes, 21.
Sutherland *v.* New York C. & H. R. R. Co. (9 J. & S. (N. Y.) 17), Cross., Inj. at, 65, 249; Evid., 299.
Sutherland *v.* Second Nat. Bank (6 Am. & Eng. R. Cas. 368, 78 Ky. 250), Attach, 47; Car. of M., 291.
Sutherland *v.* Troy & B. R. Co. (46 Hun 372, 11 N. Y. S. R. 841), Death, etc., 301.
Sutherland *v.* Troy & B. R. Co. (8 N. Y. Supp. 83, 54 Hun 639, 28 N. Y. S. R. 201; reversed in 125 N. Y. 737, 35 N. Y. S. R. 853), Death, etc., 202; Employés, Inj. to, 23, 665; Fel. Serv., 500; Trial, 109.
Sutherland *v.* Troy & B. R. Co. (125 N. Y. 737, mem., 26 N. E. Rep. 609, 35 N. Y. S. R. 853), Employés, Inj. to, 427, 451; Fel. Serv., 484.
Sutherland *v.* Troy & B. R. Co. (74 Hun 162, 26 N. Y. Supp. 237, 56 N. Y. S. R. 397), Death, etc., 216, 235.
Sutliff *v.* Cleveland & M. R. Co. (24 Ohio St. 147, 6 Am. Ry. Rep. 356), Stock, 19.
Sutliff *v.* Lake County (47 Fed. Rep. 106), Mun. Aid, 381.
Sutro *v.* Fargo (9 J. & S. (N. Y.) 231), Car. of M., 152, 154.
Sutro *v.* Manhattan R. Co. (50 N. Y. S. R. 701, 137 N. Y. 592, 33 N. E. Rep. 334; reversing 17 N. Y. Supp. 957, 42 N. Y. S. R. 958), Elev. Rys., 139, 166, 175.
Sutter St. R. Co. *v.* Baum (66 Cal. 44, 4 Pac. Rep. 916), Direct., 46.
Sutton *v.* Great Western R. Co. (3 H. & C. 800, 11 Jur. N. S. 879, 35 L. J. Ex. 18, 13 W. R. 1091, 13 L. T. 221), Charges, 28; Discrim., 35.
Sutton *v.* London & S. W. R. Co. (37 L. T. 158), Charges, 28.
Sutton *v.* New York C. & H. R. R. Co. (66 N. Y. 243; reversing 4 Hun 760), Licensees, Inj to, 19.
Sutton *v.* New York, L. E. & W. R. Co. (50 N. Y. S. R. 514, 66 Hun 632, 21 N. Y. Supp. 312), Fel. Serv., 508.
Sutton *v.* Southeastern R. Co. (4 H. & C. 325, 13 L. T. 438, L. R. 1 Ex. 33, 35 L. J. Ex. 38), Car. of M., 531; Charges, 46.
Suver *v.* Chicago, S. F. & C. R. Co. (123 Ill. 293, 14 N. E. Rep. 12, 11 West. Rep. 726), Em. Dom., 320, 822, 895.
Suydam *v.* Grand St. & N. R. Co. (17 Abb. Pr. (N. Y.) 304, 41 Barb. 375), St. Rys., 487, 515; Trial, 183.
Suydam *v.* Moore (8 Barb. (N. Y.) 358), Animals, 126, 324; Charters, 43; Stat., 16.
Suydam *v.* New York El. R. Co. (46 N. Y. S. R. 360, 64 Hun 635, 19 N. Y. Supp. 49), Elev. Rys., 121.
Swain *v.* Fourteenth St. R. Co. (93 Cal. 179, 28 Pac. Rep. 829), App., 72, 125; St. Rys., 458, 464, 466, 488.
Swaine *v.* Great Northern R. Co. (4 DeG., J. & S. 211), Nuis., 20.
Swainson *v.* Northwestern R. Co. (47 L. J. Ex. D. 372, 38 L. T. 201, 26 W. R. 413, L. R. 3 Ex. D. 341; reversing 37 L. T. 102, 25 W. R. 676), Fel. Serv., 126, 202.
Swan, In re (150 U. S. 637, 14 Sup. Ct. Rep. 225), Intox'ing L., 3.
Swan *v.* Burlington, C. R. & N. R. Co. (72 Iowa 650, 34 N. W. Rep. 457), Injunc., 2; Mort., 259.
Swan *v.* Chicago, S. F. & C. R. Co. (38 Mo. App. 588), Em. Dom., 799, 866.

Swan *v.* Manchester & L. R. Co. (6 Am. & Eng. R. Cas. 327, 132 Mass. 116, 42 Am. Rep. 432), Eject. Pass., 7, 24, 51; Tickets & F., 121.
Swan *v.* Williams (2 Mich. 427), Charters, 163; Em. Dom., 34, 128.
Swank *v.* San Antonio & A. P. R. Co. (1 Tex. Civ. App. 675, 23 S. W. Rep. 249), Car. of L. S., 97.
Swann *v.* Clark (17 Am. & Eng. R. Cas. 354, 100 U. S. 602, 4 Sup. Ct. Rep. 241), Receiv., 99.
Swann *v.* Gaston (87 Ala. 569, 6 So. Rep. 386), Adv. Poss., 5; Land Grants, 16; Lim. of Ac., 7, 22; Mort., 38.
Swann *v.* Jenkins (82 Ala. 478, 2 So. Rep. 136), Land Grants, 18.
Swann *v.* Larmore (14 Am. & Eng. R. Cas. 519, 70 Ala. 555), Land Grants, 17.
Swann *v.* Lindsey (14 Am. & Eng. R. Cas. 504, 70 Ala. 507), Land Grants, 17.
Swann *v.* Miller (82 Ala. 530, 1 S. Rep. 65), Agency, 68; Land Grants, 58.
Swann *v.* Southern Exp. Co. (53 Miss. 286), Evid., 187.
Swann *v.* State (77 Ala. 545), Tax., 151.
Swann *v.* Wright (17 Am. & Eng. R. Cas. 345, 110 U. S. 590, 4 Sup. Ct. Rep. 235), Mort., 255.
Swansea I. & T. Co. *v.* Swansea & M. R. Co. (3 Ry. & C. T. Cas. 339), Leases, 124.
Swansea I. & T. Co. *v.* Swansea U. S. Authority ([1892] 1 Q. B. 357), Tax., 380.
Swanson *v.* Chicago, St. P. & K. C. R. Co. (35 Fed. Rep. 638), Att'ys, 20.
Swanson *v.* Melton (4 Tex. App. (Civ. Cas.) 459, 17 S. W. Rep. 1088), Animals, 199.
Swarthout *v.* Chicago & N. W. R. Co. (49 Wis. 625, 6 N. W. Rep. 314, 21 Am. Ry. Rep. 153), Fire Ins., 11; Parties, 6.
Swartout *v.* New York C. & H. R. R. Co. (7 Hun (N. Y.) 571), Witn., 134.
Swartwout *v.* Michigan Air Line R. Co. (24 Mich. 389, 4 Am. Ry. Rep. 63), Direct., 36; Estop., 5; Incorp., 11; Stat., 34; Subscr., 51, 93, 105, 128, 131, 156, 167, 224.
Swasey *v.* North Carolina R. Co. (71 N. Car. 571), State Aid, 28.
Swasey *v.* North Carolina R. Co. (1 Hughes (U. S.) 17), Fed. Cts., 11; Pledge, etc., 2; Stock, 44; Words & Ph., 191.
Swatara R. Co. *v.* Brune (6 Gill (Md.) 41), Subscr., 78.
Swayze *v.* New Jersey Midland R. Co. (36 N. J. L. 295, 12 Am. Ry. Rep. 404), Em. Dom., 746.
Swazey *v.* Union Mfg. Co. (42 Conn. 556), Med. Serv., 8; Words & Ph., 98.
Sweaney *v.* Kansas City R. Co. (54 Mo. App. 265), Tax., 306.
Swearingen *v.* Buckley (1 Tex. Unrep. Cas. 421), Paym., 3.
Swearingen *v.* Missouri, K. & T. R. Co. (64 Mo. 73, 17 Am. Ry. Rep. 291), Animals, 200.
Sweat *v.* Boston & A. R. Co. (156 Mass. 284, 31 N. E. Rep. 296), Employés, Inj. to, 42, 137, 318, 563; Trial, 56, 169.
Sweatt *v.* Boston, H. & E. R. Co. (5 Bankr. Reg. 234), Bank'cy, 1.
Sweatt *v.* Boston, H. & E. R. Co. (3 Cliff. (U. S.) 339), Bank'cy, 1; Int. Com., 5; Words & Ph., 48.
Sweeney *v.* Berlin & J. Envelope Co. (101 N. Y. 520, 5 N. E. Rep. 358), Employés, Inj to, 98, 211.
Sweeney *v.* Boston & A. R. Co. (1 Am. & Eng. R. Cas. 138, 128 Mass. 5), Employés, Inj. to, 324.
Sweeney *v.* Central Pac. R. Co. (8 Am. & Eng. R. Cas. 151, 57 Cal. 15), Employés, Inj. to, 206, 234.
Sweeney *v.* Chicago, M. & St. P. R. Co. (20 Am. & Eng. R. Cas. 268, 60 Wis. 60, 18 N. W. Rep. 756), Bridges, 61, 86.
Sweeney *v.* Great Falls & C. R. Co. (11 Mont. 523, 29 Pac. Rep. 15), Employés, Inj. to, 612.
Sweeney *v.* Gulf, C. & S. F. R. Co. (84 Tex. 433, 19 S. W. Rep. 555), Fel. Serv., 73, 217, 315, 349.
Sweeney *v.* Minneapolis & St. L. R. Co. (22 Am. & Eng. R. Cas. 302, 33 Minn. 153, 22 N. W. Rep. 289), Employés, Inj. to, 303.
Sweeney *v.* New York, N. H. & H. R. Co. (26 J. & S. 223, 32 N. Y. S. R. 416, 10 N. Y. Supp. 305), Employés, Inj. to, 611, 690; Negl., 67.
Sweeney *v.* New York Steam Co. (25 N. Y. S. R. 598, 6 N. Y. Supp. 528; affirmed in 117 N. Y. 642, mem., 22 N. E. Rep. 1131, 27 N. Y. S. R. 977), Contrib. Neg., 48; Death, etc., 219; Employés, Inj. to, 295; Trial, 168.
Sweeney *v.* Paige (46 N. Y. S. R. 163, 64 Hun 172, 18 N. Y. Supp. 890), Fel. Serv., 29.
Sweeny *v.* Old Colony & N. R. Co. (10 Allen (Mass.) 368), Cross., Inj. at, 77.
Sweet *v.* Barney (23 N. Y. 335), Car. of M., 269.
Sweet *v.* Barney (24 Barb. (N. Y.) 533), Exp. Cos., 45.
Sweet *v.* Buffalo, N. Y. & P. R. Co. (79 N. Y. 293; affirming 13 Hun 643), Em. Dom., 129.
Sweet *v.* Michigan C. R. Co. (48 Am. & Eng. R. Cas. 395, 87 Mich. 559, 49 N. W. Rep. 882), Employés, Inj. to, 42; Trial, 92.
Sweet *v.* Morrison (116 N. Y. 19, 22 N. E. Rep. 276, 26 N. Y. S. R. 445), Constr. Rys., 57, 60.
Sweetman *v.* Metropolitan R. Co. (1 H. & M. 543, 12 W. R. 304, 10 L. T. 156), Em. Dom., 1157.
Sweetser *v.* Boston & M. R. Co. (66 Me. 583), Constr. Rys., 10.
Swenson *v.* Lexington (69 Mo. 157), Adv. Poss., 8; Embankm., 2; Sts. &H., 211.
Swetland *v.* Boston & A. R. Co. (102 Mass. 276), Car. of M., 649; Negl., 32.
Swift's Appeal (23 Am. & Eng. R. Cas. 1, 111 Pa. St. 516, 2 Atl. Rep. 539), Em. Dom., 94.
Swift *v.* Newbury (36 Vt. 355), Bridges, 55; Negl., 53.
Swift *v.* North Mo. R. Co. (29 Iowa 243), Animals, 122.
Swift *v.* Pacific Mail Steamship Co. (30 Am. & Eng. R. Cas. 105, 106 N. Y. 206, 12 N. E. Rep. 583, 8 N. Y. S. R. 602; affirming

36 Hun 643, mem.), Car. of M., 406, 544, 593; Parties, 1.
Swift *v.* Staten Island R. T. R. Co. (24 N. Y. S. R. 359, 52 Hun 614, 1 Silv. Sup. Ct. 375, 5 N. Y. Supp. 316; affirmed in 123 N. Y. 645, mem., 3 Silv. App. 184, 25 N. E. Rep. 378, 33 N. Y. S. R. 604), Cross., Inj. at, 22.
Swift *v.* Staten Island R. T. R. Co. (45 Am. & Eng. R. Cas. 180, 123 N. Y. 645, 3 Silv. App. 184, 25 N. E. Rep. 378, 33 N. Y. S. R. 604), Cross., Inj. at, 245; Licensees, Inj. to, 10, 19.
Swift *v.* Staten Island R. T. R. Co. (44 N. Y. S. R. 747, 63 Hun 628, 17 N. Y. Supp. 654), App., 142.
Swift Electric Light Co. *v.* Grant (90 Mich. 469, 51 N. W. Rep. 539), Evid., 192.
Swigert, In re (24 Am. & Eng. R. Cas. 494, 119 Ill. 83, 6 N. E. Rep. 469), Tax., 170, 199; Witn., 196.
Swigert *v.* Hannibal & St. J. R. Co. (9 Am. & Eng. R. Cas. 322, 75 Mo. 475), Car. of P., 219, 220, 390; Contrib. Neg., 48, 121.
Swindler *v.* Hilliard (2 Rich. (So. Car.) 286), Lim. of Liab., 2, 40.
Swindon, M. & A. R. Co. *v.* Great Western R. Co. (4 Ry. & C. T. Cas. 173), Leases, 118; Ry. Com'rs, 6.
Swindon, M. & A. R. Co. *v.* Great Western R. Co. (4 Ry. & C. T. Cas. 349), Charges, 97, 100; Discrim., 40.
Swinney *v.* Ft. Wayne, M. & C. R. Co. (59 Ind. 205), Em. Dom., 73, 275, 295, 300, 306, 701; Stat., 40, 65.
Sword *v.* Sydney & L. R. Co. (23 Nov. Sc. 214), Estop., 14.
Sword *v.* Young (89 Tenn. 126, 14 S. W. Rep. 481, 604), Car. of M., 275.
Sykes, In re (10 Ben. (U. S.) 162), Contempt, 8; Witn., 2.
Sykes *v.* Brockville & O. R. Co. (9 Grant's Ch. (U. C.) 9), Liens, 29; Parties, 19.
Sykes *v.* Brockville & O. R. Co. (22 U. C. Q. B. 459), Attach., 53.
Sykes *v.* Mayor, etc., of Columbus (55 Miss. 115), Mun. Aid, 283, 329.
Sykes *v.* Northeastern R. Co. (44 L. J. C. P. 191, 23 W. R. 473, 32 L. T. 199), Death, etc., 44, 88, 434.
Syme *v.* Richmond & D. R. Co. (113 N. Car. 558, 18 S. E. Rep. 114), Negl., 41; Tresp., Inj: to, 54, 105.
Syracuse, B. & N. Y. R. Co., In re (4 Hun (N. Y.) 311), Em. Dom., 773, 970.
Syracuse, C. & N. Y. R. Co., In re (91 N. Y. 1), Officers, 1.
Syracuse, P. & O. R. Co. *v.* Gere (4 Hun (N. Y.) 392, 6 T. & C. 636), Subscr., 20.
Syracuse Sav. Bank *v.* Seneca Falls (7 Am. & Eng. R. Cas. 216, 86 N. Y. 317; affirming 21 Hun 304), Mun. Aid, 67.
Syracuse Sav. Bank *v.* Syracuse, C. & N. Y. R. Co. (9 Am. & Eng. R. Cas. 585, 88 N. Y. 110; dismissing appeal from 25 Hun 318), App., 144.
Syracuse Solar Salt Co. *v.* Rome, W. & O. R. Co. (51 N. Y. S. R. 520, 67 Hun 153, 22 N. Y. Supp. 321), Em. Dom., 1075.
Taber *v.* Cincinnati, L. & C. R. Co. (15 Ind. 459), Mort., 20, 135.
Taber *v.* Delaware, L. & W. R. Co. (71 N. Y. 489; affirming 4 Hun 765), Car. of P., 261, 609.
Taber *v.* New York El. R. Co. (11 N. Y. Supp. 584, 33 N. Y. S. R. 706, 26 J. & S. 579; affirmed in 134 N. Y. 615, mem.), Elev. Rys., 104, 168; Witn., 152.
Tabler *v.* Hannibal & St. J. R. Co. (31 Am. & Eng. R. Cas. 185, 93 Mo. 79, 11 West. Rep. 462, 5 S. W. Rep. 810), Car. of P., 415, 420; Employés, Inj. to, 96, 97, 109, 685, 707; Fel. Serv., 406; Negl., 67.
Tabor *v.* Missouri Valley R. Co. (46 Mo. 353), Cross., Inj. at 361.
Taboreck *v.* Burlington & M. R. R. Co. (2 McCrary (U. S.) 407, 13 Fed. Rep. 103), Land Grants, 98.
Tacoma R. & M. Co. *v.* Cummings (5 Wash. 206, 31 Pac. Rep. 747, 33 Pac. Rep. 507), App., 12.
Taff Vale & T. V. R. Co., In re (4 Ry. & C. T. Cas. 54), Ult. Vir., 12.
Taff Vale R. Co. *v.* Barry D. & R. Co. (7 Ry. & C. T. Cas. 52), Arb., 3; Charges, 113, 120.
Taff Vale R. Co. *v.* Giles (2 El. & Bl. 822, 18 Jur. 510, 23 L. J. Q. B. 43), Superint., 1.
Taff Vale R. Co. *v.* Macnabb (22 W. R. 65, 42 L. J. Q. B. 153), Contr., 61; Leases, 53; Wharves, 2; Words & Ph., 26.
Taff Vale R. Co. *v.* Rhymney R. Co. (2 Ry. & C. T. Cas. 176), Leases, 119.
Taft *v.* Hartford, P. & F. R. Co. (8 R. I. 310), Divid., 8.
Taft *v.* New York, P. & B. R. Co. (157 Mass. 297, 32 N. E. Rep. 168), Animals, 152, 386, 403, 462, 528, 547.
Tagart *v.* Northern C. R. Co. (29 Md. 557), Consol., 30.
Taggart *v.* Newport St. R. Co. (43 Am. & Eng. R. Cas. 208, 16 R. I. 668, 7 L. R. A. 205, 19 Atl. Rep. 326), Elec. Rys., 6, 10, 18; Evid., 98.
Taggart *v.* Western Md. R. Co. (24 Md. 563), Charters, 27; Subscr., 6, 114, 137, 158, 170, 189, 220.
Talbert *v.* United States (25 Ct. of Cl. 141), Pat. for Inv., 11, 13.
Talbot *v.* Dent (9 B. Mon. (Ky.) 526), Mun. Aid, 33, 414; Tax., 13.
Talbot *v.* Minneapolis, St. P. & S. St. M. R. Co. (82 Mich. 66, 45 N. W. Rep. 1113), Animals, 126, 621; Proc., 45.
Talbot *v.* Merchants' Despatch Transp. Co. (41 Iowa 247), Bills of L., 36.
Talbott *v.* Richmond & D. R. Co. (31 Gratt. (Va.) 685), Sts. & H., 3.
Talcott *v.* Pine Grove Tp. (1 Flipp. (U. S.) 120), Em. Dom., 180; Mun. Aid, 37, 318; Tax., 3.
Talcott *v.* Wabash R. Co. (50 N. Y. S. R. 423, 66 Hun 456, 21 N. Y. Supp. 318), Assign., 15; Bagg., 5, 19.
Talley *v.* Great Western R. Co. (L. R. 6 C. P. 44, 40 L. J. C. P. 9, 19 W. R. 154, 23 L. T. N. S. 413, 3 Ry. & C. T. Cas. xx), Bagg., 79.
Tallman *v.* Baltimore & O. R. Co. (45 Fed. Rep. 156), Proc., 45, 48.

Tallman *v.* Butler County Treasurer (12 Iowa 531), Tax., 117.
Tallman *v.* Metropolitan El. R. Co. (43 Am. & Eng. R. Cas. 409, 121 N. Y. 119, 23 N. E. Rep. 1134, 30 N. Y. S. R. 491, 8 L. R. A. 173; reversing 16 N. Y. S. R. 684, 2 N. Y. Supp. 130), Elev. Rys., 123, 142.
Tallman *v.* Syracuse, B. & N. Y. R. Co. (4 Abb. App. Dec. (N. Y.) 351, 4 Keyes, 128), Fences, 75.
Talmadge *v.* Rensselaer & S. R. Co. (13 Barb. (N. Y.) 493), Animals, 47, 139, 167; Fences, 40.
Talmadge *v.* Zanesville & M. R. Co. (11 Ohio 197), Car. of P., 105.
Tal-y-llyn R. Co. *v.* Cambrian R. Co. (5 Ry. & C. T. Cas. 122), Charges, 106.
Tama County *v.* Melendy (55 Iowa 395, 7 N. W. Rep. 669), Judgm., 15; Land Grants, 131.
Tamvaco *v.* Timothy (1 C. & E. 1), Trial, 107.
Tanco *v.* Booth (15 N. Y. Supp. 110), Bagg., 107, 108, 119.
Tanner *v.* Buffalo R. Co. (25 N. Y. Supp. 242, 72 Hun 465, 54 N. Y. S. R. 776), St. Rys., 423.
Tanner *v.* Louisville & N. R. Co. (60 Ala. 621), Contrib. Neg., 50; Evid., 38, 175; Negl., 10; Tresp., Inj. to, 64, 111; Witn., 98.
Tanner *v.* New York C. & H. R. R. Co. (32 Am. & Eng. R. Cas. 380, 108 N. Y. 623, 1 Silv. App. 569, 15 N. E. Rep. 379, 13 N. Y. S. R. 501), Car. of M., 694; Fires, 248.
Tanner *v.* Oil Creek R. Co. (53 Pa. St. 411), Car. of M., 146, 223, 230.
Tanner *v.* South Wales R. Co. (5 El. & Bl. 618, 1 Jur. N. S. 1215, 25 L. J. Q. B. 7), Cross., St. & H., 7.
Tanner *v.* Swindon, etc., R. Co. (45 L. T. 209), Em. Dom., 1190.
Tapert *v.* Detroit, G. H. & M. R. Co. (11 Am. & Eng. R. Cas. 413, 50 Mich. 267, 15 N. W. Rep. 450), Priv. Ways, 1, 4.
Tappan *v.* Western & A. R. Co. (62 Ga. 198), Western & A. R. Co., 1.
Tappan *v.* Western & A. R. Co. (3 Lea (Tenn.) 106), Pl., 148.
Tarbell *v.* Central Pac. R. Co. (34 Cal. 616), Eject. Pass., 83, 132; Tickets & F., 117.
Tarbell *v.* Northern C. R. Co. (24 Hun (N. Y.) 51), Tickets & F., 48.
Tardos *v.* Chicago, St. L. & N. O. R. Co. (35 La. Ann. 15), Bills of L., 54, 89; Car. of M., 771; Lim. of Liab., 2; Pl., 15.
Tardos *v.* Toulon (14 La. Ann. 432), Car. of M., 176.
Tariffs of the Transcontinental Lines, In re (2 Int. Com. Rep. 203, 2 Int. Com. Com. 324), Int. Com., 33, 34, 92, 131.
Tarpey *v.* Deseret Salt Co. (5 Utah 494, 17 Pac. Rep. 631), Consol., 35; Evid., 275; Land Grants, 63.
Tarwater *v.* Hannibal & St. J. R. Co. (42 Mo. 193), Animals, 251, 371; Negl., 63.
Tasker *v.* Wallace (6 Daly (N. Y.) 364), Name, 4; Subscr., 19.
Tate *v.* Missouri, K. & T. R. Co. (64 Mo. 149, 17 Am. Ry. Rep. 191), Nuis., 12; Sts. & H., 150; Witn., 118.
Tate *v.* Ohio & M. R. Co. (7 Ind. 479), Sts. & H., 69, 133, 136, 157, 249.
Tattan *v.* Great Western R. Co. (2 El. & El. 844, 6 Jur. N. S. 800, 29 L. J. Q. B. 184, 8 W. R. 606), Actions, 9, 10; Car. of M., 776.
Tatten *v.* Chicago, M. & St. P. R. Co. (75 Iowa 459, 39 N. W. Rep. 708), Fences, 75.
Tatum *v.* Sharpless (6 Phila. (Pa.) 18), Conduct., 14.
Tawas & B. C. R. Co. *v.* Iosco Circuit County Judge (11 Am. & Eng. R. Cas. 584, 44 Mich. 479, 7 N. W. Rep. 65), Constr. Rys., 102.
Tawney *v.* Lynn & E. R. Co. (16 L. J. Ch. 282, 4 Railw. Cas. 615), Em. Dom., 1126.
Tax Cases (12 Gill & J. (Md.) 117), Tax., 188, 225, 264.
Taxpayers of Greene, In re (38 How. Pr. (N. Y.) 515), Mun. Aid, 89.
Taxpayers of Kingston, In re (40 How. Pr. (N. Y.) 444), Mun. Aid, 44, 421.
Taylor, In re (11 Ont. Pr. 371), Em. Dom., 1224.
Taylor *v.* Adams Exp. Co. (9 Phila. (Pa.) 272), Replev., 3.
Taylor *v.* Albemarle S. Nav. Co. (105 N. Car. 484, 10 S. E. Rep. 897), Agency, 106; Em. Dom., 224; Evid., 18.
Taylor *v.* Atlantic & G. W. R. Co. (55 How. Pr. (N. Y.) 275), Judgm., 25.
Taylor *v.* Atlantic & G. W. R. Co. (57 How. Pr. (N. Y.) 9), Mort., 172.
Taylor *v.* Atlantic & G. W. R. Co. (57 How. Pr. (N. Y.) 26), Consol., 4.
Taylor *v.* Baltimore & O. R. Co. (39 Am. & Eng. R. Cas. 259, 33 W. Va. 39, 10 S. E. Rep. 29), Bridges, 22; Nuis., 2; Witn., 94.
Taylor *v.* Bay City St. R. Co. (43 Am. & Eng. R. Cas. 335, 80 Mich. 77, 45 N. W. Rep. 335), Parties, 19; St. Rys., 212.
Taylor *v.* Brooklyn El. R. Co. (119 N. Y. 561, 23 N. E. Rep. 1106, 30 N. Y. S. R. 111; affirming 18 Civ. Pro. 72, 27 N. Y. S. R. 44, 7 N. Y. Supp. 625), Tender, 6.
Taylor *v.* Burlington & M. R. R. Co. (5 Iowa 114), Attach., 11.
Taylor *v.* Burlington, C. R. & M. R. Co. (4 Dill. (U. S.) 570), Mort., 106.
Taylor *v.* Cedar Rapids & St. P. R. Co. (25 Iowa 371), Em. Dom., 219, 559.
Taylor *v.* Central Pac. R. Co. (67 Ga. 122), Injunc., 11.
Taylor *v.* Chicago & N. W. R. Co. (74 Ill. 86), Agency, 54.
Taylor *v.* Chicago, M. & St. P. R. Co. (80 Iowa 431, 46 N. W. Rep. 64), Evid., 232
Taylor *v.* Chicago, M. & St. P. R. Co. (22 Am. & Eng. R. Cas. 123, 63 Wis. 327, 24 N. W. Rep. 84), Em. Dom., 1016.
Taylor *v.* Chicago, M. & St. P. R. Co. (81 Wis. 82, 51 N. W. Rep. 93), Em. Dom., 954.
Taylor *v.* Chicago, M. & St. P. R. Co. (83 Wis. 636, 53 N. W. Rep. 853), Nuis., 9.
Taylor *v.* Chicago, M. & St. P. R. Co. (83 Wis. 645, 53 N. W. Rep. 855), Em. Dom., 780.
Taylor *v.* Chicago, St. P. & K. C. R. Co. (76 Iowa 753, 40 N. W. Rep. 84), Animals, 507; App., 18; Pl., 92.

Taylor *v.* Chichester & M. R. Co. (4 H. & C. 409, 14 L. T. 437; reversed in L. R. 2 Ex. 356, 36 L. J. Ex. 201, 16 L. T. 703, 16 W. R. 147; affirmed in L. R. 4 H. L. Cas. 628, 39 L. J. Ex. 217), Ult. Vir., 2, 3.
Taylor *v.* Chichester & M. R. Co. (23 L. T. 657), Em. Dom., 1098.
Taylor *v.* Clemson (11 C. & F. 610, 8 Jur. 833; affirming 3 Railw. Cas. 65, 2 G. & D. 346, 2 Q. B. 978), Em. Dom., 1181, 1185, 1189.
Taylor *v.* Cobourg, P. & M. R. & M. Co. (24 U. C. C. P. 200), Agency, 1, 35.
Taylor *v.* Cranberry I. & C. Co. (94 N. Car. 525), Death, etc., 102.
Taylor *v.* Danville O. & O. R. Co. (10 Ill. App. 311), App., 89.
Taylor *v.* Delaware & H. Canal Co. (28 Am. & Eng. R. Cas. 656, 113 Pa. St. 162, 8 Atl. Rep. 43), Children, Inj. to, 70; Licensees, Inj. to, 25.
Taylor *v.* Dry Dock, E. B. & B. R. Co. (9 N. Y. S. R. 498), Trial, 64.
Taylor *v.* Dunn (80 Tex. 652, 16 S. W. Rep. 732), Indep. Contr., 14; St. Rys., 83, 87; Sts. & H., 138.
Taylor *v.* Evansville & T. H. R. Co. (47 Am. & Eng. R. Cas. 437, 121 Ind. 124, 6 L. R. A. 584, 22 N. E. Rep. 876), Employés, Inj. to, 182, 185, 294, 295; Fel. Serv., 75, 76, 90, 214, 397, 403.
Taylor *v.* Fletcher (15 Ind. 80), Subscr., 143.
Taylor *v.* Grand Trunk R. Co. (24 U. C. C. P. 582), Car. of M., 259.
Taylor *v.* Grand Trunk R. Co. (4 Ont. Pr. 300), Proc., 32.
Taylor *v.* Grand Trunk R. Co. (48 N. H. 304), Car. of P., 139, 140, 142, 161, 182, 636; Evid., 191, 218; Negl., 21; Witn., 21, 72, 100, 164.
Taylor *v.* Great Northern R. Co. (L. R. 1 C. P. 385, 35 L. J. C. P. 210, 12 Jur. N. S. 372, 14 L. T. 363, 14 W. R. 639), Car. of M., 28, 130.
Taylor *v.* Greenville County Sup'rs (86 Va. 506, 29 Am. & Eng. Corp. Cas. 187, 10 S. E. Rep. 433), Mun. Aid, 115, 144, 200; Subscr., 120.
Taylor *v.* Kansas City Cable R. Co. (28 Mo. App. 552), Trial, 138.
Taylor *v.* Kansas City Cable R. Co. (38 Mo. App. 668), Cable Rys., 4.
Taylor *v.* Lake Shore & M. S. R. Co. (33 Ill. App. 116), Injunc., 19.
Taylor *v.* Lake Shore & M. S. R. Co. (9 Am. & Eng. R. Cas. 127, 45 Mich. 74, 7 N. W. Rep. 728), Mun. Corp., 19.
Taylor *v.* Little Rock, M. R. & T. R. Co. (32 Ark. 393, 17 Am. Ry. Rep. 251), Car. of M., 674.
Taylor *v.* Little Rock, M. R. & T. R. Co. (18 Am. & Eng. R. Cas. 590, 39 Ark. 148), Car. of M., 430; Lim. of Liab., 28.
Taylor *v.* Manhattan R. Co. (25 N. Y. S. R. 226, 53 Hun 305, 6 N. Y. Supp. 488), Actions, 11; Judgm., 21; Lim. of Ac., 25.
Taylor *v.* Memphis & C. R. Co. (11 Lea (Tenn.) 186), Coupons, 16.
Taylor *v.* Metropolitan El. R. Co. (23 J. & S. 555, 14 N. Y. S. R. 850; affirming 18 J. & S. 311), Elev. Rys., 117, 162.
Taylor *v.* Mexican Gulf R. Co. (2 La. Ann. 654), Negl., 81.
Taylor *v.* Missouri Pac. R. Co. (26 Mo. App. 336), Car. of P., 398, 402; Contrib. Neg., 28, 75, 82, 85, 113.
Taylor *v.* Missouri Pac. R. Co. (86 Mo. 457), Cross., Inj. at, 263, 264, 268.
Taylor *v.* Missouri Pac. R. Co. (Mo.) (16 S. W. Rep. 206), Employés, Inj. to, 99, 182, 202, 297; Fel. Serv., 447; New Tr., 72.
Taylor *v.* Monnot (4 Duer (N. Y.) 116, 1 Abb. Pr. 325), Bagg., 40.
Taylor *v.* Nashville & C. R. Co. (86 Tenn. 228, 6 S. W. Rep. 393), Mun. Corp., 20
Taylor *v.* Nashville & C. R. Co. (6 Coldw. (Tenn.) 646), Em. Dom., 61, 128, 178; War, 2.
Taylor *v.* New York & L. B. R. Co. (38 N. J. L. 28), Em. Dom., 138.
Taylor *v.* North Pac. C. R. Co. (56 Cal. 317), Dam., 59.
Taylor *v.* Nunn (2 Metc. (Ky.) 199), Mun. Aid, 414.
Taylor *v.* Ohio River R. Co. (35 W. Va. 328, 13 S. E. Rep. 1009), Proc., 45.
Taylor *v.* Pennsylvania Co. (50 Fed. Rep. 755), Car. of P., 180, 266; Evid., 293; Stat. & D., 59, 145.
Taylor *v.* Pennsylvania Co. (7 Am. & Eng. R. Cas. 23, 78 Ky. 348), Death, etc., 98.
Taylor *v.* Pettijohn (24 Ill. 312), Em. Dom., 50, 55.
Taylor *v.* Philadelphia & R. R. Co. (14 Phila. (Pa.) 451), Receiv., 16.
Taylor *v.* Philadelphia & R. R. Co. (7 Fed. Rep. 377), Mort., 227.
Taylor *v.* Philadelphia & R. R. Co. (7 Fed. Rep. 386), Bonds, 1; Mort., 10; Ult. Vir., 9.
Taylor *v.* Philadelphia & R. R. Co. (3 Am. & Eng. R. Cas. 177, 9 Fed. Rep. 1), Car-Trust Assoc., 1; Mort., 221; Receiv., 51.
Taylor *v.* Plymouth County Com'rs (13 Metc. (Mass.) 449), Em. Dom., 527.
Taylor *v.* Richmond & D. R. Co. (109 N. Car. 233, 13 S. E. Rep. 736), Employés, Inj. to, 376.
Taylor *v.* Ross County Com'rs (23 Ohio St. 22), Mun. Aid, 7, 46, 423.
Taylor *v.* St. Johnsbury & L. C. R. Co. (57 Vt. 106), Em. Dom., 492.
Taylor *v.* St. Louis, I. M. & S. R. Co. (83 Mo. 386), Animals, 192; Evid., 170; Negl., 70.
Taylor *v.* Seaboard & R. R. Co. (34 Am. & Eng. R. Cas. 344, 99 N. Car. 185, 6 Am. St. Rep. 509, 5 S. E. Rep. 750), Evid., 52; Tickets & F., 81.
Taylor *v.* Second Ave. R. Co. (17 J. & S. (N. Y.) 513), Agency, 8.
Taylor *v.* Secor (92 U. S. 575), Tax., 24, 245, 257.
Taylor *v.* South & N. Ala. R. Co. (4 Woods (U. S.) 575, 13 Fed. Rep. 152), Estop., 20; Lim. of Ac., 68, 70.
Taylor *v.* South Covington & C. St. R. Co. (Ky.) (20 S. W. Rep. 275), Children, Inj. to, 94, 99.
Taylor *v.* Vermont & M. R. Co. (1 Gray (Mass.) 422, n.), Witn., 3.
Taylor *v.* Western Pac. R. Co. (45 Cal. 323),

Abate., 17; Agency, 84; Death, etc., 54, 276, 392; Trial, 100.
Taylor *v.* Whitney (5 Ill. 61), Location, etc., 4.
Taylor *v.* Wilmington & M. R. Co. (4 Jones (N. Car.) 277), Ferries, 5.
Taylor *v.* Ypsilanti (12 Am. & Eng. R. Cas. 549, 105 U. S. 60), Mun. Aid, 6, 37, 254, 318.
Taylor, B. & H. R. Co. *v.* Montgomery (4 Tex. App. (Civ. Cas.) 401, 16 S. W. Rep. 178), Car. of L. S., 29, 31, 89.
Taylor, B. & H. R. Co. *v.* Taylor (79 Tex. 104, 14 S. W. Rep. 918), Death, etc., 314, 351; Employés, Inj. to, 45, 55, 223, 264; Evid., 90; Pl., 63.
Taylor, B. & H. R. Co. *v.* Warner (84 Tex. 122, 19 S. W. Rep. 449, 20 S. W. Rep. 823), Death, etc., 344; Receiv., 139.
Taylor County *v.* Baltimore & O. R. Co. (35 Fed. Rep. 161), Corp. 12; Rem. of C., 39.
Teachout *v.* Des Moines Broad-Gauge St. R. Co. (36 Am. & Eng. R. Cas. 108, 75 Iowa 722, 38 N. W. Rep. 145), St. Rys., 53.
Teague *v.* Irwin, 127 Mass. 217), Stock, 51.
Teague *v.* Le Grand (85 Ala. 493, 5 So. Rep. 287), Attach., 32.
Tebbutt *v.* Bristol & E. R. Co. (40 L. J. Q. B. 78, 23 L. T. 772, L. R. 6 Q. B. 73, 19 W. R. 383), Stat. & D., 128.
Tecumseh Celery Co. *v.* Cincinnati, J. & M. R. Co. (5 Int. Com. Com. 663, 4 Int. Com. Rep. 318), Int. Com., 152.
Teebay *v.* Manchester, S. & L. R. Co. (L. R. 24 Ch. D. 572, 52 L. J. Ch. 613, 48 L. T. 808, 31 W. R. 739), Evid., 180.
Telfer *v.* Northern R. Co. (30 N. J. L. 188), Cross., Inj. at, 8, 66, 107, 169, 187, 192; Death, etc., 403.
Telle *v.* Leavenworth R. T. R. Co. (50 Kan. 455, 31 Pac. Rep. 1076), Employés, Inj. to, 158; Pl., 107.
Temple *v.* Flower (41 L. J. Ch. 604, 20 W. R. 587, 26 L. T. 657), Sts. & H., 60, 245.
Templeton *v.* Montpelier (56 Vt. 328), Cross., Inj. at, 226.
Templin *v.* Chicago, B. & P. R. Co. (34 Am. & Eng. R. Cas. 107, 73 Iowa 548, 35 N. W. Rep. 634), Liens, 18; Pres., 1.
Tench *v.* Great Western R. Co. (33 U. C. Q. B. 8), Libel & S., 1.
Ten Eyck *v.* Harris (47 Ill. 268), Car. of M., 277.
Ten Eyck *v.* Pontiac, O. & P. A. R. Co. (37 Am. & Eng. R. Cas. 273, 74 Mich. 226, 41 N. W. Rep. 905, 3 L. R. A. 378), Assump., 5; Direct., 32; Evid., 156.
Tennenbrock *v.* South Pac. Coast R. Co. (6 Am. & Eng. R. Cas. 8, 59 Cal. 269), Tresp., Inj. to, 101.
Tennery *v.* Pippinger (1 Phila. (Pa.) 543), Car. of P., 126, 140, 582.
Tennessee *v.* Davis (100 U. S. 257), Rem. of C., 9.
Tennessee *v.* Whitworth (17 Am. & Eng. R. Cas. 411, 22 Fed. Rep. 75; affirmed in 117 U. S. 129, 6 Sup. Ct. Rep. 645), Tax., 140, 177, 213.
Tennessee *v.* Whitworth (29 Am. & Eng. R. Cas. 205, 117 U. S. 129, 6 Sup. Ct. Rep. 645), Tax., 158, 177.
Tennessee *v.* Whitworth (29 Am. & Eng. R. Cas. 211, 117 U. S. 139, 6 Sup. Ct. Rep. 649), Tax., 158.
Tennessee *v.* Whitworth (17 Am. & Eng. R. Cas. 417, 22 Fed. Rep. 81), Tax., 212.
Tennessee & A. R. Co. *v.* Adams (3 Head (Tenn.) 596), Charters, 57, 64, 65; Cross., Inj. at, 1; Em. Dom., 984; Sts. & H., 55; Words & Ph., 177.
Tennessee & C. R. Co. *v.* East Ala. R. Co. (73 Ala. 426), Deeds, 8, 30; Direct., 20; Estop., 13; Evid., 179; State Aid, 8.
Tennessee & C. R. Co. *v.* East Ala. R. Co. (75 Ala. 516, 51 Am. Rep. 475), Ejectm., 10, 25; Right of W., 22.
Tennessee & C. R. Co. *v.* Moore (36 Ala 371), Mand., 22; Mun. Aid, 54; State Aid, 1.
Tennessee & C. R. Co. *v.* Taylor (57 Am. & Eng. R. Cas. 296, 102 Ala. 224, 14 So. Rep. 379), Aband., 2; Pub. Lds., 39.
Tennessee & P. R. Co. *v.* Mabry (85 Tenn. 47, 1 S. W. Rep. 511), Lim. of Ac., 52.
Tennessee Bond Cases (24 Am. & Eng. R. Cas. 217, 114 U. S. 663, 5 Sup. Ct. Rep. 974, 1098; affirming 2 Flipp. (U. S.) 715, 3 Fed. Rep. 673), State Aid, 35.
Tennessee C. & R. Co. *v.* Roddy (31 Am. & Eng. R. Cas. 340, 85 Tenn. 400, 5 S. W. Rep. 286), Death, etc., 436; New Tr., 30.
Tennessee C., I. & R. Co. *v.* Hayes (97 Ala. 201, 12 So. Rep. 98), App., 35; Employés, 4; Employés, Inj. to, 467, 698; Guard. & W., 3.
Tennessee C., I & R. Co. *v.* Kyle (93 Ala. 1, 8 So. Rep. 764), Employés, Inj. to, 133; Witn., 45.
Tennis *v.* Inter-State Con. R. T. R. Co. (45 Kan. 503, 25 Pac. Rep. 876), Tresp., Inj. to, 31.
Terhune *v.* Midland R. Co. (16 Am. & Eng. R. Cas. 665, 38 N. J. Eq. 423), Dissol., 1, 16.
Terhune *v.* Potts (23 Am. & Eng. R. Cas. 754, 47 N. J. L. 218), Quo War., 3.
Terre Haute, A. & St. L. R. Co. *v.* Augustus (21 Ill. 186), Animals, 342, 359, 572.
Terre Haute, A. & St. L. R. Co. *v.* Norman (22 Ind. 63), Estop., 6; Trial, 25.
Terre Haute, A. & St. L. R. Co. *v.* Vanatta (21 I'l. 188), Eject. Pass., 34, 104, 122, 132; New Tr., 30.
Terre Haute & A. R. Co. *v.* Earp (21 Ill. 291), Subscr., 127.
Terre Haute & I. R. Co. *v.* Abend (9 Ill. App. 304), Rem. of C., 53, 54.
Terre Haute & I. R. Co. *v.* Baker (4 Ind. App. 66, 30 N. E. Rep. 431), App., 141; Employés, 18.
Terre Haute & I. R. Co. *v.* Baker (122 Ind. 433, 24 N. E. Rep. 83), Attach., 39; Employés, 18; Pl., 54.
Terre Haute & I. R. Co. *v.* Black (18 Ill. App 45), Cross., Inj. at, 134.
Terre Haute & I. R. Co. *v.* Bowles (16 Ill. App. 261), Animals, 107.
Terre Haute & I. R. Co. *v.* Brown (107 Ind. 336, 8 N. E. Rep. 218), Med. Serv., 5.
Terre Haute & I. R. Co. *v.* Brunker (128

Ind. 542, 26 N. E. Rep. 178), Cross., Inj. at, 125; Dam., 72; Phys. Exam., 3; Trial, 131, 212.
Terre Haute & I. R. Co. *v.* Buck (18 Am. & Eng. R. Cas. 234, 96 Ind. 346, 49 Am. Rep. 168), Car. of P., 137, 234, 236, 413, 556; Death, etc., 74.
Terre Haute & I. R. Co. *v.* Clark (6 Am. & Eng. R. Cas. 84, 73 Ind. 168), Cross., Inj. at, 189, 290.
Terre Haute & I. R. Co. *v.* Clem (42 Am. & Eng. R. Cas. 229, 123 Ind. 15, 23 N. E. Rep. 965, 7 L. R. A. 588), Animals, 484; Cross., Inj. at, 26, 347; Evid., 87.
Terre Haute & I. R. Co. *v.* Elam (20 Ill. App. 603), Animals, 136; Fences, 57.
Terre Haute & I. R. Co. *v.* Fitzgerald (47 Ind. 79), Eject. Pass., 9, 57; Tickets & F., 97.
Terre Haute & I. R. Co. *v.* Flanigan (20 Am. & Eng. R. Cas. 452, 94 Ind. 336), Animals, 387; Release, 30.
Terre Haute & I. R. Co. *v.* Graham (46 Ind. 239, 6 Am. Ry. Rep. 358), Agency, 80; Cross., Inj. at, 210, 262; Pl., 27.
Terre Haute & I. R. Co. *v.* Graham (12 Am. & Eng. R. Cas. 77, 95 Ind. 286, 48 Am. Rep. 719), Comp. Neg., 27; Cross., Inj. at, 262; Tresp., Inj to, 29, 44, 54, 115.
Terre Haute & I. R. Co. *v.* Jackson (6 Am. & Eng. R. Cas. 178, 81 Ind. 19), Agency, 80; Assault, 4; Car. of P., 129; Evid., 28, 201.
Terre Haute & I. R. Co. *v.* Jackson (95 Ind. 594), New Tr., 23.
Terre Haute & I. R. Co. *v.* Jenuine (16 Ill. App. 209), Animals, 35, 52; Negl., 76.
Terre Haute & I. R. Co. *v.* Jones (11 Ill. App. 322), Cross., Inj. at, 136.
Terre Haute & I. R. Co. *v.* McCoy (34 Am. & Eng. R. Cas. 212, 113 Ind. 498, 13 West. Rep. 316, 16 N. E. Rep. 395), Flood. Lds., 68.
Terre Haute & I. R. Co. *v.* McKinley (33 Ind. 274), Bridges, 48.
Terre Haute & I. R. Co. *v.* McMurray (22 Am. & Eng. R. Cas. 371, 98 Ind. 358, 49 Am. Rep. 752), Imp, Neg., 6; Med. Serv., 6.
Terre Haute & I. R. Co. *v.* Penn (15 Am. & Eng. R. Cas. 561, 90 Ind. 284), Animals, 350.
Terre Haute & I. R. Co. *v.* People (41 Ill. App. 513), Judgm., 16.
Terre Haute & I. R. Co. *v.* Pierce (19 Am. & Eng. R. Cas. 581, 95 Ind. 496), Animals, 290, 380, 407; Evid., 101; Set-off, 8.
Terre Haute & I. R. Co. *v.* Schaefer (5 Ind. App. 86, 31 N. E. Rep. 557), Animals, 281, 353.
Terre Haute & I. R. Co. *v.* Scott (3 Am. & Eng. R. Cas. 208, 74 Ind. 29), Sts. & H., 106, 142.
Terre Haute & I. R. Co. *v.* Stockwell (37 Am. & Eng. R. Cas. 278, 118 Ind. 98, 20 N. E. Rep. 650), Evid., 146; Med. Serv., 2, 14.
Terre Haute & I. R. Co. *v.* Struble (16 Am. & Eng. R. Cas. 597, 109 U. S. 381, 3 Sup. Ct. Rep. 270), Stock Yards, 3.
Terre Haute & I. R. Co. *v.* Tuterwiler (16 Ill. App. 197), Animals, 35, 187.
Terre Haute & I. R. Co. *v.* Voelker (39 Am. & Eng. R. Cas. 615, 129 Ill. 540, 22 N. E. Rep. 20; affirming 31 Ill. App. 314), Contrib. Neg., 84; Cross., Inj. at, 133, 193, 239, 253, 291; Negl., 53.
Terre Haute & L. R. Co. *v.* Bissell (108 Ind. 113, 9 N. E. Rep. 144), Sts. & H., 216.
Terre Haute & L. R. Co. *v.* Crawford (27 Am. & Eng. R. Cas. 369, 100 Ind. 550), Em. Dom., 400, 914; Witn., 119.
Terre Haute & L. R. Co. *v.* Harris (46 Am. Eng. R. Cas. 582, 126 Ind. 7, 25 N. E. Rep. 831), Em. Dom., 999.
Terre Haute & L. R. Co *v.* Sherwood (55 Am. & Eng. R. Cas. 326, 132 Ind. 129, 31 N. E. Rep. 781), Car. of L. S., 45, 146; Lim. of Liab., 38; Pl., 67, 72.
Terre Haute & P. R. Co. *v.* Barr (31 Ill. App. 57), Cross., Inj. at, 29, 134, 239.
Terre Haute & R. R. Co. *v.* Smith (16 Ind. 102), Animals, 139.
Terre Haute & R. R. Co. *v.* Smith (19 Ind. 42), Animals, 342, 359.
Terre Haute & S. E. R. Co. *v.* Rodel (10 Am. & Eng. R. Cas. 284, 89 Ind. 128, 46 Am. Rep. 164), Ejectm., 9.
Terre Haute, V. & I. R. Co. *v.* Goodwin (4 Ill. App. 165), App., 137.
Terry *v.* Danville, M. & S. W. R. Co. (91 N. Car. 236), Evid., 183.
Terry *v.* Flushing, N. S. & C. R. Co. (13 Hun (N. Y.) 359), Tickets & F., 1, 41.
Terry *v.* Jewett (78 N. Y. 338; affirming 17 Hun 395), Car. of P., 198, 281, 453; Cross., Inj. at, 237; Death, etc., 350.
Terry *v.* Missouri Pac. R. Co. (77 Mo. 254), Animals, 349, 578.
Terry *v.* New York C. & H. R. R. Co. (67 How. Pr. (N. Y.) 439), Consol., 35.
Terry *v.* New York C. R. Co. (22 Barb. (N. Y.) 574), Animals, 149; Em. Dom., 382; Fires, 332.
Terry *v.* St. Louis & S. F. R. Co. (89 Mo. 586, 1 S. W. Rep. 746), Cross., Inj. at, 149.
Terry *v.* United States (8 Ct. of Cl. 277), Claims Against U. S., 9.
Terwilliger *v.* Ontario, C. & S. R. Co. (55 N. Y. S. R. 919, 73 Hun 335, 26 N. Y. Supp. 268), Sales, 12.
Teter *v.* West Virginia C. & P. R. Co. (35 W. Va. 433, 14 S. E. Rep. 146), Em. Dom., 373.
Tetherow *v.* St. Joseph & D. M. R. Co. (98 Mo. 74, 11 S. W. Rep. 310), Cross., Inj. at, 29; Death, etc., 279, 368; Evid., 170; Negl., 6, 53; Witn., 78.
Texas *v.* Texas & P. R. Co. (3 Woods (U. S.) 308), Rem. of C., 56.
Texas *v.* White (7 Wall. (U. S.) 700), War, 1.
Texas & N. O. R. Co. *v.* Barfield (Tex.) (3 S. W. Rep. 665), Tresp., Inj. to, 106.
Texas & N. O. R. Co. *v.* Berry (31 Am. & Eng. R. Cas. 147, 67 Tex. 238, 5 S. W. Rep. 817), Death, etc., 40, 42, 130; Fel. Serv., 25, 134, 268.
Texas & N. O. R. Co. *v.* Bingham (2 Tex. Civ. App. 278, 21 S. W. Rep. 569), Car. of P., 233.

Texas & N. O. R. Co. *v.* Brown (2 Tex. Civ. App. 281, 21 S. W. Rep. 424), Death, etc., 197, 341.
Texas & N. O. R. Co. *v.* Conroy (83 Tex. 214, 18 S. W. Rep. 609), Employés, Inj. to, 401, 649.
Texas & N. O. R. Co. *v.* Crowder (61 Tex. 262), Employés, Inj. to, 457, 465.
Texas & N. O. R. Co. *v.* Crowder (63 Tex. 502), Employés, Inj. to, 590, 603.
Texas & N. O. R. Co. *v.* Crowder (70 Tex. 222, 7 S. W. Rep. 709), Death, etc., 223; Evid., 175, 258.
Texas & N. O. R. Co. *v.* Crowder (76 Tex. 499, 13 S. W. Rep. 381), Employés, Inj. to, 590.
Texas & N. O. R. Co. *v.* Dillard (70 Tex. 62, 8 S. W. Rep. 113), Employés, Inj. to, 182, 205, 227.
Texas & N. O. R. Co. *v.* Goldberg (32 Am. & Eng. R. Cas. 240, 68 Tex. 685, 5 S. W. Rep. 824), Sts. & H., 216, 243.
Texas & N. O. R. Co. *v.* Ludtke (3 Tex. Civ. App. 308, 23 S. W. Rep. 82), Animals, 65; App., 117.
Texas & N. O. R. Co. *v.* Oates (2 Tex. App. (Civ. Cas.) 543), Ex. & Ad., 12.
Texas & N. O. R. Co. *v.* Sutor (11 Am. & Eng. R. Cas. 506, 56 Tex. 496), Em. Dom., 218.
Texas & N. O. R. Co. *v.* Sutor (59 Tex. 29), Em. Dom., 218; Lim. of Ac., 48.
Texas & N. O. R. Co. *v.* White (57 Tex. 129), Injunc., 64.
Texas & N. O. R. Co. *v.* Wynee (Tex. Civ. App.) (22 S. W. Rep. 1064), Employés, Inj. to, 130, 456.
Texas & P. R. Co. *v.* Adams (78 Tex. 372, 14 S. W. Rep. 666), Bills of L., 66; Car. of M., 422; Receiv., 185.
Texas & P. R. Co. *v.* Anderson (149 U. S. 237, 13 Sup. Ct. Rep. 843), App., 146.
Texas & P. R. Co. *v.* Anderson (2 Tex. App. (Civ. Cas.) 161), Cross., Inj. at, 92, 133, 239; Fright. Teams, 3, 6; Negl., 67.
Texas & P. R. Co. *v.* Bagwell (3 Tex. Civ. App. 256, 33 S. W. Rep. 829), Car. of P., 571.
Texas & P. R. Co. *v.* Bailey (83 Tex. 19, 18 S. W. Rep. 481), Cross., Inj. at, 109; Husb. & W., 15; Receiv., 90.
Texas & P. R. Co. *v.* Barron (78 Tex. 421, 14 S. W. Rep. 698), Embankm., 6; Evid., 211; New Tr., 91.
Texas & P. R. Co. *v.* Baton Rouge (36 Fed. Rep. 845), Injunc., 26.
Texas & P. R. Co. *v.* Bayliss (62 Tex. 570), Cat.-Gds., 33; Fences, 106; Parties, 6; Pl., 21.
Texas & P. R. Co. *v.* Beard (68 Tex. 265, 4 S. W. Rep. 483), Trial, 179; Trover, 3.
Texas & P. R. Co. *v.* Best (66 Tex. 116, 18 S. W. Rep. 224), Car. of P., 90; Contrib. Neg., 20; Licensees, Inj. to, 11.
Texas & P. R. Co. *v.* Bledsoe (2 Tex. Civ. App. 88, 20 S. W. Rep. 1135), Receiv., 179, 182.
Texas & P. R. Co. *v.* Bloom (85 Tex. 279, 20 S. W. Rep. 133), Rem. of C., 7, 32, 52.
Texas & P. R. Co. *v.* Bond (21 Am. & Eng. R. Cas. 413, 62 Tex. 442), Eject. Pass., 9, 17.
Texas & P. R. Co. *v.* Bradford (28 Am. & Eng. R. Cas. 479, 66 Tex. 732, 2 S. W. Rep. 595), Employés, Inj. to, 100, 352.
Texas & P. R. Co. *v.* Brick (83 Tex. 526, 18 S. W. Rep. 947), Children, Inj. to, 193; Employés, Inj. to, 465, 476; Receiv., 185.
Texas & P. R. Co. *v.* Brick (83 Tex. 598, 20 S. W. Rep. 511), Employés, Inj. to, 461, 475, 476, 477.
Texas & P. R. Co. *v.* Brown (78 Tex. 397, 14 S. W. Rep. 1034), Car. of P., 443; Stat. & D., 61, 76, 98.
Texas & P. R. Co. *v.* Bryant (56 Fed. Rep. 799), Cross., Inj. at, 143.
Texas & P. R. Co. *v.* Burke (1 Tex. App. (Civ. Cas.) 531), Release, 9.
Texas & P. R. Co. *v.* Burnes (2 Tex. Unrep. Cas. 239), Death, etc., 411.
Texas & P. R. Co. *v.* Capps (16 Am. & Eng. R. Cas. 118, 2 Tex. App. (Civ. Cas.) 35), Bagg., 42, 63, 69, 88; Wareh., 10.
Texas & P. R. Co. *v.* Carlton (15 Am. & Eng. R. Cas. 350, 60 Tex. 397), Employés, Inj. to, 126, 457, 467.
Texas & P. R. Co. *v.* Casey (52 Tex. 112), App., 94; Dam., 38; Eject. Pass., 135; Pl., 63; Stat. & D., 7.
Texas & P. R. Co. *v.* Chapman (57 Tex. 75), Animals, 194; Cross., Inj. at, 139, 206, 243.
Texas & P. R. Co. *v.* Cockrell (2 Tex. App. (Civ. Cas.) 629), Animals, 258; Negl., 29.
Texas & P. R. Co. *v.* Cole (27 Am. & Eng. R. Cas. 144, 66 Tex. 562, 1 S. W. Rep. 629), Eject. Pass., 81.
Texas & P. R. Co. *v.* Cole (Tex.) (1 S. W. Rep. 631), App., 139.
Texas & P. R. Co. *v.* Collins (84 Tex. 121, 19 S. W. Rep. 365), Receiv., 182.
Texas & P. R. Co. *v.* Comstock (83 Tex. 537, 18 S. W. Rep. 946), Parties, 15; Receiv., 185.
Texas & P. R. Co. *v.* Cook (2 Tex. App. (Civ. Cas.) 576), Bagg., 65, 123; Costs, 6.
Texas & P. R. Co. *v.* Cox (145 U. S. 593, 12 Sup. Ct. Rep. 905), Death, etc., 97, 103; Receiv., 124, 125.
Texas & P. R. Co. *v.* Crawford (2 Tex. App. (Civ. Cas.) 663), Employés, 18.
Texas & P. R. Co. *v.* Crow (3 Tex. Civ. App. 266, 22 S. W. Rep. 928), Employés, Inj. to, 94, 766; Release, 4.
Texas & P. R. Co. *v.* Curry (2 Tex. App. (Civ. Cas.) 397), Trover, 19.
Texas & P. R. Co. *v.* Curry (21 Am. & Eng. R. Cas. 448, 64 Tex. 85), Car. of P., 579; Dam., 75, 76.
Texas & P. R. Co. *v.* Cuteman (4 Tex. App. (Civ. Cas.) 17, 14 S. W. Rep. 1069), Bills of L., 10.
Texas & P. R. Co. *v.* Davidson (3 Tex. Civ. App. 542, 21 S. W. Rep. 68), Car. of P., 154; Trial, 130.
Texas & P. R. Co. *v.* Davis (2 Tex. App. (Civ. Cas.) 156), Car. of L. S., 69, 99; Car. of M., 774; Contr., 89; Lim. of Liab., 26, 27.
Texas & P. R. Co. *v.* De Milley (60 Tex. 194), Dam., 96; Derailm., 3; Evid., 90.

Texas & P. R. Co. *v.* Doherty (4 Tex. App. (Civ. Cas.) 231, 15 S. W. Rep. 44), Collis., 21; Negl., 50; New Tr., 35.
Texas & P. R. Co. *v.* Dudley (1 Tex. App. (Civ. Cas.) 271), Cat.-Gds., 9; Indep. Contr., 2, 23.
Texas & P. R. Co. *v.* Dunn (Tex.) (17 S. W. Rep. 822), Judgm., 45.
Texas & P. R. Co. *v.* Durrett (57 Tex. 48), Dam., 83; Easem., 5; Em. Dom., 698; Husb. & W., 2.
Texas & P. R. Co. *v.* Easton (2 Tex. Civ. App. 378, 21 S. W. Rep. 575), Fel. Serv., 117, 307; Negl., 88; Trial, 124.
Texas & P. R. Co. *v.* Ervay (3 Tex. App. (Civ. Cas.) 71), Fires, 266, 267, 276, 288, 289, 336, 352.
Texas & P. R. Co. *v.* Evans (2 Tex. Unrep. Cas. 318), Car. of P., 574.
Texas & P. R. Co. *v.* Ferguson (9 Am. & Eng. R. Cas. 395, 1 Tex. App. (Civ. Cas.) 724), Bagg., 25, 26, 30, 35, 123, 124; Int., 10.
Texas & P. R. Co. *v.* Fitch (12 Am. & Eng. R. Cas. 312, 2 Tex. Unrep. Cas. 257), Subscr., 217, 227.
Texas & P. R. Co. *v.* Fort (9 Am. & Eng. R. Cas. 392, 1 Tex. App. (Civ. Cas.) 722), Bagg., 26; Car. of M., 541.
Texas & P. R. Co. *v.* French (Tex. Civ. App.) (22 S. W. Rep. 866), Employés, Inj. to, 18, 20, 306; Fel. Serv., 499.
Texas & P. R. Co. *v.* Garcia (21 Am. & Eng. R. Cas. 384, 62 Tex. 285), App., 69, 107; Car. of L. S., 126; Car. of P., 411; New Tr., 72; Trial, 89.
Texas & P. R. Co. *v.* Geiger (79 Tex. 13, 15 S. W. Rep. 214), Contrib. Neg., 92; Death, etc., 431; Employés, Inj. to, 46, 100; Receiv., 72, 73; Trial, 151.
Texas & P. R. Co. *v.* Gill (2 Tex. App. (Civ. Cas.) 151), Land. & T., 4.
Texas & P. R. Co. *v.* Goodson (2 Tex. App. (Civ. Cas.) 31), Lim. of Ac., 25, 60.
Texas & P. R. Co. *v.* Gorman (2 Tex. Civ. App. 144, 21 S. W. Rep. 158), Fires, 344; Words & Ph., 138.
Texas & P. R. Co. *v.* Graves (2 Tex. Unrep. Cas. 306), Assault, 2.
Texas & P. R. Co. *v.* Gwaltney (2 Tex. App. (Civ. Cas.) 602), Husb. & W., 31; Lim. of Ac., 66.
Texas & P. R. Co. *v.* Hall (83 Tex. 675, 19 S. W. Rep. 121), Children, Inj. to, 171; Death, etc., 94; Evid., 174; Trial, 21.
Texas & P. R. Co. *v.* Hamilton (26 Am. & Eng. R. Cas. 182, 66 Tex. 92), Car. of P., 185; Negl., 23.
Texas & P. R. Co. *v.* Hamm (2 Tex. App. (Civ. Cas.) 436), Agency, 45; Car. of L. S., 5, 68, 80; Pl., 128.
Texas & P. R. Co. *v.* Hardin (21 Am. & Eng. R. Cas. 460, 62 Tex. 367), Trial, 25, 26, 124.
Texas & P. R. Co. *v.* Harrington (21 Am. & Eng. R. Cas. 571, 62 Tex. 597), Death, etc., 286; Employés, Inj. to, 517; Fel. Serv., 113, 150; Tresp., Inj. to, 26.
Texas & P. R. Co. *v.* Harrison County (54 Tex. 119), Tax., 6, 58, 283, 353.
Texas & P. R. Co. *v.* Hays (2 Tex. App. (Civ. Cas.) 341), Actions, 14; Witn., 152.
Texas & P. R. Co. *v.* Hays (3 Tex. App. (Civ. Cas.) 79), Em. Dom., 657; Tresp. to Try Title, 1, 3, 4.
Texas & P. R. Co. *v.* Hill (71 Tex. 451, 9 S. W. Rep. 351), Death, etc., 34; Fright. Teams, 3; Negl., 53, 113; Pl., 115.
Texas & P. R. Co. *v.* Hohn (1 Tex. Civ. App. 36, 21 S. W. Rep. 942), Employés, Inj. to, 83, 84, 89, 344, 780; Fel. Serv., 62, 79; Pl., 142.
Texas & P. R. Co. *v.* Horn (151 U. S. 110, 14 Sup. Ct. Rep. 259), Fed. Cts., 18.
Texas & P. R. Co. *v.* Hoskins (2 Tex. App. (Civ. Cas.) 55), Fires, 21, 159.
Texas & P. R. Co. *v.* Howard (2 Tex. Unrep. Cas. 429), Children, Inj. to, 152; Cross., Inj. at, 133, 146.
Texas & P. R. Co. *v.* Huffman (83 Tex. 286, 18 S. W. Rep. 741), Employés, Inj. to, 99; New Tr., 6; Receiv., 185, 186.
Texas & P. R. Co. *v.* Hurless (1 Tex. App. (Civ. Cas.) 306), Employés, 22.
Texas & P. R. Co. *v.* Interstate Transp. Co. (42 Fed. Rep. 261), Injunc., 37.
Texas & P. R. Co. *v.* Interstate Transp. Co. (45 Fed. Rep. 5), Bridges, 75.
Texas & P. R. Co. *v.* Jackson (3 Tex. App. (Civ. Cas.) 65), Bills of L., 97; Car. of L. S., 80, 134.
Texas & P. R. Co. *v.* Johnson (151 U. S. 81, 14 Sup. Ct. Rep. 250; affirming 42 Am. & Eng. R. Cas. 7, 76 Tex. 421, 13 S. W. Rep. 463), Receiv., 185.
Texas & P. R. Co. *v.* Johnson (2 Tex. App. (Civ. Cas.) 154), Car. of P., 313, 619; New Tr., 30, 36.
Texas & P. R. Co. *v.* Kane (2 Tex. App. (Civ. Cas.) 24, 15 Am. & Eng. R. Cas. 218), App., 43; Dam., 75; Employés, Inj. to, 259, 531, 650.
Texas & P. R. Co. *v.* Kirby (1 Tex. App. (Civ. Cas.) 285), Contrib. Neg., 82.
Texas & P. R. Co. *v.* Kirk (62 Tex. 227), Fel. Serv., 62, 73; Pl., 91.
Texas & P. R. Co. *v.* Kuteman (79 Tex. 465, 14 S. W. Rep. 693), Discrim., 37.
Texas & P. R. Co. *v.* Kuteman (55 Am. & Eng. R. Cas. 507, 54 Fed. Rep. 547, 4 C. C. A. 503), Charges, 35, 46; Discrim., 37; Fed. Cts., 13; Injunc., 3; Pl., 88.
Texas & P. R. Co. *v.* Land (3 Tex. App. (Civ. Cas.) 74), Fires, 232, 345.
Texas & P. R. Co. *v.* Lanham (1 Tex. App. (Civ. Cas.) 99), Animals, 586.
Texas & P. R. Co. *v.* Lester (75 Tex. 56, 12 S. W. Rep. 955), Death, etc., 271, 435; Evid., 96.
Texas & P. R. Co. *v.* Levi (13 Am. & Eng. R. Cas. 464, 59 Tex. 674), Car. of M., 718, 766; Fires, 123, 316; Negl., 66.
Texas & P. R. Co. *v.* Logan (3 Tex. App. (Civ. Cas.) 227), Car. of M., 688, 770; Evid., 115.
Texas & P. R. Co. *v.* Long (1 Tex. App. (Civ. Cas.) 281), Em. Dom., 471.
Texas & P. R. Co. *v.* Lowry (61 Tex. 149), Cross., Inj. at, 165; New Tr., 49; Trial, 168.
Texas & P. R. Co. *v.* Ludlam (52 Fed. Rep. 94, 2 U. S. App. 342, 2 C. C. A. 633), Eject. Pass., 101.

Texas & P. R. Co. *v.* Ludlam (57 Fed. Rep. 481), Car. of P., 83, 258; Eject. Pass., 41.
Texas & P. R. Co. *v.* McAllister (12 Am. & Eng. R. Cas. 289, 59 Tex. 349), Rem. of C., 49.
Texas & P. R. Co. *v.* McAtee (61 Tex. 695), Employés, Inj. to, 104, 772.
Texas & P. R. Co. *v.* McClanahan (2 Tex. Unrep. Cas. 270), Employés, Inj. to, 104.
Texas & P. R. Co. *v.* McCumsey (3 Tex. App. (Civ. Cas.) 321), Just. P., 14.
Texas & P. R. Co. *v.* McDonald (2 Tex. App. (Civ. Cas.) 144), Eject. Pass., 67; Tickets & F., 88.
Texas & P. R. Co. *v.* McKenzie (2 Tex. Unrep. Cas. 307), Car. of P., 268.
Texas & P. R. Co. *v.* McMullen (1 Tex. App. (Civ. Cas.) 64), Assign., 4; Jurisd., 15.
Texas & P. R. Co. *v.* Mallon (65 Tex. 115), Negl., 20.
Texas & P. R. Co. *v.* Mangum (30 Am. & Eng. R. Cas. 181, 68 Tex. 342, 4 S. W. Rep. 617), Leases, 65; Trial, 9.
Texas & P. R. Co. *v.* Marshall (42 Am. & Eng. R. Cas. 637, 136 U. S. 393, 10 Sup. Ct. Rep. 846), Contr., 40; Spec. Perf., 16.
Texas & P. R. Co. *v.* Martin (2 Tex. App. (Civ. Cas.) 295), Car. of M., 237, 774.
Texas & P. R. Co. *v.* Mays (4 Tex. App. (Civ. Cas.) 225, 15 S. W. Rep. 43), Stat. & D., 21, 105.
Texas & P. R. Co. *v.* Medaris (29 Am. & Eng. R. Cas. 159, 64 Tex. 92), Fires, 41, 57, 66, 318; Husb. & W., 10.
Texas & P. R. Co. *v.* Miller (79 Tex. 78, 15 S. W. Rep. 264), Car. of P., 29, 159, 240, 609; New Tr., 97.
Texas & P. R. Co. *v.* Miller (1 Tex. App. Civ. Cas.) 104), Animals, 495; Just. P., 6.
Texas & P. R. Co. *v.* Minnick (57 Fed. Rep. 362), Employés, Inj. to, 212, 236, 643.
Texas & P. R. Co. *v.* Mitchell (2 Tex. App. (Civ. Cas.) 324), Animals, 130, 520.
Texas & P. R. Co. *v.* Mitchell (4 Tex. App. (Civ. Cas.) 454, 17 S. W. Rep. 1079), Animals, 80.
Texas & P. R. Co. *v.* Morin (25 Am. & Eng. R. Cas. 539, 66 Tex. 133), Children, Inj. to, 82; Dam., 101; Death, etc., 163.
Texas & P. R. Co. *v.* Morin (66 Tex. 225), Children, Inj. to, 189.
Texas & P. R. Co. *v.* Morse (1 Tex. App. (Civ. Cas.) 179), Car. of M., 12, 473, 703; Wareh., 8; Words & Ph., 7.
Texas & P. R. Co. *v.* Murphy (46 Tex. 356, 13 Am. Ry. Rep. 319), App., 40; Consol., 46; Contrib. Neg., 66; Negl., 61, 63; Trial, 116.
Texas & P. R. Co. *v.* Narlor (123 U. S. 687, 8 Sup. Ct. Rep. 311), Bonds, 41.
Texas & P. R. Co. *v.* Nelson (50 Fed. Rep. 814, 2 U. S. App. 213, 1 C. C. A. 688), Evid., 80; Sts. & H., 332.
Texas & P. R. Co. *v.* Nicholson (Tex. Civ. App.) (22 S. W. Rep. 770), Death, etc., 270.
Texas & P. R. Co. *v.* Nicholson (21 Am. & Eng. R. Cas. 133, 61 Tex. 491), Car. of L. S., 158.
Texas & P. R. Co. *v.* O'Donnell (10 Am. & Eng. R. Cas. 712, 58 Tex. 27), Children, Inj. to, 37, 127, 193.
Texas & P. R. Co. *v.* O'Fiel (78 Tex. 486, 15 S. W. Rep. 33), Employés, Inj. to, 100, 143.
Texas & P. R. Co. *v.* Overall (82 Tex. 247, 18 S. W. Rep. 142), Car. of P., 465.
Texas & P. R. Co. *v.* Parrish (1 Tex. App. (Civ. Cas.) 529), Car. of M., 541.
Texas & P. R. Co. *v.* Pearl (3 Tex. App. (Civ. Cas.) 19), Assault, 2; Witn., 48.
Texas & P. R. Co. *v.* Pennell (2 Tex. Civ. App. 127, 21 S. W. Rep. 273), Trial, 119.
Texas & P. R. Co. *v.* Pollard (2 Tex. App. (Civ. Cas.) 424), App., 69; Car. of P., 263, 616; Dam., 80; Husb. & W., 35; Pl., 51.
Texas & P. R. Co. *v.* Richards (68 Tex. 375, 4 S. W. Rep. 627), Death, etc., 124.
Texas & P. R. Co. *v.* Roberts (2 Tex. Civ. App. 111, 20 S. W. Rep. 960), Cross., Inj. at, 205; Tresp., Inj. to, 38, 54.
Texas & P. R. Co. *v.* Robertson (82 Tex. 657, 17 S. W. Rep. 1041), Death, etc., 51, 212, 354; Evid., 174; Fel. Serv., 161.
Texas & P. R. Co. *v.* Rogers (57 Fed. Rep. 378), Employés, Inj. to, 207; Fel. Serv., 14, 341.
Texas & P. R. Co. *v.* Rosedale St. R. Co. (4 Tex. App. (Civ. Cas.) 266, 15 S. W. Rep. 120), Receiv., 185; Witn., 179.
Texas & P. R. Co. *v.* Rosedale St. R. Co. (22 Am. & Eng. R. Cas. 160, 64 Tex. 80), St. Rys., 89, 191.
Texas & P. R. Co. *v.* Saunders (151 U. S. 105, 14 Sup. Ct. Rep. 257), Pl., 44; Receiv., 177.
Texas & P. R. Co. *v.* Saunders (4 Tex. App. (Civ. Cas.) 528, 18 S. W. Rep. 793), Flood. Lds., 97.
Texas & P. R. Co. *v.* Scott (4 Tex. App. (Civ. Cas.) 476, 17 S. W. Rep. 1116), Animals, 83.
Texas & P. R. Co. *v.* Scott (64 Tex. 549), Car. of P., 55, 600, 602; Employés, Inj. to, 94, 648; Fel. Serv., 15, 202.
Texas & P. R. Co. *v.* Scrivener (2 Tex. App. (Civ. Cas.) 284), Bills of L., 27; Car. of L. S., 80, 104, 146.
Texas & P. R. Co. *v.* Self (23 Am. & Eng. R. Cas. 310, 2 Tex. App. (Civ. Cas.) 387), Dam., 32; Sts. & H., 408, 409.
Texas & P. R. Co. *v.* Snyder (Tex.) (18 S. W. Rep. 559), Flood. Lds., 76.
Texas & P. R. Co. *v.* Southern Pac. R. Co. (40 Am. & Eng. R. Cas. 475, 41 La. Ann. 970, 6 So. Rep. 888), Contr., 63, 64.
Texas & P. R. Co. *v.* Southern Pac. Co. (137 U. S. 48, 11 Sup. Ct. Rep. 10), Fed. Cts., 26.
Texas & P. R. Co. *v.* Talley (2 Tex. App. (Civ. Cas.) 671), Car. of M., 746, 802.
Texas & P. R. Co. *v.* Tankersley (63 Tex. 57), Dam., 110; Fires, 118; Negl., 23.
Texas & P. R. Co. *v.* Taylor (2 Tex. App. (Civ. Cas.) 368), New Tr., 39.
Texas & P. R. Co. *v.* Taylor (3 Tex. App. (Civ. Cas.) 234), Bagg., 123, 124, 125.
Texas & P. R. Co. *v.* Thedens (Tex. Civ. App.) (21 S. W. Rep. 132), Receiv., 73.
Texas & P. R. Co. *v.* Tippit (2 Tex. App. (Civ. Cas.) 710), Fires, 345.

Texas & P. R. Co. *v.* Torrey (4 Tex. App. (Civ. Cas.) 445, 16 S. W. Rep. 547), Fires, 143, 345.
Texas & P. R. Co. *v.* United States (28 Ct. of Cl. 379), Car. of Mails, 3.
Texas & P. R. Co. *v.* Virginia R., L. & C. Co. (Tex.) (35 Am. & Eng. R. Cas. 201, 7 S. W. Rep. 341), Pl., 9, 136; Witn., 149.
Texas & P. R. Co. *v.* Volk (151 U. S. 73, 14 Sup. Ct. Rep. 239), App., 85; Employés, Inj. to, 572, 764.
Texas & P. R. Co. *v.* Wagner (2 Tex. App. (Civ. Cas.) 291), Employés, Inj. to, 324; Fel. Serv., 151, 290.
Texas & P. R. Co. *v.* Watts (Tex.) (18 S. W. Rep. 312), App., 83; Receiv., 177, 185.
Texas & P. R. Co. *v.* Weakly (2 Tex. App. (Civ. Cas.) 728), Animals, 414.
Texas & P. R. Co. *v.* Wever (3 Tex. App. (Civ. Cas.) 85), Car. of M., 330, 354.
Texas & P. R. Co. *v.* Wheat (2 Tex. App. (Civ. Cas.) 146), Car. of M., 77, 449; Evid., 225.
Texas & P. R. Co. *v.* White (4 Tex. App. (Civ. Cas.) 451, 17 S. W. Rep. 419), Car. of P., 83, 92, 250; Tresp., Inj to, 12.
Texas & P. R. Co. *v.* Wills (2 Tex. App. (Civ. Cas.) 700), App., 82; Trial, 93.
Texas & P. R. Co. *v.* Wilson (Tex. Civ. App.) (21 S. W. Rep. 373), Pl., 130.
Texas & P. R. Co. *v.* Woodall (2 Tex. App. (Civ. Cas.) 413), Children, Inj. to, 34; Dam., 26, 67; Witn., 34.
Texas & P. R. Co. *v.* Wright (2 Tex. App. (Civ. Cas.) 292), Car. of M., 774; Just. P., 9.
Texas & P. R. Co. *v.* Wright (23 Am. & Eng. R. Cas. 304, 62 Tex. 515), App., 85; Cross., Inj. at, 141; Trial, 169.
Texas & St. L. R. Co. *v.* Allen (1 Tex. App. (Civ. Cas.), 291), Liens, 14, 20, 22, 44.
Texas & St. L. R. Co. *v.* Ballouf (1 Tex. App. (Civ. Cas.) 277), Proc., 45.
Texas & St. L. R. Co. *v.* Cella (42 Ark. 528), Em. Dom., 629, 691.
Texas & St. L. R. Co. *v.* Donnelly (46 Ark. 87), Evid., 254.
Texas & St. L. R. Co. *v.* Eddy (42 Ark. 527), Em. Dom., 631, 837.
Texas & St. L. R. Co. *v.* Jerrell (60 Tex. 267), Evid., 233; License, 14.
Texas & St. L. R. Co. *v.* Kirby (44 Ark. 103), Witn., 123.
Texas & St. L. R. Co. *v.* McCaughey (62 Tex. 271), Assign., 26; Liens, 59.
Texas & St. L. R. Co. *v.* Matthews (60 Tex. 215), Em. Dom., 1008.
Texas & St. L. R. Co. *v.* Myers (1 Tex. App. (Civ. Cas.) 168), Med. Serv., 12.
Texas & St. L. R. Co. *v.* Orr (46 Ark. 182), Contrib. Neg., 105; Death, etc., 178; Stat. & D., 93.
Texas & St. L. R. Co. *v.* Reid (1 Tex. App. (Civ. Cas. 120), Dam., 66; Husb. & W., 31; Trial, 139.
Texas & St. L. R. Co. *v.* Robards (60 Tex. 545), Contr., 61, 95; Estop., 26; Stat. & D., 33.
Texas & St. L. R. Co. *v.* Ross (62 Tex. 447), Bills of Partic., 4; Evid., 16; Pl., 14.
Texas & St. L. R. Co. *v.* Rust (5 McCrary (U. S.) 348, 17 Fed. Rep. 275), Eq., 2; Rem. of C., 55.
Texas & St. L. R. Co. *v.* Rust (19 Fed. Rep. 239), Contr., 72; Dam., 39.
Texas & St. L. R. Co. *v.* State (20 Am. & Eng. R. Cas. 626, 41 Ark. 488), Crim. L., 1.
Texas & St. L. R. Co. *v.* Suggs (21 Am. & Eng. R. Cas. 475, 62 Tex. 323), Car. of P., 194; Derailm., 4; New Tr., 24.
Texas & St. L. R. Co. *v.* Vallie (60 Tex. 481), Employés, Inj. to, 89, 190, 726.
Texas & St. L. R. Co. *v.* Young (13 Am. & Eng. R. Cas. 544, 60 Tex. 201), Cat.-Gds., 9, 20, 33; Dam., 4; Witn., 122.
Texas C. R. Co. *v.* Ascue (Tex.) (4 S. W. Rep. 13), New Tr., 38.
Texas C. R. Co. *v.* Burnett (61 Tex. 638), Husb. & W., 15.
Texas C. R. Co. *v.* Burnett (80 Tex. 536, 16 S. W. Rep. 320), Husb. & W., 19; Trial, 143; Witn., 165.
Texas C. R. Co. *v.* Childress (64 Tex. 346), Animals, 1; Evid., 98.
Texas C. R. Co. *v.* Clifton (2 Tex. App. (Civ. Cas.) 433), App., 86; Em. Dom., 685; Flood. Lds., 96.
Texas C. R. Co. *v.* Morris (16 Am. & Eng. R. Cas. 259, 1 Tex. App. (Civ. Cas.) 158), Car. of L. S., 80.
Texas C. R. Co. *v.* Rowland (3 Tex. Civ. App. 158, 22 S. W. Rep. 134), App., 85; Dam., 25; Fel. Serv., 479.
Texas C. R. Co. *v.* Stuart (1 Tex. Civ. App. 642, 20 S. W. Rep. 962), Car. of P., 137, 595; Children, Inj. to, 193; Contrib. Neg., 116, 121; Judgm., 1; Pl., 177; Trial, 130.
Texas Exp. Co. *v.* Dupree (2 Tex. App. (Civ. Cas.) 274), Exp. Cos., 64, 77, 78, 89.
Texas Exp. Co. *v.* Scott (Tex.) (16 Am. & Eng. R. Cas. 111, 2 Tex. App. (Civ. Cas.) 59), Car. of M., 12, 14, 200, 201; Trial, 22; Words & Ph., 7.
Texas Exp. Co. *v.* Texas & P. R. Co. (4 Woods (U. S.) 370, 6 Fed. Rep. 426), Charges, 11; Exp. Cos., 9.
Texas Mex. R. Co. *v.* Douglass (69 Tex. 694, 7 S. W. Rep. 77), Dam., 89, 92; Evid., 164.
Texas Mex. R. Co. *v.* Douglass (73 Tex. 325, 11 S. W. Rep. 333), Dam., 71; Evid., 59, 70; New Tr., 74.
Texas Mex. R. Co. *v.* Herbeck (60 Tex. 602), Children, Inj. to, 146.
Texas Mex. R. Co. *v.* Locke (74 Tex. 370, 12 S. W. Rep. 80), Evid., 229.
Texas Mex. R. Co. *v.* Showalter (3 Tex. App. (Civ. Cas.) 92), Att'ys, 14, 19.
Texas Mex. R. Co. *v.* Whitmore (11 Am. & Eng. R. Cas. 195, 58 Tex. 276), Employés, Inj. to, 2, 93, 293; Fel. Serv., 101, 132, 150, 217.
Texas Mex. R. Co. *v.* Willis (3 Tex. App. (Civ. Cas.) 94), Bagg., 96; Dam., 11.
Texas Pac. R. Co. *v.* Buckelew (3 Tex. Civ. App. 272, 22 S. W. Rep. 994), Car. of P., 151, 601; Derailm., 4; New Tr., 20; Pl., 116.
Texas Pac. R. Co. *v.* Davidson (68 Tex. 370, 4 S. W. Rep. 636), App., 117; Car. of P., 220; Lim. of Ac., 13.
Texas Pac. R. Co. *v.* Florence (4 Tex. App.

(Civ. Cas.) 58, 14 S. W. Rep. 1070), New Tr., 35.
Texas Pac. R. Co. *v.* Griffin (76 Tex. 441, 13 S. W. Rep. 471), Receiv., 185.
Texas Pac. R. Co. *v.* Grimes (Tex. Civ. App.) (21 S. W. Rep. 402), Pl., 117; Trial, 183.
Texas Pac. R. Co. *v.* James (82 Tex. 306, 18 S. W. Rep. 589), Eject. Pass., 99, 103, 106.
Texas Pac. R. Co. *v* Johnson (42 Am. & Eng. R. Cas. 7, 76 Tex. 421, 13 S. W. Rep. 463), Employés, Inj. to, 71, 634; New Tr., 77; Receiv., 82, 176, 183.
Texas Pac. R. Co. *v.* Nicholson (21 Am. & Eng. R. Cas. 133, 61 Tex. 491), Agency, 115; Car. of L. S., 5, 156; Car. of M., 59.
Texas Pac. R. Co. *v.* Overheiser (76 Tex. 437, 13 S. W. Rep. 468), New Tr., 66; Receiv., 185.
Texas Pac. R. Co. *v.* White (82 Tex. 543, 18 S. W. Rep. 478), Employés, Inj. to, 107; Receiv., 181.
Texas Pac. R. Co. *v.* Wisenor (66 Tex. 674, 2 S. W. Rep. 667), App., 44; Employés, Inj. to, 122.
Texas, S. F. & N. R. Co. *v.* Orman (3 N. Mex. 308, 9 Pac. Rep. 253), App., 7.
Texas, S. F. & N. R. Co. *v.* Orman (3 N. Mex. 365, 9 Pac. Rep. 595), Liens, 40.
Texas Trunk R. Co. *v.* Ayres (83 Tex. 268, 18 S. W. Rep. 684), Dam., 41; Evid., 87, 209.
Texas Trunk R. Co. *v.* Elam (1 Tex. App. (Civ. Cas.) 201), Em. Dom., 645.
Texas Trunk R. Co. *v.* Jackson (85 Tex. 605, 22 S. W. Rep. 1030), App., 133.
Texas Trunk R. Co. *v.* Johnson (41 Am. & Eng. R. Cas. 122, 75 Tex. 158, 12 S. W. Rep. 482), App., 53; Employés, Inj. to, 753; Evid., 47.
Texas Trunk R. Co. *v.* Lewis (81 Tex. 1, 16 S. W. Rep. 647), Jurisd., 3; Receiv., 38, 114, 115.
Texas Trunk R. Co. *v.* Mullins (Tex. App.) (18 S. W. Rep. 790), Car. of P., 572.
Texas Trunk R. Co. *v.* Pannill (4 Tex. App. (Civ. Cas.) 471, 17 S. W. Rep. 1100), Car. of L. S., 155.
Texas Trunk R. Co. *v.* State (83 Tex. 1, 18 S. W. Rep. 199), Quo War., 12; Receiv., 4, 11.
Texas Western R. Co. *v.* Cave (80 Tex. 137, 15 S. W. Rep. 786), Em. Dom., 1081.
Texas Western R. Co. *v.* Gentry (33 Am. & Eng. R. Cas. 46, 69 Tex. 625, 8 S. W. Rep. 98), Estop., 17, 33; Lim. of Ac., 35; Mort., 44; Vend. & P., 6.
Texas Western R. Co. *v.* Wilson (51 Am. & Eng. R. Cas. 364, 83 Tex. 153, 18 S. W. Rep. 325), Em. Dom., 1085.
Textor *v.* Baltimore & O. R. Co. (13 Am. & Eng. R. Cas. 635, 59 Md. 63, 43 Am. Rep. 540), Sts. & H., 299.
Thacher *v.* Com'rs of Jefferson County (13 Kan. 182), Counties, 6.
Thackwray & Y. Contract, In re (L. R. 40 Ch. D. 34), Em. Dom., 1119.
Thall *v.* Carme (24 N. Y. S. R. 270, 5 N. Y. Supp. 244), Employés, Inj. to, 462; Fel. Serv., 56.
Thames H. D. & R. Co. *v.* Hall (5 M. & G. 274, 6 Scott N. R. 342, 3 Railw. Cas. 441, 7 Jur. 238), Abate., 9.
Thames H. D. & R. Co. *v.* Rose (2 D. N. S. 104, 5 Scott N. R. 524, 4 M. & G. 552, 3 Railw. Cas. 177, 12 L. J. C. P. 90), Direct., 1.
Thames Steamboat Co. *v.* Housatonic R. Co. (24 Conn. 40), Agency, 78.
Tharsis S. & C. Co. *v.* London & N. W. R. Co. (3 Ry. & C. T. Cas. 455), Car. of M., 533, 536.
Thatcher *v.* Delaware & H. Canal Co. (1 Int. Com. Com. 152, 1 Int. Com. Rep. 356), Int. Com., 125.
Thatcher *v.* Fitchburg R. Co. (1 Int. Com Rep. 356), Int. Com., 16.
Thatcher *v.* Great Western R. Co. (4 U. C. C. P. 543), Car. of P., 184.
Thatcher *v.* Maine C. R. Co. (85 Me. 502, 27 Atl. Rep. 519), Fires, 7, 207, 240.
Thayer *v.* Burchard (99 Mass. 508), Car. of M., 141, 414.
Thayer *v.* Flint & P. M. R. Co. (93 Mich. 150, 53 N. W. Rep. 216), Consol., 40; Cross., Inj. at, 172, 190; Cross. Sts. & H., 10; Negl., 94; Sts. & H., 190, 349.
Thayer *v.* Montgomery County (3 Dill. (U. S.) 389), Coupons, 2; Mun. Aid, 391.
Thayer *v.* New Bedford R. Co. (125 Mass. 253), Rip. Rts., 9.
Thayer *v.* Rochester City & B. R. Co. (15 Abb. N. Cas. (N. Y.) 52), Injunc., 63; St. Rys., 112.
Thayer *v.* St. Louis, A. & T. H. R. Co. (22 Ind. 26), Agency, 85; Animals, 126; Car. of M., 430; Car. of P., 142; Contrib. Neg., 12, 50; Employés, Inj. to, 45, 99; Fel. Serv., 102, 143.
Thayer *v.* Vermont C. R. Co. (24 Vt. 440), Constr. Rys., 80.
Theatrical Rates, In re (1 Int. Com. Rep. 18), Int. Com., 184.
Theissen *v.* Belle Plaine (81 Iowa 118, 46 N. W. Rep. 854), Contrib. Neg., 104; Negl., 66.
Theleman *v.* Moeller (73 Iowa 108, 34 N. W. Rep. 765), Fel. Serv., 1, 394, 511.
Thelin *v.* Dorsey (13 Am. & Eng. R. Cas. 145, 59 Md. 539), Mal. Pros., 9, 11.
Thelin *v.* Stewart (100 Cal. 372, 34 Pac. Rep. 861), Actions, 11; Pl., 176.
Theobald *v.* Railway Pass. A. Co. (10 Exch. 45, 2 C. L. R. 1034, 12 Jur. 583, 23 L. J. Exch., 249), Acc. Ins., 2.
Theobold *v.* Louisville, N. O. & T. R. Co. (38 Am. & Eng. R. Cas. 462, 66 Miss. 279, 4 L. R. A. 735, 6 So. Rep. 230), St. Rys., 194; Sts. & H., 142.
Thigpen *v.* Mississippi C. R. Co. (32 Miss. 347), Subscr., 15, 103, 147.
Third Ave. R. Co., In re (43 Am. & Eng. R. Cas. 222, 121 N. Y. 536, 24 N. E. Rep. 951, 31 N. Y. S. R. 693; reversing 56 Hun 537, 31 N. Y. S. R. 645, 9 N. Y. Supp. 686, 833), St. Rys., 115.
Third Ave. R. Co. *v.* Mayor, etc., of N. Y. (54 N. Y. 159), Injunc., 3.
Third Ave. R. Co. *v.* New York El. R. Co (19 Abb. N. Cas. (N. Y.) 261), Elev. Rys., 55, 81, 96.

Third Nat. Bank *v.* Eastern R. Co. (122 Mass. 240), Eastern R. Co., 4.
Thirteenth & F. St. Pass. R. Co. *v.* Boudrou (2 Am. & Eng. R. Cas. 30, 92 Pa. St. 475, 37 Am. Rep. 707), Car. of P., 344; Dam., 6; St. Rys., 414.
Thirteenth & F. St. Pass. R. Co. *v.* Philadelphia (16 Phila. (Pa.) 164), St. Rys., 155.
Thirteenth & F. St. Pass. R. Co. *v.* Union Pass. R. Co. (15 Phila. (Pa.) 275), Location, etc., 19.
Thirty-fourth St. R. Co., In re (102 N. Y. 343, 7 N. E. Rep. 172, 2 N. Y. S. R. 33; reversing 37 Hun 442, 2 How. Pr. N. S. 369), St. Rys., 12, 112.
Thistle *v.* Union Forwarding & R. Co. (29 U. C. C. P. 76), Leases, 70.
Thomas *v.* Armstrong (4 McCrary (U. S.) 176), Death, etc., 62.
Thomas *v.* Boston & P. R. Co. (10 Metc. (Mass.) 472), Car. of M., 325.
Thomas *v.* Brownville, Ft. K. & P. R. Co. (16 Am. & Eng. R. Cas. 557, 109 U. S. 522, 3 Sup. Ct. Rep. 315; reversing 2 Fed. Rep. 877), Direct., 49.
Thomas *v.* Charlotte, C. & A. R. Co. (38 So. Car. 485, 17 S. E. Rep. 226), Car. of P., 226, 297, 552; Trial, 76.
Thomas *v.* Chicago & G. T. R. Co. (37 Am. & Eng. R. Cas. 108, 72 Mich. 355, 40 N. W. Rep. 463), Car. of P., 81; Eject. Pass., 2, 23; Pl., 141; Tickets & F., 74.
Thomas *v.* Chicago & G. T. R. Co. (86 Mich. 496, 49 N. W. Rep. 547), Cross., Inj. at, 135; Negl., 61; Witn., 128.
Thomas *v.* Citizens' Horse R. Co. (11 Am. & Eng. R. Cas. 306, 104 Ill. 462), Mort., 9, 193.
Thomas *v.* Citizens' Pass. R. Co. (46 Am. & Eng. R. Cas. 196, 132 Pa. St. 504, 19 Atl. Rep. 286), St. Rys., 475, 496.
Thomas *v.* Delaware, L. & W. R. Co. (19 Blatchf. (U. S.) 533, 8 Fed. Rep. 729), Cross., Inj. at, 297, 313, 315.
Thomas *v.* Geldart (20 New Brun. 95), Eject. Pass., 48.
Thomas *v.* Georgia R. & B. Co. (38 Ga. 222), Trial, 6; Words & Ph., 104.
Thomas *v.* Georgia R. & B. Co. (40 Ga. 231), Pl., 110.
Thomas *v.* Great Western R. Co. (14 U. C. Q. B. 389), Evid., 1.
Thomas *v.* Hannibal & St. J. R. Co. (23 Am. & Eng. R. Cas. 183, 82 Mo. 538), Animals, 94, 356; Fences, 39, 41.
Thomas *v.* Lansing (14 Fed. Rep. 618, 21 Blatchf. (U. S.) 119), Mun. Aid, 234, 383.
Thomas *v.* Missouri Pac. R. Co. (53 Am. & Eng. R. Cas. 146, 109 Mo. 187, 18 S. W. Rep. 980), Employés, Inj. to, 110, 202.
Thomas *v.* Morgan County (39 Ill. 496), Mun. Aid, 241.
Thomas *v.* Morgan County (59 Ill. 479), Eq., 26; Mun. Aid, 240, 241.
Thomas *v.* New York & G. L. R. Co. (47 N. Y. S. R. 250, 22 Civ. Pro. 326, 19 N. Y. Supp. 766), Bonds, 56.
Thomas *v.* New York & G. L. R. Co. (139 N. Y. 163, 54 N. Y. S. R. 498; affirming 47 N. Y. S. R. 250, 19 N. Y. Supp. 766, 22 Civ. Pro. 326), Bonds, 36, 41, 56.
Thomas *v.* North Staffordshire R. Co. (3 Ry. & C. T. Cas. 1), Car. of M., 35, 260.
Thomas *v.* Pacific Exp. Co. (30 Mo. App. 86), Car. of M., 277.
Thomas *v.* Peoria & R. I. R. Co. (36 Am. & Eng. R. Cas. 381, 36 Fed. Rep. 808), Leases, 106; Mort., 60, 230.
Thomas *v.* Philadelphia & R. R. Co. (148 Pa. St. 180, 23 Atl. Rep. 989), Car. of P., 129, 133, 594; Derailm., 5.
Thomas *v.* Port Huron (27 Mich. 320), Mun. Aid, 37.
Thomas *v.* Rhymney R. Co. (L. R. 5 Q. B. 226, 39 L. J. Q. B. 226, 22 L. T. 297, 18 W. R. 668), Car. of P., 508.
Thomas *v.* Rhymney R. Co. (L. R. 6 Q. B. 266, 40 L. J. Q. B. 89, 19 W. R. 477, 24 L. T. 145), Car. of P., 508.
Thomas *v.* Scotland County (3 Dill. (U. S.) 7), Mun. Aid, 4.
Thomas *v.* Union Pac. R. Co. (1 Utah 232), Death, etc., 1.
Thomas *v.* Union Pac. R. Co. (1 Utah 235), Lim. of Ac., 60; Words & Ph., 122.
Thomas *v.* Utica & B. R. R. Co. (20 Am. & Eng. R. Cas. 93, 97 N. Y. 245; reversing 24 Hun 488), Actions, 11.
Thomas *v.* Utica & B. R. R. Co. (6 Civ. Pro. (N. Y.) 353; affirmed in 98 N. Y. 649, mem.), Death, etc., 387.
Thomas *v.* Wabash, St. L. & P. R. Co. (20 Mo. App. 485), Car. of P., 627.
Thomas *v.* Wabash, St. L. & P. R. Co. (40 Fed. Rep. 126, 7 L. R. A. 145), Stat., 34.
Thomas *v.* Western Car. Co. (149 U. S. 95, 13 Sup. Ct. Rep. 824), Mort., 98.
Thomas *v.* West Jersey R. Co. (101 U. S. 71), Leases, 16, 18, 26, 79.
Thomas, B. & W. Mfg. Co. *v.* Wabash, St. L. & P. R. Co. (62 Wis. 642, 51 Am. Rep. 725, 22 N. W. Rep. 827), Car. of M., 770, 801.
Thompson *v.* Belfast, H. & B. R. Co. (5 Ir. C. L. 517), Car. of P., 240.
Thompson *v.* Boston & M. R. Co. (58 N. H. 524), Dam., 108.
Thompson *v.* Boston & M. R. Co. (153 Mass. 391, 26 N. E. Rep. 1070), Employés, Inj. to, 386, 582.
Thompson *v.* Canada C. R. Co. (14 Am. & Eng. R. Cas. 431, 3 Ont. 136), Em. Dom., 1250.
Thompson *v.* Central Ohio R. Co. (6 Wall. (U. S.) 134), Eq., 5.
Thompson *v.* Central R. & B. Co. (54 Ga. 509), Contrib. Neg., 105; Employés, Inj. to, 625; Fel. Serv., 171.
Thompson *v.* Central R. Co. (60 Ga. 120), Abate., 5.
Thompson *v.* Chicago & A. R. Co. (22 Mo. App. 321), Lim. of Liab., 22.
Thompson *v.* Chicago & N. W. R. Co. (27 Iowa 561), Car. of M., 454.
Thompson *v.* Chicago, M. & St. P. R. Co. (4 McCrary (U. S.) 629, 14 Fed. Rep. 564), Employés, Inj. to, 261, 279, 284, 293, 435, 733.
Thompson *v.* Chicago, M. & St. P. R. Co.

(5 McCrary (U. S.) 542, 18 Fed. Rep. 239), Fel. Serv., 83, 266.
Thompson *v.* Chicago, S. F. & C. R. Co. (110 Mo. 147, 19 S. W. Rep. 77), Em. Dom., 292, 436, 846, 865.
Thompson *v.* Cincinnati, L. & C. R. Co. (54 Ind. 197), Trial, 216.
Thompson *v.* Cincinnati, W. & Z. R. Co. (1 Bond (U. S.) 152), Contr., 71.
Thompson *v.* Duncan (76 Ala. 334), Car. of P., 465, 604; Contrib. Neg., 11, 56, 116, 121.
Thompson *v.* Erie R. Co. (9 Abb. Pr. N. S. (N. Y.) 212), Discov., 3.
Thompson *v.* Erie R. Co. (11 Abb. Pr. N. S. (N. Y.) 188, 42 How. Pr. 68), Mort., 1, 9; Stockh., 86.
Thompson *v.* Erie R. Co. (45 N. Y. 468), Parties, 10.
Thompson *v.* Fargo (58 Barb. (N. Y.) 575; reversed in 49 N. Y. 188, 44 How. Pr. 176), Judgm., 16.
Thompson *v.* Fargo (44 How. Pr. (N. Y.) 176, 49 N. Y. 188), Car. of M., 705, 720.
Thompson *v.* Fargo (63 N. Y. 479; affirming 2 Hun 379, 4 T. & C. 665, 48 How. Pr. 93), Exp. Cos., 81.
Thompson *v.* Flint & P. M. R. Co. (23 Am. & Eng. R. Cas. 289, 57 Mich. 300, 23 N. W. Rep. 820), Contrib. Neg., 55, 71; Cross., Inj. at, 219.
Thompson *v.* Grand Gulf R. & B. Co. (4 Miss. 240), Charters, 117; Em. Dom., 255.
Thompson *v.* Grand Trunk R. Co. (18 U. C. Q. B. 92), Animals, 276.
Thompson *v.* Grand Trunk R. Co. (37 U. C. Q. B. 40), Cat.-Gds., 23.
Thompson *v.* Great Western R. Co. (24 U. C. C. P. 429), Animals, 189.
Thompson *v.* Guion (5 Jones Eq. (N. Car.) 113), Eq., 5; Subscr., 126.
Thompson *v.* Kelly (2 Ohio St. 647), Mun. Aid, 46.
Thompson *v.* Lake Shore & M. S. R. Co. (84 Mich. 281, 47 N. W. Rep. 584), Fel. Serv., 271, 475.
Thomson *v.* Lee County (3 Wall. (U. S.) 327), Mun. Aid, 22, 318, 344.
Thompson *v.* Locke (65 Iowa 429, 21 N. W. Rep. 762), Constr. Rys., 24.
Thompson *v.* London & N. W. R. Co. (2 Ry. & C. T. Cas. 115), Discrim., 15, 28, 33.
Thompson *v.* Louisville & N. R. Co. (48 Am. & Eng. R. Cas. 517, 91 Ala. 496, 8 So. Rep. 406), Death, etc., 336, 337.
Thompson *v.* Macklem (2 U. C. Q. B. 300), St. Rys., 438
Thompson *v.* Mamakating (37 Hun (N. Y.) 400), Mun. Aid, 330.
Thompson *v.* Manhattan R. Co. (15 Daly 438, 6 N. Y. Supp. 929, 24 N. Y. S. R. 498), Elev. Rys., 145.
Thompson *v.* Manhattan R. Co. (130 N. Y. 360, 29 N. E. Rep. 264, 41 N. Y. S. R. 697; affirming 16 Daly 64, 29 N. Y. S. R. 720, 8 N. Y. Supp. 641; which affirmed 15 Daly 438, 24 N. Y. S. R. 498, 6 N. Y. Supp 929), Elev. Rys., 78.
Thompson *v.* Memphis, S. & B. R. Co. (24 Fed. Rep. 338), Insolv., 5.
Thompson *v.* Midland R. Co. (34 L. T. 34, 3 Ry. & C. T. Cas. xxiii), Car. of P., 122; Tickets & F., 106; Time-table., 3.
Thompson *v.* Milwaukee & St. P. R. Co. (27 Wis. 93, 2 Am. Ry. Rep. 9), Em. Dom., 679.
Thompson *v.* Minneapolis & St. L. R. Co. (35 Minn. 428, 29 N. W. Rep. 148), Employés, 12.
Thompson *v.* New Orleans, J. & G. N. R. Co. (50 Miss. 315), Car. of P., 261, 528.
Thompson *v.* New York & H. R. Co. (1 T. & C. (N. Y.) 411), Animals, 138.
Thompson *v.* New York & H. R. Co. (3 Sandf. Ch. (N. Y.) 625), Bridges, 6, 13, 91, 92, 93.
Thompson *v.* New York C. & H. R. R. Co. (110 N. Y. 636, 2 Silv. App. 82, 17 N. E. Rep. 690, 13 Cent. Rep. 240, 16 N. Y. S. R. 869; reversing 33 Hun 16), Cross., Inj. at, 260; Negl., 31.
Thompson *v.* North Mo. R. Co. (51 Mo. 190, 3 Am. Ry. Rep. 492), Negl., 103.
Thompson *v.* Paterson & H. R. R. Co. (9 N. J. Eq. 526), Rip. Rts., 9.
Thompson *v.* Pennsylvania R. Co. (48 N. J. Eq. 105, 21 Atl. Rep. 182), Injunc., 62.
Thompson *v.* Pennsylvania R. Co. (51 N. J. L. 42, 15 Atl. Rep. 833), Actions, 3; Em. Dom., 726; Witn., 145.
Thompson *v.* Perrine (3 Am. & Eng. R. Cas. 140, 103 U. S. 806), Mun. Aid, 358.
Thompson *v.* Perrine (12 Am. & Eng. R. Cas. 577, 106 U. S. 589, 1 Sup. Ct. Rep. 564), Coupons, 4, 16.
Thompson *v.* Peru (29 Ind. 305), Mun. Aid, 80.
Thompson *v.* Richmond & D. R. Co. (24 So. Car. 366), Fires, 14, 33, 211.
Thompson *v.* St. Paul City R. Co. (45 Minn. 13, 47 N. W. Rep. 259), Liens, 19.
Thompson *v.* Scott (4 Dill. (U. S.) 508), Receiv., 128, 129.
Thompson *v.* Southern Cal. Motor Road Co. (82 Cal. 497, 23 Pac. Rep. 130), Em. Dom., 200.
Thompson *v.* Tioga R. Co. (36 Barb. (N. Y.) 79), Bills & N., 12; Lim. of Ac., 73.
Thompson *v.* Toledo, A. A. & N. M. R. Co. (91 Mich. 255, 51 N. W. Rep. 995), Evid., 84; Pl., 23; Trial, 92.
Thompson *v.* Waters (25 Mich. 214, 4 Am. Ry. Rep. 331), Deeds, 2; For. Corp., 5, 6, 8.
Thompson *v.* White Water Valley R. Co. (40 Am. & Eng. R. Cas. 373, 132 U. S. 68, 10 Sup. Ct. Rep. 29), Mort., 88.
Thomson, In re (8 Prac. (Ont.) 423), Debent., 8.
Thomson, In re (9 Prac. (Ont.) 119), Bonds, 43; Mand., 34.
Thomson *v.* Lee County (3 Wall. (U. S.) 327), Coupons, 16.
Thomson *v.* Manhattan R. Co. (75 Hun 548, 27 N. Y. Supp. 608), St. Rys., 364.
Thomson *v.* Pacific R. Co. (9 Wall. (U. S.) 579), Tax., 69.
Thomson *v.* Sebasticook & M. R. Co. (36 Am. & Eng. R. Cas. 662, 81 Me. 40, 16 Atl. Rep. 332), Em. Dom., 559, 578.

Thomson *v.* Union Pac. R. Co. (9 Wall. (U. S.) 579), Tax., 138.
Thomson-Houston Elec. Co. *v.* Dallas Con. T. R. Co. (54 Fed. Rep. 1001), Stockh., 30.
Thomson-Houston Elec. Co. *v.* Simon (47 Am. & Eng. R. Cas. 51, 20 Oreg. 60, 25 Pac. Rep. 147), Car. of M., 2; Elec. Rys., 1.
Thorn *v.* Caledonian R. Co. (14 Sess. Cas. (Just. Cas.) 5, 6 Ry. & C. T. Cas. lxx), Tickets & F., 145.
Thorn *v.* Central R. Co. (26 N. J. L. 121), Trial, 10.
Thorn *v.* New York City Ice Co. (11 N. Y. S. R. 845, 46 Hun 497), Employés, Inj. to, 97, 211.
Thornburgh *v.* Newcastle & D. R. Co. (14 Ind. 499), Subscr., 101, 148.
Thornton *v.* Cleveland, C., C. & St. L. R. Co. (131 Ind. 492, 31 N. E. Rep. 185), Cross., Inj. at, 264, 270.
Thornton *v.* Marginal Freight R. Co. (129 Mass. 32), Dissol., 22; Reorg., 2.
Thornton *v.* Missouri Pac. R. Co. (42 Mo. App. 58), Crim. L., 2.
Thornton *v.* St. Paul & C. R. Co. (45 How. Pr. (N. Y.) 416), Deeds of Tr., 17.
Thornton *v.* Sheffield & B. R. Co. (33 Am. & Eng. R. Cas. 226, 84 Ala. 109, 4 So. Rep. 197, 5 Am. St. Rep. 337), Em. Dom., 215, 1033; Estop., 27.
Thornton *v.* Trammell (39 Ga. 202), Deeds, 28.
Thornton *v.* Wabash R. Co. (81 N. Y. 462), Reorg., 4.
Thorogood *v.* Bryan (8 C. B. 115), Imp. Neg., 1.
Thorp *v.* Concord R. Co. (61 Vt. 378, 17 Atl. Rep. 791), Car. of L. S., 118; Tickets & F., 9.
Thorpe *v.* Missouri Pac. R. Co. (89 Mo. 650, 2 S. W. Rep. 3), Contrib. Neg., 59; Employés, Inj. to, 307, 748; Fel. Serv., 1.
Thorpe *v.* New York C. & H. R. R. Co. (76 N. Y. 402, 32 Am. Rep. 325; affirming 13 Hun 70), Sleep. Car Cos., 38.
Thorpe *v.* Rutland & B. R. Co. (27 Vt. 140), Cat.-Gds., 1; Stat., 26.
Thrasher *v.* Pike County R. Co. (25 Ill. 393), Dam., 50; Stock, 58; Subscr., 3, 53.
Three Hundred and Eighteen and One-half Tons of Coal (14 Blatchf. (U. S.) 453), Car. of M., 35.
Thrings *v.* Central Park R. Co. (7 Robt. (N. Y.) 616), Contrib. Neg., 12; Trial, 64, 66.
Throop *v.* Cobourg & P. R. Co. (5 U. C. C. P. 509), Rip. Rts., 12.
Thrussell *v.* Handyside (20 Q. B. D. 359), Employés, Inj. to, 277.
Thurber *v.* Harlem Bridge, M. & F. R. Co. (60 N. Y. 326, 10 Am. Ry. Rep. 126), Children, Inj. to, 73; Negl., 64.
Thurber *v.* Harlem Bridge, M. & F. R. Co. (60 N. Y. 333), Children, Inj. to, 125.
Thurber *v.* New York C. & H. R. R. Co. (2 Int. Com. Rep. 742, 3 Int. Com. Com. 473), Int. Com., 44, 45, 46, 74.
Thuringer *v.* New York C. & H. R. R. Co. (71 Hun (N. Y.) 526, 55 N. Y. S. R. 87, 24 N. Y. Supp. 1087), Husb. & W., 16; Sts. & H., 375.
Thurman *v.* Cherokee R. Co. (56 Ga. 376), Receiv., 181.
Thurman *v.* Wells (18 Barb. (N. Y.) 500), Agency, 20; Assign., 3; Car. of M., 11; Exp. Cos., 15, 25.
Thurston *v.* Union Pac. R. Co. (4 Dill. (U. S.) 321), Car. of P., 108, 112; Eject. Pass., 42, 54.
Thyng *v.* Fitchburg R. Co. (53 Am. & Eng. R. Cas. 535, 156 Mass. 13, 30 N. E. Rep. 169), Death, etc., 212; Stat., 59.
Tiarks *v.* St. Louis & I. M. R. Co. (58 Mo. 45), Animals, 100.
Tibbetts *v.* Knox & L. R. Co. (62 Me. 437), Blasting, 4.
Tibbits *v.* Rock Island & P. R. Co. (49 Ill. App. 567), Bills of L., 12, 13, 17, 84, 125; Car. of M., 417.
Tibby *v.* Missouri Pac. R. Co. (82 Mo. 292), Car. of L. S., 132; Car. of P., 289; Death, etc., 249.
Tickell *v.* St. Louis, I. M. & S. R. Co. (90 Mo. 296, 2 S. W. Rep. 407), Animals, 353.
Tierney *v.* Chicago & N. W. R. Co. (84 Iowa 641, 51 N. W. Rep. 175), Cross., Inj. at, 75; Death, etc., 192.
Tierney *v.* Minneapolis & St. L. R. Co. (15 Am. & Eng. R. Cas. 290, 31 Minn. 234, 17 N. W. Rep. 377), Pl., 174.
Tierney *v.* Minneapolis & St. L. R. Co. (21 Am. & Eng. R. Cas. 545, 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. Rep. 229), App., 94, 117, 125; Employés, Inj. to, 144, 145; Fel. Serv., 95, 222, 229; Witn., 100.
Tierney *v.* New York C. & H. R. R. Co. (76 N. Y. 305; affirming 10 Hun 560, 67 Barb. 538), Car. of M., 39, 50.
Tierney *v.* Troy (41 Hun (N. Y.) [illegible] 4 N. Y. S. R. 15), Bridges, 36.
Tift *v.* Towns (53 Ga. 47), Parties, 7.
Tilden *v.* Monir (45 Vt. 196), Bills of L., 124.
Tilden *v.* Young (39 Mich. 58), Constr. Rys., 91.
Tilkey *v.* Augusta, G. & S. R. Co. (83 Ga. 757, 10 S. E. Rep. 448), Sales, 1.
Tilleard, In re (3 DeG., J. & S. 519, 23 L. J. Ch. 765, 8 L. T. 587, 11 W. R. 764), Incorp., 6.
Tillery *v.* Bond (38 Fed. Rep. 825), Car. of P., 231.
Tilley *v.* Hudson River R. Co. (24 N. Y. 471, 23 How. Pr. 363), Death, etc., 278, 401.
Tilley *v.* Hudson River R. Co. (29 N. Y. 252), Death, etc., 278, 326; Words & Ph., 160.
Tilley *v.* St. Louis & S. F. R. Co. (32 Am. & Eng. R. Cas. 324, 49 Ark. 535, 6 S. W. Rep. 8), Fires, 110, 264, 288.
Tilley *v.* Savannah, F. & W. R. Co. (5 Fed. Rep. 641, 4 Woods (U. S.) 427), Ry. Com'rs, 17.
Tillinghast *v.* Troy & B. R. Co. (16 N. Y. S. R. 475, 48 Hun 420, 1 N. Y. Supp. 243; affirmed in 121 N. Y. 649, mem., 24 N. E. Rep. 1091, mem.), Mort., 190.
Tillotson *v.* Hudson River R. Co. (9 N. Y. 575; affirming 15 Barb. 406), Charters, 123.
Tillotson *v.* Texas & P. R. Co. (53 Am. &

Eng. R. Cas. 104, 44 La. Ann. 95, 10 So. Rep. 400), Employés, Inj. to, 470; Fences, 13, 14, 64.
Tillotson *v.* Webber (96 Mich. 144, 55 N. W. Rep. 837), Land Grants, 32.
Tilton *v.* New Orleans City R. Co. (35 La. Ann. 1062), St. Rys., 18, 211, 223; Sts. & H., 230.
Timins *v.* Chicago, R. I. & P. R. Co. (31 Am. & Eng. R. Cas. 541, 72 Iowa 94, 33 N. W. Rep. 379), Animals, 288, 461.
Timlow *v.* Philadelphia & R. R. Co. (99 Pa. St. 284), Stat., 49.
Timm *v.* Northern Pac. R. Co. (3 Wash. T. 299, 13 Pac. Rep. 415), Animals, 259, 485; Fences, 13.
Timmons *v.* Central Ohio R. Co. (6 Ohio St. 105), Employés, Inj. to, 384.
Timpson *v.* Manhattan R. Co. (24 N. Y. S. R. 629, 52 Hun 489, 5 N. Y. Supp. 684), Car. of P., 29, 210; Elev. Rys., 212; Stat. & D., 88.
Tingle *v.* Chicago, B. & Q. R. Co. (60 Iowa 333, 14 N. W. Rep. 320), Sunday, 8, 9.
Tinker *v.* New York, O. & W. R. Co. (71 Hun (N. Y.) 431, 54 N. Y. S. R. 528, 24 N. Y. Supp. 977), Agency, 73; Fright. Teams, 2.
Tinker *v.* Rockford (36 Ill. App. 460), Em. Dom., 220.
Tinkham *v.* Erie R. Co. (53 Barb. (N. Y.) 393), Deeds, 29.
Tinney *v.* Boston & A. R. Co. (62 Barb. (N. Y.) 218; affirmed in 52 N. Y. 632, mem.), Employés, Inj. to, 343.
Tinsman *v.* Belvidere Del. R. Co. (25 N. J. L. 255), Nuis., 28, 32; Parties, 1; Pl., 21.
Tinsman *v.* Belvidere Del. R. Co. (26 N. J. L. 148), Charters, 17; Corp., 2; Dam., 1; Em. Dom., 72; Negl., 79; Waters & W., 19.
Tioga R. Co. *v.* Blossburg & C. R. Co. (20 Wall. (U. S.) 137, 10 Am. Ry. Rep. 81; affirming 5 Blatchf. (U. S.) 387), Lim. of Ac., 73.
Tippecanoe County Com'rs *v.* Lafayette, M. & B. R. Co. (50 Ind. 85, 8 Am. Ry. Rep. 324), Leases, 26; Ult. Vir., 1.
Tippecanoe County Com'rs *v.* Lucas (93 U. S. 108), Mun. Aid, 14.
Tippecanoe County Com'rs *v.* Reynolds (44 Ind. 509), Direct., 44; Sales, 13.
Tipton County *v.* Rogers L. & M. Works (1 Am. & Eng. R. Cas. 517, 103 U. S. 523), Estop., 35; Mun. Aid, 49.
Tipton County Com'rs *v.* Indianapolis, P. & C. R. Co. (12 Am. & Eng. R. Cas. 636, 89 Ind. 101; former appeal 70 Ind. 385), Mun. Aid, 411.
Tissue *v.* Baltimore & O. R. Co. (112 Pa. St. 91, 3 Atl. Rep. 667), Blasting, 1, 2; Employés, Inj. to, 14, 667; Explosions, 1.
Titcomb *v.* Fitchburg R. Co. (12 Allen (Mass.) 254), Animals, 77; Bridges, 42.
Titus *v.* Bradford, B. & K. R. Co. (136 Pa. St. 618, 20 Atl. Rep. 517), Employés, Inj. to, 94, 97, 271.
Titus *v.* Cairo & F. R. Co. (37 N. J. L. 98), Direct., 41.
Titus *v.* Cairo & F. R. Co. (46 N. J. L. 393), Contr., 81.
Titus *v.* Catawissa R. Co. (5 Phila. (Pa.) 172), Agency, 115.
Titus *v.* Catawissa R. Co. (5 Phila. (Pa.) 360), Contr., 91.
Titus *v.* Ginheimer (27 Ill. 462), Exec., 4.
Titus *v.* Mabee (25 Ill. 257), Exec., 10.
Titusville & P. C. R. Co. *v.* Warren & V. R. Co. (12 Phila. (Pa.) 642), Location, etc., 25.
Tiverton & N. D. R. Co. *v.* Loosemore (L. R. 9 App. Cas. 480, 53 L. J. Ch. D. 812, 50 L. T. 637, 32 W. R. 929, 48 J. P. 372; reversing L. R. 22 Ch. D. 25, 52 L. J. Ch. D. 260, 48 L. T. 162, 31 W. R. 130), Em. Dom., 1096.
Tobias *v.* Broadway & S. A. R. Co. (39 N. Y. S. R. 183, 14 N. Y. Supp. 641), Paupers, 2.
Tobin *v.* Chicago City R. Co. (17 Ill. App. 82), Witn., 38.
Tobin *v.* Hartshorn (69 Iowa 648, 29 N. W. Rep. 764), Mun. Aid, 412.
Tobin *v.* Houston & T. C. R. Co. (8 Am. & Eng. R. Cas. 477, 56 Tex. 641), Lim. of Ac., 60.
Tobin *v.* Missouri Pac. R. Co. (Mo.) (18 S. W. Rep. 996), Children, Inj. to, 69, 145; Death, etc., 54, 368; Sts. & H., 318; Trial, 104.
Tobin *v.* Omnibus Cable Co. (Cal.) (58 Am. & Eng. R. Cas. 223, 34 Pac. Rep. 124), App., 79; Car. of P., 342; St. Rys., 366, 367.
Tobin *v.* Portland, S. & P. R. Co. (59 Me. 183), Stat. & D., 77.
Tocci *v.* Mayor, etc., of N. Y. (25 N. Y. Supp. 1089, 73 Hun 46), Sts. & H., 152.
Tod *v.* Kentucky Union Land Co. (57 Fed. Rep. 47), Charters, 57; Consol., 16; Guar., 3, 8.
Tod *v.* Kentucky Union R. Co. (52 Fed. Rep. 241, 6 U. S. App. 186, 3 C. C. A. 60), Liens, 19, 45; Mort., 206.
Todd *v.* Kankakee & I. R. R. Co. (78 Ill. 530), Em. Dom., 457, 732.
Todd *v.* London & S. W. R. Co. (7 M. & G. 336, 8 Scott N. R. 56), Tax., 381.
Todd *v.* Metropolitan District R. Co. (24 L. T. N. S. 435, 19 W. R. 720), Acc. & Sat., 5; Em. Dom., 1144, 1146, 1205.
Todd *v.* Midland G. W. R. Co. (9 L. R., Ir. 85), Side Tr., 3; Spec. Perf., 10.
Todd *v.* Minneapolis & St. L. R. Co. (37 Minn. 358, 35 N. W. Rep. 5), Pl., 174.
Todd *v.* Minneapolis & St. L. R. Co. (36 Am. & Eng. R. Cas. 191, 39 Minn. 186, 39 N. W. Rep. 318), Sts. & H., 268.
Todd *v.* Missouri Pac. R. Co. (33 Mo. App. 110), Attach., 2, 46.
Todd *v.* Old Colony & F. R. R. Co. (3 Allen (Mass.) 18), Car. of P., 484, 492; Judgm., 17; Passes, 10.
Todd *v.* Old Colony & F. R. R. Co. (7 Allen (Mass.) 207), Car. of P., 484, 492.
Todd *v.* Pittsburg, Ft. W. & C. R. Co. (19 Ohio St. 514), Dedica., 3.
Todd County *v.* St. Paul, M. & M. R. Co. (31 Am. & Eng. R. Cas. 482, 38 Minn. 163, 36 N. W. Rep. 109), Tax., 161.
Todhunter *v.* Des Moines, I. & M. R. Co.

(7 Am. & Eng. R. Cas. 67, 58 Iowa 205, 12 N. W. Rep. 267), Leases, 28.
Tolano *v.* National Steam Nav. Co. (5 Robt. (N. Y.) 318, 4 Abb. 316, 35 How. Pr. 496), Bagg., 79, 105.
Toledo & A. A. R. Co. *v.* Johnson (49 Mich. 148, 13 N. W. Rep. 492), Franch., 10; Trial, 100.
Toledo & A. A. R. Co. *v.* Johnson (55 Mich. 456, 21 N. W. Rep. 888; former appeal 49 Mich. 148), Bills & N., 23; Evid., 1; Incorp., 11; Subscr., 210.
Toledo & W. R. Co. *v.* Daniels (21 Ind. 256), Animals, 145, 334.
Toledo & W. R. Co. *v.* Daniels (16 Ohio St. 390), Em. Dom., 184.
Toledo & W. R. Co. *v.* Fowler (22 Ind. 316), Animals, 150, 350; Fences, 8.
Toledo & W. R. Co. *v.* Goddard (25 Ind. 185), Contrib. Neg., 5, 21; Cross., Inj. at, 8, 125; Evid., 173; Imp. Neg., 25; Negl., 6; Trial, 204.
Toledo & W. R. Co. *v.* Lafayette (22 Ind. 262), Tax., 81.
Toledo & W. R. Co. *v.* Lurch (23 Ind. 10), Animals, 326.
Toledo & W. R. Co. *v.* Reed (23 Ind. 101), Animals, 630.
Toledo & W. R. Co. *v.* Smith (25 Ind. 288), Animals, 423; Witn., 118.
Toledo & W. R. Co. *v.* Thomas (18 Ind. 215), Animals, 119, 213; Fences, 75.
Toledo, A. A. & G. T. R. Co. *v.* Dunlap (5 Am. & Eng. R. Cas. 378, 47 Mich. 456, 11 N. W. Rep. 271), Consol., 37; Em. Dom., 57, 76, 192, 233, 387, 395, 470, 549, 568, 774, 864, 921; Stat., 34.
Toledo, A. A. & N. M. R. Co. *v.* Detroit, L. & N. R. Co. (61 Mich. 9, 27 N. W. Rep. 715), Injunc., 6, 12.
Toledo, A. A. & N. M. R. Co. *v.* Detroit, L. & N. R. Co. (28 Am. & Eng. R. Cas. 272, 62 Mich. 564, 29 N. W. Rep. 500), Cross. Rys., 7, 28, 40, 76; Em. Dom., 112, 274.
Toledo, A. A. & N. M. R. Co. *v.* Detroit, L. & N. R. Co. (28 Am. & Eng. R. Cas. 280, 63 Mich. 645, 30 N. W. Rep. 595), Cross. Rys., 9.
Toledo, A. A. & N. M. R. Co. *v.* Munson (20 Am. & Eng. R. Cas. 410, 57 Mich. 42, 23 N. W. Rep. 455), Em. Dom., 235, 316, 381, 920.
Toledo, A. A. & N. M. R. Co. *v.* Pennsylvania Co. (53 Am. & Eng. R. Cas. 293, 54 Fed. Rep. 746), Contempt, 1; Injunc., 10; Int. Com., 108; Strikes, 6.
Toledo, A. A. & N. M. R. Co. *v.* Pennsylvania Co. (53 Am. & Eng. R. Cas. 307, 54 Fed. Rep. 730), Injunc., 2, 23, 57; Int. Com., 156; Strikes, 6.
Toledo, B. & L. R. Co. *v.* Tilton (27 Ind. 71), Animals, 293, 336.
Toledo, C. & St. L. R. Co. *v.* Hinsdale (45 Ohio St. 556, 15 N. E. Rep. 665), Subscr., 210.
Toledo, C. S. & D. R. Co. *v.* Eder (45 Mich. 329, 7 N. W. Rep. 898), Animals, 142.
Toledo, D. & B. R. Co. *v.* Hamilton (43 Am. & Eng. R. Cas. 476, 134 U. S. 296, 10 Sup. Ct. Rep. 546), Mort., 126.
Toledo, L. & B. R. Co. *v.* Nordyke (27 Ind. 95), Animals, 1; Rev., 11.
Toledo, L. & B. R. Co. *v.* Shively (26 Ind. 181), Proc., 39.
Toledo, P. & W. R. Co. *v.* Arnold (43 Ill. 418), Animals, 583.
Toledo, P. & W. R. Co. *v.* Arnold (49 Ill. 178), Animals, 303.
Toledo, P. & W. R. Co. *v.* Arnold (51 Ill. 241), Fences, 49.
Toledo, P. & W. R. Co. *v.* Bookless (55 Ill. 230, 2 Am. Ry. Rep. 454), Fences, 21.
Toledo, P. & W. R. Co. *v.* Bray (57 Ill. 514, 10 Am. Ry. Rep. 441), Animals, 66.
Toledo, P. & W. R. Co. *v.* Chenoa (43 Ill. 209), Sts. & H., 302.
Toledo, P. & W. R. Co. *v.* Conroy (61 Ill. 162, 12 Am. Ry. Rep. 431), Employés, Inj. to, 136.
Toledo, P. & W. R. Co. *v.* Conroy (68 Ill. 560), Bridges, 20, 34, 52, 57, 58; Employés, Inj. to, 93.
Toledo, P. & W. R. Co. *v.* Crane (68 Ill. 355), Animals, 124.
Toledo, P. & W. R. Co. *v.* Darst (51 Ill. 365), Animals, 351.
Toledo, P. & W. R. Co. *v.* Darst (52 Ill. 89), Animals, 368.
Toledo, P. & W. R. Co. *v.* Darst (61 Ill. 231, 12 Am. Ry. Rep. 448), Em. Dom., 207, 423, 519.
Toledo, P. & W. R. Co. *v.* Deacon (63 Ill. 91), Animals, 211, 481, 513; Cross., Inj. at, 171; Sts. & H., 327.
Toledo, P. & W. R. Co. *v.* Delehanty (71 Ill. 615), Animals, 158.
Toledo, P. & W. R. Co. *v.* Eastburn (54 Ill. 381), Animals, 455.
Toledo, P. & W. R. Co. *v.* Foster (43 Ill. 415), Animals, 192; Cross., Inj. at, 153.
Toledo, P. & W. R. Co. *v.* Foster (43 Ill. 480), Cross., Inj. at, 156.
Toledo, P. & W. R. Co. *v.* Head (62 Ill. 233), Animals, 228.
Toledo, P. & W. R. Co. *v.* Ingraham (58 Ill. 120, 10 Am. Ry. Rep. 393), Animals, 283.
Toledo, P. & W. R. Co. *v.* Johnston (74 Ill. 83), Animals, 260, 580, 591.
Toledo, P. & W. R. Co. *v.* Kichler (48 Ill. 438), Evid., 6.
Toledo, P. & W. R. Co. *v.* Kickler (51 Ill. 157), Car. of M., 111.
Toledo, P. & W. R. Co. *v.* Lavery (71 Ill. 522), Animals, 126, 360; Fences, 92.
Toledo, P. & W. R. Co. *v.* McClannon (41 Ill. 238), Fences, 96; Pl., 136.
Toledo, P. & W. R. Co. *v.* Merriman (52 Ill. 123), Car. of M., 612.
Toledo, P. & W. R. Co. *v.* Miller (45 Ill. 42), Fences, 85.
Toledo, P. & W. R. Co. *v.* Parker (49 Ill. 385), Animals, 564, 590.
Toledo, P. & W. R. Co. *v.* Patterson (63 Ill. 304), Eject. Pass., 23, 65, 119.
Toledo, P. & W. R. Co. *v.* Pence (68 Ill. 524), Animals, 131, 523; Fences, 21; Words & Ph., 179.
Toledo, P. & W. R. Co. *v.* Pindar (53 Ill. 447), Fires, 113, 320.

Toledo, P. & W. R. Co. *v.* Riley (47 Ill. 514), Contrib. Neg., 4, 5.
Toledo, P. & W. R. Co. *v.* Rumbold (40 Ill. 143), Fences, 95.
Toledo, P. & W. R. Co. *v.* Sieberns (63 Ill. 417, 7 Am. Ry. Rep. 163), Fences, 44.
Toledo, P. & W. R. Co. *v.* Spence (68 Ill. 524), Animals, 126.
Toledo, P. & W. R. Co. *v.* Sweeney (41 Ill. 226), Animals, 590; Fences, 67.
Toledo, P. & W. R. Co. *v.* Wickery (44 Ill. 76), Animals, 122.
Toledo Produce Exch., In re (2 Int. Com. Rep. 412, 2 Int. Com. Com. 588), Int. Com., 66, 166.
Toledo Produce Exch. *v.* Lake Shore & M. S. R. Co. (3 Int. Com. Rep. 830, 5 Int. Com. Com. 166), Int. Com., 66, 70, 147, 172.
Toledo, S. & M. R. Co. *v.* Campau (83 Mich. 33, 46 N. W. Rep. 1026), Em. Dom., 338, 550, 593.
Toledo, S. & M. R. Co. *v.* East Saginaw & St. C. R. Co. (36 Am. & Eng. R. Cas. 553, 72 Mich. 206, 40 N. W. Rep. 436), Cross. Rys., 23, 25, 28, 32; Em. Dom., 185, 305, 339, 495.
Toledo, St. L. & K. C. R. Co. *v.* Adams (131 Ind. 38, 30 N. E. Rep. 794), Contrib. Neg., 72; Trial, 218.
Toledo, St. L. & K. C. R. Co. *v.* American Refrigerator Transit Co. (41 Ill. App. 625), Replev., 3.
Toledo, St. L. & K. C. R. Co. *v.* Anderson (48 Ill. App. 130), Fires, 335.
Toledo, St. L. & K. C. R. Co. *v.* Bailey (43 Ill. App. 292), Death, etc., 229, 255.
Toledo, St. L. & K. C. R. Co. *v.* Bailey (145 Ill. 159, 33 N. E. Rep. 1089), Death, etc., 230, 329; Evid., 164.
Toledo, St. L. & K. C. R. Co. *v.* Clark (49 Ill. App. 17), Sts. & H., 391.
Toledo, St. L. & K. C. R. Co. *v.* Clark (147 Ill. 171, 35 N. E. Rep. 167), App., 14.
Toledo, St. L. & K. C. R. Co. *v.* Cline (45 Am. & Eng. R. Cas. 150, 135 Ill. 41, 25 N. E. Rep. 846; reversing 31 Ill. App. 563), Comp. Neg., 2, 13, 18; Contrib. Neg., 114; Cross., Inj. at, 122, 141, 238; Trial, 164, 169.
Toledo, St. L. & K. C. R. Co. *v.* Conroy (39 Ill. App. 351), Indep. Contr., 1.
Toledo, St. L. & K. C. R. Co. *v.* Crittenden (42 Ill. App. 469), Fright. Teams, 1; Imp. Neg., 26.
Toledo, St. L. & K. C. R. Co. *v.* Fenstemaker (3 Ind. App. 151, 29 N. E. Rep. 440), Animals, 381; Cat.-Gds., 5.
Toledo, St. L. & K. C. R. Co. *v.* Harnsberger (41 Ill. App. 494), Fires, 144.
Toledo, St. L. & K. C. R. Co. *v.* Jackson (5 Ind. App. 547, 32 N. E. Rep. 793), Animals, 234, 519; Witn., 134.
Toledo, St. L. & K. C. R. Co. *v.* Kid (29 Ill. App. 353), Eject. Pass., 131; Trial, 205.
Toledo, St. L. & K. C. R. Co. *v.* Kingman (49 Ill. App. 43), Fires, 268, 277, 303, 350; Witn., 159.
Toledo, St. L. & K. C. R. Co. *v.* Levy (127 Ind. 168, 26 N. E. Rep. 773), Evid., 181.
Toledo, St. L. & K. C. R. Co. *v.* McCormick (40 Ill. App. 51), Employés, 13.
Toledo, St. L. & K. C. R. Co. *v.* Milligan (2 Ind. App. 578, 28 N. E. Rep. 1019), Animals, 346, 410.
Toledo, St. L. & K. C. R. Co. *v.* Oswald (41 Ill. App. 590), Fires, 202.
Toledo, St. L. & K. C. R. Co. *v.* Thompson (48 Ill. App. 36), Fences, 58, 59.
Toledo, St. L. & K. C. R. Co. *v.* Wingate (58 Am. & Eng. R. Cas. 232, 143 Ind. 125, 37 N. E. Rep. 274), Car. of P., 234, 426; Pl., 30; Stat. & D., 86.
Toledo, St. L. & K. C. R. Co. *v.* Woody (5 Ind. App. 331, 30 N. E. Rep. 1099), Fences, 52.
Toledo, W. & W. R. Co. *v.* Apperson (49 Ill. 480), Car. of P., 166; Derailm., 1.
Toledo, W. & W. R. Co. *v.* Asbury (84 Ill. 429), Employés, Inj. to, 98, 116, 400, 403.
Toledo, W. & W. R. Co. *v.* Baddeley (54 Ill. 19), Car. of P., 235, 622; Negl., 105.
Toledo, W. & W. R. Co. *v.* Barlow (71 Ill. 640), Animals, 47.
Toledo, W. & W. R. Co. *v.* Beggs (85 Ill. 80), Car. of P., 95, 195, 586; Passes, 34; Pl., 110; Receiv., 184; Tresp., Inj. to, 17.
Toledo, W. & W. R. Co. *v.* Bevin (26 Ind. 443), Contrib. Neg., 53.
Toledo, W. & W. R. Co. *v.* Black (88 Ill. 112, 21 Am. Ry. Rep. 290), Employés, Inj. to, 402.
Toledo, W. & W. R. Co. *v.* Brannagan (5 Am. & Eng. R. Cas. 630, 75 Ind. 490), Death, etc., 146.
Toledo, W. & W. R. Co. *v.* Brooks (81 Ill. 245), Car. of P., 559; Death, etc., 57.
Toledo, W. & W. R. Co. *v.* Brooks (81 Ill. 292), Car. of P., 559.
Toledo, W. & W. R. Co. *v.* Cary (37 Ind. 172, 5 Am. Ry. Rep. 557), Animals, 281; Fences, 55.
Toledo, W. & W. R. Co. *v.* Chapin (66 Ill. 504), Fences, 60.
Toledo, W. & W. R. Co. *v.* Chew (67 Ill. 378), Agency, 107, 110; Consol., 42; Evid., 24, 224, 227; Sales, 8.
Toledo, W. & W. R. Co. *v.* Cohen (44 Ind. 444), Animals, 143.
Toledo, W. & W. R. Co. *v.* Cole (50 Ill. 184), Animals, 17, 367.
Toledo, W. & W. R. Co. *v.* Corn (71 Ill. 493), Fires, 37, 181.
Toledo, W. & W. R. Co. *v.* Cory (39 Ind. 218), Animals, 281; Fences, 81.
Toledo, W. & W. R. Co. *v.* Durkin (76 Ill. 395), Employés, Inj. to, 12, 15, 182, 184, 293.
Toledo, W. & W. R. Co. *v.* Eddy (72 Ill. 138), Dam., 4; Employés, Inj. to, 249.
Toledo, W. & W. R. Co. *v.* Eidson (51 Ind. 67), Animals, 621.
Toledo, W. & W. R. Co. *v.* Elliott (76 Ill. 67), Discrim., 68.
Toledo, W. & W. R. Co. *v.* Fisher (13 Ind. 258), Evid., 207.
Toledo, W. & W. R. Co. *v.* Foss (88 Ill. 551, 21 Am. Ry. Rep. 368), Negl., 107; Pl., 110.

Toledo, W. & W. R. Co. *v.* Fredericks (71 Ill. 294), Employés, Inj. to, 109.
Toledo, W. & W. R. Co. *v.* Furgusson (42 Ill. 449), Cross., Inj. at, 153.
Toledo, W. & W. R. Co. *v.* Gilvin (81 Ill. 511), Car. of M., 70.
Toledo, W. & W. R. Co. *v.* Grable (88 Ill. 441, 21 Am. Ry. Rep. 336), Children, Inj. to, 120, 129; Comp. Neg., 6.
Toledo, W. & W. R. Co. *v.* Green (67 Ill. 199), Right of W., 11.
Toledo, W. & W. R. Co. *v.* Grush (67 Ill. 262), Stat. & D., 82.
Toledo, W. & W. R. Co. *v.* Hamilton (76 Ill. 393), Car. of L. S., 29.
Toledo, W. & W. R. Co. *v.* Hammond (33 Ind. 379), Bagg., 45, 62.
Toledo, W. & W. R. Co. *v.* Harmon (47 Ill. 298), Agency, 74; Fright. Teams, 3; Sts. & H., 371.
Toledo, W. & W. R. Co. *v.* Harris (49 Ind. 119), Animals, 352, 364.
Toledo, W. & W. R. Co. *v.* Hibbert (14 Ind. 509), Animals, 22, 289.
Toledo, W. & W. R. Co. *v.* Howell (38 Ind. 447, 10 Am. Ry. Rep. 272), Animals, 99.
Toledo, W. & W. R. Co. *v.* Hunter (50 Ill. 325), Flood. Lds., 47.
Toledo, W. & W. R. Co. *v.* Ingraham (77 Ill. 309), Employés, Inj. to, 124.
Toledo, W. & W. R. Co. *v.* Jacksonville (67 Ill. 37), Sts. & H., 337.
Toledo, W. & W. R. Co. *v.* Jacksonville Depot Bldg. Co. (63 Ill. 308), Contr., 80; Refresh. Rooms, 1.
Toledo, W. & W. R. Co. *v.* Jones (76 Ill. 311), Cross., Inj. at, 316, 345, 352, 354.
Toledo, W. & W. R. Co. *v.* Larmon (67 Ill. 68), Fires, 39, 263, 302.
Toledo, W. & W. R. Co. *v.* Lockhart (71 Ill. 627), Car. of L. S., 101, 144.
Toledo, W. & W. R. Co. *v.* McDonough (53 Ind. 289), Eject. Pass., 133.
Toledo, W. & W. R. Co. *v.* McGinnis (71 Ill. 346), Animals, 241.
Toledo, W. & W. R. Co. *v.* Maine (67 Ill. 298), Stat. & D., 68.
Toledo, W. & W. R. Co. *v.* Maxfield (72 Ill. 95), Fires, 115.
Toledo, W. & W. R. Co. *v.* Miller (76 Ill. 278), Cross., Inj. at, 178, 285.
Toledo, W. & W. R. Co. *v.* Milligan (52 Ind. 505), Animals, 72, 237, 294, 329; Trial, 217.
Toledo, W. & W. R. Co. *v.* Morgan (72 Ill. 155 Constr. Rys., 10; Fires, 173.
Toledo, W. & W. R. Co. *v.* Moore (77 Ill. 217), Death, etc., 331; Employés, Inj. to, 239; Explosions, 3; Fel. Serv., 67, 384, 385.
Toledo, W. & W. R. Co. *v.* Morrison (71 Ill. 616), Flood. Lds., 33.
Toledo, W. & W. R. Co. *v.* Muthersbaugh (71 Ill. 572), Fires, 97.
Toledo, W. & W. R. Co. *v.* Nelson (77 Ill. 160), Animals, 177.
Toledo, W. & W. R. Co. *v.* O'Connor (77 Ill. 91), Comp. Neg., 9, 16; Death, etc., 243; Fel. Serv., 109.
Toledo, W. & W. R. Co. *v.* Owen (43 Ind. 405), Animals, 412; Proc., 16, 31, 45.
Toledo, W. & W. R. Co. *v.* People (81 Ill. 141), Sts. & H., 404.
Toledo, W. & W. R. Co. *v.* Pineo (56 Ill. 308, 4 Am. Ry. Rep. 534), Animals, 455.
Toledo, W. & W. R. Co. *v.* Prince (50 Ill. 26), Agency, 111.
Toledo, W. & W. R. Co. *v.* Reynolds (72 Ill. 487), Attach., 45.
Toledo, W. & W. R. Co. *v.* Roberts (71 Ill. 540), Car. of M., 407, 724, 764.
Toledo, W. & W. R. Co. *v.* Rodrigues (47 Ill. 188), Corp., 5; Med. Serv., 2, 12.
Toledo, W. & W. R. Co. *v.* Shuckman (50 Ind. 42), Cross., Inj. at, 263; Death, etc., 341.
Toledo, W. & W. R. Co. *v.* Smith (57 Ill. 517), Eject. Pass., 98.
Toledo, W. & W. R. Co. *v.* Spangler (71 Ill. 568), Fences, 54.
Toledo, W. & W. R. Co. *v.* Spencer (66 Ill. 528), Comp. Neg., 4.
Toledo, W. & W. R. Co. *v.* Stevens (63 Ind. 337), Animals, 471, 621.
Toledo, W. & W. R. Co. *v.* Stithorn (16 Ind. 225), Animals, 73.
Toledo, W. & W. R. Co. *v.* Thompson (71 Ill. 434), Car. of L. S., 29, 49, 150.
Toledo, W. & W. R. Co. *v.* Wand (48 Ind. 476), Fires, 41, 61, 62, 83, 207, 251.
Toledo, W. & W. R. Co. *v.* Weaver (34 Ind. 298), Animals, 339, 342, 349, 359.
Toledo, W. & W. R. Co. *v.* Williams (77 Ill. 354), Stat. & D., 109a.
Toledo, W. & W. R. Co. *v.* Wright (68 Ind. 586), Tickets & F., 122.
Tolman *v.* Abbot (78 Wis. 192, 47 N. W. Rep. 264), Car. of M., 583.
Tolman *v.* Syracuse, B. & N. Y. R. Co. (27 Hun (N. Y.) 325), Evid., 299.
Tolman *v.* Syracuse, B. & N. Y. R. Co. (92 N. Y. 353; reversing 29 Hun 143), App., 15, 111; Costs, 6.
Tolman *v.* Syracuse, B. & N. Y. R. Co. (23 Am. & Eng. R. Cas. 313, 98 N. Y. 198; reversing 31 Hun 397), Death, etc., 194, 236.
Tolton *v.* Canadian Pac. R. Co. (22 Ont. 204), Waters & W., 23.
Tombigbee R. Co. *v.* Kneeland (4 How. (U. S.) 16), For. Corp., 28.
Tombs *v.* Rochester & S. R. Co. (18 Barb. (N. Y.) 583), Animals, 175; Farm Cross., 14.
Tome *v.* King (64 Md. 166), Mort., 232; Receiv., 158.
Tome *v.* Parkersburg Branch R. Co. (39 Md. 36, 11 Am. Ry. Rep. 285), Evid., 236; Stock, 13, 70; Witn., 187.
Tomkinson *v.* Southeastern R. Co. (30 Am. & Eng. R. Cas. 517, L. R. 35 Ch. D. 675), Ult. Vir., 8.
Tomlin *v.* Budd (43 L. J. Ch. 627, L. R. 8 Eq. 368, 22 W. R. 529), Em. Dom., 1118.
Tomlin *v.* Dubuque, B. & M. R. Co. (32 Iowa 106, 10 Am. Ry. Rep. 70), Rip. Rts., 10.
Tomlin *v.* Tonica & P. R. Co. (23 Ill. 429), Subscr., 45, 70, 89, 106.
Tomlinson *v.* Branch (15 Wall. (U. S.) 460, 3 Am. Ry. Rep. 207), Tax., 157, 158.

Tomlinson *v.* Jessup (15 Wall. (U. S.) 454, 3 Am. Ry. Rep. 201), Tax., 4, 142.
Tomlinson *v.* London & N. W. R. Co. (7 Ry. & C. T. Cas. 22), Charges, 110, 111.
Tomlinson *v.* Northern R. Co. (11 Ont. Pr. 419), Costs, 10.
Tomlinson *v.* Wilmington & S. C. R. Co. (47 Am. & Eng. R. Cas. 620, 107 N. Car. 327, 12 S. E. Rep. 138), Eject. Pass., 113.
Tommey *v.* Spartanburg & A. R. Co. (4 Hughes (U. S.) 640, 7 Fed. Rep. 429), Mort., 109.
Tompkins *v.* Augusta & K. R. Co. (21 So. Car. 420), Em. Dom., 192; Estop., 12; Evid., 154; Witn., 45; Words & Ph., 156.
Tompkins *v.* Augusta & K. R. Co. (43 Am. & Eng. R. Cas. 127, 33 So. Car. 216, 11 S. E. Rep. 692), Em. Dom., 1014.
Tompkins *v.* Augusta & K. R. Co. (37 So. Car. 382), Em. Dom., 291, 1004, 1061.
Tompkins *v.* Clay St. Hill R. Co. (18 Am. & Eng. R. Cas. 144, 66 Cal. 163, 4 Pac. Rep. 1165), Collis., 25; Release, 20; St. Rys., 316.
Tompkins *v.* Little Rock & Ft. S. R. Co. (15 Fed. Rep. 6), State Aid, 13; Words & Ph., 107.
Tompkins *v.* Little Rock & Ft. S. R. Co. (21 Fed. Rep. 370, 5 McCrary 597, 18 Fed. Rep. 344; reversed in 120 U. S. 160, 7 Sup. Ct. Rep. 469), State Aid, 13.
Tompkins *v.* Little Rock & Ft. S. R. Co. (125 U. S. 109, 8 Sup. Ct. Rep. 762), State Aid, 13.
Tompkins *v.* Oswego (15 N. Y. Supp. 371, 40 N. Y. S. R. 4, 61 Hun 619, mem.), Death, etc., 294.
Toms *v.* Buffalo Creek R. Co. (23 N. Y. Supp. 1112, 53 N. Y. S. R. 640, 70 Hun 84), Employés, Inj. to, 129; Fel. Serv., 40, 293.
Tonawanda R. Co. *v.* Munger (5 Den. (N. Y.) 255), Animals, 43.
Tonawanda Valley & C. R. Co. *v.* New York, L. E. & W. R. Co. (42 Hun 496, 4 N. Y. S. R. 744), Ult. Vir., 14.
Toner *v.* Chicago, M. & St. P. R. Co. (28 Am. & Eng. R. Cas. 449, 31 Am. & Eng. R. Cas. 320, 69 Wis. 188, 31 N. W. Rep. 104, 33 N. W. Rep. 433), Collis., 33; Employés, Inj. to, 45; Fel. Serv., 143, 414.
Toner *v.* Fulkerson (125 Ind. 224, 25 N. E. Rep. 218), Stockh., 62.
Tonica & P. R. Co. *v.* McNeely (21 Ill. 71), Subscr., 27.
Tonica & P. R. Co. *v.* Roberts (22 Ill. 224), Em. Dom., 926.
Tonica & P. R. Co. *v.* Stein (21 Ill. 96), Subscr., 111.
Tonica & P. R. Co. *v.* Unsicker (22 Ill. 221), Em. Dom., 926.
Tonkins *v.* New York Ferry Co. (14 N. Y. S. R. 874; affirmed in 113 N. Y. 653, mem., 21 N. E. Rep. 414, 22 N. Y. S. R. 998), Contrib., Neg., 28; Ferries, 11.
Tooker *v.* Gormer (2 Hilt. (N. Y.) 71), Exp. Cos., 52.
Tooley *v.* Railway Pass. A. Co. (3 Biss. (U. S.) 399), Acc. Ins., 1.
Toomer *v.* London, C. & D. R. Co. (L. R. 2 Ex. D. 450, 26 W. R. 31, 37 L. T. 161), Ry. Com'rs, 6.
Toomer *v.* London, C. & D. R. Co. (3 Ry. & C. T. Cas. 79), Car. of P., 522; Discrim., 56; Ry. Com'rs, 6, 30.
Toomey *v.* Delaware, L. & W. R. Co. (2 Misc. 82, 49 N. Y. S. R. 623, 21 N. Y. Supp. 448; affirmed in 4 Misc. 392), Dam., 15; False Imp., 4; Mal. Pros., 16.
Toomey *v.* Delaware, L. & W. R. Co. (53 N. Y. S. R. 567, 4 Misc. (N. Y.) 392), Conduct., 15; False Imp., 17; Mal. Pros., 16.
Toomey *v.* Donovan (158 Mass. 232, 33 N. E. Rep. 396), Indep. Contr., 19.
Toomey *v.* Eureka I. & S. Works (89 Mich. 249, 50 N. W. Rep. 850), Negl., 100.
Toomey *v.* London, B. & S. C. R. Co. (3 C. B. N. S. 146, 27 L. J. C. P. 39), Stat. & D., 114.
Toomey *v.* Southern Pac. R. Co. (86 Cal. 374, 24 Pac. Rep. 1074), Tresp., Inj. to, 3, 36, 41.
Toothaker *v.* Boulder (13 Colo. 219, 22 Pac. Rep. 468), Lim. of Ac., 74; Mun. Aid, 386; Pl., 78.
Topeka City R. Co. *v.* Higgs (34 Am. & Eng. R. Cas. 529, 38 Kan. 375, 16 Pac. Rep. 667), Car. of P., 158; St. Rys., 325, 334, 352, 353, 414, 452; Words & Ph., 10.
Topf *v.* West Shore & O. Terminal Co. (19 Am. & Eng. R. Cas. 7, 46 N. J. L. 34), Pl., 21.
Toplitz *v.* Ullman (20 N. Y. Supp. 50), Employés, 17.
Toppan *v.* Cleveland, C. & C. R. Co. (1 Flipp. (U. S.) 74), Contr., 1; Guar., 9, 11.
Toppan *v.* Eastern R. Co. (61 N. H. 640), Refer., 6.
Topping *v.* Buffalo, B. & G. R. Co. (6 U. C. C. P. 141), Bills & N., 4.
Toppins *v.* East Tenn., V. & G. R. Co. (5 Lea (Tenn.) 600), Trial, 11.
Torbay & B. R. Co. *v.* South Devon R. Co. (2 Ry. & C. T. Cas. 391), Arb., 1; Leases, 135.
Torgorm, The (48 Fed. Rep. 584), Bills of L., 47.
Torian *v.* Richmond & A. R. Co. (84 Va. 192, 4 S. E. Rep. 339), Fel. Serv., 425.
Toronto *v.* Bowes (4 Grant's Ch. (U. C.) 489; affirmed in 6 Grant's Ch. 1), Mun. Corp., 20.
Toronto *v.* Great Western R. Co. (25 U. C. Q. B. 570), Tax., 386.
Toronto *v.* Ontario & Q. R. Co. (22 Ont. 344), Mun. Aid, 255.
Toronto *v.* Toronto St. R. Co. (36 Am. & Eng. R. Cas. 44, 15 Ont. App. 30), St. Rys., 267.
Toronto & L. H. P. Co. *v.* Crookshank (4 U. C. Q. B. 309), Subscr., 79.
Toronto Belt R. Co. *v.* Lauder (19 Ont. 607), Em. Dom., 1222.
Toronto General Trust Co. *v.* Chicago, B. & Q. R. Co. (32 Hun (N. Y.) 190; affirmed in 96 N. Y. 668, mem.), Jurisd., 4.
Toronto Gravel R. & C. Co. *v.* County of York (12 Can. Sup. Ct. 517), Constr. Rys., 24.
Toronto St. R. Co., In re (22 Ont. 374; af-

firmed in 54 Am. & Eng. R. Cas. 576, 20 Ont. App. 125), St. Rys., 10.
Toronto St. R. Co. *v.* Dollery (12 Ont. App. 679), St. Rys., 237.
Toronto St. R. Co. *v.* Fleming (37 U. C. Q. B. 116; reversing 35 U. C. Q. B. 264), St. Rys., 283.
Torpey *v.* Independence (24 Mo. App. 288), Sts. & H., 159.
Torpey *v.* Williams (3 Daly (N. Y.) 162), Bagg., 40.
Torpy *v.* Grand Trunk R. Co. (20 U. C. Q. B. 446), Car. of P., 544.
Torrey *v.* Boston & A. R. Co. (147 Mass. 412, 7 N. Eng. Rep. 148, 18 N. E. Rep. 213), Car. of P., 472.
Torrey *v.* Camden & A. R. Co. (18 N. J. Eq. 293), Injunc., 9.
Torrey *v.* Shawano County (79 Wis. 152, 48 N. W. Rep. 246), Tax., 131.
Totten *v.* New York, L. E. & W. R. Co. (32 N. Y. S. R. 765, 57 Hun 585, 10 N. Y. Supp. 572), Cross., Inj. at, 226.
Totten *v.* Pennsylvania R. Co. (11 Fed. Rep. 564), Dam., 42, 67, 70, 73; Employés, Inj. to, 149, 293; Fel. Serv., 1, 134, 151, 202; Negl., 66; Trial, 113.
Toudy *v.* Norfolk & W. R. Co. (38 W. Va. 694, 18 S. E. Rep. 896), Animals, 52; Cross., Inj. at, 102.
Towanda Coal Co. *v.* Heeman (86 Pa. St. 418), Agency, 103.
Tower *v.* Detroit, L. & L. M. R. Co. (34 Mich. 328), App., 28; Witn., 179; Words & Ph., 53.
Tower *v.* Providence & W. R. Co. (2 R. I. 404), Animals, 222.
Tower *v.* Utica & S. R. Co. (7 Hill (N. Y.) 47), Bagg., 82.
Towle *v.* Blake (48 N. H. 92), Evid., 211.
Towle *v.* Eastern R. Co. (17 N. H. 519), Bridges, 46; Sts. & H., 51.
Towle *v.* Eastern R. Co. (18 N. H. 547), Em. Dom., 38.
Towle *v.* Wilder (57 Vt. 622), Attach., 62.
Town *v.* Cheshire R. Co. (21 N. H. 363), Animals, 166.
Town *v.* Michigan C. R. Co. (84 Mich. 214, 47 N. W. Rep. 665), Employés, Inj. to, 74, 666.
Town Com'rs of Newry *v.* Great Northern R. Co. (7 Ry. & C. T. Cas. 184), Discrim., 41.
Town Council of Woodstock *v.* Woodstock & L. E. R. Co. (16 U. C. Q. B. 146), Bonds, 52.
Towne *v.* Nashua & L. R. Co. (124 Mass. 101), Animals, 288.
Towner *v.* Missouri Pac. R. Co. (52 Mo. App. 648), Employés, Inj. to, 408.
Townley *v.* Chicago, M. & St. P. R. Co. (4 Am. & Eng. R. Cas. 562, 53 Wis. 626, 11 N. W. Rep. 55), Children, Inj. to, 12, 74, 75; Evid., 54; Negl., 61; Tresp., Inj. to, 49, 117; Words & Ph., 138.
Towns *v.* Cheshire R. Co. (21 N. H. 363), Animals, 161.
Towns *v.* Rome, W. & O. R. Co. (28 N. Y. S. R. 124, 54 Hun 638, 4 Silv. Sup. Ct. 332, 8 N. Y. Supp. 137; affirmed in 124 N. Y. 642, mem., 36 N. Y. S. R. 1015), Contrib. Neg., 82; Cross., Inj. at, 137; Death, etc., 293; Trial, 79.
Towns *v.* Vicksburg, S. & P. R. Co. (37 La. Ann. 630, 55 Am. Rep. 508), Death, etc., 375; Employés, Inj. to, 99, 111; Fel. Serv., 64.
Townsend *v.* Chicago & A. R. Co. (91 Ill. 545), Em. Dom., 28, 311, 867.
Townsend *v.* Lamb (14 Neb. 324, 15 N. W. Rep. 727), Mun. Aid, 233.
Townsend *v.* New York C. & H. R. R. Co. (56 N. Y. 295), Eject. Pass., 13, 105, 112.
Townsend *v.* New York C. & H. R. R. Co. (4 Hun (N. Y.) 217, 6 T. & C. 495), Eject. Pass., 108.
Townsley *v.* Missouri Pac. R. Co. (89 Mo. 31, 1 S. W. Rep. 15), Animals, 142, 143.
Tozer *v.* New York C. & H. R. R. Co. (105 N. Y. 617, mem., 11 N. E. Rep. 846, 8 N. Y. S. R. 56, 6 N. Y. S. R. 447, 1 Silv. App. 371; reversing 38 Hun 100), Dam., 88; Witn., 168.
Tozer *v.* New York C. & H. R. R. Co. (8 N. Y. S. R. 56, 105 N. Y. 659, 1 Silv. App. 450), App., 94.
Tozer *v.* United States (53 Am. & Eng. R. Cas. 14, 52 Fed. Rep. 917), Int. Com., 92, 98.
Tracy *v.* Elizabethtown, L. & B. S. R. Co. (14 Am. & Eng. R. Cas. 328, 78 Ky. 309), Em. Dom., 893.
Tracy *v.* Elizabethtown, L. & B. S. R. Co. (14 Am. & Eng. R. Cas. 407, 80 Ky. 259), Em. Dom., 178, 182, 829.
Tracy *v.* Gravios R. Co. (13 Mo. App. 295; affirmed in 84 Mo. 210), Trusts, 9.
Tracy *v.* New York & H. R. Co. (9 Bosw. (N. Y.) 396), App., 68.
Tracy *v.* Pullman Palace Car Co. (67 How. Pr. (N. Y.) 154), Sleep. Car Cos., 34.
Tracy *v.* Troy & B. R. Co. (55 Barb. (N. Y.) 529; affirmed in 38 N. Y. 433), Animals, 645.
Tracy *v.* Troy & B. R. Co. (38 N. Y. 433), Cat.-Gds., 4; Fences, 7, 32; Leases, 65.
Tracy *v.* Troy & L. R. Co. (54 Hun 550, 27 N. Y. S. R. 633, 7 N. Y. Supp. 892), Elec. Rys., 16.
Traders & T. Union *v.* Philadelphia & R. R. Co. (1 Int. Com. Rep. 371, 1 Int. Com. Com. 122), Int. Com., 19.
Traders N. S. Carrying Co., In re (44 L. J. Ch. 172, L. R. 19 Eq. 60, 23 W. R. 205, 31 L. T. 716), Dissol., 22, 27.
Trafford *v.* Adams Exp. Co. (8 Lea (Tenn.) 96), Death, etc., 69.
Trainor *v.* Philadelphia & R. R. Co. (137 Pa. St. 148, 20 Atl. Rep. 632), App., 92, 100; Employés, Inj. to, 38, 99, 681.
Trammell *v.* Clyde Steamship Co. (5 Int. Com. Com. 324, 4 Int. Com. Rep. 120), Int. Com., 112, 169.
Trammell *v.* Pennington (45 Ala. 673), Mun. Aid, 213.
Transier *v.* St. Louis, K. C. & N. R. Co. (54 Mo. 189), Evid., 241.
Trapp *v.* New York & E. R. Co. (6 How. Pr. (N. Y.) 237), Car. of M., 691.
Trask *v.* California Southern R. Co. (11 Am. & Eng. R. Cas. 192, 63 Cal. 96), Employés, Inj. to, 189; Fel. Serv., 61.

Trask *v.* Hartford & N. H. R. Co. (16 Gray (Mass.) 71), Fires, 9.
Trask *v.* Hartford & N. H. R. Co. (2 Allen (Mass.) 331), Judgm., 22.
Trask *v.* Jacksonville, P. & M. R. Co. (124 U. S. 515, 8 Sup Ct. Rep. 574), Mun. Aid, 358; State Aid, 16.
Trask *v.* Maguire (18 Wall. (U. S.) 391), Tax., 157.
Trask *v.* Old Colony R. Co. (156 Mass. 298, 31 N. E. Rep. 6), Employés, Inj. to, 1, 494.
Traut *v.* New York, C. & St. L. R. Co. (Pa.) (15 Atl. Rep. 678), Em. Dom., 565; Sts. & H., 181.
Traver *v.* Eighth Ave. R. Co. (4 Abb. App. Dec. (N. Y.) 422, 6 Abb. Pr. N. S. 46, 3 Keyes 497), Children, Inj. to, 182; Pl., 53.
Travers *v.* Kansas Pac. R. Co. (63 Mo. 421), Eject. Pass., 86; Evid., 102.
Traverse City, K. & G. R. Co. *v.* Seymour (81 Mich. 378, 45 N. W. Rep. 826), Em. Dom., 960; Injunc., 4.
Travis *v.* Carroltown (4 Silv. Sup. Ct. 262, 7 N. Y. Supp. 231), Contrib. Neg., 15.
Travis *v.* Louisville & N. R. Co. (9 Lea (Tenn.) 231), Evid., 202.
Treacy *v.* Elizabethtown, L. & B. S. R. Co. (85 Ky. 270, 3 S. W. Rep. 168), Em. Dom., 31, 55, 953.
Treadway *v.* Chicago & N. W. R. Co. (21 Iowa 351), Rem. of C., 36.
Treadway *v.* Sioux City & St. P. R. Co. (40 Iowa 526), Evid., 202.
Treadwell *v.* London & S. W. R. Co. (54 L. J. Ch. D. 565, 51 L. T. 894, 33 W. R. 272), Em. Dom., 1135.
Treadwell *v.* Whittier (80 Cal. 574, 22 Pac. Rep. 266), Car. of P., 140, 193, 607; Pl., 24.
Treadwin *v.* Great Eastern R. Co. (L. R. 3 C. P. 308, 37 L. J. C. P. 83, 17 L. T. 601, 16 W. R. 365), Car. of M., 518.
Treanor *v.* Manhattan R. Co. (28 Abb. N. Cas. 47, 16 N. Y. Supp. 536, 41 N. Y. S. R. 614, 21 Civ. Pro. 364; reversing 39 N. Y. S. R. 186, 14 N. Y. Supp. 270), Elev. Rys., 216; Witn., 93.
Treat *v.* Boston & L. R. Co. (3 Am. & Eng. R. Cas. 423, 131 Mass. 371), Car. of P., 420.
Tredway *v.* Sioux City & St. P. R. Co. (43 Iowa 527), Animals, 10, 109.
Treffert *v.* Ohio & M. R. Co. (36 Ill. App. 93), Death, etc., 358.
Tregear *v.* Dry Dock, E. B. & B. R. Co. (14 Abb. Pr. N. S. (N. Y.) 49), St. Rys., 378, 411.
Trenor *v.* Central Pac. R. Co. (50 Cal. 222), Med. Serv., 18.
Trenton *v.* Trenton Horse R. Co. (N. J. Eq.) (19 Atl. Rep. 263), St. Rys., 96.
Trenton Water Power Co. *v.* Chambers (9 N. J. Eq. 471), Em. Dom., 1018.
Trester *v.* Missouri Pac. R. Co. (23 Neb. 242, 36 N. W. Rep. 502), Em. Dom., 77.
Trester *v.* Missouri Pac. R. Co. (33 Neb. 171, 49 N. W. Rep. 1110), Consol., 18, 36; Em Dom., 294, 311, 548, 956; Incorp., 10.
Trevilian *v.* Louisa R. Co. (3 Gratt. (Va.) 312), App., 12.
Tribette *v.* Illinois C. R. Co. (70 Miss. 182, 12 So. Rep. 32), Injunc., 3.
Trice *v.* Hannibal & St. J. R. Co. (35 Mo. 188), Animals, 100.
Trice *v.* Hannibal & St. J. R. Co. (49 Mo. 438, 2 Am. Ry. Rep. 445), Fences, 1, 103.
Trigg *v.* St. Louis, K. C. & N. R. Co. (6 Am. & Eng. R. Cas. 345, 74 Mo. 147, 41 Am. Rep. 305), Car. of P., 624; New Tr., 44.
Trimmer *v.* Pennsylvania, P. & B. R. Co. (N. J.) (39 Am. & Eng. R. Cas. 124, 17 Atl. Rep. 967), Em. Dom., 1038, 1040; Estop., 8; Evid., 1.
Trimmer *v.* Pennsylvania, P. & B. R. Co. (55 N. J. L. 46, 25 Atl. Rep. 932), Em. Dom., 470, 644.
Trimmer *v.* Pennsylvania, S. & N. E. R. Co. (36 N. J. Eq. 411), Injunc., 56.
Trinity & S. R. Co. *v.* Lane (79 Tex. 643, 15 S. W. Rep. 477), Employés, Inj. to, 479; Negl., 15; Witn., 94.
Trinity & S. R. Co. *v.* Meadows (39 Am. & Eng. R. Cas. 29, 73 Tex. 32, 3 L. R. A. 565, 11 S. W. Rep. 145), Em. Dom., 176.
Trinity & S. R. Co. *v.* Mitchell (72 Tex. 609, 10 S. W. Rep. 698), Death, etc., 219; Fel. Serv., 136, 290.
Trinity & S. R. Co. *v.* Schofield (72 Tex. 496, 10 S. W. Rep. 575), Evid., 83; Flood. Lds., 97, 101; Trial, 112.
Tripp *v.* Boardman (49 Iowa 410), Receiv., 50.
Trogden *v.* Winona & St. P. R. Co. (22 Minn. 198, 19 Am. Ry. Rep. 387), Em. Dom., 551, 867.
Trook *v.* Baltimore & P. R. Co. (3 MacArth. (D. C.) 392), Sts. & H., 170.
Trotcky *v.* Forty-second St. & G. S. F. R. Co. (73 Hun 26, 57 N. Y. S. R. 155), New Tr., 22.
Trotlinger *v.* East Tenn., V. & G. R. Co. (13 Am. & Eng. R. Cas. 49, 11 Lea (Tenn.) 533), Car. of P., 68; Tickets & F., 119.
Trott *v.* Sarchett (10 Ohio St. 341), Subscr., 93.
Trottier *v.* Red River Transp. Co. (Man. (T. Wood), 255), Car. of M., 639, 656.
Trousclair *v.* Pacific Coast Steamship Co. (39 Am. & Eng. R. Cas. 393, 80 Cal. 521, 22 Pac. Rep. 258), Contrib. Neg., 30.
Trout *v.* Virginia & T. R. Co. (23 Gratt. (Va.) 619), Animals, 63.
Trow *v.* Vermont C. R. Co. (24 Vt. 487), Animals, 216, 261, 283; Cat.-Gds., 16, 21; Contrib. Neg., 5, 11, 16, 17, 48; Negl., 76.
Trowell *v.* Youmans (5 Strobh. (So. Car.) 67), Trover, 1, 7.
Troxler *v.* Richmond & D. R. Co. (74 N. Car. 377, 13 Am. Ry. Rep. 389), Fires, 63, 88.
Troy *v.* Atchison & N. R. Co. (11 Kan. 519), Mun. Corp., 12, 202.
Troy *v.* Atchison & N. R. Co. (13 Kan. 70), Estop., 10; Mun. Aid, 202.
Troy *v.* Cape Fear & Y. V. R. Co. (34 Am. & Eng. R. Cas. 13, 99 N. Car. 298, 6 S. E. Rep. 77, 6 Am. St. Rep. 521), Contrib. Neg., 11, 48; Dam., 17; Licensees, Inj. to, 19; Sts. & H., 370; Tresp., Inj. to, 30, 45, 96.

Troy *v.* Cheshire R. Co. (23 N. H. 83), Sts. & H., 420.
Troy & A. H. R. Co. *v.* Smith (33 N. Y. S. R. 203, 57 Hun 594, 11 N. Y. Supp. 261), Ex. & Ad., 7.
Troy & B. R. Co. *v.* Boston, H. T. & W. R. Co. (7 Am. & Eng. R. Cas. 49, 86 N. Y. 107), Charters, 62; Injunc., 9; Leases, 13.
Troy & B. R. Co. *v.* Boston, H. T. & W. R. Co. (13 Hun (N. Y.) 60, 57 How. Pr. 181; not same case as 86 N. Y. 107), Injunc., 30, 62.
Troy & B. R. Co. *v.* Lee (13 Barb. (N. Y.) 169), Em. Dom., 647, 902.
Troy & B. R. Co. *v.* Northern Turnpike Co. (16 Barb. (N. Y.) 100), Em. Dom., 509, 505, 709, 872.
Troy & B. R. Co. *v.* Potter (42 Vt. 265), Em. Dom., 148; Estop., 28.
Troy & B. R. Co. *v.* Tibbits (18 Barb. (N. Y.) 297), Subscr., 1, 3, 36, 77, 199.
Troy & B. R. Co. *v.* Warren (18 Barb. (N. Y.) 310), Subscr., 1, 3.
Troy & G. R. Co. *v.* Com. (127 Mass. 43), Mort., 310.
Troy & G. R. Co. *v.* Newton (1 Gray (Mass.) 544), Subscr., 187.
Troy & G. R. Co. *v.* Newton (8 Gray (Mass.) 596), Subscr., 206.
Troy & L. R. Co. *v.* Kane (72 N. Y. 614; affirming 9 Hun 506), Tax., 298.
Troy & R. R. Co. *v.* Cleveland (6 How. Pr. (N. Y.) 238), Em. Dom., 499.
Troy & R. R. Co. *v.* Kerr (17 Barb. (N. Y.) 581), Charters, 5; Dissol., 8; Evid., 227; Leases, 13; Subscr., 77, 120, 130, 173.
Troy T. & R. Co. *v.* McChesney (21 Wend. (N. Y.) 296), Subscr., 67, 181.
Truax *v.* Chicago, St. P., M. & O. R. Co. (83 Wis. 547, 53 N. W. Rep. 842), Animals, 77.
Truax *v.* Philadelphia, W. & B. R. Co. (3 Houst. (Del.) 233), Car. of M., 15, 26, 55, 57, 62, 64, 66, 125, 127, 136, 142, 618; Words & Ph., 7.
Trudeau *v.* New Orleans, J. & G. N. R. Co. (15 La. Ann. 717), App., 145.
Truesdale *v.* Peoria Grape Sugar Co. (5 Am. & Eng. R. Cas. 248, 101 Ill. 561), Sts. & H., 213, 223.
Truesdell *v.* Green (7 Am. & Eng. R. Cas. 369, 57 Iowa 215, 10 N. W. Rep. 630), Mun. Aid, 412; Tax., 327.
Truex *v.* Erie R. Co. (4 Lans. (N. Y.) 198), Car. of P., 1, 465; Collis., 3.
Truman *v.* McCollum (20 Wis. 360), Subscr., 155.
Trumbo *v.* City St. Car Co. (89 Va. 780), Children, Inj. to, 70, 127.
Trunick *v.* Smith (63 Pa. St. 18), Exec., 20.
Trustees *v.* Milwaukee & L. W. R. Co. (43 Am. & Eng. R. Cas. 182, 77 Wis. 158, 45 N. W. Rep. 1086), Cross. Sts. & H., 118; Em. Dom., 350.
Trustees of Internal Imp. Fund *v.* Greenough (12 Am. & Eng. R. Cas. 345, 105 U. S. 527), Fed. Cts., 19.
Trustees of Schools *v.* People (63 Ill. 299), Mun. Aid, 20.
Tuchband *v.* Chicago & A. R. Co. (2 Silv. Sup. Ct. 352, 16 Civ. Pro. 241, 5 N. Y. Supp. 493, 53 Hun 629, 24 N. Y. S. R. 236; affirmed in 40 Am. & Eng. R. Cas. 612, 115 N. Y. 437, 17 Civ. Pro. 424, 22 N. E. Rep. 360, 26 N. Y. S. R. 440), Proc., 19.
Tuchband *v.* Chicago & A. R. Co. (40 Am. & Eng. R. Cas. 612, 115 N. Y. 437, 17 Civ. Pro. 424, 22 N. E. Rep. 360, 26 N. Y. S. R. 440), Proc., 30.
Tuck *v.* Louisville & N. R. Co. (98 Ala. 150, 12 So. Rep. 168), Employés, Inj. to, 113.
Tuckahoe & C. M. R. Co. *v.* Baker (49 N. J. Eq. 581, 25 Atl. Rep. 402), Receiv., 19.
Tuckahoe Canal Co. *v.* Tuckahoe & J. R. R. Co. (11 Leigh (Va.) 43), Charters, 48, 66; Constr. Rys., 8; Em. Dom., 120, 1040.
Tucker *v.* Cheshire R. Co. (21 N. H. 29), Pl., 87, 171.
Tucker *v.* Cracklin (2 Stark. 385), Bagg., 113.
Tucker *v.* Duncan (6 Am. & Eng. R. Cas. 268, 4 Woods (U. S.) 652, 9 Fed. Rep. 867), Cross., Inj. at, 241, 337; Dam., 2; Witn., 29.
Tucker *v.* Erie & N. E. R. Co. (27 Pa. St. 281), Em. Dom., 325, 480, 481.
Tucker *v.* Ferguson (22 Wall. (U. S.) 527), Land Grants, 32; Tax., 81, 143.
Tucker *v.* Housatonic R. Co. (39 Conn. 447), Car. of M., 159.
Tucker *v.* Massachusetts C. R. Co. (116 Mass. 124), Em. Dom., 893.
Tucker *v.* Massachusetts C. R. Co. (118 Mass. 546, 9 Am. Ry. Rep. 279), Em. Dom., 698.
Tucker *v.* New York C. & H. R. R. Co. (124 N. Y. 308, 26 N. E. Rep. 916, 36 N. Y. S. R. 272; reversing 33 N. Y. S. R. 863, 11 N. Y. Supp. 692), Children, Inj. to, 70, 75, 102; Cross., Inj. at, 263.
Tucker *v.* Pacific R. Co. (50 Mo. 385, 3 Am. Ry. Rep. 291), Car. of L. S., 143.
Tucker *v.* Philadelphia & R. C. & I. Co. (53 Hun 139, 25 N. Y. S. R. 318, 6 N. Y. Supp. 134), Employés, 2, 7.
Tucker *v.* St. Louis, K. C. & N. R. Co. (54 Mo. 177, 12 Am. Ry. Rep. 364), Med. Serv., 11.
Tudor *v.* Chicago & S. S. R. T. R. Co. (Ill.) (27 N. E. Rep. 915), Sts. & H., 112.
Tuebner *v.* California St. R. Co. (19 Am. & Eng. R. Cas. 147, 66 Cal. 171, 4 Pac. Rep. 1162), Cable Rys., 2; Nuis., 5.
Tuggle *v.* St. Louis, K. C. & N. R. Co. (62 Mo. 425), Car. of M., 729; Evid., 206.
Tuite *v.* Wakelee (19 Cal. 692), Exp. Cos., 75.
Tuley *v.* Chicago, B. & Q. R. Co. (41 Mo. App. 432), Car. of L. S., 131; Car. of P., 463, 584.
Tully *v.* Fitchburg R. Co. (14 Am. & Eng. R. Cas. 682, 134 Mass. 499), Cross., Inj at, 252; Death, etc., 234, 256, 290, 426; New Tr., 14.
Tunis *v.* Hestonville, M. & F. Pass. R. Co. (1 Pa. Dist. 135), Direct., 9.
Tunis *v.* Hestonville, M. & F. Pass. R. Co. (149 Pa. St. 70, 24 Atl. Rep. 88, 1 Pa. Dist. 207), Direct., 7, 13; Stockh., 18.
Tunis R. Co., In re (22 W. R. 639, 30 L. T. 512; affirmed in 31 L. T. 264), Reorg., 19.

Tunney *v.* Midland R. Co. (L. R. 1 C. P. 291, 12 Jur. N. S. 691), Fel. Serv., 34, 393.
Turner *v.* Boston & M. R. Co. (158 Mass. 261, 33 N. E. Rep. 520), Employés, Inj. to, 63, 587, 660; Licensees, Inj. to, 2; Witn., 164.
Turner *v.* Cameron (39 L. J. Q. B. 125, L. R. 5 Q. B. 306, 22 L. T. 525, 18 W. R. 544), Fixt., 11.
Turner *v.* Chillicothe & D. C. R. Co. (51 Mo. 501, 3 Am. Ry. Rep. 248), Officers, 2.
Turner *v.* Conant (18 Abb. N. Cas. (N. Y.) 160), Bonds, 39; Parties, 22.
Turner *v.* Cross (83 Tex. 2[illegible] W. Rep. 578), Death, etc., 34; [illegible]38, 73; Words & Ph., 106, 190.
Turner *v.* Farmers' L. & T. Co. (9 Am. & Eng. R. Cas. 580, 106 U. S. 552, 1 Sup. Ct. Rep. 519), Mort., 301.
Turner *v.* Fitchburg R. Co. (35 Am. & Eng. R. Cas. 317, 145 Mass. 433, 14 N. E. Rep. 627), Priv. Ways, 2, 15.
Turner *v.* Great Eastern R. Co. (33 L. T. 431), Fel. Serv., 129.
Turner *v.* Great Western R. Co. (6 U. C. C. P. 536), Bridges, 78.
Turner *v.* Great Western R. Co. (34 L. T. 22, 13 Cox C. C. 131), Evid., 277.
Turner *v.* Hannibal & St. J. R. Co. (6 Am. & Eng. R. Cas. 38, 74 Mo. 602), Cross., Inj. at, 197, 278; Receiv., 180.
Turner *v.* Indianapolis, B. & W. R. Co. (8 Biss. (U. S.) 315), Receiv., 80.
Turner *v.* Indianapolis, B. & W. R. Co. (8 Biss. (U .S.) 380), Judgm., 43; Mort., 209.
Turner *v.* Indianapolis, B. & W. R. Co. (8 Biss. (U. S.) 527), Mort., 225, 245, 249, 287, 311; Receiv., 59.
Turner *v.* Jefferson County Com'rs (10 Kan. 16), Mand., 28.
Turner *v.* Kansas City, St. J. & C. B. R. Co. (23 Mo. App. 12), Witn., 101.
Turner *v.* Kansas City, St. J. & C. B. R. Co. (19 Am. & Eng. R. Cas. 506, 78 Mo. 578), Animals, 193, 251; Cross., Inj. at, 149.
Turner *v.* London & S. W. R. Co. (L. R. 17 Eq. 561, 43 L. J. Ch. 430), Car. of P., 214; Stat., 45; Words & Ph., 152.
Turner *v.* Midland R. Co. (1 N. Y. S. R. 219), Parties, 18.
Turner *v.* North Beach & M. R. Co. (34 Cal. 594), Agency, 74; Col. Pers., 13; Eject. Pass., 113; St. Rys., 532.
Turner *v.* North Carolina R. Co. (63 N. Car. 522), Car. of P., 558.
Turner *v.* Peoria & S. R. Co. (1 Am. & Eng. R. Cas. 348, 95 Ill. 134), Receiv., 104.
Turner *v.* Potter (56 Iowa 251, 9 N. W. Rep. 208), Bills & N., 12.
Turner *v.* Railroad Co. (8 Phila. (Pa.) 485), Em. Dom., 665.
Turner *v.* Richmond & D. R. Co. (70 N. Car. 1), Passes, 7; Pl., 15.
Turner *v.* Rome St. R. Co. (81 Ga. 336, 6. S. E. Rep. 690), Cert., 6.
Turner *v.* St. Louis & S. F. R. Co. (20 Mo. App. 632), Evid., 180; Stat. Agts., 3.
Turner *v.* St. Louis & S. F. R. Co. (76 Mo. 261), Animals, 29, 445, 572.
Turner *v.* Sheffield & R. R. Co. (10 M. & W. 425), Em. Dom., 1161.
Turner *v.* Sioux City & P. R. Co. (19 Neb. 241, 27 N. W. Rep. 103), Attach., 39.
Turner *v.* Southeastern R. Co. (17 W. R. 1096), Car. of M., 529.
Turner *v.* Union Pac. R. Co. (112 Mo. 542, 20 S. W. Rep. 673), Adv. Poss., 2.
Turner *v.* Vicksburg, S. & P. R. Co. (37 La. Ann. 648, 55 Am. Rep. 514), Stat. & D., 85.
Turner *v.* Western & A. R. Co. (69 Ga. 827), Pl., 152.
Turner *v.* Woodson County Com'rs (12 Am. & Eng. R. Cas. 600, 27 Kan. 314), Mun. Aid, 32, 108, 302.
Turpin *v.* Baltimore, O. & C. R. Co. (10 Am. & Eng. R. Cas. 45, 105 Ill. 11), Ejectm., 7; Em. Dom., 193.
Turrentine *v.* Richmond & D. R. Co. (23 Am. & Eng. R. Cas, 460, 92 N. Car. 638), Contrib. Neg., 13, 21, 48.
Turrentine *v.* Wilmington & W. R. Co. (100 N. Car. 375, 6 S. E. Rep. 116), Car. of M., 328; Wareh., 4.
Turrill *v.* Illinois C. R. Co. (3 Biss. (U. S.) 66), Pat. for Inv., 1, 43.
Turrill *v.* Illinois C. R. Co. (5 Biss. (U. S.) 344; reversed on other grounds in 94 U. S. 695, 15 Am. Ry. Rep. 387), Pat. for Inv., 20, 22, 43.
Turrill *v.* Michigan S. & N. I. R. Co. (1 Wall. (U. S.) 491), Pat. for Inv., 43.
Turton *v.* Union Pac. R. Co. (3 Dill. (U. S.) 366), Rem. of C., 7.
Tuscumbie, C. & D. R. Co. *v.* Rhodes (8 Ala. 206), Set-off, 4.
Tuten *v.* Central R. & B. Co. (88 Ga. 228, 14 S. E. Rep. 185), Employés, Inj. to, 692; Fel. Serv., 506.
Tuteur *v.* Chicago & N. W. R. Co. (77 Wis. 505, 46 N. W. Rep. 897), Death, etc., 49, 392.
Tuthill *v.* Long Island R. Co. (75 Hun 556, 26 N. Y. Supp. 1029), Trial, 13.
Tuthill *v.* Northern Pac. R. Co. (50 Minn. 113, 52 N. W. Rep. 384), Cross., Inj. at, 244.
Tutt *v.* Ide (3 Blatchf. (U. S.) 249), Charges, 41.
Tutt *v.* Port Royal & A. R. Co. (16 So. Car. 365), Ejectm., 6, 30; Husb. & W., 1.
Tutt *v.* Port Royal & A. R. Co. (20 Am. & Eng. R. Cas. 367, 20 So. Car. 110), Parties, 1; Trusts, 6.
Tutt *v.* Port Royal & A. R. Co. (28 So. Car. 388, 5 S. E. Rep. 831), Em. Dom., 191, 192; Lim. of Ac., 48.
Tuttle *v.* Burlington & M. R. Co. (49 Iowa 134), Actions, 3; Em. Dom., 194.
Tuttle *v.* Chicago, R. I. & P. R. Co. (42 Iowa 518), Husb. & W., 25, 30.
Tuttle *v.* Chicago, R. I. & P. R. Co. (48 Iowa 236), Employés, Inj. to, 626.
Tuttle *v.* Detroit, G. H. & M. R. Co. (31 Am. & Eng. R. Cas. 217, 122 U. S. 189, 7 Sup. Ct. Rep. 1166), Employés, Inj. to, 274.
Tuttle *v.* Fitchburg R. Co. (45 Am. & Eng. R. Cas. 148, 152 Mass. 42, 25 N. E. Rep. 19), Death, etc., 225; Witn., 33.

Tuttle *v.* Michigan A. L. R. Co. (35 Mich. 247, 15 Am. Ry. Rep. 406), Consol., 9, 12.
Tuttle *v.* Travelers' Ins. Co. (15 Am. & Eng. R. Cas. 488, 134 Mass. 175), Acc. Ins., 9.
Tweedy *v.* Bogart (56 Conn. 419, 15 Atl. Rep. 374), Attach., 22.
Twelfth St. Market Co. *v.* Philadelphia & R. T. R. Co. (47 Am. & Eng. R. Cas. 98, 142 Pa. St. 580, 21 Atl. Rep. 902), Charters, 85; Em. Dom., 105, 122, 887.
Twin Lakes H. G. Min. Synd. *v.* Colorado Midland R. Co. (16 Colo. 1, 27 Pac. Rep. 258), Em. Dom., 585, 899.
Twist *v.* Winona & St. P. R. Co. (37 Am. & Eng. R. Cas. 336, 39 Minn. 164, 39 N. W. Rep. 402), Children, Inj. to, 67, 91.
Twitchell *v.* Grand Trunk R. Co. (39 Fed. Rep. 419), Employés, Inj. to, 189, 645.
Twomley *v.* Central Park, N. & E. R. R. Co. (69 N. Y. 158, 18 Am. Ry. Rep. 113), Car. of P., 439, 567; Collis., 7.
Tyler, In re (149 U. S. 164, 13 Sup. Ct. Rep. 785), Receiv., 44; Tax., 303.
Tyler *v.* Cass County (142 U. S. 288, 12 Sup. Ct. Rep. 225), Fed. Cts., 25.
Tyler *v.* Chesapeake & O. R. Co. (88 Va. 389, 13 S. E. Rep. 975), New Tr., 5.
Tyler *v.* Elizabethtown & P. R. Co. (9 Bush (Ky.) 510), Branch & L. Roads, 3; Mun. Aid, 61, 74.
Tyler *v.* Illinois C. R. Co. (19 Am. & Eng. R. Cas. 519, 61 Miss. 445), Animals, 542.
Tyler *v.* Kelley (89 Va. 282, 15 S. E. Rep. 509), Death, etc., 201; Pl., 70.
Tyler *v.* London & S. W. R. Co. (1 C. & E. 285), Car. of M., 299.
Tyler *v.* New York & N. E. R. Co. (19 Am. & Eng. R. Cas. 296, 137 Mass. 238), Cross., Inj. at, 299, 318.
Tyler *v.* Old Colony R. Co. (157 Mass. 336, 32 N. E. Rep. 227), Cross., Inj. at, 31, 149, 279; Death, etc., 248.
Tyler *v.* Ricamore (87 Va. 466, 12 S. E. Rep. 799), Assign., 3; Fires, 25, 35, 58, 98, 313.
Tyler *v.* Sites (88 Va. 470, 13 S. E. Rep. 978), Death, etc., 209; Tresp., Inj. to, 45.
Tyler Tap R. Co. *v.* Driscol (52 Tex. 13), Liens, 45.
Tyndale *v.* Old Colony R. Co. (53 Am. & Eng. R. Cas. 467, 156 Mass. 503, 31 N. E. Rep. 655), Death, etc., 235.
Tynemouth Borough Tramway Co., In re (33 L. T. 8), Tramw., 8.
Tyre *v.* Wilkes (18 U. C. Q. B. 126), Stockh., 35, 63.
Tyrell *v.* Cairo & St. L. R. Co. (7 Mo. App. 294), Bonds, 17, 45, 57.
Tyrone & C. R. Co. *v.* Jones (79 Pa. St. 60), Liens, 17.
Tyrrell *v.* Eastern R. Co. (111 Mass. 546), Car. of P., 178.
Tysen *v.* Wabash R. Co. (8 Biss. (U. S.) 247), Mort., 217; Receiv., 12.
Tysen *v.* Wabash R. Co. (13 Am. & Eng. R. Cas. 134, 11 Biss. (U. S.) 510, 15 Fed. Rep. 763), Bonds, 48; Consol., 36, 40, 44.
Tyson *v.* Grand Trunk R. Co. (20 U. C. Q. B. 256), Animals, 192.
Tyson *v.* Keokuk & D. M. R. Co. (43 Iowa 207), Animals, 174.
Tyson *v.* South & N. Ala. R. Co. (61 Ala. 554), Fel. Serv., 145.
Tyson *v.* Virginia & T. R. Co. (1 Hughes (U. S.) 80), Parties, 21.

Uckfield Local Board *v.* London, B. & S. C. R. Co. (2 Ry. & C. T. Cas. 214), Car. of M., 535, 598; Ry. Com'rs, 6.
Udall *v.* Long Island R. Co. (2 How. Pr. (N. Y.) 138), Trial, 15.
Udell *v.* Illinois C. R. Co. (13 Mo. App. 254), Car. of M., 52, 694.
Uhe *v.* Chicago, M. & St. P. R. Co. (3 S. Dak. 563, 54 N. W. Rep. 601), Fires, 140.
Uline *v.* New York C. & H. R. R. Co. (23 Am. & Eng. R. Cas. 3, 101 N. Y. 98, 4 N. E. Rep. 536; reversing 31 Hun 85), Embankm., 5; Evid., 126; Sts. & H., 161.
Ullman *v.* Hannibal & St. J. R. Co. (67 Mo. 118), Constr. Rys., 11.
Ulrich *v.* New York C. & H. R. R. Co. (34 Am. & Eng. R. Cas. 350, 108 N. Y. 80, 15 N. E. Rep. 60, 13 N. Y. S. R. 120; reversing 13 Daly 129), Passes, 38.
Ulverstone & L. R. Co. *v.* Inland Revenue Com'rs (2 H. & C. 855), Stock, 3.
Umback *v.* Lake Shore & M. S. R. Co. (8 Am. & Eng. R. Cas. 98, 83 Ind. 191), Employés, Inj. to, 99, 223.
Umsted *v.* Buskirk (17 Ohio St. 113), Stockh., 47, 62, 76.
Unangst's Appeal (55 Pa. St. 128), Em. Dom., 1047.
Uncas Nat. Bank *v.* Rith (23 Wis. 339), Corp., 11.
Underbilling, In re (1 Int. Com. Rep. 813, 1 Int. Com. Com. 633), Int. Com., 86.
Underhill *v.* Chicago & G. T. R. Co. (81 Mich. 43, 45 N. W. Rep. 508), Negl., 53.
Underhill *v.* Manhattan R. Co. (27 Abb. N. Cas. 478, 18 N. Y. Supp. 43, 21 Civ. Pro. 441), Elev. Rys., 171, 172.
Underhill *v.* New York & H. R. Co. (21 Barb. (N. Y.) 489), New Tr., 7; Pl., 136.
Underhill *v.* Saratoga & W. R. Co. (20 Barb. (N. Y.) 455), Deeds, 31.
Underwood *v.* Bedford & C. R. Co. (7 Jur. N. S. 941), Em. Dom., 1151.
Underwood *v.* New York & N. H. R. Co. (17 How. Pr. (N. Y.) 537), Stockh., 93.
Unfried *v.* Baltimore & O. R. Co. (34 W. Va. 260, 12 S. E. Rep. 512), Death, etc., 146; Fel. Serv., 273; New Tr., 83.
Unger *v.* Forty-second St. & G. S. F. R. Co. (51 N. Y. 497, 4 Am. Ry. Rep. 481; affirming 6 Robt. 237), St. Rys., 334.
Uniacke *v.* Chicago, M. & St. P. R. Co. (27 Am. & Eng. R. Cas. 424, 67 Wis. 108, 29 N. W. Rep. 899), Em. Dom., 764; Witn., 68.
Union Bank *v.* Jacobs (6 Humph. (Tenn.) 515), Charters, 55.
Union Bank *v.* Laird (2 Wheat. (U. S.) 390), Stock, 41.
Union Branch R. Co. *v.* East Tenn. & G. R. Co. (14 Ga. 327) Charters, 85; Citizens., 4; Franch., 2; Land Grants, 114; Pl., 86; Stat., 67.
Union Bridge Co. *v.* Troy & L. R. Co. (7 Lans. (N. Y.) 240), Direct., 34, 54; Ult. Vir., 9.

Union D. & R. Co. *v.* Smith (16 Colo. 361, 27 Pac. Rep. 329), False Imp., 10, 21.
Union Depot Co. *v.* Chicago, K. & N. R. Co. (56 Am. & Eng. R. Cas. 245, 113 Mo. 213, 20 S. W. Rep. 792), Union D. Cos., 5.
Union Depot Co. *v.* Frederick (57 Am. & Eng. R. Cas. 656, 117 Mo. 138, 21 S. W. Rep. 1118), Em. Dom., 14, 259, 313; Union D. Cos., 3.
Union Depot Co. *v.* St. Louis (76 Mo. 303; affirming 8 Mo. App. 412), Estop., 4; Union D. Cos., 2.
Union Depot R. Co. *v.* Southern R. Co. (50 Am. & Eng. R. Cas. 354, 105 Mo. 562, 16 S. W. Rep. 920), Charters, 8; St. Rys., 246, 248.
Union D., St. R. & T. Co. *v.* Brunswick (14 Am. & Eng. R. Cas. 233, 31 Minn. 297, 47 Am. Rep. 789, 17 N. W. Rep. 626), Em. Dom., 554; Rip. Rts., 6.
Union El. R. Co., In re (112 N. Y. 61, 19 N. E. Rep. 664, 20 N. Y. S. R. 498, 2 L. R. A. 359; affirming 17 N. Y. S. R. 630, 1 N. Y. Supp. 797, 49 Hun 609, mem.), Elev. Rys., 24; Em. Dom., 85.
Union El. R. Co., In re (55 Hun 163, 28 N. Y. S. R. 386, 7 N. Y. Supp. 853), Em. Dom., 603, 768, 804.
Union El. R. Co., In re (30 N. Y. S. R. 164, 8 N. Y. Supp. 813, 55 Hun 611), Em. Dom., 321, 645, 912.
Union El. R. Co., In re (113 N. Y. 275, 21 N. E. Rep. 81, 22 N. Y. S. R. 792; affirming 22 N. Y. S. R. 842, 4 N. Y. Supp. 85), Elev. Rys., 43; Em. Dom., 64, 920.
Union El. R. Co., In re (22 N. Y. S. R. 842, 4 N. Y. Supp. 85; affirmed in 113 N. Y. 275, 22 N. Y. S. R. 792), Elev. Rys., 27.
Union Exp. Co. *v.* Graham (26 Ohio St. 595), Car. of M., 26, 471.
Union Exp. Co. *v.* Ohleman (92 Pa. St. 323), Exp. Cos., 39.
Union Exp. Co. *v.* Shoop (85 Pa. St. 325), Car. of M., 656.
Union Freight R. Co. *v.* Winkley (55 Am. & Eng. R. Cas. 695, 159 Mass. 133, 34 N. E. Rep. 91), Charges, 74.
Union L. & E. Co. *v.* Erie R. Co. (37 N. J. L. 23), Contr., 90; Discrim., 23.
Union L. & T. Co. *v.* Southern Cal. Motor Road Co. (49 Fed. Rep. 267), Mort., 226.
Union L. & T. Co. *v.* Southern Cal. Motor Road Co. (51 Fed. Rep. 840), Bonds, 45; Estop., 25; Mort., 51, 233.
Union Mut. Ins. Co. *v.* Indianapolis & C. R. Co. (1 Disney (Ohio) 480), Car. of M., 471.
Union Mut. L. Ins. Co. *v.* Chicago & W. I. R. Co. (44 Ill. App. 88), Vend. & P., 7.
Union Mut. L. Ins. Co. *v.* Chicago & W. I. R. Co. (146 Ill. 320, 34 N. E. Rep. 948), Deeds, 27; Em. Dom., 437; Int., 1.
Union Mut. L. Ins. Co. *v.* Slee (123 Ill. 57, 12 N. E. Rep. 543), Em. Dom., 846, 851, 968; Estop., 9.
Union Pac., D. & G. R. Co. *v.* McCarty (3 Colo. App. 530, 34 Pac. Rep. 767), Receipts, 3.
Union Pac., D. & G. R. Co. *v.* Williams (3 Colo. App. 526), Car. of M., 761; Contrib. Neg., 47; Evid., 22.
Union Pac. R. Co., In re (10 Bankr. Reg. 178), Bank'cy, 1, 4.
Union Pac. R. Co. *v.* Adams (19 Am. & Eng. R. Cas. 376, 33 Kan. 427, 6 Pac. Rep. 529), Cross., Inj. at, 264; Trial, 60.
Union Pac. R. Co. *v.* Anderson (11 Colo. 293, 18 Pac. Rep. 24), Med. Serv., 15.
Union Pac. R. Co. *v.* Arthur (2 Colo. App. 159, 29 Pac. Rep. 1031), Fires, 1, 33, 103.
Union Pac. R. Co. *v.* Beatty (26 Am. & Eng. R. Cas. 84, 35 Kan. 265, 10 Pac. Rep. 845), Med. Serv., 12.
Union Pac. R. Co. *v.* Billeter (41 Am. & Eng. R. Cas. 431, 28 Neb. 422, 44 N. W. Rep. 483), Fel. Serv., 106, 305.
Union Pac. R. Co. *v.* Blum (35 Am. & Eng. R. Cas. 119, 23 Neb. 404), Animals, 460.
Union Pac. R. Co. *v.* Bostford (47 Am. & Eng. R. Cas. 406, 141 U. S. 250, 11 Sup. Ct. Rep. 1000), Phys. Exam., 2.
Union Pac. R. Co. *v.* Broderick (30 Neb. 735, 46 N. W. Rep. 1121), Employés, Inj. to, 101.
Union Pac. R. Co. *v.* Buffalo County Com'rs (9 Neb. 449, 4 N. W. Rep. 53), Mun. Aid, 419.
Union Pac. R. Co. *v.* Burlington & M. R. R. Co. (1 McCrary (U. S.) 452), 3 Fed. Rep. 106), Cross. Rys., 12; Em. Dom., 515; Union Pac. R. Co., 6.
Union Pac. R. Co. *v.* Burlington & M. R. R. Co. (19 Neb. 386, 27 N. W. Rep. 238), Sts. & H., 22a.
Union Pac. R. Co. *v.* Byrne (2 Wyom. 109), New Tr., 84.
Union Pac. R. Co. *v.* Callaghan (56 Fed. Rep. 988), Fel. Serv., 57, 255, 476; Negl., 49.
Union Pac. R. Co. *v.* Carr (1 Wyom. 96), Tax., 347.
Union Pac. R. Co. *v.* Cheyenne (113 U. S. 516, 5 Sup. Ct. Rep. 601), Tax., 61, 357.
Union Pac. R. Co. *v.* Chicago, R. I. & P. R. Co. (51 Am. & Eng. R. Cas. 162, 51 Fed. Rep. 309, 2 C. C. A. 174; affirming 47 Fed. Rep. 15, 47 Am. & Eng. R. Cas. 340), App., 26; Contr., 47, 105; Leases, 17; Spec. Perf., 9, 24, 25.
Union Pac. R. Co. *v.* Clopper (131 U. S. 192 app'x, 26 Law Ed. (U. S.) 243), Bridges, 39; Witn., 139.
Union Pac. R. Co. *v.* Colfax County Com'rs (4 Neb. 450), Mun. Aid, 319.
Union Pac. R. Co. *v.* Credit Mobilier (16 Am. & Eng. R. Cas. 570, 135 Mass. 367), Direct., 49; Eq., 27.
Union Pac. R. Co. *v.* Daniels (152 U. S. 684, 14 Sup. Ct. Rep. 756), App., 104; Employés, Inj. to., 153.
Union Pac. R. Co. *v.* Dawson County (12 Neb. 254, 11 N. W. Rep. 307), Tax., 14, 271; Words & Ph., 211.
Union Pac. R. Co. *v.* De Busk (38 Am. & Eng. R. Cas. 321, 12 Colo. 294, 20 Pac. Rep. 752, 3 L. R. A. 350), Fires, 1, 260.
Union Pac. R. Co. *v.* Denver & R. G. R. Co. (37 Fed. Rep. 179), Injunc., 49.
Union Pac. R. Co. *v.* Diehl (21 Am. & Eng.

R. Cas. 350, 33 Kan. 422, 6 Pac. Rep. 566), App., 117.
Union Pac. R. Co. *v.* Dodge County Com'rs (98 U. S. 541), Tax., 338.
Union Pac. R. Co. *v.* Douglas Co. (31 Fed. Rep. 540), Land Grants, 93.
Union Pac. R. Co. *v.* Dunden (34 Am. & Eng. R. Cas. 88, 37 Kan. 1, 14 Pac. Rep. 501), Children, Inj. to, 77, 181; Death, etc., 60, 253, 386; Ex. & Ad., 3; New Tr., 53; Trial, 190.
Union Pac. R. Co. *v.* Durant (95 U. S. 576), Contr., 68.
Union Pac. R. Co. *v.* Durant (3 Dill. (U. S.) 343), Pres., 11.
Union Pac. R. Co. *v.* Dyche (11 Am. & Eng. R. Cas. 427, 28 Kan. 200), Animals, 203, 520; App., 118.
Union Pac. R. Co. *v.* Dyche (14 Am. & Eng. R. Cas. 272, 31 Kan. 120, 1 Pac. Rep. 243), Flood. Lds., 58; Rem. of C., 7; Waters & W., 17.
Union Pac. R. Co. *v.* Estes (37 Kan. 715, 16 Pac. Rep. 131), Employés, Inj. to, 297, 306, 330, 383.
Union Pac. R. Co. *v.* Fort (17 Wall. (U. S.) 553), Fel. Serv., 91, 371.
Union Pac. R. Co. *v.* Fray (15 Am. & Eng. R. Cas. 158, 31 Kan. 739, 3 Pac. Rep. 550), Fel. Serv., 464.
Union Pac. R. Co. *v.* Fray (29 Am. & Eng. R. Cas. 309, 35 Kan. 700, 12 Pac. Rep. 98), Employés, Inj. to, 656; Evid., 202; Trial, 151.
Union Pac. R. Co. *v.* Fray (43 Kan. 750, 23 Pac. Rep. 1039), Employés, Inj. to, 99, 145; Fel. Serv., 318, 331, 462.
Union Pac. R. Co. *v.* Gibson (15 Colo. 299, 25 Pac. Rep. 300), Attach., 61.
Union Pac. R. Co. *v.* Goodridge (54 Am. & Eng. R. Cas. 423, 149 U. S. 680, 13 Sup. Ct. Rep. 970; affirming 37 Fed. Rep. 182), Discrim., 14, 80.
Union Pac. R. Co. *v.* Graddy (25 Neb. 849, 41 N. W. Rep. 809), Med. Serv., 2.
Union Pac. R. Co. *v.* Hall (91 U. S. 343), Mand., 28; Union Pac. R. Co., 3.
Union Pac. R. Co. *v.* Hand (7 Kan. 380, 1 Am. Ry. Rep. 548), Car. of P., 162, 563, 645; Derailm., 3.
Union Pac. R. Co. *v.* Harris (11 Am. & Eng. R. Cas. 431, 28 Kan. 206), App., 118; Fences, 24, 56.
Union Pac. R. Co. *v.* Harris (21 Am. & Eng. R. Cas. 584, 33 Kan. 416, 6 Pac. Rep. 571), Fel. Serv., 180.
Union Pac. R. Co. *v.* Harwood (15 Am. & Eng. R. Cas. 494, 31 Kan. 388, 2 Pac. Rep. 605), Car. of L. S., 120.
Union Pac. R. Co. *v.* Hause (1 Wyom. 27), Car. of P., 644; Dam., 26; Indep. Contr., 18.
Union Pac. R. Co. *v.* Henry (36 Kan. 565, 14 Pac. Rep. 1), App., 74; Comp. Neg., 22; Evid., 80; Trial, 129.
Union Pac. R. Co. *v.* Hepner (3 Colo. App. 313), Agency, 37; Car. of M., 65; Evid., 204.
Union Pac. R. Co. *v.* High (14 Neb. 14, 14 N. W. Rep. 547), Animals, 126, 158.
Union Pac. R. Co. *v.* Horney (5 Kan. 340), App., 110.
Union Pac. R. Co. *v.* Hutchinson (39 Kan. 485, 18 Pac. Rep. 705), Cross., Inj. at, 324; Fright. Teams, 5.
Union Pac. R. Co. *v.* James (56 Fed. Rep. 1001), App., 78, 85; Employés, Inj. to, 138; Witn., 28.
Union Pac. R. Co. *v.* Jarvi (3 Wyom. 375, 23 Pac. Rep. 398), Employés, Inj. to, 720.
Union Pac. R. Co. *v.* Jones (9 Colo. 379, 12 Pac. Rep. 516), Fires, 244.
Union Pac. R. Co. *v.* Jones (49 Fed. Rep. 343, 4 U. S. App. 115, 1 C. C. A. 282), Actions, 14; Dam., 44.
Union Pac. R. Co. *v.* Kansas City (42 Kan. 497, 22 Pac. Rep. 633), Mun. Corp., 2.
Union Pac. R. Co. *v.* Keller (36 Neb. 189, 54 N. W. Rep. 420), Fires, 255, 256, 264, 283.
Union Pac. R. Co. *v.* Kindred (43 Kan. 134, 23 Pac. Rep. 112), Adv. Poss., 3.
Union Pac. R. Co. *v.* Lapsley (51 Fed. Rep. 174, 4 U. S. App. 542, 2 C. C. A. 149; affirming 50 Fed. Rep. 172), Imp. Neg., 24.
Union Pac. R. Co. *v.* Leavenworth, N. & S. R. Co. (29 Fed. Rep. 728), Cross. Rys., 28; Union Pac. R. Co., 6.
Union Pac. R. Co. *v.* Lincoln County (1 Dill. (U. S.) 314), Tax., 69, 238.
Union Pac. R. Co. *v.* Lincoln County (2 Dill. (U. S.) 279), Tax., 342.
Union Pac. R. Co. *v.* Lincoln County (3 Dill. (U. S.) 300), Injunc., 36; Mun. Aid, 322.
Union Pac. R. Co. *v.* McAlpine (129 U. S. 305, 9 Sup. Ct. Rep. 286; affirming 23 Fed. Rep. 168), Consol., 44; Contr., 82; Spec. Perf., 6, 24.
Union Pac. R. Co. *v.* McCarty (8 Kan. 125, 5 Am. Ry. Rep. 112), Judgm., 4.
Union Pac. R. Co. *v.* McComb (17 Blatchf. (U. S.) 510, 1 Fed. Rep. 799, 58 How. Pr. 478), Rem. of C., 7, 9.
Union Pac. R. Co. *v.* McDonald (152 U. S. 262, 14 Sup. Ct. Rep. 619), Children, Inj. to, 10, 77; Trial, 183.
Union Pac. R. Co. *v.* McShane (3 Dill. (U. S.) 303), Tax., 121, 357.
Union Pac. R. Co. *v.* McShane (22 Wall. (U. S.) 444, 11 Am. Ry. Rep. 456), Tax., 113, 164.
Union Pac. R. Co. *v.* Marston (30 Neb. 241), Bills of L., 13.
Union Pac. R. Co. *v.* Merrick County (3 Dill. (U. S.) 359), Mun. Aid, 237, 302.
Union Pac. R. Co. *v.* Mertes (35 Neb. 204, 52 N. W. Rep. 1099), Contrib. Neg., 48; Negl., 61.
Union Pac. R. Co. *v.* Miller (87 Ill. 45, 18 Am. Ry. Rep. 400), Proc., 28.
Union Pac. R. Co. *v.* Milliken (8 Kan. 647, 5 Am. Ry. Rep. 406), Fel. Serv., 147; New Tr., 72.
Union Pac. R. Co. *v.* Monden (53 Am. & Eng. R. Cas. 363, 50 Kan. 539, 31 Pac. Rep. 1002), Employés, Inj. to, 245.
Union Pac. R. Co. *v.* Moyer (35 Am. & Eng. R. Cas. 615, 40 Kan. 184, 19 Pac. Rep. 639), Car. of M., 91; Evid., 254.

Union Pac. R. Co. *v.* Myers (20 Am. & Eng. R. Cas. 324, 115 U. S. 1, 5 Sup. Ct. Rep. 1113), Rem. of C., 7, 9.
Union Pac. R. Co. *v.* Nichols (8 Kan. 505, 3 Am. Ry. Rep. 419), Car. of P., 52.
Union Pac. R. Co. *v.* O'Brien (49 Fed. Rep. 538, 4 U. S. App. 221, 1 C. C. A. 354), Culverts, 9; Death, etc., 356; Employés, Inj. to, 189; Trial, 160; Witn., 70, 99.
Union Pac. R. Co. *v.* O'Hern (24 Neb. 775, 40 N. W. Rep. 293), Employés, Inj. to, 735; Trial, 109.
Union Pac. R. Co. *v.* Peniston (18 Wall. (U. S.) 5), Tax., 69; Union Pac. R. Co., 7.
Union Pac. R. Co. *v.* Pillsbury (29 Kan. 652), Proc., 28.
Union Pac. R. Co. *v.* Porter (58 Am. & Eng. R. Cas. 289, 38 Neb. 226, 56 N. W. Rep. 808), Car. of P., 585; Negl., 61.
Union Pac. R. Co. *v.* Pottawattamie County (4 Dill. (U. S.) 497), Tax., 78.
Union Pac. R. Co. *v.* Proctor (12 Colo. 194, 20 Pac. Rep. 615, 2 Denver Leg. News 99), Animals, 596.
Union Pac. R. Co. *v.* Rassmussen (25 Neb. 810, 41 N. W. Rep. 778), Evid., 234.
Union Pac. R. Co. *v.* Reese (56 Fed. Rep. 288), Evid. 58; Witn., 36.
Union Pac. R. Co. *v.* Rollins (5 Kan. 167), Animals, 284, 573; Comp. Neg., 22; Fences, 5; Negl., 75; Words & Ph., 138.
Union Pac. R. Co. *v.* Ryan (2 Wyom. 408), Tax., 285; Words & Ph., 169.
Union Pac. R. Co. *v.* Saunders County Com'rs (7 Neb. 228), Tax., 37.
Union Pac. R. Co. *v.* Schwenck (13 Neb. 478), Animals, 234.
Union Pac. R. Co. *v.* Shannon (19 Am. & Eng. R. Cas. 500, 33 Kan. 446, 6 Pac. Rep. 564), New Tr., 26; Trial, 186.
Union Pac. R. Co. *v.* Shannon (38 Kan. 476, 16 Pac. Rep. 836), Trial, 208.
Union Pac. R. Co. *v.* Springsteen (41 Kan. 724, 21 Pac. Rep. 774), Agency, 41; Fly. Switch, 2.
Union Pac. R. Co. *v.* Sternberg (13 Colo. 141, 21 Pac. Rep. 1021), Pl., 156.
Union Pac. R. Co. *v.* Stewart (95 U. S. 279), Bonds, 39.
Union Pac. R. Co. *v.* Sue (25 Neb. 772, 41 N. W. Rep. 801), Car. of P., 596; Stat. & D., 76, 143.
Union Pac. R. Co. *v.* United States (2 Wyom. 170), Car. of M., 378.
Union Pac. R. Co. *v.* United States (99 U. S. 402), Land Grant Rds., 3, 11; Union Pac. R. Co., 10.
Union Pac R. Co. *v.* United States (99 U. S. 700), Union Pac. R. Co., 4.
Union Pac. R. Co. *v.* United States (10 Ct. of Cl. 548), Land Grant Rds., 12; Union Pac. R. Co., 1, 10.
Union Pac. R. Co. *v.* United States (13 Ct. of Cl. 401), Union Pac. R. Co., 10.
Union Pac. R. Co. *v.* United States (16 Ct. of Cl. 353), Car. of Mails, 9; Land Grant Rds., 2, 12.
Union Pac. R. Co. *v.* United States (20 Ct. of Cl. 70), Land Grant Rds., 6, 11; Union Pac. R. Co., 4.
Union Pac. R. Co. *v.* United States (9 Am. & Eng. R. Cas. 54, 104 U. S. 662; reversing 16 Ct. of Cl. 569), Car. of Mails, 9, 11, 15.
Union Pac. R. Co. *v.* United States (116 U. S. 154, 6 Sup. Ct. Rep. 325), Fed. Cts., 29.
Union Pac. R. Co. *v.* United States (25 Am. & Eng. R. Cas. 396, 117 U. S. 355, 6 Sup. Ct. Rep. 772), Car. of Mails, 9.
Union Pac. R. Co. *v.* Watts (2 Dill. (U. S.) 310), Land Grants, 95.
Union Pac. R. Co. *v.* York County (10 Neb. 612, 7 N. W. Rep. 270), Tax., 14.
Union Pac. R. Co. *v.* Young (8 Kan. 658, 5 Am. Ry. Rep. 419), Fel. Serv., 457.
Union Pac. R. Co. *v.* Young (19 Kan. 488, 19 Am. Ry. Rep. 52), Employés, Inj. to, 776; Fel. Serv., 475.
Union Pass. R. Co.'s Appeal (2 Pennyp. (Pa.) 434), Charters, 8; St. Rys., 249.
Union Pass. R. Co.'s Appeal (81* Pa. St. 91), St. Rys., 68.
Union Pass. R. Co. *v.* Continental R. Co. (11 Phila. (Pa.) 321), St. Rys., 249.
Union Pass. R. Co. *v.* Mayor, etc., of Baltimore (71 Md. 238, 17 Atl. Rep. 933), Tax., 313.
Union Pass. R. Co. *v.* Philadelphia (83 Pa. St. 429, 15 Am. Ry. Rep. 431), St. Rys., 282, 290.
Union Pass. R. Co. *v.* Philadelphia (101 U. S. 528· affirming 83 Pa. St. 429, 15 Am. Ry. Rep. 431), St. Rys., 290.
Union R. & T. Co. *v.* Kallaher (12 Ill. App. 400), Comp. Neg., 2, 14; Eject. Pass., 90.
Union R. & T. Co. *v.* Kallaher (114 Ill. 325, 2 N. E. Rep. 77), Agency, 91.
Union R. & T. Co. *v.* Leahy (9 Ill. App. 353), Employés, Inj. to, 197.
Union R. & T. Co. *v.* Riegel (73 Pa. St. 72), Car. of M., 400, 745.
Union R. & T. Co. *v.* Shacklet (28 Am. & Eng. R. Cas. 193, 119 Ill. 232, 10 N. E. Rep. 896), App., 122; Death, etc., 127, 157.
Union R. & T. Co. *v.* Shacklett (19 Ill. App. 145), Car. of L. S., 132; Car. of P., 365; Imp. Neg., 5.
Union R. & T. Co. *v.* Skinner (9 Mo. App. 189), Em. Dom., 445.
Union R. & T. Co. *v.* Traube (59 Mo. 355, 8 Am. Ry. Rep. 441), Car. of M., 758; Exp. Cos., 55.
Union R. & T. Co. *v.* Yeager (34 Ind. 1), Bills of L., 1, 60.
Union R. Co. *v.* Dull (124 U. S. 173, 8 Sup. Ct. Rep. 433), Arb., 32.
Union R. Co. *v.* Mayor, etc., of Cambridge (11 Allen (Mass.) 287), St. Rys., 273.
Union R. Co. *v.* State (42 Am. & Eng. R. Cas. 172, 72 Md. 153, 19 Atl. Rep. 449), Cross., Inj. at, 211, 255.
Union R. T. & S. Y. Co. *v.* Moore (5 Am. & Eng. R. Cas. 346, 80 Ind. 458), Em. Dom., 1007; Witn., 109.
Union River L. R. Co *v.* Noble (9 Mackey (D. C.) 555), Pub. Lds., 38.
Union Rolling Mill Co. *v.* Gillen (100 Ill. 52), Cross., Inj. at, 141; New Tr., 84.
Union Sav. Assoc. *v.* Seligman (92 Mo. 635, 15 S. W. Rep. 630), Stockh., 57, 58.

Union S. Y. & T. Co. *v.* Monaghan (13 Ill. App. 148), Comp. Neg., 16; Dam., 102.
Union S. Y. & T. Co. *v.* Rourke (10 Ill. App. 474), Tresp., Inj. to, 75.
Union St. R. Co. *v.* Hazleton & N. S. Elec. R. Co. (154 Pa. St. 422, 26 Atl. Rep. 557), Elec. Rys., 3.
Union S. & S. Co. *v.* Johnson R. Signal Co. (52 Fed. Rep. 867), Pat. for Inv., 46.
Union Trust Co. *v.* Chicago & L. H. R. Co. (7 Fed. Rep. 513), Receiv., 104.
Union Trust Co. *v.* Cuppy (11 Am. & Eng. R. Cas. 562, 26 Kan. 754), Culverts, 11, 17; Flood. Lds., 1, 51, 67; Judgm., 8; Receiv., 183.
Union Trust Co. *v.* Illinois Midland R. Co. (25 Am. & Eng. R. Cas. 560, 117 U. S. 434, 6 Sup. Ct. Rep. 809), Mort., 115, 171; Receiv., 25, 52, 76, 91, 99, 100, 105, 109, 148; Sales of Rds., 15.
Union Trust Co. *v.* Kendall (20 Kan. 515, 20 Am. Ry. Rep. 294), Animals, 309, 642; Words & Ph., 184
Union Trust Co. *v.* Missouri, K. & T. R. Co. (26 Fed. Rep. 485), Mort., 136.
Union Trust Co. *v.* Monticello & P. J. R. Co. (63 N. Y. 311), Coupons, 11.
Union Trust Co. *v.* Morrison (33 Am. & Eng. R. Cas. 33, 125 U. S. 591, 8 Sup. Ct. Rep. 1004), Mort., 119, 255.
Union Trust Co. *v.* Nevada & O. R. Co. (17 Am. & Eng. R. Cas. 207, 20 Fed. Rep. 80, 10 Sawy. (U. S.) 122), Bonds, 30.
Union Trust Co. *v.* Olmstead (26 Am. & Eng. R. Cas. 61, 102 N. Y. 729, 7 N. E. Rep. 822), Mort., 210.
Union Trust Co. *v.* Rochester & P. R. Co. (29 Fed. Rep. 609), Citizens., 3; Judgm., 26; Receiv., 4.
Union Trust Co. *v.* St. Louis, I. M. & S. R. Co. (4 Dill. (U. S.) 114), Receiv., 13.
Union Trust Co. *v.* St. Louis, I. M. & S. R. Co. (5 Dill. (U. S.) 1), Mort., 171.
Union Trust Co. *v.* St. Louis, I. M. & S. R. Co. (5 Dill. (U. S.) 191), Mort., 192.
Union Trust Co. *v.* Souther (11 Am. & Eng. R. Cas. 707, 107 U. S. 591, 2 Sup. Ct. Rep. 295), Mort., 219.
Union Trust Co. *v.* Southern Inland N. & I. Co. (130 U. S. 565, 9 Sup. Ct. Rep. 606), Land Grants, 20.
Union Trust Co. *v.* Thomason (5 Am. & Eng. R. Cas. 589, 25 Kan. 1), Fel. Serv., 180.
Union Trust Co. *v.* Walker (107 U. S. 596, 2 Sup. Ct. Rep. 299), Mort., 226.
Union Trust Co. *v.* Weber (3 Am. & Eng. R. Cas. 583, 96 Ill. 346), Tax., 74, 257, 306, 353, 354, 359.
Union Village & J. R. Co., In re (35 How. Pr. (N. Y.) 420, 53 Barb. 457), Em. Dom., 702.
United Elec. R. Co. *v.* Shelton (46 Am. & Eng. R. Cas. 206, 89 Tenn. 423, 14 S. W. Rep. 863), Elec. Rys., 23.
United Land Co. *v.* Great Eastern R. Co. (33 L. T. 292, 44 L. J. Ch. 685, L. R. 10 Ch. 586, 23 W. R. 896; affirming L. R. 17 Eq. 158, 43 L. J. Ch. 363, 22 W. R. 126), Cross. Rys., 20; Sts. & H., 422.
United N. J. R. & C. Co. *v.* Hoppock (28 N. J. Eq. 261, 14 Am. Ry. Rep. 23; reversing 27 N. J. Eq. 286), Spec. Perf., 16.
United N. J. R. & C. Co. *v.* Jersey City (53 N. J. L. 547, 22 Atl. Rep. 59), Tax., 77.
United N. J. R & C. Co. *v.* Long Dock Co. (38 N. J. Eq. 142), Words & Ph., 154.
United N. J. R. & C. Co. *v.* Long Dock Co. (42 N. J. Eq. 547, 7 Cent. Rep. 920, 9 Atl. Rep. 586), Partit., 6.
United N. J. R. & C. Co. *v.* Mayor, etc., of Jersey City (54 Am. & Eng. R. Cas. 272, 55 N. J. L. 129, 26 Atl. Rep. 135), Tax., 274.
United N. J. R. & C. Co. *v.* National Docks & N. J. J. Connecting R. Co. (44 Am. & Eng. R. Cas. 226, 52 N. J. L. 90, 18 Atl. Rep. 574), Cross. Rys., 19, 21, 28, 62.
United N. J. R. & C. Co. *v.* Standard Oil Co. (1 Am. & Eng. R. Cas. 33, 33 N. J. Eq. 123), Injunc., 29.
United States *v.* Alabama G. S. R. Co. (142 U. S. 615, 12 Sup. Ct. Rep. 306; affirming 25 Ct. of Cl. 30), Car. of Mails, 9.
United States *v.* Baltimore & O. R. Co. (17 Wall. (U. S.) 322), Rev., 4.
United States *v.* Baltimore & O. R. Co. (1 Hughes (U. S.) 138), License, 14; Pub. Lds., 31.
United States *v.* Boston & A. R. Co. (15 Fed. Rep. 209), Car. of L. S., 34.
United States *v.* Bransteen (13 Sawy. (U. S.) 64, 32 Fed. Rep. 738), Pub. Lds., 19.
United States *v.* Brooklyn City & N. R. Co. (14 Fed. Rep. 284), Rev., 9.
United States *v.* Buchanan County (5 Dill. (U. S.) 285), Mun. Aid, 439.
United States *v.* Burlington & M. R. R. Co. (98 U. S. 334; affirming 4 Dill. (U. S.) 297), Land Grants, 98.
United States *v.* Central Pac. R. Co. (99 U. S. 449), Cent. Pac. R. Co., 2.
United States *v.* Central Pac. R. Co. (24 Am. & Eng. R. Cas. 257, 118 U. S. 235, 6 Sup. Ct. Rep. 1038), Land Grant Rds., 12; Land Grants, 99.
United States *v.* Central Pac. R. Co. (138 U. S. 84, 11 Sup. Ct. Rep. 285), Cent. Pac. R. Co., 4.
United States *v.* Central Pac. R. Co. (8 Sawy. (U. S.) 81, 11 Fed. Rep. 449), Pub. Lds., 37.
United States *v.* Chaplin (12 Sawy. (U. S.) 604, 31 Fed. Rep. 890), Pub. Lds., 23.
United States *v.* Childers (8 Sawy. (U. S.) 171, 12 Fed. Rep. 586), Land Grants, 71.
United States *v.* Clark County (95 U. S. 769), Mun. Aid, 449.
United States *v.* Clark County Court (96 U. S. 211), Mun. Aid, 405.
United States *v.* Colton M. & L. Co. (57 Am. & Eng. R. Cas. 341, 146 U. S. 615, 13 Sup. Ct. Rep. 163; reversing 46 Fed. Rep. 683), Land Grants, 89.
United States *v.* Curtner (14 Sawy. (U. S.) 535, 38 Fed. Rep. 1; reversed in 149 U. S. 662), Land Grants, 49, 59, 63, 67; Lim. of Ac., 7.
United States *v.* Dalles Military Road Co. (41 Fed. Rep. 493), Estop., 2.
United States *v.* Delaware, L. & W. R. Co.

(40 Am. & Eng. R. Cas. 36, 40 Fed. Rep. 101), Discrim., 53, 73.
United States v. Denver & R. G. R. Co. (31 Fed. Rep. 886), Evid., 139.
United States v. Denver & R. G. R. Co. (150 U. S. 1, 14 Sup. Ct. Rep. 11; affirming 34 Fed. Rep. 838, which modified 31 Fed. Rep. 886), Charters, 61; Pub. Lds., 23.
United States v. Denver Pac. R. Co. (99 U. S. 460), Kansas Pac. R. Co., 2; Land Grant Rds., 12.
United States v. Des Moines N. & R. Co. (142 U. S. 510, 12 Sup. Ct. Rep. 308), Land Grants, 22.
United States v. Douglas (113 N. Car. 190, 18 S. E. Rep. 202), Rem. of C., 29, 32.
United States v. East Tenn., V. & G. R. Co. (9 Am. & Eng. R. Cas. 259, 13 Fed. Rep. 642), Car. of L. S., 34.
United States v. Egan (47 Fed. Rep. 112), Int. Com., 91.
United States v. Erie R. Co. (9 Ben. (U. S.) 67), Tax., 99.
United States v. Erie R. Co. (13 Am. & Eng. R. Cas. 319, 106 U. S. 327, 1 Sup. Ct. Rep. 223), Divid., 10.
United States v. Erie R. Co. (107 U. S. 1, 2 Sup. Ct. Rep. 83), Rev., 5.
United States v. Eureka & P. R. Co. (14 Sawy. (U. S.) 334, 40 Fed. Rep. 419), Pub. Lds., 22.
United States v. Godwin (7 Mont. 402, 16 Pac. Rep. 850), Land Grants, 73.
United States v. Great Falls & C. R. Co. (53 Fed. Rep. 77), Contr. Labor Law, 2.
United States v. Howard County Court (1 McCrary (U. S.) 218, 2 Fed. Rep. 1), Mun. Aid, 405.
United States v. Howell (55 Am. & Eng. R. Cas. 553, 56 Fed. Rep. 21), Crim. L., 12.
United States v. Illinois C. R. Co. (2 Biss. (U. S.) 174), Dedica., 2, 5; Em. Dom., 375.
United States v. Indianapolis & St. L. R. Co. (113 U. S. 711, 5 Sup. Ct. Rep. 716), Tax., 57.
United States v. Johnson County (5 Dill. (U. S.) 207, n.), Mun. Aid, 40.
United States v. Johnson County Sup'rs (6 Wall. (U. S.) 166), Mun. Aid, 439, 445.
United States v. Kane (9 Sawy. (U. S.) 614), Crim. L., 37; Eject. Pass., 62.
United States v. Kane (25 Am. & Eng. R. Cas. 608, 23 Fed. Rep. 748), Crim. L., 12; Strikes, 5.
United States v. Kansas Pac. R. Co. (99 U. S. 455), Kansas Pac. R. Co., 1, 2.
United States v. Kansas Pac. R. Co. (4 Dill. (U. S.) 367), Union Pac. R. Co., 10.
United States v. Keokuk City Council (6 Wall. (U. S.) 514), Injunc., 12; Mun. Aid, 439.
United States v. Kirby (7 Wall. (U. S.) 482), Crim. L., 37.
United States v. Knox County Court (5 McCrary (U. S.) 76), Mun. Aid, 439.
United States v. Knox County Court (122 U. S. 306, 7 Sup. Ct. Rep. 1171), Estop., 9.
United States v. Leavenworth, L. & G. R. Co. (1 McCrary (U. S.) 610; affirmed in 92 U. S. 733), Land Grants, 28.
United States v. Lee County (6 Wall. (U. S.) 210), Injunc., 12.
United States v. Lee County Sup'rs (2 Biss. (U. S.) 77), Mun. Aid, 316, 439.
United States v. Lincoln County (5 Dill. (U. S.) 184), Mun. Aid, 449.
United States v. Little Miami, C. & X. R. Co. (1 Fed. Rep. 700), Leases, 39; Rev., 7.
United States v. Louisville & N. R. Co. (18 Fed. Rep. 480), Car. of L. S., 34.
United States v. Louisville & N. R. Co. (33 Fed. Rep. 829), Rev., 5, 7.
United States v. Lynde (47 Fed. Rep. 297), Pub. Lds., 23.
United States v. Macdonald (5 Wall. (U. S.) 659), Rev., 3.
United States v. McLaughlin (30 Fed. Rep. 147, 12 Sawy. (U. S.) 179; affirmed in 127 U. S. 428, 8 Sup. Ct. Rep. 1177), Em. Dom., 335; Land Grants, 67.
United States v. McLaughlin (127 U. S. 428, 8 Sup. Ct. Rep. 1177), Land Grants, 68.
United States v. Macon County (99 U. S. 582), Mun. Aid, 439.
United States v. Marquette, H. & O. R. Co. (17 Fed. Rep. 719), Rev., 7, 12, 13.
United States v. Mellen (53 Fed. Rep. 229, 4 Int. Com. Rep. 247), Int. Com., 128.
United States v. Memphis & L. R. R. Co. (6 Fed. Rep. 237), Contempt., 11.
United States v. Michigan C. R. Co. (43 (Fed. Rep. 26, 3 Int. Com. Rep. 287), Int. Com., 135, 162.
United States v. Michigan C. R. Co. (53 Am. & Eng. R. Cas. 28, 48 Fed. Rep. 365), Contr. Labor Law, 1.
United States v. Milwaukee & St. P. R. Co. (5 Biss. (U. S.) 410), Bridges, 60, 67.
United States v. Minnesota & N. W. R. Co. (1 Minn. 127), Land Grants, 34, 120.
United States v. Missouri, K. & T. R. Co. (51 Am. & Eng. R. Cas. 305, 141 U. S. 358, 12 Sup. Ct. Rep. 13), Land Grants, 28, 51; Pub. Lds., 37.
United States v. Missouri, K. & T. R. Co. (37 Fed. Rep. 68), Land Grants, 101.
United States v. Morsman (42 Fed. Rep. 448), Int. Com., 23.
United States v. Murphy (45 Am. & Eng. R. Cas. 100, 44 Fed. Rep. 39), Contempt, 4.
United States v. Nashville, C. & St. L. R. Co. (26 Am. & Eng. R. Cas. 110, 118 U. S. 120, 6 Sup. Ct. Rep. 1006), Lim. of Ac., 7.
United States v. New Orleans (98 U. S. 381), Tax., 8.
United States v. New Orleans & O. R. Co. (12 Wall. (U. S.) 362), Mort., 42.
United States v. New York, N. H. & H. R. Co. (10 Ben. (U. S.) 144), Rev., 12.
United States v. North Carolina (136 U. S. 211, 10 Sup. Ct. Rep. 920), State Aid, 28.
United States v. Northern Pac. R. Co. (6 Mont. 351, 12 Pac. Rep. 769), Pub. Lds., 21.
United States v. Northern Pac. R. Co. (57 Am. & Eng. R. Cas. 362, 152 U. S. 284,

14 Sup. Ct. Rep. 598), Land Grants, 2, 8a, 108; Northern Pac. R. Co., 3.
United States *v.* Northern Pac. R. Co. (14 Sawy. (U. S.) 401, 41 Fed. Rep. 842), Land Grants, 53, 57, 70, 75, 78; Location, etc., 16; Northern Pac. R. Co., 4.
United States *v.* Ordway (12 Sawy. (U. S.) 275, 30 Fed. Rep. 30), Dam., 82; Land Grants, 71.
United States *v.* Oregon & C. R. Co. (57 Fed. Rep. 426), Land Grants, 108.
United States *v.* Oregon & C. R. Co. (57 Fed. Rep. 890), Land Grants, 107.
United States *v.* Oregon R. & N. Co. (14 Am. & Eng. R. Cas. 23, 9 Sawy. (U. S.) 61, 16 Fed. Rep. 524), Em. Dom., 62, 71, 319, 325.
United States *v.* Pacific Exp. Co. (15 Fed. Rep. 867), Exp. Cos., 86, 87.
United States *v.* Pacific R. Co. (1 McCrary (U. S.) 1, 1 Fed. Rep. 97), Rev., 12.
United States *v.* Pacific R. Co. (120 U. S. 227, 7 Sup. Ct. Rep. 490), War, 7.
United States *v.* Pacific R. Co. (4 Dill. (U. S.) 66, 71), Rev., 10, 12.
United States *v.* Philadelphia & R. R. Co. (123 U. S. 113, 8 Sup. Ct. Rep. 77), Rev., 13; Trial, 121.
United States *v.* Pittsburg & L. E. R. Co. (26 Fed. Rep. 113), Bridges, 67, 68.
United States *v.* Railroad Bridge Co. (6 McLean (U. S.) 517), Pub. Lds., 32.
United States *v.* St. Louis, A. & T. R. Co. (43 Fed. Rep. 414), Bridges, 86.
United States *v.* Sioux City & P. R. Co. (99 U. S. 491), Sioux City & P. R. Co., 1.
United States *v.* Sioux City & St. P. R. Co. (43 Fed. Rep. 617), Land Grants, 26.
United States *v.* Southern Pac. R. Co. (14 Sawy. (U. S.) 60, 39 Fed. Rep. 132), Land Grants, 89; Lim. of Ac., 7.
United States *v.* Southern Pac. R. Co. (14 Sawy. (U. S.) 620), Consol., 4; Land Grants, 49.
United States *v.* Southern Pac. R. Co. (51 Am. & Eng. R. Cas. 331, 46 Fed. Rep. 683), South. Pac. R. Co., 3.
United States *v.* Southern Pac. R. Co. (57 Am. & Eng. R. Cas. 316, 146 U. S. 570, 13 Sup. Ct. Rep. 152; reversing 51 Am. & Eng. R. Cas. 331, 46 Fed. Rep. 683), Land Grants, 89, 97.
United States *v.* Southern Pac. R. Co. (49 Fed. Rep. 297), Citizens., 3.
United States *v.* Southern Pac. R. Co. (55 Fed. Rep. 566), Land Grants, 6.
United States *v.* Stanley (109 U. S. 3, 3 Sup. Ct. Rep. 18), Col. Pers., 1.
United States *v.* Thomas (55 Fed. Rep. 380), Crim. L., 37.
United States *v.* Three Railroad Cars (1 Abb. (U. S.) 196), Crim. L., 49.
United States *v.* Tozer (37 Fed. Rep. 635, 2 L. R. A. 444, 2 Int. Com. Rep. 422), Discrim., 7, 73; Int. Com., 162.
United States *v.* Tozer (39 Fed. Rep. 369), Int. Com., 85.
United States *v.* Tozer (39 Fed. Rep. 904, 2 Int. Com. Rep. 597), Discrim., 7.
United States *v.* Trans-Missouri Freight Assoc. (51 Am. & Eng. R. Cas. 458, 53 Fed. Rep. 440), Contr., 62.
United States *v.* Trans-Missouri Freight Assoc. (56 Am. & Eng. R. Cas. 6, 58 Fed. Rep. 58), Contr., 62.
United States *v.* Union Pac. R. Co. (37 Fed. Rep. 551), Land Grants, 46.
United States *v.* Union Pac. R. Co. (148 U. S. 562, 13 Sup. Ct. Rep. 724; affirming 37 Fed. Rep. 551), Land Grants, 92
United States *v.* Union Pac. R. Co. (2 Dill. (U. S.) 527), Mand., 25.
United States *v.* Union Pac. R. Co (3 Dill. (U. S.) 524), Mand., 25.
United States *v.* Union Pac. R. Co. (4 Dill. (U. S.) 479), Bridges, 7, 60; Union Pac. R. Co., 3.
United States *v.* Union Pac. R. Co. (91 U. S. 72, 9 Am. Ry. Rep. 411), Union Pac. R. Co., 11; Words & Ph., 132.
United States *v.* Union Pac. R. Co. (45 Fed. Rep. 221), Union Pac. R. Co., 8.
United States *v.* Union Pac. R. Co. (98 U. S. 569), Union Pac. R. Co., 5.
United States *v.* United States Exp. Co. (5 Biss. (U. S.) 91), Exp. Cos., 5.
United States *v.* Wilson (106 U. S. 620, 2 Sup. Ct. Rep. 85), Receiv., 110.
United States Commission of Fish and Fisheries, In re (1 Int. Com. Rep. 606, 1 Int. Com. Com. 21), Int. Com., 180.
United States Exp. Co. *v.* Anthony (5 Kan. 490), Witn., 98.
United States Exp. Co. *v.* Backman (28 Ohio St. 144, 14 Am. Ry. Rep. 82), Bills of L., 85; Car. of M., 1; Exp. Cos., 22, 61; Lim. of Liab., 28.
United States Exp. Co. *v.* Bedbury (34 Ill. 459), Proc., 4.
United States Exp. Co. *v.* Haines (67 Ill. 137), Exp. Cos., 55, 61, 90.
United States Exp. Co. *v.* Harris (51 Ind. 127), Exp. Cos., 68.
United States Exp. Co. *v.* Hemmingway (39 Fed. Rep. 60), Int. Com., 214.
United States Exp. Co. *v.* Hutchins (67 Ill. 348), Evid., 230; Exp. Cos., 24; Words & Ph., 7.
United States Exp. Co. *v.* Keefer (59 Ind. 263), Exp. Cos., 52; Pl., 172.
United States Exp. Co. *v.* Kountze (8 Wall. (U. S.) 342), Exp. Cos., 65.
United States Exp. Co. *v.* Lucas (36 Ind. 361), Exp. Cos., 2.
United States Exp. Co. *v.* Meints (72 Ill. 293), Exp. Cos., 4.
United States Exp. Co. *v.* Rush (24 Ind. 403), Exp. Cos., 22, 61.
United States Exp. Co. *v.* Ware (20 Wall. (U. S.) 543), Lim. of Ac., 34.
United States M. R. & C. Assoc., In re (22 N. Y. S. R. 494, 52 Hun 611, mem.; appeal dismissed in 115 N. Y. 176, 21 N. E. Rep. 1034, 24 N. Y. S. R. 548), Name, 1.
United States Mortgage Co. *v.* Sperry (138 U. S. 313, 11 Sup. Ct. Rep. 321), Coupons, 12.
United States Rolling Stock Co., In re (55 How. Pr. (N. Y.) 286), Mort., 172.
United States Rolling Stock Co., In re (57 How. Pr. (N. Y.) 16), Mort., 222.

United States Rolling Stock Co. *v.* Atlantic & G. W. R. Co. (34 Ohio St. 450, 21 Am. Ry. Rep. 3), Contr., 106; Direct., 44.
United States Rolling Stock Co. *v.* Chadwick (35 Ill. App. 474), Trial, 196.
United States Rolling Stock Co. *v.* Potter (48 Iowa 56), Leases, 8.
United States Rolling Stock Co. *v.* Wilder (25 Am. & Eng. R. Cas. 414, 116 Ill. 100, 5 N. E. Rep. 92), Employés, Inj. to, 31, 295, 554, 645; Fel. Serv., 157, 160.
United States Trust Co. *v.* New York, W. S. & B. R. Co. (35 Hun (N. Y.) 341; reversing 67 How. Pr. 390, 6 Civ. Pro. 90), Mort., 218.
United States Trust Co. *v.* New York, W. S. & B. R. Co. (25 Am. & Eng. R. Cas. 601, 101 N. Y. 478, 9 Civ. Pro. 113, 5 N. E. Rep. 316), Receiv., 157.
United States Trust Co. *v.* New York, W. S. & B. R. Co.(25 Fed. Rep. 797), Mort., 227; Receiv., 76.
United States Trust Co. *v.* Wabash, St. L. & P. R. Co. (32 Fed. Rep. 480), Mort., 36.
United States Trust Co. *v.* Wabash, St. L. & P. R. Co. (42 Fed. Rep. 343), Receiv., 4.
United States Trust Co. *v.* Wabash Western R. Co. (40 Am. & Eng. R. Cas. 397, 38 Fed. Rep. 891), Mort., 50.
United States Trust Co. *v.* Wabash Western R. Co. (150 U. S. 287, 14 Sup. Ct. Rep. 86), Mort., 87, 136; Receiv., 60.
Unity *v.* Burrage (2 Am. & Eng. R. Cas. 560, 103 U. S. 447), Mun. Aid, 22.
University *v.* North Carolina R. Co. (76 N. Car. 103, 14 Am. Ry. Rep. 298), Divid., 1.
University of Minn. *v.* St. Paul & N. P. R. Co. (36 Minn. 447), Em. Dom., 1042.
University R. Co. *v.* Holden (63 N. Car. 410), Charters, 181.
Unthank *v.* Henry County Turnpike Co. (6 Ind. 125), Subscr., 70; Witn., 13.
Unthank *v.* Travelers' Ins. Co. (4 Biss. (U. S.) 357), Acc. Ins., 8.
Updegrove *v.* Pennsylvania S. V. R. Co. (132 Pa. St. 540, 19 Atl. Rep. 283), Release, 29.
Upham *v.* Detroit City R. Co. (85 Mich. 12, 48 N. W. Rep. 199), St. Rys., 417.
Uphoff *v.* Chicago, St. L. & N. O. R. Co. (5 Fed. Rep. 545), Rem. of C., 34.
Upper Coos R. Co. *v.* Parsons (N. H.) (19 Atl. Rep. 10), Em. Dom., 523.
Upson County R. Co. *v.* Sharman (37 Ga. 644), Sales of Rds., 9.
Upton *v.* New Jersey Southern R. Co. (25 N. J. Eq. 372), Jurisd., 3.
Upton *v.* South Reading Branch R. Co. (8 Cush. (Mass.) 600), Em. Dom., 624, 739.
Uransky *v.* Dry Dock, E. B. & B. R. Co. (118 N. Y. 304, 23 N. E. Rep. 451, 28 N. Y. S. R. 711; reversing 44 Hun 119, 7 N. Y. S. R. 395), Husb. & W., 29.
Uransky *v.* Dry Dock, E. B. & B. R. Co. (37 N. Y. S. R. 543, 59 Hun 626, mem., 13 N. Y. Supp. 670), Witn., 30, 154.
Urbanek *v.* Chicago, M. & St. P. R. Co. (47 Mich. 59, 1 N. W. Rep. 464), Cross., Inj. at, 348; Trial, 210.
Urias *v.* Pennsylvania R. Co. (152 Pa. St. 326, 25 Atl. Rep. 566), Cross., Inj. at, 276, 277, 348, 352.
Uruguay, C. & H. R. Co., In re (L. R. 11 Ch. D. 372, 48 L. J. Ch. D. 540, 27 W. R. 571), Dissol., 13.
Usher *v.* McBratney (3 Dill. (U. S.) 385), Contr., 66.
Usher *v.* West Jersey R. Co. (41 Am. & Eng. R. Cas. 508, 126 Pa. St. 206, 17 Atl. Rep. 597), Death, etc., 90, 113.
Utah & N. R. Co. *v.* Crawford (1 Idaho 770), Tax., 348.
Utah & N. R. Co. *v.* Fisher (24 Am. & Eng. R. Cas. 116, 116 U. S. 28, 6 Sup. Ct. Rep. 246), Land Grants, 10.
Utica & S. R. Co. *v.* Brinckerhoff (21 Wend. (N. Y.) 139), Contr., 9.
Utica, C. & S. V. R. Co., In re (56 Barb. (N. Y.) 456), Em. Dom., 454, 643, 647, 701, 724.
Utica, I. & E. R. Co. *v.* United States (22 Ct. of Cl. 265), Car. of Mails, 12.
Utter *v.* Crane (37 Iowa 631), Liens, 46.
Utter *v.* Forty-second St. & G. S. R. Co. (6 Daly (N. Y.) 227), Evid., 193.
Utter *v.* Great Western R. Co. (17 U. C. Q. B. 392), Flood. Lds., 48.
Uxbridge & R. R. Co., In re (43 Ch. D. 536), Dissol., 31.

Vail *v.* Broadway R. Co. (6 Misc. 20, 26 N. Y. Supp. 59, 58 N. W. S. R. 124), New Tr., 66, 83; St. Rys., 419; Trial, 73.
Vail *v.* Central R. Co. (23 N. J. Eq. 466), Pl., 88.
Vail *v.* Central R. Co. (N. J. Eq.) (4 Atl. Rep. 663), Abate., 2.
Vail *v.* Easton & A. R. Co. (44 N. J. L. 237), Charters, 3; Lim. of Ac., 13.
Vail *v.* Kansas City, C. & S. R. Co. (28 Mo. App. 372), Animals, 53, 129, 621.
Vail *v.* Long Island R. Co. (106 N. Y. 283, 12 N. E. Rep. 607, 8 N. Y. S. R. 700, 8 Cent. Rep. 673; reversing 31 Hun 173, mem.), Judgm., 7.
Vail *v.* Morris & E. R. Co. (21 N. J. L. 189), Em. Dom., 496, 498, 789.
Vail *v.* Pacific R. Co. (63 Mo. 230, 20 Am. Ry. Rep. 420), Car. of L., 110.
Valencia County *v.* Atchison, T. & S. F. R. Co. (3 N. Mex. 380, 10 Pac. Rep. 294), Tax., 68, 275.
Valentine *v.* Broadway & S. A. R. Co. (14 Daly 540, 4 N. Y. Supp. 481, 16 N. Y. S. R. 602), New Tr., 57; St. Rys., 397.
Valentine *v.* Middlesex R. Co. (137 Mass. 28), St. Rys., 354.
Valin *v.* Milwaukee & N. R. Co. (55 Am. & Eng. R. Cas. 247, 82 Wis. 1, 51 N. W. Rep. 1084), Contrib. Neg., 87; Cross., Inj. at, 219; Licensees, Inj. to, 28.
Vallance *v.* Boston & A. R. Co. (55 Fed. Rep. 364), Children, Inj. to, 21; Cross., Inj. at, 45.
Valle *v.* North Mo. R. Co. (37 Mo. 446), Arb., 32.
Valleau *v.* Chicago, M. & St. P. R. Co. (73 Iowa 723, 36 N. W. Rep. 760), Animals, 599.
Valley R. Co. *v.* Bohm (29 Ohio St. 633), Abate., 16.

Valley R. Co. *v.* Bohm (34 Ohio St. 114, 21 Am. Ry. Rep. 30), Em. Dom., 96, 320.
Valley R. Co. *v.* Franz (25 Am. & Eng. R. Cas. 275, 43 Ohio St. 623, 4 N. E. Rep. 88), Lim. of Ac., 23.
Valley R. Co. *v.* Lake Erie Iron Co. (46 Ohio St. 44, 1 L. R. A. 412, 18 N. E. Rep. 486), Paym., 5; Subscr., 230.
Vallo *v.* United States Exp. Co. (147 Pa. St. 404, 23 Atl. Rep. 594), Dam., 4; Exp. Cos., 3; Negl., 72.
Valparaiso *v.* Chicago & G. T. R. Co. (42 Am. & Eng. R. Cas. 685, 123 Ind. 467, 24 N. E. Rep. 249), Sts. & H., 19.
Valtez *v.* Ohio & M. R. Co. (85 Ill. 500), Fel. Serv., 40, 373.
Van Alen *v.* Illinois C. R. Co. (4 Abb. App. Dec. (N. Y.) 443, 2 Keyes 673; affirming 7 Bosw. 515), Stock, 14.
Van Allen *v.* Assessors (3 Wall. (U. S.) 573), Tax., 138.
Van Allen *v.* Atchison, C. & P. R. Co. (1 McCrary (U. S.) 598, 3 Fed. Rep. 545), Rem. of C., 9.
Van Allen *v.* Grand Trunk R. Co. (29 U. C. Q. B. 436), Cross. Sts. & H., 39.
Van Allen *v.* New York El. R. Co. (51 N. Y. S. R. 767, 22 N. Y. Supp. 704, 3 Misc. 53), Elev. Rys., 88.
Van Alstyne *v.* Houston & T. C. R. Co. (9 Am. & Eng. R. Cas. 447, 56 Tex. 273), Stockh., 106.
Van Alstyne *v.* Indianapolis, P. & C. R. Co. (21 How. Pr. (N. Y.) 175, 34 Barb. 28), Employés, 14.
Van Amburg *v.* Vicksburg, S. & P. R. Co. (37 La. Ann. 650), Death, etc., 21, 331; Employés, Inj. to, 55; Fel. Serv., 245.
Van Auken *v.* Chicago & W. M. R. Co. (96 Mich. 307, 55 N. W. Rep. 971), Cross., Inj. at, 257, 259; Sunday, 6.
Van Avery *v.* Union Pac. R. Co. (35 Fed. Rep. 40), Fel. Serv., 169, 306.
Van Benthuysen *v.* Central N. E. & W. R. Co. (45 N. Y. S. R. 16, 63 Hun 627, 17 N. Y. Supp. 709), Mort., 177.
Van Blarcom *v.* Delaware, L. & W. R. Co. (49 N. J. L. 179, 6 Atl. Rep. 503), Pl., 63.
Van Bokelen *v.* Brooklyn City R. Co. (5 Blatchf. (U. S.) 379), Injunc., 7; Sts. & H., 139.
Van Brunt *v.* Ahearn (23 Hun (N. Y.) 288), Sts. & H., 271.
Van Brunt *v.* Cincinnati, J. & M. R. Co. (78 Mich. 530, 44 N. W. Rep. 321), Death, etc., 380.
Van Buren Division, T. & S. H. R. Co. *v.* Lamphear (20 Am. & Eng. R. Cas. 643, 54 Mich. 575, 20 N. W. Rep. 590), Bills & N., 20.
Van Buskirk *v.* Roberts (31 N. Y. 661), Car. of P., 120; Evid., 178.
Vance *v.* Burlington & M. R. R. Co. (10 Am. & Eng. R. Cas. 623, 12 Neb. 285, 11 N. W. Rep. 334), Land Grants, 122; Vend. & P., 6.
Vance *v.* Erie R. Co. (52 N. J. L. 334), Mal. Pros., 3.
Vance *v.* Kohlberg (50 Cal. 346), Evid., 227.
Van Cott *v.* Van Brunt (2 Am. & Eng. R. Cas. 407, 82 N. Y. 535; reversing 2 Abb. N. Cas. 283), Pres., 7.
Vandegrift *v.* Delaware R. Co. (2 Houst. (Del.) 287), Animals, 85; Em. Dom., 550, 697; Fences, 13, 41.
Vandegrift *v.* Rediker (22 N. J. L. 185), Animals, 271.
Vandenburgh *v.* Broadway U. C. R. Co. (29 Hun (N. Y.) 348), Direct., 8, 10.
Vandenburgh *v.* Mayor, etc., of N. Y. (5 N. Y. Supp. 664; affirmed at general term in 25 J. & S. 285, 28 N. Y. S. R. 578), Mort., 213.
Vandenburgh *v.* New York City C. U. R. Co. (25 J. & S. 285, 28 N. Y. S. R. 578, 5 N. Y. Supp. 664), Judgm., 45.
Van Den Eynde *v.* Ulster R. Co. (5 Ir. R., C. L. 6; affirmed 5 Ir. R., C. L. 328), Agency, 94.
Vanderbilt *v.* Central R. Co. (35 Am. & Eng. R. Cas. 18, 43 N. J. Eq. 669, 10 Cent. Rep. 849, 12 Atl. Rep. 188; affirming 41 N. J. Eq. 167, 3 Atl. Rep. 134), Receiv., 1, 50, 51.
Vanderkar *v.* Rensselaer & S. R. Co. (13 Barb. (N. Y.) 390), Animals, 161; Cat.-Gds., 12.
Vandermulen *v.* Vandermulen (108 N. Y. 195, 15 N. E. Rep. 383, 13 N. Y. S. R. 532), Em. Dom., 128.
Vanderpool *v.* La Crosse & M. R. Co. (44 Wis. 652), App., 23; Liens, 24.
Vanderslice *v.* Newton (4 N. Y. 130), Dam., 75, 76.
Vanderwerken *v.* New York & N. H. R. Co. (6 Abb. Pr. (N. Y.) 239), Death, etc., 121.
Vanderwerker *v.* Vermont C. R. Co. (27 Vt. 130), Constr. Rys., 70, 80.
Vanderworker *v.* Missouri Pac. R. Co. (48 Mo. App. 654), Fences, 53.
Vanderworker *v.* Missouri Pac. R. Co. (51 Mo. App. 166), Animals, 126; Fences, 60.
Van de Venter *v.* Chicago City R. Co. (26 Fed. Rep. 32), St. Rys., 366.
Vandeventer *v.* New York & N. H. R. Co. (27 Barb. (N. Y.) 244), Death, etc., 109, 112.
Vandewater *v.* New York & N. E. R. Co. (74 Hun 32, 26 N. Y. Supp. 397, 56 N. Y. S. R. 208), Cross., Inj. at, 5, 66, 145, 343.
Vandewater *v.* New York & N. E. R. Co. (135 N. Y. 583, 32 N. E. Rep. 137, 49 N. Y. S. R. 55; reversing 63 Hun 186, 43 N. Y. S. R. 420, 17 N. Y. Supp. 652), Cross., Inj. at, 98, 117, 158.
Vandorn *v.* New Jersey Southern R. Co. (42 N. J. Eq. 463, 8 Atl. Rep. 99), Fences, 37.
Van Dresser *v.* Oregon R. & N. Co. (50 Am. & Eng. R. Cas. 634, 48 Fed. Rep. 202), Fed. Cts., 9; Proc., 16, 17, 28.
Van Dusan *v.* Grand Trunk R. Co. (97 Mich. 439, 56 N. W. Rep. 848), Eject. Pass., 108; Tickets & F., 33.
Van Dusen *v.* Lake Shore & M. S. R. Co. (12 N. Y. S. R. 351, 46 Hun 678, mem.; affirmed in 122 N. Y. 666, mem., 26 N. E. Rep. 754, mem., 34 N. Y. S. R. 1015), Fel. Serv., 489, 491.
Van Duzer *v.* Elmira, C & N. R. Co. (75 Hun 487, 27 N. Y. Supp. 474, 57 N. Y. S. R. 355), Flood. Lds., 84.

Vane *v.* Newcombe (132 U. S. 220, 10 Sup. Ct. Rep. 60), Liens, 45.
Van Etten *v.* Newton (134 N. Y. 143, 45 N. Y. S. R. 768, 31 N. E. Rep. 334), Bills of L., 12, 13, 26, 40.
Van Fleet *v.* New York C. & H. R. R. Co. (27 N. Y. S. R. 76, 7 N. Y. Supp. 636), Fires, 72, 89, 249, 318.
Van Gent *v.* Chicago, M. & St. P. R. Co. (80 Iowa 526, 45 N. W. Rep. 913), App., 118; Death, etc., 271, 276; Evid., 75; Witn., 180.
Van Gilder *v.* Chicago & N. W. R. Co. (44 Iowa 548), Bagg., 54.
Van Hoffman *v.* Quincy (4 Wall. (U. S.) 535), Mun. Aid, 24.
Van Hoozier *v.* Hannibal & St. J. R. Co. (70 Mo. 145), Flood. Lds., 53, 64.
Van Horn *v.* Boston, H. T. & W. R. Co. (4 N. Y. S. R. 782, 42 Hun 654, mem.; affirmed in 113 N. Y. 634, mem., 20 N. E. Rep. 878, 22 N. Y. S. R. 994), Employés, Inj. to, 97, 211.
Van Horn *v.* Burlington, C. R. & N. R. Co. (7 Am. & Eng. R. Cas. 591, 59 Iowa 33, 12 N. W. Rep. 752), Animals, 267; Witn., 128.
Vanhorn *v.* Burlington, C. R. & N. R. Co. (63 Iowa 67, 18 N. W. Rep. 679), Animals, 267.
Vanhorn *v.* Grand Trunk R. Co. (9 U. C. C. P. 264), Flood. Lds., 4; Lim. of Ac., 23.
Vanhorn *v.* Grand Trunk R. Co. (18 U. C. Q. B. 356), Flood. Lds., 48.
Van Horn *v.* Kermit (4 E. D. Smith (N. Y.) 453), Bagg., 5, 33, 69, 74, 81.
Van Horne *v.* Newark Pass. R. Co. (50 Am. & Eng. R. Cas. 235, 48 N. J. Eq. 332, 21 Atl. Rep. 1034), St. Rys., 191, 200.
Van Hostrup *v.* Madison City (1 Wall. (U. S.) 291), Mun. Aid, 380.
Van Houten *v.* Fleischmann (20 N. Y. Supp. 643, 1 Misc. 130, 48 N. Y. S. R. 763; affirmed in 142 N. Y. 624, 37 N. E. Rep. 565, 60 N. Y. S. R. 867), Negl., 47.
Van Keuren *v.* Central R. Co. (38 N. J. L. 165, 13 Am. Ry. Rep. 43), Deeds, 9; Fixt., 11.
Vankirk *v.* Pennsylvania R. Co. (76 Pa. St. 66), Eject. Pass., 90; Tickets & F., 39; Trial, 16.
Vannatta *v.* Central R. Co. (154 Pa. St. 262, 26 Atl. Rep. 384), Car. of M., 625; Contrib. Neg., 85; Fel. Serv., 126.
Van Natter *v.* Buffalo & L. H. R. Co. (27 U. C. Q. B. 581), Fences, 17.
VanNote *v.* Hannibal & St. J. R. Co. (70 Mo. 641), Animals, 65.
Vannoy *v.* Duprez (72 Ind. 26), Assign., 1; Stat. & D., 46; Subscr., 217.
Van Orsdol *v.* Burlington, C. R. & N. R. Co. (56 Iowa 470, 9 N. W. Rep. 379), Constr. Rys., 4; Culverts, 4; Lim. of Ac., 23.
Van Ostran *v.* New York C. & H. R. R. Co. (35 Hun (N. Y.) 500; affirmed (?) in 104 N. Y. 683, mem., 7 N. Y. S. R. 868), Car. of P., 236, 416; Contrib. Neg., 11, 82.
Van Ostrand *v.* Walkill Valley R. Co. (46 N. Y. S. R. 456, 64 Hun 636, 19 N. Y. Supp. 621), Fires, 318.
Van Pelt *v.* Chattanooga, R. & C. R. Co. (89 Ga. 706, 15 S. E. Rep. 622), Children, Inj. to, 154; Death, etc., 151.
Van Raden *v.* New York, N. H. & H. R. Co. (56 Hun 96, 30 N. Y. S. R. 300, 8 N. Y. Supp. 914), Negl., 100; Pl., 4; Trial, 138.
Van Rensselaer *v.* Albany & S. R. Co. (62 N. Y. 65; affirming 1 Hun 507, 3 T. & C. 620), Easem., 5.
Van Santvoord *v.* St. John (6 Hill (N. Y.) 157), Car. of M., 246.
Van Schaach *v.* Northern Transp. Co. (3 Biss. (U. S.) 394), Bills of L., 73; Car. of M., 441.
Van Schaick *v.* Hudson River R. Co. (43 N. Y. 527), Death, etc., 190.
Van Schaick *v.* Third Ave. R. Co. (38 N. Y. 346; affirming 49 Barb. 409), Leases, 84; Trial, 106.
Van Schaick *v.* Third Ave. R. Co. (25 How. Pr. (N. Y.) 446; reversing 30 Barb. 189, 8 Abb. Pr. 380), Leases, 86.
Van Slyke *v.* Chicago, St. P. & K. C. R. Co. (80 Iowa 620, 45 N. W. Rep. 396), Animals, 135, 312, 456.
Van Tassell *v.* Derrenbacher (56 Hun 477, 10 N. Y. Supp. 145, 31 N. Y. S. R. 312; affirmed in 123 N. Y. 661, mem., 26 N. E. Rep. 750, mem.), Mun. Aid, 44, 421.
Van Tassell *v.* New York, L. E. & W. R. Co. (1 Misc. 299, 48 N. Y. S. R. 767, 20 N. Y. Supp. 708; reargument denied in 2 Misc. 592), Employés, Inj. to, 23, 193, 348, 611; Witn., 33.
Van Tassell *v.* New York, L. E. & W. R. Co. (1 Misc. 312, 20 N. Y. Supp. 715, 48 N. Y. S. R. 782), New Tr., 92, 97.
Van Toll *v.* Southeastern R. Co. (12 C. B. N. S. 75, 31 L. J. C. P. 241, 8 Jur. N. S. 1213, 10 W. R. 578, 6 L. T. 244), Bagg., 129, 131.
VanValkenburg *v.* Thomasville, T. & G. R. Co. (22 N. Y. S. R. 379, 52 Hun 610, 4 N. Y. Supp. 782), Agency, 49.
Van Vorst, Ex parte (2 N. J. Eq. 292), Em. Dom., 403.
Van Wagoner *v.* New York Cement Co. (36 Hun (N. Y.) 552), Fright. Teams, 6; Witn., 124.
Vanwart *v.* New Brunswick R. Co. (27 New Brun. 59), Cross., Inj. at, 139.
Van Weel *v.* Winston (24 Am. & Eng. R. Cas. 179, 115 U. S. 228, 6 Sup. Ct. Rep. 22), Mort., 78; Pres., 11.
Vanwickle *v.* Camden & A. R. & T. Co. (14 N. J. L. 162), Em. Dom., 284, 509, 802, 804.
Van Wickle *v.* Manhattan R. Co. (23 Blatchf. (U. S.) 422, 32 Fed. Rep. 278), Fel. Serv., 33, 297.
Van Winkle *v.* Adams Exp. Co. (3 Robt. (N. Y.) 59), Car. of M., 371; Exp. Cos., 28.
Van Winkle *v.* Brooklyn City R. Co. (46 Hun 564, 12 N. Y. S. R. 548), St. Rys., 351.
Van Winkle *v.* South Carolina R. Co. (38 Ga. 32), Car. of M., 702.
Van Woert *v.* Albany & S. R. Co. (67 N. Y. 538; affirming 1 T. & C. 256), Sales, 3.

Van Wyck *v.* Knevals (10 Am. & Eng. R. Cas. 664, 106 U. S. 360, 1 Sup. Ct. Rep. 336), Land Grants, 29, 59, 60.
Varble *v.* Bigley (14 Bush (Ky.) 698), Car. of M., 3, 4; Words & Ph., 49.
Varco *v.* Chicago, M. & St. P. R. Co. (11 Am. & Eng. R. Cas. 419, 30 Minn. 18, 13 N. W. Rep. 921), Animals, 145, 591.
Varillat *v.* New Orleans & C. R. Co. (10 La. Ann. 88), Collis., 28; Dam., 37.
Varner *v.* Martin (21 W. Va. 534), Em. Dom., 3, 178, 179.
Varner *v.* St. Louis & C. R. R. Co. (55 Iowa 677, 8 N. W. Rep. 634), Em. Dom., 217.
Vars *v.* Grand Trunk R. Co. (23 U. C. C. P. 143), Fright. Teams, 2.
Vary *v.* Burlington, C. R. & M. R. Co. (42 Iowa 246), Employés, Inj. to, 502
Vason *v.* South Carolina R. Co. (42 Ga. 631), Nuis., 4, 20.
Vatable *v.* New York, L. E. & W. R. Co. (17 Am. & Eng. R. Cas. 268, 96 N. Y. 49; reversing 11 Abb. N. Cas. 133, 9 Abb. N. Cas. 271), Mort., 311; Reorg., 4, 5.
Vaughan *v.* Buffalo, R. & P. R. Co. (54 N. Y. S. R. 782, 72 Hun 471, 25 N. Y. Supp. 246), Sts. & H., 187, 204.
Vaughan *v.* Central Pac. R. Co. (4 Sawy. (U. S.) 280), Pat. for Inv., 21.
Vaughan *v.* East Tenn., V. & G. R. Co. (1 Flipp. (U. S.) 621), Pat. for Inv., 14.
Vaughan *v.* Kansas City, S. & M. R. Co. (34 Mo. App. 141), Animals, 456, 561.
Vaughan *v.* Providence & W. R. Co. (9 Am. & Eng. R. Cas. 41, 13 R. I. 578), Car. of M., 382, 560, 384.
Vaughan *v.* Taff Vale R. Co. (5 H. & N. 679, 6 Jur. N. S. 899, 29 L. J. Ex. 247, 8 W. R. 594, 2 L. T. 394), Fires, 23.
Vaughn *v.* California C. R. Co. (83 Cal. 18, 23 Pac. Rep. 215), Employés, Inj. to, 285.
Vaughn *v.* Missouri Pac. R. Co. (17 Mo. App. 4), Animals, 178, 606, 617.
Vaughn *v.* Smith (7 Am. & Eng. R. Cas. 82, 58 Iowa 553, 12 N. W. Rep. 604), Liens, 38.
Vaughton *v.* London & N. W. R. Co. (L. R. 9 Ex. 93, 43 L. J. Ex. 75, 12 Cox. C. C. 580, 22 W. R. 336, 30 L. T. 119), Agency, 90; Evid., 277.
Vautrain *v.* St. Louis, I. M. & S. R. Co. (8 Mo. App. 538), Acc. & Sat., 7; Fel. Serv., 116, 411.
Vautrain *v.* St. Louis, I. M. & S. R. Co. (78 Mo. 44; affirming on other grounds 8 Mo. App. 538), New Tr., 24.
Vawter *v.* Missouri Pac. R. Co. (19 Am. & Eng. R. Cas. 176, 84 Mo. 679, 54 Am. Rep. 105), Death, etc., 112, 120.
Vawter *v.* Ohio & M. R. Co. (14 Ind. 174), Subscr., 81, 108, 148.
Veazie *v.* Mayo (45 Me. 560), Mun. Corp., 24; St. Rys., 101, 258.
Veazie *v.* Mayo (49 Me. 156), Location, etc., 18.
Veazie *v.* Penobscot R. Co. (49 Me. 119), Charters, 159; Lim. of Ac., 51; Sts. & H., 360, 396, 397.
Vedder *v.* Fellows (20 N. Y. 126), Tickets & F., 37; Trial, 98.
Veerhusen *v.* Chicago & N. W. R. Co. (53 Wis. 689, 11 N. W. Rep. 433), Animals, 94, 105; Contrib. Neg., 113; Witn., 97.
Venable *v.* Wabash Western R. Co. (52 Am. & Eng. R. Cas. 42, 112 Mo. 103, 20 S. W. Rep. 493), Em. Dom., 194.
Veneman *v.* Jones (118 Ind. 41, 20 N. E. Rep. 644), Hacks, etc., 4.
Venice *v.* Breed (65 Barb. (N. Y.) 597, 1 T. & C. 130), Mun. Aid, 402.
Venice *v.* Murdock (92 U. S. 494), Mun. Aid, 59, 105, 380.
Venner *v.* Atchison, T. & S. F. R. Co. (28 Fed. Rep. 581), Charters, 96; Stock, 28; Stockh., 5.
Verdery *v.* Savannah, F. & W. R. Co. (82 Ga. 675, 9 S. E. Rep. 1133), Adv. Poss., 9.
Verdier *v.* Port Royal R. Co. (10 Am. & Eng R. Cas. 677, 15 So. Car. 476), Em. Dom., 191; Pub. Lds., 40, 46.
Vermilya *v.* Chicago, M. & St. P. R. Co. (23 Am. & Eng. R. Cas. 108, 66 Iowa 606, 24 N. W. Rep. 234), Fires, 346; Right of W., 20.
Vermilye *v.* Adams Exp. Co. (21 Wall. (U. S.) 138; affirming 10 Blatchf. 280), Exp. Cos., 91.
Vermont & C. R. Co. *v.* Central Vt. R. Co. (46 Am. & Eng. R. Cas. 646, 63 Vt. 1, 21 Atl. Rep. 262, 731), Tax., 48.
Vermont & C. R. Co. *v.* Vermont C. R. Co. (34 Vt. 1), Charters, 182; Contr., 48; Dissol., 12; Int., 12; Leases, 99.
Vermont & C. R. Co. *v.* Vermont C. R. Co. (46 Vt. 792), Receiv., 38, 45.
Vermont & C. R. Co. *v.* Vermont C. R. Co. (50 Vt. 500, 14 Am. Ry. Rep. 497), Receiv., 26, 111.
Vermont & C. R. Co. *v.* Vermont C. R. Co. (65 Vt. 366, 26 Atl. Rep. 638), Leases, 75.
Vermont & M. R. Co. *v.* Fitchburg R. Co. (14 Allen (Mass.) 462), Car. of M., 644, 647.
Vermont & M. R. Co. *v.* Fitchburg R. Co. (9 Cush. (Mass.) 369), Ry. Com'rs, 9.
Vermont & M. R. Co. *v.* Franklin County Com'rs (10 Cush. (Mass.) 12), Cross. Sts. & H., 112.
Vermont & M. R. Co. *v.* Orcutt (16 Gray (Mass.) 116), Trial, 6.
Vermont C. R. Co. *v.* Baxter (22 Vt. 365), Constr. Rys., 14; Em. Dom., 135, 507, 508.
Vermont C. R. Co. *v.* Burlington (28 Vt. 193), Tax., 240, 336.
Vermont C. R. Co. *v.* Clayes (21 Vt. 30), Subscr., 15.
Vermont C. R. Co. *v.* Hills (23 Vt. 681), Deeds, 10.
Vernon *v.* Grand Trunk R. Co. (2 Montr. Super. 181), Farm Cross., 13.
Verona *v.* Allegheny Valley R. Co. (152 Pa. St. 368, 25 Atl. Rep. 518), Sts. & H., 6, 28.
Verry *v.* Burlington, C. R. & M. R. Co. (47 Iowa 549), Evid., 202, 204.
Vertue *v.* East Anglian R. Co. (6 Railw. Cas. 252, 5 Exch. 208, 1 L. M. & P. 302, 19 L. J. Exch. 235), Assign., 20.
Vezina *v.* Queen (44 Am. & Eng. R. Cas. 73, 17 Can. Sup. Ct. 1), Em. Dom., 1235, 1245; Farm Cross., 2.

Vick *v.* New York C. & H. R. R. Co. (17 Am. & Eng. R. Cas. 609, 95 N. Y. 267), Fel. Serv., 1, 26.
Vickers *v.* Atlanta & W. P. R. Co. (8 Am. & Eng. R. Cas. 337, 64 Ga. 306), Children, Inj. to, 104; Trial, 70.
Vickers *v.* Shuniah (22 Grant's Ch. (U. C.) 410), Mun. Aid, 162, 248.
Vickers Exp. Co. *v.* Canadian Pac. R. Co. (13 Ont. App. 210; affirming 9 Ont. 251), Exp. Cos., 9.
Vickery *v.* Central R. & B. Co. (89 Ga. 365, 15 S. E. Rep. 464), App., 23.
Vicksburg *v.* Hennessy (54 Miss. 391), Contrib. Neg., 104.
Vicksburg *v.* McLain (67 Miss. 4, 6 So. Rep. 774), Children, Inj. to, 67; Death, etc., 403, 434.
Vicksburg & J. R. Co. *v.* Patton (31 Miss. 156), Animals, 44, 45, 583; Evid., 63.
Vicksburg & M. R. Co. *v.* Alexander (62 Miss. 496), Sts. & H., 415.
Vicksburg & M. R. Co. *v.* Barrett (43 Am. & Eng. R. Cas. 595, 67 Miss. 579, 7 So. Rep. 549), Fires, 263; Right of W., 5.
Vicksburg & M. R. Co. *v.* Bradley (66 Miss. 518, 6 So. Rep. 321), Tax., 397.
Vicksburg & M. R. Co. *v.* Dixon (19 Am. & Eng. R. Cas. 617, 61 Miss. 119), Cat.-Gds., 17.
Vicksburg & M. R. Co. *v.* Hamilton (62 Miss. 503), Animals, 480.
Vicksburg & M. R. Co. *v.* Hart (19 Am. & Eng. R. Cas. 521, 61 Miss. 468), Animals, 34, 573.
Vicksburg & M. R. Co. *v.* Howe (52 Miss. 202), Car. of P., 136.
Vicksburg & M. R. Co. *v.* Lewis (68 Miss. 29, 10 So. Rep. 32), Tax., 169, 182.
Vicksburg & M. R. Co. *v.* McCutchen (52 Miss. 645), Mort., 104; Words & Ph., 142.
Vicksburg & M. R. Co. *v.* McGowan (62 Miss. 682), Contrib. Neg., 1, 7, 21, 51; Evid., 195; Sts. & H., 386, 394; Tresp., Inj. to, 91, 111.
Vicksburg & M. R. Co. *v.* O'Brien (27 Am. & Eng. R. Cas. 232, 119 U. S. 99, 7 Sup. Ct. Rep. 118), Evid., 169, 202; Witn., 81.
Vicksburg & M. R. Co. *v.* Phillips (30 Am. & Eng. R. Cas. 587, 64 Miss. 693, 2 So. Rep. 537), Death, etc., 96; Evid., 125; Negl., 105.
Vicksburg & M. R. Co. *v.* Putnam (27 Am. & Eng. R. Cas. 291, 118 U. S. 545, 7 Sup. Ct. Rep. 1), Car. of P., 563, 568; Dam., 65; Evid., 247.
Vicksburg & M. R. Co. *v.* Ragsdale (46 Miss. 458, 1 Am. Ry. Rep. 407), Car. of M., 127, 130, 131, 135, 141, 800, 801.
Vicksburg & M. R. Co. *v.* Ragsdale (54 Miss. 200, 17 Am. Ry. Rep. 435), Estop., 13, 31.
Vicksburg & M. R. Co. *v.* Scanlan (63 Miss. 413), Car. of P., 562, 635.
Vicksburg & M. R. Co. *v.* State (23 Am. & Eng. R. Cas. 729, 62 Miss. 105), Tax., 397.
Vicksburg & M. R. Co. *v.* State (64 Miss. 5, 8 So. Rep. 128), Crim. L., 21.
Vicksburg & M. R. Co. *v.* Wilkins (47 Miss. 404), Employés, Inj. to, 299.
Vicksburg L. & T. Co. *v.* United States Exp. Co. (68 Miss. 149, 8 So. Rep. 332), Exp. Cos., 25.
Vicksburg, S. & P. R. Co. *v.* Dennis (24 Am. & Eng. R. Cas. 500, 116 U. S. 665, 6 Sup. Ct. Rep. 625), Tax., 146, 151.
Vicksburg, S. & P. R. Co. *v.* Dillard (35 La. Ann. 1045), Em. Dom., 373, 643, 687.
Vicksburg, S. & P. R. Co. *v.* Sledge (41 La. Ann. 896, 6 So. Rep. 725), Land Grants, 31; Pub. Lds., 19; Stat., 12.
Vicksburg, S. & P. R. Co. *v.* Stocking (Miss.) (10 So. Rep. 480), Trial, 23.
Vicksburg, S. & T. R. Co. *v.* Calderwood (15 La. Ann. 481), Em. Dom., 737.
Vicksburg, S. & T. R. Co. *v.* Hart (15 La. Ann. 507), Em. Dom., 781.
Vicksburg, S. & T. R. Co. *v.* McKean (12 La. Ann. 638), Subscr., 115, 132, 146.
Vicksburg, S. & T. R. Co. *v.* McKeen (14 La. Ann. 735), Charters, 184; Subscr., 73.
Victoria C. & I. Co. *v.* Neath & B. & M. R. Cos. (3 Ry. & C. T. Cas. 37), Car. of M., 535.
Victorian Railway Com'rs *v.* Coultas (13 App. Cas. 222, 6 Ry. & C. T. Cas. lxviii), Dam., 14.
Viele *v.* Troy & B. R. Co. (20 N. Y. 184; affirming 21 Barb. 381), Em. Dom., 861.
Viets *v.* Toledo, A. A. & G. T. R. Co. (18 Am. & Eng. R. Cas. 11, 55 Mich. 120, 20 N. W. Rep. 818), Employés, Inj. to, 464; Witn., 198.
Vilas *v.* Milwaukee & M. R. Co. (15 Wis. 233), Em. Dom., 1043.
Vilas *v.* Milwaukee & P. du C. R. Co. (17 Wis. 497), Reorg., 13.
Vilas *v.* Page (106 N. Y. 439, 13 N. E. Rep. 743, 12 N. Y. S. R. 864, 9 Cent. Rep. 466; affirming 11 N. Y. S. R. 416), Mort., 60, 115.
Vilhac *v.* Stockton & I. R. Co. (53 Cal. 208), Em. Dom., 405.
Vilwig *v.* Baltimore & O. R. Co. (79 Va. 449), Eq., 8.
Vimont *v.* Chicago & N. W. R. Co. (13 Am. & Eng. R. Cas. 176, 19 Am. & Eng. R. Cas. 215, 64 Iowa 513, 21 N. W. Rep. 9), Assign., 21; Cham., 2; Rem. of C., 31.
Vimont *v.* Chicago & N. W. R. Co. (19 Am. & Eng. R. Cas. 213, 69 Iowa 296, 22 N. W. Rep. 906, 28 N. W. Rep. 612), Assign., 13, 20.
Vimont *v.* Chicago & N. W. R. Co. (28 Am. & Eng. R. Cas. 210, 71 Iowa 58, 32 N. W. Rep. 100), Car. of P., 431.
Vinal *v.* Dorchester (7 Gray (Mass.) 421), Sts. & H., 363.
Vincent *v.* Chicago & A. R. Co. (49 Ill. 33), Car. of M., 209, 255; Discrim., 18.
Vincent *v.* Chicago & N. W. R. Co. (29 Iowa 592), Animals, 51; New Tr., 21.
Vincent *v.* Current River R. Co. (53 Mo. App. 616), Animals, 463.
Vineberg *v.* Grand Trunk R. Co. (27 Am. & Eng. R. Cas. 271, 13 Ont. App. 93), Bagg., 64, 67.
Vinson *v.* North Carolina R. Co. (74 N. Car. 510, 13 Am. Ry. Rep. 396), Lim. of Ac., 48.
Vinton *v.* Cattaraugus County Sup'rs (18 N.

Y. S. R. 435, 2 N. Y. Supp. 367), Mun. Aid, 421.
Vinton *v.* Middlesex R. Co. (11 Allen (Mass.) 304), St. Rys., 521, 522.
Vinton *v.* Sckwab (32 Vt. 612), Negl., 67.
Vinyard *v.* St. Louis, I. M. & S. R. Co. (80 Mo. 92), Animals, 142.
Virden *v.* Allan (107 Ill. 505), Mun. Aid, 29, 247.
Virginia & M. S. N. Co. *v.* United States (Taney (U. S.) 418), Appear., 4.
Virginia & T. R. Co. *v.* Campbell (22 Gratt. (Va.) 437), Em. Dom., 493, 892.
Virginia & T. R. Co. *v.* Elliott (5 Nev. 358), Em. Dom., 92, 493, 655, 802, 809.
Virginia & T. R. Co. *v.* Henry (8 Nev. 165), Em. Dom., 453, 510, 609, 632, 646, 647, 802, 809, 811, 914; Words & Ph., 52, 100.
Virginia & T. R. Co. *v.* Lovejoy (8 Nev. 100), Em. Dom., 321, 505, 744.
Virginia & T. R. Co. *v.* Lynch (13 Nev. 92), Sts. & H., 143.
Virginia & T. R. Co. *v.* Lyon County Com'rs (6 Nev. 68), Mun. Aid, 235.
Virginia & T. R. Co. *v.* Ormsby County Com'rs (5 Nev. 341), Tax., 272.
Virgina & T. R. Co. *v.* Sayers (26 Gratt. (Va.) 328), Car. of L. S., 72; Car. of M., 453, 455; Evid., 172.
Virgina & T. R. Co. *v.* Washington County (30 Gratt. (Va.) 471), Tax., 12.
Virginia C. R. Co. *v.* Sanger (15 Gratt. (Va.) 230), Car. of P., 162, 178, 197; Indep. Contr., 25.
Virginia Midland R. Co. *v.* Barksdale (82 Va. 330), Death, etc., 174.
Virginia Midland R. Co. *v.* Boswell (82 Va. 932, 7 S. E. Rep. 383), Contrib. Neg., 10, 13; Tresp., Inj. to, 73.
Virginia Midland R. Co. *v.* Roach (34 Am. & Eng. R. Cas. 271, 83 Va. 375, 5 S. E. Rep. 175), Car. of P., 21; Tresp., Inj. to, 13.
Virginia Midland R. Co. *v.* Washington (43 Am. & Eng. R. Cas. 688, 86 Va. 629, 10 S. E. Rep. 927), Leases, 42.
Virginia Midland R. Co. *v.* White (34 Am. & Eng. R. Cas. 22, 84 Va. 498, 5 S. E. Rep. 573), Contrib. Neg., 13, 48; Death, etc., 199; Trial, 152.
Vischer *v.* Talbotton Branch R. Co. (34 Ga. 536), Constr. Rys., 119.
Visscher *v.* Hudson River R. Co. (15 Barb. (N. Y.) 37), Em. Dom., 50, 866; Words & Ph., 56.
Voak *v.* Northern C. R. Co. (75 N. Y. 320), Cross., Inj. at, 102, 139.
Voegtly *v.* Pittsburg & Ft. W. R. Co. (2 Grant's Cas. (Pa.) 243), Land. & T., 8.
Voight *v.* Dregge (97 Mich. 322, 56 N. W. Rep. 557), Stockh., 44, 51.
Voight *v.* Wright (141 U. S. 62, 11 Sup. Ct. Rep. 855), Int. Com., 227.
Volk *v.* Livingston (31 N. Y. S. R. 668, 10 N. Y. Supp. 211), New Tr., 40.
Volkman *v.* Chicago, St. P., M. & O. R. Co. (35 Am. & Eng. R. Cas. 204, 5 Dak. 69, 37 N. W. Rep. 731), Animals, 297, 533, 577.
Volkmar *v.* Manhattan R. Co. (134 N. Y. 418, 31 N. E. Rep. 870, 47 N. Y. S. R. 631; reversing 26 J. & S. 125, 31 N. Y. S. R. 172, 9 N. Y. Supp. 708), Elev. Rys., 216.
Volmer's Appeal (115 Pa. St. 166, 8 Atl. Rep. 223), Branch & L. Roads, 2, 11.
Volmer *v.* Schuylkill River E. S. R. Co. (18 Phila. (Pa.) 248), Branch & L. Roads, 4.
Voorhees *v.* Chicago, R. I. & P. R. Co. (29 Am. & Eng. R. Cas. 322, 71 Iowa 735, 30 N. W. Rep. 29), Car. of M., 745; Stat. Agts., 5.
Voorhees *v.* Jones (29 N. J. L. 270), Partn., 1.
Voorhees *v.* Kings County El. R. Co. (50 N. Y. S. R. 569, 21 N. Y. Supp. 775, 3 Misc. 18), Car. of P., 491.
Vormus *v.* Tennessee C., I. & R. Co. (97 Ala. 326, 12 So. Rep. 111), Tresp., Inj. to, 12.
Vosburgh *v.* Lake Shore & M. S. R. Co. (15 Am. & Eng. R. Cas. 249, 94 N. Y. 374, 46 Am. Rep. 148; affirming 26 Hun 671, mem.), Bridges, 38; Employés, Inj. to, 55.
Vose *v.* Cowdrey (49 N. Y. 336), Reorg., 13.
Vose *v.* Bronson (6 Wall. (U. S.) 452), Mort., 112.
Vose *v.* Lancashire & Y. R. Co. (2 H. & N. 728, 4 Jur. N. S. 364, 27 L. J. Ex. 249), Fel. Serv., 1, 126.
Vose *v.* Newport St. R. Co. (46 Am. & Eng. R. Cas. 91, 17 R. I. 134, 20 Atl. Rep. 267), St. Rys., 227.
Vose *v.* Reed (1 Woods (U. S.) 647), Receiv., 2.
Vrankin *v.* Wisconsin, I. & N. R. Co. (66 Iowa 576, 27 N. W. Rep. 761), Farm Cross., 6.
Vredenburgh *v.* New York C. & H. R. R. Co. (34 N. Y. S. R. 953, 58 Hun 607, 12 N. Y. Supp. 18; affirmed in 134 N. Y. 597, mem., 31 N. E. Rep. 629, mem.), New Tr., 64.
Vroman *v.* American M. U. Exp. Co. (5 T. & C. (N. Y.) 22, 2 Hun 512), Agency, 58; Exp. Cos., 67, 90.
Vroman *v.* Houston, W. S. & P. F. R. Co. (27 N. Y. Supp. 257, 57 N. Y. S. R. 871, mem., 7 Misc. 234), St. Rys., 426.

Wabash & W. R. Co. *v.* Morgan (132 Ind. 430, 31 N. E. Rep. 661, 32 N. E. Rep. 85), Dam., 25; Employés, Inj. to, 99, 100; Pl., 174; Trial, 126, 162, 167, 203; Witn., 98.
Wabash R. Co., In re (24 Fed. Rep. 217), Receiv., 46.
Wabash R. Co. *v.* Brown (2 Ill. App. 516), Animals, 127.
Wabash R. Co. *v.* Brown (5 Ill. App. 590), Fences, 8, 12; Receiv., 131.
Wabash R. Co. *v.* Dykeman (133 Ind. 56, 32 N. E. Rep. 823), App., 10, 147; Receiv., 23.
Wabash R. Co. *v.* Dougan (142 Ill. 248, 31 N. E. Rep. 594; affirming 41 Ill. App. 543), Attach., 13.
Wabash R. Co. *v.* Elliott (4 Am. & Eng. R. Cas. 651, 98 Ill. 481), Contrib. Neg., 91; Employés, Inj. to, 298.
Wabash R. Co. *v.* Ferris (6 Ind. App. 30, 32 N. E. Rep. 112), Animals, 111, 328, 461; Cat.-Gds., 15.

Wabash R. Co. *v.* Forshee (77 Ind. 158), Animals, 127, 349, 441; Fences, 55, 64.
Wabash R. Co. *v.* Henks (91 Ill. 406), Comp. Neg., 8, 12; Sts. & H., 324.
Wabash R. Co. *v.* Jones (5 Ill. App. 607), Animals, 573.
Wabash R. Co. *v.* Kime (42 Ill. App. 272), Evid., 84, 87, 123; Farm Cross., 1.
Wabash R. Co. *v.* McDaniels (11 Am. & Eng. R. Cas. 158, 107 U. S. 454, 2 Sup. Ct. Rep. 932), Employés, Inj. to, 99; Fed. Cts., 19; Fel. Serv., 135, 138.
Wabash R. Co. *v.* McKittrick (36 Ill. App. 82), Death, etc., 167.
Wabash R. Co. *v.* Sanders (47 Ill. App. 436), Culverts, 1, 11, 17.
Wabash R. Co. *v.* Savage (28 Am. & Eng. R. Cas. 288, 110 Ind. 156, 9 N. E. Rep. 85), Eject. Pass., 61, 82, 86; Pl., 110.
Wabash R. Co. *v.* Smith (42 Ill. App. 527), Fires, 247, 264, 274, 288.
Wabash R. Co. *v.* Stewart (41 Ill. App. 640), Mort., 260.
Wabash R. Co. *v.* Williamson (3 Ind. App. 190, 29 N. E. Rep. 455), Animals, 339, 645; Dam., 108; Farm Cross., 1; Fences, 38; Leases, 108.
Wabash R. Co. *v.* Williamson (23 Am. & Eng. R. Cas. 203, 104 Ind. 154, 3 N. E. Rep. 814), Animals, 171, 179, 180.
Wabash, St. L. & P. R. Co. *v.* Black (11 Ind. App. 465), Car. of L. S., 95; Lim. of Liab., 22, 28.
Wabash, St. L. & P. R. Co. *v.* Central Trust Co. (17 Am. & Eng. R. Cas. 254, 22 Fed. Rep. 138), Mort., 206.
Wabash, St. L. & P. R. Co. *v.* Central Trust Co. (17 Am. & Eng. R. Cas. 261, 22 Fed. Rep. 269), Receiv., 60.
Wabash, St. L. & P. R. Co. *v.* Central Trust Co. (17 Am. & Eng. R. Cas. 264, 22 Fed. Rep. 272), Receiv., 12.
Wabash, St. L. & P. R. Co. *v.* Central Trust Co. (23 Fed. Rep. 738), Cross., Inj. at, 215.
Wabash, St. L. & P. R. Co. *v.* Central Trust Co. (33 Fed. Rep. 238), Judgm., 11.
Wabash, St. L. & P. R. Co. *v.* Coble (113 Ill. 115), Cross., Inj. at, 129.
Wabash, St. L. & P. R. Co. *v.* Conkling (15 Ill. App. 157), Employés, Inj. to, 182, 194.
Wabash, St. L. & P. R. Co. *v.* Deardorff (14 Ill. App. 401), Employés, Inj. to, 214; Fel. Serv., 511.
Wabash, St. L. & P. R. Co. *v.* Farver (31 Am. & Eng. R. Cas. 134, 111 Ind. 195, 9 West. Rep. 621, 12 N. E. Rep. 296), Indep. Contr., 7, 14, 24.
Wabash, St. L. & P. R. Co. *v.* Fenton (12 Ill. App. 417), Employés, Inj. to, 96.
Wabash, St. L. & P. R. Co. *v.* Gordon (17 Ill. App. 63), App., 40
Wabash, St. L. & P. R. Co. *v.* Ham (26 Am. & Eng. R. Cas. 66, 114 U. S. 587, 5 Sup. Ct. Rep. 1081), Consol., 43.
Wabash, St. L. & P. R. Co. *v.* Hawk (31 Am. & Eng. R. Cas. 206, 121 Ill. 259, 12 N. E. Rep. 253, 10 West. Rep. 137), Fel. Serv., 73, 218, 312, 338.
Wabash, St. L. & P. R. Co. *v.* Hicks (13 Ill. App. 407), Contrib. Neg., 20; Cross., Inj. at, 160, 162, 190; Negl., 70; Side Tr., 4.
Wabash, St. L. & P. R. Co. *v.* Illinois (26 Am. & Eng. R. Cas. 1, 118 U. S. 557, 7 Sup. Ct. Rep. 4; affirming 105 Ill. 236), Discrim., 37; Int. Com., 5, 220.
Wabash St. L. & P. R. Co. *v.* Jaggerman (23 Am. & Eng. R. Cas. 680, 115 Ill. 407, 4 N. E. Rep. 641), Bills of L., 37, 38, 91; Car. of M., 602, 674, 754.
Wabash, St. L. & P. R. Co. *v.* Johnson (96 Ind. 40), Fires, 191.
Wabash, St. L. & P. R. Co. *v.* Johnson (96 Ind. 44), Fires, 190.
Wabash, St. L. & P. R. Co. *v.* Johnson (96 Ind. 62), Fires, 190.
Wabash, St. L. & P. R. Co. *v.* Johnson (17 Am. & Eng. R. Cas. 487, 108 Ill. 11), Tax., 257, 347.
Wabash, St. L. & P. R. Co. *v.* Koenigsam (13 Ill. App. 505), Car. of P., 172.
Wabash, St. L. & P. R. Co. *v.* Krough (13 Ill. App. 431), Animals, 230; Cross., Inj. at, 12; Negl., 12.
Wabash, St. L. & P. R. Co. *v.* Lash (103 Ind. 80, 2 N. E. Rep. 250), Animals, 339; Mun. Corp., 20.
Wabash, St. L. & P. R. Co. *v.* Lavieux (14 Ill. App. 469), Animals, 9, 584.
Wabash, St. L. & P. R. Co. *v.* Locke (112 Ind. 404, 11 West. Rep. 877, 14 N. E. Rep. 391), Employés, Inj. to, 605; Negl., 97, 100; Stat. & D., 89, 90.
Wabash, St. L. & P. R. Co. *v.* Lynch (12 Ill. App. 365), Car. of M., 761, 800, 802.
Wabash, St. L. & P. R. Co. *v.* McCasland (11 Ill. App. 491), Car. of L. S., 24, 36, 154; Car. of M., 125.
Wabash, St. L. & P. R. Co. *v.* McDougall (27 Am. & Eng. R. Cas. 386, 118 Ill. 229, 8 N. E. Rep. 678), Em. Dom., 426, 435.
Wabash, St. L. & P. R. Co. *v.* McDougall (36 Am. & Eng. R. Cas. 597, 126 Ill. 111, 18 N. E. Rep. 291, 1 L. R. A. 207), Att'ys, 9; Em. Dom., 452, 472, 560, 611, 637, 638, 685, 721, 819.
Wabash, St. L. & P. R. Co. *v.* Mahaffee (16 Ill. App. 290), Fel. Serv., 511.
Wabash, St. L. & P. R. Co. *v.* Moran (13 Ill. App. 72), Comp. Neg., 2, 4; Death, etc., 333; Employés, Inj. to, 650.
Wabash, St. L. & P. R. Co. *v.* Neikirk (13 Ill. App. 387), Animals, 65, 584; Fences, 49; Negl., 42.
Wabash, St. L. & P. R. Co. *v.* Neikirk (15 Ill. App. 172), Animals, 65; Cross., Inj. at, 254; Negl., 42.
Wabash, St. L. & P. R. Co. *v.* Nice (23 Am. & Eng. R. Cas. 168, 99 Ind. 152), Animals, 266; Fences, 58.
Wabash, St. L. & P. R. Co. *v.* People (12 Ill. App. 448), Sts. & H., 174.
Wabash, St. L. & P. R. Co. *v.* People (105 Ill. 236), Stat., 22.
Wabash, St. L. & P. R. Co. *v.* People (12 Am. & Eng. R. Cas. 10, 106 Ill. 652), Charges, 12.
Wabash, St. L. & P. R. Co. *v.* People (137 Ill. 181, 27 N. E. Rep. 456), Tax., 257, 306.

Wabash, St. L. & P. R. Co. *v.* Peterson (15 Ill. App. 149), App., 136.
Wabash, St. L. & P. R. Co. *v.* Peyton (18 Am. & Eng. R. Cas. 1, 106 Ill. 534, 46 Am. Rep. 705), Dam., 101; Leases, 109; Lim. of Liab., 1.
Wabash, St. L. & P. R. Co. *v.* Pratt (15 Ill. App. 177), Car. of L. S., 29, 141; Witn., 95.
Wabash, St. L. & P. R. Co. *v.* Rector (9 Am. & Eng. R. Cas. 264, 104 Ill. 296), Assault, 4; Car. of P., 598; Dam., 37; Trial, 155.
Wabash, St. L. & P. R. Co. *v.* Rooker (15 Am. & Eng. R. Cas. 558, 90 Ind. 581), Animals, 339; Pl., 7, 67.
Wabash, St. L. & P. R. Co. *v.* Schevers (18 Ill. App. 52), Death, etc., 429.
Wabash, St. L. & P. R. Co. *v.* Shacklet (12 Am. & Eng. R. Cas. 166, 105 Ill. 364; affirming 10 Ill. App. 404), Car. of L. S., 133; Car. of P., 535; Collis., 6; Death, etc., 98, 342; Imp. Neg., 5.
Wabash, St. L. & P. R. Co. *v.* Thompson (10 Ill. App. 271), Employés, Inj. to, 300.
Wabash, St. L. & P. R. Co. *v.* Thompson (15 Ill. App. 117; former appeal 10 Ill. App. 271), Comp. Neg., 4, 5; Employés, Inj. to, 206.
Wabash, St. L. & P. R. Co. *v.* Tretts (19 Am. & Eng. R. Cas. 601, 96 Ind. 450), Animals, 127; Cat.-Gds., 11; Fences, 78.
Wabash, St. L. & P. R. Co. *v.* Wallace (19 Am. & Eng. R. Cas. 359, 110 Ill. 114), Comp. Neg., 8; Cross., Inj. at, 119, 198; Negl., 18.
Wabash, St. L. & P. R. Co. *v.* Weisbeck (14 Ill. App. 525), Comp. Neg., 2; Cross., Inj. at, 314.
Wabash, St. L. & P. R. Co. *v.* Wolff (13 Ill. App. 437), Car. of P., 533; Stat. & D., 149.
Wabash, St. L. & P. R. Co. *v.* Zeigler (15 Am. & Eng. R. Cas. 519, 108 Ill. 304), Fences, 45.
Wabash Western R. Co. *v.* Friedman (41 Ill. App. 270), Car. of P., 537; Derailm., 2, 4, 5; Witn., 165.
Wabash Western R. Co. *v.* Friedman (146 Ill. 583, 30 N. E. Rep. 353, 34 N. E. Rep. 1111), Car. of P., 629; Pl., 15, 116, 120, 140.
Wabash Western R. Co. *v.* Siefert (41 Mo. App. 35), Injunc., 3, 43; Words & Ph., 112.
Waco Tap R. Co. *v.* Shirley (45 Tex. 355, 13 Am. Ry. Rep. 233), Constr Rys., 111; Dam., 49; Mort., 209; Witn., 140.
Waddell's Appeal (84 Pa. St. 90), Em. Dom., 42.
Waddill *v.* Alabama & T. R. R. Co. (35 Ala. 323), Bills & N., 19.
Wade *v.* Chicago, S. & St. L. R. Co. (149 U. S. 327, 13 Sup. Ct. Rep. 892), Mort., 127.
Wade *v.* Hennessy & B. & L. R. Co. (14 Am. & Eng. R. Cas. 472, 55 Vt. 207), Deeds, 27.
Wade *v.* LaMoille (112 Ill. 79), Mun. Aid, 1, 331.
Wade *v.* Missouri Pac. R. Co. (19 Am. & Eng. R. Cas. 586, 78 Mo. 362), Animals, 353, 578; App., 32.
Wade *v.* New York & O. M. R. Co. (52 N. Y. 627, mem.), Sales, 3.
Wade *v.* Walnut (105 U. S. 1), Mun. Aid, 1.
Wade *v.* Wheeler (3 Lans. (N. Y.) 201), Car. of M., 75.
Wademan *v.* Albany & S. R. Co. (51 N. Y. 568, 4 Am. Ry. Rep. 259), Farm Cross., 6.
Wadham, In re (L. R. 14 Q. B. D. 747, 54 L. J. Q. B. D. 343, 52 L. T. 894, 33 W. R. 215, 49 J. P. 599), Em. Dom., 1196.
Wadhams *v.* Lackawanna & B. R. Co. (42 Pa. St. 303), Em. Dom., 406, 409.
Wadlington *v.* Newport News & M. V. R. Co. (Ky.) (20 S. W. Rep. 783), Employés, Inj. to, 14, 103.
Wadsworth *v.* Eau Claire County Sup'rs (102 U. S. 534), Mun. Aid, 21.
Wadsworth *v.* St. Croix County (4 Fed. Rep. 378), Mun. Aid, 141.
Wadsworth *v.* Union Pac. R. Co. (56 Am. & Eng. R. Cas. 145, 18 Colo. 600, 33 Pac. Rep. 515), Animals, 7, 340, 531; Fences, 19; Stat., 36, 39; Trial, 113.
Waffle *v.* New York C. R. Co. (53 N. Y. 11, 5 Am. Ry. Rep. 163; affirming 58 Barb. 413), Waters & W., 19.
Waffle *v.* New York C. R. Co. (58 Barb. (N. Y.) 413), Waters & W., 20.
Wager *v.* Troy Union R. Co. (25 N. Y. 526), Em. Dom., 163.
Wagner *v.* Cleveland & T. R. Co. (22 Ohio St. 563), Em. Dom., 976; Fixt., 5.
Wagner *v.* Long Island R. Co. (5 T. & C. (N. Y.) 163, 2 Hun 633; appeal dismissed in 70 N. Y. 614, mem.), Flood. Lds., 34, 37; Waters & W., 9, 28.
Wagner *v.* Meety (69 Mo. 150), Consol., 34; Mun. Aid, 224.
Wagner *v.* Missouri Pac. R. Co. (97 Mo. 512, 3 L. R. A. 156, 10 S. W. Rep. 486), Car. of P., 15, 18, 106, 460; Pl., 176.
Wagner *v.* New York, C. & St. L. R. Co. (10 Am. & Eng. R. Cas. 380, 38 Ohio St. 32), Em. Dom., 842; Injunc., 12.
Wagner *v.* Pittsburg & W. E. Pass. R. Co. (158 Pa. St. 419, 27 Atl. Rep. 1008), St. Rys., 469.
Wagner *v.* Union S. Y. & T. Co. (41 Ill. App. 408), Release, 10.
Wagner *v.* Woolsey (1 Heisk. (Tenn.) 235), Death, etc., 33.
Wagoner *v.* North Carolina R. Co. (5 Jones (N. Car.) 367), Proc., 11, 32.
Wahl *v.* Holt (26 Wis. 703), Bills of L., 53; Car. of M., 607, 612.
Wait *v.* Albany & S. R. Co. (5 Lans. (N. Y.) 475), Agency, 53.
Wait *v.* Bennington & R. R. Co. (61 Vt. 268, 17 Atl. Rep. 284), Animals, 168, 169, 544, 565; Cat.-Gds., 16.
Wait *v.* Burlington, C. R. & N. R. Co. (35 Am. & Eng. R. Cas. 194, 74 Iowa 207, 37 N. W. Rep. 159), Animals, 183; Farm Cross., 13.
Wait *v.* Ferguson (14 Abb. Pr. (N. Y.) 379), Officers, 5; Stockh., 46.
Wait *v.* Weller (4 Hun (N. Y.) 626), Injunc., 45.

Waite *v.* Gilbert (10 Cush. (Mass.) 177), Car. of M., 786.
Waite *v.* Lancashire & Y. R. Co. (L. R. 9 Ex. 67, 43 L. J. Ex. 47, 3 Ry. & C. T. Cas. xii), Car. of M., 523.
Waite *v.* New York C. & H. R. R. Co. (35 Am. & Eng. R. Cas. 576, 110 N. Y. 635, mem., 17 N. E. Rep. 730, 17 N. Y. S. R. 162, 2 Silv. App. 85; affirming 39 Hun 655, mem.), Car. of M., 134, 694; Evid., 160, 230; New Tr., 97.
Waite *v.* Northeastern R. Co. (El. Bl. & El. (96 E. C. L.) 719, 728), Children, Inj. to, 126.
Waite *v.* Northeastern R. Co. (5 Jur. N. S. 936, 28 L. J. Q. B. 258, 7 W. R. 311; affirming El. Bl. & El. 719, 4 Jur. N. S. 1300, 27 L. J. Q. B. 417), Children, Inj. to, 138.
Waite *v.* Port Reading R. Co. (47 Am. & Eng. R. Cas. 263, 48 N. J. Eq. 346, 22 Atl. Rep. 261), Em. Dom., 937.
Wakefield *v.* Boston & M. R. Co. (63 Me. 385), Words & Ph., 244.
Wakefield *v.* Connecticut & P. R. R. Co. (37 Vt. 330), Cross., Inj. at, 104; Evid., 145.
Wakefield *v.* Llanelly R. & D. Co. (3 De G., J. & S. 11), Em. Dom., 1174.
Wakefield *v.* Llanelly R. & D. Co. (34 Beav. 245), Em. Dom., 1174.
Wakefield *v.* South Boston R. Co. (117 Mass. 544, 6 Am. Ry. Rep. 238), St. Rys., 528.
Wakefield Local Board *v.* West Riding & G. R. Co. (10 Cox. C. C. 162, 6 B. & S. 794, 12 Jur. N. S. 160, 13 L. T. 590, 35 L. J. M. C. 69, 14 W. R. 100), Em. Dom., 1166; Just. P., 10; Sts. & H., 359.
Wakelin *v.* London & S. W. R. Co. (29 Am. & Eng. R. Cas. 425, 12 App. Cas. 41), Contrib. Neg., 105; Death, etc., 258, 259.
Wakeman *v.* New York, L. E. & W. R. Co. (10 Am. & Eng. R. Cas. 342, 35 N. J. Eq. 496), Injunc., 4.
Walburn *v.* Chenault (43 Kan. 352, 23 Pac. Rep. 657), Assign., 20; Stockh., 64.
Walcott *v.* People (17 Mich. 68), Int. Com., 196.
Wald *v.* Louisville, E. & St. L. R. Co. (58 Am. & Eng. R. Cas. 123, 92 Ky. 645, 18 S. W. Rep. 850), Bagg., 68, 69, 113.
Waldele *v.* New York C. & H. R. R. Co. (19 Am. & Eng. R. Cas. 400, 95 N. Y. 274; reversing 29 Hun 35, 61 How Pr. 350), Death, etc., 242; Evid., 170.
Waldele *v.* New York C. & H. R. R. Co. (19 Hun (N. Y.) 69), Death, etc., 294; Evid., 171.
Walden *v.* Knevals (114 U. S. 373, 5 Sup. Ct. Rep. 898), Land Grants, 109.
Waldhier *v.* Hannibal & St. J. R. Co. (2 Am. & Eng. R. Cas. 146, 71 Mo. 514), Pl., 24, 137.
Waldhier *v.* Hannibal & St. J. R. Co. (87 Mo. 37), App., 126; Dam., 102; Employés, Inj. to, 207, 344; Negl., 49.
Waldo *v.* Chicago, St. P. & F. du L. R. Co. (14 Wis. 575), Charters, 53; Corp., 8; Subscr., 143.
Waldo *v.* Goodsell (33 Conn. 432), Death, etc., 56.
Waldoborough *v.* Knox & L. R. Co. (84 Me. 469, 24 Atl. Rep. 942), Bonds, 33; Leases, 13.
Waldron *v.* Chicago & N. W. R. Co. (1 Dak. 351, 1 Dak. (Bennett) 336, 46 N. W. Rep. 456), Bagg., 38; Car. of M., 66, 273, 278; Car. of P., 108; Jurisd., 1.
Waldron *v.* Marcier (82 Ill. 550), Contr., 70.
Waldron *v.* Portland, S. & P. R. Co. (35 Me. 422), Animals, 286, 495.
Waldron *v.* Rensselaer & S. R. Co. (8 Barb. (N. Y.) 390), Animals, 155; Charters, 31
Waldron *v.* Toledo, A. A. & G. T. R. Co. (20 Am. & Eng. R. Cas. 348, 55 Mich. 420, 21 N. W. Rep. 870), Em. Dom., 214, 225.
Waldron *v.* Willard (17 N. Y. 466), Assign., 15.
Waldrop *v.* Greenwood, L. & S. R. Co. (34 Am. & Eng. R. Cas. 204, 28 So. Car. 157, 5 S. E. Rep. 471), Evid., 198, 205; Trial, 64; Waters & W., 28; Witn., 64.
Walkenhauer *v.* Chicago, B. & Q. R. Co. (15 Am. & Eng. R. Cas. 490, 3 McCrary (U. S.) 553, 17 Fed. Rep. 136), Fences, 23.
Walker, Ex parte (1 Tenn. Ch. 97), Name, 1.
Walker *v.* Atlantic Ave. R. Co. (34 N. Y. S. R. 118, 11 N. Y. Supp. 742), St. Rys., 358.
Walker *v.* Birchard (82 Iowa 388, 48 N. W. Rep. 71), Direct., 55.
Walker *v.* Boston & M. R. Co. (3 Cush. (Mass.) 1), Em. Dom., 469, 527, 530, 533, 921, 945.
Walker *v.* Boston & M. R. Co. (1 Am. & Eng. R. Cas. 141, 128 Mass. 8), Fel. Serv., 410.
Walker *v.* Boston & M. R. Co. (64 N. H. 414, 13 Atl. Rep. 649), Fright. Teams, 1.
Walker *v.* Chicago, R. I. & P. R. Co. (30 Am. & Eng. R. Cas. 173, 71 Iowa 658, 33 N. W. Rep. 224), Explosions, 5.
Walker *v.* Chicago, R. I. & P. R. Co. (57 Mo. 275), Ejectm., 3; Estop., 29.
Walker *v.* Cincinnati (21 Ohio St. 14, 2 Am. Ry. Rep. 84), Mun. Aid, 1, 6.
Walker *v.* Columbia & G. R. Co. (25 So. Car. 141), Animals, 48; Trial, 70.
Walker *v.* Detroit, G. H. & M. R. Co. (9 Am. & Eng. R. Cas. 251, 49 Mich. 446, 13 N. W. Rep. 812), Attach., 58.
Walker *v.* Detroit Transit R. Co. (47 Mich. 338, 11 N. W. Rep. 187), Bills & N., 15; Direct., 54; Eq., 11; Stock, 74.
Walker *v.* Devercaux (4 Paige (N. Y.) 229), Incorp., 8; Stockh., 107.
Walker *v.* Dry Dock, E. B. & B. R. Co. (33 How. Pr. (N. Y.) 327), St. Rys., 527.
Walker *v.* Eastern Counties R. Co. (6 Hare 594, 12 Jur. 787), Em. Dom., 1130.
Walker *v.* Erie R. Co. (63 Barb. (N. Y.) 260), Car. of P., 209, 648; Dam., 67, 70, 74.
Walker *v.* Flemming (70 N. Car. 483), Pres., 6.
Walker *v.* Great Western R. Co. (8 U. C. C. P. 161), Stat. & D., 118.
Walker *v.* Great Western R. Co. (15 W. R. 769, 16 L. T. 327, L. R. 2 Ex. 228, 36 L. J. Ex. 123), Med. Serv., 8.
Walker *v.* Hedrick (18 Ill. 570), Pub. Lds., 17.
Walker *v.* London & B. R. Co. (3 Railw. Cas. 396, 3 Q. B. 744, 3 G. & D. 549, 7 Jur.

323, 12 L. J. Q. B. 88), Em. Dom., 1101, 1183.
Walker v. London & B. R. Co. (7 Jur. 1154), Em. Dom., 1146.
Walker v. London & N. W. R. Co. (45 L. J. C. P. D. 787, L. R. 1 C. P. D. 518, 36 L. T. 53, 25 W. R. 10), Constr. Rys., 33.
Walker v. Mad River & L. E. R. Co. (8 Ohio 38), Location, etc., 1.
Walker v. Mobile & O. R. Co. (34 Miss. 245), Subscr., 144, 145, 173.
Walker v. Montclair & G. L. R. Co. (30 N. J. Eq. 525), Mort., 285.
Walker v. Old Colony & N. R. Co. (103 Mass., 10), Em. Dom., 665, 685.
Walker v. Quincy, M. & P. R. Co. (28 Fed. Rep. 734), Mort., 156, 158.
Walker v. Reidsville (96 N. Car. 382, 2 S. E. Rep. 74), Contrib. Neg., 16, 21, 24.
Walker v. St. Paul City R. Co. (52 Minn. 127, 53 N. W. Rep. 1068), Actions, 15.
Walker v. Second Ave. R. Co. (6 N. Y. Supp. 536, 25 J. & S. 141, 24 N. Y. S. R. 961; affirmed in 126 N. Y. 668, mem., 37 N. Y. S. R. 936), Children, Inj. to, 185.
Walker v. Skipwith (Meigs (Tenn.) 502), Agency, 23.
Walker v. Southeastern R. Co. (L. R. 5 C. P. 640, 39 L. J. C. P. 346, 18 W. R. 1032, 23 L. T. N. S. 14), Agency, 95; Death, etc., 434; Mal. Pros., 7.
Walker v. Spullock (23 Ga. 436), Western & A. R. Co., 2.
Walker v. State (9 Tex. App. 38), Crim. L., 27.
Walker v. Vicksburg, S. & P. R. Co. (41 Am. & Eng. R. Cas. 172, 41 La. Ann. 795, 7 L. R. A. 111, 6 So. Rep. 916), Car. of P., 426.
Walker v. Wabash, St. L. & P. R. Co. (16 Am. & Eng. R. Cas. 380, 15 Mo. App. 333), Tickets & F., 42, 60.
Walker v. Whelen (4 Phila. (Pa.) 389), Injunc., 41; Mort., 269.
Walker v. Wilmington, C. & A. R. Co. (26 So. Car. 80, 1 S. E. Rep. 366), Agency, 45; Contr., 97.
Walker v. York & N. M. R. Co. (2 El. & Bl. 750, 18 Jur. 143, 23 L. J. Q. B. 73), Car. of M., 521, 522.
Wall v. Cameron (6 Colo. 275), Dam., 27.
Wall v. Chicago & N. W. R. Co. (69 Iowa 498, 29 N. W. Rep. 427), Lim. of Ac., 73.
Wall v. Delaware, L. & W. R. Co. (54 Hun 454, 28 N. Y. S. R. 132, 7 N. Y. Supp. 709; affirmed in 125 N. Y. 727, mem., 35 N. Y. S. R. 995), Death, etc., 294, 304; Employés, Inj. to, 697, 717; Fel. Serv., 137, 153, 510; Negl., 74.
Wall v. Helena St. R. Co. (50 Am. & Eng. R. Cas. 474, 12 Mont. 44, 29 Pac. Rep. 721), St. Rys., 451, 457, 507.
Wall v. Texas & P. R. Co. (2 Tex. Unrep. Cas. 432), Employés, Inj. to, 256; Fel. Serv., 357.
Wallace v. Cannon (38 Ga. 199), Employés, Inj. to, 556; War, 1.
Wallace v. Central Vt. R. Co. (52 N. Y. S. R. 351, 138 N. Y. 302, 33 N. E. Rep. 1069; reversing 63 Hun 632, mem., 43 N. Y. S. R. 639, 18 N. Y. Supp. 280), Employés, Inj. to, 58, 365, 732.
Wallace v. Chicago, St. P., M. & O. R. Co. (67 Iowa 547, 25 N. W. Rep. 772), Release, 14.
Wallace v. Clayton (42 Ga. 443), Car. of M., 15; New Tr., 23; Words & Ph., 7.
Wallace v. Columbia & G. R. Co. (34 So. Car. 62, 12 S. E. Rep. 815), Flood. Lds., 3.
Wallace v. Columbia & G. R. Co. (37 So. Car. 335), Pl., 159; Trial, 71, 135.
Wallace v. Detroit City R. Co. (58 Mich. 231, 24 N. W. Rep. 870), Pl., 151; St. Rys., 317.
Wallace v. Dublin & B. J. R. Co. (8 Ir. C. L. 341), Car. of M., 127.
Wallace v. Grand Trunk R. Co. (16 U. C. Q. B. 551), Flood. Lds., 61.
Wallace v. Kansas City & S. R. Co. (47 Mo. App. 491), Embankm., 3; Flood. Lds., 78; Nuis., 33.
Wallace v. Long Island R. Co. (12 Hun (N. Y.) 460), Leases, 22, 27.
Wallace v. Loomis (97 U. S. 146), Estop., 5; Incorp., 3; Mort., 303; Receiv., 94.
Wallace v. Matthews (39 Ga. 617), Bills of L., 26.
Wallace v. Newcastle Northern R. Co. (47 Am. & Eng. R. Cas. 111, 138 Pa. St. 168, 22 Atl. Rep. 95), Em. Dom., 1040.
Wallace v. People (63 Ill. 451), Crim. L., 27.
Wallace v. Rosenthal (40 Ga. 419), Car. of M., 646.
Wallace v. St. Louis, I. M. & S. R. Co. (74 Mo. 594), Animals, 65, 66, 204; Negl., 41.
Wallace v. Sanders (50 Ga. 134; former appeal 42 Ga. 486), Car. of M., 17, 21; War, 10.
Wallace v. Spullock (32 Ga. 488), Car. of Slaves, 9.
Wallace v. Taunton St. R. Co. (119 Mass. 91), Trial, 50.
Wallace v. Thomas (34 Ga. 543), Trial, 10.
Wallace v. Townsend (25 Am. & Eng. R. Cas. 20, 43 Ohio St. 537, 3 N. E. Rep. 601), Subscr., 214.
Wallace v. Vacuum Oil Co. (128 N. Y. 579, mem., 27 N. E. Rep. 956), Witn., 168, 173.
Wallace v. Western N. C. R. Co. (34 Am. & Eng. R. Cas. 553, 98 N. Car. 494, 2 Am. St. Rep. 346, 4 S. E. Rep. 503), Car. of P., 291, 576; Contrib. Neg., 85, 87.
Wallace v. Western N. C. R. Co. (37 Am. & Eng. R. Cas. 159, 101 N. Car. 454, 8 S. E. Rep. 166), Car. of P., 464; Trial, 145.
Wallace v. Western N. C. R. Co. (41 Am. & Eng. R. Cas. 212, 104 N. Car. 442, 10 S. E. Rep. 552), Dam., 42, 67, 70, 71, 73, 74, 86; Stat., 21.
Wallace v. Wilmington & N. R. Co. (8 Houst. (Del.) 529, 18 Atl. Rep. 818), Car. of P., 193, 266; Contrib. Neg., 20, 21; Dam., 67, 70, 71, 73; Stat. & D., 103; Tresp., Inj. to, 9.
Wallace Tp. v. Great Western R. Co. (3 Ont. App. 44; affirming 25 Grant's Ch. 86), Spec. Perf., 12.

Wallach *v.* Manhattan R. Co. (40 N. Y. S. R. 669, 16 N. Y. Supp. 156), Elev. Rys., 121.
Wallamet Falls C. & L. Co. *v.* Kittridge (5 Sawy. (U. S.) 44), Dissol., 1, 7, 25.
Wallbridge *v.* Farwell (18 Can. Sup. Ct. 1), Deeds of Tr., 12.
Waller *v.* Hannibal & St. J. R. Co. (83 Mo. 608), Car. of P., 137, 420; Evid., 172.
Waller *v.* Martin (17 B. Mon. (Ky.) 181), Em. Dom., 415; Tresp., 11.
Waller *v.* Midland G. W. R. (Ireland) Co. (L. R. 4 Ir. 376; reversing L. R. 1 Ir. 520), Car. of L. S., 159.
Waller *v.* Southeastern R. Co. (9 Jur. N. S. 501, 32 L. J. Ex. 205, 11 W. R. 731, 8 L. T. 325, 2 H. & C. 102), Fel. Serv., 38, 202, 392.
Walling *v.* Michigan (116 U. S. 446, 6 Sup. Ct. Rep. 454), Int. Com., 210.
Walling *v.* Railroad Co. (12 Phila. (Pa.) 309), St. Rys., 415.
Wallingford *v.* Columbia & G. R. Co. (30 Am. & Eng. R. Cas. 40, 26 So. Car. 258, 2 S. E. Rep. 19), Car. of L. S., 7, 9, 159; Car. of M., 468, 642, 668; Trial, 70.
Wallis *v.* London & S. W. R. Co. (L. R. 5 Ex. 62, 39 L. J. Ex. 57, 18 W. R. 347, 21 L. T. 675), Car. of M., 380; Charges, 127.
Wallis *v.* Morgan's L. & T. R. & S. Co. (38 La. Ann. 156), Employés, Inj. to, 14, 182, 205; Fel. Serv., 27, 134, 150, 268.
Wallis *v.* New Orleans & C. R. Co. (29 La. Ann. 66), Libel & S., 3.
Wallkill Valley R. Co. *v.* Norton (12 Abb. Pr. N. S. (N. Y.) 317), Em. Dom., 292.
Waln *v.* Huntingdon & B. T. R. Co. (16 Phila. (Pa.) 21), Coupons, 18, 19.
Walnut *v.* Wade (3 Am. & Eng. R. Cas. 36, 103 U. S. 683), Coupons, 18; Mun. Aid, 123, 171, 381; Stat., 1.
Walpole *v.* Bridges (5 Blackf. (Ind.) 222), Bills of L., 106; Car. of M., 15; Words & Ph., 7.
Walsail Tp. Overseers *v.* London & N. W. R. Co. (L. R. 4 App. Cas. 467, 48 L. J. M. C. 166), Tax., 380.
Walser *v.* Seligman (21 Blatchf. (U. S.) 130, 13 Fed. Rep. 415), Eq., 6.
Walsh *v.* Barton (24 Ohio St. 28), Deeds, 3, 24; Mort., 20.
Walsh *v.* Brooklyn El. R. Co. (27 N. Y. Supp. 605, 76 Hun 24), Elev. Rys., 175.
Walsh *v.* Chicago, M. & St. P. R. Co. (42 Wis. 23, 15 Am. Ry. Rep. 71), Car. of P., 557, 619.
Walsh *v.* Fitchburg R. Co. (51 N. Y. S. R. 240, 67 Hun 604, 22 N. Y. Supp. 441), Children, Inj. to, 33.
Walsh *v.* Flatbush, N. S. & C. R. Co. (11 Hun (N. Y.) 190), Att'ys, 18.
Walsh *v.* Memphis, C. & N. W. R. Co. (2 McCrary (U. S.) 156, 6 Fed. Rep. 797), Parties, 21.
Walsh *v.* Missouri Pac. R. Co. (102 Mo. 582, 14 S. W. Rep. 873, 15 S. W. Rep. 757), App., 97; Death, etc., 259, 261; Derailm., 9; Evid., 130; Witn., 128.
Walsh *v.* Oregon R. & N. Co. (10 Oreg. 250), Death, etc., 297; Evid., 143; Words & Ph., 150.
Walsh *v.* St. Paul & D. R. Co. (2 Am. & Eng. R. Cas. 144, 27 Minn. 367, 8 N. W. Rep. 145), Employés, Inj. to, 346.
Walsh *v.* Virginia & T. R. Co. (8 Nev. 110), Animals, 29, 102, 126, 153, 448; Fences, 7; Negl., 40; Right of W., 22.
Walsh *v.* Whiteley (L. R. 21 Q. B. D. 371), Employés, Inj. to, 782.
Waltemeyer *v.* Wisconsin, I. & N. R. Co. (30 Am. & Eng. R. Cas. 384, 71 Iowa 626, 33 N. W. Rep. 140), Em. Dom., 1063; Indep. Contr., 16; Pl., 99.
Walter *v.* Chicago, D. & M. R. Co. (39 Iowa 33, 9 Am. Ry. Rep. 78, 20 Am. Ry. Rep. 319), Car. of P., 395; Death, etc., 282, 429.
Walter *v.* Northeastern R. Co. (147 U. S. 370, 13 Sup. Ct. Rep. 348), Fed. Cts., 2.
Walters *v.* Chicago, R. I. & P. R. Co. (36 Iowa 458), Death, etc., 45.
Walters *v.* Chicago, R. I. & P. R. Co. (41 Iowa 71), Children, Inj. to, 12, 67, 68, 127, 137; Death, etc., 271, 284, 406.
Walters *v.* Western & A. R. Co. (56 Fed. Rep. 369), Bills of L., 124.
Walther *v.* Pacific R. Co. (55 Mo. 271), Animals, 100, 487.
Walther *v.* Warner (25 Mo. 277), Em. Dom., 180, 412.
Walthers *v.* Missouri Pac. R. Co. (19 Am. & Eng. R. Cas. 662, 78 Mo. 617), Animals, 150, 488, 528.
Waltmeyer *v.* Wisconsin, I. & N. R. Co. (20 Am. & Eng. R. Cas. 394, 64 Iowa 688, 21 N. W. Rep. 139), Em. Dom., 940.
Walton *v.* Green Bay, W. & St. P. R. Co. (70 Wis. 414, 36 N. W. Rep. 10), Em. Dom., 250, 435, 562.
Walton *v.* Kansas City, Ft. S. & M. R. Co. (40 Mo. App. 544), Witn., 97.
Walton *v.* New York C. S. Car Co. (139 Mass. 556, 2 N. E. Rep. 101), Agency, 76.
Walton *v.* St. Louis, I. M. & S. R. Co. (67 Mo. 56), Animals, 604; Cross., Inj. at, 5.
Walworth County Bank *v.* Farmers' L. & T. Co. (14 Wis. 325), Pres., 3.
Walworth County Bank *v.* Farmers' L. & T. Co. (16 Wis. 629), Direct., 40; Pres., 3.
Wamesit Power Co. *v.* Lowell & A. R. Co. (130 Mass. 455), Em. Dom., 891.
Wamesit Power Co. *v.* Lowell & A. R. Co. (139 Mass. 173), Em. Dom., 841.
Wampach *v.* St. Paul & S. C. R. Co. (21 Minn. 364), Em. Dom., 1067.
Wampach *v.* St. Paul & S. C. R. Co. (22 Minn. 34, 19 Am. Ry. Rep. 421), Tresp., 16.
Wandell *v.* Corbin (38 Hun (N. Y.) 391), Car. of P., 455; Negl., 70.
Wandell *v.* Corbin (17 N. Y. S. R. 718, 1 N. Y. Supp. 795), Car. of P., 40, 455, 609.
Wanless *v.* Northeastern R. Co. (25 L. T. 103), Cross., Inj. at, 48.
Wannan *v.* Scottish C. R. Co. (1 Ry. & C. T. Cas. 237, 2 Sess. Cas. 1373), Car. of M., 535.
Wansbeck R. Co., In re (L. R. 1 C. P. 269, 12 Jur. N. S. 746), Consol., 27.
Wansbeck R. Co. *v.* Trowsdale (L. R. 1 C. P. 269, 12 Jur. N. S. 740), Arb., 7.
Wapello County *v.* Burlington & M. R. R.

Co. (44 Iowa 585), Lim. of Ac., 17; Mun. Aid, 176.
Warburton *v.* Great Western R. Co. (L. R. 2 Ex. 30, 36 L. J. Ex. 9, 4 H. & C. 695, 15 W. R. 108, 15 L. T. 361), Fel. Serv., 125.
Warburton *v.* Midland R. Co. (21 L. T. 835), Car. of P., 465.
Ward *v.* Albemarle & R. R. Co. (112 N. Car. 168, 16 S. E. Rep. 921), Flood. Lds., 10, 81.
Ward *v.* Bonner (80 Tex. 168, 15 S. W. Rep. 805), Cat.-Gds., 2; Derailm., 3; Employés, Inj. to, 199.
Ward *v.* Central Park, N. & E. R. R. Co. (11 Abb. Pr. N. S. (N. Y.) 411, 1 J. & S. 392, 42 How. Pr. (N. Y.) 289), Car. of P., 590, 593; St. Rys., 373, 418.
Ward *v.* Charleston City R. Co. (16 Am. & Eng. R. Cas. 356, 19 So. Car. 521, 45 Am. Rep. 794), Trial, 34; Witn., 96.
Ward *v.* Chicago, St. P., M. & O. R. Co. (85 Wis. 601, 55 N. W. Rep. 771), Fly. Switch, 2; Witn., 128.
Ward *v.* Great Western R. Co. (13 U. C. Q. B. 315), Sts. & H., 181.
Ward *v.* Louisville & N. R. Co. (Tenn.) (3 Am. & Eng. R. Cas. 506), Bridges, 49.
Ward *v.* Milwaukee & St. P. R. Co. (29 Wis. 144, 12 Am. Ry. Rep. 193), Fires, 105.
Ward *v.* Minnesota & N. W. R. Co. (119 Ill. 287, 10 N. E. Rep. 365), Em. Dom., 278, 343, 358, 361.
Ward *v.* Montclair R. Co. (26 N. J. Eq. 260), Mort., 266.
Ward *v.* New York C. & H. R. R. Co. (56 Hun 268, 30 N. Y. S. R. 604, 9 N. Y. Supp. 377), Eject. Pass., 25.
Ward *v.* New York C. R. Co. (47 N. Y. 29, 1 Am. Ry. Rep. 452), Car. of M., 778.
Ward *v.* Ohio River R. Co. (35 W. Va. 481, 14 S. E. Rep. 142), Em. Dom., 172, 522, 1048; Injunc., 12.
Ward *v.* Oxford R. Co. (2 DeG. M. & G. 750, 22 L. J. Ch. 905), Bills & N., 9.
Ward *v.* Paducah & M. R. Co. (4 Fed. Rep. 862), Cat.-Gds., 3, 27; Fences, 10.
Ward *v.* Richmond & D. R. Co. (43 Fed. Rep. 422), Cross., Inj. at, 255.
Ward *v.* Rochester Elec. R. Co. (43 N. Y. S. R. 84, 17 N. Y. Supp. 427), Death, etc., 194.
Ward *v.* St. Louis, I. M. & S. R. Co. (91 Mo. 168), Animals, 619.
Ward *v.* Salem St. R. Co. (108 Mass. 332), Exec., 22.
Ward *v.* Sittingbourne & S. R. Co. (L. R. 9 Ch. 488, 43 L. J. Ch. 533, 22 W. R. 565, 30 L. T. 550; affirming 22 W. R. 450, 30 L. T. 247), Pl., 83.
Ward *v.* Southeastern R. Co. (6 Jur. N. S. 890, 29 L. J. Q. B. 177, 2 El. & El. 812, 8 W. R. 468), Stock, 85.
Ward *v.* Wilmington & W. R. Co. (49 Am. & Eng. R. Cas. 540, 109 N. Car. 358, 13 S. E. Rep. 926), Fires, 68.
Ward *v.* Wilmington & W. R. Co. (113 N. Car. 566, 18 S. E. Rep. 211), Animals, 62.
Ward's C. & P. Lake Co. *v.* Elkins (34 Mich. 439), Car. of M., 786.
Wardell *v.* Union Pac. R. Co. (1 Am. & Eng. R. Cas. 427, 103 U. S. 651), Contr., 52.
Wardell *v.* Union Pac. R. Co. (4 Dill. (U. S.) 330), Direct., 48.
Warden *v.* Louisville & N. R. Co. (53 Am. & Eng. R. Cas. 470, 94 Ala. 277, 10 So. Rep. 276), Employés, Inj. to, 726.
Warden *v.* Missouri Pac. R. Co. (35 Mo. App. 631), Car. of P., 263.
Warden *v.* Old Colony R. Co. (21 Am. & Eng. R. Cas. 612, 137 Mass. 204), Employés, Inj. to, 58.
Wardlaw *v.* South Carolina R. Co. (11 Rich. (So. Car.) 337), Car. of M., 354; Fires, 274.
Wardle *v.* New Orleans City R. Co. (13 Am. & Eng. R. Cas. 60, 35 La. Ann. 202), St. Rys., 327, 367, 445.
Wardrope *v.* Canadian Pac. R. Co. (7 Ont. 321), Words & Ph., 68.
Wardwell *v.* Chicago, M. & St. P. R. Co. (47 Am. & Eng. R. Cas. 482, 46 Minn. 514, 49 N. W. Rep. 206), Eject. Pass., 5, 8, 50.
Ware, In re (9 Ex. 395, 7 Railw. Cas. 780, 23 L. J. Ex. 145), Em. Dom., 1171, 1198.
Ware *v.* Aylesbury & B. R. Co. (28 L. T. 893, 21 W. R. 819), Em. Dom., 1209.
Ware *v.* Galveston, H. & S. A. R. Co. (2 Tex. App. (Civ. Cas.) 648), Assign., 22.
Ware *v.* Gowen (65 Me. 534), Attach., 34.
Ware *v.* London, B. & S. C. R. Co. (52 L. J. Ch. 198, 42 L. T. 541, 31 W. R. 228), Em. Dom., 1121.
Ware *v.* Swann (79 Ala. 330), Deeds, 3; Lim. of Ac., 22.
Wareham Bank *v.* Burt (5 Allen (Mass.) 113), Bills & N., 7.
Ware River R. Co. *v.* Vibbard (114 Mass. 458), Replev., 6; Sales, 11.
Waring *v.* Cheraw & D. R. Co. (16 So. Car. 416), Lim. of Ac., 12, 66.
Waring *v.* Pennsylvania R. Co. (76 Pa. St. 491), Trover, 9, 15.
Warmington *v.* Atchison, T. & S. F. R. Co. (46 Mo. App. 159), Contrib. Neg., 48, 87; Fel. Serv., 1, 56, 160, 268.
Warner *v.* Baltimore & O. R. Co. (31 Ohio St. 265), Evid., 224; Fences, 44.
Warner *v.* Burlington & M. R. R. Co. (22 Iowa 166), Bagg., 16.
Warner *v.* Callender (20 Ohio St. 190), Incorp., 10; Lim. of Ac., 42; Proc., 27; Stockh., 48; Subscr., 212; Words & Ph., 29.
Warner *v.* Erie R. Co. (39 N. Y. 468; reversing 49 Barb. 558), Employés, Inj. to, 55; Fel. Serv., 1, 56, 142, 202.
Warner *v.* Hudson River R. Co. (5 How. Pr. (N. Y.) 454), Constr. Rys., 93.
Warner *v.* New York C. & H. R. R. Co. (3 Int. Com. Rep. 74, 4 Int. Com. Com. 32), Int. Com., 81.
Warner *v.* New York C. R. Co. (44 N. Y. 465; reversing 45 Barb. 299), Contrib. Neg., 104; Cross., Inj. at, 172; Evid., 40.
Warner *v.* New York C. R. Co. (52 N. Y. 437, 4 Am. Ry. Rep. 516), Trial, 200.
Warner *v.* Pennsylvania R. Co. (13 Blatchf. (U. S.) 231), Rem. of C., 44, 58.

Warner *v.* People's St. R. Co. (141 Pa. St. 615, 21 Atl. Rep. 737), St. Rys., 456, 492.
Warner *v.* Railroad Co. (6 Phila. (Pa.) 537), Negl., 1.
Warner *v.* Railroad Co. (1 Pa. Dist. 247), Att'ys, 5.
Warner *v.* Railroad Co. (6 Phila. (Pa.) 537), Children, Inj. to, 75.
Warner *v.* Sandusky, M. & N. R. Co. (11 Am. & Eng. R. Cas. 417, 39 Ohio St. 70), Em. Dom., 201, 209.
Warner *v.* Steamship Illinois (17 Phila. (Pa.) 549), Car. of M., 93.
Warner *v.* Texas & P. R. Co. (54 Fed. Rep. 922, 2 U. S. App. 647, 4 C. C. A. 673), Contr., 18.
Warner *v.* Western N. C. R. Co. (25 Am. & Eng. R. Cas. 432, 94 N. Car. 250), Death, etc., 66, 129, 231; Employés, Inj. to, 101, 537.
Warner *v.* Western Transp. Co. (5 Robt. (N. Y.) 490), Car. of M., 202.
Warrell *v.* Wheeling, P. & B. R. Co. (130 Pa. St. 600, 18 Atl. Rep. 1014), Em. Dom., 426.
Warren *v.* Booth (51 Iowa 215), Attach., 22.
Warren *v.* First Div. St. P. & P. R. Co. (18 Minn. 384), Em. Dom., 35, 84, 501, 889.
Warren *v.* First Div. St. P. & P. R. Co. (21 Minn. 424, 19 Am. Ry. Rep. 227), Em. Dom., 761.
Warren *v.* Fitchburg R. Co. (8 Allen (Mass.) 227), Car. of P., 14, 26; Stat. & D., 98, 143; St. Rys., 329.
Warren *v.* Keokuk & D. M. R. Co. (41 Iowa 484), Animals, 139, 154, 306.
Warren *v.* King (108 U. S. 389, 2 Sup. Ct. Rep. 789), Stock, 5.
Warren *v.* Mobile & M. R. Co. (49 Ala. 582), Consol., 46.
Warren *v.* Southern Kan. R. Co. (31 Am. & Eng. R. Cas. 10, 37 Kan. 408, 15 Pac. Rep. 601), Car. of P., 379, 384, 387.
Warren *v.* Wisconsin Valley R. Co. (6 Biss. (U. S.) 425), Rem. of C., 15.
Warren & F. R. Co. *v.* Clarion L. & I. Co. (54 Pa. St. 28), Charters, 54; Injunc., 55.
Warren County *v.* Marcy (97 U. S. 96), Lis Pend., 2; Mun. Aid, 378.
Warren R. Co. *v.* State (29 N. J. L. 353), Cross. Sts. & H., 27.
Warsop *v.* Hastings (22 Minn. 437), Mun. Aid, 108, 117.
Warwick & B. C. Nav. Co. *v.* Birmingham C. Nav. Co. (3 Ry. & C. T. Cas. 113), Charges, 101, 102.
Warwick & W. R. Co., In re (2 DeG., F. & J. 354, 6 Jur. N. S. 1172, 30 L. J. Ch. 92, 3 L. T. 380), Dissol., 26.
Warwick Canal Co. *v.* Birmingham Canal Co. (L. R. 5 Ex. D. 1, 48 L. J. Ex. D. 550, 40 L. T. 846), Charges, 14.
Warwick R. Co. *v.* Cady (11 R. I. 131), Subscr., 34.
Washburn *v.* Cass County (3 Dill. (U. S.) 251), Consol., 34.
Washburn *v.* Chicago & N. W. R. Co. (68 Wis. 474, 32 N. W. Rep. 234), Pl., 3, 22.
Washburn *v.* Chicago, St. P., M. & O. R. Co. (84 Wis. 251, 54 N. W. Rep. 504), App., 38.
Washburn *v.* Milwaukee & L. W. R. Co. (20 Am. & Eng. R. Cas. 225, 59 Wis. 364, 18 N. W. Rep. 328), Em. Dom., 453, 570, 622, 650, 758, 775, 932, 947.
Washburn *v.* Nashville & C. R. Co. (3 Head (Tenn.) 638), Agency, 10; Car. of P., 497; Collis., 7; Employés, Inj. to, 430; Fel. Serv., 52, 106, 114, 200; Superint., 3.
Washburn & M. Mfg. Co. *v.* Providence & W. R. Co. (113 Mass. 490), Car. of M., 584.
Washington *v.* Baltimore & O. R. Co. (10 Am. & Eng. R. Cas. 749, 17 W. Va. 190), Animals, 233; Words & Ph., 111.
Washington *v.* Columbus & C. M. R. Co. (53 Fed. Rep. 673), Rem. of C., 40.
Washington *v.* Louisville & N. R. Co. (34 Ill. App. 658), Ex. & Ad., 8.
Washington *v.* Raleigh and G. R. Co. (37 Am. & Eng. R. Cas. 25, 101 N. Car. 239, 1 L. R. A. 830, 7 S. E. Rep. 789), Car. of M., 544; Car. of P., 508, 519.
Washington *v.* Staten Island R. T. R. Co. (52 N. Y. S. R. 29, 22 N. Y. Supp. 599), Cross., Inj. at, 225.
Washington, A. & G. R. Co. *v.* Alexandria & W. R. Co. (19 Gratt. (Va.) 592), Corp., 19; Deeds of Tr., 13; Trusts, 7.
Washington, A. & G. R. Co. *v.* Bradley (10 Wall. (U. S.) 299), Mort., 200.
Washington, A. & G. R. Co. *v.* Brown (17 Wall. (U. S.) 445, 3 Am. Ry. Rep. 413), Col. Pers., 1; Leases, 43; Proc., 48.
Washington, A. & G. R. Co. *v.* Martin (7 D. C. 120), Alex. & W. R. Co., 1, 2; Charters, 54; Intervent., 1; Stat., 11.
Washington & B. Turnpike Road *v.* Baltimore & O. R. Co. (10 Gill & J. (Md.) 392), Turnp., 1.
Washington & G. R. Co., In re (140 U. S. 91, 11 Sup. Ct. Rep. 673), Mand., 21.
Washington & G. R. Co. *v.* District of Columbia (11 Am. & Eng. R. Cas. 38, 10[illegible] U. S. 522, 2 Sup. Ct. Rep. 865), St. [illegible].
Washington & G. R. Co. *v.* Distri[illegible]olumbia (146 U. S. 227, 13 Sup. Ct.[illegible]p. 64), Fed. Cts., 18.
Washington & G. R. Co. *v.* District of Columbia (3 MacArth. (D. C.) 11), St. Rys., 144.
Washington & G. R. Co. *v.* District of Columbia (6 Mackey (D. C.) 570), Injunc., 47.
Washington & G. R. Co. *v.* Gladmon (15 Wall. (U. S.) 401, 4 Am. Ry. Rep. 500), Children, Inj. to, 73, 75, 174; Contrib. Neg., 105; St. Rys., 516.
Washington & G. R. Co. *v.* Harmon (58 Am. & Eng. R. Cas. 380, 147 U. S. 571, 13 Sup. Ct. Rep. 557), Car. of P., 234, 363, 614; Contrib. Neg., 83, 105; Dam., 42; Int., 5; St. Rys., 367, 423.
Washington & G. R. Co. *v.* McDade (44 Am. & Eng. R. Cas. 505, 135 U. S. 554, 10 Sup. Ct. Rep. 1044), Employés, Inj. to, 96, 351, 735.
Washington & G. R. Co. *v.* Varnell (98 U. S. 479), St. Rys., 444.
Washington & I. R. Co. *v.* Coeur d' Alene R. & N. Co. (52 Fed. Rep. 765), Pub. Lds., 43.
Washington & I. R. Co. *v.* Coeur d' Alene

R. & N. Co. (2 Idaho 991, 28 Pac. Rep. 394), Em. Dom., 241; Eq., 5.
Washington & I. R. Co. *v.* Northern Pac. R. Co. (38 Am. & Eng. R. Cas. 670, 2 Idaho 513, 21 Pac. Rep. 658), Land Grants, 70.
Washington & I. R. Co. *v.* Osborne (2 Idaho 527, 21 Pac. Rep. 421), Em. Dom., 444.
Washington Cemetery *v.* Prospect Park & C. I. R. Co. (68 N. Y. 591, 4 Abb. N. Cas. 15; affirming 7 Hun 655), Em. Dom., 131, 747; Sts. & H., 106.
Washington, C. & St. L. R. Co. *v.* Switzer (26 Gratt. (Va.) 661), Em. Dom., 509, 812, 813.
Washington City & P. L. R. Co. *v.* Southern Md. R. Co. (55 Md. 153), App., 12; Injunc., 49.
Washington County *v.* St. Louis & I. M. R. Co. (58 Mo. 372), Tax., 269, 320.
Washington County Com'rs *v.* Franklin R. Co. (34 Md. 159), Tax., 31, 61.
Washington County Court *v.* Thompson (13 Bush (Ky.) 239), Mun. Aid, 292.
Washington Fifth Baptist Church *v.* Baltimore & P. R. Co. (5 Mackey (D. C.) 269), New Tr., 29.
Washington Imp. Co. *v.* Kansas Pac. R. Co. (5 Dill. (U. S.) 489), Rem. of C., 17.
Washington, O. & W. R. Co. *v.* Cazenove (83 Va. 744, 3 S. E. Rep. 433), Judgm., 30; Subrog., 6.
Washington, O. & W. R. Co. *v.* Lewis (30 Am. & Eng. R. Cas. 468, 83 Va. 246, 2 S. E. Rep. 746), Mort., 256.
Washington St., A. & P. R. Co., In re (40 Am. & Eng. R. Cas. 588, 115 N. Y. 442, 22 N. E. Rep. 356, 26 N. Y. S. R. 504; affirming 52 Hun 311, 23 N. Y. S. R. 444), Consol., 7; Incorp., 2; Stat., 41.
Washington Tp. *v.* Coler (51 Fed. Rep. 362, 4 U. S. App. 622, 2 C. C. A. 272), Mun. Aid, 378.
Wasmer *v.* Delaware, L. & W. R. Co. (1 Am. & Eng. R. Cas. 122, 80 N. Y. 212, 36 Am. Rep. 608), Death, etc., 196.
Wason Mfg. Co *v.* Levis & K. R. Co. (7 Quebec L. R. 330), Exec., 1.
Waterbury's Appeal (57 Conn. 84, 17 Atl. Rep. 355), Bridges, 8, 66.
Waterbury *v.* Dry Dock, E. B. & B. R. Co. (54 Barb. (N. Y.) 388, 32 How. Pr. 193; reversing 30 How. Pr. 39), Location, etc., 20.
Waterbury *v.* Hartford, P. & F. R. Co. (27 Conn. 146), Em. Dom., 883.
Waterbury *v.* Merchants' Union Exp. Co. (3 Abb. Pr. N. S. (N. Y.) 163), Dissol., 14; Exp. Cos., 1.
Waterbury *v.* New York C. & H. R. R. Co. (21 Blatchf. (U. S.) 314, 17 Fed. Rep. 671), Agency, 22; Passes, 10.
Waterbury & E. R. Ferry Co. *v.* Dry Dock, E. B. & B. R. Co. (54 Barb. (N. Y.) 388, 32 How. Pr. 193; reversing 30 How. Pr. 39), St. Rys., 81.
Waterford & L. R. Co. *v.* Great Western R. Co. (3 Ry. & C. T. Cas. 546), Arb., 1.
Waterford, D. & L. R. Co., In re (L. R. 5 Ir. 584), Divid., 3.
Waterford, L. & F. R. Co., In re (4 Ir. Eq. 490, 19 W. R. 145), Dissol., 26.
Waterford, W., W. & D. R. Co. *v.* Dalbiac (6 Railw. Cas. 753, 6 Ex. 443, 20 L. J. Ex. 227), Subscr., 51.
Waterford, W., W. & D. R. Co. *v.* Pidcock (8 Ex. 279), 7 Railw. Cas. 439, 17 Jur. 26, 22 L. J. Ex. 146), Subscr., 141.
Waterhouse *v.* Comer (53 Am. & Eng. R. Cas. 329, 55 Fed. Rep. 149), Int. Com., 55; Receiv., 56.
Waterhouse *v.* London & S. W. R. Co. (41 L. T. 553), Stock, 88.
Waterloo *v.* Waterloo St. R. Co. (29 Am. & Eng. R. Cas. 601, 71 Iowa 193, 32 N. W. Rep. 329), St. Rys., 265.
Waterman *v.* Chicago & A. R. Co. (34 Ill. App. 268; affirmed in 139 Ill. 658, 29 N. E. Rep. 689), Pres., 13.
Waterman *v.* Chicago & A. R. Co. (52 Am. & Eng. R. Cas. 592, 82 Wis. 613, 52 N. W. Rep. 247, 1136), App., 64; Contrib. Neg., 105; Dam., 44, 70, 71; Evid., 255; Trial, 90; Witn., 68, 152, 158.
Waterman *v.* Chicago & I. R. Co. (139 Ill. 658, 29 N. E. Rep. 689), Direct., 24; Quo War., 12.
Waterman *v.* Chicago, M. & St. P. R. Co. (18 Am. & Eng. R. Cas. 486, 61 Wis. 464, 21 N. W. Rep. 611), Parties, 3; Words & Ph., 237.
Waterman *v.* Connecticut & P. R. R. Co. (31 Vt. 610), Em. Dom., 989; Flood. Lds., 33.
Waterman *v.* Troy & G. R. Co. (8 Gray (Mass.) 433), Subscr., 43.
Waterman *v.* Vermont C. R. Co. (25 Vt. 707), Car. of L. S., 137.
Waters *v.* Moss (12 Cal. 535), Animals, 244, 411.
Waters *v.* Richmond & D. R. Co. (108 N. Car. 349, 12 S. E. Rep. 950), Contr., 109; Sales, 15.
Waters *v.* Richmond & D. R. Co. (110 N. Car. 338, 14 S. E. Rep. 802), Car. of M., 182, 737.
Watford & R. R. Co. *v.* London & N. W. R. Co. (L. R. 8 Eq. 231, 38 L. J. Ch. 449, 17 W. R. 814, 21 L. T. N. S. 81), Arb., 4.
Watier *v.* Chicago, St. P., M. & O. R. Co. (13 Am. & Eng. R. Cas. 582, 31 Minn. 91, 16 N. W. Rep. 537), Animals, 277, 281.
Watjen *v.* Green (46 Am. & Eng. R. Cas. 343, 48 N. J. Eq. 322, 21 Atl. Rep. 1028), Bonds, 15.
Watkin *v.* West Philadelphia Pass. R. Co. (1 Pa. Dist. 463), Elec. Rys., 3, 6, 9; St. Rys., 200, 256.
Watkinds *v.* Southern Pac. R. Co. (38 Fed. Rep. 711), Contrib. Neg., 81; Pl., 51, 73.
Watkinds *v.* Southern Pac. R. Co. (14 Sawy. (U. S.) 30), Contrib. Neg., 77, 78; Pl., 90.
Watkins *v.* Atlantic Ave. R. Co. (20 Hun (N. Y.) 237), St. Rys., 358.
Watkins *v.* Great Northern R. Co. (16 Q. B. 961, 20 L. J. Q. B. 391), Actions, 1; Priv. Ways, 10.
Watkins *v.* Great Western R. Co. (37 L. T. 193, 25 W. R. 905, 46 L. J. C. P. 817), Stat. & D., 112.
Watkins *v.* New York C. & H. R. R. Co. (16

N. Y. S. R. 592, 3 N. Y. Supp. 946), Bagg., 67.
Watkins *v.* Pennsylvania R. Co. (D. C.) (52 Am. & Eng. R. Cas. 159, 21 D. C. 1), Assault, 2; Car. of P., 76; Tickets & F., 36.
Watkins *v.* St. Louis, I. M. & S. R. Co. (44 Mo. App. 245), Car. of M., 590; Witn., 120.
Watkins *v.* Terre Haute & I. R. Co. (8 Mo. App. 570), Car. of M., 547.
Watkinson *v.* Wrexham, M. & C. Q. R. Co. (3 Ry. & C. T. Cas. 5), Charges, 117, 127.
Watkinson *v.* Wrexham, M. & C. Q. R. Co. (3 Ry. & C. T. Cas. 164), Leases, 132; Ry. Com'rs, 6.
Watkinson *v.* Wrexham, M. & C. Q. R. Co. (3 Ry. & C. T. Cas. 446), Car. of M., 536; Charges, 108.
Watley *v.* Mobile & O. R. Co. (Miss.) (9 So. Rep. 445), Children, Inj. to, 12.
Watson *v.* Ambergate, N. & B. R. Co. (15 Jur. 448), Car. of M., 587, 808.
Watson *v.* Broadway & S. A. R. Co. (6 N. Y. S. R. 538, 43 Hun 636, mem.; affirmed in 110 N. Y. 677, mem., 18 N. E. Rep. 482, mem.), St. Rys., 456.
Watson *v.* Camden & A. R. Co. (58 Am. & Eng. R. Cas. 377, 55 N. J. L. 125, 26 Atl. Rep. 136), Car. of P., 350, 441.
Watson *v.* Chicago, M. & St. P. R. Co. (46 Am. & Eng. R. Cas. 543, 46 Minn. 321, 48 N. W. Rep. 1129), Ejectm., 34; Em. Dom., 1017; Sts. & H., 2, 3.
Watson *v.* Cincinnati, I., St. L. & C. R. Co. (23 Fed. Rep. 443), Pat. for Inv., 35.
Watson *v.* Cincinnati, I., St. L. & C. R. Co. (132 U. S. 161, 10 Sup. Ct. Rep. 45), Pat. for Inv., 35.
Watson *v.* East Tenn., V. & G. R. Co. (92 Ala. 320, 8 So. Rep. 770; further appeal 94 Ala. 634), Car. of P., 269.
Watson *v.* Forty-second St. & G. S. F. R. Co. (15 Am. & Eng. R. Cas. 486, 93 N. Y. 522; affirming 16 J. & S. 44), Lim. of Ac., 60.
Watson *v.* Georgia Pac. R. Co. (81 Ga. 476, 7 S. E. Rep. 854), Car. of P., 426.
Watson *v.* Hoosac Tunnel Line Co. (13 Mo. App. 263), Agency, 13; Assign., 2.
Watson *v.* Houston & T. C. R. Co. (11 Am. & Eng. R. Cas. 213, 58 Tex. 434), Employés, Inj. to, 193, 289, 597; Trial, 151.
Watson *v.* Manhattan R. Co. (21 J. & S. (N. Y.) 137, 17 Abb. N. Cas. 289), Elev. Rys., 62, 170, 171.
Watson *v.* Memphis & C. R. Co. (9 Heisk. (Tenn.) 255, 19 Am. Ry. Rep. 256), Stat. Agts., 3; Words & Ph., 7.
Watson *v.* Mercer (8 Pet. (U. S.) 88), Mun. Aid, 22.
Watson *v.* Metropolitan El. R. Co. (25 J. & S. 364, 29 N. Y. S. R. 513, 8 N. Y. Supp. 533), Elev. Rys., 36, 85.
Watson *v.* Milwaukee & M. R. Co. (10 Am. & Eng. R. Cas. 168, 57 Wis. 332, 15 N. W. Rep. 468), Em. Dom., 402, 453, 622, 624, 628, 881, 945; Trial, 166, 204; Witn., 97.
Watson *v.* New York C. R. Co. (47 N. Y. 157, 1 Am. Ry. Rep. 22; affirming 6 Abb. Pr. N. S. 91, Sheld. 159), Em. Dom., 258.
Watson *v.* New York, W. S. & B. R. Co. (64 How. Pr. (N. Y.) 220), Em. Dom., 859.
Watson *v.* North British R. Co. (3 Sc. Sess. Cas. (4th series) 637, 3 Ry. & C. T. Cas. xvii), Car. of M., 30.
Watson *v.* Northern R. Co. (24 U. C. Q. B. 98), Car. of P., 498; New Tr., 19.
Watson *v.* Northern R. Co. (5 Ont. 550), Em. Dom., 1216.
Watson *v.* Pittsburg & C. R. Co. (2 Pittsb. (Pa.) 99), Em. Dom., 42.
Watson *v.* Pittsburg & C. R. Co. (37 Pa. St. 469), Em. Dom., 633, 647, 667, 691; Witn., 109.
Watson *v.* Railroad Co. (15 Phila. (Pa.) 224), Em. Dom., 838.
Watson *v.* St. Paul City R. Co. (41 Am. & Eng. R. Cas. 114, 42 Minn. 46, 43 N. W. Rep. 904), Cable Rys., 9.
Watson *v.* San Francisco & H. B. R. Co. (50 Cal. 523), Trial, 195.
Watson *v.* Tripp (11 R. I. 98), St. Rys., 175.
Watson *v.* Wabash, St. L. & P. R. Co. (19 Am. & Eng. R. Cas. 114, 66 Iowa 164, 23 N. W. Rep. 380), Imp. Neg., 7; Stat. & D., 67, 143; Tresp., Inj. to, 9.
Watt's Appeal (78 Pa. St. 370), Direct., 40, 50; Stockh., 99; Ult. Vir., 6, 15.
Watt *v.* Hestonville, M. & F. Pass. R. Co. (1 Brews. (Pa.) 418), Mort., 16.
Watt *v.* Passenger R. Co. (6 Phila. (Pa.) 386), Mort., 76.
Watterson *v.* Allegheny Valley R. Co. (74 Pa. St. 208, 8 Am. Ry. Rep. 30), Release, 28; Stat. & D., 43.
Watts *v.* Boston & L. R. Corp. (106 Mass. 466, 8 Am. Ry. Rep. 50), Car. of M., 95.
Watts *v.* Hart (7 Wash. 178, 34 Pac. Rep. 423, 771), Employés, Inj. to, 48, 95, 213, 283; Fel. Serv., 266.
Watts *v.* Norfolk & W. R. Co. (57 Am. & Eng. R. Cas. 694, 39 W. Va. 196, 19 S. E. Rep. 521), Blasting, 4; Constr. Rys., 10; Dam., 48, 87; Em. Dom., 220; Nuis., 11.
Watts *v.* Richmond & D. R. Co. (89 Ga. 277, 15 S. E. Rep. 365), Employés, Inj. to, 721; Tresp., Inj. to, 19.
Wattson *v.* Philadelphia & T. R. Co. (7 Phila. (Pa.) 249), Animals, 466.
Waukon & M. R. Co. *v.* Dwyer (49 Iowa 121), Subscr., 45.
Way *v.* Chicago & N. W. R. Co. (76 Iowa 393, 41 N. W. Rep. 51), Employés, Inj. to, 343.
Way *v.* Chicago, R. I. & P. R. Co. (64 Iowa 48, 52 Am. Rep. 431, 19 N. W. Rep. 828), Assign., 7; Car. of P., 559.
Way *v.* Chicago, R. I. & P. R. Co. (34 Am. & Eng. R. Cas. 286, 73 Iowa 463, 35 N. W. Rep. 525), Agency, 84; Car. of P., 197; Pl., 27.
Way *v.* Great Eastern R. Co. (1 Q. B. D. 692, 45 L. J. Q. B. 874, 3 Ry. & C. T. Cas. xii), Agency, 90; Car. of M., 524; Estop., 30.
Way *v.* Illinois C. R. Co. (35 Iowa 585, 5 Am. Ry. Rep. 300), Trial, 183.
Way *v.* Illinois C. R. Co. (40 Iowa 341, 8 Am. Ry. Rep. 400), Employés, Inj. to, 223, 590, 622.

Wayland *v.* Moseley (5 Ala. 430), Bills of L., 12, 13, 34, 43.
Wayland *v.* St. Louis, K. C. & N. R. Co. (11 Am. & Eng. R. Cas. 543, 75 Mo. 548), Flood. Lds., 66.
Wayne *v.* Sherwood (14 Hun (N. Y.) 423; affirmed in 76 N. Y. 599, mem.), Mun. Aid, 226.
Wayne County Com'rs *v.* Delaware & H. Canal Co. (15 Pa. St. 351), Tax., 168.
Wayt *v.* Burlington, C. R. & M. R. Co. (45 Iowa 217), New Tr., 24.
Wayzata *v.* Great Northern R. Co. (46 Minn. 505, 49 N. W. Rep. 205), Estop., 1; Sts. & H., 7.
Wayzata *v.* Great Northern R. Co. (50 Minn. 438, 52 N. W. Rep. 913), Sts. & H., 14, 350.
Wead *v.* St. Johnsbury & L. C. R. Co. (64 Vt. 52, 24 Atl. Rep. 361), Cross. Sts. & H., 119; Em. Dom., 163, 166, 718; Evid., 182; Flood. Lds., 66; Leases, 57; Sts. & H., 196.
Weane *v.* Keokuk & D. M. R. Co. (45 Iowa 246), Witn., 144.
Wear *v.* Jacksonville & S. R. Co. (24 Ill. 593), Subscr., 66.
Weatherford, M. W. & N. W. R. Co. *v.* Granger (Tex.) (22 S. W. Rep. 70), Att'ys, 21; Incorp., 6.
Weaver *v.* Fairchild (50 Cal. 360), Land Grants, 50.
Weaver *v.* Huntingdon & B. T. M. R. & C. Co. (50 Pa. St. 314), Exec., 11.
Weaver *v.* Rome, W. & O. R. Co. (3 T. & C. (N. Y.) 270), Eject. Pass., 12.
Webb *v.* Baltimore & E. S. R. Co. (54 Am. & Eng. R. Cas. 202, 77 Md. 92, 26 Atl. Rep. 113), Subscr., 28, 81, 131, 210.
Webb *v.* Denver & R. G. W. R. Co. (44 Am. & Eng. R. Cas. 683, 7 Utah 17, 24 Pac. Rep. 616), Death, etc., 346.
Webb *v.* Denver & R. G. W. R. Co. (7 Utah 363, 26 Pac. Rep. 981), Death, etc., 255, 429; Fel. Serv., 196, 206, 274.
Webb *v.* East Tenn., V. & G. R. Co. (42 Am. & Eng. R. Cas. 44, 88 Tenn. 119, 12 S. W. Rep. 428), Death, etc., 90; Sts. & H., 335.
Webb *v.* Great Western R. Co. (26 W. R. 111), Lim. of Liab., 19.
Webb *v.* Lafayette County (67 Mo. 353), Mun. Aid, 40, 331.
Webb *v.* Portland & K. R. Co. (57 Me. 117), Cross., Inj. at, 1, 6, 7, 75, 145, 218; Leases, 108; Pl., 139.
Webb *v.* Richmond & D. R. Co. (97 N. Car. 387, 2 S. E. Rep. 440), Fel. Serv., 1, 217.
Webb *v.* Rome, W. & O. R. Co. (49 N. Y. 420, 4 Am. Ry. Rep. 547; affirming 3 Lans. 453), Fires, 18, 29, 31, 79, 84, 318; Words & Ph., 5.
Webb *v.* Shropshire R. Co. ([1893] 3 Ch. 307), Contr., 50; Stock, 9.
Webb *v.* Vermont C. R. Co. (20 Blatchf. (U. S.) 218, 9 Fed. Rep. 703), Mort., 180.
Webber *v.* Eastern R. Co. (2 Metc. (Mass.) 147), Em. Dom., 579, 621; Witn., 149.
Webber *v.* Great Western R. Co. (3 H. & C. 771, 34 L. J. Ex. 170, 13 W. R. 755, 12 L. T. 498), Car. of M., 611.
Webber *v.* Great Western R. Co. (4 H. & C. 582), Car. of M., 611.
Webber *v.* Herkimer & M. St. R. Co. (34 Am. & Eng. R. Cas. 580, 109 N. Y. 311, 16 N. E. Rep. 358, 15 N. Y. S. R. 262; affirming 35 Hun 44), Lim. of Ac., 60.
Weber *v.* Kansas City Cable R. Co. (41 Am. & Eng. R. Cas. 117, 100 Mo. 194, 12 S. W. Rep. 804, 13 S. W. Rep. 587, 7 L. R. A. 819), Cable Rys., 10, 13; Car. of P., 219, 348, 423; Contrib. Neg., 82, 84, 87; Negl., 29.
Weber *v.* Lee County (6 Wall. (U. S.) 210), Mun. Aid, 445.
Weber *v.* Morris & E. R. Co. (35 N. J. L. 409), Fire Ins., 71, 168, 169, 181.
Weber *v.* Morris & E. R. Co. (36 N. J. L. 213, 12 Am. Ry. Rep. 411), Fires, 362; Judgm., 22.
Weber *v.* New York C. & H. R. R. Co. (58 N. Y. 451), Contrib. Neg., 90; Cross., Inj. at, 3, 65, 245.
Weber *v.* New York C. & H. R. R. Co. (67 N. Y. 587), Collis., 13; Evid., 294.
Webster *v.* Cedar Rapids & St. P. R. Co. (27 Iowa 315), App., 105.
Webster *v.* Fitchburg R. Co. (58 Am. & Eng. R. Cas. 1, 161 Mass. 298, 37 N. E. Rep. 165), Car. of P., 11.
Webster *v.* Hudson River R. Co. (38 N. Y. 260), Imp. Neg., 19.
Webster *v.* Kansas City & S. R. Co. (116 Mo. 114, 22 S. W. Rep. 474), Em. Dom., 423, 603, 641, 760, 919.
Webster *v.* Petre (L. R. 4 Ex. D. 127, 27 W. R. 662), Indem. Bonds, 8.
Webster *v.* Rome, W. & O. R. Co. (115 N. Y. 112, 21 N. E. Rep. 725, 23 N. Y. S. R. 778; affirming 40 Hun 161), Car. of P., 497; Collis., 16; Negl., 22.
Wedekind *v.* Southern Pac. Co. (20 Nev. 292, 21 Pac. Rep. 682), Car. of P., 648.
Wedekind *v.* Southern Pac. Co. (36 Fed. Rep. 279, 13 Sawy. (U. S.) 475), Rem. of C., 45.
Wedgwood *v.* Chicago & N. W. R. Co. (41 Wis. 478), Employés, Inj. to, 14, 118, 529.
Wedgwood *v.* Chicago & N. W. R. Co. (44 Wis. 44, 19 Am. Ry. Rep. 393), App., 83; Contrib. Neg., 115; Employés, Inj. to, 144, 689; Negl., 114.
Weed *v.* Barney (45 N. Y. 344), Car. of M., 368.
Weed *v.* Little Falls & D. R. Co. (31 Minn. 154, 16 N. W. Rep. 851), Direct., 49.
Weed *v.* Panama R. Co. (17 N. Y. 362; affirming 5 Duer 193), Agency, 82.
Weed *v.* Saratoga & S. R. Co. (19 Wend. (N. Y.) 534), Bagg., 107; Car. of P., 508.
Weeden *v.* Lake Erie & M. R. R. Co. (14 Ohio 563), Assump., 4; Sales, 16.
Weegar *v.* Grand Trunk R. Co. (23 Ont. 436), New Tr., 18.
Week *v.* Fremont Mill Co. (3 Wash. 629, 29 Pac. Rep. 215), Employés, Inj. to, 262.
Weeks *v.* Bridgman (41 Minn. 352, 43 N. W. Rep. 81), Land Grants, 35.
Weeks *v.* Bridgman (46 Minn. 390, 49 N. W. Rep. 191; former appeal 41 Minn. 352, 43 N. W. Rep. 81), Land Grants, 110.
Weeks *v.* New Orleans & C. R. Co. (32 La.

Ann. 615), Contrib. Neg., 28; Employés, Inj. to, 557.
Weeks *v.* New Orleans, S. F. & L. R. Co. (40 La. Ann. 800, 8 Am. St. Rep. 560, 5 So. Rep. 72), Car. of P., 448, 453.
Weeks *v.* New York, N. H. & H. R. Co. (72 N. Y. 50, 28 Am. Rep. 104; affirming 9 Hun 669), Bagg., 85; Car. of P., 325, 329.
Weeks *v.* Propert (42 L. J. C. P. 129, 21 W. R. 676, L. R. 8 C. P. 427), Direct., 38, 63.
Weems *v.* Georgia Midland & G. R. Co. (84 Ga. 356, 11 S. E. Rep. 503), Subscr., 143, 331.
Weems *v.* Georgia Midland & G. R. Co. (88 Ga. 303, 14 S. E. Rep. 583), Subscr., 108.
Weems *v.* Lathrop (42 Tex. 207), Receiv., 33.
Weetjen *v.* St. Paul & P. R. Co. (4 Hun (N. Y.) 529), Mort., 154.
Weger *v.* Pennsylvania R. Co. (55 Pa. St. 460), Fel. Serv., 1, 37, 64, 142, 150, 343.
Wehrhane *v.* Nashville, C. & St. L. R. Co. (4 N. Y. S. R. 541, 42 Hun 660), Charters, 52, 151; Pres., 9.
Weideman *v.* Tacoma R. & M. Co. (7 Wash. 517, 35 Pac. Rep. 414), Evid., 175, 283.
Weidenfeld *v.* Allegheny & K. R. Co. (47 Fed. Rep. 11), Stockh., 127.
Weidenfeld *v.* Sugar Run R. Co. (51 Am. & Eng. R. Cas. 505, 48 Fed. Rep. 615), Em. Dom., 179; Fed. Cts., 8; Location, etc., 2; Stockh., 79.
Weidner *v.* Rankin (26 Ohio St. 522), Death, etc., 67, 95.
Weightman *v.* Clark (103 U. S. 256), Mun. Aid, 11.
Weightman *v.* Louisville, N. O. & T. R. Co. (70 Miss. 563, 12 So. Rep. 586), Car. of P., 546.
Weil *v.* Dry Dock, E. B. & B. R. Co. (119 N. Y. 147, 23 N. E. Rep. 487, 28 N. Y. S. R. 944; reversing 25 J. & S. 188, 25 N. Y. S. R. 698, 5 N. Y. Supp. 833), Children, Inj. to, 114, 141.
Weil *v.* Express Co. (7 Phila. (Pa.) 88), Exp. Cos., 39, 40, 84.
Weil *v.* Express Co. (7 Phila. (Pa.) 245), Negl., 63.
Weil *v.* Greene County (69 Mo. 281), Mun. Aid, 215; Pl., 177.
Weil *v.* Merchants' D. & T. Co. (7 Daly (N. Y.) 456), Car. of M., 576.
Weiler *v.* Isley (6 N. Y. S. R. 595), Employés, Inj. to, 94.
Weiler *v.* Manhattan R. Co. (53 Hun 372, 25 N. Y. S. R. 543, 6 N. Y. Supp. 320; affirmed in 127 N. Y. 669), App., 81; Dam., 44; Elev. Rys., 119, 214; Evid., 70.
Weiller *v.* Pennsylvania R. Co. (42 Am. & Eng. R. Cas. 390, 134 Pa. St. 310, 19 Atl. Rep. 702), Bills of L., 81.
Weinberg *v.* Albemarle & R. R. Co. (18 Am. & Eng. R. Cas. 597, 91 N. Car. 31), Car. of M., 682.
Weinberg *v.* National Steamship Co. (8 N. Y. Supp. 195), Lim. of Liab., 27.
Weinckie *v.* New York C. & H. R. R. Co. (15 N. Y. Supp. 689, 61 Hun 619, mem., 39 N. Y. S. R. 584; affirmed in 133 N. Y. 656, mem., 31 N. E. Rep. 625, mem.), Em. Dom., 865; Mun. Corp., 55; Stat. & D., 12, 23.
Weinecke *v.* State (34 Neb. 14, 51 N. W. Rep. 307), Crim. L., 35.
Weinman *v.* Wilkinsburg & E. L. Pass. R. Co. (118 Pa. St. 192, 11 Cent. Rep. 54, 12 Atl. Rep. 288, 20 W. N. C. 455), Partn., 4; St. Rys., 68; Subscr., 175.
Weir *v.* Burlington & M. R. R. Co. (19 Neb. 212, 26 N. W. Rep. 627), New Tr., 100.
Weir *v.* Canadian Pac. R. Co. (16 Ont. App. 100), Cross., Inj. at, 264.
Weir *v.* Express Co. (5 Phila. (Pa.) 355), Exp. Cos., 68.
Weir *v.* Morden (21 Fed. Rep. 243), Pat. for Inv., 45.
Weir *v.* St. Paul, S. & T. F. R. Co. (18 Minn. 155), Em. Dom., 35, 57, 58, 72, 84, 405, 740, 941.
Weisbrod *v.* Chicago & N. W. R. Co. (20 Wis. 419), Att'ys, 8; Estop., 21.
Weisbrod *v.* Chicago & N. W. R. Co. (21 Wis. 602), Em. Dom., 1023.
Weiss *v.* Pennsylvania R. Co. (79 Pa. St. 387), Death, etc., 233.
Weissner *v.* St. Paul City R. Co. (47 Minn. 468, 50 N. W. Rep. 606), Children, Inj. to, 58, 116.
Weitz *v.* Mound City R. Co. (53 Mo. App. 39), Phys. Exam., 5.
Welch *v.* Abbot (72 Wis. 512, 40 N. W. Rep. 223), Animals, 531.
Welch *v.* Boston & A. R. Co. (41 Conn. 333, 6 Am. Ry. Rep. 95), Car. of L. S., 72.
Welch *v.* Boston & P. R. Corp. (14 R. I. 609), Mal. Pros., 14.
Welch *v.* Hannibal & St. J. R. Co. (20 Mo. App. 477), Animals, 63.
Welch *v.* Hannibal & St. J. R. Co. (26 Mo. App. 358), Animals, 56; Evid., 234.
Welch *v.* London & N. W. R. Co. (34 W. R. 166, 6 Ry. & C. T. Cas. lxix), Bagg., 50.
Welch *v.* Milwaukee & St. P. R. Co. (27 Wis. 108, 2 Am. Ry. Rep. 1), Em. Dom., 451, 456.
Welch *v.* New York C. & H. R. R. Co. (43 N. Y. S. R. 958, 63 Hun 625, 17 N. Y. Supp. 342), Employés, Inj. to, 82, 275.
Welch *v.* Northeastern R. Co. (12 Rich. (So. Car.) 290), Costs, 5.
Welch *v.* Old Dominion M. & R. Co. (31 N. Y. S. R. 916, 10 N. Y. Supp. 174), Incorp., 1.
Welch *v.* Post (5 Am. & Eng. R. Cas. 158, 99 Ill. 471), Charters, 126; Mun. Aid, 266, 399.
Welch *v.* Pullman Palace Car Co. (16 Abb. Pr. N. S. (N. Y.) 352, 1 Sheld. 457), Sleep. Car Cos., 25, 26.
Weld *v.* Brooks (152 Mass. 207, 25 N. E. Rep. 719), Trial, 167.
Weld *v.* London & S. W. R. Co. (9 Jur. N. S. 510, 11 W. R. 448, 8 L. T. 13, 33 L. J. Ch. 142, 32 Beav. 340), Em. Dom., 1137.
Weld *v.* Missouri Pac. R. Co. (39 Kan. 63, 17 Pac. Rep. 306), Employés, Inj. to, 565, 571; Witn., 143.
Weld *v.* New York, L. E. & W. R. Co. (52 N. Y. S. R. 184, 22 N. Y. Supp. 974), Car. of P., 609; Husb. & W., 24.
Weld *v.* Southwestern R. Co. (32 Beav. 340,

33 L. J. Ch. 142, 9 Jur. N. S. 510), Em. Dom., 1087, 1140.
Weldon *v.* Harlem R. Co. (5 Bosw. (N. Y.) 576), St. Rys., 483.
Welfare *v.* London & B. R. Co. (38 L. J. Q. B. 241, L. R. 4 Q. B. 693, 17 W. R. 1065, 20 L. T. 743), Stat. & D., 81.
Welland County *v.* Buffalo & L. H. R. Co. (30 U. C. Q. B. 147), Em. Dom., 1276.
Welland R. Co. *v.* Berrie (6 H. & N. 416, 30 L. J. Ex. 163, 9 W. R. 385, 3 L. T. 811), Subscr., 99.
Welland R. Co. *v.* Blake (6 H. & N. 410, 30 L. J. Ex. 161, 9 W. R. 386, 3 L. T. 678, 7 Jur. N. S. 373), Subscr., 96.
Wellcome *v.* Leeds (51 Me. 313), Andros. R. Co., 1; Cross. Sts. & H., 4.
Wellenhoffer *v.* New York, L. E. & W. R. Co. (50 N. Y. S. R. 111, 21 N. Y. Supp. 866, 66 Hun 634, mem.), Cross., Inj. at, 107.
Weller *v.* London, B. & S. C. R. Co. (L. R. 9 C. P. 126, 43 L. J. C. P. 137, 22 W. R. 302, 29 L. T. 888), Car. of P., 261.
Welles *v.* New York C. R. Co. (26 Barb. (N. Y.) 641, 24 N. Y. 181), Passes, 35.
Welles *v.* Northern C. R. Co. (150 Pa. St. 620, 25 Atl. Rep. 51), Fences, 16.
Wellington *v.* Boston & M. R. Co. (158 Mass. 185, 33 N. E. Rep. 393), Em. Dom., 469, 534, 563.
Wellington *v.* Norwich & W. R. Co. (107 Mass. 582), Charges, 46.
Wellman *v.* Chicago & G. T. R. Co. (45 Am. & Eng. R. Cas. 249, 83 Mich. 592, 47 N. W. Rep. 489), Charges, 25; Stat., 8.
Wellman *v.* Oregon S. L. & U. N. R. Co. (21 Oreg. 530, 28 Pac. Rep. 625), Employés, Inj. to, 45; Fel. Serv., 197.
Wells *v.* Alabama G. S. R. Co. (40 Am. & Eng. R. Cas. 645, 67 Miss. 24, 6 So. Rep. 737), Agency, 38; Car. of P., 245, 253; Pl., 98; Stat. & D., 9.
Wells *v.* American Exp. Co. (44 Wis. 342), Agency, 43; Exp. Cos., 26, 40.
Wells *v.* American Exp. Co. (49 Wis. 224, 5 N. W. Rep. 333), Assump., 4; Pl., 159.
Wells *v.* American Exp. Co. (6 Am. & Eng. R. Cas. 298, 55 Wis. 23, 11 N. W. Rep. 537, 12 N. W. Rep. 441, 42 Am. Rep. 695), Actions, 3; Exp. Cos., 39.
Wells *v.* Brooklyn City R. Co. (58 Hun 389, 34 N. Y. S. R. 636, 12 N. Y. Supp. 67), St. Rys., 507.
Wells *v.* Burlington, C. R. & N. R. Co. (2 Am. & Eng. R. Cas. 243, 56 Iowa 520, 9 N. W. Rep. 364), Employés, Inj. to, 237; Evid., 116.
Wells *v.* Carr (11 Sawy. (U. S.) 272), Bills & N., 6.
Wells *v.* Central Vt. R. Co. (14 Blatchf. (U. S.) 426), Tax., 75.
Wells *v.* Davis (105 N. Y. 670, 1 Silv. App. 457, 12 N. E. Rep. 42, 8 N. Y. S. R. 10; modifying 34 Hun 628, mem.), Int., 18.
Wells *v.* Denver & R. G. W. R. Co. (7 Utah 482, 27 Pac. Rep. 688), App., 61; Death, etc., 270, 277, 326.
Wells *v.* Eastman (61 N. H. 507), Witn., 106.
Wells *v.* East Tenn., V. & G. R. Co. (74 Ga. 548), Attach., 58.
Wells *v.* Kavanagh (70 Iowa 519, 30 N. W. Rep. 871), Constr. Rys., 39.
Wells *v.* London, T. & S. R. Co. (37 L. T. 302, 25 W. R. 325), Priv. Ways, 7, 17.
Wells *v.* Maine Steamship Co. (4 Cliff. (U. S.) 228), Car. of M., 299.
Wells *v.* Martin (32 Mich. 478), Constr. Rys., 85.
Wells *v.* Mehl (25 Kan. 205), Constr. Rys., 39.
Wells *v.* Milwaukee & St. P. R. Co. (30 Wis. 605, 7 Am. Ry. Rep. 279), Constr. Rys., 24.
Wells *v.* Missouri Pac. R. Co. (110 Mo. 286, 19 S. W. Rep. 530), Stat., 33, 36.
Wells *v.* New Haven & N. Co. (44 Am. & Eng. R. Cas. 491, 151 Mass. 46, 23 N. E. Rep. 724), Lim. of Ac., 56.
Wells *v.* New York C. R. Co. (24 N. Y. 181; affirming 26 Barb. 641), Passes, 26.
Wells *v.* Northern Pac. R. Co. (10 Sawy. (U. S.) 441, 23 Fed. Rep. 469), Exp. Cos., 1, 7; Int. Com., 214.
Wells *v.* Northern R. Co. (35 Am. & Eng. R. Cas. 314, 14 Ont. 594), Priv. Ways, 2, 10.
Wells *v.* Oregon & C. R. Co. (16 Am. & Eng. R. Cas. 87, 18 Fed. Rep. 667, 9 Sawy. (U. S.) 9), Exp. Cos., 9.
Wells *v.* Oregon R. & N. Co. (8 Sawy. (U. S.) 600, 15 Fed. Rep. 561), Charges, 24; Exp. Cos., 12; Name, 1; Words & Ph., 88.
Wells *v.* Oregon R. & N. Co. (16 Am. & Eng. R. Cas. 71, 9 Sawy. (U. S.) 370, 18 Fed. Rep 517), Exp. Cos., 7.
Wells *v.* Oregon R. & N. Co. (16 Am. & Eng. R. Cas. 87, 18 Fed. Rep. 667, 9 Sawy. (U. S.) 426), Discrim., 61.
Wells *v.* Oregon R. & N. Co. (9 Sawy. (U. S.) 601, 19 Fed. Rep. 20), Exp. Cos., 9.
Wells *v.* Oregon R. & N. Co. (12 Sawy. (U. S.) 519, 32 Fed. Rep. 51), Car. of M., 276, 288.
Wells *v.* Pacific R. Co. (35 Mo. 164), Med. Serv., 17.
Wells *v.* Pontotoc County Sup'rs (2 Am. & Eng. R. Cas. 605, 102 U. S. 625), Mun. Aid, 273.
Wells *v.* Rodgers (60 Mich. 525, 27 N. W. Rep. 671), Consol., 10.
Wells *v.* Shook (8 Blatchf. (U. S.) 254), Rev., 7.
Wells *v.* Sibley (31 N. Y. S. R. 40, 9 N. Y. Supp. 343), Words & Ph., 240.
Wells *v.* Somerset & K. R. Co. (47 Me. 345), Em. Dom., 94.
Wells *v.* Southern Minn. R. Co. (1 McCrary (U. S.) 18, 1 Fed. Rep. 270), Words & Ph., 208.
Wells *v.* Thomas (27 Mo. 17), Charges, 81.
Wells *v.* Wilmington & W. R. Co. (6 Jones (N. Car.) 47), Car. of M., 64.
Wells *v.* Windham (1 Tex. Civ. App. 267, 21 S. W. Rep. 402), Exp. Cos., 47, 48.
Wellsborough *v.* New York & C. R. Co. (76 N. Y. 182), Mun. Aid, 87.
Welsch *v.* Hannibal & St. J. R. Co. (6 Am.

& Eng. R. Cas. 75, 72 Mo. 451, 37 Am. Rep. 440), Cross., Inj. at, 65.
Welsh *v.* Alabama & V. R. Co. (70 Miss. 20, 11 So. Rep. 723), Employés, Inj. to, 300; Release, 24.
Welsh *v.* Chicago, B. & K. C. R. Co. (19 Mo. App. 127), Em. Dom., 647; Lim. of Ac., 10.
Welsh *v.* Chicago, B. & Q. R. Co. (53 Iowa 632, 6 N. W. Rep. 13, 21 Am. Ry. Rep. 181), Animals, 10, 56, 130, 310, 501.
Welsh *v.* First Div. St. P. & P. R. Co. (25 Minn. 314), Coupons, 21; Int., 3; Mort., 165; Reorg., 13.
Welsh *v.* Jackson County Horse R. Co. (81 Mo. 466), Children, Inj. to, 174.
Welsh *v.* Manhattan El. R. Co. (29 N. Y. S. R. 511, 8 N. Y. Supp. 492), Trial, 201.
Welsh *v.* Metropolitan El. R. Co. (25 J. & S. (N. Y.) 408, 8 N. Y. Supp. 492, 29 N. Y. S. R. 511), App., 88.
Welsh *v.* New York El. R. Co. (16 Daly 515, 12 N. Y. Supp. 545, 35 N. Y. S. R. 35), Elev. Rys., 91, 167.
Welsh *v.* New York El. R. Co. (16 N. Y. Supp. 174), Elev. Rys., 192.
Welsh *v.* Pittsburg, Ft. W. & C. R. Co. (10 Ohio St. 65), Car. of L. S., 72.
Welton *v.* Merrick County Com'rs (17 Am. & Eng. R. Cas. 436, 16 Neb. 83, 20 N. W. Rep. 111), Tax., 337.
Welton *v.* Missouri (91 U. S. 275), Commerce, 3.
Welton *v.* Pacific R. Co. (34 Mo. 358), Car. of Slaves, 10.
Welty *v.* Indianapolis & V. R. Co. (24 Am. & Eng. R. Cas. 371, 105 Ind. 55, 4 N. E. Rep. 410), Animals, 215, 217; Cat.-Gds., 27; Fences, 94, 97.
Wemple *v.* St. Louis, J. & S. R. Co. (30 Am. & Eng. R. Cas. 246, 120 Ill. 196, 11 N. E. Rep. 906, 9 West. Rep. 165), Stockh., 1; Subscr., 1, 81.
Wendell *v.* New York C. & H. R. R. Co. (14 Am. & Eng. R. Cas. 663, 91 N. Y. 420; reversing 14 Wkly. Dig. 406), Children, Inj. to, 75, 95.
Wendling *v.* Brainbridge (6 N. Y. S. R. 21), Employés, Inj. to, 31.
Wengler *v.* Missouri Pac. R. Co. (16 Mo. App. 493), Cross., Inj. at, 264; Evid., 206.
Wentroth's Appeal (82 Pa. St. 469), Liens, 45.
Wentworth *v.* Eastern R. Co. (143 Mass. 248, 9 N. E. Rep. 563), Evid., 37.
Wentz *v.* Erie R. Co. (3 Hun (N. Y.) 241, 5 T. & C. 556), Tickets & F., 86.
Werbowlsky *v.* Ft. Wayne & E. R. Co. (86 Mich. 236, 48 N. W. Rep. 1097), Negl., 32, 100; St. Rys., 326, 346, 399.
Werfelman *v.* Manhattan R. Co. (16 Daly 355, 32 N. Y. S. R. 682, 11 N. Y. Supp. 66; reversed in 134 N. Y. 613, mem., 45 N. Y. S. R. 936, 31 N. E. Rep. 629), Elev. Rys., 85, 121, 151, 166, 178.
Werges *v.* St. Louis, C. & N. O. R. Co. (35 La. Ann. 641), Nuis., 13; Pl., 112; Sts. & H., 45.
Werle *v.* Long Island R. Co. (21 Am. & Eng. R. Cas. 429, 98 N. Y. 650), Car. of P., 181, 476.
Werner *v.* Citizens' R. Co. (81 Mo. 368; affirming 11 Mo. App. 601), Pl., 135; St. Rys., 479.
Wernwag *v.* Philadelphia, W. & B. R. Co. (32 Am. & Eng. R. Cas. 515, 117 Pa. St. 46, 9 Cent. Rep. 603, 11 Atl. Rep. 868, 20 W. N. C. 150), Car. of M., 273.
Werries *v.* Missouri Pac. R. Co. (19 Mo. App. 398), Proc., 32.
Wersebe *v.* Broadway & S. A. R. Co. (1 Misc. (N. Y.) 472, 49 N. Y. S. R. 619, 21 N. Y. Supp. 637), App., 37, 48.
Wert *v.* Keim (Pa.) (13 Atl. Rep. 548), Employés, Inj. to, 363.
Wertheim *v.* Continental R. & T. Co. (21 Blatchf. (U. S.) 246, 15 Fed. Rep. 716), Witn., 2.
Wertheimer *v.* Pennsylvania R. Co. (17 Blatchf. (U. S.) 421, 1 Fed. Rep. 232), Bills of L., 77.
Wescott *v.* New York & N. E. R. Co. (153 Mass. 460, 27 N. E. Rep. 10), Employés, Inj. to, 223, 437.
Wesley *v.* Chicago, St. P. & K. C. R. Co. (84 Iowa 441, 51 N. W. Rep. 163), Cross., Inj. at, 302; New Tr., 13, 53.
Wesson *v.* Seaboard & R. R. Co. (4 Jones (N. Car.) 379), Agency, 79.
West *v.* Chicago & N. W. R. Co. (38 Am. & Eng. R. Cas. 340, 77 Iowa 654, 35 N. W. Rep. 479, 42 N. W. Rep. 512), Fires, 103, 243.
West *v.* Hannibal & St. J. R. Co. (34 Mo. 177), Animals, 342, 359.
West *v.* London & N. W. R. Co. (L. R. 5 C. P. 622, 39 L. J. C. P. 282, 23 L. T. 371, 18 W. R. 1028), Discrim., 17, 54.
West *v.* Louisville, C. & L. R. Co. (8 Bush (Ky.) 404), Culverts, 15.
West *v.* Manhattan R. Co. (16 N. Y. S. R. 886, 24 J. & S. 590, 1 N. Y. Supp. 519), Dam., 67, 73; Evid., 174, 211.
West *v.* Milwaukee, L. S. & W. R. Co. (10 Am. & Eng. R. Cas. 415, 56 Wis. 318, 14 N. W. Rep. 292), Em. Dom., 464, 762, 764.
West *v.* Missouri Pac. R. Co. (26 Mo. App. 344), Animals, 180; Fences, 85.
West *v.* Parkdale (2 Can. Sup. Ct. 250; reversing 12 Ont. App. 393, which reverses 8 Ont. 59, 7 Ont. 270), Mun. Corp., 51.
West *v.* St. Louis, V. & T. H. R. Co. (63 Ill. 545, 7 Am. Ry. Rep. 50), Indep. Contr., 27.
West *v.* West & E. R. Co. (20 Am. & Eng. R. Cas. 402, 61 Miss. 536), Em. Dom., 315, 817; Estop., 8; Pl., 74; Trial, 186.
West *v.* Whitaker (37 Iowa 598), Mun. Aid, 97, 118, 122, 412.
Westbourne Cattle Co. *v.* Manitoba & N. W. R. Co. (6 Man. 553), Fences, 12, 69.
West Branch Canal Co. *v.* Elmira & W. R. Co. (55 Pa. St. 180), State Aid, 29.
Westbrook's Appeal (37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368), Cross. Sts. & H., 98, 99, 107, 108, 109, 110; Direct., 19, 34, 38; Leases, 65; Officers, 4; Ry. Com'rs, 24; Sts. & H., 16.
Westbrook *v.* Mobile & O. R. Co. (39 Am. & Eng. R. Cas. 374, 66 Miss. 560, 6 So

Rep. 321), Children, Inj. to, 103, 127, 128, 132; Pl., 51.
West Chester & P. R. Co. *v.* Broomall (Pa.) (26 Am. & Eng. R. Cas. 591, 3 Atl. Rep. 444), Dam., 59.
West Chester & P. R. Co. *v.* Goddard (Pa.) (33 Am. & Eng. R. Cas. 195, 13 Atl. Rep. 214), Right of W., 13.
West Chester & P. R. Co. *v.* Jackson (77 Pa. St. 321), Divid., 8, 12.
West Chester & P. R. Co. *v.* McElwee (67 Pa. St. 311), Death, etc., 296; Evid., 84.
West Chester & P. R. Co. *v.* Miles (55 Pa. St. 209), Car. of P., 85; Col. Pers., 4.
West Chester & P. R. Co. *v.* Thomas (2 Phila. (Pa.) 344), Bank'cy, 6.
West Chicago St. R. Co. *v.* Camp (46 Ill. App. 503), App., 53.
West Chicago St. R. Co. *v.* Martin (47 Ill. App. 610), Car. of P., 155; Collis., 4, 12.
West Cork & I. V. R. Co., In re (2 Ry. & C. T. Cas. 334), Leases, 129.
West Cork R. Co., In re (7 Ir. R. Eq. 96), Reorg., 19.
West Cornwall R. Co. *v.* Mowatt (15 Q. B. 521, 15 Jur. 101, 19 L. J. Q. B. 478), Subscr., 27, 38, 168.
Westcott *v.* Central Vt. R. Co. (61 Vt. 438, 17 Atl. Rep. 745), Death, etc., 135.
Westcott *v.* Fargo (63 Barb. (N. Y.) 349), Car. of M., 174, 444; Exp. Cos., 30, 81; Lim. of Liab., 12, 14, 33, 43.
Westcott *v.* Fargo (61 N. Y. 542; affirming 63 Barb. 349, 6 Lans. 319), Exp. Cos., 69, 73; Stockh., 86.
Westcott *v.* New York & N. E. R. Co. (152 Mass. 465, 25 N. E. Rep. 840), Aband., 6; Evid., 254.
West End & A. St. R. Co. *v.* Atlanta St. R. Co. (49 Ga. 151), Charters, 47, 185; St. Rys., 43.
West End & A. St. R. Co. *v.* Mozely (79 Ga. 463, 4 S. E. Rep. 324), St. Rys., 367.
West End N. G. R. Co. *v.* Almeroth (13 Mo. App. 91), Em. Dom., 496, 520.
West End N. G. R. Co. *v.* Dameron (4 Mo. App. 414), Subscr., 232.
West End Pass. R. Co. *v.* Philadelphia City Pass. R. Co. (10 Phila. (Pa.) 75), Stat., 65.
Westerberg *v.* Kinzua, C. & K. R. Co. (142 Pa. St. 471, 21 Atl. Rep. 878), Children, Inj. to, 130.
Westerfield *v.* Levis (43 La. Ann. 63, 9 So. Rep. 52), Children, Inj. to, 25, 69, 114, 117, 127, 129, 159; Imp. Neg., 9.
Westermann *v.* Cape Girardeau County (5 Dill. (U. S.) 112), Mun. Aid, 379.
Western & A. R. Co. *v.* Abbott (74 Ga. 851), Car. of P., 590, 595; Dam., 70; New Tr., 6.
Western & A. R. Co. *v.* Adams (55 Ga. 279), Employés, Inj. to, 433.
Western & A. R. Co. *v.* Atlanta (19 Am. & Eng. R. Cas. 233, 74 Ga. 774), Cross., Inj. at, 112; Sts. & H., 342a, 396, 397.
Western & A. R. Co. *v.* Bishop (50 Ga. 465), Employés, Inj. to, 181, 238.
Western & A. R. Co. *v.* Bloomingdale (74 Ga. 604), Contrib. Neg., 21.
Western & A. R. Co. *v.* Brown (58 Ga. 534), Animals, 607.
Western & A. R. Co. *v.* Camp (53 Ga. 596), Car. of M., 325.
Western & A. R. Co. *v.* Carlton (28 Ga. 180), Govt. Rds., 4.
Western & A. R. Co. *v.* Denmead (83 Ga. 351), 9 S. E. Rep. 683), App., 117.
Western & A. R. Co. *v.* Drysdale (51 Ga. 644, 7 Am. Ry. Rep. 343), Dam., 27, 70, 71.
Western & A. R. Co. *v.* Exposition Cotton Mills (35 Am. & Eng. R. Cas. 602, 81 Ga. 522, 7 S. E. Rep. 916, 2 L. R. A. 102), Bills of L., 36; Car. of M., 115, 646; Lim. of Liab., 37.
Western & A. R. Co. *v.* Fulton (4 Sneed (Tenn.) 589), Car. of Slaves, 6, 9.
Western & A. R. Co. *v.* Hurst (11 Heisk. (Tenn.) 625), War, 6.
Western & A. R. Co. *v.* Jones (8 Am. & Eng. R. Cas. 267, 65 Ga. 631), Cross., Inj. at, 136, 153.
Western & A. R. R. Co. *v.* Kelly (1 Head (Tenn.) 158), Actions, 3; Car. of M., 716.
Western & A. R. Co. *v.* King (19 Am. & Eng. R. Cas. 255, 70 Ga. 261), Animals, 48; Negl., 70; Trial, 148.
Western & A. R. Co. *v.* Kirkpatrick (66 Ga. 86), Just. P., 5.
Western & A. R. Co. *v.* Lewis (84 Ga. 211, 10 S. E. Rep. 736), New Tr., 9.
Western & A. R. Co. *v.* McCauley (68 Ga. 818), Animals, 591; Dam., 107.
Western & A. R. Co. *v.* McElwee (6 Heisk. (Tenn.) 208), Agency, 108; Car. of M., 44, 401, 593, 603.
Western & A. R. Co. *v.* Main (64 Ga. 649), Animals, 34.
Western & A. R. Co. *v.* Mathis (77 Ga. 488, 2 S. E. Rep. 692), New Tr., 24.
Western & A. R. Co. *v.* Meigs (74 Ga. 857), Contrib. Neg., 108; Death, etc., 243, 379; Evid., 54; Tresp., Inj. to, 126; Trial, 123.
Western & A. R. Co. *v.* Sawtell (65 Ga. 235), Death, etc., 80.
Western & A. R. Co. *v.* State (54 Ga. 428), Tax., 255.
Western & A. R. Co. *v.* Steadly (65 Ga. 263), Animals, 489.
Western & A. R. Co. *v.* Strong (52 Ga. 461, 8 Am. Ry. Rep. 13), Death, etc., 16, 90, 113, 253; States, 4.
Western & A. R. Co. *v.* Taylor (6 Heisk. (Tenn.) 408), Change Bills, 1, 2; Govt. Rds., 4.
Western & A. R. Co. *v.* Trimmier (84 Ga. 112, 10 S. E. Rep. 503), Animals, 466.
Western & A. R. Co. *v.* Turner (28 Am. & Eng. R. Cas. 455, 72 Ga. 292, 53 Am. Rep. 842), Agency, 73; Car. of P., 48; Dam., 31, 33; Eject. Pass., 57, 69; Stat., 39.
Western & A. R. Co. *v.* Vandiver (85 Ga. 470, 11 S. E. Rep. 781), Fel. Serv., 171, 473.
Western & A. R. Co. *v.* Wilson (71 Ga. 22), Children, Inj. to, 84.
Western & A. R. Co. *v.* Young (37 Am. & Eng. R. Cas. 489, 81 Ga. 397, 7 S. E. Rep. 912; further appeal in 42 Am. & Eng. R. Cas. 135, 83 Ga. 512, 10 S. E. Rep. 197), Children, Inj. to, 73, 185, 189, 190; Cross., Inj. at, 187; Dam., 107; Negl., 20; Sts. & H., 318.

Western & A. R. Co. *v.* Young (42 Am. & Eng. R. Cas. 135, 83 Ga. 512, 10 S. E. Rep. 198), Children, Inj. to, 73; Dam., 67; Trial, 188; New Tr., 5.
Western Bank *v.* Tallman (17 Wis. 530), Corp., 5; Subscr., 55.
Western Counties R. Co., In re (13 Nov. Sc. 176), Em. Dom., 1229.
Western Development Co. *v.* Emery (61 Cal. 611), Subscr., 84.
Western Division N. C. R. Co. *v.* Drew (3 Woods (U. S.) 691), Bonds, 49.
Western Land Co. *v.* Hamblin (79 Iowa 539, 44 N. W. Rep. 807), Pub. Lds., 44.
Western Md. R. Co. *v.* Carter (13 Am. & Eng. R. Cas. 573, 59 Md. 306), Animals, 279, 480.
Western Md. R. Co. *v.* Franklin Bank (60 Md. 36), Agency, 87.
Western Md. R. Co. *v.* Herold (74 Md. 510, 22 Atl. Rep. 323), Car. of P., 94, 351, 420, 437; Tresp., Inj. to, 69a.
Western Md. R. Co. *v.* Manro (32 Md. 280), Evid., 160.
Western Md. R. Co. *v.* Orendorff (37 Md. 328), Constr. Rys., 15.
Western Md. R. Co. *v.* Owings (15 Md. 199), Em. Dom., 1034, 1046.
Western Md. R. Co. *v.* Patterson (37 Md. 125), Em. Dom., 248.
Western Md. R. Co. *v.* Stanley (18 Am. & Eng. R. Cas. 206, 61 Md. 266, 48 Am. Rep. 96), Car. of P., 467.
Western N. C. R. Co. *v.* Deal (90 N. Car. 110), Fixt., 6.
Western N. C. R. Co. *v.* Georgia & N. C. R. Co. (17 Am. & Eng. R. Cas. 28, 88 N. Car. 79), Injunc., 4.
Western N. C. R. Co. *v.* Rollins (82 N. Car. 523), Dissol., 22.
Western Pac. R. Co. *v.* Reed (35 Cal. 621), Em. Dom., 57, 228, 510, 811, 813.
Western Pac. R. Co. *v.* Tevis (41 Cal. 489, 3 Am. Ry. Rep. 50), Land Grants, 50; Pub. Lds., 18, 42.
Western Pac. R. Co. *v.* United States (108 U. S. 510, 2 Sup. Ct. Rep. 802), Land Grants, 47.
Western Paving & S. Co. *v.* Citizens' St. R. Co. (46 Am. & Eng. R. Cas. 176, 128 Ind. 525, 26 N. E. Rep. 188, 28 N. E. Rep. 88), Charters, 18; Estop., 27; St. Rys., 137, 139.
Western Pa. R. Co.'s Appeal (4 Am. & Eng. R. Cas. 191, 99 Pa. St. 155), Branch & L. Roads, 6, 7; Charters, 64; Cross. Rys., 21; Words & Ph., 118.
Western Pa. R. Co.'s Appeal (104 Pa. St. 399), Charters, 84; Cross. Rys., 70.
Western Pa. R. Co.'s Appeal (18 Phila. (Pa.) 614), Tax., 280.
Western Pa. R. Co. *v* Childs (3 Pittsb. (Pa.) 168), Em. Dom., 129; Western Pa. R. Co., 1.
Western Pa. R. Co. *v.* Hill (56 Pa. St. 460), Em. Dom., 591, 610.
Western Pa. R. Co. *v.* Johnston (59 Pa. St. 290), Em. Dom., 436, 998; Mort., 42, 93; Right of W., 3.
Western R. Co. *v.* Alabama G. T. R. Co. (96 Ala. 272, 11 So. Rep. 483), Injunc., 9; Sts. & H., 139.
Western R. Co. *v.* Avery (64 N. Car. 491), Lim. of Ac., 20; Subscr., 181.
Western R. Co. *v.* Bayne (75 N. Y. 1; affirming 11 Hun 166), Agency, 29.
Western R. Co. *v.* Davis (66 Ala. 578), Animals, 650.
Western R. Co. *v.* Harris (66 Ala. 578), Animals, 379.
Western R. Co. *v.* Harwell (45 Am. & Eng. R. Cas. 358, 91 Ala. 340, 8 So. Rep. 649), Bills. of L., 27, 81; Car. of L. S., 6, 24, 80, 105, 143, 148; Car. of M., 704.
Western R. Co. *v.* Harwell (97 Ala. 341, 11 So. Rep. 781), Car. of L. S., 80, 86; Car. of M., 654, 670, 671, 673.
Western R. Co. *v.* Huss (70 Ala. 565), Animals, 650.
Western R. Co. *v.* Lazarus (88 Ala. 453, 6 So. Rep. 877), Animals, 64, 332, 381, 425, 613; Tresp., Inj. to, 124; Witn., 110.
Western R. Co. *v.* Little (37 Am. & Eng. R. Cas. 659, 86 Ala. 159, 5 So. Rep. 563), Bills of L., 90; Car. of M., 340; Evid., 75.
Western R. Co. *v.* McCall (89 Ala. 375, 7 So. Rep. 650), Name, 4.
Western R. Co. *v.* Mutch (54 Am. & Eng. R. Cas. 107, 97 Ala. 194, 11 So. Rep. 894), Children, Inj. to, 17; Sts. & H., 374.
Western R. Co. *v.* Rembert (50 Ala. 25), Car. of M., 399.
Western R. Co. *v.* Roberts (4 Phila. (Pa.) 110), Agency, 15.
Western R. Co. *v.* Sistrunk (85 Ala. 352, 5 So. Rep. 79), Animals, 61, 62, 65, 381, 432, 573; Cross., Inj. at, 168; Negl., 44; Pl., 24, 146.
Western R. Co. *v.* Thomas (60 Ga. 313), Attach., 49.
Western R. Co. *v.* Thornton (60 Ga. 300), Attach., 21.
Western R. Co. *v.* Willis (18 C. B. N. S. 748, 34 L. J. C. P. 195), Evid., 202.
Western R. Co. *v.* Young (51 Ga. 489, 7 Am. Ry. Rep. 352), Car. of P., 245, 422, 595.
Western R. Corp. *v.* Babcock (6 Metc. (Mass.) 346), Dam., 54; Spec. Perf., 24, 26.
Western Transit Co. *v.* Hosking (19 Ill. App. 607), Agency, 13; Bills of L., 30.
Western Transp C. Co. *v.* Kilderhouse (87 N. Y. 430), Discrim., 76.
Western Transp. Co. *v.* Barber (56 N. Y. 544), Car. of M., 394.
Western Transp. Co. *v.* Downer (11 Wall. (U. S.) 129), Words & Ph., 161.
Western Transp. Co. *v.* Hoyt (69 N. Y. 230), Charges, 75, 76, 79.
Western Transp. Co. *v.* Newhall (24 Ill. 466), Car. of M., 467; Lim. of Liab., 12, 14.
Western Union R. Co. *v.* Dickson (30 Wis. 389, 8 Am. Ry. Rep. 39), Em. Dom., 502.
Western Union R. Co. *v.* Fulton (64 Ill. 271), Cross., Inj. at, 103.
Western Union R. Co. *v.* Smith (75 Ill. 496), Consol., 44; Constr. Ry., 19, 23, 30, 37.
Western Union R. Co. *v.* United States (101 U. S. 543), Rev., 5, 8.
Western Union R. Co. *v.* Wagner (65 Ill. 197), Bills of L., 125.
Western Union Tel. Co. *v.* Alabama State

Board (132 U. S. 472, 10 Sup. Ct. Rep. 161), Int. Com., 213.
Western Union Tel. Co. *v.* American Union Tel. Co. (65 Ga. 160), Tel. & T. Lines, 6.
Western Union Tel. Co. *v.* American Union Tel. Co. (9 Biss. (U. S.) 72), Tel. & T. Lines, 4.
Western Union Tel. Co. *v.* Atlantic & P. Tel. Co. (7 Biss. (U. S.) 367), Receiv., 40; Tel. & T. Lines, 5.
Western Union Tel. Co. *v.* Baltimore & O. R. Co. (20 Fed. Rep. 572), Tel. & T. Lines, 5.
Western Union Tel. Co. *v.* Baltimore & O. Tel. Co. (19 Fed. Rep. 660), Tel. & T. Lines, 4.
Western Union Tel. Co. *v.* Burlington & S. W. R. Co. (3 McCrary (U. S.) 130, 11 Fed. Rep. 1), Fixt., 10; Mort., 37; Tel. & T. Lines, 3, 6.
Western Union Tel. Co. *v.* Chicago & P. R. Co. (86 Ill. 246, 17 Am. Ry. Rep. 407), Tel. & T. Lines, 3, 5.
Western Union Tel. Co. *v.* Kansas Pac. R. Co. (4 Fed. Rep. 284), Tel. & T. Lines, 3, 5.
Western Union Tel. Co. *v.* McGill (57 Fed. Rep. 699), Death, etc., 47, 52, 91.
Western Union Tel. Co. *v.* Massachusetts (125 U. S. 530, 8 Sup. Ct. Rep. 961), Tax., 72.
Western Union Tel. Co. *v.* National Tel. Co. (22 Blatchf. (U. S.) 108), Tel. & T. Lines, 4, 5.
Western Union Tel. Co. *v.* Pendleton (122 U. S. 347, 7 Sup. Ct. Rep. 1126), Int. Com., 9.
Western Union Tel. Co. *v.* Philadelphia & R. R. Co. (9 Phila. (Pa.) 494), Injunc., 2.
Western Union Tel. Co. *v.* Phillips (2 Tex. Civ. App. 608, 21 S. W. Rep. 638), App., 142; Jurisd., 4, 9.
Western Union Tel. Co. *v.* Rich (19 Kan. 517), Tel. & T. Lines, 1.
Western Union Tel. Co. *v.* St. Joseph & W. R. Co. (1 McCrary (U. S.) 565, 3 Fed. Rep. 430), Tel. & T. Lines, 3.
Western Union Tel. Co. *v.* Union Pac. R. Co. (1 McCrary (U. S.) 418, 3 Fed. Rep. 1), Contr., 56; Tel. & T. Lines, 5; Union Pac. R. Co., 2, 8.
Western Union Tel. Co. *v.* Union Pac. R. Co. (1 McCrary (U. S.) 558, 3 Fed. Rep. 423), Tel. & T. Lines, 3.
Western Union Tel. Co. *v.* Union Pac. R. Co. (3 Fed. Rep. 721, 1 McCrary (U. S.) 581), Union Pac. R. Co., 8.
Western Union Tel. Co. *v.* Western & A. R. Co. (91 U. S. 283), Tel. & T. Lines, 5.
Western Union Tel. Co. *v.* Western & A. R. Co. (8 Baxt. (Tenn.) 54), Tel. & T. Lines, 4.
Westfall *v.* Erie R. Co. (5 Hun (N. Y.) 75), Fires, 212, 228, 235.
West Feliciana R. Co. *v.* Thornton (12 La. Ann. 736), Judgm., 25.
Westfield *v.* Great Western R. Co. (52 L. J. Q. B. D. 276, 4 Ry. & C. T. Cas. xvi), Car. of M., 380, 389.
West Gwillimbury *v.* Hamilton & N. W. R. Co. (23 Grant's Ch. (U. C.) 383), Mun. Aid, 400.
West Jersey R. Co. *v.* Cape May & S. L. R. Co. (34 N. J. Eq. 164), St. Rys., 195.
West Jersey R. Co. *v.* Thomas (7 Phila. (Pa.) 635), Arb., 11, 13.
West Jersey R. Co. *v.* Thomas (21 N. J. Eq. 205), Arb., 11, 30, 33.
West Jersey R. Co. *v.* Thomas (23 N. J. Eq. 431; affirmed in 24 N. J. Eq. 567), Evid., 268, 274.
West Lancashire R. Co. *v.* Iddon (49 L. T. 600, 48 J. P. 199), Bridges, 76.
West London Commercial Bank *v.* Kiston (L. R. 13 Q. B. D. 360, 53 L. J. Q. B. D. 345, 50 L. T. N. S. 656, 32 W. R. 757; affirming L. R. 12 Q. B. D. 157, 53 L. J. Q. B. D. 218, 50 L. T. N. S. 208, 32 W. R. 431, 47 J. P. 824), Bills & N., 15.
West London R. Co. *v.* London & N. W. R. Co. (11 C. B. 327, 7 Railw. Cas. 477, 17 Jur. 301, 22 L. J. C. P. 117), Leases, 66, 73.
West Mahanoy Tp. *v.* Watson (112 Pa. St. 574, 3 Atl. Rep. 866), Animals, 34; Negl., 48.
West Mahanoy Tp. *v.* Watson (116 Pa. St. 344, 9 Atl. Rep. 430), Fright. Teams, 2; Negl., 46, 72.
West Nashville Planing Mill Co. *v.* Nashville Sav. Bank (86 Tenn. 252, 6 S. W. Rep. 340), Stock, 74.
Weston *v.* Charleston (2 Pet. (U. S.) 449), Tax., 17.
Weston *v.* Charleston City Council (2 Pet. (U. S.) 467), Tax., 138.
Weston *v.* Columbus Southern R. Co. (90 Ga. 289, 15 S. E. Rep. 773), Subscr., 98.
Weston *v.* Foster (7 Metc. (Mass.) 297), Partit., 3.
Weston *v.* Grand Trunk R. Co. (54 Me. 376), Car. of M., 778.
Weston *v.* New York El. R. Co. (73 N. Y. 595; affirming 10 J. & S. 156), Stat. & D., 88, 121.
Westover *v.* Turner (26 U. C. C. P. 510), Attach., 41.
West Phila. Pass. R. Co. *v.* Gallagher (27 Am. & Eng. R. Cas. 201, 108 Pa. St. 524), Children, Inj. to, 48.
West Phila. Pass. R. Co. *v.* Perkins (4 Brews. (Pa.) 173), Injunc., 30.
West Phila. Pass. R. Co. *v.* Perkins (10 Phila. (Pa.) 20), Sts. & H., 31.
West Phila. Pass. R. Co. *v.* Philadelphia (10 Phila. (Pa.) 70), St. Rys., 259, 276.
West Phila. R. Co. *v.* Nagle (12 Phila. (Pa.) 228), Judgm., 44.
West Riding & G. R. Co. *v.* Wakefield Local Board of Health (5 B. & S. 478, 10 Jur. N. S. 1046, 33 L. J. M. C. 174, 12 W. R. 1076), Sts. & H., 359.
West Riding & L. R. Undertaking, Ex parte (34 L. T. 168), Incorp., 6.
West River Bridge Co. *v.* Dix (16 Vt. 446, 6 How. (U. S.) 507), Em. Dom., 101, 118.
West Virginia, P. & T. R. Co. *v.* Gibson (94 Ky. 234, 21 S. W. Rep. 1055), Em. Dom., 466, 645.
West Virginia Transp. Co. *v.* Ohio River Pipe Line Co. (22 W. Va. 600), Cov'ts, 10.

West Virginia Transp. Co. *v.* Sweetzer (22 Am. & Eng. R. Cas. 469, 25 W. Va. 434), Charges, 41, 45.
West Virginia Transp. Co. *v.* Volcanic O. & C. Co. (5 W. Va. 382), Em. Dom., 279.
West Wis. R. Co. *v.* Trempealeau County Sup'rs (35 Wis. 257), Charters, 41, 42; Tax., 124.
West Wis. R. Co. *v.* Trempealeau County Sup'rs (93 U. S. 595), Tax., 143.
Wetmore *v.* Law (22 How. Pr. (N. Y.) 130), Sts. & H., 142.
Wetmore *v.* St. Paul & P. R. Co. (1 McCrary (U. S.) 466, 3 Fed. Rep. 177, 5 Dill. 531), Mort., 294.
Wetmore *v.* Story (3 Abb. Pr. (N. Y.) 262), Priv. Ways, 17; Stockh., 95; St. Rys., 195; Sts. & H., 247.
Wetmore *v.* Story (22 Barb. (N. Y.) 414), Nuis., 3; Sts. & H., 53, 75, 225.
Wetumpka & C. R. Co. *v.* Bingham (5 Ala. 657), Bills & N., 4, 18.
Wetumpka & C. R. Co. *v.* Cole (6 Ala. 655), Proc., 44.
Wetzel *v.* Power (5 Mont. 214, 2 Pac. Rep. 338), Parties, 5.
Wetzell *v.* Dinsmore (54 N. Y. 496; reversing 4 Daly 193), Exp. Cos., 74.
Weyand *v.* Atchison, T. & S. F. R. Co. (75 Iowa 573, 1 L. R. A. 650, 39 N. W. Rep. 899; reversing on rehearing 30 Am. & Eng. R. Cas. 102), Car. of M., 264; Custom, 7.
Weyant *v.* New York & H. R. Co. (3 Duer (N. Y.) 360), St. Rys., 458.
Weyauwega *v.* Ayling (99 U. S. 112), Mun. Aid, 306.
Weyer *v.* Chicago, W. & N. R. Co. (68 Wis. 180, 31 N. W. Rep. 710), Em. Dom., 589, 709, 720.
Weyer *v.* Milwaukee & L. W. R. Co. (10 Am. & Eng. R. Cas. 508, 57 Wis. 329, 15 N. W. Rep. 481), Em. Dom., 396, 938, 939, 951.
Weyl *v.* Chicago, M. & St. P. R. Co. (40 Minn. 350, 42 N. W. Rep. 24), Sts. & H., 328.
Weyl *v.* Sonoma Valley R. Co. (69 Cal. 202, 10 Pac. Rep. 510), Sts. & H., 142.
Weyland *v.* Atchison, T. & S. F. R. Co. (Iowa) (33 N. W. Rep. 133), Car. of M., 261.
Weymouth *v.* Broadway & S. A. R. Co. (51 N. Y. S. R. 612, 22 N. Y. Supp. 1047, 2 Misc. 506; affirmed in 142 N. Y. 681, mem., 37 N. E. Rep. 825, mem.), Negl., 84; Witn., 34.
Weymouth *v.* Chicago & N. W. R. Co. (17 Wis. 550), Trover, 19.
Weymouth *v.* Port Townsend Southern R. Co. (6 Wash. 575, 34 Pac. Rep. 154), Pl., 22.
Weymouth *v.* Washington, G. & A. R. Co. (1 MacArth. (D. C.) 19), For. Corp., 26, 29.
Whaalan *v.* Mad River & L. E. R. Co. (8 Ohio St. 249), Fel. Serv., 1, 21, 202, 386.
Whalen *v.* Arcata & M. R. R. Co. (92 Cal. 669, 28 Pac. Rep. 833), Cross., Inj. at, 203, 223.
Whalen *v.* Chicago & N. W. R. Co. (41 Am. & Eng. R. Cas. 558, 75 Wis. 654, 44 N. W. Rep. 849), App., 65; Children, Inj. to, 108; Stat. & D., 62; Witn., 45.
Whalen *v.* Chicago, R. I. & P. R. Co. (38 Am. & Eng. R. Cas. 141, 75 Iowa 563, 39 N. W. Rep. 894), Employés, Inj. to, 695, 777; Evid., 140; Fel. Serv., 175, 385; Trial, 204.
Whalen *v.* Illinois & St. L. R. & C. Co. (16 Ill. App. 320), Death, etc., 335; Employés, Inj. to, 46, 99, 216.
Whalen *v.* New York C. & H. R. R. Co. (58 Hun 431, 35 N. Y. S. R. 556, 12 N. Y. Supp. 527), Cross., Inj. at, 213, 288.
Whalen *v.* New York C. & H. R. R. Co. (40 N. Y. S. R. 566, 61 Hun 623, 15 N. Y. Supp. 941), Cross., Inj. at, 327.
Whalen *v.* St. Louis, K. C. & N. R. Co. (60 Mo. 323, 9 Am. Ry. Rep. 224), Car. of P., 344, 616; Contrib. Neg., 28; Cross., Inj. at, 8.
Whalley *v.* Lancashire & Y. R. Co. (17 Am. & Eng. R. Cas. 66, L. R. 13 Q. B. D. 131, 53 L. J. Q. B. D. 285, 50 L. T. 472, 32 W. R. 711, 48 J. P. 500), Flood. Lds., 40.
Wharton *v.* Winch (140 N. Y. 287, 35 N. E. Rep. 589), Constr. Rys., 31, 120.
What Cheer Coal Co. *v.* Johnson (56 Fed. Rep. 810), App., 40; Fel. Serv., 328.
Wheadon *v.* Peoria, P. & J. R. Co. (42 Ill. 494), Charters, 73.
Wheat *v.* Platte City & Ft. D. M. R. Co. (4 Kan. 370), Attach., 58.
Wheatland *v.* Taylor (29 Hun (N. Y.) 70), Dam., 40; Mun. Aid, 44.
Wheaton *v.* North Beach & M. R. Co. (36 Cal. 590), Car. of P., 139, 142, 605; Negl., 18; New Tr., 30; St. Rys., 405, 425; Words & Ph., 36.
Wheeden *v.* Camden & A. R. Co. (1 Grant's Cas. (Pa.) 420), Rem. of C., 33.
Wheelahan *v.* Philadelphia Traction Co. (150 Pa. St. 187, 24 Atl. Rep. 688), Elec. Rys., 37.
Wheelan *v.* Chicago, M. & St. P. R. Co. (49 Am. & Eng. R. Cas. 693, 85 Iowa 167, 52 N. W. Rep. 119), Death, etc., 278, 283, 382; Employés, Inj. to, 605; Evid., 287.
Wheeler *v.* Erie R. Co. (2 T. & C. (N. Y.) 634), Animals, 142, 145, 146.
Wheeler *v.* New Brunswick & C. R. Co. (115 U. S. 29, 5 Sup. Ct. Rep. 1061, 1160), Contr., 10.
Wheeler *v.* New York & H. R. Co. (24 Barb. (N. Y.) 414), Proc., 32.
Wheeler *v.* New York C. & H. R. R. Co. (51 N. Y. S. R. 471, 67 Hun 639, 22 N. Y. Supp. 561), Fires, 30, 247, 268.
Wheeler *v.* Rochester & S. R. Co. (12 Barb. (N. Y.) 227), Em. Dom., 144, 929, 1037; Farm Cross., 1, 6.
Wheeler *v.* St. Louis & S. E. R. Co. (3 Mo. App. 358), Car. of M., 210, 219.
Wheeler *v.* San Francisco & A. R. Co. (31 Cal. 46), Car. of P., 501, 505, 507; Ferries, 2.
Wheeling *v.* Mayor, etc., of Baltimore (1 Hughes (U. S.) 90), Balt. & O. R. Co., 1; Charters, 51; Fed. Cts., 10; Stockh., 112.
Wheeling Bridge & T. R. Co. *v.* Camden Cons. Oil. Co. (47 Am. & Eng. R. Cas. 27,

35 W. Va. 205, 13 S. E. Rep. 369), Branch & L. Roads, 11; Charters, 61; Em. Dom., 245, 334.
Wheeling Bridge Co. *v.* Wheeling & B. Bridge Co. (34 W. Va. 155, 11 S. E. Rep. 1009), Em. Dom., 104.
Wheeling, P. & B. R. Co., Appeal of (1 Pennyp. (Pa.) 360), Em. Dom., 216.
Wheeling, P. & B. R. Co., Appeal of (3 Atl. Rep. 12), Injunc., 63.
Wheeling, P. & B. R. Co. *v.* Gourley (99 Pa. St. 171), Ejectm., 1; Em. Dom., 232.
Wheeling, P. & C. Transp. Co. *v.* Baltimore & O. R. Co. (1 Cin. Super. Ct. 311), Proc., 45.
Wheeling, P. & B. R. Co. *v.* Warrell (122 Pa. St. 613, 16 Atl. Rep. 20), Em. Dom., 382, 1024.
Wheelock *v.* Boston & A. R. Co. (105 Mass. 203, 2 Am. Ry. Rep. 402), Cross., Inj. at, 259.
Wheelwright *v.* Boston & A. R. Co. (16 Am. & Eng. R. Cas. 315, 135 Mass. 225), Cross., Inj. at, 229; Stat. & D., 115.
Wheelwright *v.* St. Louis, N. O. & O. Canal Transp. Co. (56 Fed. Rep. 164), Mort., 191.
Whelan *v.* Georgia M. & G. R. Co. (44 Am. & Eng. R. Cas. 335, 84 Ga. 506, 10 S. E. Rep. 1091), Car. of P., 415.
Whelan *v.* New York, L. E. & W. R. Co. (35 Fed. Rep. 849, 1 L. R. A. 65), Rem. of C., 42.
Whelan *v.* New York, L. E. & W. R. Co. (38 Fed. Rep. 15), Cross., Inj. at, 48; Dam., 67, 70, 73, 98; Evid., 247; Sts. & H., 321, 339.
Whelen *v.* Catawissa R. Co. (9 Phila. (Pa.) 220), Tax., 287.
Whelpley *v.* Erie R. Co. (6 Blatchf. (U. S.) 271), Receiv., 12.
Whetham *v.* Pennsylvania & N. Y. C. & R. Co. (8 Phila. (Pa.) 92), Pl., 84.
Whetham *v.* Pennsylvania & N. Y. C. & R. Co. (9 Phila. (Pa.) 284), Lim. of Ac., 42.
Whetstone *v.* Montgomery Bank (9 Ala. 875) Witn., 94.
Whilton *v.* Richmond & D. R. Co. (57 Fed. Rep. 551), App., 70; Cross., Inj. at, 15.
Whipple *v.* Union Pac. R. Co. (8 Am. & Eng. R. Cas. 651, 28 Kan. 474), Consol., 46.
Whipple *v.* West Phila. Pass. R. Co. (11 Phila. (Pa.) 345), New Tr., 30; St. Rys., 388.
Whirley *v.* Whiteman (1 Head (Tenn.) 620), Children, Inj. to, 127.
Whitacre *v.* St. Paul & S. C. R. Co. (24 Minn. 311), Em. Dom., 764, 929.
Whitaker *v.* Eighth Ave. R. Co. (51 N. Y. 295; reversing 5 Robt. 650), Evid., 202; St. Rys., 314.
Whitaker *v.* Hartford, P. & F. R. Co. (8 R. I. 47), Coupons, 12.
Whitaker *v.* Leavenworth D. & R. Co. (41 Kan. 315, 21 Pac. Rep. 264), Em. Dom., 426.
Whitbeck *v.* Atlantic Ave. R. Co. (4 N. Y. Supp. 100), Witn., 44.
Whitbeck *v.* Dubuque & P. R. Co. (21 Iowa 103), Animals, 48, 248.
Whitbeck *v.* New York C. R. Co. (36 Barb. (N. Y.) 644), Fires, 340, 344, 357.
Whitcher *v.* Somerville (138 Mass. 454), Bridges, 9, 39.
White, Ex parte (2 So. Car. 469), Bonds, 44; Mort., 107.
White *v.* Albany R. Co. (17 Hun (N. Y.) 98), Leases, 70.
White *v.* Augusta & K. R. Co. (30 So. Car. 218, 9 S. E. Rep. 96), Contrib. Neg., 119; Cross., Inj. at, 136; Negl., 63, 105; Trial, 123.
White *v.* Bascom (28 Vt. 268), Bailm., 6.
White *v.* Blum (4 Neb. 555), Stockh., 48, 49.
White *v.* Boston & A. R. Co. (30 Am. & Eng. R. Cas. 615, 144 Mass. 404, 4 N. Eng. Rep. 267, 11 N. E. Rep. 552), Car. of P., 188.
White *v.* Boston & P. R. Corp. (6 Cush. (Mass.) 420), Em. Dom., 559, 713.
White *v.* Burlington & M. R. R. Co. (5 Neb. 393), Land Grants, 98; Tax., 1.
White *v.* Canadian Pac. R. Co. (6 Man. 169), Car. of M., 290, 296; Lim. of Ac., 36.
White *v.* Central R. & B. Co. (83 Ga. 595, 10 S. E. Rep. 273), Death, etc., 174; Licensees, Inj. to, 24.
White *v.* Charlotte & S. C. R. Co. (6 Rich. (So. Car.) 47), Em. Dom., 724.
White *v.* Chesapeake & O. R. Co. (20 W. Va. 792), Rem. of C., 54.
White *v.* Chesapeak & O. R. Co. (26 W. Va. 800), Eject. Pass., 82.
White *v.* Chicago, M. & St. P. R. Co. (1 S. Dak. 326, 47 N. W. Rep. 146), Fires, 20, 23, 45, 256, 289, 339.
White *v.* Chicago, St. L. & P. R. Co. (43 Am. & Eng. R. Cas. 156, 122 Ind. 317, 23 N. E. Rep. 782, 7 L. R. A. 257), Em. Dom., 167, 845; Sts. & H., 272.
White *v.* Cincinnati, N. O. & T. P. R. Co. (42 Am. & Eng. R. Cas. 547, 89 Ky. 478, 12 S. W. Rep. 936), Car. of L. S., 45; Stat. & D., 76.
White *v.* Colorado C. R. Co. (3 McCrary (U. S.) 559, 5 Dill. 428), Car. of M., 324, 370.
White *v.* Colorado C. R. Co. (5 Dill. (U. S.) 428), Car. of M., 155.
White *v.* Concord R. Co. (30 N. H. 188), Animals, 165, 170, 173, 480, 514; Evid., 2.
White *v.* Daly (7 Low. Can. 360), Stockh., 63.
White *v.* Evansville & T. H. R. Co. (58 Am. & Eng. R. Cas. 479, 133 Ind. 480, 33 N. E. Rep. 273), Agency, 51; Eject. Pass., 82, 84, 88.
White *v.* Fitchburg R. Co. (18 Am. & Eng. R. Cas. 140, 136 Mass. 321), Car. of P., 139, 533; Fly. Switch, 3.
White *v.* Fitchburg R. Corp. (4 Cush. (Mass.) 440), Em. Dom., 626.
White *v.* Goodrich Transp. Co. (46 Wis. 493, 21 Am. Ry. Rep. 398), Car. of M., 73, 441.
White *v.* Great Western R. Co. (2 C. B. N. S. 7, 26 L. J. C. P. 158), Car. of M., 449; Lim. of Liab., 19.
White *v.* Kennon (39 Am. & Eng. R Cas. 330, 83 Ga. 343, 9 S. E. Rep. 1082), Employés, Inj. to, 227; Fel. Serv., 292.

White *v.* Keokuk & D. M. R. Co. (52 Iowa 97, 2 N. W. Rep. 1016), Judgm., 37.
White *v.* Louisville & N. R. Co. (Ky.) (22 S. W. Rep. 219), Death, etc., 235.
White *v.* Manhattan R. Co. (139 N. Y. 19, 54 N. Y. S. R. 409, 34 N. E. Rep. 887; reversing 45 N. Y. S. R. 760, 18 N. Y. Supp. 396, 63 Hun 634), Elev. Rys., 16.
White *v.* Memphis, B. & A. R. Co. (64 Miss. 566, 1 So. Rep. 730), Em. Dom., 522, 537, 880.
White *v.* Michigan C. R. Co. (2 Int. Com. Rep. 641, 3 Int. Com. Com. 281), Int. Com., 10, 153.
White *v.* Middlesex R. Co. (135 Mass. 216), Contr., 52.
White *v.* Milwaukee City R. Co. (18 Am. & Eng. R. Cas. 213, 61 Wis. 536, 21 N. W. Rep. 524, 50 Am. Rep. 154), Dam., 41; Negl., 70; Phys. Exam., 1; St. Rys., 346.
White *v.* Missouri Pac. R. Co. (13 Am. & Eng. R. Cas. 473, 31 Kan. 280, 1 Pac. Rep. 611), Fires, 66, 68, 318.
White *v.* Missouri Pac. R. Co. (19 Mo. App. 400), Car. of L. S., 61; Stat. Agts., 3; Strikes, 2.
White *v.* Nashville & N. W. R. Co. (7 Heisk. (Tenn.) 518), Em. Dom., 412; Lis Pend., 1; State Aid, 35.
White *v.* New York & N. E. R. Co. (51 Am. & Eng. R. Cas. 392, 156 Mass. 181, 30 N. E. Rep. 612), Deeds, 43.
White *v.* New York C. & H. R. R. Co. (42 N. Y. S. R. 24, 62 Hun 620, 16 N. Y. Supp. 788), Death, etc., 255.
White *v.* New York C. & H. R. R. Co. (47 N. Y. S. R. 174, 20 N. Y. Supp. 6), Tresp., Inj. to, 55.
White *v.* Northwestern N. C. R. Co. (56 Am. & Eng. R. Cas. 706, 113 N. Car. 610, 18 S. E. Rep. 330), Sts. & H., 138, 142, 143, 208, 209.
White *v.* Parker (16 Can. Sup. Ct. 699), Abate., 5.
White *v.* Quincy (97 Mass. 430), Bridges, 33.
White *v.* Richmond & D. R. Co. (110 N. Car. 456, 15 S. E. Rep. 197), Release, 9.
White *v.* St. Louis & S. F. R. Co. (20 Mo. App. 564), Animals, 63, 536.
White *v.* St. Louis & S. F. R. Co. (44 Mo. App. 540), Sts. & H., 328
White *v.* San Rafael & S. Q. R. Co. (50 Cal. 417), Constr. Rys., 30.
White *v.* Smith (12 Rich. (So. Car.) 595), Fel. Serv., 54.
White *v.* South Shore R. Co. (6 Cush. (Mass.) 412), Em. Dom., 994.
White *v.* State (86 Ala. 69, 5 So. Rep. 674), Crim. L., 23.
White *v.* State (24 Tex. App. 231, 5 S. W. Rep. 857), Crim. L., 27.
White *v.* Syracuse & U. R. Co. (14 Barb. (N. Y.) 559), Mun. Aid, 44.
White *v.* Union Pac. R. Co. (8 Utah 56, 29 Pac. Rep. 1030), New Tr., 103.
White *v.* Utica & B. R. R. Co. (15 Hun (N. Y.) 333), Cat.-Gds., 26.
White *v.* Vann (6 Humph. (Tenn.) 70), Charges, 79.
White *v.* Vermont & M. R. Co. (21 How. (U. S.) 575), Bonds, 28.
White *v.* Vicksburg, S. & P. R. Co. (42 La. Ann. 990, 8 So. Rep. 475), Contrib. Neg., 100; Cross., Inj. at, 248; Witn., 23.
White *v.* Wabash, St. L. & P. R. Co. (17 Am. & Eng. R. Cas. 82, 64 Iowa 281, 20 N. W. Rep. 436), Em. Dom., 1015.
White *v.* Wabash Western R. Co. (34 Mo. App. 57), Contrib. Neg., 48, 50; Cross., Inj. at, 8.
White *v.* Wood (51 Am. & Eng. R. Cas. 73, 129 N. Y. 527, 29 N. E. Rep. 835, 42 N. Y. S. R. 174; reversing 38 N. Y. S. R. 338, 13 N. Y. Supp. 631), Reorg., 9.
White County Com'rs *v.* Karp (12 Am. & Eng. R. Cas. 642, 90 Ind. 236), Mun. Aid, 429.
White Hall & P. R. Co. *v.* Myers (16 Abb. Pr. N. S. (N. Y.) 34), Subscr., 127.
Whitehead *v.* Arkansas C. R. Co. (28 Ark. 460), Em. Dom., 23.
Whitehead *v.* Buffalo & L. H. R. Co. (7 Grant's Ch. (U. C.) 351), Constr. Rys., 103, 104; Direct., 36.
Whitehead *v.* Buffalo & L. H. R. Co. (18 How. Pr. (N. Y.) 218), Attach., 7; For. Corp., 15.
Whitehead *v.* Plummer (76 Iowa 181, 40 N. W. Rep. 709), Land Grants, 25.
Whitehead *v.* St. Louis, I. M. & S. R. Co. (2 Mo. App. 60), Car. of P., 359, 539; Children, Inj. to, 148, 149.
Whitehead *v.* St. Louis, I. M. & S. R. Co. (39 Am. & Eng. R. Cas. 410, 99 Mo. 263, 11 S. W. Rep. 751), Agency, 74; Car. of P., 94, 116, 228, 289, 291, 294, 554; Conduct., 12; Tresp., Inj. to, 57, 81.
Whitehead *v.* Vineyard (50 Mo. 30, 3 Am. Ry. Rep. 7), Sales of Rds., 8; State Aid, 26.
Whitehead *v.* Wilmington & W. R. Co. (9 Am. & Eng. R. Cas. 168, 87 N. Car. 255), Bills of L., 26, 103; Charges, 9.
Whitehouse *v.* Androscoggin R. Co. (52 Me. 208), Em. Dom., 705.
Whitehouse *v.* Wolverhampton & W. R. Co. (L. R. 5 Ex. 6, 39 L. J. Ex. 1, 21 L. T. 558), Em. Dom., 1158.
Whitelaw *v.* Memphis & C. R. Co. (16 Lea (Tenn.) 391, 1 S. W. Rep. 37), Employés, Inj. to, 463, 474, 524.
Whitely *v.* Mississippi, W. P. & B. Co. (36 Am. & Eng. R. Cas. 624, 38 Minn. 523, 38 N. W. Rep. 753), Em. Dom., 740, 956.
Whiteman *v.* Wilmington & S. R. Co. (2 Harr. (Del.) 514), Em. Dom., 27, 451; Tresp., 6.
Whitemarsh Tp. *v.* Philadelphia, G. & N. R. Co. (8 Watts & S. (Pa.) 365), Mand., 13, 25.
White Mountains R. Co. *v.* Beane (39 N. H. 107), Arb., 31.
White Mountains R. Co. *v.* Eastman (34 N. H. 124), Subscr., 49, 77, 112, 168.
White Mountains R. Co. *v.* White Mountains (N. H.) R. Co. (50 N. H. 50, 1 Am. Ry. Rep. 146), Dissol., 8; Mort., 248.
White River Tel. Co. *v.* Vermont C. R. Co. (21 Vt. 590), Charters, 183.
White River Turnpike Co. *v.* Vermont C. R.

Co. (21 Vt. 590), Charters, 48; Em. Dom., 84, 101, 180.
Whitesides *v.* St. Louis, K. & N. W. R. Co. (49 Mo. App. 250), Animals, 608.
Whitewater *v.* Bridgett (20 Am. & Eng. R. Cas. 443, 94 Ind. 216), Animals, 505.
White Water R. Co. *v.* Butler (34 Am. & Eng. R. Cas. 467, 112 Ind. 598, 12 West. Rep. 207, 14 N. E. Rep. 599), Eject. Pass., 65.
White Water Valley Canal Co. *v.* Vallette (21 How. (U. S.) 414), Mun. Aid, 22.
White Water Valley R. Co. *v.* McClure (29 Ind. 536), Em. Dom., 724, 733, 934.
White Water Valley R. Co. *v.* Quick (30 Ind. 384), Animals, 617; Fences, 64.
White Water Valley R. Co. *v.* Quick (31 Ind. 127), Fences, 64.
Whitfield *v.* Southeastern R. Co. (El., Bl. & El. 115, 4 Jur. N. S. 688, 27 L. J. Q. B. 220), Libel & S., 7.
Whitford *v.* Panama R. Co. (23 N. Y. 465; affirming 3 Bosw. (N. Y.) 67), Death, etc., 28, 121.
Whiting *v.* Chicago, M. & St. P. R. Co. (5 Dak. 90, 37 N. W. Rep. 222), Fires, 207, 318.
Whiting *v.* Potter (2 Fed. Rep. 517, 18 Blatchf. (U. S.) 165), Mun. Aid, 90, 97, 342.
Whiting *v.* Sheboygan & F. du L. R. Co. (25 Wis. 167), Mun. Aid, 53, 245.
Whitlock *v.* Comer (57 Fed. Rep. 565), Car. of P., 431.
Whitman *v.* Boston & M. R. Co. (3 Allen (Mass.) 133), Em. Dom., 209, 349, 370, 603, 739.
Whitman *v.* Boston & M. R. Co. (7 Allen (Mass.) 313), Em. Dom., 459, 739; Witn., 72, 118.
Whitman *v.* Boston & M. R. Co. (16 Gray (Mass.) 530), Em. Dom., 520.
Whitman *v.* Hubbell (24 Blatchf. (U. S.) 240), Rem. of C., 22.
Whitman *v.* Pennsylvania R. Co. (156 Pa. St. 175, 27 Atl. Rep. 290), Cross., Inj. at, 277.
Whitman *v.* Western Counties R. Co. (17 Nov. Sc. 405), Car. of M., 101.
Whitman *v.* Windsor & A. R. Co. (18 Nov. Sc. 271), Animals, 168.
Whitmarsh *v.* Grand Trunk R. Co. (7 U. C. C. P. 373), Cross. Sts. & H., 25.
Whitmore *v.* Boston & M. R. Co. (150 Mass. 477, 23 N. E. Rep. 220), Employés, Inj. to, 318; Fel. Serv., 243.
Whitmore *v.* Steamboat Caroline (20 Mo. 513), Bagg., 29.
Whitney *v.* Atlantic & St. L. R. Co. (44 Me. 362), Fences, 25; Leases, 39.
Whitney *v.* Atlantic Southern R. Co. (53 Iowa 651, 6 N. W. Rep. 32, 21 Am. Ry. Rep. 178), Em. Dom., 546.
Whitney *v.* Chicago & N. W. R. Co. (27 Wis. 327, 5 Am. Ry. Rep. 291), Car. of M., 323, 361, 367, 773; Wareh., 10; Witn., 149.
Whitney *v.* Eastern R. Co. (9 Allen (Mass.) 364), Car. of M., 749.
Whitney *v.* Maine C. R. Co. (69 Me. 208), Cross., Inj. at, 196, 284; Nuis., 5.
Whitney *v.* Mayor, etc., of N. Y. (28 Barb. (N. Y.) 233), Injunc., 31.
Whitney *v.* Merchants' Union Exp. Co. (104 Mass. 152), Exp. Cos., 18.
Whitney *v.* New York & A. R. Co. (66 How. Pr. (N. Y.) 436, 32 Hun 164, 5 Civ. Pro. 118), Mort., 218; Receiv., 23.
Whitney *v.* Pullman Palace Car Co. (28 Am. & Eng. R. Cas. 147, 143 Mass. 243, 9 N. E. Rep. 619), Sleep. Car Cos., 32.
Whitney *v.* Stevens (16 How. Pr. (N. Y.) 369), Mort., 169.
Whitney *v.* Taylor (45 Fed. Rep. 616), Land Grants, 50.
Whitney *v.* Willamette Bridge Co. (23 Oreg. 188, 31 Pac. Rep. 472), Flood. Lds., 43.
Whitney Mfg. Co. *v.* Richmond & D. R. Co. (55 Am. & Eng. R. Cas. 611, 38 So. Car. 365, 17 S. E. Rep. 147), Car. of M., 249, 252, 268; Evid., 15.
Whiton *v.* Chicago & N. W. R. Co. (21 Wis. 305), Death, etc., 95.
Whiton *v.* Chicago & N. W. R. Co. (2 Biss. (U. S.) 282; affirmed in 12 Wall. (U. S.) 270), Cross., Inj. at, 125, 218, 282; Death, etc., 200, 432.
Whitsett *v.* Chicago, R. I. & P. R. Co. (22 Am. & Eng. R. Cas. 336, 67 Iowa 150, 25 N. W. Rep. 104), Employés, Inj. to, 582; Evid., 54; Negl., 67; Trial, 154; Witn., 180.
Whitsett *v.* Union D. & R. Co. (10 Colo. 243, 15 Pac. Rep. 339), Nuis., 27.
Whitsky *v.* Chicago & G. T. R. Co. (62 Mich. 245, 28 N. W. Rep. 811), Animals, 189.
Whitson *v.* Franklin (34 Ind. 392), Sts. & H., 319, 330, 331.
Whitson *v.* Philadelphia & G. F. Pass. R. Co. (3 Phila. (Pa.) 284), St. Rys., 84.
Whittaker *v.* Boston & M. R. Co. (7 Gray (Mass.) 98), Cross. Sts. & H., 21.
Whittaker *v.* Delaware & H. Canal Co. (49 Hun 400, 22 N. Y. S. R. 405, 3 N. Y. Supp. 576), Fel. Serv., 58, 59.
Whittaker *v.* Delaware & H. Canal Co. (126 N. Y. 544, 27 N. E. Rep. 1042, 38 N. Y. S. R. 523; affirming 58 Hun 606, 34 N. Y. S. R. 822, 11 N. Y. Supp. 914), Collis., 32, 35, 36; Employés, Inj. to, 24; Fel. Serv., 152.
Whittaker *v.* Johnson County (10 Iowa 161), Evid., 201; Mun. Aid, 115, 367, 394.
Whittaker *v.* Manchester, S. & L. R. Co. (22 L. T. 545), Car. of P., 229.
Whittaker *v.* New York & H. R. Co. (19 J. & S. (N. Y.) 287), Evid., 234, 293; Trial, 123.
Whittenton Mfg. Co. *v.* Memphis & O. R. P. Co. (21 Fed. Rep. 896), Actions, 10.
Whittieer *v.* Portland & K. R. Co. (38 Me. 26) Cross. Sts. & H., 119; Sts. & H., 215.
Whittier *v.* Chicago, M. & St. P. R. Co. (24 Minn. 394), Contrib. Neg., 105; Fences, 9, 97.
Whittier *v.* Chicago, M. & St. P. R. Co. (26 Minn. 484, 5 N. W. Rep. 372), Animals, 147.
Whittlesey *v.* Hartford, P. & F. R. Co. (23 Conn. 421), Em. Dom., 1047; Injunc., 9.
Whitwam *v.* Wisconsin & M. R. Co. (12 Am. & Eng. R. Cas. 214, 58 Wis. 408, 17

N. W. Rep. 124), Employes, Inj. to, 116, 119; Fel. Serv., 27, 449.
Whitworth *v.* Erie R. Co. (13 J. & S. (N. Y.) 602), Car. of M., 671, 704.
Whitworth *v.* Erie R. Co. (6 Am. & Eng. R. Cas. 349, 87 N. Y. 413; affirming 13 J. & S. 602), Bills of L., 80; Car. of M., 151, 684, 685.
Whitworth *v.* Pelton (81 Mich. 98, 45 N. W. Rep. 500), Attach., 56, 57.
Whorter *v.* People (65 Ill. 290), Mun. Aid, 169.
Wibert *v.* New York & E. R. Co. (12 N. Y. 245; affirming 19 Barb. 36, reaffirming 29 Barb. 633; see 2 Sweeney 677), Car. of M., 57, 140.
Wichita & C. R. Co. *v.* Gibbs (47 Kan. 274, 27 Pac. Rep. 991), Animals, 123, 329.
Wichita & C. R. Co. *v.* Smith (46 Am. & Eng. R. Cas. 53, 45 Kan. 264, 25 Pac. Rep. 623), Sts. & H., 135, 215.
Wichita & W. R. Co. *v.* Beebe (38 Kan. 427, 17 Pac. Rep. 154), Costs, 2.
Wichita & W. R. Co. *v.* Beebe (39 Kan. 465, 18 Pac. Rep. 502), Actions, 13.
Wichita & W. R. Co. *v.* Davis (32 Am. & Eng. R. Cas. 65, 37 Kan. 743, 16 Pac. Rep. 78), Comp. Neg., 22; Cross., Inj. at, 193, 218, 254.
Wichita & W. R. Co. *v.* Fechheimer (36 Kan. 45, 12 Pac. Rep. 362), Em. Dom., 821; Sts. & H., 75; Trial, 202.
Wichita & W. R. Co. *v.* Fechheimer (51 Am. & Eng. R. Cas. 660, 49 Kan. 643, 31 Pac. Rep. 127), Embankm., 1.
Wichita & W. R. Co. *v.* Koch (55 Am. & Eng. R. Cas. 452, 47 Kan. 753, 28 Pac. Rep. 1013), Car. of L. S., 80.
Wichita & W. R. Co. *v.* Kuhn (38 Kan. 104, 16 Pac. Rep. 75), Em. Dom., 578, 630, 645, 724.
Wichita & W. R. Co. *v.* Kuhn (33 Am. & Eng. R. Cas. 159, 38 Kan. 675, 17 Pac. Rep. 322), Em. Dom., 671, 735; Witn., 121.
Wichita Sav. Bank *v.* Atchison, T. & S. F. R. Co. (20 Kan. 519, 20 Am. Ry. Rep. 299), Bills of L., 15, 116, 121, 128.
Wickham *v.* New Brunswick & C. R. & L. Co. (11 New Brun. 175), Mort., 86.
Widder, In re (20 U. C. Q. B. 638), Em. Dom., 1241.
Widder *v.* Buffalo & L. H. R. Co. (24 U. C. Q. B. 222), Em. Dom., 1271.
Widder *v.* Buffalo & L. H. R. Co. (27 U. C. Q. B. 425), App., 40.
Widder *v.* Buffalo & L. H. R. Co. (29 U. C. Q. B. 154), Em. Dom., 1217.
Widmer *v.* West End St. R. Co. (158 Mass. 49, 32 N. E. Rep. 899), St. Rys., 477.
Widrig *v.* Newport St. R. Co. (82 Ky. 511), Direct., 52.
Wiedmer *v.* New York El. R. Co. (38 Am. & Eng. R. Cas. 481, 114 N. Y. 462, 21 N. E. Rep. 1041, 23 N. Y. S. R. 859; reversing 41 Hun 284, 2 N. Y. S. R. 622), Elev. Rys., 218.
Wiener *v.* New York El. R. Co. (42 N. Y. S. R. 785, 16 N. Y. Supp. 913; affirmed in 138 N. Y. 673, 53 N. Y. S. R. 932, mem.), Elev. Rys., 167.
Wier *v.* St. Louis & I. M. R. Co. (48 Mo 558), Animals, 480.
Wier *v.* St. Louis, Ft. S. & W. R. Co. (40 Kan. 130, 19 Pac. Rep. 316), Em. Dom., 459.
Wiggin *v.* Boston & A. R. Co. (120 Mass. 201), Car. of M., 307, 313; Evid., 192.
Wiggins *v.* Erie R. Co. (5 Hun (N. Y.) 185), Agency, 13.
Wiggins Ferry Co. *v.* Chicago & A. R. Co. (5 Am. & Eng. R. Cas. 1, 73 Mo. 389, 39 Am. Rep. 519; reversing 5 Mo. App. 347), Assign., 16; Car. of M., 593; Ferries, 7.
Wiggins Ferry Co. *v.* East St. Louis Union R. Co. (20 Am. & Eng. R. Cas. 9, 107 Ill. 450), Incorp., 2; Mun. Corp., 34; St. Rys., 15, 43.
Wiggins Ferry Co. *v.* Ohio & M. R. Co. (72 Ill. 360), Contr., 23; Ferries, 7.
Wiggins Ferry Co. *v.* Ohio & M. R. Co. (94 Ill. 83), Cov'ts, 16.
Wiggins Ferry Co. *v.* Ohio & M. R. Co. (52 Am. & Eng. R. Cas. 82, 142 U. S. 396, 12 Sup. Ct. Rep. 188), App., 146; Judgm., 20, 30; Leases, 72, 98.
Wight *v.* Missouri Pac. R. Co. (20 Mo. App. 481), New Tr., 5.
Wight *v.* Shelby R. Co. (16 B. Mon. (Ky.) 4), Subscr., 132, 155.
Wight *v.* Springfield & N. L. R. Co. (117 Mass. 226), Direct., 4.
Wightman *v.* Chicago & N. W. R. Co. (73 Wis. 169, 2 L. R. A. 185, 40 N. W. Rep. 689), Car. of P., 60; Eject. Pass., 130; Tickets & F., 68.
Wigmore *v.* Jay (5 Ex. 354, 14 Jur. 837, 19 L. J. Ex. 300), Fel. Serv., 1, 142.
Wigton *v.* Pennsylvania R. Co. (20 Phila. (Pa.) 184), Discrim., 50; Pl., 143; Stat., 24.
Wilbrand *v.* Eighth Ave. R. Co. (3 Bosw. (N. Y.) 314), St. Rys., 230, 235.
Wilburn *v.* St. Louis, I. M. & S. R. Co. (36 Mo. App. 203), Car. of P., 241, 546, 609; Trial, 99.
Wilburn *v.* St. Louis, I. M. & S. R. Co. (48 Mo. App. 224), Car. of P., 243; Negl., 67.
Wilby *v.* Midland R. Co. (35 L. T. 244), Stat. & D., 118.
Wilby *v.* West Cornwall R. Co. (2 H. & N. 703, 4 Jur. N. S. 284, 27 L. J. Ex. 181), Car. of M., 584, 593.
Wilcken *v.* West Brooklyn R. Co. (1 N. Y. Supp. 791, 49 Hun 609, 17 N. Y. S. R. 654), Nuis., 19.
Wilcox *v.* Chicago, M. & St. P. R. Co. (24 Minn. 269), Car. of M., 281.
Wilcox *v.* Parmelee (3 Sandf. (N. Y.) 610), Car. of M., 602.
Wilcox *v.* Richmond & D. R. Co. (52 Fed. Rep. 264, 8 U. S. App. 118, 3 C. C. A. 73), Dam., 63; Tender, 7.
Wilcox *v.* Rome, W. & O. R. Co. (39 N. Y. 358), Cross., Inj. at, 198, 254; Death, etc., 194.
Wilcox *v.* St. Paul & N. P. R. Co. (35 Minn. 439, 29 N. W. Rep. 148), Em. Dom., 322, 974; Sts. & H., 286.
Wilcox *v.* Toledo & A. A. R. Co. (9 Am. & Eng. R. Cas. 518, 43 Mich. 584, 5 N. W. Rep. 1003), Bills & N., 20, 22; Incorp., 11.

Wilczinski *v.* Louisville, N. O. & T. R. Co. (66 Miss. 595, 6 So. Rep. 709), Injunc., 26.
Wild *v.* Oregon S. L. & U. N. R. Co. (21 Oreg. 159, 27 Pac. Rep. 954), Employés, Inj. to, 12, 18, 182, 293, 533; Negl., 64; Pl., 117, 157, 172.
Wilde *v.* Merchants' Despatch Transp. Co. (47 Iowa 272), Bills of L., 44; Car. of M., 117, 406, 681.
Wilde *v.* New York & H. R. Co. (1 Hilt. (N. Y.) 302), Proc., 39.
Wilder *v.* Chicago & W. M. R. Co. (35 Am. & Eng. R. Cas. 162, 70 Mich. 382, 38 N. W. Rep. 289), Animals, 9, 519; Stat., 30.
Wilder *v.* Maine C. R. Co. (65 Me. 332), Animals, 238; Cov'ts, 9; Fences, 9.
Wilder *v.* St. Johnsbury & L. C. R. Co. (65 Vt. 43, 25 Atl. Rep. 896), Acc. & Sat., 1.
Wilder *v.* Shea (13 Bush (Ky.) 128, 17 Am. Ry. Rep. 57), Attach., 27.
Wilds *v.* Brunswick & W. R. Co. (82 Ga. 667, 9 S. E. Rep. 595), Tresp., Inj. to, 106.
Wilds *v.* Hudson River R. Co. (24 N. Y. 430, 23 How. Pr. 492; reversing 33 Barb. 503), Cross., Inj. at, 195, 254; Trial, 68.
Wilds *v.* Hudson River R. Co. (29 N. Y. 315), Cross., Inj. at, 313, 342; Death, etc., 192; Negl., 70.
Wilds *v.* St. Louis, A. & T. H. R. Co. (26 Am. & Eng. R. Cas. 106, 102 N. Y. 410, 7 N. E. Rep. 290, 2 N. Y. S. R. 41; affirming 33 Hun 668), Int., 6.
Wiley *v.* Long Island R. Co. (27 N. Y. Supp. 722, 76 Hun 29), App., 30.
Wiley *v.* Silliman (62 Ill. 170), Mun. Aid, 23, 118, 169.
Wiley *v.* West Jersey R. Co. (44 N. J. L. 247), Fires, 38, 81, 260, 269, 316, 333.
Wilkerson *v.* Corrigan Con. St. R. Co. (26 Mo. App. 144), St. Rys., 441.
Wilkes, In re (L. R. 16 Ch. D. 597, 50 L. J. Ch. D. 199), Em. Dom., 115.
Wilkes *v.* Gzowski (13 U. C. Q. B. 308), Em. Dom., 1275.
Wilkie *v.* Rochester & S. L. R. Co. (12 Hun (N. Y.) 242), Injunc., 12; Stockh., 78.
Wilkin *v.* First Div. St. P. & P. R. Co. (16 Minn. 271), Charters, 141.
Wilkin *v.* St. Paul, S. & T. F. R. Co. (22 Minn. 177, 19 Am. Ry. Rep. 311), Em. Dom., 931.
Wilkins *v.* St. Louis, I. M. & S. R. Co. (101 Mo. 93, 13 S. W. Rep. 893), Contrib. Neg., 87; Cross., Inj. at, 7, 87, 308; Negl., 1; Trial, 160.
Wilkinson *v.* Delaware, L. & W. R. Co. (20 Am. & Eng. R. Cas. 597, 22 Fed. Rep. 353), For. Corp., 1.
Wilkinson *v.* Fleming (30 Ill. 353), Trusts, 13.
Wilkinson *v.* Goffin (33 L. T. 824), Tresp., 2.
Wilkinson *v.* Hull, B. & W. R. J. R. & D. Co. (6 Am. & Eng. R. Cas. 504, L. R. 20 Ch. D. 323, 51 L. J. Ch. D. 788), Em. Dom., 1086, 1090, 1091, 1204.
Wilkinson *v.* Northern Pac. R. Co. (20 Am. & Eng. R. Cas. 320, 5 Mont. 538, 6 Pac. Rep. 349), Pub. Lds., 40.
Wilkinson *v.* Peru (61 Ind. 1), Mun. Aid, 247; Pl., 6.
Wilkinson *v.* St. Louis Section Dock Co. (102 Mo. 130, 14 S. W. Rep. 177), Em. Dom., 274.
Wilkinson *v.* Stewart (30 Ill. 48), Pres., 11.
Wilks *v.* Georgia Pac. R. Co. (79 Ala. 180), Corp., 8; Estop., 33; Spec. Perf., 4, 15, 23, 24.
Will *v.* West Side R. Co. (84 Wis. 42, 54 N. W. Rep. 30), App., 54.
Willamette Bridge Co. *v.* Hatch (125 U. S. 1, 8 Sup. Ct. Rep. 811), Bridges, 87.
Willamette Freighting Co. *v.* Stannus (4 Oreg. 262), Subscr., 51, 56.
Willard *v.* Newbury (22 Vt. 458), Cross. Sts. & H., 28.
Willard *v.* Swanson (22 Ill. App. 424), Comp. Neg., 14; Employés, Inj. to, 767.
Willenborg *v.* Illinois C. R. Co. (11 Ill. App. 298), Assump., 1; Em. Dom., 217.
Willer *v.* Oregon R. & N. Co. (15 Oreg. 153, 13 Pac. Rep. 768), Dam., 49; Pl., 180.
Willetts *v.* Buffalo & R. R. Co. (14 Barb. (N. Y.) 585), Children, Inj. to, 125; Eject. Pass., 45.
Willetts *v.* New York El. R. Co. (40 N. Y. S. R. 917, 61 Hun 626, 15 N. Y. Supp. 923), Elev. Rys., 139.
Willey *v.* Great Northern R. Co. ([1891] 2 Q. B. 194), Costs, 12.
Willey *v.* Norfolk Southern R. Co. (96 N. Car. 408, 1 S. E. Rep. 446), Sts. & H., 403.
Willey *v.* Norfolk Southern R. Co. (98 N. Car. 263, 3 S. E. Rep. 485), Em. Dom., 128, 687.
Williams, Ex parte (12 Am. & Eng. R. Cas. 425, 17 So. Car. 396), Paym., 3; Receiv., 30, 75; Refer., 1.
Williams *v.* Androscoggin & K. R. Co. (36 Me. 201), Attach., 24, 34.
Williams *v.* Atchison, T. & S. F. R. Co. (22 Kan. 117), Trial, 60.
Williams *v.* Aylesbury & B. R. Co. (2 L. R. 819, 28 L. T. 5479, Em. Dom., 1209.
Williams *v.* Aylesbury & B. R. Co. (43 L. J. Ch. 825, 31 L. T. 521), Em. Dom., 1155.
Williams *v.* Baker (17 Wall. (U. S.) 144), Land Grants, 22.
Williams *v.* Baltimore & O. R. Co. (9 W. Va. 33), Car. of M., 723; New Tr., 84; Pl., 106; Trial, 24.
Williams *v.* Benet (34 So. Car. 112, 13 S. E. Rep. 97), Subscr., 173; Trial, 106.
Williams *v.* Bettle (51 N. J. L. 512, 18 Atl. Rep. 750; affirming 42 Am. & Eng. R. Cas. 271, 50 N. J. L. 132, 11 Atl. Rep. 17), Tax., 39, 62, 274.
Williams *v.* Brooklyn El. R. Co. (46 Am. & Eng. R. Cas. 149, 126 N. Y. 96, 26 N. E. Rep. 1048, 36 N. Y. S. R. 504; reversing 57 Hun 591, 32 N. Y. S. R. 702, 10 N. Y. Supp. 929), Elev. Rys., 15, 156, 170; Trial, 92, 93, 162.
Williams *v.* Camden & R. Water Co. (79 Me. 543, 11 Atl. Rep. 600), Waters & W., 22.
Williams *v.* Central R. Co. (43 Iowa 396, 14 Am. Ry. Rep. 458), Employés, Inj. to, 17. App. 339), Cross., Inj. at, 104; Fright.
Williams *v.* Chicago & A. R. Co. (135 Ill. 491, 26 N. E. Rep. 661; affirming 32 Ill. Teams, 3; Negl., 97.
Williams *v.* Chicago, M. & St. P. R. Co.

(23 Am. & Eng. R. Cas. 274, 64 Wis. 1, 24 N. W. Rep. 422), Cross., Inj. at, 198, 251, 264.
Williams *v.* Chicago, S. F. & C. R. Co. (112 Mo. 463, 20 S. W. Rep. 631), Constr. Rys., 52, 55, 58, 106, 119; Liens, 17, 40.
Williams *v.* Citizens' R. Co. (130 Ind. 71, 29 N. E. Rep. 408), Injunc., 27.
Williams *v.* City Elec. St. R. Co. (43 Am. & Eng. R. Cas. 215, 41 Fed. Rep. 556), Elec. Rys., 7; St. Rys., 192, 194.
Williams *v.* Clark (24 Am. & Eng. R. Cas. 460, 140 Mass. 238, 5 N. E. Rep. 802), Farm Cross., 8, 13.
Williams *v.* Delaware & H. Canal Co. (25 N. Y. S. R. 518, 53 Hun 635, 3 Silv. Sup. Ct. 19, 6 N. Y. Supp. 36), Car. of M., 350.
Williams *v.* Delaware, L. & W. R. Co. (39 Hun (N. Y.) 430), Employés, Inj. to, 93, 266, 672, 716; Negl., 43, 46.
Williams *v.* Delaware, L. & W. R. Co. (41 Am. & Eng. R. Cas. 254, 116 N. Y. 628, 22 N. E. Rep. 1117, 27 N. Y. S. R. 760; reversing 43 Hun 633, mem., 6 N. Y. S. R. 872, mem.), Employés, Inj. to, 182, 206, 237.
Williams *v.* Delaware, L. & W. R. Co. (2 N. Y. Supp. 435, 18 N. Y. S. R. 857, 50 Hun 600, mem.), Employés, Inj. to, 271; Licensees, Inj. to, 14.
Williams *v.* Duanesburgh (66 N. Y. 129), Mun. Aid, 6, 15, 337.
Williams *v.* Duck River Valley N. G. R. Co. (9 Baxt. (Tenn.) 488), Mun. Aid, 336.
Williams *v.* East Tenn., V. & G. R. Co. (90 Ga. 519, 16 S. E. Rep. 303), Trial, 10, 11.
Williams *v.* Ft. Worth & N. O. R. Co. (82 Tex. 553, 18 S. W. Rep. 206), Bills & N., 20; Contr., 70; Mun. Aid, 224; Words & Ph., 21.
Williams *v.* Great Western R. Co. (L. R. 9 Ex. 157, 22 W. R. 531, 31 L. T. 124, 43 L. J. Ex. 105), Children, Inj. to, 10, 20.
Williams *v.* Great Western R. Co. (3 H. & N. 869, 28 L. J. Ex. 2), New Tr., 10.
Williams *v.* Great Western R. Co. (52 L. T. 250, 49 J. P. 439), Car. of L. S., 2, 115.
Williams *v.* Great Western R. Co. (10 Exch. 15), Bagg., 1, 97.
Williams *v.* Gulf, C. & S. F. R. Co. (1 Tex. App. (Civ. Cas.) 131), Em. Dom., 174; Sts. & H., 244.
Williams *v.* Hagood (98 U. S. 72), State Aid, 34.
Williams *v.* Hall (65 Ind. 129), Mun. Aid, 92, 411.
Williams *v.* Hannibal & St. J. R. Co. (80 Mo. 597), Animals, 293, 353, 504.
Williams *v.* Hartford & N. H. R. Co. (13 Conn. 110), Em. Dom., 963; Location, etc., 10.
Williams *v.* Hartford & N. H. R. Co. (13 Conn. 397), Em. Dom., 474, 478, 484, 1036.
Williams *v.* Holland (22 How. Pr. (N. Y.) 137), Car. of M., 169, 240, 242; Car. of P., 592.
Williams *v.* Jacksonville, T. & K. W. R. Co. (26 Fla. 533, 8 So. Rep. 446), Witn., 23.
Williams *v.* Kansas City, S. & M. R. Co. (37 Am. & Eng. R. Cas. 329, 96 Mo. 275, 9 S. W. Rep. 573), Children, Inj. to, 74, 107; Death, etc., 339; Tresp., Inj. to, 44, 47, 50.
Williams *v.* Lawrence County Com'rs (121 Ind. 239, 23 N. E. Rep. 76), Mun. Aid, 411.
Williams *v.* Louisiana (103 U. S. 637), Fed. Cts., 24.
Williams *v.* Michigan C. R. Co. (2 Mich. 259), Animals, 43; Fences, 27; Mich. Cent. R. Co., 1; Negl., 32.
Williams *v.* Missouri, K. & T. R. Co. (3 Dill. (U. S.) 267), Citizens., 2.
Williams *v.* Missouri Pac. R. Co. (74 Mo. 453), Animals, 234, 356, 488.
Williams *v.* Missouri Pac. R. Co. (109 Mo. 475, 18 S. W. Rep. 1098), Contrib. Neg., 105; Fel. Serv., 138, 154, 160; Negl., 20; Trial, 168.
Williams *v.* Morgan (32 La. Ann. 168), Car. of M., 114.
Williams *v.* Morgan (17 Am. & Eng. R. Cas. 217, 111 U. S. 684, 4 Sup. Ct. Rep. 638), Mort., 156, 299; Receiv., 160.
Williams *v.* New Albany & S. R. Co. (5 Ind. 111), Animals, 126; Right of W., 11.
Williams *v.* New Orleans, M. & T. R. Co. (20 Am. & Eng. R. Cas. 378, 60 Miss. 689), Em. Dom., 133, 459, 852.
Williams *v.* New York & N. H. R. Co. (39 Conn. 509, 4 Am. Ry. Rep. 264), Dedica., 1, 4; Sts. & H., 3.
Williams *v.* New York C. R. Co. (16 N. Y. 97; reversing 18 Barb. 222), Em. Dom., 163; Sts. & H., 249.
Williams *v.* New York, L. E. & W. R. Co. (21 N. Y. Supp. 259, 49 N. Y. S. R. 568, 2 Misc. 30), Employés, Inj. to, 683, 716, 722; Fel. Serv., 65.
Williams *v.* North Mo. R. Co. (50 Mo. 433, 3 Am. Ry. Rep. 258), Just. P., 3.
Williams *v.* Northern Pac. R. Co. (11 Am. & Eng. R. Cas. 421, 3 Dak. 168, 14 N. W. Rep. 97), Animals, 284, 288; Negl., 73.
Williams *v.* Pennsylvania R. Co. (9 Phila. (Pa.) 298), Ex. & Ad., 10.
Williams *v.* People (132 Ill. 574, 24 N. E. Rep. 647), Mun. Aid, 117, 137, 148, 166.
Williams *v.* Poor (65 Iowa 410, 21 N. W. Rep. 753), Mun. Aid, 108, 412.
Williams *v.* Pullman Palace Car Co. (33 Am. & Eng. R. Cas. 407, 40 La. Ann. 87, 3 So. Rep. 631), Agency, 80, 113; Sleep. Car Cos., 20, 38.
Williams *v.* Pullman Palace Car Co. (33 Am. & Eng. R. Cas. 414, 40 La. Ann. 417, 4 So. Rep. 85), Assault, 4; Judgm., 24; Sleep. Car Cos., 36, 37, 38.
Williams *v.* Roberts (88 Ill. 11, 21 Am. Ry. Rep. 268), Mun. Aid, 117, 135.
Williams *v.* Rome, W. & O. R. Co. (18 Blatchf. (U. S.) 181, 2 Fed. Rep. 702), Pat. for Inv., 23.
Williams *v.* South & N. Ala. R. Co. (91 Ala. 635, 9 So. Rep. 77), Death, etc., 45, 403; Employés, Inj. to, 167, 339, 473; Fly. Switch, 1.
Williams *v.* Southern Pac. R. Co. (Cal.) (9 Pac. Rep. 152), Contrib. Neg., 10, 13, 82; Tresp., Inj. to, 73, 103.
Williams *v.* Southern Pac. R. Co. (Cal.) (11 Pac. Rep. 849), Tresp., Inj. to, 73.

Williams *v.* Southern Pac. R. Co. (28 Am. & Eng. R. Cas. 578, 72 Cal. 120, 13 Pac. Rep. 219), Tresp., Inj. to, 69.
Williams *v.* Steamship Columbia (1 Wash. T. 95), Pl., 153.
Williams *v.* Texas & P. R. Co. (15 Am. & Eng. R. Cas. 403, 60 Tex. 205), Children, Inj. to, 129.
Williams *v.* United States Mut. Acc. Assoc. (133 N. Y. 366, 31 N. E. Rep. 222, 45 N. Y. S. R. 238), Acc. Ins., 10.
Williams *v.* Vanderbilt (28 N. Y. 217; affirming 29 Barb. 491), Car. of P., 625.
Williams *v.* Western Union R. Co. (5 Am. & Eng. R. Cas. 290, 50 Wis. 71, 5 N. W. Rep. 482), Deeds, 16; Em. Dom., 130.
Williams *v.* Wilmington & W. R. Co. (93 N. Car. 42), Bills of L., 16, 121.
Williams & G. W. R. Co., In re (26 U. C. Q. B. 340), Mand., 25.
Williamsburg Sav. Bank *v.* Solon (47 N. Y. S. R. 496, 20 N. Y. Supp. 27; modified in 136 N. Y. 465, 49 N. Y. S. R. 840, 32 N. E. Rep. 1058), Coupons, 12; Mun. Aid, 336.
Williamson *v.* Cambridge R. Co. (30 Am. & Eng. R. Cas. 636, 144 Mass. 148, 10 N. E. Rep. 790), Evid., 153, 202.
Williamson *v.* Chicago, R. I. & P. R. Co. (53 Iowa 126, 4 N. W. Rep. 870, 36 Am. Rep. 206), Contr., 59.
Williamson *v.* Chicago, R. I. & P. R. Co. (84 Iowa 583, 51 N. W. Rep. 60), Pl., 149.
Williamson *v.* Grand Trunk R. Co. (17 U. C. C. P. 615), Eject. Pass., 52.
Williamson *v.* Keokuk (44 Iowa 88), Mun. Aid, 54, 329, 338.
Williamson *v.* New Albany, etc., R. Co. (1 Biss. (U. S.) 198), Deeds of Tr., 14; Mort., 215; Receiv., 17.
Williamson *v.* New Jersey Southern R. Co. (25 N. J. Eq. 13), Mort., 41, 188.
Williamson *v.* New Jersey Southern R. Co. (26 N. J. Eq. 398), Consol., 16; Mort., 35, 68.
Williamson *v.* New Jersey Southern R. Co. (27 N. J. Eq. 225), Mort., 318.
Williamson *v.* New Jersey Southern R. Co. (28 N. J. Eq. 277, 14 Am. Ry. Rep. 34; reversed in 29 N. J. Eq. 311), Mort., 42, 48, 117; Paym., 7; Tax., 274.
Williamson *v.* New Jersey Southern R. Co. (29 N. J. Eq. 311, 15 Am. Ry. Rep. 572), Fixt., 2, 3, 9; Mort., 42, 46, 47, 67.
Williamson *v.* Newport News & M. V. Co. (48 Am. & Eng. R. Cas. 276, 34 W. Va. 657, 12 S. E. Rep. 824), Employés, Inj. to, 237.
Williamson *v.* New York, N. H. & H. R. Co. (24 J. & S. (N. Y.) 508, 4 N. Y. Supp. 834, 22 N. Y. S. R. 431), Car. of M., 330.
Williamson *v.* Washington City, V. M. & G. S. R. Co. (1 Am. & Eng. R. Cas. 498, 33 Gratt. (Va.) 624), Receiv., 80.
Williamsport & E. R. Co. *v.* Com. (13 Pa. St. 288), Canals, 5.
Williamsport & E. R. Co. *v.* Cummins (8 Watts (Pa.) 450), Trial, 18.
Williamsport & N. B. R. Co. *v.* Philadelphia & E. R. Co. (47 Am. & Eng. R. Cas. 224, 141 Pa. St. 407, 21 Atl. Rep. 645), Location, etc., 25, 27.
Williamsport Pass. R. Co. *v.* Williamsport (36 Am. & Eng. R. Cas. 125, 120 Pa. St. 1, 13 Atl. Rep. 496), St. Rys., 87.
Williamston & T. R. Co. *v.* Battle, 66 N. Car. 540), Em. Dom., 212; License, 12.
Williard *v.* Pinard (44 Vt. 34), Contrib. Neg., 110.
Willing *v.* Baltimore R. Co. (5 Whart. (Pa.) 460), Em. Dom., 830.
Willis *v.* European & N. A. R. Co. (13 New Brun. 157), Bagg., 100.
Willis *v.* Fry (13 Phila. (Pa.) 33), Stock, 1, 75.
Willis *v.* Grand Trunk R. Co. (62 Me. 488), Bills of L., 62.
Willis *v.* Long Island R. Co. (34 N. Y. 670; affirming 32 Barb. 398), Car. of P., 352, 458, 476.
Willis *v.* Missouri Pac. R. Co. (23 Am. & Eng. R. Cas. 379, 61 Tex. 432), Death, etc., 109; Trial, 11.
Willis *v.* Oregon R. & N. Co. (17 Am. & Eng. R. Cas. 539, 11 Oreg. 257, 4 Pac. Rep. 121), Employés, Inj. to, 649; Fel. Serv., 325.
Willis *v.* Toledo, A. A. & N. M. R. Co. (72 Mich. 160, 40 N. W. Rep. 205), Officers, 10; Trial, 95.
Willisch *v.* Indianapolis & St. L. R. Co. (10 Ill. App. 402), App., 136.
Williston *v.* Michigan S. & N. I. R. Co. (13 Allen (Mass.) 400), Divid., 8; For. Corp., 15.
Willits *v.* Chicago, B. & K. C. R. Co. (80 Iowa 531, 45 N. W. Rep. 916), Pl., 78.
Willitts *v.* Chicago, B. & K. C. R. Co. (88 Iowa 281, 55 N. W. Rep. 313), Flood. Lds., 28, 52, 72, 79; Lim. of Ac., 56; Witn., 49, 125.
Willmott *v.* Corrigan Con. St. R. Co. (Mo.) (10 S. W. Rep. 500), Children, Inj. to, 111, 175.
Willmott *v.* Corrigan Con. St. R. Co. (106 Mo. 535, 17 S. W. Rep. 490), Car. of P., 137; St. Rys., 414.
Willoughby *v.* Chicago & N. W. R. Co. (37 Iowa 432), Cross., Inj. at, 8, 229.
Willoughby *v.* Chicago, J. R. & U. S. Co. (50 N. J. Eq. 656, 25 Atl. Rep. 277), Bonds, 1; Discrim., 2, 4; Int. Com., 61; Judgm., 16; Stockh., 77; Stock Yards, 1.
Willoughby *v.* Northeastern R. Co. (43 Am. & Eng. R. Cas. 660, 32 So. Car. 410, 11 S. E. Rep. 339), Tresp., 13, 15.
Wills *v.* Cape Girardeau S. W. R. Co. (44 Mo. App. 51), Employés, Inj. to, 312; Negl., 89; New Tr., 30.
Wills *v.* Lynn & B. R. Co. (2 Am. & Eng. R. Cas. 27, 129 Mass. 351), Contrib. Neg., 123; St. Rys., 312, 417.
Willson *v.* Black Bird Creek Marsh Co. (2 Pet. (U. S.) 245), Bridges, 61.
Willson *v.* Northern Pac. R. Co. (58 Am. & Eng. R. Cas. 460, 5 Wash. 621, 32 Pac. Rep. 468, 34 Pac. Rep. 146), Eject. Pass., 72, 78, 106.
Wilmer *v.* Atlanta & R. A. L. R. Co. (2 Woods (U. S.) 409), Charters, 13; Receiv., 3, 13.

Wilmer *v.* Atlanta & R. A. L. R. Co. (2 Woods (U. S.) 447), Charters, 13; Deeds of Tr., 15, 17; Mort., 170, 241.
Wilmes *v.* Minneapolis & N. W. R. Co. (10 Am. & Eng. R. Cas. 161, 29 Minn. 242, 13 N. W. Rep. 39), Em. Dom., 315.
Wilmington & M. R. Co. *v.* Saunders (3 Jones (N. Car.) 126), Charters, 6.
Wilmington & M. R. Co. *v.* Wright (5 Jones (N. Car.) 304), Contr., 2.
Wilmington & R. R. Co. *v.* Baker (3 Dev. & B. (N. Car.) 79), Subscr., 184.
Wilmington & R. R. Co. *v.* Downward (Del.) (35 Am. & Eng. R. Cas. 87, 14 Atl. Rep. 720), Dissol., 12.
Wilmington & R. R. Co. *v.* High (89 Pa. St. 282), Em. Dom., 616.
Wilmington & R. R. Co. *v.* Robeson (5 Ired. (N. Car.) 391), Subscr., 205.
Wilmington & R. R. Co. *v.* Stauffer (60 Pa. St. 374), Em. Dom., 701.
Wilmington & S. R. Co. *v.* Condon (8 Gill & J. (Md.) 443), Em. Dom., 887.
Wilmington & W. R. Co. *v.* Alsbrook (110 N. Car. 137, 437, 14 S. E. Rep. 652, 1007), Consol., 28; Tax., 92, 145, 242.
Wilmington & W. R. Co. *v.* Alsbrook (53 Am. & Eng. R. Cas. 687, 146 U. S. 279, 13 Sup. Ct. Rep. 72), Tax., 166, 242.
Wilmington & W. R. Co. *v.* Reid (64 N. Car. 226; reversed in 13 Wall. (U. S.) 264), Tax., 97.
Wilmington & W. R. Co. *v.* Reid (13 Wall. (U. S.) 264, 3 Am. Ry. Rep. 195), Tax., 160.
Wilmington & W. R. Co. *v.* Smith (99 N. Car. 131, 5 S. E. Rep. 237), Em. Dom., 748, 793.
Wilmington, C. & A. R. Co. *v.* Brunswick County Com'rs (72 N. Car. 10), Tax., 277, 319.
Wilmington, C. & A. R. Co. *v.* Garner (27 So. Car. 50, 2 S. E. Rep. 634), Ejectm., 25.
Wilmington, C. & A. R. Co. *v.* Greenville & C. R. Co. (9 So. Car. 325), Car. of M., 635.
Wilmington, C. & A. R. Co. *v.* Ling (16 Am. & Eng. R. Cas. 539, 18 So. Car. 116), Stat. Agts., 11.
Wilmington C. & R. R. Co. *v.* Dominguez (50 Cal. 505), Em. Dom., 820.
Wilmington, C. & R. R. Co. *v.* Western R. Co. (66 N. Car. 90), State Aid, 28.
Wilmington R. Bridge Co. *v.* New Hanover County Com'rs (72 N. Car. 15), Tax., 163.
Wilscam *v.* Montreal St. R. Co. (4 Montr. Super. 193; affirmed in 5 Montr. L. R. 340), St. Rys., 421.
Wilsey *v.* Louisville & N. R. Co. (26 Am. & Eng. R. Cas. 258, 83 Ky. 511), Eject. Pass., 11; Tickets & F., 45, 122.
Wilson *v.* Adams Exp. Co. (27 Mo. App. 360), Exp. Cos., 48; Guar., 6.
Wilson *v.* Adams Exp. Co. (43 Mo. App. 659), Exp. Cos., 48.
Wilson *v.* Atlanta & C. R. Co. (40 Am. & Eng. R. Cas. 25, 82 Ga. 386, 10 S. E. Rep. 1076), App., 58; Car. of M., 63, 64.
Wilson *v.* Atlanta & C. A. L. R. Co. (16 So. Car. 587), App., 114; Evid., 159; Fires, 47.
Wilson *v.* Baltimore & O. R. Co. (32 Mo. App. 682), Sleep. Car Cos., 35.
Wilson *v.* Baltimore & P. R. Co. (5 Del. Ch. 524), Em. Dom., 8, 58, 282, 299, 892, 1038.
Wilson *v.* Birkenhead, L. & C. J. R. Co. (6 Ex. 627, 6 Railw. Cas. 771, 20 L. J. Ex. 306), Subscr., 90.
Wilson *v.* Boston (117 Mass. 509), Bridges, 54.
Wilson *v.* Brooklyn El. R. Co. (30 N. Y. S. R. 240, 9 N. Y. Supp. 277; affirmed in 130 N. Y. 675, mem., 29 N. E. Rep. 1034, 41 N. Y. S. R. 952), App., 94; Elev. Rys., 199; Employés, Inj. to, 605.
Wilson *v.* Bumstead (12 Neb. 1, 10 N. W. Rep. 411), Death, etc., 95.
Wilson *v.* Burlington & M. R. R. Co. (33 Iowa 591), App., 117.
Wilson *v.* Caledonian R. Co. (6 Railw. Cas. 772, 5 Ex. 822, 1 L., M. & P. 731, 15 Jur. 17, 20 L. J. Ex. 6), Proc., 40.
Wilson *v.* California C. R. Co. (94 Cal. 166, 29 Pac. Rep. 861), Car. of M., 153, 224, 241, 336, 364, 365, 366, 702; New Tr., 99.
Wilson *v.* Canadea (15 Hun (N. Y.) 218), Mun. Aid, 303.
Wilson *v.* Chesapeake & O. R. Co. (21 Gratt. (Va.) 654), Bagg., 16, 19, 56, 87, 98; Consol., 42.
Wilson *v.* Chicago, M. & St. P. R. Co. (68 Iowa 673, 27 N. W. Rep. 916), Pl., 176.
Wilson *v.* Chicago, R. I. & P. R. Co. (41 Iowa 443), Vend. & P., 2.
Wilson *v.* Cunningham (3 Cal. 241), Cross., Inj. at, 3.
Wilson *v.* Denver, S. P. & P. R. Co. (15 Am. & Eng. R. Cas. 192, 7 Colo. 101, 2 Pac. Rep. 1), Employés, Inj. to, 80, 508.
Wilson *v.* Des Moines, O. & S. R. Co. (67 Iowa 509, 25 N. W. Rep. 754), Em. Dom., 612, 1001.
Wilson *v.* Detroit & M. R. Co. (3 Ont. Pr. 37), Proc., 19.
Wilson *v.* Donaghy (7 Phila. (Pa.) 153), Agency, 78.
Wilson *v.* European & N. A. R. Co. (62 Me. 112), Partit., 5.
Wilson *v.* European & N. A. R. Co. (67 Me. 358, 16 Am. Ry. Rep. 357), Em. Dom., 268, 437.
Wilson *v.* Evansville & C. R. Co. (9 Ind. 510), Pl., 56.
Wilson *v.* Fourteenth St. R. Co. (90 Cal. 319, 27 Pac. Rep. 210), App., 79.
Wilson *v.* Gaines (9 Baxt. (Tenn.) 546, 16 Am. Ry. Rep. 316), Tax., 145, 148, 154; Words & Ph., 86.
Wilson *v.* Gaines (103 U. S. 417), Tax., 156.
Wilson *v.* Gaines (3 Tenn. Ch. 597), Tax., 148, 155.
Wilson *v.* Ginty (3 Ont. App. 124), Stockh., 57.
Wilson *v.* Grand Trunk R. Co. (56 Me. 60), Bagg., 14; Charges, 69.
Wilson *v.* Grand Trunk R. Co. (57 Me. 138), Bagg., 14, 49.
Wilson *v.* Hamilton County Com'rs (68 Ind. 507), Mun. Aid, 411.
Wilson *v.* Kansas City, St. J. & C. B. R. Co. (60 Mo. 184), Car. of L. S., 113.

Wilson *v.* Kings County El. R. Co. (114 N. Y. 487, 21 N. E. Rep. 102, 24 N. Y. S. R. 81; affirming 40 Hun 640, 1 N. Y. S. R. 759), Evid., 136.
Wilson *v.* Lancashire & Y. R. Co. (9 C. B. N. S. 632, 7 Jur. N. S. 862, 30 L. J. C. P. 232, 9 W. R. 635, 3 L. T. 859), Car. of M., 783.
Wilson *v.* Little (2 N. Y. 443), Stock, 43.
Wilson *v.* Louisville & N. R. Co. (85 Ala. 269, 4 So. Rep. 701), Employés, Inj. to, 84, 98, 718; Negl., 75.
Wilson *v.* Louisville & N. R. Co. (Ky.) (18 S. W. Rep. 638), Employés, Inj. to, 44.
Wilson *v.* Madison, etc., R. Co. (18 Ind. 226), Fel. Serv., 1, 202, 241.
Wilson *v.* Manhattan R. Co. (49 N. Y. S. R. 116, 20 N. Y. Supp. 852, 2 Misc. 127), False Imp., 15, 16.
Wilson *v.* Memphis & C. R. Co. (9 Heisk. (Tenn.) 255), Car. of M., 12.
Wilson *v.* Metropolitan El. R. Co. (120 N. Y. 145, 24 N. E. Rep. 384, 30 N. Y. S. R. 787; affirming 14 Daly 171, 6 N. Y. S. R. 234), Bills & N., 16.
Wilson *v.* Michigan C. R. Co. (94 Mich. 20, 53 N. W. Rep. 797), Employés, Inj. to, 368, 423.
Wilson *v.* Minneapolis & N. W. R. Co. (31 Minn. 481, 18 N. W. Rep. 291), Evid., 152.
Wilson *v.* New Orleans & N. E. R. Co. (63 Miss. 352), Car. of P., 214; Dam., 28, 38.
Wilson *v.* New Orleans & N. E. R. Co. (68 Miss. 9, 8 So. Rep. 330), Car. of P., 401.
Wilson *v.* New York C. & H. R. R. Co. (21 Am. & Eng. R. Cas. 148, 97 N. Y. 87; affirming 27 Hun 149), Car. of L. S., 66.
Wilson *v.* New York C. & H. R. R. Co. (2 N. Y. Supp. 65, 39 Hun 651, mem.), Stat., 34; Sts. & H., 158.
Wilson *v.* New York C. R. Co. (4 Abb. App. Dec. (N. Y.) 618, 3 Keyes 381), Constr. Rys., 111; Trial, 54.
Wilson *v.* Norfolk & S. R. Co. (19 Am. & Eng. R. Cas. 453, 90 N. Car. 69), Animals, 480, 563.
Wilson *v.* Northampton & B. J. R. Co. (L. R. 9 Ch. 279, 43 L. J. Ch. 503, 22 W. R. 380, 30 L. T. 147), Spec. Perf., 15; Stat. & D., 45.
Wilson *v.* Northampton & B. R. Co. (L. R. 14 Eq. 477, 20 W. R. 938, 27 L. T. 507), Discov., 6.
Wilson *v.* Northeastern R. Co. (5 Ry. & C. T. Cas. 97), Charges, 95.
Wilson *v.* Northern Pac. R. Co. (26 Minn. 278, 37 Am. Rep. 410, 3 N. W. Rep. 333), Car. of P., 361, 436, 586.
Wilson *v.* Northern Pac. R. Co. (43 Minn. 519, 45 N. W. Rep. 1132), Fires, 311.
Wilson *v.* Northern R. Co. (28 U. C. Q. B. 274), Animals, 153; Stat., 62.
Wilson *v.* Ohio & M. R. Co. (64 Ill. 542, 3 Am. Ry. Rep. 285), Cross., Inj. at, 156.
Wilson *v.* Pennsylvania R. Co. (132 Pa. St. 27, 18 Atl. Rep. 1087), Children, Inj. to, 108; Dam., 70.
Wilson *v.* Polk County (112 Mo. 126, 20 S. W. Rep. 469), Mun. Aid, 3.
Wilson *v.* Rochester & S. R. Co. (16 Barb. (N. Y.) 167), Cross., Inj. at, 126, 159.
Wilson *v.* Rockford, R. I. & St. L. R. Co. (59 Ill. 273, 11 Am. Ry. Rep. 189), Em. Dom., 732.
Wilson *v.* St. Louis & S. F. R. Co. (108 Mo. 588, 18 S. W. Rep. 286), Stock, 41; Stockh., 48, 56.
Wilson *v.* St. Louis, I. M. & S. R. Co. (87 Mo. 431), Fences, 88, 90.
Wilson *v.* St. Paul, M. & M. R. Co. (44 Minn. 445, 46 N. W. Rep. 909), Pl., 43.
Wilson *v.* Salamanca Tp. (99 U. S. 499), Mun. Aid, 207, 363.
Wilson *v.* Southern Pac. R. Co. (53 Cal. 735), Atty's, 7.
Wilson *v.* Southern Pac. R. Co. (62 Cal. 164), Wareh., 10.
Wilson *v.* Trafalgar & B. C. Gravel Road Co. (83 Ind. 326), Pl., 30.
Wilson *v.* Troy (135 N. Y. 96, 32 N. E. Rep. 44, 48 N. Y. S. R. 364), Dam., 109.
Wilson *v.* Union Sav. Assoc. (42 Fed. Rep. 421), Mun. Aid, 397.
Wilson *v.* Wabash, St. L. & P. R. Co. (18 Mo. App. 258), Animals, 351.
Wilson *v.* Wabash, St. L. & P. R. Co. (23 Mo. App. 50), Car. of L. S., 57, 84; Contr., 109.
Wilson *v.* Weber (5 Am. & Eng. R. Cas. 112, 96 Ill. 454; affirming 3 Ill. App. 125), Tax., 353.
Wilson *v.* West Hartlepool R. & H. Co (11 Jur. N. S. 124, 34 L. J. Ch. 241, 2 DeG., J. & S. 475, 13 W. R. 361, 11 L. T. 692), Direct., 34, 54.
Wilson *v.* West Virginia C. & P. R. Co. (38 W. Va. 212, 18 S. E. Rep. 577), Just. P., 21.
Wilson *v.* Wills Valley R. Co. (33 Ga. 466), Subscr., 66, 125.
Wilson *v.* Wilmington & M. R. Co. (10 Rich. (So. Car.) 52), Animals, 84.
Wilson *v.* Winona & St. P. R. Co. (31 Am. & Eng. R. Cas 244, 37 Minn. 326, 33 N. W. Rep. 908, 5 Am. St. Rep. 851), Employés, Inj. to, 230, 253.
Wilson *v.* York & M. L. R. Co. (11 Gill & J. (Md.) 58), Constr. Rys., 55, 56, 57; Negl., 68.
Wilson County *v.* Third Nat. Bank (3 Am. & Eng. R. Cas. 151, 103 U. S. 770), Mun. Aid, 109, 283.
Wilson Sewing Machine Co. *v.* Louisville & N. R. Co. (71 Mo. 203; reversing 3 Mo. App. 578), Car. of M., 258.
Wilson Sewing Machine Co. *v.* Southern Exp. Co. (42 La. Ann. 593, 7 So. Rep. 710), Estop., 18.
Wilton *v.* Middlesex R. Co. (107 Mass. 108), St. Rys., 336.
Wilton *v.* Middlesex R. Co. (125 Mass. 130), Children, Inj. to, 151.
Wilton *v.* Northern R. Co. (5 Ont. 490), Cross., Inj. at, 150.
Wiltse *v.* Barnes (46 Iowa 210), Exp. Cos., 49.
Wiltse *v.* Tilden (77 Wis. 152, 46 N. W. Rep. 234), Death, etc., 133, 435.
Wiltshire Iron Co. *v.* Great Western R. Co. (40 L. J. Q. B. 43, L. R. 6 Q. B. 101, 19 W. R. 177; affirmed in 40 L. J. Q. B 308.

L. R. 6 Q. B. 776, 19 W. R. 935), Car. of M., 380; Dissol., 27.
Wilts. S. & B. C. T. Assoc. *v.* Great Western R. Co. (3 Ry. & C. T. Cas. 20), Canals, 7.
Winans *v.* Boston & P. R. Co. (2 Story (U. S.) 412), Pat. for Inv., 6.
Winans *v.* Denmead (15 How. (U. S.) 330), Pat for Inv., 35.
Winans *v.* McKean R. & N. Co. (6 Blatchf. (U. S.) 215), Appear., 3; Cred. Bill, 3.
Winans *v.* New York & E. R. Co. (21 How. (U. S.) 88), Pat. for Inv., 35.
Winans *v.* Schenectady & T. R. Co. (2 Blatchf. (U. S.) 279), Pat. for Inv., 6, 8, 9, 32.
Winbourn's Case (30 Fed. Rep. 167), Receiv., 71.
Winch *v.* Birkenhead, L. & C. J. R. Co. (5 De G. & S. 562, 16 Jur. 1035), Leases, 129; Stockh., 92.
Winchell *v.* Abbot (77 Wis. 371, 46 N. W. Rep. 665), Cross., Inj. at, 228, 300.
Winchell *v.* National Exp. Co. (64 Vt. 15, 23 Atl. Rep. 728), Agency, 6; Evid., 1; Exp. Cos., 15, 84.
Winchester *v.* Baltimore & S. R. Co. (4 Md. 231), Officers, 3; Pres., 8.
Winchester & P. R. Co. *v.* United States (27 Ct. of Cl. 494), Claims Against U. S., 10.
Winchester & P. R. Co. *v.* Washington (1 Rob. (Va.) 72), Em. Dom., 857.
Winchester & S. R. Co. *v.* Colfelt (27 Gratt. (Va.) 777, 17 Am. Ry. Rep. 121), App., 124; Exec., 5; Leases, 14, 104.
Winckler *v.* Great Western R. Co. (18 U. C. C. P. 250), Cross., Inj. at, 255.
Windham Cotton Mfg. Co. *v.* Hartford, P. & F. R. Co. (23 Conn. 373), Refer., 2.
Windsor *v.* Hallett (3 Am. & Eng. R. Cas. 76, 97 Ill. 204), Mun. Aid, 108, 117, 305.
Windsor *v.* Hannibal & St. J. R. Co. (45 Mo. App. 123), Animals, 206, 282, 284, 535; Negl., 30.
Windsor & A. R. Co., In re (16 Nov. Sc. 312), Ult. Vir., 22.
Windsor & A. R. Co. *v.* Queen (10 Can. Sup. Ct. 335; reversing 1 Can. Exch. 380), Govt. Rds., 15.
Windsor & A. R. Co. *v.* Western Counties R. Co. (12 Nov. Sc. 376), Ult. Vir., 13.
Windsor & A. R. Co. *v.* Western Counties R. Co. (14 Nov. Sc. 280), Incorp., 5.
Windsor Water Com'rs *v.* Canada Southern R. C. (20 Ont. App. 388), Tax., 385, 391.
Winebiddle *v.* Pennsylvania R. Co. (2 Grant's Cas. (Pa.) 32), Em. Dom., 386, 481, 924.
Wines *v.* Rio Grande W. R. Co. (9 Utah 228, 23 Pac. Rep. 1042), Animals, 536, 537; Assign., 20.
Wing *v.* Chicago & N. W. R. Co. (1 S. Dak. 455, 47 N. W. Rep. 530), States, 1.
Wing *v.* New York & E. R. Co. (1 Hill (N. Y.) 235), Car. of M., 114, 541.
Wingard *v.* Banning (39 Cal. 543), Car. of M., 389, 391.
Wink *v.* Weiler (41 Ill. App. 336), Employés, Inj. to, 223, 238.
Winklemans *v.* Des Moines N. W R. Co. (14 Am. & Eng. R. Cas. 186, 62 Iowa 11, 17 N. W. Rep. 82), Em. Dom., 93, 595, 596; Witn., 118, 124.
Winkler *v.* St. Louis, I. M. & S. R. Co. (21 Mo. App. 99), Car. of P., 262, 267, 274; Dam., 15, 67, 70, 91; New Tr., 44.
Winn *v.* Macon (21 Ga. 275), Mun. Aid, 22.
Winne *v.* Illinois C. R. Co. (31 Iowa 583, 1 Am. Ry. Rep. 460), Car. of M., 106, 120, 740, 765, 766.
Winnebago Furniture Mfg. Co. *v.* Wisconsin Midland R. Co. (81 Wis. 389, 51 N. W. Rep. 576), Em. Dom., 297, 330.
Winnegar *v.* Central Pass. R. Co. (34 Am. & Eng. R. Cas. 462, 85 Ky. 547, 4 S. W. Rep. 237), Car. of P., 108, 309, 314; Death, etc., 3, 80, 134.
Winnipeg & H. Bay Co. *v.* Mann (6 Man. 409), Injunc., 48.
Winnipeg & H. Bay R. Co. *v.* Mann (7 Man. 81), Bonds, 3; Charters, 55; Contr., 83.
Winnipeg School Trustees *v.* Canadian Pac. R. Co. (2 Man. 163), Tax., 390.
Winnt *v.* International & G. N. R. Co. (74 Tex. 32, 11 S. W. Rep. 907), Death, etc., 86, 133, 147.
Winona *v.* Cowdrey (93 U. S. 612), Contr., 57.
Winona *v.* Minnesota R. Constr. Co. (27 Minn. 415, 6 N. W. Rep. 795, 8 N. W. Rep. 148), Mun. Aid, 231.
Winona *v.* Minnesota R. Constr. Co. (29 Minn. 68, 11 N. W. Rep. 228), Mun. Aid, 224.
Winona & St. P. Land Co. *v.* Ebilcisor (52 Minn. 312, 54 N. W. Rep. 91), Pub. Lds., 8.
Winona & St. P. R. Co. *v.* Barney (26 Am. & Eng. R. Cas. 513, 113 U. S. 618, 5 Sup. Ct. Rep. 606), Land Grants, 3, 35, 36.
Winona & St. P. R. Co. *v.* Blake (94 U. S. 180), Winona & St. P. R. Co., 1.
Winona & St. P. R. Co. *v.* Denman (10 Minn. 267) (Gil. 208), Em. Dom., 453, 463, 691.
Winona & St. P. R. Co. *v.* Deuel County (7 Am. & Eng. R. Cas. 348, 3 Dak. 1, 12 N. W. Rep. 561), Tax., 80, 137.
Winona & St. P. R. Co. *v.* Plainview (143 U. S. 371, 12 Sup. Ct. Rep. 530), Fed. Cts., 14.
Winona & St. P. R. Co. *v.* Randall (10 Am. & Eng. R. Cas. 558, 29 Minn. 283, 13 N. W. Rep. 127), Land Owners, 38.
Winona & St. P. R. Co. *v.* St. Paul & S. C. R. Co. (23 Minn. 359), Parties, 2.
Winona & St. P. R. Co. *v.* St. Paul & S. C. R. Co. (26 Minn. 179, 2 N. W. Rep. 489), Land Grants, 120.
Winona & St. P. R. Co. *v.* St. Paul & S. C. R. Co. (27 Minn. 128, 6 N. W. Rep. 461), Land Grants, 35, 36.
Winona & St. P. R. Co. *v.* Waldron (11 Minn. 515), Em. Dom., 596, 693, 740; Fences, 3; Stat., 34.
Winona & St. P. R. Co. *v.* Watertown (1 S. Dak. 46, 44 N. W. Rep. 1072), Tax., 147, 281.
Winona & S. W. R. Co. *v.* Chicago, M. & St. P. R. Co. (50 Minn. 300, 52 N. W. Rep. 657), Cross Rys., 55.
Winsford Local Board *v.* Cheshire Lines

Committee (44 Am. & Eng. R. Cas. 274, 24 Q. B. D. 456, 7 Ry. & C. T. Cas. 72), Car. of M., 533; Car. of P., 522.
Winslow *v.* Boston & A. R. Co. (11 N. Y. S. R. 831), Contrib. Neg., 20, 104; Cross., Inj. at, 148, 193, 247, 313; Tresp., Inj. to, 23.
Winslow *v.* Central Iowa R. Co. (71 Iowa 197, 32 N. W. Rep. 330), Att'ys, 14, 18.
Winslow *v.* Minnesota & P. R. Co. (4 Minn. 313), Parties, 22.
Winslow *v.* Staten Island R. T. R. Co. (51 Hun 298, 21 N. Y. S. R. 87, 4 N. Y. Supp. 169; affirming 2 N. Y. Supp. 682, 15 Civ. Pro. 202), Proc., 26, 30.
Winslow *v.* Vermont & M. R. Co. (42 Vt. 700), Car. of M., 273, 275, 287.
Winsor Coal Co. *v.* Chicago & A. R. Co. (52 Fed. Rep. 716), Charges, 16, 54.
Winstanley *v.* Chicago, M. & St. P. R. Co. (35 Am. & Eng. R. Cas. 370, 72 Wis. 375, 39 N. W. Rep. 856), Cross., Inj. at, 92, 93, 188, 291; Evid., 291.
Winston *v.* Raleigh & G. R. Co. (19 Am. & Eng. R. Cas. 516, 90 N. Car. 66), Animals, 39.
Winston *v.* Tennessee & P. R. Co. (1 Baxt. (Tenn.) 60), Mun. Aid, 105, 108, 109, 112, 154, 159, 184, 301, 426.
Winter *v.* Central Iowa R. Co. (74 Iowa 448, 38 N. W. Rep. 154), Car. of P., 599; Evid., 218; Witn., 55.
Winter *v.* Central Iowa R. Co. (80 Iowa 443, 45 N. W. Rep. 737), Car. of P., 553; Dam., 87; Trial, 71, 120; Witn., 9, 100.
Winter *v.* Federal St. & P. V. Pass. R. Co. (153 Pa. St. 25, 25 Atl. Rep. 1028), Elec. Rys., 33, 36.
Winter *v.* Iowa, M. & N. P. R. Co. (2 Dill. (U. S.) 487), Bank'cy, 1, 4.
Winter *v.* Montgomery City Council (7 Am. & Eng. R. Cas. 307, 65 Ala. 403), Mun. Aid, 25, 132, 141, 406.
Winter *v.* Montgomery City Council (79 Ala. 481), Mun. Aid, 406.
Winter *v.* Muscogee R. Co. (11 Ga. 438), Charters, 36, 51; Subscr., 82, 126.
Winterfield *v.* Second Ave. R. Co. (49 N. Y. S. R. 435, 66 Hun 627, mem., 20 N. Y. Supp. 801), Trial, 85.
Winters *v.* Hannibal & St. J. R. Co. (39 Mo. 468), Car. of P., 491; Dam., 86.
Winters *v.* Kansas City Cable R. Co. (40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536), App., 121; Cable Rys., 14; Children, Inj. to, 57, 116, 117, 128; Pl., 60.
Winterson *v.* Eighth Ave. R. Co. (2 Hilt. (N. Y.) 389), Agency, 79; Pl., 175.
Winton *v.* Delaware & H. Canal Co. (1 Pa. Dist. 701), Sts. & H., 313.
Wintuska *v.* Louisville & N. R. Co. (Ky.) (20 S. W. Rep. 819), Death, etc., 110, 257.
Wisconsin C. Co. *v.* Kneale (79 Wis. 89, 48 N. W. Rep. 248), Em Dom., 366, 768.
Wisconsin C. R. Co. *v.* Constock (71 Wis. 88, 36 N. W. Rep. 843), Tax., 124 151.
Wisconsin C. R. Co. *v.* Cornell University (40 Wis. 162, 5 N. W. Rep. 331), App., 13; Em. Dom., 949.
Wisconsin C. R. Co. *v.* Cornell University (10 Am. & Eng. R. Cas. 108, 52 Wis. 537, 8 N. W. Rep. 491), Em. Dom., 49, 62, 889.
Wisconsin C. R. Co. *v.* Forsythe (43 Fed. Rep. 867), Land Grants, 45, 51.
Wisconsin C. R. Co. *v.* Price County (64 Wis. 579, 26 N. W. Rep. 93), Tax., 124.
Wisconsin C. R. Co. *v.* Price County (41 Am. & Eng. R. Cas. 669, 133 U. S. 496, 10 Sup. Ct. Rep. 341), Land Grants, 45, 52; Tax., 113.
Wisconsin C. R. Co. *v.* Ross (53 Am. & Eng. R. Cas. 73, 142 Ill. 9, 31 N. E. Rep. 412; affirming 43 Ill. App. 454), Car. of P., 167, 168; Death, etc., 17; Employés, Inj. to, 45, 408, 502; Lim. of Ac., 70; Mort., 140; Trusts, 13.
Wisconsin C. R. Co. *v.* Smith (10 Am. & Eng. R. Cas. 364, 52 Wis. 140, 8 N. W. Rep. 613), Injunc., 56.
Wisconsin C. R. Co. *v.* Taylor County (1 Am. & Eng. R. Cas. 532, 52 Wis. 37, 8 N. W. Rep. 833), Tax., 4, 124, 151.
Wisconsin C. R. Co. *v.* United States (27 Ct. of Cl. 440), Car. of Mails, 15.
Wisconsin C. R. Co. *v.* Wisconsin River Land Co. (71 Wis. 94, 36 N. W. Rep. 837), Deeds of Tr., 1; Ejectm., 10; Estop., 7, Lis Pend., 1.
Wisconsin, I. & N. R. Co. *v.* Braham (71 Iowa 484, 32 N. W. Rep. 392), Em. Dom., 212.
Wisdom *v.* Wabash, St. L. & P. R. Co. (19 Mo. App. 324), Pl., 9.
Wise *v.* Covington & C. St. R. Co. (91 Ky 537, 16 S. W. Rep. 351), St. Rys., 362.
Wise *v.* Grand Ave. R. Co. (33 Fed. Rep 277), Pat. for Inv., 18.
Wise *v.* Great Western R. Co. (1 H. & N. 63, 25 L. J. Ex. 258), Car. of L. S., 96.
Wise *v.* Joplin R. Co. (29 Am. & Eng. R Cas. 164, 85 Mo. 178), Fires, 172, 265, 297
Wise *v.* Teerpenning (2 Edm. Sel. Cas. (N. Y.) 112), Death, etc., 80, 421.
Wiseman *v.* Booker (L. R. 3 C. P. D. 184 38 L. T. 292, 26 W. R. 634), Fences, 7, 107.
Wiseman *v.* Panama R. Co. (1 Hilt. (N. Y.) 300), Employés, 12.
Wiseman *v.* St. Louis, A. & T. R. Co. (30 Mo. App. 516), Animals, 617.
Wismer *v.* Great Western R. Co. (13 U. C. Q. B. 383), Pl., 78.
Wismer *v.* Great Western R. Co. (17 U. C. Q. B. 510), Stat., 56.
Wiswall *v.* Greenville & R. P. R. Co. (3 Jones Eq. (N. Car.) 183), Charters, 53.
Wiswall *v.* Sampson (14 How. (U. S.) 52), Receiv., 42.
Witbeck *v.* Holland (55 Barb. (N. Y.) 443, 38 How. Pr. 273; affirmed in 45 N. Y. 13), Car. of M., 215; Exp. Cos., 45, 79.
Witbeck *v.* Holland (45 N. Y. 13), Evid., 164; Exp. Cos., 41.
Witbeck *v.* Schuyler (31 How. Pr. (N. Y.) 97), Bagg., 51.
Witherell *v.* Milwaukee & St. P. R. Co. (24 Minn. 410), Animals, 38.
Withers *v.* Great Northern R. Co. (1 F. & F. 165), Car. of P., 575.

Withers *v.* Macon & W. R. Co. (35 Ga. 273), Car. of M., 499, 639.
Withers *v.* North Kent R. Co. (27 L. J. Ex. 417), Car. of P., 575.
Witherspoon *v.* Texas Pac. R. Co. (48 Tex. 309), Judgm., 2; Stat., 44.
Witmark *v.* New York El. R. Co. (27 N. Y. Supp. 777, 57 N. Y. S. R. 801), Elev. Rys., 92.
Witt *v.* St. Paul & N. P. R. Co. (35 Minn. 404, 29 N. W. Rep. 161), Em. Dom., 969.
Witt *v.* St. Paul & N. P. R. Co. (38 Minn. 122, 35 N. W. Rep. 862), Sts. & H., 123.
Witte *v.* Brooklyn City R. Co. (53 N. Y. S. R. 334, 4 Misc. 286; affirmed in 143 N. Y. 667, mem.), Elec. Rys., 35; St. Rys., 474.
Witte *v.* Gulf, C. & S. F. R. Co. (Tex.) (6 S. W. Rep. 618), App., 127.
Witter *v.* Mississippi, O. & R. R. R. Co. (20 Ark. 463), Subscr., 124, 126.
Witthouse *v.* Atlantic & P. R. Co. (64 Mo. 523), Animals, 403.
Witting *v.* St. Louis & S. F. R. Co. (28 Mo. App. 103), Car. of M., 469, 691.
Witting *v.* St. Louis & S. F. R. Co. (45 Am. & Eng. R. Cas. 369, 101 Mo. 631, 14 S. W. Rep. 743), Bills of L., 72; Car. of M., 455, 472, 473, 756; Just. P., 8, 20; Negl., 102.
Wittman *v.* Milwaukee, L. S. & W. R. Co. (51 Wis. 89, 8 N. W. Rep. 6), Assump., 7; Land. & T., 1.
Witty *v.* Chesapeake, O. & S. W. R. Co. (83 Ky. 21), Negl., 104.
Witzel *v.* Third Ave. R. Co. (23 N. Y. Supp. 317, 3 Misc. 561; reversed in 6 Misc. 635, mem.), St. Rys., 232, 475.
Wiwirowski *v.* Lake Shore & M. S. R. Co. (124 N. Y. 420, 26 N. E. Rep. 1023, 36 N. Y. S. R. 405; reversing 58 Hun 40, 33 N. Y. S. R. 666, 11 N. Y. Supp. 361), Cross., Inj. at, 242, 341; Death, etc., 192.
Woburn *v.* Boston & L. R. Corp. (109 Mass. 283, 6 Am. Ry. Rep. 270), St. & H., 396.
Wohler *v.* Buffalo & S. L. R. Co. (46 N. Y. 686), Dedica., 4.
Wolcott *v.* Des Moines N. & R. Co. (5 Wall. (U. S.) 681), Land Grants, 22.
Wolf *v.* American Exp. Co. (43 Mo. 421), Exp. Cos., 30, 31; Words & Ph., 7.
Wolf *v.* Des Moines & Ft. D. R. Co. (64 Iowa 380, 20 N. W. Rep. 481), Dam., 39.
Wolf *v.* East Tenn., V. & G. R. Co. (88 Ga. 210, 14 S. E. Rep. 199), Trial, 67.
Wolf *v.* Hough (22 Kan. 659), Car. of M., 384.
Wolf *v.* Houston & W. S. & P. F. R. Co. (19 N. Y. S. R. 762, 2 N. Y. Supp. 789), Costs, 6.
Wolf *v.* Houston, W. S. & P. F. R. Co. (19 N. Y. S. R. 763, 50 Hun 603, 2 N. Y. Supp. 787; affirmed in 130 N. Y. 638, mem., 29 N. E. Rep. 151, 40 N. Y. S. R. 982), Children, Inj. to, 60.
Wolfe *v.* Covington & L. R. Co. (15 B. Mon. (Ky.) 404), Sts. & H., 154, 163.
Wolfe *v.* Missouri Pac. R. Co. (37 Am. & Eng. R. Cas. 715, 97 Mo. 473, 3 L. R. A. 539, 11 S. W. Rep. 49), Car. of M., 258, 273, 274.
Wolfe *v.* Myers (3 Sandf. (N. Y.) 7), Bills of L., 12, 17, 47.
Wolfert *v.* Pittsburg, C. & St. L. R. Co. (44 Mo. App. 330), Bills of L., 42.
Wolff *v.* Central R. Co. (6 Am. & Eng. R. Cas. 441, 68 Ga. 653, 45 Am. Rep. 501), Bagg., 24, 25.
Wolff *v.* Chicago, M. & St. P. R. Co. (34 Minn. 215, 25 N. W. Rep. 63), Fires, 246.
Wolff *v.* McGavock (29 Wis. 290), Constr. Rys., 19.
Wolff *v.* Mayor, etc., of New Orleans (12 Am. & Eng. R. Cas. 625, 103 U. S. 358), Mun. Aid, 390.
Wolff *v.* New Orleans (12 Am. & Eng. R. Cas. 625, 103 U. S. 358), Mun. Aid, 34, 439; Tax., 8.
Wolfkiel *v.* Sixth Ave. R. Co. (38 N. Y. 49), St. Rys., 430.
Wolsey *v.* Chapman (101 U. S. 755), Land Grants, 22.
Wolsey *v.* Lake Shore & M. S. R. Co. (33 Ohio St. 227), Employés, Inj. to, 420, 423.
Wolverhampton & W. R. Co. *v.* London & N. W. R. Co. (L. R. 16 Eq. 433, 43 L. J. Ch. 131), Arb., 4; Injunc., 33; Leases, 66.
Wolz *v.* Dry Dock, E. B. & B. R. Co. (36 N. Y. S. R. 328, 59 Hun 618, 13 N. Y. Supp. 129), Pl., 170.
Womack *v.* Central R. & B. Co. (80 Ga. 132, 5 S. E. Rep. 63), Death, etc., 47.
Womer *v.* Ravenswood, S. & G. R. Co. (37 W. Va. 287, 16 S. E. Rep. 488), App., 130.
Wonder *v.* Baltimore & O. R. Co. (32 Md. 411), Employés, Inj. to, 95, 98, 99; Fel. Serv., 17, 113, 139, 146, 147, 233, 373, 374, 491.
Wood *v.* Auburn & R. R. Co. (8 N. Y. 160), Arb., 2; Em. Dom., 489.
Wood *v.* Beach (43 Kan. 427, 23 Pac. Rep. 649), Land Grants, 27.
Wood *v.* Bedford & B. R. Co. (8 Phila. (Pa.) 94), Franch., 4.
Wood *v.* Boney (N. J. Eq.) (21 Atl. Rep. 574), Acct'ng, 2; Constr. Rys., 25, 29, 32, 104; Estop., 28.
Wood *v.* Burlington & M. R. R. Co. (10 Am. & Eng. R. Cas. 611, 104 U. S. 329), Land Grants, 5, 46.
Wood *v.* Carleton Branch R. Co. (14 New Brun. 244), Sts. & H., 162.
Wood *v.* Chicago, M. & St. P. R. Co. (6 Am. & Eng. R. Cas. 314, 59 Iowa 196, 13 N. W. Rep. 99), Stat. Agts., 3, 5.
Wood *v.* Chicago, M. & St. P. R. Co. (Iowa) (21 Am. & Eng. R. Cas. 36, 24 N. W. Rep. 46), Stat. Agts., 5.
Wood *v.* Chicago, M. & St. P. R. Co. (24 Am. & Eng. R. Cas. 91, 68 Iowa 491, 27 N. W. Rep. 473), Car. of M., 45; Contrib. Neg., 84; Stat. Agts., 3, 5.
Wood *v.* Chicago, M. & St. P. R. Co. (40 Wis. 582), Fires, 214.
Wood *v.* Chicago, M. & St. P. R. Co. (51 Wis. 196, 8 N. W. Rep. 214), Wareh., 10; Witn., 90.
Wood *v.* Chicago, R. I. & P. R. Co. (11 Am. & Eng. R. Cas. 499, 60 Iowa 456, 15 N. W. Rep. 284), Rip. Rts., 3.
Wood *v.* Chicago, S. F. & C. R. Co. (39 Fed. Rep. 52), Constr. Rys., 58, 63.

Wood *v.* Coosa & C. R. R. Co. (32 Ga. 273), Evid., 226; Subscr., 139, 156.
Wood *v.* Crocker (18 Wis. 345), Car. of M., 84, 207.
Wood *v.* Detroit City St. R. Co. (19 Am. & Eng. R. Cas. 129, 52 Mich. 402, 18 N. W. Rep. 124), St. Rys., 490; Trial, 102.
Wood *v.* Dubuque & S. C. R. Co. (28 Fed. Rep. 910), Bonds, 31.
Wood *v.* Epsom & L. R. Co. (8 C. B. N. S. 731, 30 L. J. C. P. 83), Em. Dom., 1125.
Wood *v.* Erie R. Co. (72 N. Y. 196, 28 Am. Rep. 125; affirming 9 Hun 648), Car. of M., 717.
Wood *v.* Georgia R. & B. Co. (84 Ga. 363, 10 S. E. Rep. 967), Car. of P., 609.
Wood *v.* Goodwin (49 Me. 260), Mort., 313.
Wood *v.* Hamilton & N. W. R. Co. (25 Grant. Ch. (Ont.) 135), Att'ys, 7.
Wood *v.* Illinois C. R. Co. (23 Ill. App. 370), Death, etc., 347.
Wood *v.* Kansas City, Ft. S. & M. R. Co. (39 Mo. App. 63), Animals, 351.
Wood *v.* Kansas City, Ft. S. & M. R. Co. (43 Mo. App. 294), Animals, 487.
Wood *v.* Lake Shore & M. S. R. Co. (8 Am. & Eng. R. Cas. 478, 49 Mich. 370, 13 N. W. Rep. 779), Car. of P., 248, 344.
Wood *v.* Lary (47 Hun 550, 15 N. Y. S. R. 209; appeal dismissed in 124 N. Y. 83), Divid., 8, 9.
Wood *v.* Locke (147 Mass. 604, 18 N. E. Rep. 578), Employés, Inj. to, 230.
Wood *v.* Macon & B. R. Co. (68 Ga. 539), Injunc., 13; Leases, 3; Sales of Rds., 10
Wood *v.* Michigan Air Line R. Co. (81 Mich. 358, 45 N. W. Rep. 980), Em. Dom., 1066.
Wood *v.* Michigan Air Line R. Co. (52 Am. & Eng. R. Cas. 37, 90 Mich. 334, 51 N. W. Rep. 263), Em. Dom., 109; License, 12.
Wood *v.* Michigan S. & N. I. R. Co. (2 Biss. (U. S.) 62), Pat. for Inv., 12.
Wood *v.* Milwaukee & St. P. R. Co. (27 Wis. 541, 2 Am. Ry. Rep. 342), Car. of M., 223, 343, 561, 621, 622.
Wood *v.* Milwaukee & St. P. R. Co. (32 Wis. 398), Car. of M., 49.
Wood *v.* Monroe County Sup'rs (50 Hun 1, 18 N. Y. S. R. 671, 2 N. Y. Supp. 369), Lim. of Ac., 44; Mun. Aid, 421.
Wood *v.* Monroe County Sup'rs (9 N. Y. Supp. 699, 56 Hun 643, mem., 30 N. Y. S. R. 706; affirmed in 124 N. Y. 676, mem., 27 N. E. Rep. 855, mem.), Mun. Aid, 421.
Wood *v.* New York C. & H. R. R. Co. (70 N. Y. 195, 18 Am. Ry. Rep. 548), Collis., 33.
Wood *v.* Ontario & Q. R. Co. (24 U. C. C. P. 334), Agency, 1, 5.
Wood *v.* St. Louis, I. M. & S. R. Co. (20 Mo. App. 601), Animals, 313.
Wood *v.* St. Louis, K. C. & N. R. Co. (58 Mo. 109), Animals, 299, 602.
Wood *v.* Stourbridge R. Co. (16 C. B. N. S. 222), Cross. Sts. & H., 120; Em. Dom., 1155; Sts. & H., 214.
Wood *v.* Vermont C. R. Co. (24 Vt. 608), Constr. Rys., 23.
Woo Dan *v.* Seattle Elec. R. & P. Co. (58 Am. & Eng. R. Cas. 195, 5 Wash. 466, 32 Pac. Rep. 103), St. Rys., 396, 407.
Woodard *v.* Eastern Counties R. Co. (7 Jur. N. S. 971, 30 L. J. M. C. 126, 9 W. R. 660, 4 L. T. 336), Tickets & F., 33.
Woodard *v.* Michigan Southern & N. I. R. Co. (10 Ohio St. 121), Death, etc., 112.
Woodard *v.* New York, L. E. & W. R. Co. (32 Am. & Eng. R. Cas. 137, 106 N. Y. 369, 13 N. E. Rep. 424, 11 N. Y. S. R. 169, 9 Cent. Rep. 293; reversing 35 Hun 667, mem.), Cross., Inj. at, 250, 252.
Woodard *v.* West Side St. R. Co. (34 Am. & Eng. R. Cas. 472, 71 Wis. 625, 38 N. W. Rep. 347), St. Rys., 366, 375.
Woodbridge *v.* Delaware, L. & W. R. Co. (105 Pa. St. 460), Children, Inj. to, 98.
Woodburn *v.* Cincinnati, N. O. & T. P. R. Co. (42 Am. & Eng. R. Cas. 514, 40 Fed. Rep. 731), Car. of M., 678; Lim. of Liab., 27.
Woodell *v.* West Virginia Imp. Co. (38 W. Va. 23, 17 S. E. Rep. 386), Employés, Inj. to, 223.
Wooden *v.* Western N. Y. & P. R. Co. (126 N. Y. 10, 26 N. E. Rep. 1050, 36 N. Y. S. R. 387; affirming 35 N. Y. S. R. 685, 12 N. Y. Supp. 908), Death, etc., 111, 114, 115, 370.
Wooden *v.* Western N. Y. & P. R. Co. (43 N. Y. S. R. 218, 16 N. Y. Supp. 840; adhered to in 18 N. Y. Supp. 768, 46 N. Y. S. R. 77), Death, etc., 255; Employés, Inj. to, 4; Fel. Serv., 96, 213.
Wooden *v.* Western N. Y. & P. R. Co. (46 N. Y. S. R. 77, 18 N. Y. Supp. 768), Employés, Inj. to, 99, 219, 271, 425; Fel. Serv., 96, 238, 240.
Wooden *v.* Western N. Y. & P. R. Co. (25 N. Y. Supp. 977, 5 Misc. 537), Employés, Inj. to, 284; Fel. Serv., 240.
Woodfolk *v.* Nashville & C. R. Co. (2 Swan (Tenn.) 422), Em. Dom., 753.
Woodgate *v.* Great Western R. Co. (51 L. T. 826, 33 W. R. 428, 49 J. P. 196), Car. of P., 122; Time-tables, 3.
Woodger *v.* Great Eastern R. Co. (2 Ry. & C. T. Cas. 102), Discrim., 11.
Woodger *v.* Great Western R. Co. (L. R. 2 C. P. 318, 36 L. J. C. P. 177, 15 W. R. 383, 15 L. T. 579), Dam., 11, 55.
Woodhill *v.* Great Western R. Co. (4 U. C. C. P. 449), Constr. Rys., 14.
Woodhouse *v.* Rio Grande R. Co. (67 Tex. 416, 3 S. W. Rep. 323), Discrim., 78; Leases, 40.
Woodley *v.* Baltimore & P. R. Co. (8 Mackey (D. C.) 542), App., 94; Cross., Inj. at, 88.
Woodland *v.* Union Pac. R. Co. (Utah) (26 Pac. Rep. 298), Animals, 447, 591.
Woodley *v.* Metropolitan Dist. R. Co. (46 L. J. Ex. D. 521, L. R. 2 Ex. D. 384), Employés, Inj. to, 226.
Woodman *v.* Metropolitan R. Co. (38 Am. & Eng. R. Cas. 484, 149 Mass. 335, 21 N. E. Rep. 482, 4 L. R. A. 213), Cross., Inj. at, 226; Evid., 289; Indep. Contr., 14; Sts. & H., 416.
Woodman *v.* York & C. R. Co. (45 Me. 207), Attach., 27.

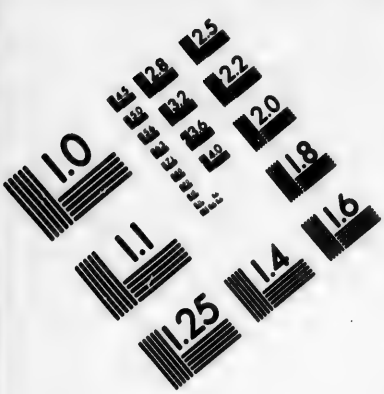
Woodruff *v.* Alabama G. S. R. Co. (75 Ga. 47), Trial, 77.
Woodruff *v.* Brecon & M. T. J. R. Co. (L. R. 28 Ch. D. 190, 54 L. J. Ch. 620, 5 Ry. & C. T. Cas. ix, 52 L. T. 69, 33 W. R. 125; affirming 54 L. J. Ch. D. 29, 51 L. T. 536, 33 W. R. 95), Side Tr., 5.
Woodruff *v.* Catlin (54 Conn. 277, 6 Atl. Rep. 849), Em. Dom., 26.
Woodruff *v.* Dubuque & S. C. R. Co. (19 Abb. N. Cas. (N. Y.) 437, 30 Fed. Rep. 91), Injunc., 38; Stock, 37.
Woodruff *v.* Erie R. Co. (16 Am. & Eng. R. Cas. 501, 93 N. Y. 609; reversing 25 Hun 246), Leases, 19.
Woodruff *v.* Georgia Pac. R. Co. (86 Ga. 318, 12 S. E. Rep. 749), Death, etc., 334.
Woodruff *v.* Great Western R. Co. (18 U. C. Q. B. 420), Pl., 76.
Woodruff *v.* Jewett (115 N. Y. 267, 22 N. E. Rep. 157, 26 N. Y. S. R. 142; reversing 37 Hun 205), Receiv., 178.
Woodruff *v.* McDonald (33 Ark. 97), Subscr., 8.
Woodruff *v.* Nashville & C. R. Co. (2 Head (Tenn.) 87), Liens, 1, 2.
Woodruff *v.* New York & N. E. R. Co. (59 Conn. 63, 20 Atl. Rep. 17), Ry. Com'rs, 22.
Woodruff *v.* New York & N. H. R. Co. (18 How. Pr. (N. Y.) 419), Stock, 86.
Woodruff *v.* New York, L. E. & W. R. Co. (51 Am. & Eng. R. Cas. 89, 129 N. Y. 27, 29 N. E. Rep. 251, 41 N. Y. S. R. 193; modifying 31 N. Y. S. R. 7, 10 N. Y. Supp. 305), Mort., 157.
Woodruff *v.* Northern Pac. R. Co. (47 Fed. Rep. 689), Children, Inj. to, 157.
Woodruff *v.* Okolona (57 Miss. 806), Mun. Aid, 322.
Woodruff *v.* Peterborough (22 U. C. Q. B. 274), Mun. Aid, 203.
Woodruff *v.* Rochester & P. R. Co. (108 N. Y. 39, 14 N. E. Rep. 832, 12 N. Y. S. R. 821; reversing 38 Hun 636, mem.), Constr. Rys., 19, 30, 51, 114, 127.
Woodruff *v.* Sherrard (9 Hun (N. Y.) 322), Bagg., 99.
Woodruff *v.* Syracuse, B. & N. Y. R. Co. (73 Hun 296, 26 N. Y. Supp. 421), Flood. Lds., 84.
Woodruff S. & P. Coach Co. *v.* Diehl (9 Am. & Eng. R. Cas. 294, 84 Ind. 474, 43 Am. Rep. 102), Sleep. Car Cos., 26, 27, 31.
Woods *v.* Durrett (28 Tex. 429), Evid., 99; Pub. Lds., 18.
Woods *v.* Jones (34 La. Ann. 1086), Car. of P., 343.
Woods *v.* Lawrence County (1 Black (U. S.) 386), Mun. Aid, 60, 63, 272, 315.
Woods *v.* Lindvall (48 Fed. Rep. 62, 4 U. S. App. 49, 1 C. C. A. 37; affirming on another point 47 Fed. Rep. 195), Employés, Inj. to, 61; Fel. Serv., 217, 326.
Woods *v.* Madison County Sup'rs (136 N. Y. 403, 32 N. E. Rep. 1011, 49 N. Y. S. R. 685), Mun. Aid, 421.
Woods *v.* Metropolitan St. R. Co. (48 Mo. App. 125), St. Rys., 526.
Woods *v.* Missouri, K. & T. R. Co. (51 Mo. App. 500), Animals, 333, 460; Evid., 86; Farm Cross., 13.
Woods *v.* Pittsburg, C. & St. L. R. Co. (3 Am. & Eng. R. Cas. 525, 7 Am. & Eng. R. Cas. 478, 99 Pa. St. 101), Mort., 212.
Woods *v.* Richmond & D. R. Co. (1 App. Cas. (D. C.) 165), App., 126; Trial, 196.
Woods *v.* St. Paul & D. R. Co. (39 Minn. 435, 40 N. W. Rep. 510), Employés, Inj. to, 266, 612.
Woods *v.* Southern Pac. Co. (9 Utah 146, 33 Pac. Rep. 628), Car. of P., 483; Contrib. Neg., 87.
Woodside *v.* Toronto St. R. Co. (14 Grant's Ch. (U. C.) 409), Pl., 42.
Woodson *v.* Milwaukee & St. P. R. Co. (21 Minn. 60, 19 Am. Ry. Rep. 293), Fires, 248, 277, 310; Pl., 92.
Woodson *v.* Murdock (22 Wall. (U. S.) 351; affirming 2 Dill. 188), State Aid, 26; Stat., 34.
Woodstock Iron Co. *v.* Richmond & D. Extension Co. (38 Am. & Eng. R. Cas. 683, 129 U. S. 643, 9 Sup. Ct. Rep. 402), Location, etc., 23.
Woodstock R. Co. *v.* Tupper (12 New Brun. 457), Trial, 27.
Woodward *v.* American Exposition R. Co. (30 Am. & Eng. R. Cas. 256, 39 La. Ann. 566, 2 So. Rep. 413), Liens, 21; Pledge, etc., 1, 3.
Woodward *v.* Booth (7 B. & C. 301), Bagg., 113.
Woodward *v.* Central Bank (4 Ga. 323), Liens, 6.
Woodward *v.* Chicago & N. W. R. Co. (21 Wis. 309), Evid., 103.
Woodward *v.* Chicago & N. W. R. Co. (23 Wis. 400), Abate., 6; Husb. & W., 18.
Woodward *v.* Com. (Ky.) (35 Am. & Eng. R. Cas. 498, 7 S. W. Rep. 613), Citizens., 1; For. Corp., 4; Tax., 395.
Woodward *v.* Grand Trunk R. Co. (46 N. H. 524), Replev., 1.
Woodward *v.* Illinois C. R. Co. (33 Ill. App. 433), Car. of M., 207.
Woodward *v.* Illinois C. R. Co. (1 Biss. (U. S.) 403), Bills of L., 53, 79; Car. of M., 109, 593, 762.
Woodward *v.* Illinois C. R. Co. (1 Biss. (U. S.) 447), Bills of L., 68; Car. of M., 458.
Woodward *v.* London & N. W. R. Co. (L. R. 3 Ex. D. 121, 47 L. J. Ex. 263, 38 L. T. 321, 26 W. R. 354), Car. of M., 520; Words & Ph., 158.
Woodward *v.* Oregon R. & N. Co. (18 Oreg. 289, 22 Pac. Rep. 1076), Employés, Inj. to, 646; Negl., 89, 104.
Woodward *v.* St. Louis & S. F. R. Co. (85 Mo. 142), Mal. Pros., 3.
Woodward Iron Co. *v.* Cabaniss (87 Ala. 328, 6 So. Rep. 300), Em. Dom., 519, 967.
Woodward Iron Co. *v.* Jones (80 Ala. 123), Contrib. Neg., 82, 87; Employés, Inj. to, 307.
Woodworth *v.* Blair (112 U. S. 8, 5 Sup. Ct. Rep. 6), Mort., 220.
Woodworth *v.* St. Paul, M. & M. R. Co. (5 McCrary (U. S.) 574, 18 Fed. Rep. 282), Citizens., 5; Employés, Inj. to, 10, 11, 99, 149, 182, 202, 204.

Woodyard *v.* Kentucky C. R. Co. (Ky.) (15 S. W. Rep. 178), Tresp., Inj. to, 36.
Woolery *v.* Louisville, N. A. & C. R. Co. (27 Am. & Eng. R. Cas. 210, 107 Ind. 381, 57 Am. Rep. 114, 8 N. E. Rep. 226), Car. of P., 288, 291, 424, 438.
Wooley *v.* Grand St. & N. R. Co. (3 Am. & Eng. R. Cas. 398, 83 N. Y. 121), Evid., 67; St. Rys., 177, 187, 468.
Wooley *v.* North London R. Co. (38 L. J. C. P. 317, L. R. 4 C. P. 602, 17 W. R. 650, 20 L. T. 613), Discov., 4.
Woolf *v.* Beard (8 C. & P. 373), Pl., 51.
Woolfolk *v.* Macon & A. R. Co. (56 Ga. 457), Animals, 513, 576.
Woolley *v.* Louisville Southern R. Co. (93 Ky. 223, 19 S. W. Rep. 595), Mun. Aid, 123, 133, 149.
Woolsey *v.* New York El. R. Co. (134 N. Y. 323, 30 N. E. Rep. 387, 43 N. Y. S. R. 474; modifying 31 N. Y. S. R. 91, 9 N. Y. Supp. 133; reaffirmed in 47 N. Y. S. R. 633), Elev. Rys., 68, 146, 152, 183, 185, 187.
Woolson *v.* Northern R. Co. (19 N. H. 267), Animals, 54, 155.
Woolwine *v.* Chesapeake & O. R. Co. (50 Am. & Eng. R. Cas. 37, 36 W. Va. 329, 15 S. E. Rep. 81), Licensees, Inj. to, 13; Negl., 53; Trial, 96.
Woonsocket Union R. Co. *v.* Sherman (8 R. I. 564), Evid., 233; Pl., 47; Subscr., 208, 224.
Woonsocket Union R. Co. *v.* Taft (8 R. I. 411), Subscr., 93.
Wooster *v.* Broadway & S. A. R. Co. (55 N. Y. S. R. 174, 72 Hun 197, 25 N. Y. Supp. 378), Evid., 36.
Wooster *v.* Chicago, M. & St. P. R. Co. (35 Am. & Eng. R. Cas. 152, 74 Iowa 593, 38 N. W. Rep. 425), Animals, 226.
Wooster *v.* Sugar River Valley R. Co. (10 Am. & Eng. R. Cas. 499, 57 Wis. 311, 15 N. W. Rep. 401), Em. Dom., 845, 920; Witn., 124.
Wooster *v.* Western N. Y. & P. R. Co. (40 N. Y. S. R. 844, 61 Hun 623, 16 N. Y. Supp. 764; affirmed in 48 N. Y. S. R. 929), Employés, Inj. to, 677; New Tr., 64.
Wooters *v.* International & G. N. R. Co. (4 Am. & Eng. R. Cas. 100, 54 Tex. 294), Contr., 96; Evid., 178; Pl., 13; Stat. & D., 35.
Worcester *v.* Western R. Corp. (4 Metc. (Mass.) 564), Tax., 241.
Worcester & N. R. Co. *v.* Hinds (8 Cush. (Mass.) 110), Subscr., 49.
Worcester & N. R. Co. *v.* Railroad Com'rs (118 Mass. 561), Charters, 49; Union D. Cos., 3.
Worcester Excursion Car Co. *v.* Pennsylvania R. Co. (2 Int. Com. Rep. 792, 3 Int. Com. Com. 577), Discrim., 57; Int. Com., 17.
Worcester, N. & R. R. Co. *v.* Nashua (63 N. H. 593, 4 Atl. Rep. 298), Bridges, 17.
Worden *v.* Canadian Pac. R. Co. (30 Am. & Eng. R. Cas. 127, 13 Ont. 652), Car. of M., 164, 307.
Worden *v.* Chicago & N. W. R. Co. (82 Iowa 735, 48 N. W. Rep. 71), Assign. for Cred., 5.
Worden *v.* Humeston & S. R. Co. (72 Iowa 201, 33 N. W. Rep. 629), Death, etc., 96; Employés, Inj. to, 633, 655; Evid., 170, 219; Witn., 99.
Worden *v.* Humeston & S. R. Co. (76 Iowa 310, 41 N. W. Rep. 26), App., 61; Death, etc., 267, 284; Evid., 48, 89, 90; Negl., 21; Trial, 133.
Worheide *v.* Missouri C. & F. Co. (32 Mo. App. 367), Fel. Serv., 15.
Workman *v.* Campbell (46 Mo. 305), Contr., 59; Subscr., 15.
Workman *v.* Great Northern R. Co. (32 L. J. Q. B. 279), Flood. Lds., 96.
Works *v.* Junction R. Co. (5 McLean (U. S.) 425), Branch & L. Roads, 3; Bridges, 8, 9, 59, 61, 66; Charters, 71; Em. Dom., 1045; Injunc., 5; Nuis., 15; Waters & W., 5.
Worley *v.* Cincinnati, H. & D. R. Co. (1 Handy (Ohio) 481), Death, etc., 1.
Wormell *v.* Maine C. R. Co. (31 Am. & Eng. R. Cas. 272, 79 Me. 397, 4 N. Eng. Rep. 692, 10 Atl. Rep. 49), Employés, Inj. to, 280, 297; Negl., 73.
Wormsdorf *v.* Detroit City R. Co. (40 Am. & Eng. R. Cas. 271, 75 Mich. 472, 42 N. W. Rep. 1000), Evid., 142, 164, 195; St. Rys., 330.
Worsham *v.* Gainesville, H. & W. R. Co. (3 Tex. App. (Civ. Cas.) 496), Em. Dom., 754.
Worsley *v.* South Devon R. Co. (16 Q. B. 539, 15 Jur. 970, 20 L. J. Q. B. 254), Em. Dom., 1095, 1181.
Worster *v.* Forty-second St. & G. S. F. R. Co. (3 Daly (N. Y.) 278; affirmed in 50 N. Y. 203, 3 Am. Ry. Rep. 537), St. Rys., 179.
Worster *v.* Forty-second St. & G. S. F. R. Co. (50 N. Y. 203, 3 Am. Ry. Rep. 537), St. Rys., 176, 186.
Worth *v.* Chicago, M. & St. P. R. Co. (51 Fed. Rep. 171), Evid., 48.
Worth *v.* Petersburg R. Co. (89 N. Car. 301), Tax., 97, 140, 177.
Worth *v.* Wilmington & W. R. Co. (13 Am. & Eng. R. Cas. 286, 89 N. Car. 291, 45 Am. Rep. 679), Tax., 41, 140.
Worthen *v.* Grand Trunk R. Co. (125 Mass. 99), Collis., 9, 11.
Worthington *v.* Central Vt. R. Co. (52 Am. & Eng. R. Cas. 384, 64 Vt. 107, 23 Atl. Rep. 590, 15 L. R. A. 326), Car. of P., 472, 476; Negl., 53.
Worthington *v.* New York C. R. Co. (6 Lans. (N. Y.) 257), Charges, 39.
Worthington *v.* Sebastian (25 Ohio St. 1), Tax., 133.
Wrasse *v.* Citizens' Traction Co. (146 Pa. St. 417, 23 Atl. Rep. 345), Children, Inj. to, 50.
Wray *v.* Chicago, B. & Q. R. Co. (86 Ill. 424), Adv. Poss., 5.
Wray *v.* New York C. & H. R. R. Co. (4 N. Y. Supp. 355), Ferries, 8.
Wray *v.* Pennsylvania R. Co. (19 N. Y. S. R. 53, 4 N. Y. Supp. 354), Ferries, 8; Penalty, 12.
Wren *v.* Louisville, St. L. & T. R. Co. (Ky.) (20 S. W. Rep. 215), Tresp., Inj. to, 64; Witn., 35.

Wrexham R. Co. *v.* Little Mountain Colliery Co. (38 L. T. 290), Charges, 64.
Wright's Appeal (99 Pa. St. 425), Agency, 9; Estop., 31.
Wright *v.* Bishop (88 Ill. 302, 21 Am. Ry. Rep. 301), Mun. Aid, 137.
Wright *v.* Boston & A. R. Co. (28 Am. & Eng. R. Cas. 652, 142 Mass. 296, 7 N. E. Rep. 866), Licensees, Inj. to, 3, 20; Tresp., Inj. to, 29, 69a.
Wright *v.* Boston & M. R. Co. (2 Am. & Eng. R. Cas. 121, 129 Mass. 440), Cross., Inj. at, 254, 330; Tresp., Inj. to, 2.
Wright *v.* Boughton (22 Barb. (N. Y.) 561), Car. of M., 613.
Wright *v.* Bundy (11 Ind. 398), Direct., 19; Mort., 26.
Wright *v.* Caldwell (3 Mich. 51), Bagg., 48.
Wright *v.* California C. R. Co. (78 Cal. 360, 20 Pac. Rep. 740), Car. of P., 68, 529; Eject. Pass., 54, 66.
Wright *v.* Central R. & B. Co. (85 Ga. 649, 11 S. E. Rep. 1031), Tax., 394.
Wright *v.* Chicago & N. W. R. Co. (7 Ill. App. 438), Pl., 29.
Wright *v.* Chicago & N. W. R. Co. (27 Ill. App. 200), Negl., 48; Nuis., 8; Pl., 134; Sts. & H., 304.
Wright *v.* Chicago, B. & Q. R. Co. (25 Am. & Eng. R. Cas. 427, 19 Neb. 175, 27 N. W. Rep. 90), Attach., 12, 36, 39.
Wright *v.* Cincinnati, N. O. & T. P. R. Co. (Ky.) (21 S. W. Rep. 581), Cross., Inj. at, 256, 262.
Wright *v.* Delaware & H. Canal Co. (40 Hun (N. Y.) 343), Employés, Inj. to, 108, 480.
Wright *v.* Detroit, G. H. & M. R. Co. (42 Am. & Eng. R. Cas. 140, 77 Mich. 123, 43 N. W. Rep. 765), Children, Inj. to, 75, 180.
Wright *v.* Georgia R. & B. Co. (34 Ga. 330), Derailm., 6; Evid., 195; Trial, 167.
Wright *v.* Gish (94 Mo. 110, 6 S. W. Rep. 704), Land Grants, 40.
Wright *v.* Gossett (15 Ind. 119), Proc., 39.
Wright *v.* Great Northern R. Co. (L. R. 8 Ir. 257), Car. of P., 451.
Wright *v.* Hannibal & St. J. R. Co. (25 Mo. App. 236), Animals, 608.
Wright *v.* Hawkins (26 Tex. 452), Evid., 99; Pub. Lds., 25.
Wright *v.* Illinois & M. Tel. Co. (20 Iowa 195), Contrib. Neg., 24.
Wright *v.* Indianapolis & C. R. Co. (18 Ind. 168), Animals, 32.
Wright *v.* Irwin (35 Mich. 347), Bills & N., 6; Subscr., 162.
Wright *v.* Kentucky & G. E. R. Co. (24 Am. & Eng. R. Cas. 312, 117 U. S. 72, 6 Sup. Ct. Rep. 697), Constr. Rys., 126; Mort., 87.
Wright *v.* London & N. W. R. Co. (33 L. T. 830, L. R. 1 Q. B. D. 252, 45 L. J. Q. B. D. 570; affirming L. R. 10 Q. B. 298, 44 L. J. Q. B. 119, 32 L. T. 599), Fel. Serv., 209; Licensees, Inj. to, 2.
Wright *v.* Malden & M. R. Co. (4 Allen (Mass.) 283), Children, Inj. to, 115, 123, 131, 169.
Wright *v.* Midland R. Co. (42 L. J. Ex. 89, L. R. 8 Ex. 137, 21 W. R. 460, 29 L. T. 436), Collis., 5.
Wright *v.* Midland R. Co. (51 L. T. 539), Contrib. Neg., 87; Death, etc., 182.
Wright *v.* Milwaukee & St. P. R. Co. (25 Wis. 46), Guar., 7; Pl., 70.
Wright *v.* New York C. R. Co. (25 N. Y. 562; reversing 28 Barb. 80), Fel. Serv., 148.
Wright *v.* Northern C. R. Co. (8 Phila. (Pa.) 19), Car. of M., 193.
Wright *v.* Ohio & M. R. Co. (1 Disney (Ohio) 465), Bonds, 52; Coupons, 5, 16.
Wright *v.* Pennsylvania R. Co. (3 Pittsb. (Pa.) 116), Car. of P., 211; Cat.-Gds., 7; Trial, 101.
Wright *v.* Shelby R. Co. (16 B. Mon. (Ky.) 4), Incorp., 11.
Wright *v.* Southwestern R. Co. (64 Ga. 783), Charters, 76; Int., 9; Tax., 103, 255, 345, 347, 362.
Wright *v.* Syracuse, B. & N. Y. R. Co. (49 Hun 445, 3 N. Y. Supp. 480; affirmed in 124 N. Y. 668, mem., 37 N. Y. S. R. 964, mem), Lim. of Ac., 58; Waters & W., 15, 23.
Wright *v.* Third Ave. R. Co. (23 N. Y. S. R. 483, 5 N. Y. Supp. 707), Cable Rys., 14.
Wright *v.* Third Ave. R. Co. (27 N. Y. S. R. 523, 5 N. Y. Supp. 707), Cable Rys., 19; Negl., 63.
Wright *v.* Vermont & M. R. Co. (12 Cush. (Mass.) 68), Subscr., 43.
Wright *v.* Wisconsin C. R. Co. (29 Wis. 341, 12 Am. Ry. Rep. 201), Em. Dom., 951.
Wrightsville & T. R. Co. *v.* Holmes (43 Am. & Eng. R. Cas. 609, 85 Ga. 668, 11 S. E. Rep. 658), Husb. & W., 1, 13; Em. Dom., 424, 1077.
Wrigley *v.* Lancashire & Y. R. Co. (4 Giff. 352), Em. Dom., 1142.
Wullenwaber *v.* Dunigan (30 Neb. 877), Agency, 47; Mun. Aid, 99, 187.
Wullenwaber *v.* Dunigan (33 Neb. 477, 50 N. W. Rep. 428), Mun. Aid, 84.
Wuotilla *v.* Duluth Lumber Co. (37 Minn. 153, 33 N. W. Rep. 551, 5 Am. St. Rep. 832), Employés, Inj. to, 225, 313.
Wyandotte *v.* Corrigan (35 Kan. 21, 10 Pac. Rep. 99), St. Rys., 33, 259, 286, 293.
Wyandotte, K. C. & N. W. R. Co. *v.* Waldo (70 Mo. 629), Em. Dom., 456, 742.
Wyatt *v.* Citizens' R. Co. (55 Mo. 485), Children, Inj. to, 103, 104.
Wyatt *v.* Citizens' R. Co. (62 Mo. 408), Car. of P., 597.
Wyatt *v.* Darent Valley R. Co. (2 C. B. N. S. 110), Stockh., 29.
Wyatt *v.* Great Western R. Co. (6 B. & S. 709, 34 L. J. Q. B. 204), Cross., Inj. at, 214.
Wyatt *v.* Lynchburg & D. R. Co. (110 N. Car. 245, 14 S. E. Rep. 683), Arb., 28.
Wyatt *v.* Ohio & M. R. Co. (10 Ill. App. 289), Receiv., 183, 184.
Wyatt *v.* Senecal (4 Queb. L. R. 76), Bonds, 52.
Wyckoff *v.* Queens County Ferry Co. (52 N. Y. 32), Ferries, 10.
Wye Valley R. Co. *v.* Hawes (L. R. 16 Ch. D. 489, 50 L. J. Ch. D. 225, 43 L. T. 715,

29 W. R. 177; affirming 50 L. J. Ch. D. 75, 29 W. R. 120), Divid., 13.
Wylde *v.* Northern R. Co. (53 N. Y. 156, 14 Abb. Pr. N. S. (N. Y.) 213), Car. of M., 544; Car. of P., 471, 572; Evid., 119.
Wylie *v.* Elwood (134 Ill. 281, 25 N. E. Rep. 570), Em. Dom., 220; Nuis., 2, 5, 33; Right of W., 11.
Wylie *v.* Missouri Pac. R. Co. (43 Am. & Eng. R. Cas. 431, 41 Fed. Rep. 623), Bonds, 29.
Wyllie *v.* Palmer (137 N. Y. 248, 33 N. E. Rep. 381, 50 N. Y. S. R. 706), Agency, 75.
Wyman *v.* Chicago & A. R. Co. (4 Mo. App. 35), Car. of M., 544; Car. of P., 507; Pl., 7.
Wyman *v.* Eastern R. Co. (1 Am. & Eng. R. Cas. 22, 128 Mass. 346), Em. Dom., 528.
Wyman *v.* Lexington & W. C. R. Co. (13 Metc. (Mass.) 316), Em. Dom., 533, 558, 634.
Wyman *v.* Northern Pac. R. Co. (22 Am. & Eng. R. Cas. 402, 34 Minn. 210, 25 N. W. Rep. 349), Eject. Pass., 68; Tickets & F., 9, 40.
Wyman *v.* Penobscot & K. R. Co. (46 Me. 162), Animals, 649.
Wymore *v.* Hannibal & St. J. R. Co. (13 Am. & Eng. R. Cas. 524, 79 Mo. 247), Animals, 212.
Wymore *v.* Mahaska County (78 Iowa 396, 6 L. R. A. 545, 43 N. W. Rep. 264), Children, Inj. to, 131.
Wynkoop *v.* Myers (17 Civ. Pro. (N. Y.) 443, 7 N. Y. Supp. 898, 26 N. Y. S. R. 81), Contempt., 1; Death, etc., 65.
Wynn *v.* Central Park, N. & E. R. R. Co. (133 N. Y. 575, mem., 30 N. E. Rep. 721, 44 N. Y. S. R. 673, 4 Silv. App. 214; reversing 38 N. Y. S. R. 181, 14 N. Y. Supp. 172), Employés, Inj. to, 331; Negl., 60; St. Rys., 357.
Wyscaver *v.* Atkinson (37 Ohio St. 80), Mun. Aid, 46.

Yager *v.* Receivers (4 Hughes (U. S.) 192), Fel. Serv., 14, 325.
Yancey *v.* Wabash, St. L. & P. R. Co. (93 Mo. 433, 6 S. W. Rep. 272), Cross., Inj. at, 306; Tresp., Inj. to, 66.
Yarde *v.* Baltimore & O. R. Co. (57 Fed. Rep. 913), Rem. of C., 22.
Yarish *v.* Cedar Rapids, I. F. & N. W. R. Co. (72 Iowa 556, 34 N. W. Rep. 417), Mun. Aid, 118.
Yarnall *v.* St. Louis K. C. & N. R. Co. (10 Am. & Eng. R. Cas. 726, 75 Mo. 575), Contrib. Neg., 10; Death, etc., 208; Negl., 63; Tresp., Inj. to, 20.
Yarnell *v.* Kansas City, Ft. S. & M. R. Co. (113 Mo. 570, 21 S. W. Rep. 1), Car. of P., 91, 218, 219; Death, etc., 332; Negl., 100.
Yates *v.* Batavia (79 Ill. 500), Injunc., 31.
Yates *v.* Great Western R. Co. (24 Grant's Ch. (U. C.) 495), Pat. for Inv., 1, 18.
Yates *v.* Milwaukee (10 Wall. (U. S.) 497), Wharves, 1.
Yates *v.* New York C. & H. R. R. Co. (67 N. Y. 100), Eject. Pass., 121.
Yates *v.* Van De Bogert (56 N. Y. 526), Deeds, 26.
Yates *v.* West Grafton (34 W. Va. 783, 12 S. E. Rep. 1075), Sts. & H., 70, 99.
Yates *v.* White (4 Bing. N. C. 272, 5 Scott 640), Death, etc., 379.
Yazoo & M. V. R. Co. *v.* Brumfield (64 Miss. 637, 1 So. Rep. 905), Animals, 67, 447.
Yazoo & M. V. R. Co. *v.* Brumfield (Miss.) (4 So. Rep. 341), Animals, 466, 583.
Yazoo & M. V. R. Co. *v.* Love (69 Miss. 109, 12 So. Rep. 266), Tax., 304.
Yazoo & M. V. R. Co. *v.* Smith (68 Miss. 359, 8 So. Rep. 508), Animals, 535.
Yazoo & M. V. R. Co. *v.* Thomas (41 Am. & Eng. R. Cas. 599, 132 U. S. 174, 10 Sup. Ct. Rep. 68; affirming 37 Am. & Eng. R. Cas. 392, 65 Miss. 553), Fed. Cts., 24; Tax., 244.
Yazoo & M. V. R. Co. *v.* Williams (67 Miss. 18, 7 So. Rep. 279), App., 118.
Yeaton *v.* Boston & L. R. Corp. (15 Am. & Eng. R. Cas. 253, 135 Mass. 418), Employés, Inj. to, 182, 289.
Yelton *v.* Evansville & I. R. Co. (Ind.) (54 Am. & Eng. R. Cas. 69, 33 N. E. Rep. 629), Death, etc., 48.
Yeomans *v.* Contra Costa S. Nav. Co. (41 Cal. 71), Car. of P., 53, 584; Exp. Cos., 13; Fel. Serv., 1, 4, 196.
Yerkes *v.* Keokuk N. L. Packet Co. (7 Mo. App. 265), Car. of P., 139, 180.
Yoakum *v.* Dunn (1 Tex. App. 524, 21 S. W. Rep. 411), Car. of M., 796, 798.
Yoakum *v.* Selph (83 Tex. 607, 19 S. W. Rep. 145), Evid., 98; Receiv., 73.
Yonge *v.* Kinney (28 Ga. 111), Death, etc., 343, 435; Evid., 140; Negl., 99.
Yonge *v.* Mobile & O. R. Co. (31 Ala. 422), Stat., 63.
Yonge *v.* Pacific Mail Steamship Co. (1 Cal. 353), Car. of P., 613.
Yonoski *v.* State (5 Am. & Eng. R. Cas. 40, 79 Ind. 393), Crim. L., 50.
Yool *v.* Great Western R. Co. (39 L. J. Ch. 562, 18 W. R. 825, 22 L. T. 781), Consol., 21.
York *v.* Kansas City, C. & S. R. Co. (117 Mo. 405, 22 S. W. Rep. 1081), Employés, Inj. to, 43, 128, 391.
York *v.* Maine C. R. Co. (84 Me. 117, 24 Atl. Rep. 790), Cross., Inj. at, 311; Fly. Switch, 3; Trial, 120.
York & C. R. Co., In re (50 Me. 552), Mort., 130.
York & C. R. Co. *v.* Pratt (40 Me. 447), Subscr., 51, 187; Witn., 13.
York & C. R. Co. *v.* Ritchie (40 Me. 425), Subscr., 179.
York & M. L. R. Co. *v.* Winans (17 How. (U. S.) 31), Pat. for Inv., 17.
York & N. M. R. Co. *v.* Milner (15 L. J. Q. B. 378), Constr. Rys., 6.
York & N. M. R. Co. *v.* Queen (7 Railw. Cas. 459, 1 El. & Bl. 858, 17 Jur. 690, 22 L. J. Q. B. 225), Constr. Rys., 1; Em. Dom., 1140, 1208.
York & N. M. R. Co. *v.* Reg. (7 Railw. Cas. 459, 1 El. & Bl. 858, 17 Jur. 690, 22 L. J. Q. B. 225), Incorp., 4.
York Mfg. Co. *v.* Illinois C. R. Co. (3 Wall. (U. S.) 107), Bills of L., 73, 79.



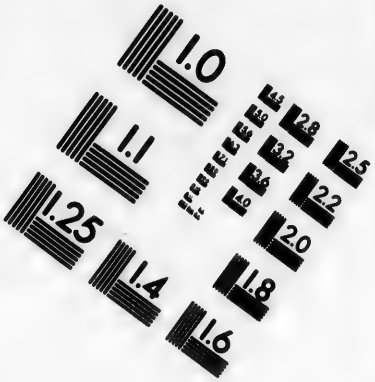
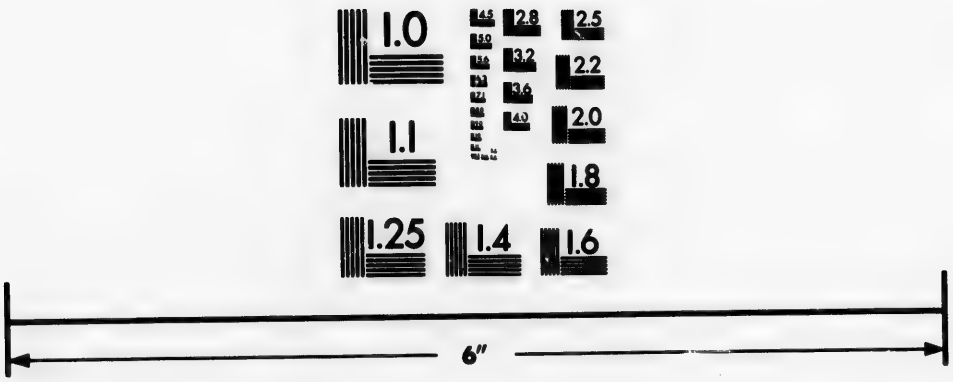


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York, N. & B. R. Co. *v.* Crisp (14 C. B. 527, 2 C. L. R. 1357, 18 Jur. 606, 23 L. J. C. P. 125), Car. of L. S., 152.
Yorkshire, D. & G. R. Co., In re (1 Jur. N. S. 975), Side Tr., 2.
Yorkshire R. Wagon Co. *v.* Maclure (L. R. 21 Ch. D. 309, 51 L. J. Ch. D. 857, 47 L. T. 290, 30 W. R. 761; reversing L. R. 19 Ch. D. 478, 51 L. J. Ch. D. 253, 45 L. T. 747, 30 W. R. 288), Contr., 52.
York Tramways Co. *v.* Willows (6 Am. & Eng. R. Cas. 492, L. R. 8 Q. B. D. 685), Abstr., 38.
Yerton *v.* Milwaukee, L. S. & W. R. Co. (6 Am. & Eng. R. Cas. 322, 54 Wis. 234, 11 N. W. Rep. 482, 41 Am. Rep. 23), Eject. Pass., 54, 65; Tickets & F., 49.
Yorton *v.* Milwaukee, L. S. & W. R. Co. (18 Am. & Eng. R. Cas. 332, 62 Wis. 367, 21 N. W. Rep. 516, 23 N. W. Rep. 401), Eject. Pass., 103; Tickets & F., 49.
Youll *v.* Sioux City & P. R. Co. (21 Am. & Eng. R. Cas. 589, 66 Iowa 346, 23 N. W. Rep. 736), Employés, Inj. to, 195, 460.
Young *v.* Campbell (75 N. Y. 525), Mun. Aid, 421.
Young *v.* Canadian Pac. R. Co. (1 Man. 205), Car. of M., 66, 713.
Young *v.* Chicago & N. W. R. Co. (28 Wis. 171, 5 Am. Ry. Rep. 159), Lim. of Ac., 75; Waters & W., 11.
Young *v.* Clarendon Tp. (29 Am. & Eng. Corp. Cas. 115, 132 U. S. 340, 10 Sup. Ct. Rep. 107), Mun. Aid, 60.
Young *v.* Delaware, L. & W. R. Co. (38 N. J. L. 502), Attach., 70.
Young *v.* Detroit, G. H. & M. R. Co. (19 Am. & Eng. R. Cas. 417, 56 Mich. 430, 23 N. W. Rep. 67), Cross., Inj. at, 318, 333; Dam., 91; Evid., 27; Sts. & H., 410, 417.
Young *v.* East Ala. R. Co. (80 Ala. 100), Car. of M., 264; Trover, 3.
Young *v.* Goss (40 Am. & Eng. R. Cas. 435, 42 Kan. 502, 22 Pac. Rep. 572), Pub. Lds., 6.
Young *v.* Grand Trunk R. Co. (10 Biss. (U. S.) 550, 9 Fed. Rep. 348), Actions, 15.
Young *v.* Gwendraeth Valleys R. Co. (4 Ry. & C. T. Cas. 247), Charges, 89.
Young *v.* Hannibal & St. J. R. Co. (19 Am. & Eng. R. Cas. 512, 79 Mo. 336), Animals, 63, 67, 212; Negl., 41.
Young *v.* Hannibal & St. J. R. Co. (82 Mo. 427), Animals, 509; Fences, 88.
Young *v.* Kansas City, Ft. S. & M. R. Co. (39 Mo. App. 52), Animals, 159, 354.
Young *v.* Kansas City, Ft. S. & M. R. Co. (52 Mo. App. 530), Animals, 602.
Young *v.* Kansas City, St. J. & C. B. R. Co. (33 Mo. App. 509), Charges, 51, 54; Lim. of Ac., 37.
Young *v.* Louisville & N. R. Co. (95 Ala. 454, 11 So. Rep. 121), Attach., 68.
Young *v.* Magazine St. R. Co. (24 La. Ann. 53), St. Rys., 82.
Young *v.* Midland R. Co. (19 Ont. App. 265), Em. Dom., 1214.
Young *v.* Montgomery & E. R. Co. (2 Woods (U. S.) 606), Mort., 172, 184; Parties, 22; Receiv., 166; State Aid, 10, 12.
Young *v.* New Jersey & N. Y. R. Co. (46 Fed. Rep. 160), Fel. Serv., 64.
Young *v.* New York C. & H. R. R. Co. (13 Daly (N. Y.) 294; affirmed in 103 N. Y. 678, mem., 7 N. Y. S. R. 861, mem.), Employés, Inj. to, 156, 693, 725.
Young *v.* New York C. R. Co. (30 Barb. (N. Y.) 229), Employés, 5.
Young *v.* New York, L. E. & W. R. Co. (32 Am. & Eng. R. Cas. 130, 107 N. Y. 500, 9 Cent. Rep. 879, 14 N. E. Rep. 434, 12 N. Y. S. R. 285; reversing 35 Hun 663, mem.), Cross., Inj. at, 265, 269.
Young *v.* Old Colony R. Co. (156 Mass. 178, 30 N. E. Rep. 560), Stat. & D., 122; Tresp., Inj. to, 2.
Young *v.* Parker (132 U. S. 267, 10 Sup. Ct. Rep. 75), Rem. of C., 27.
Young *v.* Pennsylvania R. Co. (28 Am. & Eng. R. Cas. 114, 115 Pa. St. 112, 7 Atl. Rep. 741), Tickets & F., 103.
Young *v.* Rollins (12 Am. & Eng. R. Cas. 455, 85 N. Car. 485), Receiv., 4, 9, 22, 25, 28.
Young *v.* Rollins (25 Am. & Eng. R. Cas. 646, 90 N. Car. 125), Receiv., 20, 39, 175.
Young *v.* St. Louis, K. C. & N. R. Co. (44 Iowa 172), Animals, 77, 136.
Young *v.* Smith (3 Dana (Ky.) 91), Car. of M., 250, 348.
Young *v.* Toledo & S. H. R. Co. (40 Am. & Eng. R. Cas. 514, 76 Mich. 485, 43 N. W. Rep. 632), Sales of Rds., 4; Stock, 76.
Young *v.* Virginia & N. C. Const. Co. (109 N. Car. 618, 14 S. E. Rep. 58), App., 42; Employés, Inj. to, 97.
Young *v.* Webster City & S. W. R. Co. (75 Iowa 140, 39 N. W. Rep. 234), Dissol., 3; Mun. Aid, 111, 118, 243.
Youngman *v.* Elmira & W. R. Co. (65 Pa. St. 278), Exec., 1; Judgm., 46; Mort., 20, 168, 249.
Ystalyfera Iron Co. *v.* Neath & B. R. Co. (29 L. T. 662, L. R. 17 Eq. 142, 43 L. J. Ch. 476, 22 W. R. 149), Em. Dom., 1087.

Zabriskie *v.* Cleveland, C. & C. R. Co. (23 How. (U. S.) 381), Guar., 7, 9; Stockh., 87.
Zabriskie *v.* Hackensack & N. Y. R. Co. (18 N. J. Eq. 178), Charters, 17, 27, 32, 44; Estop., 26; Partn., 3.
Zabriskie *v.* Jersey City & B. R. Co. (13 N. J. Eq. 314), St. Rys., 202; Sts. & H., 230.
Zack *v.* Pennsylvania R. Co. (25 Pa. St. 394), Em. Dom., 282, 485.
Zambrino *v.* Galveston, H. & S. A. R. Co. (38 Am. & Eng. R. Cas. 521, 38 Fed. Rep. 449), Fed. Cts., 5.
Zanger *v.* Detroit City R. Co. (87 Mich. 646, 49 N. W. Rep. 879), St. Rys., 131, 187.
Zebley, Ex parte (30 New Brun. 130), Tax., 229.
Zebley *v.* Farmers' L. & T. Co. (45 N. Y. S. R. 425, 18 N. Y. Supp. 526), Mort., 147.
Zeigler *v.* Danbury & N. R. Co. (23 Am. & Eng. R. Cas. 400, 52 Conn. 543), Fel. Serv., 70, 127, 146; Pl., 142.
Zeigler *v.* Northeastern R. Co. (5 So. Car. 221), Cross., Inj. at, 13, 185, 196.

Zeigler *v.* Northeastern R. Co. (7 So. Car. 402), Animals, 69.
Zeigler *v.* South & N. Ala. R. Co. (58 Ala. 594), Animals, 6; Words & Ph., 78.
Zeigler *v.* Wells (23 Cal. 179), Exp. Cos., 83, 90.
Zeigler *v.* Wells (28 Cal. 263), Pl., 127.
Zemp *v.* Wilmington & M. R. Co. (9 Rich. (So. Car.) 84), Car. of P., 483, 583; Evid., 175.
Zeringue *v.* Texas & P. R. Co. (34 Fed. Rep. 239), Spec. Perf., 3.
Zillenbach *v.* Xenia (41 Ohio St. 207), Sts. & H., 236.
Zimmer *v.* Brooklyn Sub-R. Co. (25 N. Y. S. R. 974, 53 Hun 637, 23 Abb. N. Cas. 382, 6 N. Y. Supp. 316), Constr. Rys., 43.
Zimmer *v.* Grand Trunk R. Co. (19 Ont. App. 693), Death, etc., 100.
Zimmer *v.* Grand Trunk R. Co. (21 Ont. 628), Lim. of Ac., 51.
Zimmer *v.* New York C. & H. R. R. Co. (7 Hun (N. Y.) 552; affirmed in 67 N. Y. 601, mem.), Cross., Inj. at, 145.
Zimmer *v.* New York C. & H. R. R. Co. (137 N. Y. 460, 33 N. E. Rep. 642, 51 N. Y. S. R. 269; reversing in part 53 Hun 631, 44 N. Y. S. R. 937, 18 N. Y. Supp. 945), Lim. of Liab., 3, 8.
Zimmer *v.* New York C. & H. R. R. Co. (42 N. Y. S. R. 63, 62 Hun 619, 16 N. Y. Supp. 631), Car. of L. S., 86, 96.
Zimmer *v.* State (30 Ark. 677), Consol., 5, 32.
Zimmerman *v.* Hannibal & St. J. R. Co. (2 Am. & Eng. R. Cas. 191, 71 Mo. 476), Contrib. Neg., 9; Cross., Inj. at, 126, 133, 240, 242, 272; Tresp., Inj. to, 4.
Zinn *v.* New Jersey Steamboat Co. (49 N. Y. 442, 3 Am. Ry. Rep. 340), Car. of M., 217, 246.
Zoliewski *v.* New York C. & H. R. R. Co. (1 Misc. 438, 51 N. Y. S. R. 54, 21 N. Y. Supp. 916), Death, etc., 263, 295.
Zorn *v.* Savannah & C. R. Co. (5 So. Car. 90), Mort., 70.
Zouch *v.* Chesapeake & O. R. Co. (49 Am. & Eng. R. Cas. 702, 36 W. Va. 524, 15 S. E. Rep. 185), Car. of L. S., 90; Car. of M., 203; Lim. of Liab., 31.
Zuccarello *v.* Nashville & C. R. Co. (3 Baxt. (Tenn.) 364), Cross., Inj. at, 42.
Zumwalt *v.* Chicago & A. R. Co. (35 Mo. App. 661), Employés, Inj. to, 428; Fel. Serv., 152.
Zunz *v.* Southeastern R. Co. (L. R. 4 Q. B. 539, 38 L. J. Q. B. 209, 3 Ry. & C. T. Cas. xix), Bagg., 98; Car. of M., 529.
Zurfluh *v.* People's R. Co. (46 Mo. App. 636), New Tr., 83; St. Rys., 465.

INDEX

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ABANDONMENT.
General treatment, I, 1.
Extinguishment of easement by, IV, 160.
Of carriage, effect of, on right to charges, II, 646.
Of condemnation proceedings, IV, 818–826.
Of enterprise as a defense to action on stock subscription, VII, 770, 771.
Of franchise, II, 710–716.
Of main line, right of abutting owner to injunction after, IV, 304.
Of notice to take land under Canadian statutes, IV, 928.
Of post of duty contrary to rules, V, 244.
Of private way, VI, 1079.
Of road, liability of contractor to company after, III, 143.
Of stations, VII, 204, 205.
Of streets and highways, VII, 554–556.
Of work under construction contract, III, 139.

ABATEMENT.
General treatment.
Grounds, I, 6.
Revival; continuance, I, 11.
Form and sufficiency of plea in, VI, 1002, 1003.
Of illegal tax, VII, 998.
Of nuisance, VI, 893, 894.
Of nuisance at suit of abutting owner, IV, 299.
Of nuisance, order for, in action for damages, VI, 902.
Of nuisance, trial by jury in action for, IV, 345.
Of obstruction to navigation, I, 720.
Pleas in, I, 271; VI, 1002, 1003.

ABSENCE.
Of party, evidence of statements made in, V, 497.
Of witnesses as ground for continuance, trial, 21.

ABSOLUTE DELIVERY.
Of deeds, IV, 5.

ABSOLUTE LIABILITY.
For fires, V, 862.
For killing stock, validity of statutes imposing, VII, 253.
Without proof of negligence, I, 156.

ABSTRACT.
Meaning of the term as applied to records, VIII, 300.
On appeal, I, 441.

ABUSE.
Meaning of the term "abuse and misuse" as used in charter, VIII, 300.
Of franchise, as ground for forfeiture, II, 711.

ABUSIVE LANGUAGE.
Use of, III, 386; IV, 189, 197.

ABUTTING OWNERS.
In general.
Assessing, for improvement of whole street, VII, 425.
Change of grade by city at request of, VII, 608.
Consent of, to construction of underground railroad, VIII, 134.
Consent of, to occupation of street, IV, 281, 282; VII, 390–393.
Consent of, under Rapid Transit Act, VI, 1157.
Dividing cost of paving between company and, VII, 401.
Duty to fence for protection of, V, 820.
How far purchaser of road at foreclosure charged with notice of rights of, VI, 504.
Meaning of the term "abutting lot," VIII, 300.
Necessity of condemnation proceedings or consent of, VII, 581, 582.
Necessity of consent of, to occupying street with steam road, VII, 570.
Notice to, before condemning right of way through street, VII, 588.
Relative rights of company and, VII, 80–82.
Release by, VII, 14, 15.
Remedies of, against steam railways in streets, VII, 628–669.
Remedies of, as to taking of land, I, 686.
Reversion to, of land taken, IV, 824–826.
Reversion to, on abandonment of railway, I, 4.
Reversion to, on discontinuance of highway, VII, 556.
Right of, to build fence where company fails to do so, V, 807, 808.
Right of, to lateral support, III, 113.
Right of, to tunnel under railway, VI, 401.
Rights and remedies of, generally, IV, 291–357; IV, 445–449.
Rights of, as against street railways, VII, 416–427.

ABUTTING OWNERS — *continued.*
In general — *continued.*
Rights of, as regards nuisances, VII, 350.
Rights of, as respects cable railways, I, 728.
Rights of, as respects construction of telegraph lines, VII, 1026.
Rights of, as respects crossings of streets and highways, III, 456, 458.
Rights of, as respects electric railway in street, IV, 264–266.
Rights of, as respects embankments, IV, 372–374.
Rights of, as respects steam railroads in streets, VII, 590–625.
Rights of, on discontinuance of old road and substitution of new one, VII, 627.
Suits by, when barred by lapse of time, VI, 310, 320.
What constitutes a taking of property of, IV, 445.
When company must fence against, I, 142.
Damages for injury to property.
Compensation to, V, 1051.
Consequential damages to, for construction of road, III, 117.
Consequential damages to, for failure to restore highway, VII, 625.
Evidence of injury to property of, VI, 1035.
Excessive damages for injuries to property of, VI, 855.
Injuries to person or property of, by derailment, IV, 48.
Liability of consolidated companies for injuries to, III, 105.
Measure of damages where fee of street is not in, IV, 330.
Right of, to compensation in cases of street railways, VII, 375.
Right to recover damages for obstruction on opposite side of street, VII, 653.

ACCEPTANCE.
By company of subscription in its aid, VI, 615; VII, 731.
By passenger of ticket containing limitation of liability, VII, 1045.
Of amendment of charter, II, 685.
Of amendment to charter, consent of stockholders to, IV, 75.
Of bill of lading by shipper's agent, I, 610.
Of charter, II, 675, 676.
Of damaged goods by consignee, II, 292.
Of debentures tendered before suit, III, 961.
Of dedication, IV, 2.
Of dedication of street or highway, VII, 543.
Of fare on freight train, effect of, II, 323.
Of goods, when implies contract for free shipment, II, 224, 225.
Of grant, VI, 162.
Of land granted for right of way, IV, 465.
Of negotiable paper, II, 588.
Of road substituted for that taken, VIII, 123.
Of statute conferring privilege or benefit, VII, 264.

ACCESS.
Deduction of benefits for increased facility of, IV, 339.
Easements of, IV, 292.
To and from abutting property, VII, 590.
To highway, obstruction of, I, 703.
To navigable waters, action for damages for obstruction of, IV, 834.
To papers in hands of adverse party, VIII, 15.
To premises, obstruction of, as an element of land damages, IV, 703, 705, 918; VII, 663.
To premises, obstruction of, by embankments, IV, 375.
To property, covenant to provide, III, 345.
To property or tidewater, loss of, as the measure of damages, IV, 936.

ACCIDENT.
In general.
By cars leaving track, IV, 39–48.
By collision, III, 12–25.
Competency of evidence of discharge of employé after, V, 403.
Evidence of others similar, IV, 414.
Failure to use best methods to avoid, when not negligence, VI, 789.
Indemnifying company against liability for, V, 1103.
On Sunday, VII, 821, 822.
On tramways, VII, 1103, 1104.
Penalties for failure to give notice of, VI, 967.
Presumption as to survivorship of persons killed in, V, 442.
Proof of, when casts burden of proof on defendant, V, 453.
What is, VIII, 300.
To animals or property.
Involving loss of property, II, 42–90.
Proof that repairs were made after, I, 283.
Showing similar, at same place, I, 282
Sufficiency of evidence to show place of, I, 299.
To persons.
Causing death of passengers, liability for, III, 764.
Evidence of increased precaution after, V, 278, 425–428.
Instructions as to precautions to prevent, III, 895, 907.
Notice of, to insurance company, I, 14.
Proof of similar, in the past, II, 811; III, 848; V, 281.
Right to stop over in cases of, VII, 1055.
To children, II, 752–763.
To passengers, II, 440–512.
To trespassers, VII, 1116–1166.
When within terms of insurance policy, I, 13.
See also, IV, 266–268, 357–364; V, 556–559, 857–883, 1006–1009, 1032–1042.

ACCIDENTAL INJURY.
Liability for, VII, 514.

ACCIDENT INSURANCE.
General treatment, I, 13.
See also, VII, 15–18.

ACCOMMODATION PAPER.
Railway aid bonds are not, VI, 689.
ACCOMMODATIONS.
Duty to provide suitable, at stations, VII, 208.
"ACCOMMODATION WORKS."
Taking land for, under English statutes, IV, 882.
ACCORD AND SATISFACTION.
General treatment, I, 18.
As a defense to action on subscription to stock, VII, 786.
As regards public contracts, III, 7.
ACCOUNTING.
General treatment, I, 19.
Between land-grant railways and the government, VI, 131.
Between principal and agent, I, 48.
Bondholder, when entitled to, VII, 54.
By purchaser with senior mortgagee, VI, 504.
By receivers, VI, 1217–1220.
Compelling husband to account for income of wife's property, V, 1067.
For benefits received under *ultra vires* contracts, VIII, 132.
Of majority to minority stockholders, VII, 311.
Right of bondholder to sue for, I, 665.
To bondholders, by mortgage trustees, VI, 465.
Under construction contract, suit for, III, 170.
ACCOUNTS.
General treatment, I, 20.
Of agents, jurisdiction of equity over, V, 352.
Of engineers, settlement of, III, 150.
Of officers and agents, auditing, VIII, 185.
Of work done or materials furnished, VI, 290.
ACCOUNTS STATED.
What are, effect, etc., I, 21.
ACCRETION.
Title by, VII, 92.
"ACCRUE."
Meaning of the word as applied to a contract for wages, VIII, 300.
ACKNOWLEDGMENT.
Of deeds, IV, 6.
Of mortgages, VI, 434.
ACQUIESCENCE.
By company in use of track to walk upon, VI, 272, 274.
By principal, when ratification of agent's act, I, 82.
By shipper, in overcharge, II, 630.
Estoppel by, V, 372–375.
In *ultra vires* acts, effect of, VIII, 125.
Of abutting owner as evidence of consent, VII, 390.
Of landowner, when bars trespass, IV, 874, 875.
Of owner, when bars action for damages, IV, 836.
Of owner, when bars ejectment, IV, 846, 847.
ACQUIESCENCE — *continued*.
Presumption of dedication from, VII, 545.
Ratification of president's act by, VI, 1070.
When bars stockholder's right of action, VII, 344.
When bars suit in equity, V, 351.
When injunction will be denied because of, IV, 862, 863.
When prevents running of statute of limitations, VI, 331.
ACTING SUPERINTENDENT.
When president acts as superintendent, VII, 826.
ACTIONS.
General treatment, I, 22.
Against elevated railways, IV, 291–356.
Against government railroads, V, 1049.
Against railway commissioners, VI, 1152.
Against trustees, VIII, 120.
Amendments changing form of, VI, 1045.
By and against corporations, III, 323, 324.
By and against foreign corporations, V, 1017–1021.
By and against receivers, VI, 1208–1217.
By or against states, V, 634.
By personal representatives, V, 554.
Computing interest from commencement of, V, 1175.
Effect of consolidation upon pending, III, 88.
Election between assumpsit and other forms of, I, 485.
For taxes, VII, 990–996.
Grounds for arrest in, I, 464.
Limitations of, VI, 301–331.
Litigation taxes, VII, 835.
Parties to, VI, 922–934.
Pleadings in, V, 1057.
Power of executor or administrator to compromise, V, 553.
Refusal to reopen, when matter of discretion, I, 383.
Remedy by, VI, 238.
Suits against Western & Atlantic R. Co., VIII, 185.
To enforce orders of railway commissioners, II, 672.
To recover land, IV, 244–250.
What is the commencement of, so as to stop running of statute of limitations, VI, 305.
What may be compromised, III, 55.
What survive after death of party, I, 11.
When attachment is proper remedy, I, 489.
When quo warranto lies, VI, 1129.
When writ of prohibition will lie, VI, 1104.
Against carriers of goods.
By and against express companies, V, 598, 604.
For loss or injury to goods carried, II, 263–305.
For overcharges, costs in, III, 329.
Mandamus to compel railroad to carry, II, 33.
Nature of, for failure to carry, II, 33.
On bills of lading, I, 646.
Remedy by, for discrimination, IV, 104.
Remedy of carrier at law to enforce lien for charges, II, 155.

ACTIONS — *continued.*
Against carriers of passengers.
Against carriers of passengers, II, 521–585.
Costs in, III, 328.
For ejecting passenger, IV, 208–238.
For loss of baggage, I, 566–574.
By and against stockholders.
By stockholders against company or its officers, VII, 328–348.
By stockholders, procedure in, VII, 344–348.
For deficiency after forfeiture of stock, VII, 799.
For dividends, IV, 151–153.
For refusal to transfer stock, VII, 295–298.
Remedy by, as against stockholders, VII, 314.
Stockholder's right of, against corporation, VII, 330–334.
Stockholder's right of, against directors, VII, 334–338.
Stockholder's right of, as between majority and minority, VII, 340–342.
Stockholder's right of, generally, VII, 328–330.
Stockholder's right of, when deprived of stock, VII, 338–340.
To enforce stockholders' liability to creditors, VII, 321–328.
To enforce subscriptions to stock, VII, 756–796.
By husband and wife.
By and against husband and wife, V, 1068–1077.
Consolidation of, V, 1077.
For recovery of or injury to wife's property, VII, 1068.
Right of wife to sue for injury to person or property, VII, 1072–1074.
For breach of duty, generally.
For breach of duty to build cattle-guards, II, 598–603.
For failure to build or repair cattle-guards, II, 598–603.
For failure to construct culverts, III, 662–664.
For money improperly withheld by government, VI, 133.
For unlawful discharge of superintendent, VII, 826.
For unlawful taxation, VII, 998–1010.
For causing death.
For causing death, III, 745–763.
For causing death, at common law, III, 742–745.
In admiralty, for death of passengers, I, 32.
For causing fires.
For causing fires, costs in, III, 328.
For damages caused by fires, V, 893–968.
Form of, for causing fires, V, 894.
For injuries to animals.
Against carriers of live stock, I, 801–820.
For killing or injuring animals, I, 238–246.

ACTIONS — *continued.*
For injuries to animals — *continued.*
Splitting or severance, I, 240.
What are local and what transitory, I, 238.
For personal injuries.
For injuries caused by fellow-servants, V, 773–792.
For injuries to children, II, 807–823.
For injuries to employés, V, 261–344.
For injuries to employés, procedure in, V, 773–792.
For taking property.
For damages for wrongful interference with property, IV, 830–842.
For wrongful interference with property under color of eminent domain, IV, 826–880, 921–923, 949–955.
To enforce awards and judgments in condemnation proceedings, IV, 762–767.
For torts, generally.
By abutting owners where railways are constructed in streets, VII, 628–669.
By master for injuries to apprentice, I, 453.
For damages for maintaining nuisance, VI, 897.
For flooding lands, V, 985–1005.
For illegal removal of corpse, III, 316.
For infringement of patents, VI, 951–953.
For injuries at or near bridges, I, 703–709.
For injuries caused by obstructions in, and encroachments upon, streets and highways, VII, 713–718.
For injuries caused by steam railways in streets, VII, 693–706.
For injuries received at stations, VII, 208–231.
For injuries to persons at crossings, III, 638–657.
For interference with easements, IV, 161.
For interference with or disturbance of franchises, V, 1027.
For interference with or obstruction of private ways, VI, 1079–1081.
Form of, for disturbance of private way, VI, 1080.
Form of, for flooding lands, V, 987.
Form of, maintainable, IV, 298, 299.
For negligence, VI, 815–835.
For negligent injuries caused by street railways, VII, 455–539.
For nuisances, VI, 893–902.
For personal injuries, costs in, III, 329.
Relative to liability for collision, III, 12.
Right of, for flooding lands, V, 985, 986.
When injured person may sue railway company, VII, 409.
When will lie for malicious prosecution, VI, 367, 368.
When will lie for trespass upon the person, VII, 1115.
On contracts, generally.
Between buyer and seller of chattel, VII, 103–105.
Between vendor and purchaser of land, VIII, 152, 153.

ACTIONS — *continued.*
On contracts, generally — *continued.*
By attorneys for compensation, I, 519.
By bailee against third person, I, 578.
For breach of contract, III, 230–235.
Growing out of construction contracts, III, 166–179.
On bonds, I, 679, 680.
On certificates of indebtedness, II. 606.
On construction contracts, III, 166–179.
On corporate bonds, I, 676–680.
On coupons, III, 338–342.
On covenants, III, 347–350.
On debentures, III, 961.
On judgments, VI, 105, 106.
On leases, VI, 238-241.
On negotiable paper, I, 596–601.
On policies, V, 850, 851.
Right to sue upon bonds secured by mortgage, VI, 471.
To recover back taxes paid, VII, 999–1001.
To recover charges, II, 648.
To recover overcharges, II, 628–639.
To recover wages, V, 8–13.
Upon awards, I, 461.
Upon covenants, III, 347–350.
Suits in equity.
By mortgage trustee for instruction of court, VI, 466.
For specific performance, VII, 155–158.
Right to sue to enforce liens, VI, 300.
To abate nuisance, VI, 894.
To enforce claims of creditors, III, 350–353.
To enforce or cancel railway aid bonds VI, 705–714.
To foreclose deeds of trust, IV, 30–32.
To foreclose laborer's or mechanics' lien VI, 291–295, 300, 301.
To foreclose mortgages, VI, 470–518.
To quiet title, III, 9, 10.
To set aside tax sale and deed, VII, 998.
When bill of interpleader will lie, V, 1177.
When will lie to restrain issuance of municipal bonds, VI, 667.
To recover penalties.
Right of, to enforce penalty, VI, 967–970.
To recover penalties for importing laborers, III, 185.
See also, I, 466, 485–488, 489, 490; V, 348–356, 1010, 1011, 1119–1132; VI, 257–261, 367–370; VII, 20–45, 64; VIII, 107, 108.

ACT OF GOD.
As a defense to action for flooding land, V, 928.
Carriers insurers except as to, II, 17, 55.
Exception of loss caused by, in bill of lading, I, 630.
Extinguishment of flow of stream by, VIII, 171.
Liability where carrier's negligence contributes to loss, II, 56.
Must be proximate cause of loss, II, 21–23.
To excuse nondelivery by carrier, II, 121.
What is an, II, 18; VIII, 300.

ACT OF GOD — *continued.*
When excuses carrier of passengers, II, 366.
When excuses loss by express company, V, 575.
When excuses loss of baggage, I, 525.

ACTS OF BANKRUPTCY, I, 582.

ACTUAL DAMAGES.
In actions for injuries to employés, V, 337.
See also COMPENSATORY DAMAGES.

ACTUAL DELIVERY.
What is, of goods to carry, II, 38.

ACTUAL STRIKING.
Necessity of, as to trespassers, VII, 1131.

AD DAMNUM.
Amendment of, VI, 1050.

ADDITIONAL BURDEN OR SERVITUDE.
Extension or change of use, when deemed to be, IV, 444.
In street, what constitutes, VII, 595–603.
Must be compensated for, IV, 446.
Use of street for electric road is not, IV, 266.
What is, IV, 291–298, 447, 448.
When street railways impose, VII, 416, 417.

ADDITIONAL LANDS.
Acquisition of, by condemnation, IV, 404.

ADDITIONAL TRACKS.
Condemning abutting easements upon construction of, IV, 288.

ADDRESS.
Of consignee, duty to leave with carrier, II, 101.

ADEQUATE REMEDY AT LAW.
Absence of, as ground for mandamus, II, 374.
Absence of, as ground for specific performance, VII, 148, 151.
Absence of, as justifying injunction against unlawful taxation, VII, 1002.
Absence of, to give equity jurisdiction, V, 349-351.
Rule as to, where injunction is sought, V, 1126.

ADJOURNMENT.
Of arbitrators' meetings in expropriation proceedings, IV, 943.
Of foreclosure sale, VI, 501.
Of hearing before commissioners to assess damages, IV, 603.
Of hearing before jury on assessment of land damages, IV, 616.

ADMINISTRATION.
Of assets in equity, V, 352.

ADMINISTRATORS.
See EXECUTORS AND ADMINISTRATORS.

ADMIRALTY.
General treatment, I, 32.
Action for causing death in, III, 743.
Jurisdiction of courts of, generally, VI, 117.

ADMISSIONS.
Against interest by agents or employés, II, 283.
As evidence, V, 481–487.

ADMISSIONS — *continued.*
By answer or plea, VI, 1009.
By demurring, VI, 1013.
By demurring to evidence, VIII, 22.
Effect of, as evidence on assessment of land damages by jury, IV, 625.
Estoppel by, V, 384.
In actions for injury to animals, I, 285.
In actions for lost baggage, I, 571.
Of agents, when bind principal, I, 51, 52, 285.
Of corporate character by appearance on part of defendant, I, 451.
Of deceased in actions for causing death, III, 855.
Of injured employé, IV, 280.
Of liability by subsequent acts, admissibility of, V, 911.
Of prior negligence by subsequent repairs, V, 427.
Of record, IV, 317.
Of record, competency of, in evidence, IV, 390.
Power to bind clients by, I, 514.
When evidence generally, IV, 481–487.

ADOPTION.
Of best appliances, VI, 780.
Of state laws in federal courts, V, 636.

ADVANCES.
Of money by directors to company, IV, 69.
On faith of bill of lading, I, 648–650.
To company as a defense to actions on subscriptions to stock, VII, 786.
To contractor, liability to company for, II, 143.
To pay debts for constructions, priority of mortgage over, VI, 454.
To pay wages, protection of, VI, 445.
To save property from sale for taxes, priority of, VI, 511.

ADVERSE POSSESSION.
General treatment, I, 33.
Acquirement of easement by, IV, 160.
Acquirement of private way by, VI, 1076.
Persons holding by, when proper parties in condemnation proceedings, IV, 498.

ADVERTISEMENT.
For bids on public contracts, III, 7.
Of sale of franchise, VII, 368.

ADVICE.
By court to receiver, VI, 1187.
Of counsel as a defense, III, 183; V, 1161; VI, 371.
Of physicians, competency of evidence of, V, 394.

AFFIDAVIT.
Admissibility of counter-affidavit, on motion for change of venue, VIII, 8.
For attachment, I, 502.
For injunction, IV, 1138.
Not in the record not considered on appeal, IV, 795.
Of assessors as proof of taxpayers' assent to railway aid, VI, 574.
Of defense, in action for taxes, VII, 993.
Of illegality, VII, 998.
Of illegality of execution sale, V, 549.
Of local prejudice, VII, 40, 41.

AFFIDAVIT — *continued.*
Of passenger as to contents of baggage, I, 560.
On motion for change of venue, VIII, 8.
On motion for new trial, sufficiency of, VI, 876.
Sufficiency of, on application for receiver, VI, 1176.
To claim for lien, VI, 291.
To papers filed to incorporate company, V, 1100.

AFFIRMANCE.
For want of prosecution, VI, 126.
Of decree of foreclosure, VI, 518.
On appeal, I, 444.
On appeal for want of prosecution, I, 367.
When proper on appeal in condemnation proceedings, IV, 809.

AFTER-ACQUIRED PROPERTY.
Mortgages of, VI, 418, 426, 428, 429.
When subject to deed of trust, IV, 27.

AGE.
Of deceased's children proof of, on question of damages, III, 879.
Of employés to show incompetency, V, 782.
Of infant employé, false representations as to, V, 249.
Of injured person, competency of evidence of, V, 395.
Of injured person, presumption as to, I, 385.
Of responsibility of children, II, 764–768.

AGED PERSONS.
Care demanded of, III, 259.
Liability for injuries to, VII, 460.
See also INFIRM PERSONS.

AGENCY.
General treatment.
Appointment, and how proved, I, 38.
Rights, powers and liabilities of agents, I, 42.
Rights, duties and liabilities of principals, I, 51.
Public agents, I, 86.
Final carrier, when agent of other lines, II, 246.
Of connecting carriers of baggage as respects each other, I, 532.
Of initial carrier in forwarding goods, II, 208.
Of one connecting carrier for another, II, 205, 518.
Power of partners to bind firm on grounds of, VI, 936, 937.
Ratification of unauthorized employment, VI, 395.
Right of undisclosed principal to sue, II, 269.
See also AGENTS.

AGENTS.
In general.
Competency of, as witnesses, VIII, 197.
Competency of, as witnesses when opposing party is deceased, VIII, 198.
Delivery of baggage to, I, 544.
Delivery of goods to, II, 40, 41.
Duties of, when judicially noticed, V, 436.

AGENTS — *continued.*
In general — *continued.*
For carrying mail, transportation of, II 8, 9.
Husband as agent for wife, V, 1066.
Jurisdiction of equity over accounts of, V, 352.
Leaving baggage in custody of, after delivery by company, I, 547.
Liability of collecting agents, V, 568, 569.
Making corporation agent for collection of taxes, VII, 984.
Of consignee, delivery of goods to, II, 119.
Of consignees, sufficiency of delivery to, II, 110, 111.
Of consignor, delivery of goods to, V, 580.
Of government railroads, liability of, V, 1050.
Of government railroads, limitation of suits against, V, 1052.
Of seller, right to exercise right of stoppage *in transitu*, II, 189.
Riding on freight trains at invitation of, II, 321.
Service of process on, VI, 1091–1096.
Subsequent carriers as agents of initial carrier, I, 787.
See also AGENCY; STATION AGENTS.
Acts of.
Action for malicious prosecution instituted by, VI, 369.
Estoppel by acts of, V, 379–381.
Liability for slander by, II, 164.
Liability of carrier for acts or negligence of, II, 42.
Liability of company for acts of, V, 565, 567, 606.
Liability of company for acts of conductor, III, 62.
Liability of, to company, V, 566.
Liability of, to physician employed by him, VI, 396.
Mistakes of, in ejecting passengers, liability of company for, IV, 209.
No limitation of liability as against wilful acts of, I, 565.
Of express companies, illegal transportation of liquors by, VI, 76.
Of express companies, liability for goods lost or stolen through carelessness of, V, 577.
Of shipper, acceptance of bill of lading by, I, 610.
Peril occasioned by acts of, V, 202.
Ratification of acts of, V, 610.
Unauthorized representations of, when release subscriber to stock, VII, 785.
Admissions and declarations of.
Admissions against interest by, VI, 283.
Admissions by, as evidence, V, 484.
Declarations of, while acting within scope of authority, V, 491–494.
Authority and contracts of.
Bills and notes executed by, I, 592.
Bills and notes payable to, I, 593.
Burden of proof as to authority of, V, 448.

AGENTS — *continued.*
Authority and contracts of — *continued.*
Competency of evidence of authority of V, 408.
Evidence of authority of, V, 391.
Execution of bill of lading by, I, 602.
Of shipper, contract with, limiting liability, II, 168, 169.
Of shipper, power of, to contract for limited liability, II, 263.
Power of, to contract for rebates and drawbacks, IV, 122.
Power of, to contract to give notice of arrival, II, 101.
To make subscriptions, duties of, VI, 612.
Validity of contracts made by, III, 190.
Validity of subscriptions by, VII, 742.
AGGRAVATION.
Of damages, circumstances of, III, 689.
Of damages, evidence in, III, 339.
Of damages for ejection of passenger from train, IV, 236–238.
Of damages for injuries to children, II 821.
Of damages in actions for flowing lands, V, 1001.
Of damages, what may be considered in, II, 575.
Of damages, what may be shown in, III, 731.
Of disease, compensatory damages for, III, 680.
Of injury by employé's own act, V, 337.
Of injury by intoxication as a defense, V, 275.
Of injury, no recovery for, VII, 510.
Of other ailments, competency of evidence of, V, 408.
AGREEMENT.
Between connecting lines, III, 68–70.
Between connecting passenger carriers, II, 517, 518.
Between landowner and company seeking to condemn, necessity of effort to make, IV, 499–502.
Of agents as to location of depots, I, 55.
To convey land, VIII, 148–153.
To furnish cars, VII, 187.
To issue free passes, VI, 939, 940.
To pave, construction of, VII, 398.
To pay interest on stock subscription, VII, 745, 746.
To subscribe to stock, VII, 726–746.
What necessary to give right to conventional subrogation, VII, 723.
With landowner as to price of land condemned, IV, 883.
See also CONTRACTS; WORKING AGREEMENTS.
AIR.
See LIGHT AND AIR.
ALABAMA.
Act of, relating to color blindness, VI, 398.
Assessment and levy of taxes in, VII, 933.
Constitutionality of statutes of, as to municipal aid for railways, VI, 536.
Constitutionality of statutes of, granting remedy for causing death, III, 745.

ALABAMA — *continued.*
Constitutionality of statutes of, relative to condemnation of land, IV, 386.
Constitutionality of tax laws of, VII, 836.
Constitutional provisions in, relative to condemnation of land, IV, 384.
Deductions for benefits under condemnation laws of, IV, 709.
Doctrine of comparative negligence denied in, III, 51.
Duty to locate station under statutes of, VII, 197.
Federal grants to, VI, 142, 143.
Grants by, to railroads, VI, 180.
Jurisdiction of city court of Selma, VI, 118.
License taxes in, VII, 1021.
Occupation of streets by steam roads under legislative grants of, VII, 557.
Operation of statute of, giving right of action for causing death, III, 746.
Plaintiff's pleadings need not negative contributory negligence in, III, 276.
Review of town bonding proceedings by mandamus in, VI, 748.
Right to sue in, for causing death in foreign state, III, 787.
Rule as to imputed negligence in, V, 1080.
State aid to railways in, VII, 160–165.
Statute of, as to local and through rates, II, 640.
Statute of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 709.
Statute of, relative to distribution of damages for causing death, III, 761.
Statutory provisions in, limiting amount recoverable for causing death, III, 920.
Taxation in aid of railways in, VI, 715.

ALEXANDRIA & WASHINGTON R. CO.
General treatment, I, 87.

ALIENATION.
Of franchise, power to make, III, 321.
Of franchise, when *ultra vires*, VIII, 127.
Of tolls, II, 612.

ALIENS.
Jurisdiction of suits by and against, V, 631.
Removal of causes by or against, VII, 35.

"ALL."
As used in a statute giving a lien to laborers, VIII, 304.

ALLOTMENT.
Of stock, necessity of, VII, 732.

ALLOWANCE.
For improvements in ejectment suit, IV, 256.
In addition to costs, III, 326.
Of appeal from justice's court, VI, 124.
To mortgage trustee for expenses and disbursements, VI, 469.

"ALL POSSIBLE SKILL AND CARE."
As applied to street railways, VIII, 304.

"ALL THROUGH GRAIN."
As applied to a storage contract, VIII, 304.

ALTERATION.
Of bill of lading, I, 601.
Of bonds, I, 663.
Of by-laws, I, 726.
Of charters, II, 683–694.
Of location of track in street, VII, 604.

ALTER EGO.
See VICE-PRINCIPAL.

"ALWAYS."
As used in a statute requiring companies "always" to keep a lookout ahead, VIII, 305.

AMALGAMATION.
See CONSOLIDATION; AMALGAMATION.

AMBIGUITY.
In verdict, effect of, VI, 849.
Latent parol evidence to explain, V, 478.

AMENDATORY STATUTES.
Construction of, VIII, 266.
Relative to condemnation of land, IV, 395.

AMENDMENT.
Of charters, etc.
Of by-laws, I, 726.
Of charter, II, 683–694; VIII, 138.
Of charter, consent of stockholders to, IV, 75.
Of charter, effect of, upon subscription to stock, VI, 618.
Of charter provision exempting from taxation, VII, 891, 892.
Of charter, when releases subscriber to stock, VII, 771–774.
To charter of Central Pacific R. Co., II, 604.
To constitution, when retroactive, VI, 525.

Of pleadings.
Allowing, on appeal in condemnation proceedings, IV, 808.
Curing misnomer by, VI, 768.
Effect of, VI, 1052, 1053.
In foreclosure, VI, 489.
In proceedings before commission, VI, 54.
In suits by stockholders, VII, 348.
Of bill of particulars, I, 652.
Of bond on appeal in condemnation proceedings, IV, 807.
Of complaint in action against elevated railway, IV, 313.
Of complaint in justice's court, I, 365.
Of creditors' bill, III, 353.
Of declaration or complaint in action for damages caused by fire, V, 900.
Of findings by court or referee, IV, 349.
Of injunction bill, V, 1137.
Of judgment, VI, 102.
Of judgment in condemnation proceedings, IV, 759.
Of petition in condemnation proceedings, IV, 291, 523, 524.
Of plaintiff's pleadings, I, 267.
Of plaintiff's pleadings in action for causing death, III, 805.
Of pleadings, VI, 1043–1053.
Of pleadings after time to sue has passed, effect of, VI, 306.
Of pleadings as ground for continuance, VIII, 10.

AMENDMENT — *continued.*
Of pleadings — *continued.*
Of pleadings, discretionary, I, 381.
Of pleadings, in actions against carriers, II, 279.
Of plea or answer in action for causing death, III, 808.
Of report of commissioners in condemnation proceedings, IV, 740.
Of summons in condemnation proceedings, IV, 512.
Of the *ad damnum* on application to remove cause, VII, 27.
Of transcript on appeal, I, 367.
Of verdict, VIII, 92.
On appeal from justice's court, VI, 125.
To cure misnomer in process, VI, 1083.
When allowed to add husband as party to wife's action, V, 1075.

AMOUNT.
In general.
Of assessments on stock, VII, 752.
Of bond on appeal in condemnation proceedings, IV, 806.
Of bond, proof of, in foreclosure, VI, 486.
Of calls, conditions as to, VII, 801.
Of compensation for carrying the mails, II, 7.
Of goods carried, discrimination as to, IV, 89-91.
Of railway aid bonds, VI, 672.
Of receiver's compensation, how fixed, VI, 1221.
Of subscription in aid of railways, statutes limiting, VI, 607.
Of tender for land taken, IV, 547.
Provisions in judgment as to, VI, 82.
Review of judgment as respects, on appeal, I, 434-438.
Right of removal of cause as dependent upon, VII, 27.
Right to costs as dependent upon, III, 325.
Statutory limit of, in actions for causing death, III, 920-923.
To be subscribed, conditions as to in subscription, VII, 805.
What necessary to make tender, VII, 1034.

Of damages recoverable.
Limitation in contract of amount recoverable, I, 775-777.
Limitation of amount recoverable, VI, 331-350.
Limiting amount recoverable in case of loss or injury to goods, V, 592-594.
Of damages, competency of witnesses to testify to, VIII, 252-259.
Of damages, opinion evidence as to, IV, 325.
Of recovery for injuries to child, II, 818-825.
Of recovery in action against carrier of passengers, II, 565-586.
Of recovery in actions for injuries to employés, V, 337-345.
What recoverable for interference with private ways, VI, 1081.

AMOUNT — *continued.*
Of damages recoverable — *continued.*
What recoverable in actions on coupons, III, 342.
What recoverable in actions on covenants, III, 349.
What recoverable in actions to enforce penalties, VI, 969.
What recoverable in proceedings to enforce laborer's lien, VI, 301.

To give jurisdiction.
Jurisdiction as dependent upon, I, 237, 355, 374; IV, 489; V, 628, 638; VI, 115, 516.
Jurisdiction of justice as dependent on, IV, 817; VI, 120.
Jurisdiction on appeal as dependent upon, IV, 783.

ANCILLARY ADMINISTRATORS.
Right of, to sue for causing death, III, 777.

ANDROSCOGGIN R. CO.
General treatment, I, 87.

ANIMALS.
See ANIMALS, INJURIES TO; CARRIAGE OF LIVE STOCK; LIVE STOCK.

ANIMALS, INJURIES TO.
General treatment.
Statutes, I, 88.
Liability irrespective of company's duty to fence, I, 97.
Liability as dependent upon company's duty to fence, I, 138.
Contributory negligence, I, 208.
Procedure, I, 236.
Effect of operation of road by lessee, receivers, etc., I, 368.
Actions for, when barred by lapse of time, VI, 326.
Allowing amendments in actions for, VI, 1050.
Constitutionality of fence and stock laws, VII, 253, 254.
Criminal prosecutions for killing stock, III, 368.
Doctrine of comparative negligence, how applied in actions for killing, III, 43.
Excessive damages for killing or injuring, VI, 856.
From failure to build or maintain fences, V, 830.
Instructions in actions for, VIII, 57, 70.
Liability of lessor road for killing, or injury to, VI, 221.
Loss of, by fire, liability for, V, 883.
Mares with foal, damages for injuries to, II, 291.
Opinion of witness as to value of, VIII, 246.
Power of agents to compromise claims for, I, 58.
Release of damages for, VII, 15.
Taker up of estray, when may sue for injury to, I, 245.
Validity of statute imposing absolute liability for, VII, 253.
Variance between pleading and proof in actions for, VI, 1038.

ANIMALS, INJURIES TO — *continued.*
When limitation begins to run in actions for, VI, 311.
See also CARRIAGE OF LIVE STOCK; LIVE STOCK; also V, 984; VII, 349, 822.

ANNEXATION.
What necessary to constitute a fixture, V, 968, 969.

ANNOUNCEMENT.
Of station, II, 395, 396.

ANNOYANCE.
Where land is not taken, damages for, IV, 709.

ANNUITY TABLES.
See MORTALITY TABLES.

ANOTHER ACTION.
As ground of abatement, I, 7.
Payment of judgment in, when a defense to garnishee, I, 506.
Pendency of, as a defense to action for causing death, III, 809.
Plea of, VI, 1003.
When pendency of deprives court of jurisdiction, I, 489.

ANSWER.
By jury or witnesses.
Privilege of witness to refuse, VIII, 227.
To interrogatories as evidence, V, 522.
To special questions submitted to jury, VIII, 98–100.
In condemnation proceedings.
In ejectment by landowner, IV, 851.
In trespass by landowner for wrongful interference with property, IV, 873, 874.
Necessity and sufficiency of, IV, 533, 534.
To certiorari, IV, 815.
To actions at law, generally.
Amendment of, III, 808.
Form and sufficiency of, generally, VI, 1001–1100.
In action against carriers of goods, II, 278.
In action against elevated railway, IV, 312.
In action at law by abutter for injury sustained by railway in street, VII, 645.
In action by stockholders, VII, 347.
In action for taxes, VII, 993.
In action on bill or note, I, 598.
In action on contract, III, 232.
In action on stock subscription, VII, 762, 763.
In ejectment, IV, 253.
In trespass, VII, 1112.
Of garnishee, sufficiency and effect of, I, 506–508.
To action for injury to animals, I, 269–271.
To action on construction contract, III, 172.
When proper, form and effect generally, IV, 1006–1010.
To actions for personal injuries.
In action against carrier of passengers, II, 532.

ANSWER — *continued.*
To actions for personal injuries — *con.*
In action for causing death, III, 807, 808.
In action for injuries by negligence of fellow-servants, V, 776.
In action for injuries to children, II, 810.
In action for injuries to employés, V, 274.
To suits in equity, VI, 1020.
Dissolving injunction on, IV, 865; V, 1158.
In proceedings to compel issuance and delivery of railway aid bonds, VI, 664.
In suit to foreclose, VI, 485.
In suit to enforce railway aid bonds, VI, 707.

ANTE-MORTEM DECLARATIONS.
Admissibility of, a spart of the *res gestæ*, V, 463–474.

ANTICIPATION.
In patent law, VI, 947.

APPARATUS.
See APPLIANCES.

APPAREL.
What may be carried as baggage, I, 533.

APPEAL AND ERROR.
General treatment.
Who may appeal and what is reviewable, I, 373.
How appellate jurisdiction is exercised, I, 384.
Taking and perfecting an appeal, I, 438.
Procedure in appellate court, I, 443.
Costs on, IV, 356.
Granting amendments after reversal on, VI, 1052.
Issuing process pending, VI, 1084.
Mandamus not a substitute for, VI, 375.
Review of attachment proceedings by writ of error, I, 511.
Review of municipal subscriptions by, VI, 743, 744.
Stay of proceedings pending, IV, 356.
Taking for delay, additional damages for, II, 299.
From or to various courts.
From Court of Claims to U. S. Supreme Court, V, 644.
From justices' courts, VI, 123–126.
To U. S. Supreme Court, V, 639.
From various proceedings at law.
From assessments under English statute, VII, 1018.
From awards, I, 462.
From order granting or refusing new trial, VI, 877.
In actions for injury to live stock, I, 367, 368.
In actions for taxes, V, 996.
In mandamus proceedings, VI, 388.
In proceedings to build branch roads, I, 686.
In condemnation proceedings, IV, 771–818, 920, 921, 940
Consolidation of, IV, 808.
Costs on, IV, 730, 731.
Effect of tender of compensation on entry pending, IV, 548.

APPEAL AND ERROR — *continued.*
In condemnation proceedings — *con.*
Entry pending, without paying or securing compensation, IV, 856.
From award of arbitrators in Canadian expropriation proceedings, IV, 949.
In proceedings under English Compulsory Purchase Acts, IV, 920.
Interest where owner obtains an increased award on, IV, 727.
Procedure on, IV, 807–814.
Review of proceedings by, IV, 771–814.
Setting aside verdict on, IV, 754.
Statutes relative to, IV, 395.
Taking and perfecting, IV, 800–807.
Waiver of notice by taking, IV, 511.
In suits in equity.
From order appointing receiver, VI, 1178.
From order granting compensation to receiver, VI, 1222.
From order of confirmation of report of Supreme Court commissioners, IV, 284.
From order removing receiver, VI, 1224.
From order to issue receivers' certificates, VI, 1206.
From report of commissioners of appraisal, IV, 286.
In accounting proceedings by receivers, VI, 1220.
In foreclosure suits, VI, 516–518.
In injunction cases, V, 1139.
Time within which to take, VI, 518.
Waiver of right of, VI, 517.
What will be reviewed on, VI, 518.
Who may take, in foreclosure proceedings, VI, 516.
See also ERROR.

APPEARANCE.
General treatment, I, 449.
Authority of attorneys to appear, I, 513.
By owner in condemnation proceedings, when bars ejectment, IV, 848.
Effect of, as a waiver of irregularities, IV, 812.
Effect of, to confer jurisdiction, V, 1018.
In justices' courts, in stock-killing cases, I, 357.
Waiver of defective service of process by, VI, 1103.
Waiver of notice of condemnation proceedings by, IV, 510.

APPLIANCES.
In general.
Adoption of best, VI, 780.
Duty of company to furnish safe, VII, 461.
Duty of company to use most approved, V, 864.
Evidence as to sufficiency of, III, 892.
Liability for failure to adopt best, IV, 266.
Liability for fires caused by defects in, V, 863–867.
Liability of independent contractor for defects in, V, 1112.
Meaning of term "most approved," VIII, 317.

APPLIANCES — *continued.*
In general — *continued.*
Opinion of witness as to safety of, VIII, 236.
Safety, evidence as to, V, 429.
Safety of, when a question for experts, VIII, 261.
As to employes.
Alleging company's knowledge of defective condition of, V, 271.
Alleging negligence in furnishing defective, V, 266–269.
Assumption of risk as to defects in, V, 135, 146, 149.
Assumption of risk as to defects in, a question for jury, V, 325.
Contributory negligence of employés in the operation of, V, 203–222.
Duty to employés as respects safety of, V, 67–113.
Duty to inspect and repair, V, 108.
Evidence of failure to furnish safe, V, 277, 278.
Evidence of use of same kind by other companies, V, 278.
Failure of employé to inspect or examine, V, 205.
Notice of defects in, assumption of risk after, V, 159–161.
Promise by company to repair defects in, V, 167.
Safety of, as to employés, IV, 368.
See also MACHINERY.

APPLICATION.
For appointment of commissioners to assess land damages, IV, 595.
For appointment of receiver, VI, 1172–1178.
For appointment of receiver in foreclosure, VI, 492.
For certiorari, II, 608.
For change of route, notice of, VI, 362.
For jury to assess land damages, IV, 609–615.
For leave to sue receiver, VI, 1212.
For new trial, VI, 875–877.
For order to sell lands for nonpayment of taxes, VII, 996.
Necessity of, to abate suit, I, 10.
Of payments, VI, 965.
Of proceeds of mortgage, covenants as to, VI, 440.
To enjoin infringement of patents, VI, 952.
To remove cause, time of, VII, 39, 40.
To set aside report of commissioners in condemnation proceedings, IV, 746.

APPOINTMENT.
Of agents, etc.
Of agents, I, 38–42.
Of appraisers to assess land damages, IV, 588.
Of arbitrators, IV, 942.
Of attorneys, I, 512, 513.
Of directors, I, 578.
Of directors by city, IV, 51.
Of executors and administrators, V, 551, 552.
Of mortgage trustee, VI, 460.
Of station agents, VII, 185.
Of trustees, VIII, 117.

APPOINTMENT — *continued.*
Of agents, etc. — *continued.*
Of trustees for bondholders, VI, 459, 460.
Of umpire, I, 457.
Of commissioners.
Of appraisal of land condemned, IV, 291.
Of railway commissioners, VI, 1136.
Of rapid transit commissioners, IV, 278.
Of Supreme Court commissioners in elevated railway cases, IV, 282.
To assess land damages, IV, 593–598.
To examine proposed route, VI, 355.
Of receivers.
In foreclosure, VI, 489–492.
Or liquidator in proceedings to dissolve, IV, 136.
Vacating, VI, 1222.
When abates action, I, 9.
Who may be appointed and ground for, VI, 1161–1172.
APPORTIONMENT.
Of award of damages, III, 920.
Of blame between wrongdoers, III, 247.
Of damages for death of child between father and mother, III, 942.
Of earnings to underlying mortgages, VI, 496.
Of expenses of making grade crossing, III, 451.
Of rates under Railway and Canal Traffic Acts, II, 656.
APPRAISEMENT.
Before sale in foreclosure, VI, 499.
Estimating land damages from time of, IV, 584.
Of damages by viewers, IV, 588–591.
Of damages for killing stock, constitutionality of statutes as to, I, 91.
Of land taken, IV, 574–734.
Of property levied on, V, 548.
Powers of commissioners of, IV, 286.
Of land damages, qualifications of, IV, 588.
APPRENTICES.
General treatment, I, 453.
APPROACHES.
To bridges, duty of company as to, I, 700–702.
To bridges, statutes providing for construction of, I, 689.
To bridges, taking land for, when for a public use, IV, 457.
To crossings, duty to keep in repair, III, 435.
To stations, duty of carrier as to, II, 417.
To stations, liability for injuries at, VII, 218–222.
To street and highway crossings, compensation of abutting owners, III, 457.
To street crossings, mode of construction, III, 427.
APPROPRIATION.
Of land for embankments, compensation for, IV, 372.
Of mineral lands, VI, 400.
Of turnpike by railroad company, VIII, 122.
APPROVAL.
Of bond on appeal in condemnation proceedings, IV, 807.
Of improvements by mortgage trustees, VI, 465.
Of maps, plans, profiles, etc., in condemnation proceedings, IV, 528.
Of proposed route by commissioners, forfeiture after, VI, 356.
Of secretary of interior as to selection of indemnity lands, VI, 161.
Of statutes by the governor, VII, 241.
Of verdict by judge, effect of, on motion to set aside, VI, 853.
APPURTENANCES.
What are, VIII, 305.
What will pass as, in a deed, IV, 12.
ARBITRATION AND AWARD.
General treatment.
The submission, I, 453.
Proceedings before the arbitrators, I, 456.
The award; how enforced and how impeached, I, 459.
Assessment of damages to abutting owners by, VII, 654.
Assessment of land damages by arbitrators, IV, 591–593, 909–912, 941–949.
Company's engineer as arbitrator, III, 152–155.
Costs of, under Canadian expropriation acts, IV, 931, 932.
Of disputes arising under working agreements, VI, 254.
Offers to arbitrate as admissions, V, 486.
On question of price of land, IV, 894.
Submission to, as a defense to action for damages, IV, 836.
See also AWARD.
ARCHES.
Taking superfluous land for, IV, 892.
ARGUMENT OF COUNSEL.
Discretionary power of court over, I, 384.
Errors in, when ground for new trial, VI, 837.
Improper remarks, when ground for reversal, I, 388, 403, 416.
Objections to, how to be taken, I, 416.
Reading statutes to jury, I, 319.
Right to open and close, VIII, 42.
To jury, VIII, 37–42.
To jury on assessment of land damages, IV, 629.
See also ATTORNEYS.
ARIZONA.
Assessment and levy of railroad taxes in, VII, 934.
Constitutionality of tax laws of, VII, 836.
Doctrine of comparative negligence denied in, III, 51.
Taxation of land grants in, VII, 879.
ARKANSAS.
Aid to railroads by, VII, 165.
Assessment and levy of railroad taxes in, VII, 934.
Constitutionality of tax laws of, VII, 836.
Constitutional provisions in, relative to condemnation of land, IV, 384, 387.
Deductions for benefits under condemnation laws of, IV, 710.

ARKANSAS — *continued.*
Double damages for killing stock in, I, 351.
Grants by, to railroads, VI, 180.
Grants of swamp lands in, VI, 188.
Homesteads in public lands in, VI, 1108.
Operation of statute of, giving right of action for causing death, III, 747.
Penalty under statute of, for failure to furnish facilities for removal of goods, II, 93.
Statute of, providing penalty for failure to deliver goods, II, 251.
Taxation in aid of railways in, VI, 716.
ARMY.
Carriage of supplies for, VI, 131.
ARRAY.
See JURY.
ARREST.
General treatment, I, 464.
And detention of passengers by employés, I, 73, 74.
Of execution sales, V, 549.
Of judgment, VI, 102.
Of receiver, when a contempt, III, 183.
Resisting, III, 384.
See also V, 605–613.
ARRIVAL.
Of goods, notice of, to consignee, III, 97–101; V, 578.
Of train, fixing hours of, VI, 249.
ARSON.
Prosecution for burning bridges, III, 360.
ARTICLE.
Meaning of the word as applied to baggage, VIII, 305.
Of association, construction of, V, 1099, 1100.
Of association, filing, VI, 1122.
Of consolidation, effect of, III, 81.
ASSAULT.
By one passenger upon another, duty of company to prevent, II, 432.
By other passengers, duty of company to protect passenger against, VII, 473.
By servant of tenant, liability of company for, VIII, 137.
By third persons upon passengers, II, 435.
On passengers by employés, I, 74; II, 429, 430, 524; VII, 133, 472.
On trespassers, liability for, II, 341.
Trespass upon the person, VII, 1115, 1116.
ASSAULT, CIVIL ACTION FOR.
General treatment, I, 466.
By conductors, III, 61.
Criminal prosecution for, III, 358.
Upon passengers, II, 429, 430.
Upon passengers by strikers, VII, 720.
ASSENT.
By shipper to bill of lading, necessity and sufficiency of, I, 608–612.
Estoppel by, V, 375.
Necessity of, to validity of contract, III, 192.
Of shipper to limitation of liability, II, 165–167.
Of shipper to limitation of liability, presumption against, VI, 350.
ASSENT — *continued.*
Of stockholders to amendment of charter, II, 686.
Of stockholders to sale of railroad, VII, 107.
Of stockholders, when ratifies *ultra vires* acts, VIII, 125.
Of taxpayers to railway aid, VI, 572–576.
To repeal of charter, II, 687.
ASSESSMENT.
Of damages, generally, III, 719–741.
By jury, mode of, VIII, 89.
For construction of steam railway in street, VII, 654–658.
In actions for causing death, III, 924–955.
In actions for injuries to employés, V, 338.
In railway crossing proceedings, III, 404.
Instructions giving rules as to, VIII, 60, 73.
Of forfeiture in criminal prosecution for causing death, III, 958.
Of land damages.
Estimating land damages from time of, IV, 584.
Of compensation by arbitrators in Canada, IV, 941–949.
Of compensation under English Compulsory Purchase Laws, IV, 909–920.
Of consequential damages for taking land, IV, 683.
Of damages for land taken, IV, 574–734, 909–920, 941–949.
Of damages for land taken in ejectment suit by owner, IV, 851.
Of land damages by appraisers or viewers, IV, 588–591.
Of land damages by arbitrators, IV, 591–593.
Of land damages by commissioners, IV, 593–604.
Of land damages by jury, IV, 604–663.
Of taxes.
Action by stockholder to recover back, VII, 333.
Affidavit of assessor as proof of taxpayers' assent to railway aid, VI, 575.
And calls on stock, form, requests, and validity of, VII, 751, 752.
For drainage, IV, 156.
For local improvements, VI, 755; VII, 450–454, 684–693.
For payment of death claim, VII, 17.
Injunction to restrain illegal, VII, 332.
Meaning of the word as applied to taxes, VIII, 305.
Of exempt property, enjoining, VII, 1005.
Of poor rates in England, VII, 1010–1018.
Of taxes, VII, 932–983.
Of taxes in Canada, VII, 1019.
Of taxes upon street railways, VII, 444–450.
On stock fully paid up, VII, 750.
On stock, right to interest on, V, 1173.
On stock subscriptions, VII, 746–756.

ASSESSMENT — *continued.*
Of taxes — *continued.*
Upon abutting owner for improvement of whole street, VII, 425.
See also CALLS.

ASSETS.
Action by stockholders to restrain misappropriation of, by directors, VII, 337.
Administration of, in equity, V, 352.
Distribution of, in dissolution proceedings, IV, 137.
In hands of receiver, application of, VI, 494.
Marshalling, V, 1168.
Misapplication of, as ground for receiver, VI, 1170.
What are, V, 553.

ASSIGNEE.
Citizenship of, on question of removal of cause, VII, 31.
Generally, rights and remedies of, I, 480, 481.
Jurisdiction of suits by and against, V, 631.
Of bankrupt, rights and powers of, I, 583.
Of cause of action, right to sue, I, 245.
Of contractor, right of, to claim lien, VI, 284.
Of laborers' liens, liability for failure to take bond from contractor, VI, 299.
Of lease, liability to lessor, VI, 233.
Of lease, right of to sue elevated railway, IV, 312.
Of railway contractor, rights of, III, 140.
Of stock, rights of prior, to transfer on books, VII, 300.
Right of, to sue for damages caused by fire, V, 895.
Sale by, I, 484.
Suits against, when barred by lapse of time, VI, 317.

ASSIGNOR.
When remedy of assignee is against, I, 481.

ASSIGNMENT.
General treatment.
What is assignable, I, 475.
Who may assign, and how, I, 478.
Validity, interpretation, and effect, I, 478.
Rights and remedies of the assignee, I, 480.
Equitable assignment, I, 481.
By purchaser, does not extinguish right of stoppage *in transitu*, II, 192.
Of breaches in pleading, VI, 991.
Of call on stock subscription, VII, 756.
Of claims for wages, V, 8.
Of dower in railroad stock, IV, 155.
Of errors, I, 441.
Of exemption from taxation, VII, 901.
Of franchise, V, 1024.
Of franchise of company aided, effect of, VI, 626.
Of laborer's lien, VI, 299.
Of lease, VI, 195, 233.
Of patent rights, VI, 950.
Of right of action against elevated railway, IV, 305.
Of shares, effect of, on stockholders' liability to creditors, VII, 320.

ASSIGNMENT — *continued.*
Of stock by deed with delivery of certificate, VII, 288.
Of warehouse receipt, VIII, 162.
Of witness' interest pending suit, VIII, 201.

ASSIGNMENT FOR BENEFIT OF CREDITORS.
General treatment, I, 482.
Effect of, on liability of stockholders to creditors, VII, 320.
Liability as to stock assigned, VII, 315.

ASSISTANCE.
Writ of, in foreclosure, VI, 507.

ASSISTANT CONDUCTOR.
Duty to inform conductor of acts, III, 63.

ASSISTANT ROADMASTER.
When fellow-servant of men under him, VII, 757.

ASSISTANT SECRETARY.
Service of process on, VI, 1090.

ASSISTANT SUPERINTENDENT.
When fellow-servant of conductor, V, 757.

ASSISTANT TREASURER.
Service of process on, VI, 1090.

ASSISTANT YARDMASTER.
When master mechanic is fellow-servant of, V, 762.

ASSOCIATION.
See ARTICLES.

ASSUMPSIT.
General treatment, I, 485.
Against conductor for not collecting fares, III, 61.
For breach of construction contract, III, 168.
On stock subscriptions, VII, 757.

ASSUMPTION.
In general.
By company that track will not be suddenly obstructed, VII, 512.
By expert of facts not proved, VIII, 277.
By purchaser of railroad of debts of selling company, VII, 111.
In instructions, of facts not pleaded or proved, V, 944, 945.
In question to witness of controverted fact, VIII, 215.
Of debts of original companies on consolidation, III, 104.
Of facts in instruction, I, 337, 391, 407; V, 998; VI, 832; VII, 53, 65.
Of risk by owner of private car, VI, 1075.
Of risk by persons driving on track, VII, 429.
Of risk from defective cars, I, 740.
Of risk of fire by adjacent landowners, V, 857.
Of risk, when shipper assumes, II, 60.
Of safety of station premises, VII, 225.

In injuries to employes.
By employés that company will perform its duty, V, 192.
Of facts in instructions, V, 304.
Of facts not proved or pleaded, in instructions, V, 786.

ASSUMPTION — *continued.*
In injuries to employes — *continued.*
Of position of peril, when contributory negligence, V, 192–202.
Of risk by employés, V, 126–151.
Of risk by infant employés, V, 250.
Of risk of negligence of fellow-servants, V, 650.
Of risk of vice-principal's negligence, V, 673.
Of risk, when question for the jury, V, 324–337.
In personal injuries, generally.
By passenger that car is improperly managed, VII, 481.
Of facts as proven in instructions, III, 902, 905.
Of facts in instruction, VII, 1164.
Of increased risk by passengers, II, 424.
Of risk by licensees, VI, 270, 271.
Of risk by person killed, instructions as to, III, 897.
Of risk by trespasser, VII, 1147.
Of risk by trespasser on track, VII, 1127.
That child will leave track, II, 751, 762.
That person on track will get off, VII, 1138, 1139.
"AT."
Meaning of, VIII, 306.
ATHENS.
Decisions particularly applicable to, VI, 758.
ATTACHMENT; GARNISHMENT; TRUSTEE PROCESS.
General treatment.
Jurisdiction, I, 489.
The right of action; who may sue, I, 489.
Who may be sued, I, 490.
What may be reached; exemptions, I, 494.
Procedure, I, 502.
Against purchaser does not bar right of stoppage *in transitu*, II, 192.
Enforcement of commissioners' orders by, VI, 1149.
In suits against foreign corporations, V, 1020.
Of goods after stoppage *in transitu*, II, 190.
Of goods in hands of carrier, when a conversion, II, 75.
Of goods, when excuses carrier for non-delivery, II, 122–125.
Staying proceedings in, V, 1154.
To enforce injunction, IV, 124.
To enforce orders of railway commissions, II, 672.
ATTENDANCE.
Of witnesses, compelling, VIII, 192, 193.
ATTORNEY-GENERAL.
General treatment, I, 511.
Right of, to enjoin construction or operation of street railway, VII, 353.
When information must be filed by, VI, 1131.
ATTORNEYS.
General treatment.
Employment of and relation with client, I, 512.
Authority and powers, I, 513.
ATTORNEYS — *continued.*
Compensation and lien, I, 515.
Privileged communications, I, 521.
Address by, to jury, generally, VIII, 37–42.
Address by, to jury, on assessment of land damages, IV, 629.
Admissions in letters written by, V, 486.
Advice of, as a defense, III, 183; V, 1161; VI, 371.
Change of, as ground for continuance, VIII, 10.
Discretion of court as to arguments of, I, 384.
Employment of physicians by, VI, 392.
Improper remarks of, as ground for reversal, I, 384, 388, 403, 416; VI, 837.
Power of county commissioners to employ, III, 332.
Reading law books and statutes to the jury by, effect of, I, 319; VIII, 41.
Service of process on, VI, 1096.
Services of directors as, compensation for, IV, 60.
Fees of.
Constitutionality of statutes allowing fees to, I, 92; VII, 255.
Construction of statute allowing "reasonable attorney fees," VIII, 324.
Demand for, in bill of particulars, I, 364.
Demand of, in plaintiff's pleadings, V, 899.
In actions against carriers, II, 293.
In actions for injuries caused by fire, V, 959.
In actions for overcharges in passengers' fares, VII, 1085.
In foreclosure, VI, 512.
In proceedings to enforce laborers' liens, VI, 301.
In stock-killing cases, I, 346.
Liability of receiver for, VI, 1191.
Necessary allegations as to, I, 266.
Of mortgage trustees, VI, 469.
Payment of claims for, by receiver, VI, 1198.
Proceedings by, to collect, removal of, VII, 26.
When allowable, III, 327.
When allowed as costs, IV, 733.
When allowed in receiver's account, VI, 1219.
See also ADVICE OF COUNSEL; ARGUMENT.
AUDITORS.
Rights, powers and duties of, VI, 907.
AUGUSTA, GA.
Decisions particularly applicable to, VI, 758.
AUTHORITY.
Of agents, I, 42–47, 54–80.
Of attorneys, I, 512–515.
Of civil engineer, III, 144.
Of conductor, III, 59–63.
Of mortgage trustees, VI, 462–465.
Of officers and agents, burden of proof as to, V, 448.

AUTHORITY — *continued.*
Of officers and agents, competency of evidence of, V, 408.
Of officers of the land department, VI, 1107.
Of president of company, VI, 1066–1068.
Of railway commissioners, VI, 1137–1152.
Of referee, VII, 3.
Of station agents, VII, 186–188.
To construct side-tracks, VII, 120.
To construct tramways, VII, 1102.
To sell railroads, necessity of, VII, 106.

AUXILIARY COMPANIES.
General treatment, I, 521.

AVOIDANCE.
Pleading matter in confession and, VI, 1005.

AWARD.
In general.
In railway intersection proceedings, III, 408, 409.
Of arbitrators, I, 459–464.
Of engineer as arbitrator, III, 153.
See also ARBITRATION AND AWARD.
In condemnation proceedings.
Conclusiveness of, IV, 770.
Enforcement of, IV, 759–767.
Estimating land damages from time of filing, IV, 584.
Of appraisers of land damages, IV, 589.
Of appraisers, review of, IV, 591.
Of arbitrators, IV, 591.
Of arbitrators, confirmation of, IV, 592.
Of arbitrators in Canadian expropriation proceedings, IV, 943–948.
Of arbitrators under English Compulsory Purchase Laws, IV, 911, 912.
Of commissioners, when appealable, IV, 776.
Of damages, generally, IV, 734–755.
Of jury under English Compulsory Purchase Laws, conclusiveness of, IV, 915.
Of land damages, interest on, IV, 725–728.
Reception of, when a waiver of original trespass, IV, 876.
When raises estoppel, V, 365.

AWNINGS.
Near track, injuries to employés by, V, 63.

BACKING CARS OR TRAINS.
Care in running, III, 490.
Duty to place lookout on, III, 529; VII, 684, 1136.
Injuries caused by, III, 634.
Injuries to employés by, V, 137.
Negligence in, V, 680.

BAGGAGE.
General treatment, I, 521.
Liability as carriers of, generally, I, 522.
What will be deemed to be baggage, I, 533.
Commencement and termination of the liability, I, 541.
Custody of baggage, I, 554.
Disclosure or concealment of value of contents, I, 558.
The carrier's lien upon baggage, I, 560.
Limitation of liability, I, 561.
Actions for loss of baggage, I, 566.

BAGGAGE — *continued.*
Cloak rooms, parcel rooms, I, 575.
Action for loss of, when barred by lapse of time, VI, 316.
Judicial notice of system of checking, V, 440.
Limitation of amount of liability for, VII, 1046.
Of married woman, action for loss of, V, 1068.
Right to remain on premises to aid in removal of, III, 318.
Rules as to checking, II, 336.
What the term includes, VIII, 306.
When subject to attachment, I, 494.

BAGGAGE CAR.
Riding in, when contributory negligence, II, 509, 511; III, 819.

BAGGAGE-MASTERS.
As fellow-servants of conductor, V, 732.
As fellow-servants of switchman, V, 766.
As fellow-servants with other employés, V, 758.
Effect of delivery of baggage to, I, 542, 547.

BAGGAGE TRUCKS.
Liability to passenger struck by, II, 419.

BAILEE.
Liability of carrier as, II, 129–149.
Right of, to sue for killing stock, I, 245.

BAILMENT.
General treatment, I, 576.
Distinguished from sales, VII, 99.
Of baggage by passenger after arrival, I, 552.

BALLASTING.
Of side tracks, duty of company as to, V, 57.

BALLOTS.
At elections of directors, IV, 53.
At elections on question of aid to railway, VI, 587.

BALTIMORE, MD.
Decisions particularly applicable to, VI, 758.

BALTIMORE & OHIO R. CO.
General treatment, I, 578.

BALTIMORE & POTOMAC R. CO.
General treatment, I, 580.

BANGOR, ME.
Decisions particularly applicable to, VI, 758.

BANKRUPTCY.
General treatment, I, 580.
Conflict between receiver and assignee as to possession, VI, 1181.
Of stockholder, effect on rights of creditors, VII, 315.

BANKS.
Protection of against overdrafts, V, 1102.

BARBED WIRE FENCES.
See WIRE FENCES.

BARK.
See COMBUSTIBLE MATTER.

BARRIERS.
At street crossings, damages to abutting owners, III, 458.
At street crossings, sufficiency of, III, 428.
BARS.
At farm crossings, liability for leaving down, I, 192.
Necessity of, at farm crossings, V, 624.
See also GATES.
BASKETS.
Permitting in cars, VII, 468.
Placing on car in violation of rule, when contributory negligence, VII, 486.
BASTARDS.
See ILLEGITIMATE CHILD.
BAYONNE, N. J.
Decisions particularly applicable to, VI, 758.
BEACH.
See SHORE FRONT.
BEDDING.
Failure to provide animals with, I, 755.
When deemed baggage, I, 534.
"BELIEVE" AND "SATISFIED."
Meaning of the words as used in an instruction, VIII, 306.
BELL.
See SIGNALS.
BELL TOWERS.
At street crossings, III, 428.
BENEFICIARIES.
In actions for causing death, competency of, as witnesses, VIII, 199.
Necessity of alleging existence of, III, 792, 793.
Pecuniary loss to, as measure of damages for causing death, III, 927–932.
Proof of pecuniary loss to, III, 876, 877.
Who are, their rights, etc., in actions for causing death, III, 755–761.
Who entitled to damages for causing death, III, 755–763.
BENEFITS.
Assessment for local improvements according to, VII, 450.
Company cannot retain and assert want of power to contract, VIII, 131, 132.
Deductions for, IV, 338–341, 709–724.
Deductions for, in suits by abutting owners for constructing steam railways in streets, VII, 666.
Deduction of, from fee damages, IV, 332.
Evidence of, in elevated railway cases, IV, 317.
Expectation of, when gives right of action for causing death, III, 756.
Itemizing in report of commissioners, IV, 737.
Opinions of witnesses as to, IV, 525.
Refusal to find general, to property on street, IV, 348.
Refusal to find special, IV, 348.
To company, deduction of, in assessing damages for street crossings, III, 445.
To landowner, consideration of, under Canadian expropriation laws, IV, 938.
What recoverable from relief associations, VII, 15, 16.
BENEFITS — *continued.*
When should be set off against damages, IV, 348.
BERGEN TUNNEL.
General treatment, I, 585.
BERTHS.
Duty to furnish, VII, 131–133.
Injuries caused by wrongful expulsion from, VII, 133.
Loss of money or goods from, VII, 136, 137, 138.
BEST AND SECONDARY EVIDENCE.
Generally, V, 453–458.
In actions against carriers, II, 282.
In stock-killing cases, I, 282.
Presumption from failure to produce best, V, 442.
Secondary evidence in actions on stock subscription, VII, 768.
BIAS.
Of arbitrators, setting aside award for, IV, 946.
Of jurors, challenge for, VIII, 13.
Of jury, when must appear to set aside verdict, VI, 852.
Of witness, showing on cross-examination, Witnesses, 71.
BIDDERS.
At foreclosure sale, rights of, VI, 501.
At judicial sale, rights of, VI, 106.
Combinations among, setting aside sale for, VI, 513.
BILLHOLDERS.
Lien of, VI, 278.
BILL IN EQUITY.
Against trustees for damages by fire, V, 902.
Dissolving injunction for want of equity in, V, 1158.
For injunction, V, 1137.
For injunction, sufficiency of, IV, 864.
In stockholders' suits, VII, 345.
In suit to enjoin unlawful tax, VII, 1009.
Of discovery, IV, 77.
Of interpleader, V, 1177.
Requisites of, to redeem from mortgage, VI, 521.
Sufficiency of, V, 357.
Sufficiency of, on application for receiver, VI, 1174.
Sufficiency of, to set aside mortgage sale, VI, 514.
To enforce lien of judgment, VI, 105.
To enjoin steam railway in street, VII, 647.
To foreclose railway mortgage, VI, 484, 485.
To quiet title, sufficiency of, III, 10.
To redeem mortgaged property, VI, 521.
To set aside foreclosure sale, VI, 514.
See also CREDITORS' BILL.
BILL OF EXCEPTIONS.
On appeal in condemnation proceedings, IV, 802.
Sufficiency of, generally, I, 442.
When the evidence must appear in, I, 423.

BILLS, NOTES, AND CHECKS.
General treatment, I, 586.
Common-law requisites, I, 586.
Validity and interpretation, I, 590.
Transfers and consequent rights and liabilities, I, 593.
Actions on bills and notes, I, 596.
Collection of, by express company, V, 568.
Debentures, how far analogous to, III, 959.
Guaranty of payment of, V, 1055.
Loss of, or failure to collect, V, 569.
Power of agents to issue, I, 61.
Taking check in payment, generally, VI, 963.
Taking check in payment for C. O. D. goods, II, 115.
Taking check in payment for stock, VII, 737.
Taking note in payment, VI, 963.
Taking note in payment for stock, VII, 281, 738, 780.
BILLS OF EXCHANGE.
See BILLS, NOTES, AND CHECKS.
BILLS OF LADING.
General treatment, I, 601.
General nature, interpretation and effect, I, 601.
Conditions, limitations, exceptions, etc., I, 625.
Negotiability and transfer, I, 643.
As evidence, V, 501.
Construction of, I, 760–783; II, 156–164.
Delivery of cattle without production of, I, 760.
Delivery of goods without production of, II, 113.
Delivery without production of, when a conversion, II, 128.
Exception of loss by fire in, when not binding, II, 72.
Extinguishment of right of stoppage *in transitu* by transfer of, II, 192.
Given after shipment or loss cannot limit liability, II, 168, 259.
Given subsequent to special contract, effect of, II, 157.
Indorsement of notice limiting liability on, VI, 337.
Liability to carrier as to, under Texas statute, II, 44.
Limitation of liability by stipulations or conditions in, V, 586.
Limitation of liability for negligence in, I, 767; II, 164–184; V, 585–594.
Meaning of words "contents and value unknown," II, 160.
Not essential to commencement of carrier's liability, II, 43.
Only *prima facie* evidence that goods were received in good condition, I, 83.
Passenger ticket distinguished from, VII, 1040.
Power of agents to issue, I, 60.
Power to bind company by, VII, 187.
Subrogation of carrier to rights of insured under provision of, V, 849, 850.
Use of, to refresh memory, VIII, 227.
When best evidence, V, 454.
See also SHIPPING CONTRACTS.
BILLS OF PARTICULARS.
General treatment, I, 650.
In action for causing death, III, 808.
In stock-killing cases, I, 364.
BIRDS.
Liability of carrier of, V, 577.
BLACKSMITH.
When engineer is fellow-servant of, V, 740.
When fellow-servant of helper, V, 758.
BLASTER.
When fellow-servant of one hauling rock, V, 758.
BLASTING.
General treatment, I, 652.
By independent contractor, liability for, V, 1113.
Duty of company as to safety of place of, V, 42.
Injuries caused by, as an element of land damages, IV, 600.
Nonliability for negligence of fellow-servants during, V, 654.
When foreman is fellow-servant of crew, V, 750.
BLIND PERSONS.
Care demanded from, III, 259.
Contributory negligence of blind passenger, III, 821.
Duty of company toward blind children, II, 751.
Effect of partial blindness on duty to look and listen, III, 607.
Traveling when blind, as contributory negligence, II, 447.
BLIZZARD.
Injuries to passengers by collisions during, IV, 359.
BLOCKING.
Of frogs, guard rails, and switches, duty of company to employés as to, V, 54–57.
BLOWING WHISTLE.
See SIGNALS.
BLUFFS.
Duty of company to fence, V, 820.
BOARD.
Of injured employé, lien for, VI, 278.
Of injured employés, power to bind company by contract for, VII, 188.
BOARDING-HOUSES.
When exempt from taxes, VII, 911.
BOARD OF DIRECTORS.
See DIRECTORS.
BOATS.
Use of canals, by, I, 733.
BOILER MANUFACTURER.
When fellow-servant of fireman, V, 758.
BOILERS.
Defects in, V, 669.
Duty of company to inspect and repair, V, 109.
When deemed fixtures, V, 970.
See also ENGINES.
BONA FIDE HOLDER.
Of bill of lading, rights of, I, 645–650.
Of debentures, rights of, III, 960.

BONA FIDE PURCHASER.
Generally, V, 1057; VII, 103.
Of bills and notes, rights of, I, 594, 595.
Of corporate bonds, I, 672–676.
Of debentures, rights of, III, 960.
Of land, VIII, 150, 153.
Of railroads, VII, 110.
Of railway aid bonds, rights of, VI, 690–700.
Of stock, rights of, VII, 298–302.
Of stolen coupons, rights of, III, 338.

BOND.
Dissolving injunction on giving, IV, 865.
Enforcement of judgment by action on, IV, 765.
For costs, III, 327.
For price at foreclosure sale, VI, 502.
Of agent, liability to principal on, I, 49.
Of carrier of mails, II, 3.
Of conductor, III, 60.
Of county treasurer, III, 332.
Of father suing as guardian of injured child, II, 809.
Of railway contractor, III, 138.
Of receiver, VI, 1177.
Of station agent, VII, 189.
On appeal, I, 440.
On appeal from justices' court, VI, 124.
On appeal in condemnation proceedings, IV, 805–807.
On removal of cause, VII, 43.
On suing out injunction, V, 1162–1165.
To build fences, V, 806.
To secure compensation under English statutes, IV, 903.
To secure damages in railway intersection proceedings, III, 407.
To secure payment of land damages, IV, 554–556.

BONDED GOODS.
Duty of carrier to give notice of arrival of, II, 100.

BONDED WAREHOUSE.
In general, VIII, 167.

BONDHOLDERS.
Accounting to, by mortgage trustees, VI, 465.
Admitting as defendants in foreclosure, VI, 481.
Authority of trustees to litigate in behalf of, VI, 463, 464.
Distribution of proceeds in foreclosure among, VI, 508–510.
Effect of consolidation on rights of, III, 89.
Liability of trustees to, for neglect of duty, VI, 467.
Of corporate bonds, rights of, I, 663–676.
Of railway aid bonds, rights of, VI, 690–700.
Relation between receiver and, VI, 494.
Relation of directors to, IV, 77.
Right of mortgage trustees to consult, VI, 464.
Right to object to lease, VI, 238.
Rights of, as purchasers, VI, 505.
Rights of, as such, I, 663–672.
Rights of, in cases of state aid, VII, 164.
Rights of, on reorganization, VII, 53–56.
Rights of, to oppose consolidation, III, 80.

BONDHOLDERS — *continued.*
Rights of, under the mortgage, VI, 438.
Subrogation of, to securities or lien of state, VII, 164, 165.
When may sue to foreclose, VI, 476, 477.

BONDS.
General treatment, I, 654.
Power to issue, I, 655.
Negotiability, I, 659.
Validity, I, 661.
Rights of purchasers and holders, I, 663.
Actions on bonds, I, 676.

In general.
Issue of, for means to construct bridges, I, 689.
Official, generally, VI, 906.
Official, of treasurer, VI, 911.
Subrogation of sureties, VII, 723, 724.
See also INDEMNITY BONDS.

Railroad aid bonds.
In aid of railroads, VI, 655–710.
In aid of railroads, enforcement of, VI, 380.
In aid of railroads, subrogation of purchaser of, VII, 725.
Municipal, actions to cancel, VI, 710–714.
Municipal, actions to enforce, VI, 705–710.
Municipal, compelling issuance of, VI, 662–667.
Municipal, effect of recitals in, VI, 700–705.
Municipal, form and contents of, VI, 670–674.
Municipal, how far negotiable, I, 660; VI, 688.
Municipal, power to issue, VI, 655–661.
Municipal, restraining issuance of, VI, 667–670.
Municipal subscriptions payable in, VI, 559.
Of state, VII, 159–183.
Right to pay donation in, VI, 652.

Railroad bonds.
Assignability of, I, 477.
Conversion of, into stock and vice versa, VII, 281.
Coupon bonds, negotiability of, I, 6..
Deposit of, on reorganization, VII, 53.
Description of, in mortgage, VI, 439.
Effect of consolidation upon subscriptions to, III, 92.
Guaranty of payment of, V, 1056–1058.
Guaranty of payment of interest on, V, 1057.
Measure of damages for failure to issue, III, 706.
Of land grant railroads, VI, 132.
Proof of amount and validity of, in foreclosure, VI, 486.
Provisions for payment of, in judgment of foreclosure, VI, 487.
Provisions in deed of trust as to bonds secured thereby, IV, 28.
Right to sue upon, instead of foreclosing mortgage, VI, 471.
Situs of, for taxation, VII, 887.
Statement of cause of action in suits on, VI, 990.

BONDS — *continued.*
Railroad bonds — *continued.*
Subsidy bonds, VI, 126.
Taxation of interest due on, VII, 69.
Transactions in, by directors, IV, 72.
When exempt from taxation, VII, 912.
When subject to attachment, I, 494.
When subject to execution, V, 544.
When subject to taxation, VII, 872–874.
BONUS.
Offered by company for right to lay tracks in street, VII, 362.
Payment of, on increase of stock, VII, 283.
To railroad to secure a station, VI, 651.
BOOK OF REFERENCE.
Filing of, under Canadian statutes, IV, 929.
Under English Compulsory Purchase Laws, IV, 900.
BOOKS.
Compelling transfer of stock on, VII, 293–295.
Entries in, as evidence, IV 315; V, 501.
Inspection of, III, 78.
Of accounts as evidence, II, 282.
Of company, admissibility of in evidence, V, 501.
Of company, necessity of recording transfer of stock in, VII, 288.
Of receivers, inspection of, VI, 1217.
Of rules, admissibility of in evidence, II, 538.
Parol proof of entries in, V, 458.
Production of, IV, 80.
Reference to, to refresh memory, VIII, 226.
Right of stockholders to inspect, VII, 307.
Standard works of authority as evidence, V, 514.
Stockbooks or ledgers, VII, 302–304.
Subscription books, VII, 730.
When subjects of copyright, III, 315, 316.
BOSS.
Statements of, V, 280.
When fellow-servant of those under him, V, 758.
Who is a, VIII, 306.
BOUNDARIES.
Of counties, judicial notice of, V, 436.
Of land patents, VI, 1118.
Of right of way in street, VII, 588.
BOX CARS.
See CARS.
BOYCOTTING.
General treatment, I, 680.
By railroad employés against connecting road, VI, 19.
Restraining, in equity, VII, 721.
See also STRIKES.
BRAKEMEN.
As experts, VIII, 291.
As fellow-servants of conductor, V, 733–735.
As fellow-servants of engineer, V, 740–742.
As fellow-servants of firemen, V, 760.
As fellow-servants of foreman, V, 749.
As fellow-servants of master mechanics, V, 762.
BRAKEMEN — *continued.*
As fellow-servants of section foreman, V, 755.
As fellow-servants of station agent, V, 765.
As fellow-servants of trackman, V, 745.
Authority to employ, III, 59.
Construction of statutes relative to, VII, 267.
Contributory negligence of deceased, III, 837.
Expulsion of passengers by, III, 200.
Getting off moving cars at command of, II, 482.
Liability of bridge contractors for death of, I, 725.
Train despatchers not fellow-servants of, V, 769.
When conductor is fellow-servant of, V, 733.
When deemed fellow-servants with car inspectors, V, 730, 731.
When deemed fellow-servants with other employés, V, 758, 759.
When trainhands are fellow-servants of, V, 770.
BRAKE-REPAIRERS.
As fellow-servants with other employés, V, 758.
BRAKES.
Admissibility of evidence as to defects in, V, 434.
Alleging defects in, V, 268.
Assumption of risk as to latent defects in, V, 150.
Contributory negligence as to inspection of, when question for jury, V, 335.
Contributory negligence of child playing with, II, 778.
Defects in, when not negligence, VI, 789.
Duty of company as to, with respect to animals on or near track, I, 101.
Duty of company to supply, III, 469.
Duty to employés as to safety of, V, 83–85.
Duty to put on, after trespasser is seen, VII, 1141.
Failure of employé to inspect, when contributory negligence, V, 206.
Insufficient, V, 670.
Liability of carrier to passenger for defects in, II, 376.
Negligence as to safety of, a question for jury, V, 319.
Notice of defects in, assumption of risk after, V, 161.
On street cars, negligent use of, VII, 464.
Patents for construction of, VI, 955.
BRAKE-WHEEL.
Employé riding on, V, 216.
Taking hold of, as contributory negligence, II, 447.
BRANCH AND LATERAL ROADS.
General treatment, I, 681.
Constructed after mortgage, power to mortgage, VI, 425.
Construction of, under provisions of charter, II, 705.
Contract for running powers, when extends to, VI, 248.

BRANCH AND LATERAL ROADS—*continued.*
Control over lateral roads, I, 579.
Extra charges on, under English acts, II, 654.
Location of, in city streets, VII, 604.
Meaning of the word "lateral," VIII, 315.
Municipal aid in construction of, VI, 628.
Rates on, VI, 25.
Rates on main line as affected by competition on, VI, 40.
Rating of, for taxation, in England, VII, 1016.
Right of street railway to construct, VII, 378.
Taking land for, when for a public use, IV, 458.
Taxation of, VII, 856.
What is a branch road, VIII, 306.
When exempt from taxes, VII, 909.

BREACH.
Of conditions in deeds, remedies for, IV, 18–20.
Of contract, assigning, VI, 991.
Of contract, evidence of, when admissible, VI, 1023, 1024.
Of contract for railway construction, effect of, III, 134, 141.
Of contract, generally, III, 224, 225.
Of contract, measure of damages for, III, 702–708.
Of contract to procure right of way, VII, 79.
Of contract, what constitutes, and its effect, III, 224, 225.
Of covenants in conveyance, remedy for, IV, 474, 475.
Of covenants, what constitutes, III, 347.
Of deeds, remedies for, IV, 18.
Of deeds, when causes land to revert, IV, 18.
Of injunctions, V, 1159–1162.

BREAKABLE GOODS.
Proof of, as affecting carrier's negligence, II, 80.

BREAKWATERS.
Right to erect, VII, 88.

BRIBERY.
Of voters, VI, 601, 651.
Of witnesses, V, 500.

BRIDGE BUILDERS.
When fellow-servants of each other, V, 759.
When fellow-servants of other employés, V, 759.
When fellow-servants of train hand, V, 770.
When foreman is fellow-servant of, V, 750, 751.
When superintendent is fellow-servant of, V, 756.

BRIDGES; VIADUCTS.
General treatment, I, 687.
Construction, repairing and rebuilding, I, 687.
Actions for injuries at or near bridges, I, 703.
Bridges over navigable waters, I, 709.
Toll bridges; bridge companies, I, 720.

BRIDGES—*continued.*
Bridges.
Allowing fire to spread from, V, 880.
Assumption of risk from defects in, V, 132, 171, 180.
At station grounds, liability for injuries at, VII, 219.
Claims against government for rebuilding, III, 8.
Compelling construction of, VI, 377.
Competency of evidence of dangerous character of, V, 410.
Condemnation of, IV, 426.
Conditions in municipal grants of right of way respecting, VII, 576.
Construction of contract to repair, III, 241.
Construction of statutes relative to, VII, 267.
Contributory negligence in approaching at rapid rate of speed, V, 212.
Contributory negligence in crossing in front of moving train, V, 197.
Contributory negligence in going under, V, 213.
Contributory negligence of employé struck by, V, 210.
Cost of, as an element of land damages, IV, 686.
Defects in, causing flooding of land, V, 974, 976.
Definition of the word, VIII, 306.
Destroyed by military authority, liability for, VIII, 161.
Drawbridge, duty to open and close, I, 715, 716.
Duty of carrier as to construction and repair of, II, 371.
Duty of company respecting, when building road in street or highway, VII, 620.
Duty to employés as to safety of, V, 48–53.
Duty to repair, VII, 407.
Effect of notice of defects in, V, 158.
Effect of notice or knowledge of low, V, 159.
Erection and use of toll bridges, I, 720–725.
Evidence of authority to build drawbridge, III, 358.
Evidence of unsafety of, V, 277.
Injuries to animals on, I, 133.
Injuries to children caused by defects in, II, 736.
Interstate, power of state to charge for inspecting, VI, 70.
Interstate, rights and duties of roads crossing, VI, 34.
Interstate, when subject to commission, VI, 9.
Liability for flooding lands by, V, 974.
Liability for negligence of fellow-servants building or repairing, V, 653.
Liability of city or town as to safety of, VII, 694.
Liability of company using bridge belonging to state, VII, 457
Liability of lessee road for defects in, VI, 227.

BRIDGES; VIADUCTS — *continued.*
Bridges — *continued.*
Obstructing navigation, criminal prosecution for, III, 378.
Offense of burning, III, 360.
Ordinances requiring construction of, VII, 674.
Over navigable waters, VIII, 169.
Passengers coming in collision with, II, 507.
Patents for bridge-building apparatus, VI, 954.
Persons on, when deemed trespassers, VII, 1119.
Prosecution for failure to repair, III, 366.
Right of street railway to cross, VII, 380.
Taking land for, when for a public use, IV, 457.
Tearing up, when deemed a trespass, VII, 1108.
Walking on, when contributory negligence, VII, 1154.
What are suitable, VIII, 328.
When deemed fixtures, V, 969.
When limitation begins to run in actions for obstruction to, VI, 312
When subject to laborer's lien, VI, 297.
When subject to mechanic's lien, VI, 286.
When subject to taxation, VII, 862.
Widening a draw, I, 714.
See also OVERHEAD BRIDGES.
Viaducts.
Authority to construct, ownership, etc., I, 702, 703.
Compelling construction of, VI, 377.
Ordinances requiring construction of, VII, 674.
Over railways at street crossings, III, 411.
Taking land for, when for a public use, IV, 457.

BRIEFS.
On appeal, I, 443.

BROKERS.
Implied powers of agents to sell or purchase, I, 44.
In real estate, opinions of, as to value, IV, 321.
Ticket brokers, VII, 1090–1091.
See also TICKET BROKERS.

BROOKLYN, N. Y.
Decisions particularly applicable to, VI, 759.

BRUSH.
See COMBUSTIBLE MATTER.

BUFFALO, N. Y.
Decisions particularly applicable to, VI, 759.

BUFFERS, BUMPERS, BUNTERS.
Duty of company as to safety of, V, 86.
Liability for failing to erect, VII, 221.

BUILDING MATERIAL.
Measure of damages for loss or injury of, II, 303.

BUILDINGS.
Construction of statute making companies liable for buildings or other property destroyed, VIII, 306.
Cost of removal of, as an element of land damages, IV, 687.
Cost or value of, as an element of land damages, IV, 688.
Erecting, on right of way, VII, 81.
Erection of, in exposed places, when contributory negligence, V, 888.
Erection of, on right of way by company, IV, 438.
Evidence of injuries to, on assessment of land damages, IV, 648.
Injuries to, by blasting, I, 653.
Liability to trespassers for dangerous condition of, IV, 1147.
Obstruction of view by, effect of, on duty to look and listen, III, 608–611.
On or near track, injury to employé by, IV, 63.
On right of way, title to, IV, 441.
Removal of, across railway track, power to authorize, I, 60.
Removal of, in condemnation of land, IV, 412.
Right to take, in condemnation proceedings, IV, 414.
Spread of fire from, V, 878–880.
When deemed fixtures, V, 969.
When exempt from taxation, VII, 909.
When subject to mechanic's lien, VI, 286.
When subject to taxation, VII, 864.

BUILT.
Application of the word to a railroad, VII, 306.

BULKY ARTICLES.
Sufficiency of delivery of, by carrier, II, 107.

BULLETIN BOARDS.
Construction of statutes relative to posting, VII, 268.
See also TIME-TABLES.

BURDEN OF PROOF.
In general.
As to limitation of liability, VI, 348, 349.
In actions against elevated railway company, IV, 314.
In actions by husband for personal injuries to wife, V, 1071.
In actions for causing death, III, 851–855.
In actions for damages for nuisance, VI, 900.
In actions for failure to build and maintain fences, V, 831.
In actions for taxes, VII, 994.
In actions for unlawful transportation of slaves, II, 588.
In actions of trespass, VII, 1112.
In actions on construction contracts, III, 176.
In actions on contracts, III, 233.
In cases of derailment, IV, 43.
In collision cases, III, 17, 20.
In ejectment, IV, 255.
In proceedings to dissolve corporation, IV, 135.
In replevin, VII, 65.

BURDEN OF PROOF — *continued.*
In general — *continued.*
On company to show consent of abutting owners, VII, 392.
On motion to remand cause, VII, 45.
To show fraud or inadequacy of consideration in release, VII, 13.
To show negligence in causing fires, V, 938–942.
Under the pleading generally, VI, 1034–1036.
When on company to show consent to lay track, VII, 392.

In actions against carriers of merchandise.
As respects contracts limiting liability, II, 171.
As respects liability of final carrier, II, 248.
In actions by and against express companies, V, 601.
On carrier to excuse nondelivery, II, 122.
On carrier to show delivery, II, 97.
On carrier to show limited liability and loss within it, II, 177, 178.
To contradict bill of lading, I, 608.
To disprove negligence, when on carrier, II, 80.
To show delivery of goods to carrier, II, 40.
To show initial carrier's liability beyond its own line, II, 219.
To show loss by negligence, I, 634.
To show negligent loss by warehouseman, II, 134.
To show shipper's assent to bill of lading, II, 612
To show that company is only liable as warehouseman, II, 145.
When on carrier to disprove negligence, II, 73.
When on plaintiff to prove negligence of carrier, II, 73.
When on plaintiff to show negligence on part of carrier, II, 179.
When on the carrier, II, 267, 268.
When shifted to the carrier, II, 57.

In actions for injuries to animals.
As to negligence of carrier of live stock, I, 754.
On carrier to show loss within limitation of liability, I, 783.
To show contributory negligence of shipper, I, 756.
To show negligence in stock-killing cases, I, 233, 234, 311–319.
When on carrier of cattle, I, 811.
When on shipper of cattle, I, 812.

In actions for injuries to employes.
As to contributory negligence of injured employé, V, 284, 285.
In actions for injuries caused by negligence of fellow-servants, V, 780.
In cases of injuries to employés, V, 283–286.
To show negligence in employment of servants, V, 784.

BURDEN OF PROOF — *continued.*
In actions for injuries to passengers or baggage.
As to contributory negligence of passenger, II, 447.
In actions by passengers for loss of property, money, etc., VII, 138.
In actions for expulsion of passengers, IV, 218.
In actions for injuries to passengers, II, 550–552.
In actions for loss of baggage, I, 572.
On carrier to show passenger's knowledge of limitation of liability, VII, 1045.
To show due care where plaintiff was riding in dangerous place, VII, 507.
When plaintiff must show negligence and absence of contributory negligence, VII, 507.

In actions for injuries on street.
As to contributory negligence of person crossing track, III, 559.
In actions for injuries at crossing, III, 641.
In actions for injuries at stations, VII, 233.
In actions for injuries caused by railway in street or highway, VII, 702.
In actions upon misuse of signals, III, 527.

In actions on subscriptions.
In attacking elections for railroad aid, VI, 605.
In proceedings to compel issuance and delivery of railway aid bonds, VI, 666.
In suits by stockholders, VII, 348.
In suits to cancel railway aid bonds, VI, 714.
In suits to enforce railway aid bonds, VI, 709.

In condemnation proceedings.
As to damage to land not taken, IV, 641.
As to title on assessment of land damages by jury, IV, 624.
In condemnation proceedings, IV, 537–539.
In proceedings to condemn land for elevated railway, IV, 291.
In trespass by landowner for wrongful interference with property, IV, 878.
On motion to set aside report of commissioners in condemnation proceedings, IV, 746.

To show negligence, generally.
As to negligence, in Illinois, III, 43.
In actions for negligence, VI, 826, 827.
Instructions relating to, III, 313.
On defendant to prove contributory negligence, VII, 532.
On plaintiff after his negligence has been shown, III, 306.
To prove or disprove contributory negligence, III, 299–306.
When cast on defendant by mere proof of injury, VII, 507.
When on plaintiff to show absence of contributory negligence, III, 299.

BURDEN OF PROOF — *continued.*
To show negligence, generally — *con.*
When on defendant to show contributory negligence, III, 303; VII, 532.
When plaintiff's evidence shows contributory negligence, III, 305.

BURGLARY.
Offense of, generally, III, 359.

BURNING.
Of bridges, III, 360.

BUSINESS.
Evidence of injury to, on assessment of land damages, IV, 647.
Evidence of loss of, III, 731.
Injury to, as an element of land damages, IV, 700.
In street, obstructing cars by, VII, 430.
Loss of, as the measure of damages, IV, 936.
Measure of damages for injury to, IV, 917.
Of abutting owner, showing decline of, VII, 657.
Of carrier, state tax on, VI, 61–64.
Of defendant, jurisdiction as dependent upon place of, VI, 110.
Of express companies, nature and conduct of, V, 560, 561.
Place of, as situs of property for taxation, VII, 885.
Place of, of defendant, when proper place of trial, VIII, 5.
Place of, where process may be served, VI, 1088.
Power of foreign corporations to transact, V, 1014.
Right of person in rival, to use tracks, VII, 430.

BUSINESS CORPORATION.
Meaning of, as used in the Bankrupt Act, VIII, 306.

BY-LAWS.
General treatment, I, 726.
Of bridge company, I, 724.
Of cities, VI, 756, 757; VII, 672–684.
Of English carrier, validity and effect of, VII, 1088.
Of relief associations, VII, 17.
Power to pass, III, 319.

BYSTANDERS.
Declarations of, when part of the *res gestæ*, V, 473.

CABLE RAILWAYS.
General treatment, I, 727.
Right to construct and operate, I, 727.
Liability for injuries caused by negligence, I, 729.
Decisions applicable to, in common with other street railways, VII, 352–539.
Do not impose new servitude upon street, VII, 417.
Patents for construction of, VI, 954.

CABOOSE.
Carrying passenger in, II, 309.
Riding on top of, contributory negligence, II, 498.

CALENDAR.
Preference of causes on, VIII, 15.

CALIFORNIA.
Animals running at large in, I, 218.
Assessment and levy of railroad taxes in, VIII, 935.
Constitutionality of statutes of, as to municipal aid for railways, VI, 537.
Constitutionality of statutes of, relative to condemnation of land, IV, 387.
Constitutionality of tax laws of, VIII, 837.
Deductions for benefits under condemnation laws of, IV, 710.
Federal grants to, VI, 14[illegible].
Grants by, to railroads, VI, 180.
License tax in, VII, 1021.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 684.
Operation of statute of, giving right of action for causing death, III, 747.
Plaintiff's pleadings need not negative contributory negligence in, III, 276.
Powers of Central Pacific R. Co. under statutes of, II, 605.
Review of town bonding proceedings by mandamus in, VI, 748.
Rule as to joint use of tracks in streets in, VII, 432.
State aid to railroads in, VII, 166.
Statute of, regulating liability to servant for injuries caused by negligence to fellow-servants, V, 710.
Statutes of, relative to killing stock, I, 95.
Statutory duty to fence in, V, 800.
Taking land for streets and laying out roads in, VII, 547.
Taxation in aid of railways in, VI, 716.
Taxation of land grants in, VII, 879.
When negligence of parent is imputable to child in, II, 792.

CALL.
For directors' meetings, IV, 56.
For stockholders' meeting, VII, 308.
Of election, in municipal aid proceedings, VI, 579–583.

CALLS.
By corporation, necessity of, to render stockholder liable to creditors, VII, 324.
Conditions as to amount of, and intervals between, VII, 801.
Meaning of the word, VIII, 306.
On stock after transfer of, VII, 755, 756.
On stock, injunction by stockholders to restrain, VII, 332.
On stock, proof of, in action on subscription, VII, 766.
On stock, right to interest on, V, 1173.
On stock subscriptions, VII, 746–756.
See, also, ASSESSMENTS.

CANADA.
Action over in, against railway company by city or town, VII, 706.
Compelling issue of railway aid bonds in, VII, 666.
Conditions exempting carrier from liability to person riding on free pass in, VI, 943.
Crossing of railways under statutes of, III, 409, 410.
Duty of traveler in, at crossing, to stop, look, and listen, III, 562.

CANADA — *continued.*
Duty to keep lookouts under statute of, III, 529.
Effect of amalgamation of roads in, III, 99.
Examination of persons before trial in, IV, 81.
Expropriation of land under statutes of, IV, 924–955.
Government railroads in, V, 1050–1053.
Incorporation under statutes of, V, 1093.
Injuries to animals running at large in, I, 227.
Land grants in, VI, 194.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 691.
Mechanics' lien law of, VI, 279.
No constitutional prohibition against impairing obligation of contracts in, VII, 247.
Occupation of streets by steam roads under legislative grants of, VII, 564.
Power to make connections under statutes of, II, 205.
Protection of private ways by statutes in, VI, 1080.
Railways declared works for the general advantage of, IV, 924.
Remedies in, to enforce railway mortgages, VI, 472.
Rule as to animals running at large in, I, 182.
Rule as to liability for negligence, I, 768; II, 182; VI, 348.
Rule in, as to preliminary payment for [illegible]ck, VII, 782.
Statutes of, concerning fires caused by locomotives, V, 856.
Statutes of, relative to damages for injuries to employés, V, 345.
Statutes of, when deemed *ultra vires*, VIII, 129, 130.
Statutory duty to fence in, V, 803.
Statutory regulation of grade crossings in, III, 448.
Taxation of railroads in, VII, 1018–1021.

CANALS.
General treatment, I, 733.
Condemnation of lands of company, IV, 427.
Property of, when subject to execution, V, 543.
When boats may be mortgaged, VI, 415.

CANCELLATION.
Jurisdiction to order, generally, V, 353, 354.
Of corporate bonds, I, 680.
Of bonds, suit to enforce, I, 680.
Of deeds, IV, 24.
Of mortgages on the record, VI, 519.
Of railway aid bonds, actions for, VI, 710–714.
Of unpaid subscriptions, VII, 52.

CANYON.
Condemnation of right of way through, IV, 425.

CAPACITY.
Of child to exercise due care as affected by age, I, 764–769.

CAPACITY — *continued.*
Of deceased to make money, proof of, on question of damages, III, 878.
Of foreign corporation to contract, evidence of, II, 286.
Of injured person to earn money, evidence of, V, 411.
Of plaintiff to labor, as bearing on amount of damages, III, 728.
Of plaintiff to sue, averment of, III, 792.
Of plaintiff to sue, denial of, as a defense, III, 811.
Of plaintiff to sue, effect of variance between pleading and proof, VI, 1036.
Of plaintiff to sue, evidence of, under the pleadings, VI, 1023.
Of plaintiff, when question for jury, III, 295.
To contract, III, 209.
To earn money, damages for diminished, II, 822.
To give a release, VII, 7.

CAPITAL STOCK.
See STOCK.

CAPITATION TAX.
On person leaving state, VI, 59.

CAPTAIN.
Of steamboat, delivery of baggage to, I, 514.

CAR-AXLES.
Defects in, II, 376.

CAR CLEANER.
Not fellow-servant with conductor, V, 740.

CAR COUPLER.
As fellow-servant of car inspectors, V, 731.
As fellow-servant of conductor, V, 735.
As fellow-servant of engineer, V, 742.
Patents for, VI, 956.

CAR COUPLING.
See COUPLING.

CARE.
In general.
Degree of, as to the erection of bridges, I, 693-696.
Degree of, required in running cable-cars, I, 731.
Degree of, required in the operation of electric railways, IV, 266–268.
Degree of, to be exercised by bailee, I, 577.
Degree of, to be exercised in blasting, I, 652.
Demanded of person to avoid injury, III, 255–263.
Failure to use, after discovery of danger, VI, 785.
Instructions as to degree of, I, 393.
Liability when by exercise of, defendant could have prevented injury, III, 270.
Meaning of the word as applied to corporations, VIII, 307.
Plaintiff must use, as applied in doctrine of comparative negligence, III, 37-40.
Required in construction of culverts, III, 659.
Required in looking after fences, V, 826.
Required in the construction of railways, III, 113.

CARE — *continued.*
In general — *continued.*
Required of company generally to avoid injuries, VI, 776–779.
Required of company in carrying slaves, II, 586, 587.
Required of company to avoid flooding lands, V, 973.
To be exercised by companies generally, evidence of, V, 393.
Toward sick or infirm persons, VI, 780.
What constitutes proper, III, 294.

As to animals.
Degree of, as towards persons traveling in charge of live stock, I, 793.
Degree of, in building or repairing fences, I, 169.
Degree of, required after discovery of animal on track, I, 107.
Degree of, required in carriage of live stock, I, 745.
Degree of, required of company at crossings, I, 194.
Degree of, required of company to avoid injuries to trespassing animals, I, 105.
Degree of, required of company where owner is required to fence, I, 117.
Degree of, required to avoid injury to stock, generally, I, 151.

As to children.
Degree of, required of children for their own protection, II, 767-772.
Due to children in street where street-cars run, II, 758–764.
Due to children on street-cars as passengers, II, 752–755.
Due to children on street-cars but not as passengers, II, 755–758.
Due to children trespassing on track or grounds, II, 748–752.
Of child, when question of fact, whether commensurate with age and capacity, II, 786.
Required of company generally as to children, II, 733.
To avoid injuries to children by turn-tables, II, 744–748.

As to employes.
Degree of, in selecting employés, evidence of, V, 410, 411.
Of employés, evidence of, V, 400.
Required as to employés generally, V, 19–21.
Required as to employés in inspecting and repairing track and machinery, V, 104–113.
Required as to employés in the management of cars and trains, V, 113–125.
Required as to hired slaves, V, 22.
Required as to making and enforcing rules for employés, V, 29.
Required from engineers, VI, 779.
Required in providing employés with safe brakes, V, 83.
Required in providing employés with safe cars, V, 90–94.
Required in providing employés with safe coupling appliances, V, 85–90.
Required in providing employés with safe engines, V, 95–98.

CARE — *continued.*
As to employes — *continued.*
Required in providing employés with safe machinery, appliances, cars, etc., V, 67–83.
Required in providing employés with safe track generally, V, 43–46.
Required in providing safe place for employés in which to work, V, 40.
Required of elevated railways as to employés, IV, 368.
That employé must exercise to avoid injury, V, 184, 185.

As to fellow-servants.
Degree of, required of injured employé, V, 777.
Degree of, required of vice-principal, V, 674.
Fellow-servant rule as affecting degree of, demanded of company, V, 651.
Required in selecting servants, V, 695–697.

As to fires.
Demanded of company to remove combustibles from right of way, V, 869–873.
Required of company as to management of engine to prevent, V, 867–869.
Required of company in selection of best appliances, V, 865.
Required of company in selection of spark-arresters, V, 866.
Required of company to avoid, V, 859–861.
Required of company to extinguish, V, 873, 874.
Required of persons living near track, V, 884.

As to licensees and trespassers.
Degree of, required as towards trespassers, VII, 1129.
Degree of, to be exercised toward licensees on track, VI, 274, 275.
Required after discovering trespasser on track, VII, 1139–1141.
Required of trespasser to avoid injury, VII, 1151.
To be exercised toward licensees, VI, 268.

As to streets and highways.
Degree of, that company must exercise to avoid injuries on street, VII, 511, 512.
Degree of, that individual must exercise in crossing track, VII, 513, 524.
Duty to exercise ordinary, III, 540–542.
Mutual or reciprocal, to be observed by company and public at crossings, III, 463, 464, 505, 569.
Required in keeping crossings in repair, III, 433–436.
Required in manner of making crossings, III, 440, 441.
Required in streets and public places, VI, 770.
Required in the construction of crossings, generally, III, 439, 440.
Required of company in building road in highway, VII, 695, 696.

CARE — *continued.*
As to streets and highways — *continued.*
Required of elevated railways as to persons in street, IV, 365–368.
Required of persons crossing electric railway track, IV, 272.
To be observed by company at crossings, III, 460–463.
To be observed by person crossing track, III, 566–569.
To be observed on going on track, III, 538.
To be observed where crossing is specially dangerous, III, 539.
To be observed where view of track is obstructed, III, 603–622.
With which trains must be run where no flagman is stationed, III, 490.
At stations.
Degree of, required in making station grounds safe, VII, 219.
Degree of, required in providing safe platforms, VII, 217.
Degree of, required to avoid injuries about stations, VII, 209, 225.
In carriage of merchandise.
Degree of, to be exercised by company after transit of goods has ended, II, 83.
Of company as warehousemen, nature and extent of, II, 131–134.
Required of express companies to avoid loss or injury, V, 574, 575.
Required of warehousemen, VIII, 163.
To be exercised by carrier where there is a limitation of liability, II, 178.
To be exercised to avoid delays, II, 67.
In carriage of passengers.
Amount of, that company must exercise to avoid injuries to passengers, VII, 458–462.
Degree of, demanded of carrier of passengers, II, 355–367.
Degree of, that passenger must exercise to avoid injury, VII, 481.
Degree of, to be exercised to prevent loss of money or property in sleeping-cars, VII, 135.
Degree of, toward passengers generally, II, 340, 349–355.
Degree of, toward persons riding on passes, VI, 941.
In the transportation of passengers on freight trains or hand-cars, II, 422–427.
Required of elevated railways in carrying passengers, IV, 357–365.
Required of passenger generally to avoid injury, II, 442.
Required of passenger in getting off car in improper manner or at dangerous place, II, 460–467.
Required of passenger in getting off cars generally, II, 458–460.
Required of passenger in getting off moving car, II, 467–488.
Required of passenger in getting on moving car, II, 453–458.
Required of passenger in riding at open window, II, 506–509.

CARE — *continued.*
In carriage of passengers — *continued.*
Required of passenger in riding upon car platform, II, 501–506.
Required of passenger to avoid injury generally in getting on car, II, 450–453.
Required of passenger when at or near station, II, 488–495.
Required while riding in baggage or express car, II, 509–512.
To be exercised in construction and repair of track, II, 367–374.
To be exercised in equipment and management of trains, II, 380–386.
To be exercised in letting off passengers, II, 393–413.
To be exercised in safety of cars, engines and appliances, II, 374–380.
To be exercised in taking on passengers, II, 386–393.
To protect passengers against company's servants, II, 428–431.
To protect passengers from other passengers, II, 431–434.
To protect passengers from third persons, II, 434–436.
Toward passengers before or after leaving train, II, 413–422.
While riding in perilous position or place, generally, II, 495–501.
In ejecting passengers.
As to manner of ejecting, IV, 194.
As to time and place of ejecting, IV, 202–208.
To be exercised by ejected, IV, 212, 213.
See, also, DUE CARE; REASONABLE CARE; UTMOST CARE; NEGLIGENCE.

CAR-HANDLE.
Failure to hold, in getting on or off, VII, 484.

CAR INSPECTOR.
As fellow-servant of brakemen, V, 759.
As fellow-servant of conductor, V, 735.
As fellow-servant of engineer, V, 742.
Contributory negligence of deceased, in action for causing death, III, 838.
When fellow-servant of carpenter, V, 731.
When fellow-servant of other employés, V, 730–732.
When vice-principal of brakeman, V, 731.

CAR LOADER.
When engineer is fellow-servant of, V, 746.
When foreman is fellow-servant of, V, 752.
When train hand is fellow-servant of, V, 770.

CARLOAD RATES.
When allowable, VI, 17.

CARPENTER.
When car inspector fellow-servant of, V, 731.
When engineer fellow-servant of, V, 742.
When fellow-servant of porter, V, 763.
When fellow-servant of switchman, V, 766.
When foreman fellow-servant of, V, 749.

CAR REPAIRER.
As fellow-servant of brakemen, V, 759.

CAR REPAIRER — *continued.*
As fellow-servant of engineer, V, 742.
As fellow-servant of foreman, V, 751.
As fellow-servant of other employés, V, 732.
Contributory negligence of deceased, in action for causing death, III, 838.
Risks assumed by, V, 179–181.

CARRIAGE.
Does not mean "railroad car" in United States, VIII, 307.

CARRIAGE OF LIVE STOCK.
General treatment, I, 736.
Obligation to receive and carry, I, 737.
Delivery to the carrier, I, 743.
Duty of carrier during transit, I, 745.
Delivery by the carrier, I, 757.
Shipping contracts, I, 760.
Connecting lines, I, 783.
Transportation of diseased live stock, I, 788.
Transportation of dogs, I, 790.
Custodians traveling on cattle-trains; drovers' passes, I, 791.
Procedure in actions, I, 801.
Animals for breeding purposes, measure of damages for failing to carry, II, 305.
Authority to allow persons to ride on cattle-car, III, 59.
By ferry, V, 840.
Compromise of claims for injury by agents, I, 58.
Construction of shipping contracts, I, 760, 761.
Duty to deliver under contract, VII, 349.
Limiting liability for injuries while being loaded, I, 639.
Measure of damages for injuries to animals carried, II, 291, 305.
Variance between pleading and proof in actions against carriers, VI, 1037.
See also ANIMALS, INJURIES TO; LIVE STOCK.

CARRIAGE OF MAILS.
General treatment, II, 1.
Duties and liabilities of carrier, II, 1.
Compensation for carriage, II, 4.
Railway mail agents, inspectors, etc., II, 8.
Carriage of mailable matter by express companies, V, 561.
Internal revenue tax on receipts for carrying mails, VII, 72.
Mail agents and postal clerks, when deemed passengers, II, 326.
Offense of obstructing the mails, III, 383.
On land grant railroads, VI, 130.
Power to mortgage claims for, VI. 417.
See also MAIL.

CARRIAGE OF MERCHANDISE.
General treatment, II, 10.
General nature of company's liability, II, 13.
Duty of company to receive and carry, II, 27.
Delivery to company, II, 38.
Liability for loss or injury, II, 42.
Delivery by company, II, 90.
Liability of company as warehouseman, II, 129.
Company's lien for charges, II, 149.

CARRIAGE OF MERCHANDISE — *con.*
Shipping contracts — rules, notices, etc., II, 156.
Stoppage in transitu, II, 186.
English acts, II, 193.
Connecting lines, II, 200.
Procedure, II, 263.
In general.
As to bills of lading, I, 601–650.
As to carrying the mails, II, 1–9.
Attachment against carrier holding goods after transit ended, I, 493, 495.
Control of the subject by Interstate Commerce Commission, VI, 5–7, 66–71.
Leases of cars, I, 735.
Long and short hauls, VI, 36–45.
Obstruction of sidewalks with merchandise, V, 561.
Pleading and proof in actions against carrier, VI, 1026, 1035.
Power of carrier to mortgage rolling stock, VI, 426–433.
Proximate and remote cause as affecting liability of carrier, VI, 793, 798, 802, 810.
Questions of fact in actions against carrier, VIII, 47.
Rights and liabilities of the carrier generally, V, 569–574.
Statement of cause of action against carrier, VI, 990.
Statutes as to when regulations of commerce, III, 33, 34, 35.
Subrogation of carrier to owner's rights against insurer, V, 849.
Variances in actions against carrier, VI, 1036.
What carriers are subject to Interstate Commerce Commission, VI, 7–10.
When baggage goes as freight, I, 526.
When merchandise may be carried as baggage, I, 536–538.
When trover will lie against carrier, VIII, 107.
Charges, rates, and tolls.
Charges for special services, II, 540–643.
Claims against United States for, III, 8.
Collection of tolls by distress, IV, 141.
Costs in actions for overcharges, III, 329.
Excessive charges and overcharges, II, 624–639.
Filing and publishing freight schedules, VI, 45–48.
Just and reasonable charges, II, 622–624; VI, 11–19.
Legislative regulation of charges, II, 612–622.
Lien for charges, II, 643, 644.
Local and through rates, II, 639, 640; VI, 23–25.
Penalties for overcharges, VI, 967.
Power of carrier to mortgage tolls and income, VI, 416–418.
Rates and charges under English Railway and Canal Traffic acts, II, 649–672.
Contracts to carry.
Averment of contract, VI, 990.

CARRIAGE OF MERCHANDISE — *con.*
Contracts to carry — *continued.*
Construction of shipping contracts, III, 241.
Contracts for weighing grain, III, 249.
Contracts with agents respecting, I, 57, 58.
Implied power of company's agent to receive goods, I, 44.
Power of agents to ship goods, I, 43.
Power of station agent to contract for transportation, to furnish cars, etc., VII, 186–188.
Right of husband to act as wife's agent in shipping, V, 1066.
Validity of contracts to carry on Sunday, VII, 818.
Delay, injury or loss.
Actions against carriers for loss or damages, V, 598–604.
Burden of proof to show loss, V, 449.
Carriers, when liable as warehousemen, I, 551–554; VI, 584, 585.
Damages for delay in carrying, III, 704.
Damages for loss or destruction of goods, III, 704.
Liability as trustees in possession of road for loss of goods carried, VI, 466.
Liability as warehouseman, VIII, 162–167.
Liability for injuries caused by carrying explosives, V, 559.
Liability for loss or injury to goods, V, 574–577.
Liability of lessee company for loss of goods, VI, 227.
Liability of lessor company for goods lost, VI, 221.
Limitation of liability for loss by fire, I 631–635
Penalties for delay in transporting goods, VI, 966.
Promise of agent to pay for lost goods, I, 58.
Recovery of profits lost and expenses incurred by non-delivery of goods, III, 675.
Strikes as excuses for delay, VI, 718–720.
Whether consignor or consignee should sue for loss of goods, VI, 925.
Different carriers.
By canal, I, 733, 734, 735.
By connecting lines, I, 526–533, 783–788; III, 65–72; V, 595–598.
By express, V, 569–598.
By ferry, V, 840.
Limitations of actions or liability.
Limitation of liability, generally, I, 625–643; V, 585–594.
Limitations of actions against carrier, VI, 311, 314, 315.
Limitations of liability, VI, 331–350.
Power to limit common law liability, VI, 331–341.
Presumptions and burden of proof in cases of limitation of liability, VI, 348–350.

CARRIAGE OF MERCHANDISE — *con.*
Limitations of actions or liability — *con.*
Stipulations against liability for negligence, VI, 341–348.
Receiving, carrying, delivering.
Care required from the carrier, generally, VI, 772–782.
Carriers of goods and carriers of passengers distinguished, II, 309.
Classification of freights, VI, 25–30.
Compelling by mandamus, VI, 378.
Delivery by carrier, generally, V, 577–584.
Delivery to carrier, when completes contract of sale, VII, 100.
Duty to deliver grain at elevator, IV, 372.
Facilities for interchange of traffic, VI, 33–36.
Goods of wife shipped by husband as her agent, V, 1066.
Mandamus to compel company to transport liquor, VI, 74.
On land grant railroads, VI, 129.
On Sunday, VII, 818.
Penalty for refusal to receive goods for carriage, VI, 967.
Seizure of liquors in possession of carrier, VI, 75.
Unjust discrimination by carrier under Interstate Commerce Act, VI, 19–31.
What amounts to negligence on part of carrier, VI, 782–792.
What constitutes discrimination by carrier and remedies therefor, IV, 83–128.
What is a preference or advantage under Interstate Commerce Act, VI, 31–33.

CARRIAGE OF PASSENGERS.
General treatment, II, 305.
General principles, II, 308.
Duties and liabilities of carrier; negligence, II, 343.
Passenger's contributory negligence, II, 440.
Connecting carriers, II, 512.
English Acts, II, 518.
Leases, running powers, etc., II, 520.
Procedure, II, 521.
In general.
Authority of conductor and liability of company for his acts, III, 59–63.
Carrying goods on passenger trains, II, 15.
Custodian traveling on cattle-trains, I, 791–801.
Enforcement of quarantine laws, VI, 1125, 1126.
Instructions as to duty of carrier, I, 393.
Liability as respects baggage, I, 522–574.
License to sell lunch on trains, VI, 264.
Limitations of actions against carrier, VI, 316.
Obstructing access to refreshment-rooms, VII, 5.
On Sunday, VII, 820.
Penalty for failure to give notice of accident, VI, 967.
Penalty for failure to stop on signal, VI, 967.

CARRIAGE OF PASSENGERS — *con.*
In general — *continued.*
Powers of railway commissioners over passenger traffic, VI, 1139.
Proximate ad remote cause, as affecting liability of carrier, VI, 793–799, 802, 810.
Rate of speed in cities, VII, 676–681.
Review of instructions as to duty of carrier, I, 393, 405.
Running according to time-tables, VII, 1093–1097.
Sales of liquor to travelers under English Act, VI, 72.
Statutes as to, when regulations of commerce, III, 33, 34.
Arrest, assault, etc., of passenger.
Arresting, detaining and searching passengers, I, 73.
Arrest of passenger at instance of carrier, I, 465.
Assaults by one passenger upon another, I, 470.
Liability for assaults upon passengers, I, 466–471.
Liability for assaults upon passengers by servants, I, 74.
Liability for false imprisonment of passengers, V, 605, 606, 607, 609, 610.
Liability for tortious acts by servants of company, I, 73–76.
Liability of company to suit for malicious prosecution, VI, 367–373.
Liability of company when passenger is robbed, I, 558.
Children.
Duties and liabilities with respect to children on train, II, 738–741.
Injuries to children getting off train, II, 739, 753.
Injuries to children getting on train, II, 739, 753.
Injuries to children on street-cars, II, 752–764.
Contributory negligence of passenger.
Action for death of passenger, contributory negligence as a defense, III, 818–822.
Contributory negligence of injured passenger, IV, 269.
Doctrine of comparative negligence in actions for injuries to passengers, III, 41.
Effect of non-compliance with rules by passenger, I, 525.
Evidence as to boarding and leaving trains while in motion, V, 399.
Riding in dangerous place, when bars action for injury, III, 266.
Violation of rules of carrier, when defeats action on insurance policy, I, 17.
Ejecting passengers.
Damages recoverable for wrongful expulsion, IV, 223–244.
Remedies for wrongful expulsion from train, IV, 208–244.
Time, manner, and place of expulsion from train, IV, 194–208.
Fares and tickets.
Criminal liability for failure to keep ticket-office open, III, 366.

CARRIAGE OF PASSENGERS — *con.*
Fares and tickets — *continued.*
Criminal liability for traveling without paying fare, III, 385.
Excessive fares, overcharges, VII, 1083–1085.
Fares and tickets as affected by Interstate Commerce Act, VI, 30, 31.
Filing and publishing passenger schedules, VI, 48.
Lien upon baggage for fare, I, 560, 561.
Mileage, excursion, and commutation tickets, VI, 57, 58.
On passes, VI, 939–946.
Penalty for exacting excessive fares, VI, 967.
Purchase of tickets and payment of fares, VII, 1039–1090.
Stop-over privileges, VII, 1053–1058.
Unlawful discrimination in sale of tickets, IV, 103.
Unlawful sale of tickets, III, 386.
See also TICKETS AND FARES.
Injuries to passengers, generally.
Evidence of increased precaution after accident, V, 425–428.
Evidence of negligence in starting train, V, 413.
Excessive damages in actions for personal injuries, VI, 850–871.
Improper starting of train, I, 77.
Inadequate damages in actions for personal injuries, VI, 871, 872.
Injuries to drovers on cattle-trains, I, 792–801.
Injuries to passengers at bridges, I, 706.
Injuries to passengers by collision, III, 12–21.
Injuries to passengers by derailment of cars, IV, 39–47.
Injuries to passengers by reason of defects in culverts, III, 663.
Injuries to passengers carried on Sunday, VII, 819–821.
Injuries to passengers causing death III, 742–961.
Injuries to passengers on cable-railways, I, 729–731.
Injuries to passengers on electric cars, IV, 268–270.
Injuries to passengers on elevated railways, IV, 357–365.
Injuries to passengers on sleepers, VII, 133–135.
Liability for injury to passenger, VII, 1103.
Liability for injuries to passenger by strikers, VII, 720.
Liability for injury to passenger at station, VII, 208–224.
Right of husband to sue for injuries to wife, V, 1069–1071.
Suit by married woman for injuries to her person, V, 1072, 1073, 1074.
What amounts to negligence on part of carrier, VI, 782–792.
Licensees and trespassers.
Duty of carrier towards trespassers on train, VII, 1148–1151.
Duty to trespasser not same as duty to passenger, VII, 1128, 1149.

CARRIAGE OF PASSENGERS — *con.*
Licensees and trespassers — *continued.*
Duty towards friends and relatives seeing passenger off, VII, 214.
Persons on trains, not passengers nor employés, VI, 271; VII, 1121–1124, 1148–1151, 1159.

Passengers on sleeping-cars.
Duties and liabilities of sleeping-car companies to passengers, VII, 130–133.
Duty of sleeping-car company as respects, VII, 130, 131.
Liability of carrier for loss of passengers' property or money, VII, 135–139.
Liability of railroad company as to passengers in sleepers, VII, 139, 140.
Liability of sleeping-car company as carrier, VII, 130.

Receiving and carrying, generally.
Arrangements by agents relative to, I, 56.
By connecting lines, III, 66–72.
By ferry, V, 841.
Care required from carrier, generally, VI, 772–782.
Carriage of mail agents, inspectors, etc., II, 8.
Carriage of slaves, injuries to, and unlawful transportation of, III, 586–589.
Compelling by mandamus, VI, 378.
Contracts as to, by agents, I, 56.
Criminal liability for failure to stop at stations, III, 367.
In private cars, assumption of risks, VI, 1075.
On construction-train, III, 59.
On land-grant railroads, VI, 131.
Permission of agent to ride on train or engine, I, 59.
Power of agents to make contracts relative to, I, 56.
See also EJECTION OF PASSENGERS; PASSENGERS; RAPID TRANSIT ACTS.

CARRIAGE OF SLAVES.
General treatment, II, 586.
See also COLORED PERSONS; SLAVES.

CARRIERS.
Discrimination as between, III, 115–117.
Duty to receive and carry, II, 27–34.
Of merchandise, liability of receivers as, VI, 1190.
When company liable as, for wrong delivery, II, 120.
See also BAGGAGE; CABLE RAILWAYS; CANALS; CARRIAGE OF LIVE STOCK; CARRIAGE OF MAILS; CARRIAGE OF MERCHANDISE; CARRIAGE OF PASSENGERS; CARRIAGE OF SLAVES; CONNECTING LINES; ELECTRIC RAILWAYS; ELEVATED RAILWAYS; EXPRESS COMPANIES; FERRIES; PARALLEL AND COMPETING LINES; STREET RAILWAYS; TRAMWAYS; UNDERGROUND RAILWAYS.

CARRIERS' ACTS.
11 Geo. IV and 1 Wm. IV, c. 68, decisions under, II, 193–195, 518.

CARS.
In general.
Agreement to furnish, power of station agent to bind company by, VII, 187.
Charges for use of, II, 670.
Charging income with rent and repairs of, VI, 496.
Climbing over, when contributory negligence, III, 265.
Contracts made by station agents for repairs of, VII, 188.
Contracts to keep in repair, time to sue on, VI, 316.
Contributory negligence in getting off, VII, 1159.
Definition of word, VIII, 307.
Destroyed by mob, liability of county for, III, 331.
Discrimination in furnishing, IV, 114.
Duty of carrier using road under working agreement to provide, VI, 251.
Duty to furnish safe and suitable, VI, 20.
Injuries to, by cattle, V, 1166.
Interpretation and effect of leases of, I, 735.
Liability for defects in, VII, 466.
Liability for explosion of nitro-glycerine in, V, 559.
Liability for rent of hired cars, VI, 244.
Liability to persons engaged in unloading, VI, 268.
Mortgages of, VI, 426–433.
Ordinances forbidding obstruction of streets by, VII, 674.
Ordinances requiring numbering and licensing of, VII, 442.
Patents for construction of, VI, 955–957, 959, 960, 961.
Power of commission over, VI, 5.
Power to compel use of a certain kind, VI, 6.
Private, VI, 1075.
Right to run over government railroad, V, 1049, 1050.
Right to stop, while paving or repairing, VII, 405, 408.
Running burning, on side track, V, 868.
Shooting or throwing missiles at, III, 385.
Stipulation in bill of lading as to acceptance of, by shipper, I, 641.
Storage of, on right of way, VII, 82.
Title to property found in, III, 63.
Undue preference in furnishing, VI, 31.
Use of defective, when negligence, VI, 784.
Using street for storing or switching, VII, 425.
When deemed fixtures, V, 970.
When subject to execution, V, 544.
When subject to mechanics' lien, V, 287.

As to carriage of live stock.
Duty of shipper to load, I, 744.
Duty to furnish, I, 737–741.
Effect of overloading, I, 745.
Liability for furnishing infected car, I, 740.
Liability for loss caused by defects in, I, 739–741.

CARS — *continued.*
As to carriage of live stock — *continued.*
Of another company, liability for defects in, I, 740.
Remedy for failure to furnish, I, 792.
As to carriage of merchandise.
Agreement to furnish, at specified time, II, 34.
Changing, when forfeits benefit of limited liability, II, 253.
Chartered, liability for goods lost from, II, 60.
Damages resulting from use of defective, II, 58.
Defects in, liability of second carrier for, II, 242.
Duty of carrier to provide, I, 34–37.
Duty of connecting carriers to transfer, II, 223.
Duty of shipper to clean and repair, VI, 20.
Duty to carry, as freight, I, 28.
Failure to furnish, excuses offer of goods for shipment, II, 37.
Liability for goods lost from, while unloading, II, 53.
Liability of loss by fire by shipping in open, II, 74.
Not bound to furnish for unmined coal, II, 36.
Of another company, liability of company hauling, II, 16, 24.
Of connecting carrier, return of, II, 51.
Private, liability of carrier hauling, II, 25.
Sealed, delivery of goods in, II, 107.
As to carriage of passengers.
Construction of statutes relative to heating of, VII, 268.
Contributory negligence in getting off, II, 458–488.
Defects in doors of, II, 377.
Defects in, liability of carrier for, II, 375.
Duty of carrier of passenger as to safety of, II, 374–380.
Exclusion of colored persons from, III, 28, 29.
For ladies, expulsion from, II, 333, 334, 384.
For ladies, removal of disorderly persons from, II, 434.
Getting off moving, contributory negligence, II, 467–488.
Injury to passenger standing in uncrowded, IV, 359.
Leaving parcels on, by passengers, I, 557.
Liability for injury to passenger in boarding or alighting from, IV, 268.
Obstruction of access to train from station by, II, 420.
Ordinance prohibiting smoking in, VII, 442.
Passing from one to another, III, 820.
As to children.
Duty to guard, to prevent injuries, II, 736, 752.
Duty to stop, II, 761.
Jumping from moving, II, 789.

CARS — *continued.*
As to children — *continued.*
Of street-railways, injuries while getting on or off, II, 753.
Ordinances prohibiting boys from riding on, VII, 674.
As to third persons.
At crossings, passing under or between, when contributory negligence, III, 622–624.
Averments as to leaving or operating, at crossings, III, 640.
Contributory negligence in going under, VII, 231.
Contributory negligence in passing between, VII, 231.
Injuries while loading and unloading, VII, 211.
Obstruction of highway by, when negligence, VII, 711.
Passing in front of or behind, when contributory negligence, III, 625–638.
Riding on wrong, as contributory negligence, VII, 1159.
As to employes.
Alleging company's knowledge of defective condition of, V, 271.
Alleging negligence in furnishing defective, V, 267–269.
Assumption of risk of improper loading of, V, 147.
Contributory negligence as to inspection of, when question for jury, V, 336.
Contributory negligence in coupling and uncoupling, V, 222–233.
Contributory negligence in coupling improperly loaded, V, 224.
Contributory negligence in going between, to couple, V, 225, 226.
Contributory negligence in going on or under, V, 214.
Contributory negligence in loading and unloading, V, 219.
Contributory negligence of employé struck by, V, 211.
Disobedience of rule prohibiting going between, V, 231.
Duty of company to furnish safe, V, 90.
Duty to employés as to safety of, V, 90–95.
Duty to employés in the management of, V, 120–125.
Duty to inspect, V, 110–113.
Employé riding on box-car, V, 217.
Failure of employé to inspect, when contributory negligence, V, 206, 207.
Improperly loaded, assumption of risk as to, V, 137.
Improperly loaded, injuries to employés caused by, V, 122, 148.
Injuries to employés by defects in, V, 146.
Inspection of, by employés, rule requiring, V, 244.
Negligence as to, V, 669.
Negligence as to safety of, a question for jury, V, 318.
Negligence in improperly loading, a question for jury, V, 322.

CARS — *continued.*
As to employes — *continued.*
Negligence in loading, V, 657.
Negligence in the management of, a question for the jury, V, 320–322.
Non-liability for negligence of fellow-servants in operating, V, 655–663.
Notice of defects in, assumption of risk after, V, 160.
Of other companies, V, 93.
Operation of, at night, V, 125.
Promise by company to repair defects in, V, 167.
Remaining between, while in motion, V, 227, 228.
Remaining on defective, when contributory negligence, V, 209.
Riding in perilous position on, V, 216, 217.
Risks assumed from defects in, V, 180.
Risks assumed in working under, V, 179.
Rule forbidding riding on top of, V, 242.
Rule respecting getting on or off of, V, 243.
Standing, injuries to employés by, V, 123.
Sufficiency of evidence of negligence in failing to provide safe, V, 291.
Unnecessarily remaining between, V, 227.
Whether employé assumes risk of defects in, a question for jury, V, 325.
Sleeping-cars.
Interpretation and effect of leases of, VII, 129.
Of another company, duty to haul, VII, 128.
Recovery for loss or destruction of, VII, 130.
Taxation of.
Employed by state, taxation of, VI, 60.
License taxes on, VII, 446–450.
Taxation of, VI, 59, 60.
Uniformity of taxation of, VI, 60.
When subject to taxation, VII, 869.
CAR SERVICE.
Regulating, by ordinance, VII, 439.
CAR-STEPS.
Duty to make safe for employés, V, 91.
Permitting passengers to ride on, VII, 468.
Riding on, VII, 500, 501.
CAR-SWITCHING COMPANIES.
When liable as common carriers, II, 16.
CAR-TRUST ASSOCIATIONS.
General treatment, I, 735.
Rights of, as respects mortgaged cars, VI, 431–433.
CAR-WHEELS.
Defects in, II, 377.
Slipping, injuries caused by, VII, 523.
CAR WINDOW.
Articles dropped from, by passengers, liability of carrier for, I, 557.
Defects in, II, 377.
Resting arm on window-sill, II, 508.
Riding with part of person projecting from, II, 506–509.
CASE.
Action of, when lies, I, 23.
When proper action for interference with private ways, VI, 1080.
When proper action for killing stock, I, 240.
CASHIER.
Of corporation, when may be made garnishee, I, 493.
Powers, duties and liabilities of, VI, 907.
CASH VALUE.
Definition of the words, VIII, 307.
Limiting damages to, at place of shipment, I, 777.
CATALOGUES.
When may be carried as baggage, I, 539.
CATTLE.
What the term includes, VIII, 307.
See, also, ANIMALS, INJURIES TO; CARRIAGE OF LIVE STOCK; LIVE STOCK.
CATTLE-CARS.
Authority of conductor to allow person to ride on, III, 59.
Patents for improvement in construction of, VI, 959.
CATTLE CHUTE.
Near track, injury to employés by, V, 64.
CATTLE GUARDS.
General treatment, II, 591.
Duty to build and maintain, II, 591.
Actions for failure to build or repair, II, 598.
Alleging insufficiency of, in action for killing stock, I, 256.
Breach of agreement to build, where right of way is obtained by consent, IV, 475.
Construction of, at street crossings, III, 444.
Cost of, as an element of damages in condemnation proceedings, IV, 686.
Definition of the term, VIII, 307.
Duty of company to construct and maintain, I, 183–186.
Erection of station too near to, VII, 199.
Evidence as to condition of, V, 434.
Evidence of defects in, I, 297.
Expert testimony as to necessity and sufficiency of, I, 284; VIII, 262.
Failure to build, is failure to fence, V, 830.
Fences at, injuries to employés by, V, 65.
Ice and snow in, I, 86.
Injuries to passengers by, II, 418.
Instructions relative to duty to construct and maintain, I, 334.
Liability for injuries to stock at, I, 136.
Liability of city or town as to safety of, VII, 694.
Sufficiency of fences at, V, 824.
CATTLE-PASSES.
Damages for failure to maintain, III, 707.
Duty to construct on right of way, VII, 81.
CATTLE-PENS.
Delivery of cattle in, I, 744.
Duty to construct, sufficiency of, etc., I, 737, 744, 759.
Exposure of cattle in, during storm, I, 755.

CATTLE-PENS — *continued.*
When deemed nuisances, VI, 889.

CATTLE TRAINS.
Custodians traveling on, rights and liabilities of, I, 791–801.

CAUSE OF ACTION.
In general.
Accruing in another state, V, 260.
Against carrier, when single, II, 264.
Amendment, adding new, VI, 1045–1048.
Arising abroad, suing foreign corporation on, V, 1018.
For causing death, survival of, III, 743, 768.
Merger of, in judgment, I, 240; VI, 83.
On appeal from justices' court, I, 367.
Right of assignee of, to sue, I, 245.
Survival of, I, 11; IV, 250.
What is assignable, I, 476–478.
Joinder and misjoinder of.
Demurrer for misjoinder of, VI, 1011.
Joinder of, I, 28–30, 251; VI, 998.
Joinder of, in complaint for causing death, III, 804.
Joinder of two or more in one count, I, 250.
Misjoinder of, IV, 313.
Misjoinder of, in action for injury to employés, V, 261.
Statement of, generally.
Demurrer for failure of complaint to state facts sufficient to constitute, VI, 1012.
How pleaded in equity, VI, 1018.
Multifariousness as to, VI, 1020.
Rule requiring separate statement of, VI, 999.
Several counts for same, I, 251; V, 261.
Splitting, V, 894.
Statement of, in actions for torts, VI, 992–999.
Statement of, in plaintiff's pleading, VI, 988–991.

CENTRAL PACIFIC R. CO.
General treatment, II, 603.
Land grants to, VI, 164–167.

CERTAINTY.
In complaint for injury to passenger, II, 526.
In complaint for killing stock, I, 250.
In contracts sought to be specifically performed, VII, 145.
In objections, VIII, 20.
What essential to validity of contract, III, 209.
What necessary in denials in answer, VI, 1008.
What requisite in bill of particulars, I, 651.
What requisite in contracts for right of way, IV, 466, 467.
What requisite in description of land condemned in judgment, IV, 757.
What requisite in description of premises conveyed, IV, 10.

CERTIFICATE.
Of clerk of election, VI, 591.
Of consolidation, III, 82.
Of division of opinion, V, 640.
Of engineer as to work done, III, 148, 149.

CERTIFICATE — *continued.*
Official, weight of, as evidence, V, 523.
Of incorporation, V, 1100.
Of purchase at tax sale, VIII, 996.
Of receivers, VI, 1200–1207.
Of regularity of railway aid bonds, VI, 673.
Of stock, cancellation of, V, 353.
Of stock, transfers of, VII, 285–305.
Of stock, when municipality entitled to, VI, 612.
Of trial judge, use of, on appeal, I, 443.
Tender of, before suit on stock subscription, VII, 757.
To be filed by foreign corporations, V, 1017.

CERTIFICATES OF INDEBTEDNESS.
General treatment, II, 605.
Priority of, over mortgages, VI, 446.
When subject to taxation, VII, 877.

CERTIFIED COPIES.
Of public records, as evidence, V, 502.

CERTIORARI.
General treatment, II, 606.
As a remedy for unlawful taxation, VII, 998.
In proceedings to lay out streets over railroads, III, 441, 457.
In United States Supreme Court, V, 640.
Review of discontinuance of highway on, VII, 555.
Review of justices' decisions on, VI, 125.
To review condemnation proceedings, IV, 814–816.
To review municipal aid proceedings, VI, 744–746.
To review proceedings to obtain right to cross another road, III, 404.
To review proceedings under English Compulsory Purchase Acts, IV, 921.
See also ELEVATED RAILWAYS.

CESTUI QUE TRUST.
Rights, generally, VIII 117–121.
When entitled to land damages, IV, 573.

CHAFING.
Injury or loss by, I, 643.

CHAIR CARS.
Right to extra fare on, VII, 131.

CHAIRS.
For street-railways, patents for, VI, 957.

CHALLENGE.
Of jurors, VIII, 12–14.
To jurors, in condemnation proceedings, IV, 614, 615.
See also JURY.

CHAMPERTY; MAINTENANCE.
General treatment, II, 609.
As ground of abatement, I, 8.
What constitutes, I, 516.
See also MAINTENANCE.

CHANGE.
In general.
In location of farm crossings, V, 622.
In periods of limitation, by statutes, VI, 308.
In rates, power of commissioners to recommend, VI, 1141.
In remedy, not an impairment of charter contract, II, 682.

CHANGE — *continued.*
In general — *continued.*
In schedule, duty to instruct employé as to, V, 38.
Of citizenship or domicil, III, 5.
Of counsel as ground for continuance, VIII, 10.
Of destination of goods, evidence of, II, 286.
Of gauge, III, 114.
Of money, duty of company to make, VII, 454.
Of motive power by consent of city, IV, 260.
Of outlet for surface water, V, 983.
Of remedy by statute, as ground of abatement, I, 10.
Of use when an additional servitude, IV, 447, 448.
Of use, when a "taking" of land, IV, 444.
Of venue, IV, 615; VIII, 6–9.
In grade or location of Highway or street.
In grade of street, damages to abutting owner for, III, 458.
In grade of street in constructing steam-railway, VII, 607–615.
In grade of streets, ordinances for, VI, 757.
Of location of highway at point of crossing, III, 432.
Of location of road, consent of abutting owners to, VII, 392.
In name or route of railroad.
In charter, name, route, termini, etc., as a defense to action on stock subscription, VII, 771–777.
Of name of railroad, VI, 766.
Of name of road seeking municipal aid, VI, 622.
Of plan of road, reassessment of damages on, IV, 588.
Of route, VI, 358–362.
Of route, charter provisions as to, II, 706.
Of route, effect of on donation to railroad, VI, 652.
Of route, effect of on liability of carrier, II, 76.
Of route, effect of on municipal subscription, VI, 601, 627.
Of route, effect of on prior mortgage, VI, 426.
Of route, new application for assessment of damages after, IV, 596.
CHANGE BILLS.
General treatment, II, 610.
CHARACTER.
Of action against elevated railway company, IV, 299.
Of deceased, evidence as to, III, 878.
Of deceased, evidence of, to show due care, III, 849.
Of injured person, evidence of, V, 408.
Of plaintiff, as affecting measure of damages, II, 574.
Of servant, as evidence of incompetency, V, 782.
Things dangerous in, as nuisances, VI, 890.
CHARGE OF COURT.
See INSTRUCTIONS.
CHARGES.
General treatment, II, 611.
Generally, II, 612.
Legislative regulation, II, 612.
Just and reasonable charges, II, 622.
Excessive charges; overcharges, II, 624.
Local and through rates, II, 638.
Special services, II, 640.
Posting and publishing rates, II, 643.
Remedies for collecting, II, 643.
Under English Railway and Canal Traffic Acts, II, 649.
In general.
Against income, while road is in hands of trustees, VI, 465.
Amount of, V, 584.
Costs in suit for overcharges, III, 329.
Deduction of, from recovery against carrier, II, 289.
Definition of the word, VIII, 308.
Discrimination in, IV, 83–128.
Filing and publishing schedules of, VI, 45–48.
For fares, recovery of excessive, VII, 1086.
Guaranteeing rates, I, 638.
Just and reasonable, under interstate commerce law, VI, 11–19.
Liability of final to preceding carrier for, II, 246.
Limiting liability where lower rate is charged, I, 630.
Local and through rates, VI, 23–25.
Mortgage of tolls and income, VI, 416–418.
Of passenger fares, VII, 1076–1090.
Penalties for overcharges, VI, 967.
Refunding excessive, VI, 56.
Relative charges for long and short hauls, VI, 36–45.
Rights and liabilities of second carrier as to, II, 241.
When pass by deeds of trust, IV, 26.
What proper at common law, VI, 11.
What proper in action for accounting, I, 20.
See, also, DISCRIMINATION; OVERCHARGES.
Fixing and regulating.
Constitutionality of statutes regulating, VII, 251.
Fixing rates in bill of lading, I, 638.
For telegraphing, power of commissioners to fix, VI, 1140.
On interstate freights, power of commissioners to regulate, VI, 1151, 1152.
Power of agents to fix, I, 57.
Power of commissioners to reduce, VI, 1141, 1142.
Power of Interstate Commerce Commission over, VI, 5.
Power of railway commissioners to fix, VI, 1139–1142.
Reduction of, as consideration for limitation of liability, I, 769.
Regulation of, VI, 379.
Regulation of, by state, VIII, 190.
State laws regulating, III, 33.

CHARGES — *continued.*
Lien for.
Distress for collection of, IV, 141.
For salvage, lien for, II, 149.
Holding goods for, II, 250.
Lien for, II, 149; V, 584.
Lien for in cases of stoppage *in transitu*, II, 188.
Lien for, on baggage, I, 560, 561.
Lien of connecting carrier for, I, 787.
Lien of final carrier for, II, 248.
Respective liens of connecting carriers for, II, 206.
Of various carriers.
Canal tolls, I, 734, 735.
Extra fares on chair cars, VII, 131.
Extra, must be reasonable, VII, 1082.
For demurrage, II, 105, 150, 162.
For detention and disinfection of immigrants, VI, 1126.
For inspecting wheat and flour brought into state, VI, 71.
For passage, VII, 1103.
For storage, II, 148; IV, 369; VIII, 164.
Of turnpike companies, VIII, 123.
Of ferries, V, 839.
On toll bridges, I, 723, 724, 725.
Right of transfer company to, II, 250.
Payment of.
Averment as to payment of, II, 276.
Collection of, when does not imply contract for through carriage, II, 226.
Condition as to payment of, by consignee, before delivery, I, 641.
Contract of through shipment, when implied from collection of, II, 226.
Contract to pay, by agent of shipper, in excess of his authority, II, 152.
Implied promise to pay, II, 151.
Payment of, as affecting right to sue for damages, II, 61.
Prepayment of, necessary to maintenance of action against carrier, II, 31, 121, 272.
Rule of carrier requiring prepayment of, II, 164.
Tender of debentures for, III, 960.

CHARITY.
Meaning of the word as applied to work that may be done on Sunday, VIII, 308.

CHARTERS.
General treatment, II, 673.
How granted, II, 673.
Inviolability, II, 678.
Interpretation, II, 696.
Abandonment and forfeiture, II, 710.
Particular charters, II, 716.
In general.
Construction of, I, 87.
Corporations as citizens of state where chartered, III, 2, 4.
Custom not valid if inconsistent with, II, 164.
Duty to keep crossings in repair under provisions of, III, 434.
Exemption from taxation in, VII, 890–892.
Expiration of, as ground of abatement, I, 10.

CHARTERS — *continued.*
In general — *continued.*
Expiration of, as ground of dissolution, IV, 129.
Forfeiture of, when not prevented by lease, VI, 201.
May restrain corporation from making contracts of through carriage, II, 221.
Of Northern Pacific R. Co., construction of, VI, 880.
Of same corporation in two or more states, V, 1012.
Quo warranto to compel surrender of, VII, 367.
Amendment of.
Changes in, when a defense to action on subscriptions, VII, 771–777.
Consent of stockholders to acceptance to, IV, 75.
Effect on municipal subscription to railways, VI, 618.
Power of congress to amend, II, 604.
Municipal.
Allowing streets to be laid out across railroads, III, 436.
Authorizing municipal aid to railways, VI, 564.
Powers under, generally.
Authority in, to bridge navigable streams, I, 711.
Authorizing municipal aid, construction of, VI, 559.
Change of route under provisions of, VI, 359.
Consolidation pursuant to power given in, III, 77.
Construction of elevated railways under special, IV, 275, 276.
Effect of consolidation on special privileges granted by, III, 90.
Effect of, on right to cross tracks of another road, III, 390.
New location, where charter power has been exhausted, VI, 361.
Power in, to occupy street dispenses with municipal assent, VII, 375.
Power of commissioners to regulate charges affected by provisions in, VI, 1142.
Power of company under, I, 578, 579.
Power to issue bonds under provision of, I, 656.
Regulations and restrictions in.
Contracts beyond authority given in, III, 191.
Contracts in excess of charter powers, VIII, 127.
Entry on land before making compensation under power given in, IV, 557.
Equity confines company within strict limits of, V, 353.
Granted subject to local consent, validity of, VII, 386.
Provisions in limiting time to sue, VI, 302.
Regulation of charges by, II, 612–620.
Restrictions in, as to poles and wires in streets, IV, 261.
Restrictions of rate of speed in, VII, 677, 678.
Right to use electricity under, IV, 259.

CHARTERS — *continued.*
Regulations and restrictions in — *con.*
Sale of stock at less than price fixed in, VII, 292.
Validity of leases not authorized by, VI, 205.
See also FRANCHISES; INCORPORATION.

CHATTEL MORTGAGE.
Of cars and other rolling stock, VI, 426–433.

CHEAP TRAINS ACT (England).
Decisions under, II, 518.
Fares under, VII, 1086.

CHECK.
Expulsion of passenger refusing to exchange through ticket for, IV, 179.
For articles deposited in cloak-rooms, I, 575, 576.
For baggage, I, 545, 546.
For drawback of extra fare paid, VII, 1082.
Of conductor, action for failure to honor, IV, 210.
Of conductor, effect, generally, VII, 1060.
Of conductor entitling passenger to stop over, VII, 1057.
See also BILLS, NOTES AND CHECKS.

CHECKING OF BAGGAGE.
Company's rules as to, II, 336.
Not a waiver of condition in limited ticket, VII, 1069.

CHICAGO, ILL.
Decisions particularly applicable to, VI, 759.
The "Lake-front case," VII, 92.

CHIEF ENGINEER.
Powers, duties, and liabilities of, VI, 907.

CHILDREN.
As trespassers, liability for injuries to, VII, 1144.
Care required from carrier of, II, 360.
Damages recoverable by, for death of parent, III, 901, 932, 933.
Duty to fence for protection of, V, 821.
Ejection of passenger for non-payment of fare, IV, 170.
Employed by company, liability for injuries to, V, 246–252.
Fares of, who responsible for, VII, 1079.
Fellow-servant rule as applied to, V, 651.
Illegitimate, right of, to sue for causing death of parent, III, 760.
In charge of mother, damages for expulsion from train, IV, 224.
Measure of damages to parent for death of, III, 938–942.
Of person killed, showing ages and number of, III, 879.
Posthumous, right of, to sue for causing death of father, III, 760.
Posthumous, when entitled to land damages, IV, 572, 908.
Right of action of, for causing death of parent, III, 755, 759.
Validity of releases by, VII, 7.
When deemed passengers, II, 312.
When entitled to land damages, IV, 572.
See also CHILDREN, INJURIES TO; INFANCY; PARENT AND CHILD.

CHILDREN, INJURIES TO.
General treatment, II, 731.
Duties and liabilities of the company, II, 732.
Negligence of street railway companies, II, 752.
Contributory negligence of children, II, 764.
Contributory negligence of parents, custodians, etc., II, 789.
Procedure, II, 807.
Application of doctrine of comparative negligence in cases of, III, 41.
By section of train, V, 1009.
Child invited to ride by motorman, IV, 269.
Contributory negligence as affecting parent's right to recover, V, 251.
Emancipation of child killed, as a defense, III, 810, 941.
Excessive damages in actions for death of child, III, 951–953.
Instructions as to contributory negligence of child, III, 897.
Instructions as to damages for killing child, III, 901.
New trials for excessive damages in actions for, VI, 853.
Questions of fact in actions for, VIII, 49.
See also CHILDREN; INFANCY; PARENT AND CHILD.

CINCINNATI, OHIO.
Power of city to grant exclusive privileges, VII, 370.

CINDERS.
As an element of damages, VII, 664.
Falling on persons in street, liability of company for, IV, 366.
In eminent domain, IV, 335, 336.
Recovery of damages for throwing on property, VII, 652.

CIRCUIT COURTS.
Appeals from, to United States supreme court, V, 639.
Certiorari to, II, 607.
Jurisdiction of, in condemnation proceedings, IV, 492.

CIRCULATION.
Of statutes, VII, 242.

CIRCUMSTANCES.
Goods carried under same or different, IV, 102.
Tending to discredit witness, cross-examining as to, VIII, 222.

CIRCUMSTANTIAL EVIDENCE.
Admissibility and weight of, in stock-killing cases, I, 281, 292, 307.
Admissibility of, in actions for injuries caused by fire, V, 911.
As bearing on question of negligence or due care, III, 296.
Value of, generally, V, 531.
Weight of, V, 297.
Weight of, to show company's negligence, V, 926–929.

CITATION.
Form and sufficiency generally, VI, 1084.

CITIES.
In general.
Authority to construct bridges under contract with, I, 691.
Delegation to, of power to tax, VII, 834.
Duty of, as to condition of streets, VII, 399.
Duty of, to repair bridges, I, 700.
Erection of elevators in, IV, 369.
Indemnity bonds to, to protect against claims for damages, V, 1103.
Not included in constitutional inhibition of aid to railways, VI, 525.
Obstructing streets in, offense of, III, 382.
Ordinances of, allowing the bridging of navigable streams, I, 711.
Ownership of fee in street in, effect of, VII, 596.
Persons walking on tracks in, when deemed trespassers, VII, 1118.
Powder magazine in limits of, V, 558.
Power of, to acquire road, VII, 354.
Power of, to change street grades, VII, 608.
Power of, to relinquish control over streets, VII, 672.
Punishment of officers of, for contempt, III, 184.
Right of, to control and improve streets, VII, 671, 672.
Rights, powers, and duties of various, VI, 758–765.
Taxation of street-cars by, VII, 446.
Constructing or maintaining railroads in.
Branch roads in, I, 683.
Charter provisions locating termini within, II, 702.
Compensation to, for use of streets, IV, 291.
Consent of, to construction of elevated railways, IV, 282.
Construction of cable railways in, I, 727–729.
Grants by, to run steam roads in streets, VII, 565-581.
Liability for defects in construction of track, VII, 415.
Liability of company to, for defect in crossing, III, 471, 472.
Liability of, for insufficiency of culverts, VII, 615.
Liability of, to abutting owners, where railroads are constructed in streets, VII, 629.
Occupation of streets by steam roads with consent of, VII, 565–581.
Percentage of income payable to, by elevated railways, IV, 276.
Power of council to subscribe in aid of railways, VI, 554.
Power of, to authorize electric roads in streets, IV, 260.
Power of, to authorize street-railways, generally, VII, 358–369.
Power of, to grant franchise for private railroads, VI, 1076.
Recovery by, of cost of repairs of street, VII, 409.

CITIES — *continued.*
Constructing or maintaining railroads in — *continued.*
Right to condemn before obtaining consent of, VII, 584.
Right to cross railroad under charter of, III, 436.
Validity of statutes authorizing aid to railways by, VI, 530.
Operating railroads in.
Care required of company in running through, VII, 1129.
Care required to avoid injuries to children in, II, 735.
Consent of, to change of motive power, IV, 260.
Duty to fence track in, I, 144; V, 811, 812.
Duty to give signals at crossings in, III, 493.
Duty to give signals in, III, 523.
Duty to look and listen at crossings in, III, 599.
Duty to maintain lookout while running through, VII, 1136.
Duty to station flagmen at crossings in, III, 483, 484.
Injuries at crossings in, III, 461.
Injuries to animals in, I, 204–208.
Liability for excessive speed at crossings in, III, 533.
Liability for injuries caused by negligence in streets and highways, VII, 693–695.
Liability of, for negligence of street-car company, VII, 458.
Liability of, to persons injured by railways, VII, 693–695.
Not relieved of liability by default of company, VII, 411.
Pleading ordinances of, I, 266.
Power of to license ticket brokers, VII, 1090.
Power of, to restrict rate of speed, VII, 676.
Rate of speed in, as affecting liability for stock killed, I, 206–208.
Recovery over by, against railway company injuring persons or property in street, VII, 704–706.
Regulation of steam roads in streets by, VII, 669–693.
Regulation of tramways in, VII, 1003.
Speed of trains in, when negligence, VI, 786–788, 790–792.
See also MUNICIPAL CORPORATIONS; STREET RAILWAYS; STREETS AND HIGHWAYS; TOWNS; VILLAGES.

CITIZENSHIP; DOMICIL; RESIDENCE.
General treatment, III, 1.
Citizenship.
Diverse, as giving jurisdiction to federal courts, V, 629; VI, 988.
Diverse, as ground for removal of causes to federal courts, VII, 29–35.
Jurisdiction as dependent upon, VI, 109.
Jurisdiction of federal courts as dependent upon, V, 629–631, 633.
Statutes abridging the privileges and immunities of citizens, VII, 255.

CITIZENSHIP; DOMICIL; RESIDENCE — *continued.*
Domicil.
Change of, III, 5.
Place of defendant's, when proper place of trial, VIII, 4.
Residence.
Declarations as to, when hearsay, V, 460.
Necessity of, to perfect adverse possession, I, 36.
Of consignee, delivery of goods at, II, 50, 95.
Of corporations, III, 4.
Of defendant, when proper place of trial, VIII, 4.
Of directors of new company, III, 82.
Of parties, jurisdiction as dependent upon, VI, 109.
Place of, as situs of property for taxation, VII, 884.

CITY COURTS.
Jurisdiction of, in condemnation proceedings, IV, 492.

CITY ORDINANCES.
See ORDINANCES.

CIVIL ENGINEERS.
As experts, VIII, 264, 288.
Authority of, to agree to locate station, VII, 201.
Compensation of, III, 145.
Duty of superintendent to pay estimates of, VII, 824.
Extra work ordered by, when recoverable for by contractor, III, 157.
Personal liability of, for unjust decision as arbitrator, III, 155.
Powers and duties of, in the building of railways, III, 144–155.
Powers of, as arbitrators, III, 152–155.
Rights and liabilities of, I, 44.
Validity of arbitration by, III, 152.
See also SURVEYORS.

CIVIL RIGHTS ACTS.
Validity and construction of, generally, III, 25–27.
See also CARRIAGE OF SLAVES.

CLAIM OF TITLE.
What necessary to found title by adverse possession, I, 35.
See also COLOR OF TITLE.

CLAIMS.
In general.
For loss or stipulation as to time and place of presenting, I, 639.
Notice of, under English statutes in condemnation proceedings, IV, 898.
Of creditors, priority in insolvency, VI, 1194–1200.
Of patented inventions, VI, 949.
Of subrogation of party paying, VII, 725.
Of third persons to property attached, I, 509–510.
Of title, as a defense in ejectment, IV, 252.
Settlement of, by superintendent, VIII, 185.

CLAIMS — *continued.*
In general — *continued.*
Stipulation by carrier for notice of, V, 590.
Timber-culture claims, VI, 1117.
Under land grants, determination of conflicting, VI, 136.
What, barred by release, VII, 8.
What, deemed inferior to execution lien, V, 546.
What, enforceable under Massachusetts Relief Act of 1876, IV, 162.
What, provable in proceedings for dissolution, IV, 136.
When inferior to mortgage lien, VI, 454–457.
For damages, generally.
For damages, limitation of time to present, VI, 340.
For injury to live stock, compromise of by agent, I, 58.
For killing stock, necessity and sufficiency of demand or notice of, I, 241–243.
For land damages, IV, 898.
For loss or damage to goods, reasonable time to make, II, 186.
For stock killed, joinder of, I, 365.
Notice of, to carrier, before removal of live stock, I, 770–775.
Rule of carrier requiring notice of, II, 163.
For labor and materials.
For construction of bridges, statutes relative to, I, 689.
For extra work, III, 132; V, 1050.
For labor and materials, when prior to mortgage, VI, 446, 448.
For labor rights of assignee of, I, 480.
For lien, affidavit to, notice of, etc., VI, 288–291, 297, 298.
For wages, assignment, priority, and release of, V, 8, 11.
Of laborers, assignability of, I, 477.
Of laborers, priority in insolvency, V, 1170.

CLAIMS AGAINST UNITED STATES.
General treatment, III, 7.
For carrying the mails, power of mortgage, VI, 417.

CLASSIFICATION.
Of freights, II, 627, 628, 635; VI, 16, 25–30, 45.
Of freights in estimating charges, II, 627, 628.
Of mail carriers, II, 1.
Of passengers, II, 333.
Of tickets, VII, 1058–1061.

CLEAN HANDS.
Rule as to, in equity, V, 349.

CLERK OF COURT.
Power of, to enter judgment, VI, 81.

CLOAK-ROOMS.
Deposits of parcels in, liability, etc., I, 575, 576.

CLOTHES.
Second-hand, measure of damages for loss or injury of, II, 300.

CLOUD ON TITLE.
General treatment, III, 9.
Quieting title to lands granted by government, VI, 163.

COACHES.
See CARS.

COAL.
Carrier not bound to furnish cars for, until mined, II, 36.
Compelling transportation of, VI, 379.
Discrimination as to receiving and delivering, rates on, etc., IV, 103, 114.
Duty of lessee to pay for waste coal, VI, 231.
Extra charges for handling, II, 642.
Freight rates on anthracite, VI, 17.
Railway connection with coal mines, VI, 403.
Tax on coal mined in one state to be shipper to another, VI, 64.
Transportation of, when deemed a public use, IV, 461.

COAL-CHUTE.
Obstructing track by, V, 64.

COAL-HEAVER.
When fellow-servant of track walker, V, 760.

C. O. D.
Duty of carrier to collect price, II, 115.
Duty to give consignor notice of failure of consignee to receive, II, 103.
Liability for loss of C. O. D. goods, II, 26; V, 582.
Notice of arrival of goods so sent, II, 103.
Notice to consignor of consignee's refusal to receive goods, II, 103, 148.

CO-EMPLOYÉ.
See FELLOW-SERVANTS.

COIN.
Allowing premium as damages for loss of, II, 288.
When payment must be made in, VI, 964.

COLLATERAL ATTACK.
Forfeiture not enforced on, IV, 136.
On charters, II, 714.
On condemnation proceedings, IV, 767–770.
On letters of administration, V, 552.
On petition in municipal aid proceedings, VI, 571.
Upon election of directors, IV, 54.
Upon judgment, VI, 99, 100.
Upon validity of consolidation, III, 81.

COLLATERAL SECURITY.
See PLEDGE.

COLLECTION.
By express companies, V, 568, 569.
Of charges, remedies for, II, 643–649.
Of claims for injuries to cattle, constitutionality of statutes providing for, I, 91.
Of goods, discrimination in, IV, 118.
Of railway fares, VII, 1079–1083.
Of taxes, VII, 983–996.
Of taxes in Canada, VII, 1020.
Of tolls by distress, IV, 141.
Unequal charges for, IV, 95, 96.

COLLECTOR.
Of customs, powers, duties, and liabilities of, VII, 68.
Of taxes, appointment, powers, and duties of, VII, 985–989.

COLLISIONS.
General treatment, III, 11.
In general, III, 12.
Injuries to passengers, III, 12.
Injuries to employés, III, 21.

In general.
Actual, necessity of, to give right of action for personal injury, VII, 1131.
Between cable-cars and other vehicles, I, 731.
Between persons crossing track, III, 637.
Between street-cars and teams or other objects, VII, 470, 471, 513, 518, 519.
On elevated railway during blizzard, IV, 359.
With bridge piers, I, 705.
With teams at crossings, III, 466, 467.
With teams in streets, liability of company for, VII, 699.
With trolley-cars, IV, 269.

Causing death.
Application of doctrine of comparative negligence to, III, 42.
Contributory negligence in endeavoring to avoid, III, 820.

Injuring animals.
Between train and animal killed, necessity of, to warrant recovery, I, 131–139, 164.
With animals, alleging in complaint, I, 252.
With animals at crossings, I, 200–202.
With animals, evidence to prove, I, 294.
With animals killed, necessity of actual, I, 164.
With animals on track, necessity of, to enable owner to recover, I, 131–137.

Injuring employes.
Caused by negligence of vice-principal, liability of company, V, 680
Jumping from moving cars avoid, V, 219.
Liability for injuries to employés caused by, V, 254.
Non-liability for acts of fellow-servants resulting in, V, 659, 660.
Remaining on engine in face of impending, V, 209.
With cattle caused by failure to fence, V, 61.
With cattle or teams, assumption of risk as to, V, 138.

Injuring passengers.
At crossings of other railroads, II, 386.
Jumping from moving car to avoid, II, 487.
Riding in baggage-car at time of, II, 511.
With baggage-trucks, II, 419.
With cattle on track, II, 385.
With object near track, arm out of window, II, 507–509.

COLLUSION.
Among bidders, effect of on validity of foreclosure sale, VI, 513.
As ground of abatement, I, 8.
Delivery by, after stopping *in transitu*, II, 190.

COLORADO.
Absolute liability for killing stock in, I, 156.
Animals running at large in, I, 224.
Assessment and levy of railroad taxes in, VII, 937.
Constitutional provisions in, relative to eminent domain, IV, 384, 387.
Deductions for benefits in, IV, 711.
Double damages for killing stock under statute of, I, 351.
Operation of statute of, giving right of action for causing death, III, 747.
Statute of, regulating liability for injuries caused by fire, V, 853.
Statute of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 710.
Statute of, relative to connecting lines, III, 65.
Statutory duty to fence in, V, 800.

COLOR-BLINDNESS.
Statutory examination for, V, 3; VI, 398.

COLORED PERSONS.
General treatment, III, 25.
Ejection of, from room reserved for white persons, VII, 224.
Rights of, as passengers under Interstate Commerce Act, VI, 69.
Right to remove from room reserved for white persons, VII, 224.
See also CARRIAGE OF SLAVES; CIVIL RIGHTS ACTS.

COLOR OF TITLE.
As a defense in ejectment, IV, 252.
In the law of adverse possession, I, 35.
See also CLAIM OF TITLE.

COLUMBUS, GA.
Decisions particularly applicable to, VI, 759.

COMBUSTIBLE MATTER.
Accumulation of, when contributory negligence, V, 890–893.
Allegation of allowing, on right of way, in action for injuries caused by fire, V, 903.
Allowing bark to accumulate on right of way, V, 871.
Allowing brush to accumulate near right of way, V, 890.
Allowing dry grass to accumulate on right of way, V, 871, 872, 877, 891.
Allowing fallen leaves, etc., to accumulate near right of way, V, 891, 892.
Allowing fallen timber to accumulate near right of way, V, 890.
Allowing hedge trimmings to accumulate on right of way, V, 871.
Allowing stubble to accumulate on or near right of way, V, 891, 892.
Carrying as freight, I, 171.
Damages for destroying hay, V, 963.

COMBUSTIBLE MATTER — *continued.*
Inflammable buildings, using or maintaining, V, 873, 878.
In stock-car, effect of, I, 757.
Leaving chips, logs, etc., on right of way, V, 873.
On right of way, V, 869–873, 953.
On right of way, admissibility of evidence to show negligence in permitting, V, 910.
On right of way, presumptive evidence of negligence in allowing, V, 935.
On right of way, weight of evidence to show negligence in allowing, V, 925.
Piling cord-wood on right of way, V, 892.
Removal of hay from right of way, VII, 81.
Stacking hay or straw near right of way, penalty for, VI, 967.
Starting fire in peat, on right of way, V, 872, 878.
See also COTTON; RUBBISH; WOOD.

COMITY.
Between states, VII, 184.

COMMANDS.
Of fellow-servants, obedience to, effect of, V, 651.
Of military officer, acts justified by, VIII, 160.

COMMENCEMENT.
Of action to stop running of limitation, what is, VI, 305.
Of action, when interest runs from, V, 1175.
Of carrier's liability, II, 42–45.
Of carrier's liability for baggage, I, 541–546.
Of liability of intermediate carrier, II, 236.
Of proceedings to condemn, when constitutes a "taking," IV, 444.
Of relation of carrier and passenger, II, 314–316.
Of suit, damages when limited to, VI, 901.

COMMENTS.
Upon evidence and witnesses in instructions, VIII, 53, 65.

COMMERCE.
General treatment, III, 31.
Definition of the word, VIII, 308.
Interstate, VI, 1–71.
Statutes regulating, VII, 250, 251.

COMMERCIAL CORPORATIONS.
Meaning of the words as used in Bankrupt Act, VIII, 308.

COMMERCIAL TRAVELERS.
Carriage of samples of, as baggage, I, 540.
Damages for loss of samples of, II, 304.
Special rates to, VI, 30.

COMMISSIONERS.
Assessment of land damages by, IV, 593–604, 618.
Authority of, as to location of stations, VII, 196, 200.
Compensation of, VI, 1158.
Examination of proposed route by, VI, 355, 356.
Fees of, when allowed in costs, IV, 733.
In partition, VI, 934.

COMMISSIONERS — *continued.*
Of appraisal, in condemnation of city streets, IV, 291.
Of appraisal of abutting easements, IV, 286.
Of subways, consent of, as to poles and wires in streets, IV, 262.
Of Supreme Court, powers and duties, in elevated railway law, IV, 282–284.
Penalty for failure to comply with orders of, III, 456.
Permission by, to build bridge, I, 691.
Powers and duties of, I, 712.
Powers and duties of, in relation to subscription, VII, 730.
Powers and jurisdiction of, VI, 254.
Powers of, as to route, mode of operation, motive power, etc., VI, 1155, 1156.
Regulation of carriers' charges by, II, 620–622, 640, 661.
Report of, in condemnation proceedings, IV, 734–747.
Specific enforcement of orders of, III, 456.
To make municipal subscription, duties of, VI, 612.
See also RAILWAY COMMISSIONERS; INTERSTATE COMMERCE.

COMMISSIONS.
Agents, when entitled to, I, 50, 51.
Of county treasurer, III, 332.
Of receiver, salary in lieu of, VI, 1221.
Of tax collectors, VII, 988.
Of trustees, VIII, 119.
On foreclosure sales, VI, 501.
To take depositions, V, 522.

COMMITMENT.
For violation of injunction, when refused, V, 1161.

COMMON CARRIERS.
Evidence of, II, 285.
Of merchandise, who are, II, 13–16.
When carriers liable as, II, 26.
When company liable as, while goods await delivery, II, 78.
When intermediate company liable as, II, 238.
When liability begins and ends, II, 42–45.
Who are, VIII, 308.
See also titles referred to under CARRIERS.

COMMON COUNTS.
What recoverable under, I, 485.

COMMON EMPLOYMENT.
Servants in, V, 686.

COMMON KNOWLEDGE.
Judicial notice of matters of, V, 438.
Matters of, do not call for expert testimony, VIII, 267.

COMMON LAW.
In general.
Construction of statutes declaratory of, VII, 266.
Dedication of streets at, VII, 541.
Duty of owner to fence in stock at, I, 114.
No civil remedy for homicide at, III, 742–745.
Presumption that it is in force in other jurisdictions, V, 447.

COMMON LAW — *continued.*
In general — *continued.*
Requisites of commercial paper at, I, 586–590.
Requisites of contracts at, III, 192–197.
Requisites of deeds at, IV, 3–5.
As to carriers.
Charges must be reasonable at, II, 622.
Discrimination at, IV, 83, 105.
Duty to fence track at, I, 138; V, 797.
Duty to station flagmen at crossing under, III, 482.
Election to sue under, or under statute for killing stock, I, 239.
Liability of carriers of goods at, II, 16–25.
Liability of initial carrier at, II, 213.
Liability of street-car company at, VII, 454.
No obligation to carry live stock at, I, 737, 747.
Obligations of connecting lines at, II, 200.
Power to limit liability imposed by, V, 585; VI, 331–341.

COMMON LAW ACTIONS.
What are, I, 30.

COMMON RUMOR.
Evidence of, when not deemed hearsay, V, 461.

COMMONS.
Conveyance of right of way on, VII, 571.
Enjoining occupation of, by railroads, VII, 643.
See also PARKS.

COMMUNICATIONS.
Between jurors and outside parties, VI, 842.
When privileged, I, 521; VI, 258; VIII, 228–230.

COMMUTATION TICKETS.
Definition of, VIII, 300.
On street railways, VII, 537.
Rights conferred by, generally, VII, 1061–1063.

COMPARATIVE NEGLIGENCE.
General treatment, III, 37.
Illinois doctrine, III, 37.
In other jurisdictions, III, 49.
Application of the doctrine in actions for injuries caused by fire, V, 958.
Application of the doctrine in stock-killing cases, I, 217, 218.
Application of the Illinois doctrine to actions for injuries caused by fire, V, 889.
Doctrine of, as applied to trespassers, VII, 1162.
Effect of slight negligence on part of person crossing track, III, 547.
How far analogous to contributory negligence, III, 247–251.
Non-reversible errors in instructions as to, I, 408.
Of company and person killed, III, 899, 910.
Of injured employé and company, V, 202.
Of injured passenger and carrier, II, 449.

COMPARISON.
Of handwriting, VIII, 294.

COMPARTMENT CARS.
Patents for signal bells in, VI, 961.

COMPEL.
Meaning of the word as used in instructions, VIII, 309.

COMPENSATION.
In general.
Claims against government for, III, 9.
Elements of, as damages, III, 681.
Jurisdiction of equity of suits for, V, 356.
Obtainable at law bars injunction suit, IV, 303.
Of creditors upon abandonment of road, I, 6.
Of purchaser in bad faith for improvements, VI, 506.
Pleading in actions for, VI, 397.
To city for use of streets, IV, 291.
To lessor, lessee running extra trains, VI, 231.
To lessor where third rail is necessary to narrow-gauge road, VI, 247.

For property taken or injured.
For imposition of an additional servitude, IV, 446.
For injuriously affecting property not taken, when necessary, IV, 451.
For land compulsorily purchased, under English statutes, IV, 902–920.
For land expropriated in Canada, IV, 933–949.
For land taken, assessment of by arbitrators, IV, 909–912.
For land taken, assessment of by jury, IV, 912–916.
For land taken, assessment of by justice and surveyor, IV, 909.
For land taken, elements and measure of, IV, 916–920.
For land taken for embankments, IV, 372.
For land taken, who entitled to, IV, 560–574, 905–909.
For property taken, assessment by appraisers or viewers, IV, 588–591.
For property taken, assessment by arbitrators, IV, 591–593.
For property taken, assessment by commissioners, IV, 593–604.
For property taken, assessment by jury, IV, 604–639.
For property taken, how assessed, generally, IV, 574–588.
For the taking of a homestead for right of way, V, 1065.
Meaning of the word as applied to taking land, VIII, 309, 310.
Must be provided for in delegating power to condemn property, IV, 412.
Necessity of, and how made or secured, in condemnation proceedings, IV, 540–663.
Of landowner in case of abandonment of road, I, 6.
Right of condemning company to enter before making, IV, 556–559.
Right to, on part of railroad crossed by another, III, 398, 404–408.

COMPENSATION — *continued.*
For property taken or injured — *con.*
To company for laying out street across tracks, III, 442–446.
To owner of land taken for new road, VII, 626.

For services rendered.
Amount of, for carrying mails, II, 7.
For carrying mails and mail clerks, II, 4–8.
For construction of cattle-guards, II, 598.
For services rendered to the government, VI, 132.
Of agents, I, 50, 51.
Of arbitrators, I, 458.
Of attorneys, I, 515–520.
Of collector of customs, VII, 68.
Of commissioners, VI, 1158.
Of company's engineer, III, 145.
Of corporate officers, VI, 907.
Of county treasurer, III, 332.
Of directors, IV, 58–61.
Of employés, generally, V, 8–14.
Of mail clerks, inspectors, etc., II, 9.
Of officers, when may be reached in attachment, I, 497.
Of physicians, VI, 396, 397.
Of president of corporation, VI, 1072.
Of railway commissioners, VI, 1153, 1154.
Of railway company for carrying express matter, V, 565.
Of railway contractors, III, 135, 136.
Of receivers, VI, 1220–1222.
Of superintendent, VII, 824.
Of trustees, VIII, 119.
Of trustees under mortgage, VI, 468, 469.
Of witnesses, VIII, 193.

For use of track.
For joint use of street-car tracks, VII, 435, 436.
For running powers, how estimated, VI, 245.
For use of track by rival company, VII, 435, 436.
For use of track, how determined, VI, 245.

To abutting owners.
For taking of abutting easements, IV, 298.
Injunction where not made or tendered, IV, 303.
Necessity of, on constructing steam-railway in street, VII, 434–437.
Power of city to authorize street-railway without, VII, 424.
To abutting owners, V, 1051.
To abutting owners for construction of railway in street, VII, 362, 375, 416–419.

COMPENSATORY DAMAGES.
For injury to passenger, II, 569.
In actions for injuries to employés, V, 337.
In stock-killing cases, I, 345.
When deemed excessive, IV, 238.
When measure for wrongful expulsion from cars, IV, 225–230.
When measure of recovery, III, 678–682.

COMPENSATORY DAMAGES — *con.*
When recoverable, III, 30.
When recoverable, failure to show case for exemplary damages, III, 946.
See also ACTUAL DAMAGES.

COMPETENCY.
Generally.
Of arbitrators, in condemnation proceedings, IV, 591, 941.
Of jurors, sufficiency of objections to, I, 415.
[illegible]mbers of corporations as witnesses, VIII, 196.
[illegible]ife where husband is a nominal party, VIII, 200.
Of witnesses, VIII, 194–201.
Of employes.
Of conductor, evidence to show, II, 537.
Of fellow-servants, V, 694–707.
Of fellow-servants, evidence on question of, V, 780–785.
Of negligent fellow-servant as a witness, V, 779.
Presumption of, V, 300, 442.
Of evidence.
Generally, V, 388–434.
In condemnation proceedings, IV, 536.
Objections as to, I, 415.
Of experts.
Generally, VIII, 269–152.
Testing on cross-examination, VIII, 223.
Of plaintiff.
In action against corporation, VIII, 195.
To prove value or contents of lost baggage, I, 570.

COMPETING LINES.
See PARALLEL AND COMPETING LINES.

COMPETITION.
As affecting passenger fares, VI, 40.
As affecting rates, VI, 13.
As affecting relative charges for long and short hauls, VI, 39, 40.
Between rival roads, effect of, generally, VI, 21, 22.
Discrimination, when justified by, IV, 108–111.
When justifies different rates of charges, II, 627.

"COMPETITIVE STATIONS."
Meaning of, in contract, III, 204.

COMPLAINANT.
Joinder of, in equity, VI, 930.
Must come with clean hands, V, 349.
Necessity of performance by, VII, 147.
Who may be, in condemnation proceedings, IV, 492–494.
See also PLAINTIFF.

COMPLAINT.
In general.
Amendment of, IV, 313; VI, 1043–1054.
Before Interstate Commerce Commission, VI, 5, 50–52.
Form, requisites, and sufficiency of, in actions, generally, VI, 985–1001.
In action for overcharge of fare, VII, 1083.
In action for penalty under Contract Labor Law, III, 185.

COMPLAINT — *continued.*
In general — *continued.*
In actions for taxes, VII, 992.
In ejectment, requisites and sufficiency of, IV, 252.
In justice's court, requisites of, VI, 122.
In proceedings for dissolution, sufficiency of, IV, 135.
Making more definite and certain, II, 277.
Of unjust preference, jurisdiction to investigate, VI, 1140.
Sufficiency of allegation of negligence in, 818–821.
Sufficiency of, on application for receiver, VI, 1175.
In condemnation proceedings, IV, 512–526.
For trespass in entry and construction of road, IV, 872.
In contract.
In actions on bonds, I, 677.
In actions on construction contracts, III, 170.
In actions on negotiable instruments, I, 597.
In actions to enforce subscriptions to stock, VII, 759.
In stockholders' actions, VII, 346, 347.
In equity.
For injunction, sufficiency of, IV, 864.
In suit to enjoin unlawful tax, VII, 1009.
Injuries to animals.
Amendment of, in justice's court, I, 365.
In actions against carriers of live stock, I, 803.
In actions for killing stock, I, 246–269.
In justice's court, requisites of, I, 358–364.
In streets.
In action at law by abutter for injury by railway, VII, 644.
In action for injuries to passenger on street-car, VII, 506.
In action for injury at crossings, III, 526, 559.
In action for personal injury, VII, 523, 699.
In action to enjoin steam railway in street, VII, 648.
In proceeding to obtain right to cross another railroad, III, 401.
In torts, generally.
For boycotting, sufficiency of, I, 680.
In action for flowing land, V, 990.
In action for injury at station, VII, 232.
In action for injury caused by fire, V, 899–907.
In action for loss of or damage to goods, II, 274–278.
In action of trespass, VII, 1111.
Personal injuries, generally.
For assault upon passenger, II, 524.
For injuries by collision, III, 15.
For injuries by derailment, IV, 40.
For injuries by negligence of fellow servants, V, 773.
For injuries to child, II, 809.
For injuries to employés, V, 261–273.

COMPLAINT — *continued.*
Personal injuries, generally — *continued.*
For injury to passengers, II, 524–531.
For loss of baggage, I, 568.
For wrongful expulsion from train, IV, 213–217.
Sufficiency of, V, 262.
Sufficiency of in actions for causing death, III, 790–806.
COMPLETION.
Of elevated railway, fixing time for, IV, 280.
Of government-aided road, II, 604.
Of railway, indemnity to the crown to secure, V, 1104.
Of road as condition precedent to donation, VI, 650.
Of road, construction of statutes relative to time of, VII, 269.
Of road, power to take lands after expiration of time for, IV, 406.
Of road, subscription to be paid upon, VI, 640.
Of road, time within which to fence after, V, 810.
When road is completed within acts of congress, VI, 129.
COMPRESS COMPANY.
Insurable interest of, V, 844.
COMPROMISE.
General treatment, III, 55.
By agent, of claim for injury to live stock, I, 58.
Estoppel by, V, 381.
Evidence of efforts to make, V, 411.
Of claims for taxes, VII, 986.
Offers of, as evidence, V, 500.
Offers of evidence as to, in actions for loss of baggage, I, 571.
Power of attorneys to make, I, 514.
Power of personal representatives to make, V, 553.
With client, effect of, on attorney's lien, I, 518.
See also RELEASE.
COMPTROLLER GENERAL.
Power of, over accounts of Western Atlantic R. Co., VIII, 185.
COMPULSORY EXAMINATION.
Of the person, see PHYSICAL EXAMINATION.
COMPULSORY NONSUIT.
See NONSUIT.
COMPULSORY PURCHASE.
Of land, under English statutes, IV, 880–924.
COMPUTATION.
Of damages for breach of construction contract, III, 177.
Of damages to abutting owners, rules for, IV, 329.
Of damages to child for death of parent, III, 933.
Of damages to wife for death of husband, III, 935.
Of interest, V, 1175.
Of prospective damages for causing death, III, 944.
COMPUTATION — *continued.*
Of time, under statutes of limitation, VI, 327.
CONCEALMENT.
By shipper, of kind or value of goods, II, 88, 89, 169.
Of value or contents of baggage, effect of, I, 558–560.
When limitation begins to run in cases of, VI, 312, 329.
CONCLUSIONS.
Facts and not conclusions must be alleged, I, 249.
Of declaration or complaint in action for damages caused by fire, V, 900.
Of law must not be stated in pleadings, VI, 984.
Of witnesses, inadmissible, IV, 219; V, 400.
Of witnesses on evidence, VIII, 230.
Questions to witness calling for, VIII, 214.
CONCLUSIVENESS.
Of assessment by jury, under English Compulsory Purchase statutes, IV, 915.
Of award, I, 461.
Of award under English and Canadian statutes, IV, 911, 944.
Of carrier's receipt for goods, II, 157.
Of commissioners' decisions, VI, 49, 50; 1146–1149.
Of compromise, III, 55.
Of decision of court below, I, 380.
Of decisions of land officers, VI, 1108.
Of decrees of foreclosure, VI, 488.
Of engineer's award or decision, III, 146, 149, 153.
Of expert testimony, VIII, 297.
Of general verdict, VIII, 105.
Of judgment against corporation in action by creditor against stockholder, VII, 314.
Of judgments, generally, VI, 84–99.
Of judgments in condemnation proceedings, IV, 757, 770, 778.
Of ordinances as to right of way through streets, VII, 574.
Of prior condemnation proceedings, IV, 404.
Of railway tickets, VII, 1041.
Of receipt, VI, 1160.
Of release, VII, 8.
Of rulings in equity in subsequent action at law, VI, 97.
Of settlements between company and contractor, III, 138.
Of verdict of jury to assess land damages, IV, 750, 770.
CONCURRENT JURISDICTION.
See JURISDICTION.
CONCURRENT NEGLIGENCE.
Effect of, generally, III, 246.
Of fellow-servants and company, liability for, V, 665–671.
Of plaintiff and another, when a defense, V, 1088; VI, 818.
Of two carriers, which liable, II, 524.
CONDEMNATION.
See EMINENT DOMAIN.

CONDITION.
Financial, of deceased, proof of, in action for causing death, III, 880, 883.
Of animals carried, notice to carrier of, I, 749.
Of approaches to bridge, I, 701.
Of bridges, duty of company as to, I, 697–700.
Of crossing where person is killed, effect of, III, 828.
Of culverts, duty of company as to, III 661.
Of goods carried, presumptions as to, II, 265.
Of goods delivered by carrier, presumption as to, II, 114.
Of goods on delivery to succeeding carrier, presumption of, II, 240, 247.
Of goods shipped, bill of lading as evidence of, I, 607, 608; II, 83.
Of injured person, opinion of witness as to, VIII, 239, 240.
Of parties, pecuniary, evidence of, V, 416.
Of persons on track helpless or unconscious, VII, 1144.
Of plaintiff, financially, as bearing on assessment of damages, III, 724.
Of premises, duty of company as to, VI, 270.
Of track, allegations in pleading as to, II, 529.
Of track, care required as to, VI, 780.
Of track, evidence as to, II, 536.

CONDITIONAL DELIVERY.
Parol evidence to show, V, 480.

CONDITIONAL EXECUTION.
Of instrument, parol evidence to show, V, 481.

CONDITIONAL SALES.
Relative rights of mortgagee and conditional vendor of rolling stock, VI, 429–433.
What are, and rights of the parties, VII, 102.

CONDITIONAL SUBSCRIPTIONS.
In aid of railways, VI, 628–643.
To stock, validity of, VII, 800–807.

CONDITIONS.
In general.
As to payment of freight before delivery of goods, I, 641.
In contracts, generally, III, 206–209.
In negotiable instruments, I, 591.
Precedent, III, 131, 207; V, 1096; VII, 391.
Subsequent, III, 209.
Upon appointment of receiver in foreclosure, VI, 492.

In condemnation proceedings.
As to payment of compensation, waiver of, IV, 559, 560.
Grants to company on, in Canada, IV, 926.
In conveyance of rights of way, IV, 471–473.
In deposit of compensation for land taken, IV, 550.
Precedent, IV, 472, 548.

CONDITIONS — *continued.*
In condemnation proceedings — *con.*
Statutory, as to condemnation, alleging non-compliance with, IV, 531.
Subsequent, IV, 473.

In contracts for carriage of goods.
In bill of lading, I, 625–643.
In contract to deliver goods at a specified time, II, 159.
Limitation of liability by conditions in bill of lading, V, 586.
On receipts, not special limitations of liability, II, 165.

In contracts for carriage of passengers or baggage.
For identification of passenger, waiver of, VII, 1068.
In checks for articles deposited in cloakrooms, I, 575, 576.
In free passes, VI, 943–946.
In railway tickets, VII, 1044–1046, 1072, 1073.
In round-trip tickets, as to identification, stamping, etc., VII, 1067–1069.
In ticket, effect of, to limit liability for baggage, I, 562.
Limiting liability in receipts for baggage, I, 563.
That drover traveling with cattle shall assume all risks, I, 795.

In deeds, franchises and grants.
As to use of franchises, V, 1026.
Imposed by city, upon occupation of street, VII, 386.
In charters, II, 708.
In deeds, IV, 14–20.
In deeds, acquiring easements by, IV, 160.
In grant, forfeiture for breach of, VI, 170, 173.
In grants of street-railway franchises, VII, 382–394.
In grants, reversion for breach of, VI, 142.
In municipal grant of right to run steam railroad through street, VII, 576, 577.
Precedent, IV, 15.
Precedent, in charters, II, 708.
Subsequent, IV, 15.
Upon use of street, right of city to impose, VII, 396.

In subscriptions.
Breach of, by company as a defense in suit by creditor against stockholder, VII, 326.
Effect of, on right to levy assessments, VII, 747.
Imposed by statute, on aid to railways, VI, 629.
Imposed by voters, as to municipal subscriptions to railways, VI, 599.
In donations to railways, VI, 649, 650.
In petition to grant municipal aid to railways, VI, 569.
In railway aid bonds as to funds from which payable, VI, 678.
In taxpayers' consent to municipal aid to railways, VI, 572.
Pertaining to recovery of stock, VII, 815.

CONDITIONS — *continued.*
In subscriptions — *continued.*
Precedent, VI, 557, 578, 598, 625, 631, 650; VII, 801, 809.
Precedent, as to construction of station, VII, 811.
Subsequent, VI, 631, 642; VII, 801.
That other municipalities subscribe, VI, 634.
That road be built and running at stated time, VI, 634.
To stock, VII, 800–816.
Waiver of, as respects municipal aid to railways, VI, 632.

CONDUCTOR.
General treatment, III, 58.
As expert witness, VIII, 292.
As fellow-servant of brakemen, V, 759.
As fellow-servant of engineer, V, 742.
Authority of, to summon physician, VI, 393.
Averment of negligence of, III, 800.
Checks of, effect generally, VII, 1060.
Contributory negligence of, as a defense to action for killing, III, 839.
Duty to notify, of obstruction on track, III, 23.
Evidence to show competency of, II, 537.
Exemplary damage for malicious acts of, IV, 232.
Expulsion by, after ticket wrongfully taken up by another conductor, IV, 170, 171.
Force used by, in ejecting passengers, IV, 195–200.
Good faith of, to mitigate damages, IV, 237.
Indorsement by, on ticket, giving right to stop over, VII, 1057.
Liability of company for false imprisonment by, V, 607.
Liability of, for killing stock, I, 239.
Liability of street-car company for acts of, VII, 535.
Mistake of, expulsion of passenger by reason of, IV, 179.
On road owned by crown, liability of, to passenger injured, II, 524.
Passenger injured in following directions of, II, 450, 483.
Requirement of, on street-cars, IV, 266; VII, 441, 472.
Riding in baggage-car with consent of, II, 510.
Right of, to refuse to make unusual stop, II, 408.
Rude and abusive language by, IV, 197.
Service of process on, VI, 1096.
Special agreement by, to stop to let off passenger, II, 408.
Stop-over checks given by, VII, 1057.
Taking up wrong end of round-trip ticket by, expulsion after, IV, 185.
Waiver of rule of company by, V, 34.
Wanton and malicious acts of, IV, 197.
When baggageman is fellow-servant of, V, 758.
When deemed fellow-servant of other employés, V, 732–740.
When fellow-servant of engineer on same train, V, 742.

CONDUCTOR — *continued.*
When train hand is fellow-servant of, V, 770.
When vice-principal of construction hands and track repairers, V, 735.
When vice-principal of engineer, V, 735.
When vice-principal of porter, V, 737.

CONFEDERACY.
Liability of carrier for acts of army of, II, 19; VIII, 160, 161.
Payments in money of, VI, 963; VIII, 159.
Status of, VIII, 158.
See also PUBLIC ENEMY.

CONFESSION.
Entry of judgment by, VI, 81.

CONFESSION AND AVOIDANCE.
Plea of, alleging contributory negligence, III, 282.
Pleading matter in, VI, 1005.

CONFIDENTIAL COMMUNICATIONS.
See PRIVILEGED COMMUNICATIONS.

CONFIRMATION.
Of awards, generally, I, 461.
Of awards in condemnation, IV, 592.
Of land patents, VI, 1119.
Of municipal grant of street-railway franchise, VII, 389.
Of report of commissioners, IV, 283, 284.
Of report of commissioners in condemnation, IV, 738.
Of sale in foreclosure, VI, 501.
Of witness' testimony, VIII, 209.

CONFISCATION.
Of stock, VIII, 160.

CONFLICT.
In general.
As to possession between receivers and attachment creditors or assignees in bankruptcy, VI, 1180, 1181.
Between instructions, reversal for, I, 395.
Between land grants and homestead claims, VI, 138, 172.
Between land grants to different roads, VI, 172.
Between receivers in federal and state courts, VI, 1180.
Between written and printed parts of contract for through carriage, II, 231.
Of attachments, I, 489.
Of claims under grants, determination of, VI, 136.
Of rights to shore front, VII, 86.
Of evidence.
As to liability of initial carrier, II, 207.
As to negligence, question for jury, VI, 807.
Between expert testimony and established facts, effect of, VIII, 298.
Granting new trial in cases of, VI, 848.
In actions against street-railway companies, VII, 523.
Instructions in cases of, III, 886.
Nonsuit in cases of, VIII, 31, 32.
Raises question of fact for jury, VIII, 46.
Review of, on appeal, I, 426.
See LAW OF PLACE.

CONFLICT — *continued.*
Of jurisdiction.
As to the appointment of receivers, VI, 1163.
Between federal and state courts, V, 635.
Between federal and state courts in injunction suits, V, 1161.
In mortgage foreclosure, VI, 474.
Of laws.
As to age of responsibility for due care, II, 766.
As to construction and validity of contracts, III, 228, 229.
As to damages for injuries to passengers, II, 574.
As to effect of statutes of limitations, VI, 304.
As to evidence in actions for injuries to employés, V, 276.
As to rate of interest, V, 1176.
As to right to sue for injuries to children, II, 808.
As to usury, VIII, 144.
As to validity of railway aid bonds, VI, 674.
Liability of foreign corporation, by what law determined, V, 1019.

CONFUSION OF GOODS.
By carrier, II, 95, 114.

CONGRESS.
Authority from, to bridge navigable streams, I, 709.
Civil Rights Acts of, III, 25.
Constitutionality of acts of, relative to removal of causes, VII, 20.
Power of, to amend charters, II, 604.
Power of, to create an interstate commerce commission, VI, 5.
Power of, to exempt railways from state taxation, VII, 889.
Power of, to regulate commerce, III, 32.
Power of, to regulate interstate commerce, VI, 1–3, 68.
Tax on franchise granted by, VI, 59.

CONNECTICUT.
Assessment and levy of railroad taxes in, VII, 937.
Conditions exempting carrier from liability to person riding on free pass in, VI, 943.
Constitutionality of statutes of, relative to condemnation of land, IV, 387.
Distribution of proceeds of action for causing death, under statutes of, III, 761, 921.
Fence laws of, V, 801.
Limitation of liability for negligence as respects injuries to employés in, V, 126.
Local assessment upon steam railways in, or repairs, paving, etc., VII, 685.
Occupation of streets by steam roads under legislative grants of, VII, 557.
Statutes of, authorizing municipal aid to railways, VI, 537.
Statute of, regulating liability for injuries caused by fire, V, 853.
Statutes of, relative to condemning right of way through streets, VII, 585.

CONNECTICUT — *continued.*
Statutes of, relative to highway crossings over railroads, III, 449–456.
Statutes of, relative to stations, VII, 205.
Statutory provisions in, limiting amount recoverable for causing death, III, 921.
Taking land for streets and laying out roads in, VII, 547.

CONNECTING LINES.
General treatment, III, 64.
In general.
Boycott by railroad employés against, VI, 19.
Charter provisions as to physical connection, II, 707.
Connecting with branch road, I, 683.
Construction of statutes relative to, VII, 268.
Duty of receivers to grant equal facilities to, VI, 35.
Liability for injury to employé of, V, 254.
Power of mortgage receiver to lease, VI, 494.
Subscriptions in aid of, VI, 624.
When deemed engaged in interstate commerce, I, 783–788; VI, 3.
As carriers of goods.
As carriers of merchandise, II, 200–263.
Connecting express companies, V, 595–598.
Contracts by agents for shipment over, I, 57.
Division of charges between, II, 647.
Duty of intermediate carrier to pay charges to preceding carrier, VI, 24.
Duty of, to give through rates, VI, 14.
Duty to pay charges to next preceding carrier, VI, 24.
Duty to receive cars of another company, VI, 34.
Liability of last carrier to preceding one for charges, II, 647.
Limitation of liability as between, II, 252–263.
Limiting liability for connecting carrier's negligence, I, 627–629.
Limiting liability to loss on initial carrier's line, I, 629.
Regulation of traffic over, by commissioners, VI, 1139.
Right of last or intermediate carrier to demand charges, II, 647, 648.
As carriers of passengers or baggage.
As carriers of passengers, II, 512–518.
Carriage of baggage by, I, 526–533.
Delivery of check for baggage to connecting carrier, I, 546.
Issuing round-trip tickets by, VII, 1065.
Limitation, in ticket, of liability to line issuing ticket, VII, 1045.
Limited tickets on, VII, 1073–1075.
Stop-over privileges on, VII, 1054.

CONNECTIONS.
Power of city to authorize, VII, 355.

CONSENT.
In general.
By stockholders, to consolidation — estoppel, III, 81.

CONSENT — *continued.*
In general — *continued.*
Conclusiveness of judgment by, VI, 98.
Decree by, in railway foreclosure, VI, 489.
Jurisdiction cannot be conferred by, VI, 108.
Of bondholders that trustees sue to foreclose, VI, 377.
Of carrier, to act of injured passenger, evidence of, II, 542.
Of conductor, riding in baggage car with, II, 510.
Of connecting carrier, necessary to bind it to contract of through carrier, II, 224.
Of other lienholders to issue of receivers' certificates, VI, 1203.
Of parents to employment of minor child, V, 246, 248.
Of stockholders to acceptance of amendment to charter, IV, 75.
Of stockholders to railway lease, VI, 206.
To forfeiture of charter, II, 715.
To transfer of stock, right of officers to withhold, VII, 293.
To use of track as footway, VI, 272, 274.
Of local authorities.
By city, as owner of abutting property, to construction of elevated railway, IV, 282.
Municipal consent, effect of, on right of abutting owner to injunction, VII, 637.
Of city or town, necessity of compensation to abutting owner in cases of, VII, 650.
Of city, right to condemn street before obtaining, VII, 584.
Of city, to change of motive power, IV, 260.
Of city to placing of poles and wires in streets, IV, 262.
Of highway commissioners to location of street railway, VII, 376.
Of local authorities, to construction of elevated railways, IV, 282.
Of local authorities to occupation of street by railway, VII, 384–390, 565–581.
Of public authorities to construction of tunnels, VIII, 121.
Of subway commissioners to erection of poles and wires, IV, 262.
To use of street by railways no defense to city or town for injury caused by negligence, VII, 693.
Of landowner.
As a defense to action for damages to land, IV, 836.
Necessity of condemnation proceedings in the absence of, VII, 581, 582.
Of abutting owner to occupation of street implies consent to regrading, VII, 613.
Of abutting owners, injunction to restrain road built without, VII, 422.
Of abutting owners to cable railways, I, 728.

CONSENT — *continued.*
Of landowner — *continued.*
Of abutting owners to elevated railways, IV, 281.
Of abutting owners to street railways, VII, 390–393.
Of abutting owners to underground roads, VIII, 134.
Of abutting owners under Rapid Transit Acts, VI, 1157.
Of husband to entry on wife's land, V, 1066.
Taking land by, generally, IV, 462–486. IV, 884.
Taking land by, under English statutes,
To entry on land, as a defense in ejectment, IV, 846.
When bars action for trespass, IV, 874.
When deprives him of right to enjoin construction of railway, IV, 862.

CONSEQUENTIAL DAMAGES.
Assessment of, IV, 683.
For failure to restore highway, VII, 625.
In actions for nuisances, VI, 901.
Right to recover for, in condemnation proceedings, IV, 679–684.
To abutters on construction of steam railway in street, VII, 667.
To adjoining owners, liability for, III, 117; IV, 336, 338.
When recoverable, generally, III, 675–677.

CONSIDERATION.
In general.
Inadequacy of, as a defense to suit for specific performance, VII, 157.
Parol evidence to show, V, 480.
Reduction of freight as a, VI, 334.
Release of right of action, VII, 13.
Restoration of, on rescission, III, 228; VII, 11.
In contracts.
Failure of, as a defense to action on subscription, VII, 787.
For consent to the taking of land, IV, 465.
For contract restricting liability, II, 438.
For limitation of liability as between connecting lines, II, 254.
For stock transfer, VII, 286.
Lack of, makes contract void, III, 193.
Necessity of, to limitation of liability, II, 167; VI, 334.
Of bills and notes, I, 589.
Of bonds, I, 661.
Of construction contract, III, 120.
Of contract for shipment of cattle, I, 760.
Of guaranty, V, 1057.
Of receivers' certificates, right to inquire into, VI, 1206.
Of subscriptions to stock, VII, 733–735.
In deeds.
Of deeds, generally, IV, 3.
Of mortgages, VI, 436.

CONSIGNEE.
Conditional payment by, return of money on breach of condition, V, 583.
Delivery at house or place of business of, II, 50, 95.

CONSIGNEE — *continued.*
Delivery of goods to company as affecting rights of, II, 42.
Delivery to agent of, II, 119.
Duties of, as towards carrier, generally, V, 582.
Duties of carrier, where consignee lives at a distance from station, II, 143.
Duty of, to examine goods before removal, II, 114.
Duty of, to leave address with carrier, II, 101.
Effect of bill of lading to pass title to, I, 625.
Habit of, to call daily for goods, effect of, on duty to give notice of arrival, II, 100.
Holding goods at request of, II, 141.
Identification of, II, 118, 128.
Leaving blank space in bill of lading for name of, I, 603.
Liability of, for negligence in unloading, II, 104.
Necessity of notice of arrival to, II, 46; V, 578.
Neglect or refusal of, to receive or unload goods, II, 101–105.
Power of consignor to change, II, 121.
Reasonable time to, for removal of goods after arrival, II, 47–49, 91, 135, 137, 138.
Release of right of action to, by consignor, II, 272.
Right of consignor to change, II, 128.
Right of, to change destination of goods, II, 113.
Right of, to inspect C. O. D. goods before paying price, II, 115.
Right of, to refuse to accept damaged goods, II, 292.
Right of, to sue when a factor, II, 272.
Right of, to unload, effect of carrier unloading, II, 78.
Rights of, in cases of partial loss, II, 59.
Rule requiring receipt of goods from, II, 164.
Shipper's right to substitute, I, 622.
Sufficiency of delivery to agent of, II, 110.
Waiver by, of irregular delivery, V, 582.
Waiver of notice of arrival to, I, 641.
When bound by terms of shipment made by consignor, II, 160, 169.
When deemed owner, II, 271.
When liable for charges, II, 645.
When may sue the carrier, II, 270, 271.
When proper party plaintiff, VI, 925.
Who is, under bill of lading, I, 614.

CONSIGNOR.
Carrier cannot dispute title of, II, 97, 271.
Delivery to, or according to directions of agent of, II, 111.
Notice to, where consignee refuses to receive goods, II, 103, 148.
Power of, to bind consignee by terms of shipment, II, 160, 169.
Release of right of action by, II, 272.
Return of goods to, on refusal of consignee to receive, V, 582.
Right of, to stop delivery or to change consignee, II, 121, 128.
When deemed owner, II, 271.
When may sue the carrier, II, 269–271; VI, 925.

CONSIGNOR — *continue*
See also SHIPPERS.

"CONSISTENT."
Meaning of, VIII, 309.

CONSOLIDATION; AMALGAMATION.
General treatment, III, 74.
The power, and how exercised, III, 74.
Effect of consolidation, III, 84.
Of actions, I, 31.
By husband and wife, V, 1077.
Of appeals, in condemnation proceedings, IV, 808.
Of corporations.
Action by stockholders against directors for unauthorized, VII, 338.
After donation voted, effect of, VI, 652.
After subscription in aid completed, effect of, VI, 622.
Allegation of, VI, 987.
Condemnation of pro[illegible] by consolidated companies, I[illegible].
Debts of consolidati[illegible]pany, when prior to mortgage, V[illegible], 452.
Effect of, as a defense to action on subscriptions, VII, 777, 778.
How to mortgage property of consolidating road, VI, 416.
Illegal, effect of, on right to vote, VII, 310.
Jurisdiction in foreclosure as affected by, VII, 473.
Meaning of the word "amalgamate" as applied to corporations, VIII, 305.
Meaning of the word "consolidation" as applied to railroads, VIII, 309.
Municipal aid subscription after, effect of, VI, 622, 623.
Of street railways, VII, 357.
Pleading and proof in actions against consolidated road, VI, 1025.
Power of consolidated company to assign property, I, 478.
Property in hands of new company, when subject to execution, V, 544.
Right of stockholders to attack legality of, VII, 330.
Sale of consolidated road in foreclosure, VI, 499.
Taxation of consolidated corporation, VII, 856.
Under English statutes, III, 84.
Validity of subscriptions pending, VII, 741.
Variance between pleading and proof in actions against consolidated company, VI, 1037.
When exemption from taxation passes to new company, VII, 904.

CONSPIRACY.
Offense of, III, 361.

CONSTITUTIONAL LAW.
Act creating Interstate Commerce Commission, VI, 7.
Alteration, amendment, and repeal of charter, II, 683–695.
As to grade crossings in Pennsylvania, III, 411.
Change in constitution after valid subscription to railway will not invalidate bonds, VI, 675.

CONSTITUTIONAL LAW — *continued.*
Constitutionality of charters, II, 674.
Constitutionality of consolidation of railways, III, 75.
Constitutionality of fence law, V, 793–795.
Constitutionality of income taxes, VII, 1024.
Constitutionality of statutes, generally, VII, 243–262.
Constitutionality of statutes regulating liability to servant for injury caused by negligence of fellow-servant, V, 707.
Constitutionality of statutes relative to bridges, I, 687.
Constitutionality of statutes relative to condemnation of land, 386–392.
Constitutional provisions as to crossings of tracks, III, 392.
Constitutional provisions relative to right of eminent domain, IV, 384–386.
Elevated railway acts, IV, 276–278.
How far charter deemed a contract, II, 678–682.
Inhibition of, and restrictions on bonuses and donations to railways, VI, 647.
Interpretation of constitutional provisions as to municipal aid, VI, 524–526.
Laws creating railway commissions, VI, 1135, 1136.
Laws embracing more than one subject, I, 89; VII, 256.
Limitations of the taxing power, VII, 831.
Limitations on power to issue railway aid bonds, VI, 660.
Meaning of the term "due process of law," VIII, 311.
New York Act of 1860, as to street railways, VII, 377.
Power of legislature to authorize public aid to railways, 527–535.
Provisions as to compensation for land condemned, IV, 541.
Provisions as to equal taxation of street-cars, VII, 453.
Provisions relating to recovery of consequential damages by land owners, IV, 680.
Provisions relating to right of eminent domain, IV, 384–386.
Provisions relative to assessment of land damages by jury, IV, 604.
Reservation of power to repeal charter, II, 689.
Restrictions upon the power to issue bonds, I, 655.
Special and local laws, I, 89; VII, 248.
State laws attempting to regulate commerce, III, 32–36.
State statutes relating to intoxicating liquors, VI, 74.
Statute authorizing commissioners to regulate interstate commerce, VI, 1152.
Statutes allowing entry on land upon filing bond for compensation, IV, 554.
Statutes allowing interest on damages, III, 954.
Statutes authorizing one railway to cross tracks of another, III, 392.
Statutes authorizing payment of compensation money into court, IV, 551.
CONSTITUTIONAL LAW — *continued.*
Statutes forbidding transportation of diseased cattle, I, 788.
Statutes giving right of action for causing death, III, 745, 746.
Statutes imposing absolute liability for stock killing, I, 90.
Statutes imposing penalties for failure to ship goods promptly, II, 30.
Statutes imposing restrictions on foreign corporations, V, 1013, 1014.
Statutes incorporating street railways, VII, 377.
Statutes of limitation, VI, 302.
Statutes provding criminal prosecution for causing death, III, 955.
Statutes providing for laborer's liens, VI, 295.
Statutes regulating carrier's charges, II, 615, 621.
Statutes relating to public aid to railways, VI, 536–554.
Statutes relative to cattle-guards, II, 591.
Statutes relative to collisions, III, 12.
Statutes relative to condemnation proceedings, IV, 396–403.
Statutes relative to damages, III, 673.
Statutes relative to highway crossings over railroads, III, 449.
Statutes relative to motive power on street railways, VII, 437.
Statutes relative to railway mortgages, VI, 409.
Statutes relative to removal of causes, VII, 20.
Statutes relative to signals and speed at crossing, III, 495, 531.
Statutes relative to taxation, VII, 836–850.
Stock laws, I, 88–93.
What statutes are within constitutional provision as to due process of law, VII, 245.

CONSTRUCTION.
In general.
Of articles of consolidation, III, 81.
Of assignments of contracts, I, 479.
Of awards, I, 460.
Of bills of lading, I, 601–625.
Of bills of particulars, I, 651.
Of by-laws, I, 726.
Of company's rules, opinion of witness as to, VIII, 240.
Of judgments, VI, 82–84.
Of negotiable instruments, I, 591–593.
Of ordinances, VI, 756.
Of ordinances granting right of way through streets, VII, 572.
Of pleadings in action against carrier of passengers, II, 524.
Of policy of accident insurance, I, 13.
Of railway tickets, VII, 1041.
Of round-trip and excursion tickets, VII, 1064.
Of rules, testimony as to duty of employés, VIII, 266.
Of "station," "depot," "stopping place," etc., VII, 192–194.
Of writings a question of law, VIII, 43.
Of bridges, cars, cattle-guards, etc.
Of bridges, I, 687–703.

CONSTRUCTION — *continued.*
Of bridges, cars, cattle-guards, etc.— *continued.*
Of bridges over navigable waters, I, 709–714.
Of cars, patents for mode of, VI, 957.
Of cattle-guards, II, 591–598.
Of culverts, III, 658–660.
Of drawbridges, I, 713–715.
Of farm crossings, I, 186–193; V, 614–620.
Of street crossings, III, 424–433, 439–442.
Of telegraph lines, VII, 1026.
Of tunnels, VIII, 121.
Of viaducts, I, 702.
Of charters, franchises and grants.
Of charter of Union Pacific R. Co., VIII, 137–140.
Of charters, II, 696–710.
Of charters granted by two or more states, II, 677, 678.
Of franchises, V, 1025.
Of grants, VI, 134. 135.
Of grants to Northern Pacific Railroad, VI, 167–171.
Of grants to Union Pacific R. Co., VI, 173.
Of street railway charters, VII, 366, 367–382.
Of contracts, generally.
Between connecting companies, II, 517, 518; III, 68.
Between owner of stock yard and railway company, VII, 350.
Executory, to sell railroads, VII, 107.
For carrying the mails, II, 1.
For joint user of right of way, VII, 83.
For shipment of cattle, I, 761, 781.
For subscriptions, VII, 739–743.
Generally, III, 201–209.
Limiting liability, II, 171, 439; V, 594.
Of agreements to issue free passes, VI, 939.
Of sale of stock, VII, 292.
Of subscriptions upon conditions, VII, 800.
See also CONSTRUCTION CONTRACTS.
Particular, for right of way, IV, 485.
Particular, of shipment, II, 161.
Shipping, II, 156–162.
To convey, VIII, 148.
To locate stations at particular places, VII, 201.
Of deeds, leases, mortgages, etc.
Of assignment for creditors, I, 482.
Of car leases, VII, 129.
Of deeds, IV, 7–23.
Of leases of railroads. VI, 198–203, 224.
Of mining leases, VI, 402.
Of mortgages, VI, 436.
Of power of attorney to transfer stock, VII, 285.
Of trusts, VIII, 117, 118.
Of railways.
See CONSTRUCTION OF RAILWAYS.
Of statutes generally,
As to compensation of receivers, VI, 1220.
English statutes relative to compulsory purchase of land, IV, 880.

CONSTRUCTION — *continued.*
Of statutes generally — *continued.*
Giving right of action for causing death, III, 746–755.
Imposing restrictions on foreign corporations, V, 1013.
In relation to costs, IV, 729.
Interstate Commerce Act, VI, 4, 5.
Of constitutional provisions relative to municipal aid to railroads, VI, 524–526.
Of delegated power to condemn land, IV, 411.
Of exemptions from taxation, VII, 892–900.
Of fence laws, V, 795–797.
Of grant of land, as regards uses intended, IV, 470.
Of rapid transit acts, VI, 1154.
Of statutory grants of right of way, VI, 1120.
Of statutory provisions as to dissolution, IV, 133.
Of stock laws, I, 93–96.
Of tax laws, VII, 850-855.
Providing for laborers' liens, VI, 295.
Regulating charges, II, 615, 617, 618, 621, 625, 636–638, 649–651, 671, 672.
Regulating condemnation of land, IV, 392–399.
Regulating liability for injuries caused by fire, V, 852–857.
Relative to appeals in condemnation proceedings, IV, 772.
Relative to bridges, I, 688, 689.
Relative to cattle-guards, II, 592.
Relative to condemnation proceedings, IV, 392–399.
Relative to consolidation, III, 74–79.
Relative to crossing of two or more railroads, III, 393–396.
Relative to culverts, III, 658.
Relative to fires, VII, 254.
Relative to foreclosure, VI, 470.
Relative to grade crossings, III, 450.
Relative to issuing of stock, VII, 278.
Relative to issuing, taking up, and redemption of tickets, VII, 1043.
Relative to mortgage trustees, VI, 459.
Relative to municipal aid to railways, VI, 554–562.
Relative to obstructions and encroachments in streets and highways, VII, 707.
Relative to railway fares, VII, 1077.
Relative to railway mortgages, VI, 409–411.
Relative to sales of railroads, VII, 107.
Relative to union depot companies, VIII, 135.
See also INTERPRETATION.

CONSTRUCTION COMPANIES.
Not liable for killing of brakeman by low bridge, I, 725.
Power of, to condemn property, IV, 409.
Rights and liabilities, generally, III, 180–182.

CONSTRUCTION CONTRACTS.
Actions growing out of, III, 166–180.

CONSTRUCTION CONTRACTS — *con.*
Breach of, by contractor, remedy of sub-contractor for, III, 158.
By agents for construction of railways, I, 56.
Claims under, priority of mortgage over, VI, 457.
Construing two contracts together, III, 124.
Effect of consolidation upon, III, 86.
For railway construction, III, 119–166.
For the building of government railroads, V, 1050, 1051.
Fraud of directors in relation to, IV, 71.
Generally, III, 119–166.
Implied contracts, III, 124.
Officers and stockholders as contractors, III, 121.
Power of agents to make, I, 56.
Power of directors to make, IV, 62.
Rights of sub-contractors as fixed by, III, 155.

CONSTRUCTION HANDS.
Assumption of risk by, V, 179–181.
On gravel or material train, conductor as vice-principal of, V, 740.
On gravel train, when foreman in charge is vice-principal of, V, 750.
When conductor is fellow-servant of, V, 739.
When conductor is vice-principal of, V, 735, 739.
When engineer is fellow-servant of, V, 742.
When foreman is not fellow-servant of, V, 750.
When superintendent is not fellow-servant of, V, 756, 757.

CONSTRUCTION OF RAILWAYS.
General treatment, III, 109.
Duty to construct and liability for defects, III, 110.
Contracts for railway construction, III, 119.
Construction companies, III, 180.
Alleging defects in, in action for killing stock, I, 255, 256.
By foreign corporations, V, 1015.
By state and city jointly, V, 1050.
Carriage of goods on road in process of construction, II, 16.
Carrying passengers during period of construction, II, 308, 324, 427.
Compelling construction, VI, 376.
Construction of side-tracks, VII, 120–124.
Contracts with agents for supplies, I, 56.
Cost of, under working agreement, VI, 252.
Damages for breach of contract to build road at particular place, III, 702.
Defects in, consequential damages for, III, 676.
Difference in value before and after, as the measure of damages, VII, 661, 662.
Duty to fence while building road, V, 808.
Effect of abandonment of, I, 2.
Failure to begin within time limited as ground for dissolution, IV, 130.
Failure to build, as affecting public subscription, VI, 611.

CONSTRUCTION OF RAILWAYS — *continued.*
Failure to build part of road, VI, 627.
For military uses, VIII, 161.
Improper, landowner's right of action for, IV, 831.
In city streets, VII, 352, 353, 394–416.
See also STREETS AND HIGHWAYS.
Indemnity to landowner in lieu of enjoining; V, 1104.
Issuing full paid stock for work on, VII, 279.
Joint liability of lessor and lessee for damages resulting from, VI, 235.
Land damages from particular mode of, IV, 586.
Liability for defective, VII, 411–416.
Liability for injuries during period of construction, V, 1110.
Limitation for suits for damages to land by, VI, 310, 311, 319.
Meaning of the word, VIII, 309.
Negligence in, V, 667, 668.
Of branch and lateral roads, I, 681–686.
Of cable railways, I, 727–729.
Of crossing of two railroads, III, 415.
Of depots and side tracks, municipal aid for, VI, 561.
Of electric railways, IV, 257–266.
Of elevated railways, IV, 273–291.
Of parallel and competing lines, VI, 918.
Of track, under license, VI, 261.
Of tramways, VII, 1102.
On street, when a "taking" of abutter's property, IV, 445, 446.
Over watercourse, VIII, 172.
Payment by receiver of claims for, VI, 1196.
Plans of, as evidence, V, 511.
Power of equity to compel, VII, 397.
Priority of mortgages over advances to pay debts for, VI, 454.
Prior to proceedings to condemn, effect of, IV, 490.
Provisions in charter as to, II, 701–708.
Regulating by mandamus, VI, 375.
Regulation of, by city ordinance, VII, 440.
Release of damages occasioned by, VII, 14.
Rights of company pending condemnation proceedings, IV, 436.
Taking materials from adjoining lands, V, 1111.
Unsecured debts for, priority of mortgage over, VI, 459.

CONSTRUCTION TRAIN.
Authority of conductor to carry passengers on, III, 59.

CONSTRUCTIVE ANNEXATION.
Of fixtures, V, 969.

CONSTRUCTIVE DELIVERY.
By carrier, II, 105, 106.
Of goods for shipment, II, 38, 39.
When defeats right of stoppage *in transitu*, II, 191.
When terminates liability as carrier, II, 146.

CONSTRUCTIVE NOTICE.
Of consolidation, III, 99.
Under recording acts, IV, 6.

CONTEMPT.
General treatment, III, 182.
By interference with receivers, VI, 1182, 1183; VII, 721.
In disobeying mandamus, VI, 338.
In suing receiver without leave of court, VI, 1213.
In violating injunctions, V, 1159–1162.

CONTENTS.
Of baggage, duty of passenger to disclose, I, 558–560.
Of call for election, VI, 581, 585.
Of lost baggage, competency of plaintiff to prove, I, 570.
Of lost election returns, proof of, VI, 593.
Of parcels, notice of, V, 572.
Of special contract, effect of ignorance of shipper of, I, 780.

"CONTENTS AND VALUE UNKNOWN."
Meaning of, in bill of lading, II, 160.

CONTEST.
Of railway aid election, VI, 604.

CONTINGENT FEES.
Agreements for, I, 516.

CONTINUANCE.
Discretion of trial court as to, I, 381.
In service after knowledge of fellow-servant's incompetency, V, 705–707.
Of causes, generally, VIII, 9–11.
Of fact, presumption of, V, 442.
Of foreclosure sale, VI, 500.
Of injunctions, V, 1156, 1157.
Of inquisitions to assess land damages, IV, 616.
Of journey after leaving train, right of, VII, 1055.
Of litigation, to enforce attorney's lien, I, 519.
Of nuisances, VI, 892, 893.
Of old corporations under new names, III, 86.
Of suits which would otherwise abate, I, 11, 12.
Of trial, VIII, 9–11.

CONTRACT LABOR LAW.
General treatment, III, 184.

CONTRACTORS.
Accounting with, on death of receiver, VI, 1219.
Admissions by, as evidence, V, 486.
Assignee of, when entitled to lien, VI, 284.
Bond of, III, 138, 156.
Breach of contract by, remedy of sub-contractor for, III, 156, 158, 159.
For railway construction, rights, duties, and liabilities of, III, 137–144.
Independent, liability for acts of, and of servants of, II, 353; V, 1105–1116.
Independent personal injuries to servants of, V, 1116.
Issuing preferred stock to, VII, 280.

CONTRACTORS — *continued*.
Liability for negligence of, III, 118.
Liability of company to laborers employed by, III, 161–166.
Meaning of the word, VIII, 309.
Negligence of, as to station grounds, VII, 220.
Right of, to keep back estimates, III, 159.
Right of, to share in land damages, IV, 573.
Taxation of, VII, 861.
When may claim a lien, VI, 279.
Who are "original contractors," as used in a mechanic's lien law, VIII, 320.
See INDEPENDENT CONTRACTORS.

CONTRACTS.
General treatment, III, 185.
The power to contract, III, 188.
Common law requisites, III, 192.
Requirements of the statute of frauds, III, 197.
Construction and effect; conditions, III, 201.
Validity, III, 209.
Performance; breach, III, 221.
Modification; rescission, III, 225.
Law of place, III, 228.
Actions for breach of contract, III, 229.
Particular contracts, III, 235.

In general.
Assignability of causes of action on, I, 476.
Bills of lading considered as, I, 608–624.
By city, to exempt from taxation, VI, 754.
Cancellation of, V, 353.
Charter fixing tolls, how far a contract, II, 612.
Contractual obligations of states, VII, 184.
Covenants in, see COVENANTS.
Creation of trusts by, VIII, 117.
Effect of war on validity of, VIII, 161.
Executed, when *ultra vires*, VIII, 126–132.
Executory, for sales of railroads, VII, 107.
For contingent fees, I, 516.
For government supplies, III, 7.
For joint use of depots, VIII, 136.
For passage of boats on canals, I, 733.
For reorganization, power to issue bonds under, I, 657.
Inviolability of, II, 678–696.
Involving patent rights, VI, 949–951.
Location of stations as affected by, VII, 201–204.
Made on Sunday, validity of, VII, 818.
Measure of damages in actions for breach of, III, 702–708.
Merger of, in judgment, VI, 83.
Merger of verbal into written, V, 476.
Of car trust association, I, 735.
Of partnership, validity of, VI, 936.
Of purchase, power of receivers to make, VI, 1185.
Oral stipulation to vary, IV, 481.
Performance of, VII, 203.
Pooling, VI, 49.

CONTRACTS — *continued.*
In general — *continued.*
Power of married women to make, V, 1067.
Reformation of, V, 355.
Right of subrogation by, VII, 723.
Right to interest on judgments in actions on, V, 1174.
Statutes impairing the obligation of, VII, 246, 247.
Time, when of the essence of, VII, 201.
Unconscionable, not enforced, V, 355.
Validity of, between parallel roads, VI, 919.
Validity, statute of frauds, VII, 202.
What are *ultra vires*, VIII, 126–132.
When champertous, II, 609.
When charter is, with state, II, 678–682.
When controlled by custom, III, 667.
When create estoppels, V, 382.
When usurious, VIII, 144.
When void, as against public policy, VII, 1030.
With warehousemen, nature of, VIII, 162.
Written, oral evidence to vary, V, 474–481.
As to farm crossings and fences.
As to erection of gates at farm crossing, I, 187.
Between company and landowner respecting fences, I, 140; V, 804–807.
Liability of company where duty to fence is imposed by, I, 166–168; V, 804–807.
To build fences, V, 804–807.
As to right of way or route.
For joint use of right of way, VII, 83.
For right of way, constructing road under, IV, 247.
For right of way upon conditions, IV, 471–473.
To change route, validity of, VI, 362.
To convey right of way, by and against whom enforceable, IV, 481; VII, 78–89.
To grant right of way, specific performance of, IV, 481.
With city for use of streets, VII, 571.
With landowners as to change of route, VI, 360.
With owner, for right of way, as a defense in ejectment, IV, 849.
Between connecting lines.
Interpretation and effect of, II, 517, 518; III, 68–72.
By agents.
Agent of one party, when agent of the other, I, 41.
As to location of depots, I, 55.
For their own benefit, I, 47.
In name of principal, I, 47.
To build gates or crossings, I, 55.
For board of injured employés made by station agents, VII, 188.
For board of laborers and others made by, I, 58, 59.
For repairs of cars, made by station agents, VII, 188.

CONTRACTS — *continued.*
By agents — *continued.*
For shipment of freight made by, I, 57, 58.
For supplies to persons constructing road, I, 56.
For transportation, power of station agent to bind company by, VII, 186.
Power of public agents to make, I, 86.
Signing as "agent for" principal, I, 47.
To store goods, made by, I, 58.
When principal bound by, I, 54–61.
Limiting liability.
Action against carrier for breach of, when barred, VI, 314.
Effect of shipper's failure to read, VI, 335.
For baggage, I, 565.
For injuries to employés, V, 125, 126.
For negligence, II, 172–180, 258.
In carriage of express goods, V, 585–594.
In carriage of live stock, I, 763–783.
In carriage of merchandise, II, 164–186.
In carriage of passengers, II, 436–440.
Made after loss do not limit liability, VI 336.
Made by shipper's agent, ratification of, II, 168.
Special, V, 591–594.
See, generally, LIMITATION OF LIABILITY.
Of service.
For personal services, when specifically enforced, VII, 154.
For work, service, etc., complaint in action on, VI, 989.
Of employment, generally, V, 2.
Of employment of physicians, VI, 391.
Of employment, power of infant to enter into, V, 246.
Of subscription.
By company to pay interest to subscriber of stock, VII, 745, 746.
Conditions form part of, VI, 633.
For municipal aid, when *ultra vires*, VI, 614.
In aid, rescission of, VI, 619.
Of municipal subscription, validity of, VI, 613.
To stock, VII, 726–746.
To subscribe for stock, when specifically enforced, VII, 149.
To subscribe in addition to aid voted VII, 617.
To take stock in payment, III, 129.
With stockholders as to application of new stock, VII, 283.
To carry live stock and mails.
By shipper to furnish cars, I, 741.
For carrying mails, II, 1, 2.
Ignorance of party to, as to contents of, I, 780.
Of drover traveling with stock to assume all risks, I, 795–797.
Of owner to feed and water stock, I, 751.
To carry drover with cattle, breach of, I, 792.
To deliver stock at stock yards, VII, 349, 350.

CONTRACTS — *continued.*
To carry merchandise.
Between connecting carriers do not affect third persons, II, 206.
By shipper's agent for limitation of liability, II, 263.
Construction of, as between shipper and carrier, II, 157.
Evidence to establish, II, 59.
Failure to deliver makes carrier liable on, II, 147.
For absolute exemption from liability, validity of, II, 259.
For express facilities, specific performance of, V, 564.
For future transportation, when *ultra vires*, VIII, 130.
For through carriage, power to make, II, 209, 221–224.
Liability of initial carrier under special, II, 215.
Made by undisclosed agent, right of principal to sue on, II, 269.
Of carriage and affreightment, construction of, II, 156–162.
Of shipment, when rights of the parties are determined by, II, 157.
Of through carriage, what are, and how made, II, 224–231.
Privity of, to give right of stoppage *in transitu*, II, 187.
Privity of, what necessary to hold final carrier, II, 245.
Special, required to make initial carrier liable beyond its own route, II, 214.
Special, setting out in pleading, II, 277.
Special, under English Carriers' Act, II, 194.
Special, when may be implied, II, 214.
To allow rebates and drawbacks, IV, 119, 123.
To carry as much grain as shipper "may desire," validity of, II, 158.
To deliver for shipment, breach of, II, 42.
To deliver goods at specified time, II, 66, 159.
To furnish cars at specified time, II, 34.
To furnish cars, made by station agents, VII, 187.
To give notice of arrival, power of agents to make, II, 101.
To pay excessive freight, effect of, II, 634.
Waiver of breach of, II, 158.
Written, oral evidence to vary, II, 156.
To carry passengers or baggage.
Action for breach of, in expelling passenger, IV, 209.
Express, giving passenger right to stop over, VII, 1056.
May be shown by parol, notwithstanding ticket, VII, 1040.
Of ferriage, V, 839.
Passage tickets are not, VII, 1039.
Power of initial carrier to make through contract, II, 514.
Powers and duties under, VII, 454, 455.
With initial carrier for through carriage of baggage, I, 527.

CONTRACTS — *continued.*
To carry passengers or baggage — *con.*
With passengers, breach of, pleading and proof as to, VI, 1024.
Miscellaneous.
Action for death caused by breach of, III, 744.
Between carriers and elevators, IV, 370.
Between companies for crossing tracks, III, 391.
Between company and its president, VI, 1070.
Between directors and company, IV, 68.
Between government and subsidized roads, VI, 129.
Between railway companies and construction companies, III, 180.
Between telegraph companies and railway companies, VII, 1027–1031.
Power of foreign corporations to make, V, 1016.
Power of receivers to make, VI, 1185.
Private interest of directors in corporate, IV, 70.
Ratification of, III, 7.
Receiver, how far bound by pre-existing, VI, 1188, 1189.
Release of company from liability for injuries by negligence of fellow-servants, V, 708.
To build or restore depot, pleading and proof as to, VI, 1024.
To construct cattle-guards, II, 593.
To construct farm crossing, V, 618.
To convey, construction of, VIII, 148.
To execute leases, VI, 202, 217.
To insure, breach of, V, 847.
To issue free passes, VI, 939, 940.
To keep cars in repair, time to sue on, VI, 316.
To locate station at particular place, VII, 201, 204.
To pay carrier's charges, II, 612.
To sell and deliver, action for breach of, VII, 105.
To sell railroads, VII, 107.
To stop trains at refreshment-rooms, VII, 5.
With abutting owner to construct bridge, I, 692.
With city, construction of bridge under, I, 691.
With owner, necessity of, to entitle claimant to lien, VI, 284, 296.
With rival elevator, delivery by carrier in cases of, IV, 370.
Pleadings and evidence.
Admissibility in evidence, III, 858.
Admissibility of evidence in actions on, V, 388–394.
Burden of proof in action for breach of, by carrier, VI, 1035.
In writing, effect of, as evidence, V, 518.
Proof of performance of, V, 394.
Secondary evidence of, V, 454.
Statement of cause of action in actions on, VI, 989.
Sufficiency of evidence in actions on, generally, V, 524–526.
What actions are founded on, I, 27.

CONTRACTS — *continued.*
Specific performance of, III, 391.
What may be specifically enforced, VII, 144–155.
See also AGREEMENTS; CONSTRUCTION CONTRACTS; IMPLIED CONTRACTS.

CONTRADICTION.
In evidence, effect of, V, 524.
In instructions in actions for injuries to employés, V, 302.
In statements of witnesses, use of, to impeach, VIII, 205, 206, 219.
Of bill of lading by parol, I, 614–618.
Of receipts by parol, V, 480.
Of testimony of opponent's witnesses, VIII, 204.
Of witnesses, VIII, 203–209.

CONTRIBUTION.
Among stockholders, VII, 330.
Among stockholders sued by creditors, VII, 328.
To sick fund out of wages, VII, 17.

CONTRIBUTORY NEGLIGENCE.
General treatment, III, 242.
General principles; what constitutes, III, 243.
Pleading, III, 275.
Questions of law and fact, III, 282.
Evidence; burden of proof, III, 295.
Instructions, III, 306.
What is, VIII, 309.
Allegations as to.
Alleging absence of, on plaintiff's part, V, 906, 907.
Alleging, in plea or answer, I, 270, 271; IV, 40; VI, 1005.
Appearing from complaint, rule as to, II, 532.
Necessity of averring, in answer, V, 274.
Negativing, in complaint, I, 266, 364; II, 529; III, 801; V, 774; VI, 997.
Evidence of.
Admissibility of evidence to prove, V, 914.
Admissibility of evidence to show absence of, V, 908.
Age of injured person, as bearing on question of, V, 395.
Burden of proof to establish, V, 286, 451, 942; VII, 532.
Burden of proof to show absence of, V, 284.
Burden to disprove, II, 551; V, 938.
Sufficiency to show absence of, V, 296.
To prove or disprove, sufficiency of, I, 279; II, 536, 542.
Instructions as to.
Ignoring doctrine of, erroneous, I, 393; III, 898, 909.
Ignoring issue of, V, 787.
Non-reversible errors in, I, 407.
Not correctly stating law of, V, 307, 308.
On question of, VII, 704.
Prayers for, stating doctrine too strongly, III, 917; VIII, 82.
Relative to, V, 947, 948.
To jury as to, III, 653, 654; VIII, 58 70–72.

CONTRIBUTORY NEGLIGENCE — *con.*
Of drivers.
Of person in charge of frightened team, V, 1043.
Of vehicle, IV, 271.
Of vehicle, when for the jury, III, 890.
See IMPUTED NEGLIGENCE.
Of employes.
Infant, V, 250.
Injured, as a defense, V, 184–246.
Injured, evidence of, V, 278, 279.
Injured, sufficiency of evidence to show, V, 295, 296.
Injury by, III, 23, 24; V, 184–203.
In manner of using tools, V, 208.
In operation of trains, use of machinery, etc., V, 203–222.
Negativing, in complaint, V, 272.
Obeying order of superior, when constitutes, V, 238, 239.
What is, V, 777.
Of parent or child.
Of child injured, II, 764–789.
Of child injured, proof of, II, 812.
Of child injured, when question of fact for jury, II, 783–785.
Of parent of child injured, proof of, II, 812.
Of parents or custodians of injured child, 789–807.
Of passengers.
Injured, II, 440–512.
Injured by collisions, III, 14, 15.
Injured in collision between train and street car, III, 20.
Injured in sleeping cars, VII, 135.
Injured on electric cars, IV, 269.
Injured on street railways, VII, 480–502.
Per se, in leaving moving cars, what is, II, 468.
Of persons on street or track.
At crossings, III, 537–638.
By cable cars, I, 733.
By collision, III, 20.
By obstruction or encroachment in highway, VII, 714.
By railway in street, as a defense, VII, 700–701.
By street car, VII, 415, 523–532.
Failure of traveler at crossing to look and listen, III, 570–573.
In crossing track, III, 822–829.
In street or highway, VII, 694.
Of licensees, VI, 275, 276.
Of trespassers, effect of, VII, 1151–1163.
Of trespassers walking on track, III, 833–834.
On track, V, 1008.
Of shippers.
Effect of in shipper of stock, I, 756, 757.
Of cattle, I, 756, 757.
Of custodian traveling with live stock, I, 798–801.
Of owner of goods lost or injured, II, 267.
When excuses carrier, II, 84.
Of other persons.
Of owner of animal killed, I, 208–236.
Of persons injured at bridges, I, 707.

CONTRIBUTORY NEGLIGENCE—*con.*
Of other persons—*continued.*
Of persons injured at stations, VII, 224–231.
Of person suffering damage through fire, V, 883–893.
Of persons whose land is flooded, III, 664.
Of plaintiff, as affecting right to damages, V, 959.
Of plaintiff suing for damages caused by defect in cattle-guards, II, 600.
Presumption of, I, 307; II, 546, 549.
Of employé injured, V, 300.
When a defense.
In action for injury by fellow-servant, V, 776–778.
In actions for injuries to employés, V, 184–246.
Nonsuiting plaintff for, VIII, 25, 30.
Not excused by negligence of company, III, 631.
Of carrier, when deprives him of defense of *vis major*, II, 22.
Of deceased, to action for causing his death, III, 813–843, 849, 874, 887, 897–899, 908.
Of ejected passenger, IV, 213.
To action for failure to fence, V, 831.
To action for flowing land, V, 988.
To action for injury caused by negligence of fellow-servants, V, 777, 778.
To action for loss of baggage, I, 573.
To action for loss of property or money of passenger, VII, 137.
To action for penalty, VI, 969.
When bars claims against government, III, 8.
When not a defense.
Recovery notwithstanding, for injuries to animals, I, 229–233.
For injuries to children, II, 778.
For injuries to passengers, II, 458.
For injuries to trespassers, VII, 1159.
When does not bar recovery, VI, 276.
When for the jury.
Generally, I, 801; II, 84; III, 628, 629, 891; V, 324–337; VII, 235, 504; VIII, 45.
Of shipper, II, 175.
Whether question of law or fact, V, 788, 957, 958.
See also COMPARATIVE NEGLIGENCE; IMPUTED NEGLIGENCE; NEGLIGENCE.

CONTROL.
By company, of work in hands of contractor, V, 1108.
Meaning of, in contract, III, 204.
Of legislature over railroads, VII, 243.
Of passenger over driver, V, 1087.
Of railroads by government, VIII, 159.
See also GOVERNMENT RAILROADS; LAND GRANT RAILROADS; STATE AID.
Of streets, VII, 569.
Over streets by cities, VII, 671.

CONVERSION.
See TROVER; CONVERSION.

CONVEYANCE.
Acquirement of easements by, IV, 159.

CONVEYANCE—*continued.*
Acquisition of right of way by, VII, 76–80.
By husband, of perpetual easement in wife's land, V, 1066.
By husband, of right of way over homestead, V, 1063.
By owner, ordering, in judgment, IV, 350.
By trustees and persons under disabilities, IV, 882.
For depot purposes, VIII, 136.
From owner, taking land by, IV, 462.
Of land held adversely, I, 38.
Of land, taking in payment, VII, 739.
Of mortgagor, judgment directing, VI, 488.
Of public common or right of way thereon, VII, 571.
Of right of way, effect of, to release damages to other property of grantor, IV, 477.
Of rights of way, upon conditions, IV, 471, 473.
Of riparian rights, VII, 91.
Of servient estate, effect of on easement, IV, 161.
Of voting power, VII, 309.
Power of corporations to make, III, 321.
Recitals in, weight of, as evidence, V, 523.
Statement of cause of action in suits to set aside, VI, 991.
When presumed, I, 38.
See also DEEDS; FRAUDULENT CONVEYANCES; LAND GRANTS; MORTGAGES.

CONVICTION.
Of crime, proof of, to impeach witness, VIII, 204.

CONVICTS.
Employment of, III, 356.

COPIES.
Of public records as evidence, V, 502.
Of written instrument as secondary evidence, V 458.
Serving process by leaving a copy, VI, 1099.

CO-PLAINTIFF.
Death of, as ground of abatement, I, 8, 9.

COPYRIGHT.
General treatment, III, 315.

CORD.
Meaning of the word as applied to the measurement of wood, VIII, 310.

CORD-WOOD.
See COMBUSTIBLE MATTER.

CORONERS.
General treatment, III, 316.
Depositions taken before, as evidence, V, 522.
Evidence of proceedings at inquests, III, 857, 859.

CORPORATIONS.
General treatment, III, 316.
General principles, III, 317.
Corporate powers, III, 318.
Corporate liabilities, III, 323.
Suits by and against, III, 323.

CORPORATIONS — *continued.*
In general.
Corporate existence, averment of, VI, 986.
Corporate records, estoppel by, V, 366.
Criminal responsibility of, generally, III, 354.
Dissolution of, as ground of abatement, I, 9.
How far deemed citizens, III, 1–4.
Legal status of reorganized, VII, 57.
Liability of, for acts of receivers while in possession, VI, 1227–1231.
Meaning of the word as applied to a tax on persons or corporations, VIII, 310.
Notice of accident to, I, 14.
Notice to, or knowledge of directors, when imputable to, IV, 64.
Residence of, III, 4.
Right to inspect books of, VII, 307.
Statutes making, agent for collection of taxes, VII, 984.
Subscriptions by, to stock of other corporations, VII, 816, 817.
Taxation of interstate business of, VI, 62, 63.
When deemed foreign, V, 1012.
When estopped, V, 369.
Agents and officers of.
Acts of officers, when binding on, VI, 905.
Agent of, when agent of other party to contract, I, 41.
Corporate officers, acts of, when estop corporation, V, 381.
Fiduciary relation between officers and, VI, 905.
Liability of, for torts of agents, I, 61–86.
Liability of president to, VI, 1071.
Power of directors to bind, IV, 63.
Power of superintendent to bind, VII, 823, 824.
Ratification by, of acts of agents, I, 80–86.
Ratification by, of acts of directors, IV, 73.
Charter or franchise.
Assignment of franchise, I, 478.
Construction of charter in favor of public, II, 700.
Franchise to be, not subject to mortgage, VI, 412.
See also CHARTERS.
Creation and existence of.
Acts creating, judicial notice of, V, 435.
Charter in two or more states, II, 677, 678.
Corporate character, appearance as an admission of, I, 451.
Corporate existence, averment of, VI, 986.
Corporate existence, burden of proof as to, V, 448.
Corporate existence, effect of acceptance of charter to prove, II, 676.
Corporate existence, right to question, V, 362, 1101.
Corporate existence, when presumed, V, 443.

CORPORATIONS — *continued.*
Creation and existence of — *continued.*
How far consolidation creates new corporations, III, 84–86.
Of different states, consolidation of, III, 78.
Power of.
Cities, generally, VI, 752–758.
Conferred by charter, II, 696–701.
De facto, to condemn lands, IV, 407.
To contract, III, 188–192.
To issue debentures, III, 959.
To make or take leases, VI, 203–218.
To mortgage property, VI, 408–411.
Under charter provisions, II, 696–701.
What corporations may exercise power of eminent domain, IV, 405–409.
Property of.
Alienation of, when *ultra vires*, VIII, 127.
Authority of president to sell or mortgage, VI, 1068.
Corporate bonds, assignability of, I, 477.
Corporate funds, action to restrain misuse of, VII, 333.
Lands of, when subject to escheat, V, 358.
Liability of, to condemnation, IV, 417–430.
Transfer of, by president to successor in office, VI, 1072.
What may be taken for railway purposes, IV, 417–430.
Suits by and against.
Competency of members of, as witnesses, VIII, 196.
Competency of plaintiff in action against, VIII, 195.
Foreign, when suable in attachment, I, 490, 492.
Impeachment by stockholders of judgment against, VII, 330.
Intervention by attorney-general in suits against, I, 512.
Jurisdiction of federal courts in, V, 631–634.
Power of attorney-general to proceed against, I, 511, 512.
Punishment of, for contempt, III, 184.
Remedy of stockholders against, VII, 330–334.
Removal of, to federal courts, VII, 21, 22, 32–35.
Right of stockholders to sue in behalf of, VII, 328, 329.
Stockholders as parties to suits against, VII, 329, 330.
See also CHARTERS; FRANCHISES; FOREIGN CORPORATIONS; MUNICIPAL CORPORATIONS.

CORRECTION.
Of deeds, IV, 24.
Of mistakes in equity, V, 354.
Of verdicts, VIII, 92, 99.
See also AMENDMENT.

CORPORATION.
Of witness, VIII, 209.

CORRUPTION.
Meaning of, as used in English Act of Regulations of 1695, VIII, 310.

CORRUPTION — *continued.*
Of arbitrators, impeachment of award for, I, 463.
CO-SERVANTS.
Competency of, when for the jury, III, 893.
Time to sue for damages caused by negligence of, VI, 327.
See also FELLOW-SERVANTS.
COSTS.
General treatment, III, 324.
General principles, III, 325.
Particular actions and proceedings, III, 328.
Allowance in addition to, IV, 729.
Constitutionality of laws giving attorney fees, I, 92.
Effect of tender or offer of judgment on right to, IV, 728.
Granting change of venue on payment of, VIII, 9.
In action for refusal to transfer stock, VII, 298.
In actions for loss of or damage to goods carried, II, 293.
In actions to collect charges, II, 666.
In condemnation proceedings, IV, 728–734.
In elevated railway cases, IV, 356.
In expropriation proceedings under Canadian statutes, IV, 931, 932.
In proceedings for compulsory purchase, under English statutes, IV, 900–902.
In proceedings to dissolve corporation, IV, 137.
In proceedings to obtain right to cross another road, III, 408.
In proceedings under the English Railway and Canal Traffic Act, II, 196.
In railway foreclosures, VI, 512.
In suits for value of lost baggage, I, 574.
In suits to restrain discrimination, IV, 104.
Litigation taxes, VII, 835.
Mandamus to compel allowance of, IV, 732.
Of arbitrations, I, 458.
Of criminal prosecution for causing death, III, 958.
Of detention and disinfection of immigrants, VI, 1126.
Of receivership, VI, 1219.
Of removal of property as an element of damages, VII, 663.
On abandonment or discontinuance of condemnation proceedings, IV, 824.
On appeals in condemnation proceedings, IV, 730, 731.
What are costs and expenses, VIII, 310.
COTTON.
Burned in warehouse of compress company, limiting liability for, I, 633.
Charges for carrying in bales, II, 627.
Contributory negligence in placing on or near right of way, V, 890, 892.
Failure to remove from compress house, liability for, II, 55.
Lost while awaiting shipment, liability for, II, 54.
Rates between New Orleans and northeast Atlantic ports, VI, 42.
COTTON — *continued.*
Shipping in open cars, liability in cases of loss by fire, II, 74, 176.
Storage of, on city streets, VII, 617.
See also COMBUSTIBLE MATTER.
COUNSEL.
See ATTORNEYS.
COUNTER-AFFIDAVIT.
See AFFIDAVIT.
COUNTERCLAIM.
See SET-OFF, etc.
COUNTIES.
General treatment, III, 330.
Bonds to be issued for work done in, VI, 641.
Burden of proof to show killing within, I, 288, 313.
Delegation of power to tax to, VII, 833.
Duty to stop at county seat, II, 388.
Interpretation of statute as to taxation in, VII, 851.
In which road is operated, when deemed residence of corporation, III, 4.
Judicial notice of boundaries of, V, 436.
Jurisdiction as dependent upon county lines, I, 236, 357; VI, 113.
Liability of, for property destroyed by strike, VII, 722.
Property in two or more, power to mortgage, VI, 413.
Validity of statutes authorizing aid to railroads by, VI, 529.
What proper for venue, generally, VIII, 3–6.
What proper for venue of action for causing death, III, 780.
What proper in condemnation proceedings, IV, 489.
What proper in which to levy tax, VII, 884.
When construction of railroad is "county purpose," VIII, 310.
When subscription to railroad stock is for purposes of, VIII, 310.
COUNTS.
Charging liability both as carrier and as warehouseman, II, 145.
Election between, VI, 1001.
Joinder of, V, 774.
Joinder of, in actions for causing death, III, 804.
Several, for same cause of action, V, 261.
Stating more than one cause of action in one count, I, 250.
Stating same cause of action in several counts, I, 251.
What matters may be included in, VI, 1000.
What may be joined in complaint, VI, 999, 1000.
Withdrawal of, VI, 1001.
See also PLEADING.
COUNTY AUTHORITIES.
Who are, under the statute authorizing public subscriptions, VIII, 310.
COUNTY COMMISSIONERS.
Action by, for obstruction of highway, VII, 718.
Certiorari to, II, 607.

COUNTY COMMISSIONERS — *con.*
Power of, III, 331, 332.
Power of, to order change of street grade, VII, 607.
Power of, to subscribe in aid of railways, VI, 564.

COUNTY COURTS.
Certiorari to, II, 607.
Jurisdiction of, VI, 118.
Jurisdiction of, in condemnation proceedings, IV, 491.
Power of, to allow exemption from taxes, VII, 890.
Power of, to call election in municipal aid proceedings, VI, 579.

COUNTY JUDGE.
Jurisdiction of, in municipal aid proceedings, VI, 561.

COUNTY TREASURER.
Rights, powers and duties of, III, 332.

COUPLING.
Alleging defects in apparatus for, V, 268.
Assumption of extra risk in, V, 173, 174.
Assumption of risk in, V, 139, 148.
Attempting to make by hand, V, 232.
Contributory negligence of employé a question for the jury, V, 333, 334.
Contributory negligence of employés in making, V, 222–233.
Disobedience of rule requiring use of stick, V, 232, 233.
Duty of company as to safety of, V, 85–90.
Duty of company to furnish safe links, pins and bolts, V, 88.
Effect of notice of defects in apparatus for, V, 161.
Failure to use crooked link, V, 226.
Going between cars to make, V, 233
Injuries to employés while making, V, 123.
Non-liability for negligence of fellow-servants while, V, 657.
See also UNCOUPLING.

COUPLINGS.
Defective apparatus of, V, 174.
Defective goose-neck, V, 224.
Defective, liability of carrier, II, 377.
Duty of company as to condition of, V, 85–90.
Failure to observe rule requiring inspection of apparatus, V, 230.
Negligence as to safety of, a question for jury, V, 319.

COUPON BONDS.
See BONDS.

COUPONS.
General treatment, III, 333.
Nature, effect, negotiability, and rights of holders, III, 333.
Actions on coupons, III, 338.
Of bonds.
Funding, I, 669.
Guaranty of payment of, V, 1058.
Interest on, V, 1174.
Limitation of suits on, VI, 309, 316.
Money loaned to pay interest on, rights of lender on distribution in foreclosure, VI, 510.

COUPONS — *continued.*
Of bonds — *continued.*
Priority among, on distribution in foreclosure, VI, 510.
When may be reached in attachment, I, 495.
When subject to taxation, VII, 872.
Of tickets.
Detachment of, by conductor, IV, 178.
On connecting lines, deemed distinct tickets for each line, VII, 1073.
On round-trip ticket, right of holder of return coupon to sue, VII, 1065.
Upon passenger tickets, generally, VII, 1063, 1064.
See also COUPON TICKETS.

COUPON TICKETS.
Generally, VII, 1063, 1064.
On street railways, VII, 537.
See also COUPONS.

COURSES AND DISTANCES.
Are controlled by fixed monuments, IV, 11.

COURT.
In general.
Contempt by interference with property in hands of, III, 182.

COURTS.
Duty of, as to instructions, III, 894; VI, 827; VIII, 50.
Findings by, IV, 346–349; VIII, 94.
Mandamus to inferior, VI, 380.
Money paid into, when subject to execution, V, 543.
Of sister states, conclusiveness of judgment of, VI, 95.
Payment of compensation money into, IV, 551–554, 904, 931.
Payment of money into, generally, II, 267; VII, 1035, 1036.
Proper court to apply to for removal of cause, VII, 41, 43.
Relative functions of jury and, VI, 813–815.
Right of, to charge what facts if found will amount to negligence, VI, 804–806.
Trial by, when proper, VIII, 1–3.
Trial *de novo* in appellate, VI, 124.
What are "Superior Courts," II, 671.
When court will make call on stock, VII, 751.
Discretion of.
As to allowing amendments, VI, 1043.
As to appointment of receivers, VI, 1162.
As to granting injunctions, V, 1134.
As to granting specific performance, VII, 144.
As to granting view by jury, VIII, 17.
As to new trials, VI, 845–848.
As to ordering physical examination, VI, 977.
As to removal of receivers, VI, 1222.
In relation to costs, IV, 728.
Matters of discretion in, and therefore not appealable, I, 381–384; IV, 781.
Jurisdiction of.
Concurrent, precedence between, VI, 115.
Effect of submission to arbitration to oust, I, 455; III, 152.

COURTS — *continued.*
Jurisdiction of — *continued.*
In actions for causing death, III, 780, 781.
In actions for loss or damage to goods carried, II, 264.
Judicial notice of matters affecting, V, 438.
Powers of.
Controlling, over receivers, VI, 493, 1187.
In proceedings to condemn right to cross a railroad, III, 413–415.
Over counsel's argument to jury, VIII, 37.
To allow remittitur of excessive damages, VI, 868–871.
To authorize receivers' certificates, VI, 1200.
To direct verdict, VI, 802; VIII, 85.
To enforce forfeiture of charter, II, 712.
To enforce forfeiture of franchise, II, 712.
To order view of premises by jury, IV, 625.
To punish contempt, III, 184.
Visitorial, V, 356.
Questions for.
Contributory negligence of passengers, when, II, 448, 469, 508.
Contributory negligence of trespassers, when, VII, 1061.
Of law, as to negligence, VI, 799–802.
Of law, generally, VIII, 42–44.
Of law, in actions for killing stock, I, 321.
Of law, in causing death, III, 884.
Reasonable time, when, II, 48.
When damages should be assessed by, III, 733.
See also FEDERAL COURTS; JUSTICE OF THE PEACE; STATE COURTS.

COVENANTS.
General treatment, III, 343.
General principles, III, 343.
Actions upon covenants, III, 347.
Dependent and independent, III, 124, 203, 344.
In deeds, IV, 8.
In mortgages, as to application of proceeds, VI, 440.
Not to sue, VII, 6, 13.

COVERTURE.
Disability of, VI, 328.
See also HUSBAND AND WIFE.

COVINGTON, KY.
Decisions particularly applicable to, VI, 759.

COWCATCHER.
See PILOT.

CREDIBILITY.
See WITNESSES.

COURT OF CLAIMS.
Appeals from, to United States Supreme Court, V, 644.
See also CLAIMS AGAINST UNITED STATES.

COURT ROOM.
Exclusion of witnesses from, VIII, 212.

CREDITORS.
Claims of, when prior to mortgages, VI, 451, 452.
Competency of, as witnesses, VIII, 196.
Delaying shipment to permit attachment by, II, 54.
Liability of stockholders to, VII, 311–328.
Liability to, upon dissolution, IV, 139.
Limitation of actions against stockholders by, VI, 310, 317.
Of bankrupt corporations, rights of, I, 583, 584.
Of corporation, relation of directors to, IV, 76, 77.
Of landowner, right of, to land damages, IV, 573.
Of old company, rights of, as respects consolidated company, III, 102–105.
Payment of wages to, by garnishee, effect of, I, 501.
Position of bondholder as respects, I, 665.
Purchaser in foreclosure, when trustee for, VI, 506.
Rights of, on insolvency of corporation, V, 1168, 1169.
Rights of, on reorganization, VII, 56.
Rights of, on sale of railroads, VII, 111.
Rights of, secured, IV, 162.
Rights of, to compel sale of superfluous land, in England, IV, 894.
Rights of, to share in deposit moneys on abandonment of road, I, 6.
Suits against stockholders, by receivers, for benefit of, VI, 1208.
Who are, VIII, 310.

CREDITORS, ASSIGNMENT FOR BENEFIT OF.
See ASSIGNMENT FOR BENEFIT OF CREDITORS.

CREDITORS' BILL.
General treatment, III, 350.

CREDITORS' SUITS.
Appointment of receivers in, VI, 1171.
Evidence under the pleadings in, VI, 1026.

CREDITS.
What should be allowed in receiver's account, VI, 1218, 1219.

CRIMINAL LAW.
General treatment, III, 353.
General principles, III, 354.
Procedure, III, 357.
Particular offenses, III, 358.
Carrying dangerous explosives on trains, II, 87.
Criminal acts of agents, liability of corporations for, I, 72.
Criminal liability for killing stock, I, 93.
Criminal prosecution for causing death, III, 955–958.
Criminal responsibility for disobeying rules of company, V, 237.
Enforcement of commissioners' orders by indictment, VI, 1150.
Felonious killing of persons on track, III, 766.
Illegal transportation of liquor by agent of express company, VI, 76.
Indictment under long and short haul clause of Interstate Commerce Act, sufficiency of, VI, 44.

CRIMINAL LAW — *continued.*
Liability for criminal acts of agents, I, 72.
Privilege as to self-crimination, VIII, 227, 228.
Proof of conviction of crime to impeach witness, VIII, 204.
Prosecution of agent of express company for illegal transportation of liquors, VI, 76.
Prosecutions for nuisances, VI, 894.
Punishment for failure to pay fare, VII, 1088–1090.
Traveling with intent not to pay fare, VII, 1089.

CRIMINAL NEGLIGENCE.
Meaning of, as used in statute, VIII, 310.
Offense of, III, 362.

CRIMINAL PROSECUTION.
Averment of previous, in action for causing death, III, 792.
For wrongful expulsion of passenger, IV, 210.
When barred by limitation, VI, 327.

CROPS.
See GROWING CROPS.

CROSS-BILL.
In condemnation proceedings, IV, 535.
In railway foreclosures, VI, 485.
When proper, generally, III, 353.

CROSS-EXAMINATION.
See WITNESSES.

CROSSING OF RAILROADS.
General treatment, III, 390.
Right of one company to cross the right of way of another, and how exercised, III, 390.
Subsequent duties and liabilities of the companies, III, 415.
Where only one or neither road is operated by steam, III, 419.
By gas company, laying mains, VII, 81.
Collisions at, III, 13.
Duty to construct cattle-guards, II, 596.
Erection of stations at point of intersection, VII, 198.
Horse railway crossed or paralleled by cable road, I, 729.
Injunction to restrain crossing or paralleling, VII, 435.
Injuries to employés at, III, 22.
Liability for excessive speed at, III, 532.
Power of commissioners to regulate, VI, 1146.
Rule requiring stops near, V, 242.

CROSSING OF STREAMS.
See BRIDGES; WATER AND WATERCOURSES.

CROSSING OF STREETS AND HIGHWAYS.
General treatment, III, 422.
Railroad crossing street or highway, III, 422.
Laying out street or highway across railroad, III, 436.
Grade crossings, III, 446.
Rights of abutting owner, III, 456.
Duty to construct bridges at, I, 692, 693.
Duty to construct cattle-guards at, II, 595, 596.

CROSSING OF STREETS AND HIGHWAYS — *continued.*
Duty to give signals at, I, 197–200.
Injuries to children at, II, 741–743.
Liability for killing or injuring stock at, I, 193–202.
Power of commissioners to regulate, VI, 1144–1146.
What is included as the crossing, and what as approaches, under Illinois statute, VIII, 324.
See also STREETS AND HIGHWAYS.

CROSSINGS.
At grade, III, 410.
Building, on streets, when a "taking," IV, 448.
Burden of proof in actions for injuries at, VI, 1035.
Conditions in municipal grants of right of way respecting, VII, 576.
Contracts of agents to build, I, 55.
Contracts to construct, when specifically enforced, VII, 150.
Cost of, as an element of land damages, IV, 650, 686.
Damages for failure to build, III, 705.
Defects in, when question for jury, I, 326.
Duty of company at, VII, 1133.
Duty to station flagman at, VII, 1133.
Effect of breach of agreement to make, IV, 475.
Effect of notice of unguarded condition of, V, 157.
Evidence as to signals at, V, 423.
Evidence of frightening teams at, V, 412.
Excessive speed at, when negligence, VI, 787.
Expert testimony as to danger in approaching, VIII, 263.
Frightening teams at, V, 1038.
Injuries to children at, II, 741–743.
Killing stock at, I, 152.
Liability of city or town as to safety of, VII, 694.
Liability of lessee road for defects in, VI, 227.
Meaning of term "adequate crossings" as used in deed, VIII, 304.
Negligence of street-car driver at, VII, 465.
Notices at, VIII, 123.
Obstructing view at, when negligence, VI, 790.
Of another road, duty to stop at, II, 404.
Of electric and steam roads, IV, 259.
Of other roads, collisions at, II, 386.
Of railway track, when deemed a trespass, VII, 1108.
Of street railway track, care to be exercised in, VII, 513.
Ordinances requiring gates and watchman at, VII, 675.
Ordinances requiring stops to be made at, VII, 675.
Private, duty to fence at, I, 147.
Public, duty to fence at, I, 149; V, 812, 813.
Reservation of, in deed, IV, 22.
Right of city to erect gates at, VII, 671.
Rights of licensees crossing track, VI, 271–275.

CROSSINGS — *continued.*
Rights of persons driving over, VII, 429.
Rights of street railways at, VII, 510.
Suddenly starting cars obstructing, VII, 712.
See also CROSSINGS, INJURIES AT; FARM CROSSINGS; GRADE; GRADE CROSSINGS.

CROSSINGS, INJURIES AT.
General treatment, III, 459.
Liability, generally, III, 460.
Defective crossings, III, 470.
Liability as dependent upon maintaining gates or signs; flagmen; watchmen, III, 476.
Liability as dependent upon duty to use signals; lookouts, III, 493.
Liability as dependent on rate of speed, III, 530.
Contributory negligence, III, 537.
Procedure, III, 638.
Burden of proof in actions for, VI, 1035.
Care required of persons crossing tracks, IV, 272.
Company's duty towards licensees, VI, 267.
Duty of motorman to slow up at crossings, IV, 272.
Failure to ring bell at crossing, I, 732.
Instructions in actions for, VIII, 56, 69.
Liability of lessor road for, VI, 221.
Negligence of person injured or killed, as a defense, II, 773, 774; III, 41, 261, 262, 265, 266, 822–833.
On Sunday, VII, 821.
Pleading and proof in actions for, VI, 996, 1031.
Questions of fact in actions for, VIII, 49.
Variance between pleading and proof in actions for, VI, 1040.
When negligence of driver will be imputed to passenger, V, 1079–1088.
See also GRADE; GRADE CROSSINGS.

CROSS-TIES.
See TIES AND SLEEPERS.

CROWDS.
Unusually large, providing for, at stations, II, 346; VII, 208.

CROWN DUTIES.
On fares collected, VII, 1087.

CRUELTY TO ANIMALS.
As a criminal offense, III, 363.

CULTIVATION.
By landowner, of sides of right of way, IV, 442.
Duty to fence where road passes through fields under, I, 145; V, 819.
Of right of way under reservation in deed, IV, 23.

CULVERTS.
General treatment, III, 657.
Duties of the company, III, 658.
Liabilities of the company, III, 662.
Construction lien upon, VI, 286.
Duty to build, to turn surface water, V, 979.
Duty to employés as to safety of, V, 53.
Expert testimony relative to, VIII, 262.

CULVERTS — *continued.*
Flooding lands by reason of defects in, V, 975.
In city streets, VII, 615.
Injuries to cattle at, I, 136.
Sufficiency of, when a question for experts, VIII, 262.

CUMBERLAND AND PENNSYLVANIA R. CO.
General treatment, III, 664.

CUMULATIVE EVIDENCE.
New trial not granted for, VI, 874.
Remedies for enforcement of mortgages, VI, 471.

CURATIVE ACTS.
Effect of, on irregular proceedings, for municipal aid to railways, VI, 534, 535, 593, 613, 684, 685.

CURVES.
Contributory negligence in coupling cars inside of, V, 226.
Duty of trainmen when approaching, VII, 1132.
Duty to sound signals at, III, 522.
Meaning of "curved line" as used in statute authorizing viaduct, VIII, 310.
Power of company to fix, IV, 284.
Speed allowable at, III, 534.
View of track obstructed by, III, 616.

CUSTODIAN.
Of child, contributory negligence of, II, 789–807.
Of child, right of, to sue for injuries to child, II, 808.
Traveling on cattle trains, I, 791–801.

CUSTODY.
Of cattle by shipper while *en route*, I, 791–801.
Of baggage by agent of carrier, I, 547, 552.
Of baggage by passenger, effect of, I, 554–558.
Of proper[illegible]ned by officer, I, 505.

CUSTOMS [illegible]TIES.
Lien of ca[illegible]er paying, II, 150.
On imported goods, VII, 68.

CUSTOMS LAWS.
Violation of, III, 387.

CUSTOM; USAGE.
General treatment, III, 665.
Custom.
As proof of disputed facts, V, 402.
As to places at which to stop train, II, 409.
As to safety of turntables, evidence of, II, 747.
Competency of evidence of, in actions for causing death, III, 847.
Effect of, as to delivery by carrier, V, 579.
Effect of on liability of connecting carriers, I, 533.
Effect of, on stop-over privileges, VII, 1056.
Effect of, to limit liability, V, 588; VI, 308.
Evidence of customary occurrences, II, 537.

CUSTOM; USAGE — *continued.*
Custom — *continued.*
Evidence of general, as throwing light on disputed fact, V, 391.
Evidence of, generally, II, 285; III, 296; V, 409.
Evidence of, to show negligence or its absence, VI, 874.
Examination of witness as to extent of, VIII, 216.
Liability of initial carrier as affected by, II, 208.
Not to employ switchmen, V, 913.
Not valid unless consistent with charter, II, 164.
Of agent, to examine freight, evidence of, V, 393.
Of other companies as a defense to action for injury to employé, V, 275.
Positive and negative evidence of, V, 536.
Sufficiency of evidence to show, II, 543.
That owner shall feed and water stock, I, 751.
To allow animals to run at large, evidence of, I, 282.
To give signals, when imposes a duty, III, 494, 504.
Usage.
Burden of proof to show ignorance of, V, 285.
Duty to give notice of arrival, as affected by, II, 98.
Effect of, as to delivery of goods, V, 579.
Effect of, on limitation of liability, VI, 338.
Effect of, on right to stop over, VII, 1056.
Evidence of, III, 296.
Evidence of, to vary terms of written instrument, V, 480.

CUTTING TIMBER.
As an element of land damages, IV, 708.
On the public lands, VI, 1115–1117.

CUTTING WIRES.
Of telephone company by railway company, damages for, IV, 264.

CUTS.
Duty to sound signals at, III, 522.
Speed allowable at, III, 534.
Through highway, bridging of, VII, 620.
View of track, obstructed by, III, 615.
What constitute a sufficient fence, V, 820.

DAKOTA.
Constitutionality of tax laws of, VII, 837.

DAMAGES.
General treatment, III, 668.
General principles, III, 671.
Elements and measure of damages, III, 702.
Assessment and recovery, III, 719.
In general.
Amount of review of, on appeal, I, 434–438.
Assessment of quotient verdict, VIII, 89.
Bond to secure, III, 407.

DAMAGES — *continued.*
In general — *continued.*
Construction of words "matters of damage to personal property," VIII, 316.
Elements of, erroneous instruction as to, I, 394.
Evidence of, on question of, V, 424.
Excessive, setting aside verdicts for, VI, 850; VIII, 94.
Exemplary, erroneous instructions as to, I, 394.
Exemplary, when recoverable for torts of servants, I, 72, 73.
For appropriation of mineral lands, VI, 400.
For assault, I, 473–475.
For conversion, VIII, 116–118.
For cutting wires of electric railway, IV, 264.
For delay or non-delivery of telegrams, VII, 1032, 1033.
For detention of personal property, VII, 65.
For diversion of water, VIII, 180.
For injuries at culverts, measure of, III, 664.
For injuries caused by derailment, IV, 47.
For injuries caused by frightening horses, V, 1045.
For injuries to crops, pasturage, etc., II, 602.
For malicious prosecution, VI, 372.
For nuisances, action for, VI, 897–902.
For obstruction of private way, VI, 1081.
For personal injuries, suits in equity to recover, V, 356.
For refusal to transfer stock, VII, 298.
For wrongful arrest or detention, V, 612, 613.
Improper rules as to, in request to charge, VIII, 80.
In actions by married woman for injury to her person or property, V, 1074.
In actions for failure to build cattle-guards, II, 602, 603.
In actions for flowing lands, V, 1000–1005.
In actions for libel or slander, VI, 260.
In actions of trespass, VII, 1112–1114, 1115.
In actions on accident policies, I, 17.
In actions on bills and notes, I, 601.
In actions on bonds, I, 679.
In actions on contracts, III, 234.
In actions on coupons, III, 342.
In actions on covenants, III, 349.
Inadequate, increasing on appeal, I, 438.
Inadequate, setting aside verdict for, I, 438; VI, 871, 872.
In assumpsit, I, 488.
In husband's action for injury to wife's person, V, 1071.
In joint action by husband and wife, for injury to wife, V, 1076.
In proceedings before Interstate Commerce Commission, VI, 57.
Instructions relative to, VIII, 58–69, 72, 73.

DAMAGES — *continued.*
In general — *continued.*
In suit on injunction bond, V, 1163.
In suits for overcharges, II, 633.
In suits for specific performance, VII, 158.
Limiting time to present claims for, VI, 340.
Measure of, for infringement of patents, VI, 953.
Measure of, when question of law, VIII, 43.
Mitigation of, by proof of contributory negligence, V, 778.
Negligence of trespasser in mitigation of, VII, 1162.
Non-reversible error in instructions as to, I, 408, 409.
On dissolution of injunction, V, 1159.
Opinions as to amount or measure of, VIII, 252–259.
Paid to injured persons, liability of conductor for, III, 61.
Presumption of regularity as regards, I, 386.
Proof of, in actions on contract, V, 394.
Reference to ascertain in patent cases, VI, 953.
Remission of excess, I, 375; VI, 868–871.
Stipulation as to amount of, I, 635–638.
Sufficiency, verdict on question of, VIII, 90.
What is included in the term, VIII, 310.
What provable by way of recoupment, VII, 118.
What recoverable in action for nuisance, VI, 900–902.
What recoverable in suits by assignees, I, 481.
When contributory negligence only goes in mitigation of, III, 49, 50, 244, 274.
When may be set off against charges, II, 348.

At crossings.
Assessment of, III, 404.
Excessive, III, 656.
Exemplary, punitive and vindictive, III, 656.
For unauthorized crossing of one road by another, III, 392.
Generally, III, 655–657.
Inadequacy of, III, 657.
In railway intersection proceedings, III, 404–408.
Measure of, III, 405, 406.
Mitigation or aggravation of, III, 546.
Remote, speculative, conjectural and contingent, III, 407.
To abutting or adjoining owners, III, 457, 458.
To company, where street or highway crossing is constructed, III, 442–446.

At stations.
Excessive, VII, 236.
For breach of contract to locate station, VII, 203.
For removal of station, VII, 204, 205.
Generally, VII, 236.

DAMAGES — *continued.*
By construction of railroad.
In suits on construction contracts, III, 177, 179.
To abutting or adjoining owners, III, 115–118.
To abutting owner for construction of electric railway, IV, 267.
When liquidated and when a penalty, III, 136.

By elevated railroads.
Alternative, IV, 351.
Computing to time of trial, IV, 329.
Consequential, IV, 336–338.
Evidence of special, IV, 316.
Finding that benefits should be set off against, IV, 348.
Future, elements in computation of, IV, 329.
Incidental to equitable relief, IV, 300.
Interest on, IV, 328.
Measure of, for condemnation of abutting easements, IV, 288.
Measure of, for damage to the fee, IV, 331.
Noise as an element of, IV, 330.
Nominal, IV, 328.
Opinions as to amount or measure of, IV, 325.
Right of abutting owner to sue for, IV, 298.
Rules for computation of, IV, 329.
To abutting or adjoining owners, IV, 325–341.
To personality, when not recoverable, IV, 336.
To the fee, IV, 308, 329–332.
To the leasehold, IV, 310.

By fires.
Elements and measure of, V, 960–964.
Evidence of, V, 964–966.
Generally, V, 959, 960.
Interest on, V, 964.
Matters in mitigation, V, 966, 967.

By street railways.
For failure to pave or repair streets, VII, 405.
For injury to person or property, VII, 514.
In actions against street-railway companies, VII, 508–510.
Right to lay track before payment of, VII, 427.
To abutting or adjoining owners, VII, 427.

For causing death.
Apportionment of, III, 920.
Elements and measure of, III, 924–927.
Evidence in mitigation of, III, 883, 884.
Evidence of, on question of, III, 874–884.
Excessive, III, 947–954.
Exemplary, punitive and vindictive, III, 944–946.
Future, contingent, prospective or speculative, III, 943, 944.
Generally, III, 920–955.
Instructions relative to, III, 900–902, 911–913.

DAMAGES — *continued.*
For causing death — *continued.*
Interest on, III, 954, 955.
Measure of, III, 924–955.
Nominal, III, 946, 947.
Pecuniary loss, when sole measure of, III, 927.
Sufficiency of averments to warrant exemplary, III, 803.
When contributory negligence only goes in mitigation of, III, 817.
Who entitled to, III, 755–761.
For failure to fence.
For failure to build or repair fences, V, 832.
For injuries to crops, pasturage, etc., V, 834, 835.
On streets and highways.
Consequential, to abutters for failure to restore highway, VII, 625.
Equity will not enjoin merely to compel payment of, VII, 639.
For new servitude imposed, VII, 595.
For right of way through city, VII, 649–669.
In suits by abutting owners, VII, 649–669.
Measure of, for damages to the fee, VII, 649–669.
To abutting owner upon construction of steam railways in, VII, 649–669.
To children.
Excessive, II, 823.
Exemplary, punitive and vindictive, II, 823.
For loss of child's services, II, 818.
Generally, II, 818–825; V, 250.
Measure of, II, 822.
Mitigation or aggravation of, II, 821.
Nominal, II, 821.
Remote, speculative, conjectural and contingent, II, 821.
To employes.
For injuries to minor employés, V, 252.
Future pain and suffering, V, 338.
Generally, V, 337–344.
Working after knowledge of danger, V, 170.
To goods carried.
For breach of contract by express carriers, V, 603.
For conversion by carrier, II, 76, 129.
For delay by second carrier, in suit against initial carrier, II, 211.
For failure to deliver grain at elevator, II, 122.
For failure to notify consignee of arrival of goods, II, 101.
For loss of market, caused by delay in transportation, II, 71.
For loss of note, or failure to collect it, V, 569.
For misdelivery by carrier, II, 120.
In actions founded on delay by carrier, II, 71, 72.
Measure of, II, 32, 287–305.
Measure of, for loss of goods by fire, II, 75.
Measure of, for loss or injury to goods during transit, II, 61.

DAMAGES — *continued.*
To goods carried — *continued.*
Nominal or actual, II, 290.
Nominal, when limit of recovery for delay, II, 298.
Notice to hold carrier liable for special damages, II, 301.
Reparable damages not a conversion, II, 75.
Resulting from defective cars, liability for, II, 58.
Who may sue for, II, 61.
To land taken.
Assessment of, IV, 574–639.
Assessment of, in ejectment suit, IV, 851.
By reason of construction and operation of road, IV, 938.
Consequential, IV, 679–684.
Ejectment for neglect or omission to pay, IV, 846.
Elements of, IV, 686–709.
Evidence in mitigation of, IV, 659–661.
Evidence of, on question of, IV, 639–663.
Excessive, IV, 743, 744, 946.
Excessive, reducing on appeal, IV, 798.
Excessive, setting aside verdicts for, IV, 753, 754.
Exemplary, punitive and vindictive, IV, 685, 879.
For land condemned, IV, 540–771.
For land expropriated in Canada, IV, 933, 949.
For land taken compulsorily in England, IV, 902–920.
For losses occasioned by abandonment of route, IV, 823, 824.
Future, contingent, prospective or speculative, IV, 919.
General rules for estimating, IV, 575.
Inadequacy of, IV, 744, 754, 947.
Inadequate, setting aside verdict for, IV, 799.
In condemnation proceedings, when subject to taxation, VII, 878.
In injunction suits, IV, 865.
Injunction for non-payment of, IV, 855.
Instructions relative to, IV, 632, 633.
Interest on, IV, 724–728, 920, 930.
In trespass by landowner, IV, 878, 879.
Itemizing, IV, 590, 737, 749.
Measure of, IV, 663–709.
Release of, by landowner, IV, 479; VII, 14, 15.
Remote, speculative, conjectural and contingent, IV, 684, 937.
Staying execution until payment of, IV, 852.
Sufficiency of commissioner's report on question of, IV, 737.
Sufficiency of verdict on question of, IV, 748.
Treble, when not recoverable, IV, 685.
Waiver of prepayment of, IV, 849.
What recoverable by landowner, IV, 841.
To live stock.
Amount of, in stock-killing cases, I, 345–351.

DAMAGES — *continued.*
To live stock — *continued.*
Double, constitutionality of statutes allowing, I, 93.
Duty of plaintiff to keep damages down, I, 349.
For killing stock, statutes making appraisement final, VII, 254.
In actions against carriers of live stock, I, 816–820.
Interest on, I, 820.
Proximate and remote, I, 818.
Remission of excess, I, 351.
To passengers.
Compensatory, II, 569; IV, 225–230.
Excessive, II, 579–586; IV, 238–244.
Exemplary, punitive and vindictive, II, 575–579; IV, 230–236.
Exemplary, when excessive, II, 585.
For breach of agreement to issue free pass, VI, 940.
For ejection of drover on return trip, I, 792.
For expulsion from street car, VII, 539.
For overcharges in passenger fares, VII, 1084.
For property lost or stolen in sleeper, VII, 139.
Future, contingent, prospective or speculative, II, 568.
General and special, II, 566.
In actions against carriers of slaves, II, 589.
In actions for expulsion, IV, 223–244.
In actions for injuries, II, 565–586.
In actions for loss of baggage, I, 573–575.
In suits for discriminating against negroes, III, 30.
Measure of, II, 568–575; IV, 223, 225.
Proximate and remote, II, 566, 567.
Special, for expulsion of passenger, IV, 216.

DAMNUM ABSQUE INJURIA.
Absence of negligence, V, 960.
What is, III, 407; IV, 39.

DAMS.
Accumulation of surface water and obstructing its flow by, V, 982.
Construction of, in navigable water, VIII, 170.
Liability for defects in, V, 976.
License to erect, VI, 262.
Right to erect, VII, 88; VIII, 172.
Using embankments as, by permission of agents, I, 60.

"DAY OF TRIAL."
Meaning of, VIII, 310.

DAYS OF GRACE.
On bonds, I, 661.

"DEADHEADS."
Meaning of, VIII, 311.

DEADWOODS.
Company's duty as to safety of, V, 89.

DEAF PERSONS.
As trespassers, liability for injuries to, VII, 1145.
Contributory negligence of, III, 835; VII, 1158.

DEAF PERSONS — *continued.*
Degree of care required of deaf child, II, 772.
Duty of company to children who are, II, 751.
Duty of company towards, VII, 1145.
Duty of company under rule to stop, look and listen, III, 592–594.

DEATH.
Assessment to pay death claims, VI, 17.
Competency of physician to testify to cause of, VIII, 286.
Of a party, as ground of abatement, I, 8, 9.
Of partner, effect of, to dissolve firm, VI, 937.
Of receiver, accounting with contractor after, VI, 1219.
Of trustee, effect of, VIII, 120.
Of wife pending suit for personal injuries, effect of, V, 1076.
Operation of, to revoke license, VI, 265.

DEATH BY WRONGFUL ACT.
General treatment, III, 741.
Common law rule, III, 742.
Statutes granting the remedy, III, 745.
Right of action; beneficiaries, III, 755.
The wrongful act, neglect, or default, III, 763.
Who may sue; parties, III, 769.
Limitations of time to sue, III, 777.
Jurisdiction; law of place, III, 780.
Pleading, III, 790.
Defenses, III, 808.
Evidence, III, 843.
Instructions, III, 884.
Verdict, III, 918.
Damages, III, 920.
Criminal prosecution, III, 955.
Caused by fire, liability for, V, 883.
Competency of beneficiaries as witnesses, in action for, VIII, 199.
Doctrine of comparative negligence in actions for, III, 42.
Liability of company where road is in hands of receiver, VI, 1228.
Liability of receivers for causing, VI, 1193.
Of brakeman, liability of bridge company for, I, 725.
Of child, contributory negligence as affecting recovery for, II, 778–782, 798–800.
Of employé, company's duty subsequent to, V, 19.
Of passenger, libel in admiralty for, I, 33.
Of person riding on free pass, VI, 942.
Of slaves, liability for causing, II, 586.
Power to compromise suits for causing, V, 553.
Priority of mortgage over damages for causing, VI, 457.
Removal to federal courts of suits for causing, VII, 24.
Sufficiency of declaration in action for causing, V, 906.

DEBENTURES.
General treatment, III, 958.
Form and characteristics of, III, 960.
Municipal, by-laws donating to railroad, VI, 654.
Priority between mortgages and, VI, 457.

DEBENTURES — *continued.*
Rights of holder of, to apply for dissolution, IV, 135.
Rights of holders of, IV, 77.
See also BONDS.
DEBTOR.
Notice to, of assignment, I, 480.
DEBTS.
Assumption of, by purchaser of railroad, VII, 111.
Description of, in mortgage to secure, VI, 489.
Due to government railroads, priority of, V, 1050.
Enforcement of judgment by action of, IV, 764.
Indemnity to receiver to protect against, V, 1103.
Leasing road by order of court to pay, VI, 204.
Notice to garnishee of assignment of, I, 506.
Of company, issuing bonds in payment of, I, 657.
Of old companies, liability of new company for, III, 102–105; VII, 58.
On subscription to stock, VII, 757.
Payable in another state, when attachment lies for, I, 489.
Payment of unsecured, VI, 1199.
Power of receiver to pay, VI, 1187.
Unpaid subscriptions a trust fund for payment of, VII, 312.
What entitled to priority on foreclosure, VI, 495, 510.
DECISIONS.
Of land officers, conclusiveness of, VI, 1108.
Of railway commissioners, conclusiveness of, VI, 1146–1149.
Of state courts, following in federal courts, V, 644; VI, 556.
DECLARATION.
Form and sufficiency of, generally, VI, 985–1001.
In actions against carriers of goods, II, 274–278.
In actions against carriers of live stock, I, 803.
In actions against carriers of passengers, II, 524–532.
In actions for causing death, III, 790–806.
In actions for flowing land, V, 991.
In actions for injuries caused by collisions, III, 15.
In actions for injuries caused by defective bridge, I, 708.
In actions for injuries caused by fire, V, 899–907.
In actions for injury to employé, V, 261–273.
In actions for killing or injuring stock, I, 246–269.
In actions for loss of baggage, I, 568.
In actions on bills and notes, I, 597.
In actions on bonds, I, 677.
In actions on construction contracts, III, 170.
In actions to enforce subscriptions to stock, VII, 759.
DECLARATION — *continued.*
In ejectment, IV, 252.
In suits to enforce railway aid bonds, VI, 706.
In trespass, IV, 872; VII, 1111, 1115, 1116.
When must negative contributory negligence, III, 275–278.
See also COMPLAINT; PETITION.
DECLARATIONS.
Admissibility of, in actions for loss of baggages, I, 571.
Admissibility of, in evidence, generally, III, 856; V, 487–500.
As evidence, in actions for injuries to children, II, 813.
As to residence, admissibility of, V, 460.
Of agent, no waiver of conditions in limited ticket, VII, 1069.
Of agent, proof of agency by, I, 41.
Of agent, when bind principal, I, 51, 52.
Of company's speakers, at public meetings, V, 494.
Of employés, as evidence, I, 286.
Of employés, right of passenger to rely upon, II, 354.
Of strangers, admissibility of, V, 499.
Of trust, VIII, 117.
Of vice-principal as proof of incompetency of servant, V, 781.
When part of the *res gestæ*, V, 463–474.
DECREE.
See JUDGMENT; DECREE.
DEDICATION.
General treatment, IV, 1.
Of land for highway, validity of, VIII, 130.
Of land for street or highway crossing, III, 438, 463.
Of land for streets or highways, VII, 541–547.
Of lands, easements in, VI, 1079.
DEDUCTION.
For benefits, in assessing damages in condemnation proceedings, IV, 338–341, 709–724.
From wages as contribution to sick fund, VII, 17.
Of insurance money from damages, II, 574; III, 927.
Under English tax laws, for what purposes allowed, VII, 1015, 1016.
DEEDS.
General treatment, IV, 3.
Common-law requisites, IV, 3.
Delivery, IV, 5.
Acknowledgment; recording, IV, 6.
Interpretation and effect, IV, 7.
Validity, IV, 23.
Canceling or reforming, IV, 24.
Acquirement of easements by, IV, 159, 160.
As evidence, I, 286.
Assignment of stock by, VII, 288.
Creation of trusts by, VIII, 117.
Estoppel by, V, 368–372.
For land purchased at tax sale, VII, 996.
Made by agents, I, 60.
Of guardians, validity of, V, 1058.
Of land held adversely, I, 38.

DEEDS — *continued.*
Of right of way, IV, 462–486; VII, 76–78.
On tax sales, actions to set aside, VII, 998.
Proof of sales of property by recitals in, IV, 653.
Reference to, in petition, IV, 518.
See also FRAUDULENT CONVEYANCES; MORTGAGES; RELEASE.

DEEDS OF TRUST.
General treatment, IV, 25.
Estoppel by, V, 371.
Issuing bonds secured by, I, 659.
Subrogation of surety in, VII, 724.
See also MORTGAGES; MORTGAGE TRUSTEES; TRUSTS AND TRUSTEES.

DE FACTO CORPORATIONS.
Power of, to take lands, IV, 406.
Powers of, III, 323.

DE FACTO PRESIDENT.
Powers of, VI, 1069.

DEFAULT.
By mortgagor, right of trustees to take possession in case of, VI, 461.
By mortgagor, when authorizes foreclosure, VI, 470.
Judgment by, VI, 81.
Judgment by, in actions for injuries caused by fire, V, 968.
Of employés, indemnity to company against, V, 1103.
Of payment of pledge, sale of collateral for, VII, 291.
Of servant, causing death, liability for, III, 764.
Provision as to, in mortgage, VI, 441.

DEFECTIVE PACKING.
See PACKING.

DEFECTS.
In general.
In brakes, when not negligence, VI, 789.
In construction of road, liability for, III, 115–118; VII, 411–416.
In cross-ties, admissibility of evidence of, V, 433.
In drains, liability for, IV, 156.
In machinery, burden of proof to show, V, 448.
In machinery used by contractor, liability of company for, V, 1112.
In streets, injuries caused by, VII, 457, 514, 517.
In substituted highway, action for, VII, 627.
In tickets, mistakes, etc., VII, 1042.
Proof of notice of, VII, 415.
In appliances, etc., as to employes.
Alleging company's knowledge or notice of, V, 270.
Assumption of risk as to, V, 135.
Averment and proof as to employé's knowledge or ignorance of, V, 273, 274, 279.
Averment of inability to discover, V, 274.
Duty to warn employés as to, V, 37.
Effect of promise to repair, V, 164–167.

DEFECTS — *continued.*
In appliances, etc., as to employes — *con.*
Failure to report to company, effect of, V, 207.
In drawbars and drawheads, V, 224.
In machinery, alleging negligence in furnishing, V, 266–269.
In machinery, sufficiency of evidence to show, V, 290.
In yards and depot grounds, notice to employé of, V, 156.
Knowledge of, by employer, V, 98–104.
Latent, assumption of risks as to, V, 149–151.
Notice to employé of, V, 159–162, 223.
Patent, assumption of risks as to, V, 141–149.
Remaining in service after notice of, V, 336.
Risks of, assumed by repairers and construction hands, V, 180.
Using machinery after knowledge of, V, 208.
In appliances, etc., as to passengers.
Liability for injuries caused by, I, 729; IV, 357.
In engines, liability of passenger carrier for, II, 378.
In platforms, liability for, II, 416.
In premises near station grounds, II, 417.
In ticket, expulsion of passenger for, IV, 182.
Latent, liability of carrier for, II, 379.
In Bridges, etc.
Assumption of risk of, V, 132.
In bridges, culverts, embankments, etc., liability for, V, 974–977.
In drawbridge, injury to vessel caused by, I, 716.
In overhead bridge, alleging, V, 266.
Liability of lessee road for, VI, 227.
Notice or knowledge of, I, 699.
Notice to employé of, V, 158.
In cars.
Liability for, I, 739, 740; II, 58; VII, 466.
Of connecting carrier, liability for, II, 242.
In crossings.
Effect of, on rule as to contributory negligence, III, 828.
Injuries to cattle caused by, I, 196.
Instructions to jury as to, III, 652.
Liability for, III, 470–476.
Pleadings in actions for injuries caused by, III, 639.
In engine.
Admissibility of evidence to show, V, 909.
Allegation of, in action for injuries caused by fire, V, 902.
Burden of proof on plaintiff to show, V, 939.
Causing loss of property by fire, V, 863–867.
Liability for fires caused by, V, 863–867.
Remaining on, after knowledge of, V, 209.
When constitute negligence, VI, 784.

DEFECTS — *continued.*
In fences, gates, etc.
Burden of proof as to, I, 314.
Evidence to show, I, 279.
In fence, gate or cattle-guard, sufficiency of evidence to show, I, 296–299.
In fences, crossings, trestles, etc., liability of lessee road for, VI, 227.
In gate fastenings, evidence to show, I, 279.
Notice of, to company, I, 169–172; V, 827.
Notice to employé of, V, 157.
Presumption of negligence from long existence of, V, 828.
Prima facie proof of, I, 308.
When question for jury, I, 326.

In track.
Causing derailment, IV, 39.
Liability for, II, 370.
Liability of lessee road for, VI, 244.
Of another company, liability to injured employé for, V, 258.
Or cars, when show negligence, VII, 516.
Or machinery, presumptions arising from proof of, V, 299.
Or roadbed, notice to employé of, V, 154.
Proof of, III, 869.
When constitute negligence, VI, 783.
When not evidence of negligence, V, 48.
Whether employé had notice of, when question of fact, V, 324.

In pleadings, process, etc.
Effect of appearance to waive, I, 451.
In allegations, how cured, I, 267–269.
In service of process, waiver by appearance or otherwise, VI, 1103.
In verdict, as ground for new trial, VI, 849.
Of parties, how cured, IV, 496.
Of parties, how pleaded, VI, 1002.
Of parties, objections for, VI, 929.
Remedies for, VI, 1054–1061.
Waiver of, by failure to demur, VI, 1058.

DEFENDANTS.
Dismissal as to one of several, I, 32.
Dissolution of corporate, as ground of abatement, I, 9.
When sustain burden of proof, V, 453.

DEFENSES.
In general.
Advice of counsel, V, 1061.
Burden of proof to establish affirmative, V, 451.
Forfeiture of charter, when available as defense, II, 714.
In actions for taxes, VII, 993, 994.
In consistent, VI, 1008.
Intoxication of person injured, VII, 531.
Joinder of, in plea or answer, VI, 1008.
Of contributory negligence, see that title and references there found.
Of limitation, how interposed, VI, 308.
Of usury, who may interpose, VIII, 144.
Striking out, for errors or defects, VI, 1054, 1055.

DEFENSES — *continued.*
In general — *continued.*
To actions to enforce penalties, VI, 969.
To criminal prosecution for causing death, III, 957.
To proceedings by *quo warranto*, VI, 1133.
To proceedings for contempt, III, 183.

To actions against carriers.
For charges, II, 648, 649.
For charging excessive fares, VII, 1084.
For conversion by carrier, II, 129; VIII, 113.
For expulsion of passenger, IV, 212, 213.
For injuries to passengers, II, 532–534; IV, 40.
For loss of baggage, I, 572, 573.
For loss or injury to goods, II, 286.
Founded on delay of carrier, II, 70.
Of live stock, I, 806; II, 532–534.

To actions in tort, generally.
For assaults, I, 471, 472.
For causing death, III, 808–843.
For damages for nuisances, VI, 900.
For diversion of water, VIII, 176.
For failure to build cattle-guards, II, 600.
For failure to build or maintain fences, V, 829, 831.
For flooding lands, etc., III, 664; V, 987–989.
For infringement of patents, VI, 952.
For injuries at or near stations, VII, 224.
For injuries by culverts, III, 664.
For injuries caused by fire, V, 907, 908.
For injuries caused by negligence of plaintiff's co-servants, V, 776–778.
For injuries to employés, V, 274–276.
For killing stock, I, 276–278.
For malicious prosecution, VI, 371.
For obstruction of private way, VI, 1081.
To actions founded on negligence, VI, 816–818, 822.
To actions of trespass, IV, 874–876; VII, 1111, 1115, 1116.

To actions on contract.
Against stockholders by corporate creditors, VII, 325.
By owner of stock whose name has been forged, VII, 304.
For compensation for carrying the mails, II, 7.
For refusal to transfer stock, VII, 296.
For subscriptions, VII, 756–797.
For wages, V, 10.
On accident policies, I, 15–17.
On bonds, I, 678.
On bonds, notice of, to purchaser, I, 675.
On construction contracts, III, 171.
On contracts, generally, III, 231.
On coupons, III, 341.
On covenants, III, 349.
On fire policies, V, 851.
On negotiable paper, I, 599.
On stock subscriptions, VII, 766, 767, 770–796.

DEFENSES — *continued.*
To civil actions, generally.
Against receivers, VI, 1215.
Of champerty, II, 610.
Of ejectment, IV, 251, 252.
Of garnishee, I, 506.
To condemnation proceedings.
Generally, IV, 529–536.
To actions by landowner, IV, 835–838.
To proceedings to condemn city streets for public use, VII, 589.
To railway intersection proceedings, III, 403.
To suits in equity.
Laches of property owner, when no defense to injunction, IV, 300.
For specific performance, VII, 156, 157.
To application for appointment of receiver, VI, 1176.
To application for dissolution, IV, 135.
To compel issue of railway aid bonds, VI, 664, 665.
To compel restoration of highway, VII, 623.
To enforce railway aid bonds, VI, 707.
To foreclosure of mechanic's lien, VI, 293.
To injunction suit by landowner, IV, 864.
To restrain nuisances, VI, 896.
What available in foreclosure, VI, 482–484.

DEFERRED CREDITOR.
When stockholder becomes, on dissolution, VII, 311.

DEFICIENCY LANDS.
See INDEMNITY LANDS.

DEFINITIONS.
See WORDS AND PHRASES.

DELAWARE.
Assessment and levy of railroad taxes in, VII, 937.
Constitutional provisions and statutes in, relative to taking of private property for public use, IV, 384, 387.
State aid to railways in, VII, 166.
When negligence of parent is imputable to child in, II, 792.

DELAY.
In general.
As a defense in foreclosure, VI, 483.
By stoppage of trains, III, 405.
In attempting to put out fire, when contributory negligence, V, 887.
In delivery of telegrams, liability for, VII, 1031.
In objecting, waiver of defects in pleading by, VI, 1060.
In performing construction contract, effect of, III, 134.
In the patent office, VI, 949.
Of company, right of contractor in cases of, III, 141.
Of owner to call for baggage, effect of, I, 550, 551, 552.
When a defense to suit for specific performance, VII, 157.
When a defense to suit on subscription, VII, 770, 771.
When amounts to laches, VII, 342, 343.

DELAY — *continued.*
Under contract to carry.
Caused by blocking the road, press of business, strikes, etc., II, 25, 36, 70.
Damages to passenger for, II, 572, 581.
In carrying goods, as an element of damages, III, 704.
In delivery, liability of final carrier for, II, 250.
In delivery of baggage, liability for, I, 525, 574.
In delivery of goods carried, liability for, V, 580.
In shipment, excuses for, I, 742.
In shipment, to suit carrier's convenience, II, 54.
In transit, liability for damage caused by, I, 753, 754; V, 576.
In transporting goods, penalties for, VI, 966.
In unloading cattle, liability for, I, 759.
Liability of passenger carrier for, II, 347–349.
Liability of second carrier for, II, 239.
Limiting liability for loss by, I, 638; II, 261; V, 589; VI, 339; VII, 1046.
Loss or injury to goods caused by, II, 62–72.
Measure of damages for, II, 293–300.
Of intermediate carrier, liability for, II, 517.
Of mail matter, liability for, II, 4.
Of passenger ejected, excessive damages for, IV, 240.
Of second carrier, liability of initial carrier for, II, 209–211.
Of shipment, to allow creditors to attach goods, II, 54.
Or temporary loss, liability for, II, 195.
Recovery of expenses caused by, II, 298.
When carrier liable as warehouseman in cases of, II, 129, 130.

DELEGATION.
Of legislative power, VI, 556, 576, 645, 647, 1136; VII, 243.
Of master's duty towards servant, V, 18.
Of power to condemn land, IV, 410–412.
Of power to locate route, VI, 353.
Of power to tax, VII, 832–835.

DELINQUENTS.
Lists of, VII, 987.

DELIVERY.
In general.
Assignment of personalty by, I, 478.
Buyer's remedy for seller's failure to make, VII, 293.
Of bill of lading, passing title by, I, 625.
Of bill of lading upon acceptance of draft attached, I, 625.
Of bond to secure land damages, IV, 555.
Of certificate, transfer of stock by, with deed of assignment, VII, 288.
Of deeds, IV, 5.
Of goods sold, VII, 100.
Of mortgage, VI, 434.
Of municipal aid bonds, conditions precedent to, VI, 557.
Of property sold, to purchaser, V, 548.
Of railway tickets, VII, 1048.

DELIVERY — *continued.*
In general — *continued.*
Of subscription to stock in escrow, VII, 786.
Transfer of bill of lading by, I, 644.
Transfer of bonds by, I, 660.
Transfer of railway aid bonds by, VI, 690.
Transfer of stock by, VII, 288.
To carrier.
As fixing beginning of liability, II, 42.
Effect of, on right of stoppage in transit, II, 187.
Evidence of, II, 285.
Generally, II, 38–42; V, 571.
Of baggage to, I, 541–546.
Of live stock to, I, 743–745.
Sufficiency of, I, 40–42.
By carrier.
Actual, of goods carried, II, 105.
Allegations as to, in suits against carriers, II, 277.
At consignee's house of place of business, II, 50.
By stock-yard company, under contract, VII, 349.
By warehousemen, liability for failure to make, VIII, 165.
Constructive, of goods carried, II, 105.
Effect of bill of lading upon validity of, I, 619.
Effect of possession of bill of lading as evidence of, I, 625.
Generally, I, 757–760; II, 90–129; V, 577–584.
How to be made at flag stations, II, 144.
Loss of lien by, II, 153, 643.
Misdelivery, I, 760.
Of baggage by company, I, 546–548.
Of check for baggage to connecting carrier, I, 546.
Of C. O. D. goods, V, 582–584.
Of freights from cars as ending carrier's liability, II, 49.
Of freight, unjust discrimination in relation to, VI, 20.
Of goods, discrimination in, IV, 118.
Of grain at elevators, IV, 370.
Of live stock, I, 757–760.
Of thing deposited in cloak rooms, I, 575.
On wharf, II, 51.
Partial, right to charges on, II, 646.
Statutes relative to, validity of, III, 35.
To consignee after notice to stop goods, liability to shipper in case of, II, 190.
To drayman, II, 145.
To elevator company, when sufficient to end carrier's liability, II, 49.
To wrong person, I, 760; II, 116–121.
Unequal charges for, IV, 95.
What necessary to entitle carrier to demand charges, II, 646.
When defeats right of stoppage in transit, II, 191, 192.
When goods are in excess of amount specified in bill of lading, I, 622.
When terminates carrier's liability as warehouseman, II, 146.

DELIVERY — *continued.*
By carrier — *continued.*
Without production of bill of lading, I, 621; II, 128.
Between connecting carriers.
By intermediate to final carrier, II, 240.
Of baggage to second carrier or transfer company, I, 528, 554.
Of cattle to connecting carrier, I, 784.
To second carrier, sufficiency of, II, 237.
To second carrier, when releases liability of initial carrier, II, 231–234.
Wrongful, liability of final carrier for, II, 246.
See also PARTIAL DELIVERY.

DEMAND.
Before applying for mandamus, VI, 384.
Before issuing warrant for taxes, VII, 968.
Before suing to enforce railway aid bonds, VI, 705.
Before suit for damage on ground of nuisance, VI, 899.
Before suit for damages caused by fire, V, 894.
Before suit for taxes, VII, 991.
Before suit, generally, I, 25, 566, 677; III, 231; IV, 151; VII, 758; VIII, 112.
Before suit, necessity and sufficiency of, I, 242, 243; II, 50, 104, 127, 267; V, 599; VII, 64.
Before suit on bond, I, 677.
Before suit, proof of, I, 241.
Before suit to recover back money paid for taxes, VII, 1001.
By consignee after once refusing to receive goods, II, 102.
By railway company of municipal bonds issued in aid, VI, 662, 664.
Effect of failure to deliver goods on, II, 50, 142.
For abatement of nuisance, necessity of, V, 986.
For attorney's fee, in bill of particulars, I, 364.
For fare, before enforcement of penalty, VII, 1090.
For more than agreed rate of freight, II, 249.
For possession, before bringing ejectment, IV, 252, 851.
Liability for loss of goods after failure to deliver on, II, 78.
Of abutting owners, foundation of, IV, 291–298.
Of charges, right to make, II, 644–646.
Of payment of bill or note, I, 595.
Of performance, III, 221.
Of performance, allegation of, in action on stock subscription, VII, 761.
Refusal to pay fare upon, IV, 168, 170.
When interest runs from time of, IV, 727; V, 1175.
When limitation runs from time of, VI, 309.

DEMURRAGE.
Lien of carrier for, II, 150.
When allowable for special services, II, 643.
When allowable to carrier, II, 104, 162.

DEMURRER.
Admissions by, VI, 1013.
Conclusiveness of judgments on, VI, 99.
Form and sufficiency, generally, VI, 1010–1014.
For nonjoinder of connecting carriers, II, 205.
General, VI, 1010.
In suit on construction contract, III, 173.
In suit to enjoin unlawful tax, VII, 1009.
Interposing statute of limitations by, VI, 1013.
Necessity of separate, to distinct paragraphs of complaint, I, 271.
Review of decisions on, VI, 1014.
Special, VI, 1011.
To bill for foreclosure, VI, 485.
To bill or answer in equity, VI, 1020.
To complaint in action for causing death, III, 807.
To complaint showing contributory negligence on its face, III, 280.
To evidence, VIII, 21–23.
To petition in condemnation proceedings, IV, 534, 535.
Waiver of defects by failure to demur, VI, 1058.

DENIAL.
General, as affecting damages, III, 723.
General, proving contributory negligence under, III, 282.
Necessity of specific, I, 269.
Of necessity for taking land, IV, 532.
Of requests to charge, discretion as to, I, 381.
Specific, of plaintiff's negative averment as to contributory negligence, III, 282.
Sufficiency of general, I, 269.
Sufficiency of, in answer or plea, VI, 1007, 1008.
When contributory negligence must be specially pleaded, III, 281.

DENVER.
Decisions particularly applicable to, VI, 760.

DENVER & RIO GRANDE R. CO.
General statement, IV, 38.

DENVER PACIFIC R. CO.
General statement, IV, 38.

DEPARTMENTS.
Application of fellow-servant rule to servants in different departments, or working for different companies, V, 683–694.
Limitation of the rule of fellow-service, when servants are in different, V, 683–691.
Mandamus to heads of, VI, 381.
The land department, VI, 1107, 1108.

DEPARTURE.
From proposed plan of construction, right of action for, IV, 832.
In replication, effect of, VI, 1016.
Of trains, fixing hours of, VI, 249.

DEPENDENCE.
Upon deceased for support, proof of, and when entitles to damages, III, 756, 877.

DEPENDENT COVENANTS.
See COVENANTS.

DEPOSIT.
By bidder at foreclosure sale, VI, 501.
Compensation to landowner out of, on abandonment of road, I, 6; IV, 820, 822.
Of articles in cloak room, I, 575.
Of bonds on reorganization, VII, 53.
Of compensation for land taken, IV, 548–551, 903, 930.
Of goods at roadside as a delivery to carrier, II, 39.
Of material on land, when a "taking," IV, 444.
Of plans and books of reference, IV, 898.
Of stock, effect on right to vote the stock, VII, 310.
Of stock, in view of consolidation, suits to recover proceeds of, VII, 339.
Of wages with company, action for, V, 8, 14.
Parliamentary, disposal of, on dissolution, IV, 139; VII, 1104.

DEPOSITIONS.
Admissibility and effect of, as evidence, III, 858; V, 520–523.
At coroners' inquests, as evidence, V, 522.
Of employés, admissibility of, V, 910.

DEPOT GROUNDS.
What are, VII, 194; VIII, 311.
When subject to taxation, VII, 864.

DEPOTS.
See STATIONS AND DEPOTS.

DEPRECIATION.
Of market value, opinions as to, VIII, 256.
Of rental value, measure of damages for, IV, 332–335.
In value of premises, damages for, VI, 901.
In value of property caused by removal of station, VII, 205.
See also DIMINUTION.

DERAILMENT.
General treatment, IV, 39.
Jumping from car in cases of, II, 488.
Nonliability for acts of fellow-servants resulting in, V, 660.
Of street car, VII, 472, 484.
Of street car, when negligence, VII, 468.
Prima facie evidence of, II, 548.

DERRICK HAND.
When fellow-servant of brakeman, V, 760.
When foreman is fellow-servant of, V, 749.

DERRICKS.
Duty of company as to safety of, V, 64.

DESCRIPTION.
Of company to be aided, in petition for municipal aid, VI, 569.
Of easements proposed to be condemned, IV, 286.
Of goods, construction of bill of lading as to, I, 614.
Of land taken in condemnation proceedings, IV, 524, 735, 736, 748, 757, 944.
Of parties in pleadings, VI, 985, 1018.
Of parties in process, VI, 1083.
Of premises conveyed, IV, 9–12.

DESCRIPTION — *continued.*
Of premises taken by consent of owner, IV, 466–468.
Of property, in notice of intention to take, IV, 508.
Of property, in petition in condemnation proceedings, IV, 515–519.
Of subject-matter in mortgage, VI, 438.
Of terminus of tunnel, VIII, 122.

DESTINATION.
Of merchandise or live stock.
Carrier only required to deliver at place of, II, 93.
Delay by sending goods past place of, II, 66.
Delivery of goods must be at place of, II, 113.
Goods can be stored only at place of, II, 148.
In absence of limitation of liability, initial carrier liable to place of, II, 252.
Notice of claim for loss or damage after arrival at, I, 774.
Of freight, duty of carrier to deliver at, II, 113.
Of goods, evidence of change of, II, 286.
Right of consignee to change, II, 113.
Termination of liability on arrival of goods at place of, II, 46, 133–149.
Value of goods at place of, when measure of damages, II, 287.
What is place of, II, 295.
Of passenger or baggage
Carrying passenger beyond, action for, when barred, VI, 316.
Damages for carrying beyond, II, 572.
Duty to carry to place of, II, 393.
Expulsion of passenger where train does not stop at place of, IV, 172, 181, 224.
Liability of company where baggage arrives before passenger, I, 552.
Rights of passengers stopping over before reaching, II, 320.

DESTRUCTION.
Of bridges in war, liability for, VIII, 161.
Of crops by independent contractor, liability for, V, 1114.

DETECTIVES.
Company's liability for wrongful arrest by, V, 608.
Employment of, by station agent, VII, 188.

DETENTION.
Of baggage, liability for, I, 525.
Of immigrants — disinfection, VI, 1126.
Of interstate freight, effect of, VI, 3.
Of personal property, damages for, VII, 65.
Of persons by agent, liability of company for, I, 73, 74.

DETERMINATION.
Of conflicting claims under land grants, VI, 136–138.

DETROIT, MICH.
Decisions particularly applicable to, VI 760.

DEVIATION.
By carrier from terms of special contract, I, 783.
From line of delineation, under English compulsory purchase proceedings, IV, 899.
Of agents from instructions, effect of, I, 54.
See also DIVERSION.

DIAGRAMS.
Admissibility and effect of, as evidence, II, 538; V, 407, 506.

DILIGENCE.
In general.
In looking after fences, what required, V, 826.
In making collections, what required, V, 568.
In moving for continuance, VIII, 10.
To obtain evidence, what necessary, VI, 873.
Of carriers.
Extraordinary, required of passenger carrier, II, 355; VI, 779.
Reasonable care and, VI, 778.
What required from bailee, I, 577.
What required from carrier of goods, V, 574.
What required from carrier of live stock, I, 745.
What required from warehousemen, VIII, 163.
Whether exercised, a question for the jury, VI, 811.
See also CARE; DUE CARE; REASONABLE CARE; NEGLIGENCE; UTMOST CARE.

DIMINUTION.
In value of land from failure to build and maintain fences, V, 832.
In value of land not taken, IV, 666.
Of rental value, IV, 310, 315, 332–335.
Of speed after accident, evidence of, V, 426.
See also DEPRECIATION.

DIRECT EXAMINATION.
See EVIDENCE; EXAMINATION; WITNESSES.

DIRECTING VERDICT.
Erroneously, when ground for reversal, I, 396.
In action against passenger carrier, II, 562.
In actions for damages caused by fires, V, 949.
In actions for injuries caused by negligence of fellow-servants, V, 788.
In action for injury to child, II, 817.
In stock-killing cases, I, 343.
Necessity of motion to direct, I, 419.
Refusal of motion for, when not ground for reversal, I, 410.
When proper, III, 314, 553, 903, 913; IV, 638; VI, 802; VIII, 85–88.

DIRECTION.
Of certiorari in town-bonding proceedings, VI, 745.
Of conductor, following, when contributory negligence, II, 450.

DIRECTION — *continued.*
Of consignor's agent, delivery of goods pursuant to, II, 111, 120.
Of employé, right of passenger to rely upon, II, 354, 446, 463.
Of gateman, effect of, on rule as to contributory negligence, III, 829.
Of shipper, liability of carrier for failure to obey, II, 60.
Of writ of mandamus, VI, 386.

DIRECTORS; TRUSTEES.
General treatment, IV, 50.
Eligibility, election, removal, etc., IV, 50.
Meetings, IV, 56.
Compensation, IV, 58.
Rights, powers, duties, and liabilities, IV, 61.
Certificate of residence of, III, 82.
Duties of, in declaring dividends, IV, 142.
Effect of dissolution on powers of, IV, 138.
Execution of leases by, VI, 210.
Exemption from liability for negligence of, VI, 945.
Guaranty of bonds by, I, 659.
Levy of assessments on subscriptions by, VII, 750.
Liability of, to creditors, in England, VII, 316.
Meetings of, III, 80.
Non-residence of, when forfeits franchise, II, 711.
Of Union Pacific R. Co., pay of, VIII, 142.
Proceedings of, secondary evidence as to, V, 457.
Ratification of acts of president by, VI, 1070.
Remedies of stockholders against, VII, 334–338.
Request to and refusal by to sue, VII, 329, 331, 336, 341, 347.
Right to pursue property fraudulently disposed of by, VII, 330.
Service of process on, VI, 1090.
See also MORTGAGE TRUSTEES; TRUSTS AND TRUSTEES.

DIRT.
Right to throw on street, VII, 414.

DISABILITY.
Of infancy or coverture, effect of landowner's, IV, 501.
Of infancy, under statute of limitations, III, 780.
Of passenger, when excuses refusal to carry, II, 346.
Personal, failure to inform carrier of, II, 459.
When ground for recovery under accident policy, I, 14.
When stops statute of limitations, VI, 328–330.

DISCHARGE.
In general.
Of garnishee, I, 509.
Of judgments, VI, 101, 102.
Of mechanic's lien, VI, 287, 288.
Of surface water upon premises of another, V, 982–984.

DISCHARGE — *continued.*
Of employes.
Damages for, III, 704.
Generally, V, 7, 8.
Obedience to order through fear of, V, 239.
Obtaining other employment after, V, 12.
Of negligent servant after accident, admissibility of evidence of, V, 403.
Of superintendent, VII, 825, 826.
Of receivers.
Effect of, on liability of company for his acts and torts, VI, 1229.
Enforcement of claims after, VI, 497.
Generally, VI, 1224–1227.
See also REMOVAL.

DISCLAIMER.
In patent law, VI, 949.

DISCLOSURE.
Of value by shipper, necessity of, II, 88–90.
Of value or contents of baggage, I, 558–560.

DISCONTINUANCE.
Of actions, generally, I, 32.
Of appeals, IV, 810.
Of bankruptcy proceedings, I, 583.
Of condemnation proceedings, IV, 818–826.
Of highway, rights of abutters on, VII, 627.
Of streets or highways, VII, 554–556.

DISCOUNT.
Issuing paid-up stock at, VII, 279.
Of draft attached to bill of lading, I, 650.
On fare, for purchase of ticket, VII, 1080.
Passenger without ticket not entitled to, IV, 177.
When unlawful as unjust discrimination, VI, 21.

DISCOVERY; INSPECTION.
General treatment, IV, 77.
Discovery.
Discretion as to granting or refusing, I, 381.
Of animal on track, burden of proof as to negligence after, I, 313.
Of animal on track, duty after, I, 107, 122, 123, 151.
Of children in danger, duty after, II, 750.
Of impending danger, failure to use due care after, VI, 785.
Of person on track, instructions as to duty of employés after, III, 896.
Of trespasser, duty of company after, III, 835; VII, 1137–1143.
Inspection.
Of cars by employés, rule requiring, V, 244.
Of C. O. D. goods before paying bill, II, 115.
Of corporate books, right of, VII, 307.
Of coupling apparatus, disobedience of rule requiring, V, 230.
Of documents, books, etc., IV, 78–80.
Of improvements by mortgage trustees, VI, 465.

DISCOVERY; INSPECTION—*continued.*
Inspection—*continued.*
Of interstate carriers or traffic, under state laws, VI, 71.
Of rate books, under Railway and Canal Traffic Acts, II, 665.
Of receivers' books, VI, 1217.
Of rolling stock, II, 379.
Of things sold, VII, 100.
Of track, II, 369, 370; V, 104–113, 335, 336.
Of transfer book and list of stockholders, VII, 302.

DISCRETION.
In general
Age of, a question for jury, II, 785.
As to granting new trial on ground that verdict is against weight of evidence, VI, 845.
As to right to open and close, IV, 627.
At what age child arrives at, II, 764–772.
Discretionary action not reviewable on mandamus, VI, 375.
In actions for specific performance, VII, 144.
Of directors as to calls on stock, VII, 750.
Of legislature as respects the condemnation of private property, IV, 383.
Of railway commissioners, extent of, VI, 1148.
Of the court.
As to admission of evidence, IV, 652.
As to allowance of amendments, VI, 1043.
As to allowance of view by jury, IV, 625; VIII, 17.
As to appointing receiver, in foreclosure suits, VI, 489.
As to appointment of receiver, VI, 1162.
As to arguments to the jury, VIII, 37.
As to costs and fees, IV, 728.
As to granting injunctions, V, 1134.
As to granting leave to sue receivers, VI, 1212.
As to ordering physical examination of plaintiff, VI, 977.
As to removal of receiver, VI, 1222.
In ruling on evidence, I, 320.
Of justice of the peace, on trial of stock-killing case, I, 358.
Of trial court, review of, on appeal, I, 381–384; IV, 781.
Of the jury.
As to exemplary damages, III, 946.
In allowing interest on damages, III, 739, 954.
In assessment of damages, III, 735, 924.

DISCRIMINATION.
General treatment, IV, 83.
What constitutes, generally, IV, 83.
As between same class of freights, IV, 88.
As to amount carried, IV, 89.
As between individuals or classes, IV, 92.
As between places, IV, 105.
As to furnishing facilities, IV, 113.
As between carriers, IV, 115.
Rebates and drawbacks, IV, 119.
Interstate freights, IV, 123.

DISCRIMINATION—*continued.*
Remedy for, IV, 123.
Actions for, when barred, VI, 315.
Against negroes, III, 27–31.
As to street-car fares, VII, 454.
Between shippers, as to moving trains, II, 37, 69.
By railway company, in granting express facilities, V, 562.
In facilities and charges on alternative routes, II, 199.
In facilities for purchasing railway tickets, VII, 1048.
In legislation, VII, 245.
Liability of receiver for, VI, 1190.
Unjust, what is, and liability for, VI, 19–31.
What is, VIII, 311.

DISEASE.
Aggravation of, as an element of damages, II, 571; III, 680.
Carrying passenger afflicted by contagious, II, 433.
Communicated by employé to passenger, liability for, II, 431.
Liability of street-car company using diseased horses, VII, 457.
Of passenger, as a defense to action for personal injury, II, 534.
Resultant, when proximate and when remote cause of damage, III, 674.
Risks resulting from, exemption from, I, 747.
Transportation of diseased animals, I, 788–790.

DISFIGUREMENT.
As an element of damages, II, 571.

DISINFECTION.
Of immigrants, VI, 1126.

DISMISSAL.
As to a joint defendant, I, 32.
Conclusiveness of judgment of, VI, 98.
In stock-killing cases, I, 320.
Of action at trial, VIII, 36, 37.
Of actions, generally, I, 32.
Of appeals from justice, VI, 124.
Of appeals, generally, I, 446.
Of appeals in condemnation proceedings, IV, 810.
Of mandamus proceedings, VI, 388.
Of petition to intervene in foreclosure, VI, 480.
Of employés, see DISCHARGE.

DISOBEDIENCE.
Of injunction, excuses for, VI, 897.
Of mandamus, punishment for, VI, 388, 666.
Of rules, as a defense to action for injuries, VII, 228.
Of rules, as proximate cause of injury, V, 235, 285.
Of rules, prosecution for, III, 363; V, 237.
Of rules, when contributory negligence, II, 444, 450; V, 220, 234–246.
Of superior servants as a defense to action for injury, V, 776.

DISORDERLY CONDUCT.
Expulsion of passenger for, IV, 188, 189; VII, 534.

DISORDERLY CONDUCT — *continued.*
Of passenger, removal from ladies' car for, II, 434.
Of passengers, generally, II, 432.

DISPENSARY ACT.
Of South Carolina, VI, 74.

DISQUALIFICATION.
Civil engineer not disqualified by reason of interest, III, 145.
Of commissioners, III, 454.
Of jurors, generally, IV, 613, 614.
Of jurors, new trial for, VI, 841.
Of sheriff, to summon jury, IV, 913.
Of trial judge, VIII, 7.
See also QUALIFICATIONS.

DISSENTING STOCKHOLDER.
See STOCKHOLDERS.

DISSOLUTION; WINDING UP.
General treatment, IV, 128.
Grounds for dissolution or forfeiture, IV, 129.
Proceedings to dissolve or wind up, IV, 133.
Consequences of dissolution, IV, 138.
Dissolution.
Liability of directors on, IV, 66.
Necessity of proceedings for, before applying for receiver, VI, 1164.
Of aided railway company as a defense to action on aid bonds, VI, 696.
Of corporate defendant, as ground of abatement, I, 9.
Of injunction, grounds for, V, 1157–1159.
Of injunction, on sworn answer or giving bond, IV, 865.
Of partnership, VI, 937.
Of relief associations, VII, 18.
Right of stockholder to sue on behalf of dissolved corporation, VII, 311.
Rights of stockholders on, VII, 311.
Suit by stockholders for fraudulent, VII, 342.
Winding up.
Liability of directors on, IV, 66.
Of tramway, VII, 1104.

DISTINCTION.
Between care due to passengers and to the public, VII, 463.
Between carriers and forwarders, II, 25–27.
Between carriers of goods and passengers, II, 309.
Between damages in condemnation of railway crossings and of private lands, III, 407.
Between domestic and foreign corporations, V, 1012.
Between duty as carrier and duty to animals on or near track, I, 100.
Between duty to passenger and to employé, II, 310; V, 21.
Between duty to passenger and to trespasser, VII, 1128.
Between easements and grants or licenses, IV, 158.
Between fee damages and damages for tort-feasance, IV, 330.
Between fellow-servant and vice-principal, V, 722.

DISTINCTION — *continued.*
Between liability of bridge company and that of carrier, I, 725.
Between licensees and trespassers, VI, 267; VII, 1128.
Between public and private carriers, II, 309.
Between railway ticket and bill of lading, VII, 1040.
Between sale and bailment, I, 576; VII, 90.
Between servant and independent contractor, V, 1105.
Between street railways and ordinary railroads in streets, VII, 418, 463.
Between subscription and agreement to subscribe, VII, 727.
Between subscription and sale of stock, VII, 729.
Between taxation and eminent domain, VII, 829.

DISTRIBUTION.
Of assets on dissolution, IV, 137.
Of damages for causing death, III, 761–763.
Of money paid into court, IV, 553.
Of proceeds of foreclosure sale, VI, 508–512.
Of proceeds of suits on injunction bond, V, 1163.
Of stock, on incorporation of company, V, 1096.

DISTRICT.
Of a company, as used in England, VIII, 311.

DISTRICT COURTS.
Jurisdiction of, IV, 492; VI, 118.

DISTRICT OF COLUMBIA.
Assessment and levy of railroad taxes in, VII, 938.
Defendant must show contributory negligence in, III, 303.
Paving and repaving streets in, VII, 402.
Right of foreign corporation to sue in, V, 1021.

DISTRESS.
General treatment, IV, 141.

DISTURBANCE.
Of franchises generally, remedies for, V, 1027.
Of ferry franchise, remedies for, V, 837, 838.
Of private ways, remedies for, VI, 1079–1081.
Of telephone system — earth currents, IV, 262.

DITCHES.
See DRAINS AND DRAINAGE.

DIVERSE CITIZENSHIP.
See CITIZENSHIP, ETC.

DIVERSION.
From designated route, forfeits benefit of limitation of liability, II, 184.
From designated route, liability of connecting carriers for, II, 206, 207, 238.
From designated route, loss of lien by, II, 154.
Of corporate property, liability of mortgage trustees for, VI, 467.
Of flow of stream, V, 973; VIII, 175–177.

DIVERSION — *continued.*
Of funds, restoration of, VI, 1200.
Of highway, while building crossing, III, 474.
Of navigable waters, enjoining, VIII, 170.
Of stream, when a "taking" or "damaging," IV, 452, 697, 833.
Of surface water from ordinary course, V, 982–984.
Of surface water, liability for, VIII, 181.
Of traffic from ferry, damages for, IV, 917.
Of water, damages for, VIII, 180.
Of water from well or spring, VIII, 184.
See also DEVIATION.

DIVIDENDS.
General treatment, IV, 142.
Action to restrain payment of, VII, 333.
Guaranty of payment of, V, 1055.
Internal revenue tax on, VII, 70.
Interpretation of statute taxing, VII, 851.
Stock, VII, 284.
Suit by stockholder to prevent action calculated to lessen or destroy, VII, 341
Taxation of, VII, 445.
When subject to taxation, VII, 876.
See also STOCK DIVIDENDS.

DIVISION.
Of charges, between connecting carriers, II, 647.
Of counties, III, 331.
Of municipality, effect of, on subscription in aid of railroad, VI, 617.
Of opinion, certificate of, to higher court, V, 640.
Of receipts, under working agreements, VI, 253.
Of road, effect on right to receive local aid, VI, 628.
Of traffic between independent routes, II, 671.

DOCKET.
Of justice, entries in, I, 358.

DOCKS.
Condemnation of, for railway uses, IV, 428.
Power of company to lease, VI, 217.
When subject to taxation, VII, 867.

DOCUMENTARY EVIDENCE.
Admissibility and effect of, generally, II, 813; V, 500–520.
In actions for causing death, III, 857, 858.
In actions for flooding land, V, 995.
In actions for injuries by fire, V, 964.
In actions on stock subscriptions, VII, 768.
In railway intersection proceedings, III, 403.
In stock-killing cases, I, 286, 287.
In suits for injuries to employés, V, 282.

DOCUMENTS.
Inspection of, IV, 78, 79.

DOGS.
Liability for killing or injuring, I, 138; IV, 268.
Liability to person bitten by, at station, VII, 213.
Transportation of, I, 790, 791.
When deemed baggage, I, 535.

DOMESTIC CORPORATIONS.
Tax on interstate business of, VI, 63.
What are, V, 1012.

DOMESTIC SHIPMENT.
Distinguished from interstate, I, 624; II, 183.

DOMICIL.
See CITIZENSHIP, ETC.

DONATIONS.
Meaning of the term as applied to aid to railroads, VIII, 311.
Of right of way, IV, 479.
Of right of way, by guardian of infant owner, V, 1058.
To railroads, VI, 643–655.
Validity of subscriptions by way of, VII, 742.
When vote to subscribe does not authorize a gift, VI, 602.

DOUBLE DAMAGES.
Constitutionality of statutes allowing, V, 795.
In stock-killing cases, when proper, I, 93, 243, 351–354, 368.
In trespass on land, VII, 1114.
Statutes allowing, for failure to fence, V, 795, 808.

DOUBLE LIABILITY.
Of stockholders to creditors, in Missouri, VII, 317, 318.

DOUBLE TRACKS.
Right of street railway to lay, VII, 396.
Right to lay in city streets, VII, 603.
Right to lay under charter provisions, VII, 379.

DOWER.
General treatment, IV, 154.

DRAFTS.
Acceptors of, when may sue carrier, II, 273.

DRAINS AND DRAINAGE.
General treatment, IV, 155.
Accumulation of surface water by, V, 982.
Company's duty to open ditches, V, 979.
Construction of, under direction of city, VII, 413.
Contributory negligence in stepping into ditch, V, 229.
Damages for impairment of, IV, 691.
Ditches in station grounds, VII, 220.
Diverting surface water by means of ditches, V, 983.
Drainage of surface water into natural outlet, VIII, 181.
Drainage of well or spring, VIII, 183.
Duty of company as to safety of ditches, V, 47.
Duty of company with respect to, V, 970.
Effect of breach of agreement to construct ditches, IV, 476.
Liability for obstruction of, V, 973.
Obstructing flow of surface water by filling up ditches, V, 982.
Obstructing flow of water by sluice-ways, V, 976.

DRAWBACKS.
Of extra fare on train, V, 1082.
Validity of allowance of, IV, 119–123.
See also REBATES

DRAWBARS.
Duty of company as to safety of, V, 89, 224.

DRAWBRIDGES.
See BRIDGES, I, 713-716.

DRAWHEADS.
Duty of company as to safety of — inspection, V, 89, 224, 230.

DRAWING-ROOM CAR.
Purchase of ticket for, by person riding on free pass, VI, 946.

DRAYMAN.
Delivering goods to, when unauthorized, II, 119.

DRIED FRUITS.
Classification of, as freight, VI, 26.

DRIVER.
Act of, outside scope of his employment, II, 762.
Contributory negligence of, III, 890; IV, 271.
Duty of, to keep lookout, VII, 515, 516.
Employment of incompetent or drunken, VII, 517.
Failure of, to see child and stop, II, 761.
Liability of company for acts of, in ejecting passenger, VII, 535.
Liability of stage coach company for negligence of, II, 342.
Negligence of, in whipping up team, liability for, VII, 464.
Negligence of, when imputed to person riding with him, V, 1079-1088.
Of street-car, company's liability for wrongful arrest by, V, 610.
Of vehicle, duty to turn off track, IV, 271.
Of wagon, imputing negligence to owner, VII, 527.

DRIVING-BAR.
Riding on, VII, 502.

DRIVING-WHEEL.
Liability for defects in, II, 378.

DROVERS.
Riding on cattle trains — passes, I, 791-801.

DRUNKENNESS.
See INTOXICATION.

DRY GRASS.
See COMBUSTIBLE MATTER.

DUBUQUE, IOWA.
Decisions particularly applicable to, VI, 760.

DUE CARE.
As applied to the selection of servants, V, 695.
Carrier bound to exercise, II, 67, 83.
Duty of carrier to show, II, 178.
Evidence that plaintiff exercised, III, 644.
Meaning of "due and reasonable care and caution," VIII, 311.
Presumption as to, III, 644.
Presumption of, on part of employé, V, 299.
Special limitation does not relieve carrier from, II, 174.
Sufficiency of evidence to show, III, 871.

DUE CARE — *continued*.
When plaintiff must affirmatively show, III, 852-854.
See also CARE; NEGLIGENCE; REASONABLE CARE; UTMOST CARE.

DUE PROCESS OF LAW.
See CONSTITUTIONAL LAW.

DUPLICITY.
In pleadings in suits against carriers, I, 250; II, 531.

DURATION.
Construction of contract as to, III, 203.
Of easement conveyed by landowner, IV, 469.
Of interest acquired in land condemned, IV, 435.
Of liability as carrier, limiting in bill of lading, I, 638.
Of lien of receivers' certificates, VI, 1203.
Of mechanics' lien, VI, 287, 288.
Of mortgage receivership, VI, 493.
Of negotiability of bill of lading, I, 643.
Of receivership, VI, 1177.
Of term of running powers, VI, 247.
Of term of service, V, 3.
Of ticket over connecting lines, VII, 1075.

DURESS.
Effect of, on contract of shipment, I, 780.

DUST.
View obstructed by, III, 619.
When deemed a nuisance, VI, 887.

DUTIES.
See CUSTOMS DUTIES.

DWELLING-HOUSE.
Expulsion of passenger near, IV, 203.
Locating route near, effect of, VI, 354.
When may be condemned, IV, 414.

DYING DECLARATIONS.
When inadmissible as hearsay, V, 462.
When part of the *res gestæ*, V, 464.

DYNAMITE.
See EXPLOSIVES.

EARNING CAPACITY.
Of employé, reduction of as an element of damage, V, 333.
Of injured person, evidence of, V, 411.

EARNINGS.
Of corporations.
Application of, to payment of subsidy bonds, VIII, 141.
Apportionment of, to underlying mortgages, VI, 496.
Ascertaining, in suit to foreclose mortgage, VI, 486.
In hands of receiver, disposal of, in foreclosure, VI, 495.
Internal revenue tax on, VII, 70.
Meaning of "net earnings," VIII, 318.
Net, of land-grant railroads, VI, 132.
Of road, when may be reached by attachment, I, 495.
Of sleeping-car companies, taxation of, VI, 60.
Of street-railway, tax on, VII, 444.
Operating expenses a first charge on, VI, 1195.
Right to mortgage net, VI, 417.

EARNINGS — *continued.*
Of persons.
Loss of future, as damages, III, 699.
Of child killed, expectancy of, III, 939.
Of deceased wife, expectancy of, III, 937.
Of wife, action by husband for loss of, V, 1069.
Showing loss of, III, 730.
See also EARNING CAPACITY.

EARTH CURRENTS.
Disturbance of, by trolley wires, IV, 262.

EASEMENTS.
General treatment, IV, 158.
Abutting, condemnation of, IV, 285–289.
Acquired by one railway crossing another, III, 397.
Acquired by street or highway crossing railway, III, 438.
Expert evidence of value of, IV, 324.
Incidental injury to, IV, 293.
In streets, what acquired by steam-railway, VII, 575.
In wife's land, power of husband to convey, V, 1066.
Measure of damages for taking of, IV, 325.
Of abutting owners are private property, IV, 298.
Of light, air, and access, IV, 292; VII, 590, 591.
Of street-railway, tax on, VII, 444.
Owner of, when entitled to land damages, IV, 571.
Reservation of, to landowner, IV, 478, 590, 738.
Right to, not gained by prescription, IV, 295.
To flood lands with surface water, V, 979.
What pass by conveyance of right of way, IV, 469.
What pass by deed, IV, 12.
What pass on sale of railroad, VII, 108.
When limit of estate acquired by condemnation of land, IV, 433.
When subject to taxation, VII, 862.
See also PRIVATE WAYS.

EASTERN R. CO.
General treatment, IV, 162.

EAST ST. LOUIS, ILL.
Decisions particularly applicable to, VI, 760.

EATING-HOUSE OR STATION.
Defective platform at, liability for, II, 416.
Who are deemed passengers at, II, 319.
See also REFRESHMENT ROOMS.

EGRESS.
Duty of company to provide means of, VII, 221.
Duty to provide safe place of, for passengers, II, 400.
On street, right of abutting owner to, VII, 591.
See also INGRESS.

EJECTION OF PASSENGERS.
General treatment, IV, 163.
Company's right to eject, IV, 164.
Time, manner, and place of ejection, IV, 194.
Remedies for wrongful ejection, IV, 208.
By agents, liability of company for, I, 77, 78.
Costs in actions for, III, 328.
Excessive damages for, as ground for new trial, VI, 854.
From berth in sleeping car, VII, 133.
From ladies' car, II, 334, 384, 434.
From sleeping car at improper place, VII, 133.
From stations, VII, 223–224.
From street-cars, VII, 533–539.
Of disorderly, from ladies' car, II, 434.
Of drover on return trip, damages for, I, 792.
Of person riding on free pass, VI, 942.
Of trespassers from trains, VII, 1149–1151.
Of trespassing child from street-car, II, 756.
Variance on trial for, VI, 1041.

EJECTMENT.
General treatment, IV, 244.
The right of action, IV, 244.
Grounds of defense, IV, 245.
Procedure, IV, 252.
Mesne profits; improvements, IV, 256.
As a remedy for nuisance, VI, 894.
By landowner, for wrongful acts under color of eminent domain, IV, 843–853, 922, 951.
By purchaser at execution sale, V, 550.
Effect of recovery in, on rights of owner of easement, IV, 161.
From lands of Western Pennsylvania R. Co., VIII, 185.
Removal of suits in, to federal courts, VII, 24.
Staying proceedings in, V, 1155.
When barred by lapse of time, VI, 321.
See also TRESPASS TO TRY TITLE.

ELECTION.
Between assumpsit and other forms, I, 485.
Between counts, VI, 1001.
Between different forms of action, for killing stock, I, 239.
Between different forms of action, generally, I, 28.
Of forms of action against carrier of passengers, II, 522.
Of remedies against relief associations, VII, 17.
Of remedies by abutting owners, IV, 298, 299; VII, 629, 630.
Of remedies by attorney-general, I, 511.
Of remedies by landowner, IV, 826.
Of remedies for collection of taxes, VII, 990.
Of remedies to enforce subscriptions, VII, 756, 757.

ELECTIONS.
Enjoining voting on stock, V, 1151.
Failure to hold, as ground for dissolution, IV, 131.
For railroad aid, jurisdiction to call, VI, 571.

ELECTIONS — *continued.*
For railroad aid, when popular vote not required, VI, 602.
Granting consent to street railway by popular vote, VII, 387.
Jurisdiction to call, VI, 571, 615.
Of corporate officers, IV, 51–55; VI, 905.
Of directors or trustees, validity of, IV, 53–55.
Of mortgage trustees, VI, 459.
On question of aid to railroad, VI, 576–610.
Registration of bonds as shares to enable holder to vote, I, 670.
Validity of contracts to influence, III, 219.

ELECTRIC RAILWAYS.
General treatment, IV, 257.
Right to construct and operate, IV, 257.
Liability for injuries caused by negligence, IV, 266.
Crossing of steam railway by, III, 420.
Do not impose new servitude upon street, VII, 417.

ELEMENTS OF DAMAGE.
For causing death, III, 924–955.
For injuries caused by fire, V, 960–964.
For land taken, IV, 686–709, 916–920.
generally, III, 702–719.
In actions against carriers of passengers, II, 569–575.
In actions for flowing lands, V, 1002–1005.
In actions for injuries to employés, V, 337, 338.
In computation of future damages, IV, 329.
In railway-intersection cases, III, 405, 406.
Instructions as to, I, 394, 408; VIII, 59, 72.
In trespass for wrongful interference with property, IV, 879.
To abutting owners, IV, 325–341.
To persons injured at crossings, III, 655.
When compensatory, III, 681.
See also MEASURE OF DAMAGES.

ELEVATED RAILWAYS.
General treatment, IV, 272.
Right to construct and operate, IV, 273.
Location and construction; right of way, IV, 284.
Rights and remedies of abutting owners, IV, 291.
Liability for torts, personal injuries, etc., IV, 357.
Taxation of, VII, 857.
See also RAPID TRANSIT ACTS.

ELEVATOR MEN.
When superintendent is not fellow-servant of, V, 757.

ELEVATORS.
General treatment, IV, 368.
Damages for failing to deliver grain at, II, 122.
Delivery of grain at, II, 92, 109.
Delivery to, when terminates liability of carrier, II, 49.
License to erect grain-house, VI, 262
Not subject to Interstate Commerce Act, VI, 10.
When exempt from taxes, VII, 910.

ELEVATORS — *continued.*
When subject to mortgage, VI, 415.
When subject to taxation, VII, 866.

ELIGIBILITY.
Of attorneys, I, 513.
Of directors, IV, 50–56.

ELMIRA, N. Y.
Decisions particularly applicable to, VI, 760.

EMANCIPATION.
Of child, evidence of, II, 811.
Of child killed, as a defense, III, 810.

EMBANKMENTS.
General treatment, IV, 372.
At street or highway crossings, III, 427, 457.
Breaking away of, I, 734.
Building of, when a "taking" of land, IV, 448.
Definition of, VIII, 312.
Duty of passenger carrier as to safety of, II, 371.
Duty to fence, VII, 397.
In city streets, liability of company to abutters, VII, 613.
Liability for defects in, V, 976, 982.
Permission to use as a dam, I, 60.
Right of company owning, to tolls, II, 672.
Right to erect, VIII, 172.
Sufficiency of, when question for experts, VIII, 262.
View obstructed by, III, 617.

EMBEZZLEMENT.
Prosecutions for, III, 363.

EMERGENCIES.
Anticipating and providing against, II, 23.
Choosing between several, in moment of peril, V, 200, 201.
Conduct in sudden, contributory negligence, II, 442; V, 201.
Errors of judgment in moments of great, II, 486.
Forgetting defects in car in time of, V, 337.
See also PERIL.

EMINENT DOMAIN.
General treatment, IV, 380.
General nature of the right, IV, 382.
Constitutional provisions, IV, 384.
Constitutionality of statutes, IV, 386.
How they are to be construed, IV, 392.
Power to take property for public use, IV, 399.
What property or interests may be taken, IV, 412.
What constitutes a "taking," "damaging," "injuring," etc., IV, 443.
What is a public use, IV, 453.
Taking land by consent of, or conveyance from owner, IV, 462.
Proceedings to obtain condemnation, IV, 486.
Compensation; damages, IV, 540.
Review by appeal, certiorari, error, etc., IV, 771.
Discontinuance or abandonment, IV, 818.
Remedies for wrongful taking or interference with property, IV, 826.

EMINENT DOMAIN — *continued.*
Compulsory purchase under English statutes, IV, 880.
Expropriation under Canadian statutes, IV, 924.
Compensation for land taken for embankments, IV, 372.
Condemnation of abutting easements, IV, 285–289.
Condemnation of land for branch roads, I, 686.
Condemnation of land for bridges, I, 723.
Condemnation of land for elevated railways, IV, 289–291.
Condemnation of land for elevators, IV, 368.
Condemnation of land for private railroads, VI, 1075.
Condemnation of land for union depot, VIII, 135.
Condemnation of right of way for telegraph line, VII, 1026.
Condemnation of right of way over public land, VI, 1123.
Condemnation of turnpike by railway company, VII, 122, 123.
Damages in condemnation proceedings, when subject to taxation, VII, 878.
Distinction between taxation and, VII, 829.
Enjoining condemnation proceedings, III, 414, 415, 442.
Establishing street or highway crossings under right of, III, 436.
Evidence of award in, to mitigate damages caused by fire, V, 966.
Exercise of right in city streets, VII, 374–377, 393, 581–590.
Forfeiture of charter as defense in condemnation proceedings, II, 714.
Indemnity to landowner in lieu of enjoining construction, V, 1104.
Jurisdiction in equity of suits to determine compensation, V, 356.
Land damages, when subject to execution, V, 543.
Land damages, when take precedence over mortgage, VI, 448.
Limitation of condemnation proceedings, VI, 318.
Meaning of words "condemn" or "appropriate," VIII, 309.
Power of foreign corporations to exercise right, V, 1015.
Removal of condemnation proceedings to federal courts, VII, 24, 25.
Right of lessee company to exercise power of, VI, 225.
Subrogation of surety in condemnation proceedings, VII, 724.
Taking land for purpose of railway intersection, III, 392–409.
Taking or injuring homesteads, V, 1064, 1065.
Taking property for military use, VIII, 159.
Validity of agreements with owner of land sought by company, VIII, 129.

EMPLOYERS' LIABILITY ACT.
Of England, V, 344.

EMPLOYERS' LIABILITY ACT — *con.*
Of Massachusetts, effect of to bar suit at common law, V, 275.

EMPLOYES.
General treatment, V, 1.
Employment and discharge, V, 2.
Wages, V, 8.
Liability to master, V, 14.
In general.
Action for death of person assisting, III, 766.
Breach of injunction by, V, 1160.
Damages for dismissal of, III, 704.
Duty of company to employ competent and skilful, II, 353.
Engagements of agents for board of, I, 58.
Expulsion of, while on way to work, IV, 165.
Failure to heed warning of, II, 458.
Indemnity against defaults by, V, 1103.
Judicial notice of duties of, V, 436.
Liens of, VI, 295–301.
Negligent persons, when presumed to be, V, 930.
Orders to, enforcement of, II, 333.
Performance of duty by, presumption of, V, 446.
Set-off in suits for wages, VII, 116.
Tickets for transportation of, VI, 58.
Wages of, when may be reached in attachment, I, 498.
When deemed passengers, II, 326–328.
When not deemed trespassers, VII, 1125.
Who the word "employé" includes, VIII, 312.
As witnesses.
Competency of, as experts, VIII, 289–294.
Credibility of, as witnesses, VIII, 202, 203.
Instructions as to credibility of, as witnesses, VIII, 203.
Presumption arising from failure to call as witnesses, I, 301; V, 442.
Presumption of competency of, V, 442.
Evidence by or concerning.
Admissions against interest by, II, 283.
Burden of proof to show negligence of, V, 451.
Competency of evidence as to customary care or negligence of, V, 400.
Competency of evidence of degree of care in selecting, V, 410.
Competency of evidence of discharge of, after accident, V, 403.
Competency of evidence of drunkenness of, V, 404.
Declaration of, as evidence, V, 488.
Depositions of, as evidence, V, 910.
Evidence of incompetency of, V, 412.
Proof of injury by act of, when raises presumption of negligence, II, 549.
Reports of, as evidence, I, 287.
Statements of, admissibility to bind company, V, 460.
Weight of testimony of, V, 524.
Liability for acts of.
Assaults by, I, 466–475; VII, 133, 472.

EMPLOYES — *continued.*
Liability for acts of — *continued.*
Boycott by, against connecting road, VI, 19.
Duty to protect passengers from wrongful acts of, II, 428–431.
Exemplary damages for unauthorized acts of, II, 579.
Getting off moving train at invitation of, II, 454, 482–485.
Injuries caused by negligence of, VII, 133.
Liability for acts of incompetent, I, 71.
Liability for failure of, to extinguish fire, V, 874.
Liability for malicious acts of, IV, 364.
Liability for negligence of, VII, 455, 463–465.
Liability for thefts committed by, VII, 137.
Liability for torts of, on ground of agency, I, 61–80.
Liability of carrier for goods stolen by, II, 194.
Liability of mortgage trustees for negligence of, VI, 466.
Liability to passenger pushed from car by, IV, 358.
Liability to passengers for negligence of, II, 351–353.
Misdirection of, to passenger leaving train, II, 403.
Of contractor, liability of company for acts of, V, 1107.
Of independent contractors, liability for acts of, V, 1105–1116.
Of railway contractors, personal injuries caused by, III, 142.
Of receiver, liability of company for negligence of, VI, 1228, 1229.
Of sleeping-car company, employés also of railroad company, VII, 140.
Passenger pushed from car by, IV, 358.
Ratification of tortious acts of, by retention in service, I, 84.
Riding against rules at invitation of, II, 426.
Right of, to presume that person on track will retire, III, 465.
Liability to.
Duty of company to fence, as to, V, 822.
Duty to, distinguished from duty to passenger, II, 310.
Duty to, when a question for experts, VIII, 266.
Employed by contractors, liability of company to, III, 161–166.
Injuries to, by derailment, IV, 47.
Liability for injuries to, by culverts, III, 663.
Liability of contractors to, III, 143.
Liability of receivers for wages of, VI, 1190.
Lien for board and medical services to injured, VI, 278.
Of construction company, liability of railway company to, III, 181.
Of express company, liability of railway company to, V, 565.
Of independent contractor, liability for injuries to, V, 1116.

EMPLOYES — *continued.*
Liability to — *continued.*
Of telegraph company, limiting liability towards, II, 440.
Overworking, prosecutions for, III, 383.
Payment of wages of, VI, 1200.
Priority of claims of, V, 1170.
See also APPRENTICES; FELLOW-SERVANTS; RELIEF ASSOCIATIONS; SERVANTS.

EMPLOYES, INJURIES TO.
General treatment, V, 14.
Company's duty towards its employés, V, 16.
Assumption of risks of employment, V, 126.
Contributory negligence of employé, V, 184.
Injuries to infant employés, V, 246.
Injuries to employés of one company by negligence of another, V, 253.
Remedies; procedure, V, 260.
English and Canadian statutes, V, 344.
At culverts, or by reason of their absence, III, 663.
Burden of proof, in actions for, V, 448; VI, 1035.
By collisions, III, 21–25.
By defects in bridges, I, 706.
By derailment, IV, 47.
Contributory negligence as a defense, III, 23, 24, 836–843.
Contributory negligence, when for jury, III, 891.
Excessive damages for killing employé, III, 953.
Instructions as to contributory negligence of employé killed, III, 898.
Instructions in actions for, VIII, 56, 69.
Liability of company for, while road was in hands of receiver, VI, 1228.
Liability of company to, when riding on a pass, VI, 942.
Liability of lessee road for, VI, 227.
Liability of railway company for injury to servant of express company, V, 565.
Liability of receivers for, VI, 1192.
Liability of road exercising running powers for, VI, 243.
Nominal damages only, when recoverable, III, 946.
Nonsuit in actions for, VIII, 27, 33.
On elevated railways, IV, 368.
On street railways, VII, 532.
On Sunday, VII, 822.
Pleading in actions for causing death of employés, III, 797.
Power of station agent to contract board of injured employé, VII, 188.
Questions for jury in actions for, VIII, 48.
Release by injured employé, VII, 13, 14.
Variance on trial for, VI, 1041.

EMPLOYMENT.
Assumption of risks of, V, 126–184, 324–337.
Contracts of, generally, V, 2–8.
Evidence of nature of, V, 279.
Fear of losing, V, 171.
Of attorneys, I, 512, 513.
Of brakeman, by conductor, III, 59.
Of common agents by connecting carriers, II, 517.

EMPLOYMENT — *continued.*
Of convicts, III, 356.
Of detective by station agent, VII, 188.
Offer of, after injury, admissibility of evidence of, V, 411.
Of infant, without consent of parents, V, 246.
Of physician in cases of personal injuries, VI, 391–398.
Of sub-agents and assistants, I, 47.
Power of infant to enter into contract of, V, 246.
Working outside of scope of, V, 174–179.
Working under orders outside of, V, 176–179.

ENACTMENT.
Of ordinances consenting to use of streets by railway, VII, 572.
Of statutes, VII, 241–243.

ENCROACHMENTS.
In streets and highways, liability for, VII, 706–713.

ENDORSEMENT.
See INDORSEMENT.

ENFORCEMENT.
In general.
Of condemning company's rights as against former owner of land taken, IV, 438.
Of conditions in franchises, V, 1026.
Of forfeiture, by *scire facias*, II, 715.
Of forfeiture of franchise, II, 712–715.
Of Interstate Commerce Act, VI, 49, 50.
Of orders of commissioners, II, 672; III, 456; VI, 1149–1151.
Of quarantine laws, VI, 1125.
Of rules, by carrier, II, 332.
Of rules for conduct of employés, V, 33, 34.
Of rules governing conduct of employés, V, 27–34.
Of rules of Union Depot Companies, VIII, 137.
Of stockholders' liability to creditors, VII, 321–328.
Of subpœnas of Interstate Commerce Commission, VI, 52.
Of certain duties.
Of duty to build cattle-guards, II, 593.
Of duty to build farm crossings, V, 621.
Of duty to build side tracks, VII, 124.
Of duty to construct bridge by mandamus, I, 693.
Of duty to locate station, VII, 199.
Of claims for money.
Of assessments for local improvements, VII, 451.
Of awards and judgments for land damages, IV, 759–767.
Of awards of arbitrators, I, 459–462; IV, 948.
Of awards of land damages, IV, 911, 912.
Of cause of action accruing in another state, V, 260.
Of claims after discharge of receiver, VI, 497.
Of claims under Canadian statutes as to land grants, VI, 194.
Of claims under Massachusetts Relief Act of 1876, IV, 162.

ENFORCEMENT — *continued.*
Of claims for money — *continued.*
Of payment for right of way, IV, 483.
Of contracts.
For right of way, IV, 481–484.
Of agreemet to issue pass, VI, 940.
Of bond for price, on foreclosure sale, VI, 502.
Of bonds in aid of railroads, VI, 380.
Of mortgages, VI, 470–518.
Of payment of change bills, II, 610.
Of provisions for forfeitures under construction contracts, III, 160.
Of railway aid bonds, VI, 705–710.
Of receivers' certificates, VI, 1204.
Of subscriptions to stock, VII, 756–797.
Of trusts, V, 355.
Specifically, VII, 144–158.
To locate station, VII, 204.
Of judgments.
Against owner of fee of land taken, IV, 443.
Against receivers, VI, 1216.
And decrees, VI, 105, 106.
In action on construction contract, III, 179.
In attachment suits, I, 511.
Of justice's, I, 368.
Of liens.
For internal revenue taxes, VII, 73.
In equity, V, 354.
Of attorney's, I, 519.
Of carrier's, II, 155, 156.
Of laborers', VI, 300, 301.
Of state, in cases of public aid to railways, VII, 163, 178.
Of vendors', IV, 923, 955.
Of penalties.
In general, VI, 967–970.
For failure to pay fare or produce ticket, VII, 1089.
Of penal laws, by attorney-general, I, 512.
Of penal statute of sister state, IV, 124.
Of taxes.
By mandamus, VI, 380; VII, 996.
Of income tax, VII, 1025.
Of lien against purchaser of road, VII, 990.

ENGINEERING PURPOSES.
Meaning of term as used in statute, VIII, 312.

ENGINEERS.
See CIVIL ENGINEERS; LOCOMOTIVE ENGINEERS.

ENGINES.
In general.
Claims against government for building, III, 7, 8.
Contributory negligence in getting under, V, 193.
Duty to carry as freight, II, 28.
Liability to servants injured by, occasioned by negligence of fellow-servants, V, 655, 656, 660, 669, 680, 760.
Payment of claims for, by receiver, VI, 1197.
Taxation of, VI, 64.
When deemed fixtures, V, 970.
When subject to levy, V, 544.

ENGINES — *continued.*
Construction of.
Alleging defects in, and company's knowledge thereof, V, 267.
Defective, assumption of risk as to, V, 135.
Defects in, assumed by repairers and construction hands, V, 181.
Defects in, when constitute negligence, VI, 784.
Duty of company as to safety of, V, 95–98.
Evidence of proper construction of, V, 913.
Failure to equip properly, V, 867.
Fitness of, under English statutes, VI, 248.
Injuries to employés caused by defects in, V, 95–98, 108, 113–125, 135, 146, 150, 160, 181, 209, 214, 217, 226, 267, 271, 290, 318, 336.
Inspection and repair of, V, 108.
Latent defects in, assumption of risk as to, V, 150.
Liability for fires by defects in, V, 863.
Liability to passengers for defects in, II, 378.
Negligence in providing, when question of fact, V, 318.
Not consuming smoke, penalty for, VI, 967.
Notice of defects in, assumption of risk after, V, 160.
Patent defects in, assumption of risks as to, V, 146.
Remaining in service, after notice of defects in, V, 336.
Sufficiency of evidence to show defects in, V, 290.
Operation of.
Alleging negligence in, V, 270.
Duty as to management of, V, 113–125.
Duty to protect employés from live, V, 11
Duty to reverse, after trespasser is seen, VII, 1141.
Duty to reverse as to animals, I, 128.
Duty to reverse, as to employés, V, 211.
Failure to reverse, sufficiency of evidence to show, I, 291.
Failure to reverse, when contributory negligence, V, 211.
Liability for fires as affected by condition or management of, V, 863–869, 890, 902, 903, 909, 910, 913, 915–917, 918–921, 922–925, 928, 929, 930, 932–935, 937, 939, 949, 950.
Liability in cases of explosion of, V, 557.
Management of, when a question of law, V, 953.
Negligence in management of, when question for jury, V, 320.
When engineer should reverse, II, 382.
When may be used without license under English statute, VIII, 316.
Riding or working on.
Attempting to board while in motion, V, 217.
Contributory negligence of child climbing upon, II, 774.
Getting on moving, when negligence, V, 334.

ENGINES — *continued.*
Riding or working on — *continued.*
Jumping from moving, V, 218.
Persons not passengers riding on, II, 313.
Remaining on, after discovery of defect in, V, 209.
Remaining on, in face of impending collision, V, 209.
Riding on foot-board or pilot of, V, 214, 215.
Riding on, when contributory negligence, II, 497.
Rule as to getting on and off of, V, 243.
Rule forbidding certain employés to operate, V, 241.
Rule forbidding riding on, V, 242.
Standing in dangerous place on, V, 226.
Trespasser riding on pilot of, VII, 1149.
See also BOILERS.

ENGINE WIPER.
When master mechanic is fellow-servant of, V, 762.
When train hand is fellow-servant of, V, 770.

ENGLAND.
In general.
Amalgamation of companies in, III, 84.
Carrier's lien for charges in, II, 150.
Cases relating to railways in highways in, VII, 628.
Conditions exempting carrier from liability to person riding on free pass in, VI, 943.
Jurisdiction of county courts in, VI, 118.
Liability of carrier as insurer in, II, 24.
Liability of directors under law of, VII, 316.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 692.
Occupation of streets by steam roads under legislative grants of, VII, 565.
Operation of Lord Campbell's Act in, III, 746.
Passenger fares in, VII, 1085–1090.
Powers of railway commissioners in, VI, 1137.
Power to appoint receivers in, VI, 1165.
Power to mortgage road in, VI, 409.
Rating of railways in, VII, 1010–1018.
Respective rights and liabilities of connecting lines in, III, 66.
Rule in, as to limitation of liability for negligence, I, 768; II, 181.
Sale of goods to enforce lien for charges under statute of, II, 155.
Transportation of diseased cattle in, I, 790.
When negligence of parent is imputable to child in, II, 795.
Statutes of.
As to carriage of goods, II, 193–200.
As to carriage of passengers, II, 518–520.
As to compulsory purchase of land, IV, 880–924.
As to discrimination, IV, 85, 86, 88, 104, 108, 110, 121.
As to distribution of damages for causing death, III, 763.

ENGLAND — *continued.*
Statutes of — *continued.*
As to duty to fence in, V, 803
As to foreclosure of mortgages, VI, 472.
As to furnishing facilities, IV, 114.
As to grade crossings in, III, 449.
As to injuries to employés, V, 344, 345.
As to intersection of railways, III, 409.
As to joint use of stations, VII, 237.
As to liability for injuries caused by fire, V, 851.
As to liability to injured employés, V, 344, 345.
As to preference stock, VII, 277.
As to private ways, VI, 1080.
As to procedure in justice's courts, VI, 123.
As to rates of freight, II, 649–673.
As to recovery of excessive charges, II, 630.
As to regulation of charges by commissioners, II, 621.
As to running powers, VI, 245–249.
As to sales of liquor to travelers, VI, 76.
As to street and highway crossings, III, 423.
As to taxation, rates, etc., VII, 1010–1018.
Incorporation of railways under, V, 1092.
Interpretation of Employer's Liability Act of 1880, V, 720.
Telegraph Acts, decisions under, VII, 1033.

ENTIRETY.
Of contract, III, 202.

ENTRIES.
In books, as evidence, V, 458, 501.
In legislative journals, VII, 241.
Of deceased party, as evidence, V, 503.

ENTRY.
In general.
By cattle on track, pleading and proof as to, I, 162, 257–259, 279, 298, 302, 360, 361.
Of car, by passenger, II, 311, 334, 390, 452.
Of judgment, *nunc pro tunc*, IV, 759.
Of judgment on garnishee's answer, I, 508.
Of judgment on report of referee, VII, 4.
Of judgment or decree, VI, 80–82.
Of *nolle prosequi* in criminal prosecution for causing death, III, 958.
Of transfer on book, to pass title to stock, VII, 303.
Of verdict for land damages, interest from time of, IV, 726.
Writ of, for misappropriation of land, IV, 829.
On land.
By company, after payment of land damages into court, IV, 552.
By company, when a trespass, IV, 868, 869, 870, 871.
By permission, ejectment in cases of, IV, 246, 247.
Illegal, ejectment for, IV, 245, 845.

ENTRY — *continued.*
On land — *continued.*
On turnpike, trespass for unlawful, VIII, 123.
On wife's, power of husband to authorize, V, 1066.
Pending appeal, in condemnation proceedings, IV, 548, 856.
Presumption as to place of, I, 162.
Right of, before compensation made, IV, 556–559.
Under English Lands Clauses Act, § 85, IV, 883.
Under license, VI, 261, 262.
Under license from or contract with owner, as a defense in ejectment, IV, 849.
See FORCIBLE ENTRY AND DETAINER.

EQUALITY.
In facilities for interchange of traffic, VI, 33.
In mileage rates, VI, 15.
Of assessments on stock, VII, 752.
Of charges, by common law, II, 623.
Of taxes and assessments, VII, 453.

EQUAL TO.
Definition of, VIII, 312.

EQUIPMENT.
Of train, duty of company as to, II, 380–386; V, 124.

EQUITY.
General treatment, V, 347.
Bill in, to stay prosecution of ejectment suit, IV, 255.
Bills of discovery, IV, 77.
Cancellation of patents for lands in, VI, 1120.
Cannot decree a forfeiture, II, 713.
Conclusiveness of rulings of, in actions at law, VI, 97.
Costs in suits in, III, 328.
Dissolving injunction for want of, V, 1158.
Effect of mortgages of after-acquired property in, VI, 426.
Enforcement of awards of land damages in, IV, 766.
Enforcement of lien for charges in, II, 155.
Enforcement of orders of railway commissioners in, VI, 1150.
Equitable assignment, what amounts to, I, 481, 482.
Equitable estoppel, doctrine of, generally, V, 372–384.
Equitable lien of city subscribing in aid of railroad, on stock certificates, VI, 612.
Equitable mortgages, what are, effect, etc., VI, 441.
Equitable relief, damages incidental to, IV, 300.
Equitable relief, limitations of suits for, IV, 341.
Equitable remedy, existence of, effect on jurisdiction, I, 489.
How far follows statute of limitations, VI, 304.
Jurisdiction of, in cases of nuisances, VI, 894–896.
Jurisdiction of, to compel issuance and delivery of railway aid bonds, VI, 662.

EQUITY — *continued.*
Jurisdiction of, under Railway and Canal Traffic Act, II, 196.
Pleading in, generally, VI, 1018–1021.
Power of, over railway intersection, III, 413–415.
Power of, to compel construction, VII, 397.
Priority of mortgages over subsequent equities, VI, 453–459.
Proper parties to suits in, VI, 930–934.
Purchase of stock with notice of equity, VII, 300.
Reformation of insurance policy in, V, 847.
Relief in, against engineer's decision as arbitrator, III, 154.
Remedies in, as between lessor and lessee roads, VI, 239.
Remedy of creditors against stockholders in, VII, 314.
Removal of suits in, to federal courts, VII 21.
Restraining discontinuance of highway in, VII, 555.
Restraining strikes and boycotts in, VII, 721.
Right of trial by jury in, VIII, 2.
Suits in, by minority against majority of stockholders, VII, 341, 342.
Suits in, for rescission of construction contracts, III, 168.
What may be set off in, VII, 116.
When bill will lie to stay action at law, IV, 255.
When purchaser of bonds takes subject to equities, I, 676; VI, 694, 695, 704, 705.

ERECTION.
Meaning of "erect" as applied to building stations, VIII, 312.
Of bridge, injunction to restrain, I, 719.
Of buildings on land condemned by company, IV, 438.

ERIE R. CO.
General treatment, V, 358.

ERROR.
Harmless, in admission of evidence, V, 912.
Harmless, in giving or refusing instructions, V, 948.
In admission of evidence, IV, 354.
In excluding evidence, V, 355.
In instructions cured by other parts of charge, III, 903.
In pleadings, remedies for, VI, 1054–1061.
In pleadings, when cured by verdict, VI, 1061.
In receiver's account, correcting, VI, 1220.
Mandamus not a substitute for writ of, VI, 375.
Of judgment by agent, liability of principal for, I, 71.
Of judgment in moment of peril, III, 815; IV, 270.
What are grounds for reversal, I, 386–397; IV, 784–789.
What may be disregarded on appeal, I, 397–414.

ERROR — *continued.*
When ground for new trial, generally, VI, 836–841.
Writ of, in condemnation proceedings, IV, 816–818.
Writ of, jurisdiction of United States Supreme Court on, V, 640–644.
See also APPEAL AND ERROR.

ESCAPE.
Of animal to track, without fault of owner, I, 216.
Of child from control of custodian, when contributory negligence, II, 805.
Of fire, liability for, V, 878–883.
Of fire, presumption that company will not permit, V, 930.
Of slave, liability of carrier for, II, 588.
Of steam, frightening teams by, III, 468.
Of steam, liability to persons injured by, II, 422; V, 123.
Of steam, proving carelessness in permitting, III, 869.

ESCHEAT.
General treatment, V, 358.

ESCROW.
Delivery of deeds in, IV, 5.
Delivery of subscription to stock in, VII, 786.
Voting stock deposited in, VII, 310.

ESTABLISHMENT.
Of depots, VII, 194–204; VIII, 312.
Of ferries, V, 835.
Of streets and highways, VII, 541–556.

ESTATE.
What acquired in condemnation proceedings, IV, 430–435, 926.
What granted by deed, IV, 12–14.

ESTIMATES.
Of company's engineer, III, 144–152.
Of damages, instructions giving rules for, VIII, 73.
Of damages to rental value, basis of, IV, 355.
Of engineer, duty of superintendent to pay, VII, 824.
Of market value, means of, IV, 671.
Of work, right of contractor to keep back, III, 159.

ESTOPPEL.
General treatment, V, 359.
General principles, V, 360.
Estoppel by record, V, 364.
Estoppel by deed, V, 368.
Estoppel in pais, V, 372.
Against state, VII, 170.
By former suit against carrier, II, 134.
By part performance, VI, 232.
In actions for injuries at culverts, III, 664.
Of carrier to deny receipt of goods, I, 605, 606.
Of carrier to dispute shipper's title, II, 97, 271.
Of city to deny validity of bonds, VI, 686, 701–703.
Of director, by action of board, IV, 56.
Of grantor of right of way, IV, 483.
Of holder by recitals in bonds, VI, 705.

ESTOPPEL — *continued.*
Of holder of bonds of road aided by state, VII, 180.
Of landowner by acquiescence or laches, IV, 863.
Of licensor to revoke license, VI, 264.
Of stockholders by consenting to acts of directors, III, 81.
Of stockholders to impeach corporate acts, VII, 307.
To appeal, IV, 775.
To claim full compensation for carrying mails, II, 6.
To deny liability on subscription, VII, 795.
To deny preliminary payment on stock subscription, VII, 780.
To deny validity of corporate acts, VIII, 125.
To deny validity of overissued stock, VII, 281.
To object to repeal of charter, II, 687.
To object to report of commissioners, IV, 747.
To prove damages different from case made by pleadings, IV, 663.
To question corporate status, VII, 787.
To question priority of receivers' certificates, VI, 1204.
To set up defense in foreclosure, VI, 484.

ESTRAY.
See ANIMALS, INJURIES TO.

ETC.
Meaning of abbreviation as used in pleadings and statutes, VIII, 312.

EVICTION.
Of lessee of road, effect of, VI, 230.
Of tenant, effect of, VI, 196.

EVIDENCE.
General treatment, V, 384.
Admissibility and competency of evidence, generally, V, 388.
Judicial notice, V, 434.
Presumptions; burden of proof, V, 440.
Best and secondary evidence, V, 453.
Hearsay, V, 458.
Res gestæ, V, 463.
Parol evidence to vary a writing, V, 474.
Admissions; declarations, V, 481.
Documents; writings; printed matter, V, 500.
Depositions; testimony on former trial, V, 520.
Weight and sufficiency of evidence, V, 523.
In general.
Absence or insufficiency of, reviewing on appeal, I, 431–433.
Admission of improper, how cured, I, 399–401.
Comments upon, in charge to jury, VIII, 53, 65.
Conflicting, review of, I, 426.
Conflicting, review of, on appeal, I, 423–434.
Cumulative, not ground for new trial though newly discovered, VI, 874.
Demurrer to, VIII, 21–23.
Discretion of court as to rulings in, I, 384.
Effect of judgment as, VI, 83.

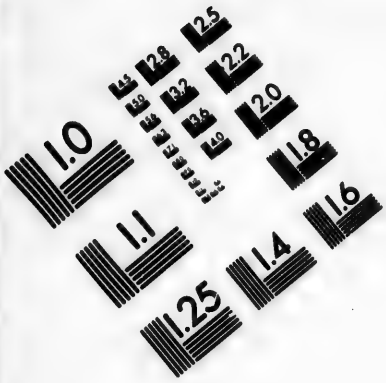
EVIDENCE — *continued.*
In general — *continued.*
Erroneous admission of, when ground for reversal, I, 387.
Erroneous instructions on weight of, I, 391.
Exclusion of, when ground for reversal, I, 388, 402.
Founded on experiment, discretion to admit, I, 381.
How framed in hypothetical question, VIII, 295.
Impeaching witness not ground for new trial, though newly discovered, VI, 874.
In rebuttal, VIII, 19.
Instructions not supported by, VI, 832.
Instructions on weight and sufficiency of, VIII, 66.
Instructions unsupported by, I, 391; VIII, 64.
Newly discovered, as ground for new trial, VI, 872–874.
New trial for exclusion of, VI, 837.
New trial for improper admission or exclusion of, VI, 837.
Non-prejudicial or harmless, I, 398.
Nonsuit for insufficiency of, VIII, 24, 29, 31.
Not misleading no ground for reversal, I, 399.
Objections to, not properly taken below, I, 415, 416.
Of agency, I, 40, 41.
Of agents' authority, I, 45.
Of attorney's authority, I, 515.
Of compromises, III, 56.
Of contract to pay rebates, IV, 122.
Of custom or usage, III, 666.
Of directors' meetings, IV, 57.
Of incorporation, III, 324.
Of jurors on motion for new trial, VI, 876.
Of membership in association, VII, 16.
Of reasonable rates, railway commissioners' decisions on, VI, 1148.
Of rules and regulations of relief associations, VII, 16.
Of witness at former trial, admissibility of, V, 522.
On hearing before arbitrators, I, 457.
On question of abandonment, I, 3.
On question of comparative negligence, III, 43.
On question of contributory negligence, III, 295–306.
On trial of replevin suit, VII, 65.
Prayer for instructions contrary, VIII, 78, 79.
Preponderance of, III, 298.
Preponderance of, reviewing on appeal, I, 430.
Presumption of regularity as applied to, I, 385.
Reception of, on trial, VIII, 15–19.
Rules of, for assessment of damages, III, 723–732.
Scintilla of, to establish negligence, VI, 801.
Statements in argument unsupported by, VIII, 39.

EVIDENCE — *continued.*
In general — *continued.*
Striking out, VIII, 19.
Sufficiency of, for jury, VI, 804, 806.
Time to object to, VIII, 20.
To authorize exemplary damages, III, 690.
To prove due incorporation, V, 1102.
To prove release, VII, 9.
To support complaint under Interstate Commerce Act, VI, 51.
Under the pleadings, VI, 1022–1043.
Verdict against, VIII, 93.
Verdict against, new trial for, VI, 843–850.
Waiver of objections to, I, 401.
Weight and sufficiency of, for jury, VIII, 46.
Weight of expert testimony, VIII, 297.
Weight of, when question of fact, III, 295.
When must appear in record, I, 422, 423.
In actions against carriers of goods.
Account books as, II, 282.
As to goods lost, II, 129.
Best and secondary, II, 282.
For loss of goods by fire, II, 75.
Generally, II, 280–287.
Hearsay and opinion, II, 284.
Of change in destination of goods, II, 286.
Of condition of goods shipped, I, 607, 608.
Of default of final carrier, II, 248.
Of delivery, bill of lading as, I, 625.
Of loss before delivery to connecting carrier, II, 212.
Of loss of goods by carrier, II, 58.
Of loss within limitations, I, 630.
Of misdelivery by carrier, II, 119.
Of quality of shipment, I, 607.
Of quantity of shipment, I, 606.
Of rates allowed to shipper, II, 172.
Of shipper's assent to limitation of liability, II, 166.
Of special value of property shipped, II, 60.
Of usage or custom, II, 285.
Of value of shipment, I, 607.
Parol, to vary or explain bill of lading, I, 604, 614–618.
Parol, to vary written agreement, II, 156, 284.
Receipt for goods as, II, 218.
Showing real agreement by extrinsic, I, 617.
Sufficiency of, as to damages to goods, II, 292.
Sufficiency of, to show delivery to carrier, II, 604; II, 40.
Sufficiency of, to show loss by delay, II, 299.
Sufficiency of, to show negligence on part of carrier, II, 82.
Sufficiency of, to show negligent loss of goods, II, 144.
To establish contract to carry, II, 59.
To fix liability of final carrier, II, 251.
To prove limitation of liability, II, 262.

EVIDENCE — *continued.*
In actions against carriers of goods — *continued.*
To raise or rebut presumption of negligence on part of carrier, II, 78–83.
What necessary to *prima facie* case against carrier for loss or injury to goods, II, 56.
In actions against elevated railways.
Error in admission of, IV, 354.
Error in exclusion of, IV, 355.
Expert and opinion, IV, 318–325; VIII, 230–298.
Generally, IV, 313–325.
Hearsay, IV, 316.
Of benefits, IV, 317, 325.
Of rental value, leases as, IV, 315.
In actions against express companies.
Admissibility of, V, 599, 600.
Generally, V, 599–602.
Sufficiency of, V, 600.
In actions against street railways.
Commenting on, VII, 506.
Generally, VII, 506.
Growing out of collisions between street cars, III, 20, 21.
Of consent of abutting owners, VII, 390.
Sufficiency of, in action for injury to passenger, VII, 504–506.
In actions for causing death.
Generally, III, 843–884, 957.
Instructions unsupported by, III, 905.
Of law of foreign state, III, 786.
Questions for jury in cases of conflict of, III, 886.
Requests to charge not supported by, III, 915.
Weight and sufficiency of, III, 859–876.
In actions for damages by fires.
Admissibility of, for plaintiff, V, 908–912.
Admissibility of, on part of company, V, 912–914.
Circumstantial, V, 911.
Documentary, V, 964.
Generally, V, 908–942.
In defense, admissibility of, V, 912–914.
On question of damages, V, 964–966.
Opinions as, V, 911, 965; VIII, 230–298.
Presumptive, V, 930–938.
To show origin of fire, V, 927.
Under the pleadings, V, 900, 901.
In actions for damages for land taken.
Admission of improper, when ground for reversal, IV, 785.
As to whether lands are superfluous, IV, 893.
In actions of trespass, IV, 876–878.
In condemnation proceedings generally, IV, 536–540.
In ejectment, IV, 851.
In landowner's action for damages, IV, 840.
Maps and plans as, IV, 528.
Non-prejudicial or harmless, IV, 787.
Objections to competency or sufficiency of, IV, 790, 791.
Of abandonment or nonuser, IV, 821.
Of title to land condemned, IV, 539.

EVIDENCE — *continued.*
In actions for damages for land taken — *continued.*
On motion to set aside report of commissioners to assess damages, IV, 746.
On motion to set aside verdict, IV, 754.
On question of damages, IV, 639–663.
On question of value, IV, 939.
On trial by jury of question of damages, IV, 621–625.
Opinions as to value, IV, 657, 658.
Review of, on appeal, IV, 796.
Right of commissioners to assess land damages to hear, IV, 601.
Setting aside verdict against weight of, IV, 753.
Sufficiency of, IV, 537.
To be considered, notwithstanding jury viewed premises, IV, 627.
Verdicts against, IV, 753.
When must appear in record on appeal, IV, 795.
Actions for injuries at crossings.
As regards signals, their sufficiency, etc., III, 526–528.
Generally, III, 641–648.
In railway-intersection proceedings, III, 403.
Of condition of track, III, 476.
Of failure to station flagman at crossing, III, 491.
Of kind and condition of crossing, III, 646.
Of negligence of watchman, III, 493.
Of subsequent repair of defect in crossing, III, 646.
Of undue speed at crossing to show negligence, III, 536, 537.
Positive and negative, III, 647.
In actions for injuries to children.
Generally, II, 810–814.
Of negligence, II, 747, 748.
Opinions as, II, 813.
Sufficiency of, II, 812.
In actions relating to colored persons.
Against carriers of slaves, II, 588.
For discriminating against, III, 29.
In actions for tort, generally.
By husband and wife jointly for injury to wife, V, 1076.
By husband for injury to wife's person, V, 1070.
By married woman for injury to her person or property, V, 1073.
By trespassers, weight and sufficiency of, VII, 1163.
Documentary, V, 995.
For conversion of personal property, VIII, 114.
For damages caused by nuisances, VI, 900.
For flowing lands, V, 993–996.
For infringement of patents, VI, 953.
For injuries at or near stations, VII, 232, 233.
For injuries caused by collisions, III, 16, 17.
For injuries caused by derailment, IV, 41.
For injuries to trespassers, VII, 1163.

EVIDENCE — *continued.*
In actions for tort, generally — *continued.*
For libel or slander, VI, 260.
For malicious prosecution, VI, 371.
For negligence, generally, VI, 821–827.
For wrongful arrest, V, 611.
Of trespass, VII, 1112, 1115.
Sufficiency of, for flooding lands, V, 995.
Sufficiency of, for injuries caused by collision, III, 17.
Sufficiency of, to show negligence, III, 22.
To prove discrimination, admissibility of, IV, 104.
In actions, generally.
Against receivers, VI, 1216.
For dividends, IV, 153.
For penalties, VI, 969.
For services as physician, VI, 397.
For taxes, VII, 994.
In criminal, III, 358.
In ejectment, IV, 254.
In foreclosure, VI, 486.
In *quo warranto* proceedings, VI, 1134.
Involving leases, VI, 241.
On bills and notes, I, 600.
On construction contracts, III, 174–176.
On contracts, III, 233.
On coupons, III, 342.
On covenants, III, 349.
On injunction bonds, V, 1162.
To recover back tax paid, VII, 1001.
To recover overcharges, II, 631.
On trial of, in assumpsit, I, 487.
To fix liability of garnishee, I, 508.
In actions relating to employes.
Admissibility of, V, 276–283, 778–780.
For injuries caused by negligence of fellow-servants, V, 776, 778–785.
For injuries to employés, V, 276–300.
For injuries to minor employés, V, 252.
For wages, V, 9.
Of defects in machinery, etc., V, 101.
Of incompetency of negligent fellow-servant, V, 780–785.
Opinions as, V, 781.
Preponderance of, V, 296.
Sufficiency of, V, 779.
Sufficiency of, to rebut presumption of negligence, V, 784.
Sufficiency of, to show negligence in employing servants, V, 783.
To enforce laborers' liens, VI, 301.
To foreclose mechanics' liens, VI, 292.
Weight and sufficiency of, as to incompetency of servants, V, 781.
Weight to be given to circumstantial, V, 297.
What admissible on question of damages to injured employé, V, 338–340.
In actions relating to fences, cattle-guards, etc.
As to sufficiency of fences, V, 824.
For failure to build cattle-guards, II, 600, 601.
For injuries at culverts, III, 664.
For injury caused by defective bridge, I, 708.
Opinion, by expert, II, 601.



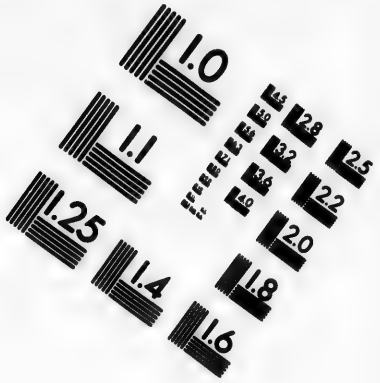
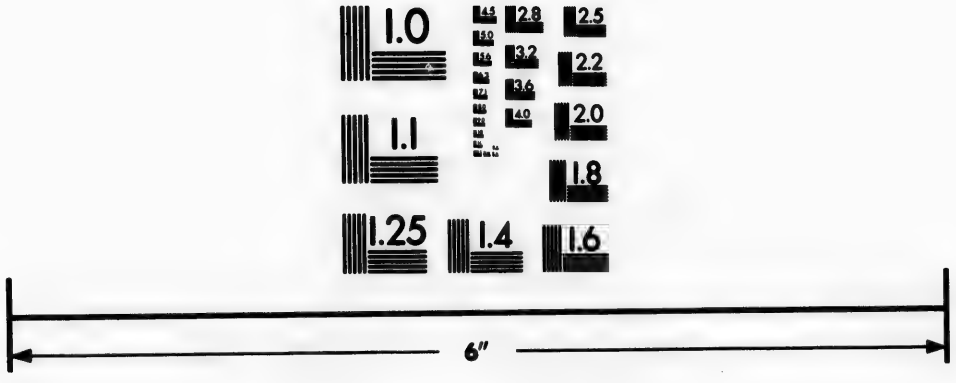
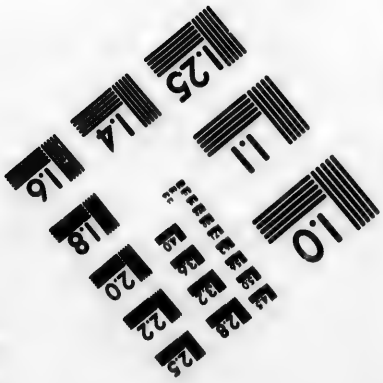


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EVIDENCE — *continued.*
In actions relating to live stock.
Admission of, order of proof, I, 320.
Against carriers of live stock, I, 807–811.
Circumstantial, showing negligence by, I, 292.
Discretion of court as to admitting or excluding, I, 320.
For killing stock, I, 278–319.
On question of damages, I, 819.
Opinions as, I, 283–284.
Sufficiency of, to show killing in township, I, 367.
Weight of, question for jury, I, 330.
What admissible under pleadings, I, 272–274, 366.
Withdrawal of, from jury, I, 320.
In actions relating to passengers and baggage.
Against passenger carriers, II, 535–552.
Against sleeping-car companies, VII, 138.
Baggage checks as, I, 545.
For expulsion of passengers, IV, 217–220.
For loss of baggage, I, 569–572.
For overcharges to passengers, VII, 1084.
Of contract, railway ticket as, VII, 1040.
Of delivery of baggage to second carrier, I, 528.
Of offers to compromise claims for lost baggage, I, 571.
Parol, to vary contract to issue free pass, VI, 939.
What admissible under pleadings, II, 531.
In actions relating to stock.
By stockholders, VII, 348.
Documentary, VII, 768.
In creditors' suits against stockholders, VII, 328.
Of title to stock, VII, 276, 303.
On subscriptions, VII, 764–770.
Secondary, VII, 768.
To enforce railway-aid bonds, VI, 709.
To enforce stock subscriptions, VII, 764–770.
Varying written by parol, VII, 768.
See also DEPOSITIONS; DOCUMENTARY EVIDENCE; NEGATIVE EVIDENCE.

EVIDENTIAL FACTS.
Need not be alleged, I, 249; V, 263.

EXAMINATION.
In general.
By consignee, before receipting for goods, II, 164.
For color blindness, V, 3.
Of cars by employés, rule requiring, V, 244.
Of garnishees, I, 508.
Of goods by consignee, V, 582.
Of machinery, duty of carrier as to, II, 379.
Of officers of claimant company, III, 9.
Of proposed route, by commissioners, VI, 355, 356.
Of roadbed, duty to make, II, 369.

EXAMINATION — *continued.*
Of witnesses, parties, etc.
Cross-examination to be confined to matters brought out in direct examination, VIII, 218.
Direct examination of witnesses, VIII, 212–217.
Explanation of direct examination on cross-examination, VIII, 224.
In chief, VIII, 212–217.
Of experts, VIII, 274–277.
Of jurors, on the *voir dire*, VIII, 13.
Of parties, before trial, IV, 80–82.
Of witness, as to value, IV, 658.
Of witnesses, generally, VIII, 210–230.
See also PHYSICAL EXAMINATION.

EXCAVATIONS.
General treatment, V, 537.
Beneath right of way, enjoining, VI, 401.
Defective, notice of defect to employé, V, 157.
Duty of company as to safety of, V, 47.
Duty to keep premises free from, VI, 270.
In banks of streams, V, 974.
In city streets, liability to abutters, VII, 617.
In or about track, liability for, VII, 413.
Liability for collection of surface water in, VIII, 183.
Near track, injuries to animals caused by, I, 132.
Under track, injuries to persons making, VII, 520.
Under track, when negligence, VII, 469.

EXCEPTIONS.
Bill of.
On appeal, I, 423, 442.
Right to take, VIII, 21.
Sufficiency of, on appeal, IV, 352.
Taking and filing, IV, 801.
To evidence, VIII, 19–23.
To refusal to charge as requested, VIII, 84.
Waiver of notice by filing, IV, 511.
From general rule.
To fellow-servant rule, V, 663–670, 686, 687, 694.
To rule as to assumption of risks, V, 131, 143, 183.
To rule exonerating carrier where passenger retains custody of baggage, I, 555.
To rule exonerating company from liability for acts of receiver, VI, 1228.
To rule forbidding collateral attack on judgments, etc., IV, 769.
To rule making principal liable for negligent or wilful acts of agent, I, 68, 70.
To rule of *res adjudicata*, VI, 85.
To rule requiring extraordinary care, II, 362.
To rule requiring safe machinery, V, 69.
To rule that degrees of negligence are not to be compared, III, 249.
To rule that working after knowledge of danger is assumption of risk, V, 153.
To superior servant or vice-principal rule, V, 681–683.

EXCEPTIONS — *continued.*
In grants, etc.
As to fencing, negativing in declaration, I, 259.
In bills of lading, I, 625–631, 641; II, 164–184.
In deeds, IV, 20.
Of homestead rights, VI, 174.
Of land included in Mexican grants, VI, 171.
Of mineral land from grant or patent, VI, 159, 165, 169, 1119.
To power of city to grant right of way, VII, 570.
Under statute of limitations, VI, 328–330.

EXCESS.
Of injury over benefits, recovery limited to, IV, 339.

EXCESSIVE.
In general.
Charges, II, 624–639.
Fares for carrying passengers, VII, 1083–1085.
Fares, recovery of, in England, VII, 1086.
Force or violence in expelling passenger, IV, 216, 233; VII, 535.
Payments, recovery back of, VI, 963.
Use of steam, liability for fire caused by, V, 869.
Width of grip-slot, liability for injuries caused by, I, 732.
Damages.
As ground for new trial, VII, 850–871.
For assault, I, 475.
For causing death, III, 947–954.
For discrimination against negroes, III, 30.
For expulsion of passengers, IV, 238–244.
For flowing lands, V, 1001.
For injuries at stations, VII, 236.
For injuries to children, II, 823–825.
For injuries to employés, V, 340–344.
For injuries to passengers, II, 579–586.
For land expropriated, IV, 946.
For land taken, IV, 743, 744.
For loss by fire, V, 959.
For loss of baggage, I, 574.
For stock killed, I, 351.
For wrongful arrest, V, 613.
Reducing, on appeal, IV, 798.
Reduction of verdict for, IV, 754.
Remission of excess on appeal, I, 437; VI, 868–871.
Setting aside verdicts for, VIII, 94.
Setting aside verdicts for, in condemnation, IV, 753, 754.
What are, IV, 47.
What are not, III, 656.
Speed.
Driving street-car at, VII, 521, 522.
Duty to trespasser, as regards, VII, 1131, 1132.
Effect of, on question of contributory negligence, III, 630.
Effect of, on rule as to contributory negligence, III, 828.
Instructions to jury as to, III, 652.

EXCESSIVE — *continued.*
Speed — *continued.*
Liability for accidents caused by, II, 380.
Liability for injuries caused by, IV, 267.
Liability for injury to passenger caused by, I, 730.
Showing use of, III, 866.
When constitutes negligence, VI, 785–788, 790–792, 809.
When question for jury, VI, 809.

EXCHANGE.
Of bonds, I, 659.
Of municipal-aid bonds for railroad stock, VI, 658.

EXCITEMENT.
Public, when ground for change of venue, VIII, 7.

EXCLUSION.
Of evidence, discretion of court as to, I, 320.
Of evidence, when ground for reversal, I, 388, 402; IV, 785.
Of negroes from cars set apart for white persons, III, 28.
Of objectionable people from station, VII, 208.
Of witnesses, from court room, VIII, 212.

EXCLUSIVE.
Franchise, violation of, I, 721–723.
Grant, charter not, unless expressly made so, II, 694.
Possession by company of land taken, IV, 436.
Power of congress to regulate commerce, VI, 2, 68.
Power of legislature to condemn property for public use, IV, 399.
Privileges of hackman at stations, IV, 103; V, 1059–1061.
Privileges of railways in streets, VII, 578–580.
Privileges of street railways, grants of by cities, VII, 369–374.
Privileges of telegraph companies, VII, 1029–1032.
Privileges, Rapid Transit Acts do not grant, IV, 278.
Right of company to its tracks, VII, 431.
Right of way, III, 465; VII, 82.
Statutory remedy, IV, 393.
Transportation of produce, covenant for, III, 346.
Use of street, when company entitled to, VII, 510.
Use of track and premises, right to, VII, 1126.
Use of right of way, VII, 82.

EXCURSION TICKETS.
Generally, VII, 1064–1069.
Requirements of Interstate Commerce Act as to, VI, 57.

EXCUSES.
For breach of contract to locate station, VII, 203.
For delay by carrier of live stock, I, 742, 743.
For delay of goods in transit, II, 63.

EXCUSES — *continued.*
For loss or injury to goods, evidence of, II, 286.
For maintenance of nuisance after injunction, VI, 897.
For non-construction of culverts, III, 659.
For non-delivery, burden on carrier to show, II, 122.
For non-delivery of supplies, III, 7.
For non-performance, III, 223.
For overshooting station, II, 413.
For violation of injunction, V, 1161.
Strikes as, for delay by carrier, VII, 719, 720.
Unlawful purpose of shipper no excuse for carrier's negligence, II, 83.
See also DEFENSES.

EXECUTED CONTRACTS.
See CONTRACTS.

EXECUTION.
General treatment, V, 541.
Property subject to execution, V, 541.
Levy and sale, V, 545.
Supplementary proceedings; analogous writs, V, 550.
Writ of.
Against corporation a prerequisite to creditors' actions against stockholders, VII, 312, 317.
Against defaulting officials, VIII, 185.
Conflict as to possession of property levied on, VI, 1180.
Enforcement of awards by, I, 450.
Enforcement of judgment by, VI, 105.
Enforcement of judgment for land damages by, IV, 761.
Levying on wife's property for husband's debt, V, 1068.
Payment of, by receivers, VI, 1198.
Priority between lien of, and mortgage, VI, 457.
Staying, until assessment and payment of damages, IV, 852.
Of deeds and contracts.
Contract to locate station not binding on purchaser at, VII, 203.
Of bill of lading, by carrier's agent, I, 602, 603.
Of construction contracts, III, 119.
Of contract as agent for principal, I, 47.
Of contract of shipment, I, 780.
Of contracts, III, 195.
Of deeds, IV, 4.
Of deeds of trust, IV, 25.
Of leases, agreements for, VI, 202.
Of leases by directors, VI, 210.
Of mortgages, VI, 433.
Of mortgage, setting out in bill to foreclose, VI, 484.
Of municipal-aid bonds, VI, 670–672.
Of negotiable paper by agents, I, 592.
Of negotiable paper, generally, I, 587.
Of petition for local aid, VI, 565–568.
Of written instrument, parol evidence to show condition, V, 481.

EXECUTORS AND ADMINISTRATORS.
General treatment, V, 551.
Damages to widow suing as, for loss of husband, III, 937.
Extent of recovery by, for causing death, III, 926.
Instructions as to damages in suits by, III, 913.
Instructions as to damages recoverable in actions by, III, 901.
Nominal damages only, when recoverable by, III, 947.
Power of, to transfer stock, VII, 285.
Right of husband's administrator to sue for injuries to wife, V, 1070.
Right of, to appeal in condemnation proceedings, IV, 774.
Right of, to revive action, I, 12.
Right of, to sue for causing death, III, 773–777.
Suits by, aganist elevated railways, IV, 305–307.
When entitled to land damages, IV, 562.
When limitation begins to run in actions by or against, VI, 313.
When may sue elevated railway, IV, 305–307.
When proper parties, VI, 925.
When words "personal representative" include executor or administrator, VIII, 320.
See also FOREIGN EXECUTOR OR ADMINISTRATOR.

EXEMPLARY DAMAGES.
Averments to warrant, III, 722.
Averments to warrant, for causing death, III, 803.
For assault, I, 474.
For expulsion of passengers, IV, 230–236; VII, 539.
For injuries at crossings, III, 656.
For injuries to children, II, 823.
For injuries to employés, V, 337.
For injuries to passengers, II, 575–579.
Generally, III, 683–693.
In trespass by landowner, IV, 879.
When allowed in stock-killing cases, I, 346.
When deemed excessive, IV, 239.
When recoverable, for causing death, III, 944–946.
When recoverable, for false imprisonment, V, 612.
When recoverable for torts of servants, I, 72, 73.
When recoverable for trespass, VII, 1114.
When recoverable, generally, IV, 47.
See also DAMAGES.

EXEMPTION.
In general.
In charter, from future legislation, not implied, II, 683.
Of property from attachment, I, 499–502.
Of states from suits, VII, 184.
What conferred by charter, II, 701, 709, 710.
From liability.
By contracts, burden of proof as to, VI, 348.
For baggage in custody of passenger, I, 554–558.

EXEMPTION — *continued.*
From liability — *continued.*
For injuries caused by fires, V, 908.
For negligence, when none allowed, II, 182–184.
Right to contract for, absolute, II, 259.
To persons riding on passes, VI, 943–946.
From taxation.
As applied to taxation, VIII, 312.
Contract for, when void, VI, 754.
Effect of consolidation on, III, 87.
Generally, VII, 888–932.
In Canada, VII, 1018.
Of lands "until sold or conveyed," VII, 865.
See also LIABILITY; LIMITATIONS OF LIABILITY.

EXHIBITION.
Of corporate books, mandamus to compel, VII, 307.
Of ticket before entering train, VII, 1051.
Of ticket by commuter, VII, 1061.
Of wounds to jury, V, 404; VIII, 17.

EXHIBITS.
Annexed to pleadings, VI, 985.

EXISTENCE.
Corporate, averment of, VI, 986.
Of license, when a question of fact, VI, 262.
Of municipal corporations, judicial notice of, V, 436.
Of streets and highways, secondary evidence as to, V, 455.

EX PARTE.
Right to apply for receiver without notice, VI, 1173.

EXPECTANCY.
Of life, competency of experts as to, VIII, 270.
Of life, proof of, III, 729, 881, 882.
Of life, proof of by mortality tables, V, 424, 515.
Of life, when a matter of expert testimony, VIII, 261, 270.
Of pecuniary benefit from person killed, III, 756, 937, 940.
See also MORTALITY TABLES.

EXPEDIENCY.
Of condemnation, not reviewable by courts, IV, 383.

EXPENDITURES.
Power of mortgage trustees as to, VI, 465.

EXPENSES.
In general.
Allowance to mortgage trustees for, VI, 465.
Allowance to receiver for, VI, 1219.
Apportionment of, III, 451.
Estimating, in foreclosure suit, VI, 486.
Indemnity to directors for, IV, 70.
In obtaining loans, when exempt from taxation, VII, 915.
Of company while contesting foreclosure, adjustment of, VI, 497.
Of constructing and maintaining street or highway crossings, III, 444, 445.
Of foreclosure sales, VI, 501.

EXPENSES — *continued.*
In general — *continued.*
Of receivership, adjusting on foreclosure, VI, 496.
Of removing property, evidence of, IV, 648.
Of reorganization, liability for, VII, 60.
Of repairing bridges, I, 700.
Reimbursement for, III, 145.
Recovery of, as damages.
Caused by delay, II, 62, 297.
Caused by non-delivery of goods, III, 675.
Incurred by plaintiff, when included in, II, 603.
Incurred in avoiding delay, II, 349.
Medical and funeral, III, 943.
Of cure as an element of damage, V, 338.
Of future recovery from effects of injury, when allowable, III, 700.
Of keeping track in repair, III, 406.
Of nursing injured child, II, 820.
Of physician, nursing, etc., III, 727.
Of recovery of escaped slave, liability of carrier for, II, 589.
Of search for lost baggage, I, 574.
Of vexatious litigation, I, 347.
Resulting from injury, II, 573; III, 717.

EXPERIENCE.
Effect of lack of, as contributory negligence, V, 189.
To qualify an expert, VIII, 270–273.

EXPERIMENTS.
Evidence founded on, discretion as to admission of, I, 381.
In presence of jury, VIII, 17.
Made by witnesses, evidence of, I, 284.
Subsequent to accident, admissibility of evidence of results of, V, 421.

EXPERTS.
Competency of, VIII, 223, 269–274.
Examination of, VIII, 274–277.
Including opinions of, in hypothetical questions, VIII, 297.
In comparison of handwriting, VIII, 294.
Meaning of the word, VIII, 312.
Opinions of, IV, 318–325.

EXPERT TESTIMONY.
As to origin and cause of fire, V, 914.
As to sufficiency of culverts, III, 664.
As to sufficiency of fences, I, 284.
In actions for flowing lands, V, 994.
In actions for injuries at culverts, III, 664.
In elevated-railway cases, IV, 318–325.
In stock-killing cases, I, 284.
Instructions as to, when not reversible error, I, 406.
In suits for failure to build cattle guards, II, 601.
In suits for injuries to employés, V, 282.
Opinions of ordinary witnesses on questions proper for, VIII, 232.
Weight of, generally, VIII, 297, 298.
Weight of, when for jury, III, 893.
What questions call for, VIII, 260–269.
See also OPINION EVIDENCE.

EXPIRATION.
Of charter as ground for dissolution, IV, 129.
Of charter, as ground of abatement, I, 10.
Of compulsory powers in England, IV, 883.
Of free pass, VI, 940.
Of lease, rights of parties after, VI, 216.
Of limited ticket, VII, 1070–1072.
Of mechanics' lien, VI, 287, 288.
Of mileage ticket, condition as to time of, VII, 1073.
Of reasonable time to call for baggage, I, 551, 552.
Of tenancy during pendency of condemnation proceedings, effect of, IV, 443.
Of ticket, expulsion of passenger because of, IV, 182.
Of time allowed by charter within which to build road, VII, 589.
Of time for completion of road, power to take lands after, IV, 406.
Of time of permissive occupation, ejectment after, IV, 247.

EXPLANATION.
Of latent ambiguities, by parol, V, 478.
Of previous testimony, VIII, 224.

EXPLOSIONS.
General treatment, V, 556.
Assumption of extra risk from car loaded with nitro-glycerine, V, 173.
Carelessness in use of dynamite, V, 194.
Carriage of dangerous explosives, II, 86–88.
Liability in case of explosion of nitro-glycerine, V, 559.
Of boiler, liability to employé for, V, 655.
Storage of explosives with other goods, liability of carrier, II, 148.
While road is in hands of contractor, liability for, V, 1113.
See also TORPEDOES.

EXPOSURE.
After expulsion from train, damages for, IV, 229.
Of cattle in stock-yard during storm, I, 755.
Of cattle to danger — contributory negligence, I, 210.
Of employé to unnecessary risks or undue danger, V, 667, 674.
Of person beyond car, when contributory negligence, VII, 483.
Of premises to fire, when contributory negligence, V, 888, 889.
Voluntary, as a defense to action on insurance policy, I, 16.

EXPRESS.
Admissions, in pleadings, effect of, VI, 1022.
Agreement, subrogation by, VII, 723.
Cars, riding in, II, 324, 335, 511.
Contracts, limitation of liability by, VI, 332, 333.
Contracts, right to stop over by virtue of, VII, 1056.
Contracts to pay charges, II, 612.
Messengers, how far deemed passengers, II, 325.

EXPRESS — *continued*.
Messengers, limiting liability as towards, II, 440.
Messengers not fellow-servants with engineer, V, 743.
Trust, proof of, by secondary evidence, V, 454.
Trust, trustee of, when proper party to sue, VI, 924.

EXPRESS COMPANIES.
General treatment, V, 560.
Rights and liabilities, generally, V, 560.
Rights and liabilities as carriers, V, 569.
Actions by and against, V, 598.
Are not subject to Interstate Commerce Act, VI, 9.
Conviction of agent of, for illegal transportation of liquor, VI, 76.
Discrimination in carrying express goods, IV, 117.
Meaning of words, "express facilities," VIII, 313.
State laws imposing taxes on, III, 35.
Taxation of, and of stock in, VII, 860, 875.
Taxation of foreign, VI, 65.

EXPRESS TRAIN.
What is, VIII, 313.

EXPROPRIATION.
Of land under Canadian statutes, IV, 924–955.

EXPULSION.
See EJECTION OF PASSENGERS.

EXTENSION.
Meaning of term "extend" as applied to extension of track, VIII, 313.
Of main line, when deemed a branch, I, 684.
Of period of exemption from taxes, VII, 899.
Of receiverships, VI, 1224.
Of roads, construction of statutes relating to, VII, 268.
Of roads, location of, VI, 354.
Of shore front, VII, 87.
Of time for sale of superfluous lands, IV, 893.
Of time to answer, in foreclosure, VI, 485.
Of track by permission of city, VII, 365, 388.
Of track, mandamus to compel, VII, 365.
Of use, when a taking, IV, 444.
Right to construct, under charter provisions, II, 708; VII, 378.
When covered by mortgage made prior to construction, VI, 425.
When deemed a public use, IV, 457.

EXTINGUISHMENT.
Of carrier's lien for charges, II, 153–155.
Of easements, IV, 160.
Of exemption from taxation by leasing road, VII, 900.
Of fires, V, 873–874, 886, 887, 958.
Of limitation of liability, II, 184–186.
Of mortgages, VI, 518–520.
Of private ways, VI, 1079.
Of right of stoppage *in transitu*, II, 191–193.

EXTINGUISHMENT — *continued.*
Of title to right of way, VII, 76.
Payment, when not an, III, 335.
EXTRA.
Allowance in addition to costs, III, 326; IV, 729.
Baggage, limit of weight, etc., I, 541.
Charge on switches or branches, II, 654.
Charge, services for which demandable, II, 640–643.
Fare, liability of conductor for not collecting, III, 61.
Fare, on chair cars, right to collect, VII, 131.
Fare, when demandable, VII, 1080–1083.
Fare, when passenger does not procure ticket, IV, 166–168.
Hazard, assumption of by employé, V, 169.
Hazardous work, duty to warn employés as to, V, 38.
Pay of railway contractors, III, 137.
Pay of receiver, when entitled to, VI, 1221.
Risks, when assumed by employé, V, 169–179.
Services of directors, IV, 59.
Sessions, constitutionality of laws passed at, VII, 257.
Territoriality of stock-laws, I, 95.
Territorial statutes as to liability for negligence of co-servants, V, 708.
Territorial statutes giving action for causing death, III, 784.
Trains, duty of company as to management of, I, 184.
Trains, right of lessee road to compensation for running, VI, 231.
Wages, suits for, V, 13.
Work ordered by engineer, right of contractor to recover for, III, 157.
Work, right to pay for, III, 132.
Work, under Canadian construction contracts, V, 1050.
EXTRAORDINARY.
Floods, non-liability in cases of, V, 977.
Risks, assumption of by employé, V, 169.
Risks, negligence in subjecting employé to, V, 264.
EXTRAORDINARY CARE.
Duty of carrier to exercise, as to passengers, II, 355, 358–360, 362.
Duty to exercise, VI, 779.
Failure to use, III, 258.
EXTRINSIC EVIDENCE.
See EVIDENCE.
FACILITIES.
Additional, application for, III, 396.
Discrimination as to furnishing, IV, 113–115.
For interchange of traffic, VI, 33.
For purchase of tickets, VII, 1048, 1049.
To express companies, duty of company to furnish, V, 561–564.
FACTORY.
Taking part of, under English statutes, IV, 887, 888.
FALLEN LEAVES OR TIMBER.
See COMBUSTIBLE MATTER.
FALLING.
On track in front of train, III, 632.
On track, when contributory negligence, VII, 529.
FALSE IMPRISONMENT.
General treatment, V, 605.
See also I, 465; VII, 1088–1090.
FALSE PRETENSES.
Prosecutions for, III, 367.
FALSE REPRESENTATIONS.
By agents, liability of principal for, I, 76.
By infant employé, as to his age, V, 250.
On sale of stock, VII, 291.
FAMILY PORTRAITS.
Measure of damages for loss of, II, 301.
FAMILY TRADITIONS.
As hearsay evidence, V, 462.
FARE REGISTERS.
Patents for, VI, 958.
FARES.
See TICKETS AND FARES.
FARM CROSSINGS.
General treatment, V, 613.
Construction of statutes requiring, VII, 269.
Cost of, as a element of land damages, IV, 686.
Duty of company respecting, I, 186–193.
Duty of lessee to maintain gates at, VI, 230.
Duty to build cattle-guards at, II, 595.
Duty to fence track at, V, 813.
Injuries to persons and teams at, III, 462.
Instructions relating to maintenance of gates at, I, 334.
Right of landowner to construction of, IV, 441.
FARMERS.
As expert witnesses, VIII, 277, 278.
"FARM OUT."
Means to lease, VIII, 313.
FATHER.
See PARENT AND CHILD.
FEDERAL CORPORATIONS.
Jurisdiction of suits by and against, V, 633.
Removal of suits by or against, VII, 21.
FEDERAL COURTS.
General treatment, V, 627.
In general, V, 628.
The Supreme Court, V, 638.
Averment of diverse citizenship to give jurisdiction to, VI, 988.
Conclusiveness of judgments of state courts in, VI, 95.
Conflict between receivers of and those of state courts, VI, 1180.
Conflict between state courts and, in injunction suits, V, 1161.
Decisions of, as to constitutionality of statutes regulating municipal and local aid, VI, 536.
Decisions of, as to taxation in aid of railway, VI, 714.
Decisions of, as to taxation of land grants, VII, 878.
Decisions of, as to the assessment and levy of taxes, VII, 932.

FEDERAL COURTS — *continued.*
Effect in, of previous proceedings in state court, VI, 474.
Enforcement of orders of Interstate Commerce Commission in, VI, 49, 52, 53.
Following decisions of state courts in, VI, 556, 675, 687.
Judicial notice of state statutes by, V, 439.
Jurisdiction of, in foreclosure as dependent on locality, VI, 473.
Jurisdiction of, to enforce railway aid bonds, VI, 705.
Jurisdiction of, to enjoin unlawful tax, VII, 1003.
Power of, to grant injunction, IV, 864.
Proceedings in, after removal of cause, VII, 44.
Proceedings in, under interstate commerce law, VI, 52, 53.
Review of town bonding proceedings by mandamus in, VI, 746.
Right of personal representatives to sue in, III, 776.
Rule as to imputed negligence in, V, 1086.
Rule of, as to limitation of liability, II, 174.
Service of process of, on foreign corporation, VI, 1087.

FEDERAL GRANTS.
Of swamp lands, VI, 187.
To railroads, VI, 158–180.
To states, VI, 141–158.

FEDERAL OFFICERS.
Removal of causes against, VII, 24.

FEDERAL QUESTION.
When involved, VII, 28, 29.

FEDERAL STATUTES.
As to trial by jury on assessment of land damages, IV, 605.
Discrimination in charges under, IV, 87.
Regulating commerce by, VI, 4–58.

FEE.
Measure of damages to, in elevated railway cases, IV, 329–332.
Merger of mortgage in, VI, 519.
Of street in city does not bar action by abutting owner, IV, 296, 298, 300.
Of street, ownership of, VII, 595–603.
Ownership of, by company as a defense to action for flooding land, V, 988.
What deeds pass less than, IV, 14.
When acquired in condemnation proceedings, IV, 431, 728–734.
When passes by deed, IV, 13, 14.
When passes by deed of right of way, IV, 468.
When passes to purchaser at foreclosure sale, VI, 503.

FEES.
For storage, VIII, 164.
Of tax collectors, VII, 988.
Payment of, in foreclosure, VI, 512.
Recovery of, in actions for taxes, VII, 995.

FELONY.
Loss by, through company's servants, V, 526.
See also CRIMINAL LAW.

FELLOW-SERVANTS.
General treatment, V, 644.
Rule of non-liability for negligence of fellow-servant, V, 645.
Superior-servant or vice-principal rule, V, 671.
Servants in different departments; servants of different companies, V, 683.
Incompetency of fellow-servants, V, 694.
Statutory regulations, V, 707.
Who are and who are not fellow-servants; who are and who are not vice-principals, V, 720.
Procedure, V, 773.
Allegation of incompetency of, V, 271, 272.
Negativing negligence of, in complaint, III, 280; V, 272.
Negligence of, as a defense to action for causing death, III, 811.
Obeying orders of co-employé, V, 178.
Risks assumed from negligence of, V, 181–184.
Rule as to, where road is operated under running powers, VI, 244.

FEMALES.
Arrest of, I, 465.
As passengers, degree of care as to, II, 360.
Duty of carrier to protect female passengers from assaults by employés, II, 430.
Providing separate cars for, II, 333, 334.

FENCE BUILDER.
When engineer is not fellow-servant of, V, 746.

FENCES.
General treatment, V, 792.
Fence laws, V, 793.
Duty to build and maintain, V, 797.
Liability for failure to build and maintain, V, 829.
Alleging company's failure to build, I, 256–262.
Along embankments, duty to build, VII, 397.
Assumption of risk as to patent defects in, V, 144.
At parks and public places, ordinance requiring, VII, 674.
Burden of proof to show duty to construct, V, 264–266.
Burden of proof to show failure to build or keep in repair, I, 314.
Burden of proof to show sufficiency of, I, 318.
Conditions in municipal grants of right of way respecting, VII, 576.
Constitutionality of fence laws, I, 88–93; VII, 253.
Construction of statutes requiring, VII, 269.
Contributory negligence of employé, struck by, V, 211.
Cost of, as an element of land damages, IV, 693–696.
Covenant to maintain, when runs with the land, III, 344, 346.
Duty to build, as affecting liability for killing stock, I, 138–208.
Duty to build at crossings, I, 197.

FENCES — *continued.*
Duty to build at farm crossings, I, 186.
Duty to construct as against children, II, 736.
Duty to fence as a protection to employés, V, 60, 61.
Duty to fence track as towards passengers, II, 374.
Duty to guard excavations by, V, 538.
Duty to keep in repair, I, 168–175.
Effect of breach of agreement to build, IV, 474.
Effect of notice of defects in, or absence of, V, 156.
Evidence of cost of, on assessment of land damages, IV, 650
Inconvenience from absence of, as an element of land damages, IV, 692.
Instructions relating to duty to build, I, 333.
Interpretation of statutes requiring, I, 139.
Liability for killing stock, irrespective of duty to build, I, 97–138.
Liability of lessee road for defects in, VI, 227.
Measure of damages for failure to build, III, 705.
Measure of damages to, by fire, V, 961.
Near track, effect of notice to employé of, V, 157.
Necessity of building, to perfect title by adverse possession, I, 36.
Presumption of performance of duty to build, I, 303.
Prosecution for destruction of, III, 363.
Prosecution for failure to erect, III, 365.
Rails, when fixtures, V, 970.
Removal of, by landowner, I, 174.
Rule when destroyed by third person, I, 175.
Sufficiency of, I, 149–151.
Sufficiency of allegation that track was not sufficiently fenced, VIII, 328.
Sufficiency of evidence to show duty to build, I, 296.
Temporary defects in, liability for, I, 173.
What is a "good and lawful fence," VIII, 313.
When must be built, I, 141.
Whether possible to build a question of fact, I, 329.

FERRIES.
General treatment, V, 835.
Damages for diversion of traffic from, IV, 917.
Impairment of franchise of, as an element of land damages, IV, 691.
Jurisdiction over ferry boats, I, 32.
Right to maintain, IV, 163.

FERTILIZERS.
Ordinances forbidding storing of, VII, 673.

FIDUCIARY RELATION.
Of directors to company, IV, 66–74.
Of officers to corporation, VI, 905.
Of station agent to company, VII, 185.

FIELDS.
Duty to place cattle-guards at entrance to, II, 595.

FILING.
Of articles of association, maps, plats, etc., VI, 1121, 1122.
Of award for land damages, interest from time of, IV, 584, 726.
Of bond on appeal in condemnation proceedings, IV, 807.
Of bond to secure land damages, IV, 554–556.
Of charters, II, 676.
Of consent of city to use of street, VII, 390.
Of exceptions in condemnation proceedings, IV, 801.
Of freight and passenger schedules, VI, 45–48.
Of garnishee's answer, I, 507.
Of interrogatories in foreclosure, VI, 487.
Of map of land grant, effect of, VI, 166, 169, 171, 174.
Of maps, plans, profiles and surveys, IV, 526–529.
Of mortgages, VI, 435.
Of mortgages of rolling stock, VI, 428.
Of petition, estimating land damages from time of, IV, 583.
Of petition in condemnation proceedings, IV, 513.
Of plans and book of reference under Canadian statutes, IV, 929.
Of proceedings for consolidation, III, 82.
Of report of referee, VII, 4.
Of statement of claim for laborer's lien, VI, 297.
Of subscription papers with secretary of state, VII, 732.
Of written location, maps, plans, etc., VI, 356–358.

FILLING.
Blanks in corporate bonds, I, 662.
Duty to repair does not include, VII, 407.
Vacancies among mortgage trustees, VI, 461.

FINAL CARRIER.
Duty of intermediate carrier to deliver to, II, 240.
Duty of, to receive from connecting lines, II, 250.
Liability of, V, 597.
Liability of, for baggage, I, 530–532.
Lien of, for charges, II, 151.
Right of, to demand charges, II, 647, 648.
Rights, duties and liabilities of, II, 242–252, 516, 517.
See also CONNECTING LINES.

FINALITY.
Of award of arbitrators in Canadian expropriation proceedings, IV, 944.
Of decision of lower court by statute, IV, 778.
Of judgments and orders, I, 376–380.
Of judgments in condemnation proceedings, IV, 757, 776, 777.
Of surveys of public lands, VI, 1117.

FINAL JUDGMENT.
See JUDGMENT; DECREE.

FINDINGS.
As to contributory negligence, III, 559.
By court generally, VIII, 94.

FINDINGS — *continued.*
By court or referee in suits against elevated railway company, IV, 346–349.
By court, review of, on appeal, I, 433.
Erroneous, when ground for reversal, IV, 786.
In action for injuries to children, II, 825.
In action for killing stock, intepretation of, I, 330, 331.
In actions on construction contracts, III, 177.
Of fact, objection to, how to be taken, I, 419.
Of Interstate Commerce Commission, effect and force of, VI, 49, 50.
Of referee, review of, IV, 353.
On trial of ejectment suits, IV, 255.
See also SPECIAL FINDINGS.

FINES.
For contempt, III, 184.
For failure to construct highway crossings, III, 426.

FIREARMS.
When may be carried as baggage, I, 535.

FIRE INSURANCE.
General treatment, V, 844.
In general, V, 844.
Subrogation, V, 847.
Actions, V, 850.
Cost of, as an element in land damages, IV, 649, 699.
Mitigation of damages by reason of, V, 967.

FIRE LIMITS.
Ordinances forbidding wooden structures within, VII, 673.

FIREMEN.
As experts, VIII, 293.
As fellow-servants of engineer, V, 743, 744.
As fellow-servants of station agent, V, 765.
As fellow-servants with brakemen, V, 759.
As fellow-servants with conductor, V, 737.
As fellow-servants with master mechanic, V, 762.
As fellow-servants with other employés, V, 760, 761.
Contributory negligence of deceased, in action for causing death, III, 840.
Engineers as vice-principals of, V, 744.
Train despatcher not fellow-servant of, V, 769.
When boiler manufacturer is not fellow-servant of, V, 758.
When not fellow-servant of one who erects mail catchers, V, 762.
When may be sued for killing stock, I, 246.

FIRES.
General treatment, V, 851.
Statutes construed, V, 852.
Company's negligence, V, 857.
Contributory negligence, V, 883.
Remedies; procedure, V, 893.
Accidental, liability for, V, 862.
Action for destruction of wife's property by, V, 1069.
Action for spread of, when barred by lapse of time, VI, 323.
Constitutionality of statutes imposing liability for injuries caused by, VII, 254.

FIRES — *continued.*
Costs in actions for causing, III, 328.
Evidence of danger from, on assessment of land damages, IV, 649.
Increased danger from, as an element of land damages, IV, 697–699, 917, 936.
Liability for loss of goods by, VIII, 165.
Liability of lessor road for, VI, 221.
Liability of warehousemen for loss by, V, 585.
Limitation of liability against loss by, I, 631, 635; II, 260.
Limitation of liability for destruction of goods by, VI, 339.
Loss of goods by, liability of carrier for, II, 72.
Presumption arising from setting out, V, 446.
Priority of mortgage over claims for loss of goods by, VI, 454.
Set by independent contractor, liability for, V, 1114.
Statement of cause of action in actions for injuries to property by, VI, 997.
What is a fire "accidentally begun," VIII, 300.

"FIRST-CLASS FUNERAL."
Meaning of, VIII, 313.

FIRST-CLASS TICKETS.
Rights of holders of, VII, 1058.

FISHERY.
Rights of, in navigable waters, VIII, 170.

FIXTURES.
General treatment, V, 968.
Right of lessee to remove, VI, 230.

FLAGMEN.
As fellow-servants of engineer, V, 744.
As fellow-servants of switchman, V, 767.
As fellow-servants with other employés, V, 744, 761, 766.
At street crossings, necessity and sufficiency of, III, 428.
Contributory negligence at crossing where flagman is stationed, III, 548.
Contributory negligence of deceased, in action for causing death, III, 840.
Driving street car against, VII, 532.
Duty to look and listen as affected by failure to provide, III, 589.
Duty to look and listen at stations where stationed, III, 597.
Duty to station, at crossing, VII, 1133.
Evidence as to, in actions for causing death, III, 847.
Liability for failure to station at crossings, III, 481–491.
Requirement of, in cities, VII, 684.

FLAGS.
Rule of company respecting danger flags, V, 245.

FLAG STATIONS.
Delivery of goods at, II, 111, 144.
Duty to designate, VII, 201.
Duty to provide safe means of egress from train at, II, 401.
Expulsion of passengers at, IV, 205.
Injuries to passengers at, II, 422.
Right of conductor to refuse to stop at, II, 408.

FLATS.
Cost of filling in, as an element of land damages, IV, 687.
Title to, VII, 84.
"FLOAT."
How long land grant remains a, VI, 168.
FLOODING LANDS.
General treatment, V, 972.
Duties and liabilities of the company, V, 972.
Remedies, V, 985.
Action for damages for, IV, 833.
Actions for, when barred by lapse of time, VI, 313, 323.
As an element of land damages, IV, 690.
By means of bridges, I, 703.
By means of embankments, IV, 375.
Competency of evidence of damages caused by, V, 410.
Duty to prevent, III, 659.
Evidence under the pleadings in actions for, VI, 1025.
Liability for, III, 663, 664; VIII, 174.
Liability for flooding mines, VI, 402.
Liability of lessor road for, VI, 221.
Reservation in deed of right to flow land, IV, 22.
When deemed a taking of lands, IV, 450.
When limitation begins to run in actions for, VI, 313.
See also FLOODS; FLOODWAYS.
FLOODS.
Caused by bridges, I, 694.
Company must provide for ordinary, III, 660.
Delays caused by, II, 66, 347.
Duty of company to employé to guard against, V, 47.
Embankment giving way by reason of, IV, 379.
Liability of company in cases of freshet, V, 977, 978.
Providing against, II, 372; III, 660, 661.
See also FLOODING LANDS; FLOODWAYS.
FLOODWAYS.
Obstructing flow of water by, V, 975.
See also FLOODING LANDS; FLOODS.
FLOORS.
At stations, leaving holes in, VII, 217.
FLORIDA.
Aid to railways by the state, VII, 166.
Assessment and levy of railroad taxes in, VII, 938.
Construction of statute of, relative to liability for injuries caused by negligence of fellow-servants, V, 710.
Construction of stock laws of, I, 95.
Exemption from taxation under Improvement Act of, VII, 899.
Federal grants to, VI, 144.
Grants of swamp lands in, VI, 189.
Homesteads in public lands in, VI, 1108.
Injuries to animals running at large in, I, 218.
Occupation of streets by steam roads under legislative grants of, VII, 557.
Posting schedule of passenger rates in, VII, 1078.
Review of town bonding proceedings by mandamus in, VI, 748.
FLORIDA — *continued*.
Taxation in aid of railways in, VI, 716.
FLOUR.
See GRAIN AND GRAIN PRODUCTS.
FLYING SWITCH.
General treatment, V, 1006.
Assumption of risk in making, V, 136.
Contributory negligence in making, V, 226.
See also KICKING CARS.
FOG.
Effect of, on duty to look and listen, III, 620.
FOG SIGNALS.
See TORPEDOES.
FOOD AND WATER.
Duty to provide cattle with, during transit, I, 750–753, 757.
FOOD PRODUCTS.
Rates on, VI, 15.
FOOTBOARD.
Of engine, contributory negligence in riding on, V, 214.
On side of open car, riding on, VII, 501.
FOOTWAY.
Right to lay out across track, III, 439.
FORCE.
Using excessive, in ejecting passenger, IV, 197, 216, 233.
Using excessive, in ejecting passenger from street car, VII, 535.
What may be employed in ejecting passenger, IV, 194–197.
FORCIBLE ENTRY AND DETAINER.
General treatment, V, 1010.
FORECLOSURE.
Lease, how affected by, VI, 237.
Of deeds of trust, IV, 30–32.
Of mechanic's lien, IV, 291–295.
Of mortgages on land condemned, IV, 438.
Of railway mortgages, VI, 470–518.
Provisions for, in deed of trust, IV, 28.
Removal of suits for, to federal court, VII, 24.
Setting aside, at instance of creditors after reorganization, VII, 56.
Staying proceedings in, V, 1155.
When barred by lapse of time, VI, 322.
When lessee should be a party to, VI, 236.
FOREIGN CARS.
Duty to employés as to safety of, V, 93, 111.
FOREIGN CORPORATIONS.
General treatment, V, 1011.
General principles, V, 1012.
Actions by and against, V, 1017.
Appointment of receivers for, IV, 1165.
Escheat of lands of, V, 358, 359.
Jurisdiction of suits by and against, V, 633.
Leases to or from, VI, 213.
Liability of, as garnishees, I, 492.
License taxes on, validity of, VI, 64–66.
Power of, to exercise right of eminent domain, IV, 407.
Prima facie evidence of capacity of, to contract, II, 286.

FOREIGN CORPORATIONS — *con.*
Removal of suits by or against, VII, 22, 32–35.
Right of, to issue bonds, I, 658.
Right of, to plead statute of limitations, VI, 329.
Service of process on, VI, 1086–1089.
Stock in, when subject to taxation, VII, 874.
Taxation of, generally, VII, 857.
Taxation of interstate business of, VI, 602.
Taxation of, on basis of number of cars in state, VI, 59.
When limitation begins to run in actions against, VI, 314.

FOREIGN EXECUTOR OR ADMINISTRATOR.
Powers of, V, 552.
Right of, to sue for causing death, III, 776.

FOREIGN JUDGMENTS.
Conclusiveness of, VI, 95.

FOREIGN RECEIVERS.
Right of, to sue, VI, 1208.

FOREIGN STATE.
Jurisdiction of action for causing death in, III, 781–790.

FOREMAN.
As fellow-servant with other employés, V, 746–753.
Contributory negligence in disobeying orders of, V, 220.
Evidence of statement of, in actions for injuries to employés, V, 280.
When one is fellow-servant of the other, V, 749.

FORFEITURE.
In general.
By passenger, for failure to pay fare or produce ticket, VII, 1088.
For failure to lay or extend tracks as required by charter, VII, 395.
For non-completion of street railway within time limited, VII, 393.
For non-payment of subscription, VII, 797–800.
For overcharge in passenger fare, VII, 1083.
In criminal prosecutions for causing death, III, 958.
Of compensation by receiver, for fraud or misconduct, VI, 1222.
Of deposit with company, on discharge of employé, V, 8.
Of donation, VI, 651.
Of location, after approval of commissioners, VI, 356.
Of stock, for non-payment of assessments is a cumulative remedy only, VII, 756.
Of stock to company, effect of on liability of stockholders to creditors, VII, 321.
Of wages, V, 14.
Provisions for, in municipal grant of right of way in street, VII, 577.
Waiver of, by public agents, I, 86,

FORFEITURE — *continued.*
Of charter, franchise, or grant.
Of charter, as a defense to action on subscription, VII, 788.
Of charter, grounds for, IV, 129–133.
Of charter, when lease of road will not prevent, VI, 201.
Of corporate franchise, V, 1028.
Of exclusive grant to use streets for railways, VII, 372.
Of franchise, II, 710–716.
Of franchise of branch roads, I, 687.
Of franchise to keep toll bridge, I, 723.
Of grants for non-completion of road, VI, 141.
Of grant to street railway, VII, 388.
Of lands granted only available at instance of government, VI, 163.
Of land grants, for breach of condition, VI, 170, 173.
Of contract.
By sub-contractors, III, 159.
For breach of condition in deed, waiver of, IV, 19.
For railway construction, III, 135, 136.
Interpertation of mortgage as regards, VI, 441.
Of construction, for non-performance, V, 1051.
Of lease, rights of parties after, VI, 216.
Of sub-contracts, enforcement of provisions for, III, 160.

FORGERY.
Liability of collector in cases of, V, 569.
Of transfer of stock, VII, 304, 305.
Prosecutions for, III, 368.

FORMA PAUPERIS.
Suits in, for injuries to children, II, 809.
Suits in, generally, VI, 961.

FORMER ADJUDICATION.
Judicial notice of, VII, 437.

FORMER RECOVERY.
As a defense to action for causing death, III, 810.

FORMS OF ACTION.
Election between, I, 28.

"FORTHWITH."
Meaning of, VIII, 313.

FORWARDERS.
Distinguished from carriers, II, 26, 27.
Express companies are not, V, 570.
When carriers liable as, only, II, 26.
Who are, II, 25.

"FOUND."
Meaning of, as used in statute authorizing service on officers "found" in the state, VIII, 313.

FOUNDER.
In blast furnace, when engineer is fellow-servant of, V, 744.

FRANCHISES.
General treatment, V, 1023.
Abandonment and forfeiture of, II, 710–716.
Alienation of, when *ultra vires*, VIII, 127.
Amendment of charter by conferring new, II, 685.

FRANCHISES — *continued.*
Assessment of, for local improvement, VII, 450.
Assignability of, I, 478.
Effect of transfer of, after subscription but before issue of bonds, VI, 680.
Forfeiture for misuser of, IV, 131.
For private railroad, power of city to grant, VI, 1076.
Granted by city to cable railways, I, 727.
Granted by Congress, state tax on, VI, 59.
Impairment of, as an element of land damages, IV, 691.
Injunction to restrain exercise of, VIII, 332.
License tax for privilege of exercising, VI, 64.
Of branch road, forfeiture of, I, 687.
Of company aided, effect of assignment of, VI, 626.
Of street railway, power of legislature to grant, VII, 354.
Of street railway, taxation of, VII, 444.
Power of city to alter, amend, or repeal, VII, 363.
Power of corporation to alienate, III, 321.
Power of legislature to alter, amend, or repeal, VII, 364.
Power to mortgage, VI, 408–411.
Purchaser of, takes *cum onere*, VI, 503.
Right to take, in condemnation proceedings, IV, 417–428.
Sale or transfer of, forfeiture for, IV, 132.
Statute impairing obligation of, VII, 247.
Statutes providing remedy for violation of, I, 689.
Surrender of, forfeiture for, IV, 133.
To build bridge, interference with, I, 722, 723.
To erect toll-bridge, I, 721–723.
To run ferries, V, 836, 837.
Transfer of, no shield from liability, III, 323.
Validity of mortgage of, VI, 411, 412.
What are, VIII, 313.
What will pass on sale in foreclosure, VI, 500.
When exempt from taxes, VII, 905.
When subject to execution, V, 543.
When subject to taxation, VII, 870, 905.

FRAUD.
Actions for, when barred by lapse of time, VI, 317.
As a defense in actions on subscriptions to stock, VII, 782–786.
Carrier cannot limit liability for, II, 174.
Collateral impeachment of judgment in cases of, VI, 100.
Delivery produced by, does not destroy lien for charges, II, 154.
Effect of, on assignment for creditors, I, 483.
Effect of, on validity of deeds, IV, 24.
ffect of, on validity of release, VII, 0.
Exception of, under statute of limitations, VI, 329.
Forfeiture of compensation by receiver for, VI, 1222.
Impeachment of accord for, I, 19.

FRAUD — *continued.*
Impeachment of award for, I, 463.
Impeachment of release for, VII, 10, 12, 13.
In condemnation proceedings as ground for injunction, IV, 857.
In creditor's claim as a defense to stockholder, VII, 327.
Inducing conductor to violate rule and carry free, II, 312.
In elections, effect of, VI, 601.
In inducing sale, seller's action for, VII, 104.
In receivers' certificates, remedy for, VI, 1206.
In release, burden of proof to show, VII, 13.
In tax assessment, injunction for, VII, 1005.
Liability of state in case of, VII, 161.
Meaning of "legal fraud," VIII, 315.
Of agent, liability of principal for, I, 70, 71.
Of directors, action by stockholders to restrain, VII, 337.
Of directors in relation to construction contract, IV, 71.
Of officers no defense against innocent purchaser of bonds, VI, 692.
Of passenger, when a defense to action for personal injury, II, 533.
Of shipper in concealing kind or value of goods, II, 88–90.
Of station agents, liability of company for, VII, 189.
On part of engineer or company, relief against, III, 151.
On part of shipper, when excuses carrier, II, 84.
Parol evidence to vary bill of lading in cases of, I, 616.
Procuring signatures to petition in aid of railway by, VI, 566.
Remedy of railway contractor for, III, 142.
Rescission of bonds on ground of, I, 679.
Rights of holder of ticket procured by, VII, 1043.
Setting aside foreclosure sale for, VI, 513.
When limitation begins to run in actions for, VI, 312.

FRAUDS, STATUTE OF.
See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES.
General treatment, V, 1030.
Of property, as ground for receiver, VI, 1169.

FRAUDULENT REPRESENTATION.
As a defense in actions on subscriptions to stock, VII, 782–786.
Competency of evidence to prove, V, 393.
See also MISREPRESENTATION.

FREEHOLDERS.
Jurors to assess land damages must be, IV, 613.

FREEZING.
Liability for loss of fruit by, II, 216.
Limiting liability for loss by, I, 639.

FREIGHT.
Carriage of baggage as, I, 526.
Carriage of, on land-grant roads, VI, 129.
Classification of, VI, 16, 25–30.
Continuous carriage of, under Interstate Commerce Act, VI, 48, 49.
Conversion of, by carrier, II, 75–76.
In parcels or in bulk, overcharges for, II, 625–627.
On platform, stumbling over, VII, 212.
Penalties for overcharges in, VI, 967.
Power of agents to make contract for through carriage of, II, 209.

FREIGHT AGENTS.
As experts, VIII, 293.
Power of, to make contracts for through carriage, II, 209.

FREIGHT CARS OR TRAINS.
Authority of conductor to allow persons to ride on, III, 59.
Carriage of passengers on, II, 309, 340, 422–427.
Contributory negligence in riding in, III, 819.
Ejection of passenger riding on, IV, 164.
Prohibition of travel on, II, 335.
Riding on, against rules, and without paying fare, III, 19.
Rights of persons riding on, II, 321.
Rule requiring passenger on, to purchase ticket, VII, 1047.
Stipulation in mileage ticket against riding on, VII, 1073.
Taking passage on, when contributory negligence, II, 446, 447.
Who deemed trespassers on, VII, 1123.

FREIGHT HOUSES.
When exempt from taxes, VII, 910.

FRESHETS.
See FLOODS AND FRESHETS.

FRIENDS.
Of passengers, duty of company as to, VII, 214.
Of passengers, rights of, II, 337–339.

FRIGHT.
Measure of damages for, consequences of, III, 716.
When considered in estimating damages, II, 571.

FRIGHTENED TEAMS.
General treatment, V, 1032.
At crossing, III, 467, 468.
At or near bridges, I, 707.
Competency of evidence in cases of, V, 412.
Duty to look and listen where team becomes frightened, III, 600.
Fire falling from elevated structure on horses, IV, 367.
Frightening teams and stock by passing trains as an element of land damages, IV, 691.
Frightening teams by failure to give or by giving signals, III, 515–517.
Fright of horses caused by cable cars, I, 732.
Liability for acts of independent contractor, V, 1114.

FRIGHTENED TEAMS — *continued.*
Liability of street car companies in cases of, VII, 522, 523.
Liability of trolley line in cases of, IV, 267.

FRIVOLOUS PLEADINGS.
Striking out, VI, 1054.

FROGS.
Duty of company to block, V, 54–56.
Effect of notice of unblocked condition of, V, 156.
Evidence of furnishing unblocked, V, 277.
Negligence in failing to block, a question for jury, V, 315.
Patents for, VI, 960.

FRONT PLATFORM.
See PLATFORM.

FRUIT.
See PERISHABLE FREIGHTS.

FRUIT TREES.
For delivery to purchaser, special damages for loss of, II, 303.
Injuries to, as an element of land damages, IV, 699.
Measure of damages for injury to, or destruction of, III, 709; V, 962.

FUEL.
Used in manufacturing, damages for loss of, II, 303.
Using dangerous, V, 868.

FUNDING.
Of coupons, I, 669.

FUNERAL EXPENSES.
When recoverable in action for causing death, III, 943.

FURNACES.
Statute prohibiting heating cars by, II, 378.

FURTHER INSTRUCTION.
As to contributory negligence, III, 312.
In actions for damages caused by fire, V, 949.
In actions for injury to employés, V, 301.
On assessment of land damages, IV, 638.
On trial, generally, VIII, 84, 85.
Prayers for, II, 561.
See also INSTRUCTIONS.

FUTURE DAMAGES.
Consideration of, in assessing fee damages, IV, 331.
Elements to be considered in computation of, IV, 329, 331.
Generally, III, 695–702.
In actions against carriers of passengers, II, 568.
In actions for nuisances, VI, 901.
Under English Compulsory Purchase Acts, IV, 919.
See also DAMAGES; PROSPECTIVE DAMAGES.

FUTURES.
Illegality of contracts for, III, 211.

GAMBLING.
On train, prosecutions for, III, 368.

GAME.
Unlawful transportation of, V, 561.

GANG BOSS.
When fellow-servant of men under him, V, 761.

GARNISHEE.
Effect of payment of wages by, to creditor, I, 501.
Fixing liability of, I, 506–509.
Service of attachment on, I, 503.
Who may be sued as, in attachment, I, 491–494.

GARNISHMENT.
See ATTACHMENT, ETC.

GAS COMPANIES.
Condemnation of lands of, IV, 428.

GATEKEEPER.
Liability of company for false imprisonment by, V, 609.
Liability of company for negligence of, III, 478.
Power of, to vary terms of ticket, VII, 1050.

GATES.
Agreements of agents to build, I, 55.
At crossings, maintenance and tending of, III, 435.
At crossings, right of city to erect, VII, 671.
At farm crossings, V, 624.
At farm crossings, instructions relating to maintenance of, I, 334.
At street crossings over railways, III, 441.
At street crossings, sufficiency of, III, 428.
Burden of proof to show defects in, I, 313.
Compensation to company for expenses of erecting, III, 445.
Damages to abutting owners for erection of, III, 458.
Duty of company to erect and maintain, I, 187.
Duty of lessee to maintain, VI, 230.
Duty to look and listen as affected by failure to provide, III, 589.
Duty to look and listen at places where maintained, III, 549, 598.
Duty to maintain at grade crossings, I, 197.
Effect of absence of, or confusing directions of gateman, III, 829.
Injuries to passengers by negligence in closing, IV, 361.
Liability at crossings as dependent upon maintenance of, III, 476–480.
Negligence in leaving open, I, 326.
Ordinances requiring, at crossings, VII, 675.
Patents for, VI, 956.
Prohibition going through without tickets, II, 334.
Proof of failure to maintain, III, 869.
Relevancy of evidence to show defects in, I, 279.
Sufficiency of, V, 824.
What is contributory negligence in places where gates are maintained, III, 549.

GAUGE.
Change of, III, 69, 114.
Construction of charter as to, VII, 378.
Ordinance prescribing, VII, 440.

GENERAL AGENTS.
Implied powers of, I, 42.

GENERAL BALANCE.
Lien of carrier for, II, 152, 188.

GENERAL BUSINESS MANAGER.
Powers of, VIII, 313.

GENERAL DAMAGES.
When allowable in actions against carriers of passengers, II, 566.

GENERAL DEMURRER.
When proper, VI, 1010.

GENERAL DENIAL.
Averment of facts admissible under, V, 274.
Effect of, in action on stock subscription, VII, 762.
Effect of, on question of damages, III, 723.
Sufficiency of, I, 269.
When contributory negligence may be proved under, III, 282.

GENERAL INSTRUCTIONS.
As to contributory negligence, III, 310.

GENERAL ISSUE.
Admissibility of evidence under, VI, 1022.
Form and sufficiency of the plea generally, VI, 1003.

GENERAL MANAGER.
As vice-principal or fellow-servant of other employés, V, 761.
Authority of, to employ physician, VI, 394.
Rights, powers, and duties of, VI, 908.

GENERAL OBJECTIONS.
Sufficiency of, VIII, 20.

GENERAL REPUTATION.
See REPUTATION.

GENERAL STATUTES.
Amendment of charters by, II, 684.
Construction of cable railways under, I, 727.
General Railroad Acts of New York, right to construct elevated railways under, IV, 273–275.
Incorporation under, V, 1090.
Modification of charters by, II, 693.
Organization of elevated railways under, IV, 273, 274.
Regulating charges, II, 612–620.
Reservation in, of power to alter, amend, or repeal charter, II, 690.
Right of city to vote aid under, VI, 563.
Specific charters are controlled by, II, 700.

GENERAL TRAFFIC MANAGER.
When fellow-servant of a milesman, V, 761.

GENERAL VERDICT.
Cannot stand if inconsistent with special findings, VIII, 102–106.
Inconsistency between special findings and, III, 919; IV, 751; VI, 850.
When sufficient, effect, etc., VIII, 91.

GEORGIA.
Aid to railways by, VII, 168.
Assessment and levy of railroad taxes in, VII, 938.

GEORGIA — *continued.*
Constitutionality of statutes of, as to municipal aid for railways, VI, 537.
Constitutionality of statutes of, granting remedy for causing death, III, 745.
Constitutionality of tax laws of, VII, 838.
Construction of stock laws of, I, 95.
Deductions for benefits under condemnation laws of, IV, 714.
Doctrine of comparative negligence, how far applied in, III, 49.
Double damages for killing stock in, I, 352.
Grants by, to railroads, VI, 181.
Liability of final carrier under code of, II, 243.
License taxes in, VII, 1022.
Limitation of liability as between connecting lines in, II, 260.
Limitation of liability for negligence as respects injuries to employés in, V, 126.
Occupation of streets by steam roads under legislative grants of, II, 557.
Operation of statute of, giving right of action for causing death, III, 748.
Plaintiff's pleadings need not negative contributory negligence in, III, 277.
Right to sue in, for causing death in foreign state, III, 787.
Rule as to imputed negligence in, V, 1081.
Rule in, as to preliminary payments for stock, VII, 781.
Special act as to street railways construed, VII, 369.
Statute of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 711.
Statutory provisions in, limiting amount recoverable for causing death, III, 921.
Taking land for streets and laying out roads in, VII, 547.

GIFTS.
See DONATIONS.

GOLD COIN.
See MONEY.

"GOOD CAUSE."
Setting aside reports in assessment of land damages for, VIII, 313.

GOODS.
For prize exhibition, measure of damages for failing to carry, II, 305.

GOVERNMENT.
Accounting with, VI, 131.
Control of railroads by, V, 1049–1053; VIII, 159.
How far bound by statutes of limitations, VI, 304.
Lands held under grants from, when subject to taxation, VII, 878–884.
Lien of carrier on goods of, II, 150.
Relation of Central Pacific R. Co. to, II, 603.
Statutory contract with, VI, 129.
See also UNITED STATES.

GOVERNMENT PROPERTY.
Special rates on, VI, 58.

GOVERNMENT RAILROADS.
General treatment, V, 1049.
In the United States, V, 1049.
In Canada, V, 1050.

GOVERNOR.
Approval of statutes by, VII, 241.
Mandamus to, VI, 381.

GRADE.
Change of, at street crossing, damages to abutting owner, III, 458.
Construction of farm crossings under, V, 620.
Crossing of railways at, III, 410–413.
Duty to repair does not include grading, VII, 407.
Of street, changing, in construction of steam railway, VII, 607–615.
Of street, damages for changing, VII, 427.
Of street, duty of company to conform to, VII, 411, 412.
Right of company to fix, IV, 284.
See also CROSSINGS; CROSSINGS, INJURIES, ETC., AT; GRADE CROSSINGS.

GRADE CROSSINGS.
Liability of lessee road for defects in, VI, 227.
Power of commissioners to abolish, VI, 1145.
Under statutes of the several states, III, 446–456.
See also CROSSINGS; CROSSINGS, INJURIES, ETC., AT; GRADE.

GRAIN AND GRAIN PRODUCTS.
Classification of, as freight, VI, 26.
Contract as to amount of grain to be handled, IV, 372.
Contract for weighing grain, III, 240.
Discrimination in receiving and delivering grain, IV, 114.
Duty to deliver grain to elevator company, IV, 370.
Right of state to charge for inspecting flour, VI, 71.

GRAIN HOUSE.
See ELEVATORS.

GRANTS.
Acquiring title to right of way by, VII, 77.
By cities to use streets for electric railway, IV, 258.
Distinguished from easements, IV, 158.
From government, lands held under, when subject to taxation, VII, 878-884.
From legislature to lay tracks in streets, VII, 353–358.
Generally, VI, 134–194.
In præsenti, VI, 164.
In præsenti, to Northern Pacific R. Co., VI, 167.
Of charters, II, 673–678.
Of exemption from taxation must be clear and explicit, VII, 894.
Of franchise to lay tracks in streets, repeal of, VII, 363–365.
Of land, VIII, 314.
Of land under water, VII, 87.
Of power to exercise right of eminent domain to be strictly pursued, IV, 402.
Of right of way, IV, 462–486.
Of right of way by guardian, V, 1058.
Of right of way on condition, IV, 926.
Of right of way over public lands, construction of, VI, 1120.
Power of cities to make, VI, 753.

GRANTS — *continued.*
To steam roads to occupy streets, VII, 557–581.
To use streets for electric railway, IV, 258.
See also LAND GRANT RAILROADS; LAND GRANTS.

GRASS.
Allowing on, right of way when dry, V, 871, 872, 877, 891.
Cutting, on right of way, IV, 442.
Damages for destroying, V, 962.
Damages for destroying meadow, V, 963.
Evidence of value of, V, 966.
See also PASTURAGE.

GRAVEL.
Reservation of right to dig, IV, 23.
Right to enter to dig, under Canadian statutes, IV, 927.

GRAVEL ROADS.
Right of railways to cross, III, 423.

GRAVEL TRAINS.
Carriage of passengers on, II, 427.

GRIPMEN.
Of cable car, care required of, I, 731.

"GROSS EARNINGS."
Meaning of, VIII, 314.
See also EARNINGS.

GROSS NEGLIGENCE.
Allegation of, I, 255.
Carrier cannot limit liability for, II, 174.
Distinguished from slight negligence, III, 39, 47.
Exemplary damages for, III, 684, 945.
Exemplary damages for injuries to passengers, II, 576.
Exemption from liability for, in free pass, VI, 945.
Existence of, when question of fact, VI, 809.
Failure to give signals, when deemed to be, III, 513.
Liability for, in injuring animals, I, 195, 202.
Limitation of liability for, VI, 344.
Limitation of liability for, in bill of lading, I, 626; II, 174.
Limitation of liability for, in injuries to passengers, II, 437.
Limitation of liability for, in injuries to animals, I, 769.
Of company, as to stock on track, I, 100, 109, 117.
Of fellow-servant, liability for, V, 665.
Of person injured, rule as to, III, 258.
Of vice-principal, liability of company for, V, 675.
Punitive damages not recoverable except in cases of, III, 945.
Recovery notwithstanding contributory negligence in cases of, VII, 1160.
Sufficiency of evidence to prove, I, 293.
What is, VI, 774; VIII, 314.
When presumed, I, 307.

GROSS RECEIPTS.
Taxation of, VI, 60, 61; VII, 70.
When subject to taxation, VII, 871.

GROUND.
For appointment of receiver, VI, 1166.

GROUND — *continued.*
For appointment of receiver in foreclosure, VI, 491.
For change of place of trial, VIII, 6–9.
For continuance, VIII, 9, 10.
For dissolution of injunction, V, 1157–1159.
For dissolution or forfeiture of charter, IV, 129–133.
For injunction against unlawful tax, VII, 1004–1008.
For new trial, VI, 836–875.
For quashing or vacating attachment, I, 505.
For removal of cause, VII, 28–39.
For removal or discharge of receiver, VI, 1223–1225.
For reversal on appeal, I, 396–414.
For sale of railroad, VII, 105, 106.
For setting aside award of arbitrators, IV, 912.
For setting aside foreclosure sale, VI, 512–516.
For setting aside report of commissioners in condemnation proceeding, IV, 740.
For setting aside verdict, VIII, 92–94.
For setting aside verdict on assessment of damages, IV, 752–754.
Of abatement, I, 6–11.
Of challenge to jurors on assessment of land damages, IV, 614, 615.
Of defense in ejectment suit, IV, 251, 252.
Of forfeiture of charter, II, 710–712.
Of opposition to consolidation, III, 80.

GROUND RENTS.
Contract for, VI, 196.

GROUNDS.
Injuries to employés by defects in, V, 143.
Injuring children while trespassing on, II, 748–752.

GROUP RATES, II, 627.
From shipping districts, IV, 112.
When just and reasonable, VI, 18.
See CHARGES, II, 627.

GROWING CROPS.
Competency of farmer to testify as to value of, VIII, 278.
Damages for destroying herbage, V, 962.
Damages for injury to or destruction of, III, 709; V, 834.
Destruction of, by flooding lands, V, 985.
Destruction of, by independent contractor, liability for, V, 1114.
Evidence of injury to, in condemnation proceedings, IV, 647.
Expert testimony as to value of, at different stages of development, VIII, 262.
Injuries to, by defects in culverts, III, 663.
Injuries to, by embankments, IV, 375.
Injuries to, by failure to fence, V, 832–835.
Injuries to, from failure to maintain cattle-guards, II, 598, 602.
Injury to, as an element of land damages, IV, 699.
Liability for injuries to, generally, III, 116.
Opinion of witness as to value of, VIII, 247, 278.

GROWING CROPS — *continued.*
Value of, as the measure of damages, V, 1004, 1005.
Value of, when a question for experts, VIII, 262.

GUARANTY.
General treatment, V, 1054.
By company of machinery, etc., V, 71.
By company, of seller's title to stock, VII, 298.
By one company of another's lease, VI, 204.
Cancellation of contract of, V, 353.
Of bill of lading, I, 624.
Of bonds by directors, I, 659.
Of competency of fellow-servants, V, 697.
Of dividends, IV, 145.
Ultra vires contracts of, VIII, 128.
What are original undertakings within meaning of statute of frauds, III, 200.
When guaranties may be mortgaged, VI, 415.
When raises an estoppel, V, 383.

GUARD.
When fellow-servant of employé on train, V, 761.

GUARDIAN AD LITEM, V, 1059.

GUARDIAN AND WARD.
General treatment, V, 1058.
Bond of father suing as guardian, II, 809.
Guardians as parties in condemnation proceedings, IV, 497.
Right of guardian to sue for causing death of ward, III, 772.
Taking land of ward by consent of guardian, IV, 464.

GUARD-RAILS.
At street crossings, sufficiency of, III, 428.
Duty of company to block, V, 56.
Duty to provide, VII, 217.
Effect of notice of unblocked condition of, V, 156.

HABENDUM CLAUSE.
Effect of, in deeds, IV, 13.

HABITS.
Habitual carelessness of servants, notice of, V, 705.
Of deceased, evidence of, to show due care, III, 849.
Of deceased, proof of, on question of damages, III, 849, 878.
Of person injured, evidence of, on question of contributory negligence, III, 296.
Of servant as evidence of incompetency, V, 782.

HACKS AND HACK LINES.
General treatment, V, 1059.

HACKMEN.
Giving exclusive privileges to, at station, IV, 103.

HALF-FARE TICKETS.
Rules and statutes relating to, VII, 1059.

HAND-CARS.
Allegation of negligence in management of, II, 529.
Alleging furnishing of defective, to employé, V, 269.

HAND-CARS — *continued.*
Assumption of extra risk in operation of, V, 172, 325.
Carriage of passengers on, II, 324, 427.
Collision with, V, 660.
Contributory negligence in operation of, V, 220–222.
Duty to employés as to safety of, V, 94.
Evidence of failure to furnish safe, V, 278.
Injuries to children riding on, II, 741.
Negligence as to safety of, a question for jury, V, 320.
Negligence of vice-principal in operation of, liability of company, V, 681.
Non-liability for negligence of fellow-servants in operation of, V, 663.
Notice of defects in, assumption of risk after, V, 161.
Promise by company to repair defects in, V, 167.
Riding on, by permission of agents, I, 59.
Sufficiency of evidence of not properly manning, V, 293.
What are, VIII, 314.
Whether employé assumes risk of defects in, a question for jury, V, 325.

HAND-HOLDS.
Defective, allegations as to, V, 267.
Failure to furnish safe, evidence of, V, 277.
Injury to employé by defective, V, 91.

HANDWRITING.
Experts in, VIII, 294.

HARDSHIP.
To individuals, no reason for interference with exercise of right of eminent domain, IV, 384.

HARMLESS ERRORS.
Disregarding on appeal, I, 404–406; IV, 355.
Disregarding on appeal, in eminent domain, IV, 787, 789.
In admission of evidence, V, 391, 405.
In admission of evidence, as to fires, V, 912.
In instructions to the jury, I, 343; III, 314, 894; V, 948.
What is, in examination of witness, VIII, 212.
See also NON-PREJUDICIAL ERRORS.

HARPER'S FERRY, VA.
Military reservation at, VI, 1118.

HATCHWAYS.
Leaving open, VII, 220.

HAY.
See COMBUSTIBLE MATTER.

HAZARD.
Assumption of extra, by employés, V, 169.
Duty to warn employé as to extra, V, 38.

HEADLIGHT.
Failing to expose, V, 655.
Instructions as to absence of, or failure to show, III, 899, 907.
Patents for, VI, 959.

HEALTH.
Things dangerous to, when deemed nuisances, VI, 888.

HEARING.
Before arbitrators, evidence on, I, 457.
Before arbitrators in Canadian expropriation proceedings, IV, 943.
Before arbitrators in condemnation proceedings, IV, 591.
Before commissioners to assess land damages, IV, 599.
Of application for jury to assess land damages, IV, 610.
Of applications for mandamus, VI, 388.
Of condemnation proceedings generally, IV, 536.
Of demurrers, VI, 1013.
Of motion for new trial, what considered on, VI, 876.
On certiorari in condemnation proceedings, IV, 815.
See also TRIAL.

HEARSAY EVIDENCE.
Generally, V, 458–462.
In actions against carriers, II, 284.
In actions against elevated railway, IV, 316.
In stock-killing cases, I, 282.
Questions to witness, calling for, VIII, 217.

HEATING CARS.
Construction of statutes relative to, VII, 268.
Duty of carrier as to, II, 378.

HEDGE TRIMMINGS.
See COMBUSTIBLE MATTER.

HEIRS.
Right of, to appeal in condemnation proceedings, IV, 774.
Right of, to sue for causing death of ancestor, III, 772.
When entitled to land damages, IV, 562.
When may revive suits, I, 12.
When may sue in their own right, IV, 306.
When proper parties, VI, 925.

HENDERSON, KY.
Decisions particularly applicable to, VI, 760.

HERBAGE.
See GROWING CROPS.

HIGHWAY COMMISSIONERS.
Power of, to consent to substitution of new road, VII, 627.
Powers of, as to restoration of highways, VII, 619.

HIGHWAYS.
Adjoining land condemned, company's rights as respects, IV, 437.
Animals trespassing on, liability for injuries to, I, 179.
Compelling restoration of, VI, 378.
Condemnation of, for railway use, IV, 416.
Constructing road under or over, III, 429.
Construction of statute authorizing telegraph companies to enter upon "public roads," VIII, 305.
Construction of the words "any regularly laid out public highway," VIII, 305.
Crossing of, by railways, III, 422–458.
Dedication of land for, validity of, VIII, 130.

HIGHWAYS — *continued.*
Destroying usefulness of, III, 430.
Duty to fence road running parallel with, I, 146; V, 817.
Duty to give signals when crossing, III, 494.
Frightening teams in, V. 1034.
Injuries to travelers in, by independent contractor, liability for, V, 1115.
Liability for non-repair of, VII, 1104.
Location of station in or near, VII, 195.
Meaning of "road," VIII, 326.
Obstruction of access to, I, 703.
Obstruction of, as an element of land damages, IV, 705.
Obstructions in, when deemed nuisances, VI, 890.
Prosecution for refusal to work on, III, 383.
Railroads as, under statute, VI, 1120.
Regulation of crossings of, by commissioners, VI, 1144–1146.
Restoration of, after building railroads on, VII, 410, 411, 618–625.
Right to change location of, III, 432, 433.
Street railways in, VII, 352–539.
Under or over track, signals at, III, 524.
What the term includes, VIII, 314.
When the term "public highway" does not include a railroad switch, VIII, 323.
When the term "public road" does not include streets and alleys, VIII, 323.
See also STREETS AND HIGHWAYS (RAILROADS IN).

"HIRER OR CHARTERER."
Who is, VIII, 314.

HOBOKEN, N. J.
Decisions particularly applicable to, VI, 761.

HOGS.
Duty to fence against, I, 140; V, 825.
Injuries to, by overheating, I, 755.
Suffocation of, by overcrowding, I, 757.

HOLDING OUT.
Showing agency by proof of, I, 40.

HOLD-STRAPS.
Failure to use, VII, 486.

HOLES.
Leaving in or about track, VII, 413.

HOMESTEAD.
General treatment, V, 1063.
Conflict between rights of owner of, and land grant, VI, 172.
Exception of homestead rights in land grant, VI, 174.
In public lands, VI, 1108–1110.
Measure of damages for injuries to, IV, 677.
Right of widow occupying, to sue for damages caused by fire, V, 896.

HORSE RAILWAYS.
Crossed or paralleled by cable roads, rights of, I, 729.
Motive power of, VII, 369.
Right to lease to motor company, VI, 222.
Right to use horse power, VI, 248.
See also STREET RAILWAYS.

HORSES.
Frightened by fire falling from elevated structure, IV, 367.
Injuries to employés by vicious, VII, 532.
Liability for killing or injuring, IV, 267.
Liability for using diseased, VII, 457.
Liability of express company as carrier of, V, 577.
Proof of value of, I, 284, 285.
When company must fence against, I, 140.
When subject to taxation, VII, 870.
See also FRIGHTENED TEAMS.

HOSTILITY.
As ground for change of venue, VIII, 7.
Of witness, impeachment for, VIII, 208.
Of witness, showing, on cross-examination, VIII, 222.

HOTELS.
Departure of guests from, through fear, I, 654.
Power of company to run, I, 579.
When exempt from taxes, VII, 911.
See also INNKEEPERS.

HOUSE.
Damages for destroying, V, 961.
Taking part of, under Canadian statutes, IV, 926.
Taking part of, under English Compulsory Purchase Laws, IV, 885–889.

HOUSEHOLD GOODS.
Measure of damages for loss or injury of, II, 300.
When may be carried as baggage, I, 535.

HUDSON, N. Y.
Decisions particularly applicable to, VI, 761.

HUMILIATION.
Recovery of damages for, IV, 226.

HUSBAND AND WIFE.
General treatment, V, 1065.
Control of wife's property by husband, V, 1066.
Property rights of wife, V, 1067.
Actions, V, 1068.
As parties in condemnation proceedings, IV, 497.
Competency of, as witnesses, VIII, 199–201.
Delivery of wife's goods to husband, II, 119.
Ejectment by widow for land conveyed by husband, IV, 249.
Excessive damages for injuries to wife, VI, 853.
Excessive damages in actions for death of husband, III, 949–951.
Excessive damages in actions for death of wife, III, 951.
Injury to wife by negligence of husband's fellow-servants, V, 664.
Measure of damages for injuries to wife, III, 713.
Measure of damages to husband for death of wife, III, 937, 938.
Measure of damages to wife for death of husband, III, 934–937, 949–951.
Negligence of husband, when imputed to wife, III, 551; V, 1087.

HUSBAND AND WIFE — *continued*.
Notice of arrival to husband is notice to wife, II, 101.
Power of husband to convey right of way over homestead, V, 1063.
Release by husband of right of action for killing wife, III, 812.
Right of husband to damages for causing death of wife, III, 758, 772.
Services of deceased wife, proof of, on question of damages, III, 880.
Taking land by consent of husband, IV, 464.
When wife entitled to land damages, IV, 572.
When should appeal in condemnation proceedings, IV, 774.
See also MARRIED WOMEN.

HYPOTHETICAL QUESTIONS.
Opinions of experts based upon, VIII, 277.
To experts, VIII, 294–297.

ICE.
See SNOW AND ICE.

IDAHO.
Assessment and levy of railroad taxes in, VII, 940.

IDENTIFICATION.
Of consignee, II, 118.
Of deponent, with person named in commission to take testimony, V, 522.
Of passenger holding round-trip ticket, rules or stipulations requiring, VII, 1067, 1068.
Of passenger, stipulation in mileage ticket as to, VII, 1073.

IDIOTS.
As trespassers, liability for injuries to, VII, 1146.

IGNORANCE.
Of contents of [illegible], impeachment for, VII, 9.
Of defects, allegation and proof of, V, 273, 279.
Of established usage, burden of proof to show, V, 285.
Of shipper as to contents of special contract, effect of, I, 780; II, 165, 167; VI, 335, 337.

ILLEGALITY.
Affidavit of, V, 549; VII, 998.
In tax assessment, injunction for, VII, 1006.
Of act of employé when injured, V, 275.
Of contracts, III, 210–221.
Of contracts prevents specific performance, VII, 153.
Of corporate bonds, I, 662.
Of creditor's claim against corporation, as a defense to stockholder, VII, 327.

ILLEGITIMATE CHILD.
Right of, to sue for causing death of parent, III, 760.

ILLINOIS.
Actions for penalty in, for failure to give signals, III, 524.
Application of fellow-servant rule in, to

ILLINOIS — *continued.*
servants of different departments, V, 685.
Assessment and levy of railroad taxes in, VII, 940.
Constitutionality of statutes of, as to condemnation proceedings, IV, 387.
Constitutionality of statutes of, as to municipal aid for railways, VI, 538.
Constitutionality of tax laws of, VII, 839.
Constitutional provisions in, relative to condemnation proceedings, IV, 384.
Construction of statutes of, as to right of way for steam roads in streets, VII, 570.
Crossing of streets and highways under statutes of, III, 422.
Deductions for benefits under condemnation laws of, IV, 711.
Doctrine of comparative negligence in, III, 37–49; V, 889.
Duty to locate stations under statutes of, VII, 197.
Duty to stop at county seats under statutes of, II, 388.
Federal grants to, VI, 144.
Grade crossings under statutes of, III, 412.
Grants by, to railroads, VI, 182.
Injuries to animals running at large in, I, 218, 224.
Jurisdiction of Appellate Courts of, VI, 118.
Laying out streets across railways under statutes of, III, 436.
Local assessments upon steam railways in, for repairs, paving, etc., VII, 686.
Occupation of streets by steam roads under legislative grants of, VII, 558.
Operation of statute of, giving right of action for causing death, III, 748.
Plaintiff's pleadings must negative contributory negligence in, III, 275.
Pleadings under statute of, to recover penalty for discrimination, IV, 125.
Review of town bonding proceedings by mandamus in, VI, 748.
Rule in, as to imputed negligence, V, 1081.
Rule in, as to limitation of liability for negligence, II, 181.
Statute of, as to discrimination, IV, 109, 113.
Statute of, regulating liability for injuries caused by fire, V, 853.
Statutes of, relative to connecting lines, III, 65.
Statutes of, relative to distribution of damages for causing death, III, 761.
Statutes of, relative to drains, IV, 155.
Statutes of, relative to intersection of railways, III, 393.
Statutory duty to fence in, V, 801.
Statutory provisions in, limiting amount recoverable for causing death, III, 921.
Statutory regulation of grade crossings in, III, 446.
Taking land for streets and laying out roads in, VII, 547.
Taxation in aid of railways in, VI, 717.
Taxation of land grants in, VII, 879.
Transportation of diseased cattle in, I, 788.
What amounts to discrimination under statute of, IV, 83.

IMPEACHMENT.
Of an accord, I, 19.
Of awards of arbitrators, I, 462–464.
Of judgments against corporations, by stockholders, VII, 330.
Of judgments, collaterally, VI, 99, 100.
Of public sales, VI, 107.
Of releases, VII, 9–11.
Of witnesses, VIII, 203–209.
Of witnesses, evidence for, not ground for new trial, VI, 874.
Of written instrument, by parol, V, 481.

IMMIGRATION.
Detention and disinfection of immigrants, VI, 1126.
Interstate Commerce Act does not extend to, VI, 9.
Rates for immigrants, VI, 17.

IMPANELING.
Of jurors, IV, 612–615; VIII, 11–14.

IMPERTINENCY.
Striking out allegation for, VI, 1051.

IMPLIED CONTRACTS.
For the construction of railroad, III, 124.
To pay carrier's charges, II, 151.
To pay charges, II, 612.
What may be implied in, III, 202.

IMPLIED COVENANTS.
Generally, III, 343.

IMPLIED POWERS.
Of agents, I, 42–45.
Of corporations generally, III, 318.
Under charter provisions, II, 697.

IMPLIED REPEAL.
Of charter, II, 687.
Of statutes, VI, 557; VII, 272.

IMPRISONMENT.
For contempt, III, 184.
See also FALSE IMPRISONMENT.

IMPROVEMENTS.
Allowance for, in ejectment, IV, 256.
Compensation for, by purchaser at foreclosure sale, VI, 506.
Compensation to owner of homestead for, V, 1065.
Evidence of contemplated, in assessment of land damages, IV, 643, 661.
Evidence of possible future, on assessment of damages, IV, 602.
In engines, duty to adopt, V, 864.
In machinery, duty to employés to adopt, V, 74.
In machinery, duty to passengers to adopt, II, 378; VII, 455.
Inspection and approval of, by mortgage trustee, VI, 465.
Made by company before condemnation, value of, when allowed to landowner, IV, 673–676.
Must be of public character to authorize aid, VI, 532, 644, 676.
Of property taken, evidence of cost of, IV, 650, 651.
Of public lands, rights of settlers making, VI, 1115.
Right to recover for, in estimating land damages, IV, 587.

IMPROVEMENTS — *continued.*
Right to remove after abandonment of road, IV, 823.
See also INVENTIONS.

IMPUTED NEGLIGENCE.
General treatment, V, 1079.
Doctrine of Thorogood v. Bryan, V, 1079.
Doctrine in the United States, V, 1080.
At crossings, III, 633.
In actions for injuries by negligence of fellow-servants, V, 778.
In actions for injuries to employés, V, 203.
In actions for injuries to passengers on street car, VII, 484.
Negligence of bailee, when imputed to owner, V, 889.
Negligence of manufacturer, when imputed to carrier, II, 380.
Of driver, to owner of wagon, VII, 527.
Of driver, to party injured at crossing, III, 601.
Of driver, to passenger injured at crossing, III, 550, 601.
Of manufacturer of cars, to carrier, II, 380.
Of parents to child, II, 792–795.
See also II, 449; III, 255.

INABILITY.
Of company to discover defect, averment of, in answer, V, 274.
To agree with landowner, burden of proof to show, IV, 538.
To agree with landowner, must be shown on assessment of damages, IV, 588.
To agree with landowner, necessity of averment of, IV, 522, 523.
To complete road as ground for sale, VII, 106.
To purchase, when warrants condemnation, IV, 286, 290.

INADEQUACY.
Of compensation, setting aside award for, IV, 744, 947.
Increasing damages on appeal for, I, 438.
Of consideration, as a defense to suit for specific performance, VII, 157.
Of consideration, burden of proof to show, VII, 13.
Of counsel, setting aside foreclosure sale for, VI, 514.
Of damages, as ground for new trial, VI, 871, 872.
Of damages, for injuries at crossings, III, 657.
Of damages, setting aside report of commissioners for, IV, 744.
Of damages, setting aside verdict for, I, 438.
Of damages, setting aside verdict in condemnation for, IV, 754, 799.

INCAPACITY.
Of railway company to contract as a defense to action on aid bonds, VI, 696.
To attend to business, as an element of damages, II, 573.
To sue, as a defense, III, 811.
To sue, as ground of abatement, I, 6.
To work, damages for, V, 341, 342.
To work, excessive damages for, II, 584.

INCOME.
As applied to the revenues of a railroad, VIII, 314.
Charges against, by mortgage trustees, VI, 465, 496.
Charging with rent and repairs of cars, VI, 496.
In hands of receiver, application of, VI, 495.
Of deceased, proof of, on question of damages, III, 880.
Operating expenses a first charge on, VI, 1195.
Percentage of, payable by elevated railway to city, IV, 276.
Right to mortgage, VI, 416.
When exempt from taxes, VII, 915.
When passed by deed of trust, IV, 27.

INCOME TAXES.
Constitutionality and enforcement of, VII, 1024, 1025.

INCOMPETENCY.
Of employés, admissibility of evidence of, V, 412.
Of fellow-servants, allegation of, V, 272.
Of fellow-servants, allegation of notice to, or knowledge of, company of, V, 271, 775.
Of fellow-servants, burden of proof to show, V, 785.
Of fellow-servants, duty to report to company, V, 705.
Of fellow-servants, evidence as to, V, 780–785.
Of fellow-servants, liability of company for injuries caused by, V, 694–707.
Of fellow-servants, whether question of law or fact, V, 789.
Of jurors, when ground for new trial, VI, 841.
Of physician employed by deceased, as a defense in action for causing death, III, 811.
Of street-car driver, liability for, VII, 517.

INCONSISTENCY.
Between special findings and general verdict, VI, 850; VII, 102–106.
Between special findings and general verdict in eminent domain, IV, 751.

INCONVENIENCE.
Damages for, IV, 230, 703.

INCORPORATION; ORGANIZATION.
General treatment, V, 1089.
Incorporation.
Agreement to lease made before, VI, 217.
Averment as to, in action on stock subscription, VII, 759.
Averment of facts showing, IV, 514.
Burden of proof as to fact of, V, 448.
Contracts made prior to, VIII, 128.
Effect of irregularity in, upon liability of stockholders to creditors, VII, 319.
Effect of irregularity or fraud in, on validity of railway aid bonds, VI, 680.
Estoppel to question, VII, 787.
Must precede petition for railway aid, VI, 570.
Of petitioner in condemnation proceedings, how questioned, IV, 530.

INCORPORATION; ORGANIZATION — *continued.*
Incorporation — *continued.*
Of tramways, VII, 1102.
Presumption as to legality of, VII, 443.
Proof of, III, 324.
Proof of, in action on stock subscription, VII, 764.
Questioning, in condemnation proceedings, VII, 589.
Under rapid transit acts, rights acquired by, VI, 1157.
Validity of subscriptions prior to, VII, 741.
What is an "incorporated company," VIII, 314.
When need not be proved, I, 288.
See also CHARTERS.
Organization.
Assessment on stock prior to, invalid, VII, 747
Averment as to, in action on stock subscription, VII, 759.
Burden of proof to show, IV, 537.
Objections to, as a defense to actions on subscriptions to stock, VII, 790.
Of company, as a condition precedent to receiving aid, VI, 625.
Proof of, VI, 1122.
Subscription before, when deemed absolute, VII, 729, 813.
Validity of conditional subscriptions made prior or subsequent to, VII, 804.
Validity of contracts made prior to, III, 189.
INCREASE.
Of stock, VII, 282–285.
INCUMBRANCES.
Covenants against, III, 346.
INDEBTEDNESS.
Certificates of, see CERTIFICATES OF INDEBTEDNESS.
Failure to meet, as ground for receiver, VI, 1168.
Of corporations, tax on, VII, 69, 876, 877.
INDEMNITY.
Agent, when entitled to, I, 51.
To conductor, for obeying orders, III, 63.
To directors, for expenses incurred, IV, 70.
Ultra vires contracts for, VIII, 128.
What required from street-railway company, VII, 384.
INDEMNITY BONDS.
General treatment, V, 1102.
INDEMNITY LANDS.
Selection and grant of, VI, 161, 162, 169.
INDEPENDENT CONTRACTORS.
General treatment, V, 1104.
Who are deemed independent contractors, V, 1104.
Liability for acts of independent contractor or his servants, V, 1105.
Liability for acts of servants of, II, 353.
Liability for injury to employé of, V, 256.
Liability for station ground left unguarded by, VII, 220.
Liability of, for killing stock, I, 368.
Servants of, not fellow-servants with employés of company, V, 693.
INDEPENDENT COVENANTS.
Generally, III, 344.
How construed, III, 203.
In contracts for railway construction, III, 124.
INDIANA.
Actions for negligence, averring that injured person was "without fault," III, 279.
Assessment and levy of railroad taxes in, VII, 948.
Conditions exempting carrier from liability to person riding on free pass in, VI, 944.
Constitutionality of statutes of, as to condemnation of land, IV, 387.
Constitutionality of statutes of, as to municipal aid for railways, VI, 540.
Constitutionality of tax laws of, VII, 839.
Construction of stock laws of, I, 96.
Crossing of streets and highways under statutes of, III, 423.
Deductions for benefits under condemnation laws of, IV, 713.
Doctrine of comparative negligence denied in, III, 51.
Double damages for killing stock in, I, 352.
Injuries to animals running at large in, I, 218, 224.
Laying out streets across railways under statutes of, III, 437.
Liability of company to laborers employed by contractors in, III, 161.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 687.
Operation of statute of, giving right of action for causing death, III, 748.
Plaintiff's pleadings must negative contributory negligence in, III, 275; V, 906.
Review of town-bonding proceedings by mandamus in, VI, 748.
Rule as to imputed negligence in, V, 1081.
Statutes of, relative to distribution of damages for causing death, III, 761.
Statutes of, relative to drains, IV, 155.
Statutory duty of company in construction of street across railway in, III, 439.
Statutory duty to fence in, V, 801.
Taking land for streets and laying out roads in, VII, 550.
Taxation in aid of railways in, VI, 718.
When negligence of parent is imputable to child in, II, 793.
INDIANS.
Condemnation of lands of, IV, 417.
Grants of lands of, VI, 140.
Killing stock in Indian Territory, I, 277.
Lands of, generally, IV, 417; VI, 1110–1112.
Taxation of lands of, VII, 866.
When entitled to land damages, IV, 573.
INDICTMENT.
Enforcement of commissioners' orders by, VI, 1150.
For causing death, sufficiency of, III, 956.
For nuisance, VI, 894.
For offenses by or against railways, III, 357.

INDICTMENT — *continued.*
Under long-and-short-haul clause of Interstate Commerce Act, VI, 44.
Variance between proof and, in prosecutions for causing death, III, 958.

INDIVIDUAL LIABILITY.
Of partners, VI, 937.
Of receivers, VI, 1193.
Of stockholders to creditors, VII, 319, 320.

INDORSEMENT.
Necessity of, to transfer of bill of lading, I, 644.
Of bill of lading, effect of, to pass title to indorsee, I, 624.
Of commercial paper, I, 593–596.
Of notice limiting liability, on receipt of bill of lading, VI, 337.
Of railroad bonds by state, VII, 160–165.
Of railway aid bonds, effect of, VI, 689.
Of void bonds, liability of company on, I, 660.
On ticket, by conductor, giving right to stop over, VII, 1057.
Transfer of bill of lading without, I, 644.

INEVITABLE ACCIDENT.
Fire, when deemed to be, V, 862.
Liability for, VI, 818.
To animals on track, I, 110–114.
What is, VIII, 315.
When excuses carrier, I, 525; II, 17–24, 55, 121, 363, 366, 373; V, 570.
See also ACT OF GOD; UNAVOIDABLE ACCIDENT.

INFAMY.
Effect of, upon competency of witness, VIII, 195.

INFANCY.
As a defense to action on subscription, VII, 763, 789.
Disability of, under statute of limitations, III, 780; VI, 328.
Loss of support during, as measure of damages for death of parent, III, 933.
Of landowner, effect of, on necessity of effort to agree before condemnation, IV, 501.
Of landowner, notice of condemnation in cases of, IV, 507.
Plea of, in action on stock subscription, VII, 763.
See also CHILDREN; CHILDREN, INJURIES TO; PARENT AND CHILD.

INFERENCES.
Should not be alleged in pleading, V, 264.

"INFERIOR TRIBUNALS."
Meaning of, as referring to courts, VIII, 315.

INFIRM PERSONS.
Care demanded of, III, 259.
Care to be exercised towards, VI, 780.
Se also AGED PERSONS.

INFLAMMABLE BUILDINGS.
See COMBUSTIBLE MATTER.

INFORMATION.
In *quo warranto*, sufficiency of, VI, 1132.
In *quo warranto*, who may file, VI, 1131.

INFORMERS.
Rights of, VI, 970.

INFRINGEMENT.
Of patents, remedies therefor, VI, 951–954.

INGRESS.
Duty of company to provide means of, VII, 221.
To trains, duty to afford safe means of, II, 389.
See also EGRESS.

INHERENT DEFECTS.
In freights, carrier not liable for loss by, II, 58.

INHERENT NATURE.
Of cattle carried, injuries resulting from, liability for, I, 747.

INITIAL CARRIER.
Benefit of limited liability, when confined to, II, 253.
Delivery by, at end of his line, II, 92.
Duties and liabilities of, as to passengers, II, 513–516.
Duty of, to transmit instructions, II, 259.
Is liable to place of destination unless there be express limitation, II, 252.
Liability of, for baggage, I, 527–530.
Liability of, for issuing through ticket, VII, 1074, 1075.
Limitation of liability to line of, in bill of lading, I, 629.
Right of, to limit liability, I, 785; II, 253, 256.
Rights and liabilities as such, as to live stock, I, 783–786.
Rights, duties and liabilities of, as to merchandise, II, 206–236.
Subsequent carriers as agents of, I, 787.
When liability of ceases, II, 231–236.
When liable as insurer until delivery to next carrier, II, 92, 148.
When liable beyond his own line, II, 213–220; V, 595–597.
When may store goods at end of line, II, 148.

INJUNCTION.
General treatment, V, 1118.
Granting the writ, V, 1119.
Use of writ in particular cases, V, 1141.
Continuing; dissolving, V, 1156.
Violation of the writ, V, 1159.
Injunction bonds, V, 1162.
In general.
Against arbitration proceedings, I, 457.
As a remedy for unlawful taxation, VII, 1002–1010.
Indemnity to landowner in lieu of granting, V, 1104.
Remedy by, for discrimination, IV, 104, 124.
Restraining suit, when removes bar of statute, VI, 329.
To restrain company from crossing another's track, III, 413–415.
To restrain construction of competing lines, VI, 918.
To restrain diversion or obstruction of water, VIII, 179.
To restrain enforcement of judgment, VI, 106.
To restrain enforcement of ordinance, VI, 756.
To restrain excavation under right of way, VI, 401.

INJUNCTION — *continued.*
In general — *continued.*
To restrain execution sale, V, 548, 549.
To restrain flowing of land, V, 987.
To restrain infringement of patents, VI, 952–954.
To restrain interference with or obstruction of private ways, VI, 1081.
To restrain local assessments, VI, 755.
To restrain misapplication of funds, I, 666.
To restrain nuisances, VI, 894–897.
To restrain obstruction of navigation, I, 719; VIII, 170.
To restrain overcharges, II, 632.
To restrain sale in foreclosure, VI, 516.
To restrain state tax on interstate commerce, VI, 59.
To restrain strikes and boycotts, VII, 721.
To restrain suit brought against receiver without leave, VI, 1213.
To restrain unauthorized sale of railroad, VII, 108.
To restrain unauthorized use of land, when barred by lapse of time, VI, 322.
When granted to restrain infringement, VI, 953.
When lies on construction contract, III, 169.

Against elevated railways.
By abutting owner to restrain construction of railway, IV, 299–304.
Determination of damages in lieu of, IV, 345.
Judgment awarding, with alternative damages, IV, 350.
Stay of proceedings in, pending condemnation proceedings, IV, 287.
To stay, until easements can be bought or condemned, IV, 351.
Trial by jury in injunction suits, IV, 342–346.

By or against street railways.
By abutting owner to restrain construction of road, IV, 264.
For want of consent of abutting owner, VII, 422.
Generally, VII, 366, 381, 392.
To restrain company proceeding without consent of abutting owner, VII, 392.
To restrain crossing or paralleling of track, VII, 435.
To restrain operation of street railway, VII, 353.
To restrain tearing up pavement in constructing road, VII, 403.
To restrain use of steam on street, VII, 422.

In condemnation proceedings.
Enforcement of judgment by, IV, 765.
For wrongful interference with property, IV, 853–866.
Remedy of landowner by, on Canadian expropriation proceedings, IV, 953.
To restrain entry on land before compensation made, IV, 558.
To restrain proceedings under English Compulsory Purchase Acts, IV, 922.

INJUNCTION — *continued.*
In matters affecting stockholders.
To restrain *ultra vires* acts, VII, 338.
To restrain exercise of corporate franchise, VII, 332.
To restrain fraudulent acts of directors, VII, 337.
To restrain granting of free passes, VII, 334.
To restrain illegal assessments or calls, VII, 332.
To restrain misuse of corporate funds, VII, 333, 337.
To restrain payment of dividends, IV, 153; VII, 333.
To restrain waste of corporate property, VII, 338.

In matters affecting streets and highways.
Action for, by abutting owner, VII, 637–643, 647, 648.
Mandatory, to compel repair of highway crossing, III, 434.
To compel restoration of highway, VII, 623.
To restrain change of grade of street, VII, 613.
To restrain obstruction of highway, VII, 716.
To restrain proceedings to lay out street over railway, III, 442.
To restrain unauthorized use of street, VII, 641.
To restrain vacation of highway, VII, 555.

In railroad aid proceedings.
To restrain holding of election on question of railway aid, VI, 606.
To restrain issuance of railway aid bonds, VI, 667–670.
To restrain municipal aid bonds, VI, 668, 669.

INJURIES.
In general.
By defects in cattle-guards, II, 598–603.
By insufficiency of culverts, III, 662–664.
By negligence at station, VII, 208–236.
By negligence in making flying switch, V, 1006–1010.
By negligence, liability of electric railway for, IV, 266–272.
By negligence, liability of street-car company for, VII, 455–539.
By negligence, liability of tramways for, VII, 1103.
Competency of evidence as to extent of, V, 395.
Declarations of injured party as to, VII, 498.
Defendant's negligence as the proximate cause of, VI, 793–799.
Evidence as to means of avoiding, V, 396.
Evidence of permanency of, VI, 1030.
On Sunday, VII, 821, 822.
Presumption of negligence upon proof of, V, 443.
Prospective damages for permanent, III, 695–702.

INJURIES — *continued.*
In general — *continued.*
To abutting owner, by embankments, IV, 374–378.
To abutting property, recovery for when in common with others, VII, 634, 664.
To business, evidence of, on assessment of land damages, IV, 647.
To estate, power of personal representatives to sue for, V, 554.
To homesteads, liability for, V, 1064.
To land not taken, IV, 450–453.
To mail clerks, inspectors, etc., liability of company for, II, 8.
To mill property, in condemnation proceedings, IV, 452.
To or by drains, IV, 156.
To persons and property, by blasting, I, 652–654.
To persons traveling on embankments, IV, 380.
To property, caused by bridges, I, 703–705.
To property, in construction of roads, liability for, III, 115–118.
To property, liability of railway contractor for, III, 142.
To slaves, liability of carrier for, II, 586.
See also PERSONAL INJURIES.
From failure to fence.
To cattle, V, 830.
To crops, pasturage, etc., V, 832–835
To employes.
Aggravation of, as affecting damages, V, 337.
By collision, III, 21–25.
By derailment, IV, 47.
Duty of company subsequent to, V, 19.
Generally, V, 16–345.
Infant, V, 246–253.
Of elevated railways, IV, 368.
Of express company, liability of railway company for, V, 565.
Of one company by negligence of another, V, 253–260.
Of street railway company, VII, 532.
Presumption of negligence arising from mere proof of, V, 299.
To apprentices, I, 453.
To master's property, liability of servant for, V, 14.
To goods carried.
By delay, II, 62–72.
In loading, liability for, II, 54.
Liability of carrier for, II, 42–90.
Liability of express company for, V, 574–577.
Measure of damages for, II, 287–305.
To live stock.
Burden of proof in cases of, V, 449.
Generally, I, 88–372.
Liability for, VII, 349.
To passengers.
By collision, III 12–21.
By derailment, IV, 39–47.
By strikers, liability for VII, 720.
Excessive damages in actions for, II, 581–586.
Expenses resulting from, as an element of damages, II, 573.

INJURIES — *continued.*
To passengers — *continued.*
From failure to build and maintain fences, V, 832.
From other passengers, duty to protect passenger against, II, 431.
On cable cars, I, 729–731.
Presumption of negligence from mere proof of, II, 544–549.
To person or property on street.
By negligence in operating steam railway in street or highway, VII, 693–706.
Due to failure to keep street in repair, VII, 697.
Generally, IV, 357–368; VII, 510–532.
To children, II, 732, 825.
To persons and teams at crossings, III, 460–657.
To trespassers, VII, 1117–1166.
INJURIES TO CARS BY CATTLE.
General treatment, V, 1166.
INJURIOUSLY AFFECTING.
What constitutes, IV, 884.
INNKEEPERS.
Liability of, distinguished from that of sleeping-car company, VII, 135.
Regulations as to use of stations by, VII, 208.
Taxation of, VII, 911.
See also HOTELS.
INQUEST.
Admissibility of depositions taken at, V, 522.
Where coroner may hold, III, 316.
INQUIRY.
By carrier as to value of baggage, I, 559.
Duty of pledgee of stock to make, VII, 291.
Duty of purchaser of bonds to make, VI, 693, 694, 704.
Transferee of commercial paper, when put upon, I, 595.
What will put a purchaser upon, I, 674–676.
See also BONA FIDE PURCHASER.
INSANE PERSONS.
Care required from carrier toward, II, 361.
Duty to eject or restrain, VII, 134.
Duty to restrain, II, 433.
Expulsion of, IV, 189.
Obligation to carry, II, 346.
INSOLVENCY.
General treatment. V, 1167.
As affecting contracts, III, 70.
As ground for receiver, VI, 1169.
Of company aided, effect of, upon validity of subscription, VI, 611, 696.
Of company, as a defense to action on subscription, VII, 788.
Of construction company, right to continue work after, III, 181.
Right of stoppage *in transitu* must be based on, II, 186.
INSPECTION.
See DISCOVERY; INSPECTION.
INSPECTORS.
At stations, liability of company for false imprisonment by, V, 609.

INSPECTORS — *continued.*
Of elections, IV, 53.
Of machinery, when fellow-servants of operators, V, 762.

INSTANTANEOUS DEATH.
Liability for, III, 766–769.

INSTRUCTIONS.
To employes, etc.
By court, to mortgage trustees, VI, 466.
Contributory negligence in disobedience of, V, 233.
Deviation from, by agent, effect of, I, 54.
Duty to give to infant employés, V, 274.
Duty to give unskilled employés, V, 34–39.
Failure of vice-principal to give, liability of company, V, 676.
Of shipper, liability of initial carrier as to, II, 207, 208.
To agents, I, 46.
To carrier, to forward forthwith, II, 29.
To commissioners appointed to assess damages, IV, 603.

To jury.
Assuming facts not in evidence, III, 310.
As to comparative negligence, III, 44–49.
As to compensatory damages, III, 682.
As to credibility of employés as witnesses, VIII, 203.
As to exemplary damages, III, 692.
Curing error in admission of evidence by, I, 390; IV, 788.
Discretion of court as to time to prepare, I, 383.
Erroneous, as assuming facts, II, 556.
Erroneous, as invading province of jury, II, 557.
Erroneous, in not correctly stating the law, II, 557, 560.
Erroneous, when ground for reversal, IV, 785; VI, 837–840.
Improper, as assuming facts not proven, V, 945.
Improper, in not correctly stating the law, V, 946.
In actions against carriers, I, 813–815; II, 266, 552–562.
In actions against city or town, for injuries received in street or highway, VII, 695.
In actions against receivers, VI, 1216.
In actions by abutter, for damages sustained by railway in street, VII, 646.
In actions by and against express companies, V, 602.
In actions by husband, for personal injuries to wife, V, 1071.
In actions for causing death, III, 884–918.
In actions for conversion, VIII, 114.
In actions for damages by fire, V, 945–949.
In actions for damages for nuisance, VI, 900.
In actions for damages for wrongful interference with property, IV, 840.
In actions for ejection of passengers, IV, 221–223.

INSTRUCTIONS — *continued.*
To jury — *continued.*
In actions for failure to build and maintain fences, V, 831.
In actions for failure to build or repair cattle-guards and fences, II, 601.
In actions for false imprisonment, V, 612.
In actions for flowing land, V, 996–999.
In actions for injuries at crossings, III, 648–655.
In actions for injuries at stations, VII, 233, 234.
In actions for injuries by collisions, III, 17–19, 21.
In actions for injuries by negligence of fellow-servants, V, 785–788.
In actions for injuries by obstructions and encroachments in highways, VII, 715.
In actions for injuries by railway in street or highway, VII, 703, 704.
In actions for injuries to children, II, 814–817.
In actions for injuries to employés, V, 300–308.
In actions for injuries to employés by collision, III, 25.
In actions for injuries to passengers by derailment, IV, 44.
In actions for injuries to trespassers, VII, 1164–1166.
In actions for libel or slander, VI, 260.
In actions for malicious prosecution, VI, 372.
In actions for negligence, VI, 827–835.
In actions for personal injury at or near bridge, I, 709.
In actions on contracts, III, 234.
In actions on construction contracts, III, 176.
In actions on subscriptions to stock, VII, 796.
In actions under Civil Rights Act, III, 30.
In stock-killing cases, I, 331–345.
Invading the province of the jury, III, 311.
Non-reversible errors in, I, 404–413.
Objections to, how to be taken, I, 417, 418.
On assessment of damages by jury, generally, III, 737.
On assessment of land damages, IV, 629–639.
On question of contributory negligence at crossings, III, 554.
On question of contributory negligence, generally, III, 306–315.
On trial *de novo* of appeal from justice of the peace, I, 368.
On trial generally, VIII, 42–88.
On trial of action for loss of baggage, I, 573.
On trial of ejectment suits, IV, 255.
Outside of the issue, II, 280.
Prayers for, in actions for causing death, III, 913–920.
Presumptions of regularity respecting, I, 385.

INSTRUCTIONS — *continued.*
To jury — *continued.*
Questions for jury subject to, VI, 814, 815.
Reference in, to view by jury, VIII, 18.
Reversal for erroneous, I, 389–396.
Verdict contrary to, when ground for new trial, VI, 843.
What are improper, generally, VIII, 61–73.
What are improper in actions for causing death, III, 904–913.
What are proper in action for causing death, III, 894–904.
What are proper, generally, VIII, 50–61.
See also FURTHER INSTRUCTIONS.
INSUFFICIENCY.
Of evidence, nonsuit for, VIII, 24, 29.
INSULTS.
By other passengers, duty of company to protect passenger against, VII, 473.
By third persons to passengers, II, 435.
Duty to protect passengers from, II, 430; VII, 460.
Excessive damages for, II, 585; IV, 241.
Exemplary damages in cases of, to passengers, II, 577; IV, 233.
From other passengers, duty to protect passenger against, II, 431.
INSURANCE.
Life and fire.
Deducting insurance money from damages by fire, V, 966, 967.
Deducting insurance money from damages for causing death, III, 812, 927.
Deduction of insurance money from damages to passengers, II, 574.
Duty of warehousemen to insure, VIII, 163.
Evidence of increased cost of, on assessment of land damages, IV, 649.
Increased cost of, as an element of land damages, IV, 699.
Of goods shipped, effect of, on right to sue carrier, II, 273.
Of property burned, as a defense, V, 907.
On deceased's life, proof of, in mitigation of damages, III, 884.
Receipt of insurance money as a defense, III, 812.
Right of intermediate carrier to benefit of, II, 242.
Stipulation for benefit of, I, 641; II, 159; VI, 340.
Subrogation of company after claims of loss, VII, 724.
See also FIRE INSURANCE.
Carriers as insurers.
Carrier not insurer, as to passengers, II, 363.
Company not insurer against fires, V, 865.
Company not insurer as to safety of machinery, V, 71.
Company not insurer of competency of servants, V, 697.
Company not insurer of employé's safety, V, 21.
INSURANCE — *continued.*
Carriers as insurers — *continued.*
Express company, how far an insurer, V, 570.
How far carrier is insurer, I, 522, 747.
Liability of carriers of merchandise as insurers, II, 16–25.
Liability of, during transit, II, 16–25, 55.
When company becomes insurer by agreement, VI, 341.
When initial carrier is insurer, until delivery to next carrier, II, 148.
When liable as insurer, I, 522.
INTENT.
Effect of, on question of dedication, IV, 2.
Of legislature, ascertaining, VII, 262, 263.
Of parties to contract, ascertaining, III, 201.
Presumption of, from conduct, V, 442.
Question of, in awarding exemplary damages, III, 685.
Weight given to, on question of abandonment, I, 1.
INTEREST.
In event, effect of, on competency of witness, VIII, 196–199.
In land, what may be condemned, IV, 412–435.
Insurable, V, 844, 845.
Interpretation of statute taxing, VII, 851.
Jurors, when disqualified by reason of, IV, 613, 614.
Of abutting owner in the street, VII, 590.
Of landowner in right of way, VII, 80.
Of receiver, removal for, VI, 1223.
Of stockholders, in corporate property, VII, 306.
Remaining in landowner after deed of right of way, IV, 470.
What acquired by condemnation of land, IV, 430–435.
What acquired in street by condemning right of way through, VII, 587.
What acquired in street by street railway company, VII, 352, 374.
What passes by deed of right of way, IV, 468.
INTEREST.
General treatment, V, 1172.
The right to interest, V, 1173.
Computation and rate, V, 1175.
Effect of payment of, to validate irregular bonds, VI, 687.
In actions against carriers, II, 292, 293, 299.
In actions for flowing lands, V, 1005.
In actions for goods lost by delay, II, 72.
In actions for injuries by fire, V, 964.
In actions for taxes, VII, 995.
On bonds, guaranty of payment of, V, 1057, 1058.
On bonds, tax on, VII, 69.
On compensation, under Canadian expropriation laws, IV, 939.
On compensation, under English Compulsory Purchase Laws, IV, 920.
On corporate bonds, I, 661; VIII, 142.
On damages, I, 820; II, 633; III, 738–741, 954, 955; IV, 328; VII, 1113.
On damages, for overcharges, II, 633.

INTEREST — *continued.*
On debentures, III, 960.
On land damages, IV, 724–728, 920, 939.
On overdue coupons, III, 337.
On overdue taxes, VII, 987.
On railway-aid bonds, VI, 672.
On railway-aid bonds, failure to pay does not affect negotiability, VI, 689.
On receivers' certificates, VI, 1206.
On subscriptions, agreement by company to pay, VII, 745, 746.
On value of goods lost by fire, II, 75.
Payments of, when subject to taxation, VII, 877.
Provisions as to payment of, VI, 679.
Receiver, when chargeable with, VI, 1219.
Rights of bondholders in respect to, I, 669.
Right to, as between buyer and seller of stock, VII, 292.
When allowed as damages, I, 350.
When lessor entitled to, VI, 241.
See also USURY.

INTERFERENCE.
With corporate franchise, remedies for, V, 1027.
With easements, remedies for, IV, 161.
With possession of receivers, VI, 1182, 1183.
With private ways, remedies for, VI, 1079–1081.
With receivers by strikers, VII, 721.

INTERLOCUTORY ORDERS.
What are, and therefore not appealable, IV, 777.

INTERMEDIATE CARRIER.
Contracts by, for limitation of liability, II, 253, 255.
Delivery of baggage to, I, 528.
Judgment against, in favor of initial carrier, V, 597.
Liability of, for baggage, I, 530.
Liability of, for delay, II, 517.
Notice and delivery to, I, 784.
Right of, to demand charges, II, 647, 648.
Rights and liabilities of, as to passengers, II, 516, 517.
Rights, duties and liabilities of, I, 786–788; II, 236–242.
Rights of, as regards charges, II, 647, 648.

INTERNAL REVENUE.
Evidence of payment of tax on lost goods, V, 390.
Generally, VII, 69–73.
Stamps, requirement of, VII, 72.

INTERPLEADER.
General treatment, V, 1177.
In actions against carriers, II, 280.
In attachment, I, 510.

INTERPRETATION.
In general.
Of bills of lading, I, 612–624.
Of bills of particulars, I, 651.
Of customs and usages, III, 665.
Of accident policies, I, 13.
Of fire policies, V, 845, 846.
Of judgments, VI, 82–100.
Of particular words on passenger ticket, VII, 1041.

INTERPRETATION — *continued.*
In general — *continued.*
Of power of attorney to transfer stock, VII, 285.
Of round-trip tickets, VII, 1064, 1065.
Of rules for the conduct of the company's business, V, 30.
Of subscriptions to stock, VII, 739–743.
Of tickets over connecting lines, VII, 1073, 1074.
Of writings, a question of law, VIII, 43.

Of contracts.
Evidence of conduct of parties to show, V, 930.
For carrying the mail, II, 1.
For joint user of right of way, VII, 83.
For railway construction, III, 121–131.
Generally, III, 201–203.
Limiting liability as to passengers, II, 439.
Limiting liability for loss of goods, V, 594.
Of agreements between connecting carriers of passengers, II, 517, 518.
Of agreements between connecting lines, generally, III, 68.
Of agreements to convey land, VIII, 148.
Of agreements to issue free passes, VI, 939.
Shipping, II, 156–162.
Special, limiting liability, I, 781.
To establish stations, VII, 201.

Of deeds, leases, etc.
Of assignments, I, 479.
Of car leases, VII, 129.
Of deeds, IV, 7–23.
Of leases, VI, 198–203, 224.
Of mining leases, VI, 402.
Of mortgages, VI, 436–443.

Of statutes, generally, VII, 262–271.
Affording remedy for causing death, III, 746–755.
And contracts for sale of railroad, VII, 107.
Authorizing mortgages of corporate property, VI, 409–411.
By-laws, I, 726.
Connecticut and Massachusetts statutes relative to grade crossings, III, 450.
Constitutional provisions as to compensation for land condemned, IV, 541.
Constitutional provisions respecting aid to railways, VI, 524–526.
English statutes relative to passenger fares, VII, 1085.
Exemptions from taxation, VII, 892–900.
Fence laws, V, 795–797.
Giving laborers' liens, VI, 294.
Imposing restrictions on foreign corporations, V, 1013.
Interstate Commerce Act, VI, 4.
Land grants, VI, 134, 135.
Rapid Transit Acts, VI, 1154.
Regulating charges, II, 615.
Regulating liability for injuries caused by fire, V, 852–857.
Regulating proceedings to dissolve corporation, IV, 133.
Relative to cattle-guards, II, 592.

INTERPRETATION — *continued.*
Of statutes, generally — *continued.*
Relative to compensation of receivers, VI, 1220.
Relative to condemnation of land, IV, 392–399.
Relative to consolidation, III, 74–79.
Relative to construction of bridges, I, 688–690.
Relative to crossing of railroads, III, 393–396.
Relative to duty to construct culverts, III, 658.
Relative to duty towards employés, V, 16.
Relative to foreclosure of railway mortgages, VI, 470.
Relative to issuing railway aid bonds, VI, 660.
Relative to issuing stock, VII, 278.
Relative to killing stock, I, 93–97.
Relative to liability of company for injuries to servants by negligence of fellow-servants, V, 709–720.
Relative to municipal aid to railways, VI, 554–562.
Relative to obstructions and encroachments in streets and highways, VII, 707.
Relative to right of appeal, IV, 772.
Relative to trustees under railway mortgages, VI, 459.
Statutory grants of right of way, VI, 1120.
Tax laws, VII, 850–855.
Of charters and franchises.
Of charter provisions, II, 696–710; IV, 275; VII, 377–382.
Of charters granted by two or more states, II, 677.
Of charters of elevated railways, IV, 275.
Of charters of street-railway company, VII, 377–382.
Of corporate franchises, V, 1025.
Of instructions.
As to contributory negligence, III, 307.
Generally, I, 331; V, 942; VIII, 61.
In actions for injuries to employés, V, 300.
On doctrine of comparative negligence, III, 44.
Of pleadings.
Generally, VI, 983.
In actions against carriers of passengers, II, 524.
In actions for injuries by negligence of fellow-servants, V, 774.
In actions for injuries to employés, V, 261.
Of plaintiff's pleadings in actions for injuries by fire, V, 899.
Of verdicts.
Generally, VIII, 91.
In actions for causing death, III, 920.
In condemnation proceedings, IV, 750.
Special verdicts, VIII, 101.

INTERROGATORIES.
Admissibility and effect of, as evidence, V, 521.
Filing of, in foreclosure, VI, 487.

INTERROGATORIES — *continued.*
Right to submit, to the jury, VIII, 95–98.
To garnishees, I, 508.

INTERRUPTION.
Of possession, when defeats title by prescription, I, 37.

INTERSECTION.
Of railroads, location of, VI, 1122.
See also CROSSING OF RAILWAYS.

INTERSTATE COMMERCE.
General treatment, VI, 1.
Power of Congress to regulate, VI, 1.
What is deemed interstate commerce, VI, 3.
The Interstate Commerce Act, VI, 4.
State laws affecting interstate commerce, VI, 58.
Appeal from commission, to U. S. Supreme Court, V, 639.
Bridging interstate river, I, 712.
Discrimination as between places under Interstate Commerce Act, IV, 106.
Discrimination in interstate freights, IV, 123.
Effect of Interstate Commerce Act, on powers of states to regulate charges, II, 619.
Issuing free passes as affected by Interstate Commerce Act, VI, 940.
Issuing interstate bills of lading, I, 624.
Power of railway commissioners over interstate freights, VI, 1151, 1152.
Remedy for discrimination under Interstate Commerce Act, IV, 123.
Removal of causes arising under Interstate Commerce Act, VII, 23.
Rights of colored persons under Interstate Commerce Act, III, 31.
State statutes attempting to regulate, VII, 250.
Statutes regulating, unconstitutional, VI, 1152.
Statutory restrictions upon liability not applicable to, VI, 341.
Texas rule as to limitation of liability for negligence as respects interstate shipment, II, 183.
What is an interstate shipment, II, 183.
See also COMMERCE.

INTERVENING CAUSE.
As a defense, II, 532.
Effect of, on doctrine of contributory negligence, III, 544.
When wind is, V, 882.

INTERVENTION.
General treatment, VI, 71.
By attorney-general, in suits against corporation, I, 512.
By stockholders in suits against corporation, VII, 329.
Citizenship of interveners, on question of removal of cause, VII, 31.
Costs of proceedings in, III, 329.
In attachment suit, I, 510.
In foreclosure, VI, 480–482.
In foreclosure, petition of, VI, 486.
In suits by stockholders, VII, 345.

INTOXICATING LIQUORS.
General treatment, VI, 74.

INTOXICATING LIQUORS — *continued.*
Drinking of, by jurors as ground for new trial, VI, 841.
Seizure of, in hands of carrier, II, 124.
State regulation of carriage of, VI, 70.
See also INTOXICATION.

INTOXICATION.
Care demanded from intoxicated persons, III, 259.
Care required from carrier towards intoxicated passengers, II, 362, 431.
Duty of company toward intoxicated trespasser, VII, 1146.
Duty to restrain wrongful acts of intoxicated passengers, II, 362, 431.
Expulsion of passenger for, from street car, VII, 534.
Expulsion of passenger for, from train, IV, 188.
Injury aggravated by, as a defense, V, 275.
Killing intoxicated persons, III, 765.
Of employé, admissibility of evidence of, V, 404.
Of insured person, as a defense, I, 17.
Of one injured at station, when contributory negligence, VII, 231.
Of passenger, II, 319.
Of passenger, as contributory negligence, II, 446, 459; III, 821, 835.
Of passenger, leaving moving train, II, 486.
Of passenger, when releases carrier from obligation to carry, II, 346.
Of person in charge of cattle, effect of, I, 209.
Of person injured, admissibility of evidence of, V, 411.
Of person injured, when a defense, VII, 531.
Of person injured, when contributory negligence, III, 628.
Of person on track, contributory negligence, III, 547.
Of servant, notice to company of, V, 705.
Of street-car driver, liability for, VII, 517.
Running on drunken man on track, liability for, VII, 521.
When contributory negligence while getting on car, VII, 483.
See also INTOXICATING LIQUORS.

INTRA VIRES.
What acts or contracts are, VIII, 129–131.

INVENTIONS.
Duty of company to adopt new, II, 378; V, 74, 864; VII, 455.
Patents for, see PATENTS FOR INVENTIONS; IMPROVEMENTS.

INVIOLABILITY.
Of charters, II, 678–696.
Of corporate franchises, V, 1024.
Of provision in charter exempting from taxation, VII, 890.

INVOLUNTARY PAYMENTS.
Of overcharges, II, 629, 630; VI, 965.

"INVOLVING."
Meaning of, as applied to appeals "involving the construction of the constitution," VIII, 315.

IOWA.
Assessment and levy of railroad taxes in, VII, 950.
Commission of, as to joint through rates, II, 640.
Conditions exempting carrier from liability to person riding on free pass in, VI, 944.
Constitutionality of statutes of, as to municipal aid for railways, VI, 540.
Constitutionality of tax laws of, VII, 839.
Deductions for benefits under condemnation laws of, IV, 713.
Doctrine of comparative negligence denied in, III, 51.
Double damages for killing stock in, I, 352.
Federal grants to, VI, 144–148.
Grade crossings under statutes of, III, 412, 446.
Grants by, to railroads, VI, 181.
Grants of swamp lands in, VI, 189.
Homesteads in public lands in, VI, 1108.
Injuries to animals running at large in, I, 219, 224.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 687.
Occupation of streets by steam roads under legislative grants of, VII, 559.
Operation of statute of, giving right of action for causing death, III, 748.
Powers of railway commissioners of, II, 621.
Review of town bonding proceedings by mandamus in, VI, 749.
Rule as to imputed negligence in, V, 1081.
Statutes of, regulating liability for injuries caused by fire, V, 853.
Statutes of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 712–715.
Statutes of, relative to connecting lines, III, 65.
Statutes of, relative to defective crossings, III, 473.
Statutes of, relative to distribution of damages for causing death, III, 762.
Statutory duty to fence in, V, 801.
Statutory penalties for overcharges in, II, 636.
Taking land for streets and laying out roads in, VII, 550.
Taxation in aid of railways in, VI, 722.
Taxation of land grants in, VII, 879.
Transportation of diseased cattle in, I, 788.
Statutory regulation of grade crossings in, III, 446.

IRREGULARITIES.
Connected with view of premises as ground for setting aside verdict, IV, 752.
Effect of appearance as a waiver of, IV, 812.
In condemnation proceedings, as ground for injunction, IV, 857.
In issue of bonds, ratification of, I, 658.
In mode of arrival at verdict, remedy for, IV, 752.
In railway aid bonds, when not fatal, VI, 676, 690.

IRREGULARITIES — *continued.*
In railway aid election, when disregarded, VI, 608.
In service of process, relief against, VI, 1103.
In subscription in aid of railway, cured by subsequent legislation, VI, 613.
In subscriptions as a defense to action for calls, VII, 793.
In taxation, injunction for, VII, 1006.
On part of commissioners in condemnation proceedings, remedy for, IV, 741.
Waiver of, in conduct of view of premises by jury, IV, 627.
What may be disregarded on appeal, generally, I, 397–414.
What may be disregraded on appeal in condemnation proceedings, IV, 786–791.
What will be disregarded on appeal from justice's court, VI, 125.

IRRELEVANCY.
Of evidence, V, 392, 405.
Striking out allegations for, VI, 1055.

IRREPARABLE DAMAGES.
Abutting owner may obtain injunction in cases of, VII, 640.

IRRIGATION.
Increased cost of, as an element of land damages, IV, 697.

ISSUANCE.
Of bonds, I, 655–659.
Of bonds in aid of railroads, VI, 655–670.
Of certificates of indebtedness, II, 605.
Of debentures, power to make, III, 959.
Of free passes, VI, 940.
Of new stock, suit to compel, VII, 339.
Of patents, VI, 949.
Of process, VI, 1083–1085.
Of receivers' certificates, VI, 1200–1203.
Of shares, payment of subscription a prerequisite to, VII, 745.
Of stock, VII, 278–282.
Of tickets, statutes regulating, VII, 1043.
Of writ of attachment, I, 502, 503.

ISSUES.
As to past damages, trial of by jury, IV, 343.
Evidence not responsive to, II, 283; V, 391.
In condemnation proceedings, trial of, IV, 536.
Instructions ignoring material, II, 560; V, 303, 786, 787, 945.
Instructions outside of or broader than, I, 338, 390; II, 280, 817; III, 904; VIII, 63.
Joinder, scope, and effect of, generally, VI, 1021, 1022.
Prayer for instructions not within or limiting, VIII, 76–78.
Re-examination on matters not pertinent to, VIII, 225.
Submission of, to jury on assessment of land damages, IV, 638.

JAMAICA, N. Y.
Decisions particularly applicable to, VI, 761.

JEFFERSON, MO.
Decisions particularly applicable to, VI, 761.

JEWELRY.
When may be carried as baggage, I, 536.

JOINDER.
Of causes of action, etc.
Generally, I, 28, 251, 998, 1001.
Of claims for stock killed, I, 365.
Of counts in action for causing death, III, 804.
Of defenses, VI, 1008.
Of issue, necessity and sufficiency of, VI, 1021.
Of parties.
In action by bondholders to foreclose, VI, 477.
In action for causing death, III, 772.
In actions on contracts, III, 230.
In condemnation proceedings, IV, 493.
In equity, VI, 930–934.
On appeal, IV, 801.
Of defendants, VI, 816, 927.
Of husband and wife in actions for injuries to wife or her property, V, 1074–1077.
Of plaintiffs, generally, VI, 926.
Of receiver with corporation as defendants, VI, 1214.
See also MISJOINDER; NONJOINDER.

JOINT ACTIONS.
By husband and wife, V, 1074–1077.

JOINT AND SEVERAL LIABILITY.
As between connecting lines, II, 203.
Of connecting carriers of passengers, II, 513.
See also SEVERAL LIABILITY.

JOINT LIABILITY.
For negligence, VI, 816; VII, 456.
Of both companies in cases of collision, III, 14.
Of connecting carriers, II, 202.
Of lessee and lessor, VI, 235, 236.
Of lessor and lessee under running power, VI, 244.
Of steam company and street-car company in cases of collision, III, 19.

JOINT OWNERS.
Of goods shipped, when may sue carrier, II, 272.
Right of, to sue for damages caused by fire, V, 895.

JOINT STOCK COMPANIES.
Distinguished from corporations, III, 317.

JOINT THROUGH RATES.
Preference or advantage in making, VI, 33.

JOINT TORTFEASOR.
Recovery over by, VI, 102.
When release of one releases both, VII, 8, 12, 14.

JOINT USE.
Of depot, contract for, VIII, 136.
Of right of way, specific performance of contracts to permit, VII, 150.
Of road, power to make agreements for, VIII, 130.
Of station by two or more companies, VII, 236.
Of tracks, I, 579, 580.
Of tracks by street railways, VII, 389, 427–436.

JOINT USE — *continued.*
Of tracks, by tramway and other vehicles, VII, 1103.
Of tracks, construction of contracts for, III, 236.
Of tracks, construction of statutes regulating, VII, 267.
Of tracks, respective liability of company for injuries to employés, V, 258.

JOLTS AND JARS.
See SUDDEN JARS, JERKS OR STARTS.

JOURNALS.
Of legislature, entries in, VII, 241.

JUDGE.
Change of venue for disqualification of, VIII, 7.
Effect of approval by, of verdict, on motion to set aside, VI, 853.
Improper remarks of, as to contributory negligence, III, 315.

JUDGMENT CREDITORS.
Priority of, on distribution in foreclosure, VI, 511.
Relation of directors to, IV, 77.
When entitled to land damages, IV, 573.

JUDGMENT; DECREE.
General treatment, VI, 79.
Rendition and entry of judgment, VI, 80.
Interpretation and effect; conclusiveness, VI, 82.
Lien; priority, VI, 100.
Satisfaction and discharge, VI, 101.
Arresting, amending, opening, and vacating, VI, 102.
Enforcement; actions on judgments, VI, 105.
Judgment.
Against corporation, impeachment of, by stockholders, VII, 330.
Against owner of land condemned, enforcement of, IV, 443.
Against party who committed first fault in pleading, VI, 1014.
Against receivers, review of, VI, 1217.
Assignability of, I, 478.
Cancellation of satisfaction of, V, 354.
Conclusiveness of, against corporation, in suit by creditor against stockholders, VII, 315.
Conclusiveness of, in condemnation proceedings, IV, 770.
Condemning abutting easements after, IV, 288.
Enforcement of, in condemnation proceedings, IV, 759–767.
Enjoining enforcement of, V, 1153, 1154.
Entry of, on garnishee's answer, I, 508.
Entry of, on report of referee, VII, 4.
In actions by husband and wife, V, 1077.
In actions for damages for maintaining a nuisance, VI, 902.
In actions for damages for wrongful interference with property, IV, 842.
In actions for injuries caused by fires, V, 968.
In actions for injuries to children, II, 825.
In actions for taxes, VII, 995.

JUDGMENT; DECREE — *continued.*
Judgment — *continued.*
In actions on construction contracts, III, 179.
In actions on subscriptions to stock, VII, 796.
In actions to enforce railway-aid bonds, VI, 710.
In attachment suits, I, 510, 511.
In condemnation proceedings, IV, 755–759, 770.
In favor of initial carrier against succeeding carrier, V, 597.
In favor of wife no bar to action by husband, V, 1071.
In foreclosure, VI, 487–489, 515.
In proceedings to enforce laborer's lien, VI, 301.
In *quo warranto*, VI, 1134.
In suits against elevated railway company, IV, 349–352.
In suits against receivers, VI, 1216.
In suits to foreclose deeds of trust, IV, 32.
In trespass by landowner for wrongful interference with property, IV, 880.
In trover, effect of, to pass title to defendant, VIII, 116.
Liability of receiver on, when obtained before his appointment, VI, 1190.
Merger of cause of action in, I, 240.
Motion for *non obstante verdicto*, I, 331; V, 968.
Necessity of, before enforcement of statutory liability of stockholders to creditors, VII, 317.
Objections to, how to be taken, I, 419.
Offer to allow, effect of on right to costs, III, 325; IV, 728.
Of nonsuit, review of, VIII, 35.
On appeal from justice of the peace, enforcement of, I, 368.
On foreclosure of mechanic's lien, VI, 294.
Payment of, by receiver, VI, 1198.
Priority of mortgage over lien of, VI, 457.
Record of, as evidence, I, 287.
Review of, in elevated-railway cases, IV, 352–356.
Right to interest on, V, 1174.
What are final and appealable, I, 376–378; IV, 776.
What are final, in foreclosure, VI, 517.
When create estoppel, V, 365.
When may be reached in attachment, I, 495.

Decrees.
Directing judicial sale, enforcement of judgment by, VI, 106.
Enforcing deed of trust by, IV, 32.
Estoppel by, V, 365.
For reconveyance, IV, 25.
In creditors' suits, III, 353.
In foreclosure, VI, 487–489.
In *quo warranto* proceedings, VI, 1134.
In railway-intersection proceedings, III, 408, 409.
In suit for injunction, IV, 865.
In suits for specific performance, VII, 157.

JUDGMENT; DECREE — *continued.*
Decrees — *continued.*
In suits to quiet title, III, 10.
Of foreclosure, when final and reviewable, VI, 517.
Pro confesso, or by consent, VI, 489.
Setting aside, in foreclosure, VI, 489.
When final and appealable, I, 376–378.
See also INTERLOCUTORY ORDERS.
JUDICIAL NOTICE.
Generally, V, 434–440.
In actions for injuries caused by negligence of fellow-servants, V, 779.
In stock-killing cases, I, 281.
Of arrangement for through shipments, II, 220.
JUDICIAL OFFICERS.
Competency of, as witnesses, VIII, 195.
JUDICIAL SALE.
General treatment, VI, 106.
By receivers, VI, 496, 1207, 1208.
Enforcement of judgment by decree directing, VI, 106.
Exemption from taxation, when passes to purchaser at, VII, 902.
In foreclosure, VI, 436, 498–518.
In foreclosure of deed of trust, IV, 32.
Of property attached, I, 511.
Of property under execution, V, 547, 548, 549.
Of stock for non-payment of assessments, VII, 799.
On foreclosure of mechanic's lien, VI, 294.
Provisions for, in judgment of foreclosure, VI, 487.
Redemption by purchaser at, VI, 521.
See also SALES; SALES OF RAILROADS.
JUDICIAL TRIAL.
Meaning of words, VIII, 315.
JUNCTION.
Of railroads, location of station at, VII, 198.
See CROSSING OF RAILWAYS.
JURISDICTION.
General treatment, VI, 107.
In general.
Demurrer for lack of, VI, 1011.
Effect of appearance to confer, I, 450; V, 1018.
Impeaching judgment for lack of, VI, 100.
Judgment of no force in absence of, VI, 83.
Judicial notice of matters affecting, V, 438.
Luring defendant within, in order to serve process, VI, 1089.
Objection to, how to be taken, I, 414.
Of criminal prosecutions, III, 357.
Of equity, what is within, V, 348–356.
On appeal and how exercised, I, 384–438.
On appeal from justice as dependent upon amount, VI, 124.
On appeal or error in foreclosure suits, VI, 516.
On certiorari, II, 608.
Over ferry-boats, I, 32.
JURISDICTION — *continued.*
In general — *continued.*
Over subject-matter, VIII, 315.
Presumption that common law is enforced in foreign, V, 447.
Rule as to parties beyond, VI, 934.
Service of process out of, VI, 1100.
In actions on contract.
On corporate bonds, I, 676.
On coupons, III, 339.
On fire policies, V, 850.
Proceedings by creditors' bill, III, 351.
To cancel railway-aid bonds, VI, 712.
To enforce stockholders' liability to creditors, VII, 321.
To enforce subscriptions to stock, VII, 757.
To foreclose mortgages and deeds of trust, IV, 31; VI, 472–475.
To foreclose railway mortgages, VI, 472–475.
In actions on tort.
Against carriers of cattle, I, 801.
Against carriers of merchandise, II, 264; V, 598.
At law by abutters for injury sustained by railway in street, VII 643.
For causing death, III, 780–790.
For damages caused by fires, V, 893.
For infringement of patents, VI, 951.
For killing or injuring stock, I, 236–238.
For loss of baggage, I, 566.
For loss of goods carried, II, 62.
In condemnation proceedings.
Averment of facts showing, IV, 514.
Concurrent, IV, 490.
Denying injunction for want of, IV, 859.
Generally, IV, 488–492.
Objections to, how taken at trial, IV, 789.
On appeal and how exercised, IV, 782–800.
On error, as dependent on amount, IV, 817.
When petition sufficient to confer, IV, 525.
In various civil actions.
Against receivers, VI, 1213.
By and against express companies, V, 598.
By and against foreign corporations, V, 1017, 1018.
Conflict of, as to appointment of receivers, VI, 1163.
Effect of want of leave to sue receiver upon, VI, 1210.
For specific performance, VII, 155.
For taxes, VII, 990.
For violation of injunction, V, 1161.
In attachment, I, 489.
In bankruptcy, I, 581.
In insolvency, V, 1167.
In *quo warranto*, VI, 1129.
To compel issuance and delivery of railway-aid bonds, VI, 662.
To condemn right to cross railroad, III, 399.
To enforce assessments for local improvements, VII, 451.
To enforce laborer's lien, VI, 300.

JURISDICTION — *continued.*
In various civil actions — *continued.*
To enforce penalties, VI, 967.
To enjoin nuisances, VI, 894–896.
To enjoin unlawful taxation, VII, 1003, 1004.
To foreclose mechanic's lien, VI, 291.
To grant writs of mandamus, VI, 382.
To hear applications for new trials, VI, 875.
To redeem from mortgages, VI, 520.
To remove receivers, VI, 1222.
To take receiver's account, VI, 1218.
Of courts, etc.
Concurrent, V, 635.
Conflict of, V, 635.
Effect of provision making engineer arbitrator to oust, III, 152.
Effect of submission to arbitration upon, I, 455.
Of arbitrators, I, 456.
Of commissioners to investigate complaints of unjust preference, VI, 1140.
Of commissioners, under working agreements, VI, 254, 255.
Of county judge, in municipal-aid matters, VI, 561.
Of federal averment of diverse citizenship to give, VI, 988.
Of federal, in general, V, 628–636.
Of federal, to enforce railway-aid bonds, VI, 705.
Of federal, under Interstate Commerce Law, VI, 52.
Of justices', I, 355–357; VI, 120–123.
Of state, after filing petition and bond for removal, VII, 43.
Of state, under Interstate Commerce Law, VI, 52.
Of United States Supreme, V, 638–643.
To call an election, VI, 571.

JURY.
In general.
Affidavits of jurors, on motion for new trial, VI, 876.
Assessment of damages by, III, 733; IV, 912–916; VII, 654.
Constitutionality of statute providing for appraisement of damages without, I, 91.
Counsel's address to, VIII, 37–42.
Exhibition of wounds to, V, 404.
Experiments in presence of, VIII, 17.
In injunction suits, IV, 342–346.
Opinion of witness upon question for, VIII, 235.
Province of, as to awarding exemplary damages, III, 690.
Questions for, VI, 1126, 1127, 1128.
Relative functions of court and, VI, 813.
Reversal for urging agreement by, I, 395.
Right to submit special questions to, VIII, 95–98.
Right to trial by, I, 319; VI, 1134; VIII, 1–3.
Sufficiency of evidence to go to, V, 424, 530.
Summoning and empaneling, VIII, 11–14.

JURY — *continued.*
In general — *continued.*
Taking objections to counsel's address to, I, 416.
To examine proposed route, VI, 355.
View of premises by, VIII, 155.
Withdrawing evidence from, I, 320.
Discretionary power of.
As to amount of damages for causing death, III, 924.
Exemplary damages, how far in, III, 690, 946.
In assessing damages, III, 735, 739.
To allow interest as damages, III, 954.
In condemnation proceedings.
Assessment of compensation by, in England, IV, 912–916.
Assessment of land damages by, IV, 604–663, 912–916.
Challenge to array, IV, 614; VIII, 12.
Costs of inquiry before, in England, IV, 901.
Impaneling, to assess damages to land, IV, 609–615.
Jurors' fees, IV, 733.
Objections to oath to, how to be taken, IV, 790.
Right to trial by, IV, 604–609.
Verdict of, IV, 747–755.
Instructions to.
Calculated to inflame the minds of, V, 307.
In actions by husband for injury to wife, V, 1071.
In action for damages for wrongful interference with property, IV, 840.
In actions for loss of baggage, I, 573.
Invading the province of, I, 339, 392; II, 557, 816; III, 48, 311, 905; V, 306; VIII, 66, 79.
On assessment of land damages, IV, 629–639.
Prayers for, III, 916.
Urging to agree, VIII, 67.
Misconduct of, or objections to.
Allowing, to take out papers, VIII, 89.
Challenge to panel, VIII, 12.
Disqualification or, new trial for, VI, 841–843.
Objections to jurors as ground for new trial, VI, 841–843.
Objections to jurors, how to be taken, I, 415.
Setting aside verdict for, VIII, 94.
Taking out papers, deliberation, etc., VIII, 89.
See also CHALLENGE.

JUSTICE OF THE PEACE.
General treatment, VI, 119.
Jurisdiction and procedure in justices' courts, VI, 120.
Appeals from justices' courts, VI, 123.
Actions in courts of, for killing stock, I, 354–368.
Appeals from, in stock-killing cases, I, 367, 368.
Assessment of compensation by, in England, IV, 909.
Discretion of, in stock-killing cases, I, 358.

JUSTICE OF THE PEACE — *continued.*
Enjoining enforcement of judgments of, V, 1154.
When certiorari will lie to, II, 607.

JUSTIFICATION.
Plea of, VI, 1005.

KANSAS.
Assessment and levy of taxes in, VII, 951.
Constitutionality of statutes of, as to condemnation of land, IV, 387.
Constitutionality of statutes of, as to municipal aid for railways, VI, 541.
Constitutionality of tax laws of, VII, 840.
Constitutional provisions in, relative to condemnation of land, IV, 384.
Deductions for benefits under condemnation laws of, IV, 714.
Doctrine of comparative negligence, how far applied in, III, 50.
Federal grants to, VI, 148–150.
Grants by, to railroads, VI, 183.
Homesteads in public lands in, VI, 1108.
Injuries to animals running at large in, I, 219, 225.
Liability of company to laborers employed by contractors in, III, 161.
Mechanic's lien law of, VI, 278.
Review of town bonding proceedings by mandamus in, VI, 750.
Statute of, regulating liability for injuries caused by fire, V, 853.
Statute of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 715, 716.
Statutes of, relative to condemning right of way through streets, VII, 585.
Statutes of, relative to distribution of damages for causing death, III, 762.
Statutory duty of company in construction of street crossing railway, III, 439.
Statutory duty to fence in, V, 802.
Taxation in aid of railways in, VI, 729.
Taxation of land grants in, VII, 118.
Transportation of diseased cattle in, I, 789.

KANSAS PACIFIC R. CO.
General treatment, VI, 126.

KENTUCKY.
Aid to railways by the state, VII, 169.
Application of fellow-servant rule in, to servants of different departments, V, 685.
Assessment and levy of taxes in, VII, 952.
Constitutionality of statutes of, as to municipal aid for railways, VI, 542.
Constitutionality of statutes of, granting remedy for causing death, III, 745.
Constitutionality of statutes of, relative to condemnation of land, IV, 387.
Constitutionality of tax laws of, VII, 841.
Doctrine in, as to contributory negligence in action for injury by act of fellow-servant, V, 778.
License taxes in, VII, 1022.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 687.
Operation of statute of, giving right of action for causing death, III, 749.
Plaintiff's pleadings need not negative contributory negligence in, III, 277.

KENTUCKY — *continued.*
Review of town-bonding proceeding mandamus in, VI, 750.
Rule as to imputed negligence in, V, 1082.
Statute of, regulating liability for injuries caused by fire, V, 854.
Statute of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 716.
Statutes of, relative to distribution of damages for causing death, III, 762.
Taxation in aid of railways in, VI, 730.

KICKING CARS.
Injuries to employés by, V, 120.
See also FLYING SWITCH.

KILLING STOCK.
Actions for, generally, I, 88–372, 737–821; V, 793–835.
Constitutionality of statutes imposing liability for, VII, 253, 254.
Excessive damages for, VI, 856.
Prosecutions for, III, 368.
Variance between pleading and proof in actions for, VI, 1038.
When limitation begins to run in actions for, VI, 311.

KNOWLEDGE.
In general.
Gained by view o. premises, how far to be used by jurors, IV, 626, 627.
Instructions to jury as to use of, IV, 633.
Judicial notice of matters of common, V, 438.
Of defects in bridge, effect of, I, 699.
Of defects in fence, when creates duty to repair, V, 827.
Of directors, when imputable to corporation, IV, 64.
Of license, by grantee of licensor, VI, 262.
Waiver of defense must be with, VII, 795.
Of shipper or passenger.
By shipper of notice limiting liability, VI, 337.
Of rules of carrier by passenger, II, 330. 331.
Of witnesses.
Competency of witness as dependent upon means of, VIII, 198.
Credibility of witness as affected by means of, VIII, 201.
Gained from scientific works, when qualifies experts, VIII, 270.
Opinion of witness as dependent upon means of, VIII, 249, 258.
Showing means of, VIII, 216.
Testing means of, on cross-examination, VIII, 220.
To qualify him to give opinion, IV, 324; VIII, 244, 245.
What requisite to qualify as an expert, VIII, 269–274.
On part of company.
As to defects in appliances, effect of, V, 98–104.
As to habitually walking on track, VI, 272, 274.

KNOWLEDGE — *continued.*
On part of company — *continued.*
By carrier, of threatened danger to passenger, II, 433.
Of carrier that shipment is intended for immediate sale, I, 754.
Of defects, allegation of, V, 270–272.
Of defects by defendant, averment of, III, 800.
Of facts, by principal, as a prerequisite of ratification of agent's act, I, 84.
Of incompetency of fellow-servant, duty of company after, V, 703–705, 775, 785, 790.
Of servant's incompetency, burden of proof to show, V, 785.
Of servant's incompetency, whether question of law or fact, V, 790.
On part of employes.
Of agent, when imputed to principal, I, 53, 54.
Of dangers and defects, evidence of, V, 279.
Of defects by plaintiff, averment of, in answer, V, 274.
Of defects, using machinery after, when contributory negligence, V, 208.
Of employé's minority, V, 246.
Of hazard as a denfense to action for injury to employé, V, 275.
Of incompetency of co-servant, negativing in complaint, V, 774.
Of incompetency of fellow-servant, remaining in service after, V, 706, 707.
Of incompetency of fellow-servants, allegation of company's, V, 775.
Of increased danger, remaining in service after, V, 170, 171, 208, 286.
Of notice of danger or defects, assumption of risk after, V, 151–164.
Of rules of company, V, 33.

KNOWN DANGER.
Failure to guard against, III, 263.

KNOWN RISKS.
See RISKS.

LABOR.
Liability of trustees for, VI, 466.
Payment by receiver of claims for, VI, 1196.
Recovery for, II, 603.

LABOR CLAIMS.
Rights of assignee of, I, 480.

LABORERS.
Assignment of claims of, I, 477.
Contributory negligence of deceased, in action for causing death, III, 840.
Employed by contractors, liability of company to, III, 161–166.
Engagements of agents for board of, I, 58.
Liability of railway contractors to, III, 143.
Liens of, who entitled, what subject to, enforcement, etc., VI, 295–301.
Moving building, when foreman is fellow-servant of, V, 750.
Non-union, duty of company to receive and carry, II, 345.
Priority of claims of, in insolvency, V, 1170.

LABORERS — *continued.*
Risks assumed by, V, 179–181.
Statutory liability of stockholders to, VII, 318.
Subrogation of party paying claims of, VII, 725.

LACHES.
As a defense to action on subscription to stock, VII, 786.
As a defense to specific performance, VII, 157.
Denial of relief in equity because of, V, 351.
Effect of, on remedy upon lease, VI, 241.
Effect of, on right of stoppage *in transitu*, II, 193.
Effect of, on right to set aside foreclosure sale, VI, 515.
Effect of, to validate *ultra vires* act, VIII, 125.
In respect to discovery of new evidence, VI, 873.
Of abutting owner no defense to injunction suit, IV, 300.
Of complainant, effect of in action to cancel railway-aid bonds, VI, 714.
Of landowner, effect of on remedy against company, IV, 829.
Of landowner, when bars trespass, IV, 875.
Of parties, void leases as affected by, VI, 211.
Of stockholder, effect of on remedy against corporation or officers, VII, 342–344.
When bars relief, III, 10.
When injunction will be denied because of, IV, 862–864.
When prevents running of statute of limitations, VI, 331.

LADDERS.
Contributory negligence in employé riding on, V, 216.
Defective, allegations as to, V, 268.
Of freight cars, duty to employés as to safety of, V, 92.
Rule forbidding use by employés of, on side of car, V, 243.

LADIES' CAR.
Exclusion of colored persons from, III, 28.
Forcible expulsion passenger from, II, 384.
Removal of disorderly passenger from, II, 434.

LADING, BILLS OF.
See BILLS OF LADING.

LAMP-SHADES.
Defects in, II, 378.

LAND.
Cost and expense of restoring, V, 1005.
Flooding, V, 972–1005.
Not needed or in actual use, taxation of, VII, 865.
Of foreign company, when subject to escheat, V, 358.
Productiveness of, as affecting damages, V, 1003.
Public, VI, 1107–1123.

LAND — *continued.*
Under water, grants of, VII, 87.
What covenants do not run with, III, 345.
What covenants run with, III, 344.
What is included as, VIII, 315.
LAND DAMAGES.
Claims for, when prior to mortgage, VI, 448.
LAND EXPLORERS.
Special rates to, VI, 58.
Tickets to, who may use, VII, 1059.
LAND-GRANT RAILROADS.
General treatment, VI, 129.
See also GRANTS; LAND GRANTS.
LAND GRANTS.
General treatment, VI, 133.
General principles, VI, 134.
Federal grants to states, VI, 141.
Federal grants to railroads, VI, 158.
State grants to railroads, VI, 180.
Grants of swamp lands, VI, 187.
Canadian grants, VI, 194.
Interpretation of agreements to obtain, III, 235.
When exempt from taxes, VII, 907.
See also GRANTS.
LANDINGS.
Meaning of word, VIII, 315.
Right to condemn for railway purposes, IV, 428, 461.
Taking land for, when deemed public use, IV, 461.
See also WHARVES.
LANDLORD AND TENANT.
General treatment, VI, 195.
Injuries to tenant as an element of land damages, IV, 700.
Respective rights of action of, for flowing land, V, 990.
Respective rights of, to sue for injuries caused by fire, V, 896.
Right of either to sue for trespass, VII, 1110.
Right of tenant to recover for injury to crops, VI, 833.
Rights of tenant whose term expires during pendency of condemnation proceedings, IV, 443.
LANDOWNER.
In general.
Assumption by, of risk from fire, V, 857.
Changing route under provisions in contract with, VI, 360.
Compensation to, on abandonment, I, 6.
Construction and repair of cattle-guards by, II, 598.
Construction of farm crossings by, V, 619.
Contract between company and, relative to fences, I, 140, 166; V, 804.
Contracts by, to fence, I, 166.
Declarations of, as to value of property, admissibility of, V, 497.
Duty of, to repair fences, V, 829.
Effect of contract with, to relieve company of duty to fence, V, 804.
Effort to agree with, VII, 588.
Indemnity to, in lieu of granting injunction, V, 1104.
LANDOWNER — *continued.*
In general — *continued.*
Release of damages by, VII, 14, 15.
Removal of fence by, I, 174.
Right of action of, for failure to build and maintain fences, V, 829, 830.
Right of, to recover cost of fence from company, V, 807, 808.
Right of, to work mines, VI, 400, 401.
Rule where bound to maintain fence, I, 174.
Waiver by, of statutory duty to fence, V, 805.
In condemnation proceedings.
Agreement with, under English Compulsory Purchase Laws, IV, 883.
At time of taking solely entitled to damages, IV, 561.
Burden of proof to show inability to agree with, IV, 538, 588.
Cultivation by, of part of strip not used by company, IV, 442.
Defense by company to proceedings instituted by, IV, 533.
Effect of deposit of land damages on rights of, IV, 550.
Effort to agree with, prior to condemnation, IV, 499–503.
Ejectment by, IV, 244–257, 843–853.
Election of remedies by, IV, 826.
Furnishing plan to, IV, 528.
Inability to agree with, must be shown on assessment of damages, IV, 588.
Laches of, when bars remedy against company, IV, 829.
May waive prepayment of land damages, IV, 559.
Necessity of compensation to, for land condemned, IV, 540–560.
Notice to, IV, 503–511.
Remedies of, under Canadian expropriation proceedings, IV, 949–955.
Remedies of, under English Compulsory Purchase Acts, IV, 921–924.
Reservation of easements to, IV, 478, 590.
Respective rights of company and, in property condemned, IV, 435–443.
Reversion of land to, on abandonment of route, IV, 824, 825.
Right of, to appeal, IV, 773.
Right of, to costs, IV, 728–732.
Right of, to jury trial of question of damages, IV, 606.
Right of, to money paid into court, IV, 550, 553.
Strict construction of condemnation laws in favor of, IV, 392.
Taking land by consent of, IV, 462–486.
Trespass by, for wrongful interference with property, IV, 867–880.
Waiver by, of prepayment of damages, IV, 849.
When has right to open and close in assessment of damages, IV, 628.
When may initiate proceedings, IV, 493; VII, 583.
When sustains burden of proof, IV, 538, 539.
See also ABUTTING OWNERS; OWNERS.

LANDS CLAUSES ACT.
Entry under, IV, 883.
Intersection of railways under provisions of, III, 499.

LAND WARRANTS.
Effect of, and rights of holders of, VI, 1118.

LARCENY.
By one passenger upon another, liability of company, II, 433.
Liability for goods stolen, V, 577.
Liability of carrier where goods are stolen, II, 134.
Liability of warehousemen for loss by, V, 585.
Of goods in hands of carrier, liability for, II, 78, 194.
Of property by employé, VII, 137.
Prosecutions for, III, 368.

LATENT DEFECTS.
Assumption of risk as to, V, 149–151.
Burden of proof as to, V, 286.
Duty of company to know and to instruct employé as to, V, 37, 103.
Injuries to employés by, V, 150.
Liability of carrier of passengers as to, II, 379.
See also PATENT DEFECTS.

LATERAL ROADS.
See BRANCH AND LATERAL ROADS.

LATERAL SUPPORT.
Of adjacent lands, duty to afford, III, 113.
Removal of, when constitutes a taking of land, IV, 444.
Right of landowner to, VI, 401; VII, 81.
Taking away, by excavations, V, 539.
See also RETAINING WALLS.

LAW AND FACT.
See QUESTIONS OF LAW AND FACT.

LAW BOOKS.
Reading from, to jury, VIII, 41.

LAW OF PLACE.
As to actions for causing death, III, 780–790.
As to age of responsibility of child, II, 768.
As to construction and validity of contracts, I, 613; II, 157; III, 228–230.
As to exemptions from attachments, I, 499–502.
As to liability for baggage, I, 524.
As to rate of interest, V, 1176.
As to right to limit liability for baggage, I, 564.
As to stipulations limiting liability, VI, 348.
As to usury, VIII, 144.
As to validity of deeds, IV, 24.
Interpretation of mortgages as affected by, VI, 441.
See also LEX FORI; LEX REI SITAE; LEX LOCI.

LAW OF ROAD.
Not applicable to street-cars, VII, 430.

LEADING QUESTIONS.
To witnesses in elevated-railway cases, IV, 318.
What are, competency of, etc., VIII, 213.

LEASES; RUNNING POWERS; WORKING AGREEMENTS.
General treatment, VI, 197.
Leases, VI, 198.
Running powers, VI, 242.
Working agreements, VI, 249.

Leases, in general.
As evidence of rental value, IV, 315.
Cancellation of, V, 354.
Condemnation of leased property, IV, 416.
Damages for depreciation of rental value during time covered by, IV, 333.
Evidence of value of leasehold property on assessment of land damages, IV, 647.
Exemption of leased land from taxation, VII, 909.
Generally, VI, 195.
Mining, VI, 402.
Of ferry franchise, V, 837.
Of wharf property, VIII, 187.
Parties to, when entitled to land damages, IV, 564.
Right of parties to, to sue elevated railway company, IV, 310–312.
Setting aside, V, 356.
When create estoppel, V, 370.

Leases of railroads or cars.
By mortgagor, ratification of, by trustees, VI, 464.
Contract to locate station not binding on lessee, VII, 202.
Effect of, on liabilities of passenger carrier, II, 520, 521.
Inspection of leased track, II, 369.
Interpretation and effect of, VII, 129.
Liability of lessees under unauthorized lease, VII
Liability of lessor company for failure to fence, V, 830.
Liability of parties for injuries to employés, V, 255.
Of cars, I, 735.
Of road, consent of stockholders to acceptance of, IV, 75.
Of road, when release subscribers to stock, VII, 778.
Of road, when revoke free passes, VI, 940.
Of rolling stock, relative rights of lessor and mortgagee, VI, 429–433.
Power of lessor and lessee corporations to condemn land, IV, 408.
Power of receiver to make, VI, 1186.
Power of receiver to take, VI, 494.
Relative duties of parties as respects fences, V, 800.
Rentals of leased roads, IV, 162.
Respective liabilities of parties to, for injuries by fire, V, 897, 898.
Servants of lessor not fellow-servants with those of lessee, V, 692.
Taxation of lessor and lessee roads, VII, 858.
Validity of, VII, 129.
When extinguish exemption from taxation, VII, 900.
When mortgaged road may be leased instead of sold, VI, 498.
See also LESSEE; LESSOR.

LEASES; RUNNING POWERS; WORKING AGREEMENTS — *con.*
Running powers.
Duty of company having, VI, 34.
Liability of company having, for killing stock, I, 371.
Liability to passengers of carrier having, II, 521.
Under American authorities, VI, 247–245.
Under English statutes, VI, 245–249.
LEGAL BUSINESS.
Transaction of, on Sunday, VII, 818.
LEGAL SERVICES.
Priority of mortgage over claims for, VI, 454.
LEAVE TO SUE.
In *quo warranto*, VI, 1131.
Receivers, generally, VI, 1209–1213.
Receivers, under Act of Congress, VI, 1210.
LEGISLATURE.
Cannot enforce forfeiture of franchise, II, 712.
Control of, over land granted to state, VI, 141.
Delegation of power of, VII, 243.
Discretion of, as to exercise of power of eminent domain, IV, 383.
Grants by, of right to lay tracks in streets, VII, 353–358, 557–565.
Power of, as regards aid to railways, VI, 526–535.
Power of, as respects land grants, VI, 134.
Power of, as to selection of tribunal to assess land damages, IV, 574.
Power of, over street railways, VII, 424.
Power of, to alter, amend, or repeal franchise, VII, 364.
Power of, to authorize entry before payment of land damages, IV, 557.
Power of, to authorize street railways, VII, 354.
Power of, to delegate right to condemn lands, IV, 410.
Power of, to enact fence laws, V, 793–795.
Power of, to grant exemptions from taxation, VII, 888–890.
Power of, to ratify invalid issue of bonds, VI, 684.
Power of, to regulate elections in aid of railways, VI, 599.
Power of, to take away or restrict the right of appeal, IV, 772.
Power to condemn private property exclusively vested in, IV, 399.
Regulation of charges by, II, 612–622.
Sanction of, necessary to grant of exclusive privilege, VII, 370.
LENGTH.
Of branch roads, I, 685.
Of roads, statutes regulating, IV, 395.
Of street crossing over railway, III, 441.
Of street crossings, III, 427.
LESSEE.
Liability of, for killing stock, I, 369.
Liability of, to passengers, II, 520.
Of bridge, liability of, for not collecting toll, I, 725.
LESSEE. — *continued.*
When company must fence against, I, 142.
See also LEASES.
LESSOR.
Liability of, for killing stock, I, 369.
LETTERS.
Admissibility and effect of, in evidence, III, 857; V, 504.
Of president admitting liability, admissibility of, V, 910.
Right of express company to carry, V, 561.
Testamentary or of administration, V, 551, 552.
Written by attorneys, admissibility of as admissions, V, 486.
LETTING.
As applied to construction contract, VIII, 315.
LEVEES.
Liability for flooding lands by, V, 976.
What are, VIII, 315.
LEVIS, P. Q.
Decisions particularly applicable to, VI, 761.
LEVY.
Of attachments, I, 504, 505.
Of executions, V, 545, 546.
Of taxes, VII, 932–983.
Preventing, in attachment, I, 505.
LEX FORI.
When governs in contracts, III, 229.
See also LAW OF PLACE.
LEX LOCI.
When controls as to limitation of liability, VI, 348.
When governs in contracts, III, 228.
See also LAW OF PLACE.
LIABILITY OVER.
Of company to town for damages for failure to restore highway, VII, 624.
LIBEL AND SLANDER.
General treatment, VI, 257.
Libel in admiralty for death of passenger, I, 33.
Slander by agents of carrier, liability for, II, 164.
LICENSE.
General treatment, VI, 261.
Nature, validity, and effect, VI, 261.
Revocation, VI, 263.
Construction of road under, effect on landowner's right to sue in ejectment, IV, 247.
Distinguished from easement, IV, 58.
From owner to enter, when bars ejectment, IV, 849.
From plaintiff's grantor to flood land, as a defense, V, 988.
Of ferries, V, 835.
Of railway engineers, VI, 65.
Requiring, as to street cars, VII, 442.
To enter as a defense to landowner's action for trespass, IV, 874.
To enter before payment of damages, when implied, IV, 559.
To manufacture or sell patented articles, VI, 950.

LICENSE — *continued.*
To use right of way, IV, 480.
See also LICENSE TAXES.

LICENSEES.
Duty of company to persons riding on passes, VI, 940–943.
Duty to, distinguished from duty to trespassers, VII, 1128.
Injuries to, VI, 265–276.
On trains, rights of, II, 336–339.
Persons on premises or track under implied license, VII, 1121.
Right of, to recover for injury to crops, V, 833.
Right of, to sublet, VI, 234.
Right of, to sue for damages by fire, V, 896.
Right of, to sue for killing stock, I, 245.
When company must fence against, I, 142.
See also LICENSEES, INJURIES TO.

LICENSEES, INJURIES TO.
General treatment, VI, 265.
Who deemed to be licensees, VI, 265.
Company's duty to licensees, VI, 268.
Contributory negligence of licensee, VI, 275.
Assaults upon, I, 469.
At stations, duty towards, VII, 213, 214.
See also LICENSEES.

LICENSE TAXES.
Decisions under state laws regarding, VII, 1021–1024.
In cities, VI, 754.
Of street railways, VII, 446–450.
On ticket brokers VII, 1090.
Validity of, under interstate commerce law, VI, 64–66.
See also LICENSE.

LIENS.
General treatment, VI, 276.
In general, VI, 277.
Mechanics' liens, VI, 278.
Laborers' liens, VI, 295.
In general.
Enforcement of, V, 354.
Not affected by receiver's sale, VI, 1207.
Priority between executions and other, V, 546.
Priority of receivers' certificates over other, VI, 1202.
Purchaser at execution sale when takes subject to, V, 550.
For charges.
Of carriers, II, 643, 644.
Of carriers, how affected by stoppage *in transitu*, II. 188.
Of carriers, on merchandise, II, 149–156, 206.
Of carriers upon baggage, I, 560, 561.
Of connecting carriers, II, 206.
Of connecting carriers for freight on live stock, I, 787.
On express goods, V, 584.
For taxes.
Generally, VII, 73, 989, 990.
Purchaser takes subject to, VI, 504.
Of mortgages.
When attach, VI. 424.

LIENS — *continued.*
Of mortgages — *continued.*
When leased property not subject to, VI, 230.
Mortgage of rolling-stock subject to pre-existing, VI, 428.
Mortgages of after-acquired property do not displace, VI, 424.
Priority between deeds of trust and other, IV, 28.
Priority of mortgage over judgment and execution lien, VI, 457.
Protection of prior, in mortgage, VI, 443–453.
Purchaser at foreclosure sale, when takes subject to, VI, 503.
Various liens.
Of attorneys for compensation, I, 517–519.
Of bailees, I, 577.
Of bondholders, I, 664.
Of construction companies, III, 181.
Of corporations, on shares, VII, 286.
Of coupons, III, 336.
Of creditors on subscriptions, waiver of, VII, 327.
Of internal revenue taxes and how enforced, VII, 73.
Of judgments, VI, 100, 105.
Of receivers' certificates, VI, 1203, 1204.
Of states aiding railroads, VII, 163–165.
Of subsidy bonds, VI, 127.
Of vendors, IV, 767; VIII, 151.
Of warehousemen, VIII, 164.

LIFE.
Assumption of greater risks to save, V, 202, 337.
Damages for loss of, III, 742–958.
Expectancy of, question for experts, VIII, 261, 270.
Forgetting defect while attempting to save, contributory negligence, V, 337.
Showing expectancy of, III, 729, 881–883.
See MORTALITY TABLES.

LIFE ESTATES.
Expropriation of, under Canadian statutes, IV, 926.

LIFE INSURANCE.
See INSURANCE.

LIFE TABLES.
See MORTALITY TABLES.

LIFE TENANTS.
As parties in condemnation proceedings, IV, 497, 563.
Injuries to life estate as element of damages, IV, 700.
When entitled to land damages, IV, 563.

LIGHT.
Deprivation of, as element of damages, VII, 663.
Easement of, IV, 292; VII, 590.
Measure of damages for interference with, and air, IV, 918.

LIGHTS.
At stations and station grounds, II, 417; VII, 222, 223.
At stations, negligence respecting, when question for jury, VII, 235.

LIGHTS — *continued.*
At switches, duty of company to provide, V, 59.
On stairway, injuries to passenger from absence of, IV, 361.
On street cars, duty to place, VII, 514. 517.
Operating cars at night without, V, 125.
Ordinance requiring use of, VII, 444, 683.
Rates for lighting under English statute, VII, 1017.

LIMITATIONS OF ACTIONS.
General treatment, VI, 301.
General principles, VI, 302.
When statute begins to run, VI, 308.
What lapse of time will create bar, VI, 314.
Disabilities and exceptions, VI, 328.
New promise, VI, 330.
Against elevated railway companies, IV, 341, 342.
Against officers and agents of government railroads, V, 1052.
Amendments barred by statute, VI, 1051.
Amendments setting up statute, VI, 1050.
By husband and wife, V, 1075.
Condemnation of abutting easements, IV, 289.
Condemnation proceedings, IV, 488.
Contracts limiting time within which to sue, I, 775; II, 184–186.
Creditors' suits against stockholders, VII, 327.
Criminal actions for causing death, III, 956.
For causing death, III, 777–780.
For damages by fire, V, 894.
For damages sustained by railway in street, VII, 645.
For flooding lands, V, 986.
For injuries at crossings, III, 470.
For injuries to employés, V, 260.
Interposing statute by demurrer, VI, 1013.
On claims against government, III, 9.
On subscriptions to stock, VII, 793.
Replication to plea of limitation, VI, 1017.
Right to lay additional track not barred, VII, 353.
Statute no defense against breach of duty to restore highway, VII, 623.
Time in which to sue, III, 777–780.
What actions are barred, VI, 85–90.
What claims are barred, VII, 8.
When equitable action to avoid election should be brought, VI, 609.
When lapse of time bars suit to remove cloud on title, III, 10.

LIMITATIONS OF LIABILITY.
General treatment, VI, 331.
Power to limit common-law liability, VI, 331.
Stipulations against liability for negligence, VI, 341.
Burden of proof; presumptions, VI, 348.
In general.
As to amount recoverable for causing death, III, 920–923.
Of initial carrier, to its own line, I, 529.
Waiver of, by agents, I, 58.

LIMITATIONS OF LIABILITY — *con.*
For injuries to employes.
By negligence, generally invalid, V, 125.
Rule in Connecticut, V, 126.
Rule in Georgia, V, 126.
In carriage of animals.
For loss or injury to dogs carried, I, 791.
Generally, I, 761–783.
Of initial carrier, to its own line, I, 785.
In carriage of goods.
As between connecting lines, II, 252–263.
For loss by fire, I, 631–635; V, 908.
For misdelivery from wilful misconduct, II, 120.
How limitation lost, II, 184–186.
In bills of lading, I, 625–631.
Of carrier, II, 164–186.
Of express companies, V, 585–594.
Power of carriers as to, II, 164–184.
When carrier liable only on own road, II, 31, 256, 259.
In carriage of passengers or baggage.
As to persons riding on free passes, VI, 943–946.
Conditions in passes exempting carrier, VI, 943–946.
For articles left in cloak-room, I, 575.
In passenger tickets, VII, 1044–1046, 1075.
Limiting carrier's liability to own line and trains, or for delay, VII, 1045, 1046.
Of carrier of baggage, I, 561–566.
Of carrier of passengers, II, 436–440.
Of initial carrier to its own line, II, 513, 516.
Of transfer company, for baggage, I, 554.
On through tickets, VII, 1075.
See also EXEMPTION; LIABILITY; LIMITS.

LIMITED TICKETS.
Right to stop over on, VII, 1054.
See TICKETS AND FARES, VII, 1069–1072.

LINE.
Connecting, III, 65–72.
What constitutes a, VI, 43.

LIQUIDATED DAMAGES.
Generally, III, 693–695.
When awarded for breach of contract, III, 136.

LIQUIDATOR.
Appointment of, in proceedings to dissolve, IV, 136.
Suit against, when barred by lapse of time, VI, 317.
See also RECEIVERS.

LIQUORS.
See INTOXICATING LIQUORS.

LIS PENDENS.
General treatment, VI, 351.

LIST.
Of delinquent taxpayers, VII, 987.
Of stockholders, keeping, inspection, etc., VII, 302–304.

LISTING.
Of property for taxes in wrong name, VII, 1007.

LIVE ENGINES.
See ENGINES.

LIVE STOCK.
Actions for injuries to, generally, I, 88–372; VII, 349.
Actions for killing or injuring, when barred by lapse of time, VI, 326.
Assumption of risk as to collisions with, V, 138.
Burden of proof in cases of injury or loss of, V, 449.
Cattle-pens as nuisances, VI, 889.
Collisions with, caused by failure to fence, V, 61.
Compromise by agent of claim for injury to, I, 58.
Contributory negligence of owner of, I, 208–236.
Cruelty to, III, 363.
Destruction of, by fire, V, 883.
Destruction of, by flooding lands, V, 984.
Distinction between slave and, III, 470.
Duty to construct watering-places for, III, 114.
Duty to fence against trespassing, V, 825.
Evidence of danger to, on assessment of land damages, IV, 650, 695.
Frightening of, by passing trains as an element of land damages, IV, 691.
Importation of diseased, VI, 68.
Injuries to cars by, V, 1166.
Injuries to, from failure to build or maintain fences, V, 830.
Killing or injuring, liability for, I, 88–372; II, 598; IV, 650.
Obligation to receive and deliver, VII, 349.
On track, collision with, II, 385.
Opinions of farmers as to weight of, VIII, 278.
Opinions of witnesses as to value of, VIII, 246.
Permitting to run at large, when negligence, III, 269.
Preventing access to water by, as an element of land damages, IV, 705.
Probable killing or injury to, as an element of land damages, IV, 695.
Proper handling of, when calls for expert testimony, VIII, 266.
Right to pasture, on right of way, IV, 443.
Transportation of diseased, I, 788–790.
Watering-places for, III, 114; IV, 705.
See also ANIMALS, INJURIES TO; CARRIAGE OF LIVE STOCK; CATTLE.

LOADING AND UNLOADING.
Damages for injuries received by, III, 765.
Delay in unloading, I, 759.
Free at competing points, IV, 101.
Injuries to animals by, I, 744, 745, 751, 752.
Injuries while, VII, 211.
Liability of carrier for injuries in loading, II, 53, 54.

LOADING AND UNLOADING — *con.*
Liability of carrier where shipper loads, II, 44.
Meaning of words "load" and "unload," VIII, 316.
Neglect of consignee to unload goods, II, 104.
Negligence in, V, 681.
Rights of drover as to, I, 792.
Using street for, VII, 616.
When unloading terminates carrier's liability, II, 234.

LOANS.
By agents, I, 60.
By directors to company, IV, 69.
By state, application for, VII, 160.
Expenses of obtaining, when exempt from taxation, VII, 915.
Power of foreign corporation to effect, V, 1017.
Power to effect, II, 699; III, 319.
Priority of mortgage over, IV, 458.
Transfer of stock by way of, VII, 287.
When subject to taxation, VII, 878.

LOCAL ACTIONS.
For causing death, III, 781.
For injuries to animals, I, 238.
What actions are, I, 25, 26.

LOCAL AGENT.
Service of process on, VI, 1094.

LOCAL AID.
See MUNICIPAL AND LOCAL AID.

LOCAL AND THROUGH RATES.
Under interstate commerce law, VI, 14, 15, 23–25.
What are, and how regulated, II, 639, 640.

LOCAL ASSESSMENTS.
Exemption from taxes, when exemption from, VII, 896.
Upon steam railroads in cities, VII, 284–693.

LOCAL AUTHORITIES.
Consent of, to construction of elevated railway, IV, 282.
Consent of, to construction of street railway, VII, 384–390.
Consent of, to construction of underground railway, VIII, 134.

LOCAL IMPROVEMENTS.
Assessments for, VII, 450–454.
Taxes and assessments for, VI, 755.

LOCALITY.
Definition of, IV, 113.
Jurisdiction in foreclosure as dependent upon, VI, 473.
Jurisdiction of justice as dependent on, VI, 121.

LOCAL LAWS.
Constitutionality of, VII, 248.
Rapid transit acts are not, IV, 277.

LOCAL PREJUDICE.
Affidavit of, who may make, sufficiency, etc., VII, 40, 41.
Removal of cause on ground of, VII, 38, 39.
See also PREJUDICE.

LOCAL RATES.
Making proportionately higher than other rates, IV, 111.

LOCAL TRAFFIC.
What is, under running powers, VI, 247.

LOCATION.
Of crossing of railway, fixing in award, III, 408.
Of depots, agreements of agents as to, I, 55.
Of farm crossings, V, 619.
Of highway, right to change in constructing crossing, III, 432.
Of indemnity lands, VI, 162.
Of municipal corporation, judicial notice of, V, 436.
Of power-house of cable railway, I, 728.
Of road or station, validity of contracts as to, III, 213–215.
Of stations, VII, 194–204.
Of termini of street railway, VII, 379.
Of track of steam railway in street, VII, 603–607.

LOCATION OF ROUTE.
General treatment, VI, 352.
General rules, VI, 352.
Examination of proposed route by commissioners, VI, 355.
Filing written location, maps, plans, etc., VI, 356.
Change of route; re-location, VI, 358.
Rival locations, VI, 362.
Bringing within municipal boundaries, VI, 651.
Condition in subscription as to, VI, 636.
Consent of abutting owner to change of, VII, 392.
Interest on damages from time of, IV, 724.
Measure of damages in cases of new location, IV, 676.
Of elevated railways, IV, 284, 285.
Of intersecting road, VI, 1122.
Of one company, condemnation by another, IV, 426.
Opinion evidence as to value of property before and after, IV, 320; VIII, 255.
Under charter provisions, II, 701–706.
When a taking under statute, IV, 443.
When cures uncertainty in description of land granted, IV, 467.
Of street railway, change of, VII, 382.

LOCKS.
Construction of, in navigable water, VIII 170.

LOCOMOTIVE ENGINEER.
As party to suit for killing stock, I, 241, 246.
Averment of negligence of, III, 800.
Care required from, VI, 779.
Contributory negligence as defense to action for causing death of, III, 839.
Declarations of, as evidence, I, 286.
License tax of, VI, 65.
Power of, to employ physician, VI, 394.
When deemed expert, VIII, 292.
When deemed fellow-servant with other employés, V, 735–737, 740, 746, 755, 762, 765, 766, 769.

LOCOMOTIVES.
See ENGINES.

LOCOMOTIVE TRUCKS.
Infringement of patent for, VI, 959.

LOCO PARENTIS.
Contributory negligence of persons in, when bars action for injury to child, II, 801–803.

LOCUS IN QUO.
Irregularity in view of, by jury, as ground for new trial, IV, 752; VI, 842.
View of, by jury, VIII, 17.
View of, in criminal cases, III, 358.
View of, in proceedings to assess damages, IV, 602, 625–627.
See also PREMISES.

LOGS.
When subject to taxation, VII, 870.

LONG AND SHORT HAULS.
As affected by competition and distance, II, 627.
Discrimination as to, IV, 105–108.
Regulation of rates for, II, 627.
Schedules as to, VI, 47.
Under Interstate Commerce Act, VI, 36–45.

LONG USER.
Acquirement of easements by, IV, 160.
Obtaining right to lay out street across railway by, III, 438.

LOOK AND LISTEN.
Duty of licensee to, VI, 275.
Duty of passenger as to approach of locomotive, III, 262.
Duty of passenger to, III, 20.
Duty of person crossing track to, III, 824–828.
Duty of traveler to, at crossing, III, 560–622.
Duty of trespasser to, VII, 1156–1159.
Duty to, at station, VII, 227.
Duty to, before going on street-car track, VII, 524, 525.
Duty to, when getting off car, II, 458, 492.
Failure of child to, when contributory negligence, II, 774.
Failure of employé to, when contributory negligence, V, 197–200.
Instructions as to failure of tra[illegible]r to, III, 654.
See also STOP, LOOK, AND LISTEN.

LOOKOUT.
Duty of car-driver to keep, VII, 515, 516.
Duty of company to keep, as to employés, V, 115.
Duty to keep, as to trespassers, VII, 1134–1137.
Duty to keep, at crossings, I, 200; III, 528–530.
Duty to keep, for animals on track, I, 153.
Duty to keep, for children, II, 749, 761.
Duty to keep, for trespassing animals, I, 184.
Duty to keep, generally, I, 118–123.
Duty to keep, to prevent injury to children on track, II, 733–735.
Duty to look and listen as affected by failure to provide, III, 589.

LOOKOUT — *continued.*
Instructions relating to duty to keep, I, 332.
Keeping inefficient, when negligence, VI, 784, 785.
Negligence in failing to keep, question for jury, V, 322.
Negligence in regard to, when question of fact, I, 326.
Requirement of, in cities, VII, 684.
Sufficiency of evidence of failure to keep, I, 291.
LOS ANGELES, CAL.
Decisions particularly applicable to, VI, 761.
LOSS.
In general.
Actions for lost coupons, III, 342.
Actions on lost bonds, I, 680.
Actions on lost contracts, III, 235.
By fire, liability of warehousemen for, V, 585.
By theft, liability of warehousemen for, V, 585.
Limitation of liability for, VI, 331, 350.
Of cars, recovery for, VII, 130.
Of cattle by fire, liability for, V, 883.
Of dogs by carrier, liability for, I, 790.
Of live stock, burden of proof in cases of, V, 449.
Of live stock caused by defects in car, I, 739, 740.
Of mail matter, liability of carrier for, II, 4.
Of market as element of damages, I, 818.
Of stock certificate, compelling re-issue in cases of, VII, 281.
Payment of, subrogation of insurance company after, VII, 724.
Of baggage, etc.
Of articles left in cloak-room, liability for, I, 575.
Of baggage, actions for, I, 566–575.
Of baggage, actions for, when barred by lapse of time, VI, 316.
Of baggage, presumption in cases of, I, 524.
Of property, money, etc., liability for, VII, 135–139.
Of ticket by passenger, expulsion for, IV, 174.
Of trunk, liability of transfer company, I, 554.
Of wife's baggage, action for, V, 1068.
Refunding money paid for lost ticket, VII, 1043, 1062.
Rights of passenger in cases of loss of ticket, VII, 1043, 1062.
Of goods.
Allegation of, in action against carrier, II, 277.
Burden of proof in cases of, V, 449.
By fire, liability of carrier for, II, 72.
By fire, limitation in bill of lading of liability for, I, 631–635.
By fire, notice and proof of, V, 846.
By negligence, sufficiency of evidence to prove, II, 144.
Carried, claims for, when prior to mortgage, VI, 448.
LOSS — *continued.*
Of goods — *continued.*
Carried, liability of express company for, V, 574–577.
Carried, liability of mortgage trustee for, VI, 466.
Carried, measure of damages for, II, 287–305.
Carried, payment of claims for, by receiver, VI, 1196.
Caused by delay, II, 62–72.
During transit, evidence to show, II, 58
In hands of initial carrier, evidence to prove, II, 212.
Liability for, V, 577.
Liability of carrier for, generally, II, 42–90.
Liability of final carrier for, II, 242–246.
Liability of intermediate carrier for, II, 237–239.
Liability of lessee road for, VI, 227.
Liability of lessor road for, VI, 221.
Liability of warehousemen for, VIII, 165.
Measure of damages for, III, 704.
Promise of agent to pay for, I, 58.
Proof of, raises no presumption of negligence where liability is limited, II, 176.
Proof of, when raises a presumption of negligence, II, 72, 78.
When limitation begins to run in actions for, VI, 311.
While awaiting shipment, II, 54, 55.
Within fire policies, V, 845, 846.
Of market.
Measure of damages for, II, 71.
Of services, time, etc.
Of access to property or tide-water as measure of damages, IV, 936.
Of business or profits as measure of damages, IV, 936.
Of earnings, business, and rental value, proof of, III, 730, 731.
Of profits as element of land damages, IV, 701.
Of profits, evidence of, on assessment of land damages, IV, 647.
Of profits, measure of damages for, IV, 917.
Of services between time of injury and time of death, action for, III, 745.
Of services of child, amount of recovery for, II, 818.
Of services of person killed, allegation of, III, 794.
Of services of wife, action for, V, 1069, 1070.
Of time, as element of damages, II, 574.
Of time, as element of damages for injury to employé, V, 338.
LOTTERIES.
General treatment, VI, 365.
LOUISIANA.
Aid to railways by, VII, 169–171.
Assessment and levy of railroad taxes in, VII, 954.
Civil rights acts of, III, 26.
Constitutionality of statutes of, as to municipal aid for railways, VI, 543.
Constitutionality of tax laws of, VII, 841.

LOUISIANA — *continued.*
Constitutional provisions in, relative to condemnation of land, IV, 384.
Deductions for benefits under condemnation laws of, IV, 715.
Federal grants to, VI, 150.
License taxes in, VII, 1022.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 687.
Occupation of streets by steam roads under legislative grants of, VII, 559.
Operation of statute of, giving right of action for causing death, III, 749.
Rule in, as to imputed negligence, V, 1082.
Rule in, as to limitation of liability for negligence, VI, 347.
Taxation in aid of railways in, VI, 732.
See also NEW ORLEANS.

LUBRICATING TUBES.
Infringement of patent for, VI, 960.

LUMBER.
Contributory negligence in placing on right of way, V, 892.
When subject to taxation, VII, 870.

LUNCHES.
License to sell on train, revocation of, VI, 264.
Rules of company as to selling, about stations, VII, 208.

LYNCHBURG, VA.
Decisions particularly applicable to, VI, 762.

MACHINERY.
In general.
Competency of evidence as to safety of, VII, 429–434.
Duty of company as to, I, 101.
Experience in handling, when qualifies expert, VII, 272.
Explosions of, V, 557.
For making or mending rails, patents for, VI, 960.
For manufacturing purposes, special damages for loss of, II, 302.
Judgment and skill required in selection and use of, VI, 780.
Liability of independent contractor for defects in, V, 1112.
Liability to trespassers for dangerous condition of, VII, 1147.
Maintaining on platform, VII, 218.
Meaning of "safe machinery," VIII, 327.
What is, VIII, 316.
As to employes.
Alleging company's knowledge of defective condition of, V, 271.
Alleging negligence in furnishing defective, V, 266–269.
Assumption of risk as to, V, 135, 146, 149.
Assumption of risk as to defects in, a question for jury, V, 325.
Burden of proof to show company's negligence with respect to, V, 283.
Care employé must exercise in the management of, V, 203.

MACHINERY — *continued.*
As to employes — *continued.*
Concurring negligence of company and fellow-servants with respect to, V, 668–670.
Contributory negligence of employés in the operation of, V, 203–222.
Duty of company to furnish best, V, 72.
Duty to employés as respects safety of, V, 67–113.
Duty to inspect and repair, V, 108.
Duty to instruct employé as to operation of, V, 38, 247.
Evidence of failure to furnish safe, V, 277, 278.
Failure of employé to keep in repair, V, 207.
Inspection and repair of, duty of company as to, V, 104–113.
Liability of company for failure of vice-principal to furnish safe, V, 678–680.
Negligence in failing to furnish safe, question for jury, V, 316–320.
Non-liability for negligence of fellow-servants in use of, V, 653, 654.
Notice of defects in, assumption of risk after, V, 159–162.
Presumption of negligence from proof of defects in, V, 299.
Promise by company to repair defects in, V, 167.
Sufficiency of evidence to show defects in, V, 290.
Using after knowledge of defects, V, 208.
See also APPLIANCES.

MACHINISTS.
As experts, VIII, 289.
When master mechanic is not fellow-servant of, V, 763.

MACON, GA.
Decisions particularly applicable to, VI, 762.

MAIL.
Carriage of, II, 1–9.
Carriage of, on land-grant roads, VI, 130.
Giving notice of arrival of goods by, II, 100.
Giving notice of assessment by, VII, 755.
Giving notice of condemnation proceedings by, IV, 509.
Mortgages of claims for carrying, VI, 417.
Right of express companies to carry mailable matter, V, 561.

MAIL AGENTS OR CLERKS.
Carriage of, II, 326.
Limitation of liability for injury to, in free pass, VI, 946.
Rights and duties of, II, 8, 9.

MAIL-BAGS.
Injuries to employés in throwing out, V, 121.
Liability to passengers struck by, II, 419.

MAIL-CRANES.
Injuries to employés by, V, 65.
Negligence as to position of, question for jury, V, 315.

MAINE.
Assessment and levy of railroad taxes in, VII, 954.

MA' 'E — *continued.*
Constitutionality of statutes of, as to municipal aid for railways, VI, 543.
Constitutionality of tax laws of, VII, 841.
Constitutional provisions in, relative to condemnation of land, IV, 384.
Construction of statute relating to connecting carriers, III, 66.
Crossing of streets and highways under statutes of, III, 423.
Grants by, to railroads, VI, 183.
Liability of company to laborers employed by contractors in, III, 161.
Occupation of streets by steam roads under legislative grants of, VII, 560.
Review of town-bonding proceedings by mandamus in, VI, 750.
Rule as to imputed negligence in, V, 1082.
Statute of, regulating liability for injuries caused by fire, V, 854.
Statute of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 717.
Statute of, relative to connecting lines, III, 65.
Statutory duty of company in construction of street crossing railway, III, 439.
Statutory duty to fence in, V, 802.
Statutory provisions in, limiting amount recoverable for causing death, III, 921.
Statutory regulation of grade crossings in, III, 446.

MAINTENANCE.
As an offense, II, 609, 610.
Of culverts, III, 658–662.
Of paupers, liability for, VI, 961.

MAJORITY.
Of commissioners to assess damages, validity of acts of, IV, 604.
Validity of report or verdict by, in condemnation proceedings, IV, 604, 747.

MALICE.
Exemplary damages in cases of, II, 577; III, 686.
In actions for libel and slander, VI, 260.
In prior prosecution, burden on plaintiff to show, VI, 369.
Proof of, and when presumed in false imprisonment, V, 610.
Proof of malicious killing, III, 871.
What is, and how proved, VI, 370.

MALICIOUS ACTS.
Of conductor, exemplary damages for, IV, 232.
Of conductor in ejecting passenger, IV, 197.
Of employés, liability of company for, IV, 364.
Of third persons, competency of evidence of, V, 407.

MALICIOUS PROSECUTION.
General treatment, VI, 367.

MALICIOUS TRESPASS.
Prosecutions for, III, 371.

MANAGEMENT.
Of engine, liability of company for carelessness in, V, 867–869.
Of trains, liability of passenger carrier as respects, II, 380–386.
See also OPERATION.

MANAGER.
Not fellow-servant of employés under him, V, 762.

MANAGING AGENTS.
Service of process on, VI, 1093.

MANDAMUS.
General treatment, VI, 373.
Nature and use of the writ, VI, 373.
Procedure, VI, 382.
Appeals from order granting or refusing, I, 381.
As a remedy for wrongful interference with property, IV, 866.
As a remedy to the landowner under English Compulsory Purchase Acts, IV, 923.
By creditor, to compel payment of subscription, VII, 312.
Compelling appointment of commissioners by, IV, 598.
Compelling deposit of land damages by, IV, 550.
Enforcement of awards by, under English Compulsory Purchase Laws, IV, 912.
Enforcement of commissioners' orders by, VI, 1149.
Enforcement of judgments by, IV, 766.
Enforcement of taxes by, VII, 996.
Removal of proceedings for, to federal court, VII, 25.
Review of condemnation proceedings on, IV, 818.
To compel allowance of costs, IV, 732.
To compel carrier to receive and carry, II, 33.
To compel carrier to transport liquor, VI, 74.
To compel construction of highway crossing, III, 424.
To compel construction of road, III, 110.
To compel delivery of grain by elevator proprietor, IV, 370.
To compel election of directors, IV, 52.
To compel extension of track, VII, 365.
To compel further proceedings under notice to treat, IV, 897.
To compel inspection of books, VII, 307.
To compel issue and delivery of railway-aid bonds, VI, 662, 663.
To compel issue and reissue of stock, VII, 280, 281.
To compel issue of warrant to summon jury, IV, 611, 913.
To compel operation of branch road, I, 685; VI, 202.
To compel operation of road, when lease will not prevent, VI, 202.
To compel payment of coupons, III, 342.
To compel restoration of highway, III, 432; VII, 624.
To compel transfer of stock, VII, 294, 295.
To enforce duty to construct bridge, I, 693.
To enforce duty to locate station, VII, 200.
To review town-bonding proceedings, VI, 746–752.
When proper remedy, and not creditors' suit, III, 352.

MANHOLE.
Of water tank, contributory negligence in stepping into, V, 217.

MANITOBA.
Liability of company to laborers employed by contractors in, III, 166.

MANSLAUGHTER.
Prosecutions for, III, 371.

MANUFACTURER'S RATES.
Right to give, VI, 18.

MANUFACTURING COMPANY.
Power of, to condemn lands, IV, 409.

"MANY."
Definition of, VIII, 316.

MAP
Admissibility and effect of, as evidence, [illegible]
Filing of, VI, 357, 1121.
Of land grant, filing, etc., VI, 166, 169, 171, 174.
Of proposed crossings of railways, III, 402.
Proof of dedication by, VII, 544.
References to, in deeds, IV, 11.
References to, in petition in condemnation, IV, 518.
Use of, in condemnation proceedings, IV, 526–529.

MARKET.
Definition of, VIII, 316.
Loss of, as affecting damages, I, 818.

MARKET COMPANY.
Taking land of, IV, 428.

MARKET VALUE.
Ascertaining damages where there is no, IV, 673.
As measure of damages for land taken, IV, 669–671.
Assessed value as evidence of, V, 390.
At destination, limiting liability to, I, 636.
Evidence of, on question of damages, V, 965.
Instructions confining jury to, IV, 633.
Liability of carrier for fall in, I, 754.
Limiting damages to, II, 176.
Measure of damages where goods have no, II, 300, 301.
Of animal killed, as the measure of damages, I, 347.
Of animal killed, proof of, I, 285.
Of goods lost, when measure of damages, II, 288.
Opinion of witness as to, VIII, 248.
Opinion of witness as to depreciation of, VIII, 256.
Recovery of, VIII, 316.
See also PRICE.

MARKING.
Of goods, defects in, when excuse carrier, II, 84–86.
Of goods, duty of initial carrier to observe, II, 208.
Of goods, imperfect, as affecting liability, II, 170.
See also MISDIRECTION.

MARRIED WOMEN.
Right of, to appeal in condemnation proceedings, IV, 774.
Validity of releases by, VII, 7.
When entitled to land damages, IV, 572.
See also HUSBAND AND WIFE.

MARYLAND.
Aid to railways by, VII, 171.
Assessment and levy of railroad taxes in, VII, 954.
Constitutionality of statutes of, as to municipal aid for railways, VI, 543.
Constitutionality of statutes of, relative to condemnation of land, IV, 388.
Constitutionality of tax laws of, VII, 841.
Construction of stock laws of, I, 96.
Deductions for benefits under condemnation laws of, IV, 715.
Duty of traveler at crossing to stop, look, and listen in, III, 562.
Injuries to animals running at large in, I, 225.
Occupation of streets by steam roads under legislative grants of, VII, 560.
Operation of statute of, giving right of action for causing death, III, 749.
Right to sue in, for causing death in foreign state, III, 787.
Rule as to imputed negligence in, V, 1082.
Statute of, regulating liability for injuries caused by fire, V, 854.

MASSACHUSETTS.
Assessment and levy of taxes in, VII, 955.
Conditions exempting carrier from liability to person riding on free pass in, VI, 944.
Constitutionality of statutes of, relative to condemnation of land, IV, 388.
Constitutionality of tax laws of, VII, 842.
Construction of statute as to compensation for joint use of track, VII, 435.
Construction of statute of, as to charges, II, 626.
Construction of statute of, relating to connecting carriers, III, 66.
Deductions for benefits under condemnation laws of, IV, 715.
Duty to give signals near crossing, under statute of, III, 509.
Employer's liability act not a bar to common-law action, V, 275.
Grade crossings under statutes of, III, 412, 449–456.
Joint use of station under statutes of, VII, 237.
Jurisdiction of Supreme Court of, VI, 119.
Laying out streets across railways under statutes of, III, 437.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 688.
Mechanic's lien law of, VI, 278.
Occupation of streets by steam roads under legislative grants of, VII, 560.
Operation of statute of, giving right of action for causing death, III, 750.
Plaintiff's pleadings must negative contributory negligence in, III, 276.
Right to sue in, for causing death in foreign state, III, 787.
Rule as to imputed negligence in, V, 1082.
Rule under Employer's Liability Act where death is instantaneous, III, 767.
Statute of, as to defective crossings, III, 473.
Statute of, regulating liability for injuries caused by fire, V, 855.

MASSACHUSETTS — *continued.*
Statute of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 717.
Statute of, requiring notice of time, place, and cause of injury, V, 260.
Statutory duty to fence in, V, 802.
Statutory provisions in, relative to abandonment of station, VII, 206.
Taking land for streets and laying out roads in, VII, 551.
When negligence of parent is imputable to child in, II, 793.

MASTER AND SERVANT.
See EMPLOYÉS; EMPLOYÉS, INJURIES TO; FELLOW-SERVANTS.

MASTER MECHANICS.
As fellow-servants with other employés, V, 762.

MATERIALITY.
Of evidence in actions against elevated railway company, IV, 313.
Of evidence in actions for causing death, III, 846–850.
Of evidence in actions for injuries to children, II, 811.
Of evidence in actions for injury to trespassers, VII, 1163.
Of newly discovered evidence, VI, 873.
Of witness' answer, VIII, 210.
See also EVIDENCE.

MATERIAL-MEN.
Notice by, of claim for lien, VI, 290.
Right of, to claim lien, VI, 282.

MATERIALS.
Claims for, when prior to mortgage, VI, 446–448, 455, 512.
Issuing receivers' certificates in payment for, VI, 1201.
Payment by receiver of claims for, VI, 1196.
Prepared but not used, right of sub-contractor to recover for, III, 157.
Repaving with more costly, VII, 403.
Used in manufacturing, damages for loss of, II, 303.
When city is to furnish, for paving or repairing, VII, 401.

MATURITY.
Of bonds, VIII, 316.
Of mortgage, provisions as to, VI, 439.
Transfer of commercial paper after, I, 595.

MAXIMS.
Causa proxima, non remota, spectatur, meaning and application of, VIII, 308.
Cessante ratione, cessat ipsa lex, application of, VIII, 308.
Damnum absque injuria, V, 960.
Ex turpi causa non oritur actio, application of, VIII, 313.
Falsa demonstratio non nocet, cum de corpore constat, application of, VIII, 313.
In jure non remota causa, sed proxima, spectatur, application of, VIII, 315.
In pari delicto, III, 10.
Lex rei sitæ, when governs, III, 229.
Nemo debet esse judex in propria sua causa, application of, VIII, 318.
Res ipsa loquitur, application of, VIII, 326.
Respondeat superior, V, 673, 684.

MAXIMS — *continued.*
Sic utere tuo alienum non lædas, III, 415; VIII, 327.
Volenti non fit injuria, V, 275.

"MAY."
When equivalent to "must" or "shall," VIII, 316.

MEADOW.
See GRASS.

MEASUREMENT.
As a prerequisite to delivery of things sold, VII, 100.
By engineers, how made, effect, etc., III, 146–148.

MEASURE OF DAMAGES.
In general.
Erroneous instructions as to, I, 394.
For failure to build and maintain fences, V, 832.
For flooding lands, III, 664; V, 1002–1005.
For infringement of patents, VI, 953.
For injuries by fire, V, 960–964.
For injuries by obstructions or encroachments in highways, VII, 715.
For injuries to crops and pasturage, V, 834, 835.
For overcharges, II, 633.
For refusal to transfer stock, VII, 298.
Generally, III, 702.
Harmless instructions as to, I, 408.
In actions of trespass, VII, 663.
In actions on construction contracts, III, 177.
In railway intersection cases, III, 405–407.
Instructions with regard to, VIII, 59, 72.
Opinion of witness as to, VIII, 258.
To abutting owners for constructing steam railway, in street, VII, 658–669.
To abutting owners for constructing street-railway in street, VII, 427.
When a question of law, VIII, 43.

For injuries to live stock.
In actions against carriers of cattle, I, 816.
In stock-killing cases, I, 347–349.

For injuries to passengers.
For ejection of passengers, IV, 223–244.
For loss of money, property, etc., VII, 139.
Generally, VII, 508–510.
In actions against carriers of passengers, II, 569–575.

For loss or injury to goods carried.
For conversion of goods by carrier, II, 76, 129.
For delay, II, 71, 72.
For delay by initial carrier, II, 211.
For failure to deliver grain on elevator, II, 122.
For failure to give notice of arrival of goods, II, 101.
For misdelivery of goods, II, 120.
Generally, II, 61, 290.
In actions against carriers of goods, II, 287–305.
Where goods are lost by fire, II, 75.

MEASURE OF DAMAGES — *continued.*
For personal injuries, generally.
For causing death, III, 924–955.
To children, II, 822.
To employés, V, 337, 338.
To persons or property in street, VII, 514.
In condemnation proceedings.
For wrongful interference with property, IV, 878–880.
Generally, IV, 663–686.
In elevated railway cases, IV, 325–341.
Of abutting easements, IV, 288.
To the fee, IV, 331.
Under Canadian Expropriation Acts, IV, 935.
Under English Compulsory Purchase Laws, IV, 916–920.
Where road is built without consent of abutting owner, IV, 328.

MEAT.
Classification of, as freight, VI, 28.

MECHANICAL EQUIVALENTS.
In patent law, VI, 948.

MECHANICS.
As experts, VIII, 288.
Tools of, when may be carried as baggage, I, 540.

MECHANICS' LIENS.
Duration of, VI, 287.
Foreclosure of, VI, 291–295.
Forfeiture of, VI, 228.
Liability of purchaser as respects, VI, 505.
Notice of claim or lien, VI, 288–291.
Statutes relating to, VI, 278, 279.
Waiver of, VI, 288.
What property may be reached, VI, 285–287.
When prior to mortgage, VI, 452, 458.
Who may claim, VI, 279–285.

MEDICAL SERVICES.
General treatment, VI, 391.
Allowance in damages for, II, 819.
Evidence of, under the pleadings, VI, 1030.
Proof of cost of, III, 727.
Questions requiring medical skill, when call for expert testimony, VIII, 263.
To injured employés, lien for, VI, 278.
When recoverable in action for causing death, III, 943.

MEETINGS.
Of arbitrators, in Canadian expropriation proceedings, IV, 943.
Of commissioners to assess damages, time and place of, IV, 599.
Of directors, IV, 56–58.
Of directors and stockholders, to effect consolidation, III, 80.
Of stockholders, VII, 308, 309.

MEMPHIS, TENN.
See STOCKHOLDERS.

MEMBERSHIP.
In relief associations, evidence of, VII, 16.

MEMORANDA.
For refreshing the memory as evidence, V, 507.
In margin of bill of lading, effect of, I, 619.

MEMORANDA — *continued.*
Left by decedent, as evidence, V, 503.
Of agreement, as evidence, V, 392.
Of transactions, when deemed best evidence, V, 458.
Using, to refresh memory, VIII, 225.

MEMORY.
Refreshing, by witness, VIII, 225–227.
Testing accuracy of, on cross-examination, VIII, 220.

MEMPHIS, TENN.
Decisions particularly applicable to, VI, 762.

MEMPHIS & CHARLESTON R. CO.
General treatment, VI, 398.

MENTAL ANGUISH.
Allegation of, in action for causing death, III, 796.
As an element of damages for death of plaintiff's wife, III, 937.
As an element of damages, for injury to children, II, 821.
As an element of damages for injury to passengers, II, 570.
Averments as to, III, 723.
Excessive damages for, II, 585.
Measure of damages for, III, 707, 714; VII, 1032.
Of ejected passenger, damages for, IV, 226.
Of parents, damages for, in action for death of child, III, 941.
Proof of, on question of damages, III, 727.
Prospective damages for, III, 700.
Sufficiency of evidence to prove, II, 543.
When may be considered in assessing damages, II, 301.

MENTAL CONDITION.
Of injured person, opinion of witness as to, VIII, 240.
Of patient, opinion of physician as to, VIII, 286.

MENTAL FACULTIES.
Impairment of, damages for, II, 571.

MERCHANDISE.
Carriage of, II, 13–305.

MERGER.
Of cause of action in judgment, I, 240; VI, 83.
Of easement in fee, IV, 160.
Of mortgage in fee, VI, 519.
Of oral agreement in written contract, II, 156; V, 476.
Of previous negotiations in bill of lading, I, 618.

MESNE PROFITS.
When recoverable in ejectment, IV, 256.

METES AND BOUNDS.
When controling as to quantity of land, IV, 10.

MEXICAN GRANTS.
Exception of land included in, from land grant, VI, 171, 1119.
Priority over, VI, 165.
Reservation in grants to railroads, of lands held under, VI, 159.

MICHIGAN.
Assessment and levy of taxes in, VII, 956.

MICHIGAN — *continued.*
Constitutionality of statutes of, as to municipal aid for railways, VI, 543.
Constitutionality of statutes of, relative to condemnation of land, IV, 389.
Constitutionality of tax laws of, VII, 842.
Constitutional provisions in, relative to condemnation of land, IV, 385.
Doctrine of comparative negligence denied in, III, 51.
Double damages for killing stock in, I, 353.
Duty of traveler at crossing to stop, look, and listen in, III, 562.
Federal grants to, VI, 151.
Grants by, to railroads, VI, 183.
Homesteads in public lands in, VI, 1109.
Laying out streets across railways under statutes of, III, 437.
Liability of carrier as warehouseman in, II, 140, 141.
Liability of company to laborers employed by contractors in, III, 161.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 688.
Operation of statute of, giving right of action for causing death, III, 750.
Plaintiff's pleadings must negative contributory negligence, III, 276.
Rule as to imputed negligence in, V, 1082.
Statute of, as to flagmen at crossings, III, 485.
Statute of, regulating liability for injuries caused by fire, V, 855.
Statute of, relative to intersection of railways, III, 394.
Statutory duty of company in construction of street crossing railway, III, 439.
Statutory duty to fence in, V, 802.
Taxation in aid of railways in, VI, 732.

MICHIGAN CENTRAL R. CO.
General treatment, VI, 399.
Charter liability of, as a connecting carrier, II, 242.

MILEAGE.
Dividing receipts according to, under working agreements, VI, 253.

MILEAGE TICKETS.
See TICKETS AND FARES, VII, 1072, 1073.

MILITARY AND POST ROAD.
When property of, subject to execution, V, 544.

MILITARY CONTROL.
Limitation of liability where a road is under, II, 165.
Of roads, when excuses prompt forwarding of goods, II, 30.

MILITARY LAW.
Claims for goods seized by military forces, III, 8.

MILITARY OFFICER.
Acts justified by command of, VIII, 160.

MILITARY RAILWAYS.
Construction of, VIII, 161.

MILITARY RESERVATIONS.
Decisions relative to, VI, 1118.
Property within, when subject to taxation, VII, 868.

MILITARY STORES.
When may be carried as baggage, I, 538.

MILITARY USE.
Taking of property for, VIII, 159.

MILK.
Charges on, in quantities and in cans, II, 626.

MILLS.
Condemnation of, for railway purposes, IV, 429.
Duty of company to fence adjoining, V, 817.
Evidence of injury to, on assessment of land damages, IV, 648, 702.
Injuries to, in condemnation proceedings, IV, 452.
License to erect, VI, 262.
Reservation in deed of right to repair, IV, 23.
Rights of owners, VIII, 177–179.

MINERALS.
See MINES AND MINING.

MINES AND MINING.
General treatment, VI, 399.
Exception of mineral lands from patents, VI, 1119.
Exception of mineral lands in grants, VI, 159, 165, 169.
Instructions as to minerals, on assessment of damages by jury, IV, 634.
Liability to lessor for interruption of, VI, 232.
Measure of damages for injuries to mines, IV, 677.
Minerals under land condemned, title to, IV, 442.
Power of mining company to condemn lands, IV, 409.
Power to purchase minerals under land condemned, IV, 882.
Right of owner or lessee of, to compensation in England, IV, 907.
What are "minerals," VIII, 317.
When foreman is not fellow-servant of miner, V, 751.

MINNEAPOLIS & C. V. R. CO.
General treatment, VI, 403.

MINNESOTA.
Aid to railways by, VII, 172.
Assessment and levy of taxes in, VII, 956.
Constitutionality of statute of, as to municipal aid for railways, VI, 543.
Constitutionality of statute of, as to removal of causes, VII, 20.
Constitutionality of statute of, relating to charges, II, 621.
Constitutionality of statute of, relative to condemnation of land, IV, 389.
Constitutionality of tax laws of, VII, 842.
Deductions for benefits under condemnation laws of, IV, 716.
Double damages for killing stock in, I, 353.
Federal grants to, VI, 153–155.
Grants by, to railroads, VI, 184.
Grants of swamp lands in, VI, 191.
Homesteads in public lands in, VI, 1109.
Injuries to animals running at large in, I, 225.

MINNESOTA — *continued.*
Local assessment upon steam railways in, for repairs, paving, etc., VII, 688.
Occupation of streets by steam roads under legislative grants of, VII, 560.
Rule as to imputed negligence in, V, 1082.
Statutes of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 717, 718.
Statutes of, relative to intersection of railways, III, 394.
Statutory duty of company in construction of street crossing railway, III, 440.
Statutory duty to fence in, V, 802.
Statutory regulation of grade crossings in, III, 447.
Taking land for streets and laying out roads in, VII, 551.
Taxation of land grants in, VII, 882.
When negligence of parent is imputable to child in, II, 794.

MINORITY.
Of employés, notice or knowledge of, V, 246.

MINUTES.
Of directors' meetings, IV, 57.

MISAPPLICATION.
Of assets as ground for receiver, VI, 1170.
Of capital and profits, suit by one stockholders against others to prevent, VII, 341.

MISAPPROPRIATION.
Of assets by directors, action by stockholders to restrain, VII, 337.
Of indorsed bonds, liability of state for, VII, 162.
Of funds by directors, IV, 73.
Of funds by trustee, liability for, VIII, 120.
Of land, writ of entry for, IV, 829.

MISCELLANEOUS ARTICLES.
When baggage, I, 535, 540.

MISCONDUCT.
Evidence of wilful, II, 535, 541.
Forfeiture of compensation by receiver for, VI, 1222.
Liability of agent to principal for, I, 49, 50.
Of arbitrators, impeachment of award for, I, 464.
Of commissioners, setting aside report for, IV, 742.
Of employés, excepting liability for, I, 629.
Of employés, protection of passengers against, II, 428–431.
Of jurors, as ground for new trial, VI, 841, 842; VIII, 94.
Of officers, no defense against innocent purchasers of bonds, VI, 692.
Of passengers, II, 318.
Of receiver, removal for, VI, 1223.

MISDELIVERY.
Of cattle by carrier, I, 760.
Of goods by carrier, II, 116–121.
Of goods by express company, V, 581.
Of goods by final carrier, liability for, II, 246.
See also DELAY; DELIVERY.

MISDIRECTION.
Of goods, effect of, on liability of express company, V, 576.
Of passengers by employés, II, 403.
See also MARKING.

MISJOINDER.
Of causes of action against elevated railway, IV, 313.
Of causes of action, demurrer for, VI, 1011.
Of causes of action for injuries to animals, I, 251.
Of causes of action for injuries to employés, V, 261.
Of complainants in equity, VI, 930.
Of defendants, VI, 928.
Of husband or wife as parties, V, 1075.

MISMANAGEMENT.
By officers, as ground for receiver, VI, 1171.
Of company's affairs, as a defense to action on subscription, VII, 790.

MISNOMER.
In actions against carriers, II, 277.
Nonsuit in cases of, VIII, 28.
Of corporation, and its effect, VI, 767, 768.
Of parties, in process, VI, 1083.

MISREPRESENTATION.
By transfer agents, effect of, VII, 303.
Impeachment of release for, VII, 10, 12, 13.
See also FRAUDULENT REPRESENTATIONS.

MISSISSIPPI.
Aid to railways by, VII, 172.
Assessment and levy of taxes in, VII, 956.
Civil Rights Acts of, III, 27.
Conditions exempting carrier from liability to person riding on free pass in, VI, 945.
Constitutionality of statutes of, as to municipal aid for railways, VI, 544.
Constitutionality of statutes of, relative to condemnation of land, IV, 389.
Constitutionality of tax laws of, VII, 842.
Deductions for benefits under condemnation laws of, IV, 717.
Injuries to animals running at large in, I, 219.
License taxes in, VII, 1022.
Rule as to imputed negligence in, V, 1082.
Statutes of, regulating liability for injuries caused by fire, V, 855.
Statutes of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 718.
Statutes of, relative to condemning right of way through streets, VII, 585.
Statutory provisions in, relative to abandonment of station, VII, 207.
Taxation in aid of railways in, VI, 733.

MISSOURI.
Aid to railways by, VII, 173.
Assessment and levy of taxes in, VII, 956.
Condition exempting carrier from liability to person riding on free pass in, VI, 945.
Constitutionality of statutes of, as to municipal aid for railways, VI, 544.
Constitutionality of statutes of, granting remedy for causing death, III, 745.
Constitutionality of statutes of, relative to condemnation of land, IV, 389.
Constitutionality of tax laws of, VII, 842.

MISSOURI — *continued.*
Constitutional provisions in, relative to condemnation of land, IV, 385.
Construction of act of, relating to railway commissioners, II, 621.
Construction of statute of, as to limitation of liability between connecting lines, II, 258.
Construction of statutes relating to lotteries, VI, 365.
Construction of statute to prevent getting on or off at front platform, VII, 494.
Deductions for benefits under condemnation laws of, IV, 717.
Doctrine of comparative negligence denied in, III, 52.
Double damages for killing stock in, I, 353, 354.
Double liability of stockholders to creditors in, VII, 317, 318.
Federal grants to, VI, 155–157.
Grants by, to railroads, VI, 185.
Grants of swamp lands in, VI, 192.
Injuries to animals running at large in, I, 220.
Jurisdiction of Supreme Court of, VI, 110.
Liability of company to laborers employed by contractors in, III, 163.
Measure of damages for injury to employé under Damage Act of, V, 338.
Mechanics' lien law of, VI, 278.
Occupation of streets by steam roads under legislative grants of, VII, 560.
Operation of statute of, giving right of action for causing death, III, 751.
Penalties for overcharges in, II, 636.
Plaintiff's pleadings need not negative contributory negligence in, III, 277.
Raising money by lotteries under statutes of, VI, 365.
Review of town-bonding proceedings by mandamus in, VI, 750.
Right of action for killing stock under statutes of, I, 239.
Right to sue in, for causing death in foreign state, III, 788.
Rule as to imputed negligence in, V, 1083.
Statutes of, as to defective crossings, III, 473.
Statutes of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 718.
Statutes of, relating to Texas cattle, VI, 68.
Statutes of, relative to distribution of damages for causing death, III, 762.
Statutes of, relative to drains, IV, 155.
Statutes of, relative to intersection of railways, III, 395.
Statutory duty of company in construction of street crossing railway, III, 440.
Statutory duty to fence in, V, 802.
Statutory provisions in, limiting amount recoverable for causing death, III, 921.
Taxation in aid of railways in, VI, 733.
Taxation of land grants in, VII, 882.
Transportation of diseased cattle in, I, 789.
When negligence of parent is imputable to child in, II, 704.

MISSOURI PACIFIC R. CO.
General treatment, VI, 405.

MISTAKE.
As a defense to action on subscription, VII, 790.
As to title, person paying taxes under, when entitled to land damages, IV, 573.
Correction of, V, 354.
Honest, in effort to perform duty, when contributory negligence, V, 191.
Impeachment of award or verdict for, I, 403.
In engineers' estimates, relief against, III, 150.
In quoting rates, effect of, on rights of carrier, II, 160.
In selling berth a second time, VII, 132.
In ticket, effect of, VII, 1042.
Liability of state in case of, VII, 161.
Mutual, as a defense to specific performance, VII, 157.
Of agent in ejecting passenger, liability of company for, IV, 209.
Of conductor in ejecting passenger, excessive damages for, IV, 244.
Of jury, when must appear to set aside verdict, VI, 852.
Of notary, liability of collector for, V, 568.
Of report of commissioners, IV, 742, 753.
Parol evidence to show, V, 481.
Parol evidence to show, in bill of lading, I, 616.
Persons on wrong train by, when deemed passengers, II, 312.

MISUSE.
Of franchise, as ground of forfeiture, II, 711; IV, 131.
See also ABUSE.

MITIGATION OF DAMAGES.
Evidence in, V, 339.
Evidence in, in action for causing death, III, 883, 884.
For contributory negligence, III, 295, 546, 817; V, 778; VII, 1162.
For ejection of passenger, IV, 236–238.
For flowing lands, V, 1001.
For injuries to children, II, 821.
For injuries to property by fire, V, 966, 967.
In case of colored persons, III, 30.
In condemnation proceedings, IV, 659–663.
In stock-killing cases, I, 351.
To abutting owner by construction of railway in street, VII, 658.
What may be considered in, II, 575.
What may be shown in, III, 732.

MIXED QUESTIONS OF LAW AND FACT.
Assumption of risk by employé, V, 328.
Contributory negligence, when so deemed, III, 289.
Generally, II, 330; VI, 813–815.
In actions for injuries by negligence of fellow-servants, V, 791.
What are, VIII, 49, 50.

MIXED TRAINS.
Carriage of passengers on, II, 427.

MIXING GOODS.
See CONFUSION OF GOODS.

MOBS.
Liability for cars destroyed by, III, 3.
Limitation of liability for goods burned by, I, 633.
Protection of passengers from acts of, II, 435.
See also STRIKES.

MONEY.
Carrying as baggage, I, 538, 557.
Delivery of, by carrier to a bank, II, 107.
Had and received, action for, I, 486.
Implied power to borrow and mortgage property to secure, VI, 408.
Land damages must be paid in, IV, 545.
Liability for loss of unsealed package of, V, 576.
Measure of damages for loss of gold coin, II, 288.
Of passenger, liability for loss of, VII, 135–139.
Paid for carrying the mail, recovery back of, II, 7.
Paid into court for right of way, recovery of, by personal representative, V, 554.
Paid into court in condemnation proceedings, when subject to execution, V, 543.
Payments for stock other than in, VII, 736–739.
Payments in Confederate, VIII, 159.
Payments other than in, VI, 963, 964.
Power of foreign corporation to borrow, V, 1017.
Priority of mortgage over loans of, VI, 458.
Right of company to increase fare after issue of paper currency, VII, 437.
To pay life insurance, failure to carry properly, damages for, II, 304.
When company liable for, as common carrier, II, 15.
When may be reached in attachment, I, 496.

MONOPOLY.
Giving to one competing line, IV, 99.
Illegality of contracts creating, III, 219.
Validity of rule of carrier tending to create, II, 163.

MONTANA.
Assessment and levy of railroad taxes in, VII, 960.
Injuries to animals running at large in, I, 220.
Jurisdiction of District Court in, VI, 118.
Plaintiff's pleadings need not negative contributory negligence in, III, 277.
Statute of, regulating liability for injuries caused by fire, V, 856.
Statute of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 718.

MONTH.
When means thirty days, VIII, 317.

MONUMENTS.
Controlling courses and distances, IV, 11.

MORRIS CANAL AND BANKING CO.
General treatment, VI, 406.

MORTALITY TABLES.
Admissibility and effect of, as evidence, V, 424, 515.
Judicial notice of, V, 440.

MORTALITY TABLES—*continued*.
Use of, in evidence, on question of damages, III, 729.
Use of, in evidence, on question of damages for causing death, III, 881.
See also EXPECTANCY.

MORTGAGEES.
As parties in condemnation proceedings, IV, 497.
Rights of prior, on reorganization, VII, 57.
Taxation of road in possession of, VII, 856.

MORTGAGES.
General treatment, VI, 407.
Power to mortgage property or franchise, VI, 408.
What property may be mortgaged or covered by a mortgage, VI, 411.
Execution; registration; filing VI, 433.
Validity, interpretation, and effect, VI, 436.
The trustees, VI, 459.
Enforcement; foreclosure [illegible]0.
Extinguishment, VI, 518.
Redemption, VI, 520.
Damages to the fee in cases of, IV, 331.
Given on consolidation, right of stockholders to set aside, VII, 330.
Holder of, when entitled to compensation in England, IV, 908.
Leasing mortgaged roads, VI, 236–238.
Of corporate property, authority of president to make, VI, 1068.
Of road, effect of, to transfer contract for carrying the mail, II, 2.
On land condemned, foreclosure of, IV, 438.
On land condemned, redemption or payment of, by company, IV, 439.
Power to give, I, 87; III, 322.
Priority among, VI, 1195.
Property in mortgagee's hands, when subject to execution, V, 543.
Right of mortgagor in possession to sue for loss of, by fire, V, 895, 896.
Right of parties to, to land damages, IV, 568–571.
Right to interest on, V, 1174.
Situs of, for taxation, VII, 887.
Taking notes secured by, in payment, VII, 789.
Transfer of stock, whether pledge or, VII, 289.
When create estoppel, V, 371.
When deeds of trust are deemed to be, IV, 25.
See also DEEDS OF TRUST; MORTGAGE TRUSTEES.

MORTGAGE TRUSTEES.
Accounting by, to boldholders, VI, 465.
Actions by, for instruction of court, VI, 466.
Authority of, to lease, VI, 236.
In possession of road, liability of, II, 217.
Insurable interest of, V, 845.
Liability of, for killing stock, I, 372.
Liability of, in cases of insolvency, V, 1167.
Liability of, to passengers, II, 521.
Powers, duties, and liabilities of, VI, 461–470.

MORTGAGE TRUSTEES — *continued.*
Right of, to foreclose, VI, 475.
Under railway mortgages, VI, 459–466.
When liable as garnishees, I, 493.
See also MORTGAGES; DEEDS OF TRUST; TRUSTS AND TRUSTEES.
MORTIFICATION.
Of feelings, damages for, III, 700.
MOTHER.
See PARENT AND CHILD.
MOTION.
For change of venue, VIII, 8, 9.
For continuance, VIII, 9–11.
For new trial, VI, 875–877.
For new trial, necessity of, I, 419.
For new trial, necessity of, in eminent domain, IV, 791.
Necessity of, to direct verdict, I, 419.
To dismiss, VIII, 37.
To make pleading more definite and specific, VI, 1055–1058.
To remand cause after removal, VII, 44, 45.
To set aside foreclosure sales, VI, 514–516.
To set aside verdict, IV, 752, 753.
MOTIVE POWER.
Consent of abutting owners to change of, VII, 393.
Consent of city to change of, IV, 260.
On horse railroad, VII, 369.
On street railways, regulation of, by statute, VII, 437.
On street railways, under municipal grants, VII, 359.
Ordinances regulating, VII, 440.
Powers of commissioners as to, VI, 1156.
Right to use electricity as, IV, 259.
What to be used on street railway, VII, 380.
MOTORMAN.
Duty of, to slow up at crossings, IV, 272.
Injury to child invited to ride by, IV, 269.
MOVING CARS.
Attempts to cross in front of, III, 265.
Competency of evidence as to boarding and leaving, V, 399.
Contributory negligence in boarding or alighting from, II, 453–458, 467–488; V, 217–219, 335.
Contributory negligence in getting off street cars, VII, 490–493.
Contributory negligence in getting on street cars, VII, 487–490.
Contributory negligence of child getting on or off, II, 775, 780.
Disobedience of rule prohibiting going between, V, 231.
Effect of, on duty to look and listen, III, 611.
Expulsion of passenger from, IV, 200.
Expulsion from, exemplary damages for, IV, 234.
Expulsion of trespassers from, VII, 1150.
Injuries to employés while coupling, V, 123.
Injury to passenger getting on, IV, 358.
MULTIFARIOUSNESS.
In bill in equity, VI, 1019, 1020.
In foreclosure bill, VI, 485.
MULTIPLICITY.
Of suits as ground for injunction, VII, 1008.
MUNICIPAL AID BONDS.
See BONDS.
MUNICIPAL AND LOCAL AID.
General treatment, VI, 523.
Interpretation of constitutional provisions, VI, 524.
Powers of the legislature, VI, 526.
Constitutionality of statutes, VI, 536.
Construction of statutes, VI, 554.
The power to subscribe, VI, 562.
Petition and consent of taxpayers, VI, 565.
Election, VI, 576.
Validity and effect of the subscription, VI, 610.
What roads may be aided, VI, 621.
Conditional subscriptions, VI, 628.
Donations; bonuses, VI, 643.
Bonds, VI, 655.
Taxation, VI, 714.
Review, VI, 743.
Does not justify unjust discrimination, VI, 21.
Effect of consolidation upon subscriptions in, III, 93.
Enforcement of bonds by mandamus, VI, 380.
Mortgages of municipal-aid bonds, VI, 415.
Subrogation of purchaser of bonds, VII, 725.
Suit to compel application of tax to payment of bonds, when barred by lapse of time, VI, 317.
MUNICIPAL CONSENT.
See CONSENT.
MUNICIPAL CORPORATIONS.
General treatment, VI, 752.
In general, VI, 752.
Particular municipalities, VI, 758.
Appointement of directors by, IV, 51.
Construction of statutes limiting indebtedness of, VI, 556.
Effect of division of, in railway aid cases, VI, 617.
Estoppels against, V, 362.
Joint construction of railroad by state and, V, 1050.
Judicial notice of existence and location of, V, 436.
Liability of, for debts of company aided, VI, 619.
License tax for privilege of doing business in, VI, 65.
Mandamus to municipal officers, VI, 382.
Occupation of street by steam roads under grants of, VII, 565–581.
Power of legislature to compel subscriptions by, to railway stock, VI, 531.
Power of, to grant franchise to private railroads, VI, 1075.
Power of, to issue bonds in aid of railways, VI, 655–661.
Power to pass ordinances regulating use of streets, VII, 672–676.
Ratification of irregular railway-aid bonds by, VI, 685.

MUNICIPAL CORPORATIONS — *con.*
Regulation of hacks at stations by, V, 1062.
Regulation of speed by, VI, 786–788.
Regulation of steam roads in streets by, VII, 669–693.
Right of, to impose conditions on subscription in aid, VI, 629.
Right of, to select company to be aided, VI, 627.
See also CITIES; TOWNS; VILLAGES.

MUNICIPAL GRANTS.
Right to construct and operate street railway under, VII, 358–374.

MURDER.
Prosecutions for, III, 371.

MUSEUM COLLECTION.
Measure of damages for loss or injury to, II, 300.

MUTUAL CARE.
To be observed by trainmen and persons on crossing, III, 505, 539, 569.

MUTUALITY.
Of contracts, generally, III, 195.
Of contract to be specifically enforced, VII, 145.
Of matters sought to be offset, VII, 115.

MUTUAL NEGLIGENCE.
Rule as to, III, 246.

MUTUAL RIGHTS.
Of company and public in street, VII, 512, 696.

NAMES.
Of beneficiary, alleging in complaint, III, 793.
Of party in process, VI, 1083.
Of passenger, failure to sign on ticket, IV, 184.
Removal of, from list of shareholders, VII, 304.
Right of receiver to sue in his own, VI, 1208.

NAME OF RAILROAD.
General treatment, VI, 766.
After consolidation, III, 86.
Change in, when releases subscriber to stock, VII, 775.
Of road aided, effect of change of, VI, 622.

NATURAL FLOW.
Of streams, VII, 84.

NAVIGABLE WATERS.
Bridges over, I, 709–720; VIII, 169.
Crossing over under charter provisions, II, 705.
Crossing rivers in constructing road, III, 114.
Diversion of, VIII, 170.
Locks and dams across, VIII, 170.
Loss of access to, as measure of damages, IV, 936.
Obstructing, VIII, 170.
Obstructing, as an element of land damages, IV, 704.
Rights of fishery in, VIII, 170.
Title to bed of navigable stream, VII, 84.
What are, VIII, 169.
What constitutes a taking of, IV, 449.
See also NAVIGATION.

NAVIGATION.
Action for damages for obstruction of, IV, 834.
Liability for obstructing, in construction of roads, III, 114.
Obstruction of, by bridges, I, 716–720.
Obstruction to, when deemed a nuisance, VI, 892.
Prosecutions for obstructing, III, 378.
Remedies for obstruction of, VII, 88.
Validity of state laws regulating, III, 34, 35.
See also NAVIGABLE WATERS.

NEBRASKA.
Assessment and levy of taxes in, VII, 960.
Constitutionality of statutes of, as to municipal aid for railways, VI, 546.
Constitutionality of tax laws of, VII, 844.
Constitutional provisions in, relative to condemnation of land, IV, 386.
Deductions for benefits under condemnation laws of, IV, 718.
Duty to locate station under statutes of, VII, 198.
Grants by, to railroads, VI, 185.
Jurisdiction of District Court in, VI, 118.
Mechanics' lien law of, VI, 278.
Right of initial carrier to make through contract under statute of, II, 515.
Status of Missouri Pacific R. Co. in, VI, 405.
Statutes of, relative to distribution of damages for causing death, III, 762.
Statutes of, relative to intersection of railways, III, 395.
Statutory duty of company in construction of street crossing railway, III, 440.
Statutory duty to fence in, V, 802.
Statutory regulation of grade crossings in, III, 447.
Taxation in aid of railways in, VI, 735.
Taxation of land grants in, VII, 882.

NECESSITY.
Condemnation of railway property must be founded on, IV, 422, 423.
For condemnation of franchises, IV, 418.
For condemning right of way in street, VII, 584.
For corroboration of witnesses, VIII, 209.
For taking land, alleging in petition, IV, 521.
For taking land, burden of proof to show, IV, 538.
For taking land, how denied, IV, 532.
For taking land, sufficiency of report of commissioners as to, IV, 737.
For taking land, sufficiency of verdict as to, IV, 748.
For taking land under English statutes, IV, 881.
For taking land, whether jury may consider, in assessing damages, IV, 619.
Meaning of "necessary" as applied to taking land, VIII, 317.
Of assessment or call on stock, VII, 746, 747.
Of bond or undertaking on appeal, IV, 805.
Of condemnation proceedings to acquire right to use streets, VII, 581, 582, 584.

NECESSITY — *continued.*
Of describing property sought to be condemned, IV, 515.
Of effort to agree with landowner, IV, 499–501.
Of exercise of right of eminent domain, IV, 383, 399.
Of instructions to jury on assessment of land damages, IV, 630.
Of making or securing compensation for lands condemned, IV, 540–560.
Of motion for new trial in court below, IV, 791.
Of municipal consent to occupation of street by steam roads, VII, 565–568.
Of notice of appeal in condemnation proceedings, IV, 804.
Of objections on trial, VIII, 19.
Of payment of land damages, or giving bond therefor, IV, 554.
Of payment of land damages to owner, or into court, IV, 551.
Of payment or tender for land condemned, IV, 546, 547.
Of payment, to passing of title for lands condemned, IV, 760.
Of pleading in condemnation proceedings, IV, 512, 533, 534.
Of plea or answer in condemnation proceedings, IV, 533, 534.
Of prayer for instructions, IV, 791; VI, 833; VIII, 73.
Receivers' certificates should be issued only in cases of, VI, 1201.
Ways of, VI, 1078.

NEGATIVE EVIDENCE.
See POSITIVE AND NEGATIVE EVIDENCE.

NEGLIGENCE.
General treatment, VI, 769.
What constitutes, VI, 772.
Questions of law and fact, VI, 799.
Actions for negligence, VI, 815.
In general.
As defense to action on insurance policy, I, 15–17.
Burden of proof as to, VI, 348.
Burden on plaintiff to show, VII, 700.
Comparative, III, 37–52.
Contributory, III, 243–315.
Definition of, VIII, 317.
Evidence under pleadings in actions for, VI, 1026–1030.
Exemplary damages in cases of, III, 684, 685.
Imputed, V, 1079–1088.
Injuries caused at station by, VII, 208–236.
Injuries caused by, in streets and highways, liability for, VII, 693–706.
Injuries caused by, liability of tramways for, VII, 1103.
In making flying switch, V, 1006–1010.
In starting train, competency of evidence of, V, 413.
Instructions on questions of, VIII, 54–58, 68–72.
Liability of electric railway for injuries caused by, IV, 266–272.
Liability of mine owner for personal injuries caused by, VI, 402.
Liability of receiver for, VI, 1191.

NEGLIGENCE — *continued.*
In general — *continued.*
Liability of street-car company for injuries caused by, VII, 455–539.
Meaning of "without any negligence," VIII, 331.
Of auxiliary companies, who liable for, I, 521.
Of companies not causing collisions, III, 12–14.
Of company, sufficiency of evidence to show, VII, 505.
Of contractors, liability of company for, III, 118.
Of defendant must be affirmatively proved, III, 724.
Of independent contractor or his servants, liability for, V, 1106.
Of original companies, liability of consolidated company for, III, 105.
Presumption of, when accident and injury are shown, V, 443.
Proof of, in actions for injuries caused by collision, III, 16.
Prosecution for criminal, III, 362.
Rebutting presumption of, IV, 41.
"Slight" and "gross" as applied in comparative negligence, III, 39.
Statement of cause of action in actions for, VI, 993–997.
Stipulations against liability for, VI, 341–348.
To persons or property along track, IV, 48.
Variance between pleading and proof in actions for, VI, 1038–1043.
When a mixed question of law and fact, VIII, 50.
When a question of fact, VIII, 44.
When presumed in cases of collision between street-cars, III, 21.
See also FLYING SWITCH.
In carriage of passengers or baggage.
As regards duty of carrier to passenger, VII, 463–480.
Burden of proof to show, II, 550.
How alleged, II, 525, 527–529.
In expelling passenger from train, how pleaded, IV, 216.
Injuries to passengers on cable cars, caused by, I, 729–731.
Limitation of liability for, II, 437.
Limiting liability for, as respects baggage, I, 564.
Of car company, liability of railroad company for, VII, 139.
Of carrier of passenger, II, 349–440.
Of employés, injuries to passengers caused by, VII, 133.
Of third persons, liability of carrier for, II, 353.
Sufficiency of evidence to show, II, 540, 541.
What amounts to, as to passengers, II, 349.
In causing death.
Burden on defendant to show absence of, III, 855.
Facts constituting, must be set out in complaint, III, 798–800.
Instructions as to the different degrees of, III, 895.

NEGLIGENCE — *continued.*
In causing death — *continued.*
Of defendant, burden on plaintiff to show, III, 851, 854.
Of defendant, presumption of, III, 851.
Of defendant, when question for jury, III, 885–887.
Of fellow-servants, as defense to action for causing death, III, 811.
Sufficiency of proof of, III, 859, 874.
When general charge of, is sufficient, III, 799.
In injuries at crossings.
Failure to give signals is, III, 510–514.
How pleaded, III, 640, 641.
Of company, as to speed near crossings, III, 536.
Of company does not excuse contributory negligence of person injured, III, 631.
Of company, duty to look and listen as affected by, III, 585.
Of company, evidence to show, III, 644–648.
Of watchmen at crossings, liability for, III, 492.
Per se in giving signals, what is, III, 512, 573, 626.
Prima facie in giving signals, what is, III, 513.
In injuries by fire.
Burden of proof on defendant to overcome *prima facie* case of, V, 940–942.
In setting fire, weight of evidence to show, V, 921–930.
Liability of company for, V, 857–883.
Of another company as a defense, V, 907.
Of carrier causing loss by fire, I, 634.
Of company, admissibility of evidence to show, V, 909, 910.
Of company, allegation of, V, 902–906.
Of company, burden on plaintiff to show, V, 938–940.
Of company, evidence to disprove, V, 913.
Of company, instructions relative to, V, 943–947.
Of company, whether a question of law or fact, V, 950–957.
Presumptive evidence of, V, 931–935.
What constitutes, as to fires, V, 861.
When loss raises a presumption of, II, 72.
In injuries to animals.
Absolute liability without proof of, I, 156.
Limitation of liability for, I, 761, 766–770.
Necessity of proof of, in stock-killing cases, I, 97, 98.
Of carrier of cattle, presumption of, I, 811.
Of carrier of live stock, I, 754, 755.
Of company, sufficiency of evidence of, I, 289–301.
Of defendant, how alleged, I, 253–255.
Presumption of, I, 138, 303.
Presumption of, arising from mere proof of killing stock, I, 303.
NEGLIGENCE — *continued.*
In injuries to animals — *continued.*
Presumption of, from time of existence of defect in fence, V, 828.
Presumption of, what will rebut, I, 309–311.
Presumption of, when rebutted, I, 329.
Prima facie proof of, I, 304–309.
Proof of, by circumstantial evidence, I, 292.
When a question for the jury, I, 321–326, 801.
When a question of law, I, 321.
In injuries to children.
In street, liability for, II, 758–760.
Of company, in management of turntables, evidence of, II, 747.
Of street-railway companies, II, 752–764.
In injuries to employes.
Allowing obstruction near track, V, 315, 316.
Burden on plaintiff to show, V, 283, 284.
By collisions, III, 21–25.
Failure to adopt rules, when deemed to be, V, 29, 30.
Failure to block frogs, V, 56, 315.
Failure to furnish safe machinery, etc., V, 316–320.
Failure to instruct employé, V, 312.
Failure to promulgate rules, V, 310.
Failure to provide safe working place, V, 313–315.
In management of engines and cars, V, 320–322.
Liability to employé for, V, 22–27.
Limitation of liability for, V, 125, 126.
Of company, allegation of, V, 264–271.
Of company, contributory negligence where peril is occasioned by, V, 201, 202.
Of company, evidence to show, V, 276–278.
Of company, evidence to show sufficiency of, V, 287–294.
Of company, questions as to, when for the jury, V, 309–324.
Of company towards employés, as the proximate cause of injury, V, 24–26.
Of company, when a question of fact, V, 209, 310.
Of company, when presumed in actions for injury to employé, V, 298, 299.
Of employés, liability of mortgage trustees for, VI, 466.
Use of defective track, when not deemed to be, V, 48.
In injuries to or loss of goods shipped.
Averment of, in actions against carriers, II, 275.
Burden of proof to disprove, when on carrier, II, 73.
Burden of proof when on plaintiff to prove, II, 73.
In unloading, liability of consignee for, II, 104.
Liability of warehousemen for, II, 133.
Limitation of liability for, I, 625–631; II, 174–184.
Of carrier, duty of plaintiff to show, II, 179.

NEGLIGENCE — *continued.*
In injuries to or loss of goods shipped — *continued.*
Of carriers' agents, liability for, II, 42.
Of carrier, sufficiency of evidence to show, II, 287.
Of connecting carrier, right to limit liability for, II, 258.
Of initial carrier, when presumed, II, 212.
Of railway company, liability of express company for, V, 576.
Of warehousemen, when for the jury, II, 140.
Power to limit liability for, V, 588.
Presumption of, in cases of limited liability, II, 176, 177.
Presumption of, on proof of loss, II, 78, 80.
Sufficiency of evidence, to render carrier liable, II, 59.
Sufficiency of evidence to show loss by, II, 144.
When question for jury, II, 83.
In injuries to trespassers.
Company liable for only after discovery, VII, 1137.
What amounts to, VII, 1131.
Of agents or servants.
Liability of agent to principal for, I, 49.
Of agents, liability of principal for, I, 69, 70.
Of lessee, liability of lessor for, VI, 219, 243.
Of managers of government railroads, when binds the government, V, 1051.
Of public agents, liabilities of, I, 153.
Of receiver's servants, liability of company for, VI, 1227–1229.
Of servants, compensatory damages for, III, 680.
Of servants, liability of company for, VII, 455.
Of station agents, liability of company for, VII, 189.
Of superintendent, when binds company, VII, 824.
Of union depot company, liability of railroad company for, VIII, 137.
Of fellow-servants.
Generally, V, 181–184.
Negativing in complaint, V, 272.
Of company in employment of servants, burden on plaintiff to show, V, 784.
Of company in retaining incompetent servant, burden of proof to show, V, 785.
Of company, in selecting fellow-servants, V, 694–707, 783.
Of company in selecting incompetent servants, V, 789.
Of company, in selecting servants, allegation of, V, 775.
Of company, whether question of law or fact, V, 789.
Of vice-principal, allegation of, V, 775.
Of vice-principal, liability of company for, V, 671–683.
Rule of non-liability for, V, 645–671.
When must be negatived in complaint, III, 280.

NEGLIGENCE — *continued.*
Of fellow-servants — *continued.*
Whether sole cause of injury, a question of fact, V, 792.

NEGOTIABILITY.
Of bills of lading, I, 643–645.
Of commercial paper, I, 586, 587.
Of corporate bonds, I, 659–661.
Of coupons, III, 334.
Of railway-aid bonds, VI, 688–690.
Of receivers' certificates, VI, 1204.
Of stock certificates, VII, 288.

NEGOTIABLE PAPER.
Made or received by agents, I, 61.
Tickets distinguished from, VII, 1040.
See also NOTES, BILLS AND CHECKS.

NERVOUS SHOCK.
Damages for, III, 677.

NET EARNINGS.
See EARNINGS.

NEVADA.
Assessment and levy of taxes in, VII, 962.
Constitutionality of statutes of, as to municipal aid for railways, VI, 546.
Deductions for benefits under condemnation laws of, IV, 718.
Operation of statute of, giving right of action for causing death, III, 752.
Taxation in aid of railways in, VI, 735.
Taxation of land grants in, VII, 883.

NEW ALBANY, IND.
Decisions particularly applicable to, VI, 762.

NEW BRUNSWICK.
Assessment and levy of railroad taxes in, VII, 983.

NEW HAMPSHIRE.
Assessment and levy of railroad taxes in, VII, 964.
Constitutionality of statutes of, as to municipal aid for railways, VI, 546.
Constitutionality of statutes of, relative to condemnation of land, IV, 389.
Constitutionality of tax laws of, VII, 844.
Constitutional provisions in, relative to condemnation of land, IV, 386.
Crossing of streets and highways under statutes of, III, 423.
Deductions for benefits under condemnation laws of, IV, 718.
Occupation of streets by steam roads under legislative grants of, VII, 561.
Plaintiff's pleadings need not negative contributory negligence in, III, 277.
Posting and publishing rates under statutes of, II, 643.
Rule as to imputed negligence in, V, 1083.
Statute of, regulating liability for injuries caused by fire, V, 856.
Statutory duty to fence in, V, 802.
Statutory provisions in, limiting amount recoverable for causing death, III, 923.
Taking land for streets and laying out roads in, VII, 552.

NEW IMPROVEMENTS.
See IMPROVEMENTS; INVENTIONS.

NEW JERSEY.
Assessment and levy of taxes in, VII, 964.
Conditions exempting carrier from liability to person riding on pass in, VI, 944.
Constitutionality of statutes of, relative to condemnation of land, IV, 390.
Constitutionality of tax laws of, VII, 844.
Crossing of streets and highways under statutes of, III, 423.
Deduction for benefits under condemnation laws of, IV, 718.
Doctrine of comparative negligence denied in, III, 52.
Duty to give signals near crossing, under statute of, III, 509.
Grants by, to railroads, VI, 185.
Injuries to animals running at large in, I, 225.
Jurisdiction of chancery court of, VI, 117.
Laying out streets across railways under statutes of, III, 437.
Local assessments upon steam railways in, for repairs, paving, etc., VII, 688.
Occupation of streets by steam roads under legislative grants by, VII, 561.
Rule as to imputed negligence in, V, 1083.
Statutes of, relative to connecting lines, III, 65.
Statutes of, relative to distribution of damages for causing death, III, 762.
Statutory regulation of grade crossings in, 447.
Taking land for streets and laying out roads in, VII, 552.

NEW LOCATION.
See LOCATION OF ROUTE.

NEWLY-DISCOVERED EVIDENCE.
As ground for new trial, VI, 872–874.

NEW MATTER.
How pleaded, I, 270.

NEW MEXICO.
Assessment and levy of taxes in, VII, 967.
Operation of statute of, giving right of action for causing death, III, 752.

NEW ORLEANS, LA.
Decisions particularly applicable to, VI, 762.
Joint use of street car tracks in, VII, 433.
Power of city to grant exclusive privileges to railroad company, VII, 370.
Power of city to grant use of streets for railway, VII, 359.

NEW PARTIES.
Bringing in, generally, VI, 929, 933.
Bringing in, in condemnation proceedings, IV, 496.

NEW PROMISE.
When prevents running of statute of limitations, VI, 330.

NEW ROCHELLE, N. Y.
Decisions particularly applicable to, VI, 763.

NEW SERVITUDE.
See ADDITIONAL BURDEN OR SERVITUDE.

NEWSPAPERS.
Publishing notice of arrival of goods in, II, 100.

NEW TRIAL.
General treatment, VI, 836.
Grounds, VI, 836.
The application, and how disposed of, VI, 875.
Appeal from orders granting or denying, I, 382, 383.
For inconsistency between general verdict and special findings, VIII, 107.
In ejectment, IV, 255.
Necessity of motion for, I, 419; IV, 791.
Ordering on appeal, I, 447.
Remanding cause for, I, 368; II, 609.

NEW YORK.
Aid to railways by the state, VII, 175.
Assessment and levy of railroad taxes in, VII, 968.
Conditions exempting carrier from liability to person riding on pass in, VI, 944.
Constitutionality of Act of 1860, VII, 377.
Constitutionality of statutes of, as to municipal aid for railways, VI, 546.
Constitutionality of statutes of, relative to condemnation of land, IV, 390.
Constitutionality of tax laws of, VII, 845.
Construction of constitution and laws as to street railways, VII, 355.
Crossing of streets and highways under statutes of, III, 423.
Deductions for benefits under condemnation laws of, IV, 718.
Duty to locate station under statutes of, VII, 198.
Examination of parties before trial in, IV, 80.
Grade crossings under statutes of, III, 412.
Grants by, to railroads, VI, 186.
Injuries to animals running at large in, I, 225.
Laying out streets across railways under statutes of, III, 437.
Liability of company to laborers employed by contractors in, III, 164.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 688.
Occupation of streets by steam roads under legislative grants of, VII, 562.
Operation of statute of, giving right of action for causing death, III, 752.
Plaintiff's pleadings need not negative contributory negligence in, III, 277.
Review of town-bonding proceedings by mandamus in, VI, 751.
Right to sue in, for causing death in foreign state, III, 789.
Rule in, allowing liability for negligence to be limited, I, 767, 768; II, 180, 181; V, 588; VI, 346.
Rule in, as to imputed negligence, V, 1083.
Rule in, as to measure of damages for causing death, III, 931.
Rule in, as to preliminary payments for stock, VII, 781.
Statutes of, against riding on platform, VII, 499.
Statutes of, as to stoves and furnaces in cars, II, 378.
Statutes of, regarding flagmen at crossings, III, 490.

NEW YORK — *continued.*
Statutes of, relative to condemning right of way through streets, VII, 585.
Statutes of, relative to connecting lines, III, 65.
Statutes of, relative to distribution of damages for causing death, III, 762.
Statutes of, relative to intersection of railways, III, 395.
Statutory duty to fence in, V, 802.
Statutory provisions in, limiting amount recoverable for causing death, III, 923.
Statutory provisions in, relative to abandonment of stations, VII, 207.
Statutory regulation of grade crossings in, III, 447.
Taking land for streets and laying out roads in, VII, 552.
Taxation in aid of railways in, VI, 735.
When negligence of parent is imputable to child in, II, 794.

NEW YORK CITY.
Consent of, to use of steam power in streets, VII, 567.
Decisions particularly applicable to, VI, 763.
Fee to streets of, IV, 296–298, 300.
Power of, to assess street railways for local improvements, VII, 452.
Power of, to grant exclusive privileges to railroad company, VII, 371.
Power of, to grant use of streets for railway, VII, 360, 361.
See also ELEVATED RAILWAYS; MUNICIPAL CORPORATIONS.

NEXT OF KIN.
Pleading damage to, III, 796.
Right of, to sue for damages for causing death, III, 760.

"NIGHT HOSTLER."
Meaning of, as applied to persons having charge of engines, VIII, 318.

NIGHT WATCHMEN.
As fellow-servants of foreman, V, 750.
Liability of company for false imprisonment by, V, 609.

NIL DEBET.
Plea of, in action on stock subscription, VII, 763.

NITRO-GLYCERINE.
See EXPLOSIONS.

NOISE.
As an element of damages, IV, 330; VII, 664.
As an element of land damages, IV, 728.
Caused by steam railway in street, damages for, VII, 652.
Consequential damages for, IV, 337.
Duty to look and listen as affected by, III, 594.
Evidence of damages by, VII, 657.
Evidence of damages by, in eminent domain proceedings, IV, 648.
Measure of damages for, IV, 919.
When deemed a nuisance, VI, 887.

NOLLE PROSEQUI.
Entry of, in criminal prosecutions for causing death, III, 958.

NOMINAL DAMAGES.
For delay of carrier, II, 298.
For refusing to carry, III, 30.
Generally, III, 677.
In actions against carriers of goods, II, 290, 299.
In actions against carriers of passengers, II, 568.
In actions for causing death, III, 946, 947.
In actions for ejection of passengers, IV, 225.
In actions for flowing lands, V, 1000.
In actions for injuries at station, VII, 236.
In actions for injuries caused by fire, V, 960.
In actions for injuries to children, II, 821.
In elevated railway cases, IV, 328.
To abutters, VII, 669.

NON-DELIVERY.
Of goods by carrier, liability for, II, 121–125.
Of telegram, liability for, VII, 1031–1033.

NON EST FACTUM.
Plea of, VI, 1004.

NON-JOINDER.
Of defendants, VI, 929.
Of husband or wife as parties, V, 1075.
Of parties, effect of, IV, 495.

NON-NEGOTIABLE.
How far bills of lading are, I, 645.
See also NEGOTIABLE PAPERS.

NON-PAYMENT.
Of damages, injunction for, IV, 855.
Of subscription, forfeiture for, VII, 797–800.
Of taxes, sale of lands for, VII, 996, 997, 1020.

NON-PERFORMANCE.
By company, as a defense to action on subscription, VII, 787.
Forfeiture of construction contract for, V, 1051.

NON-PREJUDICIAL ERRORS.
Disregarding, in pleadings, VI, 1060.
Disregarding, on appeal, I, 397–399; IV, 786–789.
See also HARMLESS ERRORS.

NON-PREJUDICIAL EVIDENCE.
Disregarding, on appeal, IV, 787.
See also HARMLESS ERRORS.

NON-PREJUDICIAL INSTRUCTIONS.
Disregarding, on appeal, IV, 789.
In actions for causing death, III, 894.
In actions for injuries by fire, V, 944.
On assessment of land damages, IV, 636.
See also HARMLESS ERRORS.

NON-RESIDENCE.
Of defendant, as ground of abatement, I, 11.
Of mortgage trustee, vacates office, VI, 461.
Of officers and directors, as ground of forfeiture of franchise, II, 711.
Right of non-residents to sue for causing death, III, 760.
Right of non-residents to sue foreign corporations, V, 1020.
When non-resident may sue or be sued in attachment, I, 490, 491.

NON-RESIDENCE — *continued.*
When property of non-residents exempt from taxation, VII, 917.
NONSUIT.
Compulsory, generally, VIII, 23–36.
Compulsory, on ground of contributory negligence, III, 292, 553.
Conclusiveness of judgment of, VI, 98.
Effect of, VIII, 35.
Effect of moving for, VIII, 35.
On trial of stock-killing cases, I, 320.
When granted in action for injury at crossing, III, 648.
When proper generally, VIII, 23–36.
When properly ordered in action for injury to passenger, VII, 505.
When should be ordered, VIII, 23–28.
When should be refused, VIII, 28–35.
NON-TRANSFERABLE TICKETS.
Rights of persons holding, VII, 1060.
NON-USER.
As evidence of abandonment of road or street, IV, 821.
As evidence of discontinuance, VII, 555.
Extinguishment of easement by, IV, 160.
Of franchise, as ground for forfeiture, II, 711; IV, 131.
NORTH CAROLINA.
Aid to railways by, VII, 175.
Assessment and levy of railroad taxes in, VII, 976.
Constitutionality of statutes of, as to municipal aid for railways, VI, 547.
Constitutionality of tax laws of, VII, 845.
Constitutional provisions in, relative to condemnation of land, IV, 386.
Deductions for benefits under condemnation laws of, IV, 719.
Injuries to animals running at large in, I, 220, 226.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 689.
Mechanics' lien law of, VI, 278.
Plaintiff's pleadings need not negative contributory negligence in, III, 277.
Statutes of, imposing penalty for failure to forward goods promptly, II, 30.
Statutes of, relative to connecting lines, III, 65.
Statutes of, relative to distribution of damages for causing death, III, 762.
Taxation in aid of railways in, VI, 741.
NORTH DAKOTA.
Constitutionality of tax laws of, VII, 846.
Contributory negligence need not be negatived in, V, 907.
NORTHERN PACIFIC R. CO.
General treatment, VI, 880.
Federal grants to, VI, 167–171.
How far subject to Interstate Commerce Act, VI, 9.
NOTARIES.
Liability for mistakes of, V, 568.
NOTES.
See BILLS, NOTES, AND CHECKS.
NOTICE.
In general.
Before suit for damages caused by fire, V, 894.
NOTICE — *continued.*
In general — *continued.*
Before suit for damages on ground of nuisance, VI, 899.
Before suit generally, I, 25.
Competency of evidence of, V, 418.
Constructive, of consolidation, III, 99.
Duty to repair after, VII, 408.
Effect of record of deed as, IV, 6.
Evidence of declarations showing, V, 498.
Land grants as, VI, 134.
Of accident, penalty for failure to give, VI, 966.
Of accident, to insurance company, I, 14.
Of amendment, to adverse parties, VI, 1053.
Of appeal, I, 439.
Of appeal from justice's court, VI, 124.
Of application for change of route, VI, 362.
Of application for receiver, VI, 492, 1173.
Of defects in bridge, I, 699.
Of directors' meetings, IV, 56.
Of election of directors, IV, 52.
Of foreclosure, VI, 482.
Of infirmity in corporate bonds, I, 675.
Of intention to alter charter, II, 685.
Of intention to work mines, VI, 400.
Of location of route, VI, 356.
Of loss by fire, V, 864.
Of obstruction of private ways, VI, 1081.
Possession as constructive, IV, 6.
To agent, when notice to principal, I, 52, 53.
To debtor, of assignment, I, 480.
To directors, when imputable to corporation, IV, 64.
To garnishee, of assignment of debt, I, 506.
To mortgage trustee, effect of, VI, 466.
To one partner, when binds firm, VI, 937.
To perform contract, III, 221.
To persons sought to be bound by a custom, III, 666.
To principal debtor, of attachment, I, 503.
To produce best evidence, V, 457.
To quit, service of, in ejectment suits, IV, 252.
To railway company, to defend action against city or town, VII, 705.
When does not apply to service of process, VIII, 318.
As affecting employes.
Failure to act on, when contributory negligence, V, 191.
Of danger, VIII, 318.
Of danger, when creates assumption of risk, V, 324.
Of defective coupling apparatus, effect of, V, 223, 224.
Of defects, allegation of want of, V, 273.
Of defects, contributory negligence in remaining in service after, when question for jury, V, 336–337.
Of defects in machinery, duty to repair after, V, 107, 108.
Of defects in machinery, effect of, V, 102.

NOTICE — *continued.*
As affecting employes — *continued.*
Of defects or danger, assumption of risk after, V, 151–164, 324.
Of defects or danger, instructions as to, V, 307.
Of employé's minority, V, 246.
Of hazard, as a defense to action for injury to employé, V, 275.
Of time, place, and cause of injury, allegation that plaintiff gave, V, 264.
Of time, place, and cause of injury to employé, V, 260, 264.
Rules must be brought to notice of employé, V, 234.
To company, of defective appliance, duty of employé to give, V, 100, 101.
To company, of defects, allegation of, V, 270–272.
To conductor, by employé, of collision, III, 23.
To employé, of rules of company, V, 33.
To employé, when notice to company, V, 101.
What constitutes, as to defects in machinery, V, 101.
As affecting fellow-servants.
To company, of incompetency of co-employé, V, 271.
To company, of incompetency of servant, V, 704–705.
To servant, of incompetency of fellow-servant, duty to quit service after, V, 706.
To vice-principal is notice to company, V, 675.
To vice-principal not notice to subordinate servant, V, 676.
As affecting rights in streets and highways.
At railway crossings, VIII, 123.
Before granting right to lay railroad tracks in streets, VII, 361.
Of consent of city to use of street, VII, 389.
Of construction of street crossing, service of, on station agent, III, 441.
Of necessity for highway crossings, III, 426.
To company, of defective restoration of highway, VII, 623.
To town, of intention to make grade crossing, III, 454.
As affecting stock and stockholders.
Of allotment of stock, necessity of, VII, 732.
Of assessment on subscriptions to stock, VII, 753–755.
Of election on question of aiding railway, VI, 583–586.
Of equities or fraud, effect of, on rights of *bona fide* purchaser of bonds, VI, 695.
Of equities, purchasing stock with, VII, 300.
Of increase of stock, to stockholders, VII, 282.
Of payment of dividends, IV, 144.
Of sale of stock for failure to pay assessment, VII, 799.
Of stockholders' meeting, VII, 308.

NOTICE — *continued.*
As affecting stock and stockholders — *continued.*
To defendant, alleging, in action on stock subscription, VII, 760.
In carriage of live stock.
Of claim before suit, stipulation requiring, I, 773–775.
Power to limit liability by, I, 761.
Stipulation as to, of claim before removing animals, I, 770–774.
To carrier, of value of live stock, I, 749.
In carriage of merchandise.
By initial carrier, of second carrier's refusal to receive goods, II, 210.
By initial to second carrier, I, 784.
Limitation of liability by, II, 165; V, 588; VI, 336–338.
Of arrival of goods shipped, II, 97–101, 136, 137; V, 578.
Of arrival of goods, waiver of, I, 641.
Of claim for overcharge, under Texas statute, II, 638.
Of claim, time within which to give, II, 184–186.
Of contents of parcels, V, 572.
Of delay, duty of carrier to give, II, 67.
Of seizure of goods, duty of carrier to give, II, 123.
Of value of goods shipped, V, 572.
Posting about stations, effect of, I, 564; II, 162.
Printed on bill of lading, effect of, I, 619.
Rule requiring consignee to remove goods without, II, 145.
Sufficiency of, to limit liability, VI, 336–338.
To carrier, of dangerous character of goods, II, 86–88.
To carrier, of intention to exercise right of stoppage *in transitu*, II, 187.
To carrier, that goods were for the market, II, 206.
To carrier, that special damages will be claimed for loss of goods, II, 301.
To consignee, of arrival, necessity of, II, 46.
To consignor, of storage of C. O. D. goods, II, 148.
To intermediate carrier, of arrival of goods, II, 211, 236.
In carriage of passengers or baggage.
By passenger, of possession of valuables, VII, 137.
Disclaiming liability, effect of, VII, 137.
Limitation of liability by, II, 436.
Of carrier's rules, II, 330, 331.
On ticket, limiting liability for baggage, effect of, I, 562.
Posted at station, limiting liability for baggage, I, 564.
In condemnation proceedings.
Entry by company without, trespass for, IV, 868.
Generally, IV, 286, 503–511.
Objection to want of, how to be taken, IV, 790.
Of appeal, IV, 804, 805.
Of application to set aside report of commissioners, IV, 746.

NOTICE — *continued.*
In condemnation proceedings — *con.*
Of appraisement by viewers, IV, 589.
Of claim, under English Compulsory Purchase Laws, IV, 898.
Of condemnation of abutting easements, IV, 286.
Of hearing before Supreme Court commissioners, IV, 283.
Of intention to summon jury, IV, 913.
Of intention to take lands under Canadian statutes, IV, 928.
Of motion to confirm report of commissioners, IV, 738.
Of time and place of deposit of land damages, IV, 550.
To occupant, before condemning right of way through street, VII, 588.
To quit, as a prerequisite to bringing ejectment, IV, 851.
To treat, under English Compulsory Purchase Laws, IV, 895–897.
Of liens.
Of attorney's lien, I, 518.
Of claim for laborer's lien, VI, 297, 298.
Of claim for mechanic's lien, VI, 288–291.
Of lien by material-men, VI, 290.
Of suits pending, VI, 351.
To owner, of claim for laborer's lien, VI, 298.
To owner, of subcontractor's claim of lien, VI, 290.
Of injuries to animals.
Judicial, I, 281; V, 434–440.
Of claim before suit, I, 241–244.
Of defects in fence, V, 827.
Sufficiency of service of, a question of law, I, 321.
To company, of defects in fences, I, 169–172.

NOVA SCOTIA.
Making land damages a county charge in, IV, 940.

NOVELTY.
Of invention sought to be patented, VI, 947.

NUISANCE.
General treatment, VI, 883.
What constitutes a nuisance, VI, 883.
Remedies, VI, 893.
Abatement of, I, 720; IV, 299, 345; V, 986.
Action for, by abutting owner, VII, 636.
Action for damages for creation of, IV, 832.
Breach of duty to restore highway is, VII, 621.
Cattle yard, when deemed to be, VII, 350.
Created by independent contractor, liability for, V, 1109.
Culvert, when deemed to be, III, 662.
Drawbridge is not, I, 714.
Embankment, when deemed to be, IV, 378.
Enjoining road as, VII, 410.
Enjoining road in street as, VII, 642.
Evidence under the pleadings in actions for, VI, 1025.
Necessity of demand for abatement of, V, 986.
Obstruction of streets by hacks, V, 1062.

NUISANCE — *continued.*
On city street, liability for creating, VII, 617.
Ordinances to prevent, VI, 757.
Prosecutions for, III, 372.
Right of abutting owner to abate, IV, 299.
Right of abutting owner to enjoin, IV, 302.
Road constructed without authority is, IV, 294.
Trial by jury in action to abate, IV, 345.
When limitation begins to run in actions for, VI, 312.

NUL TIEL CORPORATION.
Plea of, VI, 1004.

NUMBER.
Of directors of corporations, IV, 50.
Of jurors, VIII, 11.
Of jurors, to assess land damages, IV, 612.
Of shares, to be definitely fixed before assessment levied, VII, 747.
Of witnesses, limiting, VIII, 213.

NUNC PRO TUNC.
Entry of judgment, IV, 759.

NURSING.
Allowance in damages for, II, 820.
Proof of expenses of, III, 727; VI, 1030.

OATH.
To arbitrators in Canadian expropriation proceedings, IV, 943.
To commissioners, jurors, and viewers, to assess land damages, IV, 588, 598, 516, 615, 790.
To jury, objections to, how taken, IV, 790.

OBEDIENCE.
To rules, when constitutes contributory negligence, V, 234–246.

OBJECTIONS.
Allowing witness to answer without, effect of, VIII, 217.
Construction of road without, effect on landowner's right to sue in ejectment, IV, 246.
Disregarding objections not properly taken below, I, 414–421.
Effect of failure to make at trial, VI, 840.
For defect of parties, VI, 929.
How to be taken at trial, IV, 789–792; VIII, 19–21.
How to be taken at trial before justice, VI, 125.
Necessity of making, at trial, IV, 355.
To defect in pleading, waiver by failure to make or by delay, VI, 1060.
To evidence, waiver of, I, 401.
To jurisdiction, VI, 116.
To questions to experts, form of, IV, 319.
To regularity of condemnation proceedings, IV, 529–536.
To report of commissioners in condemnation proceedings, time to make, IV, 746.
To verdict on assessment of damages, IV, 751–755.
Waiver of, by going on with hearing, IV, 536.
When may be made for the first time on appeal, I, 420.

OBSTRUCTIONS.
In general.
Failure to discover, when contributory negligence, V, 210.
In public ground, when deemed nuisances, VI, 891.
Of access to eating house, VII, 5.
Of access to premises as an element of land damages, IV, 703–705.
Of access to premises by embankments, IV, 375.
Of access to premises, measure of damages for, IV, 918.
Of street cars by business in street, VII, 430.
Of the mail, prosecutions for, III, 383.
Of view at crossing, effect of on duty to look and listen, III, 602–622.
Of view at crossing, when not negligence, VI, 790.
Stumbling over, by passenger, when contributory negligence, II, 490.
Of private ways.
Action for damages for, IV, 834.
Generally, VI, 1079–1081.
Notice of, VI, 1081.
Prosecution for, III, 378.
Of streets and highways.
Action for damages for, IV, 835.
As an element of damages to abutting owner, VII, 666.
As an element of land damages, IV, 705.
As nuisances, VI, 890.
At railway crossings, III, 441.
By cars, ordinance forbidding, VII, 674.
By hacks, V, 1062.
By throwing snow from track, VII, 411.
In unlighted street at night, III, 474.
Liability for, VII, 615–618, 706–713.
Of access to, I, 703.
Of passage between train and station, II, 419, 420.
Of sidewalks, by express companies, V, 561.
Prosecution for, III, 373, 382.
Statement of cause of action in actions for, VI, 993.
Of water and watercourses.
Of bridges and water-ways, when limitation begins to run in actions for, VI, 312.
Of flow of surface water, V, 980–982.
Of flow of surface water, liability for, VIII, 181.
Of flow of water, generally, I, 703.
Of navigable waters, enjoining, VIII, 170.
Of navigation, I, 716–720; VIII, 170.
Of navigation, in constructing road, III, 114.
Of navigation or access to navigable water, IV, 834.
Of navigation, prosecution for, III, 378.
Of navigation, remedies for, VII, 88.
Of navigation, when deemed nuisances, VI, 892.
Of shore front, remedies for, VII, 89.
Of watercourses, liability for, VIII, 174.
On or near track.
Assumption of risk as to, V, 134.
Expert evidence as to, VIII, 318.

OBSTRUCTIONS — *continued.*
On or near track — *continued.*
Liability of carrier of passengers for injuries caused by, II, 373.
Liability of company to employé injured by, V, 61, 67.
Near track, alleging the existence of, V, 266.
Near track, contributory negligence in being struck by, V, 210, 211.
Near track, effect of notice or knowledge of, V, 155.
Near track, effect of, on duty to look and listen, III, 610.
Near track, negligence in allowing, a question for jury, V, 315, 316.
Of tracks, arrests for, I, 465.
Of tracks, liability of lessee for injuries caused by, VI, 242.
Of tracks of street railway, by teams, VII, 424.
Of tracks, prosecution for, III, 382.
Of tracks, when amount to negligence, VI, 783
On side track, assumption of risk as to, question for jury, V, 325.

OBVIOUS DANGERS.
Duty to warn employé against, V, 37.
Injuries to employés by, V, 141–149.

OCCUPANCY.
Of adjoining premises by plaintiff, allegation of, I, 253.
Of land, when constitutes a taking, IV, 444.
Of street, by steam road, nature of, VII, 588.

OCCUPANTS.
Of premises burned, right of action of, V, 895, 896.

ODORS.
Damages for causing, IV, 336.
When deemed nuisances, VI, 887.

OFFER.
By carrier to deliver goods, liability after, II, 142.
Of compensation, effect of, on right to costs, IV, 900, 932.
Of employment after injury, competency of evidence of, V, 411.
Of proof, VIII, 16.
To allow judgment, effect of, on right to costs, III, 325; IV, 728.
To compromise claim for lost baggage, I, 571.
To compromise, competency of evidence of, V, 393, 500.
To purchase or sell, evidence of, IV, 317.
To purchase or sell, proof of value by, IV, 653, 654.
To sell at a given price, competency of evidence of, V, 393.
To subscribe, is not a contract, VII, 728.

OFFICE.
Of directors, term of, IV, 55.
Power of corporation to have in foreign state, V, 1016.

OFFICE FURNITURE.
When may be mortgaged, VI, 415.

OFFICERS.
General treatment, VI, 904.
In general, VI, 905.
Particular officers, VI, 907.
In general.
Bills and notes executed by, I, 592.
Bills and notes payable to, I, 593.
Burden of proof as to authority of, V, 448.
By whom railway-aid bonds may be executed, VI, 670.
Competency of, as witnesses, VIII, 195, 197.
Competency of evidence of authority of, V, 393, 408.
Corporate, when may assign, I, 478.
Estoppel by acts of, V, 381.
Exemption from liability for negligence of, VI, 945.
Fraud and misconduct of, no defense against innocent purchaser of bonds, VI, 602.
Illegality of contracts to influence elections of, III, 210.
Mandamus to, VI, 381, 382
Of cities, VI, 757.
Of land department, authority of, VI, 1107.
Powers of, in issuing railway-aid bonds, VI, 659.
Presiding over jury in assessment of damages, functions, and duties of, IV, 617.
Weight, as evidence, of certificates of, V, 523.
Who are, VIII, 318.
Of railway companies.
Admissions by, as evidence, V, 483.
Custody by, of property attached, I, 505.
Declarations of, while acting within scope of power, V, 490.
Dissolution for failure to elect, IV, 131.
Executions against defaulting, VIII, 185.
Mismanagement by, as ground for receiver, VI, 1171.
Non-residence of, when forfeits franchise, II, 711.
Of construction companies, rights and powers of, III, 180.
Of government railroads, liability of, V, 1050.
Of government railroads, limitation of suits against, V, 1052.
Of new company, relation to creditors of old, III, 102.
Peril ocassioned by acts of, V, 202.
Power of directors to appoint, IV, 61.
Powers of, in effecting arrests, I, 465.
Premises or statements made by, as to subscriptions, VI, 639.
Public utterances of, when release subscriber to stock, VII, 784.
Reports of, admissibility of, in evidence, II, 538; V, 513.
Right of, to contract for construction of road, III, 121.
Salaries of, when may be reached in attachment, I, 497.
Temporarily in state, service of process on, VI, 1089.
Validity of contracts made by, III, 190.

OFFICERS — *continued*.
Warrant, how far protects, VII, 986.
When may be appointed receivers, VI, 1166.

OFFICIAL BONDS.
See BONDS.

OHIO.
Assessment and levy of railroad taxes in, VII, 977.
Constitutionality of statutes of, as to condemnation of land, IV, 391.
Constitutionality of statutes of, as to municipal aid for railways, VI, 548.
Constitutionality of statutes of, as to removal of causes, VII, 20.
Constitutionality of tax laws of, VII, 846.
Constitutional provisions in, relative to condemnation of land, IV, 386.
Deductions for benefits under condemnation laws of, IV, 719.
Injuries to animals running at large in, I, 220, 226.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 689.
Mechanics' lien law of, VI, 279.
Plaintiff's pleadings need not negative contributory negligence in, III, 277.
Review of town-bonding proceedings by mandamus in, VI, 751.
Rule as to imputed negligence in, V, 1085.
Statutes of, relative to distribution of damages for causing death, III, 763.
Statutory duty to fence in, V, 803.
Taking land for streets and laying out roads in, VII, 553.
Taxation in aid of railways in, VI, 741.

OIL.
Allowing fire to spread from, V, 881.
Boring for, on strip condemned, IV, 443.
Classification of, as freight, VI, 27, 28.
Ordinances forbidding the storing of, VII, 673.
Rates on, from Pennsylvania to seacoast, VI, 42.
Water competition as affecting rates on, VI, 22.

OIL CARS.
Patents for, VI, 960.

OKLAHOMA.
Homesteads in public lands in, VI, 1110.

OMISSION.
In tax list of property subject to assessment, VII, 1007.

OMNIBUS.
Requiring purchase of line, VII, 384.
Street car is, for purposes of taxation, VII, 448.
When street cars are, VIII, 319.

"ON OR ABOUT."
Charging an injury as committed "on or about" a certain day, VIII, 319.

ONTARIO.
Operation of statute of, giving right of action for causing death, III, 754.
Statutes of, relative to damages for injuries to employés, V, 435.
Statutes of, relative to drains, IV, 156.
Statutory regulation to grade crossings in, III, 448.

OPEN AND CLOSE.
Discretion of judge as to right to, IV, 627.
Right to, as respects argument to jury, VIII, 42.
Right to, on hearing before commissioners to assess damages, IV, 603.

OPEN CARS.
See CARS.

OPENING.
Of judgments, VI, 103.

OPERATING EXPENSES.
When a first charge, VI, 1195.

OPERATION.
Of railroad, release of damages for, VII, 14.
Of road by defendant, weight of evidence to show, V, 921.
See also MANAGEMENT.

OPINION.
Certificate of division of, V, 640.
Expressions of, in instructions, III, 903; VII, 1164; VIII, 54, 67.
Mere expressions of, not fraud, VII, 783.
Of jurors, challenge for, VIII, 13.

OPINION EVIDENCE.
As to amount of damages, IV, 659.
As to incompetency of fellow-servants, V, 781.
As to sufficiency of fences, V, 824.
As to value of land taken, IV, 657–659.
As to value on question of damages, V, 965.
Conjectural and speculative opinions, IV, 324.
Cross-examining witnesses as to matters of, VIII, 221.
Improper, when not ground for reversal, I, 399.
In actions against carriers, II, 284.
In actions for failure to build or repair cattle-guards, II, 601.
In actions for injuries by fire, V, 911.
In actions for injuries to children, II, 813.
In actions for injuries to employés, V, 281, 282.
In elevated railway cases, IV, 318–325.
In proceedings for the intersection of railways, III, 403.
In stock-killing cases, I, 283, 284.
Of experts based on testimony of other witnesses, VIII, 276, 296, 297.
Of experts concerning admitted facts, VIII, 275.
Of experts, generally, VIII, 260–298.
Of non-experts, VIII, 215.
Of real-estate experts, IV, 321.
Of witnesses generally, VIII, 230–260.
See also EXPERTS; EXPERT TESTIMONY.

OPPORTUNITY.
Rule where passenger has no opportunity to purchase ticket, VII, 1050.

OPPRESSION.
Allowing exemplary damages for, II, 577; III, 686.

OPTION.
To declare forfeiture or sue on subscription, VII, 797.

OPTION — *continued*.
To go over or under tracks with street crossing, III, 440.

OPTIONS.
Illegality of contracts for, III, 211.

"OR."
When means "on," VIII, 319.

ORAL AGREEMENTS.
Contemporaneous with written evidence, admissibility of, V, 476.
For right of way, IV, 480.
Merger of, into written contracts, II, 156.
Of corporations, validity of, III, 191.
Parol evidence of subsequent, V, 477.

ORDER OF PROOF.
In stock-killing cases, I, 320.

ORDERS.
Assumption of extra risk in obeying, V, 174–179.
Contributory negligence in obeying, question for jury, V, 331, 332.
Contributory negligence while disobeying, V, 230–233.
Directing deposit of land damages, validity of, IV, 549.
In condemnation proceedings, what are final and appealable, IV, 776, 777.
In condemnation proceedings, when appealable to court of last resort, IV, 779–781.
Instructions touching employés' obedience or disobedience of, V, 307.
Liability for tort of agent acting contrary to, I, 62–65.
Negligence in issuing dangerous, question for jury, V, 322.
Obedience or disobedience of, when constitutes contributory negligence, V, 233–246.
Of appointment of commissioners to assess land damages, IV, 598.
Of appointment of receiver, VI, 1176.
Of commissioners, remedy to enforce, VI, 1149–1151.
Of confirmation of report of commissioners, IV, 739.
Of foreman, contributory negligence in disobeying, V, 220.
Of interstate commerce commission, enforcement of, VI, 50.
Of railway commissions, enforcement of, II, 672.
Of vice-principal, liability of company for, V, 677.
To employés, II, 333.
To pay over deposit of land damages to landowner, IV, 551.
When appealable, I, 378–380.

ORDINANCES.
In general.
Admissibility of proof of violation of, by company, V, 911.
Authorizing construction of bridges, I, 711.
Conforming to, as affecting liability to abutting owner, VII, 426.
Fixing compensation for joint use of tracks, VII, 436.
How pleaded, I, 266.

ORDINANCES — *continued.*
In general — *continued.*
Injuries occasioned by violation of, VII, 697.
Judicial notice of, V, 439.
Negligence in violation of, VII, 472.
Power to pass, alter, and amend, VII, 672.
Proof of, VI, 1030; VII, 702.
Ratification of void, VII, 373.
Regulation of fares by, VII, 1076.
Validity and effect of, VI, 756, 757.
When admissible in evidence, II, 813; III, 857; V, 509; VII, 702.
When create estoppel, V, 366.
As to signals.
Forbidding signals, duty of company in cases of, III, 502.
Regarding stationing of flagmen at crossings, III, 487.
Requiring bell to be rung in cities, VII, 681.
Requiring use of bell or whistle near crossings, III, 525.
As to speed.
Construction and validity of, VII, 678, 681.
Liability for violation of, III, 532.
Rate prohibited by, VII, 1132.
As to use of street or highway.
As to gates at crossings, violation of, III, 480.
As to manner of driving teams over crossings, III, 555.
As to right of way through streets, validity and effect of, VII, 572–574.
Granting leave to lay steam railway tracks, VII, 603.
Granting use of street, revocation of, VII, 580, 581.
Obstruction of highway by cars in violation of, VII, 711, 712.
Regulating steam roads in streets, VII, 672–684.
Regulating street railways, VII, 437–444.
Regulation of cable railways by, I, 728.
Requiring change of grade of street, VII, 608.
Requiring payment of damages for constructing steam railway in streets, VII, 651.
Validity of, affecting grade or condition of streets, VI, 757.

ORDINARY CARE.
As applied to the selection of servants, V, 696.
As to passengers, when sufficient, II, 363.
Definition of, VI, 777; VIII, 319.
Duty of carrier of passengers to exercise more than, II, 356.
Duty of company to exercise, to prevent fires, V, 859.
Duty of company to use, as to trespassers, VII, 1139.
Duty of licensees to use, VI, 275.
Duty of person on crossing to exercise, III, 540.
Failure to use, III, 257.
Liability for want of, as to trespassers, VII, 1129.
Warehousemen bound to exercise, II, 129, 131.

ORDINARY DILIGENCE.
Duty of person about station to use, VII, 225.

ORDINARY PRUDENCE.
What is, and duty of employé to use, V, 185.

ORDINARY SKILL.
When not sufficient to protect against liability, VIII, 320.

ORDINARY TRAINS.
What are, under English statute, VIII, 320.

OREGON.
Assessment and levy of railroad taxes in, VII, 977.
Deductions for benefits under condemnation laws of, IV, 720.
Doctrine of comparative negligence, how far applied in, III, 50.
Homesteads in public lands in, V, 1110.
Injuries to animals running at large in, I, 221.
Plaintiff's pleadings need not negative contributory negligence in, III, 277.
Statutes of, relative to distribution of damages for causing death, III, 763.
Taking land for streets and laying out roads in, VII, 553.
Taxation of land grants in, VII, 883.

ORGANIZATION.
See INCORPORATION; ORGANIZATION.

OTTAWA, CAN.
Decisions particularly applicable to, VI, 763.

"OVER."
When means "upon" as applied to crossings, VIII, 320.

OVERCHARGES.
Action for, when barred by lapse of time, VI, 315.
Actions to recover, VI, 1151.
Costs in actions to recover for, II, 329.
In freights and fares, VI, 967.
In passenger fares, VII, 1083–1085.
Penalty for, VII, 454.
Under English statutes, II, 649–651.
Under Railway and Canal Traffic Act, II, 196.
What are, and liability by reason of, II, 624–639.
See also CHARGES; DISCRIMINATION; INTERSTATE COMMERCE.

OVERDRAFTS.
Indemnity to bank to protect against, V, 1102.

OVERFLOW.
Of water, as an element of damages to abutting owner, VII, 666.
See also FLOODING LANDS; WATERS AND WATERCOURSES.

OVERHAULER OF CARS.
When engineer is fellow-servant of, V, 744.

OVERHEAD BRIDGE.
Alleging defective condition of, V, 266.
Assumption of risk as to low bridges, V, 132, 158.

OVERHEAD BRIDGE — *continued.*
Contributory negligence in going under, V, 213.
Duty to employés as to safety of, V, 50.
Negligence as to safety of, question for jury, V, 315.
See also BRIDGES AND VIADUCTS.

OVERISSUE.
Of bonds, liability of state in case of, VII, 161.
Of corporate bonds, I, 663.
Of receivers' certificates, remedy for, VI, 1206.
Of stock, estoppel to deny validity of, VII, 281.

OVERLOADING.
Of cattle on cars, liability for, I, 745.
Of hogs, causing suffocation, I, 757.
Of street car, when negligence, VII, 468.

OVERPAYMENT.
Recovery of excess, VI, 965.
To contractors, liability to company for, III, 143.

OVERVALUATION.
Of property to be taxed, as ground for injunction, VII, 1008.

OWNER.
Meaning of the word generally, VIII, 320.
Necessity of a direct contract with, to maintain mechanics' lien, VI, 284.
Notice to, of claim for laborer's lien, VI, 298.
Notice to, of sub-contractor's claim of lien, VI, 290.
Of easement, when entitled to land damages, IV, 571.
Of goods carried, when may sue carrier, II, 268–273.
Work must be done under contract with, to give lien to laborer, VI, 296.

OWNERSHIP.
Averment of, in actions against carriers of goods, II, 276.
Evidence of, in actions against carriers, II, 285.
Of adjoining premises by plaintiff, allegation of, I, 253, 364.
Of animal killed, burden of proof to show, I, 313.
Of animal killed, presumption as to, I, 301.
Of animal killed, sufficiency of evidence to show, I, 289.
Of fee by company, as defense to action for flooding land, V, 988.
Of fee in street, VII, 595–603.
Of fee in street immaterial to abutting owner's rights, IV, 296, 300.
Of land after removal of station, VII, 205.
Of land taken, sufficiency of description of, in judgment, IV, 757.
Of plaintiff, evidence to disprove, V, 912.
Of property burned, averment of, V, 899.
Of property burned, evidence to show, V, 908, 921.
Of road, allegation of, in action for killing stock, I, 252.
Of road, presumption as to, I, 301.
Of road, sufficiency of evidence to prove, I, 289; V, 921.

OWNERSHIP — *continued.*
Of shares, duty to keep record of, VII, 302.

"OWNER'S RISK."
Liability for goods shipped at, II, 175.
Meaning of, as used in bill of lading, VIII, 326.

PACIFIC RAILROADS.
Federal grants to, VI, 164–175.

PACKAGES.
Ad valorem charge on, II, 627.
Carrying, on street car, VII, 454.
Liability of company for loss of, VII, 454.
Limiting liability for loss of, I, 639.
What are, VIII, 320.
What are goods "in a parcel or package," II, 194.
See also PARCELS.

PACKING.
Liability for loss by defects in, II, 24, 84; V, 576.

PAIN.
Admissibility of evidence of, V, 418.
As an element of damages, II, 821.
As an element of damages for injury to employé, V, 338.
Complaints of, when deemed part of *res gestæ*, V, 474.
Damages for future, III, 698.
Declarations of, to attendant physician, V, 494.
Excessive damages for, II, 585.
Expressions indicating present, evidence of, V, 495.
Expressions of, when hearsay, V, 462.
Measure of damages for infliction of, III, 713.
Necessary averments respecting, II, 723.
Of deceased as an element of damages in action for causing death, III, 926.
Proof of, on question of damages, III, 727.
Sufficiency of evidence to prove, II, 543.
When an element of damages, II, 570.

PAINTER.
When foreman is fellow-servant of, V, 751.

PAINTINGS.
What are, under English Carriers' Act, VIII, 320.

PALACE CAR COMPANIES.
See SLEEPING AND PALACE CAR COMPANIES.

PAPER CURRENCY.
See MONEY.

PARALLEL AND COMPETING LINES.
General treatment, VI, 917.
Discrimination between, IV, 98–100.
Duty to fence in cases of, V, 817.
Granting discrimination to prevent, IV, 99.
Horse and cable railways, I, 729.
Judicial notice of, V, 436.
Lease of, when valid, VI, 212.
Leases of, VI, 214.
Location of routes of, VI, 363.
Rates on branch, VI, 25.

PARCEL RATES.
When deemed excessive, II, 625-626.

PARCEL ROOMS.
Deposit of baggage in, I, 575.

PARCELS.
Evidence of damages where land lies in two or more, IV, 641.
Notice of contents of, V, 572.
Refusal to receive as baggage, I, 558.
Sale in mass or in parcels, VI, 499.
Several, when treated as part of one tract, IV, 579-581.
See also PACKAGES.

PARENT AND CHILD.
Consent of parent to employment of minor child, V, 246, 248.
Contributory negligence of child as affecting right of parent to recover for loss of services, II, 772.
Contributory negligence of parent, II, 789-792.
Contributory negligence of persons *in loco parentis*, II, 801.
Damages for death of child, III, 938-942.
Damages for death of parent, III, 932-934.
Ejecting father from train for fault of son, IV, 165.
Excessive damages in actions for death of parent, III, 949.
Imputing negligence of parent to child, II, 792-797.
Instructions as to damages to child for death of parent, III, 901.
Instructions as to damages to parent for death of child, III, 901.
Measure of damages for causing death of parent, III, 932-934.
Measure of damages to mother in action for death of child, III, 941.
Measure of damages to parent for death of child, III, 938-942.
Negligence of parent as affecting recovery for loss of services of child, II, 800, 801.
Parent of injured child, contributory negligence of, II, 789-807.
Recovery by parent no bar to action by child, II, 808.
Recovery of child no bar to action by parent, II, 808.
Release of claim by parent for damages to child, V, 250.
Right of father to damages for causing death of child, III, 757, 769, 812.
Right of mother to damages for causing death of child, III, 757, 770.
Right of mother to sue for injury to child, II, 808.
Right of parent to recover for loss of services of child, II, 772.
Right of parent to sue for causing death of child, III, 769-771.
When parent's negligence is question of fact, II, 803-807.
See also CHILDREN; CHILDREN, INJURIES TO; INFANCY.

PARI DELICTO.
Rule that equity will not interfere between parties in, V, 349.

PARI MATERIA.
Construction of statutes in, I, 94; VII, 263.

PARKDALE, CAN.
Decisions particularly applicable to, VI, 764.

PARKS.
Condemnation of, for railway purposes, IV, 429.
Consent to lay track opposite public square, VII, 391.
Enjoining occupation of public squares by railroads, VII, 642.
Obstructions in, when deemed nuisances, VI, 891.
Ordinance requiring fences where road passes, VII, 674.
See also COMMONS.

PARLIAMENTARY DEPOSITS.
Disposal of, on winding up, IV, 139.
Disposal of, on winding up tramway, VII, 1104.

PAROL.
Appointment of agent, validity of, I, 39.
Conditions in subscriptions to stock, VII, 804.
License to flood land, V, 988.

PAROL EVIDENCE.
In actions on stock subscriptions, VII, 768.
Of oral agreement, notwithstanding written contract, I, 782.
Proof of book entries by, V, 458.
Rules of company, when provable by, V, 454.
To contradict, vary, or explain bill of lading, I, 604, 614-619.
To explain or contradict writings, II, 285.
To show real contract notwithstanding existence of passenger ticket, I, 1040.
To vary agreement to issue passes, VI, 939.
To vary or explain writings generally, V, 474-481.
To vary shipping contract, II, 156.

PARTIAL DELIVERY.
Effect of, on lien for charges, II, 154, 643.
Right to charges in cases of, II, 646.
See also DELIVERY.

PARTIAL LEGISLATION.
Validity of, VII, 245.

PARTIAL LOSS.
Rights of consignee in cases of, II, 59.

PARTICULARS, BILLS OF.
See BILLS OF PARTICULARS.

PARTIES.
To deeds, IV, 3.
To judgments, rules relative to, VI, 80.
To mortgage, rights of, VI, 438.
To sales, rights of, VII, 103-105.
Who may claim mechanics' lien, VI, 279-285.

PARTIES TO ACTIONS.
General treatment, VI, 922.
At law, VI, 922.
In equity, VI, 930.
In general.
Admissions by, as evidence, V, 482.
Amendments in respect to, VI, 1044.

PARTIES TO ACTIONS — *continued.*
In general — *continued.*
By and against corporations, III, 323.
By and against counties, III, 331.
Citizenship of, as ground for removal, VII, 29–31.
Competency of, as witnesses, VIII, 195, 196.
Credibility of, VIII, 201.
Death of, as ground of abatement, I, 9.
Depositions of opposing, as evidence, V, 522.
Examination of, before trial, IV, 80–82.
Jurisdiction as dependent upon diverse citizenship of, V, 629, 630.
Jurisdiction as dependent upon residence of, VI, 109.
Naming and describing, VI, 985.
Naming in process, VI, 1083.
Notice of amendments to adverse, VI, 1053.
On appeal, I, 440; IV, 800, 801.
Pleading defect of, VI, 1002.
Right of lessor to sue, VI, 222.
Right of non-resident to sue, I, 490.
Right of Union Pacific R. Co. to sue or be sued, VIII, 141.
Substitution of new, I, 12.
When husband should join wife, V, 1074–1076.
When lessor not necessary, VI, 236.
Who may appeal, I, 373–375.
Who may apply for certiorari, II, 608.
Who may attack fraudulent conveyance, V, 1031.
Who may sue generally, I, 24; V, 1019, 1020.

Against carriers of merchandise.
For loss of goods carried, II, 61.
Generally, II, 268–274.
Of trover, II, 127.
Who may sue, V, 598.
Who may sue for damages, II, 61.
Who may sue for loss or injury of goods, II, 268–274.
Who may sue for misdelivery of goods, II, 116.

Against carriers of passengers.
For loss of baggage, I, 566–568.
Generally, II, 523, 524.
Who may be sued for loss of baggage, I, 567.
Who may sue for loss of baggage, I, 566.

By or against stockholders.
For dividends, IV, 152.
Generally, VII, 344, 345.
Right of stockholders to be parties in suits against corporation, VII, 329, 330.
To compel issue of railway-aid bonds, VI, 664.
To enforce railway-aid bonds, VI, 705, 706.
To enforce stockholder's liability to creditors, VII, 324.
To enforce subscriptions to stock, VII, 758, 759.

Civil actions, generally.
Against consolidated companies, III, 106.

PARTIES TO ACTIONS — *continued.*
Civil actions, generally — *continued.*
Against foreign corporations, V, 1019, 1020.
For construction of grade crossing, III, 454.
For conversion, VIII, 108–111.
For taxes, VII, 991.
In ejectment, IV, 252.
In mandamus cases, VI, 384.
In proceedings before interstate commerce commission, VI, 54.
In *quo warranto*, VI, 1132.
Necessary defendants, VI, 1105.
Plaintiffs and defendants, VI, 384.
To dissolve corporation, IV, 134, 135.
Under Interstate Commerce Law, VI, 53.
Who is liable in trover, VIII, 110.
Who may file an information, VI, 1131.
Who may file complaints, VI, 50.
Who may intervene, VI, 71, 72.
Who may maintain trover, VIII, 108, 109.
Who may sue in partition, VI, 934.

In condemnation proceedings.
Against elevated railways, IV, 304–312.
Designating, in petition, IV, 514.
Entitled to compensation under English Compulsory Purchase Laws, IV, 905–909.
For damages for interference with property, IV, 838.
For specific performance of contract for right of way, IV, 481.
Generally, IV, 492–499.
Of trespass by landowner for wrongful interference with property, IV, 871, 872.
To condemn crossing of railway, III, 400.
To lay out street over railway, III, 441.
Who entitled to damages for land taken, IV, 560–574.
Who may appeal, IV, 773, 776.
Who may sue for land damages, IV, 871.
Who may sue for maintaining road, IV, 304, 305.

For injuries to employes.
Who may be sued, V, 261.
Who may sue, V, 253–260.

For injuries to animals.
Against carriers of cattle, I, 802.
In stock-killing cases, I, 244–246.
Who may be sued, I, 246.
Who may sue, I, 244–246.

In equity proceedings, generally.
Defendants to injunction proceedings, V, 1136.
For receiver, VI, 1174.
For specific performance, VII, 156.
In pari delicto, V, 349.
In pari delicto, right of to bring action to quiet title, III, 10.
Multifariousness as to, VI, 1019.
Named and described in equity pleadings, VI, 1018.
To bill in equity, V, 357.
To bill to enjoin railway in street, VII, 647.
To bill to redeem from mortgage, VI, 521.

PARTIES TO ACTIONS — *continued.*
In equity proceedings, generally — *con.*
To bill to set aside foreclosure sales, VI, 514.
To cancel railway-aid bonds, VI, 712, 713.
To enforce laborer's lien, VI, 300.
To enjoin construction of street railways, VII, 422.
To enjoin railway-aid proceedings, VI, 606.
To enjoin unlawful taxes, VII, 1009.
To foreclose deeds of trust, IV, 31.
To foreclose mechanics' lien, VI, 292.
To foreclose railway mortgage, VI, 475.
To restrain issue of railway-aid bonds, VI, 669.
Who may be joined as defendants in foreclosure, VI, 478–482.
Who may maintain bill in equity, V, 357.
Who may move to vacate mortgage sale, VI, 515.
Who may sue or be made plaintiffs in foreclosure, VI, 475–478.
Who may sue or be sued in action to cancel municipal bonds, VI, 712, 713.
Who may sue to compel transfer of stock, VII, 296.
Who may sue to restrain issuance of municipal bonds, VI, 667.
In tort, generally.
At law by abutter for injury sustained by railway in street, VII, 643.
For assault, I, 466.
For causing death, III, 769–773.
For damages by fire, V, 894–899.
For damages for nuisances, VI, 898, 899.
For flowing lands, V, 989, 990.
For injuries to children, II, 808.
For injuries to crops, etc., from failure to fence, V, 833, 834.
For injury to person or property of married woman, V, 1074–1076.
For libel or slander, VI, 259.
For negligence, VI, 815, 816.
For personal injuries at or near bridges, I, 707.
For personal injuries at station, VII, 231.
For trespass, VII, 1109, 1110, 1111, 1115.
Proper plaintiff to enforce penalty, VI, 968.
Right of husband to sue for injuries to wife, V, 1069, 1070.
Right of separate property owners to join in one petition, VII, 426.
Who liable for infringement of patent, VI, 952.
Who may attack conveyance as fraudulent, V, 1031.
Who may be sued for injury at station, VII, 231.
Who may sue for interference with private ways, VI, 1080, 1081.
Who may sue or be sued for maintaining nuisance, VI, 898, 899.
Who may sue or be sued for negligence, VI, 815, 816.
On contract, generally.
By assignees, I, 480, 481.

PARTIES TO ACTIONS — *continued.*
On contract, generally — *continued.*
Creditors' suits, III, 352.
For an accounting, I, 19, 20.
Generally, III, 230.
Of attachment, I, 489–494.
On commercial paper, I, 596.
On construction contracts, III, 170.
On corporate bonds, I, 677.
On coupons, III, 339, 340.
On covenants, III, 348.
On debentures, III, 961.
On fire policies, V, 850, 851.
On leases, VI, 240.
On municipal bonds, VI, 705, 706.
Right of assignee to sue, I, 480.
Right of bondholder to sue, I, 665–667.
Right of transferee of bill of lading to sue, I, 646.
To enforce grants, VI, 194.
When assignor necessary, I, 481.
Who may be served in garnishment, I, 305.

PARTITION.
General treatment, VI, 934.

PARTNERSHIP.
General treatment, VI, 935.
Between connecting carriers, II, 518.
Between connecting lines, III, 68.
Liability of connecting carriers as partners, II, 204.
Partners as parties to condemnation proceedings, IV, 498.
Partnership liability of stockholders to creditors, VII, 319, 320.
When partners entitled to land damages, IV, 563.
When partners may sue carrier for goods shipped, II, 272.
When stockholder is liable to creditor as partner, VII, 319.

PART PERFORMANCE.
By parties to lease, estoppel by, VI, 232, 233.
Effect of, to take contract out of statute of frauds, III, 200; VII, 147.
Of construction contracts, recovery for, III, 139.
Of contract, effect of, generally, III, 223.

PASSAGEWAYS.
At stations, liability for injuries caused by, VII, 221.
Over track, reservation of, in deed, IV, 22.

PASSAIC, N. J.
Decisions particularly applicable to, VI, 764.

PASSENGER AGENT.
Service of process on, VI, 1093.

PASSENGERS.
In general.
Compelling physical examination of injured, VI, 975–978.
English statutes prohibiting sales of liquor to, VI, 76.
Opinions of, as to speed of train, VIII, 259.
Who are II, 310–314; VIII, 320.
Carriage of.
Action for carrying beyond destination, when barred by lapse of time, VI, 316.

PASSENGERS — *continued.*
Carriage of— *continued.*
Authority of conductor to carry on construction train, III, 59.
Children as, generally, II, 738, 739, 752.
Classification of, II, 333.
Compelling, VI, 378.
Drovers traveling on cattle trains are, I, 792.
Duty of sleeping and palace car companies to, VII, 130, 131.
Duty to awaken, VII, 130.
Employés, when deemed to be, II, 326–328.
Generally, II, 308–586.
Liability for personal injuries to, VII, 133–135.
On land-grant roads, VI, 131.
On freight trains, rule requiring purchase of tickets, VII, 1047.
Rules requiring first-class ticket, VII, 132.
Statement of cause of action in suits on contracts for, VI, 990.
When bound by conditions and limitations on ticket, VII, 1044, 1045.
Carriage of baggage.
Custody of baggage by, I, 554–558.
Duty of, to call for baggage, I, 548–551.
Duty of, to disclose value and nature of baggage, I, 558–560.
Effect of non-compliance by, with carrier's rules as respects baggage, I, 525.
Liability for money on person of, I, 557.
Liability of company where baggage arrives ahead of, I, 552.
On one train, baggage on another, liability of company, I, 525.
Robbery of, liability of company, I, 558.
Stopping over, rights of, as regards baggage, I, 558.
Voluntary bailment of baggage by, I, 552.
When bound by limitation of liability for articles left in cloak room, I, 575.
Colored persons as.
Rights of, III, 25–31; VI, 69.
Slaves, when regarded as, II, 586.
Ejecting.
Costs in actions for, III, 328.
For non-payment of fare or non-production of ticket, IV, 164–187.
From street cars, VII, 533–539.
Generally, IV, 164–244.
Proving social standing of, IV, 238.
Sick or insane, IV, 189, 190.
Injuries to, generally.
Accidents to, causing death, liability for, III, 764.
Arrest of, at instance of passengers, I, 465.
Assault by one passenger upon another, I, 470.
Assaults by or upon, I, 466–471.
Assaults upon, by employés, I, 74.
At or near bridges, I, 706.
By collision, III, 12–21.
By derailment, IV, 39–47.
By independent contractor, liability for, V, 1115.

PASSENGERS — *continued.*
Injuries to, generally — *continued.*
Children on train, II, 738–741.
Doctrine of comparative negligence in actions for, III, 41.
Evidence of, VI, 1031.
Excessive damages for, VI, 854.
From failure to build and maintain fences, V, 832.
From insufficiency of culverts, III, 663.
Instructions in actions for, VIII, 55, 69.
Liability for, by strikers, VII, 720.
Liability of elevated railways for, IV, 357–365.
Liability of lessee company for, VI, 226.
Liability of lessor company for, VI, 220.
Libel in admirality for death of, I, 33.
Measure of damages for, III, 709–719.
Nonsuit in suits for, VIII, 27, 32.
Pleading in action for, VI, 990, 996, 1031.
Questions of fact in actions for, VIII, 47.
Release by injured, VII, 11–13.
Safety of, as to cattle on track, I, 126, 128.
Safety of, paramount to that of animals on track, I, 125.
Statement of cause of action in actions for, VI, 996.
Variance between pleading and proof in actions for, VI, 1040.
Variances in actions for, VI, 1040.
Misconduct or negligence of.
Contributory negligence of, IV, 269.
Contributory negligence of, as a defense, II, 440–512.
Contributory negligence of, as a defense for causing death, III, 818–822.
Contributory negligence of, as a defense to action for lost baggage, I, 573.
Duty to inquire as to rules of carrier, II, 330.
Gambling on trains, III, 368.
Getting on train while in motion, IV, 358.
Intoxication of, II, 319.
Leaving seat before train stops, IV, 363.
Misconduct of, II, 318.
Riding on platform, IV, 269, 363.
Rule to stop, look and listen does not apply to, III, 562.
Traveling on Sunday, rights of, VII, 819–821.
Violation of rules by, as a defense, III, 812.
Violation of Sunday Law as a defense to action for death of, III, 810.
When negligence of another will be imputed to injured, V, 1079–1088.
On street cars.
Injuries to children while riding as, II, 753.
Injuries to, in boarding or alighting from cable car, I, 730.
Injuries to, on cable cars, I, 729–731.
Injuring, while assisting in moving car, VII, 472.
Injuring, while getting on or off, VII, 474–479.
Liability for injuries to, IV, 268–270; VII, 458–510.

PASSENGERS — *continued.*
On street cars — *continued.*
Ordinance limiting number of, VII, 443.
Right to prepare to leave, VII, 501.
Rights of, generally.
Duty required from company to, distinguished from that due to employés, V, 21.
Duty to, distinguished from duty to trespassers, VII, 1128.
Duty to fence for protection of, V, 821.
Duty towards friends and relatives of, VII, 214.
Liability of ferrymen as carriers of, V, 841.
Liability of lessee road for injuries to, VI, 226.
Liability to, distinguished from liability to trespasser on train, VII, 1149.
Ordinances as to safety of platforms for, VII, 675.
Pleading breach of contract with, VI, 1024, 1035.
Protection of, duty of company as to, II, 428–436.
Rights and liabilities of carriers of, II, 308–586.
Rights of, at union depots, VIII, 137.
Rights of persons accompanying, II, 337–339.
Rules regulating conduct of, II, 336.

PASSENGER SCHEDULES.
Duty to make and publish, VI, 48.

PASSENGER TRAINS.
Carrying goods on, II, 15.

PASSES.
General treatment, VI, 939.
Contracts to issue, VI, 939.
Issuance, expiration, and renewal, VI, 940.
Company's duty and liability to one riding on a pass, VI, 940.
Conditions exempting carrier from liability, VI, 943.
Evidence as to value of, V, 390.
Injunction by stockholder to restrain granting of, VII, 334.
Persons riding on, when deemed passengers, II, 313.
Prohibition of, by Interstate Commerce Law, VI, 31.
To drovers on cattle trains, I, 791, 782.

PAST DAMAGES.
Trial of, by jury, issues as to, IV, 343.

PASTURAGE.
Amount recoverable for injury to, by fire, V, 962.
Damages for injuries to, by failure to build or repair cattle-guards, II, 602.
Injuries to, from failure to build and maintain fences, V, 833.
Measure of damages for injuries to, V, 835.
See also GRASS.

PATENT DEFECTS.
Assumption of risk as to, V, 141–149.
Company not bound to instruct employé as to, V, 37.
See also LATENT DEFECTS.

PATENT MEDICINES.
Classification of, as freight, VI, 28.

PATENTS.
For land granted, withholding until payment of cost of survey, VI, 163.
For land, when surveys have effect of, VI, 1117.
For public lands, VI, 1118–1120.

PATENTS FOR INVENTIONS.
General treatment, VI, 946.
What is patentable, VI, 947.
Issuing and obtaining patents, VI, 949.
Various contracts involving patent rights, VI, 949.
Infringement and remedies therefor, VI, 951.
Decisions relative to particular statutes, VI, 954.

PAUPERS.
General treatment, VI, 961.

PAVING.
Duty of street-railway companies as to, VII, 397–405.
Duty of tramways as to, VII, 1102.
Duty to repair does not include, VII, 406.
Liability of steam railroads in cities respecting, VII, 684–693.
Rates for, under English statute, VII, 1017.
Right to stop cars while, VII, 405.
When duty as to, extends to whole street, VII, 404.

PAYMASTERS.
Rights, powers, and duties of, VI, 908.

PAYMENT.
General treatment, VI, 962.
In general.
For goods delivered C. O. D., V, 583.
In Confederate money, VIII, 159.
Into court generally, VII, 1035.
Of change bills, enforcement of, II, 610.
Of charges, averment of, in actions against carriers of goods, II, 276.
Of claims by receivers, VI, 1194–1200.
Of costs of former suit, III, 326.
Of dividends, guaranty of, V, 1055.
Of fare, VII, 1079–1083.
Of fare, necessity of, II, 310.
Of fee to secretary of state on consolidation, III, 83.
Of note, guaranty of, V, 1055.
Of overcharge under protest, II, 629
Of premium on insurance policy, I, 14.
Of profits, guaranty of, V, 1055.
Of rent, enforcement of, V, 354.
Of wages, by garnishee to creditor, effect of, I, 501.
Receiving a check in, II, 115.
Taking stock in, III, 129.
For land taken.
By company of mortgages on land condemned, IV, 439.
For land granted, taking stock in, IV, 465.
For lands condemned, necessity of, to passing title, IV, 760.
Into court under Canadian Expropriation Acts, IV, 931.

PAYMENT — *continued.*
For land taken — *continued.*
Into court under English Compulsory Purchase Laws, IV, 904.
Of damages, stay in execution until, IV, 852.
Of land damages into court, IV, 551–554.
Of land damages, presumption of, from lapse of time, IV, 545.
Of price for right of way, enforcement of, IV, 483.
Tender and refusal, when equivalent to, IV, 547.
For capital stock.
For stock subscribed, VII, 735–739.
For stock subscribed as a defense to suit to enforce liability to creditors, VII, 325.
Of judgment against corporation as a defense in creditor's suit, VII, 326.
Taking note in, VII, 281.
Of bonds, coupons and mortgages.
Of coupons, III, 335.
Of coupon, when compelled by mandamus, III, 342.
Of debts, issuing bonds in, I, 657.
Of mortgage, VI, 519.
Of mortgage, provisions as to time of, VI, 439.
What may be taken in, at foreclosure sale, VI, 501.
What necessary to effect redemption of mortgaged property, VI. 522.
Of taxes.
Effect of, to create adverse possession, I, 37.
Generally, VII, 985–989.
In lieu of taxation, construction of statute providing for, VII, 852.
Of amount due before applying for injunction, VII, 1002.
Of given sum in lieu of taxes, provision for, VII, 807.
When deemed voluntary, VII, 1000.
See also ACCORD AND SATISFACTION; COMPENSATION.

PAY-ROLL.
Admissibility and effect of, as evidence, V, 510.

PEAT.
See COMBUSTIBLE MATTER.

PECUNIARY CONDITION.
Of deceased, proof of, on question of damages, III, 880.
Of parties, admissibility of evidence as to, V, 416.
Of plaintiff or beneficiary, proof of, in mitigation of damages, III, 883.

"PECUNIARY INJURY."
What damages are included within term, VIII, 320.

PECUNIARY LOSS.
Averment of, in complaint for causing death, III, 794–796.
To beneficiaries as a measure of damages for causing death, III, 927–932.
To beneficiaries, proof of, III, 876, 878.

PENAL LAWS.
Enforcement of, by attorney-general, I, 512.
Not enforceable in foreign state, IV, 124.
Strict construction of, VII, 265.

PENALTY.
General treatment, VI, 966.
For what acts or omissions imposed, VI, 966.
Enforcement, VI, 967.
Actions for, when barred by lapse of time, VI, 327.
Against final carrier for failure to deliver, II, 251.
For breach of construction contracts, III, 136.
For delay, fixing, in contract, II, 298.
For discrimination, recovery of, IV, 125–127.
For disobedience of commissioners' orders, VI, 1150.
For excessive speed in cities, VII, 681.
For failure to comply with order of commissioners regarding grade crossings, III, 456.
For failure to deliver goods, under Texas statute, II, 122.
For failure to establish station, VII, 200.
For failure to feed cattle during transit, I, 753.
For failure to forward goods promptly, II, 30.
For failure to keep crossing in repair, III, 435.
For failure to obtain license, VII, 450.
For failure to pay fare or produce ticket, VII, 1088–1090.
For failure to post time of arrival of trains, VII, 1097.
For failure to stop before crossing another railway, III, 419.
For keeping cattle in cars more than 28 hours, I, 752.
For non-payment of taxes, VII, 987.
For obstruction of highway, VII, 718.
For overcharge in passenger fare, VII, 454, 1083.
For overcharges, generally, II, 618, 636–639.
For refusal to check baggage, I, 546.
For refusal to issue bill of lading, I, 603.
For violation of Contract Labor Law, III, 185.
For violation of internal revenue laws, VII, 72.
In actions for fires, V, 559.
In England for failure to pay fare or produce ticket, VII, 1088, 1089.
Recovery of, in actions for taxes, VII, 995.
Staying proceedings to enforce, V, 1156.
Under Arkansas and Texas statutes as to the removal of goods, II, 93–95.
When amount recoverable is considered a, III, 695.

PENNSYLVANIA.
Aid to railways by VII, 178.
Assessment and levy of taxes in, VII, 977.
Civil rights acts of, III, 27.
Conditions exempting carrier from liability to person riding on pass in, VI, 945.

PENNSYLVANIA — *continued.*
Constitutionality of statutes of, as to municipal aid for railways, VI, 548.
Constitutionality of statutes of, relative to condemnation of land, IV, 391.
Constitutionality of tax laws of, VII, 846.
Constitutional provisions in, relative to condemnation of land, IV, 386.
Construction of statutes authorizing street railways, VII, 356.
Crossing of streets and highways under statutes of, III, 423.
Deductions for benefits under condemnation laws of, IV, 720.
Doctrine of comparative negligence denied in, III, 52.
Grade crossings under constitution and statutes of, III, 411.
Injuries to animals running at large in, I, 227.
Liability of company to laborers employed by contractors in, III, 165.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 690.
Occupation of streets by steam roads under legislative grants of, VII, 563.
Operation of statute of, giving right of action for causing death, III, 752.
Power to construct branch roads under statutes of, I, 682.
Review of town-bonding proceedings by mandamus in, VI, 752.
Right to sue in, for causing death in foreign state, III, 789.
Rule as to imputed negligence in, V, 1085.
Rule in, requiring traveler at crossing to stop as well as to look and listen, III, 561.
Statute of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 719.
Statutes of, authorizing leases of roads, VI, 217.
Statutes of, relative to condemning right of way through streets, VII, 586.
Statutes of, relative to connecting lines, III, 65.
Statutes of, relative to intersection of railways, III, 396.
Statutory provisions in, limiting amount recoverable for causing death, III, 923.
Statutory regulation of grade crossings in, III, 447.
Taking land for streets and laying out roads in, VII, 553.
Taxation in aid of railways in, VI, 741.
Taxation of gross receipts under statute of, VI, 61.

PENSION.
Proof of widow's right to, in mitigation of damages, III, 884.

PERCOLATION.
Of surface water, interference with, VIII, 183.

PEREMPTORY CHALLENGES.
To jurors, VIII, 13.
To jurors impaneled to assess land damages, IV, 614.

PERFORMANCE.
Averment of, on plaintiff's part, VI, 991.

PERFORMANCE — *continued.*
By company of conditions in subscription, VII, 802.
By complaint, necessity and sufficiency of, VII, 147.
Necessity of, to constitute accord, I, 18.
Of duty to fence, effect of, I, 151, 153.
Of condition, effect of impossibility of, VII, 804.
Of conditions in deeds, necessity and sufficiency of, IV, 16–18.
Of conditions in grant of right of way, IV, 473, 474.
Of conditions on plaintiff's part, proof of, VII, 765.
Of contract, competency of evidence of, V, 394.
Of contracts for railway construction, III, 131–136.
Of contracts generally, III, 221–225.
Of contract to locate station, VII, 203.
On plaintiff's part, allegation of, VII, 761.

PERIL.
Assuming position of, when contributory negligence, V, 192–202.
Choosing between courses of action in moments of, III, 266–269.
Choosing between two dangers, II, 459.
Conduct of employé when in, V, 201, 202.
Conduct of passenger in cases of sudden, II, 442.
Conduct of passenger in moments of, II, 486–488.
Consideration of, in estimating damages, II, 571.
Contributory negligence in moments of sudden, VII, 485.
Error of judgment in moment of, III, 815; IV, 270.
Imminent, leaving moving train when in, II, 486–488.
Measure of damages for exposure to, III, 716.
Of trespasser, liability only after discovery of, VII, 1138, 1139.
Putting one in, III, 544.
Putting passenger in, liability for, II, 384.
Riding in position of, II, 495–501.
See also EMERGENCIES.

PERILS OF THE SEA.
Exception of, in bills of lading, I, 641.
What are, VIII, 321.
When excuse loss by carrier, II, 25.

PERISHABLE FREIGHTS.
Carrier must give preference to, II, 29, 32.
Duty of carrier as to, II, 32.
Duty to carry fruit by special train, II, 35.
How far common-law liability applies to loss of, II, 24.
Liability of final carrier as to, II, 245.
Liability of initial carrier for loss of fruit by freezing, II, 216.
Limitation of liability as respects, II, 170.
Negligence of shipper, when excuses carrier for loss of, II, 84.
Strikes, when excuse delay in forwarding, VII, 720.
When carrier may sell, II, 76.
When higher rate on, justifiable, VI, 14.

"PERMANENT."
As used in a contract to establish shops, etc., III, 206.
PERMANENT INJURIES.
Allegation of permanency, III, 722.
Evidence as to, under the pleadings, VI, 1030.
Excessive damages for ejecting passenger, IV, 241.
Excessive damages for, to employés, V, 340.
Measure of damages for, III, 712.
Opinions of physicians as to, VIII, 283.
Prospective damages for, III, 695–700.
"PERPETRATOR."
When the word includes a railroad company as applied to injuries causing death, VIII, 321.
PERPETUITY.
Of interest acquired by condemnation proceedings, IV, 435.
PERSON.
Action for trespass upon the, VII, 1115, 1116.
Compulsory examination of, VI, 975–978.
How far corporation is a, III, 317.
Meaning of words "any person," VIII, 305.
When word includes corporations, VIII, 321.
Who liable to income tax, VII, 1024.
Who may be taxed, VII, 855–861.
PERSONAL DELIVERY.
Of goods carried, II, 109.
PERSONAL INJURIES.
See also ACCIDENT INSURANCE; ASSAULT, CIVIL ACTION FOR; CABLE RAILWAYS; CHILDREN, INJURIES TO; COLLISIONS; CROSSINGS, INJURIES AT; DAMAGES; DEATH BY WRONGFUL ACT; DERAILMENT; EJECTION OF PASSENGERS; ELECTRIC RAILWAYS; EMPLOYES, INJURIES TO; EXPLOSIONS; FELLOW-SERVANTS; FRIGHTENED TEAMS; LICENSEES, INJURIES TO; NEGLIGENCE; STREET RAILWAYS; TRESPASSERS, INJURIES TO.
In general.
Actions against receivers for, VI, 1216.
Actions for, when barred by lapse of time, VI, 325.
Application of doctrine of *ultra vires* to cases of, VIII, 133.
At crossings, III, 460–657.
At or near bridges, I, 705–709.
Burden of proof under the pleadings in actions for, VI, 1035.
By blasting, I, 652.
Caused by negligence at station, VII, 208–236.
Claims for, when prior to mortgage, VI, 449.
Costs in actions for, III, 329.
Evidence under pleadings in actions for, VI, 1027.
Excessive damages for, VI, 850–868.
Instructions in actions for, generally, VIII, 54–57, 68–72.
Measure of damages for, III, 709.
Nonsuit in cases of, VIII, 27, 32.
PERSONAL INJURIES — *continued.*
On elevated railways, IV, 357–368.
Opinion of physician as to cause, extent, and permanency of, VIII, 278–286.
Payment by receiver of claims for, VI, 1196.
Priority of mortgage over claims for, VI, 455.
Proper venue in actions for, VIII, 6.
Prospective damages for permanent, III, 695.
Questions of fact in actions for, VIII, 47–49.
Statement of cause of action in actions for, VI, 994–997.
Suits in equity to recover damages for, V, 356.
To child, effect of contributory negligence to bar recovery for, II, 773–778.
To drovers riding on cattle train, I, 792–801.
To employés, damages for, V, 337–345.
To owners of private cars, right to recover for, VI, 1075.
To passengers, II, 343–436.
To wife, action for, V, 1069–1077.
To wife, release by husband of claim for, V, 1067.
Variance between pleading and proof in actions for, VI, 1039.
When limitation begins to run in actions for, VI, 311.
Liability for.
At cattle-guards, II, 599.
At excavations, V, 538.
At railway intersections, III, 416.
By receivers, liability of company for, VI, 1228.
Caused by independent contractor, V, 1115, 1116.
Caused by servants of railway contractor, III, 142.
Construction of statutes relative to, VII, 268.
From fires, V, 883.
From insufficiency of culverts, III, 662, 663.
Occasioned by construction of road, III, 118.
Of elevated railway, IV, 357–368.
Of lessee road, VI, 226, 227.
Of lessor, VI, 220, 221.
Of mine owner, VI, 402.
Of president, VI, 1072.
Of private railroads, VI, 1076.
Of receiver, VI, 1192.
Of street-car company, VII, 455–539.
To mail clerk, II, 8.
To passengers, VII, 133–135.
To person riding on free pass, VI, 941–943.
PERSONAL LIABILITY.
For stock subscribed, VII, 744, 745.
Of corporate officers, VI, 906.
Of receivers, VI, 1193.
PERSONAL NOTICE.
Of assessment on subscriptions to stock, VII, 754.
Of condemnation proceedings, IV, 509.

PERSONAL PROPERTY.
Elevators, when deemed to be, IV, 369.
Excessive damages for injuries to, VI, 856.
Of railroads, what is, VIII, 322.
Rolling stock is, VI, 426, 427.
Shares of stock are, VII, 277.
Trespass upon, VII, 1114, 1115.
What subject to execution, V, 542.
When exempt from taxation, VII, 912–915.

PERSONAL REPRESENTATIVES.
See EXECUTORS AND ADMINISTRATORS.

PERSONAL SERVICE.
Specific performance of contract for, VII, 154.

PERSONS INTERESTED.
Who are, VIII, 322.

PETITION.
In general.
For mandamus, VI, 383.
Form and sufficiency of, generally, VI, 985–1001.
For removal of cause, VII, 41–43.
In action against carrier of cattle, I, 805.
In action against carrier of passengers, II, 524–531.
In action at law by abutter for injury sustained by railway in street, VII, 645.
In action before justice of peace, VI, 122.
In action for flowing land, V, 992.
In action for injury to child, II, 809.
In action for injury to employé, V, 261–273.
In action for overcharge in passenger fare, VII, 1083.
In action for taxes, VII, 992.
In action for trespass to personal property, VII, 1115.
In name of state to enforce orders of commissioners, VI, 1151.
In proceedings for construction of grade crossing, III, 454.
In proceedings for crossing of railways, III, 401, 402.
In *quo warranto*, sufficiency of, VI, 1132.
In stock-killing cases, I, 246–269.
In suit to enjoin unlawful tax, VII, 1009.
Of intervention in foreclosure, VI, 486.
Sufficiency of, for injury by derailment, IV, 40.
Sufficiency of, in action for causing death, III, 790.
Sufficiency of, on application for receiver, VI, 1175.
For railroad aid.
Bonds not to issue until sufficiency of is determined, VI, 570.
Collateral attack or reconsideration of, VI, 570, 571.
Conditions annexed to, VI, 569.
In proceedings to compel issue of bonds, VI, 664.
In suit to enforce bonds, VI, 706.
Signatures to, VI, 565–568.

PETITION — *continued.*
Submitting written proposals of company with, VI, 640.
Verification of, VI, 568.
When must show that required number of taxpayers has signed, VI, 567.
In condemnation proceedings.
Estimating land damages from time of filing, IV, 583.
For condemnation, allegation of inability to agree with landowner in, IV, 501.
For expropriation under Canadian statutes, IV, 928.
In condemnation proceedings, IV, 512–526.
In trespass by landowner for wrongful interference with property, IV, 873.
To condemn land, amendment of, IV, 291.
See also COMPLAINT; DECLARATION.

PETITIONER.
Substitution of new, IV, 494.

PETROLEUM.
See OIL.

PHILADELPHIA, PA.
Decisions particularly applicable to, VI, 764.
Joint use of street car tracks in, VII, 434.

PHILADELPHIA & R. R. CO.
General treatment, VI, 974.

PHILADELPHIA, G. & N. R. CO.
General treatment, VI, 974.

PHOTOGRAPHS.
Admissibility and effect of, as evidence, V, 511.
Admissibility of, in evidence, III, 857; V, 407.

PHYSICAL CONDITION.
Of injured person, opinion of witness as to, VIII, 239.

PHYSICAL EXAMINATION.
General treatment, VI, 975.
Admissibility of evidence of objection to, V, 413.

PHYSICIANS AND SURGEONS.
As experts, VIII, 278–288.
Competency of evidence of advice of, V, 394.
Competency of evidence of failure to call, V, 404.
Declarations of pain and suffering made to, V, 494.
Employment of, VI, 391–396.
Evidence of statement to, as to cause of injury, V, 495.
Implied powers of, I, 44.
Incompetency of, as a defense to action for causing death, III, 811.
Privileged communications with, VIII, 228–229.
Right of, to compensation, VI, 396, 397.
Statements of, when deemed hearsay, V, 460, 462.

PIERS.
When deemed fixtures, V, 969.

PILE-DRIVER.
When foreman is not fellow-servant of, V, 751.

PILOT OF ENGINE.
Contributory negligence in riding on, V, 215.
Duty to employés as to safety of, V, 97.
Liability for injury to person riding on, VII, 1149.

PIPES.
Injunction against laying of, V, 1146.

PIRACY.
When a defense to carrier, II, 20.

PIT-HANDS.
When foreman is not fellow-servant of, V, 753.

PLACE.
In general.
Admissibility of evidence as to condition of track at other places than that of accident, V, 431.
Contracts to locate station at particular, VII, 201.
Contracts to locate station at particular, validity of, III, 213–215.
Discrimination by carrier as between places, IV, 105–113.
For payment of coupons, III, 335.
Of construction of roads, measure of damages for breach of contract as to, III, 702.
Of delivery by carrier of live stock, I, 758.
Of holding coroner's inquests, III, 316.
Of injury, evidence of, as controled by pleadings, VI, 1029.
Of injury, evidence of, variance, VI, 1039.
Of issuing attachment, I, 502.
Of meeting of directors, IV, 56.
Of payment of coupon, III, 334.
Of payment, stating in railway-aid bond, VI, 672.
Of presenting claim for loss, stipulation as to, I, 639.
Of registration of mortgages, VI, 435.
Of service of attachment, I, 504.
Of service of process, VI, 1097.
Of trial, what proper and how changed, VIII, 3–9.
To move for new trial, VI, 875.
To what places ordinances regulating speed apply, VII, 678.
Where cattle-guard must be built, II, 593–596.
Where dividends are payable, IV, 144.
Where fences must be built, V, 810–820.
Where signals must be given by statute or ordinance, VII, 682.

In carriage of passengers or baggage.
Duty to discharge passenger at proper, VII, 480.
For passenger to ride, duty of carrier to provide safe, II, 375.
Getting off train at dangerous, contributory negligence, II, 460–467.
Of accident, allegation of, in complaint, II, 525.
Of delivery of baggage by company, I, 547.
Of egress from train, duty to provide safe, II, 400–404.

PLACE — *continued.*
In carrier of passengers or baggage — *continued.*
Of entering cars, fixing by company, II, 334.
Riding in perilous, when contributory negligence, II, 495–512.
Suing where cause of action accrued, IV, 211.

Of business.
Of defendant, jurisdiction as dependent upon, VI, 110.
Or residence as situs of property for taxation, VII, 884, 885.
Where process may be served, VI, 1088.
Of consignee, delivery of goods at, II, 50, 95.
Of corporation, when deemed its residence, III, 4–6.
Of defendant, when proper venue for action for causing death, III, 781.

Of crossings.
Allegations respecting, III, 402.
At which traveler should stop, look, and listen, III, 595, 596.
Railways, fixing in award, III, 408.
Track, negligence of traveler as to, III, 542.

Of ejecting passenger or trespasser.
Exemplary damages for ejection in dangerous, IV, 234.
Expulsion from sleeping car at improper, VII, 133.
Of ejection of trespasser from train, IV, 207.
Of expulsion of passenger, IV, 202–208.
What proper, VII, 1151.

Of injury to animals.
Of accident, evidence to show, I, 299.
Of entry by animal on track, evidence to show, I, 298.
Of entry by animal on track, presumption as to, I, 302.
Of entry fixes liability, I, 159.
Of entry on track, how alleged, I, 360, 361.
Of entry on track, when question of fact, I, 328.
Of killing animal, presumption as to, I, 302.
Of killing animal, when question of fact, I, 320.
Of killing stock, allegations as to, I, 262, 263.
Of killing stock, burden of proof to show, I, 315.
Where fences must be built, I, 143–149.

Of injury to employe.
Allegation of, in action for injury, V, 264.
Assumption of risk while riding in perilous, question for jury, V, 328–331.
Contributory negligence in riding in dangerous, V, 214–217.
Duty to provide safe, in which to work, V, 39–43.
Failure of vice-principal to provide safe, liability of company, V, 678.
Of accident, when need not be alleged in pleading, V, 264.

PLACE — *continued.*
Of injury to employe — *continued.*
Of employment, assumption of risk as to, V, 132.
Of injury, statute requiring notice of, V, 260.
Of work, assumption of risk from unsafe, V, 179.
Of work, duty to warn infant employé as to, V, 247.
Of work, notice of danger and peril connected with, V, 154.
Of work, promise of employer to repair defects in, V, 166.
To work, alleging negligence in failing to provide safe, V, 265.
To work, evidence of failure to provide safe, V, 276.
To work, negligence in failing to provide safe, V, 313.
To work, person charged with duty to provide is a vice-principal, V, 725.
To work, sufficiency of evidence to show unsafety of, V, 289.
Walking in dangerous, in the dark, when contributory negligence, V, 194.
Of shipment and delivery.
Agreement to deliver goods at specified, II, 108.
Of delivery of goods carried, V, 580.
Of delivery, what proper or sufficient, II, 113.
Of shipment, limiting carri r's liability to value at, I, 636.
Of shipment, limiting damages to market value at, II, 176.
To store goods is that of destination, II, 148.
In condemnation proceedings.
Of deposit of land damages, notice of, IV, 550.
Of giving notice of condemnation proceedings, IV, 508.
Of meeting of commissioners to assess damages, IV, 599.
Of trial by jury in assessment of land damages, IV, 615.
See also Law of Place; Locus in Quo.

PLANK ROADS.
See Turnpikes; Plankroads.

PLANS.
Filing of, generally, VI, 357.
Filing of, under Canadian statutes, IV, 929.
Of construction as evidence, V, 511.
Of elevated railways, adoption of, IV, 279.
Proof of dedication by, VII, 544.
Reference to, in deeds, IV, 11.
Under English Compulsory Purchase Laws, IV, 898–900.
Use of, in condemnation proceedings, IV, 526–529.

PLATFORM CAR.
Contributory negligence in riding on side of, V, 216.

PLATFORMS.
At stations.
Absence of guards at edge of, IV, 359.

PLATFORMS — *continued.*
At stations — *continued.*
Duty to provide safe, II, 400.
Duty to stop alongside of, II, 389, 394, 413.
Erecting too high or too low, VII, 218.
Erection of, when constitutes a taking of property, IV, 449.
Injuries caused by snow and ice on, IV, 363.
Injuries caused by trucks on, VII, 211.
Injuries to passenger by opening between car and, IV, 360.
Joint use of, by two or more companies, VII, 237.
Liability for defects in, II, 416.
Liability for personal injuries at, VII, 215–219.
Liability to passenger for defects in, II, 378.
Maintaining, too far from track, VII, 468.
Near track, duty of company to fence, V, 60.
Near track, effect of notice or knowledge of, V, 157.
Negligence as to safety of, VII, 234.
Ordinances as to safety of, VII, 675.
Receiving passengers where there is no, II, 401.
Stumbling over freight piled on, VII, 212.
Walking on unlighted, VII, 229.
Walking on, when covered with ice, VII, 229.
Of cars.
Boarding train elsewhere than at, contributory negligence, II, 450.
Contributory negligence in riding on, II, 501–506.
Duty to remove ice and snow from, II, 384.
Entering car by front, or riding on, VII, 493.
Going to, for purpose of leaving car, VII, 499.
Injury to passenger riding on, I, 730.
Injury to passenger standing on, IV, 269.
Leaving car by front, VII, 496.
Negligence in allowing passengers to ride on, VII, 468.
Of crowded car, injury to passenger on, IV, 363.
Riding on, VII, 497–499.
Riding on, by child, whether negligence question of fact, II, 789.
Riding on front, VII, 494–496.
Riding of street-car company to make rule prohibiting riding on, VII, 455.
Rules forbidding standing on, II, 336.
Standing on very edge of, VII, 499.
Stepping off, by passenger, when contributory negligence, II, 490.

PLATS.
Admissibility and effect of, as evidence, V, 506.
Admissibility of, in evidence, I, 287.
Filing, VI, 1121.
Of streets, admissibility of, in evidence, III, 857.

PLEADING.
General treatment, VI, 981.
At law and under codes, VI, 983.
In equity, VI, 1018.
Issue; its scope and how joined, VI, 1021.
Evidence under pleadings; variance, VI, 1022.
Amended and supplemental pleadings, VI, 1043.
Remedies for errors and defects; waiver, VI, 1054.
In general.
Account in actions before justices, VI, 123.
Admissions in, V, 487.
Allegations in, when create estoppel V, 366.
Alleging or negativing contributory negligence, III, 275–282.
Amendment of, after statutory period has run, effect of, VI, 306.
Amendment of, as ground for continuance, VIII, 10.
And proof of incorporation, III, 324.
Averments as to contributory negligence, III, 559.
Competency of evidence as to matters not alleged, V, 413.
Discretion of court in allowing amendments of, I, 381.
How acts *ultra vires* should be pleaded, VIII, 125.
How estoppel should be pleaded, V, 363.
How exemption from taxation should be pleaded, VII, 900.
How misnomer should be pleaded, VI, 767.
How release should be pleaded, VII, 9.
In another action as evidence, V, 511.
Instructions broader than, VI, 831.
Judgment must conform to, VI, 82.
Objections to, how to be taken, I, 414.
Presumption of regularity respecting, I, 385.
Rules of, relative to damages, IV, 719–723.
Statement in actions before justices, VI, 122.
Sufficiency of complaint before justice, I, 358, 359.
What errors and irregularities respecting, will be disregarded on appeal, I, 398.
In actions for injuries to employes.
Alleging time of injury, V, 264.
Alternative allegations, V, 262.
By negligence of fellow-servants, V, 773–776.
Evidence admissible under, V, 776.
Generally, V, 261–274.
Inconsistent allegations, V, 262.
To infant employés, V, 251.
In actions for injuries to goods.
Against carriers, II, 274–280.
Against final carriers, II, 251.
By and against express companies, V, 599.
For damages for loss of goods carried, II, 61.
Necessary averment in, II, 61.
PLEADING — *continued*.
In actions for injuries to passengers.
Against carriers of passengers, II, 524–532.
By expulsion, IV, 213–217.
By loss of baggage, I, 568–569.
By unlawful transportation of slaves, II, 588.
In actions for torts, generally.
Against railway company for injuries in streets or highways, VII, 699, 700.
By husband for personal injuries to wife, V, 1070.
By wife for injuries to her separate estate, V, 1073.
Evidence admissible under, damages by fire, V, 900, 901.
For causing death, III, 700–808.
For conversion, VIII, 112.
For damages for nuisances, VI, 899.
For discrimination, IV, 113.
For diversion of water, VIII, 176.
For failure to build and maintain fences, V, 831.
For failure to build or repair cattle-guards, II, 599.
For false imprisonment, V, 611.
For flooding land, V, 990–993.
For injuries at crossings, III, 638–641.
For injuries at station, VII, 232.
For injuries by collision, III, 15.
For injuries by fire, V, 899–907.
For injuries by obstructions and encroachments in streets and highways, VII, 713.
For injuries to children, II, 809, 810.
For injuries to crops, etc., from failure to fence, V, 834.
For injuries to passengers by derailment, IV, 40.
For interference with easements, IV, 161.
For interference with private ways, VI, 1081.
For libel or slander, VI, 259.
For negligence, VI, 818–821.
For malicious prosecution, VI, 371.
For refusal to transfer stock, VII, 296.
For trespass, VII, 1108, 1115, 1116.
Founded upon misuse of signals, III, 526.
Over by city or town against railway company, VII, 705.
To enforce penalty, VI, 968.
To recover penalty for discrimination, IV, 125–127.
Under Civil Rights Act, III, 29.
Setting out law of foreign state, III, 785.
In actions on contract, generally.
By assignees, I, 481.
By creditors, III, 353.
For compensation by physician, VI, 397.
For specific performance, VII, 155.
For taxes, VII, 902, 993.
Of assumpsit, I, 487.
On contracts, III, 231, 232.
On coupons, III, 340.
On guaranty of bond, V, 1057.
To enforce subscriptions to stock, VII, 759–764.

PLEADING — *continued.*
In actions on contract, generally — *con.*
To recover back money paid for taxes, VII, 1001.
To recover back overcharges, II, 631.
To recover charges, II, 648.
To recover wages, V, 9.
Upon covenants, III, 348.
Upon leases, VI, 240.
In civil actions, generally.
Against elevated railway company, IV, 312, 313.
Against consolidated companies, III, 106.
Against lessor companies, VI, 223.
Against receivers, VI, 1215.
By and against foreign corporations, V, 1021.
By stockholders, VII, 345–348.
In ejectment, IV, 252–254.
In foreclosure of mechanics' lien, VI, 292.
In foreclosure of railway mortgages, VI, 484–487.
In joint, by husband and wife, V, 1076.
In justice's court, VI, 122.
In replevin, VII, 65.
To cancel railway-aid bonds, VI, 713.
To enforce laborer's lien, VI, 300.
To enforce railway-aid bonds, VI, 706, 707.
To enforce stockholder's liability to creditors, VII, 324.
To enjoin unlawful tax, VII, 1009.
To foreclose deeds of trust, IV, 31.
To restrain issue of railway-aid bonds, VI, 670.
On application for mandamus, VI, 383.
In condemnation proceedings.
Disregarding irregularities in, on appeal, IV, 787.
Estoppel to prove damages different from case made by, IV, 663.
For damages for wrongful interference with property, IV, 839.
Generally, IV, 512, 525.
In trespass by landowner for wrongful interference with property, IV, 872–874.
Objections to, how to be taken, IV, 790.
To condemn right of way through street, VII, 589.
What required on assessment of damages by jury, IV, 616.
In stock-killing cases.
Evidence admissible under, I, 272–274.
Evidence under, in justice's court, I, 366.
Generally, I, 246, 276.
See also COUNTS.

PLEA.
Amendment of, III, 808.
Form and sufficiency of, generally, VI, 1001–1010.
In abatement, III, 455.
In action against carrier of cattle, I, 805.
In action for causing death, III, 807.
In action for loss of baggage, I, 568.
In action for taxes, VII, 993.
In action of trespass, VII, 1112.
In action on bill or note, I, 598.

PLEA — *continued.*
In action on contract, III, 232.
In action on stock subscription, VII, 762–764.
In condemnation proceeding, necessity and sufficiency of, IV, 533, 534.
In ejectment, IV, 253.
In ejectment by landowner, IV, 851.
In equity, VI, 1020.
In suit against carrier of goods, II, 278.
In suit by stockholders, VII, 347.
In suit for injuries to employés, V, 274.
In trespass by landowner for wrongful interference with property, IV, 873.
Of confession and avoidance alleging contributory negligence, III, 282.
Of "not guilty by statute," proving contributory negligence under, III, 282.
Striking out, on appeal from justice's court, VI, 124.
To action against carrier of passengers, II, 532.
To suit on construction contract, III, 172.

PLEASURE GROUNDS.
At seaside resort, condemnation of, IV, 416.
See also COMMONS: PARKS.

PLEDGE; COLLATERAL SECURITY.
General treatment, VI, 1061.
Pledge.
Of assets, power of receivers to make, VI, 1186.
Of corporate property, authority of president to make, VI, 1068.
Of corporate property by directors, IV, 65.
Power of corporations to, III, 322.
Rights of pledgee of corporate bonds, I, 667.
Transfer of stock by way of, VII, 289–291.
Collateral security.
Holder of stock as, liability of, to creditor, VII, 322–324.
Rights of holders of bonds as, I, 667; VI, 509.
Transfer of bill of lading as, I, 647–650.
Waiver of lien by taking, VI, 288.

PLUMBER.
When master mechanic is not fellow-servant of, V, 763.

POLES.
Right to erect, in streets, IV, 261–264.
Situs of, for taxation, VII, 885.

POLICE OFFICERS.
Liability of company for false imprisonment by, V, 609.

POLICE POWER.
Corporate franchises are subject to, V, 1026.
Enactment of fence laws valid exercise of, V, 793.
Is paramount to contracts in charters, II, 682.
Object and purpose of, VIII, 322.
Of carriers of passengers, II, 434.
What statutes are valid exercises of, VII, 248–250.

POLICE REGULATION.
License tax justified as, VII, 447.
Statutes relating to signals at crossings, III, 495.

POLICIES.
Of insurance, construction of, I, 13.

POLL-BOOKS.
As evidence, VI, 592.

POOLING CONTRACTS.
Validity of, III, 215–219.
Validity of, under Interstate Commerce Law, VI, 49.

POOR RATES.
Enforcement of, by distress, IV, 141.
Liability for, in England, and how enforced VII, 1010–1018.

PORTER.
Conductor as vice-principal of, V, 737.
Delivery of baggage to, I, 543.
When fellow-servant of carpenter, V, 763.

POSITIVE AND NEGATIVE EVIDENCE.
Competency of negative, V, 407.
In actions for injuries at crossings, III, 647.
Negative, in stock-killing cases, I, 281.
Questions to witness calling for negative, VIII, 216.
Request to charge as to relative weight of, VIII, 80.
Weight and sufficiency of positive, V, 533–537.

POSSESSION.
By company, when consent or deed from landowner will be presumed, IV, 470.
By mortgage trustees, VI, 462, 463.
By officers must be actual, I, 505.
Demand for, prior to bringing ejectment, IV, 252, 851.
Effect of judgment to warrant company in taking, IV, 758.
Necessary in plaintiff to maintain trespass, IV, 871.
Necessity of, to validity of lien, VI, 277.
Necessity that defendant be in, to maintain ejectment, IV, 249.
Of deed as notice, IV, 6.
Of part of tract, claiming whole, I, 36.
Of plaintiff, necessity of, to maintain ejectment, IV, 249.
Of property condemned, company's right of exclusive, IV, 436.
Of receiver, VI, 1178–1183.
Of receiver in foreclosure, VI, 493.
Order for immediate, under Canadian Expropriation Acts, IV, 930.
Persons in, when entitled to land damages, IV, 562.
Right of, in defendant as defense in ejectment, IV, 251.
Right of party in, to appeal in condemnation proceedings, IV, 774.
Right of person in, to sue for damages by fire, V, 894, 896.
Right of trustees to take, on default by mortgagor, VI, 461, 462.
Surrender of, as element of land damages, IV, 688.

POSSESSION — *continued.*
Under license from owner as defense in ejectment, IV, 849.
What is adverse, I, 33–35.
What necessary in order to maintain trespass, VII, 1110.
What necessary in plaintiff to support trover, VIII, 109.
See also ADVERSE POSSESSION.

POSSESSORY WARRANT.
Form and sufficiency, generally, VI, 1085.

POSTAL CLERKS.
Carriage of, II, 326.

POSTHUMOUS CHILD.
Right of, for damages for causing death of parent, III, 760.
When entitled to land damages, IV, 572.

POSTING.
Of rates, under New Hampshire statutes, II, 643.
Of rules of carrier, II, 331.
Of schedule of passenger rates, VII, 1078.
Time of arrival of trains, VII, 1096, 1097.

POST-OFFICE.
Giving notice of arrival through, II, 100.
Prosecutions for obstructing mail, III, 383.
Right of express companies to carry mailable matter, V, 561.
See also CARRIAGE OF MAILS.

POSTPONEMENT.
See CONTINUANCE.

POSTS, STATIONS, OR DEPOTS.
When phrase means military posts and not railway stations, under transportation contract, VIII, 322.

POWDER MAGAZINE.
In city limits, explosion of, V, 558.

POWER.
Construction of words "by any power other than locomotive," VIII, 306.
Of agents, I, 42.
Of arbitrators, I, 456.
Of city to authorize and regulate street railways, VII, 358–369.
Of company to issue stock, VII, 279.
Of company to locate stations and depots, VII, 194–197.
To authorize taxation, generally, VII, 829–836.
To grant exclusive privileges to street railways, VII, 369–374.
To purchase railroads, VII, 109.
To sell railroads, when exists, VII, 105, 106.

POWER-HOUSE.
Of cable railway, location of, I, 728.

POWER OF ATTORNEY.
To transfer stock, construction of, VII, 285.

PRAIRIE LANDS.
Uninclosed, duty of company to fence, I, 146.

PRAYER.
In general.
For damages in justice's court, I, 364.
For relief in bill to foreclose, VI, 484.
For relief in equity, VI, 1020.

PRAYER — *continued.*
In general — *continued.*
For relief, in plaintiff's pleadings, VI, 1001.
For instructions.
Appealing from denial of, I, 381.
As to contributory negligence, III, 308–310.
For causing death, III, 913–918.
For injuries to trespassers, VII, 1165.
Generally, I, 815; II, 558–562; VI, 833; VIII, 73–84.
In stock-killing cases, I, 339–343.
Necessity of, I, 417.
Necessity of, in condemnation proceedings, IV, 791.
On assessment of land damages, IV, 636–638.
Refusal of, when ground for new trial, VI, 840.
What instructions must be given without, II, 817.
See also INSTRUCTIONS; REQUESTS.

PRECAUTIONS.
After accident, evidence of, V, 278.
Evidence of increased, after accident, V, 425–428.
Increased, after fire, admissibility of evidence of, V, 911.

PRECEDENCE.
Between courts of concurrent jurisdiction, VI, 115.

PRECEPT.
Enforcement of award or judgment by, IV, 762.

PRECINCT.
When does not include municipal corporations, VIII, 322.

PRE-EMPTION.
By original owner of superfluous lands under English statutes, IV, 890.
Holder of, when entitled to land damages, IV, 573.
Right, how acquired, effect, etc., VI, 1112–1115.

PRE-EMPTIONERS.
Of public lands, rights of, VI, 160, 166, 170.
Rights of, under Canadian laws, VI, 194.

PREFERENCE.
In assignment for creditors, I, 483.
Of causes on trial calendar, VIII, 15.
To perishable freights to be given by carrier, II, 29.
Undue, under Interstate Commerce Law, VI, 31–33.

PREFERRED DIVIDENDS.
Nature and right to, IV, 145.

PREFERRED STOCK.
In English law, VII, 277.
Issuing to contractors, VII, 280.
Priority of holders of, VI, 511.
Rights of holders of, VII, 277.
Right to vote on, VII, 310.
What is, VIII, 322.
See also STOCK; STOCKHOLDERS; SUBSCRIPTIONS TO STOCK.

PREJUDICE.
As ground for change of venue, VIII, 7.
Of jury, when must appear to set aside verdict, VI, 852.
See also LOCAL PREJUDICE.

PRELIMINARY PAYMENT.
Failure to make, as a defense to action on subscription, VII, 778–782.

PRELIMINARY PROOF.
Of loss by fire, V, 846.

PRELIMINARY SUBSCRIPTION.
Insufficiency of, as defense to action on subscription, VII, 789.
See also STOCKHOLDERS.

PREMISES.
Conveyed, description of, in deed, IV, 9–12.
Duty to keep, in safe condition, as to licensees, VI, 270.
Duty to keep, in safe condition, as to trespassers, VII, 1147, 1148.
Knowledge of defects of, V, 270.
Liability of company to trespassers on, VII, 1126–1148.
Measure of damages for obstruction of access to, IV, 918.
Negligence as to safety of, VII, 234.

PREMIUM.
On gold as damages in case of loss, II, 288.
On insurance policy, payment of, I, 14.

PREPAYMENT.
Of damages, waiver by landowner of, IV, 849.

PREPONDERANCE.
Of evidence as to contributory negligence or its absence, III, 298.
Of evidence in actions for damages by fires, V, 929.
Of evidence in actions for injuries to employés, V, 296.
Of evidence in actions for negligence, VI, 823.
Of proof, generally, V, 524, 528.

PRESCRIPTION.
Acquirement of easements by, IV, 160.
Acquiring right to turn surface water on land by, V, 979.
Continuance of nuisance gives no right by, VI, 893.
Creation of private ways by, VI, 1077.
Obtaining right to lay out street across railway by, III, 438.
Right to easement not gained by, IV, 295.

PRESENTATION.
Of petition in condemnation proceedings, IV, 513.

PRESENTMENT.
Of commercial paper, I, 595.
Of coupons for payment, III, 335.

PRESIDENT.
General treatment, VI, 1066.
Authority of, to employ physician, VI, 394.
Service of process on, VI, 1089.

PRESS OF BUSINESS.
Delay caused by, II, 36.
Delays caused by unusual, II, 68.

PRESUMPTIONS.

In general.

Against shipper's assent to limitation of liability, VI, 250.
As to competency of fellow-servants, V, 697.
As to condition of car as regards safety, VII, 462.
As to negligence, VI, 823–826.
Generally, V, 440–447.
In actions for injuries by collisions, III, 16.
In favor of general verdict, VIII, 91.
In favor of validity of amendment, VI, 1053.
Of acceptance of charter, II, 675.
Of attorney's authority, I, 515.
Of citizenship of corporation, III, 2.
Of dedication from public user, acquiescence, etc., VII, 545.
Of existence of relation of landlord and tenant, VI, 195.
Of negligence from time of existence of defect in fence, V, 828.
Of payment from lapse of time, VI, 965.
Of prejudice from erroneous instructions, I, 396.
Of presence or absence of contributory negligence, III, 298.
Of regularity in court below, I, 384–386.
Of shipper's assent to bill of lading, I, 611.
That agent's act has been ratified, I, 82–84.
That holder of bonds is *bona fide* purchaser, VI, 698–700.
When conveyance will be presumed, I, 38.
When grant will be presumed, VI, 140.

As to goods shipped.

Against carrier for loss of baggage, I, 524.
Against carrier in cases of loss or injury, V, 575.
As to condition of goods carried, II, 265.
As to condition of goods in hands of final carrier, II, 247.
As to condition of goods in hands of intermediate carrier, II, 240.
In actions against carriers of passengers, II, 543–550.
In actions by and against express companies, V, 601.
In actions for damages by fire, V, 930–938.
In actions for fires, V, 934–936.
In actions for injuries to employés, V, 298–300.
In actions for injuries to passengers by derailment, IV, 41.
Of loss of goods while in carrier's hands, II, 57.
Of negligence from failure to account for goods, II, 177.
Of negligence not raised by proof of loss where liability is limited, II, 176.
Of negligence of initial carrier where goods reach destination damaged, II, 212.

PRESUMPTIONS — *continued.*

As to goods shipped — *continued.*

Of negligence, when failure of carrier to account for loss raises a, II, 80–82.
Of negligence, when raised by proof of loss, II, 78, 80.
Of negligence, when raised by proof of loss by fire, II, 72.
That goods are delivered by carrier in good condition, II, 114.
That injury was within risks assumed, burden of proof to rebut, V, 284.

As to live stock.

As to place where animal entered on track, I, 162.
As to place where animal was killed, I, 205.
In stock-killing cases, I, 301–311.
Of negligence, I, 138.
Of negligence from failure to give signal, I, 198.
Of negligence in action against carrier of cattle, I, 811.
Of negligence, when overcome, I, 321.
Of notice from lapse of time, I, 171.

As to personal injuries.

As to due care of person injured at crossing, I, 644.
Facts presumed need not be alleged in pleading, V, 264.
In actions for causing death, III, 850, 851.
In actions for injuries to trespassers, VII, 1163.
Of competency of servants, V, 784.
Of knowledge on part of passenger of rules of carrier, II, 331.
Of negligence, burden of proof to rebut, II, 551.
Of negligence from accident at crossing, III, 644.
Of negligence from speed at crossings, III, 536.
Of negligence in case of injury to passenger, I, 729.
Of negligence in cases of collision between street cars, III, 21.
Of negligence in causing death, III, 851.
Of negligence of person injured by street car, VII, 531.
Of negligence, rebutting, II, 549.
Right of trainmen to presume that person will get off track, III, 547.
That company discharged its duty, burden of proof to rebut, V, 284.
That company has knowledge of defective appliance, V, 102.
That company used due care in selection of servant, V, 784.
That person killed at crossing stopped, looked, and listened, III, 561.
That person on train is passenger, II, 314.
That train will be properly managed, III, 583.

In condemnation proceedings.

In favor of award of damages, IV, 797.
Of consent or deed from landowner from long possession by company, IV, 470.

PRESUMPTIONS — *continued.*
In condemnation proceedings — *con.*
Of payment of land damages from lapse of time, IV, 545.
Of regularity on appeal, IV, 783.

PRESUMPTIVE EVIDENCE.
Collision as *prima facie* evidence of contributory negligence, III, 560.
In actions for damages by fire, V, 930–938.
In actions for injuries by negligence of fellow-servants, V, 779.
Of capacity of foreign corporation to contract, II, 286.

PRICE.
Decline in, as an element of damages, I, 818.
Of C. O. D. goods, duty of carrier to collect, II, 115.
Of goods sold, seller's action for, VII, 103.
Of rolling stock, lien for, VI, 277.
See also MARKET PRICE.

PRICE-LISTS.
When may be carried as baggage, I, 539.

PRIMA FACIE EVIDENCE.
Admissibility and effect generally, I, 301–311.
In actions against carriers of passengers, II, 543–550.

PRINCIPAL.
Cause, challenge to jurors for, VIII, 12, 13.
Debtor, notice to, of attachment, I, 503.
Debtor, who may be sued as, I, 490, 491.
Office of corporation as fixing residence, III, 4.
Place of business, as fixing residence, III, 4.

PRINCIPAL AND AGENT.
Agent must contract in name of principal, I, 47.
Knowledge of agent, when imputed to principal, I, 53, 54.
Liability of agent to principal, I, 48–50.
Liability of principal for acts of agent generally, I, 51–54.
Liability of principal for torts of agents, I, 61–80.
Notice to agent, when notice to principal, I, 52, 53.
When principal bound by agent's contracts, I, 54–61.
See also EMPLOYES; SERVANTS.

PRIORITY.
Among coupons on distribution in foreclosure, VI, 510.
Among holders of land warrants, VI, 1118.
Among mortgages, VI, 1195.
Ascertaining, by reference, in foreclosure, VI, 486.
Between conflicting attachments, I, 489.
Between deeds of trust and other liens, IV, 28.
Between executions and other claims and liens, V, 546.
Between junior and senior surveys, VI, 1117.
Between land grants, VI, 135.

PRIORITY — *continued.*
Between land patents, VI, 1119.
Between mortgages and other liens, VI, 443–459.
Between mortgages of rolling stock, VI, 428.
Between rival locations of route, VI, 362–364.
Between tax lien and other incumbrances, VII, 989.
Of claims, VI, 1194–1200.
Of claims for wages, V, 8.
Of coupons, III, 336.
Of debts due to government railroads, V, 1050.
Of debts in cases of receivership, VI, 495.
Of grants of right of way over public lands over other conveyances and titles, VI, 1120.
Of judgments, VI, 101.
Of laborers' claims in insolvency, V, 1170.
Of mortgages over equities subsequently arising, VI, 453–459.
Of passage at crossing of railways, III, 415.
Of receivers' certificates, how questioned, VI, 1204.
Of receivers' certificates over other liens, VI, 1202.
Of third parties' claims in attachment, I, 510.

PRIVACY.
Measure of damages for interference with, IV, 918.
Of dwellings, measure of damages for invasion of, IV, 327.

PRIVATE ACTS.
Admissibility and effect of, as evidence, V, 512.
Construction of, VII, 266.
Judicial notice of, V, 439.

PRIVATE CARRIERS.
Distinguished from carriers of passengers, II, 309.
When companies become, VI, 341.
Who are, II, 14.

PRIVATE CARS.
General treatment, VI, 1075.

PRIVATE CORPORATIONS.
Distinguished from public, III, 317.

PRIVATE CROSSINGS.
Cost of, as element of land damages, IV, 686.
Duty to fence track at, V, 813.
Duty to give signals at, III, 502–504.
Duty to look and listen at, III, 599.
Injuries to children at, II, 743.
Injuries to persons and teams at, III, 462.
Power of commissioners to provide for, VI, 1146.
Right of landowner to construction of, IV, 441.

PRIVATE INDIVIDUALS.
Power of, to condemn lands, IV, 409.

PRIVATE PROPERTY.
Power to take, VII, 374, 419.
See also CONSTITUTIONAL LAW; EMINENT DOMAIN.

PRIVATE RAILROADS.
General treatment, VI, 1075.
Branch lines, I, 684.

PRIVATE USE.
Of side tracks, VII, 126.
Property cannot be taken for, IV, 453–457.
What is, IV, 455–457.

PRIVATE WAYS.
General treatment, VI, 1077.
General principles, VI, 1077.
Remedies for interference or obstruction, VI, 1079.
Action for damages for obstruction of, IV, 834.
Obstruction of, as element of land damages, IV, 706.
Prosecutions for obstructing, III, 378.

PRIVILEGED COMMUNICATIONS.
Between attorney and client, I, 521.
Between husband and wife, VI, 258; VIII, 200.
Between physician and patient, VIII, 228–230.

PRIVILEGED DOCUMENTS.
Denying inspection of, IV, 79.

PRIVILEGES.
Of express companies upon railroad trains, V, 561–566.
Of hackmen at station, V, 1059–1061.
Of witnesses to refuse to answer, VIII, 227.
Under charters, II, 701.
What pass by deed, IV, 12.

PRIVY ACCOMMODATIONS.
Duty of company to provide, VII, 199.

PROBABLE CAUSE.
Burden on plaintiff to show want of, VI, 369.
For arrest, V, 610.
What is want of, and how proved, VI, 370, 371.

PROBATE.
Jurisdiction of courts in condemnation proceedings, IV, 490.
Removal of proceedings for, to federal court, VII, 26.

PROCEEDINGS.
Stay of, VII, 275.

PROCEEDS.
Distribution of, in foreclosure, VI, 508–512.
Of property sold under execution, disposition of, V, 547.
What are surplus proceeds, VIII, 328.

PROCESS.
General treatment, VI, 1082.
General principles, VI, 1082.
How framed and issued, VI, 1083.
Service, and how proved, VI, 1085.
Effect of appearance as a waiver of defects in, I, 451.
In condemnation proceedings, IV, 511, 512.
In criminal prosecutions, III, 357.
In justices's courts, VI, 121.
In stock-killing cases in justices' courts, I, 257.

PROCESS — *continued*.
In suits against foreign corporations, V, 1020.
In suits against receivers, VI, 1214.
In suits for injuries to live stock, I, 238.
Objections to, how to be taken, I, 414.
Seizure of goods on, when excuses carrier for non-delivery, II, 122–125.
Seizure under, when defense to carrier, II, 25.

PROCESSION.
Rule where man is marching in, VII, 531.

PRODUCTION.
Of books and papers, IV, 80.
Of tickets, VII, 1050–1053.

PROFANITY.
Expulsion of passenger for, IV, 189.

PROFERT.
Of original subscription, when not necessary, VII, 764.

PROFILES.
Use of, in condemnation proceedings, IV, 526–529.

PROFITS.
Anticipated, when allowed as damages, III, 701.
Damages for loss of future, III, 701.
Damages for loss of, on goods, II, 296.
Guaranty of payment of, V, 1055.
Loss of, as element of land damages, IV, 701.
Loss of, as damages, III, 675.
Loss of, as measure of land damages, IV, 936.
Loss of, by tenant as element of damages, VII, 662.
Loss of, evidence of, on assessment of land damages, IV, 647.
Measure of damages for loss of, IV, 917.
Proof of probable and reasonable, VII, 656.
Sufficiency of evidence to show, V, 524.
Taxation of undivided, VII, 876.
When recoverable as damages in actions on construction contracts, III, 179.

PROHIBITION, WRIT OF.
General treatment, VI, 1104.
Review of condemnation proceedings by, IV, 818.
When lies for wrongful interference with property, IV, 866.

PROMISE.
By employer to remedy defects, effect of, V, 164–167.
Of vice-principal, liability of company because of, V, 674.
To pay for stock subscribed, VII, 744, 745.
See also AGREEMENT; CONTRACTS.

PROMISSORY NOTES.
See BILLS, NOTES, AND CHECKS.

PROMOTERS.
Effect of consolidation on rights of, III, 90.
Rights and liabilities of, V, 1094.

PROOF.
Amendment of pleadings to conform to, VI, 1048, 1049.

PROOF — *continued.*
Of acceptance of dedication, VII, 545.
Of attorney's authority, I, 515.
Of compromise, III, 56.
Of consolidation of roads, III, 83.
Of customs and usages, III, 666.
Of dedication of streets, VII, 543–546.
Of giving notice of election in railway-aid cases, VI, 586.
Of inability to agree with landowner in condemnation proceedings, IV, 502.
Of incorporation, III, 324; V, 1102.
Of law of foreign state, III, 786.
Of service of process, VI, 1100.
Of signature to petition in aid of railway, VI, 567.
Of taxpayers' assent to railway aid, VI, 574.
Variance between indictment and, in prosecutions for causing death, III, 958.
See also EVIDENCE.

PROPER CARE.
What constitutes, III, 294.

PROPERTY.
Assumption of risk to save, when contributory negligence, V, 202.
Description of, in mortgage, VI, 438.
For what trover lies, VIII, 710.
Liability for loss of, by passenger, VI 135–139.
Lost or destroyed, liability to lessor for, VI, 229.
Necessary to corporate functions, when exempt, VII, 915.
Not necessary for road, when may be mortgaged, VI, 414.
Not necessary or indispensable, when exempt, VII, 917.
Not used for railroad purposes, when exempt, VII, 916.
Of non-resident, when exempt, VII, 917.
Of unusual value, limiting liability as to, VI, 339.
Omitted from taxation, when taxable against subsequent purchasers, VII, 868.
Power to mortgage, and what may be mortgaged, VI, 408–433.
Questions of fact in actions for injuries to, VIII, 49.
Rights of married women, V, 1067, 1068.
Situs of, for taxation, VII, 884–888.
Use of, subject to lien for taxes, VII, 990.
What covered by fire risk, V, 845.
What is deemed baggage, I, 533–541.
What is exempt from taxation, VII, 905–917.
What is, that may be taken, VII, 374.
What liable to income tax, VII, 1025.
What may be reached in attachment, I, 494–502.
What may be taken in condemnation proceedings, IV, 412–430.
What passes by deed of trust, IV, 26.
What subject to execution, V, 541–545.
What subject to laborer's lien, VI, 207.
What subject to mechanics' lien, VI, 285–287.
What subject to taxation, VII, 445, 861–888.
What taxable and to whom, under Canadian statutes, VII, 1018.

PROPERTY — *continued.*
What will pass on sale in foreclosure, VI, 500.
When word in tax law does not include franchise, VIII, 323.

PROPRIETORS.
Upper and lower, on watercourses, rights of, VIII, 177.

PROSECUTION.
Criminal, for causing death, III, 955–958.
For wrongful expulsion of passenger, IV, 210.
Malicious, VI, 367–373.

PROSPECTIVE DAMAGES.
Generally, III, 695–702.
In actions against carriers of passengers, II, 568.
In actions on construction contracts, III, 179.
To abutters, VII, 668.
When recoverable in action for causing death, III, 943–944.
See also FUTURE DAMAGES.

PROTECTION.
Of *bona fide* purchasers of stock, VII, 298–300.
Of prior liens, VI, 443–453.
Of property by sheriff, liability of company for, VII, 722.
Of purchaser at receiver's sale, VI, 1207.
What is accorded to *bona fide* purchasers, I, 673.

PROTEST.
Payment of overcharge under, II, 629.

PROVISOS.
In statutes, VII, 266.

PROVOCATION.
To justify an assault, I, 472.

PROXIES.
To vote at stockholders' meeting, VII, 310.

PROXIMATE CAUSE.
In general.
Of death by accident, I, 14.
Of injury by obstruction or encroachment in highway, VII, 708.
Of injury in street or highway, VII, 697.
Requests to charge as to, VIII, 80.
Rule as to, generally, VI, 793–799.
What is, VIII, 323.
When question for jury, VII, 234; VIII, 46.
Carriage of merchandise.
Of damage, delay of carrier must be, II, 295.
Of goods lost prior to transit, II, 53.
Of loss, act of God must be, II, 21–24.
Of loss by fire, when carrier's negligence is, II, 74.
Injuries to animals.
Alleging failure to fence as, I, 263.
Failure to signal must be, I, 199.
In stock-killing cases, I, 99, 100.
Liability for killing stock as dependent on, I, 227–229.
Of killing stock, failure to fence must be, I, 165.
Sufficiency of evidence to show that company's negligence was, I, 293.

PROXIMATE CAUSE — *continued.*
Injuries to animals — *continued*
What constitutes, I, 196.
When question of fact, I, 327.
Injuries to employes.
Burden of proof to show disobedience of order was not, V, 285.
Company's negligence must be, III, 22; V, 24–27.
Contributory negligence must be, III, 251–255; V, 187, 188.
Disobedience of rule as, V, 235.
Failure to adopt rules, when must be, V, 30.
Failure to warn or instruct employé must be, V, 39.
Incompetency of fellow-servant must be, V, 700.
Negligence of company as, V, 666.
Negligence of fellow-servants must be, V, 664.
Sufficiency of evidence of, V, 294.
Whether company's negligence was, question for jury, V, 323.
Injuries to passengers.
At station, II, 415.
Contributory negligence of passenger must be, II, 441, 468.
Generally, IV, 211.
Negligence of carrier must be, II, 350.
Loss or injury by fire.
Admissibility of, showing evidence of, V, 910.
As to spread of fire, V, 875–883.
Complaint must allege that negligence was, V, 905.
Contributory negligence of plaintiff must have been, V, 885.
Of fire, whether question of law or fact, V, 954.
Weight of evidence to show company's negligence to be, V, 926.
Personal injuries, generally.
Act or default of defendant must be, III, 764.
At crossing, III, 543, 575.
At station, VII, 431.
By collision, III, 15.
Contributory negligence must be, III, 817; VII, 1152.
To children at turntable, II, 746.
To children, parents' negligence must be, to bar recovery, II, 791, 801.
Proof that company's negligence was, III, 805.
Undue speed at crossing, when deemed, III, 536.
Whether contributory negligence was, question for jury, III, 295.
See also REMOTE CAUSE.

PROXIMATE DAMAGES.
Generally, III, 673–675.
In actions against carrier of passengers, II, 566.
In actions for flowing lands, V, 1000.
In actions for injuries by fire, V, 959.
In stock-killing cases, I, 345.

PUBLIC AGENTS.
Liability for negligence of, I, 86.
Liability of, as garnishees, I, 493.
Power to contract, I, 86.
Power to waive forfeitures, I, 86.

PUBLICATION.
Notice by, of condemnation proceedings, IV, 509, 510.
Of company's rules for government of employés, V, 234.
Of freight and passenger schedules, VI, 45–48.
Of libels, VI, 258.
Of notice before grant by city of right to lay tracks in streets, VII, 361.
Of notice of assessment on stock, VII, 754.
Of ordinances, VI, 756; VII, 572.
Of rates by commissioners, VI, 1141.
Of rates under New Hampshire statutes, II, 643.
Of rules of carrier, II, 331.
Of statutes, VII, 242.
Service of notice of condemnation proceedings by, IV, 510.
Service of process by, VI, 1009.
What are libelous, VI, 257, 258.

PUBLIC AUTHORITY.
Consent of, to construction of tunnels, VIII, 121.

PUBLIC CROSSING.
When crossing is, III, 463.

PUBLIC ENEMY
Act of, when defense to express company, V, 575.
Act of, when excuses carrier of passengers, II, 373.
Act of, when excuses non-delivery by carrier, II, 121.
Carrier as insurer, except as to act of, II, 17, 35.
What is act of, II, 19.

PUBLIC EXCITEMENT.
As ground for change of venue, VIII, 7.

PUBLIC GROUNDS.
See COMMONS; PARKS.

PUBLIC IMPROVEMENTS.
Local assessments for, against steam railways in cities, VII, 684–693.

PUBLIC LANDS.
General treatment, VI, 1107.
Land department, VI, 1107.
Homesteads, VI, 1108.
Indian lands, VI, 1110.
Pre-emption; rights of settlers, VI, 1112.
Timber on public lands, VI, 1115.
Surveys, VI, 1117.
Land warrants, VI, 1118.
Military reservations, VI, 1118.
Patents, VI, 1118.
Right of way over public lands, VI, 1120.
Land office records as evidence, V, 503.
Right of homestead settlers and pre-emptioners to land damages, IV, 573.
What are, VIII, 323.
See also LAND GRANTS; LAND GRANT RAILROADS.

PUBLIC MESSENGERS.
Who are, under a statute requiring free carriage of, VIII, 323.

PUBLIC OFFICERS.
Abatement of nuisances by, VI, 893.
Free transportation to, VI, 58.
PUBLIC OR PRIVATE CONVEYANCE.
Meaning of term in accident insurance law, ., 14.
PUBLIC PLACES.
Ordinance requiring fences where road passes, VII, 674.
PUBLIC POLICY.
Contracts against, not specifically enforced, VII, 153.
Contracts as against, III, 71.
Contracts granting exclusive privileges, when void as against, VII, 1030.
Contracts to locate station, when contrary to, VII, 202.
Contracts void as against, III, 212–221.
When condition in pass exempting carrier from liability is void as against, VI, 944.
PUBLIC PURPOSE.
Meaning of, as applied to taxation, VIII, 323.
Which will justify taxation, VII, 830.
See also PUBLIC USE.
PUBLIC ROADS.
See HIGHWAYS; STREETS AND HIGHWAYS.
PUBLIC SQUARES.
See COMMONS; PARKS.
PUBLIC USE.
Abutting easements taken by elevated railroads are for, IV, 285.
Condemnation of land previously devoted to, IV, 418–428.
Crossing of one road by another, when a, III, 399.
Of street, abutting owner may enjoin in cases of destruction of, VII, 640.
Power to take property for, IV, 399–412.
Presumption of dedication from, VII, 545.
Prior, in patent law, VI, 948.
Private way in lands dedicated for, VI, 1070.
Right to have street opened for, VII, 592.
Right to take private property for, VII, 419.
Second condemnation must not be for same, IV, 420.
What is, under condemnation laws, IV, 453–462.
See also PUBLIC PURPOSE.
PUNISHMENT.
For contempt, III, 184.
For disobedience of mandamus, VI, 388, 666.
In England for traveling with intent to avoid payment of fare, VII, 1089.
Of corporations for contempt, III, 184.
PUNITIVE DAMAGES.
Averments to warrant, III, 722.
Disregarding error in instructions as to, I, 408.
Erroneous instructions as to, I, 394.
For ejection of passenger from train, IV, 230–236.
For injuries caused by derailment, IV, 47.
In actions for false imprisonment, V, 612.
In actions for injuries to employés, V, 337.
PUNITIVE DAMAGES — *continued.*
In trespass to land, VII, 1114.
Sufficiency of averment to warrant, III, 308.
When deemed excessive, II, 585.
When recoverable against carrier of passengers, II, 575–579.
When recoverable for torts of servants, I, 72, 73.
When recoverable in actions for causing death, III, 944–946.
See also EXEMPLARY DAMAGES.
PURCHASE.
By one company of stock subscriptions of another, VII, 817.
For company, authority of president to make, VI, 1067.
Of bridge already built, I, 691.
Of competing road or stock therein, VI, 917.
Of land at tax sale, validity of, VIII, 130.
Of passenger tickets, VII, 1046–1050.
Seller's remedy for buyer's refusal to complete, VII, 203.
PURCHASE MONEY.
Buyer's action to recover back, VII, 105.
PURCHASER.
See VENDER AND PURCHASER.
PURCHASING AGENT.
Implied powers of, I, 44.
Of machinery, not fellow-servant of those using it, V, 763.
Rights, powers, and duties of, VI, 908.
PURPOSE.
Of taking land, stating in petition, IV, 519.
Of taxation, interpretation of statute as to, VII, 850.
Of taxation must be public, VII, 830.
PURPRESTURE.
What necessary to create, VIII, 323.
PUSH CARS.
Duty to employés as to safety of, V, 94.
QUALIFICATIONS.
Of appraisers or viewers, IV, 588.
Of arbitrators, generally, I, 456.
Of arbitrators in condemnation, IV, 941.
Of arbitrators to assess land damages, IV, 501.
Of commissioners to assess land damages, IV, 597.
Of directors, IV, 50.
Of experts, VIII, 269–274.
Of jurors, VIII, 12.
Of referees, VII, 3.
See also DISQUALIFICATION.
QUALITY.
Deterioration in, damages for, I, 819.
Of goods shipped, bill of lading as evidence of, I, 607.
QUANTITY.
Of goods lost, proof of, II, 286.
Of land controlled by metes and bounds, IV, 10.
Of land described in petition, company may take less than, IV, 519.
Of land included in grant, how ascertained, VI, 158.

QUANTITY — *continued.*
Of land taken, setting forth in report of commissioners, IV, 736.
Of land to be taken in condemnation proceedings, IV, 412.
Of shipment, bill of lading as evidence of, I, 600.
QUANTUM MERUIT.
Recovery on, I, 487.
Suits on, VIII, 132.
QUARANTINE.
General treatment, VI, 1125.
QUARRIES.
Injuries to employé in, V, 42.
QUASHING.
Insufficient petitions in condemnation proceedings, IV, 525.
Of attachment, I, 505.
QUESTION OF FACT.
In general.
As regards negligence, VI, 802–813.
As to contributory negligence, VII, 502–506.
As to credibility of witnesses, VIII, 202.
Authority of agent, when a, I, 45.
Dedication, when a, VII, 545.
Diminution of rental value, when a, IV, 335.
Employment, when a, V, 6.
In action for failure to build or repair cattle-guards, II, 602.
In action for flowing lands, V, 999.
In case of obstructions and encroachments in highway, VII, 715.
In contest between rival locations, VI, 364.
In ejectment by landowner, IV, 851.
Sufficiency of fence, when a, V, 824.
Weight of evidence, when a, V, 530.
Weight of expert testimony, when a, VIII, 298.
Weight of negative testimony, when a, V, 536.
What is, V, 1009; VI, 260; VIII, 44–49.
When company's negligence in causing collision is, III, 21.
When does not call for expert testimony, VIII, 265.
When employé's contributory negligence is, III, 24.
When negligence is a, VI, 802–813.
Carriage of merchandise.
As to negligence, II, 73.
Contributory negligence, when a, II, 84.
Delay, when a, II, 68.
Discrimination, when a, IV, 88.
In action by or against company, V, 603.
Knowledge and assent of shipper to limitation of liability, II, 167.
Negligence, when a, II, 183.
Reasonableness of rates, when a, II, 623.
Reasonable time for removal of goods, when a, II, 48, 140.
Shipper's assent, when a, I, 612.
Sufficiency of delivery of goods by carrier, when a, II, 114.
Injuries at crossings.
Care required from traveler at crossing, when a, III, 565.
QUESTION OF FACT — *continued.*
Injuries at crossings — *continued.*
Contributory negligence of person injured, when a, III, 551, 628–630.
Duty of traveler at crossing to look and listen, when a, III, 579.
Duty to look and listen, when a, III, 620.
Duty to station flagman at crossing, when a, III, 487.
Negligence in failing to give signals, when a, III, 514–515.
Negligence of company, when a, III, 469.
Sufficiency of gate, when a, III, 480.
When negligence in attempting to cross track is, III, 637.
Whether company exercised proper care, when a, III, 461–463.
Injuries to animals.
Contributory negligence, when a, I, 235.
Generally, I, 815.
Negligence, when a, I, 755.
What is, I, 321–326.
Injuries to children.
Generally, II, 782–789.
Negligence in management of turntable, when a, II, 747.
Parents' negligence in action, when a, II, 803–807.
When child's negligence is, II, 784.
When company's negligence is, II, 755. 763.
Injuries to employes.
As to assumption of risk, V, 324–337.
As to company's negligence, V, 309–324.
Employés' negligence, when a, V, 325–328.
In general, V, 308.
Injuries to infant employés, V, 252.
When mixed question of law and fact, V, 328.
Injuries to passengers or baggage.
As to leaving moving cars, what is, II, 469.
Contributory negligence of passenger in boarding train, when a, II, 452, 458.
Contributory negligence of passenger, when a, II, 448.
In action for lost baggage, I, 573.
Reasonableness of rules, when a, II, 330.
Reasonable time to call for baggage, when a, I, 552.
What is a, II, 562.
What is, as to contributory negligence, II, 460.
What is or is not, as to baggage, I, 534.
When liability of company to person using pass is, VI, 942.
When manner of getting on or off car is, VII, 489, 491.
When question of contributory negligence is, II, 494.
Personal injuries, generally.
As to deceased's negligence, III, 831.
Contributory negligence of licensee, when a, VI, 276.
Contributory negligence of trespasser, when a, VII, 1161.
Duty of company to persons on track, when a, VI, 275.

QUESTION OF FACT — *continued.*
Personal injuries, generally — *continued.*
Existence of license, when a, VI, 262.
In action for causing death, III, 884–894.
In action for injury at station, VII, 234–236.
On trial for assault, I, 473.
When company's duty to licensee is, VI, 275.
When company's negligence is, VII, 234.

QUESTION OF LAW.
As to who are independent contractors, V, 1105.
In injuries to animals, II, 234–236.
What is, I, 321; VIII, 42–44.
When child's negligence is, II, 782–784.
When negligence is, VI, 799–802.

QUESTIONS OF LAW AND FACT.
In general.
Adverse possession, when for jury, I, 37.
Authority of agent, when for jury, I, 45.
Customs and usages, when questions of fact, III, 667.
Degree of negligence of party question of fact, III, 49.
Diminution of rental value, IV, 335.
In actions for failure to build or repair cattle-guards, II, 602.
In actions for flowing lands, V, 999.
In actions for libel or slander, VI, 260.
In actions on construction contracts, III, 176.
In actions on contracts, III, 234.
In suits to quiet title, III, 10.
Mixed, as respects negligence, VI, 313–815.
Negligence in failing to construct culvert, question for jury, III, 659.
Obligation to fence, question of law, V, 820.
On assessment of land damages by jury, IV, 629.
On trial, generally, VIII, 42–49.
Presence or absence of contributory negligence, III, 282–295.
Question for jury in ejectment by landowner, IV, 851.
Questions of negligence, VI, 799–815.
Whether contractor is independent or servant, V, 1105.
Carriage of merchandise.
Assent of shipper is question for jury, I, 612.
Construction of bill of lading, question of law, I, 614.
Contributory negligence, when for jury, II, 84.
Delay, when for jury, II, 68.
In actions against carriers of cattle, I, 815.
In actions by and against express companies, V, 603.
In actions for damages by fires, V, 949–958.
Knowledge and assent of shipper to limitation of liability, when for jury, II, 167.
Negligence, when for jury, II, 73, 83.

QUESTIONS OF LAW AND FACT — *continued.*
Carriage of merchandise — *continued.*
Reasonable time for removal of goods, II, 48, 140.
Sufficiency of delivery of goods by carrier, II, 114.
Whether contract of shipment is for through shipment, when for jury, II, 227.
Whether person is an employé, V, 6.
Who is a *bona fide* holder, question of fact, I, 646.
Injuries to animals.
In stock-killing cases, I, 234–236, 321–330.
Negligence and contributory negligence, when for jury, I, 801.
When negligence is for jury, I, 755
Injuries to children.
Generally, II, 782–789.
Negligence in management of turntable, when question of fact, II, 747.
Negligence of street-car company as to child in street, II, 763.
Negligence of street-car company as towards children, II, 755–758.
Parents' negligence in action, II, 803–807.
Injuries to employes.
As to fellow-servants, V, 743.
Generally, V, 308–337.
Infant employés, V, 252.
Negligence of company where employé is injured by collision, III, 22.
Negligence of fellow-servants, V, 788–792.
Injuries to passengers or baggage.
As to contributory negligence of passenger in boarding train, II, 452, 458.
Contributory negligence of passenger, II, 448.
In actions against carriers of passengers, II, 562.
In actions for lost baggage, I, 573.
Reasonableness of rules, II, 320, 330.
Reasonable time to call for baggage, I, 552.
What is baggage, when for jury, I, 534.
Whether getting off moving cars is negligence, II, 469–472.
Personal injuries, generally.
Contributory negligence of trespasser, VII, 1161.
Deceased's negligence, when for jury, III, 831.
In actions for assault, I, 473.
In actions for causing death, III, 884–894.
In actions for injuries by derailment, IV, 44.
In actions for injuries caused in making flying switch, V, 1009.
Proximate cause of injury by collision, III, 15.

QUIETING TITLE.
To land granted, VI, 163.
See also CLOUD ON TITLE.

QUI TAM ACTIONS.
Generally, III, 524.

QUORUM.
At directors' meetings, IV, 56.
At stockholders' meetings, VII, 308.
QUOTIENT VERDICT.
Validity of, VIII, 89.
QUO WARRANTO.
General treatment, VI, 1128.
Proceedings in, V, 359.
Removal of proceedings for, to federal court, VII, 26.
To compel surrender of charter, VII, 367.
To contest election of directors, IV, 54.
RACE TRACK.
Injury to, as an element of land damages, IV, 702.
RAILS.
Admissibility of evidence as to spreading of, V, 434.
Admissibility of evidence of breaking of, V, 433.
Contributory negligence in catching foot between, V, 229.
Duty to employés as to safety of, V, 48.
For street railways, patents for, VI, 957.
Lien for price of, VI, 277.
Machinery for making or mending, patents for, VI, 960.
Prescribing by ordinance kind of, VII 441.
RAILWAY-AID BONDS.
See BONDS; MUNICIPAL AND LOCAL AID; STATE AID.
RAILWAY AND CANAL TRAFFIC ACT.
Carriage of passengers under provisions of, II, 519.
Liability of carrier of merchandise under provisions of, II, 196, 197.
Passengers' fares under provisions of, VII, 1086.
Powers and duties of commissioners under, VI, 1137–1139.
Regulation of charges under, II, 649–672.
RAILWAY COMMISSIONERS.
General treatment, VI, 1135.
Laws creating — constitutionality of, VI, 1135.
Appointment and removal, VI, 1136.
Powers and duties, VI, 1137.
Compensation, VI, 1153.
Authority of, to establish stations, VII, 196.
Duty of, as regards flagmen at crossings, III, 485.
Of states, powers of, VI, 68.
Order of, to locate station, VII, 200.
Regulation of charges by, II, 620–622.
Statutes relating to duties of, I, 689.
See also COMMISSIONERS.
RAILWAYS.
Application to, of statutes requiring signals, III, 496.
Construction of, III, 110–182.
Control of, by government, VIII, 159.
Crossing of, III, 390–421.
Delay caused by another carrier blocking, II, 25.
Distinction between "railroad" and "railway," VIII, 323, 324.
RAILWAYS — *continued*.
Electric, IV, 257–272.
Elevated, IV, 273–368.
Government, V, 1049–1053.
In different states, consolidation of, III, 95.
Injunction against operation of, V, 1140.
Judicial notice of geographical position of, V, 437.
Judicial notice of manner of operating, V, 437.
Name of, V, 766–768.
Particular, when exempt from taxation, VII, 917–932.
Power of foreign corporation to construct and operate, V, 1015.
Powers of receivers in operating, VI, 1184.
Private, VI, 1075–1077.
Sales of, VII, 105.
Subsequently acquired, when exempt, VII, 909.
Transfers of, no shield from liability, III, 323.
What are, VIII, 323.
RAILWAYS CLAUSES CONSOLIDATION ACT.
Joint use of stations under, VII, 237.
RAILWAY STATION.
Meaning of, VII, 194.
RAILWAY SYSTEM.
Judicial notice of extent of, V, 440.
RAIN.
Company must provide for ordinary, III, 660.
RAPE.
Duty to protect passenger from, II, 432.
RAPID TRANSIT ACTS.
General treatment, V, 1154.
Commission, powers and duties of, IV, 278–281.
Construction of elevated railways under, IV, 276–284.
RATE.
Of interest, V, 1176, 1177.
Of interest allowed as damages, III, 955.
Of interest on damages, what rate governs, III, 741.
RATE-BOOKS.
Under English statutes, II, 662–666.
RATES.
As affected by long and short hauls, VI, 37–44.
Competition as affecting, VI, 13.
Construction of contract for lower, VIII, 316.
Contracts by agents fixing, I, 57.
Decision of commissioners as to *prima facie* evidence of reasonableness of, VI, 1148.
For passenger traffic, VII, 1076–1090.
Just and reasonable, VI, 11–19.
Limitation of liability in consideration of reduction in, I, 760.
Power of interstate commerce commission over, VI, 5, 6.
Power of railway commissioners to fix, VI, 1139–1143.
Reduction of, as consideration for limitation of liability, VI, 334.

RATES — *continued.*
Unjust discrimination in, VI, 19–31.
See also CHARGES.

RATIFICATION.
By corporation of acts of directors, IV, 73.
By directors of acts of president, VI, 1070.
By legislature of corporate mortgage, VI, 409.
By stockholders of acts of directors, VII, 344.
By trustees of leases given by mortgagor, VI, 464.
Estoppel by, V, 376.
Of action of meeting irregularly called, VII, 308.
Of acts of agents, I, 80–86.
Of acts of partner, VI, 936.
Of agent's contract to limit liability, II, 168.
Of agent's wrongful acts, V, 610.
Of assault upon passenger, I, 467.
Of assignment of lease, VI, 233.
Of contracts for supplies, III, 7.
Of contracts made by officers and agents, III, 190.
Of former election to give railway aid, VI, 603, 604.
Of invalid ordinance, VI, 756.
Of invalid release, VII, 12.
Of irregular issue of bonds, I, 658.
Of irregular issue of railway-aid bonds, VI, 684–687.
Of leases, VI, 232, 233.
Of libel, VI, 258.
Of license by grantee or licensor, VI, 262.
Of mortgage executed without authority, VI, 434.
Of payment for stock by stranger, VII, 780.
Of previous employment of attorney, I 513.
Of *ultra vires* acts, VIII, 125.
Of unauthorized employment of physician, VI, 395.
Of voidable contracts, III, 210.
Of void ordinances, VII, 373.

REAL ESTATE.
Adverse possession of, I, 33–38.
After-acquired, when passes by mortgage, VI, 422.
Compelling purchase of, VI, 376.
Compensatory damages for trespass on, III, 680.
Condemnation of, for elevated railways, IV, 289–291.
Condemnation of, for public use, IV, 382–955.
Effect of consolidation on title to, III, 94.
Evidence of injury to, variance, VI, 1037.
Issuing stock for, VII, 279.
Measure of damages to, by fire, V, 960.
Opinion of witness as to value of, VIII, 245.
Payment by receiver of claims for damage to, VI, 1196.
Power of consolidated company to acquire and dispose of, III, 95.
Power of foreign corporations to hold, V, 1015.

REAL ESTATE — *continued.*
Power to acquire and dispose of, under charter, II, 699.
Power to acquire, hold, and convey, III, 320, 321, 322.
Re-appraisement of land damages, IV, 590.
Rolling stock is, VI, 427.
Sale of, for non-payment of taxes, VII, 996, 997.
Sale of, requirements of statute of frauds, III, 199.
Situs of, for taxation, VII, 885.
Statement of cause of action in suits for injury to, VI, 992.
Trespass upon, VII, 1108–1114.
Variance between pleading and proof in actions relative to, VI, 1037.
What is, VIII, 324.
When exempt from taxes, VII, 906.
When limitation begins to run in actions for, VI, 310.
When may be mortgaged, VI, 412–415.
When subject to execution, V, 542.
When subject to taxation, VII, 861.

REASONABLE CARE.
As applied to selection of servants, V, 695.
Duty of company to exercise, V, 859.
Duty of company to use, as to trespasser, VII, 1140, 1141.
Failure to use, III, 257.
What is, VI, 778; VIII, 324.
See also CARE; DUE CARE; UTMOST CARE; DILIGENCE; NEGLIGENCE.

REASONABLE FACILITIES.
Duty of carrier to furnish, II, 197–200.
Under English statutes, II, 649–651.

REASONABLENESS.
Of carrier's rules, II, 329–330.
Of charges, II, 622–624.
Of contract limiting liability, VI, 333.
Of limitation of liability, II, 439.
Of ordinances, VII, 673.

REASONABLE RATES.
Construction of Ohio statutes as to, VIII, 325.

REASONABLE TIME.
In general.
Duty to repair or rebuild fence in, I, 172.
What is, in shipment of live stock, I, 741.
When question of, is for court or jury, VIII, 325.
Within which to repair or rebuild fence, V, 827.
In carriage of merchandise.
Duty of carrier to forward within, II, 29.
For consignee to remove goods, II, 91.
For goods to remain in warehouse, II, 146.
For intermediate carrier to receive goods, II, 235.
For intermediate carrier to receive goods after notice of arrival, II, 236.
For removal, as changing liability from carrier to warehousemen, II, 138–140.
For removal, when question for jury, II, 140.

REASONABLE TIME — *continued.*
In carriage of merchandise — *continued.*
In which to receive or unload goods by consignee, what is, II, 103.
Must be carried within, II, 64.
To consignee, to remove goods after arrival, II, 47–49, 137–140.
To remove goods after transit ended, II, 78.
To store goods after refusal of consignee to receive, II, 103.
What is, for carriage, II, 65.
What is, for removal by consignee, II, 48.
Within which carrier must deliver, II, 90–92.
Within which to file notice of claim for loss, II, 186.
In carriage of passengers or baggage.
For transfer of passengers to connecting line, II, 517.
In which to alight, duty of carrier to allow, II, 308.
Starting train after expiration of, II, 405.
To alight from train, II, 317, 397–400, 477–481.
To call for baggage, I, 549, 550, 551, 552.
To enter car, II, 300, 301.
To produce ticket, VII, 1051.

REASSESSMENT.
Of increased land damages, IV, 588.

REBATES.
Of taxes, VII, 980.
On charges, unjust discrimination in, VI, 21.
Right of owning company to demand, VI, 248.
Right to recover, II, 635.
Validity and effect of contracts for, IV, 119–123.
See also DRAWBACKS.

REBELLION.
See WAR.

REBUILDING.
Of abandoned lines, compelling, I, 5.
Of bridges, I, 696, 697.

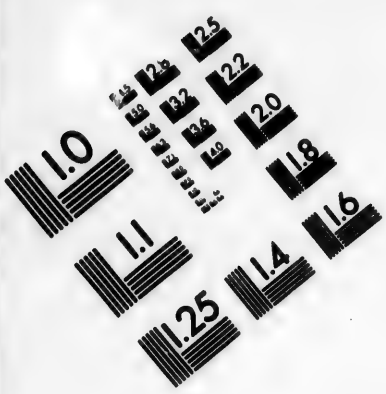
REBUTTAL.
Admissibility of evidencee in, in actions for damages by fire, V, 912.
Competency of evidence in, V, 391.
Evidence in, V, 428; VIII, 19.
Of evidence in reduction of damages, IV, 662.
Of presumption of company's negligence, III, 16; V, 936–938; VI, 825.

RECEIPT.
Of baggage by carrier, check as evidence of, I, 545.
Of goods by carrier, bill of lading as evidence of, I, 604–606.
Of goods, *prima facie* evidence of through contract, II, 227.
Of money by mortgage trustees, VI, 465.

RECEIPTS.
General treatment, VI, 1160.
Admissibility and effect of, as evidence, V, 512.
Bills of lading considered as, I, 603–608.
Conclusiveness of, II, 157.

RECEIPTS — *continued.*
Effect of failure to read, V, 587.
For baggage, stipulations limiting liability in, I, 503.
For carrying mails, tax on, VII, 72.
For goods, effect of, as evidence, II, 218.
Indorsement of notice limiting liability on, VI, 337.
In full, by subcontractors, effect of, III, 160.
In full of all damages as defense, V, 980.
Limitation of liability by stipulations or conditions in, I, 761; II, 165; V, 586, 587.
Parol evidence to contradict, V, 480
Passenger tickets are, VII, 1039.
Warehouse, VIII, 162.
Weight of, as evidence, V, 526.
When deemed special contracts limiting liability, V, 592.

RECEIVERS.
General treatment, VI, 1161.
Power to appoint a receiver, VI, 1161.
Who may be appointed, VI, 1166.
Grounds for appointment, VI, 1166.
Application, and how disposed of, VI, 1172.
Rights, powers, and duties of receivers, VI, 1178.
Payment of claims; priority, VI, 1194.
Receivers' certificates, VI, 1200.
Sales by receivers, VI, 1207.
Actions by or against, VI, 1208.
Accounts, VI, 1217.
Compensation, VI, 1220.
Removal, substitution, and discharge, VI, 1222.
Liability of company for acts of receiver while in possession, VI, 1127.
Appointment of, as ground of abatement, I, 9.
Appointment of, in proceedings to dissolve, IV, 136.
Citizenship of, on question of removal of cause, VII, 31.
Compelling construction of highway crossing by, III, 425.
Duty of, to grant equal facilities to connecting lines, VI, 35.
Effect of appointment of, on creditors' right to enforce payment of subscription, VII, 315.
Indemnity to, to protect against debts, V, 1103.
In foreclosure suits, VI, 480–498.
Interference with, as contempt, III, 182, 183.
Interference with, by strikers, VII, 721.
Liability of company for personal injuries where road is in hands of, III, 479.
Liability of, for injuries by fire, V, 898.
Liability of, for killing stock, I, 371.
Necessity of assessment on subscription where road is in hands of, VII, 747.
Of relief associations, VII, 18.
Operation of road by, as defense to action for causing death, III, 811.
Powers of, VIII, 325.
Powers of, to contract for rebates and drawbacks, IV, 122.
Proceedings against, by Interstate Commerce Commission, VI, 55.



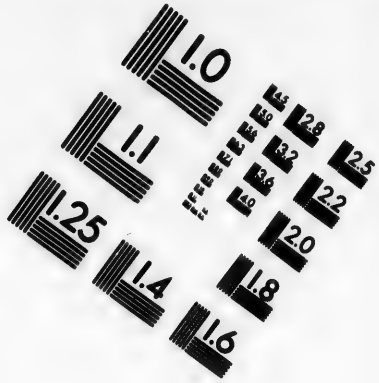
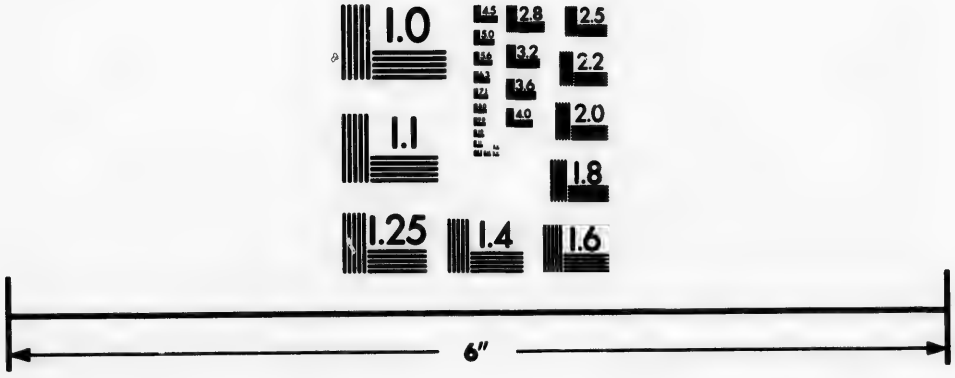


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RECEIVERS — *continued.*
Property in hands of, when subject to taxation, VII, 867.
Sales by, VI, 496.
Sufficiency of declaration in actions against, III, 805.
Variance between pleading and proof in actions against, VI, 1037.

RECIPROCAL DUTIES.
Of passenger and sleeping-car company, VII, 130.

RECITALS
In bills of lading as to condition of goods shipped, I, 607, 608.
In deeds, estoppel by, V, 370.
In deeds, proof of sales of similar property by, IV, 653.
In deeds, weight of, as evidence, V, 523.
In invalid instruments, competency of, as evidence, V, 502.
In judgments, conclusiveness of, IV, 757.
In railway-aid bonds, effect of, VI, 700–705.
In railway-aid bonds, effect of, upon negotiability, VI, 689.
In records on appeal, sufficiency of, I, 421.
In statutes relating to live stock, I, 89.
In statutes, weight of, as evidence, V, 524.
In transcripts on appeal, effect of, I, 367.

RECKLESSNESS.
Allowing exemplary damages for, II, 577.

RECOGNITION.
Estoppel by, V, 376.

RECOMMITTAL
Of report of commissioners in condemnation proceedings, IV, 740.

RECONSIDERATION.
Of verdict, VIII, 92.

RECONVEYANCE.
Decree for, IV, 25.

RECORDING.
Consent of city to use of street, VII, 390.
Of assessment on stock, VII, 752.
Of deeds, IV, 6.
Of mortgage of rolling stock, VI, 428.
Of ordinances, VI, 756.
Of proceedings for consolidation, III, 82.
See also REGISTRATION.

RECORDS.
Admissibility of admissions of, V, 390.
Admissibility of, in evidence, III, 858; IV, 317.
Certified copies of public, as evidence, V, 502.
Estoppel by, V, 364–368.
Filing, on appeal, I, 443.
Jurisdictional facts must appear on face of, IV, 489.
Of assignment for creditors, I, 482.
Of corporations as evidence, V, 508.
Of deeds, effect of, as notice, IV, 6.
Of instruments as best evidence, V, 458.
Of judgments as evidence, I, 287.
Of judicial proceedings, admissibility and effect of, V, 512.
Of judicial proceedings as best evidence, V, 457.
Of land office as evidence, V, 503.

RECORDS — *continued.*
Of train dispatcher, admissibility and effect of, as evidence, V, 518.
Review of matters not apparent on, I, 421–423.
Sufficiency of, on appeal, generally, I, 421–423.
What must appear in, as to attempt to agree with landowner, IV, 502.
What must appear in, on appeal, IV, 794–796.

RECOUPMENT.
See SET-OFF; COUNTERCLAIM, AND RECOUPMENT.

RECOVERY BACK.
Of taxes paid, VII, 999–1001.

RECOVERY OVER.
By city against company, VII, 458.
By company against third person, VII, 458.
By express company against railway company, V, 604.
By initial carrier, II, 211.
By insurer against railway company, I, 18.
By joint tort-feasor after satisfaction, VI, 102.
By municipality against company for injury in streets, VII, 704–706.
For injury at station against mail contractor, VII, 231.
Of damages to third persons, VII, 408.

REDEMPTION.
From execution, V, 549.
From mortgages on land condemned, IV, 439.
From tax sale, VII, 997.
Meaning of "redeemable" in a pledge, VIII, 325.
Of mortgaged premises, VI, 521, 522.
Of tickets, statutes regulating, VII, 1043.

REDUCTION.
By statute of compensation for carrying mail, II, 5.
Of capital stock, VII 285.
Of rental value as element of damages, VII, 666.

RE-EXAMINATION.
Of witnesses generally, VIII, 224, 225.

REFEREES.
Authority and power of, VII, 3.
Findings of, in elevated railway cases, IV, 346–349.
Qualifications of, VII, 3.
Removal of, VII, 4.
See also REFERENCE.

REFERENCE.
General treatment, VII, 2.
To ascertain damages for infringement of patents, VI, 953.
To master in foreclosure, VI, 486.
See also ARBITRATION AND AWARD; REFEREE.

REFORMATION.
Of contract, V, 355.
Of deeds, IV, 24.
Of errors in receiver's account, VI, 1220.
Of insurance policy, V, 847.

REFRESHING THE MEMORY.
Admissibility of memoranda used for, as evidence, V, 507.
How may be done, VIII, 225–227.
REFRESHMENT ROOMS.
General treatment, VII, 4.
Rights of passengers at, II, 319.
See also EATING-HOUSE OR STATION.
REFUNDING.
Amount received on setting aside accord, I, 19.
Of excessive rates, VI, 56.
Of illegal tax, VII, 998.
Of money on lost ticket, VII, 1062.
Of money upon refusal to honor through ticket, VII, 1075.
REFUSAL.
Of consignee to receive or unload goods, effect of, II, 101–105.
REGISTRATION.
Of bonds as shares to enable holder to vote, I, 670.
Of charters, II, 676.
Of condemnation proceedings, IV, 490.
Of debentures, III, 960.
Of deeds, IV, 6.
Of deeds of trust, IV, 25.
Of mortgages, VI, 434, 435.
Of order of confirmation of report of commissioners, IV, 739.
Of railway-aid bonds, VI, 673, 684.
Of voters at election on question of aid to railways, VI, 586.
See also RECORDING.
REGULAR DEPOT OR STATION.
What is, VIII, 325.
REGULARITY.
Of election in aid of railway, who may question, VI, 606.
REGULAR TRAINS.
What are, VIII, 325.
REGULATION.
In general.
By states of interstate carriers or traffic, VI, 66–71.
By statute or ordinance as to rate of speed, VII, 676–681.
Of cable railway by city ordinance, I, 728.
Of commerce by statutes, VII, 250.
Of construction of roads by statute, III, 110.
Of depots, side-tracks, etc., by commissioners, VI, 1143.
Of highway and railway crossings by commissioners, VI, 1144–1146.
Of speed at crossings in cities, VI, 786–788.
Of street railways by ordinance, VII, 437–444.
Of steam roads in streets by statutes and ordinances, VII, 669–693.
Of street railways by statutes, VII, 436, 437.
Of telegraph lines, VIII, 141.
Of tramways by cities, VII, 1103.
Of charges, fares and tolls.
Of charges, VI, 379.
Of charges by legislature, II, 612–622.
REGULATION — *continued.*
Of charges, fares and tolls — *continued.*
Of charges by state, VIII, 190.
Of charges for storage in elevators, IV, 369.
Of passenger fares, VII, 1076–1079.
Of rates and fares by railway commissioners, VI, 1139–1143.
Of tolls by statute, I, 723.
REGULATIONS.
Of cities as to hacks at stations, V, 1062.
Of other companies, admissibility of evidence of, V, 422.
Of passenger carriers, II, 328–336.
Of relief associations, evidence of, VII, 16.
REHEARING.
Before commissioners in condemnation proceedings, IV, 740.
Of proceedings before Interstate Commerce Commission, VI, 54.
REIMBURSEMENT.
Of agents, for expenditure, I, 51.
Of expenditures by civil engineer, III, 145.
REINSTATEMENT.
Of satisfied judgments, VI, 101.
Of street or highway after discontinuance, VII, 555.
REISSUE.
Of stock, compelling, when certificate is lost, VII, 281.
REJOINDER.
When proper, form, sufficiency, etc., VI, 1018.
RELATIONSHIP.
Degree of, between plaintiff and person killed unimportant in assessing damages, III, 930.
Of person killed to plaintiff, allegation of, in complaint, III, 793.
RELATIVES.
Of passengers, duty of company as to, VII, 214.
Of passengers, rights of, II, 337.
RELATOR.
Who may be, VI, 384.
RELEASE.
General treatment, VII, 6.
General principles, VII, 6.
By injured passenger, VII, 11.
By injured employé, VII, 13.
By landowner, VII, 14.
In general.
Acquiring title to right of way by, VII, 78.
By father of minor child killed, III, 812.
Of garnishee, I, 509.
Of interest of witness, VIII, 199.
Of mortgages, VI, 519.
Of right of way, power of personal representative to give, V, 553.
Transfer of right of way by, IV, 479.
Of cause of action.
By husband of woman killed, III, 812.
By parent of damages for injuries to infant employé, V, 250.
From plaintiff as a defense to action for flowing land, V, 981.

RELEASE — *continued.*
Of cause of action — *continued.*
From tenant to landlord, effect of, on right to sue elevated railway, IV, 311.
Of cause of action for causing death, by deceased in his lifetime, III 812.
Of claim for personal injuries to wife, V, 1067.
Of claim for wages, V, 11.
Of damages to other property of grantor by conveyance of right of way, IV, 477.
Of liability for stock killed, I, 277.
Of subscriber to stock as defense to action on subscription, VII, 791.
Of subscriber to stock by abandonment of enterprise, VII, 770.

RELETTING.
See SUB-LETTING.

RELEVANCY.
Of evidence in actions for causing death, III, 845.
Of evidence in actions for injuring animals, I, 278–280.
Of witnesses' answers, VIII, 210.

RELIEF.
Against irregular service of process, VI, 1103.
What, granted in suit to enjoin construction of steam railway in street, VII, 648.

RELIEF ASSOCIATIONS.
General treatment, VII, 15.

RELIGIOUS TEACHERS.
Special rates to, VI, 58.

RELOCATION.
Notice of application for, VI, 362.
Of route, effect of, VI, 362.
Of route, right to make denied, VI, 361.
Of route, right to make, generally, VI, 358.
Of route, right to make under charter or statute, VI, 359.
Of route, right to make under contract with landowner, VI, 360, 362.

REMAINDERMAN.
As party in condemnation proceedings, IV, 497.
When entitled to land damages, IV, 564.

REMANDING.
Cause after removal, VII, 44, 45.
For further proceedings below, IV, 810.
For new trial below, II, 609.
To justice of peace for new trial, I, 368

REMEDIAL CASES.
Meaning of, under Minnesota Constitution fixing jurisdiction of Supreme Court, VIII, 325.

REMEDIAL STATUTE.
Construction of, VII, 265.

REMEDIES.
In general.
Against relief associations, election of, VII, 17.
Amending charter by providing new, II, 685.
At law, creditor must exhaust, III, 352.
Change in, not impairment of charter contract, II, 682.

REMEDIES — *continued.*
In general — *continued.*
Change of, by statute, as ground of abatement, I, 10.
Election of, by attorney-general, I, 511.
For breach of construction contracts, III, 166–180.
For disturbance of ferry franchise, V, 837–839.
For errors and defects in pleadings, VI, 1054–1061.
For interference with easements, IV, 161.
For interference with, or disturbance of, corporate franchise, V, 1027.
For interference with, or obstruction of, private ways, VI, 1079–1081.
For nuisances, VI, 893–902.
For obstruction of navigation, I, 718–720.
Of assignees, I, 480, 481.
Of parties to purchase of land, VIII, 152, 153.
Of railway contractor, III, 141, 142.
On leases, VI, 238–242.
Upon railway mortgages, election of, VI, 470–472.
Validity of statutes affecting, VII, 250.

As to charges.
For collection of charges, II, 643–649.
For discrimination in charges, IV 104, 123–128.
For overcharges in passenger fares, VII, 1083–1085.
Of parties paying overcharges, II, 628–639.

As to stock and stockholders.
For invalid or irregular increase of stock, VII, 284.
Of companies against holders of forged certificates or transfers, VII, 304.
Of minority against majority of stockholders, VII, 340–342.
Of stockholders against corporations, VII, 330–334.
Of stockholders against corporations or their officers, VII, 328–349.
Of stockholders against directors, VII, 334–338.
Of stockholders on reorganization, VII, 49–53.
Of stockholders who have been deprived of stock, VII, 338–340.
To enforce subscriptions to stock, VII, 756–797.

For collection of taxes.
For collection of taxes, election of, VII 990.
For illegal taxation, VII, 72.
For illegal taxation in Canada, VII, 1020.
For unlawful taxation, VII, 998–1010.

For damages, generally.
For damages by fires, V, 893–968.
For flooding lands, V, 985–1005.
For infringement of patents, VI, 951–954.
For injuries caused by obstructions and encroachments in streets and highways, VII, 713–718.

REMEDIES — *continued.*
For damages, generally — *continued.*
For injuries to employés, V, 260–345.
For refusal to transport passengers, II, 347.
For wrongful ejection from train, IV, 208–244.
For wrongful interference with property under color of eminent domain, IV, 826–880.
Of abutting owners, IV, 291–357.
Of abutting owners where steam roads are constructed in streets, VII, 628–669.
Of landowners for interference with property in England, IV, 921–924.
Of landowners under Canadian expropriation proceedings, IV, 949–955.

REMITTITUR.
Of excessive damages, VI, 868–871.
Of excessive damages in stock-killing cases, I, 351.
Of excessive damages on appeal, I, 437.
Of damages, effect of, on right to appeal, I, 375.

REMOTE CAUSE.
Of accident, when question for jury, VI, 810.
Of death by accident, I, 14.
Of injury in street or highway, VII, 697.
Of injury to employé, what is, V, 26.
Of spread of fire, V, 876.
Plaintiff's negligence as, III, 253–255.
When question for jury, VI, 802.
See also PROXIMATE CAUSE.

REMOTE DAMAGES.
Generally, III, 673–675.
In actions against carriers of passengers, II, 567.
In actions for false imprisonment, V, 612.
In actions for flowing lands, V, 1000.
In actions for injuries by fire, V, 959.
In actions for injuries to children, II, 821.
In actions on construction contracts, III, 179.
In condemnation proceedings, IV, 684.
In railway-intersection proceedings, III, 407.
In stock-killing cases, I, 345.
Under Canadian Expropriation Laws, IV, 937.
See also PROXIMATE DAMAGES.

REMOVAL.
Of buildings, freights, etc.
Of banks of streams, V, 974.
Of buildings, cost of, as element of land damages, IV, 687.
Of buildings in condemnation of land, IV, 412.
Of farm crossings, V, 622.
Of freights, duty of carrier to furnish facilities for, II, 93.
Of goods by consignee, reasonable time for, II, 47–49.
Of highway obstruction by surveyors, VII, 717.
Of personal property as element of land damages, IV, 688.
Of property, cost of, as element of damages, VII, 663.

REMOVAL — *continued.*
Of buildings, freights, etc. — *continued.*
Of property, evidence of expense of, on assessment of land damages, IV, 648.
Of officers, etc.
Of directors, IV, 55.
Of disorderly passenger from ladies' car, II, 434.
Of mortgage trustee, VI, 460.
Of name from list of shareholders, VII, 304.
Of railway commissioners, VI, 1136.
Of receivers, V, 1222–1224.
Of referee, VII, 4.
Of trustees, VIII, 121.
See also DISCHARGE.

REMOVAL OF CAUSES.
General treatment, VII, 20.
Constitutionality of statutes, VII, 20.
What controversies are removable, VII, 21.
Grounds for removal, VII, 28.
Procedure, VII, 39.

RENDITION.
Of judgment, VII, 80–82.

RENEWAL.
Of negotiable paper, I, 590.
Of pass after expiration, VI, 940.

RENT.
Charging, upon income, VI, 496.
Enforcement of payment of, V, 354.
Of leased lines, liability of receiver for, VI, 1190.
Of right of way, claim for, when prior to mortgage, VI, 449.
Of submerged land, liability of lessee to lessor for, VI, 229.
Payment of claims for, by receiver, VI, 1197.
Priority of mortgage over claims for, VI, 455, 456.
Right of mortgagee to, VI, 237.
Under leases generally, VI, 196.
When liability of lessee for, ceases, VI, 234.

RENTALS.
When exempt from taxes, VII, 915.

RENTAL VALUE.
As element of damages, V, 1003.
As measure of damages, IV, 676.
Before and after construction of road, proof of, VII, 656.
Difference in, before and after building road, VII, 662.
Evidence of loss of, III, 731.
Evidence of, on assessment of land damages, IV, 647.
Leases as evidence of, IV, 315.
Limitation of time to sue for damages to, IV, 341.
Measure of damages for depreciation of, IV, 332–335.
Of contiguous property, evidence of, IV, 315.
Of property similarly situated, showing loss of, VII, 657.
Opinions of farmers as to, VIII, 278.
Opinions of witnesses as to, VIII, 247.
Proof of diminution of, IV, 315.

RENTAL VALUE — *continued.*
Reduction of, as element of damages, VII, 666.
Who may sue for diminution of, IV, 310.
RENT CHARGES.
When may be mortgaged, VI, 415.
REOPENING.
Of accounts, I, 21.
REORGANIZATION.
General treatment, VII, 46.
After sale by receiver, VI, 1208.
New company takes burden of paying compensation for land taken, IV, 545.
Power to issue bonds under agreement for, I, 657.
Property in hands of new company, when subject to execution, V, 544.
When exemption from taxes passes to reorganized road, VII, 903.
REPAIRERS.
Risks assumed by, V, 179–181.
When foreman is not fellow-servant of, V, 751.
REPAIRS.
After accident, admissibility of evidence of, V, 426.
After accident, evidence of, V, 278.
At farm crossings, liability for failure to make, V, 626.
Charging upon income, VI, 496.
Claims for supplies used in making, when prior to mortgage, VI, 450.
Duty and liability of street railway as to, VII, 405–410.
Duty of lessee to make, VI, 229.
Duty of receiver to make, VI, 1188.
Duty to keep cattle-guards in repair, II, 597.
Evidence of subsequent, in action for injury at crossing, III, 646.
Of bridges, expenses of, I, 700.
Of cars, power to bind company by contracts for, VII, 188.
Of farm crossings, duty to make, V, 623.
Of fences, company's duty as to, I, 168–175.
Of fences, duty to make, V, 825–829.
Of highway crossings, III, 433–436.
Of machinery, failure of employé to make, when contributory negligence, V, 207.
Of property taken, evidence of cost of, IV, 651.
Of railway intersections, III, 415.
Of road and machinery, failure of vice-principal to make, effect of, V, 678–680.
Of roadbed or track, duty to make, as towards passengers, II, 367–374.
Of steam roads in cities, VII, 684–693.
Of track, machinery, etc., duty of company as to, V, 104–113.
Of tramways, VII, 1102.
Of wharves, liability of owner as to, VIII, 188.
Payment of claims for, by receiver, VI, 1198.
Promise by employer to make, effect of, V, 164–167.
Negligence as to, V, 667.
Recovery by city of cost of, VII, 409.
What it is to repair street, VIII, 325.
REPAIRS — *continued.*
When bound to make, but not to pave, VII, 405.
When duty to make, extends to whole street, VII, 404.
When obligation to make, includes paving, VII, 398, 399.
REPAVING.
Duty of street-railway companies as to, VII, 397–405.
REPEAL.
Of charter provision exempting from taxation, VII, 891, 892.
Of charters, II, 683–694.
Of condemnation laws, IV, 396.
Of franchise to lay tracks in street, VII, 363–365.
Of limitation laws, VI, 308.
Of ordinances, VI, 757.
Of provision requiring assent of city to use of steam power in streets, VII, 567.
Of statutes, VII, 271–274.
Of statutes before subscription is completed, VI, 559.
Of statutes by implication, VI, 557.
Of statutes making stockholders liable to creditors, effect of, VII, 317.
Of statutory grant of right of way, effect of, VI, 1123.
Of stock laws, I, 96, 97.
Of tax laws, effect of, VII, 853, 984.
REPLEVIN.
General treatment, VII, 64.
Effect of, on carrier's lien for charges, II, 152.
Of goods carried, right to charges after, II, 646.
Of property seized for taxes, VII, 999.
REPLICATION.
Evidence in, VIII, 19.
In action against carrier of cattle, I, 805.
In action for injury at station, VII, 232.
In action for loss of baggage, I, 569.
In action on corporate bonds, I, 679.
In action on stock subscription, VII, 764.
In condemnation proceedings, IV, 534.
Sufficiency of, in stock-killing cases, I, 271.
When proper, form, sufficiency, etc., VI, 1014–1018.
REPORT.
Estimating land damages from time of filing, IV, 584.
In railway-intersection proceedings, III, 408, 409.
Inspection of, IV, 79.
Of appraisers of land damages, IV, 589.
Of appraisers, review of, IV, 591.
Of commissioners, objections to, how taken, IV, 791.
Of commissioners to assess damages, duty of court to render judgment on, IV, 755.
Of commissioners, when appealable in condemnation proceedings, IV, 776.
Of company's employé as evidence, I, 287; V, 282.
Of company's officer as evidence, V, 513.
Of damages in condemnation proceedings, generally, IV, 734–746.

REPORT — *continued.*
Of officer, admissibility of, in evidence, II, 538.
Of referee, sufficiency of, I, 3.
Of supreme court commissioners, confirmation of, IV, 283.

REPRESENTATIONS.
Estoppel by, V, 383.
Power of president to bind company by, VI, 1069.

REPUTATION.
General, of servant, as proof of incompetency, V, 781.
Of animals, evidence of, I, 285.
Of deceased, proof of, on question of damages, III, 878.
Of party for carelessness, competency of, evidence of, V, 396.
Of witness, attack upon, VIII, 208.

REQUESTS.
By stockholders that directors bring suit, VII, 329, 331, 336, 341, 347.
To charge, in actions for causing death, III, 913–918.
To charge in stock-killing cases, I, 339.
See also PRAYER.

RESCISSION.
Of agreements to convey, VIII, 153.
Of conditional subscriptions, VII, 803.
Of construction contract, equitable suit for, III, 168.
Of contracts generally, III, 226–228.
Of corporate bonds on ground of fraud, I, 679.
Of lease, how affected by part performance, VI, 233.
Of railway-aid subscriptions, VI, 619.
Of release, restoration of consideration on, VII, 11.
Of rules for government of employés, V, 236.
Of rules of company by conductor, III, 60.
Of sales, stopping goods *in transitu* is not, II, 189.

RESERVATION.
From grants, of lands held under Mexican grants, VI, 159.
In behalf of grantor of deed of trust, IV, 28.
In charter, II, 709.
In conveyance for depot purposes, VIII, 136.
In deed, IV, 20–23.
In deeds, acquirement of easements by, IV, 160.
In favor of mortgagor, VI, 440.
Of easements to landowner in appraisement of damages, IV, 590.
Of easements to landowner in grant of right of way, IV, 478.
Of easements to landowner in report of commissioners, IV, 738.
Of power to alter, amend, or repeal charter, II, 687–694.
Of right of action by grantor, IV, 308.

RES GESTÆ.
Doctrine of, generally, V, 463–474.
What is admissible as, V, 420.

RES GESTÆ — *continued.*
What is admissible as, in actions for causing death, III, 856.
What is part of, in action against carrier of passengers, II, 537.
What is part of, in actions for injuries to children, II, 813.

RESHIPMENT.
Effect of, to extinguish right of stoppage *in transitu*, II, 192.

RESIDENCE.
See CITIZENSHIP, ETC.

RESIDENT.
When word does not include a corporation, VIII, 325.

RESIDUE.
Of tract, diminution in value of, when measure of damages for land taken, IV, 666.
Of tract not taken, damages to, assessment of, IV, 577.
Of tract, part of which is taken, inconvenient shape of as element of land damages, IV, 696.

RESIGNATION.
Of arbitrators in expropriation proceedings, effect of, IV, 947.
Of superintendent, VII, 825.

RESISTANCE.
Of passenger to wrongful expulsion from train, IV, 200–202.

RESISTING ARREST.
Prosecutions for, III, 384.

RES JUDICATA.
Doctrine of, VI, 84–99.
Prior condemnation proceedings as bar, IV, 532.
Recovery by child no bar to action by parents, and vice versa, II, 808.

RESOLUTION.
Fixing directors' compensation by, IV, 58.
Granting right of way through streets, VII, 574.
Of directors, validity of, IV, 57.
See also BYLAWS; ORDINANCES.

RESPONDEAT SUPERIOR.
Applications of doctrine, V, 671–683.
Applications of doctrine to servants of different departments, V, 684.
Meaning of maxim, VIII, 326.

RESPONSIBILITY.
For due care, age as test of, II, 764–769.

RESTATING.
Of accounts, I, 21.

RESTAURANTS.
See REFRESHMENT ROOMS.

RESTITUTION.
Right of, where route is abandoned, IV, 826.

RESTORATION.
Of diverted funds by receiver, VI, 1200.
Of diverted stream, VIII, 180.
Of highway after building steam road, VII, 618–625.
Of highway after construction of crossing, III, 430–432.

RESTORATION — *continued.*
Of railway track after making street crossing, III, 441.
Of stream after construction of bridge, I, 694.
Of street after construction of street railway, VII, 410, 411.
Of streets and highways, compelling, VI, 378.
RESTRICTIONS.
In charters, as to charges, II, 614.
Of taxing power, VII, 830–832.
RESULTING TRUSTS.
When arise, VIII, 118.
RETAINING-WALLS.
Cost of, as element of land damages, IV, 687.
See also LATERAL SUPPORT.
RETIRING PARTNER.
Rights of, VI, 937.
RETROSPECTIVE LAWS.
Construction of, I, 94.
Power of commission over pre-existing contracts or transactions, VI, 7.
Regarding municipal aid to railroads, VI, 560.
Validity of, VII, 247.
When cure want of assent of taxpayers to railway aid, VI, 573.
RETURN.
Of award to court, I, 460.
Of collector of taxes, VII, 986.
Of elections as evidence, VI, 592.
Of execution by sheriff, V, 546.
Of justice on appeal, VI, 124.
Of service of attachment, I, 504.
Of service of process, VI, 1100–1103.
Of service of summons, IV, 252.
To certiorari, II, 608.
To certiorari in condemnation proceedings, IV, 815.
To certiorari in town-bonding proceedings, VI, 745.
To mandamus, VI, 387.
To mandamus issued to compel delivery of railway-aid bonds, VI, 664.
RETURN TICKETS.
Rules and stipulations requiring stamping VII, 1068, 1069.
REVENUE.
General treatment, VII, 68.
Customs duties, VII, 68.
Internal revenue, VII, 69.
Of canals, meaning of, as used in New York Constitution, VIII, 326.
REVERSAL.
Of decree of foreclosure, VI, 518.
Of judgment on appeal, I, 445.
On appeal, granting amendments after, VI, 1052.
On appeal, grounds for, I, 386–414.
On appeal in town-bonding proceedings, VI, 744.
What errors are grounds for, IV, 784–794.
When proper on appeal in condemnation proceedings, IV, 809.
REVERSION.
Of land granted for condition broken, VI, 142.
REVERSION — *continued.*
Of land on breach of condition in deed, IV, 18.
Of land to grantor on dissolution, IV, 140.
Of land to owner on abandonment of route IV, 824–826.
To abutting owners on abandonment, I, 4.
To abutting owners or discontinuance of highway, VII, 556.
REVERSIONERS.
Right of, to compensation in England, IV, 908.
REVIEW.
Of actions against carrier of cattle, I, 820.
Of actions for injuries to children, II, 825.
Of amount awarded on appeal, IV, 796.
Of arbitration under Canadian expropriation proceedings, IV, 949.
Of attachment suits, I, 511.
Of award of arbitrators, IV, 592.
Of decisions of commissioners appointed to examine proposed route, VI, 356.
Of decisions on demurrer, VI, 1014.
Of discontinuance of highway on *certiorari*, VII, 555.
Of election of directors, IV, 54.
Of elevated railway suits, IV, 352–356.
Of evidence on appeal, IV, 796.
Of foreclosure proceedings, VI, 516–518.
Of judgments against receivers, VI, 1217.
Of judgments of nonsuits, VIII, 35.
Of justice's decisions, VI, 123–126.
Of motion for continuance, VIII, 11.
Of motion for new trial, VI, 877.
Of procedure under English Compulsory Purchase Acts, IV, 920, 921.
Of proceedings for construction of grade crossing, III, 455.
Of proceedings for laying out street over railway, III, 414.
Of proceedings in California, VIII, 326.
Of proceedings under town-bonding acts, VI, 743–752.
Of report or award of appraisers, IV, 591.
See also APPEAL AND ERROR.
REVIVAL.
Of abated suits, I, 11, 12.
REVOCATION.
Of assent of taxpayers to railway aid, VI, 573.
Of consent by city to use of streets, VII, 580, 581.
Of consent or grant for right of way, IV, 484.
Of free passes, VI, 940.
Of land grants, VI, 163.
Of letters of administration, V, 552.
Of licenses, VI, 263–265.
Of offer to make conditional subscription, VII, 810, 816.
Of submission to arbitration, I, 456.
Of submission to arbitration of question of compensation, IV, 941.
Of subscriptions, VII, 733.
Of transfer of stock, VII, 287.
REWARDS.
For detection of criminals, III, 354.

RHODE ISLAND.
Operation of statute of, giving right of action for causing death, III, 753.
Statutory regulation of grade crossings in, III, 448.
Taking land for streets and laying out roads in, VII, 554.

RIGHT OF WAY.
General treatment, VII, 74.
General nature and how acquired, VII, 75.
Relative rights of company and adjoining owners, VII, 80.
Rights and duty of company as towards public, VII, 82.
Joint user by two or more roads, VII, 83.
In general.
Abandonment of, I, 1–3.
Acquired subsequent to mortgage, priority of mortgage over, VI, 458.
Claim for rent of, when prior to mortgage, VI, 449.
Combustible material on, liability for, V, 869–873.
Condemnation of, for telegraph line, VII, 1026.
Construction of grant of, IV, 38.
Contributory negligence in allowing accumulation of combustible materials on or near, V, 890–893.
Crossing by one railway of right of way of another, III, 390–421.
Definition of, VIII, 326.
Ejectment by company to obtain possession of, IV, 248.
Evidence of width of, V, 911.
Indemnity to company for moneys paid for, V, 1103.
Leaving combustibles on, V, 953.
Measure of damages for breach of engagements regarding, III, 703.
Over coal lands, VI, 232.
Over homestead, power of husband to convey, V, 1063.
Over public lands, VI, 1120–1123.
Penalties for stacking hay or straw near, VI, 967.
Presumption of, from undisputed operation of road, V, 445.
Recovery by personal representative of money paid into court for, V, 554.
Right of landowner to tunnel under, VI, 401.
Rule where animal is trespassing upon, I, 164.
Taking timber adjacent to, VI, 1116.
When exempt from taxes, VII, 906.
When may be mortgaged, VI, 413.
When subject to execution, V, 542.
When subject to taxation, VII, 862.
Who deemed trespassers on, VII, 1119.
In streets.
Assessment of, for local improvement, VII, 450.
Company entitled to, at crossing, III, 464, 465.
In city street, leaving stone and earth outside of, VII, 617.
In streets, boundaries of, VII, 588.
In streets, power of cities to grant, VII, 568–572.
Of elevated railway, IV, 284–291.

RIGHT OF WAY — *continued.*
Under condemnation proceedings.
Acquisition of, by consent or conveyance from owner, IV, 462–486.
Boring for oil on, by landowner, IV, 443.
Cultivation of, by landowner, IV, 442.
Cutting grass on, by landowner, IV, 442.
Entry under contract for, when bars ejectment, IV, 849.
Gifts of, IV, 479.
Measure of damages in case of voluntary grant of, IV, 676.
Pasturing cattle on, by landowner, IV, 443.
Power of foreign corporation to condemn, V, 1015.
Second condemnation of, IV, 423–426.
Title to buildings on, IV, 441.
Transfer of, by release, IV, 479.
Unlawful use of, as element of damages, IV, 707.
Value of buildings on, as element of land damages, IV, 688.
Under grants or license.
Donation or grant of, by guardian, V, 1058.
License to use land as, VI, 261.
Power of personal representative to give release of, V, 553.
Release of damages for taking, VII, 14.
Reservation of, in deed of land, IV, 21.
Reservation of privilege to mow or cultivate sides of, IV, 23.
Right of landowner to maintain ejectment where he has given contract for, IV, 247.
Specific performance of contracts to permit joint use of, VII, 150.
See also ROADBED; TRACK.

RIGHTS.
Of persons, VIII, 326.
Of promoters, V, 1094.

RIPARIAN RIGHTS.
General treatment, VII, 83.
Admissibility of evidence as to taking water from stream, V, 417.
Injury to, as element of land damages, IV, 702.
In watercourses, VIII, 171–183.
Rights of riparian owner of land condemned, IV, 440.
What constitutes a taking of, IV, 449.

RISKS.
In general.
Allegation of negligence in subjecting employé to extraordinary, V, 264.
Endangering one's life to save another, III, 815.
Exposure to unnecessary, liability for, V, 667.
Extra, from manner of loading cars, V, 173.
Extraordinary or hazardous, V, 169.
Increased, due to passenger's physical condition, liability for, VII, 134.
Increase of, right to compensation for, in proceedings to lay out street over railway, III, 443.

RISKS — *continued.*
In general — *continued.*
Known, injuries to employés by, V, 141–149.
Obedience to order involving, III, 269.
Of fire assumed by adjacent landowner, V, 857.
Of negligence of fellow-servants, assumption of, V, 650.
Working without knowledge of, V, 176.
Assumption of.
By drover on cattle train, I, 795–797.
By employés, V, 126–184.
By employés, when for jury, V, 324–337.
By licensees, VI, 270, 271.
By owner, in shipping, I, 642.
By owner of cattle and company respectively, I, 104.
By owner of private car, VI, 1075.
By passengers, in getting on cars, II, 450.
By passenger traveling on freight train, II, 424.
By person driving on track, VII, 429.
By person killed, instructions as to, III, 897.
By repairers and construction hands, V, 179–181.
By shipper, I, 740: II, 60.
By shipper in special contract, I, 764–766.
By trespasser, VII, 1147.
By trespasser on track, VII, 1127.
Incident to employment, V, 126–141.
Negativing, by deceased, III, 801.
Sufficiency of evidence to show, V, 296.
To save life or property, V, 202.
Vice-principal's negligence not an assumed risk, V, 673.
Voluntary, V, 169–174, 324.
What are assumed by infant employés, V, 250.
When contributory negligence, III, 264–269.

RIVAL LOCATION.
Of route, VI, 362.

RIVERS.
See NAVIGABLE WATERS.

ROADBED.
Assumption of risk from defects in, V, 133.
Construction and repair of, as towards passengers, II, 367–374.
Duty of company as to safety of, V, 43–48.
Failure of employé to examine, when contributory negligence, V, 205.
Notice or knowledge of defects in, V, 154.
Risks assumed from defects in, V, 180.
Situs of, for taxation, VII, 885.
When exempt from taxes, VII, 906.
When subject to taxation, VII, 862.
See also RIGHT OF WAY; TRACK.

ROADMASTERS.
As experts, VIII, 293.
As fellow-servants with other employés, V, 763.
Authority of, to employ physician, VI, 394.
Implied powers of, I, 44.

ROADMASTERS — *continued.*
When conductors are fellow-servants of, V, 738.
When engineers are fellow-servants of, V, 744.

ROBBERY.
Of passenger, liability of company, I, 558; II, 436.
Prosecutions for, III, 384.
When defense to carrier, II, 21.

ROCK ISLAND.
Military reservation at, VI, 1118.

ROLLING STOCK.
Claims against United States for sale of, III, 8.
Claims for, when prior to mortgage, VI, 450.
Construction of contracts for, III, 238.
Lien for price of, VI, 277.
Mortgages of, VI, 426–433.
Payment of claims for, by receiver, VI, 1197.
Receiver, how far bound by contracts for, VI, 1189.
Situs of, for taxation, VII, 886.
What it embraces for purposes of taxation, VIII, 327.
When deemed fixtures, V, 970.
When may be reached in attachment, I, 497.
When subject to execution, V, 544.
When subject to mechanic's lien, VI, 287.
When subject to taxation, VII, 868–870.

ROUNDHOUSEMAN.
When foreman is fellow-servant of, V, 752.

ROUND-TRIP TICKETS.
Duty of carrier to offer for sale, VII, 1064.
Exchanging, VII, 1066.
Good for how long, VII, 1066.
Good on what trains, VII, 1066.
Interpretation and effect of, VII, 1064, 1065.
Rule requiring identification and stamping, VII, 1067–1069.
Taking up wrong end of, IV, 185.
When fare must be paid, VII, 1067.
Who may use, VII, 1065.

ROUTE.
Change of, after election to give municipal aid, effect of, VI, 601.
Change of, effect on donation, VI, 652.
Change of, when releases subscriber to stock, VII, 775.
Choice of, under charter provisions, II, 706.
Conditions in subscription as to location of, VI, 636; VII, 812–816.
Construction of bill of lading as respects, I, 614.
Construction of statutes making company liable for property destroyed along its, VIII, 305.
Construction of subscription as regards, VII, 740.
Diversion of goods from, extinguishes lien for charges, II, 154.
Diversion of goods from, liability of carrier for, II, 238.
Diversion of goods from usual, II, 76–78.

ROUTE — *continued.*
Effect of change of, after mortgage, VI, 426.
Effect of change of, on right to railway aid, VI, 627.
Liability of initial carrier for diverting goods from, II, 206, 207.
Limitation of liability lost by diverting goods from, II, 184.
Location of, VI, 352–364.
Location of road must be within boundary lines of, IV, 284.
Of elevated railway, selection of, IV, 279.
Powers of commissioners as to, VI, 1155.
Question of, how far involved on assessment of damages, IV, 619.
Selection of, by carrier, II, 32.
See also RELOCATION.

RUBBISH.
Allowing to accumulate on right of way, V, 871, 878.
Leaving near track, II, 418.
See also COMBUSTIBLE MATTER.

RULES.
In general.
By bridge company, right to make, I, 724.
Ejection from station for violation of, VII, 223.
Forbidding collateral impeachment of judgment, IV, 767–770.
For management of stations, VII, 207, 208.
Of company, admissibility and effect of, as evidence, V, 513.
Of company, construction of, when question for experts, VIII, 266.
Of company, opinion of witness as to interpretation of, VIII, 240.
Of company, reasonableness of, a question of law, VIII, 43.
Of company, when provable by parol, V, 454.
Of corporations, admissibility of evidence of, V, 422.
Of evidence as to damages, III, 723–733.
Of other companies, admissibility of evidence of, V, 422.
Of relief associations, evidence of, VII, 16.
Of union depot companies and their enforcement, VIII, 137.
Rescission of, by conductor, III, 60.
To plead, in ejectment, IV, 252.
Violation of, as defense to accident insurance policy, I, 17.

For employes.
Allegation of failure to adopt, V, 265.
As to duty to employés respecting safety of machinery, appliances, etc., V, 67–83.
Contributory negligence while disobeying, V, 230–233.
Duty of employé to obey, V, 234–237.
Instructions touching employés' obedience or disobedience of, V, 307.
Insufficiency of, V, 166.
Negligence of company with respect to promulgation of, V, 310.

RULES — *continued.*
For employes — *continued.*
Obedience or disobedience of, when constitutes contributory negligence, V, 234–246.
Of company, admissibility of, in evidence, V, 282.
Of company, duty to make and enforce, V, 27–34.
Violations of, V, 240–246.

For estimating damages, etc.
As to liability of master for injury to servant caused by negligence of vice-principal, V, 671–683.
For ascertaining damages for injuries at crossing, III, 656.
For assessing damages, III, 733.
For assessing damages in actions for causing death, III, 924.
For computation of damages, IV, 329.
For estimating damages, instructions giving, VIII, 60, 73.
For estimating land damages, IV, 575–588.
Of carriers of goods, II, 162–164.

For fellow-servants.
Disobedience of, V, 662.
Failure of vice-principal to promulgate, liability of company, V, 677.
Non-liability for negligence of fellow-servants in disobeying, V, 655.
Of non-liability for negligence of fellow-servants, V, 645–671.

For passengers.
Against traveling on freight trains, violation of, II, 426.
As to care required from carrier of passengers, II, 355–367.
As to carriage of baggage, effect of non-compliance with, I, 525.
Compliance with, by passenger, how pleaded, IV, 215.
Crossing tracks in violation of, contributory negligence, II, 492.
Disobedience of, when contributory negligence, II, 444; VII, 228.
Disobeying, in getting on cars, contributory negligence, II, 450.
Ejection of passenger for violation of, IV, 164.
Expulsion of passenger for disobedience of, VII, 534.
Of carriers, admissibility of, in evidence, II, 538.
Of carriers of passengers, II, 328–336.
Of company as to getting on or off by front platform, VII, 493, 494.
Of company, evidence of, in actions for ejection of passengers, IV, 220.
Requiring identification of passenger, stamping of tickets, etc., VII, 1067–1069.
Requiring production of ticket, VII, 1051.
Requiring purchase of tickets, IV, 176; VII, 1046.
Riding in baggage car in violation of, II, 510.
Riding on freight train in violation of, III, 19.

RULES — *continued.*
For passengers — *continued.*
Riding on freight trains in violation of, when contributory negligence, II, 447.
Riding on platform in violation of, II, 504.
Violation of, by passenger, as a defense, III, 812.
RUNNING POWERS.
See LEASES, ETC.
RUNNING SWITCH.
What it consists in, VIII, 327.
SAFEGUARDS.
Duty of company to use most approved, V, 864.
SAFETY.
Of appliances, opinion of witness as to, VIII, 236.
Of appliances, when a question for experts, VIII, 261.
Of brakes, right of employé to rely on, V, 83.
Of cars, duty to employés as to, V, 90–95.
Of cars, track, and appliances, duty to passengers as to, VII, 461.
Of employés, disobedience of rules intended to promote, V, 235.
Of employés, duty to provide for, V, 16–27.
Of engines, duty of employés as to, V, 95–98.
Of given rate of speed, opinions as to, VIII, 259.
Of platforms and premises, when question for jury, VII, 234.
Of platforms at stations, VII, 215–219.
Of station buildings, VII, 209.
Of wharves, liability of owner as to, VIII, 188.
Question of, when for the jury, VI, 809.
SAFETY CHAINS.
Duty to provide, V, 97.
SAFETY VALVES.
Patents for, VI, 961.
ST. LOUIS, MO.
Joint use of street car tracks in, VII, 434.
Railways in, VII, 408.
ST. PAUL & PACIFIC R. CO.
General treatment, VII, 96.
SALARIES.
Loss of, as an element of damages, II, 574.
Of mail clerks, inspectors, etc., II, 9.
Of officers, power of directors to fix, IV, 61.
Of officers, when may be reached in attachment, I, 497.
Of presidents, VI, 1072.
Of railway commissioners, VI, 1153, 1154.
To receivers in lieu of commissions, VI, 1221.
SALE.
General treatment, VII, 97.
In general.
As evidence of value, V, 389.
Damages for loss of contract of, II, 296.
Distinguished from bailment, I, 576.
Judicial, VI, 106, 107.
Judicial, impeaching, VI, 107.
SALE — *continued.*
In general — *continued.*
Judicial, rights of purchasers at, VI, 107.
Judicial, time of, VI, 106.
Loss of contract for, when measure of damages, II, 289.
Measure of damages for breach of contract of, III, 702, 703.
Of property attached, I, 511.
Of property levied on by execution, V, 547.
Of right to construct road, VII, 368.
Set-off in actions for price, VII, 116.
Under execution, arresting, V, 549.
Under execution, enjoining, V, 548.
By assignee, guardian or officer.
By assignee for creditors, I, 484.
By assignee in bankruptcy, I, 583.
By guardian, validity of, V, 1058.
Of corporate property, authority of president to make, VI, 1068.
Of corporate property by directors, IV, 65.
Of corporate property, purchase of by directors, IV, 72.
For taxes.
Action to set aside, VII, 998.
Injunction against summary, VII, 1005.
Of land, VII, 996, 997, 1020.
Of rails and cars, VII, 988.
Power to purchase at, VIII, 130.
In foreclosure.
Bona fide purchasers, VI, 436.
Extinguishment of mortgage by, VI, 519.
Generally, VI, 498–518.
In suits to foreclose deeds of trust, IV, 32.
Of mechanics' lien, VI, 294.
Provisions for, in judgment of foreclosure, VI, 487.
Right to restrain, VI, 516.
Without foreclosure, under power in mortgage, VI, 471.
Of personal property, generally.
Action for refusal to complete purchase, I, 679.
As to stoppage *in transitu*, II, 186–193.
Effect of transfer of bill of lading upon rights of seller, I, 647.
Goods in hands of carrier not attachable for seller's debts, II, 125.
Liability of carrier to seller and purchaser respectively, II, 190, 191.
Of corporate bonds, I, 659.
Of coupons, III, 335.
Of cross-ties to independent contractor, liability for price, V, 1116.
Of ferry-boats, V, 843.
Of ferry franchise, V, 837.
Of goods, right of carrier to make to satisfy charges, II, 155.
Of goods to enforce lien for charges, II, 155, 644.
Of municipal bonds below par, effect of, VI, 680, 697.
Of perishable goods by carrier, II, 76.
Of real estate.
By trustee, VIII, 118.
Of land granted, VI, 162, 170.

SALE — *continued.*
Of real estate — *continued.*
Of similar property, evidence of, on assessment of land damages, IV, 651.
Of superfluous lands under Canadian Expropriation Acts, IV, 933.
Of superfluous lands under English Compulsory Purchase Laws, IV, 889–894.
Requirements of the statute of frauds, III, 199.
Weight of evidence of, as to value of land, V, 524.
Of stock.
After failure to collect by suit, VII, 798.
Before suit for assessments, VII, 797.
Distinguished from subscription, VII, 729.
For non-payment of assessment, VII, 799.
Generally, VII, 291–293.
Pledged, on default of payment, VII, 291.
Power of personal representative to make, V, 553.

SALE OF RAILROAD.
General treatment, VII, 105.
By purchasers of road to existing corporation, VII, 48.
By receiver, VI, 1207, 1208.
By receiver in foreclosure, VI, 496.
By trustees under power given in mortgage, VI, 464.
Does not divest lien for taxes, VII, 990.
Of government railroads, V, 1049.
Of road or franchise, forfeiture for, IV, 132.
Of street railways, rights of purchasers, VII, 369.
When releases subscriber to stock, VII, 778.

SALT.
Classification of, as freight, VI, 28.

SALVAGE.
Claims for salvage services, I, 33.
Lien for, II, 149.

SAMPLES.
Of commercial traveler, special damages for loss of, II, 304.
When may be carried as baggage, I, 540.

SAND.
Right of company to remove from right of way, VII, 81.

SATISFACTION.
Of judgments, VI, 101, 102.
Of judgments, cancellation of, V, 354.
See also ACCORD AND SATISFACTION.

SAVANNAH, GA.
Decisions particularly applicable to, VI, 765.

SAVING CLAUSES.
In statutes, VII, 274.

SCALING LAWS.
Effect of, generally, I, 679.

SCALPERS.
See TICKET BROKERS.

SCHEDULE.
Attached to complaint in action for loss of baggage, I, 508.
Duty of passenger carrier to observe, II, 348.
Duty to instruct employé as to changes in, V, 38.
Instructions as to trains behind time, III, 651.
Obligation to run on schedule time, VII, 1094–1096.
Of freight and passenger rates, filing and publishing, VI, 45–48.
Of passenger rates, posting, VII, 1078.
Running out of schedule time, liability for, V, 119.

SCHENECTADY, N. Y.
Decisions particularly applicable to, VI, 765.

SCHOOL DISTRICTS.
Power of legislature to authorize aid to railways by, VI, 531.
When do not include municipal corporations, VIII, 322.

SCHOOL TAXES.
Generally, VII, 852.
In Canada, VII, 1020.
Where to be levied, VII, 888.

SCINTILLA OF EVIDENCE, V, 523.

SCIRE FACIAS.
By creditor upon unpaid subscription, VII, 312.
Enforcement of forfeiture of franchise by, II, 715.

SCRIP.
Interest on, V, 1175.

SEAL.
Consent to lay track need not be under, VII, 393.
Necessity and sufficiency of, III, 196.
Necessity of, on report of commissioners in condemnation proceedings, IV, 735.
Necessity of, to a release, VII, 9.
Omission of, from money package, liability of express company, V, 576.
Upon railway-aid bond, VI, 671.

SEALED VERDICTS.
Form and effect, generally, VIII, 94.

SEAMEN.
Who are, I, 33.

SEARCH.
For lost baggage, recovery of expenses of, I, 574.

SEASIDE RESORT.
Constructing road on street at, VII, 425.

SEASON TICKETS.
See TICKETS AND FARES, VII, 1059.

SEAT.
Duty to furnish passenger with, II, 392; IV, 172, 181.
In car, right to demand before surrender of ticket, VII, 1052.
Passenger injured by leaving, before train stops, IV, 363.

SEATTLE, WASH.
Decisions particularly applicable to, VI, 765.

SECONDARY EVIDENCE.
See BEST AND SECONDARY EVIDENCE.

SECOND-CLASS TICKETS.
Rights of holders of, VII, 1058.

SECOND CONDEMNATION.
Measure of damages in cases of, IV, 676.

SECRET AGREEMENTS.
By subscribers in fraud of other subscribers, VII, 742.
In fraud of other subscribers as a defense to action on subscription, VII, 791.

SECRETARY.
Rights, powers, and duties of, VI, 909.
Service of process on, VI, 1090.

SECRETARY OF INTERIOR.
Approval by, of selection of indemnity lands, VI, 161.

SECRETARY OF STATE.
Filing subscription papers with, VII, 732.
Payment of fee to, on consolidation of roads, III, 83.

SECRETARY OF WAR.
Power and duties of, as respects bridges I, 712.

SECRET INSTRUCTION.
To agents, I, 46.

SECTION HANDS.
As fellow-servants of engineer, V, 744.
As fellow-servants with other employés, V, 764.
Contributory negligence of deceased, in actions for causing death, III, 840.
Riding on train, when fellow-servants with conductor, V, 738.
When deemed in different department from trainmen, V, 688.

SECTION MASTER.
As an expert, VIII, 293.
As fellow-servant of other employés, V, 753–755.
Declarations of, as evidence, I, 286.
Service of process on, VI, 1096.
When conductor is fellow-servant of, V, 738.
When engineer is not fellow-servant of, V, 744.
When fellow-servant of another section master, V, 755.
When fellow-servant of men under him, V, 753.
When vice-principal of men under him, V, 754, 755.

SECURED CREDITORS.
Rights of, IV, 162.

SECURITY.
Before suit in replevin, VII, 64.
For costs, III, 327.
On appeal, I, 440.
On appeal in condemnation proceedings, IV, 805–807.
Taking additional, not waiver of foreclosure, VI, 471.
Under Canadian Expropriation Acts, IV, 930.

SEIZURE.
Not essential to exercise of right of stoppage *in transitu*, II, 189.

SEIZURE — *continued*.
Of goods by military forces, claims for, III, 8.
Of goods, when relieves carrier from liability, II, 122–125.
Of land, ejectment after, IV, 845.
Of land, right of action in ejectment for, IV, 245.
Of liquors in possession of carrier, VI, 75.
Under legal process as a defense to carrier, II, 25.

SELECTION.
Of indemnity lands, VI, 161, 162.
Of route of elevated railway, IV, 279.

SELLING AGENTS.
Implied powers of, I, 44.

SEPARABLE CONTROVERSIES.
Removal of cause on ground of, VII, 35–38.

SEPARATE ESTATE.
Of married women, power to make contracts touching, V, 1067.
Of wife, competency of husband and wife in actions affecting, VIII, 200.
Right of married woman to sue alone for injuries to, V, 1073.

SEPARATION.
Of things sold, VII, 100.

SEQUESTRATION.
As a substitute for execution, V, 551.

SERVANT.
Distinguished from independent contractor, V, 1105.
No limitation of liability as against wilful acts of, I, 565.
Protection of passengers from acts of, II, 428–431.
Right of master to prospective damages for death of, III, 944.
Who is, VI, 295; VIII, 327.
See also EMPLOYÉS.

SERVICE.
Of attachment, I, 503, 504.
Of garnishee's answer, I, 507.
Of notice of appeal in condemnation proceedings, IV, 805.
Of notice of claim for laborer's lien, VI, 298.
Of notice of condemnation proceedings, IV, 508.
Of notice of condemnation proceedings by publication, IV, 510.
Of notice of construction of street crossings, III, 441.
Of notice, sufficiency of, a question of law, I, 321.
Of papers in bankruptcy, I, 582.
Of process and how proved, VI, 1085–1104.
Of process in condemnation proceedings, IV, 512.
Of process in justice's court, VI, 121.
Of process in suits against receivers, VI, 1214.
Of process on foreign corporations, V, 1020.
Of summons, return of, IV, 252.
Of writ of mandamus, VI, 386.

SERVICES.
Action for loss of, between time of injury and time of death, III, 745.
Competency of evidence as to value of, V, 390.
Contracts for, when not within the statute of frauds, III, 199.
Extra charges for special, II, 640–643.
Medical, VI, 391–398.
Of child during minority, damages to parent for loss of, III, 939.
Of child, recovery for loss of, II, 818.
Of child, when contributory negligence of parent bars action for loss of, II, 800, 801.
Of deceased parent, measure of damages for loss of, III, 933.
Of deceased, proof of value of, on question of damages, III, 880.
Of person killed, allegation of loss of, III, 794.
Of wife, action by husband for loss of, V, 1069.
Of wife, measure of damages to husband for loss of, III, 937.
Opinion of witness as to value of, VIII, 247.
Parents' right of action for loss of, how affected by contributory negligence of injured child, II, 772.
Rendered by directors, compensation for, IV, 58–61.
Rendered to government, compensation for, VI, 132.
Salvage, I, 33.
Specific performance of contracts for, VII, 154.
Statement of cause of action in complaint for, VI, 989.
Term of, by employé, V, 3.
To company, payment for stock in, VII, 780.

SERVIENT ESTATE.
Rights of owner of easement as affected by conveyance of, IV, 161.

SERVITUDE.
See ADDITIONAL BURDEN OR SERVITUDE.

SET-OFF; COUNTERCLAIM; RECOUPMENT.
General treatment, VII, 114.
Set-off.
Against damages for the condemnation of land, IV, 685.
In actions for wages, V 11.
In actions on subscriptions to stock, VII, 792.
Of benefits against damages, IV, 348.
Of damages against charges, II, 648.
Of enhanced value of land not taken, IV, 920.
Replication to plea of, VI, 1018.
What allowable in creditor's suit against stockholder, VII, 327.
Counterclaim.
How pleaded, generally, VI, 1006.
In actions for killing stock, I, 272.
In actions for wages, V, 11.
In actions on construction contracts, III, 173.

SET-OFF; COUNTERCLAIM; RECOUPMENT — *continued.*
Counterclaim — *continued.*
What may be the subject of, generally, VII, 117.
Recoupment.
In action for wages, V, 11.
In action on construction contract, III, 173.
What damages may be proved by way of, VII, 118.

SETTLEMENT.
Between contractors and company, conclusiveness of, III, 138.
Of claims by superintendent, VIII, 185.
Of claims for taxes, VII, 986.
Of engineer's accounts, III, 150.
Power of attorneys to make, I, 514.
With clients, effect of, upon attorneys' liens, I, 518.

SETTLERS.
Of lands granted to railroads, rights of, VI, 160.
On public lands, rights of, VI, 166, 170, 173, 194, 1113–1115.

SEVERABLE CONTRACTS.
What are, III, 202.

SEVERABLE LIABILITY.
For negligence, VI, 816.
Of both companies in cases of collision, III, 14.
See also JOINT AND SEVERAL LIABILITY.

SEVERANCE.
Of causes of action, I, 30.
Of trials, when granted, VIII, 14.

SEWERS.
Right of city to construct, VII, 367.

SHARES.
Of stock, when subject to execution, V, 544.

SHED.
Allowing fire to spread from, V, 880.

SHEEP.
When company must fence against, I, 140.

SHERIFF.
Fees of, IV, 733.
Liability of company to, for protection of property, VII, 722.
Return of writ on refusal to levy, V, 546.

SHIFTING CARS.
Liability for injury caused by, VII, 461.

"SHIP FOR EXPORTATION."
Meaning of, in shipping contracts, VIII, 327.

SHIPMENT.
Discrimination when allowed in favor of large, IV, 90–92.
Liability of carrier for goods awaiting, II, 129–131.
Selection of mode of, by carrier, II, 32.
Value at place of, when measure of damages, II, 288.

SHIPPER.
Acquiescence of, to overcharge, II, 630.
Fraud of, in concealing kind or value of goods, II, 88–90.

SHIPPER — *continued.*
Liability of carrier, where shipment is delayed at request of, II, 129.
Liability of, where goods are explosives, II, 87.
Must have knowledge of limitation of liability, II, 165–167.
Negligence or fraud of, when excuses carrier, II, 84.
Right of carrier to demand charges from, II, 645.
Title of, cannot be disputed by carrier, II, 97.
Undue preference as between, by carrier, VI, 33.
When may sue for failure to deliver, II, 114.
See also CONSIGNOR.

SHIPPING AGENTS.
Implied powers of, I, 43, 44.

SHIPPING CONTRACTS.
Construction of, III, 241.
For carriage of cattle, I, 760–783.
Generally, II, 156–186.
See also BILLS OF LADING.

SHOP.
Allowing fire to spread from, V, 880.
When exempt from taxes, VII, 912.
When subject to taxation, VII, 867.

SHOPMEN.
In gangs, when fellow-servants, V, 764.

SHOP REPAIRERS.
When superintendent is not fellow-servant of, V, 756.

SHORE FRONT.
Grants of, VI, 194.
Remedy for obstructing, VII, 89.
Right to extend, conflicting rights to, VII, 86, 87, 92.

SHOVELERS.
When brakeman is fellow-servant of, V, 759.
When conductor is fellow-servant of, V, 738.
When engineer is fellow-servant of, V, 745.

SHOW GOODS.
Measure of damages for loss or injury to, II, 304.

SHUNTING.
Assumption of risk as to, V, 136.
Duty to protect employés during, V, 120.
Non-liability for negligence of fellow-servants in, V, 661.

SICK FUND.
Deduction from wages as contribution for VII, 17.

SICK PASSENGERS.
Allowing time to, for alighting from train, II, 400.
Care required from carrier towards, II, 361; VI, 780.
Expulsion of, IV, 190; VII, 538.
Liability for injuries to, VII, 460.
Obligation to carry, II, 345, 346.

SIDE TRACKS.
General treatment, VII, 119.

SIDE TRACKS — *continued.*
Assumption of risk as to obstruction of, a question for jury, V, 325.
Construction of, under provisions of charter, II 705.
Duty of company as to safety of, V, 57.
Duty to employés in switching cars at, V, 120.
Duty to fence at, V, 816.
Location of, in city streets, VII, 605.
Measure of damages for failure to maintain, III, 707.
Municipal aid for construction of, VI, 560.
Negligence as to safety of, question for jury, V, 314.
Promise by employer to repair defects in, V, 166.
Regulation of, by commissioners, VI, 1143.
Running burning cars on, liability for, V, 868.
Taking land for, when for a public use, IV, 457.
When subject to execution, V, 545.
See also TURNOUTS.

SIDEWALKS.
At street crossings, duty to construct and maintain, III, 426.
Liability of company for injuries caused by snow and ice on, VII, 699.
Obstruction of, by express companies, V, 561.

SIGNAL POSTS.
Injuries to employés by, V, 65.
Prosecution for failure to erect, III, 365.

SIGNALS.
In general.
Bells in compartment cars, patents for, VI, 961.
Blowing whistle, when negligence, VI, 789.
Burden of proof in the absence of, V, 453.
Failure to give, when negligence, VI, 784, 790.
Failure to sound whistle, IV, 39.
Injuries occasioned by violation of ordinances requiring, VII, 698.
Ordinance requiring use of, VII, 444.
Patents for, VI, 960.
Penalties for failure to stop on, VI, 967.
Prosecution for failure to give statutory, III, 365.
Statutes and ordinances forbidding blowing of whistle, VII, 682.
Statutes and ordinances requiring, in cities, VII, 681–683.
Sufficiency of evidence concerning giving of, V, 528.
When train is approaching or leaving station, VII, 209–211.

As to animals.
Averment of absence of, I, 363.
Duty to give at crossings, I, 199.
Duty to give, to avoid injury to animals, I, 123.
Duty to sound whistle, where animals are discovered on track, I, 123.
Failure to give, when proximate cause of damages, I, 100.

SIGNALS — *continued.*
As to animals — *continued.*
Instructions relating to duty to give, I, 332.
Proof of failure to give, I, 309.
Sufficiency of evidence of failure to give, I, 291.
To avoid injuring animals in cities and villages, I, 205.
As to employes.
Alleging negligence in failure to use, V, 270.
Contributory negligence in relying upon unauthorized, V, 213.
Duty to give, for protection of employés, V, 115–118.
Misunderstanding or disobeying of, V, 228.
Negligence in failure to give, question for jury, V, 322.
Non-liability for negligence of fellow-servants in giving, or failing to give, V, 662.
Right to assume obedience to, V, 192.
Rule of company respecting, V, 245.
As to licensees and trespassers
Duty to give, as respects licensees, VI, 269.
Duty to trespassers as respects, VII, 1132, 1133.
Failure to heed, as contributory negligence, VII, 1155.
At crossings.
Admissibility of evidence as to, V, 423.
Care required from person in absence of, III, 540.
Contributory negligence in failure to observe or heed, III, 547; V, 213.
Duty to look and listen as affected by failure to give, III, 585–589.
Duty to use, III, 493–528.
Expense of maintaining, as damages, III, 406.
Failure to ring bell, I, 732.
Instructions as to duty to give, III, 650, 651.
Liability for injuries as dependent upon duty to use, III, 493–528.
On farm, V, 623.
Rendered useless by excessive speed, liability of company, III, 532.
Under statutes, III, 495–528.
Use of whistle, before reaching signal post, when negligence, III, 518.
In carriage of passengers.
Duty of passenger carrier to give, II, 281.
Duty to give, when taking on passengers, II, 391.
To stop, getting on train after, II, 451.
In causing death.
Effect of absence of, at crossing, III, 829–831
Evidence as to, in actions for causing death, III, 847.
Instructions as to failure to give, III, 907.
Showing failure to give, III, 867.
Whether given, question for jury, III, 893.

SIGNATURE.
Of carrier to bill of lading, I, 602.
Of mileage tickets, stipulation as to, VII, 1072.
Of passenger on free pass, necessity of, VI, 943.
Of passenger on ticket, IV, 184.
Of shipper to bill of lading, I, 602.
Of shipper to contract limiting liability. VI, 335.
To coupon, III, 333.
To debenture, III, 959.
To petition for railroad aid, VI, 565–568.
To petition in condemnation proceedings, IV, 512.
To petition to bond towns or cities in aid of railway, VI, 565–568.
To railway-aid bonds, VI, 670.
To report of commissioners in condemnation proceedings, IV, 735.
To special contract limiting liability, II, 167, 169.

SIGNBOARDS.
Care required from person in absence of, III, 542.
Duty to look and listen as affected by failure to provide, III, 589.
Reqirement of, in cities, VII, 683.

SIGNS.
At street crossings, sufficiency of, III, 428.
Failure to provide, III, 589.
Liability for injuries at crossings as dependent upon maintenance of, III, 480, 481.
Liability for injuries by, VII, 457.

SILENCE.
Estoppel by, V, 378, 379.
Of abutting owner, effect of, VII, 426.
Of principal, when ratification of agent's act, I, 83.

SINKING-FUND.
Taxes for, VII, 835.

SIOUX CITY & P. R. CO.
General treatment, VII, 128.

SISTER STATES.
Conclusiveness of judgments of courts of, VI, 95.

SITUS.
Of property for taxation, VII, 884–888.

SKILL.
Lack of, when deemed contributory negligence, V, 189.
Of employé, presumption of, V, 300.

SLANDER.
See LIBEL AND SLANDER.

SLAVES.
Carriage of, II, 586–589.
Duty of company as to safety of hired, V, 22.
Liability for injury to, V, 665.
Not included as "stock," III, 470.
See also COLORED PERSONS.

SLEEPING.
Duty to awake passenger when, II, 396; VII, 130.
In dangerous places, or while on duty, as contributory negligence, V, 195.

SLEEPING — *continued.*
On track, as contributory negligence, VII, 1155.
On track, children, II, 780.
On track, generally, III, 834.
On track, liability for injury, VII, 1147.
On train as contributory negligence, II, 460.
SLEEPING AND PALACE CAR COMPANIES.
General treatment, VII, 128.
In general, VII, 128.
Duties and liabilities to passengers, VII, 130.
Liability of railroad company, VII, 139.
Taxation of sleeping cars, VI, 59, 60.
When palace cars subject to taxation, VI, 59, 60; VII, 869.
When sleeping cars subject to taxation, VII, 869.
SLIGHT CARE.
Failure to use, III, 258.
SLIGHT NEGLIGENCE.
Distinction between "slight" and "gross," III, 39, 47.
Liability of carrier of passengers for, II, 357.
Of person injured, rule as to, III, 258.
When words are equivalent to "want of extraordinary care," VIII, 327.
SLOT.
Liability for excessive width of, I, 732.
SLUICEWAYS.
See DRAINS AND DRAINAGE.
SMOKE.
As an element of damages, VII, 664.
As an element of damages to abutting owner, IV, 335, 336.
As an element of land damages, IV, 706.
Damages for, III, 117.
Evidence of damage by, in eminent domain proceedings, IV, 648.
Evidence of damages from, VII, 657.
Measure of damages for, IV, 919.
Obstruction of view by, effect of, on duty to look and listen, III, 607.
Right of abutting owner to damages for, VII, 652.
When deemed a nuisance, VI, 887.
SMOKING.
In cars, ordinance prohibiting, VII, 442.
SNOW AND ICE.
Allowing snowdrifts against fences, I, 153.
Cutting ice on right of way, VII, 81.
Duty to remove from car platform, II, 384.
Duty to remove from cattle-guards, I, 186.
Effect of, on duty to look and listen, III, 620.
Heaping up, on street, rights of adjoining owner, VII, 421.
In cattle-guards, liability for, II, 597.
Injury to employé by, liability of company, V, 62.
Negligence in removing from track, VII, 456.
Negligence in throwing from track to street, VII, 469.
SNOW AND ICE — *continued.*
Obstructing track by snowbanks, V, 66.
On platform at station, liability for, VII, 218, 229.
On sidewalk, liability of company for injuries caused by, VII, 699.
On steps or platform, injuries caused by, IV, 363.
Ordinance requiring removal of, VII, 443.
Ordinances relative to, VI, 757.
Right to throw on street, VII, 414.
Thrown from track, obstruction of street by, VII, 411, 414.
SNOWPLOWS.
Assumption of risk in use of, V, 138.
SOAP.
Classification of, as freight, VI, 29.
SOCIETY.
Action by husband for loss of, V, 1070.
Alleging loss of, in action for causing death, III, 796.
Meaning of, in actions for loss of, VIII, 327.
Of child, damages to parent for loss of, III, 940.
Of husband, damages to wife for loss of, III, 936.
Of wife, measure of damages to husband for loss of, III, 937.
SOIL.
Removal of, from right of way, VII, 81.
"SOME TIME."
Meaning of, in agreement to repair machinery, VIII, 327.
SOMNAMBULISM.
As cause of accident, I, 14.
SOUTH CAROLINA.
Constitutionality of statutes of, as to municipal aid for railways, VI, 549.
Constitutionality of statutes of, relative to condemnation of land, IV, 391.
Constitutionality of tax laws of, VII, 848.
Constitutional provisions in, relative to condemnation of land, IV, 386.
Deductions for benefits under condemnation laws of, IV, 721.
Degree of care required from company under stock law of, I, 117.
Dispensary act of, VI, 74.
Injuries to animals running at large in, I, 221.
Operation of statute of, giving right of action for causing death, III, 753.
Plaintiff's pleadings need not negative contributory negligence in, III, 278.
Review of town-bonding proceedings by mandamus in, VI, 752.
Statute of, as to defective crossings, III, 473.
Statute of, regulating liability for injuries caused by fire, V, 856.
Taxation in aid of railways in, VI, 742.
Termination of initial carrier's liability under statute of, II, 234.
SOUTH CAROLINA R. CO.
General treatment, VII, 141.
SOUTH DAKOTA.
Assessment and levy of taxes in, VII, 979.

SOUTH DAKOTA — *continued.*
Operation of statute of, giving right of action for causing death, III, 753.

SOUTHERN PACIFIC R. CO.
General treatment, VII, 142.
Federal grants to, VI, 171–173.

SOVEREIGNTY.
Power to take private property for public use an attribute of, IV, 399.

SPARK ARRESTERS.
Liability of company for defects in, V, 865–867.
Patents for, VI, 961.

SPARKS.
As an element of damages, VII, 664.
Evidence of damages by, VII, 657.
Liability for fire caused by, V, 852–968.

SPECIAL AGENTS.
Implied powers of, I, 43.

SPECIAL APPEARANCE.
Effect of, I, 452.

SPECIAL CONTRACT.
As to safety of employés, duty of company under, V, 18.
By conductor to stop train at unusual place, II, 408.
Effect of, on liability for acts or negligence of fellow-servants, V, 664.
For through shipment, necessity of, II, 226.
Limiting liability for baggage, I, 565.
Limiting liability for live stock, I, 763–783.
Limiting liability of express company, V, 591–594.

SPECIAL DAMAGES.
Complainant must show, to enjoin street railway, VII, 420.
How pleaded in action for expulsion from train, IV, 216.
In actions for flowing lands, V, 1000.
When abutting owner may sue for, VII, 632.
When allowable in actions against carriers of passengers, II, 566.

SPECIAL DEMURRER.
When proper, VI, 1011.

SPECIAL FINDINGS.
As to contributory negligence, III, 559.
Errors in, when ground for new trial, VI, 849.
In actions for causing death, III, 918–920.
In actions for injuries caused by fire, V, 967.
In actions for killing stock, I, 331.
Inconsistency between general verdict and, IV, 751; VI, 850.
See also FINDINGS.

SPECIAL LAWS.
Amendment of charters by, II, 684.
Constitutionality of, VII, 248.
Construction of, VII, 265.
Incorporation under, V, 1091.
Relating to live stock, constitutionality I, 89.

SPECIAL PLEA.
Contributory negligence, when must be interposed by, III, 281.

SPECIAL PLEA — *continued.*
Form and sufficiency of, generally, VI, 1004–1006.
Necessity of, in condemnation proceedings, IV, 534.

SPECIAL PROCEEDINGS.
Costs in, III, 330.

SPECIAL PURPOSE.
Loss of goods ordered for, measure of damages, II, 301.

SPECIAL QUESTIONS.
Submission of, to jury on assessment of land damages, IV, 638.
To jury impaneled to assess damages, IV, 751.

SPECIAL SERVICES.
Extra charges for, under Railway and Canal Traffic Acts, II, 666–671.
Extra charges for, when allowable, II, 640–643.

SPECIAL TICKETS.
Right to stop over on, VII, 1053.

SPECIAL VALUE.
Of freight, proof of, II, 60.

SPECIAL VERDICTS.
Generally, VIII, 95–107.
In actions for killing stock, I, 331.
Of juries impaneled to assess damages, IV, 751.

SPECIFICATION.
In applications for patents, VI, 949.

SPECIFIC DENIALS.
Must be, in answer, VI, 1008.
Necessity of, I, 269.

SPECIFIC PERFORMANCE.
General treatment, VII, 144.
When specific performance will be decreed, VII, 144.
Procedure, VII, 155.
Action for, by landowner, in Canadian expropriation proceedings, IV, 953.
Bill for, in lieu of foreclosure of mortgage, VI, 472.
On agreements between connecting companies, III, 70–72.
Of conditions of donation, VI, 650.
Of construction contract, III, 169.
Of contracts for crossing of railroads, III 391.
Of contracts for express facilities, V, 564.
Of contracts for joint user of right of way, VII, 83.
Of contracts for right of way, IV, 481; VII, 80.
Of contracts for sale of stock, VII, 293.
Of contracts to locate station, VII, 204.
Of judgments, actions for, IV, 766.
Of notice to treat under English Compulsory Purchase Laws, IV, 896.
Of order of commissioners in respect to grade crossings, III, 456.

SPECULATIVE DAMAGES.
Generally, III, 697–700.
In actions for injuries to children, II, 821.
In condemnation proceedings, IV, 684.
Under English Compulsory Purchase Acts, IV, 919.

SPEED.
In general.
City ordinances regulating rate of, VII, 676–681.
Competency of evidence as to, V, 396.
Construction of charter as to rate of, VII, 378.
Criminal prosecution for unlawful, III, 386.
Driving car at excessive, liability for injury to child, II, 759.
Duty regarding, with respect to licensees, VI, 269.
Duty to check, on discovery of person on track, VII, 1141–1143.
Duty to trespassers as regards, VII, 1131–1132.
Evidence of diminution of, after accident, V, 426.
Excessive, when negligence, VI, 785–788, 790–792.
Injuries occasioned by violation of ordinances restricting, VII, 698.
Instructions relative to, VI, 832.
Liability for driving at excessive or prohibited rate of, VII, 521, 522.
Of cable car, excess of, I, 730.
Of street cars, negligence respecting, VII, 468.
Of street cars, ordinances regulating, VII, 440.
Of train while on drawbridge, I, 714.
Of trolley car, liability for excessive, IV, 267.
Opinion of witness as to, VIII, 259–260.
Proof of, VI, 1030.
Right of municipal corporations to limit, to so many miles an hour, VII, 679–681.
Whether given rate is excessive a question for jury, VI, 809.
As to employes.
Assumption of risk from running at high rate of, V, 138.
Contributory negligence in running at high rate of, V, 212.
Duty to employés as affected by, V, 121.
Non-liability for acts of fellow-servant in respect to, V, 658.
Of hand car, contributory negligence as to, V, 221.
Rules and orders respecting rate of, V, 244.
As to passengers.
Effect of, on question of contributory negligence in getting off moving car, II, 472–474.
Liability to passenger for unlawful or excessive, II, 380.
Of train, as affecting right to board while moving, II, 455–457.
At crossings.
Approaching at rapid rate, VII, 465.
Contributory negligence in crossing track where train is running at unlawful, III, 630.
Driving over crossing at too rapid rate, III, 596.
Driving street car rapidly over, VII, 527.
Duty of motorman to slow up, IV, 272.

SPEED — *continued.*
At crossings — *continued.*
Duty to look and listen as affected by unlawful rate of, III, 590.
Evidence of rate of, III, 646.
Instructions as to excessive, III, 652.
Liability for injuries as dependent upon rate of, III, 530–537.
Necessity of checking, after giving signal near crossing, III, 507.
Negligence in approaching at too great, III, 640.
Of farm, V, 623.
In causing death.
Admissibility of evidence as to rate of, III, 848.
Effect of excessive, to excuse contributory negligence, III, 828.
Instructions as to rate of, III, 899.
Proof of excessive, III, 866.
Rate of, when question for jury, III, 893.
Showing failure to slacken, III, 868.
In injuring animals.
Allegation of unlawful rate, I, 255.
As affecting liability, I, 203.
Burden of proof to show undue, I, 313.
Duty to slacken, I, 128–131.
Duty to slacken at crossings, I, 201.
Illegal rate of, as the proximate cause of damage, I, 100.
Negligence with respect to, when question of fact, I, 327.
Presumption upon proof of prohibited rate of, I, 306.
Rate of, in cities and villages, I, 206–208.
Relevancy of evidence to show unlawful rate of, I, 279.
Sufficiency of evidence to show undue, I, 296.

SPIKES.
Projecting from rail in street car track, VII, 413.

SPITTING.
On floor, right to eject from station for, VII, 224.

SPLITTING.
Of causes of action, I, 30, 240; V, 894.

SPRINGS.
Generally, VIII, 183, 184.
Loss of use of, as an element of land damages, IV, 705.
Reservation of access to, in deeds, IV, 22.

SPRINKLING.
Ordinance requiring, as to track, VII, 442.

SPUR TRACKS.
Taking land for, when for a public use, IV, 458.
See also SIDE TRACKS.

STABLES.
When exempt from taxes, VII, 912.

STAGE-COACH COMPANIES.
Analogy between railroads and, II, 310.
Duties and liabilities of, II, 341–343.

STAIRWAY.
At station, liability for injuries caused by defects in, VII, 221.
Duty of company as to safety of, IV, 358.

STAIRWAY — *continued.*
Injuries to passengers from failure to light, IV, 361.
Using unlighted, when contributory negligence, II, 489.

STAMPING.
Of mileage tickets, conditions and stipulations as to, VII, 1072.
Round-trip ticket before return trip, rules and stipulations requiring, VII, 1068, 1069.

STAMPS.
Stamp duty on subscriptions, VII, 733.

STANDING.
In car, when contributory negligence, VII, 481.

STANDING CARS.
Liability for injuries by violation of ordinance as to, VII, 698.
Obstructing travel by, VII, 616.
Obstructing view of track by, III, 612.
On or near track, V, 66.

STANDING TREES.
See TREES.

STATE AID.
General treatment, VII, 159.
Alabama, VII, 160.
Arkansas; California; Delaware, VII, 165.
Florida; Georgia; Kentucky, VII, 166.
Louisiana, VII, 169.
Maryland; Minnesota; Mississippi, VII, 171.
Missouri; New York, VII, 173.
North Carolina; Pennsylvania, VII, 175.
South Carolina, VII, 178.
Tennessee; Texas; Virginia, VII, 180.
Enforcement of bonds by mandamus, VI, 380.
See also BONDS.

STATE COURTS.
Conclusiveness of judgments of, in federal courts, VI, 95.
Concurrent jurisdiction of federal courts with, V, 635.
Conflict between federal courts and, in injunction suits, V, 1161.
Conflict between receivers of, and those of federal courts, VI, 1180.
Conflict of jurisdiction between federal courts and, V, 635.
Decisions of, followed in federal courts, VI, 675.
Decisions of, when followed by federal courts, VI, 556.
Effect in, of previous proceedings in federal courts, VI, 474.
Effect of filing petition and bond for removal on jurisdiction of, VII, 43.
Following decisions of, V, 636, 644.
Jurisdiction of, in foreclosure as dependent on locality, VI, 473.
Jurisdiction of, of actions for causing death, III, 780–790.
When error lies to, from U. S. Supreme Court, V, 640–643.

STATE LAWS.
Adoption of, in federal courts, V, 636.
Affecting interstate commerce, VI, 58–71.

STATE LAWS — *continued.*
Inspection of interstate traffic under, VI, 71.

STATE LINES.
Jurisdiction as dependent upon, I, 237.

STATEMENT.
In justice's court, of claim for killing stock, I, 358–364.
Of claim for laborer's lien, filing of, VI, 297.
Of employés, evidence of, in actions for injury, V, 279, 280.
Required by statute to be filed by express companies, V, 560.

STATEMENT OF FACTS.
Amendment of, in justice's court, I, 365.
On appeal, I, 443.

STATES.
General treatment, VII, 183.
In general.
Condemnation of land owned by, IV, 415.
Estoppels against, V, 360.
Extent of statutory liens of, VII, 163.
Federal grants to, VI, 141–158.
Grants by, to railroads, VI, 180–187.
Indorsement of bonds of state, VII, 160.
Joint construction of railroad by municipality and state, V, 1050.
Lands within, power of United States to condemn, IV, 405.
Liability of, for killing stock, I, 246.
Liability of, in cases of fraud, etc., VII, 161.
No compensation need be provided for taking lands of, IV, 544
Ownership of fee in street in, effect of, VII, 596.
Paramount liens of, how enforceable, VII, 163.
Possession by receiver of property out of state, VI, 1180.
Regulation by, of interstate carriers or traffic, VI, 66–71.
Right of, to enforce quarantine laws, VI, 1125.
Rights of purchasers of canals from, I, 734.
State canals, I, 734.
Statutes of, relative to trial by jury in assessment of land damages, IV, 605.
Suing in one state on cause of action arising in another, V, 260.
Taxation of road lying partly without state, VII, 859.
Title of, to navigable waters, VII, 83.
When entitled to damages for land taken, IV, 561.
When state must raise question of *ultra vires*, VIII, 125.
Control of carriers, etc.
Carrying slave out of state, II, 587.
Charters granted by two or more, II, 677, 678.
Control by, over Union Pacific R. Co., VIII, 140.
Corporations chartered in two or more, V, 1012.
Corporations, when deemed citizens of more than one state, III, 1.

STATES — *continued.*
Control of carriers, etc. — *continued.*
Effect of consolidation of roads lying in different, III, 95.
Jurisdiction as dependent upon state lines, VI, 110.
Jurisdiction of suits by and against, V, 634.
Laws of, attempting to regulate commerce, III, 32–36.
Position of, as stockholders, VII, 307.
Regulation of charges by, II, 612–622.
Regulation of charges on roads chartered by state, II, 620.
Regulation of speed by, VI, 786.
Regulation of steam roads in cities by, VII, 669–693.
Right of corporation to sue in foreign state, V, 1021.
Right of, to contest elections of directors, IV, 55.
Taxation of road running into two or more, III, 36.
Where corporations are chartered, III, 4.
Powers of.
By attorney-general to bind, I, 512.
Over navigable waters, VIII, 169.
To prevent discrimination, IV, 127.
To regulate charges, II, 614, 619, 620; VIII, 190.
To regulate fares, VII, 1076–1079.
To regulate interstate traffic, VI, 66–71.

STATION AGENTS.
General treatment, VII, 185.
As fellow-servants with other employés, V, 765.
Assaults by, I, 470.
Authority of, to employ physician, VI, 394.
Company's liability for torts of, V, 608.
Declarations of, as evidence, I, 286.
Liability of, as garnishees, I, 493.
Service of notice of construction of street crossing on, III, 441.
Service of process on, VI, 1094.

STATION GROUNDS.
Defects in premises, liability of carrier for, II, 417.
Duty to build cattle-guards at, II, 595.
Duty to fence at, V, 814–816.
Liability for injuries caused by negligence at, VII, 219–222.
Injuries to animals at, I, 202–204.
When exempt from taxes, VII, 910.
When fences required at, V, 814–816.
Who deemed trespassers in, VII, 1120.

STATION HAND.
When fellow-servant of brakeman, V, 766.

STATIONS AND DEPOTS.
General treatment, VII, 191.
Definitions; interpretation of words, VII, 192.
Establishment; location, VII, 194.
Abandonment and relocation, VII, 204.
Rules of company, VII, 207.
Injuries caused by negligence, VII, 208.
Joint use by two or more companies, VII, 236.

STATIONS AND DEPOTS — *continued.*
In general.
Abandonment of, I, 3.
Allowing fire to spread from, V, 879.
Compelling construction of, VI, 377.
Construction of statutes relative to, VI, 561.
Crossing of railways at, III, 416.
"Depot or station," VII, 192.
Dower in lands purchased for, IV, 154.
Duty of company to warm, VII, 223.
Duty to furnish freight facilities at, VI, 35.
Duty to permit building of elevators at, IV, 369.
Duty to run between designated under working agreements, VI, 252.
Erection of, where railways intersect, III, 416.
For union depot company conveyances for, VIII, 136.
Frightening teams at, V, 1042.
Giving hackmen exclusive privileges at, IV, 103.
Goods awaiting shipment burned in, I, 632.
Liability of company for false imprisonment at, V, 609.
Measure of damages for failure to build, III, 705.
Municipal regulations as to, V, 1062.
Power of city to grant lands for purposes of, VII, 572.
Prosecution for failure to stop at, III, 367.
Regulation and privileges of hackmen at, V, 1059–1062.
Regulation of, by commissioners, VI, 1143.
Right of company to eject persons from, VII, 223, 224.
Right to move or abandon, VII, 396.
What are stations, VIII, 327.
What is a depot, VIII, 311.
When a fixture, V, 969.
When exempt from taxes, VII, 910.
When subject to mechanics' lien, VI, 286.
Condemning land for.
Deduction of benefits for proximity of, IV, 340.
Erection of, when a "taking" of land, IV, 449.
Evidence of contemplated, IV, 661.
Lands used for, when may be condemned, IV, 427.
Stipulation to erect, IV, 476.
When a public use, IV, 459.
Contracts to locate.
Agreements by agents, I, 55.
At particular place, validity of, III, 213–215.
Bonus to company to secure, VI, 651.
Conditions in subscription as to construction of, VII, 810–812.
Conditions in subscription as to place of building, VI, 639.
Covenant to maintain, when runs with the land, III, 344.
Enforcement of contract to build, VII, 149.

STATIONS AND DEPOTS — *continued.*
Contracts to locate — *continued.*
Municipal subscription conditioned on location of, VI, 639.
Specific performance of contracts to build and maintain, VII, 149.
Subscription conditioned on construction of, VII, 810–812.
Validity of, III, 213–215.
Duty to passengers at.
Announcement of, II, 395–397.
Care demanded from carrier of passengers at, II, 413–422.
Carrying beyond, as an element of damages, II, 502.
Contributory negligence of passenger at, after alighting from train, III, 821.
Duty to provide safe place of egress at, II, 400.
Duty to stop for passengers at places other than, II, 404.
Duty to stop trains at, II, 386–389.
Excessive damages to passenger put off at or near, IV, 241.
Expulsion of passengers at, IV, 203–206.
Expulsion of passengers at places remote from, IV, 206.
Getting off before train has reached, contributory negligence, II, 474.
Getting off train at or near, II, 488–495.
Getting off train which stops short of, contributory negligence, II, 463–465.
Insufficient lighting, II, 417.
Liability of carrier when passenger is put off beyond, II, 412.
Liability of carrier where train falls short at, or overshoots, II, 410, 413.
Overshooting, II, 411–413.
Overshooting, manner of leaving when, II, 466, 476.
Posting notices at, limiting liability for baggage, I, 564.
Recently established, stopping at, II, 394.
Regulating stopping of trains at, II, 335.
Stopping at places other than, II, 422.
To carry passenger to station named in ticket, II, 393.
To which fare has been collected, duty to carry passenger to, II, 394.
What stations tickets are good for, VII, 1043.
Injuries to animals, children, and employes at.
Duty to fence track at, I, 148.
Injuries to children at, II, 743.
Injuries to employés caused by defects in, V, 254.
Notice to employé of defects in, V, 156.
What land necessary for, when question for jury, I, 329.
See also FLAG STATIONS; UNION DEPOT COMPANIES.

STATUS.
Of corporations, how far deemed persons, III, 317.
Of new company on consolidation, III, 100.
Of new corporation after reorganization, VII, 57.
STATUS — *continued.*
Of the Confederate government, VIII, 158.

STATUTE OF FRAUDS.
Application of, to guaranties, V, 1055.
Effect of, on acquirement of easement, IV, 159.
Requirements of, as respects agreements to convey, VIII, 149.
Requirements of, as respects contract for fencing, V, 805.
Requirements of, as to contracts, III, 197–201.
Requirements of, as to contracts to be specifically enforced, VII, 146, 147.
Requirements of, as to contracts to locate station, VII, 202.
Requirements of, as to sales, VII, 99.
Subscriptions, how far subject to, VII, 741.

STATUTE OF LIMITATIONS.
When begins to run, VI, 308–314.
See LIMITATIONS OF ACTIONS.

STATUTES.
General treatment, VII, 238.
Enactment, VII, 241.
Constitutionality; validity, VII, 243.
Interpretation and effect, VII, 262.
Repeal, and its effect, VII, 271.

STATUTORY ACTIONS.
By employés for injuries, effect of contributory negligence as a defense, V, 186.
Contributory negligence as a defense in, III, 244.
Election between common-law actions and, I, 239.
What are, I, 30.

STATUTORY LIABILITY.
Of stockholders to creditors, VII, 316–319.
Of stockholders to laborers, VII, 318.

STATUTORY LIENS.
Payment of, by receiver, VI, 1199.

STATUTORY RECEIVERS.
Accounting by, VI, 1220.

STATUTORY REMEDIES.
When abutting owner confined to, VII, 628.

STATUTORY SIGNALS.
See SIGNALS.

STAY OF PROCEEDINGS.
Effect of appeal as a, IV, 812.
In injunction suit pending condemnation proceedings, IV, 287.
In partition, VI, 934.
Of execution, V, 548.
Of execution in ejectment until assessment and payment of damages, IV, 852.
Of suit brought against receiver without leave, VI, 1213.
Pending appeal from judgment, IV, 356.
When granted by injunction, V, 1152–1156.

STEAM.
As an element of damages to abutting owner, IV, 336.
Damages for using, VII, 427.
Frightening teams by escape of, III, 468.

STEAM — *continued.*
Injuries to employés by escape of, V, 123.
Injuries to passengers by escape of, II, 422.
Letting off, when amounts to negligence, VI, 789.
Liability for using excessive amount of, V, 868.
Limiting head of, to be carried, V, 241.
Obstruction of view by, effect of, on duty to look and listen, III, 607.
Power of city to prohibit use of, VII, 566.
Proof of carelessness in permitting escape of, III, 869.
Right to use in streets and highways, VII, 556–590.
STEAMBOAT COMPANIES.
Liability of, as carriers of baggage, I, 523.
STEPFATHER.
Right of, to sue for injury to child, II, 808.
"STICKS."
What are, as applied to lumber, VIII, 327.
STIPULATIONS.
Against condemnation pending injunction suit, IV, 287.
Against liability for negligence, VI, 341.
Against liability for negligence of fellow-servants, V, 776.
As to amount of recovery in bill of lading, I, 635–638.
As to notice of claim for loss, V, 590.
As to sufficiency of car accepted by shipper, I, 641.
By carrier for benefit of insurance, II, 159.
For benefit of insurance, I, 641; VI, 340.
In mileage tickets, VII, 1072, 1073.
In mortgage relative to taxes, VI, 440.
In receipts, limitation of liability by, I, 761.
In receipts of bills of lading, limitation of liability by, V, 586, 587.
Limiting initial carrier's liability to its own line, II, 516.
Limiting liability in receipts for baggage, I, 563.
Powers to bind clients by, I, 514.
Requiring notice of claim of loss, I, 770–775.
To erect depots and stations, IV, 476.
To prevent abatement, I, 10.
STOCK.
General treatment, VII, 276.
Nature, characteristics, and rights of holders, VII, 276.
Issuing, VII, 278.
Increase and reduction of stock, VII 282.
Transfers, VII, 285.
Actions for subscriptions to, when barred by lapse of time, VI, 316.
Actions to recover assessments on, VII, 333.
Agreement to take, in payment for construction of roads, III, 129.
Agreement to take, in payment for land granted, IV, 465.
Assignability of, I, 478.
Assignment of dower in, IV, 155.
Cancellation of certificate of, V, 353.
Capital, when exempt from taxation, VII, 912.
STOCK — *continued.*
Capital, when subject to taxation, VII, 872–874.
Compensation of directors for procuring subscriptions to, IV, 60.
Confiscation of, VIII, 160.
Conversion of bonds into, I, 668.
Distribution of, V, 1096.
Effect of consolidation upon subscriptions to, III, 92.
Effect of pledge of, VI, 1062.
Enjoining voting on, V, 1151.
Held by municipality, power to sell, VI, 616.
Held by municipality, surrendered to company, VI, 616.
In competing lines, purchase of, VI, 917.
Increased, when exempt from taxation, VII, 913.
Increase of, as a defense to action on subscription, VII, 788.
In hands of stockholders, when exempt from taxation, VII, 914.
Interest on assessment or calls, V, 1173.
In union depot company, right of railroad to subscribe for, VIII, 136.
Issuing bonds convertible into, I, 658.
Of another corporation, consolidation by purchase of, III, 82.
Of foreign corporation, taxation of, as represented by number of cars in state, VI, 59.
Payment on account of, on reorganization, VII, 51.
Power of corporation to purchase and hold, III, 322.
Power of county commissioners to sell and transfer, III, 332.
Power of directors to make contracts in relation to, IV, 62.
Power of legislature to compel issuance of, to taxpayers, VI, 531.
Power of personal representative to sell and transfer, V, 553.
Purchasers of, when entitled to dividends, IV, 145.
Reduction of, as a defense to actions upon subscriptions, VII, 791.
Remedy by stockholder who has been deprived of, VII, 338–340.
Right of corporation to purchase its own, III, 322.
Right to interest on subscriptions to, V, 1175.
Shares of, when may be reached in attachment, I, 498.
Shares of, when subject to execution, V, 544.
Shares of, when subject to taxation, VII, 873–876, 887.
Specific performance of contracts to subscribe for, VII, 149.
Subscriptions for, by married women, V, 1068.
Subscriptions to, when may be reached in attachment, I, 498.
Subscriptions to, when subject to mechanics' lien, VI, 287.
Taxpayer, when entitled to, VI, 559.
Transactions in, by directors, IV, 72.
Transfer of, by married woman, V, 1068.

STOCK — *continued.*
What is included in "capital stock," VIII, 307.
When equivalent to "capital stock," VIII, 327.
When limitation begins to run in actions on subscriptions to, VI, 309.
See also SUBSCRIPTIONS TO STOCK; STOCKHOLDERS.

STOCK DIVIDENDS.
Nature and rights of holder, IV, 150.
Validity and effect of, VII, 284.
See also DIVIDENDS.

STOCKHOLDERS.
General treatment, VII, 305.
Rights and powers, VII, 306.
Liability to creditors, VII, 311.
Stockholders' rights of action, VII, 328.
Actions by creditors against, when barred by lapse of time, VI, 317.
Acts that directors may perform without consent of, IV, 76.
Answer in foreclosure filed by, VI, 485.
As affected by lease of road, VI, 207–210.
Assent of, to amendment of charter, II, 686.
Assent of, to sale of railroad, VII, 107.
Competency of, as witnesses, VIII, 195, 196.
Competency of, as witnesses when opposing party is deceased, VIII, 198.
Consent by, to acceptance of amendment of charter, IV, 75.
Contract with, as to application of new stock, VII, 283.
Dissenting remedies of, VI, 208; VII, 328–349.
Dissenting rights of, on consolidation, III, 81.
Dissenting, rights of, on reorganization, VII, 54.
Estoppel of, by consent to consolidation, III, 81.
Levy of assessment on stock by, VI, 751.
Liability of, for fraud or misapplication of funds, VII, 161.
Meetings of, to effect consolidation, III, 80.
Members of corporation, competency of, as witnesses, VIII, 196.
Municipality as stockholder exercise of privilege of, VI, 615.
Notice of increase of stock to, VII, 282.
Of bridge companies, rights of, I, 724.
Of construction companies rights and liabilities of, III, 180.
Of preferred stock, rights of, VII, 277.
Priority of mortgage over claims of, VI, 456.
Property of, when may be reached in attachment, I. 497.
Ratification of *ultra vires* acts by assent of, VIII, 125.
Relation of directors to, IV, 74–76.
Remedy of, for non-performance of conditions by company, VII, 802.
Rights and remedies of, as to leasing of railways, VI, 208–210.
Rights and remedies of, on reorganization, VII, 49–53.

STOCKHOLDERS — *continued.*
Rights conferred on, VII, 277.
Rights of, as to increase or reduction of stock, VII, 282, 283.
Rights of, as to stock fraudulently issued, VII, 280.
Rights of counties as, III, 331.
Rights of, generally, VII, 276–278.
Rights of, in insolvency, V, 1167.
Rights of, to contract for construction of roads, III, 121.
Stock in hands of, when exempt from taxation, VII, 914.
Suits against, by receivers, for benefit of creditors, VI, 1208.
When limitation begins to run in actions against, VI, 310.
When qualified as directors, IV, 50.
When "subscriber" is the equivalent of "stockholder," VIII, 328.
See also STOCK; SUBSCRIPTIONS TO STOCK.

STOCK KILLING.
See ANIMALS, INJURIES TO.

STOCK LAWS.
Constitutionality of, VII, 253, 254.

STOCK PENS.
Duty of carrier to provide, I, 759.
Receiving cattle in, I, 744.
See also CATTLE PENS.

STOCK YARDS.
General treatment, VII, 349.
Exposure of cattle in, during snowstorm, I, 755.
When deemed a nuisance, VI, 889.

STOLEN PROPERTY.
Duty to restore to owner, V, 561.
Rights of purchaser of stolen bonds, VI, 699.

STONE.
License to cut and carry away, VI, 262.

STOP, LOOK, AND LISTEN.
Duty of deceased to, question for jury, III, 890.
Duty of persons crossing track to, III, 824–828.
Duty of traveler to, at crossing, III, 560–622.
Instructions as to duty to, III, 898.
Instructions as to failure of traveler to, III, 654.
Rule in Pennsylvania, III, 561.
See also LOOK AND LISTEN.

STOP-OVER.
By passenger, effect of, on liability for baggage, I, 558.
Passenger claiming right of, IV, 180.
Privilege of, generally, VII, 1053–1058.
Rights of drovers to stop over at intermediate points, I, 792.
Rights of passengers exercising privilege of, II, 320.
Wrongful expulsion of passenger on resuming journey IV, 178.

STOPPAGE IN TRANSITU.
Does not defeat lien for charges, II, 155.
Effect of transfer of bill of lading to defeat right of, I, 647.
Nature of the right, and how enforced, II, 186–193.

STORAGE.
Fees for, VIII, 164.
In elevators, regulation of charges for, IV, 369.
Of cars, using street or highway for, VII, 425, 712.
Of freight in streets, VII, 617.
Of goods by carrier, II, 147–149.
Of goods by initial carrier, II, 234.
Of goods by intermediate carrier, without notice, liability for, II, 238, 239.
Of goods, no waiver to lien for charges, II, 154.
Right of carrier to charge for, II, 148.

STOREHOUSES.
Taking land for, when for a public use, IV, 460.
When exempt from taxes, VII, 912.

STORMS.
Unusual, liability of carrier for loss by, II, 148.

STOVES.
Statute prohibiting heating cars by, II, 378.

STRANGERS.
Acts of, as a defense to action for causing death, III, 812.
Assaults upon passengers by, I, 471.
Declarations of, as evidence, V, 498.

STRAW.
See COMBUSTIBLE MATTER.

STREAMS.
See WATERS AND WATER-COURSES.

STREET CARS.
See STREET RAILWAYS.

STREET RAILWAYS.
General treatment, VII, 351.
Right to construct and operate, VII, 352.
Construction of charters, VII, 377.
Conditions annexed to grants, VII, 382.
Construction and repair of track or street, VII, 394.
Rights of abutting owners, VII, 416.
Joint use of tracks, VII, 427.
Regulation by public authority, VII, 436.
Taxation; assessments, VII, 444.
Powers, duties, and liabilities as respects the management of the road, VII, 454.
Collisions between cars, III, 20, 21.
Collisions between trains and cars, III, 19, 20.
Contributory negligence of child crossing in front of car, or getting on or off, II, 773, 775, 776, 781, 788.
Crossing of, by steam roads, III, 419, 420.
Crossing of two or more, III, 421.
Leases of, with power to extend, VI, 201.
Liability of company for false imprisonment, V, 610.
Liability of, to tolls for using bridge, I, 724, 725.
Negligence of, as regards children, II, 752–764.
Negligence of employé in operation of cars, V, 222.
Parallel lines of, VI, 919.
Patents for chairs and rails for, VI, 957.

STREET RAILWAYS — *continued*.
Regulating construction and operation of by mandamus, VI, 376.
Right to consolidate, III, 79.
Right to cross toll bridge, I, 725.
Rights of, where electric railway is constructed in street, IV, 264.
Running street cars on Sunday, VII, 822.
When subject to laborer's lien, VI, 297.
See also CABLE RAILWAYS; ELECTRIC RAILWAYS; ELEVATED RAILWAYS; TRAMWAYS.

STREETS AND HIGHWAYS.
General treatment, VII, 540.
Establishment of streets and highways, VII, 541.
Right of steam railroads to occupy, VII, 556.
Rights of abutting owners, VII, 590.
Remedies of abutting owners, VII, 628.
State and municipal regulations, VII, 669.
Liability for injuries caused by negligence, VII, 693.
Obstructions and encroachments, VII, 706.
Action for damages for obstruction of, IV, 855.
Admissibility of plats of, in evidence, III, 857.
Averments in actions for obstructing, VI, 993.
Care required from companies in, VI, 779.
Compelling restoration of, VI, 378.
Compensation to city for use of, IV, 291.
Constructing road along country highway, VII, 425.
Contributory negligence in allowing children to go unattended in, II, 804.
Crossing of, III, 422–458.
Description of lands bounded on, IV, 11.
Duty of company to restore, VII, 410, 411.
Duty to build cattle-guards at crossings of, II, 595.
Duty to construct bridges at crossings of, I, 692, 693.
Duty to fence at crossing, I, 812.
Duty to fence track through, V, 812.
Ejectment against company building road in, IV, 247.
Ejectment for road unlawfully constructed on, IV, 850.
Existence of, when provable by parol, V, 455.
Extent of use by tracks, VII, 419.
Frightening teams in, V, 1034.
Improving in lieu of taxation, VII, 445.
Injuries to children at crossings of, II, 741–743.
Injuries to children in, by street-car company, II, 758–764.
Injuries to persons in, by cable cars, I, 731–733.
Injuries to persons in, by elevated railways, IV, 365–368.
Injuries to persons in, by trolley cars, IV, 270–272.
Injuries to persons or teams at crossings in, III, 459–657.
Injuries to travelers in, by independent contractor, liability for, V, 1115.

STREETS AND HIGHWAYS — *con.*
Laying track on one side of, VII, 426.
Liability for injuries caused by defects in, VII, 457.
Liability of street-car company to assessment for widening, VII, 451, 452.
Location of station in, VII, 195.
Location of track on one side of, rights of abutting owners, VII, 604.
Manner of constructing tracks across, VII, 437.
Measure of damages for failure to grade, pave, or gravel, III, 706.
Obstruction in, at night, without light, III, 474.
Obstruction in, when deemed nuisance, VI, 890.
Obstruction of, by hacks, V, 1062.
Occupation of, under charter provisions, II, 704.
Ordinances changing grade of, VI, 757.
Power of city to authorize railroads in, VII, 508.
Power of commissioners to regulate crossings in, VI, 1145.
Priority of route between two roads using same, VI, 363.
Prosecution for failure to repair, III, 366.
Prosecution for obstruction of, III, 373–378, 382.
Raising track above, III, 474.
Repair of, by company, VII, 408.
Right of city to control and improve, VII, 671.
Right of city to impose conditions as to use of, VII, 397.
Right of company to use, generally, VII, 352, 353.
Right to cut down, VII, 425.
Right to open and lay cable, I, 727.
Right to place poles and wires in, IV, 261–264.
Right to throw dirt or snow on, VII, 414.
Right to use for electric railways, IV, 257–266.
Right to use without consent, VII, 388.
Storage of freights in, VII, 617.
Street railways in, VII, 352–539.
Suits by abutters for damages from occupation of, when barred by lapse of time, VI, 320.
Unauthorized use of, VII, 615–618.
Unreasonable and oppressive use of, VII, 618.
What constitutes a taking of, for railway purposes, IV, 445.
What may be used, and how, VII, 381.
When a street is a highway, VIII, 328.
When limitation begins to run in actions for construction of railways in, VI, 310.
When statutes requiring signals apply to, III, 502.
See also HIGHWAYS.

STRIKES.
General treatment, VII, 718.
Delays caused by, II, 70.
Liability for cars destroyed by strikers, III, 331.
When excuse delay on part of carrier, II, 33.

STRIKES — *continued.*
When excuse the carrier for loss or delay, II, 20.
See also BOYCOTTING; MOBS.

"STRUCTURE."
When moving train is not a, VIII, 328.

STUBBLE.
See COMBUSTIBLE MATTER.

SUB-AGENTS.
Liability of agent for misconduct of, I, 50.
Right of agents to employ, I, 47.

SUB-BOSS.
When conductor is vice-principal of, V, 738.

SUBCONTRACTOR.
Filing of lien claim by, VI, 289.
Notice by, to owner, of claim for lien, VI, 290.
Rights, duties, and liabilities of, III, 155–161.
Rights of, to claim lien, VI, 281.

"SUBJECT TO CONDITIONS EXPRESSED."
Meaning of, in a shipping contract, VIII, 328.

SUBLETTING.
By lessee, VI, 234, 235.
Of construction contracts, right to, III, 139.
Reletting of contract by subcontractor, III, 160.
Right of a licensee as to, VI, 234, 235.

SUBMISSION.
To arbitration, I, 453–456.
To arbitration as a defense to action for damages, IV, 836.
To arbitration in condemnation proceedings, validity of, IV, 591.
To arbitration of question of compensation, IV, 941.
To engineer as arbitrator, what is covered by, III, 153.

SUBPŒNA.
Failure to obey as a contempt, III, 183.
Issued by interstate commerce commission, VI, 52, 55.
Non-compliance with, as ground for continuance, VIII, 10.
To testify, VIII, 192.

SUBPŒNA DUCES TECUM.
Failure to obey as a contempt, III, 183; VIII, 192.
To produce books and papers, VI, 55.

SUBROGATION.
General treatment, VII, 723.
Of bondholders to security held by state, VII, 164.
Of carrier or insurer to rights of insured, V, 847–849.
Of insurer to owner's right to sue for damages by fire, V, 893.
To laborer's lien, VI, 299.

SUBSCRIPTIONS TO STOCK.
General treatment, VII, 725.
The contract of subscription, VII, 726.
Assessment; calls, VII, 746.
Actions to enforce subscriptions, VII, 756.

SUBSCRIPTIONS TO STOCK — *con.*
Forfeiture for non-payment, VII, 797.
Subscriptions upon conditions, VII, 800.
Subscriptions by other companies, VII, 816.

In general.

Actions for, when barred by lapse of time, VI, 316.
Assignability of, I, 478.
Compensation of directors for procuring, IV, 60.
Guaranty of payment of, V, 1055.
In union depot companies, VIII, 136.
Meaning of "subscribe" as applied to stock, VIII, 328.
Mortgages of, VI, 416.

By individuals.

At less than par value as a defense in creditor's suit against stockholder, VII, 327.
Before condemnation of land, IV, 880.
Cancellation of unpaid, on reorganization, VII, 52.
Evidence of similar inducements to other subscribers, V, 394.
New stock, right of original holders to make, VII, 282.
New stock, validity of, VII, 283.
On bonds, effect of consolidation upon, III, 92.
Power of wife to make, V, 1068.
Prior to incorporation, V, 1096.
Requisites of, to entitle subscriber to vote, VII, 309.
Right of receivers to sue on, VI, 1208.
Right to interest on, V, 1175.
Specific performance of, VII, 149.
Unpaid, liability to creditors upon, VII, 311–316.
Unpaid, when may be reached by creditors' bill, III, 351.
When limitation begins to run in actions for, VI, 309.
When may be reached in attachment, I, 498.
When subject to mechanics' lien, VI, 287.

By the public.

By cities, power of legislature to compel, VI, 531.
In aid of railways, VI, 523–752.
In aid of railways, effect of consolidation upon, III, 93; VI, 622, 623.
In aid of railways, payable in bonds, VI, 559.
In aid of railways, rescission of, VI, 619.
In aid of railways without election is void, VI, 603.
Invalid, when may be cured by retrospective act, VI, 534, 535.
Power of cities, etc., to make, VI, 562–564.
Power to make, does not authorize donation, VI, 647.
Power to make, when implies power to issue bonds, VI, 656–658.
Repeal of statute before completion of, effect of, VI, 550.
See also STOCK; STOCKHOLDERS.

SUBSEQUENT PURCHASERS.
Right of, to sue elevated railway company, IV, 307–310.

SUBSIDY BONDS.
Application of earnings to payment of, VIII, 141.
Of Central Pacific R. Co., II, 604.

SUBSIDY LANDS.
Under Canada grants, VI, 194.

SUBSTANTIAL DAMAGES.
Generally, III, 677.

SUBSTITUTION.
Of new contract in place of former one, III, 225.
Of new party to action, I, 12.
Of new petitioner in condemnation proceedings, IV, 494.
Of new road, acceptance of, VIII, 123.
Of new road for highway used by railroad, VII, 625–628.
Of parties, VI, 929.
Of parties on appeal, IV, 801.
Of purchaser as a party *pendente lite*, IV, 310.
Of receiver as defendant, VI, 1215.
Of service of process, VI, 1100.
Of trustees under deed of trust, IV, 30.

SUBWAY COMMISSIONERS.
Consent of, to placing poles and wires in streets, IV, 262.

SUGAR.
Classification of, as freight, VI, 29.

SUI JURIS.
When child is, II, 785.

SUITS.
See ACTIONS.

SUMMARY PROCEEDINGS.
For the collection of taxes, VII, 996.

SUMMONS.
For jury, VIII, 11.
For jury to assess land damages, IV, 611, 612.
For jury, under English Compulsory Purchase Laws, IV, 913.
Form and sufficiency of, generally, VI, 1084.
In condemnation proceedings, IV, 511, 512.
In ejectment suits, IV, 252.
In suits against foreign corporations, V, 1020.
See also PROCESS; SUBPŒNA.

SUNDAY.
General treatment, VII, 818.
Effect of Sunday laws as a defense to action for injury to employés, V, 275.
Fellow-servant rule not affected by Sunday laws, V, 652.
Limited ticket expiring on, VII, 1071.
Navigation of canals on, I, 734.
Procuring signatures to petition in aid of railway on, VI, 566.
Prosecution for violation of Sunday laws, III, 387.
Sunday laws as regulations of interstate traffic, VI, 69.
Traveling on, as a defense to action for causing death, III, 810.

SUNDAY — *continued.*
Traveling on, as a defense to carrier of passengers, II, 533.
Violation of Sunday laws by carrier, II, 60.

SUPERFLUOUS LANDS.
Sale of, under Canadian Expropriation Acts, IV, 933.
Sale of, under English Compulsory Purchase Laws, IV, 889–894.

SUPERINTENDENT.
General treatment, VII, 823.
Authority of, to employ physician, VI, 394.
Of track, when engineer is fellow-servant of, V, 745.
Powers of, in settlement of claims, VIII, 185.
Service of process on, VI, 1090.
When vice-principal of those under him, V, 755, 756.
Whether fellow-servant or vice-principal of other employés, V, 755, 756.

SUPERIOR SERVANT.
Obeying orders of, V, 178.
See also VICE-PRINCIPAL.

SUPERSEDEAS.
Effect of appeal as a, IV, 812.

SUPERVISION.
By railway company over business of express company, V, 565.

SUPERVISORS.
Call by, for election as to railway aid, VI, 580.

SUPPLEMENTARY ANSWER.
In trespass by landowner for wrongful interference with property, IV, 874.

SUPPLEMENTARY PLEADINGS.
When proper, sufficient, etc., VI, 1053.

SUPPLEMENTARY PROCEEDINGS.
In aid of execution, V, 550.

SUPPLIES.
Claims against United States for, III, 7.
Claims for, when prior to mortgage, VI, 450.
Filing claim of lien for, VI, 290.
For army, carriage of, VI, 131.
Issuing receivers' certificates in payment for, VI, 1201.
Liability of trustees for, VI, 466.
Payment of claims for, by receiver, VI, 1198.
Priority of claims for, VI, 512.
Priority of mortgage over claims for, VI, 456.
To persons constructing roads, contracts by agents for, I, 56.

SUPPORT.
Dependency for, as giving right to damages for causing death, III, 756.
During minority as measure of damages for causing death of parent, III, 933.
Of paupers, liability for, VI, 961.
Proof of dependence upon deceased for, III, 877.

SUPREME COURT COMMISSIONERS.
Powers and duties of, in elevated railway cases, IV, 282–284.

SURETY.
In condemnation proceedings, subrogation of, VII, 724.
Of agents, rights of companies as respects, V, 566.
Of station agents, liability of, VII, 189.
Of treasurer, liability of, VI, 911.
On bond of county treasurer, liability of, III, 332.
On bond on appeal in condemnation proceedings, rights of, IV, 807.
On receiver's bond, liability of, VI, 1177.

SURFACE WATERS.
Accumulating and obstructing the flow of, V, 980–982.
Controlling flow of, V, 984.
Duty to provide outlet for, III, 660.
Liability for flooding lands with, V, 978–984.
Rights and liabilities with regard to, VIII, 180–183.
What are, VIII, 328.

SURGEONS.
See PHYSICIANS AND SURGEONS.

SURGICAL INSTRUMENTS.
When may be carried as baggage, I, 540.

SURPLUSAGE.
Disregarding, in pleadings, VI, 1060.
In plaintiff's pleadings in action for damages caused by fire, V, 899.
In proceedings against elevated railway company, IV, 313.
In verdict, VIII, 92.
What allegations may be stricken out as, I, 267.

SURPRISE.
As ground for continuance, VIII, 10.
As ground for new trial, VI, 874.

SURRENDER.
Of bonds in exchange for new ones, I, 667.
Of certificate on transfer of stock, VII, 293.
Of corporate bonds, suit to enforce, I, 680.
Of franchise, forfeiture for, IV, 133.
Of goods by carrier to mortgagee, II, 125.
Of possession, cost of, as an element of land damages, IV, 688.
Of power to tax, VII, 832.
Of stock to company, effect of, on liability of stockholders to creditors, VII, 321.
Of ticket, VII, 1052.

SURVEYORS.
As experts, VIII, 288.
Assessment of compensation by, in England, IV, 909.
When conductor is fellow-servant of, V, 738.
See also CIVIL ENGINEERS.

SURVEYS.
Entry without payment of damages for purpose of making, IV, 558.

SURVEYS — *continued.*
Of intersection of railways, III, 402.
Of lands, as affecting title, VI, 168.
Of lands granted to Union Pacific R. Co., VI, 174.
Of public lands, VI, 1117.
Preliminary, VI, 354.
Title of state to land granted by federal government before making, VI, 141.
Use of, in condemnation proceedings, IV, 526–529.
What is a sufficient survey of a route, VIII, 328.

SURVIVAL.
Of action, I, 11, 12.
Of cause of action for causing death, effect of statutes as to, III, 768.
Of cause of action for injury after death of party injured, III, 743.
Of cause of action in ejectment, IV, 250.

SURVIVING PARTNER.
Powers of, VI, 937.

SURVIVORSHIP.
Presumption of, V, 442.

SWAMP LANDS.
Donation of, in aid of railways, VI, 644.
Grants of, VI, 187–194.
When subject to taxation, VII, 866.

SWITCH CREW.
When foreman is not fellow-servant of, V, 752.

SWITCH ENGINEER.
When fellow-servant of yard repair-hand, V, 766.

SWITCHES.
Admissibility of evidence as to dangerous character of, V, 434.
Construction of, under provisions of charter, II, 705.
Covenant to maintain, when runs with the land, III, 345.
Duty of carrier as to construction and repair of, II, 372.
Duty of company as to safety of, V, 58–60.
Duty of company to block, V, 57.
Duty to fence at, V, 816.
Duty to repair, VII, 407.
Instructions as to safety of, III, 907.
License to use, VI, 262.
Location of, in city streets, VII, 606.
Mismanagement of, IV, 39.
Negligence as to safety of, question for jury, V, 314.
Negligence in management of, II, 422; V, 661.
On branch roads, I, 684.
On horse railways, patents for, VI, 958.
Proof of defects in, III, 869.
Regulation of, by commissioners, VI, 1143.
Right of street railway to construct, VII, 394.
Rule respecting adjustment of, V, 245.

SWITCHING.
Non-liability for negligence of fellow-servants in, V, 661.
Using street for, VII, 425.

SWITCH MARKER.
Knowledge of absence of, assumption of risk after, V, 162.

SWITCHMEN.
As experts, VIII, 294.
As fellow-servants of brakemen, V, 759.
As fellow-servants of car inspectors, V, 732.
As fellow-servants of engineer, V, 745.
As fellow-servants of foreman, V, 750.
As fellow-servants of other employés, V, 766–767.
Contributory negligence of deceased, in action for causing death, III, 843.
Not fellow-servant of section foreman, V, 755.

SWITCH POLE.
Contributory negligence of employé struck by, V, 211.

SWITCH YARDS.
Duty of company as to safety of, V, 60.

TACKING.
Of one adverse possession upon another, I, 37.

TAKING.
Damaging, injuring, etc., what constitutes, VII, 586–588.
Difference in value before and after, when measure of damages, IV, 576.
Estimating land damages from time of, IV, 582.
Interest on damages from time of, IV, 724.
Of private property for military use, VIII, 159.
Under eminent domain law, IV, 445.
What is, under eminent domain law, VIII, 328.
What is, under English statutes, IV, 884, 885.

TANK HOUSE.
When subject to execution, V, 543.

TARGET SWITCHES.
Duty of company to provide, V, 59.
See also SWITCHES.

TAXATION.
General treatment, VII, 828.
Power to tax, VII, 829.
Constitutionality of statutes, VII, 836.
Interpretation of tax laws, VII, 850.
Who may be taxed, and for what property, VII, 855.
Situs of property for taxation, VII, 884.
Exemptions, VII, 888.
Assessment and levy, VII, 932.
Collection, VII, 983.
Sale of land for non-payment; tax titles, VII, 996.
Remedies for unlawful taxation, VII, 998.
English poor rates and other rates, VII, 1010.
Taxation of Canadian railroads, VII, 1018.
License taxes, VII, 1021.
Income taxes, VII, 1024.
In general.
Assessed value as evidence of market value, V, 390.

TAXATION — *continued.*
In general — *continued.*
By state of railway property, VIII, 140.
Duties of tax receiver, VII, 985.
Duty of lessee to pay taxes, VI, 231.
Effect of consolidation upon exemptions from, III, 87.
Enforcement of taxes, VI, 380.
Evidence of valuation for, on assessment of land damages, IV, 656, 657.
Exemption from, in charters, II, 709.
Liability of reorganized company for taxes, VII, 61.
License taxes, VI, 754.
Lien for taxes, purchaser takes subject to, VI, 504.
Lien for taxes, when prior to mortgage, VI, 452.
Meaning of words "sinking fund tax," VIII, 327.
Municipal power to grant exemptions from, VI, 754.
Municipal power to tax, VI, 753.
Of Baltimore and Ohio Railroad, I, 579.
Of branch roads, I, 686.
Of car-trust associations, I, 735.
Of certificates of indebtedness, II, 606.
Of dividends, IV, 150.
Of express companies under state laws, III, 35.
Of ferries, V, 843.
Of foreign corporation, V, 1017.
Of importers, state laws imposing, III, 35.
Of receivers' certificates, VI, 1206.
Of street railway, VII, 444–454.
Of witness fees, VIII, 193.
Payment of taxes by receiver, VI, 1199.
Payment of taxes, when makes possession adverse, I, 37.
Person paying taxes under mistake as to title, right of, to land damages, IV, 573.
Power of superintendent to list property for, VII, 824.
Right to interest on taxes, V, 1175.
Stipulation in mortgage relative to, VI, 440.
Tax list as evidence of value, V, 517.
Validity of tax titles, and rights of purchaser, VII, 996.
As affected by interstate commerce law.
By state of interstate carriers or traffic, VI, 58–66.
Of roads running into other states, III, 36.
Of sleeping cars, VI, 59, 60.
Power of state to tax interstate carriers or traffic, VI, 58, 59.
Right of state to tax property or business of carrier, VI, 61–64.
In aid of railways.
Assent of taxpayers to railway aid, VI, 572–576.
Conversion of tax certificate into stock, VII, 282.
Generally, VI, 714–743.
Issuance of stock to taxpayers in railway-aid cases, VI, 616.
Legislature cannot confer unlimited power of, VI, 532.

TAXATION — *continued.*
In aid of railways — *continued.*
Right of taxpayers to sue to restrain issue of railway-aid bonds, VI, 667.
Signature by taxpayers to petition in aid of railway, VI, 565–568.
When taxpayers entitled to stock, VI, 559.

TEAMS.
Colliding with, at crossings, III, 466.
Frightened, V, 1032–1046.
Injuries to, at crossings, III, 459–657.
Liability for colliding with, VII, 518, 510.
Liability of steam railroad for collisions with, in streets, VII, 699.
Obstruction of track by, VII, 424.

TEAMSTER.
When engineer is not fellow-servant of, V, 745.

TELEGRAPH AND TELEPHONE LINES.
General treatment, VII, 1026.
Telegraph lines.
Admissibility and effect of telegram as evidence, V, 517.
Business of company, when deemed interstate commerce, VI, 4.
Contributory negligence of employé struck by pole, V, 211.
Liability for injury to employé of company, V, 257.
License tax on foreign companies, VI, 65.
Negligence as to position of poles, question for jury, V, 316.
Operators as fellow-servants with other employés, V, 767.
Power of commissioners to fix charges, VI, 1140.
Regulation of, VIII, 141.
Transportation of employés of company, liability of carrier, II, 440.
Wires, when deemed fixtures, V, 970.
Telephone lines.
Disturbance of system by trolley wires, IV, 262.
Taxation of companies, VII, 861.

TELL-TALES.
Duty to employés as regards, V, 51–53.
See also WHIPPING STRAPS.

TENANCY.
At will, VI, 202.
From year to year, VI, 202.

TENANT.
See LANDLORD AND TENANT; TENANTS IN COMMON.

TENANTS IN COMMON.
As parties to condemnation proceedings, IV, 498.
Right of, to appeal in condemnation proceedings, IV, 775.
When entitled to land damages, IV, 563.

TENDER.
General treatment, VII, 1034.
Necessity of, before suit, III, 231.
Of amount due before applying for injunction, VII, 1002.
Of certificate before suing on stock subscription, VII, 757.

TENDER — *continued.*
Of charges claimed by carrier before suing in trover, VIII, 112.
Of compensation for land condemned, IV, 546–548.
Of compensation for land taken, effect of, on right to costs, IV, 728.
Of debenture for acceptance before suit, III, 961.
Of debentures for freight charges, III, 960.
Of fare, how pleaded, IV, 215.
Of fare to prevent ejection of passenger, IV, 190–194.
Of government notes in payment of fare, VII, 1079.
Of taxes, VII, 985.

TENDER OF ENGINE.
Contributory negligence in riding on, V, 215.

TENNESSEE.
Aid to railroads by state, VII, 180.
Assessment and levy of taxes in, VII, 979.
Constitutionality of statutes of, as to municipal aid for railways, VI, 550.
Constitutionality of tax laws of, VII, 849.
Construction of constitution authorizing street railways, VII, 357.
Construction of statute as to signals when person appears on track, VII, 1133.
Construction of stock laws of, I, 96.
Deductions for benefits under condemnation laws of, IV, 721.
Doctrine of comparative negligence, how far applied in, III, 50.
Grants by, to railroads, VI, 186.
Injuries to animals running at large in, I, 221.
License taxes in, VII, 1023.
Mitigation of damages for contributory negligence in, III, 546.
Occupation of streets by steam roads under legislative grants of, VII, 564.
Operation of statute of, giving right of action for causing death, III, 753.
Review of town-bonding proceedings by mandamus in, VI, 752.
Right to sue in, for causing death in foreign state, III, 789.
Rule in, as to fellow-servants of different grades, V, 722.
Statutes of, as to duty to keep lookout, VII, 1135.
Statutes of, relative to connecting lines, III, 65.
Statutes of, relative to distribution of damages for causing death, III, 763.
Taxation in aid of railways in, VI, 742.

TERM.
Imposing, upon appointment of receiver, VI, 492.
Of running powers, duration of, VI, 247.
Of service of employé, V, 3.

TERM FEES.
Allowance of, IV, 734.

TERMINAL CHARGES.
Assessment of poor rates on, VII, 1013.
Regulation of, by commissioners, VI, 1140.
Under working agreement, VI, 253.

TERMINAL FACILITIES.
Lease of, what includes, VI, 202.
Regulation of, by commissioners, VI, 1143.
Right to give mortgage on, VI, 413.

TERMINATION.
Of carrier's liability as such, II, 45–52, 134–148.
Of carrier's liability for baggage, I, 551–554.
Of initial carrier's liability, II, 231–236.
Of liability of carrier as warehouseman, II, 146, 147.
Of liability of intermediate carrier, II, 240.
Of prosecution, when plaintiff must show, VI, 369.
Of relation of carrier and passenger, II, 316–319.
Of relation of landlord and tenant, VI, 195.

TERMINI.
Change of, when releases subscriber to stock, VII, 776, 777.
Condition in subscription as to location of, VI, 636.
Construction of statutes relative to, VII, 268.
Construction of subscription as regards, VII, 740.
Location of, VI, 354.
Location of, under charter provisions, II, 701–704.
Meaning of words "at the termini," VIII, 306.
Of street railway, location of, VII, 379.
Of tunnels, description of, VIII, 122.
Power to contract for transportation of persons and property beyond, VIII, 130.
Priority of route where two roads run between same, VI, 363.
What are, as applied to a railroad, VIII, 328.

TESTIMONY.
See EVIDENCE; WITNESSES.

TESTS.
Of due care and negligence, VI, 780.
Of what are fixtures, V, 968, 969.

TEXAS.
Aid to railroads by state, VII, 181.
Assessment and levy of railroad taxes in, VII, 982.
Common-law liability of carrier cannot be limited in, II, 18.
Conditions exempting carrier from liability to person riding on free pass in, VI, 945.
Constitutionality of statutes of, as to municipal aid for railways, VI, 550.
Constitutionality of statutes of, granting remedy for causing death, III, 745.
Constitutionality of statutes of, relative to condemnation of land, IV, 391.
Constitutionality of tax laws of, VII, 849.
Constitutional provisions in, relative to condemnation of land, IV, 386.
Construction of stock laws of, I, 96.
Deductions for benefits under condemnation laws of, IV, 722.

TEXAS — *continued.*
Doctrine of comparative negligence denied in, III, 52.
Grants by, to railroads, VI, 186.
Injuries to animals running at large in, I, 221.
Liability of carrier as regards bill of lading under statute of, II, 44.
Mechanics' lien law of, VI, 279.
No limitation of liability for negligence in, II, 182–184.
Occupation of streets by steam roads under legislative grants of, VII, 564.
Operation of statute of, giving right of action for causing death, III, 753.
Penalties for overcharges in, II, 637, 638.
Penalties under statute of, for failure to furnish facilities for removal of goods, II, 94.
Plaintiff's pleadings need not negative contributory negligence in, III, 278.
Pleadings under statute of, to recover penalty for discrimination, IV, 125.
Right to sue in, for causing death in foreign state, III, 790.
Rule as to imputed negligence in, V, 1085.
Status of Missouri Pacific R. Co. in, VI, 405.
Statutes of, imposing penalty for failure to deliver goods, II, 122.
Statutes of, making overcharges penal, II, 618.
Statutes of, regulating interstate carriers, VI, 68.
Statutes of, relative to distribution of damages for causing death, III, 763.
Statutory provisions in, limiting amount recoverable for causing death, III, 923.
Taxation in aid of railways in, VI, 743.
Transportation of diseased cattle in, I, 790.
What amounts to discrimination under statute of, IV, 84.
What are deemed overcharges under statutes of, II, 625.

THEATRICAL TROUPES.
Liability for delay in transportation of, II, 348.
Special rates to, VI, 58.

THEFT.
See LARCENY.

THIRD-CLASS TICKETS.
Rights of holders of, VII, 1058.

THROUGH CARRIAGE.
Duty of carrier to furnish means of, II, 35.
Duty of initial carrier to provide means of, II, 209.
Duty to provide reasonable facilities for, II, 198.
Limitation of liability as regards, II, 252–263.
Of baggage, contract with initial carrier for, I, 527.
Overcharges on through freights, II, 633.
Power of general freight agent to make contract for, II, 209.

THROUGH CARRIAGE — *continued.*
Power of initial carriers to make contracts, II, 514, 515.
Power to make contracts for, II, 221–224.

THROUGH RATES.
Discrimination as between carriers in making, IV, 116.
Duty of company as to, VI, 35.
Duty of connecting lines to give, VI, 14.
How made and construed, VI, 23, 24.
Power of commission to order, VI, 6.
Regulation of, under Railway and Canal Traffic Acts, II, 654–662.
What are, and how regulated, II, 639, 640.

THROUGH ROUTES.
Power of commission to order, VI, 6.

THROUGH TICKETS.
Interpretation of, VII, 1073, 1074.
Right to stop over on, VII, 1054.
Rule requiring, between certain points, VII, 132.
Taking up on first road, IV, 179.

TICKET AGENT.
Delivery of baggage to, I, 544.
Expulsion of passenger by reason of mistake of, IV, 179.
Liability of company for false imprisonment by, V, 610.
Modification of terms of tickets by, VII, 1050.
Service of process on, VI, 1095.

TICKET BROKERS.
Power of city to impose license tax on, VII, 1090.
Rights of purchasers of tickets from, VII, 1090.
Selling at reduced rates through, VI, 30.
Statutes regulating sale of tickets, VII, 1090.

TICKET OFFICE.
Duty to keep open, VII, 1048, 1049.
Prosecution for failure to keep open, III, 366.

TICKETS AND FARES.
General treatment, VII, 1038.
Tickets, generally, VII, 1039.
Particular kinds of tickets, VII, 1058.
Fares, VII, 1076.
Ticket brokers and scalpers, VII, 1090.

Tickets.
Assignability of, I, 478.
Commutation, VI, 57.
Constitutionality of statutes regulating, VII, 252.
Damages for wrongfully taking up, IV, 228.
Discrimination in sale of, IV, 103.
Duty in sale of through, VI, 36.
Duty to carry passenger to station named in, II, 393.
Duty to pay extra fares when passengers do not procure, IV, 166–168, 170.
Effect of notice on, limiting liability for baggage, I, 562.
Effect of production of tender of, to prevent ejection of passengers, IV, 190–194.
Expulsion for failure to procure, IV, 167, 168, 170.

TICKETS AND FARES — *continued.*
Tickets — *continued.*
Expulsion for failure to produce, IV, 173–181.
Expulsion for presenting invalid or wrong, IV, 181–187.
Limitation of liability in, for articles left in cloak-room, I, 575.
Limited and unlimited, discrimination in, VI, 31.
Mileage tickets, VI, 57.
Necessity of purchase of, II, 310.
No agreement to stop implied from taking up, II, 408.
Notice disclaiming liability printed on, VII, 137.
Of preceding carrier, duty to honor, II, 517.
On sleeping and palace cars, VII, 132, 133.
Ordinances regulating and requiring sale of, VII, 438.
Party-rate, VI, 30.
Prosecution for unlawful sale of, III, 386.
Requiring purchase of, before getting on train, II, 334.
Right of passenger in sleeping car after loss of, VII, 153.
Rule requiring passenger to have first-class, VII, 132.
Rule requiring purchase of, IV, 176.
Selling at reduced rates through brokers, VI, 30.
State laws regulating, III, 33.
Status of travelers as passengers before purchase of, II, 315.
To drovers on cattle trains, I, 791, 792.
See also FIRST-CLASS TICKETS.
Fares.
Competition as affecting, VI, 40.
Constitutionality of statutes regulating, VII, 252.
Crown duties on, in England, VII, 1087.
Duty to carry passenger to station to which fare has been paid, II, 394.
Effect of payment of, on freight trains, II, 323.
Effect of tenders of, to prevent ejection of passengers, IV, 190–194.
Ejection of passengers for non-payment of, IV, 165–173.
Evidence of established rate of, IV, 219.
Expulsion of passengers for non-payment of, VII, 533.
Generally, VII, 1076–1090.
Lien of carrier upon baggage for, I, 560.
Necessity of payment of, II, 310.
No agreement to stop implied from collection of, II, 408.
On English tramways, VII, 1103.
On ferries, V, 839.
On street railways, regulations of, by statute, VII, 436.
Ordinance regulating, VII, 438.
Overcharges and discrimination in, VII, 454.
Penalties for overcharges in, VI, 967.
Persons on train after refusal to pay, when deemed trespassers, VII, 1124.

TICKETS AND FARES — *continued.*
Fares — *continued.*
Prosecution for traveling without paying, III, 385.
Regulation of, by railway commissioners, VI, 1139.
Riding on freight trains without paying, III, 19.
Right to fix, VII, 454.
Status of travelers before payment of, II, 315.
Tender of, how pleaded, IV, 215.
Validity of state laws attempting to regulate, III, 27.

TICKETS AT ELECTIONS.
See BALLOTS.

TIDE WATERS.
Duty of company to keep out, V, 980.

TIES AND SLEEPERS.
Admissibility of evidence as to defects in, V, 433.
Classification of, as freight, VI, 28.
Duty towards passengers as to condition of, II, 370.
Evidence of defective condition of, V, 433.
Injury to employé in stepping between ties, V, 229.
Liability for purchase-price of, V, 1116.
Obstructing track by, V, 67.
Set-off in action for price of, VII, 116.
Situs of, for taxation, VII, 885.

TIMBER.
Amount recoverable for injury to, by fire, V, 961.
Cut on land taken or adjoining lands, value of, as element of land damages, IV, 708.
Licenses to cut, VI, 263.
On public lands, VI, 1115–1117.
On strip taken, company's rights relative to, IV, 438.
Opinion of witness as to value of, VIII, 247.

TIME.
In general.
As essence of contract to locate station, VII, 201.
Covered by exemption from taxation, VII, 899.
During which trains may block street, ordinances limiting, VII, 673.
For payment of coupons, III, 335.
From which interest on damages should be calculated, III, 740.
From which interest should be computed, V, 1175.
Loss of, resulting from injuries, measure of damages for, III, 719.
Obligation to run on, VII, 1094–1096.
Of foreclosure sale, VI, 500.
Of holding election of directors, IV, 52.
Of holding judicial sales, VI, 106.
Of meeting of directors, IV, 56.
Of payment of mortgage, provisions as to, VI, 439.
Of performance of contract, III, 222.
Of permissive occupation, ejectment after expiration of, IV, 247.

TIME — *continued.*
In general — *continued.*
Of service of process, VI, 1097.
Of submission of special questions to jury, VIII, 98.
Of trial, computing damages to, IV, 329.
Of view by jury, VIII, 18.
Other than that of accident, admission of evidence of condition of track at, V, 432.
Presumption of payment from lapse of, VI, 965.
To answer amended pleading, VI, 1053.
To file answer in foreclosure, extension of, VI, 485.
To make tender, VII, 1034.
To object to deposition, V, 522.
To object to evidence, VIII, 20.
To plead, VI, 1002.
To prepare instructions, discretion of court as to, I, 383.
When dividends are payable, IV, 144.
When statute takes effect, VII, 242.
Within which to fence, V, 808–810.
Within which to file mechanics' lien, VI, 288.
Within which to make amendments, VI, 1053.
Within which to make award, I, 459.
Within which to redeem from mortgage, VI, 521.
Within which to repair or rebuild fence, V, 827.
In carriage of merchandise.
Contract to deliver goods at specified, effect of, II, 159.
In which notice shall be given or suit brought, II, 184–186.
Of delivery of goods carried, V, 579.
Of receipt of goods by carrier, averment of, II, 278.
Of shipment, limiting carrier's liability to value at, I, 636.
Of shipment, limiting damages to value at, II, 176.
That bill of lading remains in force, I, 622.
In carriage of passengers or baggage.
During which excursion ticket is good, VII, 1066.
During which office must be open, VII, 1048, 1049.
Going on train before proper, II, 452.
In which to produce ticket before expulsion of passenger, IV, 175.
Length of, that round-trip tickets are good for, VII, 1066.
Loss of, as element of damages, II, 574.
Loss of, damages for, IV, 230.
Of delivery of baggage to carrier, I, 544.
Of expiration of mileage ticket, VII, 1070–1072.
Of expiration of mileage ticket, stipulation as to, VII, 1073.
Of expulsion of passenger, IV, 202–208.
Presenting ticket after expiration of, to travel thereon, IV, 182.
Right to limit ticket as to, VII, 1069.

TIME — *continued.*
In carriage of passengers or baggage — *continued.*
To produce fare before expulsion for non-payment, IV, 172.
To produce ticket or tender fare to prevent ejection from train, IV, 190–194.
To start passenger train, II, 347.
When relation of carrier to passenger begins, II, 314–316.
When relation of passenger and carrier ends, II, 316–319.
Within which passenger must call for baggage, I, 549.
In carrying or injuring animals.
Of injury to stock, allegation of, I, 360.
Presumption of notice of defects in fence from lapse of, I, 171.
Within which to complete transit, I, 753, 754.
Within which to ship live stock, I, 741–743.
Within which to sue, limitations of, in contract, I, 775.
In condemnation proceedings.
At which proceedings to condemn land may be discontinued, IV, 819–821.
For completion of road, power to take lands after expiration of, IV, 406.
For sale of superfluous lands under English statutes, extension of, IV, 893.
Limited by statute for construction of road, ejectment after lapse of, IV, 845.
Of assessment, interest on damages from, IV, 724.
Of demand for land damages, interest from, IV, 727.
Of deposit of land damages, notice of, IV, 550.
Of filing maps, plans, etc., in condemnation proceedings, IV, 526.
Of filing or entry of award or verdict, interest on land damages from, IV, 726.
Of giving notice of condemnation proceedings, IV, 508.
Of meeting of commissioners to assess damages, IV, 599.
Of raising objections in condemnation proceedings, IV, 529.
Of selection of right of way, presumption of, from grant, IV, 471.
Of taking, or location of road, interest on damages from, IV, 724.
Of taking possession by company, interest on land damages from, IV, 727.
Over which inquiry may extend on assessment of damages by jury, IV, 620.
Presumption of payment of land damages from lapse of, IV, 545.
To apply for commissioners to assess land damages, IV, 596.
To apply for jury to assess land damages, IV, 609.
To institute condemnation proceedings, IV, 488.
To object to report of commissioners in condemnation proceedings, IV, 746.
To object to verdict on assessment of damages, IV, 751.

TIME — *continued.*
In condemnation proceedings — *con.*
Within which to appeal in condemnation proceedings, IV, 802.
Within which to sue for damages to adjoining owner, IV, 838.
Within which to sue out writ of error, IV, 817.
With reference to which land damages should be estimated, IV, 581–585.
In injuries to employes.
Allegation of, in action for injury, V, 264.
Contributory negligence in running out of, V, 217.
Loss of, as element of damages for injury to employé, V, 338.
Of injury to employé, notice of, V, 260.
Of service, evidence of, to show incompetency, V, 783.
To inspect and repair machinery after notice of defect, V, 107, 108.
To sue after injury to employé, limitation of, V, 260.
In subscription contracts.
Of subscription, necessity of preliminary payment at, VII, 735.
Of taking effect of statute, VI, 561.
To apply for certiorari in town-bonding proceedings, VI, 745.
To apply for mandamus, VI, 663.
To make calls upon stock, VII, 751.
Which municipal bonds are to run, departure from statute as to, VI, 677.
In which to build road.
For completion of road, fixing, IV, 280.
For completion of road, forfeiture for failure to complete within, IV, 130.
For construction of road allowed by charter, II, 701.
For construction of road, forfeiture for failure to begin within, IV, 130.
Of completion of road, condition as to, in grant of right to use street, VII, 576.
Of completion of road, construction of statutes relative to, VII, 269.
Within which road must be built, powers of commissioners as to, VI, 1156.
Within which road shall be completed, limitation of, VII, 383.
Within which to build branch road, I, 685.
Within which to build new road in place of highway used by railway, VII, 626.
Within which to build road, expiration of, VII, 589.
Within which to construct roads, III, 111.
Within which to construct street railways, VII, 393, 394.
In which to claim damages or sue.
Denial of relief because of lapse of, V, 351.
For claiming damages, limitation of, VI, 340.
In which to prosecute claims against government, III, 9.
Of issuing attachment, I, 502.
To apply for receiver, VI, 1172.
TIME — *continued.*
In which to claim damages or sue — *con.*
To sue elevated railway company, limitation of, IV, 341, 342.
To sue, limitations of, VI, 302–331.
To which damages to abutting owners are to be computed, VII, 655.
What lapse of, will create a bar, VI, 314–328.
Within which to present claim for loss, stipulation as to, I, 639.
Within which to sue for damages by fires, limitation of, V, 894.
Within which to sue to quiet title, III, 10.
In which to remove cause or appeal.
Of application to remove cause, VII, 39, 40.
Of taking appeals, I, 439.
Within which to appeal from justice's court, VI, 124.
Within which to appeal in foreclosure, VI, 518.
In which to sue for causing death.
What lapse of, bars action for causing death, III, 778.
Within which to prosecute criminally for causing death, III, 956.
TIME BOOK.
Of foreman, admissibility and effect of, as evidence, V, 517.
TIME-TABLES.
General treatment, VII, 1093.
Admissibility and effect of, as evidence, V, 518.
Duty of passenger carrier to observe, II, 348.
Liability to passenger for improper arrangement of, II, 382.
Movement of trains according to, VII, 212.
See also BULLETIN BOARDS.
TITLE.
In general.
Bills of lading considered as muniments of, I, 624, 625.
Cloud on, III, 9, 10.
Color of, I, 35.
Conclusiveness of judgments on questions of, VI, 91.
Effect of judgment in trover to pass, VIII, 116.
Hostile claim of, I, 35.
Of company to right of way, VII, 76.
Of landowner in right of way, VII, 80.
Of purchaser from purchaser, V, 550.
Of purchaser of railway-aid bonds, VI, 690–700.
Of receivers, VI, 1178.
Of receivers in foreclosure, VI, 493.
Of state to land granted, before survey, VI, 141.
Of state to navigable waters, VII, 83.
To bed of navigable stream, VII, 84.
To flats and land under water, VII, 85.
To indemnity lands, when passes to railroad, VI, 161, 162.
To land, costs when in dispute, IV, 356.
To lands, effect of consolidation upon, III, 94.

TITLE — *continued.*
In general — *continued.*
To materials, effect of engineer's certificate to pass, III, 150.
To property found in car, III, 63.
To timber on public lands, VI, 1115.
Trespass to try, VII, 1166.
What is an "outstanding," VIII, 320.
What necessary in order to maintain trespass, VII, 1110.
What necessary in plaintiff to support trover, VIII, 109.
What passes by land grant, VI, 164, 167, 168, 171, 173.
What passes by mortgage, VI, 437.
What passes on sale by receiver, VI, 1207.
What passes to purchaser at foreclosure-sale, VI, 502–505.
What vests under land grants, VI, 135.
When passes on sale, VII, 101.
In condemnation proceedings.
Burden of proof on owner to show, IV, 539.
Effect of judgment in condemnation proceedings to pass, IV, 758.
Effect of judgment to pass, IV, 842.
Effect of payment of land damages into court to divest, IV, 552.
Evidence to prove or disprove, on assessment of damages by jury, IV, 623–625.
In plaintiff, what necessary to support ejectment, IV, 850.
Jury not to pass on question of, IV, 915.
Necessary in plaintiff to maintain trespass, IV, 871.
Necessity of payment to passing of, IV, 760.
Of company to lands purchased under English Compulsory Purchase Laws, IV, 889.
Of land condemned, not to be considered by jury on question of damages, IV, 618.
Person paying taxes under mistake as to, right of, to land damages, IV, 573.
Proof of, in action for damages for interference with property, IV, 840.
Remaining in landowner after deed of right of way, IV, 470.
Sufficiency of evidence of, IV, 539.
To buildings on right of way, IV, 441.
To lands taken, averment as to, in petition, IV, 521.
To minerals under land condemned, IV, 442.
What acquired by condemnation of land, IV, 430–435.
What passes by deed of right of way, IV, 468.
In ejectment.
Claim of color of, as defense, IV, 252.
In defendant as defense, IV, 251.
Infirmity of plaintiff's, as defense, IV, 251.
In third person as defense, IV, 252.
Of plaintiff, what necessary to maintain, IV, 249.

TITLE — *continued.*
To capital stock.
Proof of, and of transfer of stock, VII, 298.
Purchase of stock from one not having, VII, 300.
To shares, necessity of entry of transfer to pass, VII, 303.
To stock, evidence of, VII, 276.
Transfer-book as evidence of, VII, 303.
What passes on sale of stock, VII, 292.
To goods carried.
Carrier cannot convey, II, 129.
Of goods sold by carrier, II, 76.
Of shipper, carrier cannot dispute, II, 97, 271.
Sufficiency of, to support actions against carriers, II, 273.
To goods, as affected by notice of arrival, II, 101.
To property burned.
Burden of proof on plaintiff to show, V, 938.
Of plaintiff, evidence to show, V, 908.
Weight of evidence to show, V, 921.

TITLE OF STATUTES.
See STATUTES.

TO CHANGE OR LIMIT.
When equivalent to "lessen or abridge," VIII, 329.

TO FORWARD.
Meaning of words as used in bill of lading, VIII, 329.

TOKENS.
Tickets considered as, VII, 1039.

TOLL BOARDS.
Under English statutes, II, 662–666.

TOLL BRIDGES.
See BRIDGES AND VIADUCTS.

TOLLS.
Charging, on navigable streams, VIII, 170.
Collection of, by distress, IV, 141.
General power to take, only authorizes reasonable charges, II, 623.
How described in pleading, II, 648.
Liability of bridge lessees for failing to collect, I, 725.
Meaning of, VIII, 329.
On canals, I, 734, 735.
On ferries, V, 839.
On turnpikes, VIII, 123.
Power of carrier to alienate, II, 612.
Regulation of, by statute, I, 723.
Right of bridge company to collect from railroad company, I, 724.
Right of embankment company to, II, 672.
Right to collect, I, 724.
Right to mortgage, VI, 417.
What are, II, 672.
When passed by deed of trust, IV, 27.
When subject to taxation, VII, 871.
See also CHARGES.

TONNAGE TAXES.
Validity of, under Interstate Commerce Act, VI, 62.

TOOLS.
Alleging negligence in furnishing defective, V, 266.
Contributory negligence in manner of using, V, 208.
Duty to instruct employé upon change of, V, 38.
Duty to instruct infant employé respecting, V, 247.
Of mechanics, when may be carried as baggage, I, 540.
TORPEDOES.
Left on track, liability for injuries to children caused by, II, 736.
Liability for use of, V, 556.
Liability for use of, as fog signals, V, 556.
On track, liability to trespassers in cases of, VII, 1148.
Placed on track by agent, liability of company, I, 77.
See also EXPLOSIONS.
TORTFEASORS.
See JOINT TORTFEASORS.
TORTS.
Action in tort for expulsion of passenger, IV, 210.
Application of doctrine of *ultra vires* to, VIII, 132, 133.
Assignability of causes of action in, I, 476.
By independent contractors or their servants, liability for, V, 1105–1116.
Committed before receiver's appointment, action for, VI, 1217.
Competency of evidence in actions for, V, 394–434.
In another state, remedy for, I, 489.
Interest on damages in actions for, III, 739.
Liability for, as to trespassers, VII, 1130.
Liability of corporations for, III, 323.
Liability of corporation for, not enforceable against stockholders, VII, 318.
Liability of elevated railways for, IV, 357–368.
Liability of receiver for, VI, 1192, 1193.
Measure of damages in actions for, generally, III, 708–719.
Of agents, damages recoverable for, I, 72, 73.
Of agents, liabilities of principal for, I, 61–80.
Of employés, protection of passengers against, II, 429–431.
Of independent contractors, liability of company for, V, 1106.
Of lessee, liability of lessor for, VI, 219.
Of lessor, liability of lessee for, VI, 226.
Of old company, liability of new corporation for, VII, 59.
Of original companies, liability of consolidated company for, III, 105.
Of receivers' servants, liability of company for, VI, 1228.
Of selling company, liability of purchaser for, VII, 111.
Of station agents, liability of company for, VII, 189.
Of superintendent, when bind company, VII, 824.
Right to damages for, generally, III, 672.
TORTS — *continued*.
Right to interest on judgments for, V, 1174.
Statement of cause of action in suits for, VI, 992–998.
Sufficiency of evidence in actions for, V, 527–533.
What actions sound in, I, 27.
When limitation begins to run in actions for, VI, 311.
See also FALSE IMPRISONMENT; TRESPASS.
TOWNS.
As parties to condemnation proceedings, IV, 499.
Duty of, to repair bridges, I, 700.
Duty of, toward travelers where highway is obstructed, VII, 708.
Duty to fence track in, I, 144; V, 811–813.
Injuries at crossings in, III, 462.
Jurisdiction as dependent on township lines, I, 356.
Liability for excessive speed at crossings in, III, 533.
Liability for injuries caused by negligence in streets and highways, VII, 693–695.
Liability for unsafe condition of substituted road, VII, 628.
Liability of, to abutting owners, where railroads are constructed in streets, VII, 629.
Meaning of word, VIII, 329.
Power of, to change street grades, VII, 608.
Power of, to restrict rate of speed, VII, 676.
Recovery over by, against railway company injuring persons or property in street, VII, 704–706.
Remedy by, for damages or removal of obstruction in highway, VII, 716, 717.
See also TOWNSHIPS; VILLAGES.
TOWNSHIPS.
Power of legislature to authorize aid to railways by, VI, 530.
When do not include municipal corporations, VIII, 322.
See also TOWNS.
TRACK.
In general.
Building additional, on right of way, VII, 80.
Care required as to condition of, VI, 780.
Compensation for use of, how determined, VI, 245.
Competency of evidence as to safety of, V, 429–434.
Construction of statutes regulating joint use of, VII, 267.
Contributory negligence in erecting building close to, V, 888.
Defects in and obstructions on, when amount to negligence, VI, 783.
Evidence of condition of, IV, 41.
Laying additional, when a taking of property, IV, 449.
Liability for injuries caused by torpedoes placed on, I, 77.
Liability of lessee for defects in or obstructions on, VI, 242, 244.

TRACK — *continued.*
In general — *continued.*
Of Baltimore and Ohio Railroad, use of by other roads, I, 579, 580.
Permission by agent to move building across, I, 60.
Prosecutions for obstructing, III, 378–382.
Rails of, when deemed fixtures, V, 971.
Right to give mortgage on, VI, 413.
Situs of, for taxation, VII, 885.
Standing upon or near, when negligence, III, 266.
What is, VIII, 329.
What is railroad, for purpose of taxation, VIII, 324.
When exempt from taxes, VII, 906.
When subject to execution, V, 545.
When subject to taxation, VII, 862.
As to employes.
Alleging company's knowledge of defective condition of, V, 270.
Alleging negligence in failure to keep in safe condition, V, 265.
Assumption of risk as to latent defects in, V, 149.
Assumption of risk as to patent defects in, V, 143.
Assumption of risk from defects in, V, 133.
Assumption of risk of defects in, question for jury, V, 324.
Contributory negligence in being on, V, 193, 194, 195–197, 198, 200.
Duty of company as to safety of, V, 43–48.
Duty of company to inspect and repair, V, 104–113.
Effect of notice of excavations near, V, 157.
Evidence of failure to provide safe, V, 276.
Failure of employé to examine, when contributory negligence, V, 205.
Failure to discover obstructions on, when contributory negligence, V, 210.
Injury to employé by obstruction near, V, 210.
Leaving cars standing on, negligence of company a question for jury, V, 321.
Liability for injuries to employés by defects in, V, 253.
Liability for injuries to employés by obstructions upon or near, V, 61–67.
Negligence in allowing obstructions near, question for jury, V, 315–316.
Negligence in failing to provide safe, V, 313, 314.
Notice or knowledge of defects in, V, 154.
Obstructions on, V, 61, 62.
Obstructions to, effect of knowledge of, V, 155.
Of another company, injuries caused by defects in, liability for, V, 258.
Placing lumber too near, V, 654.
Presumption of negligence from proof of defects in, V, 299.
Proximity of platform to, effect of notice to employé, V, 157.

TRACK — *continued.*
As to employes — *continued.*
Risks assumed from defects in, V, 130.
Sufficiency of evidence to show unsafety of, V, 289, 290.
As to licensees and trespassers.
Duty to persons walking on or crossing, VI, 271–275.
Liability for injury to person suddenly coming on, VII, 1143.
Liability of company to trespassers on, VII, 1126–1148.
Liability to trespassers for injuries by torpedoes placed on, VII, 1148.
License to construct and use, VI, 261.
Lying down upon, or sleeping on, as contributory negligence, VII, 1155.
Persons habitually walking on or across, when deemed licensees, VI, 267.
Persons walking along, company's duty as to, VI, 274.
Persons walking on, crossing, or riding on, when deemed trespassers, VII, 1117–1119.
Standing or walking on, when negligence, VII, 1152–1155.
When crossing of, amounts to trespass, VII, 1108.
As to passengers.
Allegations as to condition of, II, 529.
Construction and repair of, as towards passengers, II, 367–374.
Crossing, as contributory negligence, II, 491, 492.
Degree of care as to, II, 424.
Duty of passenger to leave, after expulsion from train, IV, [illegible]
Standing on, as contributory negligence, II, 491.
Standing or walking on, when contributory negligence, II, 491, 492.
Walking near, when dark, as contributory negligence, II, 491.
At crossings.
Averments as to manner of locating and constructing, III, 639.
Effect of obstructed view of, on duty to look and listen, III, 602–622.
Evidence to show condition of, III, 476.
Manner of crossing, with highway, III, 440, 441.
Right to lay out footway across, III, 439.
At stations.
Building platform between tracks, VII, 218.
Crossing, in front of moving train, VII, 230.
Failure to erect bunters at end of, VII, 221.
Too much or too little space between station platform and, VII, 217.
Fencing against animals.
Duty to fence, I, 138–151.
Failure to fence both sides of, I, 164.
In injuries causing death.
Contributory negligence of persons crossing, III, 822–833.
Driving team on, III, 835.
Instructions as to safety of, III, 907.

TRACK — *continued.*
In injuries causing death — *continued.*
Proof of defects in, III, 869.
Running over persons on, III, 766.
Safety of, question for jury, III, 892.
Sleeping on, III, 834.
In injuries to children.
Allowing children to go upon, when contributory negligence, II, 806.
Injuries to children trespassing on, II, 748–752.
Lying or sleeping on, II, 780.
In streets and highways, generally.
Alteration of location of, VII, 604.
Conditions for use of, by other roads, VII, 577.
Duty of company toward persons walking on, VII, 696.
Of steam railway, location of, in street, VII, 603–607.
Use of, by other roads, VII, 579.
Of street railways.
Contributory negligence in standing or walking between, VII, 529.
Damages for manner of laying or using, VII, 427.
Double, duty to repair between, VII, 407.
Duty of company to make safe, VII, 461.
Duty of driver of wagon to turn off, IV, 271.
Duty to get off in time, VII, 530.
Duty to sand, VII, 443.
Duty to see it is clear, IV, 270.
Excavating under or about, VII, 469.
Extent to which street may be used by, VII, 419.
Forfeiture for failure to lay or extend VII, 395.
Gauge of, VII, 378.
Joint use of, VII, 389.
Joint use of, as between company and public, VII, 427–431.
Joint use of, as between different companies, VII, 431–436.
Joint use of, by tramway and other vehicles, VII, 1103.
Laying different, from terms of consent, VII, 389.
Liability of street railway for defective construction of, VII, 411–416.
Maintaining, too near other structures, VII, 467.
Manner of constructing, across streets and highways, VII, 437.
Obstruction of, by teams, VII, 424.
Of street railway, mandamus to compel extension of, VII, 365.
Of street railway, right of public to use, VII, 427–431.
Ordinance regulating construction of, VII, 440, 441.
Ordinance regulating sprinkling of, VII, 442.
Power of city to tear up or remove, VII, 353.
Power to authorize additional, VII, 395.
Right of person driving across or along, VII, 428, 429.

TRACK — *continued.*
Of street railways — *continued.*
Right of person in rival business to use, VII, 430.
Right to drive other vehicles on, IV, 270.
Right to lay, before damages are paid, VII, 427.
When company may lay, as it deems best, VII, 396.
Working near, when contributory negligence, VII, 531.
See also RIGHT OF WAY; ROADBED.

TRACK CLEANERS.
Patents for, VI, 961.

TRACKMASTER.
Service of process on, VI, 1097.

TRACKMEN.
Train dispatcher not fellow-servant of, V, 769.
When brakeman is fellow-servant of, V, 759.
When conductor is vice-principal of, V, 735.
When engineer is fellow-servant of, V, 745.
When fellow-servants of trainmen, V, 767.
When foreman is not fellow-servant of, V, 750, 751.
When trainhand is fellow-servant of, V, 771.

TRACKWALKER.
Trainhand not fellow-servant of, V, 772.
When fireman fellow-servant of, V, 761.

TRACT.
Of land, evidence of damage to part of, not taken, IV, 640–642.

TRADE.
Contracts in restraint of, validity of, III, 215–219.
Contracts void as in restraint of, VII, 1031.

TRADE CENTRES.
Undue preference or advantage in preferring, IV, 33.

TRADE FIXTURES.
Compelling company to take, under English Compulsory Purchase Laws, IV, 889.
What are deemed to be, V, 971.

TRAFFIC.
Facilities for interchange of, VI, 33–36.
Over connecting lines, regulation of, by commissioners, VI, 1139.
What is, arising and terminating on railway, VIII, 329.

TRAFFIC AGREEMENTS.
Construction of, III, 242.

TRAIN-DISPATCHER.
As fellow-servant with other employés, V, 768, 769.

TRAINMASTER.
Is vice-principal of fireman, V, 769.

TRAINMEN.
As fellow-servants with conductor, V, 739, 740.

TRAINMEN — *continued.*
As fellow-servants with engineer, V, 745.
As fellow-servants with section foreman, V, 755.
As fellow-servants with other employés, V, 769–772.
When deemed to be in different department from other employés, V, 688–691.

TRAINS.
In general.
Agreement to stop at eating-house, VII, 5.
Collisions between, III, 19.
Collisions between street cars and, III, 19, 20.
Compelling running of, IV, 163; VI, 378.
Construction of statutes relative to brakemen on, VII, 267.
Duty to refrain from running on Sunday, VII, 822.
Duty to run, under working agreements, VI, 252.
Failure to run, as ground for receiver, VI, 1169.
Failure to stop, and extinguish fires, V, 873.
Failure to stop, when negligence, VI, 790.
Fixing hours of arrival and departure of, VI, 249.
Frightening of teams by, as element of land damages, IV, 691.
Incidental damages for running, IV, 337.
Injuries by improper starting of, I, 77.
Injuries to passengers by negligent starting of, IV, 364.
Liability for acts of independent contractor in operation of, V, 1112.
Making up, in city streets, VII, 616.
Posting time of arrival of, VII, 1096, 1097.
Privileges of express companies upon, V, 561–566.
Projections from passing, injuries caused by, VII, 212.
Prosecutions for gambling on, III, 368.
Running heavily ladened, up grade, V, 869.
Running into open draw, I, 716.
Speed of, while on drawbridge, I, 714.
Wrecking of, III, 385.

Operation of, as to animals.
Behind time, sufficiency of evidence to show, I, 292.
Burden of proof to show killing by defendant's, I, 313.
Duty to stop, I, 200.
Failure to check, sufficiency of evidence of, I, 291.
Instructions as to duty to stop, I, 332.
Negligence in failing to stop, I, 325, 326.

Operation of, as to children.
Crossing in front of, II, 787, 788.
Negligence of company with respect to children on, II, 738–741.
Operation of, in city, II, 735.

TRAINS — *continued.*
Operation of, as to employes.
Alleging negligence in management and, V, 269, 270.
Assumption of extra risk in, V, 171.
Assumption of risk as to management and, V, 136, 137, 147.
Care employé must exercise in management of, V, 293.
Concurring negligence of company and fellow-servants in management of, V, 670.
Contributory negligence in making up, V, 214.
Contributory negligence of employés in, V, 203–222.
Crossing track in front of, when contributory negligence, V, 105.
Duty of company as to manning and equipment of, V, 124.
Duty to employés in management of, V, 113–125.
Duty to instruct employé as to, V, 39.
Improper manning and equipment of, effect of notice to employé of, V, 163.
Knowledge of dangerous manner of running, effect of, V, 162, 163.
Negligence in, V, 656.
Negligence in insufficiently manning, question for jury, V, 322.
Negligence in making up, V, 657.
Negligence in management of, sufficiency of evidence of, V, 293.
Negligence in starting, V, 658.
Non-liability for negligence of fellow-servants in, V, 655–663.
Risks assumed by repairers and construction hands as to, V, 181.
Rules requiring employé to remain in middle of, V, 243.
Rules respecting running and starting of, V, 241.
Sudden start of, V, 120, 137.

Operation of, as to licensees and trespassers.
Duty of company to licensees on, VI, 271.
Duty of company towards trespassers on, VII, 1148–1151.
Duty to stop, to avoid injury to trespasser, VII, 1142.
Ejection of trespassers from, VII, 1149–1151.
Persons on, when deemed trespassers, VII, 1121–1124.
Revocation of license to sell lunch on, VI, 264.

Operation of, as to passengers.
Alleging failure to stop, II, 528.
Alleging negligence in management of, II, 527.
Carrying baggage on one, owner on another, I, 525, 526.
Contributory negligence of passengers in boarding and alighting from, III, 818, 820.
Contributory negligence of passenger in waiting for or boarding, III, 818.
Duty to stop, II, 382, 398.
Entering on wrong side, II, 461.

TRAINS — *continued.*
Operation of, as to passengers — *con.*
Exhibition of ticket before entering, VII, 1051.
In motion, compelling passengers to leave, II, 404.
On adjoining track, passenger coming in collision with, II, 507.
Passenger attempting to ride on wrong, IV, 171, 186.
Passing under, as contributory negligence, II, 494.
Payment of fare on, VII, 1079–1083.
Prematurely starting, II, 390, 391,
Regulations of carrier as to admissions to, II, 334.
Removing passenger from, while in motion, IV, 200.
Riding on, which does not stop at station, II, 407.
Starting, while passenger is alighting, II, 405.
Sudden starting without notice, II, 456.
Sufficiency of evidence to show negligence in management of, II, 541.
When round-trip tickets are good, VII, 1066.
When ticket is good, VII, 1043.
Operation of, at crossings.
Application to, of statutes requiring signals, III, 499.
Duty to stop before reaching crossing, III, 417–419.
How far one may presume, will be proper, III, 549.
Regulating distance between, III, 469.
Sudden movement of, instructions as to, III, 653.
See also SPEED; SUDDEN JARS, JERKS, OR STARTS.

TRAIN WRECKING.
Prosections for, III, 385.
See also WRECKS AND WRECKING.

TRAMWAYS IN ENGLAND.
General treatment, VII, 1102.
Rating of, VII, 1018.

TRANSCRIPT.
On appeal from justice, I, 367.
On appeal in condemnation proceedings IV, 802.

TRANSFER.
In general.
Meaning of, as applied to freight or passengers, VIII, 329.
Of bills of lading, I, 643–645.
Of bills of lading as collateral security, I, 647–650.
Of bills of lading, effect of, to extinguish right of stoppage *in transitu*, II, 192.
Of bonds by delivery, I, 660.
Of commercial paper, I, 593–596.
Of commercial paper after maturity, I, 595.
Of contract for carrying mail, by mortgage of road, II, 2.
Of corporate franchise, V, 1024.
Of corporate property to successor in office, VI, 1072.
Of coupons, III, 335.

TRANSFER — *continued.*
In general — *continued.*
Of goods, by carrier, to its own car, II, 242.
Of goods, duty of connecting carriers as to, under Georgia statute, II, 223.
Of goods stored, VIII, 167.
Of liens, VI, 277.
Of passenger tickets contrary to rule of company, IV, 184.
Of passengers to connecting line, reasonable time for, II, 517.
Of railway-aid bonds by delivery, VI, 690.
Of right of way in street under municipal grants, VII, 577.
Of road or franchise, forfeiture for, IV, 132.
Of stock.
Action for refusal, VII, 295–298.
Assessments after, VII, 755, 756.
By married woman, V, 1068.
By way of pledge, VII, 289–291.
Effect of, on stockholders' liability to creditors, VII, 320, 321.
Forged or fraudulent, VII, 304.
Generally, VII, 285–305.
How effected, VII, 287–289.
On books, compelling, VII, 293–295.
Power of personal representative to make, V, 553.
Rights of transferees, VII, 298–302.
Right to, VII, 285–287.
Wrongful, action for, VII, 340.

TRANSFER AGENTS.
Misrepresentations by, effect of, VII, 303.
Powers and duties of, VII, 289.

TRANSFER BOOK.
Keeping, inspection, entries in, etc., VII, 302–304.

TRANSFER CHECKS.
Expulsion of passengers using, VII, 536, 537.

TRANSFER COMPANIES.
General treatment, VII, 1105.
Liability of, for baggage, I, 554.
Right of, to charges, II, 250.

TRANSFER STATIONS.
Who deemed passengers at, II, 319–321.

TRANSFERABLE TICKETS.
Right to transfer and use, VII, 1060.
See also NON-TRANSFERABLE TICKETS.

TRANSIT.
Duty of carrier during, I, 745–750.
Liability for loss or injury during, II, 55–78.
Liability of carrier for loss or injury prior to, II, 52–55.
Liability of carrier of goods after, II, 78.

TRANSITORY ACTION.
For causing death, III, 781.
What is, I, 26, 238.

TRANSPORTATION.
Contract for, when *intra vires*, VIII, 130.
Meaning of word as distinguished from commerce, VIII, 308.
Of coal, when deemed public use, IV, 461.
Of diseased live stock, I, 788–790.

TRANSPORTATION — *continued.*
Of dogs, I, 790, 791.
Of freight, when deemed interstate commerce, VI, 3, 4.
Of mail clerks, inspectors, etc., II, 8.
Of passengers, II, 305–586.
Of passengers on freight trains, hand-cars, etc., II, 422–427.
Power to bind company by contract for, VII, 186.

TRANSSHIPMENT.
Of goods by carrier, II, 77.

TRAVELERS.
Duty of town towards, where highway is obstructed, VII, 708.
Injuries to, by independent contractor, liability for, V, 1115.
Liability for delay of, by obstructions in highway, VII, 709.
Of highway, duty to fence for protection of, V, 822.
On Sunday, VII, 819–821.

TRAVELING AGENTS.
Service of process on, VI, 1096.

TRAVERSE.
On return of mandamus, VI, 388.

TREASURER.
Bond and liability of sureties, VI, 911.
Levy of assessment on stock by, VII, 751.
Of corporation, liability of, as garnishee, I, 493.
Rights, powers, and duties of, VI, 910.

TREBLE DAMAGES.
In condemnation proceedings, IV, 685.

TREES.
Amount recoverable for injury to, by fire, V, 961, 962.
Evidence of value of, on assessment of land damages, IV, 647.
Evidence of value of standing, V, 965.
Removal of dangerous, from right of way, VII, 82.

TRESPASS.
General treatment, VII, 1107.
In general, VII, 1107.
Trespass upon land, VII, 1108.
Trespass upon personal property or things attached to soil, VII, 1114.
Trespass upon person, VII, 1115.
Action of, by abutting owner, VII, 636.
Action of, when lies for interference with private ways, VI, 1080.
As element of land damages, IV, 707.
By independent contractor, liability for, V, 1111.
By landowner for wrongful interference with property, IV, 867–880.
Criminal prosecution for, III, 386.
Enjoining continuance of, VII, 643.
For unlawful entry on turnpikes, VIII, 123.
Measure of damages in actions of, VII, 663.
On lands, action for, when barred by lapse of time, VI, 322.
On lands, compensatory damages for, III, 680.

TRESPASS — *continued.*
On lands, liability of corporation for, III, 323.
On wife's land, action for, V, 1069.
Prosecutions for malicious, III, 371.
Remedy of landowner by, under Canadian Expropriation Acts, IV, 954.
Right to enjoin continuous, IV, 299.
Staying proceedings in, V, 1155.
When case and not trespass is proper form of action, I, 240.
When deemed a taking of land, IV, 445.
When lies by abutting owner against elevated railway, IV, 295.

TRESPASS TO TRY TITLE.
General treatment, VII, 1166.
See also EJECTMENT.

TRESPASSERS.
Actions by, for injuries by fire, V, 897.
Contributory negligence of, VII, 1151–1163.
Distinguished from licensees, VI, 267.
Distinguished from passengers, II, 313.
Duty and liability of company to, VII, 1126–1131.
Duty of company after discovery of, VII, 1137–1143.
Duty of company towards persons walking on track, VII, 696.
Duty to fence for protection of, V, 822.
Liability of company for ejection of, from train, I, 77–79.
May be put off train at any safe place, IV, 207.
On trains, generally, II, 339–341.
On trains, liability for injuries to, VII, 1148, 1149.
Passengers refusing to produce ticket are, IV, 176.
Right of tenants to recover against, VI, 195.
Unlawfully on car, contributory negligence of, VII, 484.
When assume risk of danger, VII, 1147.
When carrier may sue, II, 274.
Who are, VII, 1116–1126.

TRESPASSERS, INJURIES TO.
General treatment, VII, 1116.
Who is to be deemed a trespasser, VII, 1117.
Duties and liabilities of company to trespassers, VII, 1126.
Contributory negligence of trespasser, VII, 1151.
Procedure, VII, 1163.
At crossings, duty to give signals to, III, 498.
At stations, duty towards, VII, 214.
Children as, on street railways, II, 755–758.
Children riding on cars but not as passengers, liability for, II, 755–758.
Children trespassing on train, II, 740.
Children trespassing on turntable, II, 746.
Children when trespassing, II, 748–752.
Contributory negligence of, when a defense to action for causing death, III, 832, 836.
Defense that deceased was a trespasser, III, 809.

TRESPASSERS, INJURIES TO — *con.*
Injuries to children trespassing on track or ground, II, 748–752.
Instructions in actions for, VIII, 57, 70.
Statement of cause of action in actions for, VI, 997.
TRESPASSING ANIMALS.
Liability of company for killing or injuring, I, 103–131, 175–183.
TRESTLES.
Contributory negligence in crossing, in front of moving train, V, 197.
Cost of filling in flats crossed by, as element of land damages, IV, 687.
Defects in, V, 668.
Duty of carrier as to construction and repair of, II, 372.
Duty to employés as to safety of, V, 53.
Injuries to animals on, I, 135.
Liability for flooding lands by, V, 976.
Liability of lessee road for defects in, VI, 227.
Persons on, when deemed trespassers, VII, 1119.
Walking on, when contributory negligence, VII, 1154.
When subject to mechanics' lien, VI, 286.
TRIAL.
General treatment, VIII, 1.
Mode of trial; court or jury, VIII, 1.
Place of trial, VIII, 3.
Continuance; postponement, VIII, 9.
Jury, and how impaneled, VIII, 11.
Conduct of trial, VII, 14.
Instructions to jury, VIII, 42.
Verdict; findings, VIII, 89.
Admissibility of testimony of witness in former, III, 858, 859; V, 522.
By jury in injunction suits, IV, 342, 346.
By jury of assessment of land damages, IV, 604–663.
By jury to assess land damages, conduct of, IV, 615–629.
Computing damages to time of, IV, 329.
De novo in appellate court, VI, 124.
Errors on, when ground for new, VI, 836–841.
Estimating land damages from time of, IV, 584.
Granting amendments at, VI, 1051.
New, VI, 836–877.
Of issues in condemnation proceedings, IV, 536.
Of mandamus, VI, 388.
Of stock-killing cases, I, 319–345.
Review of objection not made at, IV, 355.
See also HEARING.
TRIAL FEES.
Allowance of, IV, 734.
TRIBUNAL.
For assessment of land damages, selection of, IV, 574.
TRICYCLES.
Negligence of employés in operation of, V, 222.
TROLLEY LINES.
See ELECTRIC RAILWAYS.
TROOPS.
See ARMY.
TROUBLE AND EXPENSE.
As element of damages, I, 345.
TROVER; CONVERSION.
General treatment, VIII, 107.
When trover will lie, VIII, 107.
Procedure, VIII, 112.
Trover.
When lies against carrier of merchandise, II, 127.
When maintainable by holder of bill of lading, I, 646.
Conversion.
Effect of stipulation limiting liability where carrier is guilty of, I, 637.
Of baggage by carrier, I, 524.
Of bonds into stock, I, 658, 668.
Of bonds into stock, and *vice versa*, VII, 281.
Of goods, liability of carrier for, II, 75, 76, 125, 126.
Of property, action for, VIII, 107–116.
Of stock by pledgee, remedy for, VII, 291.
Of tax certificate into stock, VII, 282.
Of trust property by trustee, VIII, 120.
Reparable damage is not a, II, 75.
Right of transferee of bill of lading to sue for, I, 646.
What amounts to, VIII, 111, 112.
When limitation begins to run in cases of, VI, 311.
TRUCKS.
On platform, injuries caused by, VII, 211.
Patents for, VI, 956.
TRUSTEE PROCESS.
See ATTACHMENT, ETC.
TRUSTEES.
See TRUSTS AND TRUSTEES; DIRECTORS; TRUSTEES; MORTGAGE TRUSTEES.
TRUSTS AND TRUSTEES.
General treatment, VIII, 116.
Trusts.
Compensation of attorneys out of trust fund, I, 516.
Enforcement of, V, 355.
Exception of, under statute of limitations, VI, 328.
When unpaid subscription is a trust fund, as to corporate debts, VII, 312.
Trustees.
As parties to condemnation proceedings, IV, 499.
Illegal transfer of debentures by, III, 960.
In deeds of trust, subrogation of, VII, 724.
In foreign attachment, fixing liability of, I, 506–509.
Liability of, for injuries by fire, V, 898.
Liability of, in case of insolvency, V, 1167.
Of an express trust, right of, to sue, VI, 924.
Pledge of stock by, VII, 291.
Substitution of, IV, 30.
Taking land by consent of, IV, 464.
Under deed of trust, powers and duties of, IV, 29.
Validity of subscriptions by, VII, 742.

TRUSTS AND TRUSTEES — *continued.*
Trustees — *continued.*
When limitation begins to run in actions by or against, VI, 313.
When proper plaintiffs in actions against elevated railways, IV, 306.
Who are, of express trusts, VIII, 329.
Who may be made, in attachment suit, I, 491–494.
See also MORTGAGE TRUSTEES.
TUNNEL WORKMEN.
When engineer is fellow-servant of, V, 745.
When fellow-servants of each other V, 772.
When superintendent is fellow-servant of, V, 757.
TUNNELS.
General treatment, VIII, 121.
Damages to abutting owners when constructed under city streets, VII, 651.
Duty to employés as to safety of, V, 54.
In streets or highways, VII, 572.
Taking superfluous land for, IV, 892.
Under railways, right of landowners to dig, VI, 401.
When subject to taxation, VII, 867.
TURNING TO RIGHT.
Rule as to, not applicable to street railways, VII, 430.
TURNOUTS.
Location of, in city streets, VII, 606.
Right of street railway to construct, VII, 394.
Taking land for, when for public use, IV, 457.
See also SIDE TRACKS.
TURNPIKES; PLANK ROADS.
General treatment, VIII, 122.
Condemnation of land of plank road companies, IV, 428.
Liability of turnpike company for defects in crossings, III, 476.
Right to construct track on street used by plankroad, VII, 430.
What is a turnpike, VIII, 329.
TURNTABLE HANDS.
When fellow-servants of each other, V, 772.
TURNTABLES.
At station, liability for injuries caused by, VII, 220.
Contributory negligence of child riding on, or playing with, II, 777.
Duty to employés as to safety of, V, 48.
Injuries occasioned by negligence in operating, VII, 699.
Injuries to children at, II, 744–748.
Knowledge of absence of, assumption of risk after, V, 162.
Negligence as to safety of, question for jury, V, 317.
ULTRA VIRES.
General treatment, VIII, 124.
General principles, VIII, 124.
What acts or contracts are ultra vires, VIII, 126.
What acts or contracts are intra vires, VIII, 129.
ULTRA VIRES — *continued.*
Rule as respects executed contracts, VIII, 131.
Application of doctrine to torts, VIII, 132.
Grants of exclusive privileges in streets are, VII, 578.
Leasing of railway, when deemed to be, VI, 211.
Meaning of words, VIII, 330.
Restraining action of directors as, at instance of stockholders, VII, 338.
Subscriptions in aid of railways, VI, 614.
Subscriptions to stock in other corporations, when deemed to be, VII, 816, 817.
UMBRELLA.
Obstructing view of track by, III, 620.
UMPIRE.
Appointment of, and hearing before, I, 457.
Appointment of, in expropriation proceedings, IV, 942.
UNAUTHORIZED USE.
Of street, injunction to restrain, VII, 641.
Of streets, liability for, VII, 615–618.
UNAVOIDABLE ACCIDENT.
As a defense, VI, 818.
As a defense to action for injury in street or highway, VII, 697.
Burden of proof to show, I, 316.
Damages not recoverable for, III, 672; IV, 40.
Evidence of, I, 310.
Evidence to show, I, 299.
Exception as to, in bill of lading, I, 643.
Generally, VI, 781, 790.
To children in street, II, 760.
To trespassers, VII, 1143.
When excuses carrier of passengers, II, 366.
Whether accident was unavoidable a question of fact, I, 329.
See also ACT OF GOD; INEVITABLE ACCIDENT.
UNCERTAINTY.
In contract, effect of, III, 209.
In description of premises conveyed for right of way, IV, 467.
In description of premises in deed, effect of, IV, 10.
In subscriptions as defense to action on subscription, VII, 793.
In verdict, effect of, VI, 849.
UNCOUPLING.
Contributory negligence of employés in, V, 222–233.
See also COUPLING.
UNDERBILLING.
Effect of, VI, 29.
UNDERGROUND RAILWAYS.
General treatment, VIII, 133.
UNDERTAKING.
On appeal in condemnation proceedings, IV, 805.
UNDISCLOSED PRINCIPAL.
Rights and liabilities of, I, 54.
UNDUE PREFERENCE.
In charges, or delivery, IV, 93.

UNDUE PREFERENCE — *continued.*
Jurisdiction of commissioners to investigate, VI, 1140.
Under English statutes, II, 651–654.
Under Interstate Commerce Act, VI, 31–33.

UNENCLOSED LANDS.
Animals on, I, 182.
Duty of company to fence, V, 819.

UNFORESEEN DANGERS.
Duty to warn employé against, V, 37.

UNILATERAL CONTRACTS.
How construed, III, 203.

UNINTENTIONAL INJURY.
Damages for, III, 680.

UNION DEPOT COMPANIES.
General treatment, VIII, 135.
Requirement as to lighting and warming depots, VII, 223.
Taxation of, VII, 861.

UNION PACIFIC R. CO.
General treatment, VIII, 137.
Federal grants to, VI, 173–175.
Transfer of franchise of, to Central Pacific R. Co., II, 605.

UNITED STATES.
Admission of states into, VII, 184.
Claims against, III, 7–9.
Government railroads in, V, 1049, 1050.
Obligations of land-grant railroads to, VI, 129.
Power of, to condemn lands within state, IV, 405.
Powers and duties of railway commissioners in, VI, 1137.
Relation between, and Central Pacific R. Co., II, 603.
Taxation of road chartered by, VII, 859.
See also GOVERNMENT.

UNITED STATES SUPREME COURT.
Jurisdiction and powers of, generally, V, 638–644.

UNIVERSITIES.
Condemnation of property of, IV, 428.

UNLAWFUL.
Act, right to recover for injury while doing, VII, 531.
Transportation of slaves, II, 587–589.
When equivalent to wrongful, VIII, 330.

UNLIQUIDATED DEMANDS.
Payment of, by receiver, VI, 1199.
Right to interest on, V, 1175.
Set-off of, VII, 115.
When may be reached in attachment, I, 498.

UNLOADING.
See LOADING AND UNLOADING.

UNSECURED DEBTS.
Payment of, by receiver, VI, 1199.
Provisions for payment of, in judgment of foreclosure, VI, 487.

UPON.
Meaning of word as used in subscription contract, VIII, 330.

USAGE.
See CUSTOM; USAGE.

USE.
Change of, when constitutes additional servitude, IV, 447, 448.
Evidence of value of land for particular, IV, 642–646.
Meaning of "uses and purposes" as used in a statute, VIII, 330.
Special value for particular, as measure of damages, IV, 669.
To which property is adaptable, consideration of, in estimating damages, IV, 585, 937.

USE AND OCCUPATION.
Assumpsit for, I, 488.
Opinion of witness as to value of, VIII, 247.

USURY.
General treatment, VIII, 144.
Effect of, on validity of bonds, I, 661.
In judgment against company as defense to stockholders sued by creditors, VII, 327.

UTAH.
Operation of statute of, giving right of action for causing death, III, 754.
Statute of, regulating liability for injuries by fire, V, 856.

UTILITY.
Of invention sought to be patented, VI, 947.

UTMOST CARE.
Duty of carrier of passengers to exercise, II, 356.
Duty of company to exercise, V, 860; VI, 779.

VACANCIES.
Among directors, filling, IV, 55.
In boards of commissioners, filling, IV, 598.
In office of mortgage trustee, VI, 461.

VACATING.
Appointment of arbitrators, I, 458.
Appointment of receiver, VI, 1222.
Assessments for local improvements, VI, 755.
Attachments, I, 505.
Judgments, VI, 104.
Land patents, VI, 1120.
Streets and highways, VII, 554–556.
Transfers in fraud of the Bankrupt Act, I, 533.

VACATION.
Jurisdiction of condemnation proceedings during, IV, 489.

VALIDITY.
In general.
Of assignments, I, 478.
Of award of arbitrators, I, 460.
Of award of arbitrators in Canadian expropriation proceedings, IV, 944, 945.
Of award of arbitrators in condemnation proceedings, IV, 591.
Of by-laws, I, 726.
Of by-laws as to fares in England, VII, 1088.
Of certificates of indebtedness, II, 605.
Of customs and usages, III, 666.
Of customs of carrier inconsistent with charter, II, 164.

VALIDITY — *continued.*
In general — *continued.*
Of dedication of street, VII, 541.
Of donations in aid of railways, VI, 643–655.
Of elections, IV, 53.
Of engineers' estimates, III, 145.
Of licenses, VI, 261–263.
Of majority verdict, IV, 747.
Of ordinances, VII, 672.
Of ordinances and resolutions as to right of way through streets, VII, 572–574.
Of ordinances regulating speed, VII, 678.
Of proceedings at directors' meetings, IV, 57.
Of rules for the conduct of the company's business, V, 30.
Of rules requiring identification of passengers, stamping of tickets, etc., VII, 1067.
Of schemes for reorganization, VII, 46.
Of surveys of public lands, VI, 1117.
Of taxes and assessments for local improvements, VI, 755.
Of tender, VII, 1034.
Of trusts, VIII, 118.
Of bonds, deeds, mortgages, etc.
Of bonds, proof of, in foreclosure, VI, 486.
Of car leases, VII, 129.
Of conditions in deeds, IV, 14.
Of corporate bonds, I, 661–663.
Of coupons, III, 334.
Of debentures, III, 959.
Of deeds, IV, 23, 24.
Of deeds of trust, IV, 25.
Of mortgages, VI, 436.
Of provisions in mortgage prohibiting foreclosure, VI, 471.
Of railway-aid bonds, VI, 674–684.
Of railway leases, VI, 205, 206.
Of contracts, generally.
Agreements between connecting companies, III, 70.
Agreements to change route, VI, 362.
Agreements to convey land, VIII, 148.
Agreements to issue free pass, VI, 940.
As affected by law of place, III, 229.
Between parallel roads, VI, 919.
Between railroad companies and telegraph lines, VII, 1027, 1031.
Commercial paper, I, 590, 591.
Compromises, III, 55.
Effects of war upon, VIII, 161.
Employment of infants without consent of parents, V, 246.
For carrying mails, II, 2.
For railway construction, III, 120.
For rebate and drawbacks, IV, 119–122.
Generally, III, 209–221.
Of car-trust associations, I, 735.
Parol appointment of agents, I, 39.
Partnership, VI, 936.
Pledges, VI, 1063.
Provisions in contract making engineer arbitrator, III, 152.
Release, VII, 7–11.
Release by injured employé, VII, 13.
Release by injured passenger, VII, 11.

VALIDITY — *continued.*
Of contracts, generally — *continued.*
Submission to arbitrators in condemnation proceedings, IV, 591.
Sunday contracts, VII, 818.
To locate stations, VII, 202–203.
To procure or convey right of way, VII, 79.
Of contracts of sale.
Execution sales, V, 547.
Generally, VII, 98.
Guardian's sale and deed, V, 1058.
Of lands for non-payment of taxes, VII, 996.
Of stock, VII, 291.
Receivers' sales, VI, 1207.
Of contracts limiting liability.
As to amount recoverable for live stock, I, 775–778.
As to amount recoverable for loss or injury to goods, V, 592–594.
Conventional limitation of time to sue, VI, 302.
For loss by fire, I, 631.
Generally, II, 438.
In special contracts, I, 763–783.
Limitations of time for notice of claim or bringing suit, II, 185.
Stipulations against liability for negligence, VI, 341–348.
Of subscription contracts.
Conditions in subscription, VII, 803–805.
Conditions in subscription as to portion of road to be built, VII, 807.
In aid of railways, VI, 610–621.
Issue of stock, right to attack, VII, 281.
Overissued stock, estoppel to deny, VII, 281.
Provisions for payment of interest on subscriptions, VII, 745.
Stock certificate, VII, 279.
To new stock, VII, 283.
To stock, generally, VII, 740–743.
Transfers of stock, VII, 285–287.
Of statutes.
Authorizing mortgages of corporate property, VI, 409.
Double-damage laws, V, 795.
Fence laws, V, 793–795.
Generally, VII, 243–262.
Grant to Southern Pacific R. Co., VI, 171.
Of Alabama, as to state aid, VII, 160.
Or orders directing deposit of land damages, IV, 549.
Relative to branch roads, I, 681.
Relative to process, VII, 1082.

VALUABLES.
Duty of passenger to give notice of possession of, VII, 137.

VALUE.
In general.
Of circumstantial evidence, V, 531.
Of services, evidence as to, V, 390.
Opinions of witnesses on questions of, VIII, 245–252.
Proof of, V, 527.

VALUE — *continued.*
Of property, generally.
At nearest available market, competency of evidence of, V, 394.
Declarations of owner as to, V, 497.
Depreciation in, as the measure of damages, VII, 650.
Destroyed, proof of, on question of damages, V, 965, 966.
For taxation, evidence of, on question of damages, V, 965.
Of crops as the measure of damages in actions for flowing lands, V, 1004, 1005.
Of crops, opinions of farmers as to, VIII, 278.
Of crops, when a question for experts, VIII, 262.
Of easement, opinions as to, IV, 324.
Of governmental right to use land-grant roads, VI, 131.
Of railway passes, evidence of, V, 390.
Sale as evidence of, V, 389.
Sale of stock at less than face, VII, 292.
Tax list as evidence of, V, 517.
Of baggage.
Disclosure or concealment of, by passenger, I, 558–560.
Lost, competency of plaintiff to prove, I, 570.
Of goods shipped.
At place of destination, when measure of damages, II, 287.
At place of shipment, when measure of damages, II, 288.
Bill of lading as evidence of, I, 607.
Concealment by shipper, effect of, II, 169.
Declaration of, by shipper, conclusiveness of, II, 193.
Fixing, in bill of lading, I, 635–638.
Fraud of shipper in concealing, II, 88–90.
Limiting liability for goods to less than, II, 175.
Lost, proof of, II, 286.
Notice of, V, 572.
Of land.
Actual sales as evidence of, V, 524.
Along the road, evidence of present or future increase in, IV, 662.
As measure of damages, VII, 659.
Before and after construction, difference in, as measure of damages, VII, 661, 662.
Before and after location of road, opinion of witness as to, VIII, 255.
Before and after taking, difference between, when measure of damages, IV, 576.
Buildings on the right of way as an element of land damages, IV, 688.
Evidence on question of, under Canadian Expropriation Laws, IV, 939.
For a particular purpose, consideration of, in assessment of damages, IV, 937.
For particular uses, evidence of, on assessment of land damages, IV, 642–646.
For taxation, evidence of, on assessment of damages, IV, 656.

VALUE — *continued.*
Of land — *continued.*
Immediately before and after taking, evidence of, IV, 655, 656.
Meaning of the word as used in condemnation proceedings, VIII, 330.
Opinions of farmers as to, VIII, 278.
Opinions of real estate brokers as to, IV, 321.
Other land in vicinity of that taken, evidence of, IV, 642.
Premises, depreciation of, as measure of damages, VI, 901.
Property before and after building of road as measure of damages, IV, 936.
Property before and after location of roads, opinions as to, IV, 320.
Property for special purpose, opinions as to, IV, 322.
Residue of land, diminution of, when measure of damages, IV, 666.
Special, for particular use, when measure of damages, IV, 672.
Taken by old company, liability of new company for, VII, 60.
Taken, opinion evidence as to, IV, 657–659.
Taken with interest, when measure of damages, IV, 664.
Timber cut as an element of land damages, IV, 708.
To be taken, allegation of, in petition, IV, 519.
Trees, crops, leasehold property, etc., evidence of, IV, 647.
Whole tract before and after taking, difference in, when measure of damages, IV, 665.
With or without the railroad, difference in, when measure of damages, IV, 668.
Of life.
Of husband, how ascertained in action by wife for his death, III, 936.
Proof of deceased's services, on question of damages, III, 880.
Of live stock.
Animal killed as measure of damages, I, 347.
Animal killed, proof of, I, 284, 285.
Notice to carrier of, I, 749.

VARIANCE.
Amendments to pleadings to obviate, VI, 1049.
Between allegation and proof, III, 806.
Between indictment and proof in prosecution for causing death, III, 958.
Between pleading and proof, generally, VI, 1036–1043; VIII, 224.
Between pleading and proof in action against carrier of passengers, II, 531.
Between pleading and proof in action for damages by fire, V, 901.
Between pleading and proof in action for injury by negligence of fellow-servant, V, 776.
Between pleading and proof in action for lost baggage, I, 572.
How to be objected to on trial, I, 416.
In actions against carriers of merchandise, II, 278.

VARIANCE — *continued.*
In actions against carriers of cattle, I, 812.
In actions for assault, I, 473.
In actions for flowing land, V, 992.
In actions for injuries to employés, V, 264.
In actions for injuries to passengers, VII, 506.
In actions on stock subscriptions, VII, 769.
Nonsuit in cases of, VIII, 28.
When material, I, 274–276.

VEHICLES.
Right of, to use tramway track, VII, 1103.

VENDOR AND PURCHASER.
General treatment, VIII, 148.
Right of subsequent grantee of abutting property to recover damages, VII, 653.
Which may appeal in condemnation proceedings, IV, 775.
Vendor.
Enforcement of vendor's lien under Canadian expropriation proceedings, IV, 955.
Enforcement of vendor's lien under English Compulsory Purchase Acts, IV, 923.
Requirements of the statute of frauds, III, 199.
Right of vendor to sue, for animals sold, I, 245.
Rights of vendor who reserves title until payment, VI, 429.
Suit to enforce vendor's lien, IV, 767.
When vendor entitled to land damages, IV, 565.
Purchaser.
At execution sale, rights of, V, 549, 550.
At foreclosure, conditions in railway-aid subscriptions not binding on, VI, 633.
At foreclosure, rights and liabilities of, VI, 501–507.
At judicial sale, redemption by, VI, 521.
At judicial sale, rights of, VI, 107.
At tax sale, rights and title of, VII, 996.
Bona fide, of municipal bonds, VI, 698, 699.
Delivery to, at execution sale, V, 548.
Effect of surrender of road to, on liability for acts of receiver, VI, 1230.
Exemption from taxation, when passes to, VII, 901–903.
From assignee for creditors, rights of, I, 484.
From assignee in bankruptcy, rights of, I, 583.
Liability of carrier to, after stoppage *in transitu*, II, 190.
Liability of, for killing stock after sale, I, 372.
Of corporate bonds, rights of, I, 663–676.
Of drafts attached to bill of lading, rights of, I, 649.
Of land, rights and liabilities of, VIII, 148–153.
Of land sought to be condemned, when proper party, IV, 498.
Of municipal-aid bonds, subrogation of, VII, 725.

VENDOR AND PURCHASER — *con.*
Purchaser — *continued.*
Of property attached, rights of, I, 511.
Of railroads, rights and liabilities of, VII, 110, 111.
Of receivers' certificates, rights of, VI, 1205.
Of road, enforcement of lien for taxes against, VII, 990.
Of road, sale by, to existing corporation, VII, 48.
Of scalpers' tickets, rights of, VII, 1090.
Of stock, rights of, VII, 298–302.
Of stock, when entitled to dividend, IV, 145.
Rights of purchaser to sue for damages caused by fire, V, 896.
When entitled to land damages, IV, 566.

VENTILATING APPARATUS.
Patents for, VI, 961.

VENUE.
Change of, VIII, 6–9.
How laid in justice's court, I, 359.
How laid in pleading, VI, 986.
How laid in stock-killing cases, I, 248.
In suits against foreign corporations, V, 1019.
Of actions for causing death, III, 780, 781.
Of actions for conversion by carrier, II, 127.
Of actions for trespass, VII, 1108, 1115.
Of condemnation proceedings, IV, 489.
Of jury trial in assessment of land damages, IV, 615.
Of local and transitory actions, I, 25, 26.
Proper place of trial, and how changed, VIII, 3–9.

VERDICT.
In general.
Against some one of defendants, II, 265.
Assignability of, I, 478.
Death of plaintiff after, as ground of abatement, I, 9.
Directing, generally, VIII, 85–88.
Directing, in actions for damages by fire, V, 949.
Errors cured by, I, 413; VI, 1061.
Excessive, instances of, VI, 856–868.
Granting amendments after, VI, 1052.
In actions for injuries by fire, V, 967.
In actions on construction contracts, III, 177.
Informality in, not ground for reversal, I, 413.
Irregularities and defects in, as ground for new trial, VI, 843–850.
Irregular mode of arrival at, as ground for new trial, VI, 843.
On foreclosure of mechanics' lien, VI, 294.
On trial, generally, VIII, 89–94.
Reversal for errors in, I, 396.
Reviewing amount of, I, 435.
Setting aside as excessive, VI, 850–871.
Setting aside for inadequacy, I, 438.
Sufficiency of evidence to sustain, V, 531.
When court may direct, VI, 802.
In actions for injuries to live stock.
Against carriers of cattle, I, 815.

VERDICT — *continued.*
In actions for injuries to live stock — *continued.*
Defective allegations not cured by, I, 269.
Direction of, when proper, I, 343.
Form and sufficiency of, I, 330.
Interpretation of, I, 330, 331.
In condemnation proceedings.
Assessing land damages, requisites of, as respects fencing, IV, 696.
Direction of, on assessment of land damages, IV, 638.
Duty of court to render judgment on, IV, 755.
Erroneous, when ground for reversal, IV, 786.
For land damages, interest on, IV, 725, 728.
Generally, IV, 747–755.
Objections to, how taken, IV, 791.
To assess damages, IV, 747–755.
When interest should be included in, IV, 725.
In personal injury cases.
Directing, for contributory negligence, III, 314.
Directing, in actions for causing death, III, 903, 913.
Directing, in actions for injuries by negligence of fellow-servants, V, 788.
In actions for assault, I, 473.
In actions for causing death, III, 918–920.
When excessive in actions for causing death, III, 947–954.
When properly directed for plaintiff's contributory negligence, III, 553.
See also JURY.

VERIFICATION.
Of petition for railway aid, VI, 568.
Of petition for removal of cause, VII, 43.
Of petition in condemnation proceedings, III, 402; IV, 513.
Of replication, VI, 1016.

VERMONT.
Constitutionality of statutes of, as to municipal aid for railways, VI, 551.
Constitutionality of tax laws of, VII, 850.
Laying out streets across railways under statutes of, III, 438.
Liability of company to laborers employed by contractors in, III, 165.
Operation of statute of, giving right of action for causing death, III, 754.
Statute of, regulating liability for injuries caused by fire, V, 856.
Statutes of, relative to intersection of railways, III 39[illegible]
Statutory regulation of grade crossings in, III, 448.

VESSELS.
Rights of, in passing drawbridges, I, 715, 716.
Statement of cause of action in actions for injuries to, VI, 997.

VESTED RIGHTS.
Company has none until subscription is made, VI, 533.

VESTED RIGHTS — *continued.*
Statutes interfering with, VII, 245.
See also CONSTITUTIONAL LAW.

VESTIBULE CARS.
Patents for connection of, VI, 957.

VIADUCTS.
See BRIDGES — VIADUCTS.

VIBRATION.
As an element of damages, VII, 664.
As an element of land damages, IV, 706.
Evidence of damage by, in eminent domain proceedings, IV, 648.
Measure of damages for, IV, 919.
Of buildings, consequential damages for, IV, 337.

VICE-PRESIDENT.
Of corporation, as fixing residence, III, 4.
Rights, powers, and duties of, VI, 912.

VICE-PRINCIPAL.
Allegation of negligence of, V, 775.
Assumption of extra risk in obeying orders of, V, 178.
Concurring negligence of, liability for, V, 671.
Declarations of, as proof of incompetency of servants, V, 781.
Distinction between fellow-servants and, V, 722.
Negligence of, in selection of servants, V, 681.
Notice to, as notice to principal, V, 675, 676.
Notice to, of incompetency of servant, V, 705.
Temporary, effect of notice to, V, 676.
When foreman is, V, 748, 749.
When superintendent is, V, 755, 756.
Whether negligence of, was cause of injury a question of fact, V, 792.
Who is, whether question of law or fact, V, 791.
Who deemed to be, V, 725–730.

VIEW.
By jury or commissioners.
By jury in stock-killing cases, I, 320.
By sheriff's jury in condemnation proceedings, VIII, 330.
Knowledge gained by, instructions to jury as to use of, IV, 633.
Of *locus in quo* by jurors, VIII, 17–19.
Of *locus in quo* by jurors, irregularities in, as ground for new trial, VI, 842.
Of *locus in quo* in criminal cases, III, 358.
Of premises by commissioners to assess damages, IV, 602.
Of premises by jury on assessment of land damages, IV, 625–627.
Of premises, irregularities in, as ground for setting aside verdict, IV, 752.
Obstruction of.
Duty to give signal in cases of, III, 494.
Effect of, on duty to look and listen, III, 602–622.
Of track, effect of on defense of contributory negligence, III, 827.

VIEWERS.
Assessment of land damages by, IV, 588–591.

VIEWERS — *continued.*
Of land damages, qualifications of, IV, 588.

VILLAGES.
Degree of care required in passing through, VII, 1129.
Duty to fence track in, I, 144.
Duty to give signals at crossings in, III, 494.
Duty to keep lookout in running through, VII, 1136.
Injuries to animals in, I, 204–208.
Liability for excessive speed at crossings in, III, 533.
Location of stations in, VII, 197, 198.
Power of legislature to authorize aid to railways by, VI, 530.
When the word may be used for "town," VIII, 330.
See also TOWNS.

VINDICTIVE DAMAGES.
For ejection of passenger from train, IV, 230–236.
For injuries caused by derailment, IV, 47.
In actions for false imprisonment, V, 612.
In actions for injuries to employés, V, 337.
In condemnation proceedings, IV, 685.
In trespass to land, VII, 1114.
When recoverable against carrier of passengers, II, 575–579.

VINEYARD.
Damages for destroying, V, 962.

VIOLATION.
Of carrier's rules, as a defense to accident insurance policy, I, 17.
Of injunctions, V, 1159–1162.
Of internal revenue laws, penalties for, VII, 72.

VIOLENCE.
Duty to protect passenger against, VII, 460.
From other passengers, duty to protect passenger against, II, 431.
From third persons, duty to protect passenger against, II, 435.
Of employés, duty to protect passenger against, II, 429.
Unnecessary, by conductor, IV, 198–200.

VIRGINIA.
Aid to railroads by the state, VII, 182.
Assessment and levy of taxes in, VII, 983.
Constitutionality of statutes of, as to municipal aid for railways, VI, 552.
Constitutionality of tax laws of, VII, 850.
Deductions for benefits under condemnation laws of, IV, 722.
Occupation of streets by steam roads under legislative grants of, VII, 564.
Operation of statute of, giving right of action for causing death, III, 754.
Plaintiff's pleadings need not negative contributory negligence in, III, 278.
Rule as to imputed negligence in, V, 1086.

VISITORS.
To premises, when deemed licensees, VI, 267.

VIS MAJOR.
As a defense to carrier of merchandise, II, 20.

VIS MAJOR — *continued.*
Meaning and application of words, VIII, 330.
When excuses carrier of passengers, II, 366.

VOIR DIRE.
Examination of jurors on, VIII, 13.

VOLUNTARY BANKRUPTCY.
Generally, I, 582.

VOLUNTARY DELIVERY.
Extinguishes lien for charges, II, 153.

VOLUNTARY EXPOSURE.
As defense to action on insurance policy, I, 16.

VOLUNTARY NONSUIT.
Effect of, VIII, 35.

VOLUNTARY PAYMENTS.
What are, VII, 1000.
What are, and right to recover back, VI, 964.

VOLUNTEERS.
Contributory negligence of, V, 203.
Fellow-servant rule as applied to, V, 651.
Liability for injuries to, V, 257.
Risks assumed by, V, 140.
When deemed fellow-servants with other employés, V, 725.

VOTERS.
Bribery of, VI, 601.
Registration of, on election on question of aid to railway, VI, 586.

VOTING.
For directors, IV, 51–52.
Right to vote at stockholders' meeting, VII, 309–311.

VOUCHER.
Ticket considered as, VII, 1039.

VULGAR LANGUAGE.
Expulsion of passenger for, VII, 535.
Use of, as a crime, III, 386.

WAGERS.
Illegality of, III, 211.

WAGES.
Advances to pay, protection of, VI, 445.
Claims for, when prior to mortgage, VI, 450.
Deduction from, as contribution to sick fund, VII, 17.
Difference of, as determining who are fellow-servants, V, 725.
Employé on car to receive, when deemed passenger, II, 328.
Excessive damages for loss of, V, 343.
Loss of, as an element of damages, II, 574.
Of employés, V, 8–14.
Of employés, liability of receiver for, VI, 1190.
Of employés, payment of, by receiver, VI, 1200.
Of employés, what may be set off against, VII, 116.
Priority of mortgage over claims for, VI, 456.
When exempt from attachment, I, 500–502.

WAGES — *continued.*
When may be reached in attachment, I, 498.
When the word does not include salary to officers, VIII, 330.
WAGON.
Collision between trolley car and, IV, 269.
Contributory negligence of driver of, IV, 271.
Duty of driver of, to turn off track, IV, 271.
WAITING ROOM.
At station, what is, VII, 192.
Ejection from, VII, 223, 224.
WAIVER.
In general.
By landowner of duty to fence, I, 181.
Of company's liability as condition precedent to receiving freight, VI, 338.
Of defective service of process by appearance or otherwise, VI, 1103.
Of defects in pleadings, VI, 1058–1060.
Of erroneous refusal to direct verdict, VIII, 88.
Of errors by appealing from justice, VI, 125.
Of forfeiture by public agent, I, 86.
Of forfeiture by statute, IV, 133.
Of forfeiture for breach of condition in deed, IV, 19.
Of forfeiture for failure to complete railway within time limited, VII, 394.
Of forfeiture of construction contracts, III, 136.
Of grounds of forfeiture of franchise, II, 715.
Of mechanics' lien, VI, 288.
Of objection for laying unauthorized track, VII, 368.
Of objections at trial, I, 419; IV, 792; VIII, 21.
Of objections to evidence, I, 401.
Of privileged communications, VIII, 229.
Of proof of loss, V, 846.
Of right of trial by jury, VIII, 2.
Of right to appeal in foreclosure suits, VI, 517.
Of right to full compensation for carrying the mail, II, 6.
Of right to move to vacate foreclosure sale, VI, 515.
Of right to remove cause by applying too late, VII, 40.
Of statutory requirements to fence, by landowner, V, 805.
Of strict performance of contract, III, 224.
Of strict performance of contracts for railway construction, III, 132.
As to employes.
By employé of duty of company as respects safety of machinery, V, 79.
Of rule for government of employés, V, 236.
Of rule of company by conductor, V, 34.
In carriage of animals or goods.
By consignee of irregular delivery, V, 582.
Of breach of special contract, II, 158.
WAIVER — *continued.*
In carriage of animals or goods — *con.*
Of defective marking by receipt of goods, II, 85.
Of defects in car, I, 740.
Of lien for charges, II, 154.
Of limitation as to amount of loss by payment of larger sum, I, 638.
Of notice of arrival of goods, I, 641.
Of notice of claim for damages, II, 163.
Of notice of claim for loss, II, 186.
Of right of action for damages caused by delay, II, 70.
Of right of action for wrong delivery, II, 119.
Of statutory requirements as to sufficiency of fences, I, 150.
In carriage of passengers.
Of carrier's rules, II, 331.
Of conditions requiring identification of passenger, VII, 1068.
Of limitation in ticket by checking baggage, VII, 1069.
Of right of action against carrier of passengers, II, 522.
Of rule requiring production of ticket, VII, 1051.
In condemnation proceedings.
By owner of prepayment of damages, IV, 849.
Of conditions as to prepayment of land damages, IV, 550, 560.
Of grounds of challenge of jurors, IV, 615.
Of irregularities, effect of appearance as, IV, 812.
Of irregularities in assessment of damages by jury, IV, 916.
Of irregularities on view of premises by jury, IV, 627.
Of notice, IV, 510, 511.
Of objections by going on with hearing, IV, 536.
Of original trespass by reception of award, IV, 876.
Of right of appeal, IV, 775.
Of right to assessment of damages for land taken, IV, 940.
Of right to jury trial, IV, 608, 609.
In subscription contracts.
By city of irregularities in issue of bonds, VI, 687.
Of conditions in subscription, VII, 803.
Of conditions in subscriptions in aid of railway, VI, 632.
Of conditions in subscription, what is, VII, 810, 816.
Of conditions that stock must be all subscribed before assessment, VII, 750.
Of defenses, VII, 794–796.
Of lien on stock by creditor, VII, 327.
Of notice of assessment of stock, VII, 755.
Of performance of condition in subscription, VII, 807.
WALKING.
In car, when contributory negligence, VII, 481.
On or near track, when contributory negligence, VII, 528, 1153.

WALKING — *continued.*
On track at crossing, III, 542.
WALLS.
Obstructing flow of water by, V, 976.
WANTON INJURY.
To trespasser, liability for, VII, 1149.
WANTON MISCONDUCT.
Liability for, as to trespassers, VII, 1130.
WAR.
General treatment, VIII, 158.
Claims for goods seized during, III, 8.
Claims for rebuilding bridges destroyed during, III, 8.
Effect of, on compensation for carrying mail, II, 6.
Liability of carriers of merchandise as affected by, II, 17, 19, 20, 30, 55, 121.
Liability of carriers of passengers as affected by, II, 366, 373.
Liability of express companies as affected by, V, 570, 575.
Validity of statutes in aid of rebellion, VII, 255.
WARD.
See GUARDIAN AND WARD.
WAREHOUSEMEN.
General treatment, VIII, 162.
Agreements of agents to store goods, I, 58.
Charging liability as both carrier and, II, 145.
Discrimination in warehouse facilities, IV, 114.
Duty to furnish warehouse facilities, II, 35.
Effect of notice of arrival to reduce carrier's liability to that of, II, 99.
Express company, when liable as, V, 584, 585.
Insurable interest of, V, 844.
Liability of carriers as, II, 129–149.
Liability of initial carriers as, II, 234.
Power to act as, I, 578.
When carrier's liability attaches on delivery to, II, 43.
When company liable as, for baggage, I, 551–554.
When liability as, attaches, II, 134–146.
When liability as, terminates, II, 146, 147.
See also WAREHOUSES.
WAREHOUSES.
Delivery of grain in, sufficiency of, II, 109.
Liability for explosion of nitro-glycerine in, V, 559.
Sufficiency of delivery at, by carrier, II, 92.
When deemed fixtures, V, 969.
When subject to taxation, VII, 866.
See also WAREHOUSEMEN.
WARNING.
Alleging negligence in failure to give, V, 270.
Duty to give to infant employés, V, 247.
Duty to give to unskilled employés, V, 34–39.
Failure of vice-principal to give, liability of company for, V, 670.
Failure to heed, in getting off train, II, 485.
WARNING — *continued.*
Failure to heed, when contributory negligence, V, 191; VI, 275; VII, 228.
Getting on moving train after being warned not to, II, 455.
Non-liability for negligence of fellow-servants in giving or failing to give, V, 662.
Of employés, failure to heed, when getting off cars, II, 458.
To employé, negligence in failing to give, V, 312.
To leave platform and go inside of car, disregard of, II, 501.
To passenger, duty to give, II, 354, 391, 402.
When train is approaching or leaving station, VII, 209–211.
WARRANT.
Form and sufficiency, generally, VI, 1085.
For taxes, demand before issuing of, VII, 986.
In condemnation proceedings, IV, 512.
To summon jurors to assess land damages, IV, 611.
WARRANTY.
Buyer's action for breach of, VII, 105.
Covenants of, III, 347.
Measure of damages for breach of, III, 703.
On sales of chattels, VII, 102.
On sales of stock, VII, 292.
WASHINGTON.
Conditions exempting carrier from liability to person riding on free pass in, VI, 944.
Constitutionality of tax laws of, VII, 850.
Construction of stock laws of, I, 96.
Deductions for benefits under condemnation laws of, IV, 723.
Mechanics' Lien Law of, VI, 279.
Operation of statute of, giving right of action for causing death, III, 754.
Plaintiff's pleadings need not negative contributory negligence in, III, 278.
Taking land for streets and laying out roads in, VII, 554.
WASHINGTON TERRITORY.
Injuries to animals running at large in, I, 221.
WASTE.
As ground for receiver, VI, 1170.
Liability of lessee to lessor for, VI, 228.
Of corporate property by directors, action by stockholders to restrain, VII, 338.
WATCHES.
When may be carried as baggage, I, 540.
WATCHHOUSE.
Negligence in erecting, III, 490.
WATCHMEN.
As fellow-servants with master mechanics, V, 763.
As fellow-servants with other employés, V, 772.
At intersection of railroads, III, 488.
Duty to keep, to prevent fire, V, 873.
Duty to look and listen as affected by failure to provide, III, 589.
Duty to provide, VII, 136.

WATCHMEN — *continued.*
Employment of, at stations, VII, 211.
Expense of maintaining, as damages, II, 406.
Instructions as to negligence of or absence of, III, 651.
Liability for injuries at crossings as dependent upon employment of, III, 491–493.
Ordinances requiring, at crossings, VII, 675.
When conductor is not fellow-servant of, V, 740.

WATER RATES.
In Canada, VII, 1021.

WATERS AND WATERCOURSES.
General treatment, VIII, 168.
Navigable waters, VIII, 169.
Watercourses, VIII, 171
Surface waters, VIII, 180.
Wells and springs, VIII, 183.
Action for damages for diversion of streams, IV, 833.
Action for damages for diversion of water, IV, 833.
Action for damages for obstruction of access to, IV, 834.
Backing water, V, 974.
Charter provisions as to crossing of streams, II, 705.
Compelling restoration of streams, IV, 378.
Condemnation of land under water, IV, 415.
Diversion of streams as an element of land damages, IV, 697.
Diversion of streams, in condemnation proceedings, IV, 452.
Diverting flow of, V, 973.
Duty to afford outlet for, V, 972.
Duty to fence road along or over watercourses, V, 818.
Duty to provide for natural flow of water, III, 658, 659.
Duty to restore stream, I, 694.
Evidence of obstruction of, variance, VI, 1037.
Flooding lands, V, 972–1005.
Injury to water power as an element of land damages, IV, 702.
Lands under water, when subject to taxation, VII, 866.
Liability for obstructing flow of watercourses, V, 972–978.
Obstructing flow of, I, 703.
On premises, injuries to trespassers by, VII, 1148.
Overflow of water as an element of damages to abutting owner, VII, 666.
Removing banks of, V, 974.
Taking from stream, V, 417.
Turning surface water into watercourses, V, 984.
What constitutes a taking of water, IV, 449, 450.
What is a damaging or injuring, IV, 450.
What is a watercourse, VIII, 171, 330.
When limitation begins to run in actions for obstruction to, VI, 312.

WARMING STATIONS.
Duty of company as to, VII, 223.

WATER-TANK.
Passenger coming in collision with, II, 507.

WAY BILLS.
Admissibility and effect of, as evidence, V, 518.
Liability of carrier where wrong address is entered on, II, 85.
When contract of through shipment may be implied from, II, 225, 226.

WAY STATIONS.
Delivery of freight at, II, 111.

WAYS.
Private, VI, 1077–1081.

WEATHER.
State of, when a question for experts, VIII, 263.

WEIGHING MACHINES.
At stations, VII, 199.

WEIGHT.
In general.
Of baggage, limit of, I, 541.
Of live stock, opinions of farmers as to, VIII, 278.
Of evidence.
Circumstantial, V, 297.
Conflicting, a question of fact, VIII, 46.
Erroneous instructions on, I, 391.
Generally, V, 325–537.
Harmless instructions on, I, 406.
How far reviewable on appeal, I, 429–431.
In actions for causing death, III, 859–874.
In actions for damages caused by fire, V, 921–930.
Of expert testimony, VIII, 297, 298.
Of positive and negative testimony, V, 533.
Setting aside verdict against, IV, 753.
Verdict against, when ground for new trial, VI, 845–849.
When question for jury, III, 295.

WELLS.
Digging, on right of way, VII, 81.
Near track, injuries to animals caused by, I, 133.
See also WATERS AND WATERCOURSES, 30, 31.

WESTERN & ATLANTIC R. CO.
General treatment, VIII, 185.

WESTERN PENNSYLVANIA R. CO.
General treatment, VIII, 185.

WHARVES AND PIERS.
General treatment, VIII, 186.
Delivery of goods on, II, 96.
Delivery of goods on, sufficiency of, II, 51.
For ferry purposes, V, 843.
License to erect, VII, 262.
Reservation of right of access to, IV, 23.
Right to condemn for railway purposes, IV, 428.
Sufficiency of delivery at, II, 107.
Taking land for, when deemed a public use, IV, 461.

WHARVES AND PIERS — *continued.*
When exempt from taxes, VII, 910.
When subject to taxation, VII, 867.
WHEAT.
Right of state to charge for inspecting, VI, 71.
"WHILE."
Definition of, VIII, 330.
WHIPPING STRAPS.
Duty to employés as regards, V, 51–53.
See also TELL-TALES.
WHISTLE.
See SIGNALS.
WIDOW.
Instructions as to damages to, for death of husband, III, 900, 912.
Right of action of, for causing death of husband, III, 758, 771.
Right of action of, for injury to homestead caused by fire, V, 896.
WIDTH.
Of branch roads, I, 684.
Of bridge, I, 695.
Of land grant, VI, 169, 171.
Of right of way, evidence of, V, 911.
Of street crossing over railway, III, 441.
Of street crossings, III, 427.
Of strip conveyed for right of way, description of, IV, 467.
Of strip taken, statutes regulating, IV, 394.
WIFE.
See HUSBAND AND WIFE.
WILD TRAINS.
Duty to protect employés from, V, 118.
WILFUL ACTS.
Allegation of, when excuses negativing of contributory negligence, III, 278.
Exemplary damages in cases of, II, 577.
Inflicting injuries on children, liability of company for, II, 749.
Limitation of liability for, I, 762; II, 437.
Of employés, protection of passengers against, II, 428–431.
Of servants, exemplary damages for, III, 686–689.
Of servants, liability cannot be limited as against, I, 565.
Of servants, liability for, I, 100.
Showing wilful or malicious killing, III, 871.
Wanton and malicious assaults, I, 467.
WILFUL INJURY.
To trespasser, liability for, VII, 1149.
What is, VIII, 331.
WILFUL MISCONDUCT.
Evidence to show, II, 535, 541.
Liability to trespassers for, VII, 1130.
Of carriers, passenger's contributory negligence will not excuse, II, 442.
Of defendant, when excuses plaintiff's negligence, III, 273.
WILFUL NEGLIGENCE.
Averment of, III, 803.
Burden of proof as to, I, 313.
Company liable for, notwithstanding plaintiff's contributory negligence, III, 817.
WILFUL NEGLIGENCE — *continued.*
Competency of evidence as to, V, 417.
Definition of, VI, 776.
Exemplary damages for, III, 685, 945.
Exemplary damages for, III, 945.
In injuring animals, I, 195.
Limitation of liability for, VI, 344.
Limitation of liability to cases of, I, 769.
Of company, sufficiency of evidence of, V, 294.
Of company, when question for jury, V, 322.
Of employé bars action for damages, V, 202.
Of fellow-servant, liability for, V, 665.
Of vice-principal, liability of company for, V, 675.
Punitive damages not recoverable except in cases of, III, 945.
Recovery by trespassers for, VII, 1160.
What is, VIII, 331.
When question of fact, I, 327.
WILFUL TORTS.
Of agents, liability of principal for, I, 66–69.
WILLS.
General treatment, VIII, 190.
WIND.
When an intervening cause, V, 882.
WINDING UP.
See DISSOLUTION; WINDING UP.
WINDOW.
See CAR WINDOW.
WINONA & ST. PETER R. CO.
General treatment, VIII, 190.
WIRE FENCES.
Barbed, injuries to animals, I, 136.
Sufficiency of, V, 823.
WIRES.
Right to stretch, in street, IV, 261–264.
WISCONSIN.
Constitutionality of statutes of, as to municipal aid for railways, VI, 552.
Constitutionality of statutes of, relative to condemnation of land, IV, 391.
Constitutionality of tax laws of, VII, 850.
Deductions for benefits under condemnation laws of, IV, 723.
Examination of parties before trial in, IV, 81.
Federal grants to, VI, 157, 158.
Grants by, to railroads, VI, 187.
Jurisdiction of Circuit Court of, VI, 118.
Liability of company to laborers employed by contractors in, III, 166.
License taxes in, VII, 1023.
Local assessment upon steam railways in, for repairs, paving, etc., VII, 691.
Occupation of streets by steam roads under legislative grants of, VII, 564.
Penalties for overcharges in, II, 638.
Plaintiff's pleadings need not negative contributory negligence in, III, 278.
Review of town-bonding proceedings by mandamus in, VI, 752.
Statutes of, regulating liability to servant for injuries caused by negligence of fellow-servants, V, 719.

WISCONSIN — *continued.*
Taxation in aid of railways in, VI, 743.
Taxation of land grants in, VII, 883.

WITHDRAWAL.
From stockholders' meeting, VII, 308.
Of appeal in condemnation proceedings, IV, 810.
Of consent by city to use of streets, VII, 580, 581.
Of counts, VI, 1001.
Of flagmen from crossing, liability for, III, 489.
Of names of taxpayers from petition in aid of railway, VI, 568.

WITNESSES.
General treatment, VIII, 191.
Attendance and compensation, VIII, 192.
Competency, VIII, 194.
Credibility, VIII, 201.
Examination, VIII, 210.
Opinions; expert testimony, VIII, 230.
Absence of, as ground for continuance, VIII, 9.
Admissibility in evidence of experiments by, I, 284.
Admissibility of testimony of, at former trials, III, 858, 859.
As to value of land condemned, examination of, IV, 658.
At former trial, admissibility of testimony of, V, 522.
Attempts to bribe, as evidence, V, 500.
Change of venue for convenience of, VIII, 7.
Comments upon, in instructions, VIII, 65.
Commissioners to assess damages, how far bound by testimony of, IV, 602.
Competency of negligent fellow-servants as, V, 779.
Competency of, to testify as to value of animal killed, I, 285.
Credibility of, a question of fact, I, 330.
Credibility of conflicting evidence a question of fact, VIII, 46.
Credibility of employés as, VIII, 202, 203.
Credibility of, how far reviewable on appeal, I, 431.
Credibility of, generally, VIII, 201–209.
Credibility of, question for the jury, I, 330; VIII, 202.
Credibility of, review of, on appeal, I, 431.
Cross-examination of experts, VIII, 277.
Cross-examination of, generally, VIII, 217–224.
Discretion of court to limit number of, I, 382.
Evidence to impeach not ground for new trial, VI, 874.
Examination of, by arbitrators in condemnation proceedings, IV, 591.
Examination of, by commissioners to assess land damages, IV, 601.
Fees of, IV, 734.
Knowledge of, to qualify them to give opinion, IV, 324.
Not bound to criminate themselves, VI, 56.
Opinions of, in elevated railway cases, IV, 318–325.

WITNESSES — *continued.*
Positive and negative testimony of, V, 533–537.
Presumption arising from failure to call, I, 301.
Presumption from failure to produce employés as, V, 442.
Re-examination explanatory of cross-examination, VIII, 224.

WOOD.
Piled near track, passenger coming in collision with, II, 507.
Piling on or near right of way, causing fires, V, 872, 892.
Purchase of, when cut on public lands, VI, 1116.
Using, instead of coal, V, 868.
See also COMBUSTIBLE MATTER.

WORDS AND PHRASES.
General treatment, VIII, 298.
"All risks," VI, 1075.
"Arising under a law of the United States," VII, 23.
"As much as shipper may desire," II, 158.
"At company's convenience," I, 642.
"Baggage," I, 533.
"Bill, order, note," II, 195.
"Break ground," III, 204.
"Breaking," I, 643.
"Carried," VII, 455.
"Competitive stations," III, 204.
Construction of, in stock laws, I, 95.
Construction of particular, in statutes, VII, 270.
"Counted" — "inspected," III, 205.
"Damaged," in eminent domain statutes, IV, 452.
"Found," VI, 1088.
"Good cause" for setting aside report of commissioners, IV, 740.
"Good for this trip only," VII, 1071.
"Heirs," III, 205.
"In and about the rails," VII, 398.
"In apparent good order," I, 607.
"In future extension," III, 204.
"In good order and well conditioned," I, 608.
"Inhabitants," III, 4.
"Injuring," VII, 587.
"Injuriously affected," under English Compulsory Purchase Laws, IV, 884.
"Injuriously affecting," VII, 587.
In tax laws, construction of, VII, 853.
Interpretation of, in constructing bridges, I, 689.
Interpretation of, in pleadings, I, 247.
Interpretation of particular, III, 124.
Interpretation of particular, in condemnation statutes, IV, 397.
Interpretation of particular, in deeds, IV, 9.
"Just and reasonable," in limitation of liability, I, 778.
"Just compensation," IV, 541.
"Legal negligence," II, 349.
"Local and through traffic," VI, 255.
"Negotiation," III, 959.
"New lines," III, 205.
"Not to exceed 200 tons," III, 205.
"Operating expenses," VI, 132.

WORDS AND PHRASES — *continued.*
"Other portions of the drawbridge," III, 206.
"Owners, occupants," in eminent domain law, IV, 506.
"Privilege of reshipping," I, 643.
"Railroad connection," III, 65.
"Regular depot or station," VII, 193.
"Revenue bond scrip," VII, 180.
"Rights, powers, and privileges," VII, 896.
"Shall be disposed of," III, 206.
"Solid rock," III, 206.
"To be forwarded," III, 206.
"To be left until called for," II, 144.
"To intersect, join, and unite," VI, 216.
"Total inability to labor," VII, 16.
"To the satisfaction of board of trade," I, 697.
"Unjust or unreasonable," in limitation of liability, I, 779.
"Until sold and conveyed," VII, 865.
"Usual stopping places," VII, 194.
"Workman," liens of, VI, 295, 296.

WORK.
Agreement to make subscription payable in, VII, 767.

WORKING AGREEMENTS.
Power to make, and their effect under English statutes, VI, 249–256.

WORKSHOPS.
Taking land for, when for a public use, IV, 460.

WOUNDS.
Exhibition of, to jury, V, 404; VIII, 17.

WRECK MASTER.
When master mechanic is fellow-servant of, V, 763.
When vice-principal of men under him, V, 772.

WRECKS AND WRECKING.
Risks assumed from dangers incident to clearing away wrecks, V, 181.
Transfer of passengers beyond place of wreck, II, 354.
Wrecking crew, when foreman is fellow-servant of, V, 752.
Wrecking train, collision with, V, 659.
Wrecking trains, prosecution for, III, 385.
Wrecks caused by embankments giving way to a flood, IV, 379.
See also TRAIN WRECKING.

WRIT.
Of error, judgment in attachment, I, 511.
Of prohibition, VI, 1104, 1105.
See also ATTACHMENT; EXECUTION; MANDAMUS; PROHIBITION.

WRITTEN INSTRUMENTS.
Admissibility and effect of, as evidence, V, 518.

WRITTEN INSTRUMENTS — *continued.*
Construction of, a question of law, VIII, 43.
Copies of, as secondary evidence, V, 456.
Necessity of, to validity of contract, III, 197.
Necessity of, to validity of subscription, VII, 727.
Parol evidence to vary, V, 474–481.
Requirement that instructions be in writing, VIII, 61.

WRONG CLASSIFICATION.
Schedule as to, VI, 47.

WRONGFUL ACT.
Death by, III, 742–958.

WRONGS.
See FALSE IMPRISONMENT; TORTS.

WYOMING.
Assessment and levy of railroad taxes in, VII, 983.

YARD AND CAR CLERK.
When engineer is fellow-servant of, V, 746.

YARD ENGINEER.
When fellow-servant of brakeman, V, 773.

YARD MASTER.
As fellow-servant of car inspector, V, 732.
As fellow-servant with other employés, V, 773.
Authority of, to employ physician, VI, 395.

YARDMAN.
When fellow-servant of other employés, V, 772.
When foreman is fellow-servant of, V, 752.

YARD SWITCHMAN.
As fellow-servant of engineer, V, 746.
When car inspector is fellow-servant of, V, 732.

YARDS.
Duty of carriers to provide, I, 759.
Duty to look out for trespassers in, VII, 1135.
Effect of notice of defects in, V, 156.
Injuries to animals in, I, 204.
Injuries to children while trespassing in, II, 751.
Injuries to employés in, liability of companies jointly using, V, 259.
Negligence in allowing cars to move unattended in, question for jury, V, 321.
Of railway, laying out streets and highways across, III, 439.
Of station, going beyond to board train, VII, 229.
Right of one company to cross yards of another, III, 397.
Who deemed trespassers in, VII, 1120.

YEAR.
Contracts not to be performed within — statute of frauds, III, 199.